

2017

**State of Utah, Plaintiff-Appellee, v. Miguel Hernandez,
Respondent-Appellant.**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff-Appellee,

v.

MIGUEL HERNANDEZ,

Respondent-Appellant.

CASE NO. 20160671-SC

AMICUS BRIEF OF THE UTAH ASSOCIATION OF CRIMINAL
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**AMICUS BRIEF OF THE UTAH ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS**

SUMMARY OF ARGUMENT

The district court erred in ruling that the defense was not entitled to subpoena as a witness the individual that is alleged to be the victim of the crime charged against the defendant. In doing so, that court violated the constitutional, statutory, and rules-based rights of defendant/appellant Miguel Hernandez (“Hernandez”). First, this case does not implicate the right of confrontation. Instead, it is controlled by the right to compulsory process, a related but separate right the defendant has. Compulsory process, that is, the defendant’s right to command the attendance and testimony of witnesses, is a right so fundamental that

is guaranteed in the Utah Constitution, as well as in statutes and court rules of our state.

Nothing in the law, not even the Victims' Rights Amendment to the Utah Constitution, operates to confine this right to the ultimate trial, but multiple provisions strongly indicate that it extends to preliminary hearings, as well. If the testimony to be taken from the subpoenaed witness is germane to the subject matter of the preliminary hearing, the subpoena seeking that testimony should be enforced. Moreover, nothing in the Victims' Rights Amendment or in the Rights of Crime Victims Act operates to immunize crime victims from being called as witnesses by the defense.

ARGUMENT

I. The Law Governing Confrontation of Witnesses Is Irrelevant to the Issue of Whether the Defense Has the Right to Compel the Attendance of Witnesses at a Preliminary Hearing

Before the district court, the State supported its motion to quash the subpoena issued by counsel for Hernandez by focusing, in part, on the right of confrontation at a preliminary hearing. The right of confrontation is the right of the defense (1) to require the state to produce before the court the witness that is providing the testimony in question and (2) to question that witness. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). The State was partially correct, though entirely irrelevant, in its argument below that there is no right of confrontation at a

preliminary hearing under either the federal or state constitution. *State v. Timmerman*, 2013 UT 58; *State v. Hattrich*, 2013 UT App 177, ¶ 30. The admission of a witness's prior recorded statement at a preliminary hearing (as done in both *Timmerman* and *Hattrich*) denies the defendant the opportunity to confront the witness but, under the current state of the law, that does not itself violate that defendant's constitutional rights if the witness's testimony is presented through reliable hearsay that complies with the requirements of the applicable evidentiary rules. Specifically, the introduction of prior recorded statements is allowed both by the rules of procedure and evidence and the relevant constitutional provisions. Utah R. Crim. P. 15.5; Utah R. Evid. 1102; Utah Const. art. I, § 12.¹ In this case,

¹ In 1994, the Victims Right Amendment was adopted as part of the Utah Constitution. Utah Const., art. I, § 12 ("1994 Amendment"). That amendment added a provision that specifically limited the constitutional right to the confrontation of witnesses against the defendant at the preliminary hearing by allowing the use of reliable hearsay evidence. Rule 1102 of the Utah Rules of Evidence was promulgated with the purposes of implementing this constitutional amendment and it defines the circumstances that must be met before proposed hearsay evidence may be admitted at a preliminary hearing. To the extent that the hearsay evidence proffered by the prosecution is either not reliable or does not comply with the requirements of Rule 1102, the right of confrontation still prevails at the preliminary hearing. Additionally, to the extent that the prosecution presents evidence through the testimony of a live witness, the defendant still has the right to cross examine that witness at the preliminary hearing.

As more directly relevant to the issue now before the Court, the advisory committee note to Rule 1102 states expressly: "Either party is at liberty to subpoena and call any live witnesses whose testimony would be germane to the determination of probable cause." In other words, the contraction of the right of

unlike in *Timmerman* and *Hattrich*, the defense is not arguing against the introduction of the recorded interview or other out-of-court statement of the alleged victim and therefore is not asserting a violation of the right to confront.

Instead, Hernandez has the right to compulsory process, a right that is separately enshrined in both the federal and state constitutions and in statute and court rule. The State below confused this right with the right of confrontation. In neither *Timmerman* nor *Hattrich* did the defense issue subpoenas to any of the witnesses or otherwise attempt to secure their presence.² In this case, the defense issued a properly-drawn subpoena to the alleged victim of the crime. The State argued, and the district court held, that Hernandez was not within his rights to do so. As shown below, this is inconsistent with the rules-based, statutory, and constitutional rights of the accused.

confrontation at preliminary hearings was based in part on the understanding that the right of compulsory process would not be denied to the defendant.

