

1991

# Utah v. Roberts : Brief of Appellee

Utah Supreme Court

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910164

## IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:
Plaintiff/Appellee,	: Case No. 910164
v.	: Category No. 2
KENNETH GLENN ROBERTS,	:
Defendant/Appellant,	:

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## BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION OF AGGRAVATED  
 ASSAULT BY A PRISONER, A FIRST DEGREE FELONY,  
 IN VIOLATION OF UTAH CODE ANN. § 76-6-103.5  
 (1990), IN THE THIRD JUDICIAL DISTRICT COURT  
 IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,  
 THE HONORABLE SCOTT DANIELS, PRESIDING.

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**FILED**

NOV 14 1991

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 UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:
Plaintiff/Appellee,	: Case No. 910164
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KENNETH GLENN ROBERTS,	:
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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff-Appellee, : Case No. 910164  
v. :  
KENNETH GLENN ROBERTS, : Category No. 2  
Defendant-Appellant. :

---

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of aggravated assault by a prisoner, a first degree felony, in violation of Utah Code Ann. § 76-5-103.5 (1990). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2-2(3)(i) (Supp. 1991), because the appeal is from a district court in a criminal case involving a first degree felony.

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did the trial court deprive defendant of a due process right to present his defense when it ruled as a matter of law that the defense of compulsion was not available to him? Because the court ruled as a matter of law that the evidence was insufficient to allow evidence of the defense, the issue is a legal conclusion and reviewed for correction of error. State v. Mitchell, 779 P.2d 1116, 1123 (Utah 1989).

2. Did the trial court correctly determine that the defense of compulsion was not available to defendant in this case

as a matter of law? This issue is a legal conclusion which is reviewed for correction of error, but any subsidiary factual determinations are reviewed under a clearly erroneous standard. State v. Ramirez, 159 Utah Adv. Rep. 7, 16 n.3 (Utah April 23, 1991).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies are included in the body of this brief.

#### STATEMENT OF THE CASE

On March 30, 1990, defendant was charged with aggravated kidnapping, a first degree felony, in violation of Utah Code Ann. § 76-5-302 (1990); and aggravated assault by a prisoner, a first degree felony, in violation of Utah Code Ann. § 76-5-103.5 (1990) (Record [hereafter R.] at 6-8).

Trial was set originally for November 26, 1990, in the Third Judicial District Court for Salt Lake County, the Honorable Scott Daniels, judge, presiding (R. at 18). On November 30, 1990, trial was re-scheduled for January 22, 1991 (R. at 19). On January 9, 1991, defendant filed a subpoena for the director of the Utah State Department of Corrections (R. at 20). Five days later, counsel for the director filed a motion to quash the subpoena on the bases of improper service and unreasonableness (R. at 22-32). Also on January 14, 1991, defendant filed subpoenas and subpoenas duces tecum for eight other individuals involved in the Department of Corrections (R. at 33-40). At a hearing conducted on January 17, 1991, Judge Daniels granted a

motion to quash all of the subpoenas and granted defendant's motion to continue the trial (R. at 41). The court also ruled that the evidence and witnesses sought by defendant through these subpoenas were irrelevant to defendant's case and that the defense of compulsion was not available as a matter of law in defendant's factual circumstance (Transcript of hearing 1/17/91 [hereafter T.] at 19-20; a copy of the transcript is attached as the Addendum). On March 8, 1991, defendant entered a guilty plea to aggravated assault by a prisoner, conditioned on taking this appeal of the court's prior ruling (R. at 80 and transcript of hearing 3/8/91 at 3-4). Defendant was immediately sentenced to a term of five years to life in the Utah State Prison, to be served concurrently with the sentences he was already serving (R. at 88).

#### STATEMENT OF THE FACTS

The facts pertinent to this matter are contained in the Statement of the Case and the body of the brief.

#### SUMMARY OF THE ARGUMENT

Defendant's right to present his defense is not an absolute right. If he has not proffered or presented sufficient evidence of the elements of the defense to raise it, the trial court may, as a matter of law, preclude defendant from presenting the defense.

The evidence proffered by defendant did not meet the elements of the defense of compulsion; consequently, the defense was not available to defendant.



## ARGUMENT

### POINT I

THE TRIAL COURT DID NOT DEPRIVE DEFENDANT OF ANY DUE PROCESS RIGHT BY RULING AS A MATTER OF LAW THAT THE DEFENSE OF COMPULSION WAS NOT AVAILABLE TO DEFENDANT.

Defendant first claims that he was deprived of a due process right to present his defense when the court determined as a matter of law that the defense of compulsion was not available to defendant in this factual circumstance. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532 (1984). This right was recognized by this Court in State v. Harding, 635 P.2d 33 (Utah 1981), when it said:

[W]e start with the proposition that the defendant's right to present all competent evidence in his defense is a right guaranteed by the due process clause of our State Constitution, Art. I, Sec. 7, as well as our Federal Constitution, 14th Amendment. It is also axiomatic that where the defendant has asserted a defense to justify or excuse the criminal charge, and where there is reasonable basis in the evidence to support it, the viability of the defense then becomes a question of fact and the jury should be charged regarding it. Where, however, there is no reasonable basis in the evidence to support the defense or its essential components, it is not error for the trial judge to either refuse to instruct the jury as to the defense, or to instruct them to disregard it. . . .

The question for this Court to determine is whether there was sufficient credible evidence in support of the defense of compulsion to justify instructing the jury thereon.

