

1956

# The State of Utah v. John Joseph Sullivan and Joseph Craven Washington : Brief of Appellant

Utah Supreme Court

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John Joseph Sullivan; Joseph Craven Washington;

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UNIVERSITY UTA

IN THE SUPREME COURT

JAN 28 1957

OF THE STATE OF UTAH

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AUG 27 1956

THE STATE OF UTAH, Clerk, Supreme Court, Utah

Plaintiff & Respondent,

-vs-

JOHN JOSEPH SULLIVAN and  
JOSEPH CRAVEN WASHINGTON,

Defendants & Appellants.

) Case No.

) 8532.

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A P P E L L A N T ' S B R I E F

---

Appeal from - Fifth Judicial District Court,  
Washington County, State of Utah;  
Honorable: Will L. Hoyt, Judge.

---

JOHN JOSEPH SULLIVAN and  
JOSEPH CRAVEN WASHINGTON

In Propria Persona,  
Box 250, Draper, Utah.

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

THE STATE OF UTAH,

Respondent,

-vs-

JOHN JOSEPH SULLIVAN and  
JOSEPH CRAVEN WASHINGTON,

Appellants.

)

)

)

)

)

Case No.

8532.

STATEMENT OF THE CASE .

In an Information filed December 7, 1955,  
appellants were accused by Mr. Patrick H.  
Watson, District Attorney at St. George,  
Washington County, State of Utah, of the crime  
of Burglary in the Second Degree, more specifically that  
they did break and enter a room occupied by Mr. E. R.  
Sprague in the Twin Oaks Motel at St. George, Utah (Gl. Tr.  
. 3.) Upon being arraigned, they were appointed  
Mr. Ellis J. Pickett of St. George, Utah

: Counsel and they entered Pleas of Not Guilty  
Clark's Trans. p. 18. )

: the 1st and 2nd. days of February, 1956, they  
were Tried in the Fifth District Court, County of  
Washington, Hon: Will E. Hoyt, Judge; and  
were convicted by Verdict of the Jury of 2nd.  
degree Burglary as charged (Cl. Tr. p. 10. )  
and on the 7th. day of February, 1956, the  
trial Court rendered its' Final Judgment of  
conviction and Sentence to the Utah State  
Prison ( Cl. Tr. p. 17.); On the 9th day of  
March, 1956, their Counsel duly gave 'Notice of  
Appeal to the Supreme Court of Utah, and made  
Motion for the preparation of the Transcripts  
on Appeal ( Cl. Tr. pp. 14-15.) and the Appell-  
ants later made a more detailed 'Notice of  
Appeal' with Ancilliary Papers, in Proper  
Form ( Cl. Tr. p. 16, etc.)

The complaining witness in this case was  
R. E. E. Sprague of Salt Lake City, Utah, who  
testified that he and his wife arrived in St.  
George, Utah, at about 11 P.M. on the night of

September 27, 1955, (Rep. Tr. p. 2, 3. )  
and stayed at the Twin Oaks Motel, Room 23.  
He testified that at about 3:00 A.M. he heard  
stirring sound in the room, thought it was  
his wife, then looked up and saw a man in the  
room at the foot of his bed (Rep. Tr. p. 4.)  
that he yelled at him, whereupon the man ran  
out of the room and Mr. Sprague chased him as  
he ran across the court and into a car at the  
end of the driveway, in which he then sped  
away; Mr. Sprague observed the man's clothing  
and that he had on a square cut jacket with  
the collar turned up, although he didn't recall  
if he had any hat (Rep. Tr. p. 5.) and that the  
man was between Five foot eight and Five foot-  
ten inches tall, was of medium build and that  
he weighed about 160 pounds (Rep. Tr. pp. 6-7.)  
and described the car as being a 1947 or 1948  
dark sedan, with California 1955 License No.  
462175 (Rep. Tr. pp. 9-10.) that he got within  
ten feet of the car (Rep. Tr. p. 37, L. 8.)  
Mr. Sprague testified that as the car started

leave he knelt down and got the license number-California 1955 No. 4N621 75, which is lighted (Rep. Tr. p. 10, L. 28-32.) that he could see it very distinctly, that he was within ten feet of the car when he took it, that he ran it over in his mind several times to memorize it (Rep. Tr. p. 39.) that he then immediately returned to his room and wrote it down (Rep. Tr. p. 12, L. 3-4; p. 49, L. 5-8.) that that the license number on Appellant's car that he later saw in Mesquite, Nevada, was number 4N621 26, Not number 4N621 75 which he had seen and memorized in good light within ten feet, written down and reported to the Officer at St. George, Utah (Rep. Tr. p. 39, p. 30,- p. 41, L. 4.)

Mr. Sprague testified that he reported to the officers that the car he saw at the Hotel in St. George was a PONTIAC or a CHRYSLER (Rep. Tr. 53, L. 2-9, 25-28.)

Whereas the car that appellant's were driving which he saw in Mesquite, Nevada, was a PONTIAC,



(Rep. Tr. p. 24, L. 7-15.)