² In *Hattrich*, the defense, upon learning immediately prior to the preliminary hearing that the State intended to present the written statement of a witness and not call the witness to testify, moved the court to continue the hearing so that they could issue a subpoena to and require the attendance of the witness, a motion the court provisionally denied. *Hattrich*, 2013 UT App 177, ¶ 27. The defense never renewed the motion. *Hattrich* is distinguishable from the instant case in that there the defense did not take available steps prior to (or even after) the scheduled preliminary hearing to secure the witness's attendance and thereby waived the compulsory process issue.

II. The Right of Compulsory Process Is Fundamental to a Defendant's Right to a Preliminary Hearing

A. The Right of Compulsory Process for a Preliminary Hearing Is Rooted in the Utah Constitution

Both the state and federal constitutions include provisions guaranteeing the defense the right “to have compulsory process to compel the attendance of witnesses in his own behalf.” Utah Const. art. I, sec. 12; *accord* U.S. Const. amend. VI (guaranteeing the right “to have compulsory process for obtaining witnesses in his favor”).³ The right to compulsory process is necessary to the proper functioning of the adversary process. As the United States Supreme Court reasoned:

We have elected to employ *an adversary system of criminal justice* The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. *The very integrity of the judicial system and public confidence in the system depend on full disclosure* of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution *or by the defense*.

United States v. Nixon, 418 U.S. 683, 709 (1974) (emphases added). In that case, admittedly in a context different than the one now before this Court, the High Court held that the right of compulsory process was so fundamental to the

³ The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-18 (1967).

processes of justice that it outweighed the President's invocation of executive privilege. The value of a judgment based only on partial or speculative facts will be "defeated." Even at the preliminary hearing stage, we should be loath to so limit our judicial process.

Without compulsory process, one cannot be sure that the result reached in a proceeding has any basis in reality. That it is a preliminary hearing rather than a trial should not change the ultimate goal of the criminal process – finding the truth. After all, the function of a preliminary hearing is to "ferret[] out groundless and improvident prosecutions" and to prevent "the substantial degradation and expense incident to a modern criminal trial when the charges against him are unwarranted or the evidence insufficient." *State v. Virgin*, 2006 UT 29, ¶ 20 (quoting *State v. Anderson*, 612 P.2d 778, 783-84 (Utah 1980) (internal quotation marks omitted)). In doing so, the magistrate is empowered to make certain credibility determinations. *Id.* ¶¶ 23-24 (holding that magistrates may make credibility determinations "limited to determining that evidence is wholly lacking and incapable of reasonable inference to prove some issue" (internal quotation marks omitted)). A magistrate cannot be expected to carry out this task in a vacuum. But that is exactly what the magistrate will be required to do if subpoena power is not available to the defendant for use at the preliminary hearing.

Indeed, without the availability of compulsory process, a proceeding cannot truly be said to be adversarial in nature. *See Faretta v. California*, 422 U.S. 806, 818 (1975) (citing *California v. Green*, 399 U.S. 149, 176 (1970) (Harlan, J., concurring)). Since the preliminary hearing in Utah is an adversarial proceeding,⁴ the right of compulsory process is necessary. Without it, the preliminary hearing would be reduced virtually to the point of being a one-side determination of probable cause, an ex parte proceeding, with the defendant and his counsel merely looking on as passive observers. *See State v. Brooks*, 638 P.2d 537, 540 (Utah 1981) (quoting *State v. Anderson*, 612 P.2d 778, 783 (Utah 1980)). Since the advent of the “1102 statement,”⁵ Utah R. Evid. 1102, and the “CJC interview,”⁶ Utah R. Crim. P. 15.5, that is precisely what may and likely will happen if the right of the defendant to compel the attendance of witnesses is denied.

⁴ *See, e.g., State v. Virgin*, 2006 UT 29, ¶ 31; *State v. Clark*, 2001 UT 9, ¶ 16 n.3; *State v. Talbot*, 972 P.2d 435, 438 (Utah 1998); *State v. Brooks*, 638 P.2d 537, 540 (Utah 1981); *State v. Anderson*, 612 P.2d 778, 783, 785 (Utah 1980).

