

1981

# State of Utah v. Jahes E. Ballenberger : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

STATE OF UTAH, :  
Plaintiff-Respondent, :  
vs. : Case No. 17619  
JAMES E. BALLEMBERGER, :  
Defendant-Appellant. :

BRIEF OF APPELLANT

Appeal from a Jury Verdict of the  
Third Judicial Court in and for Salt Lake County  
Honorable Jay E. Banks, Judge

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	Case No. 17619
	:	
JAMES E. BALLEMBERGER,	:	
	:	
Defendant-Appellant.	:	
	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant, James Ballenberger, appeals from a conviction of second degree felony theft in the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

This criminal action was brought by the State of Utah against James E. Ballenberger for second degree felony theft alleging that Mr. Ballenberger exercised unauthorized control over the property of R. C. Ashby on May 15, 1980.

On March 5, 1981, before the Honorable Jay E. Banks, Defendant Ballenberger moved to suppress certain evidence on the ground that it was seized pursuant to an illegal arrest. The motion to suppress the evidence was denied.

The case was then tried before a jury, the Honorable Jay E. Banks presiding which convicted Defendant Ballenberger of the

offense of theft, a second degree felony. He was thereafter sentenced to the Utah State Prison on March 5, 1981 for a term of 1 to 15 years.

#### RELIEF SOUGHT ON APPEAL

Appellant asks that the jury verdict, and the sentence imposed pursuant thereto, be reversed.

#### STATEMENT OF FACTS

At approximately 3:00 a.m. on May 15, 1980, Officer LeVitre, of the Murray City Police Department, observed James S. Ballenberger and Lynn Fulton in an automobile coming toward him on the Hyland Dairy access road, approximately 5400 South 9th East (Tr. 25-29). The vehicle in which Mr. Ballenberger was riding made a sharp turn into the Oakwood Village Shopping Center (Tr. 27). However, the car did not swerve nor did the tires screech (Tr. 29-30). Officer LeVitre observed the vehicle until he decided that it was not going through the Oakwood storage area (Tr. 31-32). Officer LeVitre then proceeded through the Oakwood Village Shopping storage area (Tr. 31).

Officer LeVitre located Mr. Ballenberger's car in a well lighted area of the Oakwood Village Shopping Center (Tr. 36). Noticing the raised hood (Tr. 32), Officer LeVitre then asked Mr. Ballenberger what he was doing, to which he explained he was merely checking the oil (Tr. 33, 34). Officer LeVitre then

stepped from his patrol car and asked for identification (Tr. 34).

LeVitre testified that he observed a CB radio, an antenna and some stereo head phones in the back seat of the vehicle (Tr. 36). He asked Mr. Ballenberger "about the property in the back seat" (Tr. 35), but Mr. Ballenberger did not respond (Tr. 37).

At that time Officer Hansen, responding to LeVitre's call, arrived (Tr. 131). Officer Hansen took Mr. Ballenberger into his patrol car to question him while Officer LeVitre took Lynn Fulton, who was also riding in the vehicle with Mr. Ballenberger, into his car to be questioned (Tr. 131). In Officer Hansen's patrol car Mr. Ballenberger was first read the "Miranda warning" and then questioned about the property in the back seat of the vehicle (Tr. 38). Mr. Fulton was also questioned in Mr. LeVitre's car after receiving the Miranda warning from Officer LeVitre (Tr. 38). At this point no theft had been reported nor was there any indication that the property in the back seat was stolen.

Following Fulton's interrogation, Officer LeVitre conversed briefly with Officer Hansen. Officer LeVitre then took Mr. Fulton to 550 East 5300 South to observe a parked Van (Tr. 131, 132). Mr. Robbie Ashby, was located and returned to the Oakdale Village Shopping Center (Tr. 133). Mr. Ashby then identified the property in the back of Mr. Ballenberger's car



being his (Tr. 134). Mr. Ballenberger was required to wait Officer Hansen while Mr. Fulton traveled with Officer LeVitre some five blocks to awaken Mr. Ashby, question him and return to the scene (Tr. 131-134). At that time Mr. Ballenberger and Mr. Fulton were formally placed under arrest (Tr. 134).

