

2016

State of Utah, Plaintiff/Petitioner, v Ahn Tuam Pham, Defendant/ Petitioner

Utah Supreme Court

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Case No. 20160502-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Respondent,

v.

ANH TUAM PHAM,
Defendant/Petitioner.

Brief of Respondent

On Writ of Certiorari to the Utah Court of Appeals

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IN THE
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v.

ANH TUAM PHAM,
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Brief of Respondent

STATEMENT OF JURISDICTION

This case is before the Court on a writ of certiorari to the Utah Court of Appeals in *State v. Pham*, 2016 UT App 105, 372 P.3d 734 (Addendum A). This Court has jurisdiction under Utah Code Ann. § 78A-3-102(5) (West 2009).

INTRODUCTION

Petitioner Anh Pham shot Luis Menchaca in the groin at point-blank range. Luis testified at the preliminary hearing, and Pham cross-examined him without limitation. By the time of trial, Luis had returned to Mexico. Despite diligent efforts, the State could not locate him. The trial court found Luis unavailable and admitted his preliminary hearing testimony over Pham's confrontation objection.

Pham appealed, and the court of appeals affirmed, holding that, under *Crawford v. Washington*, Pham's right to confront Luis was satisfied because Luis was unavailable and Pham had a prior opportunity to cross-examine him at the preliminary hearing.

Pham argues that a preliminary hearing can almost never afford an adequate opportunity for cross-examination. But in a long, unbroken line of cases, both the United States Supreme Court and this Court have held the opposite. And the court of appeals here did not foreclose the possibility that a particular preliminary hearing might not afford such an opportunity. It correctly held that this case fell outside that possibility.

STATEMENT OF THE ISSUES

1. This Court granted review on the following question: "Whether the court of appeals erred in concluding Petitioner had failed to demonstrate that his Sixth Amendment right to confront witnesses against him was violated by the presentation of the victim[']s preliminary hearing testimony at his trial." Order, September 12, 2016.

Standard of Review. This Court reviews the court of appeals' decision for correctness. *Brierley v. Layton City*, 2016 UT 46, ¶18, __ P.3d __.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum B:

United States Constitution, Amendment VI;

Utah Constitution, Article I, § 12.

STATEMENT OF THE CASE

A. Summary of facts.

Luis Menchaca and his girlfriend, Donna Olmeno, went to a 7-Eleven to buy Slurpees. R291:6. There, they saw Anh Tuam Pham “bullying” two boys on bikes. R292:15. Pham and his friend Yeth Yan—who had been partying and “ran out of beer”—had gone to the 7-Eleven to resupply. R293:61–62; R292:43, 57, 66. The four were not acquainted. R291:7.

From the moment they arrived, Olmeno had a “bad vibe, like there was going to be problems,” because she saw Pham “picking on” the boys. R292:18, 21, 35. As Menchaca and Olmeno entered the store, the boys asked them for a ride. Wanting “no drama, no nothing,” Menchaca said no. R292:21, R291:8.

Once back outside, standing next to his truck, Menchaca watched Pham harass the boys again. R291:8. The boys again asked Menchaca for a ride. *Id*; R292:22. Pham, who was only a few feet away, turned around and asked Menchaca if he “wanted problems too.” R292:22, 39; R291:8-9.

Menchaca said, "No." *Id.* Pham repeated two or three times, "[D]o you want problems too," and Menchaca repeated each time: "No, I don't want problems." R292:39.

Suddenly, Pham pulled a gun out of his pocket and pointed it at Menchaca. R291:9. Menchaca's girlfriend screamed, "[A]re you going to shoot him? Are you going to shoot him when there is cops across the street?" R292:24. Pham pointed the gun at Menchaca's groin. State Exh. 4b. "[W]atch me," he said before shooting Menchaca. R292:24.

The single bullet produced three wounds, one right above Menchaca's penis on his right side, one through his scrotum on his left side, and one in his leg, where the bullet is permanently lodged. State Ex. 3; R291:9-10; R293:103-04.

While Menchaca jumped up and down, Pham hopped into his white minivan and put it in reverse. R292:9-11, 26, 49-52, 94, 99; R293:71. Two police officers—guns drawn—chased after Pham yelling "stop, police stop, police, stop now." R292:51-53, 78-80, 95. But Pham just "sped off." R292:94.

Menchaca began to feel dizzy. R291:11. He sat down and stuck his hand into the hole in his pants; it came out bloody. R291:11; R292:96. When the officers found him, Menchaca was "holding between his legs." R292:96. They called the ambulance, and Menchaca was transported to the hospital,

where he stayed for three days. 291:11; R292:96-97. The entire episode was caught on tape by the outdoor 7-Eleven security camera. State Exh. 4a, 4b.

Pham and Yan ditched their minivan in the adjoining neighborhood. R292:53. They stole a family's running SUV with the father chasing after them. R292:53-56; 293:10-14. The duo then threw Pham's striped shirt into some bushes, drove a few blocks, and abandoned the stolen SUV around the corner from Yan's fourplex – where they had been “partying” earlier in the evening. R293:11, 13-14; R292:55, 66.

Police officers found Pham at that fourplex later that night. R293:33. He was dressed in different clothes than on the security footage and as reported by eyewitnesses. R292:70, 82; R293:22.

B. Summary of proceedings.

Preliminary hearing. Four months later, Pham's victim testified at the preliminary hearing. Menchaca identified Pham and testified that Pham was harassing the two boys on bicycles when Pham pulled out his gun and shot him. R291:7-9. Menchaca also testified about his injuries. R291:9-11, 12-14. He testified that he felt dizzy, bled from his groin wounds, was in the hospital for three days after the shooting, could not walk without pain for two weeks, could not sleep at night without pain in the sole of his foot, believed the bullet hit a nerve in his leg that caused problems with his big

toe, returned to the hospital after two weeks to have x-rays because of the pain, and could still feel the bullet lodged in his leg. R291:12-14.

Pham's attorney cross-examined Menchaca. R291:14. The State's direct examination spans eleven pages, R291:4-14; Pham's cross-examination spans thirteen R291:14-26. He asked Menchaca about his background, marital status, failure to pay hospital bills, interactions with police the day of the incident, relationship to those involved, ability to perceive, memory, and details of the incident. *Id.* The State did not object to any of counsel's questions, and the trial court placed no limitations on counsel's cross-examination. *Id.* In cross-examination, Pham's attorney discovered that aside from harassing the two boys on bikes, Pham also pushed them just before shooting Menchaca. R291:20.

Trial. By the time of trial, Menchaca was no longer in Utah. The State tracked Menchaca to Mexico—first to Minchocan and then to Guanajuato—but, even working with the Los Angeles Police Department, Foreign Prosecution/Interpol, the State was unable to discover Menchaca's whereabouts or to procure his presence at trial. R104-108. Pham did not then, and does not now, dispute that Menchaca was unavailable at trial.

During trial, over Pham's objection, the court allowed the State to read Menchaca's preliminary hearing testimony into the record because

Menchaca was unavailable to testify and Pham had cross-examined him at the preliminary hearing. R292:41; R134-136.

The jury found Pham guilty of discharge of a firearm with serious bodily injury, receiving or transferring a stolen motor vehicle, obstructing justice, and failure to respond to an officer's signal to stop. R274. The trial court sentenced Pham to concurrent prison terms of five years to life for felony discharge of a firearm; one to fifteen years for receiving or transferring a stolen vehicle; one to fifteen years for obstructing justice; and zero to five years for failure to stop or respond at the command of an officer. R278-79.

Court of Appeals' decision. Pham timely appealed, arguing that admitting the victim's preliminary hearing testimony violated his confrontation right because preliminary hearings were so limited in scope that they could not afford an adequate opportunity to cross-examine.¹ *Pham*, 2016 UT App 105, ¶¶9-10. Pham argued that three aspects of preliminary hearings rendered them inadequate opportunities for cross-examination: (1) the magistrate's limited ability to determine credibility; (2)

¹ Pham also argued in the court of appeals that the evidence was insufficient to convict him of discharge of a firearm with serious bodily injury. *Pham*, 2016 UT App 105, ¶8. The court of appeals rejected that claim, and he does not seek certiorari on that issue.

the magistrate's duty to draw all reasonable inferences in the prosecution's favor; and (3) the State's low burden of proof. *Id.* at ¶¶13-14, 16; *see generally* *State v. Jones*, 2016 UT 4, 365 P.3d 1212 (discussing preliminary hearing standards).

