1998

Enrique Gracia v. State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

Enrique Gracia Appellant,	)	
vs.	)	Case No. 981299-CA
State of Utah Appellee,	)	Priority No. 2

BRIEF OF APPELLANT

On Appeal from the Final Decree of
the Fourth District Court
Utah County, State of Utah
Honorable Lynn W. Davis

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STATEMENT OF JURISDICTION

Appellant, Enrique Gracia, appeals from a jury verdict which found him guilty of one second degree felony charge and one class A misdemeanor charge. The trial was held in front of the Honorable Lynn W. Davis, Judge, Fourth District Court, Utah County, State of Utah. The verdict of guilt was entered by the court on March 13, 1998 and the defendant was sentenced on May 18, 1998 to a term of 1-15 years at the Utah State Prison to be stayed upon his completion of 200 days in the Utah County Jail and 36 months of probation. The Appellant filed his notice of appeal in a timely fashion.

The Utah Court of Appeals has jurisdiction to hear the appeal pursuant to Utah Code Ann. §78-2a-3(e).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW WITH STANDARDS OF REVIEW

Issue I

Did the court commit error as a matter of law by allowing hearsay evidence of laboratory test results to be admitted into evidence without requiring a legal basis for the admission of the hearsay information?

Standard of Review for Issue I

In general, trial courts are granted broad discretion in admitting or excluding evidence. State v. Pena, 869 P.2d 932 (Utah 1994). However, a decision on whether or not to admit evidence is often the "Sum of several rulings each of which may be reviewed under a separate standard. " State v. Thurman, 846 P.2d 1256, 1270 (Utah 1993). In the case of business records, a proper foundation must be laid by the proponent of the records. If the trial court does not require that foundation be laid to establish the necessary reliability, the court's decision is a matter of law which should be reviewed for correctness. See State v. Bertul, 664 P.2d 1181 (Utah 1983), Trolley Square Associates v. Nielson, 886 P.2d 61, 66-67 (Utah App. 1994).

Issue II

Did the court err as a matter of law denying Gracia of his

right to confrontation by allowing hearsay information concerning laboratory test results to be admitted into evidence when the court did not determine that the witnesses who tested the specimen were unavailable and the court did not determine that the information had a sufficient indicia of reliability?

Standard of Review for Issue II

When a defendant's right to confrontation is at issue a two pronged test must be used by a court to determine whether prior hearsay testimony should be admitted. A failure by a court to apply this test is a question of law which should be reviewed for correctness. See, State v. Brooks, 638 P.2d 537 (Utah 1981), See also, Ohio v. Roberts, 448 U.S. 56 (1980).

Issue III

Did the court commit error as a matter of law by allowing laboratory test results performed on Gracia's urine specimen to be admitted into evidence without requiring the state to present adequate evidence for the court to consider the circumstances surrounding the custody of the urine specimen and the likelihood of tampering?

Standard of Review for Issue III

While abuse of discretion is the proper standard for evidentiary rulings which require a balancing of factors, individual legal determinations which are part of an overall

evidentiary ruling are reviewed under the correction of error standard. State v. Dunn, 850 P.2d 1201, 1222 n.2 (Utah 1993).

Issue IV

In the alternative to Issue III, did the court abuse its discretion by allowing the State to introduce test results into evidence when none of the six people who handled and tested the urine specimen testified and the sole witness for the chain of custody was the lab supervisor who did not handle or test the specimen?

Standard of Review for Issue IV

If after consideration of the circumstances surrounding the custody of an article and the likelihood of tampering these factors the court is satisfied that the substance has not been changed or altered it may permit its introduction into evidence. Such decisions regarding the introduction of evidence will be overtured only upon a showing that the court abused its discretion. State v. Madsen, 28 Utah 2d 108, 110-111, 498 P.2d 670, 672 (1972).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

The following Utah statutes are determinative in this action:

Utah Code Ann,§78-2a-3(e)

Constitution of Utah Article 1 Section 12

Sixth Amendment to the United States Constitution

Utah Rule of Evidence 802

STATEMENT OF THE CASE

A. Nature of the Case

On April 18, 1997, the State of Utah filed an information alleging that the defendant, Enrique Gracia, Possessed or used Cocaine in a drug free zone, a second degree felony and unlawfully possessed drug paraphernalia in a drug free zone, a class A misdemeanor. The matter proceeded to trial by jury.

B. Court of the Proceedings

A Jury Trial was held on March 11 and March 13, 1998 in the Fourth District Court in front of the Honorable Lynn W. Davis.

C. Disposition at Trial Court

The Jury returned a Verdict of guilty which was entered by the court on March 13, 1998. The Defendant was sentenced by the Court on May 18, 1998 to 1-15 years in the Utah State Prison. The Prison sentence was stayed upon Defendant's completion of 200 days in the Utah County Jail and 36 months probation.

RELEVANT FACTS

In the early hours of April 12, 1997, Officer Butterfield

and Officer Mangleson of the Lehi Police Department received a dispatch that there was a dispute or possibly a fight between some roommates at 455 West Main Street in Lehi. (R. 229-230)

Upon arriving at the scene they observed four males arguing in a parking lot of an apartment complex, one of whom was later identified as appellant, Enrique Gracia (Gracia). (R. 230-231)

At the scene Officer Butterfield noticed one of the individuals, later identified as Russell Allen, push Mr. Gracia and that another of the individuals, later identified as Scott Allen, was carrying a baseball bat. (R.179, 232) He also noticed a female individual, later identified as Russell and Scott Allen's mother, Joanne Faust and another individual later identified at Mark Harris. (R. 233)

The arguing individuals were standing at the head of a flight of stairs which led to a basement apartment with its door open. After inspecting the scene Officer Butterfield decided to separate the individuals in the hopes of calming them down. Enrique then went in the apartment, followed by the rest of the group and Officer Butterfield. (R. 233)

