

1983

## State of Utah v. Timothy and Mildred Lairby : Brief of Appellants

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IN THE SUPREME COURT  
STATE OF UTAH

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STATE OF UTAH,

PLAINTIFF-RESPONDENT

VS.

Case Number 18998

TIMOTHY M. LAIRBY, JR., Pro Se  
& MILDRED R. LAIRBY, His Wife

DEFENDANTS-APPELLANTS

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BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE

The Appellant Timothy M. Lairby, Jr. was convicted by jury before the Third Judicial District Court, County of Salt Lake, Honorable Peter F. Leary, presiding, of (1) Rape, in violation of Title 76, Chapter 5, Section 402; (2) Two counts of Forcible Sexual Abuse, in violation of Title 76, Chapter 5, Section 404; and (3) Forcible Sodomy, in violation of Title 76, Chapter 5, Section 403, all violations being of the Utah Code Annotated, 1953 as Amended.

The Appellant Mildred R. Lairby was convicted by jury before the Third Judicial District Court, County of Salt Lake, Honorable Peter F. Leary, presiding, of Forcible Sexual Abuse, in violation of Title 76, Chapter 5, Section 404, Utah Code Annotated, 1953 as amended. The trials were consolidated, and it is from the Judgements of conviction and the sentences thereupon entered that the Defendants-appellants bring this direct appeal.

#### DISPOSITION IN THE LOWER COURT

The trial court found the defendants guilty of the crimes charged, as defendant Timothy Lairby in violation of various sections of the Utah Code Annotated, 1953. Consequently, Appellant Timothy Lairby was sentenced to four concurrent prison terms at Utah State Prison, the longest being an indeterminate sentence of between five years and life; Appellant Mildred Lairby was sentenced to an indeterminate sentence at Utah State Prison of between zero to five years, which sentence was suspended on condition that she properly fulfill the conditions of a supervised probation.

#### RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the verdict and judgement of the trial court, with prejudice, to include a judgement of acquittal, and any other relief the court sees as appropriate.

#### STATEMENT OF FACTS

On April 20, 1981, one Virginia Marie Lairby, the natural daughter of Appellant Timothy Lairby by a previous marriage, complained to her natural mother that Appellant Mildred Lairby had abused her sexually by inserting the handle end of a kitchen fork into her vagina. Following an investigation by members of two municipal police departments, Appellant Mildred Lairby was arrested May 14, 1981, on the strength of an Information which had been filed by Officer Guy W. Blunck of the Salt Lake City Police Department, and charged with forcible Sexual Abuse, in violation of 76-5-404, Utah Code Annotated, 1953.

Further investigation followed, and on July 22, 1981, Appellant Timothy Lairby was arrested, again on the strength of an Information filed by Officer Blunck, and charged with (1) Rape, in violation of 76-5-402, Utah Code Annotated,

1953, and (2) Forcible Sexual Abuse, in violation of 76-5-404, Utah Code Annotated, 1953. The Information was amended December 15, 1981, and Appellant Dorothy Lairby was further charged with (1) Two counts of Forcible Sodomy, in violation of 76-5-403, Utah Code Annotated, 1953, and (2) Another count of Forcible Sexual Abuse, in violation of 76-5-404, Utah Code Annotated, 1953.

After many delays, trial was had on October 26, 27, 28, 29, and November 1, 1982. At the trial, all of the evidence relied on by the State came from two sources: Two very young girls, or heavily biased adult witnesses, virtually all of whom had a vested interest in seeing the defendants convicted.

The youngest girl, Virginia Marie Lairby, was four at the time of the alleged incidents, and six at the time of trial. She claimed never to have told a lie (Tr. Vol. I, P.35-36), but yet it was not necessary to tell the truth (Tr. Vol. I, P.40). Her story was replete with lies, inconsistencies, and serious, material changes from earlier versions of the same allegations, far too numerous to cite here. They will be covered with much specificity in Points 2, 4, 11, 12, 14, & 24, infra.

The other child, Carri Ann Long, is the natural daughter of Appellant Mildred Ruth (Long) Lairby. She was eight at the time of the alleged offenses, and almost ten at the time of trial. She testified that it was all right to tell lies (Tr. Vol. I, P.346), and, significantly, admitted problems in the past with telling the truth (Tr. Vol. I, Pp.346-347). While the changes in Carri's testimony are not as glaring as they are in Virginia's version, they are nonetheless still there, as much in substance as in the fact that now, at the trial almost two years after the alleged events, her memory is much better than it was then (Tr. Vol. II, Pp.392-393), and she can remember details now which, on

at least two occasions in the past, she could not recall despite extensive efforts by the prosecutor to elicit such testimony. The changes and problems with her testimony, again too numerous to bring out here, will be carefully pointed out in points 4, 10, 11, 12, & 14, infra.

The remainder of the State's evidence came from three witnesses who had the aforementioned vested interest in seeing to it that the defendants were convicted, and one, who although he was seemingly neutral, made highly prejudicial opinion statements to the jury which flew in the face of all factual evidence.

Wanda Lairby (Tr. Vols. I & II, Pp.18-32, 261-317, 338-343) the former wife of Appellant Timothy Lairby, has only a temporary custody order for the four children of the marriage; Violet Jones (Tr. Vol. II, Pp.318-338) is the mother of Wanda Jones Lairby, and would obviously favor her position; and Richard Long (Tr. Vol. II, Pp. 420-432) is the natural father of Tracy and Carri Long. He was granted custody of the two girls December 8, 1981, but he, too, needed a conviction of his former wife to consolidate his position. The only other State witness who contributed much to the case was Dr. Martin Palmer (Tr. Vol. I, Pp. 211-242). He made some very damaging opinion statements to the jury, with no basis whatsoever for such opinion.

This is the sum total of the State's evidence. Upon hearing such evidence, and after one hour and forty minutes of deliberation, the jury returned guilty verdicts on all counts, against both Appellants. The sentences were then imposed by Judge Peter F. Leary, on December 14, 1982. From his judgement of guilt, and the sentences imposed, the Defendants-Appellants bring this direct appeal.

POINT 1: THERE WAS NO PROBABLE CAUSE FOR THE ARREST OF APPELLANT MILDRED LAIRBY ON MAY 14, 1961.

The Constitution of Utah, at Article I, Section 13, allows that felony offenses may be prosecuted by either indictment or information. The provisions of 77-1-3(1) UCA, gives the following definition of Information, as used in the Constitution:

"Information means an accusation in writing, charging a person with a public offense which is presented and signed by the Prosecuting Attorney and filed in the office of the clerk where the prosecution is commenced, or subscribed and sworn to by a complaining witness before a magistrate if the offense is a Class B misdemeanor or a lesser offense not requiring the approval of the Prosecuting Attorney."

Clearly this mandatory provision of the Utah Code of Criminal Procedure was not complied with in the case at bar. Information 81CRS1199 was subscribed by a police officer, Guy W. Blunck, of the Salt Lake City Police Department, and not by a Prosecuting attorney, or other responsible counsel for the State. Officer Blunck stepped entirely out of his bounds as a police officer when he signed the information, and such action rendered the information fatally defective to the point of being a nullity at law, and insufficient to support arrest, pretrial detainment, prosecution, or conviction. The actions of Officer Blunck amount to a summary judgement of Appellant Mildred Lairby, conduct specifically proscribed in JOHNSON v. US, 333 US 10.