Id. at 34 (emphasis added) (citations omitted). In State v. Hendricks, 596 P.2d 633 (Utah 1979), this Court also stated:

It is a basic legal premise that a defendant in a criminal case is entitled to have his theory of the case presented to the jury. However, the right is not absolute, and a defense theory must be supported by a certain quantum of evidence before [the jury may be instructed on it].

Id. at 634 (footnotes omitted). While recognizing a defendant's right to present his defenses, this Court has also recognized that the right is not absolute. Defendant must proffer sufficient credible evidence in support the defense to justify the defense being presented to a jury. Obversely, if he has not proffered sufficient credible evidence to support the defense, the trial court may properly preclude him from presenting that defense.

The Court of Appeals for the Tenth Circuit addressed a similar situation, involving the defense of entrapment, in United States v. Ortiz, 804 F.2d 1161 (10th Cir. 1986). Ortiz had sought to assert the defense at trial but the district court did not allow him to because there was no evidence to support the defense. Id. at 1163. The circuit court said:

It is well established that a defendant is entitled to have a jury consider any defense which is supported by the law and has sufficient foundation in the evidence to create a genuine issue of fact. . . . This right is so important that the failure to

allow a defendant to present a theory of defense which is supported by sufficient evidence is reversible error. . . . Evidence is sufficient to put a theory of defense before a jury if it creates a genuine factual dispute. When the evidence presents no genuine dispute, there is no factual issue for the jury, and the district court has a duty to rule on the defense as a matter of law. . . .

Just as a court may find entrapment "as a matter of law" when the evidence satisfying the elements of entrapment is uncontradicted, it also may conclude "as a matter of law" that the evidence is insufficient to create a triable issue. Thus, whether there is evidence sufficient to constitute a triable issue of entrapment is a question of law.

Id. at 1163-64 (citations omitted). See also United State v. Campbell, 609 F.2d 922, 924 (8th Cir. 1979), cert. denied, 445 U.S. 918, 100 S.Ct. 1282 (1980) ("If evidence is introduced, but it is apparent that all of the requirements of the coercion defense are not addressed, the trial court is not obligated to allow the evidence to remain for consideration by the jury").

The right to present a specific defense is not absolute. If a defendant has not proffered or presented enough evidence of the elements of the defense to even raise it, the trial court has a duty to refuse to allow defendant to present the defense. As will be addressed in Point II, the trial court correctly concluded that defendant had not proffered sufficient evidence of the elements of the defense of compulsion to raise the defense.

At the pretrial hearing on the motion to quash subpoenas, the attorney for the subpoenaed witnesses argued that the subpoenas had not been served properly because they were not

served personally and because they were not served timely (T. at 4 and 6-7). The trial court found that service had not been properly done and quashed the subpoenas on that basis (T. at 19-20). After the attorney for the witnesses addressed the court, the deputy county attorney argued that the testimony to be provided by these witnesses was not relevant to the case (T. at 7-8). In response to this argument, defendant proffered the evidence which he intended to elicit from the witnesses in support of his claimed defense of compulsion (T. at 13-16). The court required defendant to specifically address the question of the relevance of each witness (T. at 16). Taking the witnesses individually, defendant proffered what each would testify and the relevance of that testimony to his claimed defense (T. at 16-18). After hearing this proffer of the full testimony that defendant expected from the witnesses, the trial court concluded that the testimony would not support the claim of compulsion as a matter of law and thus was irrelevant. Because the evidence was irrelevant, the court concluded that the evidence was not admissible and defendant would not be allowed to put it on (T. at 20). The trial court did not preclude defendant from presenting a defense. Based on defendant's proffer, the court determined that the evidence was irrelevant and inadmissible. Defendant did not seek to elaborate on his proffer or call the witnesses to demonstrate that the evidence was relevant; instead, he pled guilty and filed this appeal.

## POINT II

THE TRIAL COURT PROPERLY FOUND THAT THE DEFENSE OF COMPULSION DID NOT APPLY TO DEFENDANT'S CASE.

Defendant's next claim is that the trial court improperly concluded that defendant's proffered evidence was not relevant and therefore, the defense of compulsion was not a viable defense as a matter of law in this case (T. at 20).

The defense of compulsion (also known as duress) is codified in Utah Code Ann. § 76-2-302 (1990):

(1) A person is not guilty of an offense when he engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would not have resisted.

Utah courts have not addressed the defense of compulsion in the context of aggravated kidnapping and aggravated assault by a prisoner. However, language from this Court and from courts from other states in prison cases are helpful in analyzing this claim. In an escape case, this Court, in State v. Tuttle, 730 P.2d 630 (Utah 1986), examined the defense of compulsion under the common law and the Utah criminal code. Although the legislature "abandoned" the common law when it codified Utah criminal law, this Court considered itself "free to refer to [the common law] for such interpretive assistance as it may offer" when the differences between the common law and the code were "largely technical." Id. at 633. Finding the differences between common law and the criminal code in the realm

of the defense of compulsion or duress to fall within this category, this Court sought guidance in the common law for analyzing the use of this defense. This Court found no Utah cases construing the defense in the context of an escape charge; however, it approved the trial court's reliance on cases from other jurisdictions in fashioning a jury instruction incorporating this defense. Id. Specifically, this Court approved the use of a test delineated in People v. Lovercamp, 43 Cal.App.3d 823, 118 Cal.Rptr. 110 (Cal.App. 4th Dist. 1974), which "has been widely followed since it was published." Tuttle, 730 P.2d at 633. These other jurisdictions had, like Utah, found "that their statutes were inadequate to respond to the exigencies of an escape situation." Id. While the present case does not involve an escape charge, the exigencies of the kidnapping and assault by a prisoner charges also require an atypical review of the duress defense.