While in the apartment Officer Butterfield was informed by Scott Allen and Mark Harris, that Gracia had attempted to flush bindles of drugs down the toilet and that the toilet had subsequently clogged and overflowed. (R.234-235)

Officer Butterfield then went into the bathroom and observed some small balloon-like containers on the floor at which time he called dispatch and had them page Detective Harold Terry to come

and assist him.(R.235-236)

Following his page to Detective Terry, Gracia asked Officer Butterfield to accompany him into his bedroom so that they could talk privately about the incident. Gracia indicated that there was a lot of confusion and that he felt that the other individuals were not allowing him to speak, therefore, he would feel more comfortable speaking with the Officer in the privacy of his own room. (R.236)

Officer Butterfield and Gracia entered Gracia's bedroom. Officer Butterfield asked Gracia about the balloons and Gracia indicated that he knew nothing about them. While speaking with Gracia, Officer Butterfield noticed what looked like a marijuana pipe--a pop can with holes in it. Officer Butterfield picked up the can and observed residue. (R. 238) He asked Gracia if the can was his and Gracia indicated that it was not. (R.250)

Detective Terry and Officer Gordon Smith arrived and met with Officer Butterfield in the living room. Officer Butterfield described to Terry what he had seen in Gracia's bedroom and showed him the bindles in the bathroom. The determination was made to arrest Gracia. (R. 239, 260, 290)

Detective Terry spoke with Russell Allen, Scott Allen, Mark Harris, Joann Faust, and Gracia. Gracia explained that the drugs were not his, and that someone else placed them in the bathroom. (R. 279) Gracia was arrested, transported to the police station. (R. 267)

Gracia's bedroom was searched and the officers found a pipe,

butane and cigarette lighters, a hemostat, a box of baking soda, plastic baggies with residue, a rolled up dollar bill, and a spoon with residue on it. They seized these items along with the pop can that Officer Butterfield had seen earlier. (R. 239-243, 292-293)

Detective Terry took the balloons from the bathroom and the items seized from the bedroom to the Lehi Police Department where he logged it in, put it in a sack, and then placed it in a locked bin for the evidence custodian, Sergeant James Munson. (R. 270-271) Sergeant Munson then transported the evidence to the Utah State Crime Lab and after it had been released, he transported it back to Lehi. (R. 298)

While conducting his investigation detective Terry learned that Gracia was on probation for Misdemeanor Theft (R.271, 282). Terry called Adult Probation and Parole's twenty four hour line, learned that John Perry was Mr. Gracia's Probation Officer, and asked Perry to come to the crime scene. (R 271-272)

Perry arrived at the scene and Detective Terry showed him what he and Officer Butterfield had found. Perry authorized the police to search Gracia's room pursuant to Gracia's probation status.

Perry then went to where Gracia was being held and collected a urine sample from Gracia. (R. Vol II 36-37) After collecting the urine sample, Perry transported the sample to Adult Probation and Parole, where he sealed it, labeled it with his name, Gracia's name, and the date and time the sample was

collected, he then put the sample in a refrigerator located in his office. (R. Vol II 38)

Later Perry removed the seal from the cup and poured a sample into a container provided by Associated Regional and University Pathologists "ARUP", a private laboratory in Salt Lake City. Perry took the sample to ARUP and requested that they test the sample for cocaine. Perry gave the sample to a technician at the lab, where it was numbered, and initialed with Perry's initials. (R Vol II 40-42)

On April 18, 1997 an Information was filed in the Fourth Judicial District Court charging Enrique Gracia with Possessing or Using Cocaine in a Drug Free Zone, a Second Degree Felony, and Unlawfully Possessing Drug Paraphernalia in a Drug Free Zone, a Class A Misdemeanor.

A Preliminary Hearing was held in the Fourth Judicial District Court before the Honorable Judge Lynn W. Davis on June 30, 1998. The State did not call anyone from ARUP to testify at the preliminary hearing. The Court found that there was probable cause and bound the case over for trial.

Trial was held on March 11 and 13, 1998. On March 11, 1998 the State, called Scott Allen (R. 141) Allen Testified that he had seen Gracia throw the cocaine into the toilet. On cross examination, Richard Gale, Gracia's attorney, asked Allen if he had talked to Enrique Gracia following his arrest. Allen indicated that he had not. Mr. Gale asked Allen if he had ever left threatening messages on Gracia's answering machine, Allen

again indicated that he had not. (R. 194) Mr. Gale read a transcription of a message that was left on Gracia's answering machine and asked Mr. Allen if he had left the message on Gracia's answering machine. Allen again denied leaving any message and said that he had no reason to call him. (R. 194, 196) Allen indicate that he was angry with Gracia on the day of the incident but that he did not "plant" the drugs in an effort to hurt Gracia. (R. 194-197)

The next day of trial, March 13, 1998, Mr. Gale called Scott Allen to testify and asked him again if he had aver left messages on Mr. Gracia's answering machine. Scott indicated again, that he did not. (R. Vol II 121).

Richard Gale then called Gracia to the stand. He questioned Gracia about how many times he had seen Scott Allen since the incident. Gracia indicated that it had been more than ten times. Mr. Gale asked Gracia if he had ever received a answering machine message from Scott Allen, Gracia indicated that on the 20th of April, 1997 he had received a threatening message from Allen on his answering machine. Mr. Gale then played the tape of the answering machine message. (R. Vol II 130)

Scott Allen was brought into the courtroom so that he could listen to the tape. Mr. Gracia indicated that he believed the voice was of Scott Allen's. (R. Vol II 131)

Scott Allen was then called again to testify, he testified that he had left the message but had forgotten about leaving it.