The time sequence in which the foregoing took place was from approximately 3:10 a.m., when the Ballenberger vehicle was observed, to 3:19 a.m., when the suspects were advised of their rights, to 3:40 a.m. when they were formally arrested (Tr. 8, 134).

#### ARGUMENT

##### POINT I

#### THE TRIAL COURT ERRED IN NOT SUPPRESSING EVIDENCE SEIZED SUBSEQUENT TO AN ILLEGAL ARREST

A. At the time of the arrest, the officers did not have probable cause; therefore, the subsequent arrest was illegal and any evidence obtained thereafter should be suppressed.

Generally, the moment at which an officer restrains the freedom of an individual for more than a momentary questioning, he has made an "arrest." An arrest does not require that the individual be taken to the station house and prosecuted for the crime. Nor does it require an officer formally pronouncing that an individual is arrested. In the landmark case of Terry v. Ohio, 392 U.S. 1 (1968), the Court outlined when an officer is

justified to "stop and frisk." The Court also cautioned that when an individual's freedom to walk away is limited, or when an individual is detained more than briefly, such detention elevates a "stop" to a full arrest.

It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. Id., at 16.

Although the differentiation between an allowable stop and an arrest is difficult to ascertain, whenever a person is restrained for more than a "momentary" period, Rio v. United States, 364 U. S. 253, 264 (1960), or "briefly," Terry v. Ohio, 392 U. S. 1, 10 (1968), the restraint must be viewed as an arrest.

According to Officer LeVitre, he first stopped and questioned Mr. Ballenberger as to any possible automobile problems and as to the property within the automobile (Tr. 32-35). Such momentary questioning is within the purview of the stop and frisk doctrine enunciated by Terry. However, once Mr. Ballenberger was ordered to step into Officer Hansen's car and then read the Miranda warning, he was involved in much more than a momentary questioning (Tr. 38). At that point it was inconceivable that Mr. Ballenberger felt he was at liberty to leave. In fact, it was clear that Officer Hansen required not only that Mr. Ballenberger submit to the questioning, but that he wait in his presence while Mr. Fulton traveled with Officer LeVitre some five blocks to awaken Mr. Ashby and question him

(Tr. 131-134). He also was required to await Mr. Ashby's arrival back to the scene where he was being detained. According to the two officer's estimate of this time lapse, Mr. Ballenberger was restrained for at least twenty minutes (Tr. 134). This total control over Mr. Ballenberger amounted to much more than momentary questioning; it represented an arrest not supported by probable cause.

The circumstances under which Mr. Ballenberger was arrested is analogous to these in the case of People v. Miller 496 P.2d 1228 (Cal. 1972). In that case defendant was found sleeping in a car in a private lot. The investigating officer observed electronic equipment and a coat in the rear seat of the vehicle. He later learned of an outstanding warrant on the defendant and arrested him. The officer asked the defendant whether he could take the coat and electronic equipment, but the defendant refused permission. The officer then seized the goods and later found marijuana in the coat pocket of the defendant.

At the trial the defense sought to suppress the evidence arguing that the officer did not have probable cause to arrest the defendant. The court held that absent exigent circumstances, the mere fact that the defendant was found sleeping in a car in a private parking lot with electronic equipment in the back seat, did not amount to probable cause to arrest the defendant for receiving stolen property. The court further held that the defendant's refusal to waive his Fourth

Amendment rights against unreasonable searches and seizure did not amount to "suspicious" activity evidencing criminal conduct. The court ruled that the officers lacked probable cause and that the evidence should therefore be excluded. The rationale of the Miller case is applicable to the case at bar.

In the Miller case the court found that the defendant sleeping in his car in a private parking lot did not give rise to reasonable suspicion. Likewise, in this case Mr. Ballenberger working underneath the hood of his car in a well-lighted area of a private parking lot does not give rise to reasonable suspicion of criminal activity.

In the Miller case, the additional fact that electronic equipment happened to be in the back seat of the car in plain view did not amount to probable cause because there was no inference that the equipment was stolen. The court in that case stated:

The additional fact that he happened to be carrying electronic equipment at the time would not, in itself, support an inference that the equipment was stolen, particularly since the police had not received any report of the theft of such material. Id., at 1232.

