

1958

State of Utah v. James W. Rodgers : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

A. Reed Reynolds; Robert H. Ruggeri; Attorneys for Appellant;

Recommended Citation

Brief of Appellant, *State v. Rodgers*, No. 8868 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3109

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Case No. 8868

UNIVERSITY UTAH

DEC 19 1958

W LIBRARY

IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

1958

THE STATE OF UTAH,

Plaintiff and Respondent,

vs.

JAMES W. RODGERS,

Defendant and Appellant.

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

A. REED REYNOLDS

ROBERT H. RUGGERI

Attorneys for Appellant

Moab, Utah

I N D E X

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	1
STATEMENT OF POINTS	18
POINT I. THE COMPLAINT CHARGED THE DEFENDENT WITH "MURDER" AND HE WAS BOUND OVER TO STAND TRIAL FOR "MURDER" WHICH IS A DEFINITIVE TERM NOT CONSTITUTING A PUBLIC OFFENSE UNDER THE LAWS OF THIS STATE. UNDER THESE CIRCUMSTANCES A CONVICTION OF MURDER IN THE FIRST DEGREE IS CONTRARY TO AND IN VIOLATION OF THE LAWS OF THE STATE OF UTAH AND THE CONSTITUTION OF THE STATE OF UTAH AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA.	
	18
POINT II. THAT THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO QUASH THE INFORMATION MADE AT THE TIME OF ARRAIGNMENT AND BEFORE PLEA ON THE GROUNDS THAT THE DEFENDANT DID NOT HAVE A PRELIMINARY HEARING ON THE CHARGE OF FIRST DEGREE MURDER AND THE COURT THEREFORE WAS WITHOUT JURISDICTION TO HEAR THE CASE.	
	18
POINT III. THAT THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO QUASH THE INFORMATION OR IN LIEU THEREFORE TO AMEND SAME TO CONFORM TO THE CHARGE THAT WAS MADE IN THE ORIGINAL COMPLAINT AND THE CHARGE FOR WHICH THE DEFENDANT WAS BOUND OVER BY THE COMMITTING MAGISTRATE TO STAND TRIAL.	
	18
POINT IV. THAT THE COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO THE INTRODUCTION OF ANY TESTIMONY WITH RESPECT TO FIRST DEGREE MURDER.	
	19
POINT V. THAT THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION IN ARREST OF JUDGEMENT BASED ON THE FOLLOWING GROUNDS:	
(a) THAT THE DEFENDANT IS INSANE, AND,	
(b) THAT THE TRIAL COURT WAS WITHOUT JURISDICTION TO TRY THE DEFENDANT FOR THE CRIME OF MURDER IN THE FIRST DEGREE BECAUSE THE DEFENDANT WAS CHARGED IN THE COMPLAINT WITH WHAT CONSTITUTES THE CRIME OF MURDER IN THE SE-	

I N D E X — (Continued)

	Page
COND DEGREE; THAT THE PRELIMINARY HEARING WAS BASED UPON SAID COMPLAINT AND THAT THE DEFENDENT WAS BOUND OVER BY THE COMMITTING MAGISTRATE TO STAND TRIAL FOR THE OFFENSE STATED IN THE COMPLAINT TO WIT: MURDER IN THE SECOND DEGREE. -----	19
POINT VI. THAT THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE VERDICT RENDERED IN THIS CASE IS NOT SUPPORTED BY THE EVIDENCE AND IS IN FACT CONTRARY TO THE UNCONTRIDICTED EVIDENCE THAT THE DEFENDENT WAS SUFFERING FROM AN ORGANIC MENTAL DISORDER WHICH RENDERED HIM INSANE AND INCAPABLE OF CONTROLLING HIS ACTIONS. -----	19
ARGUMENT -----	20
CONCLUSION -----	89

Cases Cited

State v. Avery, 125 P. 2d 803, 102 Ut. 33 -----	22
People v. Hill, 3 Ut. 334, 3 P. 75 -----	24
People v. Bogdanoff, 256 New York 16, 171 N.E. 890, 69 A.L.R. 1378. -----	25
State v. Spencer, 121 P. 2d. 912, 101 Ut. 287 -----	27
State v. Hill, 116 P. 2d 392, 100 Ut. 456 -----	27
State v. Russel, 106 Ut. 116, 145 P. 2d 1003 -----	34
State v. Jensen, 136 P. 2d. 949, 103 Ut. 478 -----	37
State v. Pay, 146 P. 300, 45 Ut. 411 -----	38
State v. Green, 78 Ut. 580, 6 P. 2d. 177 -----	41

TEXT

5 C. J. S. 638, 639, 655 -----	44
--------------------------------	----

U. S. CONSTITUTION

Article 5 of the Amendments -----	21
Article 6 of the Amendments -----	21

UTAH CONSTITUTION

Article 1 Section 12 -----	21
Article 1 Section 13 -----	37

STATUTES

Utah Code Annotated 1953, 76-1-11 -----	21
Utah Code Annotated 1953, 76-30-1 -----	21
Utah Code Annotated 1953, 76-30-3 -----	21
Utah Code Annotated 1953, 76-30-4 -----	21
Utah Code Annotated, 1953, 77-23-1 -----	3
Utah Code Annotated 1953, 77-23-3 -----	3
Utah Code Annotated 1953, 76-1-41 -----	4
Utah Code Annotated 1953, 77-48-1 -----	41

IN THE SUPREME COURT of the STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

JAMES W. RODGERS,
Defendant and Appellant.

} Case No. 8868
}

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The defendant and Appellant will be referred to as defendant. The plaintiff and respondent will be referred to as the State.

STATEMENT OF FACTS

Charles Merrifield was shot to death on the 19th day of June, 1957 at the Rattle Snake mine in San Juan County, Utah. A Complaint was filed against James W. Rodgers on the 22nd day of June, 1957, which read in words and figures as follows, to-wit:

"IN THE CITY COURT OF MONTICELLO

STATE OF UTAH,

Plaintiff,

vs.

JAMES W. RODGERS,

Defendant.

COMPLAINT

STATE OF UTAH)
 : ss.
 COUNTY OF SAN JUAN)

On the 22nd day of June, 1957, before me, Ralph J. Hafen, Judge of the above entitled Court City of Monticello, San Juan County, State of Utah, personally appeared R. D. McAlister who, being duly sworn by me, on his oath did say that James W. Rodgers on the 19th day of June, 1957, at and in the County of San Juan, State of Utah unlawfully did commit the crime of murder in the manner as follows, to wit: that at the time and place aforesaid James W. Rodgers murdered Charles T. Merrifield. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Utah.

/s/ R. D. McALISTER

Subscribed and sworn to before me the day and year first above written.

/s/ RALPH J. HAFEN
 Judge

I approve issuance of a warrant of arrest on the foregoing complaint.

/s/ F. BENNION REDD
 County Attorney "

On the 22nd day of June a Warrant of Arrest was signed which read in words and figures as follows, to-wit:

“IN THE CITY COURT OF MONTICELLO

STATE OF UTAH

Plaintiff

vs.

JAMES W. RODGERS,

WARRANT OF ARREST

Defendant

STATE OF UTAH, COUNTY OF SAN JUAN

THE STATE OF UTAH TO ANY PEACE OFFICER IN
THE STATE

A complaint, upon oath, having been made this day before me Ralph J. Hafen Judge of the above entitled Court, by R. D. McAlister that the offense of murder has been committed, and accusing James W. Rodgers thereof;

You are commanded to arrest the above named James W. Rodgers and bring him before me forthwith at my office in Monticello, Utah.

WITNESS my hand at Monticello, Utah this 22nd day of June, 1957.

/s/ RALPH J. HAFEN
Judge”

The defendant, James W. Rodgers, was apprehended without incident at Cortez, Colorado on the morning of the 20 of June, 1957 and voluntarily returned to Monticello, Utah.

On June 26, 1957 a Preliminary Hearing was had before the Honorable Ralph J. Hafen, Judge of the City Court at Monticello, Utah, at which time the complaint was read to the defendant, as appears from reading the transcript

of the preliminary hearing. Quoting from the transcript of the preliminary hearing, page 3, lines 17 through 30, and page 4, lines 1 through 18:

THE COURT: You will listen to a reading of the complaint by the acting clerk of the court.

THE REPORTER: In the City Court of Monticello. State of Utah, vs. James W. Rodgers, Defendant. Complaint. State of Utah, County of San Juan, ss.

On the 22nd day of June, 1957, before me, Ralph J. Hafen, Judge of the above entitled Court, City of Monticello, San Juan County, State of Utah, personally appeared R. D. McAlister who, being duly sworn by me, on his oath did say that James W. Rodgers on the 19th day of June, 1957, at and in the County of San Juan, State of Utah unlawfully did commit the crime of murder in the manner as follows, to wit: That at the time and place aforesaid James W. Rodgers murdered Charles T. Merrifield. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Utah.

/s/ R. D. McALISTER

Subscribed and sworn to before me the day and year first above written.

/s/ RALPH J. HAFEN

Judge

I approve issuance of a warrent of arrest on the foregoing complaint.

/s/ F. BENNION REDD

County Attorney

THE COURT: You have listened, Mr. Rodgers, to a reading of the charge as set forth in the complaint and you have been charged with the crime of murder.

Do you have an attorney?

MR. RODGERS: I do.

THE COURT: And is Mr. Gibson your attorney?

MR. RODGERS: That is right."

The Court made the following finding at the conclusion of the evidence at the Preliminary Hearing, see page 96, lines 3 through 16 of the transcript of the Hearing:

"THE COURT: It is the finding of this Court that the defendant in this case — what is his full name?

MR. REDD: James W. Rodgers.

THE COURT: James W. Rodgers — strike that and let me start again.

It is the judgement of this Court that there being shown by the State of Utah evidence which gives the Court sufficient proof that a crime has been committed in this County and that there is reasonable cause to believe that the defendant in this action, James Rodgers, committed said crime, it is the order of the Court that he be bound over to the District Court to answer to the same and for all further proceedings in this case."

On the 26th day of June, 1957 the following statement was typed on the back of the Complaint:

"It appearing to me that the offense in within Complaint mentioned has been committed and that

there is sufficient cause to believe the within named Defendant, James W. Rodgers, guilty thereof, I order that he be held to answer to the same and he is hereby committed to the Sheriff of the County of San Juan, State of Utah, without bail pending further proceedings in the District Court of San Juan County, State of Utah.

/s/ RALPH J. HAFEN
Judge

Dated: June 26, 1957."

On the 26th day of June an information was prepared by the District Attorney of the Seventh Judicial District, which read in words and figures as follows, to-wit:

"INFORMATION

James W. Rodgers having been on the 26th day of June, 1957, by Ralph J. Hafen, Judge of the Monticello City Court in and for San Juan County, State of Utah, duly committed to answer to the crime of murder in the first degree, is accused by Boyd Bunnell, District Attorney of the Seventh Judicial District, of said crime committed as follows:

That said Defendant, on or about the 19th day of June, 1957, murdered Charles T. Merrifield.

/s/ BOYD BUNNELL
District Attorney

The following witnesses testified for the State at the

Preliminary hearing:

D. B. Ingram, Moab, Utah
 Harold E. Pickens, Moab, Utah
 Thomas M. Thompson, Moab, Utah
 Ben R. Goodnight, Moab, Utah
 Chauncey E. Black, Blanding, Utah
 Seth F. Wright, Monticello, Utah”

On the 6th day of August, 1957 the defendant was brought before the Seventh Judicial District Court in and for San Juan County, Utah for arraignment, the transcript of which reads in part as follows:

Quoting from page 2, lines 28 through 30, and page 3, lines 1 through 30, and page 4, lines 1 through 12.

“MR. GIBSON: If Your Honor please, we move that the Information be quashed on the grounds that this Defendant hasn’t had a preliminary hearing on the charge of first degree murder.

THE COURT: You want to argue the motion?

MR. GIBSON: Yes.

THE COURT: All right, I will set it down for argument at 3:30 p. m. or as soon thereafter as the matter may be heard, if that is agreeable to you.

(Further proceedings continued until 3:30 o’clock p. m.)

THE COURT: In case No. 243 there is a motion to quash the Information for failure to state what?

MR. GIBSON: For the reason that the Defendant hasn’t

had a preliminary hearing on the first degree murder charge.

THE COURT: Very well, I will hear your argument.

(Counsel for the Defendant and the State made oral arguments to the Court.)

THE COURT: Court is in session and the record may show that the accused and his counsel and counsel for the State are here. The motion to quash the Information upon the ground that the Defendant has had no preliminary hearing on the charge stated in the Information is denied and overruled. Now are you ready to plead?

MR. GIBSON: We are ready to plead, Your Honor.

THE COURT: You may step forward, Mr. Rodgers. Now under the old, under the old code we, if you desired to enter a plea of not guilty by reason of insanity you had to so state. I don't think that that is required now, but I think that you merely need to announce your intention to rely upon insanity as a defense, but if you want to make your plea that way —

MR. GIBSON: Well, I have checked that, if Your Honor please, and I am inclined to think the law is as you say, but to be sure about it and safe —

THE COURT: You want to plead as the old statute required.