At the end of the first day of trial, after the jury had

been dismissed, the Court went on record to discuss the admissibility of Mr. Gracia's urine test. (R.302) The Court stated that Defense Counsel had indicated to him that they would not be calling Mr. Gracia as a witness, and that the Court thought that the results of the blood test would probably be best reserved for impeachment depending on what the defendant would testify to. (R. 302)

The State argued that the jury had been told about the balloons on the bathroom floor and how they got there and that above and beyond the balloons sitting on the floor, that the State had to prove how they got there. The State argued that they established a link with the balloons to the paraphernalia found in the bedroom and that they wanted the jury to hear that they had the "innermost connection that you can have," that cocaine was found in Gracia's system. (R. 303) The State argued further that if the Court was to accept the evidence, it would certainly be specific evidence that would go to who possessed the balloons. (R. 304)

The State indicated that they wanted to call a lab technician from ARUP to testify about very scientifically accepted tests, like the gas chromatograph mass spectrometer test in order to admit the test results performed on urine. (R. 304-305)

Mr. Gale objected and stated that he thought there was insufficient foundation for the laboratory test results to be admitted into evidence.(R.305)

The Court decided to call the individual from ARUP and argue the established facts after he had testified. (R. 305)

The State called Gordon J. Nelson from the ARUP Laboratory. Prior to asking any questions the state referred the court to the case of State v. Wynia.

The State argued that pursuant to State v. Wynia the circumstances surrounding the likelihood of tampering are likely factors in determining evidence admitted and that if, after consideration of these factors, the Court is satisfied that the substance has not been changed or altered, that it may permit its introduction into evidence. He then stated that the ruling of the Court would not be overturned, unless there was a showing of an abuse of discretion. (R 307) The State then remarked that the Appellate Court has said that once the evidence is in the hand's of the State, that such evidence is generally presumed to be handled with regularity, absent an affirmative showing of bad faith or actual tampering. (R. 307)

Mr. Gale then indicated to the Court that he thought State v. Wynia was very distinguishable from the case that was before the Court at that time. Mr. Gale stated that in Wynia the Appellant was contesting the chain of custody because the individual in the Crime Lab who actually opened the container and tested the substance did not say that he had received the sample from the individual who accepted it at the Crime Lab.(R. 308) Mr. Gale then contended that the present case was completely different, Gracia was objecting to the fact that Mr. Gordon

Nelson was not the person who opened the substance, broke the seal, or the one that tested the substance.

Mr. Gale then stated that prior to the proceedings, he had spoken with Mr. Nelson in the presence of the state and that Mr. Nelson informed him that there were three people who had handled the specimen while it was at the laboratory. One person opened the specimen, one person retrieved the specimen from the security bag, and one person conducted a preliminary test on the sample. Another person then conducted a confirmatory test. (R. 308) Mr. Gale then stated that none of the three individuals who handled and tested the specimen where present in the courtroom. (R. 308-309)

Mr. Gale argued that Gracia could not explore the circumstances surrounding the custody of the specimen or whether the specimen had been tampered with because none of the three individuals who had possession of the substance were there to testify. (R. 309)

Mr. Gale also argued that in Wynia, "they did testify that the evidence was sealed. Sealed, unopened envelopes with the appropriate identifying marks strongly indicating that the evidence was in its original form." (R. 310)

Mr. Gale also argued that in the present case there was no one there to testify to the fact that they had themselves tested the specimen. (R. 310)

The Court then decided to listen to the witness and establish the facts after he had testified. All parties agreed

that Mr. Nelson was an expert and he was sworn in. (R.312)

Mr. Nelson testified about his education, work experience, testing policies at the lab, the kinds of tests located at the lab, and about the number of employees at the lab. (R.312-315)

Mr. Gale interrupted the witness and indicated to the Court that he did not dispute the validity of the tests, but instead was concerned about the chain of custody with the sample. (R.315)

Mr. Nelson then testified more extensively about the testing of samples and the equipment used to test such samples. (R. 316-320)

Mr. Nelson also testified about records that are kept which identify all individuals that handled the sample. He testified that according to his records, that an individual by the name of Stacey Szareck had been the one that received the sample. (R.322) Mr. Nelson then testified that Ms. Szareck was no longer working at the lab and that she was not the one who tested the sample. (R. 322-323)

Mr. Nelson explained about the chain of custody records kept at the lab. Mr. Nielsen testified that through his examination of the chain of custody record he felt that the tests were done appropriately. (R.326)

Following Mr. Nielsen's testimony, the court ruled that the State had not yet met its burden in terms of foundation. He stated that Mr. Nelson was not acquainted with the individuals who conducted the tests and whether or not their qualifications met the Federal Guidelines.

The Court then directed the State that it would be in their best interest to have the individuals that handled the sample to come in and testify. He also stated that he would make a ruling the next day. (R. 358-363)

On March 13, 1998, outside of the jury's presence, the judge went on record to hear the argument's of the parties before he made his ruling. (R. Vol II 5)

The state proffered to the Court that the following individuals were involved with the sample: Stacy Szarek, who received the sample from the probation officer, Stephanie Brown accessed the sample, who released the sample to Maria Chacone, who performed the initial test. Next was Glenn Eldridge and Don Nash, who deal with all positive result samples, then Teresa Lee, and then lastly, Charles Jones, who runs the second test. After the second test it was then taken off the machine by Aiping Liu, who then reviewed the data.(R. Vol II 6-9).