All that Mr. Sprague could definitely say about the car was that it was a dark color with a chrome strip on it, like millions of other cars; But he was quite definite in testifying that the car which he looked at in Mesquite, Nevada, which appellants were driving, had a license No. 4N621 26, instead of the Number 4N621 75 which he had carefully memorized and immediately written down at the Motel in St. George (Rep. Tr. p. 21.)

Mr. Sprague admitted that there were 'lots' of other cars on the road the same as the car of appellants, and the same as the car that he saw at the Motel, of the same color and general shape, and that the last two numbers of the License Number that he turned in definitely were '75', and NOT '26' as in the License on appellant's car (Rep. Tr. p. 57, L. 7-23.)

Mr. Sprague said that appellant's had around 118.00 dollars about evenly divided in their wallets at Mesquite, Nevada (Rep. Tr. p. 56, L. 8-24.)

that neither of the wallets belonged to him

(Rep. Tr. p. 56, L. 19-21.)

That the wallet which was gone when he returned to his Motel room was never found (Rep. Tr. p. 45, L. 5-10.).

Mr. Sprague testified that he did not observe the color of the man's clothes as he ran in front of the headlights (Rep. Tr. p. 35, L. 19-26.) Mr. Sprague also testified that there was another person in the car but that he did not know whether it was a man or a woman (Rep. Tr. p. 11, L. 25-26.) that he then went back to his room, wrote down the License number he had memorized, and advised his wife that he had been robbed. (Rep. Tr. p. 12.) of money that was in his wallet at the foot of the consisting of four twenty-dollar bills; three five-dollar bills, and three one dollar bills, a total of ninety-eight dollars (Rep. Tr. p. 12.) because his wallet was gone when he returned to the room (Rep. Tr. p. 13, L. 20-25; p. 45, L. 5-10.)

Mr. Sprague described the clothing of the man he saw in his Motel room as:

" The man's trousers..were dark brown or a green, as compared to a lighter colored jacket." (Rep. Tr. p. 14, L. 19-24; p. 18.)

Mr. Sprague said that the man he saw at Motel had on a Navy field Jacket (Rep. Tr. p. 51, L. 5-11.) That upon returning to his Motel room and writing down the License number of the car he saw , he woke up the proprietor of the Motel and called the local Police, and about an hour and half later left for Mesquite, Nevada, where the Appellants had been stopped (Rep. Tr. pp. 49-50 ), and upon arriving there they, the same two men sitting in the courtroom, were pointed out to him sitting in a Cafe, and he was asked if they were the men, and Mr. Sprague testified:

" I said, NO, THEY ARE NOT THE MEN." (Rep. Tr. 15, L. 6-16; p. 41, L. 18-20.) That he was right next to them in the Cafe when he looked at them and made the statement that:

"These are not the men" (Rep. Tr. p. 50, l. 23-27.) And Mr. Sprague again on cross examination testified that when he saw appellants in Mesquite, Nevada, that he definitely said;

"they were not the men, that he had never seen them before,"

(Rep. Tr. p. 58, l. 30--p. 59, l. 2.)

All that Mr. Sprague could say by way of any identification of Appellant Washington, was that he: "...would fit the general description."

(Rep. Tr. p. 26, l. 27-28; p. 41, l. 21-25.)

despite the fact that the man that he chased at the Motel ran in front of car with headlights on only a few feet ahead of Mr. Sprague (Rep. Tr. p. 33.)

Mr. Sprague in his testimony said that the man he chased could not have been less than five feet-eight in height (Rep Tr. p. 40, l. 15-16.) which eliminates appellant Sullivan, who is much shorter as the man who was in the Motel room; And Mr. Sprague also testified that the man he saw in the room couldn't have been six

- 7 -

feet tall (Rep. Tr. p. 40, L. 25-30.) which eliminates Appellant Washington as the man because he is, as Deputy Abbott testified; "six feet or six feet one tall, and weighs 190 pounds." (Rep. Tr. p. 119, L. 4-9.)

Whereas Mr. Sprague testified the man he saw in his Motel room was between 5' 8" and 5' 10" and only weighed about 160 pounds (Rep. Tr. pp. 6-7.) Mr. Sprague said that he did not observe any of the features of the man he saw in his room (Rep. Tr. p. 42, L. 3-13, 19-23.) that the only way he had of distinguishing the man was that he was approximately five feet eight to ten in height and of medium build (Rep. Tr. p. 42, L. 14-18.)

Oscar Abbott, Mesquite, Nevada, Deputy Sheriff, testified that he was on duty on the morning of September 28, 1955, and was patrolling the highway looking for a car with California License No. 4N621 75 (Rep. Tr. p. 79, L. 11-15.) and he stopped and arrested the Appellants in a 1947 NASH sedan with License No. 4N621 26

(Rep. Tr. p. 80, L. 5-16.) whereas he had received a phone call from St. George to stop a car with License number 4M621 75 (Rep. Tr. p. 80, L. 19-23.) Deputy Abbott phoned the Officers in St. George, Utah, and waited in the Cafe until they came. Deputy Abbott also testified that Mr. Sprague, when he came into the Cafe in Menquite, looked at the Appellants and said:

" I can't positively identify the men".

