

1979

State of Utah v. Cecil Earl Brooks and James Charles Edward Good : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

:
STATE OF UTAH,
:

Plaintiff-Respondent,
:

-vs-
:

Case No. 16639
:

CECIL EARL BROOKS and
JAMES CHARLES EDWARD GOOD,
:

Defendants-Appellants.
:

BRIEF OF RESPONDENT

APPEAL FROM JURY VERDICTS, JUDGMENTS AND
SENTENCES FOR AGGRAVATED ASSAULT ENTERED
IN THE THIRD JUDICIAL DISTRICT COURT, IN
AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE PETER F. LEARY, JUDGE,
PRESIDING.

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verdicts was entered and each appellant was sentenced to an indeterminate sentence of zero to five years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order from this Court affirming the verdicts of the jury and the judgments and sentences of the court below.

STATEMENT OF THE FACTS

Respondent generally agrees with appellant's Statement of the Facts as far as it goes, with certain exceptions noted below.

Prior to trial, on July 9, 1979, Judge Leary convened a hearing on the State's motion to introduce at trial the tapes of the preliminary hearing (R. 279-566).

Detective Foster, South Salt Lake Police, testified at that hearing that both victims had indicated they were going to stay for the trial (R. 285); that Vinson promised he would notify Foster of any change of address (R. 287); that as soon as Foster had any idea of a Bakersfield, California address for Storie, he contacted the Bakersfield police and the local bus lines in a vain attempt to locate Storie (R. 288-291); that he contacted all known relatives of Storie and left messages for Storie to contact Foster (R. 291-294); that he contacted likely hangouts in Fresno

and Sacramento all to no avail (R. 293).

Foster further testified that Vinson did contact him regarding Vinson's change of address (R. 295) and that after discovering that Vinson had left, he checked with the Assistance Payments Division and Salt Lake Rescue Mission and searched Pioneer Park (R. 296-97). He also stated that he left word with Roper Yards personnel to notify him if they saw the witnesses (R. 297).

Detective Foster also stated that at the time of him last personal contacts with either witness he had no idea of when the trial would occur and that he had followed up every lead he received (R. 328).

Wendy Hufnagel, Deputy Salt Lake County Attorney and Prosecutor in this case, stated that she had directed Detective Foster to follow any leads he had in attempting to locate the witnesses (R. 330).

The following additional testimony was received at trial:

Larry Creason, a trainyard supervisor at Roper Yards, led the group of employees which first encountered the appellants after they had fled the crime scene. He testified that Good admitted the appellants were involved in the "fracas;" that Brooks said the cut throat (of Vinson) resulted from Good hitting the victim with the "pickax;"

and that Good stated that both victims should have been dead (R. 615-616, 633). Mr. Creason further testified that both appellants indicated they wanted to turn themselves in rather than run (R. 617). He also testified that Brooks' hand wound did not appear to be fresh and was not bleeding (R. 636, 638-639).

Paul Midgely, a carman at Roper Yards was also with the group that stopped the appellants. He testified that appellants admitted being in the fight; that they stated they didn't want to run for the rest of their lives; and that they were surprised that the victims were not dead (R. 651). Scott Broussard, special agent for the railroad, testified that neither of the appellants appeared to be injured, but that Brooks did have blood on his hands (R. 700-701).

Dr. Mathews, an emergency-room physician from Holy Cross Hospital who treated Vinson, testified that Vinson's neck wound was life-threatening (R. 829). Both Dr. Mathews and Dr. Callister, an emergency-room physician from Valley West Hospital who treated Storie, testified to the effect that some of both victims' wounds were caused by a sharp instrument and others by a blunt instrument (R. 824-840).

Dr. McCloskey, University of Utah pathologist, testified that almost all of the articles found at the scene of the crime were stained with blood of a type

consistent with either or both of the victims, but with neither of the appellants (R. 849-888).

Officer Crelly, South Salt Lake Police, testified that during the ride to the station following Brooks' arrest, Brooks stated he had hurt his hand that morning or the day before on a piece of railroad equipment (R. 999-1000).