Mr. Gale argued that he objected to Mr. Nelson testifying, because his testimony would be insufficient to establish chain of custody for the urine sample. He stated that the people who broke the seal, who handled and open sample and conducted the tests were not present to testify, and that the defense did not have a chance to cross-examine. (R. Vol II 12-13)

Mr. Gale asserted that six people handled the opened sample, and that none of them were there, and that by allowing Mr. Nelson to testify, it violated Mr. Gracia's right to confrontation as guaranteed by the Sixth Amendment to the Constitution of the

United States and Article I section 12 of the Constitution of the State of Utah. (R. Vol II 14)

He went on further to say that Mr. Gracia does not have the opportunity to confront these witnesses, to cross-examine them, or to find out why Ms. Szarek was released and whether it was for tampering with the samples. (R. Vol II 14)

Finally, Mr. Gale argued that any information provided by Mr. Nelson would be hearsay information read off of a piece of paper. (R. Vol II 14)

The Court then ruled that Gordon Nelson would be allowed to testify to the chain of custody and that the positive test results performed on the urine sample would be admitted into evidence. (R. Vol II 18)

Following the courts ruling the court heard testimony from Gordon Nielsen, and John Perry, Gracia's probation officer.

After three hours of deliberation, the jury returned with a guilty verdict and the Court set the matter for sentencing on April 27, 1998.

On April 27, 1998 Gracia was sentenced to serve a term of one to fifteen years in the Utah State Prison, the execution of the sentence was stayed, and Mr. Gracia was orderd to serve a term of two hundred days in the Utah County Jail and to complete 36 months of supervised probation.

SUMMARY OF THE ARGUMENT

Gracia contends that the trial court erred as a matter of law in three areas or in the alternative abused its discretion. These errors or abuse of discretion by the court resulted in prejudicial error and Gracia's conviction.

First, Gracia contends the trial court erred by allowing hearsay information regarding laboratory test results performed on a urine specimen to be admitted into evidence. The court admitted the hearsay information when no exception to the hearsay rule was presented by the State and the state did not present adequate foundation for the court to allow admission of the hearsay information.

Second, Gracia contends that in admitting into evidence hearsay information regarding laboratory test results, the trial court deprived Gracia of his right to confrontation as provided by the Sixth amendment to the Constitution of the United States and Article I section 12 of the Constitution of Utah. The trial court committed this error by admitting the hearsay test results into evidence without making the factual determinations necessary to overcome Gracia's right to confrontation. Before admitting the hearsay information the court should have made a factual determination that the six people who tested and handled the urine specimen were unavailable and a factual determination that the hearsay information bore a sufficient indicia of reliability.

Third, Gracia contends that the trial court erred as a

matter of law in allowing the test results to be admitted into evidence because the court did not have testimony through which the court could determine the circumstances surrounding the custody of the urine specimen and the likelihood of tampering. The only evidence the court heard regarding the custody of the specimen and the likelihood of tampering was inadmissable hearsay.

Fourth, Gracia contends that even if the hearsay evidence presented by the state was sufficient for the court to consider the circumstances surrounding the custody of the urine specimen and the likelihood of tampering, the court abused its discretion. The court abused its discretion by allowing the hearsay test results into evidence when the six people in the lab who handled and tested the specimen did not testify.

Lastly, Gracia contends that such errors or abuses by the court were prejudicial because the State relied on the hearsay information so that they could argue to the jury that cocaine was found in Gracia's urine and therefore Gracia was guilty of possessing other bindles of cocaine. Other testimony and evidence which connected Gracia to the bindles of cocaine was shown by Gracia to be unreliable and biased. Moreover, Gracia had not planned on testifying in his own behalf and decided that it would be necessary to testify following the court's admission of the hearsay test results.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY ALLOWING HEARSAY INFORMATION CONCERNING LABORATORY TEST RESULTS PERFORMED ON A URINE TO BE ADMITTING INTO EVIDENCE

Gracia contends that the court erred by admitting hearsay information regarding the laboratory test performed on a urine specimen into evidence. The court admitted the hearsay into evidence without providing a legal basis for the admission. No exception to the hearsay rule was presented by the State nor was adequate foundation presented to permit the court to allow admission of the hearsay.

Utah Rule of Evidence 802 Provides: "Hearsay is not admissible except as provided by law or by these rules." U.R.E. 802.

In the present case Gracia objected to the court admitting the hearsay information concerning the laboratory test results performed on a urine specimen. (R. Vol. II,13, 19-25; 14, 1-21). Notwithstanding Gracia's objection, the court admitted the hearsay information into evidence. The admitted the hearsay without citing a provision of law or rule of evidence through which the hearsay should be allowed. (R. Vol. II 17, 5-25; 18-19; 20, 1-20). Furthermore, there is no exception to the hearsay rule which was relevant or would have allowed the court to admit the test results.

Presumably the state will argue that the hearsay information

should have been allowed under one of the exceptions to the hearsay rule. However, for evidence to be admissible under an exception to the hearsay rule, foundation must be laid to establish the necessary indicia of reliability. State v. Bertul, 664 P.2d 1181.

In the present case no foundational findings were made by the court. At the close of the first day of trial the court indicated that the state had not laid the proper foundation for the hearsay information to be admitted into evidence and that the state should attempt to subpoena the individuals that handled the evidence in the laboratory so that they could testify on the second day of trial. (R. Vol I, 360, 7-25). However, on the second day of trial the court recieved a proffer of hearsay information from the state. The state used the proffer in an effort to establish sufficent foundation for the court to allow the hearsay laboratory results. Following the profer by the state and over Gracia's objection, the court allowed the hearsay information to be admitted into evidence and the labratory test results to be presented to the jury. The proffer of hearsay information by the state did not provide any additional foundation as to the reliability of the hearsay. The proffer simply provided the names and educational qualifications of the individuals who handled and tested the specimen in the laboratory. (R. Vol. II,6, 10-25, 8-23). The information provided by the state did not establish that the test results were made in the regular course of business, when the hearsay was

recorded or by whom, Whether the hearsay information was kept under circumstances that would preserve its integrity, or any other guarantees of trustworthiness. Moreover, the court did not make any findings necessary to establish the required foundation for any exception to the hearsay rule.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW AND DEPRIVED GRACIA OF HIS RIGHT TO CONFRONTATION BY ADMITTING HEARSAY LABORATORY TEST RESULTS INTO EVIDENCE

The trial court erred as amatter of law when it allowed labratory test results to be admitted into evidence through hearsay although there were six people who handled and tested the urine specimen in the labratory. Five of the six people's wherabouts were known by the state but were not called upon to testify. Gracia never had an opportunity to cross examine any of these six people on the circumstances surrounding the custody or testing of the urine specimen. Therefore, the court deprived Gracia of his right to confrontation as provided by the Sixth amendment to the Constitution of the United States and Article I section 12 of the Constitution of Utah by admitting hearsay test results into evidence.