⁵ An “1102 statement” is a statement signed under oath and subject to the penalty of perjury or certain other out-of-court statements that are deemed to be reliable and therefore admissible at a preliminary hearing even if the declarant is not present before the court. Utah R. Evid. 1102.

⁶ A “CJC interview” is an interview of an alleged child victim of physical or sexual abuse conducted and recorded at the “Children’s Justice Center” in accordance with the provisions of Rule 15.5 of the Utah Rules of Criminal Procedure. If those requirements are met, that recorded interview may be introduced into evidence at the preliminary hearing, even if the child victim is not called by the State as a witness at the hearing.

In the *Brooks* case, at trial the defendant objected to the admission into evidence of the preliminary hearing testimony of the victims of the alleged crime, who were not present at the trial, without first determining whether that testimony was reliable. The court held that the preliminary hearing itself provided the needed indicia of reliability to allow the recorded testimony of the absent victims to be admissible. Specifically, the court held that two specific aspects of the preliminary hearing help assure reliability, namely, the defendant's right of cross examination and his right to subpoena and present witnesses. *Brooks*, 638 P.2d at 540 (quoting *Anderson*, 612 P.2d at 783). The application of these "basic procedural safeguards" is needed to allow the preliminary hearing to retain its basic purpose of terminating improvident prosecutions at or near the inception. Since the requirement for the first of these two factors has now been limited,⁷ the importance of the second, the defendant's right to compel the attendance of witnesses, has grown even more in importance.

To ensure that the evidence presented at the preliminary hearing is in fact reliable, the defendant should be free to call witnesses that will show that the "reliable hearsay evidence" cannot be true. For instance, "reliable hearsay" may be admitted at the preliminary hearing accusing the defense of committing the alleged

⁷ See the discussion of the 1994 Amendment in footnote 1, *supra*, and in Section IV, below.

crime at a particular time and location. To test the reliability of that evidence, the defense should be allowed to call witnesses and subpoena documents that would show beyond question that the defendant was at another location at the specific time of the alleged crime.⁸ If the defense is not allowed to compel the attendance of witnesses that have such evidence, the purpose of the preliminary hearing is largely defeated. This applies whether the person to whom the subpoena is issued is an unrelated third party or the alleged victim of the crime.

B. Utah's Statutory and Rules-Based Law Also Guarantees a Defendant at a Preliminary Hearing the Right of Compulsory Process

The importance of the right of compulsory process as explained above is recognized by our state's statutes and rules, as well. First, "[i]n criminal prosecutions the defendant is entitled . . . (e) [t]o have compulsory process to insure the attendance of witnesses in his behalf." Utah Code Ann. § 77-1-6(1). This right is one of several rights guaranteed by this section of the Utah Code. Among the others are the right to appear and defend in person or by counsel, to receive a copy of the charges, to testify in one's own behalf, to be confronted by

⁸ Of course, there might be times when such evidence merely raises a question of fact that a factfinder should resolve after a full trial. In other instances, however, the evidence subpoenaed by the defense and introduced at the preliminary hearing may be so compelling as to justify the magistrate in determining that the allegations in the "reliable hearsay evidence" are so lacking in credibility that it cannot be considered on the question of probable cause. *Virgin*, 2006 UT 29, ¶¶ 23-24.

the witnesses against one, and the right of appeal. Utah Code. Ann. § 77-1-6(1).

Nothing in this section limits these rights to the time of trial.⁹

Additionally, Rule 7 of the Utah Rules of Criminal Procedure specifically provides the defendant the right of compulsory process in the case of a preliminary hearing.

Unless otherwise provided, a preliminary examination shall be held *under the rules and laws applicable to criminal cases tried before a court*. The state has the burden of proof and shall proceed first with its case. At the conclusion of the state's case, *the defendant may* testify under oath, *call witnesses*, and present evidence. The defendant may also cross-examine adverse witnesses.

Utah R. Crim. P. 7(i)(1) (emphases added). The meaning of this rule is clear.