The court of appeals—consistent with its own, this Court's, and the United States Supreme Court's precedent—disagreed. *Pham*, 2016 UT App 105, ¶¶11-12 (citing *State v. Garrido*, 2013 UT App 245, 314 P.3d 1014). The court explained that neither its own precedent “nor *Crawford [v. Washington]* state a blanket rule that an opportunity to cross-examine a witness at a preliminary hearing will always, as a matter of law, satisfy a defendant's right to confrontation.” *Id.* at ¶12. “Rather,” the court continued, it understood “those cases to set forth the general proposition that it is *possible* for the cross-examination opportunity at a preliminary hearing to satisfy that right.” *Id.* Because Pham did not allege that his motive changed between preliminary hearing and trial, the trial court did not limit his cross-examination in any way, and Pham did “not identify any shortcomings in the cross-examination” at preliminary hearing, the court of appeals held that he did not show a confrontation violation. *Id.* at ¶¶18-19 & n.4.

The court of appeals explained that the characteristics of preliminary hearings do not “limit the ability of a defendant to conduct a full cross-

examination” because they “impose[d] no obvious structural limitation on the scope or depth of cross-examination” in that setting. *Pham*, 2016 UT App 105, ¶17. Thus, the court could not “conclude that cross-examinations conducted within Utah’s preliminary hearing framework can never satisfy a defendant’s” confrontation rights. *Id.* (citing *State v. Brooks*, 638 P.2d 537 (Utah 1981)). The court likewise refused to decide “whether the inverse [was] true”—that is, whether preliminary hearings *always* satisfy a defendant’s confrontation rights. *Id.* at ¶18.

SUMMARY OF ARGUMENT

Pham argues that because a preliminary hearing is limited to determining whether probable cause exists to bind a defendant over for trial, there is less motive to cross-examine, which renders that prior opportunity inadequate to satisfy the confrontation right. This position contradicts over a century of precedent from the United States Supreme Court, this Court, and the court of appeals. Pham has provided no compelling reason to depart from this precedent, particularly where the United States Supreme Court has considered—and rejected—the sort of arguments he makes. Under this long, unbroken line of precedent, Pham’s prior *opportunity* to cross-examine the victim at the preliminary hearing

satisfied his right to confront him when he became unavailable to testify at trial.

Preliminary hearings in Utah—withstanding their limited purpose—retain the relevant attributes that the Supreme Court has held make them “trial-like”: witnesses are placed under oath, testify at a recorded hearing in front of a judge, the defendant is represented by counsel, and he has a rule-based right to cross-examine. And defense counsel is animated by the same motive and interest—to further the defendant’s chances of success—at preliminary hearing no less than at trial, notwithstanding a state constitutional amendment permitting the State to present reliable hearsay at preliminary hearings. Further, the concerns that Pham points to—such as a judge limiting cross-examination—do not apply to his case.

The correct rule is essentially a mirror image of Pham’s proposed rule. Pham argues that preliminary hearings as a general rule cannot afford an adequate opportunity for cross-examination “absent exceptional circumstances.” In reality, preliminary hearing testimony of an unavailable declarant is generally admissible absent exceptional circumstances, such as where a magistrate significantly limits cross-examination on credibility issues.

ARGUMENT

I.

Preliminary hearings can provide an adequate opportunity for cross-examining a witness who is unavailable to testify at trial.

Pham argues that the court of appeals erroneously held that cross-examination at preliminary hearings takes place “under the same motive and interest” as cross-examination at trial because the precedent on which the court of appeals relied for this proposition—this Court’s decision in *State v. Brooks*, 638 P.2d 537 (Utah 1981)—was later overruled by state constitutional amendment.² Apl’t.Br. 12-16. He also asserts that preliminary hearings can almost never satisfy the confrontation clause because of their

² Pham cites to this amendment as evidence of a confrontation violation, Pet.Br. 5-6, 17, but his claim is made entirely under the Sixth Amendment. *Id.* at 12-13, 16, 26-27. Although he briefly references the state constitution, *id.* at 13, he makes no separate argument regarding it, and his constitutional argument relies solely on cases addressing the Sixth Amendment’s Confrontation Clause. *See id.* at 7, 12-28. He does not argue that the state constitution was violated; rather, he asserts that a state constitutional change shows a federal violation. *Id.* at 5-6, 17. And the Court of Appeals addressed only a federal claim. *See Pham*, 2016 UT App 105, ¶¶3-19. This Court has “repeatedly refrained from engaging in state constitutional law analysis unless ‘an argument for different analyses under the state and federal constitutions is briefed’.” *See State v. Worwood*, 2007 UT 47 ¶16, 164 P.3d 397, 405 (quoting *State v. Laferty*, 749 P.2d 1239, 1247 n.5 (Utah 1988)). Because Pham has not separately briefed a state constitutional claim—which would be unpreserved at any rate—the State confines its analysis to the Sixth Amendment.

“very limited” purpose of establishing probable cause, which does “not allow . . . for purposeful and rigorous cross-examination.” *Id.* at 14, 16. These factors, according to him, render preliminary hearings all but per se inadequate opportunities for cross-examination. *Id.* at 22. Pham is mistaken. A long, unbroken line of decisions from both the United States Supreme Court and this Court show that preliminary hearing testimony can be admissible at trial where the declarant is unavailable. This Court should hew to that precedent, as Pham offers no compelling reason to depart from it.

A. Preliminary hearing testimony of an unavailable declarant has long been admissible under the Confrontation Clause.

The Sixth Amendment to the United States Constitution protects an accused’s right “to be confronted with the witnesses against him” at trial. U.S. CONST. amend. VI; *State v. Timmerman*, 2009 UT 58, ¶ 9, 218 P.3d 590. But this right is not absolute. The Confrontation Clause applies only to “testimonial” hearsay. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). A hearsay statement is “testimonial” if, in making it, the declarant “bears testimony” against a defendant. *Id.* at 51. Testimonial hearsay includes, among other things, “prior testimony at a preliminary hearing.” *Crawford*, 541 U.S. at 51, 59, 68.

But even testimonial hearsay is admissible at trial if (1) the declarant is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the declarant about the prior statements. *Id.* at 68. Prior testimony—whether given at a prior trial or a preliminary hearing—has long been admissible where these conditions are met. *Id.* at 57 (citing *Mattox v. United States*, 156 U.S. 237, 241 (1895)); *see also State v. Menzies*, 889 P.2d 393, 403 (1994).

Unavailability is not at issue here. The trial court found the victim unavailable, R292:41, R134–136, and Pham does not contest that ruling.

As to the second requirement, the Sixth Amendment guarantees only the *opportunity* to cross-examine. *Crawford*, 541 U.S. at 68 (“the Sixth Amendment demands what the common law required: unavailability and a prior *opportunity* for cross-examination”) (emphasis added). As this Court has long recognized, even where a defendant “may have elected to forgo cross-examination” that “does not mean that the opportunity was not available.” *State v. Nelson*, 725 P.2d 1353, 1357 (Utah 1986); *see State v. Pecht*, 2002 UT 41, ¶39, 48 P.3d 931; *State v. Jolley*, 571 P.2d 582, 586 (Utah 1977); *see also Barger v. Oklahoma*, 238 F. App’x. 343, 346–47 (10th Cir. 2007); *United States v. Williams*, 116 F. App’x. 890, 891 (9th Cir. 2004); *Simmons v. State*, 234 S.W.3d 321, 326 (Ark. Ct. App. 2006); *People v. Williams*, 181 P.3d 1035, 1061

(Cal. 2008); *People v. Yost*, 749 N.W.2d 753, 774-75 (Mich. Ct. App. 2008); *State v. Artis*, 215 S.W.3d 327, 335 (Mo. Ct. App. 2007).

Thus, satisfying the Sixth Amendment confrontation right does not require that cross-examination will take place at all, let alone “cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *United States v. Owens* 484 U.S. 554, 559 (1988) (citations omitted); *Pecht*, 2002 UT 41, ¶39; see also *People v. Cowan*, 236 P.3d 1074, 1126 (Cal. 2010) (“Nothing in *Crawford* casts doubt on the continuing vitality of *Owens*.”). Whether a prior opportunity is “adequate” depends on the facts of a case.

Both the United States Supreme Court and this Court have long held that the preliminary hearing testimony of an unavailable witness may be admissible at trial.³ More than a century ago, the United States Supreme

³ The Supreme Court excluded the preliminary hearing testimony of an unavailable witness in *Pointer v. Texas*, 380 U.S. 400, 406-08 (1965). But the problems in *Pointer*—that Pointer lacked counsel at the preliminary hearing and the government made no attempt to procure the out-of-state witness to testify at trial—are not present here. Other Supreme Court cases excluding preliminary hearing testimony on confrontation grounds have generally involved circumstances—also not present here—where the declarant was not truly unavailable. See *id.*; see also *Barber v. Page*, 390 U.S. 719 (1968) (preliminary hearing testimony inadmissible where State did not seek presence); *Motes v. United States*, 178 U.S. 458 (1900) (witness unavailable due to negligence of government); see also *State v. Oniskor*, 510 P.2d 929 (Utah 1973). (preliminary hearing testimony inadmissible at trial where State had not proven unavailability).