In determining how prior testimony is to be weighed against confrontation concerns, the United States Supreme Court outlined a two-pronged test. Ohio v. Roberts, 448 U.S. 56 (1980). This two-pronged test was adopted by the Utah Supreme Court in the case of State v. Brooks, 638 P.2d 537 (Utah 1981). In Brooks,

the court indicated that for prior testimony to be admitted through hearsay: first, "the witness must be unavailable" and second, "the testimony must bear sufficient indicia of reliability to permit its introduction at trial." Id., at 539. Generally, a witness is unavailable for confrontaion purposes when the state has made a good faith effort to obtain [the witnesses] presence. State v. Oniskor, 29 Utah 2d 395 (1973).

In Brooks, the court allowed the prior testimony of two transients who had testified at a preliminary hearing to be heard at trial. In making its decision, the Brooks court determined that the two individuals could not be located by the state to testify at trial and the prior testimony of the two individuals at the preliminary hearing bore sufficient indicia of reliability. Id., at 542.

In determining that the individuals in Brooks were not available to testify, the court considered the fact that a police officer had made a good faith effort to locate the witnesses. Id., at 540. The police officer testified that he had contacted all known relatives, likely hangouts, the local bus terminals and out of state police but could not locate the individuals.

In contrast to Brooks, the state in the present case knew exactly where five of the six missing witnesses could be located. (R. Vol. II, 10,3-25; 11, 1-15). The witness who the state had not located, Stacey Szarek, was no longer employed at the laboratory. However, the state presented no evidence that they

had made any effort whatsoever to locate Stacey Szarek. Indeed, neither the state had not even attempted to obtain Stacey Szarek's name until after the first day of trial. Nevertheless, even if the state had presented evidence sufficent for the court to find that Stacey Szarek was unavailable to testify, the court could not have concluded that the other five individuals were constitutionally unavailable to testify. In the proffer made by the state, the court received information that the other five individuals were at the laboratory on the day of trial and could be called to testify. The state indicated that requiring the five individuals to testify would negatively impact the ability of the laboratory to run effectively on that day. (R. Vol. II, 11, 12-19). When considered in context with a defendant's right to confrontaion, it seems that the loss of a person's liberty for up to 15 years certainly outwieghs any inconvience the laboratory may have experienced by losing the work product of five people for a few hours.

In addition to the unavailability of the witnesses, the Brooks court considered whether the witnesses prior testimony bore a sufficient indicia of reliability. The Brooks court considered the fact that the prior statements of the witnesses had been given at a preliminary hearing under oath. Id., at 540. Moreover, the Brooks court considered the fact that at the preliminary hearing the defendant had, " . . .a statutory right to cross-examine the witness against him, and the right to subpoena and present witnesses in his defense." Id.

Unlike the Brooks case, in the present case, the six missing witnesses did not testify to the test results while under oath at a preliminary hearing. The missing witnesses prior statements simply consisted of writings on a sheet of paper. Moreover, Gracia, unlike Brooks did not have an opportunity to cross examine the witnesses at a preliminary hearing. In fact, the actual names of the individuals who handled the urine specimen in the laboratory were not provided to Gracia until the morning of the second day of trial. (R. Vol. II, 6, 10-25, 7-14).

In sum, the court did not make the legal determinations required by Ohio v. Roberts, and State v. Brooks, to overcome a defendants right to confrontation. The court did not determine that the six people who tested and handled the urine specimen were unavailable testify. Nor did the court determine that the hearsay information bore the sufficient indicia of reliability. Therefore the trial court deprived Graica of his right to confrontation by allowing the laboratory test results to be received by the jury through hearsay information.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY ALLOWING LABORATORY TEST RESULTS TO BE ADMITTED INTO EVIDENCE WITHOUT HAVING EVIDENCE WHICH THE COURT COULD CONSIDER IN DETERMINING THE CIRCUMSTANCES SURROUNDING THE CUSTODY OF THE SPECIMEN AND THE LIKELIHOOD OF TAMPERING

Gracia contends that the trial court erred as a matter of law by allowing the test results to be admitted into evidence when the only evidence the court considered in determining the

circumstances surrounding the custody of the urine specimen and the likelihood of tampering was inadmissable hearsay.

Before a substance connected with the commission of a crime is admissible as evidence, there must be a showing that the proposed exhibit is what it purports to be and is in substantially the same condition as it was at the time of the crime. State v. Madsen, 28 Utah 108, 110-111, 498 P.2d 670, 672 (1972). The circumstances surrounding the custody of the article and the likelihood of tampering are factors to be considered in determining admissibility. Id. Nevertheless, a party proffering evidence is not required to eliminate every conceivable possibility that the evidence may have been altered. State v. Bradshaw, 680 P.2d 1036, 1040 (Utah 1984). Nor is every person who handled a specific piece of evidence required to testify in order for a party to establish a chain of custody. State V. Wynia, 754 P.2d 667 (Utah App. 1988). Evidence is generally presumed to have been handled with regularity once it is in the hands of the state absent a showing of bad faith or actual tampering. State v. Eagle Book, Inc., 583 P.2d 73, 75 (Utah 1978).