In Tuttle, this Court determined that the trial court was correct in applying a modified Lovercamp test in instructing the jury and affirmed Tuttle's conviction. Id. at 634-35. The Lovercamp test approved in Tuttle states:

[W]e hold that the proper rule is that a limited defense of necessity [or compulsion or duress] is available if the following conditions exist:

(1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;

(2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;

(3) There is no time or opportunity to resort to the courts;

(4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and

(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

Lovercamp, 43 Cal.App.3d at 831-32, 118 Cal.Rptr. at 115. The Kansas Court of Appeals adopted and modified this test in State v. Pichon, 15 Kan.App.2d 527, 811 P.2d 517, 522-23 (Kan.App. 1991) (listing jurisdictions which have or have not applied the Lovercamp test). The Kansas court modified the first paragraph to read, "The prisoner is faced with a threat of imminent infliction of death or great bodily harm," in order to comport with the statutory compulsion defense in Kansas. Id. at 523.

In a case factually similar to the present one, the North Carolina Court of Appeals found no error in the kidnapping convictions of three co-defendants. In State v. Little, 67 N.C. App. 128, 312 S.E.2d 695 (N.C.App.), review denied, 311 N.C. 307, 317 S.E.2d 905 (1984), defendants had seized control of an area of the prison in which they were incarcerated. Using weapons, they held guards and inmates hostage for nearly forty-eight hours. Id. at 696. As in the present case, defendants sought to subpoena the records of the Department of Corrections; however, the trial court quashed the subpoenas and ruled that duress could not be raised as a defense in that case. Id. at 697. Citing North Carolina law, the court said "'[I]n order to constitute a defense to a criminal charge other than taking the life of an innocent person, the coercion or duress must be *present, imminent*

or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done.'" Id. at 698 (quoting State v. Kerns, 27 N.C.App. 354, 357, 219 S.E.2d 228, 230-31 (1975) (emphasis added in Little). The court quoted the Lovercamp test, adopted in North Carolina in State v. Watts, 60 N.C.App. 191, 298 S.E.2d 436 (1982), then stated:

It is true that defendants' acts of kidnapping and holding hostage prison officials do not fit neatly into the scheme of things envisioned by Watts. For example, the fourth and fifth conditions set forth in Watts [Lovercamp] are clearly inapplicable to the facts of this case. We need not decide if judicial surgery or alchemy is necessary to transform conditions four and five into useful requisites when inmates kidnap and hold prison officials hostage because the defendants, in this case, did not even satisfy the first three conditions of Watts [Lovercamp].

Little, 312 S.E.2d at 698. The court further held that there was no error when the trial court quashed defendants' subpoenas.

When defendants sought a subpoena requiring production of information about the existence of weapons in certain cell blocks, prisoners' assaults on other prisoners, and emotional and psychiatric complaints of prisoners, all with the apparent aim of showing "deplorable conditions" at Central Prison as justification for the three defendants taking prison employees hostage, the trial court held that "there is no law to allow the defense of duress or coercion *in this case on this charge* of kidnapping[.] . . . The trial court correctly held on the facts of this case that the general prison conditions at Central Prison provided defendants with no defense to the charge of kidnapping and holding hostage prison officials and inmates.

Id. at 699 (emphasis in original).



The first condition of the Lovercamp test is that "[t]he prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future." This condition translates to "was coerced . . . by the use or threatened imminent use of unlawful physical force upon him or a third person" in the Utah compulsion statute. Utah Code Ann. § 76-2-302. As the Arizona Court of Appeals said in State v. Lamar, 144 Ariz. 490, 698 P.2d 735, (Ariz.App. 1984):

Duress envisions a third person compelling a person by the threat of immediate physical violence to commit a crime against another person or the property of another person.

Id. 144 Ariz. at 497, 698 P.2d at 742. The Alaska Court of Appeals in Betzner v. State, 768 P.2d 1150 (Alaska App. 1989), stated:

"Duress must consist of threatening conduct which produces in the defendant a reasonable fear of immediate or imminent death or serious bodily harm. Threatened future death or serious bodily harm does not suffice."

Id. at 1155 (quoting W. LaFare & A. Scott, Handbook of Criminal Law § 49 (1972)). See also United State v. Campbell, 609 F.2d 922, 924 (8th Cir. 1979), cert. denied, 445 U.S. 918, 100 S.Ct. 1282 (1980) ("Basically a defense of duress or coercion requires that there be an immediate threat of death or serious bodily harm which requires the defendant to commit the criminal act, and it must be in a situation in which there was no opportunity to avoid the danger").

