

2016

**State of Utah, Plaintiff/Respondent, vs. Desean Michael Goins,  
Defendant/Petitioner.**

Utah Supreme Court

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THE DEFENDANT IS PRESENTLY INCARCERATED IN THE UTAH STATE PRISON.

Case No. 20160485-SC

THE DEFENDANT IS PRESENTLY INCARCERATED IN THE UTAH STATE PRISON.

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IN THE UTAH SUPREME COURT

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THE STATE OF UTAH, :  
Appellee, :  
v. :  
DESEAN MICHAEL GOINS, : Case No. **20160485-SC**  
Appellant. :  
:

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**JURISDICTIONAL STATEMENT**

This appeal is before this Court on a Writ of Certiorari to the Utah Court of Appeals. The Supreme Court has jurisdiction to consider this appeal under Utah Code Ann. § 78A-3-102(3)(a).

**STATEMENT OF ISSUES PRESENTED FOR REVIEW, STANDARD OF APPELLATE REVIEW, PRESERVATION OF ISSUES AND GROUNDS FOR APPEAL**

The Petition for Writ of Certiorari was granted by Order of this Court on September 12, 2016 as to the following issues:

1. Whether the Court of Appeals erred in concluding that a witness whose preliminary hearing testimony was admitted at trial was unavailable and that Petitioner had failed to demonstrate that his Sixth Amendment right to confront witnesses against him was violated by the presentation of the preliminary hearing testimony at his trial.
2. Whether the Court of Appeals erred in denying Petitioners petition for rehearing raising new arguments that trial and appellate counsel provided ineffective assistance.

A copy of the court of appeals decision in *State v. Goins*, 2016 UT App 57, is included in Addendum A. Appellant addresses the issues as follows:

**I. Right of Confrontation Violation.**

A. **Issue:** Whether the Court of Appeals erred in affirming the trial court's ruling admitting preliminary hearing testimony of a victim/witness. .

B. **Standard of Review:** On certiorari this Court reviews a decision of the Court of Appeals, not the decision of the trial court, for correctness, turning in part on whether the Court of Appeals accurately reviewed the trial court's decision under the appropriate standard of review. *State v. Levin*, 2006 UT 50, ¶ 15, 144 P.3d 1096, 1101 (Sup.Ct.). "When reviewing rulings on hearsay, we review '[l]egal questions regarding admissibility . . . for correctness, . . . questions of fact . . . for clear error,' and the final 'ruling on admissibility for abuse of discretion.'" *State v. Garrido*, 2013 UT App 245, ¶ 10, 314 P.3d 1014 quoting *State v. Jackson*, 2010 UT App 328, ¶ 9, 243 P.3d 902. Interpretations of federal and state constitutions are questions of law. *State v. Timmerman*, 2009 UT 58, ¶ 7, 218 P.3d 590, 593 (Sup.Ct.). Where it is not contended that the analysis under the Utah Constitution is any different from the analysis under the federal constitution, a defendant's contentions are reviewed under the federal constitution. *State v. Drawn*, 791 P.2d 890, 893 n.2 (Utah Ct. App. 1990). Specific analysis must be provided for this Court to engage in state constitutional analysis. *State v. Bean*, 869 P.2d 984, 988 (Utah Ct. App. 1994) A trial court's admission of testimonial evidence is reviewed for abuse of discretion. *Id.*, 791 P.2d at 894. To hold a

constitutional error harmless, it must be deemed harmless beyond a reasonable doubt.

*State v. Young*, 853 P.2d 327, 359 (Utah Sup.Ct. 1993)

C. **Grounds for Review:** The day before trial, defense counsel objected to the admission of the preliminary hearing testimony of an absent witness, who had not been subpoenaed, as purportedly “unavailable” pursuant to Utah R. Evid. 804. R.166:6-7. The trial court overruled the objection. R.166 at 12-13, 34. The next day, at trial, defense counsel renewed the objection to admission of the preliminary hearing testimony, arguing, inter alia, that the State’s efforts were insufficient and that further attempts to locate the witness should have been made. R.167:2-17. The district court again overruled the objection, and the witness’ testimony was played for the jury. R.167:149.

## **II. The Court of Appeals Denial Or Refusal To Rule On Goins’ Petition For Rehearing Regarding Erroneous Self-Defense Jury Instruction.**

**Issue:** Did the Court of Appeals err in denying or refusing to decide the issue regarding ineffective assistance of appellate counsel in failing to raise the issue of trial counsel’s ineffective assistance in submitting an erroneous self-defense jury instruction which previous appellate counsel had failed to bring to the court’s attention?

**Standard of Review:** On certiorari this Court reviews a decision of the Court of Appeals, not the decision of the trial court, for correctness, which turns, in part, on whether it accurately reviewed the trial court’s decision under the appropriate standard of review. *State v. Levin*, 2006 UT 50, ¶ 15, 144 P.3d 1096, 1101 (Sup.Ct.). Where defense counsel affirmatively approved the jury instruction at trial, it is reviewed under



the ineffective assistance of counsel doctrine. *State v. Malaga*, 2006 UT App 103, ¶ 7, 132 P.3d 703, 707. Ineffective assistance of counsel questions require a showing that counsel's performance was deficient, "that it fell below an objective standard of reasonableness" and that the defendant was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

**Grounds for Review:** The Court of Appeals issued its decision, *State v. Goins*, 2016 UT App 57 on March 24, 2016. Newly appointed undersigned counsel petitioned the Court of Appeals for a rehearing on the basis of ineffective assistance of counsel on appeal, on April 19, 2016. On April 25, 2016 the Utah Court of Appeals requested further briefing on the issue of whether ineffective assistance of counsel on appeal could be raised in a petition for rehearing. On May 4, 2016, Petitioner submitted further briefing on that issue. On May 17, 2016, the Utah Court of Appeals issued its Order denying the petition for rehearing without comment.

During discussion of proposed jury instructions, the subject arose of Defendant's requested instruction discussing the burden and weight, inter alia, relative to self-defense. R.60. The trial court gave the instruction as written, "over the State's objection." R.167: 229-231. Respecting the underlying issue of the faulty jury instruction, unpreserved claims before the trial court are reviewed for plain error and/or ineffective assistance of counsel. *State v. Kozlov*, 2012 UT App 114, ¶ 28, 276 P.3d 1207, 1218.

### **RULES, STATUTES AND CONSTITUTIONAL PROVISIONS**

The statutes and rules relevant to the issues are included in Addendum C.

## **STATEMENT OF THE CASE**

### **NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, DISPOSITION IN THE COURT BELOW.**

Desean Michael Goins was convicted of Aggravated Assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (2006), and Threatening with or Using a Dangerous Weapon in Fight or Quarrel, a Class A Misdemeanor in violation of Utah Code Ann. § 76-10-506 (2010). R.75-76;R.168:51-52. The Defendant was acquitted of one charge of Mayhem, a second degree felony under Utah Code Ann. § 76-5-105. Id.

For the offense of Aggravated Assault, Mr. Goins was sentenced to a suspended prison term of zero to five years in the Utah State Prison; for the offense of Threatening with or Using Dangerous Weapon in Fight or Quarrel, Mr. Goins was sentenced to 180 days in the Salt Lake County jail, with credit for 158 days served, and was placed on probation for 36 months with AP&P. R.139-141. Judgement, Sentence and Commitment, Addendum D. An Order to Show Cause and Warrant of Arrest, R.161-164, were issued based upon affidavits of Mr. Goins' probation officer, R.159-160, 194-196. The record on appeal does not reflect the disposition, however, the trial court revoked his probation and he is currently incarcerated in the Utah State Prison.

Amended Minute Entry, Order to Show Cause, July 14, 2014, Addendum E.

## **STATEMENT OF FACTS**

### **STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW**

The three counts of the Amended Information involved two victims: Counts I and

II, Jacob Omar, and Count III, Gabriel Estrada. R.16-18 (See Amended Information, Addendum B, probable cause statement); R.166:2.

The preliminary hearing testimony of Gabriel Estrada. R.202:2-13, which was played for the jury at trial, R.167:149, reflects the following. On July 5, 2013, Desean Goins and his girlfriend, Star, went to Pioneer Park in Salt Lake City in an effort to locate an individual named Gabriel Estrada; Desean believed Gabriel Estrada had stolen his cell phone the night before. R.202:5. Goins confronted Estrada outside of the homeless shelter near Pioneer Park about the missing cell phone, pulled out a knife, and waived it in front of Estrada, threatening him if he didn't return his phone. R.202:4-7. Estrada denied stealing Goins' cell phone, indicating to Goins that his friend had awakened before Estrada had and left (inferentially with Goins' cell phone). R. 202:7. Estrada then indicated he had nothing to do with it and walked away. Id.

Desean Goins and Star then approached Jacob Omar, who was asleep on a blanket in the park. R. 167 at 123-124. According to the testimony of Omar, Goins and Star accused his "street son," Gabriel Estrada, of stealing Desean's cell phone. R.167-124-125. During the State's direct examination, the testimony Jacob Omar first brought forth the issue of Mr. Goins acting in self-defense. Mr. Omar indicated on direct examination by the prosecution that he was being questioned by Mr. Goins and his friend, Star, and that Mr. Omar was the initial aggressor:

Next thing I knew just because being waken up in the middle of the afternoon to this nonsense, I see Desean stepping onto my blanket. I don't allow anybody to step onto my blanket. So I got up and I pushed him off

my blankets.

R.167:124-125. The Defendant was then placed in a defensive position and reacted accordingly. R.167:125-6. A physical altercation ensued, and when Jacob Omar was on top of Mr. Goins during the fight and holding him down on the ground, Omar claimed that Goins took a bite of Jacob's earlobe. R.167 at 127. The fight continued, and Omar testified that Goins had bitten off his earlobe and stabbed him under his left arm. R.167 at 128-131. Police responding to the scene apprehended and arrested Desean Goins.

The State charged Desean Goins by Amended Information with one count of Mayhem, a second degree felony, and two counts of Aggravated Assault, third degree felonies, and a jury trial was scheduled for October 23-24, 2013. R. 16-18.

During discussion of proposed jury instructions, the subject arose of defendant's requested instruction discussing the burden and weight, *inter alia*, relative to self-defense. R.60. The trial court gave the instruction as written, "over the State's objection." R.167: 229-231. See instruction, No. 24.

Following the completion of the trial, the jury acquitted the Defendant of the charge of Mayhem, but returned a guilty verdict for one count of Aggravated Assault for the stabbing of Jacob Omar, and for a lesser included a charge of Threatening with or Using Dangerous Weapon in Fight or Quarrel, a Class A misdemeanor, for the encounter with Gabriel Estrada.

## **SUMMARY OF THE ARGUMENT**

1. The State failed to carry its heightened burden under the Confrontation Clause of establishing that Gabriel Estrada was an “unavailable” witness, which would allow the State to utilize his preliminary hearing testimony at trial. The trial court’s ruling that the witness was unavailable was not harmless beyond a reasonable doubt because the witness was a victim and the only percipient witness to the event about which he testified. Even if the witness was technically unavailable, his testimony from preliminary hearing should not have been allowed at trial as counsel did not have the opportunity to conduct full and fair cross-examination at trial, for several reasons, one of which is that only plausibility and not credibility are in issue at preliminary hearing, the sole purpose of a preliminary hearing being for the establishment of probable cause pursuant to Utah State Constitution, Utah Const. Art. I, § 12.

2. Undersigned counsel was appointed after the decision in *State v. Goins* was issued. It was apparent that prior appointed counsel had failed to raise an important issue. Undersigned counsel petitioned the Court of Appeals for a rehearing on the basis that prior counsel was ineffective in failing to raise the issue of the ineffective assistance of trial counsel in submitting an erroneous self-defense instruction which the trial court used to instruct the jury. The Court of Appeals denied the Petition for Rehearing without comment. The Court of Appeals should have decided the merits of Mr. Goins’ Petition for Rehearing on the basis of the ineffective assistance of prior counsel on appeal. This Court should reverse and remand on the basis of the ineffective assistance of trial counsel



and the prejudice effected by the erroneous jury instruction.

## **ARGUMENT**

### **POINT I**

#### **THE COURT OF APPEALS ERRED IN FINDING AN UNSUBPOENAED WITNESS UNAVAILABLE UNDER RULE 804 AND ADMITTING HIS PRELIMINARY HEARING TESTIMONY AT TRIAL IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.**

##### **A. FACTS RELEVANT TO THE ISSUES.**

On October 23, 2013, the district court informed the parties that a jury panel had not been called for the first day of trial in this case, and therefore the trial was postponed until the following day. R.166:2-3. Gabriel Estrada did not appear for trial that morning and the State made an offer of proof as to his unavailability under Utah R. Evid., Rule 804, and request to use his testimony from preliminary hearing at trial, to which Mr. Goins objected. R.166:3-12. A copy of this portion of the trial transcript is included in Addendum F. The State proffered that a subpoena was emailed to Gabriel Estrada's pastor, Russ, who purportedly gave Mr. Estrada notice of the court date. R.166:4-5. Defense counsel accepted the proffer, R.166:12, but objected, arguing, *inter alia*, that Mr. Estrada was not shown to be "unavailable" pursuant to Utah Rule of Evidence 804, that his testimony was inadmissible under the defendant's Sixth Amendment right of confrontation, and that the preliminary hearing testimony should not be admissible at trial. R.166:6-7,9-11.

The trial court overruled the objection, finding that Gabriel Estrada was

unavailable under Rule 804 and allowed his preliminary hearing testimony to be admissible at trial the following day. R.166:12-13, 34.

On October 24, 2013, day two of the trial, still not disputing the State's proffer, R.167:14, defense counsel renewed the objection to the admission of Gabriel Estrada's preliminary hearing testimony, arguing, *inter alia*, that the State's efforts to locate Mr. Estrada were insufficient and that further attempts to locate him should have been made in the light of the fact that the trial was postponed. R.167:2-19. A copy of this portion of the transcript is contained in Addendum G. The defense further argued that the defense had a different motive in cross-examining Estrada at trial and that certain matters contained in the preliminary hearing transcript should not be allowed in evidence, e.g., Estrada's statement that he moved out from living with Mr. Goins when his "bike ended up missing," R.202:16, inferring that Mr. Goins had stolen it. *Id.* The trial court again overruled the objection, and Gabriel Estrada's testimony was played for the jury during trial. R.167:16-19, 149. A copy of Mr. Estrada's testimony is contained in Addendum H.

**B. THE COURT OF APPEALS ERRED IN FINDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE STATE MADE A GOOD FAITH EFFORT TO PROCURE THE ATTENDANCE OF THE WITNESS. THE WITNESS WAS NOT SHOWN TO BE "UNAVAILABLE."**

The Court of Appeals determined the State had made a sufficient effort to produce the victim/witness, Gabriel Estrada, by keeping in touch with people believed to know him. *Goins* at ¶¶ 4 – 5. At no time does the record indicate that, during the time period in which this person could have been subpoenaed, that the State sought by conventional

means to actually serve a subpoena upon him. Nevertheless, the trial court allowed the testimony from preliminary hearing to be read to the jury over Mr. Goins' objection. *Goins* at ¶ 6.

The Court of Appeals agreed that the statement was hearsay under Utah R. Evid., Rule 801, subject to an exception, i.e, "the admission of prior testimony by an unavailable potential witness." *Goins* at ¶ 8. The Court of Appeals agreed that a good faith effort must be made to produce the witness before a finding of unavailability can be made. *Id.* at ¶ 9. "A party can only introduce a witness' testimonial statements into evidence if the witness is unavailable to testify at trial and the opposing party had a prior opportunity to cross-examine." *State v. Timmerman*, 2009 UT 58, ¶ 9, 218 P.3d 590. The Court of Appeals cited authority, however, to the effect that Rule 804(a)(5) does not require a patently futile attempt to serve a subpoena on a potential witness . . . whose physical location and address are completely unknown. *Goins* at ¶ 10. It cited *State v. Drawn*, 791 P.2d 890 (Utah Ct. App. 1990), in support of its position that the prosecution had made every reasonable effort to procure the attendance of the witness.

One major distinction, however, between the circumstances in *Drawn* and the instant case, is that, as the Court of Appeals pointed out, in *Drawn*, the prosecution actually subpoenaed the witness three times. *Goins* at ¶ 11. In the instant case, while some effort was made to keep in touch with Pastor Russ, who was familiar with the witness, by e-mailing him a copy of the subpoena, R.166:4, there is no indication in the record that any effort was made to actually serve a subpoena upon Mr. Estrada, in

accordance with the requirements of the law, at any time. If the pastor was able to locate Mr. Estrada and inform him of the trial date, surely the State could have subpoenaed him properly and directly. The State proffered that it maintained contact with Russ and, when he left for another job, with his replacement, Jacob. Upon hearing from Jacob that Mr. Estrada, "in the last few weeks," had gotten into trouble and was in jail, R.166:4-5, it would have been a perfect opportunity for the State to properly effect service of the subpoena on Estrada, but the State did not do that, nor did it even check the jail roster until the week and the day before trial, whereupon it found Estrada to have been released. R.166:5. The subpoena was merely e-mailed and presumably passed along, although we don't have a concrete record that Estrada received trial notice.

The State was able to produce Mr. Estrada at the preliminary hearing to testify. According to the record, the State sent a subpoena for Mr. Estrada for the trial, to Pastor Russ via email and asked him to give it Mr. Estrada. R.166:3-5. The State relied solely upon that method. R.166:2-6. That constitutes a feeble effort by any standard.

The State apparently was no longer in touch with Pastor Russ at the time of trial. R.166:4. No testimony from him was presented at time of trial. The Utah Rules of Criminal Procedure has specific requirements in the service of subpoenas upon witnesses. Utah R. Crim. P. 14. Proper service of a subpoena can be effected as follows: "(3) A subpoena may be served by any person over the age of 18 years who is not a party. Service shall be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying the witness or interpreter of the contents. A peace officer shall

serve any subpoena delivered for service in the peace officer's county.” *Id.* It is a matter of conjecture whether the subpoena was actually served, let alone whether it was served in accordance with Rule 14.

One of the safeguards of having a responsible person, such as a constable or sheriff, serve a subpoena, is that a proper return gives opposing counsel reasonable notice of the actual service. It is not for nothing that the Rule requires that, “(4) Written return of service of a subpoena shall be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.” Utah R. Crim. P. Rule 14. That did not occur in this case. This failure severely undermines the question of the witness’ unavailability.

Federal courts give certain deference to State court proceedings. The United States Supreme Court noted that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2254, imposes a highly deferential standard in evaluating state-court rulings, demanding that state-court decisions be given the benefit of the doubt.” *Hardy v. Cross*, 565 U.S. 65, 66, 132 S. Ct. 490, 491 (2011). For State court purposes, the United States Supreme Court applied the standard that, “a witness is not ‘unavailable’ for purposes of the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” *Id.*, 565 U.S. at 69 quoting *Barber v. Page*, 390 U. S. 719, 724-725, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). “The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.” *Hardy*, 565 U.S. at 70 quoting *Ohio v. Roberts*, 448 U.S.



56, 74, 100 S. Ct. 2531, 2543 (1980) [reversed on other grounds, *Crawford v. Washington*, 541 U.S. 36, 69, 124 S. Ct. 1354, 1374 (2004)]. The Tenth Circuit recognizes that “(d)espite the loss of . . . important aspects of confrontation, where the government is able to prove the unavailability of a witness, the Sixth Amendment includes a “rule of necessity” permitting use of prior testimony.” *Cook v. McKune*, 323 F.3d 825, 832 (10th Cir. 2003). “But because there is a real cost to the defendant in foregoing true confrontation, the unavailability requirement must be more than a formality.” *Id.* at 833. Nevertheless, “if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation.” *Ohio v. Roberts*, 448 U.S. at 74. “The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate.” *Id.*, 448 U.S. 74-75.

Federal courts view the Confrontation Clause to require a stronger showing of unavailability and reliability than does evidentiary Rule 804. *Ecker v. Scott*, 69 F.3d 69, 72 n.3 (5th Cir. 1995). That is the law in Utah as well. “In a criminal case, the Confrontation Clause establishes a heavy burden on the prosecutor to exercise good faith efforts to produce the out-of-court witness.” *Mangrum & Benson on Utah Evidence, Unavailability: Unable to Procure Attendance* [Rule 804(a)(5), p. 869 (2015-2016), citing *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)]. “The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine

and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown [\*726] to be actually unavailable, this is not, as we have pointed out, such a case.” *Barber v. Page*, 390 U.S. at 725-26.

Utah courts apply a standard perhaps more stringent than its federal counterparts. ““(F)or a witness to be constitutionally unavailable, it must be practically impossible to produce the witness in court. . . . Every reasonable effort must be made to produce the witness.’ This requires the proponent of the out-of-court statement to do his utmost to ‘procure the declarant’s attendance by process or other reasonable means.’ Utah R. Evid. 804(a)(5).” *State v. Montoya*, 2004 UT 5, ¶ 15, 84 P.3d 1183, 1187 (Sup.Ct.) quoting *State v. Webb*, 779 P.2d 1108, 1113 (Utah 1989) (citations omitted); accord *State v. Drawn*, 791 P.2d 890, 893 (Utah App. 1990) (holding that where the state had subpoenaed each witness three times prior to trial, these efforts were sufficient to demonstrate unavailability for purposes of the hearsay exception), cited by Mangrum & Benson on Utah Evidence, Unavailability of Declarant, [Rule 804(a)], supra, p. 867; *State v. Barela*, 779 P.2d 1140, 1142-43 (Utah Ct. App. 1989)(“ The State bears the burden of proving unavailability by competent evidence.”). “Thus, in general, a witness will not be

found unavailable until the proponent of the evidence demonstrates that he has used all reasonable means at his disposal to secure the attendance of the witness.” *Montoya*, at ¶ 16.

A further question goes to the issue of when the State gave notice of the witness’ likely absence. The timing of the State’s notice in the instant case is suspect. Notifying the trial court on the first day of trial that a witness is “unavailable” is too late to allow for reasonable investigation. A recent decision from Massachusetts highlights the problem:

Where a witness is unavailable due to illness or infirmity, the “good faith effort” required of the Commonwealth is to promptly inform the court and the defendant of the unavailability of the witness once the Commonwealth learns of it, so that they have an adequate opportunity to learn more about the witness’s medical condition and to explore the alternative of a continuance or a deposition. *Where the unavailability of the witness is not made known until the first day of trial, the defendant has little opportunity to investigate* the witness’s medical condition to challenge the prosecutor’s claim of unavailability. At that juncture, ordering a continuance or scheduling a deposition might be impracticable, effectively denying the defendant the possibility of these alternatives.

*Commonwealth v. Housewright*, 470 Mass. 665, 674, 25 N.E.3d 273, 283 (2015)(emphasis added). The impracticality in the instant matter of ordering a continuance is obvious, whereas if the State had notified court and counsel that the witness was in jail when that was learned, or had recently been released, defense counsel may have been able to locate and make their own provisions to secure the witness’ attendance.

The Court of Appeals erred in its determination that the trial court exercised appropriate discretion in finding that the witness was unavailable under the circumstances, even under those circumstances set forth in the Court's opinion. *Goins* at ¶¶ 12 – 13. Even with knowledge that a witness is available during substantial periods prior to trial (although perhaps not immediately), no attempt was made to issue, properly serve a subpoena, the contents of which are not in the record, and secure and file a proper return, nor was there any attempt indicated in the record to notify the trial court or counsel in a timely manner of the witness' apparent unavailability. Accordingly, the witness should not be found unavailable.

Mr. Goins was prejudiced by the trial court's finding and the Court of Appeals decision affirming it was error. Respecting an error involving the Sixth Amendment, this Court must be able to "confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Del. v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436 (1986). To hold a state constitutional error harmless under Utah Const. Art. I, § 12, the Utah State constitutional analog to the Sixth Amendment, it must, again, be deemed harmless beyond a reasonable doubt. *State v. Young*, 853 P.2d 327, 359 (Utah Sup.Ct. 1993) ("In other words, the side which benefited by the error (the prosecution) must show beyond a reasonable doubt that the error did not contribute to the verdict (or sentence) obtained."). Where "the error in question amounts to a violation of a defendant's right of confrontation guaranteed by the Sixth Amendment to the United States Constitution, its harmlessness is to be judged by a higher standard, i.e., reversal is

required unless the error is harmless beyond a reasonable doubt." *State v. Villarreal*, 889 P.2d 419, 425 (Utah Sup.Ct. 1995) quoting *State v. Hackford*, 737 P.2d 200, 204 (Utah 1987) (citing *Harrington v. California*, 395 U.S. 250, 254, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969)); see also *State v. Maestas*, 2012 UT 46, ¶ 86 n.88, 299 P.3d 892, 922 (Sup.Ct.).

Obviously, without Mr. Estrada's testimony, there could be no conviction on Count III, the Threatening charge, as he was not only the alleged victim under that charge, but the only percipient witness. Erroneously finding Mr. Estrada to have been unavailable as a witness was not harmless beyond a reasonable doubt. The Court of Appeals erred holding the trial court had not abused its discretion in finding Estrada "unavailable."

The prejudice does not end there, however. Mr. Estrada's testimony was also vital to the State's case, not only because he was the victim under Count III, but also because he corroborated Mr. Omar's testimony regarding the knife, Mr. Goins' behavior, and his motives when he was looking for Mr. Omar. "Confrontation Clause concerns are heightened and courts insist on more diligent efforts by the prosecution where a "key" or "crucial" witness' testimony is involved." *McCandless v. Vaughn*, 172 F.3d 255, 265-6 (3rd Cir. 1999). For such an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the jury's verdict. *State v. Young*, supra, 853 P.2d at 345. Presentation of Estrada's preliminary hearing testimony at trial necessarily undermines confidence in the overall verdict.

**C. PRELIMINARY HEARING TESTIMONY SHOULD NOT BE ADMITTED AT TRIAL. ALLOWING MR. ESTRADA'S PRELIMINARY HEARING TESTIMONY WAS PREJUDICIAL TO MR. GOINS.**

The Court of Appeals held with prior precedent that the introduction of preliminary hearing testimony satisfies the confrontation clause and Utah R. Evid. 804(b)(1)(B), because Mr. Goins was given the “opportunity” to confront the witness. *Goins* at ¶ 17 citing *State v. Garrido*, 2013 UT App 245, ¶ 18, 314 P.3d 1014 [Defendant was given ample opportunity to cross-examine the missing witness but declined to avail himself of the opportunity. “While ‘[d]efense counsel may have elected to forego cross-examination[,] . . . that does not mean that the opportunity was not available’.” quoting *State v. Nelson*, 725 P.2d 1353, 1357 (Utah 1986)].

The current authorities overlook the fact that the current nature of preliminary hearings precludes a defendant, both by Utah State Constitutional authority and, as a result of that authority, by common practice, from adequately or, perhaps more important, appropriately and sufficiently confronting and cross-examining a witness in at least an approximation of cross-examination at trial. Defense counsel objected to introduction of Estrada’s testimony on the basis that the motive to cross-examine at preliminary hearing, was, and is, often entirely different from that at trial. Admitting that there was an “opportunity” to cross examine Estrada, Mr. Goins defense counsel stated,

. . . that under 801(b)(1)(b) it specifically states that you had an opportunity and similar motive to develop it by direct, cross, or redirect examination and in these preliminary hearings there is an abbreviated procedure and quite frankly, Your Honor, the motive in developing testimony is different at a preliminary hearing than it is at trial. We frequently ask questions

during preliminary hearings that we would not ask at trial because evidence is admissible at . . . preliminary hearing but not necessarily admissible at trial. The rules of evidence are different and - or, or by the same token, we don't ask question that we might ask at a trial because credibility determinations are not being made at preliminary hearing. *The Court making the probable cause determination is not assessing the credibility of a witness, therefore we do not ask those questions to get that information out. So I don't believe that the motive of developing that testimony is the same at a preliminary hearing as it would be at trial . . .*

R.166:10 (emphasis added).