" It seemed as if one of them had a sport coat on or a field jacket". "Did they have any other clothes?" "He turned to me and said: "Did they have any other clothes?" And I said: "I never checked the car".

He said: "The taller one fills the description in stature but I can't identify him positively." (Rep. Tr. p. 85, L. 30--p. 86, L. 7; p. 113, L. 5-12.)

Deputy Abbott testified that he took \$65 from Washington and \$62 from Sullivan, a total of \$127. (Rep. Tr. p. 88, L. 16--p. 89, L. 19.)

Deputy Abbott said that he put the two wallets taken from appellants in envelopes with his writing on and turned them over to the Sheriff from Las Vegas (Rep. Tr. p. 106.) that he never removed the money from their wallets (P. 107, L. 4-5.) but it appears from his testimony that the envelopes in which he had placed their wallets and money had vanished and been replaced, that the envelopes introduced in evidence did not bear his writing, and the wallets were gone (Rep. Tr. p. 107, L. 7--p. 108, L. 11.) And the District Attorney admitted that they St. George Sheriff's office had never received the wallets, and he had never seen them. (Rep. Tr. p. 104, L. 3-7.)

Deputy Abbott testified that he was at the Cafe in Mesquite with the Appellants for about three hours , that during the time he was stopping them, and during the time they were in the Cafe a number of other cars passed, but that he didn't even pay any attention to them, despite the fact that he was looking for a car with

License number hW621 75, and he had stopped  
Appellant's car and it had No hW621 26, just  
because he figured that he had the one.  
Rep. Tr. p. 120, L. 13-30; p. 121, L. 8-12.)  
That the car he was looking for had a number  
ending in "75", and he had picked up one that  
ended in "26" (Rep. Tr. p. 121, L. 8-12; p.  
124, L. 14-16; Rep. Tr. p. 97, L. 12-17.)  
Deputy Abbott testified that often, in fact every  
day he had occasion to follow and stop cars  
going through the main street of Mesquite at  
65 miles an hour (Rep. Tr. p. 125, L. 5-11.)  
That the fact that Appellant's car was going rapidly did  
not mean anything in Mesquite, as  
quite a number of them do it (Rep. Tr. p. 98,  
L. 3-7.) Deputy Abbott said that he found no  
other clothes or coats in Appellant's car  
(Rep. Tr. pp. 113-114; p. 117, L. 2-9, 24-29.)  
and that Mr. Sprague said the coat worn by  
Washington was different from the one he had  
seen the man in his room in St. George wearing  
(Rep. Tr. p. 115, L. 10-15.)



Sheriff Roy Hancock of St. George, Utah, testified that he got a call to go to Mesquite, Nevada, at 3:12 A.M., September 28, 1955 (Rep. Tr. p. 76.) that Mr. Sprague, when he looked at the Appellants in the Cafe in Mesquite, Nevada, said:

"they are not the men,"

(Rep. Tr. p. 135, L. 24-26.)

And that the coat that Washington was wearing was NOT the same color as the one worn by the man Mr. Sprague had seen in his Motel room (Rep. Tr. 136, L. 4-6.)

Sheriff Hancock testified that Washington when he saw him in Mesquite, right after he had been arrested, was wearing LIGHT TAN Trousers and a DARK Jacket, that the Jacket was darker than the Trousers (Rep. Tr. p.136, L. 10-23; p. 137, L. 24-30.) whereas Mr. Sprague said the clothing of the man he saw in his room was:

"The man's trousers..were dark brown or

a green as compared with a lighter jacket."

(Rep. Tr. p. 14, L. 19-24; p. 18.)

Sheriff Renouf examined the car of appellants in Mesquite, Nevada, and testified that the license number on it was 4M621 26 and that the license number given him to look for in St. George was 4M621 75 (Rep. Tr. p. 132, L. 1-9.) and Mr. Sprague testified that the last two numbers of the license that he took down and turned in were definitely 75 not 26 (Rep. Tr. p. 57, L. 22-23.) ; Sheriff Renouf testified further that he was an old resident of California that California numbered it's License plates consecutively (as do they all)(Rep. Tr. p. 139, L. 18-30.) therefore there would be 27 other last two numbers in the same series of plates concerned in this case, that is from 00 to 99; And no check was made regarding these other license plate numbers of such series.

The Record shows that the Appellants consistently denied all knowledge of the alleged crime, refused to voluntarily leave Nevada for Utah, and plead 'NOT GUILTY' to the charge of Burglary.

To sum up the evidence as shown by the Record in this case, all that it shows is that- No One ever identified appellants as having been at the scene of the crime, in fact Mr. Sprague said that "They were not the men." That the clothing worn by them was different from that worn by the man Mr. Sprague saw in his Motel room, and no clothing was found in their car; That their car did ~~not~~ have the same license number as that carefully taken down and reported by Mr. Sprague, and that no stolen property of any kind was found on or about the persons or property of the accused appellants.