ARGUMENT

POINT I

THE RIGHT TO CONFRONTATION OF WITNESSES
GUARANTEED BY THE CONSTITUTIONS OF UTAH
AND THE UNITED STATES WAS NOT VIOLATED
BY THE ADMISSION AT TRIAL OF THE PRELIM-
INARY HEARING TAPES.

The fundamental issue in this case is whether appellants were denied their "right to confront the witnesses against [them]" as guaranteed by Article I, Section 12 of the Utah Constitution and by the Sixth Amendment to the United States Constitution, by the admission at trial of the victims' tape-recorded preliminary hearing testimony. In other words, does the exception to the Hearsay Rule provided in Rule 63(3)(b)(ii), Utah Rules of Evidence, allowing the prior recorded testimony of an unavailable witness to be admitted as substantive evidence at a subsequent trial necessarily violate constitutional confrontation rights? Respondent submits that the answer must be in the negative based on the standards articulated by this Court and the

United States Supreme Court.

The recent case of Ohio v. Roberts, ___ U.S. ___, 100 S.Ct. 2531 (1980), reiterates the two-step analysis necessary to determine the acceptability of prior testimony evidence in relation to confrontation considerations. First, the witness must be unavailable; second, the testimony must have been recorded under circumstances manifesting sufficient indicia of reliability.

A

THE PROSECUTION MET ITS BURDEN OF
DEMONSTRATING THE UNAVAILABILITY OF
THE WITNESSES.

The threshold requirement for admitting at trial prior recorded testimony is that the party seeking to introduce that testimony has the burden of establishing the unavailability of the witness whose declarations are sought to be admitted. Rule 63(3)(b), Utah Rules of Evidence

In Roberts, the Court stated:

The basic litmus of Sixth Amendment unavailability is established: "[A] witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Barber v. Page, 390 U.S. at 724-725, 88 S.Ct., at 1322 (emphasis added). . . [citations omitted].

Although it might be said that the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge. The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. "The lengths to which the prosecution must go to produce a witness. . . is a question of reasonableness." California v. Green, 399 U.S., at 189, n. 22, 90 S.Ct., at 1951 (concurring opinion, citing Barber v. Page, supra). The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.

100 S.Ct. at 2543 (emphasis in original).

The Court noted that the extent of the prosecution's efforts in that case included only talking to the witness' mother and issuing five subpoenas to the mother's address, knowing that the witness was not there. The Court then stated:

Given these facts, the prosecution did not breach its duty of good-faith effort. To be sure, the prosecutor might have tried to locate by telephone the San Francisco social worker with whom Mrs. Isaacs had spoken many months before and might have undertaken other steps in an effort to find Anita. One, in hindsight, may always think of other things. Nevertheless, the great improbability that such efforts would have resulted in locating the witness, and would have led to her production at trial, neutralizes any intimation that a concept of reasonableness required their execution.

The Court went on to compare the factual situation in Roberts with the prior cases of Barber v. Page, 390 U.S. 719 (1968), and Mancusi v. State, 408 U.S. 204 (1972). In Barber, a witness was held not to be unavailable when he was incarcerated in a federal prison and procedures existed to secure the witness' presence at trial.

In Mancusi, the unavailable witness had returned to his Swedish homeland. The Court held that he was indeed unavailable because, even though his whereabouts were known, no procedures existed to compel his attendance at the second trial.

The Roberts Court then concluded that where the witness' "whereabouts were not known and there was no assurance that she would be found in a place from which she could be forced to return. . .the prosecution carried its burden of demonstrating that [the witness] was constitutionally unavailable for. . .trial." 100 S.Ct. at 2544-45.

This Court in State v. Oniskor, 29 Utah 2d 395, 510 P.2d 929 (1973), recognized that the burden on the State was to show "it had made a good-faith effort to secure the attendance of the witness and had been unsuccessful." 510 P.2d at 931. Rule 62(7)(e), Utah Rules of Evidence, defines "unavailable as a witness" to include situations where the witness is "absent from the place of hearing because the proponent of his statement does not know and with diligence

been unable to ascertain his whereabouts."