MR. GIBSON: Yes, I want.

THE COURT: To the Information that has been read to you, what is your plea, guilty or not guilty?

MR. RODGERS: Not guilty.

MR. GIBSON: And not guilty by reason of insanity."

On the 7th day of December, 1957 the Defendant filed a Motion to Quash the Information or in Lieu Thereof to Amend Same, which said motion reads in words and figures as follows, to-wit:

"IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

CRIMINAL NO. 243

JAMES W. RODGERS,

Defendant.

MOTION TO QUASH THE INFORMATION OR IN
LIEU THEREOF TO AMEND SAME

The defendant James W. Rodgers by and through his attorneys A. Reed Reynolds and Robert H. Ruggeri moves the Court for an order Quashing the Information or in Lieu Thereof for an order amending same for the reason and upon the grounds herein set forth as follows:

1. That said Information does not charge the defendant with the commission of the offense charged in the complaint, upon which the preliminary hearing was held, and for which he was bound over to the District Court for trial.

2. That the Court trying the cause has no jurisdiction of the offense charged in the Information or of the person of the defendant.

3. That an Information was filed without the defendant first having had or waived a preliminary examination on the offense charged in the information.

4. That the prosecuting attorney had no authority to file the Information covering the offense charged in the Information.

That in lieu of quashing the information that the same be amended by order of this Court to conform to the offense charged in the complaint, upon which the preliminary hearing was based, and to conform to the offense for which the defendant was bound over to the District Court to stand trial.

This motion is based upon the complaint, transcript of the preliminary hearing, the Information, and any and all other proper statutes, records and files thereto appertaining.

Dated this 7th day of December, A. D., 1957.

A. REED REYNOLDS and
ROBERT H. RUGGERI
/s/ Robert H. Ruggeri
/s/ A. Reed Reynolds

NOTICE OF MOTION

TO: The Honorable Boyd Bunnell District Attorney for the Seventh Judicial District.

Please take notice that the undersigned will bring the above Motion on for hearing before the Court at the courtroom thereof in the Court House at Monticello, San Juan County, State of Utah, on the 10th day of December, A. D., 1957, at the hour of 10:00 o'clock A. M., or as soon

thereafter as counsel can be heard.

Dated this 7th day of December, A. D., 1957.

A. REED REYNOLDS and

ROBERT H. RUGGERI

/s/ Robert H. Ruggeri

/s/ A. Reed Reynolds

Attorneys for the defendant"

That on December 11, 1957 the above entitled case came on regularly for hearing at which time oral arguments were presented to the Court on the defendant's motion to quash the information or in lieu thereof to amend same, and the Court made its ruling which appears in the reporter's transcript of the trial as follows:

Page 4, lines 13 through 30, and page 5, lines 1 through 3.

"THE COURT: I have heretofore considered the pronouncement of our Supreme Court on this problem. I may not have made the right interpretation of what they have said nor reached the right conclusion with respect to it, and if I am in error, of course the Supreme Court will correct me. I have already ruled in this case on this proposition. And taking 77-21-38 and giving it what I think is the plain meaning of that statute I reached the conclusion that the complaint charged murder in the first degree. Because the section says plainly that where an offense is divided in degrees, a charge that the offense was committed includes all of the degrees. So I conclude that the complaint in this case charged murder in the first degree and that the information doesn't charge a crime on which he hasn't had a preliminary hearing. And what I have said

applies to other items specified in the motion. I therefore deny the motion. I hope, however, gentlemen, that if there is a verdict that you don't like in this case that you will go up to the Supreme Court and see what they have to say about it. Trial courts make errors and I may have made one here. If I have, I want to be corrected, but that is my best judgment, gentlemen."

The defendant then made an objection to the introduction of any testimony with respect to first degree murder.

See page 5, lines 25 through 30, and page 6, line 1 of the transcript of the trial:

"MR. REYNOLDS: Your Honor, may the record also show that the Defendant makes an objection to the introduction of any testimony with respect to first degree murder, and that that objection will continue throughout the entire trial?

THE COURT: You may have that objection, and the objection is overruled."

On the 14th day of December, 1957, the jury returned a verdict of Guilty of Murder in the First Degree without a recommendation of leniency.

On December 19, 1957, the defendant made a Motion in Arrest of Judgment and Motion for New Trial, which read in words and figures as follows:

"IN THE DISTRICT COURT OF SAN JUAN COUNTY
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

MOTION IN ARREST

vs.

OF JUDGMENT

JAMES W. RODGERS,

Criminal No. 243

Defendant.

Comes now the Defendant and moves the above entitled Court for an order arresting judgment in this case pursuant to Sections 77-34-1 and 77-35-10, Utah Code Annotated 1953 on the following grounds.

1. That the facts proved at the trial of this matter do not constitute a public offense for the reason that the Defendant was in such a mental condition as to proclude him from forming the required specific intent.

2. Pursuant to the provisions of Section 77-35-10, Utah Code Annotated 1953, the judgment should be arrested for the following reasons to wit:

(a) That the Defendant is insane, and,

(b) That the above entitled Court was without jurisdiction to try the Defendant for the crime of Murder in the First Degree because the Defendant was charged in the Complaint with what constitutes the crime of Murder in the Second Degree; that the preliminary hearing was based upon said Complaint and that the Defendant was bound over by the Committing Magistrate to stand trial for the offense stated in the Complaint, to wit: Murder in the Second Degree.

Dated this 19th day of December, 1957.

A. REED REYNOLDS AND
ROBERT H. RUGGERI
Attorneys for Defendant
Moab, Utah
By /s/ A. Reed Reynolds

Received a copy of the foregoing Motion in Arrest of
Judgment this 19th day of December, 1957.

/s/BOYD BUNNELL
District Attorney "

"IN THE DISTRICT COURT OF SAN JUAN COUNTY
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

MOTION FOR NEW TRIAL

JAMES W. RODGERS,

Criminal No. 243

Defendant.

Comes now the Defendant and moves the above en-
titled Court for an order granting him a new trial on the
following grounds, to wit:

That the verdict rendered in this case is not support-
ed by the evidence and is in fact contrary to the evidence.

Dated this 19th day of December, 1957.

A. REED REYNOLDS AND
ROBERT H. RUGGERI
Attorneys for Defendant
Moab, Utah
By /s/ A. Reed Reynolds

Received a copy of the foregoing Motion for New Trial this 19th day of December, 1957.

/s/ BOYD BUNNELL
District Attorney "

The Motion in Arrest of Judgment and the Motion for a New Trial were argued and overruled.

See Page 291, lines 24 through 30, and page 292, lines 1 through 11 of the transcript of the trial:

"(At this time the Court heard the oral arguments of counsel on the motion for a new trial.)

THE COURT: The motion for a new trial is denied and overruled. Do you want to argue your motion in arrest of judgment?

MR. REYNOLDS: I might just point out, if the Court please, that the ground number 1 stated in the motion is based on substantially the same matter I argued with respect to the motion for a new trial. And the second ground set forth in the motion in arrest of judgement is with respect to the matter once directed to this Court by Mr. Ruggeri and myself and that goes to the Complaint and the crime charged at that time and also the form of the Information charging first degree murder, and the Court has heard our argument in connection with that.

THE COURT: The motion in arrest of judgment is denied and overruled. We will be in recess for five minutes and I would like to confer with counsel in chambers."

Sentence was pronounced on Defendant. See page 292, lines 14 through 30, page 293, lines 1 through 30, and page

294, lines 1 through 6 of the transcript of the trial as follows:

"THE COURT: You will stand before the Court, James W. Rodgers. James W. Rodgers, you are charged by an Information filed in this Court with commission of the crime of murder. It was charged in this Information that on or about the 19th day of June 1957, within this county you murdered Charles Merrifield. To that Information you entered a plea of not guilty. You were without funds to employ counsel for your defense and upon that being made to appear to the satisfaction of the Court I appointed the two gentlemen that now stand by you as your counsel to defend you. A jury was impaneled and sworn and heard the evidence in support of the Information and in your defense. That jury returned a verdict finding you guilty of murder in the first degree without a recommendation of imprisonment for life. In that situation, the Court is bound by law to impose upon you the death penalty. Have you any legal reason to state why the judgment and sentence of the Court should not be pronounced? You may answer that, gentlemen.

MR. RUGGERI: Do we have? Do you have anything to say?

MR. RODGERS: No.

MR. REYNOLDS: No, Your Honor.

MR. RUGGERI: No, Your Honor. No, Your Honor, we don't have any reason.

THE COURT: Do you have anything you wish to direct to the Court?

MR. RODGERS: Only that the execution take place as quickly as possible.

THE COURT: Under the law of this State, one convicted of the crime of murder in the first degree without a recommendation of imprisonment for life has the right to make an election between hanging and shooting as a means of having his life extinguished. What election do you make?

MR. RODGERS: Shooting.

THE COURT: The judgment and sentence of the Court is that you, James W. Rodgers, be executed by shooting. I fix the 17th day of March 1958, at sunrise on that day as the date for your execution, and you are committed to the custody of the Sheriff of this county who is charged with the execution of this sentence. Now I take it if there are no objections, no good objection, this man may be taken forthwith to the State Prison. This execution is to occur within the outer walls of the State Prison.

MR. REYNOLDS: I don't know of any reason why he shouldn't be.

THE COURT: I have fixed this date as the 17th day of March to give your counsel ample time to prepare an appeal to the Supreme Court. They advised me that you don't want to appeal. The Court is of the opinion, however, that in such a case as this that an appeal should be had so that what we have done here in this courtroom may be screened very carefully by a higher Court than this. You are committed to the custody of the Sheriff. Is there anything further that you wish to direct to the Court? Court is in recess."

Record on appeal was filed April 1, 1958.

POINTS RELIED ON FOR REVERSAL

Defendant, appellant herein, declares that the lower court erred in this cause and that its decision should be reversed because:

POINT I

The complaint charged the Defendant with "murder" and he was bound over to stand trial for "murder" which is a definitive term not constituting a public offense under the laws of this state, under these circumstances a conviction of murder in the first degree is contrary to and in violation of the laws of the State of Utah and the Constitution of the State of Utah and of the Constitution of the United States of America.

POINT II

That the Court erred in not granting Defendant's motion to quash the information made at the time of arraignment and before plea on the grounds that the Defendant did not have a preliminary hearing on the charge of first degree murder and the Court therefore was without jurisdiction to hear the case.

POINT III

That the Court erred in overruling the Defendant's motion to quash the information or in lieu thereof to amend same to conform to the charge that was made in the original complaint and the charge for which the Defendant was bound over by the committing magistrate to stand trial.

POINT IV

That the court erred in overruling the Defendant's objection to the introduction of any testimony with respect to first degree murder.

POINT V

That the Court erred in overruling Defendant's motion in Arrest of Judgment based on the following grounds:

- (a) That the Defendant is insane, and,
- (b) That the Trial Court was without jurisdiction to try the Defendant for the crime of murder in the first degree because the Defendant was charged in the complaint with what constitutes the crime of murder in the second degree; that the preliminary hearing was based upon said complaint and that the defendant was bound over by the committing magistrate to stand trial for the offense stated in the complaint to wit: Murder in the second degree.

POINT VI

That the Court erred in overruling the Defendant's motion for a new trial on the grounds that the verdict rendered in this case is not supported by the evidence and is in fact contrary to the uncontradicted evidence that the defendant was suffering from an organic mental disorder which rendered him insane and incapable of controlling his actions.

ARGUMENT

POINT I

“76-1-11. “CRIME” DEFINED. — A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, any of the following punishments:

(1) Death.

(2) Imprisonment.

(3) Fine.

(4) Removal from office.

(5) Disqualification to hold and enjoy any office of honor, trust or profit in this state.”

“76-30-1. “MURDER” DEFINED. — Murder is the unlawful killing of a human being with malice aforethought.

“76-30-3. DEGREES OF MURDER. — Every murder perpetrated by poison, lying in wait or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than the one who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life; — is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree.”

"76-30-4. PENALTY FOR MURDER. — Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the state prison for life, in the discretion of the court. Every person guilty of murder in the second degree shall be imprisoned at hard labor in the state prison for a term which shall be not less than ten years and which may be for life."

(a) Constitutional Provisions

THE FEDERAL CONSTITUTION provides:

Article V of the Amendments:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury; nor shall any person be subject for the same offense and be twice put in jeopardy of life and limb; nor be deprived of life, liberty or property, without due process of law;"

Article VI of the Amendments:

"In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation;"

THE CONSTITUTION OF UTAH provides:

Article 1 Section 12

"In criminal prosecution, the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, and be confronted by the witnesses against him, to have

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

It is the contention of this Defendant that the legislature in dividing murder into first degree murder and second degree murder and prescribing to the respective penalties therefor has created two crimes, the first of which necessarily includes the second as a lesser included offense. However, the first just as certainly is not included in the second. This contention is born out by the Supreme Court of Utah in the case of *State v. Avery*, Supreme Court of Utah, 125 P. 2d 803. The Defendant in the *Avery* case was accused in the Information of murder in the first degree and made the contention that under the laws of this state, there was no such crime as murder in the first degree. In its determination, the Court, speaking through Judge Keller, District Judge, used the following language.