Further, the Record of the Trial in this case shows persistent prejudicial misconduct by the District Attorney throughout the Trial, that he persisted in leading the witnesses, in his asking for 'Opinion' evidence, and his many attempts to introduce prejudicial 'Hearsay', although berated by the Trial Court time after time not to do so, in order to arouse the Jury

against appellants and convict them on mere suspicion, speculation and conjecture.

The Record shows as follows:

"(Rep. Tr. p. 15, L. 18-19.):-

Q. Are you of the Opinion, Mr. Sprague, that these men, or one of them, was the man that was in your room?"

"(Rep. Tr. p. 18, L. 18.):

The Court: Refrain from leading."

(Rep. Tr. p. 19, L. 1.):

Mr. NELSON: Would you stand up, Mr.

Washington? ."

"(Rep. Tr. p. 19, L. 4-30):

(Attempt to get in 'Hearsay' )"

"(Rep. Tr. p. 27, L. 4-7.):

A. All right, now Mr. Sprague, I am going to ask you to look about the courtroom and to point out, if you can the person who you think committed this crime in your hotel room." (Plus prejudicial argument by D. A.)

"(Rep. Tr. p. 29, L. 3-14.):

(Court admonished the witness, Mr. Sprague.)"

"(Rep. Tr. p. 60, L. 2-7.):

(Court admonishes witness, W. Sprague,)"

"(Rep. Tr. pp. 61, 62, 63.):

(attempts to enter 'Hearsay' testimony.)"

"(Rep. Tr. pp. 67-69.):

(After long haggling and attempting to get in more 'hearsay', the D. A. finally brought out that Sullivan had said he would not go to Utah)"

"(Rep. Tr. p. 73-74.):

(Sheriff Rencuf attempted to get in 'Hearsay',)"

"(Rep. Tr. p. 78, L. 12-18.):

(Court again berates D. A. for attempting to get in 'Hearsay'.)"

"(Rep. Tr. p. 81, L. 4-6, 16.):

THE COURT: I believe the ruling should stand. It is palpably hearsay...

THE COURT: Refrain from leading."

"(Rep. Tr. p. 84, L. 17-20.):

(Court again comments on 'Hearsay'.)"

"(Rep. Tr. p. 88, L. 14-15.):

THE COURT: Refrain from that, just ask the witnesses without informing the jury of the endorsements."

At Rep. Tr. p. 90. L. 23; p. 91, L. 1-14.)

the District Attorney persisted in attempting to get testimony as to some alleged tools that were supposed to have been found in appellant's car on a second search of it, and persisted in arguing as to its admissibility in front of the jury; continuing from P. 91, L. 20 on, the issue was argued in the absence of the jury and the Court finally refused to admit such tools (Rep. Tr. p. 95, L. 6-7.) but the jury was not admonished to disregard the testimony and the arguments, the harm planned by the District Attorney had been done.

It was stated by Mr. Pickett:

"There is no evidence there was any tools used, and forced entrance to this man's room.. There could be no relation between the tools found in the car and this burglary."

(Rep. Tr. p. 92, L. 4-7.)

" (Rep. Tr. p. 93, L. 29-30.):

THE COURT: There is no evidence to indicate any tools were used."

And Mr. Parague had testified that he didn't know whether his Hotel room door was locked.

( Rep. Tr. p. 43, L. 3-10.)

At Rep. Tr. pages 145-146, Mr. Ellis Pickett, the Defense Counsel made a motion for a directed verdict of acquittal, on the grounds that no sufficient evidence had been adduced to justify the case being submitted to the Jury, and it a very good summation of the lack of evidence in this case, that it is nothing but speculation;

But this Motion was denied and overruled by the Trial Court (Rep. Tr. p. 147, L. 1-3.)

The case submitted to the jury and it in less than two hours returned a verdict of guilty against both of the Defendant - Appellants.

(Rep. Tr. p. 148.)..

POINTS, ARGUMENTS AND AUTHORITIES.

POINT ONE.

THE VERDICT AND JUDGMENT IS CONTRARY  
TO THE LAW AND THE EVIDENCE.

\* \* \* \*

(1) There was no identification of either of the appellants as having been at the scene of the alleged burglary.

Mr. Sprague, the complaining witness, could offer but a very meager description of the man he saw in his Motel room., and as to the second occupant of the car that sped away he testified that he did not know whether it was a man or woman (Rep. Tr. p. 11, L. 25-28.)

And Mr. Sprague, upon confronting the appellants within two hours after said burglary, while the facts were still fresh in his mind stated :

" They are NOT the men. "

and that they were wearing different colored clothes than the man he saw at the Motel.

(Rep. Tr. p. 15, L. 6-16; p. 41, L. 18-20;



(Rep. Tr. p. 58, L. 23-27; p. 58, L. 30--  
p. 59, L. 2; p. 85, L. 30--p. 86, L. 7;  
p. 113, L. 5-12; p. 135, L. 24-26; p. 136, L. 4-6.)