There was no due process in the actions of Officer Blunck, because the Appellant was convicted before she was ever arrested.

"Due process postulates a day in court, which means that a police officer can do nothing more than arrest and convey to the reasonably convenient trier." COMM. FOR IND. ORG. v. HAGUE, DC NJ 1938, 25 FSupp 127, mod. on other grounds 101 F2d 774, mod. on other grounds 59 Sct 954, 307 US 496, 33 Fed 1424.

Even dismissing the legal problems in the initial information as issued by

a police officer totally incompetent to do so, such a deprivation of due process should have been stopped at the magistrate who issued the Warrant of Arrest.

Judge Arthur G. Christean abdicated his constitutional responsibility when he issued the warrant on the word of Officer Blunck.

The requirement of probable cause before search warrant should be issued interposes the magistrate between the police officer's zealous pursuit of suspects and evidence and citizen's pursuit of privacy and freedom from unreasonable interference and the magistrate's function is to render neutral and detached judgement, not to serve as perfunctory rubber stamp for the police. ALEXANDER v. SUPERIOR COURT OF L.A. COUNTY, 1973, 508 P2d 1131, 9 C3d 387, 107 Cal Rptr 483.

The responsibilities of the issuing magistrate must go further than merely accepting as fact the unsubstantiated statement of opinion of the swearing officer.

"Magistrate who had only sworn assertion of police officer that informant was reliable, could not credit that unsupported assertion without abdicating his constitutional function of determining probable cause for search warrant." STATE v. GILL, 360 NE2d 693, 49 Ohio2d 177.

That Judge Christean did precisely nothing to ascertain probable cause is without question. He did not examine the physical evidence - if indeed any was presented to him. Doctor Gruwell, the physician who examined the alleged victim some 44 hours after the alleged insertion of a fork handle into her vagina (Tr. Vol. 1, Pp. 9-10, 13-16) found absolutely no evidence to substantiate the crime, and his evidence, plus the testimony of the child were all that could possibly have formed any basis for probable cause for arrest.

"Probable cause for arrest is established where victim of offense both communicates to arresting officer information affording credible ground for believing that offense has been committed and unequivocally identifies accused as perpetrator, and where materially impeaching circumstances are lacking." U.S. v. ANDERSON, 1976, 533 F2d 1210 175 US App DC 75.

There were materially impeaching circumstances in the instant case, a fact either conveniently ignored by both the police officers involved in the investigation and the issuing judge, or a fact hidden from the issuing judge when Officer

in hindsight, with all the scattered allegations of rape, sexual assault, possibly perpetrated by a black woman fairly against a white male Virginia Fairby, with a modest bedchamber or assorted kitchen area, with a living room, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

plaintiffs, since the courts make no effort to see all the evidence that should be presented at such a hearing, but that is not the point here.

A logical interpretation of the constitutional intent for such hearings is that the court is required to view all the evidence that bears directly on the issue of probable cause. No effort is intended to require the appellant here by the appellant to produce the entirety of evidence, but most obviously, if materially-impeaching evidence exists, which tends to destroy or seriously wound the State's case, then that evidence bears directly on the issue of probable cause for a binding order of the accused for trial, and should be presented to the court. Such a procedure is doubly binding if it is in the hands of the prosecutor.

Deputy County Attorney Woody Gwinn had in his hands the "materially-impeaching" evidence, which, when viewed properly with the allegations of massive bleeding by Virginia, entirely destroys the State's case. That evidence was the medical report of Doctor Druewell, and Gwinn conveniently suppressed it to secure a binding order of the appellant.

There is also an obligation placed on the reviewing magistrate, in this case Judge Raymond Uno, to insure that no miscarriage of justice is being purposefully accomplished, and that no fraud is being perpetrated on the court. Judge Uno did none of that. At this honorable court, in its review of the case at bar, a total and conspicuous silence on the part of the court as to their asking if there was any impeaching evidence, then it would give carte blanche to the prosecuting attorney, in the State's attempt to hide whatever they wanted to hide in an effort to keep the prosecuting attorney's safeguards which lawfully should exist at preliminary hearings. What is the purpose of the hearing at all?

The court is expected to be a functionary, maintaining, if not in the prosecution's favor, at least to be held - and not over - for trial, that before-mentioned

practice of not presenting a defense notwithstanding. When the mitigating evidence is in the hands of the prosecutor, it is his duty to bring it forward.

It is not attorney's duty is not to win cases brought by him; rather his duty is to prosecute those cases diligently and fairly, with the firm purpose of seeing to it that justice is done in the courtroom. U.S. v. KELLY, (1944) 143 F.2d 1009.

But duty is also squarely on the shoulders of Utah state prosecutors, whether they file it or not, and whether they will submit it or not, and Woody Joins failed in that responsibility.

Appellant Mildred Lairby should never have been bound over for trial, and even viewing the evidence (ALL OF IT) most favorably for the state, there was not enough to sustain the charge. The theory-poisoned conviction should be reversed, based as it is on such an evidentiary house of cards.

POINT 3: There was NO PROBABLE CAUSE FOR THE ARREST OF APPELLANT TIMOTHY LAIRBY ON JULY 22, 1981.

Such the same argument as put forth in POINT 1 applies here: the information BICK3194, as filed against Appellant Timothy Lairby, was subscribed illegally by a police officer, Officer Guy W. Blunck of the Salt Lake City Police Department, as was the amended information filed in December, 1981. They cannot stand, subscribed as they are by someone other than the proper state's attorney.

As far as a determination of probable cause, the instrument is as fatally flawed here as was the one (BICK3199) filed against Appellant Mildred Lairby. While the instrument referred to may be proper under the provisions of 77-35-4(b), "adherence of criminal procedure, that rule in Utah law is unconstitutionally vague, and places no obligation on either the police or the prosecution to properly meet the constitutional mandates of probable cause.

Information BICK3194 was filed July 22, 1981, with the main offense alleged therein was, in violation of 76-3-501, Utah Code Annotated. It was subscribed by THE PUBLIC AND BELLY, and this honorable court has held that

"Since our Constitution requires a showing of probable cause to support a search warrant, an affidavit based merely on information and belief fails to meet the Constitutional requirement." ALLEN v. LINDBECK, 97 U 471, 93 Fd 920.

The case cited above, ALLEN, deals with search warrants, but it is obvious that any requirements for arrest must be at least as high, if not higher, than those for search, U.S. v. BAKER, D.C.S.D. 1974, 377 FSupp102. The requisite probable cause for arrest, which in GERSTEIN v. PUGH, supra, was required to be determined before the arrest, was not present in the case at bar. It is beyond argument that such conduct should be held in violation of the Fourth Amendment.

The Supreme Court of the United States, in GIORDENELLO v. U.S., 357 US 480, in expounding on the questions of searches and seizures, held

"Rules 3 & 4 of the Federal Rules of Criminal Procedure which provide that an arrest warrant shall be issued only upon a written and sworn complaint which sets forth the essential facts constituting the offense charged, and shows that there is probable cause to believe that such an offense has been committed and that the defendant has committed it must be read in the light of the Constitutional requirements they implement."

And that

"The protection afforded by Rules 3 & 4 of the Federal Rules of Criminal Procedure...is that the inferences from the facts which lead to the complaint be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

It would appear that the State was and is on extremely thin ice as to their determination of probable cause for the arrest of Appellant Timothy Lairby, a fact further demonstrated at the Preliminary Hearing held into the charges against him January 7, 1982.