"Sec. 103-1-11 defining "crime"; Sec. 103-28-1 defining "murder"; Sec. 103-28-3 dividing murder into two degrees and defining each; and Sec. 103-28-4 prescribing penalty for first and second degree murder.

The provisions of these sections are interrelated and in-

terdependent, so to speak, and from them we may make a number of conclusions, neither of which bears out the contention of the appellant. We may logically say that murder is a crime because it is an act punishable by death, or, upon recommendation of a jury, imprisonment for life, if of the first degree; or by imprisonment for a term not less than ten years and which may be for life, if of the second degree. Or, it is equally sound to say that the three sections considered together create two crimes; Murder in the first degree, because a punishment by death or life imprisonment is provided for the killing of a human being with malice aforethought, committed under the circumstances or having the qualities of premeditation and deliberation provided in the first sentence of 103-28-3; murder in the second degree, because a punishment of imprisonment of not less than ten years and which may be for life for the killing of a human being with malice aforethought, where the circumstances of aggravation which are present in murder of the first degree are absent, and under such circumstances as would have constituted murder at common law. But whether we consider murder in the first degree as only a grade or degree of murder, or as a separate crime, it is nevertheless a crime as defined by Section 103-1-11, *supra*."

In the Avery case, unlike the case at hand, the Court points out, at page 805 — By the recital that the defendant was accused of murder in the first degree, the accuser made the information definite and certain as to the punishment that would be demanded.

Under the constitutional provisions, as under the old common law, a person accused of a crime is entitled to be, at all stages of the proceedings, advised of the crime with

which he is charged . This principle was followed in *People vs. Hill*, Supreme Court of Utah, 3 U 334 3P 75. On page 78 of the *Pacific Reporter*, the Court state as follows:

“Section 158 of that act declares that the indictment is sufficient if it can be understood therefrom, among other things not called in question here, that the act or omission charged as the offense is clearly and distinctly set forth, without repetition, and in such a manner as to enable the court to understand what is intended, and to pronounce judgment, upon conviction, according to the right of the case. It is sufficient if the charge be stated with so much certainty that the defendant may know what he is called upon to answer, and the court how to render judgment. In other words, substantial justice should be more sought after than artificial nicety.

“Even under the above liberal rule, laid down by the legislature as our guide in determining its sufficiency, it is the duty of the prosecution to so frame every indictment as to apprise the defendant, with a reasonable degree of certainty, of the character of the charge preferred against him. The absence of a direct allegation of anything essential in the description of the substance, character, or manner of the crime, cannot be supplied by intendment. It is as much an essential requisite, under our criminal practice act, as it ever was, that all matter material to constitute the particular crime charged should be alleged with such positiveness and distinctness as not to need the aid of intendment or implication. All this is embraced in the fundamental declaration that it is the right of every person accused of a crime to be informed of the nature and cause of the accusation. These rules do not require any hypercritical

construction and interpretation of an indictment on the part of the court."

Stated in another way, it is the defendant Rodgers' contention any charge against any defendant must contain such facts as to accomplish the following objects:

1. To completely and fully advise the Defendant of the crime with which he is charged so that he can prepare his defense;

2. To protect the Defendant in the event he is again placed in jeopardy for the same offense or crime; and,

3. To sufficiently advise the Court in order that it may render proper judgment and sentence in the event the Defendant is found guilty.

In the case of *People vs. Bogdanoff*, 256 New York 16, 171 N. E. 890, 69 A. L. R. 1378, the Court said on page 1382 of 69 A. L. R. as follows:

"In this jurisdiction the courts have used a similar test in determining the sufficiency of indictments. In *People vs. Farson*, 244 N. Y. 413, 417, 155 N. E. 724, 725, the court said, per Pound, J.: 'The indictment is sufficient, if it identifies the charge against the defendant, so that his conviction or acquittal may prevent a subsequent charge for the same offense; notifies him of the nature and character of the crime charged against him to the end that he may prepare his defense; and enables the court upon conviction to pronounce judgment according to the right of the case.' In other jurisdictions the test has been at times form-

ulated in other manner, but the test has been essentially the same."

It will be noted in the Bogdanoff case unlike the case at bar, that the indictment charged the accused with "murder in the first degree, contrary to the Penal Law, Section 1044." The Court considered that the defendant was not in actual doubt as to the act to be proved against him. In doing so, however, the Court disapproved of the form of indictment and indicated in other cases it might be declared insufficient.

Note the language of the Court found at page 1387 of 69 A. L. R.

"The new forms may at times prove unwise. Doubtless if district attorneys insist upon using the form employed here, they will at times be unable to meet a challenge to the sufficiency of the description of a crime. Extraneous evidence may still leave uncertain at times whether an indictment for 'murder' or 'larceny' covers one crime or several. The evidence presented to the grand jury might cover several connected homicides or a series of defalcations with nothing to demonstrated which crime of the series was intended to be the subject of the charge. Then the courts will be compelled to discharge the accused. Too often the courts are called upon to point out that innovation does not necessarily imply improvement. With equal ease and with greater certainty the district attorney might have used, if he had chosen, a more precise form of indictment not subject to any possible claim that the indictment did not describe the same crime covered

by the bill of particulars. There must in every case be identity of accusation, and the indictment must describe the crime upon which the accused is held. It is the duty of the district attorney to formulate that description with such precision that it cannot be successfully challenged."

In the case of *State v. Spencer*, Supreme Court of Utah, 121 P. 2d 912 on petition for rehearing the court said:

"(1-3) The issues established by an information or a complaint and the plea of not guilty thereto constitute the foundation of each criminal trial. Upon those issues the relevancy of the proffered evidence is determined, such for instance as the question of the relevancy of the facts, ultimate or probative, set out in the bill of particulars. Under section 105-21-10, Chapter 118, Laws of Utah 1935 (our new code of criminal procedure), those issues are used to determine the sufficiency or the consistency of the particulars outlined in the bill of particulars. In the recent case of *State v. Hill*, Utah, 116 P. 2d 392, 397, we said: 'It is elemental that where a bill of particulars is furnished it may not set out a different crime than that charged in the information.' If, then, the information is indefinite as to the offense charged it is of no help in deciding those questions of the relevancy of evidence or those questions of the application of section 105-21-10, *supra*. "Our penal code defines certain offenses in general terms: Murder, section 103-28-1; manslaughter, 103-28-5; larceny, 103-36-1; perjury, section 2, Chapter 134, Laws of Utah 1937 — there may be others. Under each are set out, either as degrees of the general class

or designated by individual names, the offenses to which specific penalties are attached, the penalties being graded in severity according to the seriousness of the particular degree. Assume that I am bound over to stand trial for murder in the second degree. The district attorney files against me an information charging as follows: E. P. murdered C. D. (see form 'murder', section 105-21-47, Chapter 118, Laws of Utah 1935). Assume that upon the face of that information there are no words limiting 'murdered' to either degree. At my trial the prosecution offers evidence of murder in the first degree. I object upon the ground that the offense with which I am charged is murder in the second degree. But the issue established by my plea of not guilty to the charge in that information is not limited to either degree, and is broad enough to include both. The allegations of that information are of no aid to a solution of the question raised by my objection. No particular offense has been charged against me. There is no punishment for merely the general definition of murder. An accused is not found guilty of a class of offenses, but of one of the class (see section 105-25-3, Chapter 122, Laws of Utah 1935, hereinafter discussed). This Spencer case parallels my illustration, substituting the offense of perjury for that of murder."

"Assume an accused is bound over to stand trial for murder in the first degree. The information filed charges the offense by general definition, to wit, murder — no degree is mentioned. A bill of particulars is furnished. Inadvertently the prosecution omits some

of the facts which it believes will support first degree murder. This results in the bill supporting only murder in the second degree. The accused moves to quash the information on the ground that the facts set out are not sufficient to support murder in the first degree. The prosecution, discovering the error, moves for permission to include the additional facts, contending that they have charged the greater offense. Section 105-21-10, *supra*, requires a comparison of the bill with the information to determine the sufficiency of the former. Such a comparison in this assumed case is of no aid to a solution of these motions. The information, if good at all, is good for either degree of the offense, but which one is intended is not indicated.

“(5) The information or the complaint, as the case may be, should stand upon its own feet. Until a particular offense as distinguished from the general definition of the class of offenses, is charged, the accused should be under no obligation to demand a bill of particulars at the risk of waiving some of his rights by failure to make such demand. Incidentally, of the bill of particulars was contemplated as the means of supplying elementary defects in the information, then of what use are sections 105-21-12 to 16, both inclusive, Chapter 118, Laws of Utah 1935? These sections cover matters of time, place, value or price, and ownership. This brings me to a discussion of certain sections of this new code upon which respondent seems to place considerable reliance.

Under the old form of pleading, facts were alleged directed to the particular degree of the offense, **wheth-**

er named as a degree or by an individual name. The objection to the old form of pleading was its verbosity and complexity. See the quotations in *State v. Hill*, supra. To avoid such pleading, the legislature adopted the simple form of pleading of Chapter 118, supra.

In adopting that chapter, however, the legislature had no intention of permitting the prosecution to jeopardize the accused's rights by evasiveness nor vacillation. The accused is an innocent man. His prosecution—and the prosecutor—should be impartial. It is as much the duty of the prosecution to recognize his innocence as it is to accomplish a conviction, if the facts justify it. The code of criminal procedure is not intended as a substitute for insufficient facts.

Section 105-21-8 of Chapter 118 permits charging the offense by name, by definition, or by section or subsection number. These methods of pleading may be accomplished by referring to the offense by the name given to the degree, by defining the degree of the offense, or by referring to the section and subsection number of the degree of the defense. For all practical purposes it is no more verbose nor complex to refer to the offense as murder in the second degree than to say merely murder — the former has the advantage of being definite in substance and as to penalty."

"Are the forms given in section 105-21-47 to be used blindly, or are they to be used with modification or limitation as our penal code or the rights of the accused may require? The latter seems the sensible conclusion to reach. Again I invite attention to sections 105-21-12 to 16 inclusive. These sections imply the use

of more particularity than is required by the forms found in section 105-21-47. I am of the opinion that these forms are merely exemplary, and are not intended as sufficient if they do not include the elements or the name of the particular offense defined in the penal code, for which a penalty is provided."

"(7) In 27 Am. Jur. 655 at page 666, section 105, there is a brief discussion of such sections as this. Reference is made to the case of State v. Roy, 40 N. M. 397, 60 P. 2d 646, 658, 110 A. L. R. 1. In New Mexico the information and the bill of particulars are considered together to determine the offense charged. In this cited case the offense charged is murder in the first degree. Speaking of a section of their rules of practice similar to the section of our code quoted above, the court said: 'We have held that the charge of first degree murder includes second degree murder and voluntary manslaughter. Under the present practice an information in one count charging murder in the first degree includes therein murder in the second degree and voluntary manslaughter.' Such a statement does not answer the question of how to charge only the lesser degree in an information — may it be charged simply as murder, or should it be charged as murder in the second degree? If the former is to be the interpretation, then one is met with the uncertainties and and indefiniteness I have illustrated and discussed in this opinion; not to mention the grave question of whether or not section 105-21-38 quoted above does away with due process for the accused. I have in mind the principles applied in cases where state legislatures

sought to eliminate the necessity of supporting enhanced penalties by pleading, and which efforts of the legislatures have been held unconstitutional. One of those cases from Massachusetts (*Com. v. Harrington*, 130 Mass. 35) is cited in the annotation to 58 A. L. R. 20, at page 67. This section 105-21-38 should be limited to the meaning given to it by the New Mexico court — that when the greater offense is charged it includes the lesser without specific allegation of the latter.

The penalty attached to an offense is of importance to the accused. It may mean the difference between prison and jail for him; it may mean the difference between a felony and a misdemeanor; or it may determine his right to bail (105-44-3 and 4, R. S. U. 1933). In cases calling for enhanced penalties for habitual criminals the authorities uphold the necessity of pleading to support the additional penalty. 25 Am. Jur. 273 section 26; 14 R. C. L. 190 section 366; and the annotations in 58 A. L. R. 20, at page 64; 82 A. L. R. 366, and 116 A. L. R. 229. In the forms of 104-21-47, *supra*, is one for habitual criminals, setting out pleading of the previous conviction. The accused is as much interested in the initial penalty as he is in an enhanced penalty. It would seem, then, that if the enhanced penalty must be supported by a pleading indicating that such a penalty is in order in a particular case, the initial penalty should also be so supported. But it is not so supported if the accused is unable to determine from the information or the complaint which penalty is applicable to the case.