Court addressed this possibility in *Mattox v. United States*, 156 U.S. 237 (1985). Mattox was convicted of a murder in Indian territory. *Id.* at 239. His conviction was reversed on appeal, and he was tried a second time, which resulted in a hung jury. *Id.* at 251. By the time of his third trial, two of the witnesses against him had died. *Id.* at 240. The trial court permitted those witnesses' prior testimonies—in the form of reporter's notes—to be read at Mattox's third trial. *Id.* He was convicted and appealed, claiming that admission of this prior testimony violated his confrontation rights. *Id.*

In holding the testimony admissible, the Supreme Court noted that “the authority in favor of the admissibility of such testimony, where the defendant was present *either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming.*” *Id.* at 242 (emphasis added). In support, the court favorably cited more than a dozen lower court cases, including one in which “the substance of a deceased witness' testimony given at a preliminary examination was held to be admissible.” *Id.* at 242 (citing *United States v. Macomb*, 5 McLean 286, Fed. Cas. No. 15,702).

The court explained that the “primary object” of the confrontation clause was “to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination

of the witness.” *Id.* at 242. Prior sworn testimony, the court explained, is not the evil the confrontation clause targets. *Id.* The court understood that its holding would “deprive[]” a defendant “of the advantage of that personal presence of the witness before the jury which the law has designed for his protection,” but noted that the general rule “must occasionally give way to considerations of public policy and the necessities of the case,” and that letting the guilty walk free in all cases where their accusers were no longer available “would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.” *Id.* at 243. Thus, confrontation was satisfied “in the advantage he has *once* had of seeing the witness face to face, and subjecting him to the ordeal of cross-examination.” *Id.* at 244 (emphasis added).

Mattox’s holding has been reaffirmed for more than 100 years. Though the language of *Mattox* itself was broad enough to include preliminary hearings, the Supreme Court first addressed preliminary hearings specifically nearly half a century ago in *California v. Green*, 399 U.S. 149, 165 (1970).

In *Green*, Porter sold marijuana to an undercover officer. 399 U.S. at 151. After Porter was arrested, he named Green as his supplier. *Id.* Porter later testified for the State at Green’s preliminary hearing, where he was cross-examined by defense counsel. *Id.* At trial, Porter again testified, but became “markedly evasive and uncooperative,” claiming that he had forgotten who his supplier was. *Id.* at 151-52 (citation and quotation omitted). The court admitted Porter’s preliminary hearing testimony to impeach him. *Id.* at 152. The California Supreme Court held that admitting Porter’s preliminary hearing testimony violated Green’s confrontation rights. *Id.* at 153.

The United States Supreme Court reversed. The court acknowledged that one virtue of having a witness testify at trial was that the jury could “observe the demeanor of the witness in making his statement,” which would aid “the jury in assessing his credibility.” *Id.* at 158. But the court cautioned that this direct observation was not the be-all and end-all of the Confrontation Clause – while it “may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness” it, the Constitution did not require that. *Id.* at 160-61.

Granted, Porter actually testified at Green's trial, and was subject to cross-examination on his prior statements. *Id.* at 161-62. But the Court's holding was not limited to that circumstance. The Court explained that "Porter's preliminary hearing testimony was admissible" under the Confrontation Clause even if Porter had not testified at trial, because his preliminary hearing statement was "given under circumstances closely approximating those that surround a typical trial," which included:

- Porter was **under oath**;
- Green was **represented by counsel**;
- Green's counsel had the **opportunity to cross-examine** Porter on his statements to police, **without any significant limitation**; and
- the proceedings were held in front of a **judge**.

Id. at 165-66. Under these circumstances, the preliminary hearing was not "significantly different from an actual trial" for confrontation purposes, and the preliminary hearing testimony would have been admissible even if Porter had been unavailable to testify at trial. *Id.* (citing *Mattox*, 156 U.S. 257).

It is true that *Green* was decided before both *Ohio v. Roberts*, 448 U.S. 56 (1980) and *Crawford*, which set out the current confrontation requirements. But both *Roberts* and *Crawford* show *Green's* continuing validity.

Roberts was charged with check forgery and possession of stolen credit cards from a Bernard Isaacs. *Roberts*, 448 U.S. at 58. One of the witnesses for Roberts at the preliminary hearing was Anita Isaacs—Bernard’s daughter—who let Roberts stay at her apartment. *Id.* Anita denied giving Roberts permission to use her father’s checks and credit cards. *Id.* At trial, Roberts claimed that Anita had given him the financial instruments “with the understanding that he could use them.” *Id.* at 59. Anita was not available to testify at trial, so the State introduced her preliminary hearing testimony to rebut Roberts’ claim. *Id.*

Like the California court in *Green*, the Ohio Supreme Court in *Roberts* held that prior preliminary hearing testimony was inadmissible under the Confrontation Clause because there was “little incentive to cross-examine a witness at a preliminary hearing, where the ultimate issue is only probable cause.” *Id.* at 61 (citation and quotation omitted). The Supreme Court reversed and re-affirmed *Green*, explaining that the preliminary hearing afforded an “adequate opportunity to cross-examine.” *Id.* at 73 (citation omitted).

True, the *Roberts* court also held that hearsay statements of an unavailable declarant were admissible under the Confrontation Clause so long as they bore “adequate indicia of reliability.” *Id.* at 66 (quotation

omitted). And the Supreme Court later abandoned this test in *Crawford* in favor of the two-element test of (1) unavailability and (2) prior opportunity for cross-examination. 541 U.S. at 60.

But *Crawford* itself noted that *Roberts*' result likely survived under the *Crawford* test. *Crawford*, 541 U.S. at 58. This was so because, despite reciting the "reliable hearsay" test that *Crawford* disavowed, the *Roberts* court "hew[ed] closely to the traditional line" by admitting "testimony from a preliminary hearing at which the defendant had cross-examined the witness." And like *Roberts*, *Crawford* re-affirmed *Green* and *Mattox*. *Id.* at 57 (citing *Green* and *Mattox* for proposition that "preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine").

This Court has also repeatedly affirmed the admission of an unavailable witness's preliminary hearing testimony, most recently this year. *Mackin v. State*, 2016 UT 47, ¶¶38-42, __ P.3d __; *Menzies*, 889 P.2d 393, 402-03; *State v. Lovell*, 758 P.2d 909, 913-14 (Utah 1988); *State v. Brooks*, 638 P.2d 537, 540-42 (Utah 1981). For example, in *Brooks*. There, four transients fought each other in the "hobo jungle" over \$14. *Brooks*, 638 P.2d at 538. Two of the men were charged with aggravated assault, and the other two testified against them at a preliminary hearing, where they were cross-

examined. *Id.* When the victims were later declared unavailable, their prior testimony came in at trial over Brooks’s confrontation objection. *Id.*

This Court affirmed under the *Roberts* reliability test—which governed confrontation clause questions at the time—but explained that the reliability of the testimony sprang from a preliminary hearing, “with all its formalities and protections.” *Id.* at 540-41. And it rejected Brooks’s argument that preliminary hearings did not afford an adequate opportunity to cross-examine based on the limited purpose of the hearing, explaining that the defense’s “motive and interest are the same” at both preliminary hearing and trial—to establish the defendant’s innocence. *Id.* at 541.

This Court also held prior preliminary hearing testimony admissible in both *Lovell*, 758 P.2d at 913-14, and *Menzies*, 889 P.2d at 402-03, which were decided under *Roberts*. And this Court most recently affirmed the admission of prior preliminary hearing testimony under *Crawford* in *Mackin*, 2016 UT 47, ¶¶40-42.

The court of appeals has followed suit. See *State v. Goins*, 2016 UT App 57, 370 P.3d 942, cert. granted, 384 P.3d 567; *West Valley City v. Kent*, 2016 UT App 8, 366 P.3d 415; *State v. Garrido*, 2013 UT App 245, 314 P.3d 1014. This Court has approved this course. See *Mackin*, 2016 UT 47, ¶39 (holding that *Garrido* is “[c]onsistent” with *Crawford* and *Menzies*). And at

least three federal circuits and seven other states have similarly held preliminary hearing testimony of an unavailable witness to be admissible under the confrontation clause. See *United States v. Avants*, 367 F.3d 433, 445 (5th Cir. 2004); *Glenn v. Dallman*, 635 F.2d 1183, 1187 (6th Cir. 1980); *United States ex rel. Haywood v. Wolff*, 658 F.2d 455, 459-60 (7th Cir. 1981); *People v. Williams*, 181 P.3d 1035, 1061 (Cal.App.4th 2008); *State v. Vinhaca*, 205 P.3d 649 (Haw. 2009); *State v. Young*, 87 P.3d 308, 316-17 (Kan. 2004); *State v. Aaron*, 218 S.W.3d 501, 517 (Mo. Ct. App. 2007); *Chavez v. State*, 213 P.3d 476, 479 (Nev. 2009); *State v. Henderson*, 136 P.3d 1005, 1011 (N.M. Ct. App. 2006); *Primeaux v. State*, 88 P.3d 893, 905-06 (Okla. Crim. App. 2004); see also *United States v. Williams*, 116 Fed.Appx. 890, 891-92 (10th Cir. 2004) (holding deposition testimony admissible under confrontation clause); *Simmons v. State*, 234 S.W.3d 321, 326 (Ark. Ct. App. 2006) (same); *People v. Yost*, 749 N.W.2d 753, 774-75 (Mich. Ct. App. 2008) (same).