The context and manner in which a defense attorney might cross-examine a witness during the course of a jury trial is likely to be very different from the manner in which cross-examination takes place, if allowed by the court, during preliminary hearing. It is simply inaccurate to give a blanket imprimatur upon preliminary hearing testimony, as the nature of a preliminary hearing is extremely different from that of a jury trial, or even of a bench trial. The preliminary hearing is constitutionally intended solely to be for the purpose of establishing probable cause. See Utah Const. Art. I, § 12 as amended 1995. The Court of Appeals' warning in *Goins* to defense counsel to be prescient ("It may behoove defense counsel in such cases to take full advantage of any opportunity to cross-examine such witnesses,") *Goins* at n. 7., is essentially a directive for counsel to obtain a crystal ball. Given the fact that, in any given case, defense counsel may be completely precluded by the particular magistrate judge from cross-examining the witness on the basis that such examination will not assist the court in establishing probable cause, the effort to become a seer may be entirely wasted. Many judges take the position that if cross-examination is not in furtherance of establishing probable cause it is

objectionable and will, even *sua sponte*, disallow questioning beyond what may assist in establishing probable cause for a bind-over. “How does that help establish probable cause(?),” is a commonly asked question. Other judges will of course sustain a prosecutor’s objection on the basis that a question goes beyond the scope of establishing probable cause. There is no constitutional right to confrontation of witnesses at preliminary hearings. *State v. Timmerman*, 2009 UT 58, ¶ 13, 218 P.3d 590. Reliable hearsay is allowed, evidence of prior bad acts, bad character evidence, and various matters which would be entirely extraneous at trial, may come in to evidence without objection, for the very reason that the preliminary hearing has such a limited constitutional purpose.

For confrontation purposes, throughout *Crawford v. Washington*, 541 U.S. 36, reference is made throughout to the “opportunity to cross-examine”, rather than actual cross-examination. *Crawford*, 541 U.S. passim. The “prior testimony exception” to the exclusion of out-of-court statements, specifically preliminary hearing testimony, applies “only if the defendant had an adequate opportunity to cross-examine.” *Id.*, 541 U.S. at 57. Many State courts, however, have considered motive in determining whether to allow preliminary hearing testimony at trial. *Commonwealth v. Taylor*, 32 Mass. App. Ct. 570, 574-75, 591 N.E.2d 1108, 1112 (1992)(“In order to establish reliability, ‘[t]he prior testimony of the currently unavailable witness must have been given ‘in a proceeding addressed to substantially the same issues as in the current proceeding, with reasonable opportunity *and similar motivation* on the prior occasion for cross-



examination of the declarant by the party against whom the testimony is . . . offered," Quoting *Commonwealth v. Ortiz*, 393 Mass. at 532); *State v. Richardson*, 156 Idaho 524, 528-29, 328 P.3d 504, 508-09 (2014) (Identifying three non-exhaustive indicators of an "adequate opportunity," determined case-by-case, for cross-examination: 1. representation by counsel, 2. no significant limitation in any way in the scope or nature of cross-examination, 3. no new and significantly material line of cross-examination that was not touched upon in the preliminary hearing."); *People v. Zapien*, 4 Cal. 4th 929, 975, 17 Cal. Rptr. 2d 122, 147, 846 P.2d 704, 729 (1993) (A defendant's motive for cross-examining a witness during a preliminary hearing will differ from the motive for cross-examining that witness at trial. To be admissible at trial, these motives must be at least "similar."). In the instant matter, counsel conducted cross-examination of Estrada for discovery purposes but did not bother to object to testimony at the preliminary hearing. Estrada's statement that he moved out from living with Mr. Goins when his "bike ended up missing," R.202:16, strongly inferred that Mr. Goins stole it. This evidence, to which counsel objected at trial, R. was very objectionable, which defense counsel raised in terms of "evidentiary admissibility," the stolen bike inference, R.167:3, to which the State responded, R.167:12. The prior "bad act" evidence may very well have had a substantial impact on the decision of the jury. The trial court allowed it, R.167:16-17, and the Court of Appeals did not address the issue at all in its decision. This was error of a significant magnitude and raises the question of why some mechanism was not sought by the court to excise this particular statement from the

recording played for the jury. Certainly it would not have been allowed had the witness been present, no curative jury instruction could have ameliorated the problem, and it badly eroded Mr. Goins' right of confrontation to have reasonably untainted testimony from a prior proceeding to be presented to the jury. Prior cross-examination must not only be full, but also fair. See discussion *infra*. For purposes of reiterating the testimony of Estrada at trial, therefore, prior cross-examination in the area of this prior bad act was not fair. It was error not to require that it be excluded.

There are those jurisdictions, including case law in Utah, which have adopted a *per se* rule, e.g., *State v. Brooks*, *infra*. In rejecting such a position, the Idaho Court of Appeals stated,

Some courts have adopted a *per se* rule that preliminary hearing testimony is admissible in a subsequent trial if the unavailability and opportunity to cross-examine requirements are satisfied. See *State v. Brooks*, 638 P.2d 537 (Utah 1981) (cross-examination at trial and at preliminary hearing in same case take place under same motive and interest as matter of law); see also *State v. Massengill*, 99 N.M. 283, 657 P.2d 139 (App.1983). These courts treat the "motive" issue primarily, if not entirely, as one of law. We decline to adopt such a rule, although it would be much easier for trial courts to apply.

*State v. Ricks*, 122 Idaho 856, 862-63, 840 P.2d 400, 406-07 (Ct. App. 1992). The Idaho court in *Ricks* concluded that a case-by-case determination would allow the trial court to determine, as a matter of fact, whether the party opposing the use of such testimony "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." *Ricks* 840 P.2d at 407. It should be pointed out that the Utah case referenced by *Ricks* in the above quotation, *State v. Brooks*, utilized the "sufficient

indicia of reliability” of the hearsay test. 638 P2d at 539. Brooks was decided well before *Crawford v. Washington* overruled *Ohio v. Roberts* on that very issue. “The Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability.” *Crawford v. Washington*, 541 U.S. at 62. Since the Brooks decision was heavily rooted in the type of “reliability” determination, which Crawford soundly rejected in abrogating *Ohio v. Roberts*, the viability of Brooks and its per se determination of motive is heavily in doubt at the present time.

There are numerous cases which hold that cross-examination at preliminary hearing need not be identical to that at trial, the opportunity must be “sufficient.” *State v. Outlaw*, 216 Conn. 492, 499, 582 A.2d 751, 755 (1990)(using the rejected *Ohio v. Roberts* “reliability” test); *People v. Zapien*, supra, 846 P.2d at 729; *Commonwealth v. Blazemore*, 531 Pa. 582, 588, 614 A.2d 684, 687 (1992)[“(T)he standard to be applied is that of full and fair opportunity to cross-examine.”].

More recent authority, however, has taken a different approach, particularly where, as in Utah, the preliminary hearing is confined to establishing probable cause. Utah Const. Art. I, § 12 (“Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall

preclude the use of reliable hearsay evidence . . .”). The Wisconsin Supreme Court stated the following:

In Wisconsin, a defendant has a statutory right at a preliminary hearing to cross-examine witnesses against him. Wis. Stat. § 970.03(5). *However, the scope of that cross-examination is limited to issues of plausibility, not credibility.* State ex rel. Huser v. Rasmussen, 84 Wis. 2d 600, 614, 267 N.W.2d 285 (1978). *This is because the preliminary hearing "is intended to be a summary proceeding to determine essential or basic facts" relating to probable cause, not a "full evidentiary trial on the issue of guilt beyond a reasonable doubt."*

*State v. Dunn*, 121 Wis. 2d 389, 396-97, 359 N.W.2d 151 (1984)(emphasis added).

Further clarifying, a more recent post-Crawford Wisconsin case stated,

Cross-examination at a *preliminary examination is not to be used "for the purpose of exploring the general trustworthiness of the witness."* Huser, 84 Wis. 2d at 614. *Indeed, "[t]hat kind of attack is off limits in a preliminary hearing setting."* State v. Sturgeon, 231 Wis. 2d 487, 499, 605 N.W.2d 589 (Ct. App. 1999). *When this restriction is enforced, as it was in the present case, and the State attempts to use the preliminary hearing testimony at a later trial, a Confrontation Clause problem arises.*

*State v. Stuart*, 2005 WI 47, ¶¶30-31, 279 Wis. 2d 659, 673, 695 N.W.2d 259, 265-66(emphasis added). This highlights a pragmatic dilemma which dogs defense attorneys who wish to fully cross-examine but do not wish to push the preliminary hearing judge, or the prosecuting attorney, too far and have it cut off. The question is, how does one know if “full and fair cross-examination” will be allowed in a particular case without overstepping one’s bounds? Defense attorneys are often walking on eggshells to ensure the magistrate judge does not cut them off and will truncate or curtail their examination accordingly.

Exploring areas of bias, motive to lie, and lack of credibility, matters not associated with “plausibility,” are generally off limits in preliminary hearings in Utah, which brings up an interesting equal protection issue. If some magistrates allow full and fair cross-examination and hew to a strict construction of Art I, § 12, such an arbitrary and capricious application of the Utah Constitution and the Rules of Evidence violates the guarantee of equal protection of the laws under the Fourteenth Amendment and the requirement of the uniform operation of laws, Utah Const. Art. I, § 24. The uniform operation of laws clause “is at least as rigorous as the federal guarantee.” *State v. Houston*, supra, ¶41, citing, inter alia, *State v. Drej*, 2010 UT 35, ¶33 n.5, 233 P.3d 476; accord *Gallivan v. Walker*, 2002 UT 89, ¶ 33, 54 P.3d 1069 (Sup.Ct.).

Thus, presumably only analysis under Utah Const. Art. I, § 24 of the Utah Constitution is required. Whatever the case may be, given that hundreds of preliminary hearings are held each year in Utah, some magistrates and/or prosecutors allowing considerable latitude in cross-examination, some hewing to the principle that only the depths of plausibility and not credibility may be plumbed, there is a considerable question as to whether criminal defendants, separated into differing classes (those allowed full and fair cross examination with similar motive and interest, and those who are denied the opportunity) are being treated discriminatorily and the law, specifically Utah Const. Art. I, § 12, is being applied in a non-uniform fashion, denying equal protection.

“All laws of a general nature shall have uniform operation.” Utah Const. Art. I, § 24. As was long ago explained,

"A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matter included as compared to those excluded from its operation, provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act.

"In order to see whether the excluded classes or transactions are on a different basis than those included, we must look at the purpose of the act. The objects and purposes of a law present the touchstone for determining proper and improper classifications.

"It is only where some persons or transactions excluded from the operation of the law are as to the subject matter of the law in no differentiable class from those included in its operation that the law is discriminatory in the sense of being arbitrary and unconstitutional. If a reasonable basis to differentiate those included from those excluded from its operation can be found, it must be held constitutional."

*State v. J. B. & R. E. Walker, Inc.*, 100 Utah 523, 530, 116 P.2d 766, 769 (Sup.Ct. 1941) quoting *State V. Mason*, 94 Utah 501, 78 P.2d 920, 923, 924, 117 A. L. R. 330 (Sup.Ct. 1938). This presents an extremely difficult issue to preserve at the trial level and should be considered. The fact cannot be ignored, however, that there is no rational basis for any differentiation between those who are allowed sufficient opportunity for cross-examination at preliminary hearing and those who are not. The Fourteenth Amendment guarantees all citizens equal protection of the law. U.S. Const. amend. XIV, §1 as does Utah Const. Art. I, § 24. For this reason alone, preliminary hearing testimony, which was obtained contrary to the strictures of the United States and State Constitutions, should be disallowed at trial.

*People v. Fry*, 92 P.3d 970 (Colo. 2004) presents the argument which Goins believes is the most persuasive in this area. A copy of *People v. Fry* is included in Addendum I. Some, not all, of the reasoning of Fry is set forth as follows:

A preliminary hearing is limited to matters necessary to a determination of probable cause. The rights of the defendant are therefore curtailed: evidentiary and procedural rules are relaxed, and the rights to cross-examine witnesses and to introduce evidence are limited to the question of probable cause.

A defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary hearing. By rule, defendants have the right to a preliminary hearing under certain circumstances, and pursuant to the rule a defendant 'may cross-examine witnesses against him and may introduce evidence in his own behalf.' Crim. P. 7(h)(3). However, the preliminary hearing is not intended to be a mini-trial or to afford the defendant an opportunity to effect discovery.

Hence, a preliminary hearing does not provide the same safeguards as a trial.

Additionally, the judge's findings at a preliminary hearing are restricted to a determination of probable cause. A judge may not engage in credibility determinations unless the testimony is incredible as a matter of law. . . . if it is "in conflict with nature or fully established or conceded facts. It is testimony as to facts which the witness physically could not have observed or events that could not have happened under the laws of nature." Aside from the exceptionally rare instance of credibility as an issue of law, defense counsel has no legitimate motive to engage in credibility inquiries and may be prohibited from doing so. Thus, the right to cross-examination may be curtailed by the judge in all but the most unusual circumstances. Because credibility is not at issue and probable cause is a low standard, once a prima facie case for probable cause is established, there is little defense counsel can do to show that probable cause does not exist. Therefore, as a practical matter, defense counsel may decline to cross-examine witnesses at the preliminary hearing, understanding that the cross-examination would have no bearing on the issue of probable cause and that the judge may limit or prohibit the cross-examination. Thus we conclude that the opportunity for cross-examination at a preliminary hearing is very limited. Further, the opportunity for cross-examination regarding the

credibility of a witness, as a matter of fact, exists only to the extent that an attorney persists in asking questions that have no bearing on the issues before the court, and such irrelevant questioning is not prohibited by the court.

*People v. Fry*, 92 P.3d at 977(internal citations omitted). “Thus,” the Fry court concluded, “we have held that the preliminary hearing does not satisfy Confrontation Clause requirements.” *Id.* “(W)e do not wish to change the scope of the preliminary hearing by overruling our decision in Smith that a preliminary hearing does not provide an adequate opportunity for cross-examination. As the Attorney General recognized in oral argument, Smith is good law; it prevents the preliminary hearing from becoming a mini-trial which would expend time and resources the judiciary does not possess.” *Id.* at 978.

Considering the issue in the context of judicial resources, if every preliminary hearing becomes a “mini-trial,” there may be little time left for judges to conduct actual trials. Bound separately as an Appendix is a printout obtained from Utah Court Data Services on October 21, 2016. There are 20,073 entries, virtually all felonies, for cases in 2015, wherein preliminary hearings were scheduled. The explanatory e-mail indicates that column F reflects the date the preliminary hearing was scheduled to be heard. If it was cancelled, column E indicates the date it was cancelled and column G reflects the reason. As is evident, few of those scheduled for hearing were cancelled. As the explanatory e-mail indicates, unless column E indicates the hearing was cancelled, it took place on the date indicated in column F (it is possible that the data does not indicate whether or not the preliminary hearing was held or waived). The vast majority of those



preliminary hearings, as reflected in column F, took place as scheduled, approximately 70-75%.<sup>1</sup> Assuming roughly 15,000 preliminary hearings resulted in mini-trials wherein full and fair cross-examination, going to every facet of a witness' credibility and such sundry other matters as defense counsel wished to preserve for trial were to be allowed, somewhere in the vicinity of 45,000 hours of judicial time would be consumed.<sup>2</sup> That is not an unfair estimate considering that counsel often forgo cross-examination of most witnesses entirely, as cross-examination would be both premature and would serve no useful purpose in frustrating the prosecution's ability to establish probable cause. Whether or not these figures and speculations are precise, it is entirely evident that it is impractical to allow full and fair cross-examination of each witness in every preliminary hearing held.

There seems to be at least some agreement in the Court of Appeals that the issue is unsettling. See *State v. Pham*, 2016 UT App 105, ¶ 17 n.3 [“(W)e are also not convinced that a preliminary hearing always provides the opportunity for cross-examination guaranteed by the Confrontation Clause. . . .”].

The State would have it both ways: a criminal defendant is provided the “opportunity” to fully and fairly confront the witness at preliminary hearing yet the purpose of a preliminary hearing is solely for the purpose of establishing probable cause. Those are diametrically opposed propositions. The two can only be reconciled if the

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1 . Counsel's best guess.

2 . Again, just a conjecture on the part of counsel. An average of three hours per preliminary hearing would likely be required.

preliminary hearing court chooses to allow defense counsel ample latitude to cross-examine in areas which may have nothing to do with establishing probable cause. Even then, it is questionable whether that sort of “opportunity” satisfies the needs of defense counsel when it comes time to cross-examine a witness before a jury at trial.

Oftentimes, certainly more often than not, discovery is in its seminal stages. In order to meaningfully cross-examine, counsel must have all the information which would be available at trial. It is very troubling that one would feel compelled to cross-examine to the fullest extent possible, perhaps bringing forth inadmissible testimony or otherwise unfavorable testimony, without the benefit of discovery which would later be produced prior to trial. One court has determined that, “The adequacy of the opportunity to confront will be decided on a case-by-case basis, turning upon the discovery available to the defendant at the time and the manner in which the magistrate judge allows the cross-examination to proceed.” *Chavez v. State*, 125 Nev. 328, 337, 213 P.3d 476, 482 (2009). One must wonder how practical that is in terms of judicial resources. And again, it second guesses defense counsel, as well as the magistrate, to a considerable degree.

With respect to rulings on hearsay, legal questions regarding admissibility are reviewed for correctness, questions of fact . . . for clear error, and the final ruling on admissibility for abuse of discretion. *State v. Garrido*, supra, 314 P.3d at ¶ 10. The Court of Appeals erred in finding that the witness was unavailable and that counsel had an adequate opportunity to cross-examine at preliminary hearing, thus permitting admission

of the preliminary hearing testimony of Gabriel Estrada. For the reasons set forth, this Court should reverse and remand for a new trial.

## **POINT II**

### **THE COURT OF APPEALS ERRED IN DENYING PETITIONER'S PETITION FOR REHEARING RAISING NEW ARGUMENTS THAT TRIAL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.**

#### **A. FACTS RELEVANT TO THE ISSUE OF SELF-DEFENSE INSTRUCTION.**

The recorded preliminary hearing testimony of the victim of the Threatening with a Dangerous Weapon charge, Gabriel Estrada, R.202:2 – 13, was played for the jury. R. 167:149. The defendant's cross-examination of Mr. Estrada raised no factual support for or issues of self-defense whatsoever. R.202: 9 – 13. Thus, this point goes only to Counts I and II of the Amended Information.

The testimony of the primary victim, Jacob Omar, first brought forth the issue of self-defense on the part of the defendant during the State's direct examination. Factually, it arose on direct examination with the victim, Mr. Omar, indicating he was being questioned by Mr. Goins and his friend, Star, and that Mr. Omar was the initial aggressor:

Next thing I knew just because being waken up in the middle of the afternoon to this nonsense, I see Desean stepping onto my blanket. I don't allow anybody to step onto my blanket. So I got up and I pushed him off my blankets.

R.167:124-125. The defendant was then placed in a defensive position and reacted accordingly. R.167:125-6. While the defense elaborated on the issue during cross-examination, R.167:140-145, 146-150, the initial and primary testimony with respect to

the defendant's defense of self-defense was raised and developed by the State in its direct examination. R.167:124-139,145-146.

The trial court ruled that sufficient evidence of self-defense was present to entitle the defendant to instruct the jury on the issue. R.167:217-218.3 During discussion of the proposed jury instructions, the subject arose of defendant's requested instruction discussing the burden and weight, *inter alia*, relative to self-defense. R.60, defense requested instruction is attached as Addendum J. The State objected to the instruction, but defense counsel insisted that it should be given as is. R.167:228-231. The trial court gave the instruction as written, "over the State's objection." R.167:231. The instruction, R.102, No. 24, is attached as Addendum K.

**B. THE COURT OF APPEALS SHOULD HAVE DECIDED THE MERITS OF THE PETITION FOR REHEARING.**

This subsection responds to the question of whether a petition for rehearing is an appropriate vehicle for addressing a claim of ineffective assistance of counsel, including prior appellate counsel.

Utah R. App. P. Rule 35 states in pertinent part, "the petition (for rehearing) shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended . . . ." There was no claim that the Court

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3 "It is a subtle nuance but I am finding that there has been evidence that Omar pushed the defendant, that he was angry, he was intense, even his own admissions is that he was angry and that under the circumstances the defense has described which they may argue to the jury and it's for the trier of fact to determine if those are the circumstances, that at one point the defendant was on the bottom and Omar was on top and that is sufficient for some evidence to warrant the self-defense instruction." R.167:217-218.

“misapprehended” anything which was presented. The claim was that, due to the ineffective assistance of counsel of previously appointed appellate counsel, the Court of Appeals “overlooked” an important issue. The rule itself places no restrictions upon why, i.e., the underlying reasons, the court may have “overlooked” an issue. It simply allows the consideration of something which was overlooked.

The Petition for Rehearing itself was fully supported by the record, consistent with the record and briefing of the facts before this Court. It involved no extraneous facts, and provided the Petitioner with the guarantee of a meaningful appeal of the issue briefed in the Petition for Rehearing, and allowed the Court of Appeals ample latitude to provide for such further briefing and argument as desired.

The Court of Appeals should have ruled on the merits of the Petition for Rehearing because the Petitioner has stated with particularity the points of law and fact, all contained within the record on appeal, which the Petitioner claimed the Court had “overlooked.” It was the responsibility of Mr. Goins’ initial appellate counsel to bring the matters to the court’s attention. “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *United States v. Cronin*, 466 U.S. 648, 655-56, 104 S. Ct. 2039, 2045 (1984). Failing to provide adversarial testing as to a single issue, when that issue is critical to a finding of guilt, may in itself produce a breakdown in the adversarial process. See *Cronin*, 466 U.S. at 664. “Counsel also has a duty to bring to bear such skill and knowledge as will render the trial

a reliable adversarial testing process.” *Strickland v. Washington*, 466 U.S. 668, 688, 104 Sup. Ct. 2052 (1984). Appellate counsel failed to “bring to bear such skill and knowledge as will render the (appeal) a reliable adversarial testing process.” *Id.*

The result of prior appellate counsel’s ineffective assistance is that the Court of Appeals was caused to “overlook” the specific issue involved. Refusal of the court to rule on the Petition for Rehearing was a denial of the defendant’s right to effective appellate counsel on appeal. The petitioner enjoys a constitutional right to appeal arising from article I, section 12 of the Utah Constitution. *State v. Verikokides*, 925 P.2d 1255, 1256 (Utah Sup.Ct. 1996) citing *State v. Tuttle*, 713 P.2d 703, 704 (Utah Sup.Ct. 1985)(“The Utah Constitution provides that a defendant in a criminal prosecution shall have a “right to appeal in all cases.” Utah Const. art. I, § 12.”). He is entitled to have counsel appointed and paid for at the appellate level. “The cost of appointed counsel for a party found to be indigent, including the cost of counsel and expense of the first appeal, shall be paid by the county in which the trial court proceedings are held.” Utah Code Ann. § 78A-6-1111. It goes without saying that the Petitioner is entitled to the effective assistance of counsel. *Gregg v. State*, 2012 UT 32, ¶ 48, 279 P.3d 396, 409 (Sup.Ct.); *Landry v. State*, 2012 UT App 350, ¶ 11, 293 P.3d 1092, 1096. “The Due Process Clause of the Fourteenth Amendment ensures criminal defendants a right to effective assistance of appellate counsel.” *Lafferty v. State*, 2007 UT 73, ¶ 39, 175 P.3d 530, 539 (Sup.Ct.)<sup>4</sup>.

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<sup>4</sup> For this proposition *Lafferty* cites *Bruner v. Carver*, 920 P.2d 1153, 1157 (Utah Sup.Ct. 1996), which states as follows:

Initial defense counsel's error was caught early enough in the appellant process that the Court of Appeals could of swiftly and effectively dealt with the matter. This presented an excellent reason to litigate the issue in the Court of Appeals, rather than put it off to this Court, or more so, a post-conviction proceeding under the PCRA, assuming the defendant could obtain counsel to handle the matter or attempt to do it pro se (always, at the least, problematic).

Because the practical effect of a refusal by the Court of Appeals to entertain the merits of the Petition for Rehearing was to deny the effective assistance of counsel at that stage, the defendant timely brought the issue to the Court of Appeals' attention as a matter which, through no fault of its own, the court had "overlooked." Mr. Goins would be severely prejudiced by having to raise the issues presented in a subsequent proceeding pursuant to the Post-Conviction Relief Act. Because Mr. Goins, who is indigent, would

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The Due Process Clause of the Fourteenth Amendment guarantees the right to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). The standard for judging ineffective assistance of appellate counsel is the same as the standard for judging ineffective assistance of trial counsel. *Butterfield v. Cook*, 817 P.2d 333, 336 (Ct. App.), cert. denied, 826 P.2d 651 (Utah 1991); see also *Tillman v. Cook*, 855 P.2d 211, 221 (Utah 1993), cert. denied, 510 U.S. 1050, 114 S. Ct. 706, 126 L. Ed. 2d 671 (1994); *State v. Humphries*, 818 P.2d 1027, 1029 (Utah 1991). Under that standard, a defendant must show that his counsel's representation fell below an objective standard of reasonable conduct and that the deficient performance prejudiced the defendant. *Tillman*, 855 P.2d at 221 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

not be entitled to counsel as a matter of right pursuant to a Post-Conviction Petition, his ability to even raise the issue presented at all would be severely limited, if not denied altogether.

Furthermore, there are legitimate policy reasons for hearing the matter at the appellate court level, while it is still ripe, rather than shuffling it down the road with the hope that some good-hearted lawyer will take up the issue pro bono in a PCRA setting.

The Sixth Amendment requires that an appellant be provided the effective assistance of counsel. See *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)<sup>5</sup>. The Petitioner timely raised that issue in the Court of Appeals. It is not necessary for the Court of Appeals to detour from the direct application of Utah R. App. P. Rule 35. The issue was “overlooked” by the Court. The reason it was overlooked is precisely why Mr. Goins was required to request a rehearing. His right to counsel was abridged by his original appellate attorney. Rehearing was the efficient, fair, just, and judicially economic forum for the issue presented to be heard. Rehearing should have

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<sup>5</sup> “In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. *To prosecute the appeal, a criminal appellant must face an adversary proceeding that -- like a trial -- is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake.* To be sure, respondent did have nominal representation when he brought this appeal. But *nominal representation on an appeal as of right -- like nominal representation at trial -- does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.*”

*Evitts v. Lucey*, 469 U.S. at 396.



been granted.

This Court addressed this very issue, in the context of a petition for certiorari, where the issue of prior appellate counsel's ineffective assistance was raised for the first time on certiorari. The Court held that, while unusual, it should hear the issue. It stated as follows:

The State is correct that ordinarily a claim of ineffectiveness of appellate counsel must be raised in a postconviction proceeding, as provided for in rule 65B(i), Utah Rules of Civil Procedure. Obviously, such a proceeding would usually be the first opportunity to advance that claim. However, this case presents the unusual situation where the claim of ineffectiveness of appellate counsel is being raised in a second tier of appellate review by new appellate counsel. *If we were to require defendant to present the claim of ineffective assistance of trial or appellate counsel in a postconviction proceeding in the trial court, we are not aware of any evidence or argument which might be made that is not now before us. We therefore conclude that in these peculiar, narrow circumstances, we should now address defendant's claim and not require him to raise it later in a postconviction proceeding in the trial court. Judicial economy will be served thereby.* (Emphasis added).