The court reasoned that:

Unless it is first established that the police officer believed that a crime . . . had been committed by the [defendants], the issue of probable cause does not arise, for it would be a logical absurdity for the courts to be asked to determine the reasonableness of an officer's belief that the particular crime had been committed unless it were first established that

the officer did entertain such a belief. Id., at 1233.

In this case, at the time the police officers ordered Mr. Ballenberger into their patrol car, read him the Miranda warning and questioned him, there was no indication that the property on the back seat was stolen. The officers only assumed that it was or might have been. Because there was no evidence of a crime having been committed prior to the officers taking Mr. Ballenberger into custody, the officers obviously had no probable cause for an arrest. Therefore, the evidence obtained subsequent to the illegal arrest should have been suppressed. Beck v. Ohio, 379 U.S. 89 (1964).

B. The officers did not have an articulable suspicion to justify an investigatory detention, a stop, and therefore any evidence obtained thereafter should be suppressed.

When Officer Ray LeVitre approached Mr. Ballenberger, any suspicions he might have had would only have been based on (1) the lateness of the hour and (2) the fact burglaries had been reported in the area two days previous (Tr. 43, 48). These two factors, independently or in conjunction with each other, do not constitute sufficient grounds to justify an investigative stop. In People v. Bower, 597 P.2d 115 (Cal. 1979), an officer observed a white man, the defendant, late at night enter a

predominantly black community noted for its high crime rate. The officer had never previously observed a white person enter this neighborhood at night and therefore when groups of blacks started mingling around the white individual, the officer became somewhat suspicious. The officer then approached the group and stopped and frisked the defendant. At trial the defendant claimed that the lateness of the hour combined with the high crime rate of the area were inadequate grounds to justify a detention, i.e. a stop and frisk. The court held that a white man entering a predominantly black residential area having "high" crime rate in the evening did not provide a sufficient basis for the officer's detention.

In the case at bar, Officers LeVitre and Hansen relied solely on the lateness of the hour and the fact that crimes had been reported in the area previously to justify their action of detaining Mr. Ballenberger, contrary to People v. Bower, in which the "night-time" factor and a "high crime" area cannot justify a detention. Where such detention is not justifiable, a prolonged detention in an officer's patrol car where the arrestee has been read the Miranda warning, subjected to the interrogation of an officer and held there while his fellow companion is taken from the scene and later returned, is likewise not justifiable.

Similarly, in Fare v. Tony C., 582 P.2d 557 (Cal. 1978), two young blacks were walking down the street during school

hours. The officer, knowing that the boys should have been in school and remembering that several burglaries perpetrated by black youths had recently occurred in the area made an investigative stop and subsequently seized allegedly stolen property from the boys. At trial, counsel for the boys argued that the officer had insufficient evidence to support a suspicion necessary to justify an investigative stop or detention. The court held that circumstances known to the police officer did not support a reasonable suspicion that the minors were involved in criminal activity, thus the ensuing investigative stop was unlawful and the property seized was not admissible. The court reasoned that even though the action of the boys was somewhat suspicious in that they were on the street at an hour when they probably should not have been, and even though several burglaries had occurred which were reportedly committed by black youths, much more is needed to reasonably suspect that a person is participating in a crime. The court found that certain factors must exist in order to justify an investigative stop or detention. The Court stated:

The circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or is about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must also be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on training

and experience. . . to suspect the same criminal activity and the same involvement by the person in question. Id., at 959.

The court in Fare v. Tony C., 582 P.2d 957 (Cal. 1978), held that the officer could not articulate more than a mere suspicion and that a suspicion or a hunch did not justify an investigatory stop or an arrest. The court specifically stated that:

. . . an investigative stop or detention predicated on mere curiosity, rumor or hunch is unlawful, even though the officer may be acting in complete good faith. Id., at 959.