In the testimony of Wanda Lairby (Appellants's Exhibit Two, Pp. 115-116) she stated that she (and by logical inference, Virginia) found out about the Appellant's being in jail for the rape from the newspaper, some week after the Appellant was already in jail. Obviously, then, there was nothing in the way

of testimony from Virginia which could have formed the basis for any probable cause for Appellant Timothy Lairby's arrest. That leaves only Tracy and Carri, who were at that time still down in Arizona with their father and his live-in girlfriend. There had been nothing come out of Arizona either, that could serve as a reasonable basis for probable cause for arrest.

One of the charges filed on the original Information was Forcible Sexual Abuse allegedly perpetrated against Carri. She was in Arizona at the time the charge was filed, so the only possible way for probable cause to establish would be by either Officer Blunck flying down to Arizona and taking, under the auspices of a magistrate, her sworn testimony about the incident, or Carri's making out such a deposition and sending it back on her own, giving both Officer Blunck and any reviewing magistrate something sound with which to make the Constitutional determination of probable cause. Such a deposition is nowhere in existence. There are some unverified depositions which Carri allegedly signed while down in Arizona, but since the reviewing magistrate had no way to interview either the person who wrote them, or the person who allegedly dictated them, there is no proper way that those 'letters' (and they amount to no more than that!) can stand as a rational basis for determining that probable cause exists to deprive an individual of his freedom.

The Appellant was made the subject of an illegal arrest, interred in the Salt Lake County Jail for thirteen days, and given none of the benefits of a neutral determination of probable cause, all on the strength of either rumor

"Rumors are patently insufficient to provide sufficient basis for probable cause for issuance of search warrant. U.S. v. KARATHANOS, C.A.N.Y., 1976, 541 F2d 26, cert. den. 96 Sct 3221, 428 US 910, 49 LEd2d 1217.

or suspicion, based entirely in the mind of Officer Blunck

"Here suspicion is not enough to justify an arrest; only probable cause suffices. U.S. v. BRANCH, 1976, 542 F2d 177, 178 U.S. App DC 99; U.S. v. WYNN, C.A. Fla. 1977, 544 F2d 786; U.S. v. VASQUEZ, C.A. Tex. 1976, 534 F2d 1142,

cert. den. 97 Sct 389, 429 US 962, 979, 50 LEd2d 330, 587; U.S. v. JACKSON, C.A. Ohio, 1976, 533 F2d 314; U.S. v. CLAY, C.A. Ill. 1974, 429 F2d 700, cert. den. 95 Sct 207, 419 US 937, 42 LEd2d 164 (rumor, roeppt, or suspicion); U.S.v. GUANA-SANCHEZ, C.A. Ill. 1973, 484 F2d 590, cert. dism. 95 Sct 1344, 420 US 513, 43 LEd2d 361 (hunches); U.S.v. CHADWICK, D.C. Mass, 1975, 393 Supp 763, affirmed 532 F2d 773, affirmed 97 Sct 2476.

Officer Blunck manufactured what he figured would suffice for the requisite probable cause out of thin air, and Judge Maurice Jones acted as a perfunctory rubber stamp for exactly whatever the State, in the person of Officer Blunck, desired in the way of an arrest warrant. See ALEXANDER v. SUPERIOR COURT OF L.A. COUNTY, supra. Both the information filed against Appellant Timothy Lairby, as well as the one filed against Appellant Mildred Lairby, fall into the proscribed category as stated in SALTER v. STATE, 102 P2d 719:

"A verification to an Information charging a misdemeanor and stating that affiant declares that the statements set forth in the information are true as he is informed and verily believes, is nothing more than the expression of an opinion and is not sufficient to justify the issuance of a warrant, and an information so verified is INSUFFICIENT TO SUPPORT A JUDGEMENT OF CONVICTION." (Emphasis added.)

Since information and belief forms the backbone of the State's original Informations, as filed,

"Under Rule 4 of the Federal Rules of Criminal Procedure, providing that an arrest warrant shall be issued only upon a written and sworn complaint showing that there is probable cause to believe that the offense charged has been committed and that the defendant has committed it, an arrest warrant is invalid where the underlying complaint....contains no affirmative allegation that the complainant spoke with personal knowledge of the matters contained therein, does not list any sources for the complainant's belief, and did not set forth any other sufficient basis upon which a finding of probable cause could be made; and these deficiencies cannot be cured by reliance....upon a presumption that the complaint was made on the personal knowledge of the complaining officer, especially where it affirmatively appears that the complaining officer had no personal knowledge of the matters on which his charge was based." GIORDENELLO v. U.S., supra.

The guidance under which Utah police authorities labor with regard to their procedures surrounding prosecution by information is 77-35-4, Rule 4 of the Utah

rules of Criminal Procedure, which states in part:

Prosecution of public offenses. (a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

(b)...An information may contain or be accompanied by a statement of facts to make out probable cause to sustain the offense charged where appropriate.

The Defendants-Appellants hereby contend that the above-quoted Utah Rule of Criminal Procedure is deficient as to the Constitutionally-mandated provision for the determination of probable cause BEFORE any meaningful detaining of a suspect. Subparagraph (a) of 77-35-4 would allow a complaint to be sworn out by anyone who had a "reason to believe that the offense has been committed." This overly-broad provision would allow any person, with a personal grudge, or laboring in the personal or professional effort to enhance their own image (Officer Blunck?) to swear out a complaint without any meaningful prior determination of probable cause, and to obtain a warrant again without probable cause.

Subparagraph (b) of 77-35-4 makes an accompanying affidavit of a witness of knowledge, or affidavit of a complaining officer after that officer has satisfied the magistrate that his informant is reliable and his information is also credible (per the two-pronged test of AGUILAR v. TEXAS, 378 US 108, and SPINELLI v. U.S., 393 US 410), entirely unnecessary, and allows a shadow of the Constitutional requirement to be fulfilled with a 'Statement of Probable Cause'. Such a meaningless Statement of Probable Cause fatally infected all the informations used against both appellants, statements which amount to only an identification of the alleged perpetrator by the victim. See U.S. v. ANDERSON, Page 6, supra. Merely identifying a supposed perpetrator will not stand where there are materially impeaching circumstances present. In both cases revolving around the Appellants, that 'Materially impeaching circumstance' is the medical evidence, which totally

destroys the State's case against Appellant Mildred Lairby, and concurrently destroys both Counts I & V against Appellant Timothy Lairby.

Either Officer Brunck hid the materially impeaching medical evidence from the issuing magistrates (Judge Christean for Appellant Mildred Lairby, and Judge Jones for Appellant Timothy Lairby), or the magistrates conveniently ignored that evidence; in either case the arrests are unconstitutional because of the improper actions of officers who represented the interests of the State of Utah.

The provisions included in 77-35-4 are too broad to stand up under any test of constitutionality. Referring to the Fourth Amendment, it has been held that

"This amendment would be reduced to a mere form of words if a court were to countenance an administrative search ordinance which makes no pretense of compliance with the probable cause, warrant, and neutral magistrate requirements of the amendment." HOGGE v. REDRICK, D.C. Va. 1975, 391 FSupp 91.