*State v. Humphries*, 818 P.2d 1027, 1029 (Utah Sup.Ct. 1991)(emphasis added).

Furthermore, rehearing is not inconsistent with current practice under Utah R. App. P. Rule 23B. "A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel." *Id.* That mechanism is available in order to expose the inadequacies of counsel at the trial level even after the matter is on appeal. There is nothing inconsistent then with giving similar consideration to an error made by appellate counsel timely brought to the Court's attention at the appellate level on a petition for rehearing. Compared to a Rule 23B

remand, evidentiary hearing in the trial court, and revisiting the issue on appeal, it is far less time consuming, requires no additional fact finding, and provides the defendant/appellant the constitutional guarantee of the effective assistance of counsel throughout his appeal.

Consistent with the Utah Supreme Court's ruling in granting a petition for certiorari in *State v. Humphries, supra*, 818 P.2d at 1029, and for the reasons stated in the premises, Court of Appeals should have granted a rehearing and ruled on the merits of Mr. Goins' Petition for Rehearing.

**C. JURY INSTRUCTION NO. 24 IS AN INCORRECT STATEMENT OF THE LAW WHICH MISLED THE JURY AND PREJUDICED THE DEFENDANT.**

Whether jury instructions correctly state the law is a question of law. *State v. Weaver*, 2005 UT 49, ¶ 6, 122 P.3d 566. Jury instructions are reviewed for correctness. *State v. Liti*, 2015 UT App 186, ¶ 8, 355 P.3d 1078. Mr. Goins' initial appellate counsel in the Court of Appeals failed to raise this issue, which undersigned counsel then requested the Court of Appeals address by way of his Petition for Rehearing.

Jury instruction No. 24 states as follows:

You are instructed that the laws of Utah do not require a defendant to establish self defense by a preponderance or greater weight of the evidence. *The laws of Utah do require the defendant to bring forward some evidence which tends to show self-defense. If the defendant has done this*, and if such evidence of self-defense, when considered in connection with all other evidence in this case, raises a reasonable doubt as to the defendant's guilt or if it raises a reason to believe that the defendant acted in self-defense, then you must find him not guilty. (Emphasis added)

The defendant has no particular burden of proof but is entitled to an

acquittal if there is any basis in the evidence from either side sufficient to create a reasonable doubt.

R.103 (emphasis added). The emphasized language constitutes an incorrect statement of the law.

Contrary to this jury instruction, the defendant bears no burden whatsoever to establish self-defense. This Court has stated, “(t)he trial court made clear that Jackson did not bear the burden to establish self-defense and that ‘if there was a reasonable doubt as to whether [the] defendant did or did not act in self-defense, then the jury should acquit.’” *Jackson v. State*, 2014 UT App 168, ¶ 4, 332 P.3d 398, 400 citing *State v. Knoll*, 712 P.2d 211, 215 (Utah 1985). The defense has no burden to present any factual basis of self-defense whatsoever. Whether the facts establishing self-defense come from the State’s case or from the defendant’s is immaterial. Either the facts are present, regardless of their genesis, or they are not. The law was made clear in *State v. Knoll*:

In sum, when there is a basis in the evidence, whether the evidence is produced by the prosecution or by the defendant, which would provide some reasonable basis for the jury to conclude that a killing was done to protect the defendant from an imminent threat of death by another, an instruction on self-defense should be given the jury. And if the issue is raised, *whether by the defendant's or the prosecution's evidence*, the prosecution has the burden to prove beyond a reasonable doubt that the killing was not in self-defense. *State v. Starks*, Utah, 627 P.2d 88, 92 (1981); *State v. Torres*, 619 P.2d at 695; *State v. Wilson*, 565 P.2d 66, 68 (1977). (emphasis added)

*State v. Knoll*, 712 P.2d at 214. The instruction in *Knoll* indicated that, “if the prosecution's evidence did not tend to show self-defense, then the defendant must “bring forward some evidence which tends to show self-defense” to avail himself of that

defense.” Id. at 215. That is not what trial counsel’s proposed instruction stated here. It stated blankly and inaccurately that, “The laws of Utah to require the defendant to bring forward some evidence which tends to show self-defense.” R.60. The trial court used that very instruction. R.103. Its language places the burden solely upon the defendant to bring forward self-defense evidence. The defendant bears no such burden. The law plainly requires the State to prove the defendant’s guilt, including eradicating any reasonable doubt as to the defense of self-defense, regardless of the source of any facts supporting that defense. Of course, as the Court in Knoll further noted,

As a practical matter, a defendant may have to assume the burden of producing some evidence of self-defense if there is no evidence in the prosecution's case that would provide some kind of evidentiary foundation for a claim of self-defense. But there need only be "sufficient evidence of [the defendant's] justification to create in the minds of the jury a reasonable doubt of his culpability for the offense charged" to justify the giving of an instruction on the point. *State v. Harris*, 58 Utah 331, 199 P. 145, 147 & 148 (1921). See also *State v. Starks*, *supra*, at 92; *State v. Torres*, 619 P.2d at 695. If the jury concludes that there is a reasonable doubt as to whether a defendant acted in self-defense, he is entitled to an acquittal. *State v. Wilson*, Utah, 565 P.2d 66 (1977); *State v. Jackson*, Utah, 528 P.2d 145 (1974).

*Knoll*, 712 P.2d at 215. The Court in Knoll concluded its holding on the issue with this black letter statement of the law:

The trial court made clear in its instructions that the defendant had no burden to adduce evidence of self-defense for the defense to be considered; that *the jury should consider the defense of self-defense, whether the evidence thereof was presented by the prosecution or the defendant*; that the burden of proof remained on the prosecution throughout the case; and that if the jury entertained a reasonable doubt about whether defendant acted in self-defense, it should acquit. On the basis of these instructions, we conclude that there was no error. (Emphasis added)

*Knoll*, 712 P.2d at 215 (emphasis added); accord *State v. Low*, 2008 UT 58, ¶ 25, 192 P.3d 867 (“When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented--either by the prosecution or by the defendant--that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies to the defendant.”); *State v. Alzaga*, 2015 UT App 133, ¶ 74, 352 P.3d 107 (“The instruction clearly conveyed that the jury should consider any evidence of self-defense, that the burden of proof remained with the State at all stages of the trial, and that if the jury entertained a reasonable doubt about whether defendant acted in self-defense, it should acquit.”); *Jackson v. State*, 2014 UT App 168, ¶ 4, 332 P.3d 398 (“The trial court made clear that Jackson did not bear the burden to establish self-defense and that ‘if there was a reasonable doubt as to whether [the] defendant did or did not act in self-defense, then the jury should acquit.’”); *State v. Sellers*, 2011 UT App 38, ¶ 15, 248 P.3d 70 (“Rather, a defendant is entitled to an affirmative defense instruction so long as there is a reasonable basis in the evidence for such a defense.”).

Many states agree with the proposition that if the jury is not instructed clearly on the burden of proof of self-defense, the omission constitutes plain error.<sup>6</sup> Here the jury

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<sup>6</sup> See e.g., *Government of Virgin Islands v. Smith*, 27 V.I. 332, 949 F.2d 677, 680 (3rd Cir. 1991) (applying Virginia state law); *Brown v. State*, 698 P.2d 671, 675 (Alaska Ct. App. 1985); *State v. Janes*, 982 P.2d 300, 303, 304 (Colo. 1999); *Coley v. State*, 220 Ga. App. 468, 469 S.E.2d 513, 516 (Ga. Ct. App. 1996); *Raines v. State*, 79 Haw. 219, 900 P.2d 1286, 1292 (Haw. 1995); *State v. Evans*, 278 Md. 197, 362 A.2d 629, 635 (Md. 1976); *Commonwealth v. Rodriguez*, 370 Mass. 684, 352 N.E.2d 203, 206-08 (Mass. 1976); *Infantolino v. State*, 414 A.2d 793, 795-97

may well have concluded that, since the defendant did not “bring forward” the facts constituting self-defense in the first instance, rather those facts were brought forward by the State in its direct examination, that the defense was not entitled to such a defense.

#### **D. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.**

Ineffective assistance of counsel presents a mixed question of law and fact. *Menzies v. Galetka*, 2006 UT 81, ¶ 56, 150 P.3d 480. Counsel's deficient performance must be prejudicial - i.e., affecting the outcome of the case. *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92.

The record in the trial court reflects that the self-defense jury instruction, which was discussed at great length, was defective and would have been misleading to the jury. R.167: 229-231. By requesting an instruction containing an incorrect and misleading statement of the law regarding the burden in establishing self-defense, defense counsel allowed the State a free pass in its burden to prove the defendant guilty. It has been held that when obvious defenses are ignored in lieu of those which are ostensibly weaker, the presumption of effective assistance of counsel may be overcome. See, e.g., *Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986). Defense counsel did not ignore self-defense entirely, however, counsel ignored the importance of allowing the burden of bringing

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(R.I. 1980); *State v. Green*, 538 N.W.2d 698, 704 (Minn. Ct. App. 1995); *Barone v. State*, 858 P.2d 27, 28-29 (Nev. 1993); *State v. Parish*, 1994 NMSC 72, 878 P.2d 988, 994-95, 118 N.M. 39 (N.M. 1994) and *State v. Acosta*, 1997 NMCA 35, 939 P.2d 1081, 1087-88, 123 N.M. 273 (N.M. Ct. App. 1997); *State v. Olander*, 1998 ND 50, 575 N.W.2d 658, 664-65 (N.D. 1998); *State v. Summers*, 120 Wn.2d 801, 846 P.2d 490, 499-501 (Wash. 1993).

*State v. Garcia*, 2001 UT App 19, ¶ 19 n.6, 18 P.3d 1123.

forth the supporting facts to be shouldered solely by the defendant. This was both negligent and prejudicial and supports a finding of ineffective assistance of counsel.

The possibility that counsel was employing some sort of strategy is simply implausible under any of the circumstances of this case. It is understood that, in order to overcome the presumption of that the apparent failure of counsel to request a jury instruction, there must be a demonstrable “lack of any conceivable tactical basis for counsel’s actions.” *State v. Bryant*, 965 P.2d 539,542 (Utah Ct. App. 1998). Depriving the defendant of what can only be considered an avenue of defense, by misplacing the burden on the defendant to establish self-defense, is not a tactical decision. It is a default, a failure which falls below a reasonably objective standard of professionalism.

Accordingly, “counsel’s deficient performance prejudiced the defense.” *Litherland*, ¶ 19. The likelihood of a different outcome is sufficiently high to undermine confidence in the verdict. See *State v. King*, 2010 UT App 396, ¶ 23, 248 P.3d 984. In consequence of which, the defendant should be entitled to a new trial.

#### **E. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.**

Appellate counsel argued only one issue in his brief on appeal: “Whether the trial court erred in finding witness Estrada unavailable under Rule 804 and permitting his preliminary hearing testimony.” See Brief of Appellant, Argument, *passim*. Appellate counsel did not raise the issue of the flawed self-defense instruction.

It is the law that counsel’s failures on appeal, which prejudices a criminal defendant on appeal, are cognizable under the standard set forth in *Strickland v.*

*Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). A person convicted of a crime is entitled to effective assistance of counsel in his first appeal of right. *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). The general standard for judging performance of counsel established in *Strickland* also applies to claims of ineffective appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). To prevail on a claim that appellate counsel was constitutionally ineffective, it must be shown that appellate counsel unreasonably failed to discover and assert a non-frivolous issue and establish a reasonable probability that he would have prevailed on this issue on appeal but for his counsel's deficient representation. *Smith*, 528 U.S. at 285-86.

This Court has stated,

If trial counsel's deficiencies were prejudicial, appellate counsel's failure to raise those deficiencies is necessarily prejudicial in the same way and to the same extent. The prejudice from Landry's claim that appellate counsel was deficient in failing to assert on appeal trial counsel's ineffective representation is therefore implicit in his argument that he was prejudiced by trial counsel's deficient performance. Thus, Landry has pleaded a prima facie case of ineffective assistance of appellate counsel, and it was error to dismiss that aspect of his petition for failure to state a claim.

*Landry v. State*, 2012 UT App 350, ¶ 11, 293 P.3d 1092. To establish a meritorious claim based on the ineffective assistance of appellate counsel, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonable professional judgment, that this deficient performance prejudiced the outcome of his trial, and that the appellate counsel failed to raise the issue. See *Archuleta v. Galetka*, 2011 UT 73, ¶ 41 n.5, 267 P.3d 232 ("with respect to each prong of *Strickland* a habeas petitioner arguing ineffective assistance of counsel for failure to raise a claim on appeal



must demonstrate (1) that appellate counsel failed to raise an issue which was obvious from the trial record and (2) that the issue is one which probably would have resulted in reversal on appeal.); *Ross v. State*, 2012 UT 93, ¶ 44, 293 P.3d 345 ("And [a]s is the case in challenges to the effectiveness of trial counsel, to prevail on a claim of ineffective assistance of appellate counsel, a petitioner must prove that appellate counsel's representation fell below an objective standard of reasonable conduct and that the deficient performance prejudiced [him]." (alterations in original) (internal quotation marks omitted)); *Menzies v. State*, 2014 UT 40, ¶ 211, 344 P.3d 581. ("(T)he Strickland two-part test applies. But we have further held that where a petitioner argues that appellate counsel rendered ineffective assistance by failing to raise a claim, the petitioner "must show that there is a genuine issue of material fact with respect to whether appellate counsel overlooked an issue which is obvious from the trial record and . . . which probably would have resulted in reversal on appeal.).

**F. THE SUPREME COURT SHOULD RULE ON THE MERITS, REVERSE AND REMAND TO THE TRIAL COURT.**

In the instant matter, for the reasons above stated, appellate counsel's conduct fell below the standard of practice required of defense counsel in failing to bring to bear the skill and expertise required of defense counsel, and was therefore deficient. *Strickland v. Washington*, 466 U.S. at 687. The likelihood of a different outcome is sufficiently high to undermine confidence in the verdict. See *State v. King*, 2010 UT App 396, ¶ 23, 248 P.3d 984. In this regard, it should be borne in mind precisely what the standard is:

(T)houghtful reflection suggests that confidence in the outcome may be

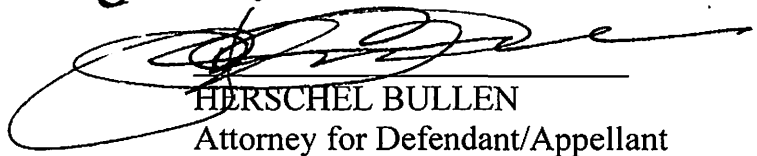
undermined at some point substantially short of the "more probable than not" portion of the spectrum.

*State v. Knight*, 734 P.2d 913, 920 (Utah 1987). The likelihood of a different result "more probable than not" in this particular case. "To merit reversal of his conviction, (a defendant) must also demonstrate that his defense was prejudiced by trial counsel's deficient performance—that there is a reasonable probability of a more favorable result absent the error. *State v. Liti, supra*, 2015 UT App at ¶ 21. It is clear that both trial and appellate counsels' error prejudiced the defendant. Trial and appellate counsels' error created a reasonable likelihood of a different outcome sufficiently high to undermine confidence in the verdict and this Court's decision to require reversal and a new trial. This Court should reverse and remand this matter for a new trial because of the erroneous jury instruction.

### CONCLUSION

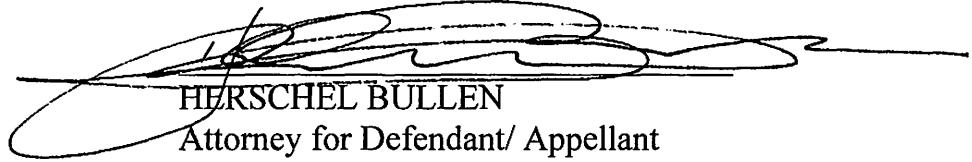
For the reasons set forth herein, Desean Michael Goins respectfully requests that this Court reverse the Court of Appeals convictions of Aggravated Assault and remand the case for a new trial.

SUBMITTED this 26 day of October, 2016.

  
HERSCHEL BULLEN  
Attorney for Defendant/Appellant

### **CERTIFICATE OF RULE 24 COMPLIANCE**

Appellant certifies pursuant to Rule 24(f)(1)(C) Utah R. App. P. that the foregoing principal brief of appellant contains less than 13,100 words.

  
HERSCHEL BULLEN  
Attorney for Defendant/ Appellant

### **CERTIFICATE OF SERVICE**

I, Herschel Bullen, hereby certify that I have caused to be hand-delivered or mailed, postage pre-paid, an original and 7 copies of the foregoing to the Utah Supreme Court together with a searchable CD, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 2 copies together with a searchable CD to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 26 day of October, 2010.

  
HERSCHEL BULLEN

THE UTAH COURT OF APPEALS

STATE OF UTAH,  
Appellee,

v.

DESEAN MICHAEL GOINS,  
Appellant.

Opinion  
No. 20140009-CA  
Filed March 24, 2016

Third District Court, Salt Lake Department  
The Honorable Ann Boyden  
No. 131906358

Richard G. Uday, Attorney for Appellant  
Sean D. Reyes and Kris C. Leonard, Attorneys  
for Appellee

JUDGE GREGORY K. ORME authored this Opinion, in which JUDGES  
JAMES Z. DAVIS<sup>1</sup> and KATE A. TOOMEY concurred.

ORME, Judge:

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1. Judge James Z. Davis began his work on this case as a member of the Utah Court of Appeals. He retired from the court, but thereafter became a Senior Judge. He completed his work on this case sitting by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11-201(6). Judge Davis, a member of this court from 1993 until late in 2015 when he became a senior judge, passed away on February 27, 2016. Judge Davis was twice our presiding judge and three times our representative on the Judicial Council. More importantly, he was an esteemed colleague and good friend. His wit, wisdom, and dedication will be sorely missed.

*State v. Goins*

¶1 Desean Michael Goins (Defendant) was convicted of aggravated assault, a third degree felony, *see* Utah Code Ann. § 76-5-103 (LexisNexis Supp. 2015), and threatening with or using a dangerous weapon in a fight, a class A misdemeanor, *see id.* § 76-10-506.<sup>2</sup> Defendant now appeals both convictions, arguing that the trial court erroneously found that a witness was unavailable and allowed the witness's prior testimony to be used against Defendant on that basis. Because there was no error in the trial court's determination of unavailability, and because Defendant had the opportunity to cross-examine the witness when he gave his prior testimony, we affirm.

BACKGROUND

¶2 One morning in July 2013, Defendant and his girlfriend set off on a search in downtown Salt Lake City with a very specific goal: to find a homeless man (Witness) whom Defendant believed had stolen his cell phone. They found Witness outside a homeless shelter for men. With knife in hand, Defendant confronted Witness, who denied taking the phone and hurried away.

¶3 The couple then made their way to Pioneer Park, a traditional haunt of Salt Lake's homeless denizens, where one of Witness's friends (Victim), also a homeless man, was sleeping on his blanket. Defendant's girlfriend woke Victim and asked if he had seen Witness. Defendant, waving the knife he still carried, complained that Witness had stolen his phone. When Defendant

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2. Although some of the statutes cited in this opinion have been amended since July 2013, when the incident giving rise to the charges against Defendant occurred, the amendments do not affect our analysis. Accordingly, for ease of reference we cite the most recent codification of the statutes.

Tab A

encroached on Victim's personal space, Victim pushed Defendant off the blanket. An altercation ensued, during which Defendant bit off Victim's earlobe. Both men stood up and squared off once again, and Defendant then retrieved his knife, which he had dropped during the scuffle, and stabbed Victim under the left arm. Soon thereafter, police arrived and arrested Defendant. Defendant was later charged in connection with the assault of Victim and the brandishing of the knife against Witness.<sup>3</sup>

¶4 Prior to the preliminary hearing, the prosecution asked Salt Lake City police bike patrols to locate Victim and Witness. The officers were able to locate both men, who spent much of their time together, "based primarily on a description of [Victim's] missing earlobe," even though they did not have a description of Witness. Victim and Witness arrived together at the preliminary hearing with a pastor from a church both men regularly visited. The prosecution seized the opportunity to keep more regular contact with both men through the pastor,<sup>4</sup> a man who had the trust of both Witness and Victim.

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3. Defendant was also charged with—and acquitted of—the felony of mayhem, nearly forgotten outside the confines of first-year Criminal Law in law school. *See* Utah Code Ann. § 76-5-105 (LexisNexis 2012) ("Every person who unlawfully and intentionally deprives a human being of a member of his body, or disables or renders it useless, or who cuts out or disables the tongue, puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."). Despite the rarity of mayhem convictions in modern times, they are not unheard of. *See, e.g., State v. Fairclough*, 44 P.2d 692, 692–93 (Utah 1935) (affirming conviction for mayhem).

4. By the time of the trial, the pastor had left the state for a new position. Because both the pastor and his successor affirmed that service was made on both Witness and Victim, and because the  
(continued...)

¶5 The prosecution regularly followed up with the pastor and emailed him the trial information for him to pass along to Witness and Victim. The pastor verified that the two men received the notification. A few weeks before trial, the pastor informed the prosecution that Witness had gotten into some trouble, been jailed, and fallen out with Victim. After receiving this information, the prosecutor contacted the jail, but Witness had already been released. From that time forth, neither Victim nor the pastor, both of whom knew Witness well and could recognize him by sight, saw or heard from Witness, and no one saw Witness with his former friends or in his former hang-outs. On the eve of trial, the prosecution contacted the jail to see if Witness was incarcerated again, but he was not.

¶6 Trial was scheduled to begin on October 23, 2013, but was continued one day because no jury had been called for that date. At that time, the prosecution asked the trial court to declare Witness unavailable because Witness did not appear for trial and the prosecution was unable to locate him. The prosecution also asked the trial court to admit Witness's preliminary hearing testimony during the trial. Over an objection raised by Defendant's counsel that Witness "was not 'unavailable,'" the trial court granted the motion and indicated that it would allow the preliminary hearing testimony at the rescheduled trial. At trial, which began the following day, the jury convicted Defendant of aggravated assault, for the attack on Victim, and of threatening with a dangerous weapon during a fight, for his confrontation of Witness. Defendant appeals, and we affirm.<sup>5</sup>

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(...continued)

prosecution utilized the second pastor in the same manner as the first, we use "the pastor" when referring to either of the two pastors.

5. Although Defendant apparently appeals both the conviction related to the assault of Victim and the one for brandishing the  
(continued...)



ISSUES AND STANDARDS OF REVIEW

¶7 Defendant argues that the trial court erred in finding Witness to be unavailable under rule 804 of the Utah Rules of Evidence and in permitting Witness's preliminary hearing testimony to be admitted under that rule as prior testimony. "We review the district court's evidentiary rulings under an abuse of discretion standard. However, error in the district court's evidentiary rulings will result in reversal only if the error is harmful." *Anderson v. Larry H. Miller Commc'ns Corp.*, 2015 UT App 134, ¶ 17, 351 P.3d 832 (citations and internal quotation marks omitted). "The district court's decision to admit testimony that may implicate the confrontation clause is also a question of law reviewed for correctness." *State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519.

ANALYSIS

¶8 We note, preliminarily, that a statement is hearsay if (1) the witness made the statement outside of the current trial or hearing and (2) a party offers the statement "to prove the truth of the matter asserted in the statement." Utah R. Evid. 801(c)(1)–(2). Hearsay is inadmissible, unless an exception applies. *See id.* R. 802. It is the interpretation and application of one such

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(...continued)

knife against Witness, we agree with the State that Witness's testimony was relevant only to the charge relating to Witness. Witness was *not* a witness to the assault of Victim and offered no testimony on that point at the preliminary hearing; therefore, even were we to discern an error in the presentation of Witness's preliminary hearing testimony to the jury—which we do not, *see infra* ¶¶ 12–15, 18–20—we would still affirm Defendant's assault conviction because the alleged error would be harmless as to that charge.

*State v. Goins*

exception—the admission of prior testimony by an unavailable potential witness—that we address in this opinion. *See id.* R. 804(b)(1).

I. The Trial Court Did Not Abuse Its Discretion in Finding That Witness Was Unavailable.

¶9 Utah law requires that the party offering evidence in the form of witness testimony make reasonable efforts to procure the witness's testimony at trial. *Id.* R. 804(a)(5). "[C]onstitutional unavailability is found only when it is 'practically impossible to produce the witness in court.' . . . [E]very reasonable effort must be made to produce the witness." *State v. Menzies*, 889 P.2d 393, 402 (Utah 1994) (citations omitted).

¶10 But "[a] good faith search does not mean that every lead, no matter how nebulous, must be tracked to the ends of the earth." *Poe v. Turner*, 490 F.2d 329, 331 (10th Cir. 1974) (determining that the prosecution was under no obligation to investigate vague claims that one prosecution witness had "moved to somewhere in the state of New York" and that another "was said to have applied for employment with the Santa Fe Railway in the 'midwest'"). In essence, although a party must make every reasonable effort to procure the in-court testimony of the witnesses that the party wishes to use, the party is not, as the State puts it, required to do "everything humanly possible" to do so. Thus, "Rule 804(a)(5) does not require a patently futile attempt to serve a subpoena on a potential witness . . . whose physical location and address are completely unknown." *Brown v. Harry Heathman, Inc.*, 744 P.2d 1016, 1018 (Utah Ct. App. 1987). *See also State v. Carter*, 888 P.2d 629, 645–46 (Utah 1995) (holding that State's efforts to locate witness were reasonable where it contacted United States Marshal's Office, which had an outstanding warrant for arrest of witness, and where federal officials "could not provide any concrete information as to his present location, other than that he might

be found in Mexico or southern California”), *abrogated by statute on other grounds as recognized by Archuleta v. Galetka*, 2011 UT 73, ¶ 70, 267 P.3d 232.

¶11 In *State v. Drawn*, 791 P.2d 890 (Utah Ct. App. 1990), we concluded that the prosecutor’s efforts to obtain two witnesses’ testimony were reasonable. In that case, the prosecution subpoenaed the witnesses three times before trial; spoke with and was assured of the presence of one witness at trial by that witness’s mother; visited the last known address of the other witness, but discovered that the witness had moved without leaving a forwarding address; questioned police informants; and searched police files for evidence of the whereabouts of the missing witness. *Id.* at 893. Under such circumstances, we held that the prosecution’s “efforts compl[ied] with the hearsay exception unavailability requirements.” *Id.* On the other hand, in *State v. Chapman*, 655 P.2d 1119 (Utah 1982), the Utah Supreme Court concluded that the prosecutor’s efforts to locate a witness were unreasonable and the witness was not unavailable “where efforts to secure the witness’s attendance [were] cursory, where the party had clear indications that the witness would not attend or where the party had obvious means of obtaining those indications but neglected to do so.” *Id.* at 1122. *See also id.* at 1124–25 (affirming the district court, nonetheless, because the district court’s improper admission of the testimony was harmless error).