Defendant in the present case, just as the defendants in Little, has failed to meet the conditions set out in

Lovercamp. The first condition, as modified to read the same as the compulsion statute, is that defendant had to show that he was coerced by the use or threatened imminent use of unlawful physical force upon him or a third person. When proffering the evidence supposedly to be gained from the Department of Corrections officials, defendant said that his defense was one of compulsion (T. at 13). He claimed that he had been incarcerated "under rather incredible and strict scrutiny" (T. at 14); he had requested "relief from the physical and safety threats that ha[d] been made against him during primarily the eight years since [his last conviction]"; those threats were from other prisoners (T. at 15); certain witnesses could testify about their knowledge of certain threats made against defendant, and the investigation and disposition of defendant's complaints about those threats (T. at 17). Defendant never alleged that there was "the use or threatened imminent use of unlawful physical force upon him or a third person" at the time he committed the kidnapping and assault. Because there was no immediacy to the threats defendant complained of, the trial court correctly determined that defendant had not demonstrated that the defense of compulsion was viable in his case.

Defendant has also failed to demonstrate that there was no time for complaint to the authorities, although he did allege that there was a history of futile complaints. Giving him the benefit of his allegation, he may have met the second condition of the Lovercamp test. However, he has not alleged that he meets

the third condition. Defendant never alleged that he did not have the time or opportunity to resort to the courts for protection from the alleged threats. He alleged that he had been receiving threats for eight years and had filed complaints about the threats with prison officials during that time (T. at 15 and 17). He felt that his complaints were not being handled properly. He never alleged that he had filed any court proceeding to seek redress; neither has he alleged that he did not have time to do so. Defendant has not met the third condition of the Lovercamp test.

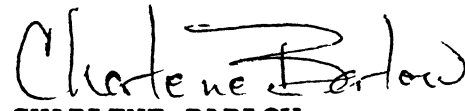
This Court may find, as did the North Carolina Court of Appeals, that conditions four and five do not apply in kidnapping and assault by a prisoner cases; however, defendant has not met all of the other conditions of the Lovercamp test, and consequently, the compulsion statute. Therefore, the trial court was correct in concluding that the defense of compulsion was not available to defendant in this case.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the trial court's ruling on the defense of compulsion and affirm defendant's conviction.

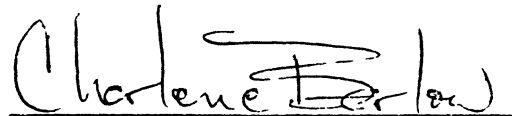
RESPECTFULLY submitted this 13<sup>th</sup> day of November, 1991.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Brooke C. Wells and Elizabeth Holbrook, Salt Lake Legal Defender Association, Attorneys for Defendant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 13<sup>th</sup> day of November, 1991.

  
Charlene Barlow

## ADDENDUM

CA 90/989

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

\* \* \* \* \*

THE STATE OF UTAH,

Plaintiff,

vs.

KENNETH GLEN ROBERTS,

Defendant.

CASE NO. 901900989 FS

ORIGINAL

\* \* \* \* \*

BEFORE THE HONORABLE SCOTT DANIELS

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SALT LAKE CITY, UTAH

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Third Judicial District

JUN 11 1991

By Ladeen Parker  
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1           SALT LAKE CITY, UTAH; JANUARY 17, 1991; A.M. SESSION

2           THE COURT: The matter before the Court is State  
3 of Utah versus Kenneth Glen Roberts. The record will show  
4 that Mr. Roberts is present here personally. This is some  
5 of witness's motions to quash subpoenas; is that right?

6           MR. MILLER: That's correct.

7           THE COURT: Mr. Miller, you represent the  
8 Department of Corrections?

9           MR. MILLER: Yes, and also the people that have  
10 been subpoenaed in the Department

11          THE COURT: Fine.

12          MR. MILLER: Do you want their names?

13          THE COURT: Yes, might as well.

14          MR. MILLER: First of all it was Gary DeLand, and  
15 subsequent to his--the motion and receiving his subpoena we  
16 received subpoenas for David Franchina, Jerry Cook, Nick  
17 Morgan, Fred Trujillous, Robert Steele, John Glazier and  
18 last night I just realized there is another one for Nola  
19 Phillips. She is not represented in any of the papers I  
20 have submitted but she is also included.

21          THE COURT: Okay. You can proceed, Mr. Miller.

22          MR. MILLER: I'd like to begin by stating first  
23 of all that the Department of Corrections and its employees  
24 are not trying to harass or delay the defense in any of  
25 these proceedings. It is merely trying to get the defense



1 and this Court and its officers to obey the rules of  
2 criminal procedures as they have been stated in the  
3 statute.

4 Basically our contentions in all of these motions  
5 is that the subpoenas that were issued to the Department  
6 were improperly served in that they were placed in the  
7 hands of people unauthorized to take personal service for  
8 the person that is named. Because of that, we have moved  
9 to quash those subpoenas and we ask that the defense  
10 re-serve those in a correct manner--in the manner that's  
11 proper. Again we are willing to cooperate to the best of  
12 our ability, but we also ask the Court make them abide by  
13 the rules as established.

14 I'd like to also address Mr. DeLand and a few of  
15 the other people that have been subpoenaed. Mr. DeLand is  
16 a very busy man. He is scheduled far in advance of seven  
17 days prior to a trial. This trial, as I have been  
18 informed, the arraignment started on June 15th of this  
19 year. It is now January 17th, there has been a lapse of  
20 several months and we just received these subpoenas less  
21 than eight days ago. In fact it has only been several days  
22 ago. I know Nola Phillips I mentioned--I was just informed  
23 about that subpoena last night because of the process of  
24 the mail within our department.