Rule 4 of the Utah Rules of Criminal Procedure should be overturned as unconstitutional, and the arrests of the appellants, done as they were under such a rule, cannot be allowed to stand.

POINT 4: THERE WAS A DENIAL OF DUE PROCESS IN THE PRELIMINARY HEARING, HELD TO INQUIRE INTO THE CHARGES FILED AGAINST APPELLANT TIMOTHY LAIRBY, AS TO THE DETERMINATION OF (1) THAT A CRIME HAD BEEN COMMITTED, AND (2) THERE WAS PROBABLE CAUSE TO BELIEVE THAT THE ACCUSED HAD COMMITTED SAME.

The Supreme Court of the United States has held that prosecution of felonies by information, including as a necessary part a preliminary hearing into the charges filed against the accused, is constitutional as to the determination of probable cause, GEROFEIN v. PUGH, supra. This is, of course, assuming that the preliminary hearing itself can pass Constitutional muster. All the safeguards in the world will not protect a person's rights of there is a predisposition

against those rights in the first place, a fact made painfully apparent to the Appellant Timothy Lairby in his Preliminary Hearing.

Appellant was informed before the Hearing that the general practice is not to prevent a defense at the Preliminary, but to allow the magistrate to make his decisions solely on the basis of the State's evidence. This, of course, is based on the assumption that the magistrate is going to do more than rubber stamp the state's case.

Since the Appellants had already learned the hard way that in the Preliminary Hearing for Appellant Mildred Lairby that the process was almost an automatic handing over to the District Court, they elected to present one witness for the defense. Dr. Elmo Gruwell, the physician who initially examined Virginia after the alleged incident which resulted in the charge against Appellant Mildred Lairby, was that witness. (That should say something for the State's case, in that they didn't even use him as one of their witnesses, when he was the first to see the victim.)

In his testimony, Dr. Gruwell said that there was NO EVIDENCE to support the charge of the insertion of a fork handle into Virginia's vagina (App. Ex. 2, p. 4, lines 13-20, p. 7, lines 2-4). The Prosecuting attorney, forgetting or ignoring that unless the evidence shows that the crime was committed, the accused is entitled to release or acquittal, whatever is appropriate, pressed blindly on. From appellant exhibit 2, p. 7, lines 18-24.

Q: Now your examination, I take it didn't exclude or include to possibility of penetration of the lips....the mucous....the entroits by either a penis or any other object. Is that a fair statement?

A: Say it again, I....

Q: Your examination did not exclude, nor did it include the possibility of

23 penetration of the lips, that is, penetration to the entroitus, only, of  
24 either a penis or other large object, or a small object, or a finger?  
25 Dr. Ho. You're talking of the....a penetration distance of maybe a centimeter  
26 and a half. That's about all.

And p. 9, line 22 to p. 10, line 4.

22 Q: Your judgement, based on your examination, would be that or would not  
23 exclude penetration of the entroitus by penis or by any other object then,  
24 would it?

25 A: Cannot exclude it, but on the definition of hyperemia, this is more of  
26 a transient, short-duration phenomena. It lasts for a period of hours. Uh,  
1 hyperemia that would have occurred three days before, I don't think I would  
2 have noted it or seen it. 'Cause kind of....in my own mind, this was some-  
3 thing that had recently developed. Recently meaning, it would have had to  
4 have been in a period of hours, for me to have detected it.

\* \* \*

The conduct and intent of Deputy County Attorney Woody Gwinn is akin to the police just grabbing the first person they come to to fill in and solve an unsolved crime, then when he protests that there is no evidence to support the charge, the prosecutor replies, "Yes, but there isn't any to disprove that you did it, either."

Such conduct might not be so reprehensible if the State's case were solid, but it was not. The doctor's testimony did in fact rule out the charge which was filed against Appellant Mildred Lairby, as well as the rape of Virginia which was charged against Appellant Timothy Lairby. Virginia alleged a copious amount of bleeding (App. Ex. 1, pp. 6, 10, 19, 22, 23, 26; App Ex. 2, pp. 96-99, 100, 101) which is completely incompatible with the findings of Dr. Gruwell. If

the bleeding had not been alleged, the story would be entirely different, but it was alleged, and many times.

The allegations of bleeding were before the court in the Preliminary Hearing for Appellant Timothy Lairby, and those obviously perjured stories took sway over the less-sensational, common-sense evidence that said nothing had happened. Further, that a four-year-old child could be raped by a full grown male (App. Ex. 2, pp 106-108), allege pain, bleeding, and entry, and yet display for the doctor the undamaged genitals that Virginia did to Dr. Gruwell, says something rather plain about both her story, and the determination of probable cause which Judge Paul Grant was supposed to perform at the hearing at bar.

His prejudice went even beyond ignoring the obvious evidence. Many times during the Preliminary, he took an active part in the prosecution's case, actually advising and helping Deputy County Attorney Gwinn (App. Ex. 2, pp. 16, 17, 19, 21, 26, 27, 28, 31, & 33), instead of looking out for the rights of the accused as he should be doing, and maintaining himself as a neutral determiner of probable cause. The Appellant cannot escape the feeling that Judge Grant was determined to bind him over, at the very first of the hearing, regardless of what he had to do to elicit the required testimony.

Utah law allows, at 77-35-7(d)(1), that the evidence at a Preliminary hearing may be all or part hearsay. Nowhere, the Appellant contends, was that a license to ignore sworn, personal testimony, and allow into evidence highly questionable letters to bind over a defendant. That is what Judge Grant did.

The State's star witness at the Preliminary was Garri Long. Quoting from page 33 of Appellants' Exhibit Two, lines 9 through 18:

Q Now you don't remember any time Virginia didn't have panties on? do you  
A I remember any time Tim touched Virginia?

11 CL: No.

12 W: Do you remember any time he touched her private area?

13 LF: Now, Your Honor, I think he's leading her, and trying to suggest....

14 COURT: She may answer if she remembers.

15 W: Do you remember any time he touched her in the private area?

16 CL: No.

17 W: Do you remember any time that he touched you in the private area?

18 CL: No.

\* \* \*

That was not the only time that Carri repudiated the statements that she was alleged to have either written or signed, while down in Arizona. See App. Ex. 2, pp. 45-47 and 56-60. She repeatedly said that she could not remember anything, or she gave a flat no to the questions posed to her by the prosecutor about any wrongdoing on the part of Appellant Timothy Lairby. It even netted the state nothing that they were able to circumvent the objections of the defense regarding the laying of proper foundation for questions, by pure persistence. See App. Ex. 2, pp. 13-25, particularly p. 25, lines 17-19.

At the final session of the Preliminary Hearing, Judge Grant allowed into evidence, over the strenuous objections of the defense, certain unverified affidavits, purported to have been dictated and signed by Carri in Arizona under the pressure and auspices of her stepmother. In commenting on the admissability of said letters, which is what they are in fact, Appellant goes back to the principle which allows this Honorable Court to revert back to a previous statute when an appropriate remedy is not available under present law, or to even fashion a remedy out of case law, or even out of common law if needs be.

The guidelines of admitting hearsay at Preliminary Hearings, under the

provisions of 277(b)(7)(B)(1) are too vague to be of use, and do not attach to appellant his own responsibility for his action, or guidelines by which he can make a proper decision as to whether or not to allow hearsay. Appellant refers, additionally, that case annotated (1976) 111 Cal.2d for a remedy.