¶12 The instant case is much more like the events in *Drawn* than those discussed in *Chapman*. As in *Drawn*, but unlike in *Chapman*, the prosecution in this case went to considerable effort to obtain Witness’s testimony at trial. Prior to the preliminary hearing, the prosecution sent out police bike patrols to locate Victim and Witness, and the officers located both men, even though they were part of Salt Lake City’s large homeless population, based mostly on Victim’s unfortunate lack of one earlobe. There was nothing as distinctive in Witness’s appearance, but luckily for the prosecution, Witness was often in

the company of Victim. The two were homeless, presenting obvious challenges to staying in touch, but when Victim and Witness arrived together at the preliminary hearing with the pastor, whom both men trusted, the prosecution seized upon the opportunity to use the pastor as a vehicle for staying in more regular contact with both men. The prosecution followed up regularly with the pastor and emailed him Defendant's trial information. And the pastor verified that the two men personally received this notification.

¶13 A few weeks before trial, however, the pastor informed the prosecution that Witness had gotten in some trouble, been jailed, and fallen out with Victim. After receiving this information, the prosecutor contacted the jail, but Witness had already been released. From that time forward, neither Victim nor the pastor saw or heard from Witness, and Witness was no longer found with his former friends or in his former haunts. It is far from clear that he even remained in Utah.<sup>6</sup> Thus, although the prosecution did not re-enlist the police bike patrols to locate Witness, it did not need to. It had no idea where to send the

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6. Research shows that not only are homeless people more mobile than the population at large but that a significant percentage of homeless individuals engage in interstate migration, Peter H. Rossi, *Down and Out in America: The Origins of Homelessness* 126 (The University of Chicago Press 1989). See also Jennifer Amanda Jones, *Problems Migrate: Lessons from San Francisco's Homeless Population Survey*, Nonprofit Quarterly (June 26, 2013), available at <http://nonprofitquarterly.org/2013/06/26/problems-migrate-lessons-from-san-francisco-s-homeless-population-survey/> [<https://perma.cc/JHE8-7QS2>] ("Almost 40% of San Francisco's homeless population became homeless in a city other than San Francisco. Most (24%) hail from California, but many (15%) from around the United States.").

patrols, and the police would have been unlikely to recognize Witness when not in the presence of Victim. Realistically, the pastor and Victim were more likely to spot Witness than were randomly dispatched bike patrols. Additionally, on the eve of trial, the prosecution also contacted the jail to see if Witness might once again be incarcerated. They learned he was not.

¶14 Whether the prosecution “could have done more to ensure . . . [Witness] showed up for the trial” is not the issue; instead, we consider whether the prosecution’s efforts were reasonable. As the State noted, “[a] good faith search does not mean that every lead, no matter how nebulous, must be tracked to the ends of the earth,” *Poe v. Turner*, 490 F.2d 329, 331 (10th Cir. 1974), and we conclude that the State acted reasonably even though “[Witness] could [neither] be located nor produced in court,” *Drawn*, 791 P.2d at 894.

¶15 Indeed, the instant case is, in our estimation, an even stronger case for affirmance than *Drawn* because here Defendant acquiesced in both the method of keeping tabs on Witness and in the means of serving him notice of the trial. First, the prosecution told the magistrate at the preliminary hearing that the pastor was the best way to stay in contact with Witness. If Defendant had an objection to this method of communication as a substitute for more formal service, unusual though it may have been, the time to contest it was not at trial but at the preliminary hearing when it was first proposed. Where “there is ‘apparent[] if not complete acquiescence [in] what the court did as a matter of procedure,’ ‘[n]either party is in a position to complain as to [that] procedure’ on appeal.” *Brown v. Babbitt*, 2015 UT App 291, ¶ 14 n.9, 364 P.3d 60 (alterations in original) (quoting *Hodges v. Smoot*, 125 P.2d 419, 421 (Utah 1942)). Second, Defendant explicitly accepted the prosecution’s proffer of its efforts to get Witness to appear. For example, although Defendant faults the trial court for “not even attempt[ing] to get testimony from the pastor regarding the service to [Witness],” in doing so he ignores the fact that the trial court offered him the opportunity to get

such testimony from the pastor—an opportunity that he declined. Because the prosecution made reasonable efforts to locate Witness, though perhaps not all efforts “humanly possible,” we agree with the trial court that the prosecution acted in good faith, and we conclude that the trial court did not abuse its discretion in finding Witness to be unavailable for purposes of rule 804.

II. Witness’s Testimony Was Properly Admitted Under Rule 804.

¶16 If the potential witness is unavailable, prior testimony may be admitted if the witness gave the testimony “as a witness at a . . . hearing,” Utah R. Evid. 804(b)(1)(A), and the testimony is “offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination,” *id.* R. 804(b)(1)(B). Because a preliminary hearing is a “hearing” under rule 804(b)(1)(A), the introduction of preliminary hearing testimony may be allowed in lieu of the in-court testimony of the witness if the court finds the potential witness to be unavailable. *State v. Brooks*, 638 P.2d 537, 541 (Utah 1981). Rule 804(b)(1)(B) essentially incorporates the requirements of the Confrontation Clause of the United States Constitution. *See Crawford v. Washington*, 541 U.S. 36, 53–54 (2004) (holding that the Confrontation Clause does not “allow[] admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination”). It is instructive that in *California v. Green*, 399 U.S. 149 (1970), the United States Supreme Court concluded that if a witness is unavailable, preliminary hearing testimony is admissible under the Confrontation Clause because the circumstances of a preliminary hearing

closely approximat[e] those that surround the typical trial. [The witness is put] under oath; respondent [i]s represented by counsel . . . ; respondent ha[s] every opportunity to cross-examine [the witness] as to his statement; and the

proceedings [a]re conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

*Id.* at 165. The Court determined that, under such circumstances, a party opposing introduction of preliminary hearing testimony “had an effective opportunity for confrontation.” *Id.*

¶17 Regarding the requirement that a party be given “an opportunity” to develop the testimony of the witness, Utah R. Evid. 804(b)(1)(B), the rule refers to the opportunity to examine the witness, not to whether the defendant actually availed himself of that opportunity, *State v. Garrido*, 2013 UT App 245, ¶ 18, 314 P.3d 1014. The *opportunity* for cross-examination “satisfie[s] the requirements of [the Constitution and the Rules of Evidence].” *Id.* ¶ 20. This principle is well-established in Utah law, predating even the codification of the Rules of Evidence. *See, e.g., State v. King*, 68 P. 418, 419 (Utah 1902) (“By taking the testimony of the witness . . . in the presence of the accused upon the examination at a time when he had the privilege of cross-examination, this constitutional privilege is satisfied, provided the witness cannot, with due diligence, be found . . . . The constitutional requirement of confrontation is not violated by dispensing with the actual presence of the witness at the trial, after he has already been subjected to cross-examination by the accused[.]”).

¶18 During the preliminary hearing, Defendant had the opportunity to cross-examine Witness; indeed, he admits as much in his appellate brief. It is therefore irrelevant whether trial counsel voluntarily elected to forgo some aspect of cross-examination due to counsel’s strategy.<sup>7</sup> *Garrido*, 2013 UT App

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7. Defendant makes much of the fact that the prosecution knew procuring Witness’s testimony at trial would be more difficult than in the typical case because Witness was a homeless person.

(continued...)

245, ¶ 18. Indeed, forgoing or minimizing cross-examination at a preliminary hearing is a common practice among the defense bar.<sup>8</sup> But Defendant was not denied the opportunity to cross-examine Witness.

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(...continued)

True enough. But like the prosecution, defense counsel knew that Witness was homeless. Defense counsel was likewise aware that the prosecution might have difficulty in securing the testimony of Witness and Victim at trial. In such a context, defense counsel could have anticipated that Witness and/or Victim might not be physically present at trial and that, if deemed unavailable, their testimony would be read for the jury. In the case of homelessness and similar circumstances—such as where a potential witness is terminally ill, seriously mentally ill, suicidal, a known drug addict, or an active-duty soldier who may be called up for combat deployment—there is a distinct possibility that the witness may vanish or otherwise become unavailable before trial. It may behoove defense counsel in such cases to take full advantage of any opportunity to cross-examine such witnesses. Then, if the testimony is read at trial, counsel's cross-examination is part of what will be read, and the jury will have a less one-sided version of the witness's testimony.

8. Justice Brennan, writing in dissent in *California v. Green*, 399 U.S. 149 (1970), the case in which the United States Supreme Court recognized that preliminary hearing testimony may be admissible under the prior testimony hearsay exception, *id.* at 165, articulated several reasons for this common practice, *id.* at 197 (Brennan, J., dissenting). He noted,

First . . . the objective of [a preliminary] hearing is to establish the presence or absence of probable cause, not guilt or innocence proved beyond a reasonable doubt; thus, if evidence suffices to establish probable cause, defense counsel has little reason at the preliminary hearing to show that it

(continued...)



¶19 As noted previously, however, hearsay testimony is admissible under the prior testimony exception if, and only if, the party offering the evidence can show that the party opposing the introduction of the evidence had both “opportunity *and* similar motive to develop it.” Utah R. Evid. 804(b)(1)(B) (emphasis added). To this end, Defendant, relying upon persuasive authority only, attempts to convince this court that

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(...continued)

does not conclusively establish guilt . . . . Second, neither defense nor prosecution is eager before trial to disclose its case by extensive examination at the preliminary hearing; thorough questioning of a prosecution witness by defense counsel may easily amount to a grant of gratis discovery to the State. Third, the schedules of neither court nor counsel can easily accommodate lengthy preliminary hearings. Fourth, even were the judge and lawyers not concerned that the proceedings be brief, the defense and prosecution have generally had inadequate time before the hearing to prepare for extensive examination. Finally, though counsel were to engage in extensive questioning, a part of its force would never reach the trial factfinder, who would know the examination only second hand.

*Id.* See also *Right of Confrontation: Substantive Use at Trial of Prior Statements*, 84 Harv. L. Rev. 108, 114 (1970) (characterizing as “troubling” “the [Supreme] Court’s use of . . . preliminary hearing testimony” at trial, on the ground that “it had been subject to cross-examination,” because “[g]enerally, there is little motivation for comprehensive cross-examination at a preliminary hearing”). Whatever the truth of these sentiments, they are not reflected in Utah law, *see supra* ¶ 18; therefore, members of the defense bar might do well to heed our suggestions in appropriate cases, *see supra* ¶ 18 note 7.

when “[t]rial counsel . . . initially questioned [Witness], at the preliminary hearing, . . . she did not have [the] same motive as she would have had at trial.” Defendant further states that “[t]he purpose of a preliminary hearing is to determine probable cause, not [to] prov[e] the cause beyond a reasonable doubt. Thus, the cross-examination may not have been as thorough because they are only focusing on the basis for the arrest.” We are not unsympathetic to this argument, but the Utah Supreme Court expressly foreclosed it in *State v. Brooks*, 638 P.2d 537 (Utah 1981), which is overlooked in Defendant’s briefs on appeal.

¶20 Dismissing as meritless arguments *identical* to those raised by Defendant in this case, our Supreme Court concluded in *Brooks* that “counsel’s motive and interest are the same in either [the trial or preliminary hearing] setting; he acts in both situations in the interest of and motivated by establishing the innocence of his client. Therefore, cross-examination takes place at preliminary hearing and at trial under the same motive and interest.” *Id.* at 541. Thus, adhering to the rationale of *Brooks*, we determine that Defendant’s challenge is unavailing, and we affirm the decision of the trial court to admit Witness’s preliminary hearing testimony.

## CONCLUSION

¶21 The trial court did not abuse its discretion by admitting Witness’s preliminary hearing testimony when it found that Witness was unavailable to testify because, under the circumstances, the State made reasonable efforts to procure the testimony of Witness at trial. Because Defendant had an appropriate opportunity to cross-examine Witness, Witness’s testimony from that hearing was admissible under rule 804.

¶22 Affirmed.

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Tab B

SIM GILL, Bar No. 6389  
District Attorney for Salt Lake County  
PETER D. LEAVITT, Bar No. 11407  
Deputy District Attorney  
111 E. BROADWAY, SUITE 400  
SALT LAKE CITY, UT 84111  
Telephone: (801)363-7900

ORIGINAL  
FILED DISTRICT COURT  
Third Judicial District

JUL 22 2013

SALT LAKE COUNTY

By \_\_\_\_\_  
Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH

Plaintiff,

vs.

**DESEAN MICHAEL GOINS**  
**DOB: 11/29/1990,**  
**AKA: DESEAN GOINS, MOSELY,**  
**DESEAN MOSELY, DESEAN**  
**GOINS MOSLEY**  
**746 NORTH 900 WEST APT 105**  
**SALT LAKE CITY, UT**  
**D.L.#**  
**OTN 43077601**  
**SO# 367909**

Defendant.

Assigned to: PETER LEAVITT

**AMENDED  
INFORMATION**

DAO # 13014430

Case No. 131906358

*Boyd*

The undersigned Deputy District Attorney upon a written declaration states on information and belief that the defendant, DESEAN MICHAEL GOINS, committed the crime(s) of:

**COUNT 1**

**MAYHEM, 76-5-105 UCA, Second Degree Felony, as follows:** That on or about July 05, 2013 at 350 South 400 West, in Salt Lake County, State of Utah, the defendant did unlawfully and intentionally deprive a human being of a member of his or her body, or disable or render it useless, or cut out or disable the tongue, or put out an eye, or slit the nose, ear, or lip.

**COUNT 2**

**AGGRAVATED ASSAULT, 76-5-103(1) UCA, Third Degree Felony, as follows:** That on or about July 05, 2013 at 350 South 400 West, in Salt Lake County, State of Utah, the defendant did commit assault as defined in Utah Code Section 76-5-102 and used

STATE vs DESEAN MICHAEL GOINS  
DAO # 13014430  
Page 2

- (a) a dangerous weapon as defined in Utah Code Section 76-1-601; or
- (b) other means or force likely to produce death or serious bodily injury.

COUNT 3

AGGRAVATED ASSAULT, 76-5-103(1) UCA, Third Degree Felony, as follows: That on or about July 05, 2013 at 350 South 400 West, in Salt Lake County, State of Utah, the defendant did commit assault as defined in Utah Code Section 76-5-102 and used

- (a) a dangerous weapon as defined in Utah Code Section 76-1-601; or
- (b) other means or force likely to produce death or serious bodily injury.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

J BRIERLEY, J BRIERLEY, RICHARD BRYSON, MICHAEL CARDWELL, GABRIEL ESTRADA, CHRIS HOLDING, JUSTIN HUDSON, HOKU LII LII MANUEL-DIZON, DONALD MEYERS, JACOB OMAR, ROBERT SHORT, JARED ZARGOZA,

DECLARATION OF PROBABLE CAUSE:

This Information is based upon the following:

The statement of Officer Cardwell of the Salt Lake City Police Department that on July 5, 2013, he responded to the Pioneer Park located at 350 West 400 South in Salt Lake County, State of Utah, on a report of a fight in progress. Upon arrival, Officer Cardwell was flagged down by Donald Meyers who stated that he saw a male hitting another male in a green shirt. Mr. Meyers stated that he saw the first male stab the male in the green shirt with a knife. Mr. Meyers stated that the argument was over a cell phone.

Officer Cardwell located Jacob Omar in Pioneer Park and found that he had a stab wound and part of his ear missing. Mr. Omar stated that a male approached him and they got into an argument. Mr. Omar stated that the male accused him of stealing his phone and grabbed a knife and stabbed him. Officer Cardwell located Mr. Omar's earlobe on the ground where the incident occurred. Mr. Omar was transported to the hospital for treatment.

Officer Mortensen located defendant DESEAN MICHAEL GOINS walking away from the park at 180 West 400 South in Salt Lake County, State of Utah. Defendant GOINS had some small cuts on his face and admitted that he had a knife in his bag. Officer Mortensen removed a black handled kitchen knife from defendant GOINS bag. The defendant admitted post-Miranda to Officer Mortensen that he had been in an altercation with Mr. Omar and that he bit Mr. Omar's ear and grabbed his knife and stabbed him with it.

STATE vs DESEAN MICHAEL GOINS

DAO # 13014430

Page 3


Sgt. Hudson responded to the area to assist and a male identified as Gabriel Estrada began yelling at the defendant. Sgt. Hudson approached Mr. Estrada who stated that he saw that Mr. Omar had been stabbed and knew that defendant GOINS had stabbed him. Mr. Estrada stated that the defendant approached him prior to the incident with Mr. Omar and threatened to stab him with a knife while accusing him of stealing his phone. Mr. Estrada stated that he feared for his safety and left the area. Mr. Estrada described the knife which matched the knife found in the defendant's bag.

Pursuant to Utah Code Annotated § 78B-5-705 (2008) I declare under criminal penalty of the State of Utah that the foregoing is true and correct to the best of my belief and knowledge.

Executed on: \_\_\_\_\_

\_\_\_\_\_  
J BRIERLEY  
Declarant

Authorized for presentment and filing  
SIM GILL, District Attorney

  
\_\_\_\_\_  
Deputy District Attorney  
18th day of July, 2013  
MAH / DAO # 13014430



Tab C

## Document:Utah R. Evid. Rule 804

### Utah R. Evid. Rule 804

#### Copy Citation

Current with **rules** received through September 1, 2016.

**Utah Court Rules   STATE RULES   UTAH RULES OF EVIDENCE   ARTICLE VIII.  
HEARSAY**

#### **Rule 804.** Exceptions to the **rule** against hearsay -- When the declarant is unavailable as a witness

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**(a)** *Criteria for being unavailable.* -- A declarant is considered to be unavailable as a witness if the declarant:

- (1)** is exempted from testifying about the subject matter of the declarant's statement because the court **rules** that a privilege applies;
- (2)** refuses to testify about the subject matter despite a court order to do so;
- (3)** testifies to not remembering the subject matter;
- (4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

**(b)** *The exceptions.* -- The following are not excluded by the **rule** against hearsay if the declarant is unavailable as a witness:



**(1) Former testimony.** -- Testimony that:

**(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

**(B)** is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

**(2) Statement under the belief of imminent death.** -- In a civil or criminal case, a statement made by the declarant while believing the declarant's death to be imminent, if the judge finds it was made in good faith.

**(3) Statement against interest.** -- A statement that:

**(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

**(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

**(4) Statement of personal or family history.** -- A statement about:

**(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

**(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

## History

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Amended effective October 1, 1992; November 1, 2004; December 1, 2011

► Annotations

UTAH COURT **RULES** ANNOTATED

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**Content Type:** Statutes and Legislation

**Terms:** evidence rule 804

**Narrow By:** All Jurisdictions: Utah Category: Court Rules

**Date and Time:** Oct 19, 2016 12:47:43 p.m. EDT



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Document:Utah R. Crim. P. Rule 14

**Utah R. Crim. P. Rule 14**

**Copy Citation**

Current with **rules** received through September 1, 2016.

**Utah Court Rules    STATE RULES    UTAH RULES OF CRIMINAL PROCEDURE**

**Rule 14. Subpoenas**

---

**(a)** *Subpoenas requiring the attendance of a witness or interpreter and production or inspection of records, papers, or other objects.*

**(1)** A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a **criminal** investigation or prosecution may be issued by the magistrate with whom an information is filed, the prosecuting attorney on his or her own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

**(2)** A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects, other than those records pertaining to a victim covered by Subsection (b). The court may quash or modify the subpoena if compliance would be unreasonable.

**(3)** A subpoena may be served by any person over the age of 18 years who is not a party. Service shall be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying the witness or interpreter of the contents. A peace

officer shall serve any subpoena delivered for service in the peace officer's county.

**(4)** Written return of service of a subpoena shall be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.

**(5)** A subpoena may compel the attendance of a witness from anywhere in the state.

**(6)** When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring the witness before the court.

**(7)** Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.

**(8)** Whenever a material witness is about to leave the state, or is so ill or infirm as to afford reasonable grounds for believing that the witness will be unable to attend a trial or hearing, either party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court shall make whatever order is necessary to effect such attendance.

**(b)** *Subpoenas for the production of records of victim.*

**(1)** No subpoena or court order compelling the production of medical, mental health, school, or other non-public records pertaining to a victim shall be issued by or at the request of the defendant unless the court finds after a hearing, upon notice as provided below, that the defendant is entitled to production of the records sought under applicable state and federal law.

**(2)** The request for the subpoena or court order shall identify the records sought with particularity and be reasonably limited as to subject matter.

**(3)** The request for the subpoena or court order shall be filed with the court as soon as practicable, but no later than 28 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim's representative and on the prosecutor. Service on an unrepresented victim shall be made on the prosecutor.

**(4)** If the court makes the required findings under subsection (b)(1), it shall issue a subpoena or order requiring the production of the records to the court. The court shall

then conduct an *in camera* review of the records and disclose to the defense and prosecution only those portions that the defendant has demonstrated a right to inspect.

(5) The court may, in its discretion or upon motion of either party or the victim or the victim's representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.

(6) For purposes of this **rule**, "victim" and "victim's representative" are used as defined in Utah Code Ann. § 77-38-2(2).

(c) *Applicability of **Rule 45**, Utah **Rules** of Civil Procedure.*

The provisions of **Rule 45**, Utah **Rules** of Civil Procedure, shall govern the content, issuance, and service of subpoenas to the extent that those provisions are consistent with the Utah **Rules** of **Criminal** Procedure.

## History

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Amended effective November 1, 1996; April 1, 2001; November 1, 2007; November 1, 2015

### ► Annotations

UTAH COURT **RULES** ANNOTATED

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**Content Type:** Statutes and Legislation

**Terms:** criminal rule 14

**Narrow By:** All Jurisdictions: Utah

**Date and Time:** Oct 18, 2016 03:36:13 p.m. EDT

Document:Utah Const. Art. I, § 12

**Utah Const. Art. I, § 12**

**Copy Citation**

Current through the 2016 3rd Special Session

**Utah Code Annotated    Constitution of Utah    Article I Declaration of Rights**

**Sec. 12. [Rights of accused persons.]**

---

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

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

## History

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Const. 1896; L. 1994, S.J.R. 6, § 1.

### ► Annotations

Utah Code Annotated

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**Content Type:** Statutes and Legislation

**Terms:** State v. Young, 853 P.2d 327

**Narrow By:** -None-

**Date and Time:** Oct 19, 2016 12:24:38 p.m. EDT

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Document:Utah Const. Art. I, § 24

**Utah Const. Art. I, § 24**

**Copy Citation**

Current through the 2016 3rd Special Session

**Utah Code Annotated    Constitution of Utah    Article I Declaration of Rights**

**Sec. 24.** [Uniform operation of laws.]

---

All laws of a general nature shall have uniform operation.

**History**

---

Const. 1896.

► **Annotations**

Utah Code Annotated

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## Document:Utah R. App. P. Rule 35

### Utah R. App. P. Rule 35

#### Copy Citation

Current with rules received through September 1, 2016.

**Utah Court Rules   STATE RULES   UTAH RULES OF APPELLATE  
PROCEDURE   TITLE V. GENERAL PROVISIONS**

#### Rule 35. Petition for rehearing

---

**(a)** *Petition for rehearing permitted.* -- A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed only in cases in which the court has issued an opinion, memorandum decision, or per curiam decision. No other petitions for rehearing will be considered.

**(b)** *Time for filing.* -- A petition for rehearing may be filed with the clerk within 14 days after issuance of the opinion, memorandum decision, or per curiam decision of the court, unless the time is shortened or enlarged by order.

**(c)** *Contents of petition.* -- A petition for rehearing may be filed with the clerk within 14 days after issuance of the opinion, memorandum decision, or per curiam decision of the court, unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires. Counsel for petitioner must certify that the petition is presented in good faith and not for delay.

**(d)** *Oral argument.* -- Oral argument in support of the petition will not be permitted.

**(e)** *Response.* -- No response to a petition for rehearing will be received unless

requested by the court. Any response shall be filed within 14 days after the entry of the order requesting the response, unless otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for a response.

**(f) *Form of petition.*** -- The petition shall be in a form prescribed by Rule 27 and shall include a copy of the decision to which it is directed.

**(g) *Number of copies to be filed and served.*** -- An original and 6 copies shall be filed with the court. Two copies shall be served on counsel for each party separately represented.

**(h) *Length.*** -- Except by order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

**(i) *Color of cover.*** -- The cover of a petition for rehearing shall be tan; that of any response to a petition for rehearing filed by a party, white; and that of any response filed by an amicus curiae, green. All brief covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the cover.

**(j) *Action by court if granted.*** -- If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

**(k) *Untimely or consecutive petitions.*** -- Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

**(l) *Amicus curiae.*** -- An amicus curiae may not file a petition for rehearing but may file a response to a petition if the court has requested a response under subparagraph (e) of this rule.

## History

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Amended effective October 1, 1992; April 1, 2004; June 1, 2010; November 1, 2014

► Annotations

UTAH COURT RULES ANNOTATED

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**Content Type:** Statutes and Legislation

**Terms:** Utah R. App. P. Rule 35

**Narrow By:** -None-

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Tab D

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
vs. :  
DESEAN MICHAEL GOINS, : Case No: 131906358 FS  
Defendant. : Judge: ANN BOYDEN  
Custody: Salt Lake County Jail : Date: December 9, 2013

---

PRESENT

Clerk: patd  
Prosecutor: BLAYLOCK, ROGER S  
Defendant  
Defendant's Attorney(s): SINGLETON, LACEY C

DEFENDANT INFORMATION

Date of birth: November 29, 1990  
Sheriff Office#: 367909  
Audio  
Tape Number: S42 Tape Count: 917-936

CHARGES

2. AGGRAVATED ASSAULT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 10/25/2013 Guilty  
3. THREAT/USE OF DANGEROUS WEAPON IN FIGHT (amended) - Class A  
Misdemeanor  
Plea: Not Guilty - Disposition: 10/25/2013 Guilty

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.  
The prison term is suspended.

ALSO KNOWN AS (AKA) NOTE

DESEAN GOINSMOSELY  
DESEAN MOSELY

SENTENCE JAIL

Based on the defendant's conviction of THREAT/USE OF DANGEROUS WEAPON IN FIGHT a Class A Misdemeanor, the defendant is sentenced to a term of 180 day(s) in the Salt Lake County Jail.  
Commitment is to begin immediately.

Credit is granted for time served.  
Printed: 12/09/13 09:35:18 Page 1

SENTENCE JAIL SERVICE NOTE

Credit for Time Served from 7-5-13

Attorney Fees Amount: \$350.00 Plus Interest  
Pay in behalf of: SALT LAKE COUNTY TREASURER

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).  
Probation is to be supervised by Adult Probation & Parole.  
Defendant to serve 180 day(s) jail.  
Defendant is to report to the Salt Lake County Jail.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation and Parole.  
If supervised by Adult Probation and Parole: all fines, fees and/or restitution are to be paid directly to Adult Probation and Parole.  
Violate no laws.  
No contact with victim(s).  
Undergo assessment to determine appropriate counseling. Enter and successfully complete any recommended treatment.  
Enter, participate in, and complete any program, counseling or treatment as directed by probation agency.  
Comply with all standard drug and alcohol conditions imposed by probation agency.  
Do not use, consume, or possess alcohol or illegal drugs; nor associate with any persons using, possessing or consuming alcohol or illegal drugs.  
Do not frequent any place where drugs are used, sold or otherwise distributed illegally.  
Submit to breath and/or urine testing for drugs or alcohol upon the request of any law enforcement officer and/or probation agent.  
No spice, ivory wave or items of that nature.  
Submit to random UA's and/or ETG testing.  
Submit to search of person and/or property upon the request of any law enforcement officer.  
Refrain from the use of alcoholic beverages.  
Not to possess alcohol nor frequent places where alcohol is the chief item of sale.  
Obtain a mental health evaluation and successfully complete any recommended treatment.  
Defendant to take medications as prescribed.  
Complete T.R.C as Directed by AP&P  
Evaluations to be Completed Within 60 Days of Release  
No Contact With Witnesses

Case No: 131906358 Date: Dec 09, 2013

State Has 120 Days to Provide Any Restitution Information

Date: \_\_\_\_\_

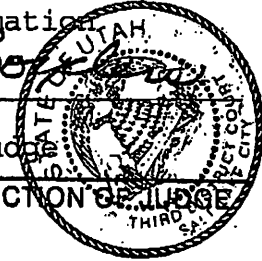
12/9/13

ANN BOYDEN

District Court Judge

By \_\_\_\_\_

STAMP USED AT DIRECTION OF JUDGE





Tab E



3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,  
Plaintiff,

vs.  
DESEAN MICHAEL GOINS,  
Defendant.  
Custody: Salt Lake County Jail

: MINUTES *Amended*  
: ORDER TO SHOW CAUSE  
: SENTENCE, JUDGMENT, COMMITMENT  
:  
: Case No: 131906358 FS  
: Judge: ANN BOYDEN  
: Date: July 14, 2014

PRESENT

Clerk: mandya  
Prosecutor: DEESING, ANDREW K  
Defendant  
Defendant's Attorney(s): SINGLETON, LACEY C

DEFENDANT INFORMATION

Date of birth: November 29, 1990  
Sheriff Office#: 367909  
Audio  
Tape Number: S-42 Tape Count: 10:50-11:00

CHARGES

2. AGGRAVATED ASSAULT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 10/25/2013 Guilty  
3. THREAT/USE OF DANGEROUS WEAPON IN FIGHT (amended) - Class A  
Misdemeanor  
Plea: Not Guilty - Disposition: 10/25/2013 Guilty

HEARING

TIME: 10:50 AM This case comes before the court on an Order to  
Show Cause hearing.