In Gallegos v. Turner, Utah, 526 P.2d 1128 (1974), the admission at the second trial of an unavailable witness' prior testimony was upheld. In defining the extent of the State's good-faith due-diligence burden, this Court rejected any mechanical application of a prescribed set of steps to be taken in attempting to locate witnesses:

It is true that many and various things might be done in attempting to locate a witness. Neither those listed in [Poe v. Turner, 353 F.Supp. 672 (D. Utah 1972)] nor, we assume, any other case, would be all inclusive or exclusive. The requirement is simply that the trial court be persuaded that the party (the State) has acted in good faith and with reasonable diligence and is unable to locate and bring the witness to the trial. The rule of review is comparable to that in most situations wherein it is the prerogative of the trial judge to make the determination. That is: he is allowed considerable latitude of discretion; and that his ruling will not be reversed in the absence of a showing of clear abuse thereof.

526 P.2d at 1129-30 (footnote omitted).

Poe v. Turner, 353 F.Supp. 672 (D. Utah 1972), was a habeas proceeding concerned with the efforts of the State to locate missing witnesses. The witnesses in that case were not transients, had former residence addresses and previous places of employment. They apparently possessed driver's licenses and owned vehicles registered in their names. Further,

the witness' relatives were all contacted to no avail. There were also reports that one of the witnesses may have been living in Chicago or New York, and that another may have been working for the City of Las Vegas and later, for a railroad company in the Midwest. Significantly, none of those reports were followed up by the State. In concluding that the State had made a good faith effort to locate the witnesses, the court stated that those reports were not indications of sufficient substance as to be included within the necessary purview of a good-faith search. . . . It was not necessary for the state to follow every single lead to its ultimate end.

353 F.Supp. at 676.

In the case at bar, the trial court was satisfied that the State had made a good faith effort to locate the witnesses (R.361). As noted in Gallegos v. Turner, supra, the trial court's determination of unavailability will be upheld absent a showing of clear abuse of discretion. Appellants cite numerous cases purporting to demonstrate that on the facts here, the trial court abused that discretion. Respondent submits that all of those cases are distinguishable.

Appellants liken the present case to Fresneda v. State of Alaska, 483 P.2d 1011 (1971). However, in that case, the missing witness had definitely joined the Army and like in Barber v. Page, supra, official procedures existed to locate

and return the missing witness. 483 P.2d at 1018, fn. 26. Further, the lack of diligence was held to be harmless error where other evidence was sufficient to uphold the conviction.

Appellants also cite People v. Horn, 36 Cal.Rptr. 903 (1964), to show the importance of the time lapse between knowledge of a witness' absence and the start of the search to locate him. The court did indeed recognize that the time lapse was important, but then pointed out that that was only one factor to be considered. The prior cooperation of the witnesses was also a factor to consider.

Similarly in the present case, both the witnesses had indicated their intention to stay and Vinson had promised to notify Detective Foster of any change of address. Respondent suggests that it was not unreasonable to assume that either or both witnesses would return for the trial based not only on their prior statements, but also on the apparent easy availability of support and lodging from Assistance Payments and St. Mary's Home.

People v. Starr, 89 Mich.App. 342, 280 N.W.2d 519 (1979), is cited by appellants as requiring that all specific leads and reasonable alternatives be pursued. The missing witness in that case was a potential co-defendant and a local resident. Further, as appellants recognize, there were other individuals present at the incident and the local police were well acquainted with the participants.

Respondent would agree that had other participants been available in the present case and had any local officials had familiarity with the witness' movements, those leads should have been checked out. Indeed, all other witnesses to any of the events on the night of the assault were produced at trial. Further, all possible leads to the witnesses' whereabouts were checked out up to and including the beginning of trial.

The "most specific lead. . .not checked out by the prosecutor" in People v. McIntosh, 389 Mich. 82, 204 N.W.2d 135 (1973), which appellants cite, was the distinct possibility that the unavailable witness was in a North Carolina prison whose authorities were never contacted by the prosecution. Suffice to say no such specific lead existed in the present case.