3. When he may be admitted, the court, in determining the existence of sufficient cause, shall consider:

(a) the extent to which the hearsay quality of the evidence affects its weight it should be given, and

(b) the likelihood of evidence other than hearsay being available at trial to provide the information furnished by hearsay at the preliminary hearing.

Under paragraph (a), Judge Grant was remiss in not considering the fact that the very witness whose written hearsay he admitted, had herself repeatedly and emphatically (for a scared nine-year-old) denied the contents of those letters. The hearsay quality of those letters so eviscerated their believability and use that they should not have been admitted. There was evidence, in the testimony of Kathleen Long, Lurri's stepmother, of collusion between her and Officer Blunck to effect pressure and questioning sessions on Lurri that Blunck could not directly accomplish himself, physically or legally. (App. Ex. 1, pp. 92, 93-94)

Police may not escape proscription of this amendment (fourth) merely by directing a third party to perform the search and seizure which would be improper if the police themselves did it. U.S. v. WOOT, 3d Cir. 1972, 453 F.Supp. 191.

And there was evidence that Kathleen Long had "reminded her" of what had happened (App. Ex. 1, pp. 45-49, 54 lines 1-22), yet Lurri denied any such action (App. Ex. 1, pp. 96-97). The documents were completely unreliable and should not have been admitted.

Under paragraph (b), Judge Grant was remiss in not considering that there was direct and direct testimony to replace the written hearsay. Lurri was the source of such testimony, and, barring extensive coaching (read that as witness tampering) she should not be able to replace the hearsay with direct evidence at trial. There must be some testimony at trial, including many details which she

previously could not remember, after a lapse of a year and eight months since the alleged offense, speaks for itself as to the Appellants charge of witness tampering on the part of some adult involved in the web.

Judge Grant made no effort to determine - properly - that probable cause existed that a crime had been committed at all. The fact that the medical evidence destroys Virginia's story, and Carri's version of the kitchen utensil incident, ruins all of the State's case, because Virginia's lies places such a heavy burden of lack of credibility on the rest of her story that none of it was in fact sufficiently believable to deprive the Appellant of a dismissal, with prejudice.

POINT 5: THERE WAS A DENIAL OF THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL, FOR BOTH APPELLANTS.

Appellant Mildred Lairby was arrested May 14, 1981, arraigned May 15, 1981, underwent Preliminary Hearing June 5, 1981, and was arraigned in District Court on or about June 12, 1981. No problems yet. Her trial, however, was not held until October 26, 1982, after a lapse of sixteen months and fourteen days. During those 16½ months, there was never a motion by the defense for a continuance; all came from the prosecution, or as a result of an overcrowded docket. From

CAIN v. SMITH, Ky 1982, 686 F2d 374, we read

Factors particularly probative in evaluating whether right to speedy trial has been violated are (1) length of delay, (2) reasons for delay, (3) whether defendant asserted his or her right to speedy trial, and (4) whether defendant has been prejudiced by delay.

We shall consider the factors one at a time.

Length of delay: Sixteen and a half months is outrageous. Such an imposition of stress and mental cruelty over that period of time amounts to the deposition of punishment before the defendant is even found guilty. Utah law, at

§ 1-4, Utah Code of Criminal Procedure, mandates

Conviction to precede punishment. No person shall be punished for a public offense until convicted in a court having jurisdiction.

Further, the United States Constitution, at Amendment VI, states that "...the accused shall enjoy the right to a speedy and public trial,..." A speedy trial is a RIGHT under our Constitution, and was intended to avoid precisely what has happened in the case at bar: the imposition of constant stress, waiting, and, in truth, the imposition of punishment before trial. For the Appellants to have been made as they were, to live under the shadow of these charges for many months, is a very real form of very real punishment. The RIGHT to a speedy trial is one which is not abridgable by the actions of any state law, court, or practice.

State prisoner had right under this amendment to speedy trial, and society should enjoy a like right. SUIT v. ELLIS, c.a. Tex. 1906, 282 F2d 145.

The State of Utah, in the case at bar, should be reminded that

It is basic concept of our system of justice, articulated and made secure by this amendment, that a fair and impartial trial is impossible after a long lapse of time. U.S. v. CHASE, D.C. Ill. 1955, 135 FSupp 230

and that the Appellants did not receive a fair and impartial trial, in large degree because of the oppressive delays

(2) Reasons for delay: The initial setting of trial date for Appellant Mildred Lairby was September 28, 1981. Defense was ready, but the Court Docket was not. Trial was then set for February 9, 1982, over four months later. The trial was again put off for overcrowded docket, until February 25. On February 25, 1982, the defense was prepared, but evidently the Prosecuting Attorney Woody Whinn knew what was going to happen, because he didn't even show up; the trial was again put off because of court conflicts. The next trial date was April 29, 1982, and it was again postponed because of court overloading. Appellants have received of further continuances being granted between April 29, 1982, and

October 26, 1982, when the case finally did come to trial. The state asked for a continuance on July 12, 1982 due to a change in prosecuting attorneys, and that may have occasioned another delay (it certainly did for Appellant Timothy Lairby, as will be shown), but Appellants are not precisely sure as to whether or not that contributed to the delays surrounding Mildred Lairby's trial.

(3) whether defendant asserted his or her right to a speedy trial: A RIGHT means something that is inalienable, undeniable, and not subject to denial. Appellant Mildred Lairby did not per se make a demand in an open court session for a speedy trial, but

It is not the duty of defendant to press that he be prosecuted upon indictment under penalty of waiving his right to speedy trial if he fails to do so. U.S. v. DILLON, D.C.N.Y., 1096, 183 FSupp 541. It is duty of public prosecutor, not only to prosecute those charged with crime, but also to observe constitutional mandate guaranteeing speedy trial. Id.

In addition, the counsel for Appellants constantly advised them that the delays were not hurting them, that the more time that passed actually helped the defense case. The fallacy of that reasoning, in hindsight, is obvious, and equally as obvious is the fact that Appellant Mildred Lairby was restrained from making an actual demand for speedy trial by faulty guidance from her counsel.

(4) Whether defendant has been prejudiced by delay: Appellant Mildred Lairby was seriously prejudiced by the delays in bringing her to trial. The major witnesses against her, her daughter Carri, and her stepdaughter Virginia, were eight and four, respectively, in age, and giving the State almost two years to allow pressuring of those youthful witnesses, and concurrently allowing them to mature for that same two years, amounts to a denial of fairness that cannot, under any stretch of any imagination, be cured with a new trial. It is the formal contention, and accusation, of the appellants, that the delays secured by

the prosecution in the cases at bar were wilfull, purposeful, and specifically designed to allow the coaching of witness (tampering) which did, inarguable, harm, and thereby to secure a tactical and real advantage over the defense. This allegation, and its proof, will be discussed at length under this same heading, with reference to Appellant Timothy Lairby.

Appellant Timothy Lairby was arrested July 22, 1981, arraigned July 23, 1981, and brought before Judge Melvin H. Morris July 30, 1981 for Preliminary Hearing. No problems yet. At said hearing, the State's star witness, Carri Ann Long, said she could remember nothing, and refused to testify. The State thereupon requested a continuance to allow the small girl to gather her thoughts, and that continuance should have been limited by 77-35-7, Rule 7 of the Utah Rules of Criminal Procedure, which states, in subparagraph (c):

"....Such examination shall be held within a reasonable time, but in any event not later than ten days if the defendant is in custody for the offense charged and not later than thirty days if he is not in custody; provided, however, that these time periods may be extended by the magistrate for good cause shown.