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd  
Degree Felony, the defendant is sentenced to an indeterminate term  
of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your  
custody for transportation to the Utah State Prison where the  
defendant will be confined.

ALSO KNOWN AS (AKA) NOTE

DESEAN GOINSMOSELY  
DESEAN MOSELY

SENTENCE JAIL SERVICE NOTE

Defendant served a sentence of 180 days for count 2 at the time of original sentence.

SENTENCE, JUDGMENT and COMMITMENT

The defendant admits the following numbered allegations as stated in the Affidavit and Order to Show Cause: 3, 4, 5

The following numbered allegations are dismissed as stated in the affidavit and Order to Show Cause: 1, 2, 6, 7, 8, 9

The defendant's probation is revoked.  
The defendant is to serve the sentence as imposed in the original Sentence, Judgment and Commitment.

COMMITMENT is to begin immediately.

Based upon the admissions to allegations 3, 4, 5 the remaining allegations are dismissed without prejudice on the state's motion. court strikes financial requirements with the exception of restitution owed.

ORIGINAL SENTENCE OF PRISON

Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

ALSO KNOWN AS (AKA) NOTE

DESEAN GOINSMOSELY  
DESEAN MOSELY

CUSTODY

Case No: 131906358 Date: Jul 14, 2014

The defendant is present in the custody of the Salt Lake County Jail.

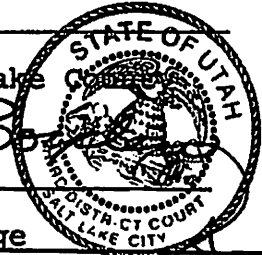
Date:

July 14, 2014

*Ann Boyden*  
ANN BOYDEN

District Court Judge

STAMP USED AT DIRECTION OF JUDGE



Tab F

17-90-2015

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

DESEAN MICHAEL GOINS,

Defendant.

: Case No. 131906358FS

: Appellate Court Case No. 2013 2

: Volume I of III

: With Keyword Index

FILED DISTRICT COURT  
Third Judicial District

JAN 29 2014

SALT LAKE COUNTY

By  Deputy Clerk

JURY TRIAL OCTOBER 23, 24 & 25, 2013

BEFORE

JUDGE ANN BOYDEN

FILED  
UTAH APPELLATE COURTS  
FEB 21 2014

20140009-CA

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

FILED  
UTAH APPELLATE COURTS

SEP 15 2016

20160485-SC

ORIGINAL

1 begin with picking the jury tomorrow morning because we will  
2 have been able to address all preliminary matters today,  
3 okay?

4 What is the preliminary motion that you wish to  
5 address at this time?

6 MR. LEAVITT: Your Honor, the preliminary motion is  
7 this, Gabriel Estrada who is the listed victim in Count 3, we  
8 have gone to some lengths to try to procure his attendance  
9 here today -

10 THE COURT: Proffer those efforts for me, please.

11 MR. LEAVITT: And what those - as an offer of proof,  
12 Your Honor, what those efforts were was about a month ago -  
13 in order to procure his attendance at the preliminary  
14 hearing, both of these witnesses in this case are homeless.  
15 Their address is a shelter and so as the Court knows, there's  
16 a very transient nature to that and it's sometimes hard to  
17 locate people. In order to do that for the preliminary  
18 hearing what we did is we contacted the Salt Lake City Bike  
19 Police and were able to find them mostly based on Jacob  
20 Omar's appearance because as a result of this case he has a  
21 missing earlobe. They were able to do that and when they did  
22 that Mr. Estrada and Mr. Omar both came to the preliminary  
23 hearing. When they did so they brought a person they  
24 referred as their pastor whose name was Russ. He's part of  
25 the K-2 Church and he's in charge - he was at the time in

1 charge of community outreach, so a lot of his, a lot of his  
2 job and a lot of his responsibilities dealt with, you know,  
3 getting to know the people in the area, watching out for  
4 them, helping them out, helping them through the process.  
5 Russ was the person who was the contact 'cause, of course,  
6 these two homeless people don't have cell phones or any way  
7 that I can contact them regularly. Russ had brought them to  
8 the prelim and I had spoke with Russ and spoke with them at  
9 the prelim and asked them if it's okay if I go through Russ  
10 to contact them and let them know when we get a trial date  
11 and they agreed to that, both Mr. Estrada and Mr. Omar did  
12 that. I kept in contact with Russ and I had emailed him a  
13 subpoena. Russ informed me - and I emailed that subpoena  
14 about a month ago. Russ informed that he did have the  
15 opportunity to serve both Mr. Omar and Mr. Estrada those  
16 subpoenas letting them know the court date and letting them  
17 know that they needed to be here. Now, he since that time -  
18 I maintained some contact with Russ just to make sure that he  
19 tabs on them as the trial was getting closer. Russ left that  
20 job for another job and his replacement, Jason, whose here  
21 today with Mr. Omar, they're in the conference room. He was  
22 kind of taking over for Russ and was aware of the situation,  
23 was able to verify that indeed Russ did serve the subpoena on  
24 Gabriel Estrada. They both informed me that in the last few  
25 weeks Mr. Estrada has come into some trouble. He was in jail

1 at one point. I checked the jail yesterday, he's not there  
2 now, he was actually released on September 24th. We checked  
3 it again about a week ago and I checked yesterday to see if  
4 he'd been returned to jail, he's not. So he's not in jail at  
5 this point.

6 Mr. Omar and the community pastor have let me know  
7 that they've lost touch with him. I guess Mr. Omar and Mr.  
8 Estrada have kind of had a falling out and so they were  
9 concerned that he may not be here today. He did have a  
10 subpoena, he did know about the court date but - and again,  
11 Jason, the new community outreach person, I had him watching  
12 for Gabriel the last couple of days to see if he saw him to  
13 make contact with him. He did not. He said he doesn't run  
14 around in that area any more and he's kind of involved with a  
15 different crowd, but again, his whereabouts are unknown.

16 Our position, Your Honor, is that we have - he's  
17 been served by process and we've gone to additional means to  
18 try to find this witness, he's unavailable and so again, this  
19 is going to take a two-part test. So I'm just addressing  
20 unavailability now and so the Court asked for a proffer of  
21 what we've done, that's what we've done to try to procure his  
22 attendance, he's not here today.

23 THE COURT: All right. Do you want to address  
24 different steps or do you want - that's fine.

25 MR. LEAVITT: And we can address unavailability and



1 then if we get to there I think we can address the rule.

2 THE COURT: All right, thank you.

3 MR. VENABLE: Your Honor, I'll address -

4 THE COURT: Mr. Venable then.

5 MR. VENABLE: In the United States Supreme Court  
6 and the Utah Courts have held that the right to confront  
7 witnesses at trial and to provide the fact finder an  
8 opportunity to assess their credibility, cannot be lightly  
9 dismissed. I know the Court of Appeals in State v. Tron said  
10 that for a witness to be constitutionally unavailable, it  
11 must be practically impossible to produce the witness in court  
12 and, you know, in this case, in State v. Tron, they found  
13 that the witness was unavailable but that was because the  
14 D.A. subpoenaed that witness three times, they had their  
15 detective on the case search for him, go to the last known  
16 addresses. They had the detective, you know, calling family  
17 members. Detective search consisted of questioning police  
18 informants, searching police files and working with Salt Lake  
19 County investigators to try and procure the attendance of  
20 that witness. You know, in this case the subpoena wasn't  
21 even served by, you know, a member of the police or the  
22 attorney's office, it was emailed to a pastor and then passed  
23 along. That's just simply not enough to meet the prong of  
24 unavailability.

25 THE COURT: Thank you.

1           Any further response on that?

2           MR. LEAVITT: Our response, Your Honor, is simply  
3 as far as different cases that have addressed the issue, in  
4 Brown vs. Heathman, the 1987 case in Utah, in that one they  
5 didn't even try to serve the person because they didn't they  
6 were here because they didn't know where they were and so  
7 they didn't even serve them and the Court in that case - and  
8 I have copies for counsel [inaudible].

9           In that case, Your Honor, you can simply look at  
10 page, Page 3 it just says at the very bottom of that  
11 Paragraph 2 at the very bottom, (inaudible) in order to show  
12 an inability of attendance of a witness the opponent must -  
13 of prior testimony must always attempt service of process.  
14 But then it talks about other reasonable means and does not  
15 require (inaudible) attempt to serve a subpoena on a witness.  
16 We served a subpoena on the witness here. We've gone further  
17 than this.

18           As far as the notion that when we start arguing  
19 ability to cross examine and confront a witness, again, we'll  
20 get to that when we get to the prior testimony but the issue  
21 that that raises is whether or not Mr. Goins has had the  
22 opportunity to confront and cross examine the witness. What  
23 we are asking the Court to offer is prior preliminary hearing  
24 testimony. Ms. Singleton who is his attorney now had the  
25 opportunity to cross examine Mr. Estrada about this. They

1 had an opportunity to confront him about everything that's  
2 going to be coming in. There was a complete cross  
3 examination. There were not even any objections made and the  
4 Court didn't stop the cross examination, the Court didn't  
5 limit the cross examination. Defense was able to cross  
6 examine him and ferret out any truth or bias or anything that  
7 they wanted to do and that's what he's entitled to  
8 constitutionally. He was given that right at the preliminary  
9 hearing, it's a complete transcript. That's what we're  
10 asking to offer.

11 Under - I suppose now is probably as good a time as  
12 any to talk about where we're offering the exception which is  
13 804(b)(1) which is former testimony and indeed it is  
14 testimony that was given at a hearing and is now offered  
15 against the party who had an opportunity and similar motive  
16 to develop and cross and redirect examination which they were  
17 able to do.

18 As far as his right to confront a witness, he's had  
19 that right with this testimony. We're not offering an 1102  
20 statement, we're not offering an out-of-court statement. It  
21 was a statement that was made in court, at a prior proceeding  
22 in this case under oath in which Mr. Goins had ample  
23 opportunity to confront and cross examine the witness.

24 Again, are there more things that we could do?  
25 Sure, we could send out, we could send out an army of people

1 to try to find that person but that's not what we're required  
2 to do under the rule. The requirement is that the Court is  
3 persuaded that we have acted in good faith, with reasonable  
4 diligence to try to locate a witness and we've been unable to  
5 do so. We have done that. The one person who I had contact  
6 with, with this homeless man, I maintained that contact. He  
7 served him a subpoena. Mr. Estrada has that subpoena and  
8 he's not here. The rule says that if the person is served,  
9 that they're absent from the trial and we've not been able to  
10 get them by process, that's what that subpoena is. He was  
11 served in process. That's it. We don't even get to  
12 reasonable means. We've gone above that and tried to go to  
13 other reasonable means to locate people who know him and try  
14 to find him but we've been unable to do that. But it doesn't  
15 matter because he was served a subpoena. He's not here today  
16 and we've done what we can to get him here. Again, the  
17 confrontation right has been fulfilled, we're offering  
18 preliminary hearing testimony and nothing else.

19 THE COURT: Do you want to address the  
20 confrontation issue?

21 MS. SINGLETON: Yes, Your Honor I can address that  
22 issue. Your Honor, the Supreme Court of Utah has held that  
23 the (inaudible) confrontation law does not apply to  
24 preliminary hearings and although, under the rules for the  
25 admission of former testimony, you know, as far as having had

1 an opportunity, a prior opportunity to cross examine the  
2 witness which, yes, there was a preliminary hearing in this  
3 case and yes, we did have the opportunity to cross examine  
4 Mr. Estrada, I would submit that that is - that would still  
5 violate my client's right to confront and cross examine the  
6 witnesses against him by admitting this testimony at trial.  
7 The reason being that under 804(b)(1)(b) it specifically  
8 states that you had an opportunity and similar motive to  
9 develop it by direct, cross, or redirect examination and in  
10 these preliminary hearings there is an abbreviated procedure  
11 and quite frankly, Your Honor, the motive in developing  
12 testimony is different at a preliminary hearing than it is at  
13 trial. We frequently ask questions during preliminary  
14 hearings that we would not ask at trial because evidence is  
15 admissible at trial - or at a preliminary hearing but not  
16 necessarily is admissible in a trial. The rules of evidence  
17 are different and - or, or by the same token, we don't ask  
18 question that we might ask at a trial because credibility  
19 determinations are not being made a preliminary hearing. The  
20 Court making the probable cause determination is not  
21 assessing the credibility of a witness, therefore we do not  
22 ask those questions to get that information out. So I don't  
23 believe that the motive of developing that testimony is the  
24 same at a preliminary hearing as it would be at trial and  
25 therefore it would violate my client's right to confront and

1 cross examine the witnesses against him by admitting this  
2 testimony, the preliminary hearing testimony at trial.

3 THE COURT: Thank you.

4 MR. LEAVITT: May I just briefly address the Sixth  
5 Amendment issue? The fact the Supreme Court said that that  
6 Sixth Amendment right to confrontation would not apply to  
7 prelim, that's being used in reverse here. What they're  
8 saying is that you don't get every single witness at a  
9 preliminary hearing. You don't get to have that right to  
10 confront them. Now, when they're there and you've confronted  
11 them, that right to confrontation has been fulfilled. But  
12 what that case is saying is it's saying that reliable hearsay  
13 can be admitted at a preliminary hearing and you can't insist  
14 on every single witness being at a preliminary hearing, not  
15 the reverse. It's not that you don't have that right, that  
16 right may be fulfilled at the preliminary hearing, it's just  
17 that they can't necessarily assert that right at a  
18 preliminary hearing, and again, as we know, as a matter  
19 (inaudible) every - in this instance had I objected to say,  
20 Hey, these are questions about credibility, this is beyond  
21 the scope of this hearing and Ms. Singleton had been shut  
22 down, I can see how possibly they didn't get a complete cross  
23 examination. But as we know, as a matter of course, every  
24 cross examination at every single prelim, we talk about  
25 inferences, statements, we talk about bias, we talk about all

1 of these things that she's saying they don't have a motive to  
2 do but that's what the cross examination at preliminary  
3 hearing is about. They had an opportunity to confront that  
4 witness, it's been fulfilled and so the testimony should be  
5 admitted.

6 THE COURT: All right, thank you.

7 I'm going to address first of all the initial prong  
8 of whether or not this witness is actually unavailable and  
9 the parties have been willing to do as I ask, to just go on  
10 proffer of what the State has done. Are both parties willing  
11 to accept those proffers with out contesting the proffers of  
12 what they've done to serve him without bringing in the -  
13 without hearing from Jason I guess is who the witness we have  
14 here. Are you willing to accept those proffers as far as the  
15 availability issue goes?

16 MS. SINGLETON: I'll accept the proffer, Your  
17 Honor.

18 THE COURT: All right and I do find that based on  
19 the proffer of what the State has done to procure this  
20 witness's testimony, that he is unavailable under Rule 804 as  
21 far as that first prong goes.

22 The key for that for me is that he knew about when  
23 this hearing was, I mean, whether the service is actually  
24 done by law enforcement officer or a pastor or a friend or a  
25 neighbor or a spouse or someone's whose at the home when it's

1 delivered by mail, the key is is I cannot find fairly that  
2 someone is unavailable if they really do not know when this  
3 trial is. All indications are that this person, even before  
4 he was in jail and released from jail on September 24th was  
5 aware of this court date and had, in fact, come to a  
6 preliminary hearing, so knew the proceeding was going. I am  
7 finding that for the requirements of Rule 804 - and we are  
8 dealing specifically with subsection A, sub-5 in this case,  
9 that the State did do reasonable means of process and, in  
10 fact, due process has actually occurred as far as trying to  
11 get Mr. Estrada here and he is not here. He has not  
12 appeared. This is the time set for this hearing, in fact  
13 we're an hour past the time when he would have been  
14 subpoenaed to have come in and meet with them and he is not  
15 present.

16 As we go to the next prong and that is the next  
17 part of this analysis, argument has been made that the right  
18 to confrontation is met if the defendant, defense counsel or  
19 opposing counsel of the witness has had an opportunity to  
20 cross examine under circumstances that would provide a  
21 similar motive. That is what's key here, was it the same  
22 type of a cross examination and opportunity that it meets the  
23 criteria needed for Rule 804? I have not read the  
24 preliminary hearing. Has that been given to me and I just  
25 don't, haven't received it electronically?



Tab G

13-904M178

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

DESEAN MICHAEL GOINS,

Defendant.

: Case No. 131906358FS

: Appellate Court Case No. 2013 ?

: Volume II of III

: With Keyword Index

FILED DISTRICT COURT  
Third Judicial District

JAN 29 2014

SALT LAKE COUNTY

By

Deputy Clerk

JURY TRIAL OCTOBER 23, 24 & 25, 2013

BEFORE

JUDGE ANN BOYDEN

FILED  
UTAH APPELLATE COURTS

FEB 21 2014

20140009-CA

FILED  
UTAH APPELLATE COURTS  
CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

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Sandy, Utah 84092  
801-523-1186

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ORIGINAL

1 weren't able to do if they were in trial and sometimes that  
2 changes the circumstances. So my understanding is we do have  
3 the jury pool gathering right now. Have you received a list  
4 of how many?

5 CLERK: We called in 46 and there are 8 no-shows.

6 THE COURT: And I know that we didn't need as many  
7 as we had originally scheduled in for yesterday. I had  
8 called in more than usual because of the number one setting  
9 on yesterday's calendar was a domestic violence case and that  
10 sometimes takes more. That's a lot put on the record just to  
11 clarify. I know that each of the parties want the benefit of  
12 the record. Where are we now as far as requests for looking  
13 to different timings? How we're going to proceed with the  
14 evidence?

15 It was your request, Ms. Singleton, that started,  
16 what is the defense's position right now.

17 MS. SINGLETON: Your Honor, I believe - well - and  
18 again not knowing when you referenced how long the next date  
19 would be and we have discussed with Mr. Goins what our  
20 position is and I think he understands why we are requesting  
21 a continuance. Our main issues, Your Honor, are - well, there  
22 are two, I guess, one being that again this was scheduled for  
23 a 2-day trial. We had subpoenaed our witness for yesterday  
24 and today and she is still scheduled to work tomorrow and so  
25 our concern is that if this were to run into a second day for

1 whatever reason that we would be precluded from having our  
2 witness available.

3 And secondly, upon further sort of consideration of  
4 the issue of the testimony that will be admitted from the  
5 preliminary hearing, there are things that we would need to  
6 address with that in terms of the evidentiary admissibility  
7 of some of that testimony. And I think our issue yesterday  
8 that we objected to were based on grounds of the  
9 confrontation clause and 804. Today our issue would be with  
10 respect to some evidentiary concerns with things that were  
11 said in that preliminary hearing that would not otherwise be  
12 admissible at trial. And, Your Honor, for the record, again  
13 today, we are renewing our objection - well, I guess I should  
14 - I guess this is going to be relevant if we, depending on  
15 what the Court rules about a continuance but just to, just so  
16 it's out there, we are renewing our objection to the  
17 unavailability ruling because today is a different day, this  
18 is the 24th. I believe the Court's ruling yesterday was  
19 based in part on the fact that Mr. Estrada was presumably  
20 aware of yesterday's court date and not here. Today is a  
21 different day. I believe the State could have made overnight  
22 effort to locate him yesterday. They could have sent officers  
23 out to locate him. They could have called jails, hospitals,  
24 things of that nature. I think the unavailability of Mr.  
25 Estrada needs to be readdressed today. We still maintain our

1 objection in any event to that testimony coming in at all but  
2 again, that's an issue to be discussed if we are going  
3 forward today. But -

4 THE COURT: And the objection is still the  
5 unavailability, you're not arguing any of the other?

6 MS. SINGLETON: I think my objection stands as it  
7 was yesterday along on -

8 THE COURT: Okay.

9 MS. SINGLETON: - all grounds but I'm renewing the  
10 unavailable objections stating it is a different day but I do  
11 think that that's going to depend on whether we're going  
12 forward today or not but (inaudible). That's our position,  
13 Your Honor.

14 THE COURT: Tell me a little bit about defense  
15 witness that is the problem. Who is it and is the work  
16 situation such that - that was one of the things, wasn't it?  
17 That was the first request for a delay that certainly with  
18 the timing in the same respect that I would anticipate the  
19 State would be able to make some efforts to get their  
20 witnesses and that changes the unavailability and I even  
21 responded to that in one of the emails with the Court but  
22 what about this witness. I mean, she was subpoenaed for  
23 today and tomorrow. It's still anticipated that much of the  
24 testimony is going to be coming - excuse me, for yesterday  
25 and today - thank you very much, Wednesday and Thursday and I

1 do need to make sure that we're clear on that, for the first  
2 two days of trial, of a 2-day scheduled trial, Wednesday and  
3 Thursday and then when we recognized yesterday that we were  
4 not going to have Wednesday as the first day, talked about  
5 putting on the evidence on Thursday and then hopefully being  
6 able to reserve Friday for arguments and deliberations but  
7 the defense did anticipate all along that it would be a 2-day  
8 trial and so you were anticipating the best you can with the  
9 presentation of evidence that the defense witnesses would be  
10 going on day two. Has she had an opportunity - and she is  
11 here so she can give me some information that way - to make  
12 arrangements and see if she could be available for Friday?  
13 First of all, just a proffer, I know that the defense doesn't  
14 have any obligation to put on a defense, defense witnesses,  
15 but what is anticipated that her -

16 MS. SINGLETON: As far as her testimony?

17 THE COURT: Yeah.

18 MS. SINGLETON: She was present during the -

19 THE COURT: Okay, so she -

20 MS. SINGLETON: - all of this -

21 THE COURT: - was anticipated all along. This is  
22 not rebuttal type of, to the extent that the defense is.  
23 Okay then, what is the work situation - and the name of the  
24 witness?

25 MS. SINGLETON: This is Ms. Star.

1 THE COURT: Okay, and what is the work situation  
2 that you have?

3 MS. STAR: I work Friday mornings and I don't know  
4 when I get off early in the morning.

5 THE COURT: Okay.

6 MS. STAR: But that's about it. I get off early to  
7 walk to work because I don't have my boss to pick me up.

8 THE COURT: Okay. And when do you typically get  
9 off?

10 MS. STAR: Maybe about 7:30, sometimes 8:00.

11 THE COURT: In the morning?

12 MS. STAR: Yes.

13 THE COURT: And that would be the case tomorrow  
14 morning as well?

15 MS. STAR: That was -

16 THE COURT: So that would not be a conflict then.  
17 There's no way that we're going to be starting before 7:30 in  
18 the morning. So am I correct in understanding then that the  
19 defense witness is the only concern about going forward  
20 today? And that you want to deal with that and we - with the  
21 next one as far as that you want to have an opportunity to go  
22 through and redact testimony?

23 MS. SINGLETON: Yes.

24 THE COURT: Has that been done? I mean, we've had  
25 an extra day, where are we with how - first of all let's put

1 on the record where we are and I'll let the State respond on  
2 that and it's going to be a back and forth response. My  
3 ruling yesterday - and the defense has accurately reflected  
4 that I ruled under the circumstances that the witness was  
5 unavailable yesterday and even with that ruling it does not  
6 change the responsibility of the proponent of that testimony  
7 to go forward with that testimony and we did run into some  
8 logistical problems with the presentation of that testimony.

9 How does the State anticipate putting on the  
10 testimony that I ruled yesterday, the preliminary hearing  
11 testimony of Witness Delgado that I ruled was appropriate?

12 MR. LEAVITT: The same way I think that we had left  
13 it yesterday and that is to play the actual audio.

14 THE COURT: Okay. And again, it is the Court, the  
15 clerk that has been putting that together but with the two  
16 problems that had been raised with that testimony is the  
17 written testimony neither party was satisfied accurately  
18 represented it. There has not been an official transcript  
19 and has there been any effort to get some type of a redacted,  
20 written copy so that there aren't objections and that there  
21 aren't otherwise inadmissible portions of that testimony?  
22 The fact that I ruled under the rule that he was unavailable  
23 does mean that otherwise inadmissible evidence wouldn't be  
24 able to come in through that way. Has there been any -

25 MS. SINGLETON: Well, Your Honor, I guess - well, we



1 gave the State our copy of the recording.

2 THE COURT: And that's all we've been - really the  
3 State is the proponent of the testimony but the only written  
4 copy that we've had was the defendant's unofficial copy of  
5 it.

6 MS. SINGLETON: That's correct, Your Honor, but my  
7 understanding was that the State wasn't satisfied with that  
8 so no, to answer your question, no, we have gone through to  
9 redact things and again, that was part of the basis for the  
10 continuance yesterday was that I thought upon further  
11 consideration that it would be more appropriate to get a  
12 certified transcript that is not, you know, one-sided, you  
13 know, our evidence that can be gone through.

14 THE COURT: And with that you just used that as a  
15 basis for a motion to continue. But there has not been any  
16 attempt to come to an agreement of some kind of a copy  
17 redacted or otherwise that you have-

18 MR. LEAVITT: No.

19 THE COURT: - on that one?

20 All right. And the second reason and the most  
21 important reason why I put this all on the record this  
22 morning - and that's what we're doing is that when I received  
23 information that the email had been sent to the Court that  
24 the defense was looking for a continuance because of those  
25 two reasons, within moments there was an objection from the

1 State. Was that inaccurate or is there an objection from the  
2 State to that continuance -

3 MR. LEAVITT: Yes, there is.

4 THE COURT: - and that's why there needed to be a  
5 hearing with the defendant present and that's why there  
6 weren't - it wasn't handled on a phone call [inaudible], it  
7 just wasn't appropriate. If there's an objection to a motion  
8 to continue, then we need to address it.

9 I am concerned about and in-custody defendant and  
10 now there is not the consideration of the witness that is a  
11 problem so the remaining basis for the request to continue  
12 this trial is because of the way we're going to be presenting  
13 the preliminary hearing testimony of Witness Delgado that I  
14 ruled was appropriate yesterday.