Previously the courts have held that a court could make a determination that a specimen was in substantially the same condition as at the time the crime was committed even though every person who handled the substance did not testify. Wynia at 669. However, in these previous cases persons who handled an opened sample and actually performed the tests have always been

present and have testified. See, State v. Madsen, 28 Utah 108, 110-111, 498 P.2d 670, 672 (1972); State v. Bradshaw, 680 P.2d 1036, 1040 (Utah 1984); State V. Wynia, 754 P.2d 667 (Utah App. 1988).

In Wynia this court held that sufficient facts had been presented by the state for the court to make its determination when the technician who actually received the sample into the state crime lab did not testify. Wynia, at 669. Unlike Wynia however, in the present case, there were six people who actually handled an opened urine specimen once it was received at the laboratory. (R. Vol. II, 6-9) In Wynia, the person who checked the unopened sample into the laboratory did not testify. Nevertheless, the two people who actually handled the opened sample and performed the test did testify. Id., at 669. In contrast to Wynia, in the present case six people handled an opened sample and did not testify. In particular, Stacey Szarek and Stephanie Brown who received the specimen from the probation officer, broke the seal and who poured off aliquots, did not testify. Unlike the missing link in Wynia, these two people handled an opened sample. Likewise, the two people who actually performed the initial test, Maria Chacon and Glenn Eleridge, were not called by the state to testify. Additionally, the two people who placed the specimen in the gas chromatograph mass spectrometer, Charles Jones, and Aiping Liu, were not called by the state to testify. The only information the court recieved upon which it could rely in determining the conditions

surrounding the custody of the specimen and the liklihood of tampering was hearsay testimony the court recieved from Gordon Nielson, the laboratory supervisor. Gordeon Nielson had no personal knowledge of the specimen or the tests performend on the specimen. The only knowledge Gordon Nielson had was hearsay information he read from a document.

Although the Utah Supreme Court held in State V. Bradshaw that the state must not eliminate every concievable possibility that a substance may have been altered, Bradshaw, is distinguishable from the present case because the chemist who actually tested the substance was called upon to testify. Bradshaw, at 1040. Unlike Bradshaw, in the present case the state's only witness was Gordon Nielson, the lab supervisor who never handled the specimen. Bradshaw_ is further distinguishable from the present case because in Bradshaw the substance was in a sealed envelope the entire time it was unattended. Id., at 1039. Unlike the sealed envelope in Bradshaw, the specimen in the present case was opened and handled by six people who did not testify. Moreover, the sample in the present case was left opened and unattended for a substantive period of time. Gordon Nielson testified that a shift change took place where Charles Jones replaced Aiping Liu. When this shift change occurred an unopened aliquot of the specimen was on the gas chromatograph machine. (R. Vol II 13, 21-25, 14, 1-10). The state did not present any witnesses who could testify how long the sample was unattended or who in the laboratory had access to the opened

sample. Hence, in the present case the specimen was opened and unattended while the specimen in Bradshaw, was unattended but remained in a sealed envelope.

Although, the courts of this state have allowed a link in the chain of custody to be missing and a sealed sample to be left unattended while in a locked mailbox, the court in the present case has gone far beyond the prior case law and allowed test results to be recieved into evidence when the person who tested the specimen did not tesify. The trial court's ruling in the present case seems to surpass the outer limit that this state's courts have allowed previously.

Because the state did not present any evidence except hearsay, the court did not have sufficent information to determine the circumstances surrounding the custody of the specimen in this case or the liklihood of tampering. Therefore, the court erred as a matter of law in admitting the laboratory test results performed on the urine specimen into evidence.

IV. EVEN IF THE COURT HAD SUFFICENT INFORMATION TO DETERMINE THE CIRCUMSTANCES SUROUNDING THE CUSTODY OF THE SPECIMEN AND THE LIKLIHOOD OF TAMPERING, THE COURT ABUSED ITS DESCRETION BY ALLOWING THE TEST RESULTS INTO EVIDENCE

Even if the hearsay evidence presented by the state was sufficent for the court to consider the circumstances surrounding the custody of the urine specimen and the liklihood of tampering, the court abused its discretion by allowing the test results into evidence when the six people in the lab who handled and tested

the specimen did not testify.

Generally, an abuse of discretion occurs when the trial court's ruling was "beyond the limits of reasonability." State v. Hamilton, 827 P.2d 232, 239 (Utah 1992).

In the present case the trial court's ruling was beyond the limits of reasonability. On the first day of trial the state presented only one witness, Gordon Nielson, to testify concerning the circustances surrounding the custody of the specimen and the liklihood of tampering. This witness wa a laboratory supervisor who had never touched or tested the urine specimen. Upon Gracia's objection and based upon his inquiries the state indicated that there were three people who had handled the specimen while it was in the laboratory. However, the state did not know the names of these individuals, their qualifications, or any other information regarding their behavior on the day the test was performed. Following Gracia's objection, the court told the state that "it would be in their best interest" to secure the presence of the missing individuals in order to establish a chain of custody.

On the morning of the second day of trial the state provided the names of six individuals who had handled and tested the urine specimen in the laboratory. This was the first time Gracia had been provided with the names of the individuals who had handled the specimen. (R. Vol. II, 6, 10-25, 7-14). Additionally, this was the first time Gracia had been told that six rather than three individuals had handled the specimen. The state proffered

to the court that five of the six witnesses could be located at the laboratory. (R. Vol. II, 10,3-25; 11, 1-15). The one witness who the state had not located, Stacey Szarek, was no longer employed at the laboratory. However, the state had not even attempted to procure Stacey Szarek's name until after the first day of trial. Nevertheless, even if Stacey Szarek could not be found, the court was unreasonable in admitting laboratory test results through hearsay rather than requiring the five individuals whose whereabouts were known to testify. The court concluded that requiring the five individuals to testify would negatively impact the ability of the laboratory to run effectively on that day, therefore hearsay testimony from the laboratory supervisor would be sufficent to establish a chain of custody. (R. Vol. II, 11, 12-19).