. Appellants cite State v. Greer, 27 Ariz.App. 197, 552 P.2d 1212 (1976), to suggest that the prosecutor in the instant case was negligent in failing to supervise the efforts to locate the missing witnesses. In the Greer case, there was a six month lag between knowing of the witness' unavailability and the beginning of trial. During that six month period no effort at all was made to locate the witness, including no checks with his employer, his mother or his sister-in-law. Further, no attempt was

made to check any forwarding address from his address at the time of the preliminary hearing. The court favorably cited Poe v. Turner, supra, for examples of the sorts of things that could be done to demonstrate good-faith attempts to locate a missing witness.

The case of People v. Rogers, 79 Ill.App.3d 745, 398 N.E.2d 1058 (1979), is inappropriately cited by appellants. In that case, the missing witness was one of the co-defendants who had testified at the preliminary hearing on behalf of herself and the other defendants as to possible justification for the robbery. The remaining defendants attempted to introduce this absent defendant's testimony at trial. The defense made eight or ten phone calls, had indeed contacted the witness-defendant two or three times and was still unable to offer an explanation for her absence. Respondent agrees that had any telephone contact been made with the witnesses here, or anyone who had a reasonable idea as to their location, the State would have had to do more. However, no contacts of that sort were made or ignored.

Appellants place heavy emphasis on the fact that no subpoena to Donald Storie was ever issued. They do not suggest, however, where this subpoena could have been served. The lack of importance of a worthless subpoena was recently

discussed in People v. Forgason, 99 Cal.App.3d 361, 160 Cal.Rptr. 263 (1979). There, the State was challenging the good faith effort of the defense to secure unavailable witnesses. Although, as the court noted, the burden to show good faith is considerably heavier on the prosecution than on the defense, the value of a subpoena issued for a known-to-be-unavailable witness is equally worthless:

[L]ittle, if any, importance will be placed upon the pro forma act of delivering a subpoena "in a timely fashion to the sheriff for service upon the missing witness," when the party is unable to suggest a place where he may be served. . . And "'no good could be accomplished by requiring that an officer. . . make a pretense of looking for the witness in a number of places where he could not reasonably be expected to be found. . . .'"

[A]n "idle" and "pro forma" requirement . . . accomplished "'no good'" and is manifestly unreasonable.

160 Cal.Rptr. at 266-267 (citations omitted).

Appellants next assert that the State "had reason to know that Vinson and Storie had no intention of remaining in Salt Lake for any extended time, especially since neither had sought employment." (App. Brief. at 27). On the contrary, as already demonstrated, the State did have reasonable expectations that the witnesses would remain for the trial. Their failure to obtain employment would seem more reasonably explainable on the basis of the seriousness of the wounds inflicted by the appellants than on any preconceived plans to leave town.

Flores v. People, Colo., 593 P.2d 316 (1978), cited by appellants, is initially distinguishable from the instant case on the basis that there it was indeed likely, four months before trial, that the witness would be dead or incapacitated by the time of trial. Further, as will be discussed below in Part B of Point I, a preliminary hearing in Colorado may not offer sufficient indicia of reliability to justify admission of that testimony at trial, and therefore a deposition may be the only appropriate way to preserve testimony in that jurisdiction.

That preliminary hearing testimony in Utah is sufficiently reliable generally, and clearly was in this case, will be demonstrated below in Part B. Suffice to say here that the testimony of the witnesses was adequately preserved via the preliminary hearing tapes.

Appellants question the lack of requiring bonds or surety deposits from these witnesses pursuant to Utah Code Ann. §§ 77-15-25 and 26 (repealed), in force at the time. Respondent suggests that the committing magistrate, along with the State, had reasonable expectations that the witnesses would appear for trial. Thus, there was insufficient reason to require a bond in this case.

Finally, appellants cite People v. Enriquez, 137 Cal.Rptr. 171, 561 P.2d 261 (1977), to suggest, once

more, the allegation that the State did not make a good faith effort to locate the missing witnesses. In that case, the State offered no testimony on the issue of due diligence, and the defense offered testimony from the witness' mother to the effect that she could have located the witness but the prosecution made little, if any, attempt to elicit the information from her. The Court characterized the prosecution's efforts as one of "casual indifference."