15 And again, the availability goes to that. When  
16 there was a request for a continuance, certainly the State  
17 would need to continue to make efforts to have that witness  
18 available and that's one problem with granting a continuance  
19 as well is that then it starts all over again and the State  
20 needs to make the efforts to do it.

21 I would also have anticipated that with the  
22 additional day that there would have been some efforts to  
23 find that witness this morning. Has anything been attempted  
24 to try and reach him?

25 MR. LEAVITT: Your Honor, what we were doing

1 yesterday, we already knew the trial was going to continue to  
2 today and we (inaudible) your ruling and we based our actions  
3 yesterday on that ruling. As far as his continued  
4 unavailability, nothing has changed. He received a 2-day  
5 subpoena. He was subpoenaed to be here today as well -

6 THE COURT: And he knew that he had both days.

7 MR. LEAVITT: - and is not here. But what we did  
8 yesterday and we didn't address availability before we knew  
9 our trial yesterday was going to continue. We addressed it  
10 afterwards. Based on the Court's - based on those  
11 circumstances we thought the Court was making a ruling on  
12 what was going to happen today because we knew the trial  
13 wasn't going yesterday.

14 THE COURT: Okay, and I agree except to the extent  
15 that the issue is how are we going to present it? What  
16 happened yesterday -

17 MR. LEAVITT: That's what - and I can respond to  
18 that.

19 THE COURT: That's what we need to address. The  
20 State needs - the State in this case - because you're the  
21 proponent of the testimony to come in through the preliminary  
22 - is the one that then needs to have some way in which it can  
23 be presented.

24 MR. LEAVITT: And I can address that now. I was  
25 answering your question as far as unavailability first and

1 now I'll address as far as the presentation of the evidence,  
2 Your Honor. As far as the presentation of the evidence we  
3 discussed quite at length yesterday I think and the argument  
4 of defense yesterday was that the best evidence is that tape  
5 recording. My concern is you couldn't hear it very well. We  
6 went back to our office and made some efforts to make sure  
7 that we had some speakers here that maybe the audio was a  
8 little bit better. And, and we've come prepared and I think  
9 that Pat actually worked on it as well and we have a little  
10 bit better than the PA. So we did come prepared based on our  
11 conversation yesterday presented that way.

12 As far as redaction, we haven't done anything to  
13 redact it. I do know from past experience redacting  
14 something that's from the court record recordings is kind of  
15 hard, there's proprietary things on there that make it a  
16 little bit difficult but the question on redaction though is  
17 it doesn't need to be because - and, you know, have we made  
18 efforts to redact it? No. But that I think is getting the  
19 cart a little bit before the horse. I don't think it needs  
20 to be redacted. There isn't anything in there. The  
21 testimony the defense referred to yesterday is on Page 6 of  
22 that transcript and it's during Ms. Singleton's cross  
23 examination of this witness and it's about when, the  
24 question, the context of this is he's asking - she's asking  
25 the witness when he had lived with the defendant and on the

1 bottom of Page 6, 184 is the question is like "a couple days,  
2 couple weeks, couple months?" And then he said "Ummm, I  
3 don't, I stopped staying there until - I stopped staying  
4 there mostly (inaudible) and I when I found my bike ended up  
5 missing." I think that the motion yesterday was that this is  
6 inadmissible because it's some sort of character evidence and  
7 there's been no 404 - this isn't character evidence. This is  
8 in no way a pertinent trait of character of the defendant.  
9 There's not even an accusation in there that the defendant is  
10 the one who took the bike. It could have ended up missing  
11 several ways. This is a completely innocuous statement that  
12 certainly doesn't give rise to the need for a 404B hearing.  
13 This is a mayhem case. There's not even a theft involved in  
14 this case.

15 Ummm, and so, and so our position is that, is that  
16 no, we haven't redacted it but it doesn't need to be  
17 redacted. This isn't something that is going to be so  
18 incredibly prejudicial that the jury is going to hear, Wow,  
19 Gabriel Estrada's bike was missing when he was over at that  
20 guy's house? He must have bit of Jacob Omar's ear. I don't  
21 see how a jury could ever, under any circumstances be  
22 affected in that way. This again, an innocuous statement  
23 saying that he just ended up not moving there, not living  
24 there 'cause his bike ended up missing. I don't think this  
25 is something that needs to be redacted and it's not going to

1 affect the jury or affect the defendant's right to a fair  
2 trial in any way.

3 THE COURT: Defense's -

4 MS. SINGLETON: Your Honor, may I respond?

5 THE COURT: - response.

6 MS. SINGLETON: You know, taken in and of itself  
7 perhaps, you know - well, I still think that that, you know,  
8 the bike ended up missing is problematic but I think it's  
9 also in conjunction with Lines 175, 176 and 177 on Page 6  
10 when Mr. Estrada is referring to an incident prior to that  
11 and prior to this and going on and that's why I didn't stay  
12 there and inaudible and I think in conjunction, what this is  
13 suggesting is that there was some prior incident with, in  
14 between these two parties and there was something going on  
15 and I think that that is, I think the jury could maybe infer  
16 that something, you know, something else that was perhaps  
17 some form of 404B and again, this goes to, you know, the  
18 difference between cross examination at a preliminary hearing  
19 versus at a trial and what, you know, and what information is  
20 elicited, you know, because of the different motive of cross  
21 and I think those are our main objections, you know, to the  
22 testimony of Gabriel Estrada.

23 But Your Honor, again and just so that the record  
24 is clear we are renewing our - I think it's proper for the  
25 Court to consider the unavailability of Mr. Estrada again

1 today even - because it is germane - even though he may have  
2 been subpoenaed for a 2-day trial. I don't think that  
3 relieves the State of the burden to seek him out yesterday  
4 and I don't think that they made any effort to do so. And  
5 furthermore I don't think that the proffer yesterday,  
6 although we agreed to a proffer in terms of what they had  
7 done, I don't think that again, if that proffer is still, you  
8 know, the sole efforts that they made to obtain Mr. Estrada,  
9 I don't think that's sufficient. You know, the rules of  
10 service as outlines on the Court's website required that a  
11 person serving process, which I presume in this case would  
12 have been somebody from the D.A.'s office, that require that  
13 they should legibly document date and time of service,  
14 legibly print the person's name and address on the return of  
15 service, sign the return of service in substantial compliance  
16 with the rules and I don't think that emailing a pastor a  
17 subpoena and then just receiving some sort of verbal  
18 confirmation that that date was conveyed to a witness is  
19 sufficient to demonstrate service or knowledge of the date  
20 and especially now on day two when again there's been a whole  
21 other afternoon in which efforts could have been made to  
22 locate Mr. Estrada. So I think, we maintain our objection to  
23 any of this testimony coming in in the first place. I don't  
24 think the State has met their burden to show that Mr. Estrada  
25 is not available today - or yesterday but we understand the

1 Court ruled yesterday but again today and so we maintain our  
2 objection.

3 THE COURT: Okay. Does the State wish to respond?

4 MR. LEAVITT: As far as the character nature of the  
5 parts Ms. Singleton just pointed out, from 174 on when he's  
6 talking about - let's look at what it says, not what we can,  
7 not what someone may infer from that. "But not a week, but I  
8 had an incident prior to that and prior to this, going on.  
9 That's why I didn't stay there." What does that mean? He  
10 could have gone to jail. He could have had an incident with  
11 someone else on the street. He could have had an incident  
12 where he slipped and fell at a McDonald's, nobody knows.  
13 This in no way - in no way creates an unfair inference that  
14 the defendant did something wrong, but again, if she's  
15 referring to 404B, 404B is an exception to the 404 rule  
16 against character evidence. 404 says the prohibited use is  
17 evidence of a person's character or trait of character not  
18 admissible to prove that on a particular occasion the person  
19 acted in conformity with that character trait. Nothing in  
20 this gets us even close to creating some sort of a character  
21 inference that something happened with these guys and  
22 therefore on this date he was acting the same way that he did  
23 that day. It just doesn't fall within the scope of that  
24 rule.

25 Again, as far as the unavailability, I think I've



1 addressed that. I actually think the way we did it was quite  
2 creative. We have a homeless person here and you know what,  
3 how do the cops find homeless people? Sometimes it's pretty  
4 hard to do and so we found someone who actually knew him, who  
5 had contact with him and he served him a subpoena for today.  
6 We didn't do anything else but I think it stands to reason  
7 that after we were, after we broke for the day yesterday and  
8 knew we were coming back today for this trial, we were  
9 hearing how that testimony is going to be heard and the Court  
10 made a ruling that in this trial, this witness is going to be  
11 unavailable. I can see how if we had addressed that  
12 yesterday and then continued it yesterday, we may need to do  
13 a little bit more work. But when we have a hearing after the  
14 jury is dismissed, knowing that we're going back in 23 hours,  
15 and the Court rules that this witness is unavailable for this  
16 trial and again, it's a 2-day subpoena, he's not here today.  
17 I don't think that there's anything else that we needed to do  
18 so and so we'd ask the Court to deny the continuance, we're  
19 ready to go forward today.

20 THE COURT: And I am going to rule in favor of the  
21 State on these issues. My ruling was clear yesterday that  
22 under the - in terms of Rule 804 that an unavailable witness  
23 is unavailable if the proponent party has done reasonable  
24 means to try and get them there and it was clear that it was  
25 for yesterday and today. It was a 2-day trial scheduled. I

1 agree with the reasoning the State has presented on this as  
2 far as that issue goes because I specifically said we're  
3 going to have to be dealing with the continuance of the jury  
4 not being available on Wednesday. The jury was going to be  
5 called in on Thursday, and found under those circumstances  
6 that the witness was unavailable.

7           The problems with yesterday was how we were going  
8 to put on that testimony and that's what all the discussion  
9 was. None of that was changed by the fact that we still  
10 couldn't have the jury on Wednesday and even the witness, the  
11 other homeless witness was here under the same means and  
12 received the same information and so it does not change my  
13 ruling because the 2-day trial did, in fact, go into the  
14 second date. So I'm still finding that he's still  
15 unavailable.

16           As to the issue of whether or not the testimony  
17 going in by the recording is a basis for a continuance, again  
18 I am ruling that it is not. The information that is in the  
19 testimony of this witness that I'm allowing that there was  
20 some bad blood, something going on, simply does not rise to  
21 the level of 404B character evidence and so I am not going to  
22 preclude that.

23           The argument yesterday and the status was that the  
24 defense and the prosecution had looked at the testimony,  
25 looked at the unofficial transcript, listened to the

1 recordings and ultimately determined before we recessed when  
2 Mr. Goins was here and everyone was present, that the  
3 recording was the best evidence, not necessarily the easiest  
4 way to put it on but the best evidence and that, in fact, was  
5 the argument that the defense made and both the Court and the  
6 parties have made efforts now to put that in through the  
7 recording and we will follow that process.

8           Given the two issues then that the defense witness  
9 is available for today and tomorrow and is here and present,  
10 because it won't be until after work and the fact that the  
11 preliminary hearing testimony that I've admitted is coming in  
12 through the recording, there doesn't really seem to be any  
13 reason to continue an in-custody case where the jury is now  
14 here and present to hear it rather than continue it to  
15 another date where he would fall back into second or third  
16 position. He was number two even in this one.

17           Thank you. All right.

18           MS. SINGLETON: Your Honor, may I just, I  
19 understand the Court has ruled and I'm not challenging that  
20 ruling necessarily I just want to, I mean - I just want to  
21 make one other objection for the record just for purposes of  
22 appeal.

23           THE COURT: You have the benefit of the record.  
24 That's absolutely appropriate.

25           MS. SINGLETON: That again we have an objection on

1 Page 6 of the preliminary hearing testimony at Line 163 when  
2 Mr. Estrada is basically saying I have (inaudible), I needed  
3 a place to sleep (inaudible) Star and I. I thought I was  
4 going to be safe, I thought everything was okay." I think  
5 that is objection - I mean, we would object to that as -

6 THE COURT: I'm to Page 6. Tell me the lines  
7 again.

8 MS. SINGLETON: 163 and 164. "I thought I was  
9 going to be safe, I thought everything was okay." I mean, I  
10 thinks that's another reference to some sort of prior, I mean  
11 - well, I guess it's 404 but I just would object to that.

12 THE COURT: Anything response to the defendant's  
13 objections to Line 163, 164 and 165?

14 MR. LEAVITT: No, Your Honor, I feel the same way -

15 THE COURT: The argument -

16 MR. LEAVITT: - you can create inferences from any  
17 of it -

18 THE COURT: - is the same. Okay. All right.

19 MR. LEAVITT: - that's the same.

20 THE COURT: And the record has been made clear and  
21 I am overruling the objection on that. Thank you. Do you  
22 want the benefit of the record for anything else because this  
23 is the time to put that on even given my rulings. That's not  
24 improper at all.

25 MS. SINGLETON: I -

Tab H

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE

**FILED DISTRICT COURT**  
Third Judicial District

SALT LAKE COUNTY, STATE OF UTAH

MAY 22 2014

STATE OF UTAH,

Plaintiff,

vs.

DESEAN MICHAEL GOINS,

Defendant.

: Case No. 131906358FS

: Appellate Court Case No. 20140009

: With Keyword Index

SALT LAKE COUNTY

Deputy Clerk

PRELIMINARY HEARING AUGUST 22, 2013

BEFORE

JUDGE PAUL G. MAUGHAN

FILED  
UTAH APPELLATE COURTS

JUN 25 2014

~~20140009-CA~~

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

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UTAH APPELLATE COURTS

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## APPEARANCES

For the Plaintiff:

PETER D. LEAVITT  
Deputy District Attorney

For the Defendant:

LACEY C. SINGLETON  
Attorney at Law

\* \* \*

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SALT LAKE CITY, UTAH - AUGUST 22, 2013

JUDGE PAUL G. MAUGHAN PRESIDING

(Transcriber's note: Identification of speakers  
may not be accurate with audio recordings)

P R O C E E D I N G S

THE COURT: I'm sorry, is this Goins?

MS. SINGLETON: Yes, Your Honor.

DEFENDANT GOINS: Yes, sir.

THE COURT: Goins? How many witnesses will the  
State have?

MR. LEAVITT: I anticipate we'll probably call two  
witnesses. We have three witnesses subpoenaed, but I think  
we'll be fine to go two.

THE COURT: All right. Do you waive a formal  
reading of Information?

MS. SINGLETON: I do, Your Honor.

THE COURT: All right. Do you want to call your  
first witness?

MR. LEAVITT: Yes, Your Honor. Our first witness is  
Gabriel Estrada. He's in the hallway. I'll go grab him.

THE COURT: Sure.

MR. LEAVITT: And, Your Honor, before Mr. Estrada  
gets here, Officer Mortensen's now entering the courtroom. I  
don't know if the exclusionary rule's been invoked, but if it  
is, he's our case agent, so we'll have him remain.



1 MS. SINGLETON: Okay. I would invoke it for the  
2 record, but that's fine.

3 THE COURT: Okay. Officer may remain.

4 GABRIEL ESTRADA

5 Having first been duly sworn, testified  
6 upon his oath as follows:

7 THE COURT: Come and sit in this chair, sir.

8 Would you state your appearances, please, for the  
9 record? Sorry.

10 MS. SINGLETON: Lacey Singleton for Mr. Goins.

11 MR. LEAVITT: Peter Leavitt for the State.

12 THE COURT: All right, you may proceed.

13 MR. LEAVITT: Thank you.

14 DIRECT EXAMINATION

15 BY MR. LEAVITT:

16 Q Could you state your name and spell your last name  
17 for the record?

18 A Gabriel, the last name is Estrada, E-S-T-R-A-D-A.

19 Q Mr. Estrada, do you know an individual by the name  
20 of Desean Goins?

21 A Yes.

22 Q How do you know Desean Goins?

23 A It was a mutual thing, a mutual friendship.

24 Q How long have you known him?

25 A I'd say a month. A month or two.

1 Q A month or two? And do you see Desean Goins in the  
2 courtroom today?

3 A Yes, I do.

4 Q Could you point him out and describe where he's  
5 sitting and what he's wearing?

6 A He's sitting on my right, in that chair. He's  
7 wearing black.

8 Q Okay. Is he sitting at a table?

9 A Yes, sir.

10 Q All right, is he sitting next to a woman?

11 A Yes, sir.

12 MS. SINGLETON: Objection, this is leading.

13 THE COURT: Overruled.

14 MR. LEAVITT: Will the record reflect identification  
15 of the defendant?

16 THE COURT: It will.

17 Q (BY MR. LEAVITT) All right. Did something happen  
18 with Mr. Goins back in July that would've brought you to  
19 court today?

20 A Yes.

21 Q All right. Let's talk about it. Do you remember  
22 the exact date that that happened?

23 A I do not.

24 Q Okay, was it - but it was in July?

25 A Yes, it was in July at Pioneer Park.

1 Q Okay, and is that Pioneer Park here in Salt Lake?

2 A Yes, it is.

3 Q All right. Tell us what happened?

4 A Well, what happened is -

5 Q And, I'm sorry, let me just ask you to just - to  
6 pull the mic a little closer and just speak up a little bit.  
7 The room's kind of big. We just want to make sure we get  
8 your voice, okay?

9 A Okay. What happened that day is, supposedly he  
10 came up to me at the block, which is 210 Rio Grande, and at  
11 the homeless shelter he came up to me with Star saying -

12 Q Who - sorry, let me stop you, who's Star?

13 A The young lady in the back.

14 Q Okay. And how do you know Star?

15 A Through Myra.

16 Q Okay.

17 A We - I knew her before I knew him.

18 THE COURT: Mr. Leavitt, is she liable to be a  
19 witness in (inaudible)?

20 MR. LEAVITT: I think she is - I didn't know who she  
21 was, so, yes.

22 MS. SINGLETON: I didn't either. Your - okay. And  
23 so at that point, I - I'm going to have to have you step out  
24 of the courtroom.

25 DEFENDANT GOINS: She's a witness for me, sir.

1 MR. LEAVITT: She is a very likely witness in the  
2 case.

3 THE COURT: All right. You may continue.

4 MR. LEAVITT: Thank you, Judge.

5 Q (BY MR. LEAVITT) So, you said your - I think you  
6 said you were at the shelter?

7 A Yes.

8 Q And -

9 A I was approached by him and her, and -

10 Q So the defendant and Star, and once they approached  
11 you, what happened?

12 A He came at me basically in a disrespectful tone  
13 saying I stole his phone, he said, I do a killer (inaudible),  
14 mother F-er, pulled out a knife, waived it around basically  
15 saying I stole his phone, or saying that I need to get his  
16 phone back to him. And (inaudible) very possible as long as  
17 he would have that (inaudible).

18 Q Now, all right. So you said that he then pulled  
19 out a knife. How was he holding the knife when he pulled it  
20 out?

21 A Like anybody else would hold a knife when you're  
22 cutting an apple or an orange, basically. (Inaudible).

23 Q So, it was in his hand?

24 A In his hand.

25 Q Okay, so I just want to get an idea of how exactly

1 he was holding it. Was he holding it up high? Was he  
2 holding it down low? Just give us a little more description.

3 A (Inaudible).

4 Q Okay.

5 A That's how he was holding it.

6 Q And when he was holding it, was he facing you, or  
7 was he standing away from you?

8 A He was facing me.

9 Q About how far away from you was he standing when he  
10 was holding the knife?

11 A Like two feet away.

12 Q I'm sorry?

13 A Within arm's reach, basically.

14 Q Okay. And you said - a moment ago you said he was  
15 waving it around. Could you give us a little bit more  
16 description of how he was waving it around?

17 A I would say, he had the knife like this, he was  
18 pretty much - like that.

19 Q Okay, so if - so just so that - would it be a fair  
20 statement to say that he was moving it back and forth in  
21 front of his body?

22 A Uh-huh (affirmative).

23 Q Is that a yes?

24 A Yes.

25 Q Okay.

1           A     That's a yes.

2           Q     All right.

3           A     Yes.

4           Q     Okay. And did he - when he - he pulled the knife  
5 out, did he pull the knife out before or after he had said  
6 the statement about killing any mother F-er who took his  
7 phone?

8           A     Before, and it was in his hand. That's - after  
9 (inaudible) saying that I need to get his phone back, then he  
10 pulled out a knife.

11          Q     Okay.

12          A     And that's when he started saying about stabbing  
13 someone, killing someone.

14          Q     All right. After he said that, what happened next?

15          A     I told him I didn't have anything to do with that.  
16 I told him what happened. I told him I woke up, I got my  
17 clothes ready, I got ready, and I left. His home boy, or his  
18 friend, was awake before I was.

19          Q     Okay. So, what - how did the confrontation end?

20          A     I told him, I don't have it, told him I didn't have  
21 to do anything with it, it's not my problem, it's his. And I  
22 walked away.

23          Q     When you walked away, did you see what the  
24 defendant did?

25          A     No, I just walked away from the situation. I

1 didn't want to be in it.

2 Q So, did you have any more encounters with the  
3 defendant that day?

4 A When he got arrested.

5 Q Okay. And about how long after the confrontation  
6 you had with him at the shelter was it until you saw when he  
7 was getting arrested?

8 A Half-hour.

9 Q Okay.

10 A It would have been 30 minutes from me walking  
11 around the block and finding out that Myra is leaving, and  
12 finding out that she is (inaudible) blood from right here,  
13 and -

14 Q Is Myra known by another name?

15 A Jacob Omar.

16 Q Okay. And at the beginning of this, I asked you if  
17 the Pioneer Park was in Salt Lake County. The shelter you  
18 (inaudible) where this incident occurred, is that in Salt  
19 Lake County as well?

20 A Yes.

21 MR. LEAVITT: Okay. Thank you. I have no further  
22 questions for this witness.

23 THE COURT: Thank you.

24 ///

25 ///

CROSS EXAMINATION

BY MS. SINGLETON:

Q So, Mr. Estrada, you were staying at the shelter back in July?

A Yes.

Q With Mr. - with Mr. Goins?

A Not with him.

Q Not with him?

A Huh-uh (negative).

Q But you knew him from there; is that correct?

A No.

Q You - you knew him from somewhere else?

A I had met him is when I needed a place to sleep is with Star. And I thought I was going to be safe, I thought everything was okay with him.

Q Okay, so you were friends with - you knew Star.

A (Inaudible).

Q Okay. And that's how you met Desean?

A Him. Yes.

Q Okay. And so you did stay, then, with Sean - or with Desean and Star at one point in time?

A A week.

Q A week or so?

A And -

Q How long was that?



1           A     Well, not a week, it was a few - that I had an  
2 incident prior to that, prior to this that's going on now,  
3 and that's why I didn't stay there any more. I didn't  
4 (inaudible)-

5           Q     Okay, but - so how long did you stay with Star and  
6 Desean? About a week?

7           A     I would say within months, but ranging going back  
8 and forth and staying there a few nights (inaudible).

9           Q     Okay. So - but when was the last time that you -  
10 do you recall when the last time you stayed with them was  
11 prior to this incident on this day?

12          A     I don't recall.

13          Q     Like a couple days, couple weeks, couple months?

14          A     I stopped staying there until - I stopped staying  
15 there - well, sleeping there at night is when I found out my  
16 bike end up missing.

17          Q     Okay. So, you - on this day, you were at the  
18 shelter, and you said that Desean approached you in the  
19 shelter?

20          A     Not in the shelter. Outside of it.

21          Q     Outside of it?

22          A     He was walking from his apartment that's in Rose  
23 Park off of 800 all the way down. I don't know the exact  
24 address. It was close to the tracks, is when he approached  
25 me, and he walked off to the park, and I was still on the

1 men's side of the shelter.

2 Q Okay. So this encounter with him occurred sort of  
3 on the men's side of the shelter?

4 A Yeah.

5 Q Okay, right outside of it? Okay. What - was there  
6 anybody else around at that point?

7 A Not really, it was just me and him and his girl.

8 Q Okay.

9 A There was people probably around observing, but not  
10 in it.

11 Q Okay. You said earlier that you told Desean that  
12 you had - that by the time you woke up that morning, his home  
13 boy was already awake? Is that -

14 A Uh-huh (affirmative).

15 Q Now, who is that?

16 A (Inaudible), but I don't recall his last name.

17 Q Okay, what - so, what was the relevance of that -  
18 what was the point of that, that - were you staying next to  
19 him, sleeping next - I mean, sleeping near him or something?

20 A No, it is - I went there because I was tired and I  
21 wanted to sleep somewhere besides outside. So I went there  
22 and fell asleep there, because I had to get my clothes ready.  
23 I wanted my clothes ironed. And he was there before I got  
24 there that night - or the night before. Then when I wake up,  
25 he was awake.

1 Q Okay. And so - so when he approached you - and you  
2 said he was being disrespectful?

3 A Yeah.

4 Q What do you mean by that?

5 A Vulgar.

6 Q Vulgar?

7 A High tone, attitude.

8 Q Okay. And he thought you had his phone, correct?

9 A Yeah, he thought I stole his phone and sold it.

10 Q Okay. When - do you recall when the last time - so  
11 before - so before this day, when was the last time you saw  
12 Desean prior to this? Had he been -

13 A (Inaudible) that night.

14 Q Huh?

15 A That night.

16 Q The night before? With his friend who was staying  
17 in the shelter?

18 A Mmm, his friend wasn't in the shelter. He was  
19 there at his apartment that night.

20 Q You were at Desean's apartment that night?

21 A I didn't stay there, but I don't like staying there  
22 that much.

23 Q Okay, but you were there the night before. Okay.  
24 That's a yes?

25 THE COURT: Is that a yes?

1 THE WITNESS: Yes, because I had to get my clothes  
2 ready, like I said.

3 Q (BY MS. SINGLETON) Okay. So that happened at  
4 Desean's place.

5 A Mmm.

6 Q Yes?

7 A Yes.

8 MS. SINGLETON: Okay.

9 THE COURT: Anything else?

10 MR. LEAVITT: No further questions, Your Honor.

11 THE COURT: Okay. Thank you, Mr. Estrada. You may  
12 step down.

13 MR. LEAVITT: Our next witness is Jacob Omar, he's  
14 in the hall. I'll go grab him.

15 THE COURT: If you'd come up and be sworn, please.

16 JACOB OMAR

17 Having first been duly sworn, testified  
18 upon his oath as follows:

19 THE COURT: Come and sit in this chair, please.

20 MR. LEAVITT: May I proceed?

21 THE COURT: You may proceed.

22 MR. LEAVITT: Thank you.

23 DIRECT EXAMINATION

24 BY MR. LEAVITT:

25 Q Could you state your name and spell your last name

Tab I

## Document: People v. Fry, 92 P.3d 970

### **People v. Fry, 92 P.3d 970**

#### **Copy Citation**

Supreme Court of Colorado

June 28, 2004, Decided

Case No. 03SC98

#### **Reporter**

**92 P.3d 970 \*** | 2004 Colo. LEXIS 529 \*\*

Petitioner: THE PEOPLE OF THE STATE OF COLORADO v. Respondent: RICHARD DEE FRY

#### **Prior History:** [\*\*1]

People v. Fry, 74 P.3d 360, 2002 Colo. App. LEXIS 1962 (Colo. Ct. App., 2002).

**Disposition:** Judgment of Court of Appeals affirmed.

#### **Core Terms**

---

cross-examination, preliminary hearing, confrontation clause, witnesses, reliability, preliminary hearing testimony, admissible, unavailable, credibility, questions, adequate opportunity, right to confront, defense counsel, trial court, harmless, prior opportunity, prior testimony, probable cause, admitting, hearsay exception, ex parte, prosecution's, hearsay, unavailable witness, state constitution, court of appeals, reasonable doubt, trustworthiness, guarantees, cases

## Case Summary

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### Procedural Posture

Defendant was convicted by a Colorado trial court of second degree assault and second degree murder. The Colorado Court of Appeals reversed, stating that there was a bright-line rule prohibiting the use of preliminary hearing testimony of an unavailable witness. It held that the error was not harmless beyond a reasonable doubt, and remanded the case for a new trial. The supreme court granted certiorari to review.