B. Pham has shown no compelling reason to depart from this long-established, and correct, precedent.

Notwithstanding this extensive authority, Pham asks this Court to reverse a century-old course and hold that preliminary hearings—due to their limited purpose—are all but per se inadequate to afford a defendant the opportunity to cross-examine a witness “absent exceptional circumstances.” Pet.Br. 15-16, 22. This Court should decline to do so.

It is true, as Pham points out, that preliminary hearings take place early on in a case and are generally limited to determining whether probable cause exists. *Id.* It is also true that there is no right to confront witnesses at preliminary hearings, and that the State may choose to present written statements in lieu of live testimony. *See* Utah R. Evid. 1102; *State v. Timmerman*, 2009 UT 58, 218 P.3d 590.

But where the State elects to present live testimony, defendants do have a rule-based right to cross-examine. Utah R. Crim. P. 7(i)(1). Where there is a prior opportunity to test credibility through cross-examination, confrontation is satisfied. *See, e.g., State v. Stano*, 159 P.3d 931, 945 (Kan. 2007) (holding no confrontation violation from admission of preliminary hearing testimony where defendants are not barred from cross-examining witnesses at preliminary hearing on credibility); *Chavez*, 213 P.3d at 485 (similar).

Though Pham asserts that there “was no cross-examination regarding [the victim’s] credibility and veracity,” Pet.Br. 9, this side-steps the issue. The Supreme Court in *Owens* made clear that cross-examination need not even necessarily take place—the defendant need only have the *opportunity* to cross-examine. 484 U.S. at 559. Contrary to his assertion, *id.* at 19, Pham had that. And as shown, counsel did explore several avenues in cross,

including the victim's background, marital status, failure to pay hospital bills, interactions with police the day of the incident, relationship to those involved, ability to perceive, memory, and details of the incident. R291:14-26.

Further, however limited other preliminary hearings might be, the one here had those characteristics that the *Green* court held "closely approximat[e] those that surround a typical trial" –the victim was under oath; Pham was represented by counsel; defense counsel had the opportunity to cross-examine the victim without any limitation; and the proceedings were held in front of a judge. *Green*, 399 U.S. at 165-66; *see also Menzies*, 889 P.2d 403 (holding preliminary hearing testimony reliable where it was "given under oath before a judge and Menzies was represented by counsel who had the opportunity to cross-examine" the witness). And tellingly, though Pham discusses potential shortfalls in preliminary hearing cross-examinations, Pet.Br. 19-22, he points to nothing *in this case* that counsel might have done differently. *See Pham*, 2016 UT App 105, ¶18 n.2 (holding that Pham did not "identify any shortcomings in the cross-examination actually conducted at his preliminary hearing. Rather, [he] simply urged [the court of appeals] to hold, as a matter of law, that Utah

preliminary hearings never provide defendants with sufficient opportunity to cross-examine witness so as to satisfy the Confrontation Clause”).

In pressing his position, Pham relies largely on (1) Utah’s Victim Rights Amendments to the state constitution permitting the use of reliable hearsay at preliminary hearings; and (2) *People v. Fry*, 92 P.3d 970 (Colo. 2004). Neither is persuasive.

After this Court decided *Brooks*, the Utah Constitution was amended to make clear that the purpose of preliminary hearings was to determine probable cause, and that reliable hearsay was admissible. *See Pham*, 2016 UT App 105, ¶17 n.3. This overturned this Court’s decision in *State v. Anderson*, 612 P.2d 778 (Utah 1980), which held that there was a state constitutional right to cross-examine at preliminary hearings.

But the possibility of the State proceeding—in other cases—on reliable hearsay rather than live testimony at preliminary hearings does not affect the federal constitutional analysis. If the State had relied on affidavits in lieu of live testimony here, then there would have been no opportunity for cross-examination, and the victim’s statements would not have come in at trial.

Pham also cites to *People v. Fry*, 92 P.3d 970 (Colo. 2004). Pet.Br. 22-26. But *Fry* is unpersuasive. There, the Colorado Supreme Court held that

because preliminary hearings in that state are limited to probable cause findings, they could not afford an adequate prior opportunity for cross-examination. *Id.* at 977. But as shown, the Supreme Court rejected this very sort of reasoning as far back as *Mattox* and as recently as *Green* and *Roberts*. And whatever the limits of preliminary hearings generally, the one here retained the characteristics that both the United States Supreme Court and this Court have held most critical—an oath, a judge, a witness able to be cross-examined, and a defendant represented by counsel.

Further, this Court explicitly rejected the very case on which *Fry* relied—*People v. Smith*, 597 P.2d 204 (Colo. 1979)—in *Brooks*. *Fry* cited *Smith* for the proposition that “due to the limited nature of the preliminary hearing, the opportunity for cross-examination was insufficient to satisfy the Confrontation Clause.” 92 P.3d at 977. *Brooks* argued that former rule of evidence 63(3)(b)(ii)—in light of *Smith*—showed that preliminary hearing testimony was inadmissible. That rule stated that hearsay statements were admissible if the declarant were unavailable and “the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered.” *Brooks*, 638 P.2d at 541. *Brooks* argued that *Smith* showed that defense counsel’s “motive and interest”—

and thus opportunity to cross-examine—were different at preliminary hearings than at trial. *Id.*

This Court disagreed—and directly rejected *Smith's* reasoning—holding that defense counsel's "motive and interest are the same" at both preliminary hearing and trial" and that "cross-examination takes place" at both "under the same motive and interest." 638 P.2d at 541. Thus, a preliminary hearing afforded an adequate opportunity for cross-examination. *Id.*; see also *Henderson*, 136 P.3d at 1010 ("At the preliminary hearing and trial, Defendant was charged with the same crimes, he had the same defense counsel, and the same opportunity and motive to cross-examine" the witness); *State v. Mohamed*, 130 P.3d 401, 405 (Wash. Ct. App. 2006) ("Mohamed's interest at the pretrial hearing was the same as it would have been at trial, and equally pressing: to establish [victim's] recantation as credible and prove that her out of court statements were unreliable."). Contrary to the court of appeals' reasoning, *Pham*, 2016 UT App 105, ¶17 n.3, this aspect of *Brooks* was unaffected by the later constitutional amendment permitting the use of reliable hearsay.

Further, other courts have almost universally rejected *Fry's* reasoning. Most of the courts addressing *Fry* have either distinguished it or outright declined to follow it. This is because *Fry's* extreme outcome results in "a

blanket prohibition of preliminary hearing testimony of an unavailable witness” – which the “majority of courts do not condone.” *State v. Mantz*, 222 P.3d 471, 477 (Idaho Ct. App. 2009); *see, e.g., People v. Thompson*, case no. C058768, 2009 WL 4758792, *14 (Cal. App. 3d. Dec. 14, 2009) (refusing to follow *Fry*); *State v. Nofoa*, 349 P.3d 327, 339–40 (Haw. 2015) (refusing to follow *Fry*’s “complete ban on preliminary hearing” testimony in favor of reviewing each decision on “case-by-case basis”); *Stano*, 159 P.3d at 945 (refusing to follow *Fry* where defendants can cross-examine state witnesses at preliminary hearings and have similar motives to trial); *State v. Aaron*, 218 S.W.3d 501, 516 (Mo. Ct. App. 2007) (refusing to follow *Fry* despite defendant’s admittedly different “interest and motive in his cross-examination” at preliminary hearing); *Chavez*, 213 P.3d at 484–85 (refusing to follow *Fry*); *Henderson*, 136 P.3d at 1010; (refusing to follow *Fry* and holding that counsel had same motive and interest both at preliminary hearing and at trial); *Mohamed*, 130 P.3d at 402, 404–05 (refusing to follow *Fry* because defendant had similar motive and prior opportunity to cross-examine); *see also O’Neal v. Province*, 415 Fed.Appx. 921, 923–24 (10th Cir. 2011) (affirming lower court because preliminary hearing afforded sufficient opportunity for prior cross-examination); *Parker v. Jones*, 423 Fed.Appx. 824, 831–32 (10th Cir. 2011) (same); *United States v. Hargrove*, 382 Fed.Appx. 765, 779 (10th Cir.