(8) Respondent cites section 105-25-9, Chapter 122, Laws of Utah 1935. It reads: 'Where an information or indictment charged an offense which is decided into degrees without specifying the degree, if the defendant pleads guilty generally the court shall, before accepting the plea, examine witnesses to determine the degree of the offense of which the defendant is guilty.'

This section is not evidence that the legislature thought the degree of crime was only material when it came time to impose sentence. The section provides that before the plea is accepted — not before penalties are imposed — the degree of the offense must be determined. It is a strange thought, indeed, that an information charging an offense by general definition is not sufficient to support a plea of guilty where there is no controversy between the parties, and yet, that same information is sufficient to support a plea of not guilty where there is a controversy between the parties, which controversy may raise many questions the solution of which depends upon the degree of the offense intended to be charged. It is not sufficient to answer that section 105-25-9, *supra*, was passed to prevent an accused from being placed twice in jeopardy for the same offense. The accused is as greatly concerned about his life or liberty being jeopardized once as he is about the possibility of a second offense. This section is rather strong evidence that in the eyes of the legislature pleading by general definition was not considered sufficient foundation for a trial and conviction of an accused.

In conclusion I quote from the prevailing opinion in

People v. Bogdanoff, 254 N. Y. 16, 171 N. E. 890, 895, 69 A. L. R. 1378, cited in the case of State v. Hill, supra, upholding the short form of pleading: "The new forms may at times prove unwise. Doubtless if district attorneys insist upon using the form employed here, they will at times be unable to meet a challenge to the sufficiency of the description of a crime. Extraneous evidence may still leave uncertain at times whether an indictment for 'murder' or 'larceny' covers one crime or several. The evidence presented to the grand jury might cover several connected homicides or a series of defalcations with nothing to demonstrate which crime of the series was intended to be the subject of the charge. Then the courts will be compelled to discharge the accused. Too often the courts are called upon to point out that innovation does not necessarily imply improvement. With equal ease and with greater certainty the district attorney might have used, if he had chosen, a more precise form of indictment not subject to any possible claim that the indictment did not describe the same crime covered by the bill of particulars. There must in every case be identity of accusation, and the indictment must describe the crime upon which the accused is held.' "

It is the further contention of the defendant Rodgers that if any interpretation at all can be placed on the charge that was made against the defendant in the complaint by use of the definitive term "murder" it must necessarily be interpreted as murder in the second degree.

In State v. Russel, Supreme Court of Utah, 106 Ut. 116, 145 P. 2d 1003, Justice Wade stated in part, at page 1007

of the Pacific Reporter as follows:

"Section 103-28-1, U. C. A. 1943, defines murder as the lawful killing of a human being with malice aforethought. This is simply a codification of the common-law definition of murder. The legislature did not thereby attempt to define, in its own language, what constituted murder at common law, but merely adopted the common-law definition of murder, which means that we have also adopted the interpretation placed thereon at common law. It is that in 4 Blackstone's Commentaries 194, in his definition, quoted from Sir Edward Coke, he uses not only the terms used by our statute but other terms which express our fundamental concept of the necessary elements of crime. He also adds that malice may be expressed or implied. This statutory definition is now the accepted definition or description of murder in practically all of the states. 1 Warren on Homicide, Sec. 63 and 64; 1 Wharton's Criminal Law, 12th Ed., 625, Sec. 419; 2 Brill's Cyclopedia of Criminal Law, 1025, Sec. 614; State v. Lowe, 93 Mo. 547. 5 S. W. 389; People v. Davis, 8 Utah 412, 32 P. 670; People v. Halliday, 5 Utah 467, 17 P. 118. It was obviously the legislative intent to merely adopt the common-law definition of murder together with the construction placed thereon by the courts as 103-28-3, U. C. A. 1943, divide murder into two degrees and after stating what constitutes murder in the first degree it provides that "any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree."

Thus under the definition of the crime of murder as defined by the Supreme Court of the State of Utah, if the Defendant James W. Rodgers in this case, was charged

with any crime, he was charged with the crime of second degree murder in the complaint and that he was likewise bound over to the District Court to stand trial for the offense of second degree murder and that his objections to being tried for first degree murder were timely and should have been granted and that the court in overruling his repeated protests acted arbitrarily and without regard to the constitutional and statutory rights of the Defendant and contrary thereto.

POINT II

Pertinent provisions of the Utah Code of Criminal Procedure applicable to Point II are set forth below:

77-23-1 Utah Code Annotated 1953.

“TIME TO MOVE TO QUASH OR PLEAD. — Upon being arraigned the defendant shall immediately, unless the court grants him further time, either move to quash the information or indictment, or plead thereto, or do both. If he moves to quash, without also pleading, and the motion is withdrawn or overruled he shall immediately plead.”

77-23-3 Utah Code Annotated 1953.

“MOTION TO QUASH — GROUNDS. — A motion to quash the information or indictment shall be available only on one or more of the following grounds. In the case of:

(1) Either an information or indictment:

(a) That it does not charge the defendant with the commission of an offense.

(f) That the court trying the case has no jurisdiction of offense charged or of the person of the defendant.

(2) An information:

(a) That an information was filed without the defendant first having had or waived a preliminary examination.

(c) That the prosecuting attorney had no authority to file the information.

If a motion to quash is based on an alleged defect in the information or indictment which can be cured by amendment the court shall order the amendment to be made and shall overrule the motion."

Article 1, Section 13, Constitution of Utah.

(Prosecuting by information or indictment in grand jury.)

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur and find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district public interest demands it.

State v. Jensen, Supreme Court of Utah, 136 P. 2d 949. The court said on page 951 of the Pacific Reporter as follows:

" Was the defendant given a preliminary hearing for the offense of which she was convicted? If she was not the cause must be reversed, regardless of the other

claimed errors in the trial. That defendant cannot lawfully be tried and convicted on a charge upon which she was not given or on which she did not waive a preliminary hearing is elemental. Constitution of Utah, Art. 1, Sec. 13; Section 105-1-4 R. S. U. 1933; being Section 105-1-4 U. C. A. 1943; State v. Johnson, 100 Utah 316, 114 P. 2d 1034; State v. Leek, 85 Utah 531, 39 P. 2d 1091; State v. Spencer, 15 Utah 149, 49 P. 302."

Quoting from page 955:

"Since defendant was convicted of uttering a forged instrument, and there was no such charge in the complaint, it follows defendant was not given a preliminary hearing for the offense of which she was convicted.

The cause is reversed and remanded to the District Court for further proceedings consistent herewith."

In State v. Pay, Supreme Court of Utah, 146 P. 300, the defendant was charged with larceny in the complaint and charged in the information with marking sheep with intent to steal.

"(3) It should here also be stated that, in all that this court has said upon the right of a preliminary examination and respecting the right to waive, it shows that the right has been regarded as a substantial one, and that it had reference to the charge preferred against the accused in the complaint. See State v. Jensen, 34 Utah, 166, 96 Pac. 1085; State v. Hoben, 36 Utah, 186, 102 Pac. 1000."

Points numbered III, IV, and V insofar as they relate to the sufficiency of the pleadings and constitutional rights

and guarantees of defendant have been heretofore presented in the above arguments relating to points 1 and 2.

POINT NO. VI

Point six resolves itself to the question of the sanity or insanity of the defendant. It is contended that the defendant is insane due to the organic disease of syphilis which has centralized in the central nervous system and which, has robbed him of his ability to control his impulses or actions.

The defendant relied on the defense of insanity and on this part see page 5, lines 4 through 24 of the transcript:

“MR. REYNOLDS: Your Honor, there are two preliminary matters that I think should be called to your attention. The statute requires that at least four days prior to the commencement of the trial a written notice be served on the District Attorney informing him of the Defendant’s intention to take advantage of the plea of insanity and raise that question and make it an issue in the trial. The notice was given to Mr. Bunnell by phone that we intended to do that, and I understood that I could file the written notice later, and I think that it can be stipulated can’t it, Mr. Bunnell?

MR. BUNNELL: We have no objection, Your Honor.

THE COURT: There can’t possibly be any claim of surprise, because at the very beginning of this case it was announced that would be the defense, so the record may show that, if you have now filed written notice — Have you filed it?

MR. REYNOLDS: Yes, it has been filed, Your Honor.

THE COURT: That the State waives any claim relative to the time of its filing."

The following are pertinent provisions of the Utah Criminal Code, to wit:

76-1-41, Utah Code Annotated 1953.

"Who are capable of committing crime. — All persons are capable of committing crimes, except those belonging to the following classes:

(1) Children under the age of seven years.

(2) Children between the ages of seven years and fourteen years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness.

(4) Lunatics and insane persons.

(6) Persons who commit the act charged without being conscious thereof.

77-48-1, Utah Code Annotated 1953.

"Insane persons not to be punished for crime. — No person while insane shall be tried, adjudged to punishment or punished for a public offense."

The Utah Supreme Court is committed to the proposition that the defendant in criminal cases is insane and shall not be tried, adjudged to punishment or punished for a public offense when the accused:

1. Did not know the nature of his act.

2. Did not know it was wrong in the sense that such an act was condemned by morals or law; or,

3. Was unable by reason of his mental disease to control his actions or impulses to injure or kill.

Speaking for the Court in *State v. Green*, Supreme Court of Utah, 78 Ut. 580, 6 P. 2d 177, at pages 184 and 185 of the Pacific Reporter, Justice Hansen says:

“Insanity may be a complete defense to a criminal act, it may reduce the degree of the offense where the crime is divided into degrees and where a particular intent is a necessary element of the greater degree, and it may neither excuse nor mitigate the offense. Insanity is effective in warding off or reducing punishment for crime only when it renders the person so afflicted irresponsible or partly irresponsible. Assuming that the jury in this case found from the evidence beyond a reasonable doubt that the defendant shot and killed James Green as charged in the information, he would be entitled to an acquittal if at that time he was, as a matter of fact, insane to such an extent that he either (1) did not know the nature of his act, that is, did not know that he had a revolver, that it may be loaded, and that, if discharged at or towards James Green, it would probably injure or kill him; or (2) that when he fired the shot he did not know it was wrong in the sense that such act was condemned by morals or law; or (3) that he was unable by reason of his mental disease to control his actions or impulses to injure or kill James Green. If the defendant was afflicted with a disease of the mind at the time of the alleged offense in any one or more of the three manners and to the extent indicated, then and in such case he was not legally responsible. In some jurisdictions a plea of in-

sanity, to be available, must be established by a preponderance of the evidence, but such is not the law in this state. In this jurisdiction evidence which raises a reasonable doubt in the minds of the jury as to the sanity of the accused at the time of the alleged offense entitles him to an acquittal."

"This court has not directly passed on the question as to whether or not a person is legally responsible where he knows the nature and quality of his act and also knows that the act complained of is wrong, but because of a diseased mind is unable to control his conduct. That question was apparently not presented, or, if presented, was not discussed, in the case of *State v. Brown*, supra, and moreover *Brown* was found, as a matter of law, to be insane. The doctrine of irresistible impulse was referred to in the case of *State v. Mewhinney*, supra, but was not determined. In that case it was held the evidence was insufficient to raise the question of insanity. It is the general, if not the uniform, opinion of those who have made a careful and scientific study of mental diseases, that some forms of insanity are characterized by inability of the person afflicted to choose the right and avoid doing the wrong. In the light of such generally accepted views coming from those who are best qualified to speak on the subject, we are of the opinion that courts are not justified in holding that, as a matter of law, no such form of insanity exists, or that such insanity does not render the person so afflicted legally irresponsible. One who knows the right but because of mental disease his will is so deranged or disordered

that it fails to function and cannot direct or control the acts of the person so afflicted is and should be recognized as being legally insane. Volitional ability to choose the right and avoid the wrong is as fundamental in the required guilty intent of one accused of crime as is the intellectual power to discern right from wrong and understand the nature and quality of his acts. In reaching this conclusion, we are not unmindful that many courts have reached a different conclusion."

"The only irresistible impulse recognized as a complete defense to a crime is one arising solely from a mental disease."

It is submitted to this Court that the medical testimony concerning defendant's defense of insanity and the state's rebuttal which appears in the transcript of the testimony at pages 219 through 280, is uncontradicted and establishes beyond all reasonable question of a doubt that the defendant is suffering from syphilis which has centralized in the central nervous system and which had affected his mind at the time of the fatal incident to the extent that he was so deranged and disordered that he could not control his acts. The jury, for reasons best known to them, have disregarded the undisputed and established facts and the instructions of the Court on the question of insanity.

While it is conceded that the appellate court will not ordinarily interfere with a verdict of the jury, it is submitted that it is proper for it to do so where the verdict is clearly and palpably against the weight of the evidence. It is further submitted that in this case there is a

total lack of proof to sustain the verdict.