25 Trial was originally set for September 24th,

1 continued to November 26th, continued to January 22nd. The  
2 defense has had plenty of time to serve proper subpoenas,  
3 but yet they have decided that in the last moment before  
4 trial they will serve subpoenas that greatly are--or put a  
5 great burden on the Department and its employees.

6 As you've noticed, David Franchina, Jerry Cook  
7 and Nick Morgan have also been served. Both Gary DeLand  
8 and David Franchina are the number one and two people in  
9 the Department. They are asking those people stand at this  
10 trial doing nothing at work, not able to manage the  
11 Department in the way that they are supposed to do that,  
12 and that puts a great burden on them.

13 You will also notice that both David Franchina  
14 and Gary DeLand have previously scheduled meetings. One,  
15 Gary DeLand would be in southern Utah teaching a law course  
16 for in-service training, and David Franchina is scheduled  
17 to be at the legislative committee--Law Enforcement  
18 Legislative Committee, and neither of those two meetings  
19 can be rescheduled at this short notice, and those  
20 schedules have been locked in for quite sometime.

21 Mr. Cook is the number one person at the  
22 Institutional Operations and yet he has been subpoenaed on  
23 short notice. Also, he has only received approximately  
24 four working days under these.

25 THE COURT: When was he served?

1 MR. MILLER: Yesterday.

2 MS. WELLS: Nick Morgan was served the 15th or  
3 was it the 17th?

4 MR. MILLER: All Monday.

5 THE COURT: Monday? Okay.

6 MR. MILLER: So we notice we have got a three-day  
7 weekend here. So we have got--if it was served late Monday  
8 he would have received it, if it was properly served, on  
9 Monday, but it wasn't so it would take the mail for all of  
10 these people--takes interoffice mail--they wouldn't receive  
11 that until Tuesday. That gives them Tuesday afternoon,  
12 Wednesday, Thursday, Friday, and that's it. Then they are  
13 on the weekend, they are on a holiday. We have got court  
14 on the morning of Tuesday. Under those circumstances, it  
15 is completely unreasonable that the defense has delayed  
16 this many months to subpoena these people and now ask that  
17 this court make them attend this hearing with improper  
18 service. That's basically our contention.

19 One other contention is Nick Morgan is another  
20 special case, in that--and I guess Nola Phillips would also  
21 be the other one. They have Subpoenas Duces Tecum, which  
22 asked for documents. They are giving us less than four  
23 working days to produce all the documents requested in  
24 their subpoenas. They have had plenty of time for this.  
25 And again, we'll comply with these if we can. But four

1 day's notice is a very limited time to comply with these  
2 subpoena requests and that's the Department's contention  
3 and the individual officers. Thank you.

4 THE COURT: Do you want to add something, Mr.  
5 Skordas?

6 MR. SKORDAS: If I could, briefly, your Honor.

7 I think that more important than the fact that  
8 the subpoenas may or may not have been served properly is  
9 the essence of proposed testimony by these witnesses. I am  
10 wondering whether any of them have any relevance at all to  
11 the case at hand. What we are looking at, Mr. Roberts here  
12 is charged with an aggravated kidnapping, an aggravated  
13 assault by a prisoner. I understand the defense is going  
14 to be some sort of compulsion, as I understand it.

15 THE COURT: Or justification.

16 MR. SKORDAS: Right. In that he was compelled to  
17 do this because of mistreatment by prison authorities and  
18 other individuals.

19 I am wondering how many of these people can  
20 really shed any light on that at all, or whether or not  
21 what he is doing here is trying to upset the system, flush  
22 out people, and really continue his kidnapping, his  
23 original charge, by kidnapping these people, so to speak,  
24 and having them come into court and making this circus that  
25 he has created much, much bigger than what it is--he has

1 really intended to.

2 I don't think under the rules or under the  
3 constitution Mr. Roberts is entitled to bring in people  
4 without any foundation, without any relevance to the case,  
5 without any personal knowledge about the case just so that  
6 he can put on his little circus act in front of a jury here  
7 next week. That would be my reason for asking the Court  
8 not to force these people to come in and testify next  
9 Tuesday.

10 I want to make clear that we are very interested  
11 and pushing this case along and I would hope that Mr.  
12 Miller's comments don't lead the Court to think that these  
13 people need more time, and so maybe we ought to continue  
14 this trial along. That's certainly the last thing I would  
15 want to do, and I would meet with their representatives  
16 personally and hope that we could get the papers together,  
17 if the Court is going to require them to testify, rather  
18 than continue it, so their calendars could be worked out.  
19 But I don't think they are necessary or even appropriate  
20 witnesses anyway.

21 THE COURT: Thank you.

22 Ms. Wells?

23 MS. WELLS: Thank you, your Honor.

24 Your Honor, first and foremost, if this were a  
25 civil case in which the defendant were a plaintiff and was

1 attempting to bring in witnesses that might be  
2 questionable, I think this court could look at that and  
3 make a determination whether or not these people were  
4 appropriate. But that's not what this is. This is a  
5 criminal case wherein the defendant--or Mr. Roberts is the  
6 defendant--a criminal defendant charged with two first  
7 degree felony offenses--and although the State is the  
8 prosecuting agency through Mr. Skordas, the complainant in  
9 the case is the Department of Corrections--it is one of  
10 their officers who is the alleged victim in this matter and  
11 they provide the pool of person with whom witnesses for  
12 that very event come.

13 Now, I'd like to address each of Mr. Miller's  
14 concerns in the following way. He indicates that this was  
15 insufficient or improper service made within a required  
16 time limit. The rules offering or governing issuance of  
17 subpoenas indicate that they must be served within 24  
18 hours.