(14) At the time of their arrest shortly after the alleged burglary, the appellants were NOT wearing, did NOT have, and were never shown to have had, any clothing of the description of that worn by the alleged burglar.

Mr. Sprague described the clothing of the man he saw in his Motel room to be :

"The man's trousers.. were dark brown or green, as compared to a lighter jacket."

(Rep. Tr. p. 14, L. 19-24; p. 18.)

That upon seeing appellant in Mesquite, Nevada, Mr. Sprague immediately noticed the difference in clothes and asked Deputy Abbott:

"Did they have any other clothes, etc."

(Rep. Tr. p. 85, L. 30--p. 86, L. 7; p. 113, L. 5-12.) That the coat worn by Washington was different from the one he had seen the man in his room in the Motel in St. George wearing  
(Rep. Tr. p. 115, L. 10-15.)

That no other clothes were found in appellants car (Rep. Tr. pp. 113, 114; p. 117, L. 2-9, 24-29.)

And Sheriff Roy Remouf of St. George, testified that Washington was wearing :

" LIGHT tan trousers and a DARK Jacket, that the Jacket was darker than the trousers."

(Rep. Tr. p. 136, L. 10-23; p. 137, L. 24-30.)

the opposite of the clothing worn by the burglar.

(111) The description given of the alleged burglar, does not apply to either of the appellants.

Mr. Spragus testified that the burglar was a man between five foot-eight and ten inches in height and weighed about 160 pounds, and of medium build (Rep. Tr. pp. 6-7;) p. 40, L. 15-16.)

which automatically cancels out Sullivan, who is much shorter, stocky and over 200 pounds; and also eliminates Washington as the man, as he is six foot-one tall and weights 190 pounds.

(Rep. Tr. p. 119, L. 4-9.)

(1111) There was NO identification of the appellant's car as being the one used in the alleged burglary.

Mr. Sprague, the complaining witness, being in the insurance business should know cars, he testified that he was within ten feet of the car seen at the Motel (Rep. Tr. p. 37, L. 8.) that the car he saw at the Motel was a PONTIAC or CHRYSLER (Rep. Tr. p. 53, L. 2-9, 25-28.) whereas the car driven by appellants was a NASH (Rep. Tr. p. 24, L. 7-15.)

Further the evidence shows that the License number which Mr. Sprague took down in good light within a distance of ten feet at the Motel, was NOT that of the License on appellant's car. (Rep. Tr. p. 39, L. 30; — p. 40, L. 4; p. 37, L. 8; p. 57, L. 7-23; p. 79, L. 11-15; p. 80, L. 5-16; p. 121, L. 8-12; p. 124, L. 14-16; p. 97, L. 12-17; p. 139, L. 1-9.)

(11111) There was no identification of the money or anything else in appellant's possession as

having been stolen or even acquired suddenly or under unusual circumstances.

Mr. Sprague testified that he lost a total of ninety-eight dollars (Rep. Tr. p. 12.)

Deputy Abbott testified that appellants had over \$130 between them when he arrested them (Rep. Tr. p. 109, L. 16-19.) that he gave them 3 or 4 dollars to spend and put the rest, still in their wallets, in two envelopes which he endorsed, to the Officers from Las Vegas, Nevada. (Rep. Tr. p. 106.) But that the money submitted as evidence at the trial, was in entirely different envelopes from an unknown source, the wallets taken from appellants had disappeared, and there was no showing whatever that it was the same money as that taken from appellants, no chain of custody and nothing to identify it. (Rep. Tr. pp. 103, L. 15,—p. 108, L. 13.)

Nevertheless, the State was allowed to present as evidence part of the money allegedly taken from appellants, in those denominations like those lost by Mr. Sprague, who could identify

It only by denomination (Rep. Tr. p. 55-56.)

Appellant submit that even if the money put in evidence was part of that taken from them, that there was no possible way of identifying it as that taken from Mr. Sprague, that millions of persons in this country daily carry over a hundred dollars on their persons in Twenty, Five and One dollars Bills, that there is not a thing unusual about carrying that amount of money in those denominations, and just because several men may be carrying among their other money, similar denominations to those stolen from someone else means nothing, that purported 'identification by denomination' is a fraud.

Certainly the possession by appellants of \$62 and \$65 in their respective wallets while traveling in a car is not unusual, and there is no showing that they suddenly acquired the exact amount lost by Mr. Sprague, or even that they suddenly acquired any amount of money; The appellants submit that it is not unlawful per se to have money and that just because among

their small amount of money there happened to be some of the same common denominations that were lost by Mr. Sprague, is not by any means evidence that it was stolen from him or anyone else.

In *State v. Crowder* (Utah 1948) 197 P. 2d.