We quote from 5 C. J. S. page 638-639 and 655, which sets forth the general principle applicable as follows:

“It is well settled that the verdict will be set aside when it is clearly and papably against the great weight of the evidence, where there is a total lack of proof to sustain the verdict, where the evidence is legally insufficient to support the verdict, where there is a strong preponderence of evidence over that on which the verdict is based, and it appears that injustice has been done or where manifest injustice thereof shows mistake, prejudice, sympathy, corruption, or other improper motive on the part of the jury, or where the verdict is so contrary to the weight of the evidence as to shock the ordinary fair minded person.”

In support of defendant Rodgers' argument that the jury rendered a verdict contrary to the overwhelming weight of the evidence with respect to the question of the sanity of the defendant, we assume that the Court will examine all of the medical testimony in detail. However, for the purpose of emphasizing such testimony, we take the liberty of quoting extensively from the testimony of the witnesses with respect to the question of the sanity of the Defendant.

Dr. Chester B. Powell, an M. D. specializing in the field of neurology and neurosurgery, testified on behalf of the Defendant to the effect that the Defendant had syphilis of the central nervous system, that is, the brain and spinal cord. The significant portions of the testimony of Dr. Powell are set forth below, beginning at page 220 et seq of the transcript of the trial:

"Q. Now, Doctor, do you know the Defenrant, James Rogers?

A. Yes I had occasion to examine him on December 3, 1957.

Q. Now, Doctor, what did this examination include?

A. I took a history from the patient. Including any symptoms he might have. I discussed his background with respect to diseases, illnesses. The family from which he came. I then examined him with particular reference to the nervous system. Which is a rather detailed examination including the test of the eyes and of the various nerves that come off the brain. The extension movement, patient co-ordination. Reflexes when we tap with the hammer. I checked his sensation in various forms like touch, pain, vibration, so forth. And had him walk. Examined his posture and gait. Sense of balance. Looked for special signs. And then finally did a brain wave test on him.

Q. Now, Doctor, in your practice have you had experience with persons who have had syphilis of the nervous system?

A. Yes.

Q. Now in connection with your examination of this Defendant and assuming the fact, Dr. Powell, that there had been two positive serologies of the spinal fluid of this Defendant, do you have an opinion of what that indicates?

A. Yes, the indication is syphilitic infection.

Q. Now, Doctor, assuming also the fact that there have been two serologies of the Defendant's blood which

were negative, what would that indicate to you in relationship to the positive spinal serology?

A. Well in most cases where there is a syphilitic infection somewhere in the body the blood test is positive in some degree. It often is positive in the spinal fluid. Now if there is an infection in the nervous system itself, that is to say, the brain or the spinal cord, then in most instances the spinal fluid also shows a positive serology. However, this isn't a hundred percent the case. In about ninety five to ninety-seven percent of patients infected with syphilis in the nervous system the spinal fluid serology is positive. And in some three to five percent of the cases it may be negative. The blood likewise is not a hundred percent positive when, particularly when the syphilitic infection is in the nervous system. About three percent on the average of patients with syphilis of the nervous system will show a negative blood serology.

If neither blood or spinal fluid serology is positive, then the diagnosis of syphilis can be made, but it has to be made on other grounds. And it is a rather difficult and suspecting diagnosis in that instance. But if one or the other serology, blood or spinal fluid, is positive then the, that alone presents the presumptive diagnosis of syphilis.

Q. With respect to this Defendant, Mr. Rodgers, is the diagnosis a strong or weak diagnosis?

A. The diagnosis of syphilis in this instance depends on the spinal fluid serology. I have considered that in his case since we have a question posed by the fact that his blood serology is negative. And also by the fact that he doesn't have any prominent clinical signs of syphilis. In

other words, when we examined him we don't find the usual changes in the reflexes and the coordination and so forth that we might expect to find in some degree. So I was particularly concerned about the diagnosis.

Now there are other possibilities of known, known to occur which are quite rare, and which other factors can produce a positive syphilitic reaction. It is called a false positive. In other words, you get the reaction but it doesn't mean what it says.

Q. Well now may I interrupt, Doctor. Are those occasions of false positive common?

A. No, they are exceedingly rare. And they may occur under certain circumstances such as the following: In this country most often we see it happen when a patient has a brain tumor which causes a secretion of protein into the spinal fluid, and in very rare instances when the protein is quite high this may produce a false positive.

In the tropics there are certain tropical diseases which are infrequent and do not occur in this climate which can also produce a false positive reaction.

There is also an acute infection of the lymph glands of the body and this disease occurs in this country, which has been reported on rare instances to cause a false positive.

Now because of the lack of a positive blood serology I wondered in this instance in this patient whether the positive serology in the spinal fluid could be so-called false positive. So I considered his findings, and he does not have, neither by examination or by the brain wave, any evidence of

brain tumor. And, furthermore, his spinal fluid protein is normal. Secondly, he has no signs of this lymph gland disease. Thirdly, he has no signs, and there is no basis for making any diagnosis of a tropical disease. So there is no evidence whatever to suspect that the positive serology is a so-called false positive. The only conclusion that I can come to then is that this reaction which is a standard diagnostic test, highly reliable, used throughout the world, means that this man has an infection with syphilis and specifically in the nervous system.

Q. Now, Doctor, when you say in the nervous system, does the fact that it is taken from spinal fluid have any particular significance?

A. In what respect?

Q. Well, what are the vital organs of the nervous system?

A. We divide the nervous system in two major parts. The central nervous system which is the brain and spinal cord, and the nerves constitute the other part. The nerves in the arms and legs. Throughout the body. The spinal fluid is associated with the central nervous system. Produced in the brain, circulates through the brain, around the brain and down the spinal canal. So when we encounter an infection of the nervous system such as syphilis the evidence of that infection is found in the spinal fluid.

Q. Now when one has syphilis of the brain and the spinal cord, what is the effect on the brain and spinal cord?

A. This is a loaded question.

Q. Perhaps I shouldn't have asked it, but try please.

A. Almost any, any symptoms having to do with the nervous system and almost any signs we see in the way of weakness or change of sensation, change of reflexes, in coordination, mental changes, paralysis, almost any change that reflects something wrong in the nervous system can be caused by syphilis. It has been called the great imitator because it can simulate so many other diseases. So the medical profession from time immemorial has been alerted to suspect this condition and keep a watchful eye for it because it may appear in so many guises.

Q. Now — Pardon me

A. Let me —

Q. Go right ahead.

A. Let me go a little further. I can just enumerate briefly some of the varieties of disorder that syphilis in the nervous system causes. In the acute infection it causes an acute inflammation of the brain and spinal cord. And the covering. It may, in fact, produce a meningitis like spinal meningitis. Later on it produces scarring in the tissue. And this scar may affect predominantly the brain or predominantly the spinal cord, or predominantly the blood vessels in the brain, and depending on which area is involved the symptoms will vary. If it involves the brain it will affect the functions of the brain. And it will produce symptoms like a headache. Loss of memory. Any mental symptoms. Impairing of thinking, vision. Impairment of vision or hearing. Impairment of speech, and produces mental changes and very commonly does as it progresses. In the

spinal cord it produces usually weakness in the extremities and loss of coordination. With impairment of gait, loss of balance. When it affects the blood vessels of the nervous system it usually produces some indication of both brain and spinal cord symptoms. Any of these infections, any of these localizations of the infection will produce usually a positive serology both in the blood and the spinal fluid.

Q. With respect to the mental changes which this disease causes, would you explain to the Court and Jury please what some of those are?

A. In the same way that syphilis can simulate other organic diseases like brain tumor and injury, it can also simulate mental disease itself. In other words, mental changes that are associated with syphilitic infection of the brain can duplicate other types of mental disease. But most often it produces changes in the realm of thinking. Which result in what we call delusions.

Delusions are false beliefs. The person is deluded. He may believe he is the President of the United States. Or God. That is a false belief. But in his mind that is the truth so far as he is concerned. The delusions that are characteristic of syphilitic infection of the nervous system take on a variety of patterns. Usually they are ideas of grandeur, in which a person will feel that he is important, that he has great powers. He will identify himself as the President, as a general, for instance. And very often he is either God or Jesus or someone else of great religious significance.

The other type of delusion apart from grandeur and expansiveness includes things like feeling that they have great wealth. Feeling that they can control people's actions.

And then another large set of delusions are what the doctors call ideas of reference in which the patient refers everything to himself. In terms of himself. If he sees a policeman coming down the street he is apt to think, well I better get out of here because this policeman is obviously after me. In other words, he doesn't have the normal reaction, well there goes John or there goes a cop. But he references the policeman and the situation to himself. These ideas of reference may take a pattern of fear, or they may take the pattern, and this is a very common group called paranoid. In which these ideas of reference in the patient's mind imply a threat. These, many such patients are the ones you read about in the papers who suddenly kill someone else and afterward they say, well I was threatened. These are the dangerous lunatics. They are the ones if we can recognize them beforehand are the ones that are committed to the State Hospital and often have to be put into confinement because they are the individuals who feel that Russia, the Russians are after them or their wife or their husband is after them, that all the policemen are after them. All the ideas of reference apply to themselves and imply a threat and they are very unhappy people because they are so terribly endangered. And these are the ones that because of this danger that their delusions tell them they are threatened with, they have to protect themselves and this often means fighting or committing some violent act to ward off the threat."

Q. I see. Of course, Doctor, even if we assume that he has syphilis of the, at least that the test showed a positive in his spinal fluid, we don't know that the central nervous system or brain has been affected at all do we?

A. The implication of the positive serology in the spinal fluid is assuming that it is not a false positive?

Q. Yes.

A. There is infection in the nervous system. Syphilitic infection of the nervous system, and I think that with that, that that implication is unaltered by the fact that there were no clinical signs or brain wave changes."

"Q. Doctor, are these psychiatric examinations and psychological examinations a part of the, the examinations normally employed in diagnosis of syphilis of the brain?

A. Would you restate your question?

(Question read by reporter.)

A. Yes. Psychological tests are very important because very often the psychologic tests provide the basis for the clinical diagnosis of central nervous system involvement."

Dr. John Landward appeared on behalf of the Defendant to testify as a clinical psychologist. An examination of the transcript will demonstrate the qualifications of Dr. Landward. Dr. Landward's testimony is most significant because of the fact that his examination shows to have been conducted without reference to any history of the behavior of the defendant and designed primarily to accomplish an analysis of the mental condition of the Defendant by use of objective tests. The testimony of Dr. Landward eloquently demonstrated the discovery of organic mental disorder and we quote extensively from the testi-

mony of Dr. Landward as follows, beginning at page 232 et seq of the transcript, to wit:

“Q. Now how would you define or classify mental disorder?

A. Well there are two general broad classifications. One you call the organic and having to do with the, primarily the physical aspect and the functional that has primarily to do with the emotional and personal aspect.

Q. Would you define the organic type?

A. The organic has to do primarily with the, what we call the neurological or the nervous system and this has to do with various kinds of damage to the nervous system. Particularly the central nervous system and damage being caused by various agents such as disease, encephalitis, syphilis, poison, physical damage, and so on. Is that what you had in mind?

Q. Yes, thank you. On the other hand, how would you define the functional type disorder?

A. The functional type primarily has to do with the influences of the environment upon the person, and how this molds the person into the kind of person he is. His basic attitude. His viewpoint or what you might call his life style. Style of life.

Q. Is there any relationship between the functional type mental disorder and the organic type mental disorder?

A. Yes. You can't separate the physical from the person because they are inter-related. We have to use them both. And very frequently damage to the physical affects

the personal attributes and expressions and manifestations of the person. And likewise in reverse."

Q. Now in your examination of the subject what procedures do you use to determine if there are any indications of an organic disorder?

MR. BUNNELL: Your Honor, I think that I will object to this unless we can tie it in with this case some way. The general procedures he uses in organic disorders, can't we tie it down to this Defendant and get on with it?

THE COURT: Well I don't know myself. He is laying a foundation for some other judgement, so he may proceed. I can't tell as yet.

A. Well the, my, as I would see it my primary involvement in the situation was to give the Defendant some psychological tests. Which is one of the primary functions of the clinical psychologists and psychiatrists determination, and the tests that I used in regard to the Defendant are the following: What we call the Wexler Adult Intelligence Scale. Rorscach Ink Blot Test. The Bender-Gesthalt Motor Test. The Schematic Apperception Test, and a Sentence Completion Test. Now the way that you asked the question I think I should clarify this. That I, when I tested the Defendant I had no notion that this man might have some organic involvement. I was merely giving him a battery of tests to evaluate him as a person, his viewpoint, attitude, function, intellectual function and so on.

Q. Pardon me, Doctor, on what day was that examination conducted by you?

A. November 23, 1957.

Q. Now with respect to each of the examinations that you gave the Defendant would you explain the nature of the examination and the result if you will please?

A. Well I usually give these tests in a certain sequence. I am accustomed to it. The very first test that I gave to the Defendant was this Bender-Gesthalt Motor Test. This is composed of some cards, eight cards on which there are some rather simple figures. And the test is for the person who takes the test to copy these figures. I present them to him one at a time, and the instructions are, "You copy this on a blank sheet of paper the best way that you can." Those are all the instructions that I give to the person who takes the test.