The first limit mentioned, ten days, applied to the Appellant, because he was in custody for thirteen days before arranging bond. The State and the court obviously cooperated in an effort to gain more time, since the order setting Appellant's date for Preliminary was not signed by Judge Morris until four days after the initial session, on August 3, 1981, when Appellant was finally out on bond.

At that point, even ignoring the first, ten-day limit, the 30 day limit then comes into play, and the continuance for the state was almost two months, until September 17, 1981. Everything done from this time forward is irretrievably poisoned by the bad faith actions of the Deputy County Attorney.

On September 6, 1981, Appellant underwent surgery for an ulcer, and the

defense made its only request in both case for a continuance. The continuance was granted, albeit for a longer period of time that was reasonable, until October 17, 1981, three months.

The information 012801784 was amended December 15, 1981, and to allow time to prepare the preliminary was again put off until January 7, 1982. The total delay, from arraignment to a meaningful session in the preliminary Hearing for Appellant Timothy Lairby, was five months and nine days, just to get to a decision as to whether or not the Appellant should be held for trial. The delays were unreasonable, and without proper good cause. Overcrowded dockets are never an excuse for actions such as these.

Delay caused by overcrowded dockets is weighed against state. CAIN v. SMITH, supra.

Now to the points referred to in CAIN, supra, to determine the extent of constitutional deprivation in the instant case.

(1) Length of delay: From arraignment in Fifth Judicial Circuit Court, July 23, 1981, until the binding over of Appellant Timothy Lairby to the Third Judicial District Court, the delay was eight months and two days. The delay from that point to trial was another seven months and one day, until October 16, 1982. Fifteen months and three days is totally beyond the stretch of any imagination as reasonable. Virtually all of the delays(all but one) were due to overcrowded courts, or motions of the State because they could not keep their own house in order as to prosecuting attorneys. Much of the same argument as put forth against the delays imposed on Appellant Mildred Lairby would also apply here. The delays in proceeding to trial were, standing entirely by themselves, sufficient to amount to a fundamental unfairness of the entire proceeding.

(2) Reasons for delay: The reasons for the improper delays in arriving at

a preliminary hearing have already been discussed. From that point, the story is much the same.

Initially Appellant Timothy Lairby's trial was set for April 15, 1982, exactly one month after he was bound over to the district court. Then it was put off until May 3, 1982 due to overcrowding in the courts, then to July 14, 1982, for the same reason. On July 12, 1982, the County Attorney's Office requested another delay because Woody Gwinn had changed assignments within the Office, and was not going to handle the Appellant's case at trial. Paul K. Farr was appointed to the job on July 22, 1982. The trial date at that time, July 27, 1982, did not give Paul Farr enough time to prepare, so the Defendant was made to labor under another delay not of his making. This time, after a few jockeyings and maneuvers, the trials of the two Appellants were consolidated, and set for October 26, 1982, when they did finally come to trial.

The burden is on the state to see that the constitutional mandate of a speedy trial is met (See U.S. v. DILLON, Page 20, supra.), and in the instant cases, the State appeared to have cared not a whit for the rights of the Appellants for that particular Constitutional right.

(3) whether defendant asserted his or her right to speedy trial: The Appellant Timothy Lairby did in fact make that demand, functionally, on two occasions, one at about July 27, before Judge Maurice Jones, and on July 30, 1981, before Judge Melvin Morris. To wit:

Demand for reasonable bail is functionally equivalent to demand for speedy trial. CAIN v. SMITH, Supra.

For the remainder of the next fifteen months, Appellant was laboring under the erroneous advice of counsel, and made no formal demands for a speedy trial, even though he did voice concern on numerous occasions to his attorney over the

delay being sought by and given to the state. The state and appellant Mildred Fairby seemed entirely powerless to bring the matter to any kind of a conclusion, and they were forced to labor under an appalling burden of suspicion and stress upon waiting for the state to decide whether or not appellant Timothy Fairby was even going to stand trial.

The United States Supreme Court, mindful of any responsible court is of the opinion that the delay caused by pending state action, in U.S. v. POH, supra,

This amendment requires a judicial finding of probable cause as a prerequisite to extended restraint on liberty following arrest. See also State v. WYDAL, 10.1970, 347 P.2d 681. (affirmed 1971)

Any attempt to argue that the U.S. v. POH decision holds sway only when the "extended restraint" is actual physical incarceration is strained and unrealistic because bail, coupled with the stress and worry of the pending actions is a very real restraint on liberty. Further, even though as was stated in CAIN v. SMITH, p.23, supra, that the demand for the fixing of reasonable bail and the demand for a speedy trial are inextricably intertwined, the fixing of bail does not in any way let the court or the prosecution off the hook as far as bringing the matter to a decision point as soon as possible.

where fixing of bail does not satisfy requirement of...BERNSTEIN decision that there be a probable cause determination as to misdemeanor post-arrest detentions; as posting of bail may impose unwarranted burden on accused if probable cause is lacking, accused is entitled to have that determination made prior to electing to post or not to post bail. in re WALTERS, Cal. 1970, 33 C.2d 697.

Appellant contends that the previously-mentioned collusion between the court and county deputy attorney Woody Wilson to allow appellant out on bail before setting the next date for an attempt at a preliminary hearing was nothing more than a thinly-veiled effort to circumvent the law and gain more time to influence the youthful witness the state intended to use against appellant Timothy Fairby. The only bill they try to duck the provisions of 75-76-7, p.21,

again, but also they tried to duck the constitutional law as imposed on such proceedings by Jeffery and the United States Supreme Court.

Yet another defendant has been prejudiced by delay: herein is stated the intention of the Appellants, that the delay was occasioned by a conscious, willful, purposeful act on the part of the Deputy County Attorneys involved to gain a tactical advantage over the accused.

To begin with, we must realize that the key to the entire State case was Carri Lewis. Virginia's story by itself was so weak that it was not sufficient to sustain any kind of serious prosecution. The medical evidence said she was lying, and she consistently maintained that Carri had witnessed much of what had allegedly went on between Appellants and herself. Carri was the key.

At the Preliminary Hearing July 30, 1981, Carri said she couldn't remember anything. The story was much the same almost six months later, on January 7, 1982, when she again said she could remember virtually nothing. At that time, however, the State relied on the improper hearsay evidence of the coerced letters to bind Appellant over for trial. And at the trial, Carri's testimony was radically different.

At the trial, she told her memory was better (Tr. Vol.II, pp.392-393), but she was not willing to give any explanation for the improvement (Tr. Vol.II, pp. 393-94). She had been coached extensively, and that coaching, resulting as it did in obvious perjury, amounted to no more than outright witness tampering. Not only did her story contradict the unimpeachable medical evidence, but also her positive statements that are shown as firmly uncontested record (See Vol. II, infra, for reference to her statement that the Kirby children were at the home of the Appellants the weekend after incident).

The Appellants stand on their claim of witness tampering on the part of the County Attorney, his father and stepmother of Carri Lewis, at the behest of

the police or the prosecution. The same would apply to the testimony of Virginia Lairy, but that will be discussed at length under Point 24, infra, since Virginia did not testify directly at either of the preliminary hearings.