917, at 922-923, this Supreme Court quoted:

- " (1) Appellant contends that the court erred in admitting in evidence the \$1000 in twenty dollar bills because no proper foundation was laid for its admission in evidence, the State having failed to identify the twenty dollar bills found in appellant's possession as the identical bills which were stolen. In support of this contention he quotes the following from Wignore, "Treatise on Evidence, 'Vol. 1. Sec. 154, p. 186;

" The mere possession of MONEY is in itself no indication that the possessor was the taker of money charged as taken, because in general all money is alike and the hypothesis that the money found is the same as the money taken is too forced and extraordinary to be receivable. "

Although this Court affirmed the judgment in the Crowder case, it took the pains to point out that in that case Crowder had previously had no more than \$300, that he had had no employment since his departure from his last

employer, that right after his departure from said last employer Crowder suddenly acquired \$1000 in twenty dollar bills, the same amount and denomination of which his employer's home was robbed shortly after, Crowder left his employ; That Crowder attempted to explain his sudden acquisition of so much wealth by saying that he had won it gambling but told conflicting stories as to when and where; And this Court held that under such circumstances the money was admissible with other circumstances as evidence against him.

But in the instant case, no such circumstances exist as existed in the Crowder case, the two appellants having had \$62 and \$65 apiece, which is not a large or unusual amount for the average person to be carrying, especially in Nevada, and there is not even an attempt to show that such money was suddenly acquired or that it was not the usual thing for appellants to have money; The mere fact that Appellant Washington owned the car they were driving, and that he was able

to post Bond in Las Vegas, and the fact that they were able to hire an Attorney there, shows that they were not destitute derelicts.

Therefore, appellants submit, their money not being shown to have been suddenly acquired or acquired under suspicious circumstances, and lastly only identifiable as mere MONEY, it has no legal value as evidence against them at all.

In the cases of STATE v. HALL (Utah 1943) 139 P. 2d. 228, at 230, and STATE v. HALL (Utah 1944) 145 P. 2d. 494, at 496, this Court HELD:

" Under the authorities, it is clear that the State must definitely identify the goods found in the defendant's possession as the goods which were charged to have been stolen before the jury may draw an inference of guilt based upon the proof of possession by the defendant of such goods.

( Citing cases . )

And at page 231 of 139 P. 2d, it Held:

"(6) The conclusion that the State failed

as a matter of law to identify the plugs disposes of the case for without such identification the jury could not draw the inference of guilt under section 103-36-1. Without this inference if guilt there is not sufficient evidence to support the conviction."



In STATE v. WHITE Utah 1944 ) 152 P. 2d. 60,  
at 81, this Supreme Court of Utah said:

" (1) The rule relating to the identification of  
of stolen property is stated in 17 R. C. L. Sec. 70,  
P. 65, as follows:

" The Prosecution must identify stolen property  
found in the possession of the accused with that for  
the theft of which he is indicted, and this must be  
done by the most direct and positive testimony of which  
the case is susceptible."

In STATE v. CRAWFORD ( Utah 1921 ) 201 P. 1033

this honorable Court at page 1032 held:

"(1) ... There can be no question in a case of this  
kind, where the prosecution relies principally on  
possession of stolen property, but that the identity  
of the property so possessed and the property stolen  
should be established beyond a reasonable doubt,..."

And at top right of page 1033:

" It is consistent with  
the rule applied in cases dependent solely upon cir-  
cumstantial evidence, as in the case at bar, that the  
circumstances must be such as to exclude every reason-  
able hypothesis except that of the defendant's guilt  
of the offense charged that every circumstance consti-  
tuting a necessary link in the chain of evidence must  
be consistent with the defendant's guilt and incon-  
sistent with his innocence. "

In STATE v. LAUB (Utah 1942) 131 P. 2d 805,

at 807-808, this Supreme HELD:

- (2, 3,) while the State's evidence is circumstantial, such evidence may be just as conclusive or even more so than direct evidence, but the prosecution still has the burden of proving beyond a reasonable doubt that the defendant is guilty. Or "not only show by a preponderance of evidence that an offense was committed, and that the alleged facts and circumstances are true, but they must also be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than the defendant's guilt. "People v. Scott, 10 Utah 227, 37 P. 335. See also State v. Burch, 100 Utah 444, 115 P. 2d 911; State v. Crawford, 59 Utah 39, 201 P. 1030. As pointed out in Underhill's Criminal Evidence, Fourth Edition, page 21, "All the circumstances as proved must be consistent with each other and they are to be taken together as proved. Being consistent with each other and taken together, they must point surely and unerringly in the direction of guilt. \*\*\* Hence, if two reasonable hypothesis are pointed out by the evidence and one of them points to the defendant's innocence, it would be difficult to see how any jury could be convinced beyond a reasonable doubt of the defendant's guilt."

Appellant's submit that in the instant case, there is not a scintilla of direct evidence against them, and that the so-called circum-

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stantial evidence in this case is so far fetched as to only amount to bare suspicion. As set forth in the 'Statement of the Case' PP. 16 - 18 - supra, the record in this case is replete innuendo, and bare-faced attempts to get in palpably 'Hearsay' evidence which, in view of the fact that at no time was the jury instructed to disregard such conduct on the part of the District Attorney, could not do no other than violently prejudice the jury against Appellants, that they were thereby convicted on surmise, speculation and suspicion instead of legal evidence.