2010) (affirming lower court even “if defendant’s cross-examination of witness at the preliminary hearing was narrow in scope and would have been conducted differently” if counsel knew the witness would be unavailable at trial); *Bowman v. Neal*, 172 Fed.Appx. 819, 828–29 (10th Cir. 2006) (affirming lower court’s admission of preliminary hearing testimony even when limitations were placed on defense counsel’s prior cross-examination).

Pham cites a few cases from other jurisdictions purportedly following *Fry* to buoy up his claim, Pet.Br. 23-27, but they are unpersuasive for the same reasons that *Fry* itself is unpersuasive. They are also distinguishable. *State v. Stuart*, 695 N.W.2d 259 (Wis. 2005), for example, did not adopt a per se ban on using preliminary hearing testimony, like the Colorado court did in *Fry*. It merely stated that when a cross-examination is in fact restricted on credibility issues, a confrontation problem could arise if the prosecution later tried to use that testimony at trial. *Id.* at 266. There, both parties agreed that the restricted preliminary hearing cross-examination of defendant’s brother did not satisfy the Confrontation Clause, and the court agreed. *Id.* at 265.

Coronado v. Texas, 351 S.W.3d 315 (Tex. Crim. App. 2011), as Pham acknowledges, “did not involve preliminary hearing testimony,” but an

interview of a child witness where there was no opportunity for cross-examination under oath. Pet.Br. 24. And *Blanton v. State*, 978 So.2d 149 (Fla. 2008) involved a deposition.

Pham also presses a number of policy arguments, none of them persuasive. He alleges—without citation or evidence—that if defense counsel were required to fully cross-examine at preliminary hearings “there may be little time left for judges to conduct actual trials.” Pet.Br. 19. But the preliminary hearing testimony of an unavailable witness has been admissible at trial in Utah since *Maddox, Green*, or at very least, *Brooks*. The intervening decades have not created unmanageable caseloads.

And Pham’s “assumption that there are thousands of cases” in which defendants “are entitled to a preliminary hearing,” and that hearing them all would put a “burden on already strained judicial resources,” Pet.Br. 19-20, is beside the point. Having the right and exercising the right are two different things. The vast majority of defendants waive their preliminary hearings—or plead guilty, thereby waiving their confrontation right. Cf. *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012) (noting that 97% of federal convictions and 94% of state convictions result from guilty pleas); *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (same); Utah R. Crim. P. 11(e)(3) (listing confrontation right among those waived by guilty plea). Because the law is

so long-established, recent decisions affirming the admission of prior preliminary hearing testimony could not have created—as Pham asserts—a “climate of uncertainty” regarding the extent of defense counsel’s duties in cross-examinations at preliminary hearings. Pet.Br. 20. It has long been certain that such testimony could be admissible if the declarant were unavailable, the defendant had counsel, and counsel were able to cross-examine the witness.

Pham also asserts that evidence discovered after the preliminary hearing often affects cross-examination at trial, and that a preliminary hearing conducted before all discovery is available to the defense necessarily renders the prior opportunity inadequate. Pet.Br. 21. But it is not apparent that, should such evidence arise, it would be inadmissible. Indeed, the victim in *Garrido*, though absent at trial, was extensively impeached with evidence obtained after the preliminary hearing. See *Garrido*, 2013 UT App 245, ¶22; see also *Brooks*, 638 P.2d at 541 (noting that defense counsel were unaware of some evidence during preliminary hearing, but nothing prevented counsel from presenting the inconsistency to the jury at trial).

This Court also addressed that circumstance in *State v. Menzies*, 889 P.2d 393, 402-03 (Utah 1994). *Menzies*’s former cell mate, Walter Britton,

testified at Menzies's preliminary hearing that Menzies confessed to killing the victim. *Id.* at 401. At trial, Britton became uncooperative and refused to testify, despite the court holding him in contempt. *Id.* The trial court ruled Britton unavailable and admitted his preliminary hearing testimony. *Id.* at 401-02.

On appeal, Menzies argued a confrontation violation, based in part on his inability to cross-examine Britton using convictions that occurred between preliminary hearing and trial. *Id.* at 403. This court affirmed, explaining that while it "agree[d] that new evidence obtained after the hearing may have aided an attack on Britton's credibility on cross-examination, the preliminary hearing transcript indicate[d] that the issue was well-explored." *Id.*

Pham has not met his heavy burden of convincing this Court that a long line of authority stretching back more than a century—and approved by this Court as recently as last October—has become unworkable or was incorrectly decided in the first instance. *See generally Menzies*, 889 P.2d at 398. The correct rule is essentially a mirror image of Pham's proposed rule. Pham argues that preliminary hearings as a general rule cannot afford an adequate opportunity for cross-examination "absent exceptional circumstances." Pet.Br. 22. In reality, preliminary hearing testimony of an

unavailable declarant is generally admissible absent exceptional circumstances, such as where a magistrate significantly limits cross-examination on credibility issues.

Finally, there are important policy reasons to reject Pham's near-blanket approach. In fairness to the State and victims, a defendant should not walk free merely because a victim has become unavailable after being cross-examined at a preliminary hearing. As the *Mattox* court explained, "To say that a criminal . . . should go scot free simply because death has closed the mouth of" the victim "would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." 156 U.S. at 243.

Those "incidental benefits" included "testing the recollection and sifting the conscience of the witness" and "compelling him to stand face to face with the jury in order that they may look at him, and judge his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Id.* at 242-43. *Cf. Green*, 399 U.S. at 160 (rejecting confrontation claim based on admission of preliminary hearing testimony even though it "may be true that a jury would be in a better position to evaluate the truth of the prior statements if it could somehow be

whisked magically back in time to witness a grueling cross-examination” at the time of the statement). Pham likewise argues these incidental benefits compel a different result, Pet.Br. 19, but the Supreme Court long ago rejected that argument. *Mattox*, 156 U.S. at 243.

Fairness concerns are particularly acute in domestic violence and gang cases, where it is lamentably common for victims to become uncooperative—and thus unavailable—out of fear of the defendant, a misplaced sense of love or loyalty, or some other factor outside the State’s control. *See, e.g., Garrido*, 2013 UT App 245, ¶¶4, 23-26 (discussing domestic violence victim’s lack of cooperation with prosecution stemming from fear).

C. Admitting the unavailable victim’s cross-examined preliminary hearing testimony did not violate Pham’s confrontation right.

Pham’s arguments focus almost exclusively on other cases—precedent, possible consequences, and the like, Pet.Br. 12-29—which the State has responded to. But even if this Court disagrees with the State, it should still hold that Pham has not shown a violation of *his* confrontation right.

Even if—as Pham contends, *id.* at 22—it would be a rare case in which a preliminary hearing would afford an adequate opportunity for cross-examination, this case qualifies. Other than the lack of in-person

observation by the jury, *id.* at 19, 28 he points to no defect in or limitation of the cross-examination that took place at preliminary hearing. Though he asserts that “discovery was not complete” at the time, *id.* at 28, he does not point to any evidence that later came to his attention that he would have used had the victim appeared at trial. *See Pham*, 2016 UT App 105, ¶¶18-19 & n.4 (holding no confrontation violation because Pham did not allege changed motive between preliminary hearing and trial, trial court did not limit cross-examination, and Pham did “not identify any shortcomings in the cross-examination” at preliminary hearing). And because he has not identified what any of that evidence is, he has not postulated how it may have tipped the credibility finding in his favor.

Likewise, he has pointed to no limitation—court- or self-imposed—on his actual examination, let alone one so severe that it calls into serious question the adequacy of his prior opportunity to cross-examine. By pressing issues not at issue here, Pham is essentially requesting an advisory opinion, which this Court is loath to issue. *See UTA v. Local 382 of Amalgamated Transit Union*, 2012 UT 75, ¶19, 289 P.3d 582 (explaining that Utah “courts are not a forum for hearing academic contentions or rendering advisory opinions” when there is not a “controversy directly affect rights.”) (citations and quotations omitted). But at any rate, Pham has not shown that

the preliminary hearing in his case did not afford him an adequate opportunity to cross-examine the victim, and this Court should affirm.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted on January 4, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 7,577 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

JOHN J. NIELSEN
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on January 4, 2017, two copies of the Brief of Respondent were ☒ mailed ☐ hand-delivered to:

Michael J. Langford
43 East 400 South
Salt Lake City, UT 84111

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Addenda

Addendum A

372 P.3d 734
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Anh Tuan PHAM, Appellant.

No. 20140438–CA.

|
May 19, 2016.

Synopsis

Background: Defendant was convicted in the Third District Court, Salt Lake Department, Katie Bernards–Goodman, J., of discharge of a firearm causing serious bodily injury, receiving or transferring a stolen vehicle, obstructing justice, and failing to stop or respond to an officer's signal. Defendant appealed.