First, the preliminary hearing is to be conducted under the same rules as govern a bench trial. It is beyond argument that a defendant has the right at trial to subpoena witnesses and to use them to present evidence as he may choose, subject to reasonable limitations based on, for instance, relevance, harassment, and

⁹ The two rights in this section that are or may be limited, in whole or in part, to the time of trial are (1) the right to a speedy and public trial by an impartial jury (rights that by definition are intrinsically intertwined with the trial itself, as opposed to other hearings) and (2) the right of confrontation. At the time this statute was last amended, in 1980, the right of confrontation also applied fully to preliminary hearings. It is only because of the subsequent adoption of the 1994 Amendment that the right of confrontation has a more limited application at preliminary hearings. See footnote 1, *supra*. Accordingly, at the time this statute was enacted or last amended, the legislature understood and intended that the right of compulsory process would apply in contexts beyond the trial itself.

cumulativeness. Under the first sentence of Rule 7(i)(1), if a defendant may do so at trial, he is likewise entitled to do so at the preliminary hearing.

If that were not clear enough, under the penultimate sentence of that subparagraph, the accused has the right to call witnesses. This right is not limited to those witnesses that are sufficiently friendly to the accused that they will appear voluntarily. That interpretation would be at odds with all other provisions of law and with the purpose of the preliminary hearing. To take advantage of this right, a defendant must have the right to compel the attendance and testimony of witnesses that might not wish to appear for or at the call of the defendant.

The scope of a defendant's Rule 14(a)(2) subpoena power specifically extends to witnesses for hearings, including victims of crimes. "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)."¹⁰ Accordingly, only

¹⁰ The first subsection of Rule 14(b) provides:

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.

subpoenas directed toward the production of records related to a victim are excluded from the scope Rule 14(a)(2). The drafters of this rule clearly knew how to draft an exception to the scope of the defendant's subpoena power because they actually did draft such an exception. That exception, however, only extends to certain records and did not reach individuals.

Although it is true that Rule 14(a)(2) gives the court the power to quash a subpoena if it is unreasonable, the state must bear the burden of proving that a particular subpoena is unreasonable.¹¹ In this case, the only argument advanced by the State as to the supposed unreasonableness of Hernandez's subpoena is the fact that it was directed toward an alleged victim. If that is all that is required to show unreasonableness, the rule would have been drafted to exclude victims *and* victim's records from its scope.

Instead, a court should determine a subpoena to be "unreasonable" only if it determines that:

Utah R. Crim. P. 14(b)(1). The remaining subsections of Rule 14(b) provide the procedures for a defendant to obtain the court order provided for by Rule 14(b)(1). They do not provide other exceptions to Rule 14(a).

¹¹ The structure of this provision makes it clear that the burden of proof is on the government. If the drafters had intended that the defendant bear the burden, they would have drafted the rule more like the provisions of Rule 14(b), which restrict the defendant's ability to gain access to records concerning a victim unless and until the court first approves.

- The subpoenaed party has no relevant information to provide the court concerning the matter;
- The subpoenaed witness's testimony is wholly cumulative;
- The sole purpose in issuing the subpoena is to threaten, intimidate, harass, or badger the witness;
- The subpoena is procedurally improper (e.g., it does not comply with the requirements of Rule 14(a) of the Utah Rules of Criminal Procedure or Rule 45 of the Utah Rules of Civil Procedure¹²);
- The subpoena calls for the disclosure of privileged information; or
- Other improper purpose underlies the issuance of the subpoena.¹³

Failure to limit the meaning of the term “unreasonable” to these circumstances, and extending it to include any subpoena issued to a victim (or even to a child victim)

¹² Rule 45 of the civil rules has been held to be applicable to criminal matters. *See State v. Gonzales*, 2005 UT 72, ¶¶ 26-41 (holding that under Rule 45 a defendant must give notice to the prosecution of the issuance of a subpoena duces tecum); *State v. Yount*, 2008 UT App 102, ¶¶ 11-16 (holding that under Rule 45 the state must give notice to the defendant of the issuance of a subpoena duces tecum seeking production of the defendant's medical records); *accord In re Criminal Investigation*, 738 P.2d 1027 (Utah 1987) (holding that the state must pay the costs required by Rule 45 when issuing a subpoena as part of its criminal investigation).

¹³ Of course, that a subpoena may be unreasonable under one of these categories would not preclude the enforcement of the subpoena if to deny enforcement would violate the defendant's constitutional right to compulsory process. *See* Section II.A., above.

witness would violate the plain meaning of Rule 14, especially when all of its provisions are read together.