Respondent submits that instead of "casual indifference" and the refusal to check reasonable leads, the State's efforts in the present case more nearly resemble the efforts made by the prosecution in State v. Anderson, 42 Or.App. 29, 599 P.2d 1225 (1979), cited favorably by appellants (App. Brief at 28). The witnesses in that case, like Vinson and Storie and unlike the witness in Enriquez, were truly transient and had no relations and few friends on the scene. (Indeed, Vinson and Storie could fairly be said to have had no contacts at all in the area, except for the appellants themselves.) The efforts made to locate those witnesses in Anderson included only checking their last known addresses, making a futile call to Los Angeles based on a sketchy report that they had gone someplace in that area, and in the case of one of the witnesses,

talking with friends who had not seen him for a few months.

As the Court put it:

The itinerant lifestyle of these witnesses made it much more difficult to track them down because they left few tracks. They maintained no permanent employment, had no permanent residence in the area and left no forwarding address.

599 P.2d at 1228.

Respondent submits that not only have appellants failed to show that Judge Leary committed a clear abuse of discretion in finding that the State made a good-faith due-diligence effort to locate the missing witnesses, but that any reasonable reading of the facts inexorably leads to the conclusion that Vinson and Storie were constitutionally "unavailable" at the time of trial.

B

THE PRELIMINARY HEARING TESTIMONY
WAS OBTAINED UNDER CIRCUMSTANCES
BEARING SUFFICIENT INDICIA OF
RELIABILITY TO BE ADMISSIBLE AT
TRIAL.

Appellants recognize early in their argument that Ohio v. Roberts, ___ U.S. ___, 100 S.Ct. 2531 (1980), and its precursors are adversely dispositive of the issue of the reliability of the preliminary hearing tapes and the propriety of their admission at trial once unavailability of the witnesses has been demonstrated (App. Brief at 7 and 29).

Appellants proceed, however, to ask this Court to declare that either generally, preliminary hearing testimony is so inherently unreliable as to render it inadmissible at trial, or specifically, that the preliminary hearing testimony in this case is so inherently unreliable as to render it inadmissible.

Respondent initially agrees that Ohio v. Roberts, supra, is indeed dispositive of the reliability issue. While reaffirming the fundamental importance of confrontation at trial, the Court noted that it has

recognized that competing interests, if "closely examined," Chambers v. Mississippi, 410 U.S., at 295, 93 S.Ct., at 1045, may warrant dispensing with confrontation at trial. See Mattox v. United States, 156 U.S., at 243, 15 S.Ct. at 340 ("general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case"). Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings.

100 S.Ct. at 2538. The Court went on to set out the necessary requirements for admitting prior testimony:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.

100 S.Ct. at 2539 (emphasis added).

In Roberts, the unavailable witness, Anita Isaacs, was a friend of the defendant's who the defendant called as his witness at the preliminary hearing in an attempt to show that he had permission to use the credit cards and checks he was convicted of stealing and forging. Anita denied that assertion. Defense counsel did not ask that she be declared hostile nor that he be allowed to cross-examine her. At trial, Anita was declared "unavailable" and her preliminary hearing testimony was admitted over defendant's objections.

In upholding the trial court's admission of the testimony, and reversing the Ohio Supreme Court, the Court refused to distinguish "preliminary hearing testimony previously subjected to cross-examination from previously cross-examined prior-trial testimony." 100 S.Ct. at 2542.