The facts of the Fare v. Tony C., 582 P.2d 957 (Cal. 1978), case are analogous to the circumstances in this case. When Officers Levitre and Hansen approached Mr. Ballenberger, their justification for the original stop was the lateness of the hour and the fact that burglaries had previously occurred in the area. Under the rationale of either the Bower case or the Tony C. case, the lateness of the hour or the fact that the incident occurred after regular store hours is not sufficient ground to justify an investigatory stop. The Bower case specifically stated that the fact that the defendant was observed at night had little or no bearing to justify an articulable suspicion. The court underscored this by explaining that:

No reasonable suggestion of criminality is added by the fact it was dark when the officer observed appellant. Strictly speaking, the "night-time factor" is not activity by a citizen, and this court has warned that this factor "should be appraised with caution" . . . and that it has at most, "minimal importance" in evaluating the



propriety of an intrusion. . . People v. Bower,  
597 P.2d 115 (Cal. 1979).

Additionally, the fact that some criminal activity had previously occurred in the area is not in and of itself ground for suspicion. In the Tony C. case the fact that burglaries had occurred a few days earlier perpetrated by young blacks did not rise to the level of an articulable suspicion when other young blacks entered the area. Likewise, in the Bower case the court specifically found that the officer's assertion that the incident occurred in a high crime area did not elevate the circumstances to a reasonable suspicion of criminality. In the case the court stated:

Finally, the officer's assertion that the location lay in a "high crime" area does not elevate these facts into a reasonable suspicion of criminality. The "high crime" area factor is not an "activity" of an individual . . . As a result, this court has appraised this factor with caution and has been reluctant to conclude that a location's crime rate transforms otherwise innocent-appearing circumstances into circumstances justifying the seizure of an individual. Id., at 119.

Thus, under the Bower rationale, the fact that the Oakwood shopping area may have been the subject of criminal activity in the past, is not sufficient to make Mr. Ballenberger's presence there a reasonably suspicious activity.

Moreover, the Oakwood Village Shopping Center was not even an area of high criminal activity. Officer LeVitre was merely alerted to the area by routine dispatches which two days previous to the occurrence indicated that a break-in had

occurred in the Oakwood Village Shopping Center (Tr. 48). The routine report of the dispatcher indicating a break-in does not elevate the Oakwood Village Shopping Center to a "high crime" area. Mr. Ballengerger's mere presence at the Oakwood Village shopping area was not sufficient to amount to an articulable suspicion in light of his innocent activity engaged in there.

Neither does his failure to answer concerning the property in the back of the car in which he was riding elevate his behavior to that which is reasonably suspicious. A person's mere refusal to waive a Fourth Amendment right may not be transformed into "suspicious" activity evidencing criminal conduct. "The courts have, of course, condemned any state practice which imposes adverse treatment on individuals for exercising constitutional rights intended to protect against such adversity," People v. Miller, 496 P.2d 1228, 1232 (Cal. 1972).

Therefore, at the time Officers LeVitre and Hansen approached Mr. Ballenberger, read him the Miranda warning and questioned him in their police vehicle, the officers were without any articulable suspicion. At that time the goods had not been identified as stolen property, and the only support the officers had for their belief that Mr. Ballenberger might have been engaged in a criminal activity was the lateness of the hour and the area in which he was found. Under the circumstances neither of these two factors would justify an investigatory

detention. Accordingly, the evidence obtained subsequent to investigatory detention should have been suppressed.

## POINT II.

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE WHERE THE SEIZURE OF THE ALLEGED STOLEN PROPERTY WAS WITHOUT A WARRANT AND ABSENT EXIGENT CIRCUMSTANCES.

The United States Supreme Court has recognized that a warrantless search is not justified by probable cause in the absence of exigent circumstances. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court specifically stated:

[N]o amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances," Id., at 468.

In this instance there were no exigent circumstances which required a seizure without a warrant. Sometime after Mr. Ballenberger and Mr. Fulton had been taken into custody, the car in which they were riding was towed to the Murray Police Station (Tr. 39). While the car was at the Police Station, the property was seized without a search warrant (Tr. 39). In his testimony Officer LeVitre stated that there was no danger of losing the property but that a warrant was not obtained simply because the property had been identified by the victim (Tr. 39). Under the holding of the Coolidge case, Officer LeVitre was not justified in seizing the property before obtaining a warrant from an impartial magistrate. The fact that the car was at the police

department, combined with the fact that the property had been identified by the victim was not sufficient to allow Officer LeVitre or any other officer to search the vehicle and to seize the property contained within. Accordingly, evidence obtained by the warrantless seizure should have been suppressed.