It is obvious that the Appellants were seriously prejudiced by the delays secured by the state in the process of bringing these cases to trial. The testimony changed materially on at least two occasions, and on many points, and the youthful state witnesses gained memories and recall all out of proportion with either their ages, or any expectation of reality. The convictions in the cases at bar cannot be allowed to stand, coming as they do under STRUNK v. U.S., 412 US 434.

"Dismissal is the only possible remedy for a violation of the right to a speedy trial." (18 U.S.C. 3152-3156, 3161 et seq.).

77-35-7(b) demands that a trial date be set, and that said trial date may not be extended except for good cause shown. Good cause connotes something which can be seen as a reasonable cause by all parties, and if not reasonable, then something which the disagreeing party can argue against. Overcrowded dockets, the direct result of a niggardly state posture on the appropriation of funds to expand the court system, is not good cause, and is prejudicial to the defendant because he does not even have the chance to argue against the delay.

POINT 6: THERE WAS A COMPLETE LACK OF JURISDICTION IN THE TRIAL COURT, TO SITHEAR TRY, OR SENTENCE, THE APPELLANTS.

The Constitution of the United States at Amendment V requires, in part, that "No person shall....be deprived of life, liberty, or property without due process of law;...." Further, at Amendment XIV, the Constitution places those same requirements on the states, that "....No state shall make or enforce any law

which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Under the provisions of Article I, Section 7, the Utah Constitution places this sovereign state under the same "due process" requirements that are restrictive and mandatory on the federal government. Indeed, this Honorable court, in a recent decision, the citation of which the Appellants do not have at hand, has held that the United States Constitution Bill of Rights is of full power within the jurisdiction of this state. Pursuant to those restrictions, this Honorable Court has held that

"It is elementary that there can be no judicial action affecting vested rights that is not based upon some process or notice whereby the interested parties are brought within the jurisdiction of the judicial tribunal about to render judgement." PARRY v. BONNEVILLE IRRIGATION DIST., 72 U 202, 263 P 251.

Specifically with regards to bringing the interested parties under the jurisdiction of a District Court for trial of felony, this Honorable Court has said

"Right of district court to try person for felony rests upon filing of proper indictment by grand jury, or filing of proper information by district attorney or other proper counsel for state, and such information can be filed properly only after accused has been bound over and held to answer in district court by magistrate having jurisdiction to investigate charge and determine if there is probable cause to believe that offense has been committed and that the defendant is guilty thereof." STATE v. FRIZZMAN, 93 U 126, 71 P2d 196.

the "proper information" is delineated quite clearly in STATE v. COX, 100 U 281, 147 P2d 558, wherein the following requirements were given.

"Under this section, papers filed in the District Court must be entitled "In the District Court of (or in and for).....County." The name of the county must be given."

Again, the Appellants must return to the previous code for a remedy which does not exist in the 1960 Revised Code. The present code gives no provisions for relief if an information is deficient, giving the prosecutor carte blanche to impose whatever abuses he has a mind to on an accused.

Under 77-17-4, Utah Code of Criminal Procedure (1973 edition), the contents of the (District Court) information are specifically and carefully mandated.

COMMENTS.-- An information must recite the fact of the commitment or binding over of the defendant by a magistrate, and the names of the witnesses testifying for the state on such examination must be endorsed thereon. (emphasis added)

Indeed, the provisions of 77-23-3 (1973 code), which state the grounds for quashal of an information, specifically require that 77-17-4, and the provisions of 77-21-5, regarding the subscription and verification of an information by the prosecuting attorney, be adhered to in all respects or the information cannot stand. This Court has upheld on numerous occasions the requirement that a binding over be stated on the information.

No such District Court Information was filed in either of the Appellants' cases, the State instead relying on the Circuit Court information through both proceedings. Appellants feel that their referral back to the previous code, where the present code is unconstitutionally vague and offers no relief if the information is deficient, is appropriate and proper, since this Court need not have its arm shortened in fashioning a remedy simply because the present code is deficient. Even if this Court did not allow such a referring back, the fact still remains that the district court, in both cases at bar, was not given jurisdiction to proceed because the properly entitled papers were never filed, and those which were filed and used were constitutionally deficient as to the required jurisdictional facts, without the filing of the requisite information, certified and proper for the district court, and without the court was not given jurisdiction.

ETHER TO TRY OR TO DENY THE APPELLANTS. Since the sentences were imposed in what is a void, a nullity at law, they cannot stand the scrutiny of this Court, and they must be vacated, and the convictions reversed.

POINT 7: WITHDRAWN AS WITHOUT MERIT. The provisions of Discovery, as outlined in 77-35-16, Utah Code of Criminal Procedure, were nominally met, if begrudgingly, by the prosecution, a fact not known to the Attorney Pro Se at the time he filed his Docket Statement.

POINT 8: THERE WAS A DENIAL OF DUE PROCESS IN THE STATE'S REFUSAL TO ALLOW DEFENSE COUNSEL TO CONDITIONALLY EXAMINE TWO OF THE STATE'S WITNESSES.

To quote from 77-35-14, Rule 14 of the Utah Rules of Criminal Procedure,

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

On October 27, 1981, with the real fear in mind that the two daughters of Appellant Mildred Laird were about to be taken out of the state by their natural father pursuant to a possible court order granting him custody of them, Appellants filed a Notice of Taking Deposition in the Third District Court, and a subpoena to compel the attendance of Tracy and Carri at the session. This was done through Monel H. Farr, their attorney of record at the time, and the Deposition was scheduled for November 6, 1981.

On November 6, 1981, Attorney Farr received a telephone call from Deputy County Attorney Gwinn in reference to the Deposition. Mister Gwinn said that he,

in his capacity and office as Deputy County Attorney, was not going to honor the subpoena, and that counsel for the defense would have to content himself with cross examining the girls when the time came. Appellants can't help but wonder what Deputy County Attorney Swinn would do if, on the very day of a scheduled hearing they were to telephone him and say they weren't going to honor his subpoena. The question doesn't need an answer, but evidently it is fine for the prosecution to do as they well please, even to the point of refusing to honor a subpoena, if it fits into their plans, and if honoring the subpoena might upset their applecart.

A Motion to Compel was filed by Attorney Farr on November 27, 1981, which was summarily denied by the court. Tracy and Carri left the state December 8, 1981, and Tracy has not been back, even though the defense requested her attendance at the trial. See POINT 24, infra.

It is a proper request for the defense to ask to interview the state's witness, particularly where their future availability is in question. The defense in the case at bar complied with the law, and did nothing more than that which is their right, and the prosecution would not cooperate. It seems to have been the practice, throughout the cases of the Appellants, that the state obeyed all the laws that went their way, and ignored the ones that went the way of the defense. The state's refusal to allow the conditional examination of Tracy and Carri Long was a severe abridgement of the Appellants' rights, and a wet blanket on any efforts they could make to put together a meaningful defense. The unsure and inconclusive nature of Carri's testimony both before and after this action by the state cannot help but give rise to the thought that maybe the prosecution didn't want defense counsel to have access to her because she might tell something unfavorable to the state. Whether or not such was the case, the arbitrary and

Improper actions of Deputy County Attorney Woody Gwinn amounted to an obstruction of the due process to which the accused has a right, and that obstruction denied the defense what could have been a major tool of incalculable value in the constructing of a viable defense. There is no way to determine what Tracy might have said at a disposition, with the sobering effect of her mother's presence to make her aware of what she was saying, so there is no way to assess the damage that Mister Gwinn inflicted on the defense.