In the case now before the Court, the State has not shown that the enforcement of the defendant's subpoena would in any way be unreasonable. There is nothing in the record to indicate that the subpoena is seeking the disclosure of evidence that is not relevant or material to the proceedings. Indeed, all indications are that the defense wishes to question the witness concerning the very events that are alleged to be the basis for the charges now pending. Nor does the defense seek evidence that is wholly cumulative. Similarly, the State has not pointed to any procedural default in the subpoena and it is not aimed at obtaining privileged information. Nor is there any basis in the record to believe that Hernandez is seeking by the subpoena to threaten, intimidate, harass, or badger the witness.

III. That the Subpoenaed Witness's Testimony May or May Not Defeat Bindover Does Not Control This Issue

A. The Procedural and Evidentiary Rules Specifically Contemplate the Subpoenaing of Witnesses by the Defense

As noted above, Rule 7 of the Utah Rules of Criminal Procedure specifically provides (1) that preliminary hearings shall be conducted under the same rules applicable to trials, and (2) that the defense may call witnesses of its choosing as part of presenting its defense. Of course, no one would read this to mean that the

Court must enforce subpoenas served on individuals that have no knowledge of any facts related to the case to be heard. A defendant's subpoenas should, however, be enforced as long as they are "germane" to the issues on which probable cause will depend. *See* Utah R. Evid. 1102 advisory committee note ("Either party is at liberty to subpoena and call any live witnesses whose testimony would be germane to the determination of probable cause."). The term "germane" is not defined by Rule 1102 or by the advisory committee note but it does have a well-recognized meaning: "2: being at once relevant and appropriate: FITTING." Merriam-Webster's Collegiate Dictionary 489 (10th ed. 1998); *accord* Black's Law Dictionary 687 (6th ed. 1990) ("In close relationship, appropriate, relative, pertinent. Relevant to or closely allied").

That an alleged victim's testimony about the event on which the crime charged is based is "germane" under these definitions cannot be reasonably argued. Any testimony that an alleged victim might give concerning the events comprising the charged crime are necessarily germane. In addition to anything else that might come of it, virtually any testimony given by an alleged victim will have a bearing on that witness's credibility. Such testimony is material – is germane – to the case. Such testimony is relevant to the crimes alleged. Such testimony is in close relationship to the testimony to be provided under Rule 1102. Such testimony is pertinent and appropriate.

Accordingly, nothing in Rules 7 or 14 of the Utah Rules of Criminal Procedure precludes the enforcement of subpoenas issued by the defendant to an unwilling witness as a general matter. Rather, every provision of those rules requires the enforcement of such a subpoena if it is designed to produce germane evidence, unless and until the state shows that the subpoena is “unreasonable.” The subpoena issued by the defense in this case was designed to elicit germane evidence and was not in any way unreasonable.

B. The Discovery Function of the Preliminary Hearing Requires the Defense to Have the Right to Compel the Attendance of Witnesses

In addition, the preliminary hearing has traditionally served as a means for the defense to obtain discovery.

Several ancillary purposes supplement the primary purpose of the hearing. The examination provides a means of effectively advising the defendant of the nature of the accusations against him. The hearing also provides a discovery device in which the defendant is not only informed of the nature of the State's case against him, but is provided a means by which he can discover and preserve favorable evidence.

The discovery available at the preliminary hearing represents an important step in the preparation of the defendant's defense for the subsequent trial. The opportunity to prepare an effective defense is recognized as essential to the preservation of the defendant's substantive right to a fair trial. Thus, here again, effectuation of the ancillary purposes of the preliminary hearing mandates the application of certain procedural safeguards to the hearing itself.

State v. Anderson, 612 P. 2d 778, 784 (Utah 1980) (emphasis added).

In the court below, the alleged victim argued that the discovery purpose had been eliminated by the 1994 Amendment. This Court, however, has recognized the ongoing right of the defendant to use the preliminary hearing as a means of discovery. In *State v. Talbot*, 972 P. 2d 435 (Utah 1998), this Court reaffirmed that ancillary purpose. After referring to the hearing's primary purpose of determining probable cause, this Court stated, "Second, and independently, the preliminary hearing acts as a discovery device advising the accused of the details of the charges and preserving favorable evidence." *Id.* at 438 (*citing Anderson*, 612 P.2d at 784). Accordingly, regardless of the arguments presented by the alleged victim, this Court has already held that discovery remains a viable purpose underlying the preliminary hearing.