In STATE v. NICHOLS ( Utah 1944) 145 P. 2d. 802, at Mid right page 803, this Court said:

" The damage was already done by this incompetent testimony as will be observed from a detailed examination of all the testimony, and as evidenced by the verdict returned by the jury. Even had the trial Court explained its incompetency to the jury and instructed them expressly to disregard it, it is doubtful that the injurious effect could have been overcome. "

In **NASH v. STATE** ( Okla. 1951) 233 P. 2d. 322,  
the Oklahoma Criminal Court of Appeals held:

" Where the evidence of the state to sustain a conviction is based upon surmise, speculation and suspicion, the conviction will be reversed as not sustained by sufficient evidence, "

One of the most flagrant examples in the instant case is that at Rep. Tr. P. 27, L. 4-7, where the District Attorney asked:

" All right now Mr. Sprague, I am going to ask you to look about the Courtroom and to point out, if you can the person who you think committed this crime in your hotel. "

Appellants submit that the state is certainly scraping the bottom of the barrel in its quest for evidence, when it has to ask a witness who he 'THINKS' committed the crime, but nevertheless in this case the District Attorney not only asked this incompetent question, but also had the gall to argue with the Court and spent imaginary citations that it was advisable in

front of the jury, which was not admonished to disregard these vindictive tantrums of the District Attorney ( Rep. Tr. P. 27)

At Reporter's Transcript Pages 90, L. 23 --- to Page 9, L. 8, it shows that the attempt of the District Attorney to get some tools allegedly found in Appellau car admitted in evidence, and lines 8-10, a page 93, show his idea of a trial, as follows:

" There is no positive evidence that the door was not broken and entered."

In other words, the District Attorney is of the idea that the defendants in a criminal action must prove that a burglary was not committed, to prove themselves innocent; That if they fail to disprove anything, it is ipso facto proved for the State.

In the STATE v. UNOSAW (Wash. 1956) 296 P. 2d 315, the Supreme Court of Washington Held:

" (3) In a criminal prosecution the state cannot rely on the absence of evidence to establish a fact which the statutes require

Appellants submit that the Motion for a Directed Verdict made by their Counsel - Mr. Ellis J. Pickett, a respected member of the Utah Bar, at pages 145-146 Rep. Tr. should have been granted, on the grounds that no sufficient evidence was adduced by the State to justify the case being submitted to the jury; That there being no direct evidence, and such circumstantial evidence as there was did not point to the guilt of appellants. Further that the jury had to speculate on too many things, some incompetent and very prejudicial, to render a just verdict in this case. That the only admissible evidence in this case was a vague description of a man and the clothes he may have worn, and also a rather vague description of a car either a PONTIAC or CHRYSLER with a definite license number 4N621 75, and appellants had a NASH with number 4N621 26. It was definitely established many times that Mr. Sprague unequivocally said "That they are NOT the man," when the events were still

fresh in his mind, but that thereafter, no doubt under the suggestions of the Officers who were too lazy to check any other cars or investigate the case further, Mr. Sprague evidently let the seed of suspicion planted by the Officers take root, and he hedged a bit and said "Well this man Washington, he could fit the general description."

But as Mr. Pickett stated: - There are millions of men who could fit the general description of a man as being between five feet-eight and ten inches tall, of medium (anywhere between fat and thin) and about 160 pounds in weight, just about an average man, according to statistics. So we end up with a description and License number of a car which proves that that of appellants was the wrong one, with identification by denomination of money which proves nothing, by a description of clothes which again absolves appellants, and a statement that Washington fits the description of the average man, and as to Sullivan ? NOTHING!

POINT TWO

APPELLANTS WERE DENIED THEIR FEDERAL CONSTITUTIONAL RIGHT TO A " FAIR TRIAL," GUARANTEED THEM BY THE " DUE PROCESS OF LAW" CLAUSE OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

\* \* \* \* \*

Appellant contend that they were denied their Constitutional Right to a ' FAIR TRIAL' by the actions of the District Attorney throughout the trial in persisting in attempting to lead his witness , in attempting to introduce what he knew was ' Opinion,' Hearsay, and other inadmissible evidence, and arguing upon the same with the Court before the jury to impress them with his feigned righteousness and that <sup>if</sup> he didn't have any evidence it was because the defendants were clever blackguards and guilty anyhow; That, although the Trial Court time and time again berated the District



Attorney for such attempts to introduce Hearsay and other inadmissible evidence before the Jury. Which had a very harmful and prejudicial effect on them adverse to the accused Appellants, inasmuch as the Court did not once caution the Jury to disregard such harmful attempts an misconduct on the part of the District Attorney.

Appellants believes that the Reporter's Trans. shows that this was a sustained calculated effort by the District Attorney to arouse the Jury against them, to convict them by any means and to deny their Constitutional Right to a 'Fair Trial' upon legal evidence.