### POINT III.

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CHARGE WHEN PROSECUTION FAILED TO PRODUCE MATERIAL EVIDENCE WHICH WAS DIRECTLY RELEVANT TO THE ISSUE OF THE VALUE OF THE PROPERTY ALLEGEDLY STOLEN.

A. Defendant's right of confrontation was violated by the failure of the prosecution to physically admit into evidence all the property that was allegedly stolen.

The main purpose for the right of confrontation is to secure the opportunity of cross-examination, Pointer v. Texas, 380 U.S. 400 (1965). In interpreting this right, this Court has long held that a defendant may not be convicted unless he has the opportunity of confronting and cross-examining the witnesses against him, State v. Mannion, 57 P. 542 (Utah 1899). The right of confrontation not only affords an opportunity to cross-examine, but also enables the jury to observe the demeanor of the witnesses for the state, Barber v. Page, 390 U.S. 719 (1968).

In this case, the value of the property which was stolen is an essential element of the prosecution's case. The

Defendant was charged with second degree felony theft under the Utah Criminal Code, Sec. 76-6-412 U.C.A. (1953), as amended. To establish second degree felony theft, the prosecution has to prove that the property stolen exceeded a value of \$1,000. If evidence did not establish that value, Defendant should have been acquitted of second degree felony theft.

At trial, none of the physical evidence of the stolen property, the tools, the speaker, or the C.B., were introduced into evidence. The only physical evidence before the jury identifying the stolen property were two 4x4 Polaroid photographs of poor quality which depicted only the speakers, C.B. headphones, antenna and the tool box (Tr. 93). The tools were not admitted into evidence, nor were they depicted by a photograph, even though they were significantly the most valuable items stolen.

Where all the stolen property was not present at trial Defendant did not have an opportunity to adequately cross-examine the Mr. Ashby, the State's only witness on value, with regard to the property's value, since the property in question was absent from the proceeding and was therefore not subject to observation and inspection. The jurors also could not examine the property to determine the weight they would give to Mr. Ashby's testimony. Moreover, Defendant's expert witness could not most persuasively rebut the victim's testimony concerning property value where there was no property to

examine. This is especially critical in light of the testimony of Mr. Ashby that the stolen property was used, but in good or fair condition. Under these circumstances Defendant was denied his right to cross-examine and his right of confrontation was seriously undermined.

The circumstances at trial do not evidence bad faith, or a deliberate suppression of evidence by the prosecution. This case is not cut from that cloth. See State v. Stewart, 544 P.2d 477 (Utah 1975). Defendant is contending, however, that because the stolen property was simply absent from the trial, he was effectively denied his right to cross-examine on the value of the property.

This case is analogous to the case of State v. Havas, 601 P.2d 1197 (Nev. 1979), where the defendant was charged with forcible rape. The defendant was convicted and appealed arguing that the failure to produce potentially relevant evidence at trial, the undergarments of the victim, violated his due process rights. There was no indication of prosecutorial misconduct. The garments were either lost, destroyed or simply not taken into possession. The Nevada Supreme Court held that the evidence was material, and that the failure of the prosecution to produce the material evidence violated the defendants due process rights without the necessity of showing the reason for its unavailability.

Similarly, the evidence excluded from Mr. Ballenger's trial was clearly material. Its absence alone justifies reversal.

This Court has expressed its policy to allow the jury the opportunity to view the property which was stolen in an effort to aid the jury in a determination of its value. In State v. Harris, 519 P.2d 247 (1974) this Court, in a case dealing with the fraudulent use of a credit card, stated:

Value is something at which the jury may take a look. The owner of an article is competent as to its value, and such testimony is admissible, but neither inviolate or impervious to disbelief. The jury may take a view of the item for excellence or shoddiness and look through the same spectacles at the witness to determine the latter's imagination or credibility, -- and the verdict is its as to value. Id., at 248.

See also State v. Limb, 581 P.2d 142 (Utah 1978).