Considering all the circumstances, it is readily apparant that the court went beyond the limits of reasonability and abused its discretion when it determined that the risk of inconvienienceing a private laboratoy for a few hours outwieghed the risk that an innocent person could lose his liberty for up to 15 years.

V. THE TRIAL COURT'S ERROR IN ADMITTING THE TEST RESULTS INTO EVIDENCE WAS PREJUDICIAL AND RESULTED IN GRACIA'S CONVICTION

Gracia contends that the court's error in admitting the laboratory test results was prejudicial. The state relied on the fact that cocaine was found in the urine sample to link Gracia to the bindles of cocaine which were found in the bathroom. The

State in their closing argument admitted that the labaratory test results were crucial to their case when they stated:

> "[Gracia] would have you believe that somebody planted [the drugs] there, but then there's the ultimate connection. And that is after all of that evidence was found, a urine sample was taken from the defendant, and it tested positive for cocaine. In addition to all of the things that were in his room, the cocaine was in him."

(R. Vol. II 204, 22-25; 205, 1-3)

Other testimony and evidence which was presented by the State to show that Gracia possessed the bindles of cocaine was shown by Gracia to be unreliable and biased. Both of the witnesses who told the police officers that they had seen Gracia attempt to flush the drugs down the toilet were related to Russell Allen. It was shown by Gracia that Russel Allen had made threats against Gracia. Additionally, Russell Allen had a motive to frame Gracia because Gracia had threatened to report Russell Allen to the Internal Revenue Service. (R. Vol II 146-147). And Russell Allen would have been in danger of losing his business. In fact, Rusell Allen had previously been convicted of disorderly conduct for making threats against Gracia. (R. 159-161). Part of the court record in the disorderly conduct trial against Russell Allen was a statement made by Allen that "the only thing [Allen] wanted was to see [Gracia] go to prison for his cocaine drug charges." (R. 161, 12-24). Allen also stated he would do anything within his power to keep his trucks going. (R. Vol. II 147, 8-19).

Scott Allen, one of the two witnesses who said he saw Gracia

throw the cocaine into the toilet was Russell Allen's younger brother. Scott Allen, lied on the stand about making threats towards Gracia. He adamantly denied making threats on three different ocasions while under cross examination. However, after hearing his voice played to the jury on a cassette tape, Scott Allen admitted he had called Gracia and made threats on his answering machine. (R. Vol II 131-133)

The other witness who said he saw Gracia attempt to flush the cocaine down the toilet, Mark Harris, was a brother-in-law to Russell Allen. Moreover, Mark Harris did not have an opportunity to observe Gracia when in the bathroom because Harris' view was obstructed by both Scott Allen and Gracia. (R. 224-230).

Because the witnesses had a motive to lie and the credibility of the witnesses was impeached, the fact that a urine test indicating that Gracia had cocaine in his system was extremely prejudicial to Gracia's case.

Gracia had not previously planned on testifying in his own behalf and decided that it would be neccesary to testify so that he could explain the test results following the court's decision to admit the test results into evidence. Furthermore, when the court admitted the test results into evidence, the jury also learned the prejudicial fact that Gracia was on probation for a prior crime.

The fact that the laboratory test results were prejudical to Gracia's case is further demonstrated by the fact that the jury deliberated for approximately three hours prior to convicting

Gracia notwithstanding the fact that the test results were admitted into evidence.

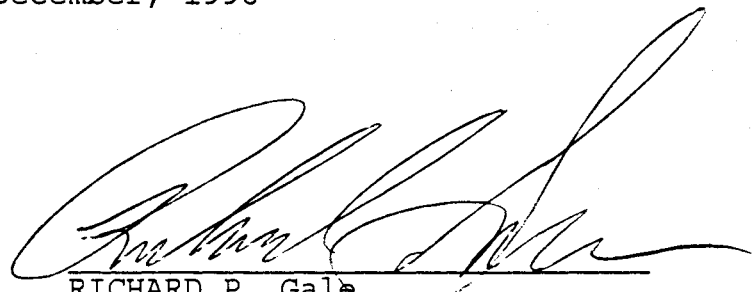
CONCLUSION

The trial court erred as a matter of law by allowing hearsay information regarding laboratory test results performed on a urine specimen to be admitted into evidence. In admitting such hearsay information into evidence the trial court deprived Gracia of his right to confrontation as provided by the Sixth amendment to the Constitution of the United States and Article I section 12 of the Constitution of Utah. The trial court also erred as a matter of law in allowing the test results to be admitted into evidence without determining the circumstances surrounding the custody of the urine specimen and the likelihood of tampering. If the hearsay evidence was sufficient for the court to consider the circumstances surrounding the custody of the urine specimen and the likelihood of tampering, the court abused its discretion.

The errors or abuses by the court were prejudicial because the State relied on the hearsay information so that they could argue to the jury that cocaine was found in Gracia's urine and therefore Gracia was guilty of possessing other bindles of cocaine when other testimony and evidence which connected Gracia to the bindles of cocaine was shown by Gracia to be unreliable and biased.

WHEREFORE, defendant requests this court to reverse appellant conviction and remand for a new trial.

DATED this 23 day of December, 1998



RICHARD P. Gale
Attorney for Appellant

ADDENDUM

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings. 1996

78-2-3. Repealed. 1986

78-2-4. Supreme Court — Rulemaking, judges pro tempore, and practice of law.

(1) The Supreme Court shall adopt rules of procedure and evidence for use in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the rules of procedure and evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

(2) Except as otherwise provided by the Utah Constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah.

(3) The Supreme Court shall by rule govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to the practice of law. 1986

78-2-5. Repealed. 1988

78-2-6. Appellate court administrator.