### Overview

The supreme court had to decide whether a prior case categorically excluded all preliminary hearing testimony, even when it met the two-part test of unavailability and reliability and would be admissible under a hearsay exception other than Colo. R. Evid. 804; and whether any error was harmless beyond a reasonable doubt. The supreme court noted, however, that its Confrontation Clause inquiry was changed to whether a defendant had an adequate prior opportunity to cross-examine, not whether the previous testimony was reliable. The preliminary hearing did not provide an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause requirements. The trial court denied defendant his right to an adequate opportunity to cross-examine the witnesses against him. The prosecution did not show that the error in admitting the witness's testimony absent an adequate opportunity for defendant to cross-examine was harmless. The prosecution relied on the witness's testimony. Other witnesses were subject to attack, and the witness's testimony was contradicted by defendant's version of events. The overall strength of the prosecution's case was questionable.


### Outcome


The judgment was affirmed.


## ▼ LexisNexis® Headnotes


Criminal Law & Procedure > Preliminary Proceedings ▼ > General Overview ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ > General Overview ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ >   
Evidence ▼

Criminal Law & Procedure > Trials ▼ > Examination of Witnesses ▼ >   
Cross-Examination ▼

Criminal Law & Procedure > Trials ▼ > Witnesses ▼ >  Unavailability ▼


**HN1**  Previous testimony of a witness is admissible only if the witness is unavailable and the defendant had an adequate prior opportunity for cross-examination. *Shepardize* - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >  
Right to Confrontation ▼

Criminal Law & Procedure > Trials ▼ > Defendant's Rights ▼ > General Overview ▼

Criminal Law & Procedure > Trials ▼ > Defendant's Rights ▼ > 

Right to Confrontation ▼


**HN2**  A defendant's right to confront the witnesses against him is guaranteed by both the Sixth Amendment of the United States Constitution and Colo. Const. art. II, § 16. Even without the state provision guaranteeing this right, the United States Supreme Court has held that this bedrock procedural guarantee applies to both federal and state prosecutions through the Fourteenth Amendment. *Shepardize* - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >  
Right to Confrontation ▼


Criminal Law & Procedure > Trials ▼ > Defendant's Rights ▼ > General Overview ▼

Criminal Law & Procedure > Trials ▼ > Defendant's Rights ▼ > 

Right to Confrontation ▼

**HN3**  The Sixth Amendment to the United States Constitution states: In all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. *Shepardize* - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >  
Right to Confrontation ▼

**HN4**  See Colo. Const. art. II, § 16. *Shepardize* - Narrow by this Headnote



Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >

Right to Confrontation ▼

**HN5** Although the federal Confrontation Clause does not include specific language requiring face to face confrontation, the U.S. Supreme Court has stated that simply as a matter of English it confers at least a right to meet face to face all those who appear and give evidence at trial. *Shepardize* - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >

Right to Confrontation ▼

**HN6** The purposes behind both the federal and state Confrontation Clauses are well articulated. The Confrontation Clause is designed to ensure that convictions are not obtained through the use of ex parte affidavits. Testimony is much more reliable when it is given under oath at trial where the witness can be cross-examined and the jury may observe the witness's demeanor. Thus, although by necessity exceptions to the right of confrontation must exist, courts have continually maintained the importance of that right. Accordingly, courts must protect the most obvious manifestation of that right-the opportunity for cross-examination. *Shepardize* - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >

Right to Confrontation ▼

**HN7** The right of an accused to confront the witnesses against him has been regarded as a fundamental right for hundreds of years. It was included in both the United States and Colorado Constitutions to insure that persons would not be convicted on the basis of ex parte testimony and without the benefit of cross-examination. This right remains crucial to the adversarial system of law. *Shepardize* - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >


Right to Confrontation ▼

Constitutional Law > Bill of Rights ▼ > State Application ▼

**HN8** The Sixth Amendment of the United States Constitution applies to state prosecutions through the Fourteenth Amendment and Colorado courts have followed U.S. Supreme Court law regarding the Confrontation Clause. *Shepardize* - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >

Right to Confrontation ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ > 

Evidence ▼

**HN9** The Confrontation Clause provides a procedural, not a substantive, guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. Therefore, the flaw in the Roberts test is that it allows judges to substitute their determinations of amorphous notions of reliability for a jury's determination. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. The Confrontation Clause applies to "witnesses" or those who "bear testimony." "Testimonial" is not defined comprehensively, but it applies at a minimum to prior testimony at a preliminary hearing. *Shepardize* - Narrow by this Headnote


Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >

Right to Confrontation ▼


Criminal Law & Procedure > Preliminary Proceedings ▼ > General Overview ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ >

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Evidence > Types of Evidence ▼ > Testimony ▼ > General Overview ▼

Evidence > ... > Examination ▼ > Cross-Examinations ▼ > General Overview ▼

**HN10** The Supreme Court has refocused its analysis of Confrontation Clause violations, mandating not that evidence necessarily be reliable, but that its reliability be assessed in a particular manner--through cross-examination. The Crawford test therefore limits the admissibility of testimonial evidence, which includes preliminary hearing testimony, to that of unavailable witnesses whom the accused has had an adequate prior opportunity to cross-examine. The Confrontation Clause inquiry is changed to whether a defendant had an adequate prior opportunity to cross-examine, not whether the previous testimony is reliable. *Shepardize* - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >

Right to Confrontation ▼


Criminal Law & Procedure > Preliminary Proceedings ▼ > General Overview ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ >

General Overview ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ >


Entitlement ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ > 

Evidence ▼


Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ >

Procedural Matters ▼

Criminal Law & Procedure > Trials ▼ > Defendant's Rights ▼ > 

Right to Confrontation ▼

Evidence > ... > Examination ▼ > Cross-Examinations ▼ > General Overview ▼

**HN11**  A preliminary hearing is limited to matters necessary to a determination of probable cause. The rights of the defendant are therefore curtailed: evidentiary and procedural rules are relaxed, and the rights to cross-examine witnesses and to introduce evidence are limited to the question of probable cause. A defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary hearing. By rule, defendants have the right to a preliminary hearing under certain circumstances, and pursuant to the rule a defendant may cross-examine witnesses against him and may introduce evidence in his own behalf, Colo. R. Crim. P. 7(h)(3). However, the preliminary hearing is not intended to be a mini-trial or to afford the defendant an opportunity to effect discovery. Hence, a preliminary hearing does not provide the same safeguards as a trial. *Shepardize* - Narrow by this Headnote

Civil Procedure > Judicial Officers ▼ > Judges ▼ > General Overview ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > General Overview ▼


Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ > General Overview ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ > 

Evidence ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ >

Procedural Matters ▼


Criminal Law & Procedure > Trials ▼ > Defendant's Rights ▼ > 

Right to Confrontation ▼

Criminal Law & Procedure > Trials ▼ > Witnesses ▼ > Credibility ▼

Evidence > Types of Evidence ▼ > Testimony ▼ > General Overview ▼

Evidence > ... > Examination ▼ > Cross-Examinations ▼ > General Overview ▼

**HN12**  The judge's findings at a preliminary hearing are restricted to a determination of probable cause. A judge may not engage in credibility determinations unless the testimony is incredible as a matter of law. Aside from the exceptionally rare instance of credibility as an issue of law, defense counsel has no legitimate motive to engage in credibility inquiries and may be prohibited from doing so. Thus, the right to cross-examination may be curtailed by the judge in all but the most unusual circumstances. Because credibility is not at issue and probable cause is a low standard, once a prima facie case for probable cause is established, there is little defense counsel can do to show that probable cause does not exist. Therefore, as a practical matter, defense counsel may decline to cross-examine witnesses at the preliminary hearing, understanding that the cross-examination would have no bearing on the issue of probable cause and that the judge may limit or prohibit the cross-examination. Thus the opportunity for cross-examination at a preliminary hearing is very limited. Further, the opportunity for cross-examination regarding the credibility of a witness, as a matter of

fact, exists only to the extent that an attorney persists in asking questions that have no bearing on the issues before the court, and such irrelevant questioning is not prohibited by the court. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ > General Overview ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ > Evidence ▼

Criminal Law & Procedure > Trials ▼ > Defendant's Rights ▼ > Right to Confrontation ▼

Criminal Law & Procedure > Trials ▼ > Examination of Witnesses ▼ > Cross-Examination ▼

**HN13** The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > Preliminary Proceedings ▼ > General Overview ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ > General Overview ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ > Evidence ▼

Criminal Law & Procedure > Preliminary Proceedings ▼ > Preliminary Hearings ▼ > Procedural Matters ▼

Criminal Law & Procedure > Trials ▼ > Defendant's Rights ▼ > Right to Confrontation ▼

Criminal Law & Procedure > Trials ▼ > Examination of Witnesses ▼ > Cross-Examination ▼

Criminal Law & Procedure > Trials ▼ > Witnesses ▼ > General Overview ▼

Criminal Law & Procedure > Trials ▼ > Witnesses ▼ > Unavailability ▼

Evidence > Types of Evidence ▼ > Testimony ▼ > General Overview ▼

Evidence > ... > Examination ▼ > Cross-Examinations ▼ > General Overview ▼


Evidence > ... > Examination ▼ > Cross-Examinations ▼ > Scope ▼

**HN14** The preliminary hearing does not satisfy Confrontation Clause requirements. A preliminary hearing does not provide an adequate opportunity for cross-examination. It prevents the preliminary hearing from becoming a mini-trial which would expend time

and resources the judiciary does not possess. Changing the purpose of these hearings would impact all criminal cases, not just those with Confrontation Clause issues. Preliminary hearings are limited to a determination of probable cause so that they do not become mini-trials. Were the courts to allow extensive cross-examination by defense counsel so as to prevent any Confrontation Clause violations at trial if a witness were to become unavailable, it would turn the preliminary hearing in every case into a much longer and more burdensome process for all parties involved. Therefore, the supreme court does not expand the scope of preliminary hearings in order to allow them to satisfy Confrontation Clause requirements. Rather, it merely reiterates a prior holding; although a defendant must have been provided with a prior adequate opportunity to cross-examine an unavailable witness before the State can admit that witness's previous testimony into evidence, the preliminary hearing does not provide an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause requirements. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > Examination of Witnesses ▼ > 

Cross-Examination ▼

**HN15**  Cross-examination is the greatest legal engine ever invented for the discovery of truth. *Shepardize* - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ >

Right to Confrontation ▼

Criminal Law & Procedure > Trials ▼ > Burdens of Proof ▼ > General Overview ▼

Criminal Law & Procedure > Trials ▼ > Burdens of Proof ▼ > Prosecution ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > General Overview ▼


Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ >

Constitutional Rights ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ >

Evidence ▼

Evidence > Burdens of Proof ▼ > Proof Beyond Reasonable Doubt ▼

**HN16**  Two types of constitutional error exist: structural errors, which affect the framework within which the trial proceeds, rather than simply an error in the trial process itself; and trial errors, which occur during the presentation of the case to the jury and may therefore be quantitatively assessed in the context of other evidence presented. Structural errors require automatic reversal. Trial errors require reversal unless an appellate court determines that the error was harmless beyond a reasonable doubt. The prosecution bears the burden of proving that the error was harmless. Confrontation Clause violations are trial errors. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > Examination of Witnesses ▼ > 


Cross-Examination ▼

Criminal Law & Procedure > Trials ▼ > Witnesses ▼ >  Presentation ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ >

General Overview ▼

Evidence > Admissibility ▼ > Procedural Matters ▼ > Rulings on Evidence ▼

**HN17**  The inquiry in a harmless error analysis is whether the guilty verdict actually rendered in this trial was surely unattributable to the error, and not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered. Factors a reviewing court should consider include, the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence on the material points of the witness' testimony, the extent of the cross-examination otherwise permitted, and the overall strength of the prosecution's case. Thus, a reviewing court must look at the trial as a whole and decide whether there is a reasonable probability that the defendant could have been prejudiced by the error. If so, the error is not harmless and the reviewing court must reverse the conviction below. *Shepardize* - Narrow by this Headnote

## ▼ Headnotes/Syllabus

### Headnotes

Confrontation Clause - Preliminary Hearing - Unavailable Witness

## Syllabus

In this case involving a defendant's right to confront the witnesses against him, the supreme court considers the United States Supreme Court's recent decision in Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354, No. 02-9410, 2004 WL 413301 (U.S. Mar. 8, 2004). In line with that decision, the supreme court holds that before a witness's previous testimony can be used at trial, the witness must be unavailable to testify at trial and the defendant must have had an adequate prior opportunity to cross-examine that witness. The supreme court reiterates its holding in People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979) that because of the limited scope of the preliminary hearing in Colorado, that hearing does not provide an adequate opportunity for cross-examination sufficient to meet Confrontation Clause requirements.

Thus, in this case, the supreme court holds that an unavailable witness's preliminary hearing testimony was improperly admitted at trial. As the court finds that the error was not harmless, the case is remanded for a new trial.

**Counsel:** Ken Salazar, Attorney [\*\*2] General Paul Koehler, Assistant Attorney General

Denver, Colorado Attorneys for Petitioner.

David S. Kaplan ▼, Colorado State Public Defender Alan Kratz ▼, Deputy State Public Defender  
Denver, Colorado Attorneys for Respondent.

**Judges:** JUSTICE MARTINEZ ▼ delivered the Opinion of the Court. JUSTICE COATS ▼ dissents,  
and JUSTICE KOURLIS ▼ joins in the dissent.

**Opinion by:** MARTINEZ ▼

## Opinion

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[\*972] EN BANC

JUSTICE MARTINEZ ▼ delivered the Opinion of the Court.

JUSTICE COATS ▼ dissents, and JUSTICE KOURLIS ▼ joins in the dissent.

### I. Introduction

In this case, we consider whether the preliminary hearing testimony of an unavailable witness is admissible at trial. In accordance with the United States Supreme Court's recent decision in Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354, No. 02-9410, 2004 WL 413301 (U.S. Mar. 8, 2004), we hold that **HN1** previous testimony is admissible only if the witness is unavailable and the defendant had an adequate prior opportunity for cross-examination. Because preliminary hearings in Colorado do not present an adequate opportunity for cross-examination, we find that the trial court erred in admitting preliminary hearing testimony. The error in this case was not harmless. Therefore, [**\*\*3**] we affirm the court of appeals' decision remanding the case for a new trial.

### II. Facts and Procedure

The victim in this case, Darla Fischer, died as a result of complications related to a cerebral hemorrhage that was caused by an impact to the head. At trial, the parties disputed whether a fall or an assault caused the [**\*\*973**] injury. A jury convicted Respondent Richard Fry, Fischer's boyfriend at the time, of second degree assault and second degree murder for Fischer's death.

At the preliminary hearing, the prosecution called Fry's uncle, Arlo Gene Burgess, to testify. Burgess testified that about two days after Fischer was hospitalized, Fry telephoned him and stated that "Darla [Fischer] was in the hospital and that he had put her there." Burgess further stated that Fry had told him he had hit Fischer and that he thought she had brain damage. However, Fry telephoned him again about two weeks later, Burgess testified, and told him that he had "no hand in it, that somebody else had done that."

Defense counsel did not cross-examine Burgess at the preliminary hearing. Burgess died before trial.

After Burgess died, Fry's counsel filed a Motion to Exclude Hearsay Testimony [**\*\*4**] of Arlo

Gene Burgess. Fry argued that Burgess's preliminary hearing testimony was inadmissible at trial pursuant to the Confrontation Clause in article II, section 16, of the Colorado Constitution, and this court's decision in People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979). Moreover, the defense contended that Burgess had a motive to lie because he had allegedly been assaulted by Fry and because he had been intimately involved with Fry's girlfriend, Fischer. The prosecution countered that the testimony was admissible under the residual hearsay exception because the defense had an opportunity to cross-examine Burgess at the preliminary hearing. Additionally, the prosecution asserted that the testimony was reliable because Burgess had no motive to lie.

The trial court denied the motion, ruling that Burgess's testimony was admissible under the residual hearsay exception, C.R.E. 807. The trial court reasoned that although People v. Smith prohibits the use of preliminary hearing testimony under C.R.E. 804, such testimony can be admitted pursuant to another hearsay exception which meets the two part test of unavailability and reliability as set forth in Ohio v. Roberts, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), [\*\*5] and People v. Dement, 661 P.2d 675 (Colo. 1983). The case then went to trial and Fry was convicted.

The court of appeals reversed. People v. Fry, 74 P.3d 360 (Colo. App. 2002). It stated that Smith established a bright-line rule prohibiting the use of preliminary hearing testimony of an unavailable witness. Id. at 364. Further, the court of appeals reasoned that although Smith was decided before Roberts and Dement, it "essentially determined that preliminary hearing testimony does not possess the requisite trustworthiness" to satisfy the reliability prong of the Roberts test. Id. Thus, the court of appeals found that the testimony was improperly admitted. Id. Additionally, the court of appeals held that the error was not harmless beyond a reasonable doubt. Id. at 365. The court noted that the prosecution relied heavily on Burgess's testimony and that the other incriminating evidence was ambiguous and insufficient to support the conviction. Id. The court of appeals therefore remanded the case for a new trial. Id.

We granted certiorari to review two questions: first, whether Smith [\*\*6] should be read to categorically exclude all preliminary hearing testimony, even when that testimony meets the two-part test of unavailability and reliability and would be admissible under a hearsay exception other than C.R.E. 804, the exception discussed in Smith; and second, whether any error was harmless beyond a reasonable doubt. [1]

[\*\*7] [\*\*974] In the time between briefing and oral argument in this case, however, the United States Supreme Court decided Crawford v. Washington, which overruled Roberts. Crawford v. Washington, 158 L. Ed. 2d 177, No. 02-9410, 2004 WL 413301 (U.S. Mar. 8, 2004). The Court held that testimonial statements of an unavailable witness are not admissible unless the defendant had a prior opportunity for cross-examination. Consequently, we now review the questions before us in light of Crawford.

### III. Confrontation Clause

To answer the questions before us, we first briefly review the purposes and history behind the Confrontation Clause. Next, we examine the progression of United States Supreme Court cases analyzing the Confrontation Clause and our own interpretation and application of those cases. We then outline the nature and purpose of preliminary hearings in Colorado and how they impact our Confrontation Clause analysis. We then apply this analysis to the case before us and find that the use of a transcript from the preliminary hearing as evidence at trial violated Fry's right to confront the witnesses against him. Finally, we review the court of appeals' decision to determine [\*\*8] whether the error in this case was harmless. We agree with the court of appeals' decision that the prosecution did not show beyond a reasonable doubt that the error was harmless. Thus, we affirm the court of appeals decision remanding the case for a new trial.

#### A. Confrontation Clause-Purposes and History

**HN2** A defendant's right to confront the witnesses against him is guaranteed by both the Sixth Amendment of the United States Constitution and article II, section 16 of the Colorado Constitution. [2] Even without our state provision guaranteeing this right, the United States Supreme Court has held that "this bedrock procedural guarantee applies to both federal and state prosecutions" through the Fourteenth Amendment. Crawford v. Washington, 158 L. Ed. 2d 177, 2004 WL 413301 at \*5 (citing Pointer v. Texas, 380 U.S. 400, 406, 13 L. Ed. 2d 923,



85 S. Ct. 1065 (1965)).

[\*\*9] The history behind the Confrontation Clause is discussed extensively in Crawford, 158 L. Ed. 2d 177, 2004 WL 413301 at \*5-\*9. Although we do not discuss it at length here, we review the Clause's history briefly to illustrate the importance of the right to confrontation in our system of law.

The concept that an accused has the right to confront the witnesses against him dates back to Roman times, but was incorporated into English law in the 1600s. Crawford, 158 L. Ed. 2d 177, 2004 WL 413301 at \*5-\*6. English courts developed the right, allowing out-of-court testimony only if the witness was unable to testify in person. 158 L. Ed. 2d 177, [WL] at \*6. English courts further developed the common law to require that statements made before trial were admissible only if the accused had a prior opportunity to cross-examine the witness. Id.

Although several state constitutions included a right of confrontation, the United States Constitution did not originally include that right. 158 L. Ed. 2d 177, [WL] at \*8. Following criticism regarding the omission, the First Congress included the right in the Sixth Amendment. Id. The People of Colorado included a right to confrontation of witnesses against an accused in Colorado's [\*\*10] original constitution and it has remained unchanged since that time. See Colo. Const. art. II, § 16.

**HN6** [\*\*975] The purposes behind both the federal and state Confrontation Clauses are well articulated. We have stated that the Confrontation Clause is designed to ensure that convictions are not obtained through the use of *ex parte* affidavits. People v. Bastardo, 191 Colo. 521, 524, 554 P.2d 297, 300 (1976); see also Crawford, 158 L. Ed. 2d 177, 2004 WL 413301 at \*9. We have recognized that testimony is much more reliable when it is given under oath at trial where the witness can be cross-examined and the jury may observe the witness's demeanor. People v. Dement, 661 P.2d 675, 680 (Colo. 1983). Thus, although by necessity exceptions to the right of confrontation must exist, we have continually maintained the importance of that right. Accordingly, we must protect the most obvious manifestation of that right—the opportunity for cross-examination. See Pointer, 380 U.S. at 406-07.

In sum, **HN7** the right of an accused to confront the witnesses against him has been regarded as a fundamental right for hundreds of years. It was included in both the [\*\*11] United States and Colorado Constitutions to insure that persons would not be convicted on the basis of *ex parte* testimony and without the benefit of cross-examination. This right remains crucial to our adversarial system of law.

## B. Confrontation Clause Case Law

We first examine the history of the U.S. Supreme Court's treatment of the Confrontation Clause. **HN8** The Sixth Amendment of the United States Constitution applies to state prosecutions through the Fourteenth Amendment and we have followed U.S. Supreme Court law regarding the Confrontation Clause. In addition, we outline our case law and our interpretation of the Supreme Court's case law.

Until the Supreme Court's recent decision in Crawford, the test for Confrontation Clause violations was outlined in Ohio v. Roberts, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), overruled by Crawford, 158 L. Ed. 2d 177, 2004 WL 413301. In Roberts, the Court set forth a two-part test to determine whether prior testimony of a hearsay declarant was admissible. Id. at 65-66. First, the Court stated that the Confrontation Clause required that the declarant be unavailable to testify at trial. Id. at 65. Second, if [\*\*12] unavailability was established, the Court found that the Clause approves only statements that bear adequate indicia of reliability. Id. at 65-66. The Court held that reliability could be inferred where the testimony fell under a firmly rooted hearsay exception. Id. at 66. Before evidence could be admitted when it did not come under such an exception, the party offering the evidence had to show that the evidence possessed particularized guarantees of trustworthiness. Id.

Applying this test in Roberts, the Court found that the Confrontation Clause was not violated by the introduction of an unavailable witness's preliminary hearing testimony where the witness had been cross-examined at the preliminary hearing. Id. at 73. The Court held that "since there was an adequate opportunity to cross-examine [the witness], and counsel . . . availed himself of that opportunity, the transcript . . . bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'" Id. (citing Mancusi v. Stubbs, 408 U.S. 204, 216, 33 L. Ed. 2d 293, 92 S. Ct. 2308 (1972)).

We adopted the Roberts test in [\*\*13] Dement, 661 P.2d at 681. In Dement, we reached only the first prong because we found that the prosecution failed to establish unavailability. Id. at 681. However, in later cases, we applied the reliability prong of the Roberts test. We stated that we must look at the totality of the circumstances surrounding the statement to decide whether it possessed the requisite guarantees of trustworthiness. Stevens v. People, 29 P.3d 305, 314 (2001), abrogated by Crawford, 158 L. Ed. 2d 177, 2004 WL 413301, (citing Idaho v. Wright, 497 U.S. 805, 820-21, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990)). Although we noted that courts have "considerable discretion in determining what factors may enhance or detract from the statement's reliability," we pointed out several factors a court could use. People v. Farrell, 34 P.3d 401, 406-07 (2001), abrogated by Crawford, 158 L. Ed. 2d 177, 2004 WL 413301, [\*\*976] (citing Wright, 497 U.S. at 822). These factors included whether the statement was detailed, how soon after the events the statement was made, whether the statement was voluntary, whether the declarant had a motive to [\*\*14] inculcate the defendant, among others. Id. at 406-07; see also Stevens, 29 P.3d at 314. Thus, our reliability analyses considered both the procedural setting in which the contested statements were made as well as the substance of the statements. See id.

The Supreme Court's recent decision in Crawford rejects the reliability prong of the Roberts test in favor of an inquiry into whether the defendant had a prior opportunity to cross-examine witnesses. Crawford, 158 L. Ed. 2d 177, 2004 WL 413301 at \*19. In explaining its abrogation of the Roberts test, the Court in Crawford begins with the purposes of the Confrontation Clause. 158 L. Ed. 2d 177, [WL] at \*9. The Court explains that the "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." Id. The Court notes that the common law at the time of the Sixth Amendment's enactment "conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations." 158 L. Ed. 2d 177, [WL] [\*\*15] at \*11.

Thus, the Supreme Court's decision explains that **HN9** the Clause provides a procedural, not a substantive, guarantee. 158 L. Ed. 2d 177, [WL] at \*14. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Id. Therefore, the flaw in the Roberts test is that it allows judges to substitute their determinations of "amorphous notions of 'reliability'" for a jury's determination. Id. The Supreme Court cites inconsistent decisions of reliability as a reason why allowing courts to make reliability determinations about *ex parte* testimony does not provide the protection envisioned by the Framers adopting the Confrontation Clause. 159 L. Ed. 2d 177, [WL] at \*15 (citing Stevens, 29 P.3d at 316, and Farrell, 34 P.3d at 406-07, as examples of the inconsistent application of the Roberts test due to the wide range of sometimes contradictory factors used in the reliability analysis). "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." 158 L. Ed. 2d 177, [WL] at \*14.

Crawford limits its holding to "testimonial statements," noting that the [\*\*16] Confrontation Clause applies to "witnesses" or those who "bear testimony." 158 L. Ed. 2d 177, [WL] at \*10. Crawford explicitly declines to define "testimonial" comprehensively, but notes that "it applies at a minimum to prior testimony at a preliminary hearing." 158 L. Ed. 2d 177, [WL] at \*10.

**HN10** The Supreme Court has refocused its analysis of Confrontation Clause violations, mandating not that evidence necessarily be reliable, but that its reliability be assessed in a particular manner--through cross-examination. The Crawford test therefore limits the admissibility of testimonial evidence, which includes preliminary hearing testimony, to that of unavailable witnesses whom the accused has had an adequate prior opportunity to cross-examine. In light of Crawford, we reject the Roberts reliability analysis that we adopted in Dement. Consequently, to the extent that Stevens and Farrell and any of our other prior cases employ that analysis, we overrule those cases. We therefore change our Confrontation Clause inquiry to whether a defendant had an adequate prior opportunity to cross-examine, not whether the previous testimony is reliable.