And as he finishes one figure, copying or drawing the figure as he sees it on the card I present, I withdraw that card and present the next one. So on through the sequence of these cards. Now it is generally well known that individuals who suffer some damage, physical neurological damage, this shows up in their physical coordination and so on. And though this may appear to be a rather simple thing, what we call eye-hand coordination, we learn this as we grow up so we just take these things for granted; but when some of the nerves are damaged then this comes up, and we notice people not being able to reproduce these particular figures accurately. And there are two or three of these particular figures which we know from studies that have been made, psychological experiments that have been made with the brain damaged people, particularly what we call a figure ground kind of operation, intellectual operation which involves expression of this, or through the use of the muscles

that in, people these processes of clearly seeing the figure and ground, and I don't know how to express this, but when he gets used to say this scenic country out here and you get to seeing things you get accustomed to seeing things in certain locations. And if something happens to you they look kind of odd to you and funny to you and this is just on the area of perception, but when you attempt to reproduce the things with muscles this is difficult, and particularly this one figure in my experience with these kind of people they have difficulty in what we call the overlapping figures on that one card. And in the Defendant's case, as I say, I had no notion of what, as far as I was concerned this was going to be an evaluation of him as a person, and I give this test routinely. Pick up any clues that I might look for in the rest of the battery of the tests that I give to these individuals. And I noticed that on this particular card that this man had a good bit of difficulty of reproducing these overlapping figures. I asked him to try it again. He did so and went through the exact process. He acknowledged his difficulty. I don't recall exactly what he said, but some difficulty he recognized of drawing this thing the way it was done by people who don't have this kind of difficulty.

Q. What did you conclude from that inability?

A. I concluded then on some of the other tests that I gave that I would then examine this particular, what I perceived as an impairment or disfunction, and see if I would be able to discern this as I went along through the other tests of, that also are sensitive to brain damage. Should I go on and tell what these are?

Q. Let me ask you this question first. Did you make any

recommendation with respect to this impairment?

A. You mean at the conclusion of my examination? Yes.

Q. Yes.

A. Yes I did. I suggested that this man be examined further by other clinical procedures. Particularly procedures that are used by neurologists. I didn't specify, I left that up to the person that you might refer the Defendant to. Ordinarily I think, I think when I talked to you, I think I at least mentioned that he get an E. E. G.

Q. Now what did then your examination include other than that matter you told us about?

A. It included these other tests that I mentioned that I used in the battery. The Wexler Bellview Adult Intelligence Scale is a test that is widely used throughout the country in hospitals and clinics for evaluation of intellectual performance. There are two or three of these what we call sub-tests. And are tests that are used to detect any brain damage impairment. One of these is what we call the block design test. This is made up of nine little blocks that are colored white and red and they have a white side, a red side and half of them, some of them have a half red and white. A person who takes this particular test, we have some designs which we present to them and ask them then to take these blocks and to put these blocks together so that they come out with the design matching the one on the card that we give them. Now to the extent that they find difficulty in doing this, of course, we have to inquire as to what their problem was, how they perceived this. If they seem to be puzzled or did it wrong, then of course we

have to inquire and find out what the particular problem is. And again, in people who have brain damage they have a feeling or idea that they know how to do it but just can't quite fit it together, and this again is what we call a sort of impotence. This is one of the technical terms that we use, but it is used in the sense that a person has a sense of knowing what needs to be done, but not being able to do it. And Mr. Rodgers on this particular test had difficulty on again one of these designs that is particularly sensitive to people who have brain damage. Now this was my second corroborative bit of evidence that I picked up from the previous test.

Q. Then what did you do next in your examination?

A. Then I go to the ink blot test which consists of ten cards on which there are some designs again. I have these thing with me if you want me to show the people.

Q. You might demonstrate this one, Doctor.

A. These are the ten blocks. They are just made from ink blot designs. The man who worked with this technique was a man by the name of Rorschach. He was a Swiss psychiatrist and that is why it is called Rorschach, after Dr. Rorschach. And he used these to have people look at and then tell him what he thought they saw in them or imagined they could look like or resemble and so on. And this is again one of the standard techniques that we use to examine people, mentally disturbed, emotionally disturbed people. And from it we get some pretty clear ideas. Sort of a quick cross section of how they react to stimulus and environment, social, psychological situations.

Q. Now with respect to the Defendant —

A. And in this — I was coming to that. Again in this test a person with brain damage shows up particular difficulty. Again it is the same kind of difficulty that you pick up in the block design test. The difficulty in pulling together in the whole sense, what we call an integrated sense, a particular image that appears to him that he formulates in his mind and tell me what he sees there. This is particularly true in people of what I call good intelligence.

Now I haven't mentioned this, and you haven't asked me for it, but I will state it here. Mr. Rodgers is a person with what we would, a person with intelligence. In the I. Q. tests he had an average I. Q. test of 122 which places him in what we call the superior intellectual group. On some of the sub tests that I, have to do with abstract reason, he was what we call a very superior level of intelligence, coming out with an I. Q. of 132. So these kind of people who have this level of intelligence, coming out with rather simple concrete kinds of ideas, together with the other evidence that I had accumulated in the other two tests, in my experience this again is another evidence to me that this man is not living up to or expressing his potentialities, and the number of cases that I have seen usually have been substantiated as having some kind of brain disfunction or brain damage.

Q. Was that indicated by the result of Mr. Rodgers test on this Rorschach Test?

A. Yes. Perhaps I didn't make that clear. But again I used this as an, another bit of evidence from the total bat-

tery of tests that this is what this should be interpreted in my experience.

Q. Now, Doctor, what is the relationship between intelligence and high I. Q. and mental disorders?

A. Well, quite a relationship. We know that people with high I. Q.'s usually come out with certain kinds of mental disorders rather than others. For example, people with high I. Q.'s when they get, if there are mental disturbances and so on are likely to come out with, oh, what we could call paranoid stages, paranoid conditions. And so on. That is, if they are disturbed. There are groups of mental conditions, but this is one that frequently you see with people with high I. Q.'s.

Q. Doctor, now with reference to your examination of the Defendant, Mr. Rodgers, do you have an opinion of his mental condition?

A. You mean now?

Q. Yes.

A. You mean as a result of my examination? Yes.

Q. Yes

A. Yes, I think so.

Q. What is the opinion, your opinion?

A. My opinion is that Mr. Rodgers is an emotionally, mentally, intellectually, disturbed person. I see him as a person who, because of the environment, environmental situation and the stress of this particular environment grew up with I think, as I would see it, a distorted viewpoint about

people and about life situations that involved people. And the distorted viewpoint as I would see it comes out generally as being a rather distrustful person. A suspicious person, one I think who would tend generally to misunderstand and misinterpret the intentions and motives of people in regard to himself as a person. He would be easily threatened by individuals because of his, of his, of his very sensitive nature in regard to how people treat him. And I think, it would be my conclusion from the test materials and test data would, would lead me certainly to the opinion that it would be difficult for him, certainly under stress, to accurately evaluate the nature of things going on about him. Particularly when these are threatening to him and the picture of himself that he has to maintain to feel adequate as a person.

Q. Doctor, in your opinion does the Defendant suffer from delusions?

A. I think he could under stress. Well I would say delusions in the sense as I understand them, that under stress he would not accurately perceive the nature of the situation as it affected him in the way that he would feel that he would have to maintain himself and his integrity with himself. I think because of his sensitivity in relationship to people that he would more likely perceive things inaccurately under stressful situations and the meaning of that situation than the ordinary person would.

Q. How would you define the mental condition of the Defendant?

A. You mean the label that we, I would give to it?

Q. Yes.

A. I defined it in my report as primarily egoid character disorder with strong paranoid tendencies. Do you want me to tell you what I think that means?

Q. I'm afraid I will have to ask you what that means now.

A. All right. To me egoid character disorder is a person who has rather detached relationships with people. There is a certain amount of aloofness, a certain amount of distance that they place between people. They may be friendly, but you never feel that you get hold of these people as a person. They live around people, but they are not with people. They are not part of the community or the social life. And this is what I have in mind, sort of a detached, isolated kind of person.

Now the paranoid condition as I understand that can best be explained as I understand it as a certain suspiciousness about the intentions and motives of people toward them. Feeling in a sense that there is always, particularly if you are challenged, that you have got to prove yourself. And so on. Sometimes it comes out in grandiose ways. They may say things, boast about things that they have done that they may not have done and begin to believe perhaps that they have done in order to build up this picture of themselves that is important to them because of their very strong feeling of being inadequate as a person."

"Q. Assuming then, Dr. Landward, that the Defendant has had a positive serology on two spinal tests, one a two plus and one a three plus, would that affect in any way

your opinion as to his mental condition?

A. Well I would assume that some disease process certainly is involved.

Q. Would this have any relation?

A. To the extent that this is one of the, classified under brain syndromes classifications of mental disturbances and mental disorders. Then I would have to accept that as indicating some degree of brain damage. And this certainly would make me feel that the things that I picked up on my psychological tests could be explained in this way. If there weren't any other history of some other brain damage by blows on the head or excessive alcohol or a number of other things that can bring about brain damage.

Q. Did your examination disclose any cause of brain damage?

A. No, it can't do that. It is not designed to do that. It is merely designed to detect brain damage in the intellectual and muscular cyclomotor functions of the individual.

Q. Now, Doctor, I have a hypothetical question to pose to you. It is rather lengthy. Doctor, please assume these to be a fact. That this man Rodgers that you have examined was working at the Rattle Snake Mine in San Juan County for a period of about eight months up and to June 19, 1957; that on one occasion during that period he struck a co-worker named Dee Gardner several times over an altercation concerning the loading of a truck. In addition to that he had an altercation with another man named Bobby Goodnight which was a disagreement arising over the

dumping of some ore. That Rodgers apologized to this fellow Goodnight. Goodnight accepted his apology with the remark as follows, "I accept your apology but I will never forget it." That the Defendant Rodgers bragged and exaggerated before his fellow workers, and he was therefore teased and ribbed, perhaps no worse than others on the job were teased and ribbed. That approximately nineteen days, that is around June 1st of 1957, Mr. Rodgers had an altercation with the Deceased, Mr. Merrifield, and that at that time Mr. Merrifield accused Mr. Rodgers of not performing some of his duties. And in the ensuing argument that the Deceased, Mr. Merrifield, called Mr. Rodgers a damned liar. And that on the 18th of June of this year the Defendant related a story to one Tommy Thompson to the effect that he, Rodgers, had heard that Merrifield was going to pick a beef with Rodgers and that Rodgers stated that if so he would be ready for Merrifield. And then assume that on the 19th day of June, 1957, that the Defendant Rodgers was working in the mine pit with several other employees and that the Deceased, Charles Merrifield, remarked to two other employees, "You better get off your ass or I'll tell Boss Rodgers." That Rodgers overheard this remark and stated to Dennis Ingraham, another fellow worker, that he was going to have to kill Merrifield. And that he was going to get his gun. That Rodgers left the pit and came back with the gun in his belt. That he walked over to within twenty-five feet of where the Deceased was loading trucks with a power shovel. That Rodgers waited until Merrifield had loaded a truck, whereupon Rodgers fired a shot into the ground. Merrifield rose from his seat on the shovel and as he was getting off the shovel Rodgers shot Merrifield sev-

eral times. Rodgers claims Merrifield attacked him with a large wrench. No wrench has been found. Upon leaving the pit, Rodgers stated to a co-worker, "He asked for it and he got it." Rodgers fled the scene and was apprehended peacefully in Cortez, Colorado. Now assuming those facts, Dr. Landward, do you have an opinion of the mental condition of Mr. Rodgers at the time of the shooting incident?

A. Yes, I could give you one.

Q. Would you please.

A. The way I would understand the nature of Mr. Rodgers as a person, the way he would be sensitive about himself as a person in relationship to other people, the very strong need to maintain himself as an adequate person, under circumstances that would be challenging to him with his distorted, as I would see it, his distorted viewpoint and attitude about people and how they treat him, I believe that over a period of time he could become so vexed that he would have no other choice in his own mind to do what he did to defend himself.

Q. Do you have an opinion, Doctor Landward, concerning the ability of the Defendant, Mr. Rodgers to control his actions and impulses on the occasion of the shooting?

A. Well I think I have implied that.

MR. BUNNELL: Your Honor, I will object to that unless he says on the occasion stated in the hypothetical question.

A. Will you state that again then?

THE COURT: The hypothetical question?

A. No, no, I have that in mind, but the question in terms of the hypothetical question.

Q. Do you have an opinion, Doctor, whether at the time of the shooting as related in the hypothetical question the Defendant was in such a condition as to be able to control his actions and impulses?

A. Well like, I should say again I think I implied that in my previous answer. And it is this, that I do not believe that within himself he felt that he had any other choice to do than what he did, and to this extent I do not believe that he was able to control what he did. Other than to do what he determined he had to do to maintain his safety.