Holdings: The Court of Appeals, Christiansen, J., held that:

[1] admission of unavailable victim's preliminary hearing testimony at trial did not violate confrontation clause, and

[2] evidence was sufficient to support finding that victim suffered serious bodily injury.

Affirmed.

Voros, J., filed opinion concurring in part and concurring in the result.

West Headnotes (7)

[1] Criminal Law

⚡ Reception of evidence

The Court of Appeals reviews a trial court's decision to admit testimony that may implicate the confrontation clause for correctness. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[2] Criminal Law

⚡ Construction of Evidence

Criminal Law

⚡ Reasonable doubt

The Court of Appeals will reverse a jury's guilty verdict due to insufficiency of the evidence only when the evidence, viewed in the light most favorable to the verdict, is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crimes of which he or she was convicted.

Cases that cite this headnote

[3] Criminal Law

⚡ Availability of declarant

Criminal Law

⚡ Testimony at preliminary examination, former trial, or other proceeding

Admission of unavailable victim's testimony from preliminary hearing at trial did not violate defendant's constitutional rights under confrontation clause of federal constitution in prosecution stemming from shooting incident; defendant was permitted to cross-examine victim during preliminary hearing, defendant's motivation for cross-examination did not change between preliminary examination and trial, trial court did not limit cross-examination at preliminary examination in any way, and, although principal fact finding and determinations of credibility were left until trial, such considerations imposed no obvious structural limitation on scope or depth of cross-examination defendant could conduct at preliminary hearing. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[4] Criminal Law

⚡ Availability of declarant

Where testimonial evidence is at issue, the Sixth Amendment demands what the common

law required: unavailability of the witness and a prior opportunity for cross-examination. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[5] **Courts**

⚡ Erroneous or injudicious decisions

The Court of Appeals will overrule a decision previously made by it only when it is clearly convinced that the rule was originally erroneous or is no longer sound due to changing conditions and that more good than harm will come by departing from precedent.

Cases that cite this headnote

[6] **Weapons**

⚡ Possession, Use, Carrying

Evidence was sufficient to support finding that victim suffered serious bodily injury as result of gun shot, and therefore was sufficient to support conviction for unlawful discharge of a firearm causing serious bodily injury; victim was shot in the leg and spent three days in the hospital following the shooting, victim testified that he had trouble walking for about two weeks and experienced considerable pain during those two weeks, and bullet struck and lodged permanently in victim's leg only after first passing through his abdomen and scrotum. West's U.C.A. § 76-10-508.1.

Cases that cite this headnote

[7] **Criminal Law**

⚡ Elements of offenses

It is within the province of the jury to consider the means and manner by which the victim's injuries were inflicted along with the attendant circumstances in determining whether a defendant caused serious bodily injury.

Cases that cite this headnote

Attorneys and Law Firms

*735 Michael J. Langford, Salt Lake City, for Appellant.

Sean D. Reyes, Salt Lake City, Cherise M. Bacalski, and John J. Nielsen, for Appellee.

Judge MICHELE M. CHRISTIANSEN authored this Opinion, in which Senior Judge RUSSELL W. BENCH concurred.¹ Judge J. FREDERIC VOROS JR. concurred, except as to Part II, in which he concurred in the result, with opinion.

¹ Senior Judge Russell W. Bench sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11-201(6).

Opinion

CHRISTIANSEN, Judge:

¶ 1 Defendant Anh Tuan Pham challenges his convictions. He argues that the admission of preliminary hearing testimony infringed upon his Confrontation Clause rights and that the State failed to produce sufficient evidence at trial to support one of the convictions. We affirm.

***736 BACKGROUND**

¶ 2 Defendant and his friend went to a convenience store to replenish their party supplies. The victim (Victim) and his girlfriend went to the same convenience store to get water for their baby. After they arrived, they saw Defendant “picking on” or “bullying” two younger men outside the store. Victim approached, and the younger men asked Victim for a ride. Defendant turned to Victim and asked him several times if he “wanted problems too.” Victim responded each time that he did not. Nevertheless, the situation escalated. Defendant pulled out his gun and shot Victim; the bullet entered Victim's lower abdomen and exited through his scrotum, before lodging permanently in Victim's left leg.

¶ 3 Two police officers were across the street from the convenience store and, upon hearing the gunshot, ran to the store, yelling “stop now” and “police.” Defendant and his friend fled in a van, later ditching it and stealing

an SUV whose owner had left it running. Defendant was apprehended later that night and was charged with discharge of a firearm causing serious bodily injury, receiving or transferring a stolen vehicle, obstructing justice, and failing to stop or respond to an officer's signal.

¶ 4 Victim was taken to a hospital, where he stayed for three days. For two weeks, he could not walk without pain. Victim later returned to the hospital for further treatment, believing that the bullet had hit a nerve and caused problems in his foot.

¶ 5 Victim testified at Defendant's preliminary hearing, and Defendant cross-examined Victim without any limitation by the trial court. However, Victim moved to Mexico before the trial in this matter, and neither the United States Marshals Service nor the Mexican authorities were able to locate him. The State therefore filed a motion in limine seeking to admit Victim's preliminary hearing testimony. The trial court granted that motion over Defendant's objection.

¶ 6 At Defendant's jury trial, Victim's girlfriend, Defendant's friend, and the responding police officers testified for the State. Victim's preliminary hearing testimony was also read to the jury. Defendant testified in his own defense. The jury found Defendant guilty of all four charges, and Defendant timely appealed.

ISSUES AND STANDARDS OF REVIEW

[1] ¶ 7 Defendant contends that the trial court erred in allowing Victim's preliminary hearing testimony to be read at trial, because doing so violated his constitutional right to confrontation. We review a trial court's decision to admit testimony that may implicate the Confrontation Clause for correctness. *State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519.

[2] ¶ 8 Defendant also contends that the State did not produce sufficient evidence of Victim's injuries to support Defendant's conviction for discharge of a firearm causing serious bodily injury. We will reverse a jury's guilty verdict due to insufficiency of the evidence only when the evidence, viewed in the light most favorable to the verdict, is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crimes of which

he or she was convicted. See *State v. Kennedy*, 2015 UT App 152, ¶ 19, 354 P.3d 775; *State v. Labrum*, 2014 UT App 5, ¶ 17, 318 P.3d 1151.

ANALYSIS

I. Confrontation Clause

[3] [4] ¶ 9 Defendant first contends that the admission of Victim's preliminary hearing testimony violated his Confrontation Clause rights. "The Sixth Amendment to the United States Constitution states in relevant part, 'In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....'" *State v. Marks*, 2011 UT App 262, ¶ 13 n. 6, 262 P.3d 13 (ellipses in original) (quoting U.S. Const. amend. VI). "Where testimonial evidence is at issue ... the Sixth Amendment demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); see also *State v. Garrido*, 2013 UT App 245, ¶ 20, 314 P.3d 1014. Cf. *737 *State v. Brooks*, 638 P.2d 537, 541 (Utah 1981) (noting, in a pre-*Crawford* case, that for purposes of a hearsay challenge, "cross-examination takes place at preliminary hearing and at trial under the same motive and interest" because defense counsel "acts in both situations in the interest of and motivated by establishing the innocence of [his or her] client"); but see *infra* ¶ 17 n. 3.

¶ 10 Defendant does not contest that he was given an opportunity to cross-examine Victim at the preliminary hearing, but rather that "cross examination at a preliminary hearing is limited in scope and opportunity and therefore inadequate." Furthermore, Defendant "admits that he was not expressly limited in his cross-examination, but rather the nature of the preliminary hearing necessarily constricts confrontation." The essence of Defendant's argument is that preliminary hearings, as they are conducted under Utah law, are limited so as to preclude defendants from fully exercising their opportunity for cross-examination as guaranteed by the Confrontation Clause.

¶ 11 Though Defendant "requests that Utah reconsider its opinion" on this issue, he concedes that our appellate courts have determined that the opportunity to cross-examine a witness at a preliminary hearing can satisfy

a defendant's right to confrontation at trial. Defendant cites to this court's opinion in *State v. Garrido*, 2013 UT App 245, 314 P.3d 1014, which addressed the use of a witness's preliminary hearing testimony when that witness was unavailable at trial. There, the defendant's trial counsel chose not to cross-examine a witness at the preliminary hearing, likely because her preliminary hearing testimony contradicted her earlier statements to police and thus was favorable to the defendant. *Id.* ¶ 5. When the witness largely failed to appear at trial,² her preliminary hearing testimony was read to the jury. *Id.* ¶ 6. On appeal, the defendant argued that the admission of the witness's preliminary hearing testimony violated his Sixth Amendment right to confrontation. *Id.* ¶ 9. This court held that, under the facts of that case, "it was the opportunity to cross-examine [the now-unavailable witness], not the actual undertaking of cross-examination, that satisfied the requirements of *Crawford*." *Id.* ¶ 20.