### C. Preliminary Hearings in Colorado

Before the [\*\*17] holdings of either Roberts or Crawford, we noted that the admissibility of prior testimony depended on the nature of the proceeding at which the prior testimony was made. People v. Smith, 198 Colo. 120, 125, 597 P.2d 204, 207 (1979), overruled on other grounds by People v. Vance, 933 P.2d 576 (Colo. 1997), overruled by Griego v. People, 19 P.3d 1 (Colo. 2001) (Vance overruled Smith on grounds that materiality is an issue that must be submitted to the jury; Griego later overruled Vance on the proper standard of review for such an error). In particular, we examined whether prior testimony given at a preliminary hearing provided an adequate [\*\*977] opportunity for cross-examination. Id. at 125-26, 597 P.2d at 207-08. In deciding that question, we looked to the purpose of the preliminary hearing. Id. We concluded that due to the limited nature of the preliminary hearing, the opportunity for cross-examination was insufficient to satisfy the Confrontation Clause. Id. at 126, 597 P.2d at 208. We now reiterate that holding.

**HN11** A preliminary hearing is limited to matters necessary to a determination of probable cause. [\*\*18] Id. at 125, 597 P.2d at 207. The rights of the defendant are therefore curtailed: evidentiary and procedural rules are relaxed, and the rights to cross-examine witnesses and to introduce evidence are limited to the question of probable cause. Id.

A defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary hearing. By rule, defendants have the right to a preliminary hearing under certain circumstances, and pursuant to the rule a defendant 'may cross-examine witnesses against him and may introduce evidence in his own behalf.' Crim. P. 7(h)(3). However, the preliminary hearing is not intended to be a mini-trial or to afford the defendant an opportunity to effect discovery.

Id. at 125-26, 597 P.2d at 207-08 (quoting Rex v. Sullivan, 194 Colo. 568, 571, 575 P.2d 408, 410 (1978)). Hence, a preliminary hearing does not provide the same safeguards as a trial.

Additionally, **HN12** the judge's findings at a preliminary hearing are restricted to a determination of probable cause. Id. at 125, 597 P.2d at 207. A judge may not engage in credibility determinations unless the testimony is [\*\*19] incredible as a matter of law. Id. at 126, 597 P.2d at 208; Hunter v. Dist. Court, 190 Colo. 48, 52-53, 543 P.2d 1265, 1268 (1975); People v. Ramirez, 30 P.3d 807, 809 (Colo. 2001) (Testimony is "incredible as a matter of law" if it is "in conflict with nature or fully established or conceded facts. It is testimony as to facts which the witness physically could not have observed or events that could not have happened under the laws of nature."). Aside from the exceptionally rare instance of credibility as an issue of law, defense counsel has no legitimate motive to engage in credibility inquiries and may be prohibited from doing so. Smith, 198 Colo. at 126, 597 P.2d at 208; Hunter, 190 Colo. at 52-53, 543 P.2d at 1268. Thus, the right to cross-examination may be curtailed by the judge in all but the most unusual circumstances. Id. Because credibility is not at issue and probable cause is a low standard, once a prima facie case for probable cause is established, there is little defense counsel can do to show that probable cause does not exist. Therefore, as a practical matter, defense counsel may decline to [\*\*20] cross-examine witnesses at the preliminary hearing, understanding that the cross-examination would have no bearing on the issue of probable cause and that the judge may limit or prohibit the cross-examination. Thus we conclude that the opportunity for cross-examination at a preliminary hearing is very limited. Further, the opportunity for cross-examination regarding the credibility of a witness, as a matter of fact, exists only to the extent that an attorney persists in asking questions that have no bearing on the issues before the court, and such irrelevant questioning is not prohibited by the court.

Given the limited nature of the preliminary hearing in Colorado, we held in Smith that the Colorado Confrontation Clause "precludes the admission of the transcript of a preliminary hearing at a subsequent trial when the witness whose testimony is sought has become unavailable." Id. at 126, 597 P.2d at 208 (compare California v. Green, 399 U.S. 149, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970) (in California case, where preliminary hearing constitutes a mini-trial, unavailable witness's prior testimony at preliminary hearing admissible)). We relied in Smith on the [\*\*21] Supreme Court's analysis in Barber v. Page, 390 U.S. 719, 722, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968), that "there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." The Supreme Court first held in Barber that the state did not establish

unavailability. *Id.* at 724-25. [\*978] Additionally, it rejected the notion that the defendant had waived his right to confront the witness by not cross-examining him at the preliminary hearing. *Id.* at 725. The Court noted that even if defense counsel had cross-examined the witness at the preliminary hearing, the Confrontation Clause still would not be satisfied on the facts of that case. *Id.* Citing the differences between a trial and a preliminary hearing, the Court concluded that cross-examination at the preliminary hearing would not have provided the same opportunity for exploration into the case. *Id.*

**HN13** The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the [\*\*22] occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

*Id.* The Court's decision in *Barber* --that the exception to the right of confrontation arises only when a witness is unavailable and previously gave testimony that was subject to cross-examination by the defendant --thus foreshadowed its decision in *Crawford* requiring the same.

Thus, we have held that **HN14** the preliminary hearing does not satisfy Confrontation Clause requirements. *Smith*, 198 Colo. at 126, 597 P.2d at 208; *see also Commonwealth v. Smith*, 436 Pa. Super. 277, 647 A.2d 907, 912-15 (Pa. Super. Ct. 1994) (because issue of credibility important at trial, and because credibility not an issue at preliminary hearing, preliminary hearing testimony inadmissible because defendant did not have a "full and fair opportunity for cross-examination"); *cf. People v. Rosa*, 302 A.D.2d 231, 231-32, 754 N.Y.S.2d 279 (N.Y. App. Div. 2003) (suppression [\*\*23] hearing did not provide full and fair opportunity for cross-examination; little incentive to impeach credibility); *Nazworth v. State*, 352 So. 2d 916, 918 (Fla. App. 1977) (bond hearing, the purpose of which was limited to setting bond, did not afford defendant a proper opportunity for cross-examination). Other states are split on whether a preliminary hearing provides an adequate opportunity for cross-examination. *See generally* Francis M. Dougherty, J.D., Annotation, *Admissibility Or Use In Criminal Trial Of Testimony Given At Preliminary Proceeding By Witness Not Available At Trial*, 38 A.L.R.4th 378, § 6 (2004). Nonetheless, we do not wish to change the scope of the preliminary hearing by overruling our decision in *Smith* that a preliminary hearing does not provide an adequate opportunity for cross-examination. As the Attorney General recognized in oral argument, *Smith* is good law; it prevents the preliminary hearing from becoming a mini-trial which would expend time and resources the judiciary does not possess. Changing the purpose of these hearings would impact all criminal cases, not just those with Confrontation Clause issues. Preliminary [\*\*24] hearings are limited to a determination of probable cause so that they do not become mini-trials. Were we to allow extensive cross-examination by defense counsel so as to prevent any Confrontation Clause violations at trial if a witness were to become unavailable, we would turn the preliminary hearing in every case into a much longer and more burdensome process for all parties involved. Therefore, we do not expand the scope of preliminary hearings in order to allow them to satisfy Confrontation Clause requirements. Rather, we merely reiterate our holding in *Smith*; although a defendant must have been provided with a prior adequate opportunity to cross-examine an unavailable witness before the State can admit that witness's previous testimony into evidence, the preliminary hearing does not provide an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause requirements.

#### D. Application

Before proceeding with our Confrontation Clause analysis, we point out what we do not discuss here. First, we do not delve into whether the preliminary hearing testimony would be admissible under a hearsay exception. Although admissibility under a hearsay exception [\*\*25] may have lent support to a finding of reliability under the *Roberts* test, in light of *Crawford*, such a determination is [\*979] no longer relevant. Even were we to find

the preliminary hearing testimony to meet the requirements of the residual hearsay exception, Fry's right to confrontation was violated nonetheless as a result of the lack of an adequate opportunity for cross-examination pursuant to Crawford and Smith. Stevens, 29 P.3d at 311 ("Although an out-of-court statement may be admissible because it falls within an exception to the hearsay rule, the statement nevertheless must be excluded at a criminal trial if admitting it into evidence would deprive the defendant of his constitutional right to be confronted with the witnesses against him."). Thus, as we would find a Confrontation Clause violation in either case, we need not address whether the preliminary hearing testimony meets the requirements of the residual hearsay exception. Second, we do not address the unavailability prong of the Crawford test. It is uncontested that Burgess passed away prior to trial and was therefore unavailable.

This case exemplifies the dangers of admitting preliminary [\*\*26] hearing testimony as evidence at trial when the witness is unavailable. Burgess made several statements incriminating Fry at the preliminary hearing. Although Burgess's credibility was factually subject to attack, credibility determinations are not allowed at preliminary hearings. See Hunter, 190 Colo. at 52-53, 543 P.2d at 1268. Thus, Burgess's testimony could not be subjected to the procedural rigors required by the Confrontation Clause at the preliminary hearing. Moreover, the trial court further allowed the testimony to skirt the procedural safeguards of the Confrontation Clause by allowing the testimony to be read aloud at trial, by a police officer, without the opportunity for immediate rebuttal. The testimony was therefore never subject to direct attack. The process employed in this case illustrates how dispensing with an adequate opportunity for cross-examination impedes a defendant from having a proper chance to rebut the evidence against him.

To start, Burgess made several statements incriminating Fry at the preliminary hearing. Defense counsel did not cross-examine Burgess. Nonetheless, there were several reasons to question Burgess's credibility. First, [\*\*27] Burgess had motive to lie. He stated that he had been assaulted by Fry in the past. Additionally, defense counsel presented evidence that showed that Burgess was involved intimately with the victim, who was Fry's girlfriend at the time. Moreover, Burgess's character was not flawless. He had a history of criminal convictions and evidence indicated that he was constantly intoxicated. Finally, Burgess was hard of hearing and it was necessary to shout when speaking to him on the telephone. Thus, his testimony regarding telephone conversations with Fry was not necessarily accurate. In short, the preliminary hearing did not provide an adequate opportunity for Fry to confront Burgess and reveal these issues of credibility.

The introduction of Burgess's testimony at trial further demonstrated the importance of the right to confrontation. At trial, a police officer read Burgess's testimony to the jury. Although the trial court allowed Fry to present evidence that indirectly questioned Burgess's testimony, it denied Fry's request that he be allowed to rebut the testimony immediately after it was read. Thus, the procedure followed by the trial court did not allow any opportunity for Fry to [\*\*28] attempt to rebut the testimony against him.

Because Burgess's testimony was not subject to cross-examination, or tested through any other means, it was allowed to stand un rebutted, its truth completely unquestioned. The evidence which brought to light some of the credibility issues was not allowed until Fry's case-in-chief, much later in the trial. Thus, the effect of that rebuttal was greatly diminished. Even if the trial court had allowed the evidence immediately after Burgess's testimony, however, such indirect contradictions do not carry the force of cross-examination. As the U.S. Supreme Court has stated, HN15 cross-examination is the "greatest legal engine ever invented for the discovery of truth." Green, 399 U.S. at 158 (quoting 5 Wigmore § 1367). This case illustrates the truth of that statement. Indirect rebuttal evidence cannot have the same effect on a jury as answers to questions put directly to the witness on cross-examination. Here the witness might [\*\*980] have been confronted with whether he was in fact intimately involved with Fry's girlfriend; whether he had a drinking problem; whether he had been drinking before his testimony at the preliminary hearing; [\*\*29] whether he had a hearing problem; and whether he had a particularly hard time hearing on the telephone. A skilled cross-examiner can confront a dishonest witness, or a witness who is mistaken, with questions that cause the witness to see the corner he has painted himself into and react in a way that permits the jury to judge credibility from what it hears and sees. Thus, a witness's testimony on cross-examination may be much more damning to the witness's credibility than any sort of indirect evidence the defense can offer. In sum, the opportunity for cross-examination is without equal as a tool in the search for truth. Therefore, by admitting the preliminary hearing testimony of Burgess at trial, the trial court denied Fry his right to an

adequate opportunity to cross-examine the witnesses against him. As such, Fry's right to confront the witnesses against him was also denied.

#### IV. Harmless Error Analysis

Having established that the admission of Burgess's testimony at trial constituted constitutional error, we must now determine whether the error was harmless.

**HN16** Two types of constitutional error exist: structural errors, which affect the "framework within which the trial [\*\*30] proceeds, rather than simply an error in the trial process itself"; and trial errors, which occur "during the presentation of the case to the jury and . . . may therefore be quantitatively assessed in the context of other evidence presented." Blecha v. People, 962 P.2d 931, 942 (Colo. 1998) (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 307-08, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991)). Structural errors require automatic reversal. *Id.* Trial errors require reversal unless an appellate court determines that the error was harmless beyond a reasonable doubt. *Id.* The prosecution bears the burden of proving that the error was harmless. *Id.* Confrontation Clause violations are trial errors. *Id.* Thus, in this case, the prosecution must prove that the trial court's error in admitting Burgess's testimony absent an adequate opportunity for Fry to cross-examine Burgess was harmless. We find that the prosecution did not make that showing.

**HN17** The inquiry in a harmless error analysis is "whether the guilty verdict actually rendered in this trial was surely unattributable to the error," and "not whether, in a trial that occurred without the error, a guilty verdict [\*\*31] would surely have been rendered." *Id.* (quoting Sullivan v. Louisiana, 508 U.S. 275, 279, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993)). Factors a reviewing court should consider include, "the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence on the material points of the witness' testimony, the extent of the cross-examination otherwise permitted, and the overall strength of the prosecution's case." *Id.* (quoting Merritt v. People, 842 P.2d 162, 169 (Colo. 1992)). Thus, a reviewing court must look at the trial as a whole and decide whether there is a reasonable probability that the defendant could have been prejudiced by the error. *Id.* If so, the error is not harmless and the reviewing court must reverse the conviction below. *Id.*

The error in this case was not harmless. Using the factors articulated above, we find that the prosecution did not meet its burden of proving that the error was harmless beyond a reasonable doubt.

First, the importance of Burgess's testimony is made clear by looking at the prosecution's treatment of the evidence. [\*\*32] In its notice of intent to offer Burgess's preliminary hearing testimony, the prosecution stated that Burgess's testimony was "more probative on the issue of what happened to Darla Fischer than any other evidence in existence." In addition, the prosecution relied on Burgess's testimony on three different occasions in closing argument.

Second, although the evidence was cumulative in that Burgess's testimony was corroborated by Fischer's hearsay statements and the testimony of Fry's ex-girlfriend, both witnesses were also subject to attack.

[\*981] A police officer questioned Fischer about the incident after she underwent surgery to remove a blood clot on her brain. Because Fischer was unable to speak, the officer asked her to respond to questions by nodding her head yes or no. Through this officer's testimony, the prosecution introduced Fischer's hearsay communications that Fry had beaten her. The officer testified that when he asked whether Fry had caused the injuries, Fischer nodded yes. On cross-examination, however, defense counsel showed that the officer did not establish whether Fischer was referring to injuries sustained a few days earlier or to the injury that caused the cerebral [\*\*33] hemorrhage. Further, the officer testified that he was not certain whether Fischer was oriented as to time or place. Also, the officer stated that he received only affirmative nods in answer to his questions with the exception of one shrug. Thus, he agreed with defense counsel that he could not tell if Fischer's ability to answer questions was limited to affirmative nods.

Fry's ex-girlfriend, Karen LeDoux, also testified against Fry. She stated that Fry had told her that he had beat up Fischer. She also testified that Fry had hurt her on previous occasions. However, on cross-examination, LeDoux admitted that she had previously told the hospital and an acquaintance that her injuries were caused by her boyfriend at the time, not Fry. In addition, LeDoux testified that she had been convicted of forgery. Thus, although testimony corroborated Burgess's testimony, it was questioned extensively on cross-examination.

Burgess's testimony was contradicted by Fry's version of events. Fry told investigating officers that when Fischer came home on the morning of the injury, she appeared drunk or inebriated in some manner. Fry told the officer that he heard her fall outside the house and that [\*\*34] when he helped her to the bedroom, she fell twice. Experts testified that Fischer's injuries could have been caused by a fall or accident. Additionally, the statements incriminating Fry were not corroborated by physical evidence. Consequently, had the trial court not erred in admitting Burgess's testimony, the incriminating evidence against Fry would have been substantially weaker.

Third, we review the extent of cross-examination. Defense counsel did not cross-examine Burgess at the preliminary hearing. Although the prosecution knew that Burgess was in failing health, it did not depose him before trial, a procedure which would have allowed defense counsel an opportunity for cross-examination. See *Crim. P. 15*; *Morse v. People*, 180 Colo. 49, 53-54, 501 P.2d 1328, 1330 (1972). Additionally, although the trial court relaxed the rules for admission of evidence which questioned Burgess's testimony, it did not allow the impeachment evidence to be presented directly after Burgess's testimony was read to the jury. Thus, the importance of the contradictory evidence may not have been fully realized.

Finally, the overall strength of the prosecution's case was questionable. [\*\*35] Burgess's testimony was read by a police officer and relied upon heavily by the prosecution. Although the prosecution had corroborating witnesses, their testimony was not immune from attack. Additionally, there was no physical evidence linking Fry to the crime. In sum, the prosecution has not shown that the error in admitting Burgess's preliminary hearing testimony was harmless beyond a reasonable doubt.

## V. Conclusion

We find that the defendant's right to confront the witnesses against him was violated when the trial court admitted the preliminary hearing testimony of an unavailable witness at trial. Pursuant to the United States Supreme Court's decision in *Crawford*, we hold that previous testimony is not admissible at trial unless the witness is unavailable and the defendant had an adequate prior opportunity for cross-examination. Thus, we reiterate our holding in *Smith* that a preliminary hearing does not present an adequate opportunity for cross-examination. Therefore, we hold that the trial court erred in admitting preliminary hearing testimony of an unavailable witness at trial. Furthermore, we hold that the error was not harmless.

[\*982] Accordingly, we affirm [\*\*36] the decision of the court of appeals remanding the case for a new trial.

**Dissent by:** JUSTICE COATS ▼ dissenting

## Dissent

JUSTICE COATS ▼ dissenting.

In the United States Supreme Court's recent and dramatic re-interpretation of the Confrontation Clause, see *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004), the majority finds support for our own, quarter-century-old, blanket prohibition

against using the preliminary hearing testimony of a witness whose death makes him unavailable to testify at trial. Because I understand the analysis of Crawford to dictate precisely the opposite result, I respectfully dissent.

In Crawford, the Supreme Court overturns a line of authority, stretching back at least as far as 1980, see Ohio v. Roberts, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), which had evaluated the constitutional admissibility of prior testimony according to its trustworthiness, whether or not the defendant was given an opportunity to cross-examine. By contrast, Crawford makes clear that "where testimonial evidence is at issue," the Sixth Amendment demands the satisfaction of two, and only two, conditions: "unavailability and a prior opportunity [\*\*37] for cross-examination." Id. at 1367-69. The Confrontation Clause therefore can no longer be construed to permit the admission of prior testimony taken in the absence of an opportunity for cross-examination, regardless of other guarantees of trustworthiness; or, for that matter, to sometimes require the exclusion of prior testimony as to which the defendant was given an opportunity to cross-examine, based on further scrutiny of its trustworthiness.

Perhaps because Crawford was concerned only with an ex parte statement, made during police interrogation, it made no attempt to further define the term "cross-examine" or specify circumstances under which the "opportunity to cross-examine" might be considered constitutionally inadequate. It also nowhere suggests, however, that the Confrontation Clause envisions a more restrictive notion of "cross-examination" than the term itself implies or that the right to cross-examine at a preliminary hearing must be considered inadequate. Quite the contrary, using the term "ex parte" at least a dozen times, the Supreme Court leaves no doubt that "the principal evil at which the Confrontation Clause was directed was the civil-law mode [\*\*38] of criminal procedure, and particularly its use of ex parte examinations, as evidence against the accused." Id. at 1363.

The Crawford Court overruled Roberts, not only for analyzing the restrictions of the Confrontation Clause too narrowly, which resulted in the admission of "statements that do consist of ex parte testimony upon a mere finding of reliability;" but also for analyzing them too broadly by applying the same reliability standard to hearsay not consisting of ex parte testimony, which resulted "in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause." See id. at 1369. If the language it used were not clear enough on its face, the Supreme Court's intent in referring to an "opportunity to cross-examine" is apparent from its juxtaposition with the term "ex parte testimony" throughout, as well as the Court's expressed concern to articulate a clear standard that avoids the ad hoc analyses of the past. The Crawford analysis also makes abundantly clear that the Ohio Supreme Court in State v. Roberts, 55 Ohio St.2d 191, 378 N.E.2d 492 (1978), erred in excluding prior preliminary [\*\*39] hearing testimony as a violation of the Confrontation Clause, not for the reasons given by the Supreme Court at the time, but rather by discounting statements in California v. Green, 399 U.S. 149, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970), "suggesting that the mere opportunity to cross-examine rendered the prior testimony admissible." See Ohio v. Roberts, 100 S. Ct. at 2541.

By articulating a blanket prohibition against the use of preliminary hearing statements at trial, the holding of this court in People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979), set this jurisdiction apart from virtually every other jurisdiction in the country. [\*\*983] See, e.g., Rodriguez v. State, 711 P.2d 410, 414 (Wyo. 1985) (expressly rejecting blanket prohibition of Smith); see also King v. State, 780 P.2d 943 (Wyo. 1989)(same); see generally Francis M. Dougherty, J.D., Annotation, Admissibility or Use in Criminal Trial of Testimony Given at Preliminary Proceeding by Witness not Available at Trial, 38 A.L.R.4th 378, §§ 1-6 (2004) ("At the present time, virtually all jurisdictions appear to allow the introduction of [\*\*40] testimony given at a preliminary proceeding, at which the accused was present and had an opportunity to cross-examine the witness, when the witness is unavailable at trial."); 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 491(d), 782 (2nd ed. 1994 & Supp. 2003) (observing that by far the greater number of courts hold that receipt of preliminary hearing testimony against the accused does not violate his constitutional rights).

This has been particularly true of the federal courts, which have found preliminary hearing testimony constitutionally admissible at trial pursuant to Rule 804(b)(1) of the Federal Rules of Evidence, which is virtually identical with CRE 804(b)(1). See, e.g., Ex rel Haywood v. Wolff, 658 F.2d 455, 463 (7th Cir. 1981); Glenn v. Dallman, 635 F.2d 1183 (6th Cir. 1980). Crawford has only strengthened rather than undermined those holdings. See United States v. Avants, 367 F.3d 433, 445 (5th Cir. 2004) ("The qualities that made [the witness'] testimony



admissible under 804(b)(1): unavailability and prior opportunity for cross-examination" satisfy [\*\*41] "Crawford's confrontation clause test.").

In Smith, this court distinguished Colorado on the basis of the limited nature of its preliminary hearing. Limitations restricting the inquiry to probable cause and excluding questions of witness credibility, however, do not make preliminary hearings in this jurisdiction significantly different from those permitted by many other states or the federal government. See, e.g., Coleman v. Burnett, 155 U.S. App. D.C. 302, 477 F.2d 1187 (D.C. Cir. 1971) (preliminary hearing not a mini-trial on guilt but an investigation into reasonableness of bases for charge; examination of witnesses not of same breadth as at trial); Virgin Islands v. Aquino, 378 F.2d 540, 549, 6 V.I. 395 (3d Cir. 1967) ("Credibility is not the issue at a preliminary hearing as it is in a trial. All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing. Nevertheless, we must accept for present purpose the rule which makes no distinction between testimony given at a prior trial and the testimony given at a preliminary hearing.").

Whether or not the defendant committed the crime of [\*\*42] which he is charged is the precise inquiry at a preliminary hearing, and the Colorado Rules of Criminal Procedure, like their federal counterparts, expressly guarantee a defendant the right to be represented by counsel and to call and cross-examine witnesses. See Crim. P. 5(a)(4)(II) & (7)(h)(2). A preliminary hearing in Colorado is therefore not an ex parte proceeding and, as a matter of law, guarantees the defendant an "opportunity to cross-examine." Although an assessment of the credibility of witnesses is not within the scope of a probable cause determination, a defendant is not barred from challenging the perceptions, memory, or even veracity of witnesses who testify at a preliminary hearing. Nor is it irrelevant or meaningless to confront a witness with the goal of inducing him to correct, modify, or even retract his earlier statement. Even if the exercise of a court's discretion to limit examination could, under some circumstances, render the opportunity for cross-examination constitutionally inadequate, the blanket prohibition of Smith is unjustified.

In Smith, a case in which the primary holding concerning the materiality of perjured statements was subsequently [\*\*43] overruled by the Supreme Court, see United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995), this court relied upon the state constitution to find a per se confrontation clause violation. Smith, 198 Colo. at 126, 597 P.2d at 208. Nothing in the opinion indicates that the issue was presented as a challenge under the state constitution, separate and apart from the corresponding provision of the federal constitution, nor did this court attempt to articulate any distinction between the two. In support of its ultimate holding, the court relied only upon State v. Roberts, which construed the Sixth Amendment of the federal constitution [\*\*984] and was itself reversed shortly thereafter by the Supreme Court. Because Smith neither suggests nor contains any justification for a separate reading of the Colorado Constitution, and because any federal underpinnings, upon which it may once have rested, have now clearly been removed by Crawford, I would overrule it and reverse the court of appeals.

I therefore respectfully dissent.

I am authorized to state that JUSTICE KOURLIS ▾ joins in the dissent. [\*\*44]

## Footnotes

**17**

Specifically, we granted certiorari on the following questions:

Whether the pre-Rules of Evidence case of People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979), should be read to categorically prohibit the admission of all preliminary hearing evidence even where: (a) the evidence is admissible under an exception to the hearsay rule set forth in the Rules of Evidence; and (b) the evidence is supported by "particularized guarantees of trustworthiness" sufficient to meet

confrontation clause concerns as set forth by this court's and the United States Supreme Court's case law guiding the admission of evidence under exceptions to the hearsay rule.

Whether in light of the other evidence of the [respondent's] guilt, any erroneous admission of the respondent's uncle's preliminary hearing testimony was harmless beyond a reasonable doubt.

**2**

**HN3** The Sixth Amendment to the United States Constitution states:

"In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

**HN4** The Colorado Constitution states:

"In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ."

**HN5** Although the federal Confrontation Clause does not include specific language requiring face to face confrontation, the U.S. Supreme Court has stated that "'simply as a matter of English' it confers at least 'a right to meet face to face all those who appear and give evidence at trial.'" Coy v. Iowa, 487 U.S. 1012, 1016, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988) (citing California v. Green, 399 U.S. 149, 175, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970)).

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Tab J

INSTRUCTION NO. \_\_\_\_\_

You are instructed that the laws of Utah do not require a defendant to establish self-defense by a preponderance or greater weight of the evidence. The laws of Utah require the defendant to bring forward some evidence which tends to show self-defense. If the defendant has done this, and if such evidence of self-defense, when considered in connection with all other evidence in this case, raises a reasonable doubt as to the defendant's guilt or if it raises a reason to believe that the defendant acted in self-defense, then you must find him not guilty.

The defendant has no particular burden of proof but is entitled to an acquittal if there is any basis in the evidence from either side sufficient to create a reasonable doubt.

State v. Harris, 58 Utah 331, 199 P. 145 (1921)

State v. Torres, 619 P.2d 694 (Utah 1980)

State v. Knoll, 712 P.2d 211 (Utah 1985)



Tab K

INSTRUCTION NO. 24

You are instructed that the laws of Utah do not require a defendant to establish self-defense by a preponderance or greater weight of the evidence. The laws of Utah require the defendant to bring forward some evidence which tends to show self-defense. If the defendant has done this, and if such evidence of self-defense, when considered in connection with all other evidence in this case, raises a reasonable doubt as to the defendant's guilt, then you must find him not guilty.

The defendant has no particular burden of proof but is entitled to an acquittal if there is any basis in the evidence from either side sufficient to create a reasonable doubt.