The foundation had been laid long ago for the clear holding in Roberts that no principled distinction exists between cross-examined preliminary hearing testimony and trial testimony. As the Court stated in California v. Green, 399

U.S. 163, 90 S.Ct. 1930 (1970):

This Court long ago held that admitting the prior testimony of an unavailable witness does not violate the Confrontation Clause. *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). That case involved testimony given at the defendant's first trial by a witness who had died by the time of the second trial, but we do not find the instant preliminary hearing significantly different from an actual trial to warrant distinguishing the two cases for purposes of the Confrontation Clause. Indeed, we indicated as much in *Pointer v. Texas*, 380 U.S. 400, 407, 85 S.Ct. 1065, 1069 (1965), where we noted that "[t]he case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." And in *Barber v. Page*, 390 U.S. 719, 725-726, 88 S.Ct. 1318, 1322 (1968), although noting that the preliminary hearing is ordinarily a less searching exploration into the merits of a case than a trial, we recognized that "there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable * * *." In the present case respondent's counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness Porter at the preliminary hearing. If Porter had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing--the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State.

399 U.S. at 165-166, 100 S. Ct. at 1939.

This Court has recently recognized that a preliminary hearing in Utah affords criminal defendants adequate protection of their right to confrontation. State v. Anderson, Utah, 612 P.2d 778 (1980) (same case as "State v. Brackenbury," App. Brief at 16). In Anderson, this Court stated:

[T]he adversarial qualities of the examination allow the defendant an opportunity to attack the prosecution's evidence and to present any affirmative defenses. Although the hearing is not a trial per se, it is not an ex parte proceeding nor one-sided determination of probable cause, and the accused is granted a statutory right to cross-examine the witnesses against him, and the right to subpoena and present witnesses in his defense. Thus, the preliminary examination is an adversarial proceeding in which certain procedural safeguards are recognized as necessary to guarantee the accused's substantive right to a fair hearing.

612 P.2d at 783 (footnotes omitted).

The Anderson case was concerned with the admission at the preliminary hearing of an absent witness' affidavit to support a finding of probable cause. In ruling that confrontation rights demanded the witness' presence at the hearing, it was said:

The adversarial nature of the preliminary hearing is conducive to the imposition of these procedural safeguards. The application of the right of cross-examination, and the exclusion of certain out of court statements at this stage of the criminal prosecution insures essential protection of the defendant's substantive rights.

Specifically, the cross-examination of witnesses presenting testimony against the accused at the hearing provides a means of attacking their credibility and thus the substance of their testimony. In a proceeding such as the preliminary examination, where the credibility of the witnesses is an important element in the determination of probable cause, the recognition of a procedural right of cross-examination is essential to the preservation of a fair hearing.

612 P.2d at 786 (footnote omitted). (Contrast Flores v. People Colo, 593 P.2d 316 (1978), and People v. Smith, Colo, 597 P.2d 204 (1979), where the Colorado Supreme Court determined that, unlike Utah, Colorado preliminary hearings are severely limited in the protections provided to defendants.)

The Court's attention is called to the Transcript of Preliminary Hearing (R.158-278). Respondent submits that not only were appellants given adequate opportunity to cross-examine the two witnesses but that they took full advantage of that opportunity. Mr. Iwasaki, counsel for appellant Brooks at the preliminary hearing and at trial, thoroughly cross-examined the witness Storie. Indeed, the 38 pages of the transcript are replete with appropriately hostile and argumentative questions designed to break down the victim's story (R.172-210). Ms. Pixton, appellant Good's counsel at the hearing and at trial, consumed 27 pages of transcript during her cross-examination of Storie, similarly attempting to shake his story (R.210-237). By comparison, the direct examination of Storie by Ms.

Hufnagel consists of only 11 pages (R.161-72). The cross-examination of the witness Vinson by Mr. Iwasaki covers 21 pages of transcript (R.244-64), and by Ms. Pixton, 11 pages (R.265-275). Vinson's direct testimony is contained in seven pages (R.238-44). Respondent submits that not only was the cross-examination thorough, but that it is difficult to imagine any more potentially searching and effective questioning that could have taken place at trial. (See People v. Garcia, 65 Ill.App.3d 13, 302 N.E.2d 316 (1978), where relief was denied when further cross-examination would have been of no benefit.)