The appellate court administrator shall appoint clerks and support staff as necessary for the operation of the Supreme Court and the Court of Appeals. The duties of the clerks and support staff shall be established by the appellate court administrator, and powers established by rule of the Supreme Court. 1986

78-2-7. Repealed. 1988

78-2-7.5. Service of sheriff to court.

The court may at any time require the attendance and services of any sheriff in the state. 1988

78-2-8 to 78-2-14. Repealed. 1986, 1988

CHAPTER 2a

COURT OF APPEALS

Section

78-2a-1. Creation — Seal.
78-2a-2. Number of judges — Terms — Functions — Filing fees.
78-2a-3. Court of Appeals jurisdiction.
78-2a-4. Review of actions by Supreme Court.
78-2a-5. Location of Court of Appeals.

78-2a-1. Creation — Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal. 1986

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation $1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

(a) administer the rotation and scheduling of panels;

(b) act as liaison with the Supreme Court;

(c) call and preside over the meetings of the Court of Appeals; and

(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire

and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings. 1996

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1986

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1986

CHAPTER 3

DISTRICT COURTS

Section

78-3-1 to 78-3-2. Repealed.
78-3-3. Term of judges — Vacancy.
78-3-4. Jurisdiction — Appeals.
78-3-5. Repealed.
78-3-6. Terms — Minimum of once quarterly.
78-3-7 to 78-3-11. Repealed.
78-3-11.5. State District Court Administrative System.
78-3-12. Repealed.
78-3-12.5. Costs of system.
78-3-13. Repealed.
78-3-13.4. Transfer of court operating responsibilities.
78-3-15 to 78-3-17. Repealed.
78-3-17.5. Application of savings accruing to counties.
78-3-18. Judicial Administration Act — Short title.
78-3-19. Purpose of act.
78-3-20. Definitions.
78-3-21. Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports.
78-3-21.5. Data bases for judicial boards.
78-3-22. Presiding officer — Compensation — Duties.
78-3-23. Administrator of the courts — Appointment — Qualifications — Salary.
78-3-24. Court administrator — Powers, duties, and responsibilities.
78-3-25. Assistants for administrator of the courts — Appointment of trial court executives.
78-3-26. Courts to provide information and statistical data to administrator of the courts.
78-3-27. Annual judicial conference.
78-3-28. Repealed.
78-3-29. Presiding judge — Associate presiding judge — Election — Term — Compensation — Powers — Duties.
78-3-30. Duties of the clerk of the district court.
78-3-31. Court commissioners — Qualifications — Appointment — Functions governed by rule.

78-3-1 to 78-3-2. Repealed. 1971, 1981, 1988

78-3-3. Term of judges — Vacancy.

Judges of the district courts shall be appointed initially until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office for judges of the district courts is six years, and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. 1988

78-3-4. Jurisdiction — Appeals.

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

(2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.

(3) The district court has jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court.

(4) The district court has jurisdiction over all matters properly filed in the circuit court prior to July 1, 1996.

(5) The district court has appellate jurisdiction to adjudicate trials de novo of the judgments of the justice court and of the small claims department of the district court.

(6) Appeals from the final orders, judgments, and decrees of the district court are under Sections 78-2-2 and 78-2a-3.

(7) The district court has jurisdiction to review agency adjudicative proceedings as set forth in Title 63, Chapter 46b, Administrative Procedures Act, and shall comply with the requirements of that chapter, in its review of agency adjudicative proceedings.

(8) Notwithstanding Subsection (1), the district court has subject matter jurisdiction in class B misdemeanors, class C misdemeanors, infractions, and violations of ordinances only

AMENDMENT I

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances:

AMENDMENT II

[Right to bear arms.]

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

[Quartering soldiers.]

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII

[Trial by jury in civil cases.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

[Bail — Punishment.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

[Rights retained by people.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

[Powers reserved to states or people.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

[Suits against states — Restriction of judicial power.]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

[Election of President and Vice-President.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law. 1988 (2nd S.S.)

Sec. 9. [Excessive bail and fines — Cruel punishments.]

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor. 1896

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded. 1896

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. 1896

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule. 1994

Sec. 13. [Prosecution by information or indictment — Grand jury.]

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by law.

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized. 1896

Sec. 15. [Freedom of speech and of the press — Libel.]

No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. 1896

Sec. 16. [No imprisonment for debt — Exception.]

There shall be no imprisonment for debt except in cases of absconding debtors. 1896

Sec. 17. [Elections to be free — Soldiers voting.]

All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law. 1896

Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed. 1896

Sec. 19. [Treason defined — Proof.]

Treason against the State shall consist only in levying war against it, or in adhering to its enemies or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act. 1896

Sec. 20. [Military subordinate to the civil power.]

The military shall be in strict subordination to the civil power, and no soldier in time of peace, shall be quartered in any house without the consent of the owner; nor in time of war except in a manner to be prescribed by law. 1896

Sec. 21. [Slavery forbidden.]

Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within this State. 1896

Sec. 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation. 1896

Sec. 23. [Irrevocable franchises forbidden.]

No law shall be passed granting irrevocably any franchise, privilege or immunity. 1896

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation. 1896

Sec. 25. [Rights retained by people.]

This enumeration of rights shall not be construed to impair or deny others retained by the people. 1896

Sec. 26. [Provisions mandatory and prohibitory.]

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be

have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) *Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compesation under the Fifth Amendment. In other civil actions and proceedings the compesation shall be paid by the parties in such proportion and at such time as the court direct, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII. HEARSAY

Rule 801. Definitions.

The following definitions apply under this article:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by law or by these rules.

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) *Records of vital statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of public record or entry.* To prove the absence of a record, report, statement, or data compilation, in any

CERTIFICATE OF MAILING

I hereby certify that on the 23 day of ~~May~~ December, 1998, I mailed (2) true and exact copies of the foregoing Brief of Appellants to the following:

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