Q. Now is that what you could call a delusion?

A. To the extent that he was unable to accurately interpret and perceive the nature of the threat to him which he apparently perceived as being threatening to him as a person and as a, his physical safety as well.

Q. In light of the hypothetical question propounded to you —

A. Let me put it this way to you. Any time there is a misinterpretation or exaggeration of what is happening to us, well, again to Mr. Rodgers to make it specific. And I see him being unable to accurately perceive phenomena or social situations or circumstances that he has always seen as threatening to himself. Therefore, he would tend to exaggerate the nature of the threat. This would be very real to him. To us, to myself, seeing this, yes you could label this as a delusion, but it was not reality.

Q. Would that be in your opinion then, Doctor, considered to be an irresistible impulse?

A. Yes, he had no other choice."

A. Well I tell you this, that I started with Mr. Rodgers from scratch. As far as the examination was concerned I, all I knew was that he was on trial, but any of his background, any of his personal history was not given to me, and I made no inquiry regarding it while he was there. While I examined him.

Q. Did you inquire of him regarding the incident on June 19th?

A. He volunteered this information. I did not inquire. And as far as I am concerned I didn't include this in terms of the interpretation of my test data. My report and my opinion is based primarily on my test data."

Dr. C. Craig Nelson appeared on behalf of Defendant as a medical doctor, specializing in psychiatry. It is significant to point out to the Court that at the time of the arraignment of the Defendant, Dr. Craig Nelson was chosen by the District Judge, F. W. Keller, as one of the alienists to examine into the sanity of the Defendant and for some reason unknown to the Defendant, Dr. Craig Nelson was unable to conduct the examination until he was requested to do so on behalf of the Defendant by Defendant's Counsel herein. Dr. Craig Nelson's testimony in this matter clearly demonstrates that the Defendant was suffering from syphilis of the brain and spinal cord and that this organic defect coupled with a functional mental disorder caused a severe mental disorder in the Defendant characterized by

Dr. Nelson as paranoid with psychotic delusions. Dr. Nelson's testimony most significantly demonstrates the mental condition of the Defendant at the time of the fatal incident and, we think, stands uncontradicted. Accordingly, we quote from the transcript of the trial and Dr. Nelson's testimony is as follows:

"MR. REYNOLDS: May we proceed?

CRAIG NELSON, the witness on the stand at the time of taking recess, resumed the stand for further examination as follows:

DIRECT EXAMINATION BY MR. REYNOLDS:

Q. Doctor, assume the fact that the Defendant has had two spinal fluid tests and that the results of these show, the first one shows a three plus and the second one shows a two plus. Assuming that fact in connection with your examination of the Defendant do you have an opinion concerning his mental condition?

A. My opinion would be that he is suffering from central nervous system infection of lues or syphilis.

Q. You base that opinion on medical indications of the two plus and three plus separate and apart from the psychiatric examination?

A. I base it on the composite of all of them together. My examination plus the laboratory findings.

Q. Then I will withdraw that question. Would you explain to the Court and Jury, Doctor, what lues of the central nervous system means?

A. This means there has been an infection of the per-

son's body by the organism that caused it. And the infection travels to the brain and the spinal cord and the, there has been an actual infection of the structures of the brain and spinal cord. That this then, on the basis of an organic basis, there has been a definite change then in the tissue and this then affects the way a person thinks and acts and feels.

Q. Now with respect to the type of mental disorder, how do you classify it?

A. We are speaking still just of the luetic infection? This is an organic brain condition. This is an infectious organic brain condition, but if we take in the additional facts that came out of my examination then I would say this of, this has brought about a specific functional state, a paranoid state in the individual. That is, this plus all of the effects of his past.

Q. Now will you explain what are the characteristics of this type of paranoid condition?

A. A paranoid condition is one where there is an abnormal, unusually large amount of suspicion, or jealousy. Of, there is a grandiose or bragging kind of nature to an individual. These are all of an abnormal and unusually large component. The person is inclined to be, to keep his feelings to himself up to a point, but then he can contain them no longer and there is often a discharge of these feelings, an action, a very impulsive action.

Q. Now does this type of person suffer from feelings of persecution?

A. Yes. This would be in the area of the suspiciousness

and jealousy. Where there is always a feeling that people pick on or plan against or do things to hurt an individual. To hurt them.

Q. Did the Defendant display these feelings and attitudes to you?

A. Yes. I, in my examination I felt that he regularly described in relationships with several people that he came in contact with this feeling he was picked on or pushed around or ridiculed. He felt very much the same in regard to three people. Each time he would handle it in the same way. Kind of repetitious way. Where he felt, where first of all he would deny that he was jealous or that he cared, but then all of the feelings would suddenly come out and he was compelled to act with each of these three people in such a way as to provoke a fight or attempt to provoke a fight, or, in one instance that led to the shooting.

Q. Doctor, is that what you call systematization?

A. Yes, this is systematization in this, in the sense that it is repeated over and over again. The same pattern where he feels that someone is pushing him, out to get him, belittling him. He takes it as long as he can, doesn't let little bits of feeling out the way most people do, but then is compelled to erupt to get this feeling out.

Q. Is this true though in fact the reality doesn't support it, these feelings?

A. That's right.

Q. Now did the Defendant exhibit to you any delusions?

A. It was my opinion that the actions that he des-

cribed in terms of each of these fights and the shooting he was acting on a delusion that he had to either defend his honor, his self esteem or his personal body.

Q. In your opinion would that be a psychotic delusion?

A. Yes.

Q. Now, Doctor, I am going to propound a hypothetical question to you, and I want you to assume these facts in connection with your diagnosis of the Defendant. Assume that this man Rodgers was working at the Rattle Snake Mine here in San Juan County for a period of about eight months up until the 19th of June, 1957. And that on one occasion he had an altercation with a man by the name of Dee Gardner concerning the manner in which a truck should be loaded and that as a result of that the Defendant struck Dee Gardner about three times. Now assume also that on another occasion he had an altercation with a fellow by the name of Bobby Goodnight and that this arose out of a disagreement concerning the dumping of ore. And that Rodgers apologized for this and in response Goodnight accepted his apology and said, "I will accept your apology but I will never forget it." Assume that Rodgers bragged and exaggerated before his fellow workers and that he therefore was teased and ribbed and perhaps to no more extent than the other men on the job were also teased and ribbed. And assume that about on June the 1st, 1957, that the Defendant had an altercation with the Deceased, Charles Merrifield, and that the Deceased accused the Defendant of not performing his duties and an argument ensued and that the Deceased, Merrifield, called Rodgers a damned liar. And then assume on the 19th, or the 18th day of June

1957, that the Defendant related to a man by the name of Tommy Thompson that he, Rodgers, had heard that Merrifield was going to pick a beef with him before Merrifield left the job. And that if he did Rodgers would be ready for him. And then further assume that on the 19th day of June 1957, that the Defendant was working in this mine pit with other employees and that Charles Merrifield remarked to two other employees as follows, "You better get off your ass or I'll tell Boss Rodgers." That Rodgers overheard this remark and stated to Dennis Ingrahm, another worker, that he was going to have to kill Merrifield before Merrifield left. And that he would also have to get his gun That Rodgers left the pit and came back with the gun in his belt. That he walked over to within twenty-five feet of where the Deceased, Mrrifield, was loading trucks with a power shovel. And that Rodgers waited until Merrifield had completed loading one of these trucks and then he shot into the ground. That Merrifield rose from his seat on the shovel and as Merrifield was getting off Rodgers shot Merrifield several times. Rodgers claims Merrifield attached him with a large wrench. No wrench has been found. Upon leaving this pit after the shooting Rodgers stated to a fellow worker, "He asked for it and he got it." Rodgers fled the scene and was apprehended peacably in Cortez, Colorado.

Now, Doctor, assuming those facts, do you have an opinion concerning the mental condition of the Defendant at the time of the shooting as it was recited in the hypothetical question?

A. Yes. My opinion is that Mr. Rodgers was suffering

from central nervous system lues. Was suffering from a paranoid condition. Was psychotic and acted in a compulsive manner were he driven from within, had to carry out this action against the Deceased.

Q. At the time of the shooting as related in this hypothetical question, do you have an opinion concerning whether the Defendant had any control over his actions or impulses?

A. I feel that he, all of his control was taken from him in terms of the organic lues change, and on the basis of this compulsion to shoot this man.

Q. Was the Defendant at that time acting under an irresistible impulse?

A. Yes. An irresistible impulse. It was a delusional system that impelled him. That made that an irresistible act.

Q. Doctor, do you have an opinion as to whether or not the mental condition of the Defendant led to or was the cause of the shooting?

A. Yes. I feel it was the mental condition of Mr. Rodgers that led to the shooting as it was, well it came about through the usual routine of his life. Usual amounts of kidding or whatever happened. This came from within him. This was a sickness from within."

"A. It means that he has an organic condition.

Q. Of course, Doctor, the fact that he is and has as you say or at least in your opinion that he has paranoid tendencies doesn't necessarily mean that he doesn't know the difference between right and wrong does it?

A. No. And I didn't indicate. I think that he does know the difference between right and wrong, but that he acted from a compulsion.

Q. Well, does the fact that he is a paranoid necessarily mean that he has to act under compulsion all the time?

A. Yes.

Q. You say that definitely, yes?

A. Yes.

Q. Do all paranoids act under compulsion all the time?

A. All paranoids are acting on a delusional system. Their actions are governed. This is an abnormal condition and their actions are governed."

"Q. Doctor, you stated that the Defendant in your opinion is paranoid with psychotic delusions, is that correct?

A. Yes.

Q. Is that a mild or severe condition?

A. I think it is always a severe condition.

Q. Is the Defendant's case severe?

A. Yes.

Q. Also you have referred to something called lues. Is that the same as syphilis?

A. That is syphilis.

The State called as a rebuttal witness to the evidence offered by the Defendant on the question to the Defendant's sanity, Dr. William D. Pace, who had examined the Defend-

ant on behalf of the State. With the exception of the testimony by Dr. Pace with reference to his qualification as an expert, we quote the entire testimony given by Dr. Pace for the purpose of demonstrating that to the extent of the examination made by him, no conflict exists between his testimony and the testimony of the Witnesses testifying on behalf of the Defendant with respect to the question of the Defendant's sanity. We believe that the testimony of Dr. Pace patently shows that his examination was perfunctory, superficial and without sufficient inquiry into the condition of the Defendant, and without any inquiry into the possibility of an organic mental disease. Beginning at page 270, line 29 of the transcript, we quote as follows:

“Q. Do you, Doctor, do you know the Defendant in this case, James W. Rodgers?

A. Yes I do.

Q. And have you ever had an occasion to make an examination of him?

A. Yes.

Q. When did that examination take place?

A. That took place on the 8th and 9th of September in Salt Lake City.

Q. And about how long did you spend with him on each of those days, September 8th and 9th?

A. Approximately an hour each day.

Q. And what was the nature of your examination, Doctor?

A. I made a psychiatric examination. An interview type of examination, asking questions regarding his history, family history. His personal history, medical history, that sort of thing. And also asking certain questions for the purpose of arriving at an opinion of his mental condition.

Q. Now, Doctor, from this examination that you conducted on those two days were you able to arrive at an opinion regarding his mental condition?

A. Yes.

Q. And will you tell us what that opinion is?

A. My opinion was that he was not mentally ill or psychotic, or insane would be the legal word for it. That he did not show abnormal personality traits or character traits which would in my opinion place him in the category of psychopathic personality.

Q. And could you describe this psychopathic personality for us? That is, what type of person is a psychopathic person?

A. A psychopathic personality tends to be a person that tolerates frustration very poorly, that reacts against others in the environment as a result of the inner conflict or frustrations. They can be people that are, that tolerate authority poorly. That are egocentric. That have little feeling for others. That fail to learn certain things from experience. They repeat certain types of behavior after the average person will learn that it didn't pay to do so.

Q. And did you find in your examination, Doctor, or could you establish any opinion as to whether or not he was

suffering from any mental disease?

A. My opinion was that he was not suffering from a mental disease; that this represented abnormal personality traits or character traits rather than a definite mental illness.

Q. Now, Doctor, if you were to learn that this same man, assuming that you were to learn that this same man had had a sample taken of his spinal fluid and that it was tested on two occasions, once when tested it was a two plus and on the other occasion it was a three plus. Do you think that would have any bearing on your opinion or change it in any way?