Appellants also contend that they were denied due process by the trial court's refusal to hold a hearing on the reliability of the recorded testimony. Respondent confesses confusion as to what the appellants are asking for here. Respondent suggests that "indicia of reliability" are those factors identified by the United States Supreme Court in Green and Roberts, and by this Court in Anderson, and include:

. . . circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel--the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

California v. Green, 399 U.S. 149, 165, 90 S.Ct. 1930, 1938 (1970). Further, at the Hearing on Motions, defense

counsel agreed that part of the purpose of that hearing was to determine the reliability of the testimony (R.508). It should also be noted that Judge Leary made every effort to insure that the tapes were indeed reliable when he allowed defense counsel to make original substantive objections to the testimony in the tapes when the tapes were played at the Hearing on Motions (R.507). Indeed, the tapes admitted at trial had been edited to delete objectionable statements.

Appellants further urge that the demeanor, i.e., the "sweaty brow" and "seedy appearance," of the witnesses here was so necessary to the jury's weighing of credibility as to render its absence fatal to the State's case. Appellant's cite no authority for this proposition. Respondent agrees that witness demeanor is important, however, it is submitted that in no case has the mere absence of demeanor evidence been deemed dispositive. Indeed, the fact that the jury was able to hear the actual testimony and cross-examination appears to make these tape recordings more inherently reliable than the dry reading of transcript in the usual case of this kind. (See State v. Oniskor, supra, and Gallegos v. Turner, supra, where it appears that this Court presumed the reliability of prior recorded testimony and was concerned only with the unavailability question.)

Respondent suggests that in this case the State also would have preferred the in-court trial testimony of the witnesses. It is certainly reasonable to assume that the witnesses' absence raised initial doubts and questions in the jurors' minds as to the basic credibility of the witnesses. Further, the State was deprived of rather grisly, but effectively demonstrative direct evidence of the nature of the wounds inflicted by appellants.

None of the cases cited by appellants compel this Court to find other than that the reliability of the recorded testimony was sufficiently established to justify its admission at trial.

For example, State v. Smyth, 286 Or. 293, 593 P.2d 1166 (1979), turned on the issue of unavailability, not the lack of face-to-face confrontation at trial. There the State made absolutely no effort to obtain the voluntary attendance at trial of a witness who, although living in a foreign country, was nevertheless only a short distance away in Canada and probably made the trip "a dozen times a year."

Appellants also cite People v. Gibbs, 63 Cal.Rptr. 471 (1968), for the proposition that preliminary

hearing testimony may be inherently unreliable because of the difference in the nature of cross-examination. The missing witness in that case was a police informer who made a narcotics purchase from the defendant, and who was facing possible criminal charges himself. The most important factor cited by the court in finding that a denial of confrontation had occurred was that defense counsel had been appointed only five minutes before the hearing. Although counsel did cross-examine the witness, the court found that the "[b]are existence of an opportunity for cross-examination. . ." id. at 474, did not amount to a "complete and adequate opportunity for cross-examination." Id. at 476. Respondent reiterates that the preliminary hearing cross-examination in the instant case clearly amounted to an adequate opportunity for, and indeed, a thorough exercise of, complete and adequate cross-examination.

Respondent submits that appellants have failed to demonstrate that prior recorded testimony from preliminary hearings in general, or from the preliminary hearing in this case, is so inherently unreliable as to preclude its admission at trial.

POINT II

THE EVIDENCE PRESENTED WAS SUFFICIENT TO
SUPPORT THE VERDICT OF THE JURY.

This Court recently restated the standard of
review it would apply to claims of insufficiency of
the evidence:

It is the exclusive function of the
jury to weigh the evidence and to determine
the credibility of the witnesses, and it is
not within the prerogative of this Court
to substitute its judgment for that of
the fact-finder. This Court should only
interfere when the evidence is so lacking
and insubstantial that reasonable men
could not possibly have reached a verdict
beyond a reasonable doubt.

State v. Lamm, Utah, 606 P.2d 229, 231 (1980). That case
cited numerous other cases as standing for the same
proposition. Id. at 231, fn. 2. State v. Reddish, Utah,
550 P.2d 728 (1976), held that where the defendant's
version of the story differs from the State's, the court
must assume that the jury believed that version which
supports their verdict.