2 "[J]ust as her testimony from the preliminary hearing was about to be read aloud [to the jury] by a stand-in, [the witness] appeared in the back of the courtroom, shouted that she refused to testify, and fled from the courtroom." *State v. Garrido*, 2013 UT App 245, ¶ 6, 314 P.3d 1014.

[5] ¶ 12 We will overrule a decision previously made by this court only when we are "clearly convinced that the rule was originally erroneous or is no longer sound [due to] changing conditions and that more good than harm will come by departing from precedent." *State v. Tenorio*, 2007 UT App 92, ¶ 9, 156 P.3d 854 (citation and internal quotation marks omitted). Defendant does not explicitly indicate under which of these paths he seeks abrogation of *Garrido*. In any event, neither *Garrido* nor *Crawford* state a blanket rule that an opportunity to cross-examine a witness at a preliminary hearing will always, as a matter of law, satisfy a defendant's right to confrontation. Rather, we understand those cases to set forth the general proposition that it is *possible* for the cross-examination opportunity at a preliminary hearing to satisfy that right. It is in this light that we consider Defendant's claim that Utah preliminary hearings are structurally limited such that defendants are denied an opportunity to cross-examine witnesses in a manner that satisfies their Confrontation Clause rights.

¶ 13 Defendant states that "Confrontation requires an opportunity for full and unfettered cross-examination in order to discover and display credibility, consistency, and

fact." He asserts that "Utah preliminary hearings provide an inadequate opportunity for Confrontation" because Utah's "preliminary hearings do not allow Judge's to make substantial credibility determinations, are heard in favor of the prosecution, whom do not have to eliminate alternative inferences, and do not allow a defendant to deeply explore issues of credibility or fact." Thus, according to Defendant, "testimony elicited during [Utah preliminary hearings] is not subject to adequate cross-examination."

¶ 14 Defendant refers us to a Colorado case, *People v. Fry*, 92 P.3d 970 (Colo.2004), which was decided shortly after *Crawford*. The Colorado Supreme Court held that a defendant's right to confrontation was violated *738 when the court admitted a deceased witness's preliminary hearing testimony at trial. *Fry*, 92 P.3d at 973, 981. In doing so, the court expressed concern that, because credibility is not an issue at a preliminary hearing, a defendant's cross-examination might not explore a witness's credibility. *Id.* at 977–78. The court explained that "allow[ing] extensive cross-examination by defense counsel so as to prevent any Confrontation Clause violations at trial if a witness were to become unavailable ... would turn the preliminary hearing in every case into a much longer and more burdensome process for all parties involved." *Id.* at 978. The Colorado Supreme Court noted its belief that other states had elected to do exactly that and, consequently, had preliminary hearings that amounted to mini-trials in order to provide defendants a full cross-examination opportunity. *Id.* at 977. The court concluded that Colorado's "preliminary hearing [procedure] does not provide an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause requirements," and it refused to "expand the scope of [Colorado] preliminary hearings in order to allow them to satisfy Confrontation Clause requirements." *Id.* at 978.

¶ 15 Defendant "insists that Utah's preliminary hearing standards are essentially the same as Colorado" but provides no comparative analysis of Colorado and Utah standards. We are therefore unable to measure how closely Utah's preliminary hearing standards track those of Colorado.

¶ 16 However, Defendant does describe some facets of Utah's preliminary hearing process. For example, he notes that "the bindover standard [of the preliminary hearing]

is intended to leave the principal fact finding to the jury.’ ” (Alteration in original) (quoting *State v. Virgin*, 2006 UT 29, ¶ 21, 137 P.3d 787). Defendant also explains that the “ ‘evidentiary threshold at [the preliminary hearing] is relatively low’ ” and “ ‘a showing of “probable cause” entails only the presentation of “evidence sufficient to support a reasonable belief that the defendant committed the charged crime.” ’ ” (Alteration in original) (quoting *State v. Ramirez*, 2012 UT 59, ¶ 9, 289 P.3d 444). And Defendant reminds us that the magistrate’s role in assessing credibility at a preliminary hearing is limited and that the magistrate is to take reasonable inferences in the prosecution’s favor.

¶ 17 These statements, while true, do not limit the ability of a defendant to conduct a full cross-examination at a preliminary hearing. Although “principal fact finding” and determinations of credibility are left until trial, such considerations impose no obvious structural limitation on the scope or depth of cross-examination a defendant may conduct at a preliminary hearing. We are therefore unable to conclude that cross-examinations conducted within Utah’s preliminary hearing framework can never satisfy a defendant’s Sixth Amendment right to confrontation. *See, e.g., State v. Brooks*, 638 P.2d 537, 541–42 (Utah 1981) (holding that the defendants’ opportunities for cross-examination during a preliminary hearing were constitutionally adequate for Confrontation Clause purposes, despite defense counsel being unaware of the witnesses’ prior statements to police and thus being unable to cross-examine the witnesses about those statements, because defense counsel “apparently advisedly and intentionally decided to refrain” from cross-examining the witnesses about the challenged topics).³

³ On the other hand, we are also not convinced that a preliminary hearing always provides the opportunity for cross-examination guaranteed by the Confrontation Clause. The State filed a letter of supplemental authority pursuant to rule 24(j) of the Utah Rules of Appellate Procedure, citing *State v. Brooks*, 638 P.2d 537, 541 (Utah 1981), for the proposition that “cross-examination takes place at preliminary hearing and at trial under the same motive and interest.” We note that counsel’s possession of the same motive and interest in conducting cross-examination does not necessarily mean counsel had the same opportunity to cross-examine. *See Garrido*, 2013 UT App 245, ¶ 20, 314 P.3d 1014 (“We conclude that it was the opportunity

to cross-examine ..., not the actual undertaking of cross-examination, that satisfied the requirements of *Crawford*.”). Indeed, the *Brooks* court separately considered whether “certain omissions in cross-examination at preliminary hearing precluded [the defendants] from an adequate exercise of the right to confrontation.” *Brooks*, 638 P.2d at 541.

Moreover, thirteen years after *Brooks* was issued, the nature of preliminary hearings in Utah was changed by the passage of the Utah Victims’ Rights Amendment. As relevant here, the Utah Constitution was amended to provide that “[w]here the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists” and to provide that “reliable hearsay evidence” is admissible at a preliminary hearing. *See* Utah Const. art. I, § 12. In light of these changes, the Utah Supreme Court overruled *State v. Anderson*, 612 P.2d 778 (Utah 1980), upon which the relevant portion of *Brooks* had partially relied. *See State v. Timmerman*, 2009 UT 58, ¶¶ 14–16, 218 P.3d 590. It is therefore unclear whether *Brooks*’s blanket statement that “cross-examination takes place at preliminary hearing and at trial under the same motive and interest” is still true insofar as Confrontation Clause rights are concerned. *See Brooks*, 638 P.2d at 541.

*739 ¶ 18 We need not decide today whether the inverse is true. It is true that some courts have considered changes in a defendant’s motive to cross-examine and court-imposed limitations on cross-examination as factors relevant to determining whether a defendant had a full opportunity to cross-examine a witness during a preliminary hearing. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (holding that “[by] cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court’s ruling violated [the defendant’s] rights secured by the Confrontation Clause”); *State v. Henderson*, 2006–NMCA–059, ¶ 19, 139 N.M. 595, 136 P.3d 1005 (concluding that a defendant’s right to confrontation was not violated where he had the same motive to cross-examine the witness at the preliminary hearing and enjoyed “an unrestricted right to cross-examine” the witness); *State v. Stuart*, 2005 WI 47, ¶ 38, 279 Wis.2d 659, 695 N.W.2d 259 (vacating a defendant’s conviction where a court “did not allow [the defendant] to cross-examine [a witness] at the preliminary hearing about the effect the pending charges had on his

decision to cooperate”). In the case before us, however, Defendant does not allege that his motivation to cross-examine Victim changed between the preliminary hearing and trial. Nor does he claim that the trial court limited his cross-examination in any way. Under the circumstances of this case, we cannot conclude that Defendant was prevented from exercising his Confrontation Clause right to, in Defendant's words, “unfettered cross-examination in order to discover and display credibility, consistency, and fact.”⁴

⁴ On appeal, Defendant does not identify any shortcomings in the cross-examination actually conducted at his preliminary hearing. Rather, Defendant simply urges us to hold, as a matter of law, that Utah preliminary hearings never provide defendants with sufficient opportunity to cross-examine witnesses so as to satisfy the Confrontation Clause.

¶ 19 Defendant has not demonstrated that Utah's preliminary hearing procedures limit cross-examination of a witness in such a way that a defendant's Confrontation Clause rights are necessarily violated if that witness's testimony is read at trial due to the witness's unavailability. Defendant does not claim that the specific circumstances of his preliminary hearing resulted in such a limitation. Consequently, we hold that the court did not err in allowing Victim's preliminary hearing testimony to be read to the jury at trial.