In THE STATEMENT OF THE CASE, at pages 16 to 19 supra, Appellants have pointed out many of these attempts of the District Attorney to introduce illegal evidence and prejudice the Jury against them, with the Reporter's Trans. pages and line numbers, therefore they do not see the need of repeating them here, but will let this Honorable Court do as it will in studying the quoted protings and Appellants

humbly offer the following citations to aid,  
if need be, this Honorable Court in its decision

In the case of COSTELLO v. UNITED STATES, (1956)  
76 S. Ct. 406, at 409, the Supreme Court of the  
United States, made the statement that:

" In a Trial Court on the merits, defendant  
are entitled to a strict observance of all the  
rules designed to bring about a fair verdict. "

In STATE v. THOMAS, ( Utah 1952) 244 P. 2d. 653,  
656, this Honorable Court quoted:

" (8) It is true as stated in this court in  
STATE v. MURPHY, 92 Utah 382, 383, 68 P. 2d. 188  
" While the District Attorney is obligated to  
prosecute person brought to trial with vigor and  
earnestness, he owes the defendant duty to be  
fair in conduct of trial \* \* \* \* ,"

A good statement as to proper decorum  
of a prosecutor is contained in BERGER v. UNITED  
STATES, 296, U. S. 78, 88, 55. S. Ct. 629, 633,  
79 L. Ed. 1314, 1321:

( A prosecutor is)" \* \* \* in a peculiar and  
very definite sense the servant of the law, the  
two-fold aim of which is that guilt shall not  
escape or innocence suffer. He may prosecute wit  
earnestness and vigor.

But while he may strike hard blows, he is not at  
liberty to strike foul ones. It is as much his  
duty to refrain from improper methods calculated  
to produce a wrongful conviction as it is to use  
every legitimate means to bring about a just one

The case of STATE v. NICHOLS ( Utah 1944 )  
145 P. 2d. 802, 803, quoted at page 31, supra,  
was a Burglary case in which a lot of 'Hearsay'  
evidence was entered to convict defendant, and  
this Court said at page 805:

" And under all the testimony, the attempt  
to introduce hearsay evidence linking appellant  
with the sale of cigarettes and dividing the  
proceeds with Paugh was highly unfair and pre-  
judicial, even though the testimony was ordered  
stricken."

In PEOPLE v. KWILOSZ 388 Ill. 461, 14 N. E.  
2d. 475, a rape case in which an expert witness  
was allowed to answer that an examination indi-  
cated there had been a rape; And the details of  
a conversation not in defendant's presence were  
testified to. The Supreme Court of Illinois in  
reversing the case said among other things:

" It was going far beyond the range of  
authorized expert testimony to allow him to give  
an opinion that the inflammation he discovered  
was produced by rape. \* \*  
the testimony admitted was an usurpation of the  
province of the Jury, and beyond all question  
its admission was error".

In the case of **STATE v. BROSS**, (Or. 1953)  
255 P. 2d 1055, the Supreme Court of the State  
of Oregon, at bottom right of page 1062, quoted:  
" In 23 C. J. 2., Criminal Law, Sec. 961, p.  
274, it is said:

"Under constitutional or statutory  
guarantees thereof, every person ac-  
cused of crime is entitled to a fair and  
impartial trial, in which the legal rights  
of such accused person are safeguarded,  
protected and respected; there is, a  
trial on the facts, in accordance with  
the law and the evidence \* \* \* be-  
fore an unbiased tribunal \* \* \* free  
from harmful error and from any extrane-  
ous influence that might be to his  
prejudice."

And at bottom right of page 1063, the Court held:

" (14) Denial of a fair and impartial  
trial in a criminal case, whether the crime  
charged is either a felony or misdemeanor,  
would be a violation of the Fourteenth  
Amendment to the Federal Constitution,  
it would constitute a denial of due pro-  
cess.

In 16 C. J. 2., Constitutional Law, Sec. 591,  
p. 1185, the rule is stated:

"Due process of law in a criminal  
case requires not only a trial or hear-  
ing before judgment and condemna-  
tion, but also a fair and impartial trial  
or hearing according to the due and  
orderly course of the law."

CONCLUSION

In Conclusion, Appellants submit that they have shown under POINT ONE, pages 20 to 35, supra, that there is NO legal evidence sufficient to sustain the conviction of appellants; That as to Washington, the fact that he might fit the vague description of an 'average man' is not sufficient to overcome the presumption of innocence; And as for Sullivan, there is no evidence against him whatsoever, only the fact that he was riding in the car with Washington in Mesquite, Nevada, a long way from the scene of the alleged crime.

Appellants also submit that under POINT TWO, pages 36 to 40, supra, they have shown, that upon the facts of this case, they were denied their Constitutional Right to a 'Fair Trial'

Therefore Appellants Pray that the Judgment of the Trial Court shall be Reversed.

Respectfully submitted this 24th. day of August, 1956.

By: Joseph Joseph Sullivan  
Joseph Charles Washington

Appellants In Propria Persona.