19 Your Honor, clearly one week before is a  
20 sufficient time within which to have those subpoenas  
21 served.

22 With regard to the manner of their service--

23 THE COURT: Just a moment. Would you get--there  
24 is a paperback volume that says Utah Rules. It is in the--

25 MS. WELLS: It would be Volume 4.

1           THE COURT: Is it in Volume 4? I can never find  
2 it in Rule 4--what page, then? What rules? Utah Rules of  
3 Criminal Procedure?  
4           MS. WELLS: I don't think that governs the issue  
5 of subpoenas. I think that is probably in the civil cases.  
6           THE COURT: Let's find out what it says here.  
7           MR. MILLER: Look at Rule 14.  
8           MR. SKORDAS: 14. Look at Rule 14.  
9           MR. MILLER: 14(c).  
10          MR. SKORDAS: Of the Utah Rules of Criminal  
11 Procedure.  
12          THE COURT: Rule 14?  
13          MR. SKORDAS: (b) and (c).  
14          MR. SKORDAS: Actually, your Honor, Utah Rules of  
15 Criminal Procedure are no longer part of the Criminal Code.  
16          MS. WELLS: The rules are there. They are in a  
17 different place.  
18          THE COURT: I am in the Utah Rules of Criminal  
19 Procedure.  
20          MR. SKORDAS: After that.  
21          THE COURT: It is after that?  
22          MR. SKORDAS: Yes. Go to page 524.  
23          MS. WELLS: It is 523 or 24? It is 24? That's  
24 right.  
25          THE COURT: Okay. 5--oh, all right, now, Rule

1       what? 14, did you say?

2               MS. WELLS: It is Rule 14, your Honor. As I look  
3 at the rule in this manner, there is no time line stated  
4 governing the nature upon which the service is required.

5               THE COURT: Okay.

6               MS. WELLS: My understanding has always been a  
7 24-hour period is necessary and required. Clearly that has  
8 been met.

9               Now, your Honor, with regard to the manner in  
10 which the subpoenas were served, this court is certainly  
11 aware that the Department of Corrections personnel are in a  
12 secure type of setting. Those persons that are at the  
13 prison are personally unaccessable to any type of process  
14 server.

15              Further, by analogy, I would indicate that the  
16 State, when it issues its subpoenas, does to police  
17 officers and corrections officials in the very exact manner  
18 in which service was effected by my representatives on  
19 behalf of the defendant.

20              The Court must look at the particulars  
21 involving--the people involved to determine whether or not  
22 personal service is in any way available to us or if it is  
23 able to be achieved.

24              THE COURT: Well, the rule--the very rule you  
25 cited me to says, "Service shall be made by delivering a



1 copy of the subpoena to the witness or interpreter  
2 personally." You are relying on the rule for one thing,  
3 then you're talking, let's take a look beyond the rule and  
4 see if this is really a reasonable thing on the other hand.

5 MS. WELLS: Your Honor, I would suggest to you  
6 that if we were required to serve each of these persons  
7 personally, then no subpoenas issued for witnesses within  
8 this district are ever properly served. Police are served  
9 in exactly the same manner. The State serves its subpoenas  
10 to all persons either by mail or by delivery to a  
11 receptionist, someone who can take those and deliver them.  
12 These persons are appearing in their capacity as officials  
13 of the Department of Corrections, therefore, this is the  
14 only meaningful type of service and it is consistent with  
15 the rule.

16 If I could go on further though, and indicate to  
17 the Court or address some of the other issues. I don't  
18 think Mr. Miller is very familiar with the goings on of  
19 this case, since it was filed by the State some six or  
20 seven months ago. He points out we are late in issuing  
21 these subpoenas. The Court knows through conversations it  
22 has held in chambers with Mr. Skordas and I, which have  
23 necessitated two continuances of this case, it is because  
24 we have been in negotiation with the Department of  
25 Corrections.

1           In one instance, Mr. Morgan, one of the very  
2 people who is subpoenaed here, for other reasons, kept us  
3 waiting for a period of six weeks without responding to us  
4 concerning his discussion with Mr. DeLand and other people.  
5 Pursuant to properly filed discovery motions, we have  
6 attempted to get each and all--each and every document and  
7 all documents pertaining to Mr. Robert's custody status and  
8 incarceration records through Carrie Hill, another attorney  
9 with the Department of Corrections, and to this date have  
10 not received that information. Therefore it is necessary  
11 to require, by subpoena, those very documents.

12           Now, with regard to why these particular persons  
13 are necessary, your Honor, I have been representing Mr.  
14 Roberts since this matter was filed. I have had the  
15 opportunity to review a voluminous amount of information.  
16 I have, with him, determined that his defense to this  
17 alleged crime is one of compulsion which is authorized as a  
18 legal defense under the criminal code. I can cite you to  
19 the very definition of that. It is contained in 76-2-302.  
20 It indicates that, "A person is not guilty of an offense  
21 when he engaged in proscribed conduct because he was  
22 coerced to do so by the use or threatened imminent use of  
23 unlawful physical powers."

24           THE COURT: 76-2 what.

25           MS. WELLS: 76-2-302. It is the first--well, it

1 is the second delineated defense to criminal responsibility  
2 included within the code.