II. Serious Bodily Injury

[6] ¶ 20 Defendant next contends that the State did not provide sufficient evidence for the jury to conclude that Victim suffered serious bodily injury. Specifically, he argues that there was no evidence that the gunshot created a substantial risk of death.

¶ 21 Defendant was convicted of the first degree felony of unlawful discharge of a firearm causing serious bodily injury. See Utah Code Ann. § 76–10–508.1 (LexisNexis 2012). The Utah Criminal Code defines serious bodily injury as “bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.” *Id.* § 76–1–601(11). We consider only the third criterion—substantial risk of death.⁵

⁵ The State argues that the jury could also have found that the evidence of Victim's injuries satisfied the “protracted loss or impairment of the function of any bodily member or organ” prong, on the ground that two weeks was a protracted length of time. See Utah Code Ann. § 76–1–601(11) (LexisNexis 2012). Because we conclude that the evidence was sufficient to support a jury finding of “substantial risk of death,” we need not address that argument.

*740 [7] ¶ 22 “[I]t is within the province of the jury to consider the means and manner by which the victim's injuries were inflicted along with the attendant circumstances in determining whether a defendant caused serious bodily injury.” *State v. Bloomfield*, 2003 UT App 3, ¶ 18, 63 P.3d 110 (citation and internal quotation marks omitted). In addressing an insufficiency-of-the-evidence claim, we review the evidence and all reasonable inferences drawn therefrom in the light most favorable to the jury's verdict. *State v. Kennedy*, 2015 UT App 152, ¶ 39, 354 P.3d 775.

¶ 23 Defendant admits that Victim's preliminary hearing testimony described his being shot in the leg, bleeding, feeling dizzy, spending three days in a hospital, having trouble walking for about two weeks, and experiencing considerable pain during those two weeks. Defendant neglects to mention that Victim also testified that the bullet struck and lodged permanently in his leg only after first passing through Victim's abdomen and scrotum. See *State v. Mitchell*, 2013 UT App 289, ¶ 31, 318 P.3d 238 (noting that marshaling the evidence is “prudent tactical advice” because, generally, “[a]n appellant cannot demonstrate that the evidence supporting a factual finding falls short without giving a candid account of that evidence.”).

¶ 24 Defendant does not refer us to any case in which an appellate court has determined that evidence of a gunshot wound was insufficient to support a jury's finding. Rather, he cites a single case in which a defendant beat his victim into unconsciousness, stomped on the victim's head, and ripped out the victim's eyebrow ring. *Bloomfield*, 2003 UT App 3, ¶ 3, 63 P.3d 110. There, this court held that the evidence presented to the jury was sufficient to support the jury's finding that the defendant had caused serious bodily injury. *Id.* ¶ 18.

¶ 25 Defendant baldly asserts that his case “simply does not present facts” like those in *Bloomfield* and that the jury's finding of serious bodily injury here therefore must have been unreasonable. But he does not argue that *Bloomfield* marks the boundary between bodily injury and serious bodily injury. Thus, the fact that the evidence of a severe beating in that case was sufficient to sustain the jury's finding of serious bodily injury has no bearing on Defendant's claim that the evidence of a shooting in his case was not sufficient for the jury to find that he caused serious bodily injury.

¶ 26 In any event, Defendant fails to cite any authority suggesting that gunshot wounds do not or cannot create a substantial risk of death. On the contrary, a cursory search reveals several cases in which gunshot wounds to the leg have been fatal. See, e.g., *Hawkins v. Lafler*, No. 11-cv-11250, 2015 WL 2185970, at *1 (E.D.Mich. May 11, 2015) (after being shot in the leg, the victim ran away to take refuge in a house, where he died from blood loss); *Ostling v. City of Bainbridge Island*, 872 F.Supp.2d 1117, 1121 (W.D.Wash.2012) (a man was shot in the leg and then bled to death); *People v. Payton*, No. 257402, 2006 WL 548917, at *1-2 (Mich.Ct.App. Mar. 7, 2006) (per curiam) (noting that a defendant shot a victim in the leg, that “the natural tendency of such behavior is to cause death or great bodily harm,” and that the victim did in fact die). Even if the wound is not directly fatal, a gunshot to any part of the body can cause infections that lead to death. See, e.g., *People v. Fedora*, 393 Ill. 165, 65 N.E.2d 447, 455-56 (1946) (two doctors' opinions that a victim's death had been caused by peritonitis resulting from a gunshot wound were “sufficient evidence” to support a jury finding that the shooter was responsible for causing death); *State v. Davis*, 317 Mo. 272, 295 S.W. 96, 97-98 (1927) (testimony from two doctors that a victim's death had been caused by peritonitis resulting from being shot in the abdomen by the defendant approximately two months before death was “amply sufficient to support the verdict” of manslaughter); see also, e.g., *State v. Hamilton*, 16 N.C.App. 330, 192 S.E.2d 24, 25 (1972) (considering the admissibility of a doctor's opinion that a victim died from “pneumonia [that] was secondary to the peritonitis which was secondary to the gunshot wound.”); *State v. Nix*, No. C-030696, 2004 WL 2315035, at paras. 3, 16 (Ohio Ct.App. *741 Oct. 15, 2004) (victim died in hospital, after being shot in the abdomen, from “acute ischemic colitis with peritonitis” or “dying bowel due to inadequate vascular supply due to injur[ed] vessels due

to gunshot wound” (internal quotation marks omitted)); *Adams v. State*, 150 Tex.Crim. 431, 202 S.W.2d 933, 934 (1947) (noting that a decedent's death from peritonitis was traceable to a gunshot wound caused by the defendant, who was therefore guilty of capital murder). Because being shot can lead to death, it is not inherently unreasonable for a jury to find that a particular shooting resulted in serious bodily injury by creating a substantial risk of death.

¶ 27 We will vacate a defendant's conviction after a jury trial due to the insufficiency of the evidence only if we determine that the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt as to whether the defendant committed the crime of which he or she was convicted. *State v. Kennedy*, 2015 UT App 152, ¶ 39, 354 P.3d 775. Defendant has not demonstrated that a reasonable jury, after hearing evidence that Defendant fired a bullet that penetrated Victim's abdomen, scrotum, and leg, causing Victim to be hospitalized for three days, must have entertained a reasonable doubt as to whether Defendant created a substantial risk of death.

CONCLUSION

¶ 28 The trial court did not err by admitting Victim's preliminary hearing testimony to be read to the jury after determining that Victim was unavailable, because Defendant had a full opportunity to cross-examine Victim at the preliminary hearing. Defendant has failed to show that the evidence was insufficient to support a jury finding that Victim suffered serious bodily injury.

¶ 29 Affirmed.

VOROS, Judge (concurring in part and concurring in the result in part):

¶ 30 I concur in the majority opinion except as to Part II, in which I concur in the result only.

¶ 31 I would reject Pham's sufficiency challenge on marshaling grounds. True, our marshaling rule no longer requires the appellant to present “every scrap of competent evidence” supporting the verdict. See *State v. Nielsen*, 2014 UT 10, ¶ 43, 326 P.3d 645. But an appellant still bears the burden of persuasion. *Id.* ¶ 42. And to persuade a court that an injury was not so serious as to

satisfy the statutory definition of “serious bodily injury” an appellant must at minimum accurately describe the injury.

¶ 32 Here, Pham argues that Victim did not suffer serious bodily injury without acknowledging all the bodily injury Victim suffered. Pham states that Victim “testified that the bullet struck his leg.” In fact, the record shows that the bullet produced three wounds: it entered Victim's body above his penis on the right side, passed through

his scrotum on his left side, and lodged in his leg. The first two wounds are not mere “scraps” of evidence; they are additional evidence that Victim's injury qualified as serious. Without acknowledging them, Pham cannot show that the evidence of serious bodily injury fell short.

All Citations

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Addendum B

United States Code Annotated Constitution of the United States Annotated Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions I through XX are contained in this document. For Notes of Decisions for subdivisions XXI through XXIX, see the second document for Amend. VI. For Notes of Decisions for subdivisions XXX through XXXIII, see the third document for Amend. VI.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. VI-Jury trials, USCA CONST Amend. VI-Jury trials

Current through P.L. 114-254. Also includes P.L. 114-256.

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West's Utah Code Annotated
Constitution of Utah
Article I. Declaration of Rights

U.C.A. 1953, Const. Art. 1, § 12

Sec. 12. [Rights of accused persons]

Currentness

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.

Credits

Laws 1994, S.J.R. 6, § 1, adopted at election Nov. 8, 1994, eff. Jan. 1, 1995.

U.C.A. 1953, Const. Art. 1, § 12, UT CONST Art. 1, § 12
Current through 2016 Fourth Special Session.

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