Where the exclusion of relevant and material evidence seriously undermines defendant's right to confrontation and is directly related to an essential element of proof, the policy of this Court, as articulated in Harris should be followed. This Court should rule under the facts of this case that the jury should have had an opportunity to observe the actual physical evidence, and that the defendant should have had an opportunity for meaningful cross-examination. Quite obviously, where value is at issue, and the best evidence of value is not admitted into evidence and is unavailable, defendant's opportunity for meaningful cross-examination has been severely undermined.

Accordingly, such circumstances so seriously impair defendant's right of confrontation that this Court should rule that he was actually denied said right and reverse his conviction.

B. The evidence below was insufficient as a matter of law to support a conviction of second degree felony theft.

At the close of prosecution's case, counsel for the Defendant made a motion to dismiss based on the sufficiency of the evidence (Tr. 145). The trial court denied this motion (Tr. 145).

The standard required for the Defendant to successfully overturn a verdict on the grounds of insufficiency of the evidence as stated in State v. Wilson, 565 P.2d 66 (Utah 1977), is that reasonable minds would not differ. This court stated:

In order for the defendant to successfully challenge and overturn a verdict on the ground of insufficiency of the evidence, it must appear that upon viewing the evidence reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime. Id., at 68.

See also State v. Mills, Utah 530 P.2d 1272 (Utah 1975); State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970) and State v. Danks, 10 Utah 2d 162, 350 P.2d 146 (1960).

In the case at bar there was not sufficient evidence to go to the jury on the issue of second degree felony theft. The prosecution did not present physical evidence of all the property which was stolen. The only physical evidence, the two



Polaroid photographs, did not include any of the tools (Exhibits 2-S, 4-S). According to the testimony of Mr. Ashby, these tools comprised the most valuable portion of the property taken, with a total cost to the victim of more than \$1,800, with an estimated value of \$1,300 (Tr. 94-100).

Counsel for the Defendant introduced his expert to testify as to the value of the stolen tools (Tr. 193-195). These tools were not new but had been used by the Defendant (Tr. 96-100). Defendant's expert testified that the value of used tools was significantly less than the new tools (Tr. 193-216). But because the prosecution failed to produce the tools at trial, Defendant's expert was prevented from examining the tools.

Where there is no physical evidence of the stolen tools before the jury, the jury is left with only the item pictured in the Polaroid photographs, the CB, speaker, antenna and headphone. The value of items pictured in the Polaroid photographs, the CB, the speakers, the antenna and headphones, Ashby's estimation amounted to \$245 (Tr. 99-102), and is therefore insufficient to justify a verdict of second degree felony theft.

While the owner of property may testify as to its value where that testimony is controverted by an expert witness, and the testimony is on the value of used automatic tools, reasonable minds, could not determine that the value of the

tools exceeded the value determination made by Defendant's expert. That being the case, the evidence was insufficient to convict for second degree felony theft.

## CONCLUSION

The constitutional right of the people to be secure against unreasonable searches and seizures is meaningful only if officers of the law are not given unfettered authority to intrude on the privacy of the individual on more than a mere whim or suspicion. Where an officer cannot articulate a suspicion, he should not be allowed to make an investigatory interrogation or stop. Where an officer does not have probable cause, he should not be allowed to make an arrest. Where an officer plans to seize property in the possession of another, he must have a warrant unless the exigencies of a situation justify an exception. Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more than substantial inarticulate hunches.

Likewise, the right of trial by jury is meaningful only if the defendant has an opportunity to rebut the allegations of the prosecution. Where the defendant is denied the opportunity to cross examine, he is denied its right of confrontation. Where the physical evidence of the property stolen does not

amount to mandatory monetary value for second degree theft, evidence is insufficient.

Accordingly, where the evidence is obtained through an improper investigatory interrogation, arrest, or an improper seizure, the evidence obtained thereby should be suppressed and the trial court determination reversed. In addition, where the absence of relevant material physical evidence results in a denial of the right of confrontation or where the absence of physical evidence prevents the prosecution from proving a material element of its case, the conviction of the trial court should be reversed and a new trial ordered.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that on the 28<sup>th</sup> day of September, 1981, I mailed two true and correct copies of the foregoing Brief to the office of the Attorney General, Criminal Justice Division, State Capitol Building, Salt Lake City, Utah 84114.

Sheila P. Lord