Despite this ongoing purpose of the preliminary hearing, that purpose would be virtually nullified if, after the restriction on the right to confrontation created by the 1994 Amendment to article I, section 12 of the Utah Constitution, the Court were to hold that there is no right to compulsory process either. Without the right to require the state to require the appearance of witnesses that provide "reliable hearsay," without the right to cross-examine such witnesses, and without the right to compel the attendance of such witnesses themselves or others, defendants are left with nothing but what the state chooses to dole out grudgingly, sufficient only to meet the *prima facie* standard of probable cause. That is not how an adversarial

system is meant to work. And if that is how a preliminary hearing is required to work, it is no longer adversarial.

Preliminary examinations in Utah are adversarial proceedings Therefore, conflicting evidence may be expected. As is appropriate in an adversarial proceeding, the accused is granted . . . the right to subpoena and present witnesses in his defense.

Talbot, 972 P.2d at 438 (internal quotation marks and citations omitted; first alteration in original).

IV. Calling an Alleged Victim as a Witness at a Preliminary Hearing Does Not Violate the Alleged Victim's Rights

As noted above, in 1994, Utah amended its constitution with the Utah Victims' Rights Amendment, the 1994 Amendment. That amendment added a new paragraph to section 12 of article I, which paragraph provides:

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.

Utah Const. Art. I, § 12. By its express terms, this amendment abrogated the right of a defendant to confront the witnesses against him or her at a preliminary hearing to the extent that reliable hearsay evidence that complies with the requirements of Rule 1102 of the Utah Rules of Evidence is introduced. This is because a prior

recorded statement, which in the identified circumstances is expressly admissible, cannot be cross examined. Instead, the amendment allows for the introduction of “reliable hearsay” for the purpose of determining probable cause, a fact that necessarily prevents confrontation through cross examination.

Nothing in this amendment, however, expressly addresses the right of compulsory process.¹⁴ Indeed, nothing in the amendment addresses the issuing of subpoenas by either the prosecution or the defense. Given the constitutional rights (as well as statutory and rules-based rights) that are at issue here, it should not be presumed that it was the intent of the drafters of the amendment to nullify a defendant’s right to compulsory process.

Giving such an interpretation to the 1994 Amendment would severely undermine the fundamental purpose of the preliminary hearing, that is, the early

¹⁴ Indeed, as noted above, the advisory committee’s note to this amendment’s implementing “legislation,” i.e., Rule 1102 of the Utah Rules of Evidence, specifically disclaimed such intent. Utah R. Evid. 1102 advisory committee note (“Either party is at liberty to subpoena and call any live witnesses whose testimony would be germane to the determination of probable cause.”). The actions of those implementing constitutional provisions are often considered as reasonable guides to the intent underlying the constitutional provision. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (considering the fact that the first Congress adopted the death penalty for certain crimes in determining whether the death penalty violated the Fifth Amendment, which was passed by that same Congress); *Bors v. Preston*, 111 U.S. 252, 256-57 (1884) (in construing the provisions of Article III of the United States Constitution, the court analyzed the Judiciary Act of 1789, which was adopted by the First Congress, many of whose members had been part of the constitutional convention).

terminating of unfounded prosecutions before they have the effect of substantially injuring persons in their reputation, their property, and their liberty, when there is no legitimate basis for such a prosecution. When a constitutional amendment implicates a previously-existing constitutional right, unless the amendment is absolutely clear that it intends to abrogate that right, the Court should strive to harmonize the two constitutional provisions. *See, e.g., Felix v. Milliken*, 463 F. Supp. 1360, 1384 (E.D. Mich. 1978) (construing Michigan's constitutional prohibition on alcoholic beverages as not to prohibiting the sacramental use of alcohol so as to be consistent with the First Amendment guarantee of the right of free exercise of religion).

In summary, the rights of victims, whether found in our state constitution or in our statutes do not immunize such person from being subject to subpoena, whether issued by the state or the defense.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's order quashing the subpoena.

DATED this 21st day of July, 2017.

UTAH ASSOCIATION OF CRIMINAL
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/S/ Stewart Gollan

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing AMICUS BRIEF OF THE UTAH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS complies with the type-volume limitations of Rule 24(f)(1) of the Utah Rules of Appellate Procedure. Specifically, I certify that, according to the word count of MS Word, the foregoing brief (including headings, footnotes and quotations but excluding the cover page, table of contents, table of authorities, certificates of service and compliance, and addenda) contains 5,165 words.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Amicus Brief of the Utah Association of Criminal Defense Lawyers** to be mailed, first-class, postage prepaid, this 21st day of July, 2017, to the following:

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