In the present case, contrary to appellant's
assertions, the jury was presented with far more than a
mere "choice between two far-fetched accounts of an
evening's events." (App. Brief 35). Not only was there
the reliably recorded prior testimony of the unavailable
witnesses, but as noted above in the Statement of Facts,

the equally damaging testimony of the other witnesses at the general scene of the crime and of the pathologist. That other testimony not only cast serious doubt on appellant's self-defense theory, it also strongly corroborated the victim's accounts of the "evening's events."

It seems apparent, then, that the evidence here is not so lacking and insubstantial that the jury must necessarily have entertained a reasonable doubt that appellants committed the crime.

POINT III

THE TRIAL COURT'S REFUSAL TO GIVE APPELLANTS' INSTRUCTION NO. 23 WAS NOT AN ABUSE OF DISCRETION.

Appellants requested the giving of their Instruction No. 23, which reads, in pertinent part, thus:

The absence of a testifying witness who could provide the jury with material evidence is one factor you may consider when weighing their credibility. The jury should view with caution such testimony if you find that the witness could have made themselves [sic] available for trial.

Record at 84. Appellants assert they were denied due process of law by Judge Leary's refusal to give that instruction. They cite as authority for that proposition the footnote 20 comment in Justice Harlan's concurrence in California v. Green, 399 U.S. 149, 186, 90 S.Ct. 1930, 1950 (1970).

Respondent has been unable to locate a holding by any court that mandates the type of cautionary instruction that Justice Harlan proposed, and appellants cite no case authority requiring that type of instruction. Further, as is apparent from Justice Harlan's language cited by appellants, the instruction he envisioned was a rather general caveat to the jury regarding all types of hearsay evidence. The language of the instruction requested here appears to be an inappropriate comment on the evidence in the case. It also asks the jury to make a determination of potential availability, a preliminary determination properly the responsibility of the trial judge (see Point I, Part A).

Although respondent was unable to locate any cases dealing specifically with cautionary instructions as to hearsay, several cases have dealt with instructions regarding the credibility of certain categories of witnesses. State v. Smith, 88 N.M. 541, 543 P.2d 834 (App. 1975), upheld the trial court's refusal to give a cautionary instruction to treat "with a great deal of care and circumspection" the testimony of a witness granted immunity. The court stated:

(1) there is no requirement that an instruction be given concerning weighing the testimony of particular categories of witnesses; (2) the validity of special instructions concerning the evaluation of certain witnesses is doubtful; and (3) the basic instruction on credibility of witnesses sufficiently instructs on witness evaluation.

543 P.2d at 840. The general propriety of cautionary instructions as to witness credibility is a matter for the trial court. State v. Boetger, 96 Idaho 535, 531 P.2d 1180 (1975); Land v. People, 171 Colo. 114, 465 P.2d 124 (1970); State v. Huff, 76 Wash.2d 577, 458 P.2d 180 (1969).

Respondent submits that Judge Leary sufficiently instructed the jury as to their exclusive duty to judge the credibility of the witnesses in the preliminary instructions (R.91) and in the final instructions (R.100, 101). Further, the jury was clearly instructed on the defense theory of the case (R.108,109). Taken as a whole, the instructions given in this case adequately and appropriately informed the jury of the applicable law and their duty under that law (R.88-115).

Respondent submits that appellants' claim of abuse of discretion is simply without merit.

CONCLUSION

Admission at trial of the recorded preliminary hearing testimony of the victims did not deny appellants' right to confrontation because the witnesses were constitutionally unavailable and their testimony was obtained under circumstances bearing sufficient indicia of reliability. The evidence presented at trial was sufficient to support the jury verdict. The trial court committed no abuse of discretion in refusing appellants' requested instruction.

For the foregoing reasons, respondent respectfully prays for an order from this Court upholding the verdicts of the jury and affirming the judgments and sentences entered in the court below.

Respectfully submitted,

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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief of Respondent to Mr. Glenn Iwasaki and Ms. Jo Carol Nasset-Sale, Attorneys for Appellants, 333 South Second East, Salt Lake City, Utah 84111, this 26th day of March, 1981.