A. Not just that fact wouldn't change it.

Q. Now, Doctor, I am going to put to you a hypothetical question. Let us assume, Doctor, that Mr. Rodgers, the man you examined, had had the spinal tests made and the results were as I just stated to you, that is one a two positive and one a three positive, and those tests were taken in November of this year, and let's assume, Doctor, that he was working at what is called the Rattlesnake Pit Mine here in LaSal County. That he worked there about eight months prior to June 19, 1957, and that on one occasion, that is he worked with other men there, and on one occasion one of his fellow workmen, Dee Gardner, who is a truck loader, had some kind of an argument with him and Mr. Rodgers had struck him at some time during that period of time. And let's further assume that some time during that prior eight months to June 19th he had some altercation with a Mr. Goodnight, or some disagreement or argument over the dumping of some ore, and that Mr. Rodgers had apologized

later for what was said in the altercation and Mr. Goodnight stated, "I'll accept your apology, but I won't forget it." And then let's assume that on three or four occasions during that time he had bragged at least to one individual about things that the individual didn't know whether they were true or not and that this Mr. Rodgers was teased and ribbed in the normal amount that a group of men will on the job, and that on or about June 1st Mr. Rodgers had an altercation with one Charles Merrifield in which there was an argument over whether some equipment had been greased or not and during the course of that Mr. Merrifield had called Mr. Rodgers a damn liar. And then let's assume that on June the 18th, 1957, that Mr. Rodgers had said to one Thomas Thompson that he, Rodgers understood that Mr. Merrifield was going to pick a beef with him and if he did he'd be ready for him. And then let's assume that on June 19th that Mr. Rodgers was working here in the pit mine with other men and that during the course of the work he had said to one Dennis Ingraham that he was going to have to kill Charles Merrifield before he left, meaning Mr. Merrifield left the job. And that he also said that Mr. Merrifield had been talking about me and calling me something about Boss Jim. And that Mr. Rodgers further said to Mr. Ingraham that he was going to get his gun. That he then got in his truck and left the pit. Went down some four hundred yards to his own truck and got a pistol out of the truck, which was loaded. And drove back into the pit and that during this time his demeanor was as usual according to the men who worked with him. That he parked the truck and got out. He walked directly toward the shovel that Mr. Merrifield was operating and stood and waited for

Mr. Merrifield to finish loading a dumpster which he was loading. That during this time he took out his cigarettes and lit one and stood and smoked it. That when the dumpster pulled out that Mr. Merrifield was continuing to work with the shovel. That Mr. Rodgers took the gun out of his belt, fired a shot into the ground. That Mr. Merrifield looked at Mr. Rodgers, at which time Mr. Rodgers motioned for him to come to him. That then Mr. Merrifield throttled down the shovel, set the bucket half way in the air, and turned and stood up in the door, at which time Mr. Rodgers shot in a rapid burst of shots and hit Mr. Merrifield six times. And that as a result Mr. Merrifield died. That Mr. Rodgers then put the gun back in his belt, walked out of the pit in the normal demeanor, saying to one of his fellow workmen, "He had it coming. He asked for it and he got it." That he then went to his pickup, drive up to his trailer, loaded up his equipment and then left the scene and was apprehended later in, near Cortez, Colorado. Now, Doctor, if we assume all of those facts could you give us an opinion as to whether or not you feel the man we have been talking about here in this question knew the difference between right and wrong at the time he shot the gun?

A. My opinion — First let me ask the beginning of that question. You mentioned two plus and three plus.

Q. Yes.

A. I assume you meant to say Wasserman reaction for syphilis.

Q. Well, these were spinal.

A. Yes spinal, but it was a simple test for syphilis was it?

Q. Yes.

A. My opinion would be that he did know the difference between right and wrong.

Q. And, Doctor, from that would you have an opinion as to whether or not he knew the nature of the act that he was doing?

A. I think that he did know the nature of the act that he was doing.

Q. And, Doctor, would you have an opinion as to whether or not he was acting under uncontrollable impulses as a result of mental disease?

A. My opinion would be that he did not control his impulses but that it was not from mental disease.

MR. BUNNELL: I believe that's all Your Honor.
CROSS EXAMINATION BY MR. REYNOLDS:

Q. Doctor, would it be fair to say that mental disorders can be broadly classified into organic mental disorders and functional mental disorders?

A. Yes that would be a fair statement.

Q. And they sometimes overlap don't they?

A. Yes they do.

Q. They fit in together. I mean they can have both simultaneously?

A. That's correct.

Q. What are some of the examples of organic disorder, Doctor?

A. Oh, such things as mental disorders resulting from senile changes in the brain or arteriosclerotic changes in the brain, or some instances brain tumors or in some instances syphilitic infections of the central nervous system. There are others.

Q. Syphilis is, has been referred to by some medical people as a great imitator has it not?

A. That's correct.

Q. And among some of the diseases that, will you name some of the diseases that it does imitate.

A. Oh, in certain instances types of syphilis can imitate gastro intestinal disorders of other types. Or skin lesions such as eczema or other rashes. Or some instances it can somewhat imitate other mental illnesses such as schizophrenia or manic stages. Manic depressive or manic, types of manic depressive psychoses.

Q. Then when it is localized in the nervous system, why then it would be affecting to the brain, isn't that correct?

A. If an infection progresses to a certain point it does. Or it can.

Q. And when it does that sometimes it can imitate the paranoic person?

A. To some degree yes.

Q. And the, what are some of the symptoms of the

paranoid, that the paranoid exhibits, Doctor?

A. You are referring to paranoid schizophrenia or what?

Q. Well somebody with a paranoid personality what would you say. I don't know the medical terms as well as you do I'm sure.

A. I think the word paranoid refers to tendencies toward being suspicious or projecting ones difficulties on others, or feelings of being wronged or discriminated against. Sometimes it reaches the point of actual delusions.

Q. And sometimes it takes on the nature of a bragging type of person?

A. Yes.

Q. A braggart?

A. Yes, that could be.

Q. Talk about the machinery that they had operated or the mine that they had owned or sometimes as much as being President of the United States and things like that don't they?

A. Not the word paranoid. I think what you are referring to would be a paraoid delusion of a grandiose type.

Q. But these people you said were suspicious, jealous?

A. Yes.

Q. That would be fair to say?

A. Yes.

Q. And isn't it sometimes true, Doctor, that when these

suspensions converge on some individual that it is serious from the point of view of physical danger to this particular person?

A. Possibly, yes.

Q. What are the usual tests given to determine whether a person has syphilis of the spinal nervous system, Doctor?

A. Spinal fluid examination, neurological examination.

Q. Neurological?

A. Yes.

Q. And also psychological examination?

A. Not to determine syphilis.

Q. Well from a psychological examination couldn't you get some indication that a man may have some organic degeneration of the brain?

A. You could get some indication as to organic changes but not as to specifically which.

Q. Well did you when you examined Mr. Rodgers here, did you find any evidence at all of any organic disorder?

A. No I didn't.

Q. Did you notice any slurring of speech, for example, which might have shown you that he was inarticulate and that he couldn't talk properly which might indicate an organic disorder?

A. I didn't notice anything unusual about his speech. He talked very freely.

Q. He talked freely, but I meant by that did you notice any slurring of the words that he used?

A. I didn't notice any.

Q. Was there anything else that was brought out in your examination that would indicate any possibility of organic trouble in this man's mind?

A. No, I saw nothing whatever that would indicate organic changes in the central nervous system.

Q. Now if this man exhibited such things as suspicion and was a braggart and has a persecution complex wouldn't that in itself indicate that he might possibly have syphilis?

A. He wasn't bragging in the examination.

Q. I didn't ask you that though, Doctor. I asked you if a man exhibited suspicion and things of that kind wouldn't it be indicative of the possibility of syphilis?

A. That would be one possibility. There would be many others.

Q. Yes, if a man, in other words if he exhibited the things that, in his examination that you pointed out here a few minutes ago about having these, having these suspicions and having a psychopathic personality and poor tolerance for frustration, wouldn't those things in themselves indicate from what you know about syphilis being the great imitator that it might, that he might possibly have syphilis?

A. The personal history that he gave to me did not indicate that he had, that his behavior since childhood was the result of syphilis.

Q. The indications, now I think you testified here a few minutes ago that when you examined him he, and gave him your psychiatric examination you noticed that he had a psychopathic personality, he had a low tolerance for frustration, that he had exhibited some evidences of suspicious nature. Now aren't those things in and of themselves an indication that he might have had syphilis?

A. No, I don't think so.

Q. Well you stated here a few minutes ago, I believe that, if I am not mistaken, that syphilis can imitate anything and that those are some of the characteristics that syphilitics sometimes exhibit.

A. It would be possible for syphilitic to exhibit those things without having anything particularly wrong with the central nervous system.

Q. When did you examine the patient, Doctor?

A. September 8th and 9th.

Q. This year?

A. Yes, this year.

Q. Where?

A. Salt Lake County Jail.

Q. How long did your examination take?

A. Approximately one hour each day.

Q. What kind of examination did you conduct? Was it confined exclusively to a psychiatric examination?

A. That's right.

Q. Is that just interviewing?

A. Yes.

Q. The patient?

A. Yes.

Q. Now, Doctor, what you have said here I believe is that with all of your knowledge and understanding about syphilis, particularly after examining this man and noticing that he had a psychopathic personality and low tolerance of frustration, would you recommend a neurological examination?

A. I was asked to make a psychiatric examination of him.

Q. Now Doctor, if you will —

A. And I arrived at a psychiatric opinion of his condition and felt that there was no, that the picture that was presented psychiatrically was clear cut.

Q. Did you recommend a neurologic examination?

A. I made no recommendation.

Q. Did you make any recommendation that the man have a spinal test made on him?

A. No I didn't."

In addition to the testimony given by the expert medical witnesses with respect to the mental condition of the Defendant, see page 48, line 30, page 49, lines 1 through 5 of

the transcript as testified to by Dennis Ingram, a witness for the State. And when the same Witness, Dennis Ingram, was called on behalf of the Defendant his testimony reflected the fact that the Defendant was a braggart, was "high tempered." See page 158 of the transcript, lines 1 through 25, page 159 of the transcript, lines 28 to 30, page 160, lints 1 to 7 page 161, lines 11 to 15. And, it is also apparent from the testimony given by the witnesses for the State that the Defendant had a "low tolerance for frustration" for he had had altercations with two of the witnesses who testified on behalf of the State, one Dee Gardner and one Bobby Goodnight. See page 69 lines 2 to 16 and page 70 lines 2 to 10. See also page 103 lines 28 to 30 and page 104 lines 1 to 19. In addition, it is apparent that the Defendant had had altercation with the deceased, Charles Merrifield. See page 47 lines 18 to 19, page 82 lines 28 to 30, page 83 lines 1 to 23, page 155 lines 24 to 30, page 156 lines 1 to 30, page 157 lines 1 to 6. Finally, although there is no evidence other than the inference to be drawn from what the defendant told Dennis Ingram just prior to the fatal incident, it seems obvious that Merrifield had said something to two of the witnesses who appeared at the trial to the effect that he would tell Jim Rodgers if they didn't off their tail and go to work. See page 86 lines 10 to 30, page 87 lines 1 to 15.

We point out the foregoing facts which were established at the trial of this matter not for the purpose of even suggesting that if the Defendant had been ribbed, teased and tormented that such fact would justify his killing Charles Merrifield. The purpose of pointing out the facts relative to the bragging and the difficulty which the De-

fendant had with his fellow employees is simply for the purpose of emphasizing the peculiar behavior of the Defendant. Witness the fan incident as testified to by Bobby Goodnight, see page 107 lines 26 to 30, page 108 lines 1 to 8. We believe that the evidence concerning Defendant's bragging and grandiose attitude, the evidence of difficulty with several people at the Continental Mine, the evidence of the fan incident and in fact, the killing itself without any apparent reason or provocation, substantiates and corroborates the expert evidence offered in the case by Drs. Powell, Landward and Nelson.

From an examination of the statement made by the Defendant on June 22, and June 26, which statements were offered in evidence by the District Attorney, clearly show that the Defendant's version of what occurred during the fatal incident is an exaggerated interpretation of reality and what actually occurred, and, accordingly, further demonstrates the psychotic delusions under which this Defendant was suffering at the time of the fatal incident.

If the jury had performed its duty to follow the law and evidence offered in the case, it was dutybound to render a verdict of not guilty by reason of insanity. Can there be any doubt in the mind of any reasonable man that the evidence adduced at the trial of this matter, clearly establishes that the Defendant was suffering from a severe organic mental disorder characterized by psychotic delusions brought on by functional disorders and syphilis of the brain and spinal cord.

CONCLUSION

It is respectfully submitted that the Court should reverse the judgment in this case and remove the defendant to the District Court with instructions to proceed with a sanity hearing for the purpose of having the defendant committed to the State Mental Hospital, for the two basic reasons set forth below:

1. The State failed to sufficiently inform the defendant of the crime he was accused of and the trial Court refused to correct this omission of defendant's legal and constitutional rights although timely objections were made thereto.

2. That there is uncontradicted evidence based on scientific facts that the defendant was acting under an irresistible impulse because of the organic lues change on which point there was no evidence submitted by the State to the contrary. The only evidence on the part of the State with respect to organic mental disorders of the defendant was the statement of Dr. Pace that he was requested to give the defendant a psychiatric examination and that he did not recommend that any neurological or spinal tests or any test at all be given to determine the existence of organic mental disorder.

Respectfully submitted,

A. Reed Reynolds
Robert H. Ruggeri

Attorneys for Defendant
and Appellant.