3 Now, Mr. Roberts' situation is rather unique in  
4 that he is not an ordinary citizen but is confined to the  
5 Utah State Prison. As this court has been aware, Mr.  
6 Roberts, while on parole status, was involved in the--or  
7 was criminally responsible for the injuries that were  
8 caused to a young lady, Miss LaDawn Prue. As a result of  
9 that incident in 1982, additional charges were filed  
10 against him and he has been incarcerated since that time.  
11 As a result of that particular incident, which involved Mr.  
12 Roberts' actions, which occurred as a result of Parole  
13 Board actions, which ultimately led to suit against the  
14 Utah State Prison, and those persons individually for  
15 malfeasance or acts in allowing his release, several of  
16 those Department of Corrections persons lost their jobs and  
17 as a result of that, Mr. Roberts has continued his  
18 incarceration under rather incredible and strict scrutiny  
19 because as a result of his actions there were personal  
20 actions taken against members of Department of Corrections.

21 Since 1982, particularly, your Honor, I have  
22 reviewed the documents over eight years of incarceration  
23 which involve individually each of these persons who have  
24 been subpoenaed. Granted it is not now in their--perhaps  
25 in their present capacity, but their knowledge of this case

1 involves actions or attempts by Mr. Roberts to secure some  
2 type of relief from the physical and safety threats that  
3 have been made against him during primarily the eight years  
4 since this occurred. In each of the instances the people  
5 who have been subpoenaed have direct involvement in them.  
6 As I say, perhaps not now in their present capacity, with  
7 regard to Mr. DeLand.

8 THE COURT: When you say safety threats, you mean  
9 by other prisoners?

10 MS. WELLS: Other prisoners. I intend to  
11 introduced a series of documents known as grievances in  
12 which Mr. Roberts, over that eight-year period, explained  
13 through the appropriate channels that his safety was in  
14 jeopardy, that threats were being made against him. That  
15 all goes to his state of mind and certainly is relevant to  
16 the defense of compulsion.

17 Now, as I indicated, Mr. Franchina was a warden  
18 and the head of policies. Mr. Glazier is one of those  
19 persons who acted as representative of the Inspector  
20 General in denying requests and grievances that were raised  
21 by Mr. Roberts. Nick Morgan has also been personally  
22 involved since his assuming the position of Inspector  
23 General, directly involved in the case at hand in that he  
24 and representatives of his offices responded and were  
25 involved in the investigation of this particular offense to

1 which he is charged. Mr. DeLand, despite his affidavit,  
2 has been involved not only in these attempted negotiations  
3 over the past seven months, but it was--and we have tapes  
4 that will show that Mr. Roberts at the time--that he was  
5 involved with the Utah State Prison guard, asked to speak  
6 to Mr. DeLand directly.

7 It was only when he was informed that Mr. DeLand  
8 had been contacted and would be involving himself in the  
9 investigation, that this incident resolved itself and I  
10 would add without injury to any person. Mr. DeLand--and I  
11 have seen the correspondence--has responded personally by  
12 correspondence to Mr. Roberts, therefore, each of these  
13 persons--I can go on. I can tell you the relevance of each  
14 person's involvement if you wish me to do so.

15 THE COURT: I do, go ahead.

16 MS. WELLS: With regard to Gary DeLand, I just  
17 indicated I do not intend to call him for any purpose of  
18 dealing with him about these current negotiations, but  
19 rather I intend to call him to testify concerning his  
20 knowledge of the particular incident and his response  
21 thereto, which involved his sending personal correspondence  
22 to Mr. Roberts. Therefore he--and he is a critical,  
23 critical witness for that very reason.

24 Mr. Morgan, as I have indicated to you, is now  
25 the Inspector General. He has been issued a Subpoena Duces

1 Tecum because the investigation of this matter was  
2 ultimately turned over to the Inspector General's office,  
3 and additionally, persons including Mr. Glazier and Ms.  
4 Phillips, as administrative hearing officers, were directly  
5 involved in the hearing of Mr. Roberts' grievances and  
6 their subsequent denial. So that addresses Nick Morgan.

7 Nola Phillips and John Glazier--he also mentioned  
8 Jerry Cook and David Franchina--both of those individuals  
9 were previously wardens over the particular units that Mr.  
10 Roberts was housed at and have personal knowledge of the  
11 eight-year period of time that Mr. Roberts spent prior to  
12 this incident and can testify concerning their knowledge of  
13 threats made against him, subsequent investigations of that  
14 and subsequent disposition thereto. Those are the ones  
15 that have been mentioned by Mr. Miller.

16 I would also indicate that there is no affidavit  
17 dealing with Ms. Phillips and so I think that it is not  
18 proper that he address any quashable subpoena by her, since  
19 there is no affidavit before you here on her behalf.

20 THE COURT: Well, why would you want to call her?

21 MS. WELLS: She is a hearing officer, your Honor.  
22 She has been directly involved in the denial and the  
23 disposition of at least five or six separate grievance  
24 forms indicating threats of force and physical safety that  
25 have been filed through appropriate channels by Mr.

1 Roberts. Ms. Phillips is in the same position basically as  
2 Mr. Glazier in that they were both responsible for  
3 disposition of those forms.

4 Your Honor, if the Court wishes us to, if the  
5 Court is prepared to say these were not properly served,  
6 then I would indicate to you that in whatever manner we  
7 can, we will properly serve them. If we have to do that, I  
8 will send somebody out there to do it today. But it  
9 appears that these people are all on notice.

10 The purpose of a subpoena is to give them  
11 appropriate and proper notice of their necessity to appear  
12 as a witness. I see no practical reason why we should, at  
13 this point on behalf of these people who indicated no good  
14 reason why they should not be required to testify, and deny  
15 this man his right to a fair and constitutionally protected  
16 trial, should otherwise have the benefit of saying that you  
17 did not personally serve me, although we know we got these  
18 and we are on notice as to what it is. That seems to me to  
19 be a manner in which justice would be granted and I suggest  
20 to you again that is the manner in which all subpoenas are  
21 served by the State because of the practical problems  
22 involved with serving people involved in law enforcement  
23 agencies. And each of these persons are associated with  
24 law enforcement albeit through the Department of  
25 Corrections. Again I reiterate the reason these went out

1 seven days prior to trial rather than months before is  
2 because of the Department of Corrections' refusal to deal  
3 with us in a timely manner. And that I did note and Mr.  
4 Morgan will certainly remember, we waited six weeks for his  
5 last response which netted the court's continuing upon our  
6 request of this matter. And in fact, we have attempted to  
7 negotiate with the Department of Corrections until last  
8 week.

9 Mr. Skordas would agree we have been in contact  
10 about that and it was only on probably Friday--in fact, I  
11 think Mr. DeLand was served on Friday--Thursday or Friday  
12 of this week, so his service would have been sooner--but it  
13 was only because of their indications that they would talk  
14 to us, but then their refusal to give us any answers that  
15 we have been forced at this time to say, all right, looks  
16 like the trial is on. We must go forward.

17 THE COURT: Thank you.

18 Well, I'm going to quash the subpoenas. First  
19 of all, I do think the rule--it does say personal service  
20 and that's what it says, and so based upon that there is no  
21 personal service. The service of process--attempted  
22 service of process will be quashed.

23 Secondly, I do think the amount of time was  
24 unreasonable. Under the circumstances, I know these  
25 are busy people and that doesn't justify not coming to



1 court, even though it doesn't matter how important you are,  
2 President Nixon has to go testify if he has got evidence to  
3 be presented--but under the circumstances where this trial  
4 date has been set for some weeks, I think waiting until the  
5 last minute to serve the subpoenas is unreasonable. That's  
6 not enough notice.

7 But more fundamentally than that, I am inclined  
8 to agree with Mr. Skordas' position on relevance of this  
9 testimony. I don't think the defense of compulsion is a  
10 viable defense as a matter of law in this case. I don't  
11 think the law is if you are being mistreated at the prison  
12 you are therefore justified in taking a hostage. That's  
13 just not the law. This statute was made for a situation  
14 where someone is threatened. If you don't commit this  
15 crime, if you don't wait for me in the get-away car, then I  
16 will shoot you, that kind of compulsion. Not the kind of  
17 compulsion we are talking about here. I think the  
18 testimony of these witnesses would be irrelevant. That  
19 defense is not available as a matter of law and I am not  
20 going to let you put on that evidence.

21 I am just--even if you wanted to reserve them, I  
22 am just not going to make this a trial of the Department of  
23 Corrections. The issue here is going to be did he commit  
24 the crime or didn't he, and the subpoenas will be quashed.

25 MS. WELLS: Your Honor, based upon that I would

1 move to continue this trial. The Court has now undercut my  
2 entire defense. You have told me that I cannot present the  
3 defense that I have for months indicated, not only to the  
4 State but to the Court, that I intended to--intend to do.  
5 And I move for a continuance and I would intend to file  
6 some sort of interlocutory appeal of this court's decision  
7 on that matter. But under any circumstances, your Honor, I  
8 cannot go forward on Tuesday, to attempt to try this matter  
9 with the Court having now told me that I cannot present the  
10 defense intended.

11 THE COURT: Well, your client is entitled a  
12 speedy trial.

13 MS. WELLS: He has waived it before. I am  
14 certain he will waive that again.

15 THE COURT: Will you?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. If you want to file an  
18 interlocutory appeal that might be the better way to do it  
19 if that's your--

20 MS. WELLS: Well, I am also requesting a  
21 continuance in order to do that. I am in a position where  
22 I need to do that. I will certainly do that in a timely  
23 manner, but I cannot do that at the same time as being  
24 concerned about beginning a trial on Tuesday with no  
25 defense and no witnesses.

1           THE COURT: Motion for a continuance is granted.  
2 Order that this case's trial date will be stricken. What  
3 do you want to do, set another trial date?  
4           MS. WELLS: Well, perhaps--I don't know. I am  
5 trying to think.  
6           THE COURT: I will give you a couple of days to  
7 think about and that get back to me.  
8           MS. WELLS: All right.  
9           THE COURT: Court will be in recess.  
10                   (Pceedings concluded.)  
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REPORTER'S CERTIFICATE

STATE OF UTAH            )  
                             :  SS.  
SALT LAKE COUNTY        )

I, NORA S. WORTHEN, an official court reporter  
for the Third Judicial District Court in and for Salt Lake  
County, State of Utah, do hereby certify that I reported  
stenographically the proceedings in the matter of THE STATE  
OF UTAH VS. KENNETH GLEN ROBERTS, Case No. 901900989 FS and  
that the above and foregoing is a true and correct  
transcript of said proceedings.

Dated this 6th day of June, 1991.

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Nora S. Worthen, CSR, RPR  
Utah License No. 205