In a furtherance of their efforts to deny the defense access to Tracy, the Prosecuting Attorney at the Trial, Paul K. Farr, played the innocent when the defense asked if he would please have Tracy at the trial as a witness for the defense. He said that her attendance could not be secured because she was in Arizona, and would not willingly come. He knew as well as any State counsel of the provisions of 77-21-3, Utah Code of Criminal Procedure, and he also would know that Arizona was a signator to the Uniform Act To Secure The Attendance Of Witnesses From Without A State In Criminal Proceedings. It cannot escape thought that he was possibly a bit afraid of having an older witness on the stand, one that he may well not be able to control, so the denial of due process which began with Mister Gwinn's arbitrary refusal to allow a conditional examination of Appellant Mildred Lairby's children (by refusing to honor a lawful subpoena) continued right on through the trial, with Mister Paul Farr's inexplicable failure to give the defense the compulsory process required by the Sixth Amendment of the United States Constitution.

"Under this amendment, defendant accused of crime is guaranteed right to compel attendance of witnesses, and who the witnesses shall be is a matter for defendant and his counsel to decide and it does not rest with prosecution or person under subpoena.

Defendant may not be deprived of right to summon to his aid witnesses who it is believed may offer proof to negate government's evidence or to support

defense." U.S.v. SEAGER, D.C.N.Y.1960, 180 FSupp 467.

And further, in light of the other actions of the Court during the trial when the defense asked for a concession which might delay the proceedings even for a moment (See POINTS 11, 14, & 17, infra), the following applies, particularly when viewed with the outright cooperation of the Court with the Prosecutor.(See POINTS 14, 17, 19, 20, & 24, infra.)

"Accused's right to compulsory process for obtaining witnesses is a fundamental right which courts should safeguard with meticulous care and award to accused whether requested or not, unless waived by accused in manner showing his express and intelligent consent." BRIDWELL v. ADERHOLD, D.C. Ga. 1935, 13 FSupp 253, affd. 92 F2d 748, rev. on other gnds 58 Sct 1019, 304 US 458, 82 LEd 1461.

The accused in this case did not waive this right, and infact made numerous requests to secure the attendance of Tracy Long at the trial. Paul Farr once again conveniently ignored the Constitution of the United States, and the Constitution of Utah (Art. I, Sec 12), and from his actions, this appeal is brought.

"Refusal to summon witness for defendant at state's expense is remediable by appeal...." FITZGERALD v. SANFORD, C.A. Ga. 1944, 142 F2d 445.

POINT 9: THE TRIAL WAS HEARD BY AN UNCONSTITUTIONAL PANEL OF JURORS, COMPOSED AS IT WAS OF ONLY EIGHT MEMBERS.

Trial commenced on October 26, 1982. Between the prosecution and the defense, the prospective jurors were examined, and the panel was chosen, comprised of seven men and one woman. It is virtually inarguable that the trial was unfair, since, with all the convoluted law and contested and conflicting facts, the panel deliberated for one hour and forty minutes before returning guilty verdicts on all counts. It is herein the contention of the Appellants that the jury was unconstitutional as to the number of jurors, because of (1) nature of case,

Involving as it did two defendants and five crimes, and (2) the serious nature of the offenses and the virtually-capital nature of the possible sentences which could be imposed on Appellant Timothy Lairby, depriving him of freedom for possibly the rest of his natural life.

The Appellants are citizens of the United States, and did not give up any of the rights guaranteed to citizens of this country, simply by moving to within to boundaries of the sovereign state of Utah. The restrictions and mandates of the Bill of Rights are applied to the States by virtue and power of the Fourteenth amendment of the Constitution, a fact recently acknowledged by this Honorable Court, and with those restrictions and mandates comes the RIGHT to a trial by jury, as held by the United States Constitution, Article I, Section 10 of the Utah Constitution notwithstanding.

"Right to trial by jury ranks very high in catalogue of constitutional safeguards." U.S. ex rel TOTH v. QUARLES, U.S. App. D.C., 1955, 135 FSupp 224.

And with that carefully guarded right to a trial by jury, comes the definition of the term as understood by those who framed the Constitution.

"As the guaranty of a trial by jury in the third article implied a trial in that mode and according to the settled rules of the common law, the enumeration, in this amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to in the anxiety of the people of the state to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. GALLAH V. WILSON, D.C. 1888, 8 Sct 1301, 127 US 550, 32 LEd 223.

And further,

"That trial by jury means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, and is not open to question. Those elements were: (1) That the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law, and advise them in respect of the facts; and (3) that

the verdict should be unanimous." PATTON v. U.S., Okla. 1930, 50 Sct 253, 41 Ed 276, 74 LEd 854.

Even the Congress of the United States is powerless to abridge that right.

"Act of Congress enacting a code for Alaska, providing "that hereafter in trials for misdemeanors six persons shall constitute a legal jury," was invalid in depriving persons accused in Alaska of a right to trial by jury by a common-law jury, as Alaska was incorporated as a part of the United States." HASHUSEN v. U.S., Alaska 1905, 23 Sct 514, 197 Us 518, 49 LEd 862.

Utah is part of the United States, and the prohibition referred to above extends to all the actions of State legislatures, and, by inference, to any body that draws up the statutes or guidance for a state judicial system.

"This clause has rendered the legislatures of states as incompetent as Congress to enact laws which will deprive individuals of their liberty without due process." CANTWELL v. STATE OF CONNECTICUT, Conn. 1940, 60 Sct 900, 310 US 296, 84 LEd 1213, 128 A.L.R. 1352.

The requirement for due process goes even further, to a matter of degree.

"A state or federal statute may require more in the way of due process than is required by this clause but it cannot in any event excuse less." WESTERN UNION TELEGRAPH CO. v. INDUSTRIAL COMMISSION OF MINNESOTA, D.C. Minn. 1938, 24 FSupp 370.

Appellants are fully aware of the fact that a trial by jury can be waived, but they made no such waiver, and merely their residence in this state does not deprive them of rights which are inalienable, unbridgable, and granted to every American citizen by virtue of that citizenship.

There has evolved a body of law, which the Appellants, in their present circumstance of having to proceed in Pro Se, and from the confines of a state prison, cannot directly quote, which says, in effect, that the right to a trial by jury in the Constitutional sense of twelve-person panel, is based on the "seriousness" of the sentences which may be imposed, and that a lesser offense need not be tried before a panel of twelve. Even if the Appellants ascribed to such reasoning - which they DO NOT - they would still be entitled to a trial

before twelve jurors, since a life sentence was a possibility for Appellant Timothy Fairby, and by anybody's thinking, a life sentence is surely "serious." The entire weight of American justice requires that the sentences imposed in the case at bar must be vacated as unconstitutional, and the provisions of Article I, Section 10, Utah Constitution be held as invalid and unconstitutional insofar as they allow a trial by less than a Constitutionally- correct jury of twelve when a person might well be deprived of his freedom for life. There is, as well, grounds to believe that the outcome of the instant case could well have been different had it been heard by four more minds. Maybe one of those four would have brought some reason to the proceedings, something woefully lacking, as this action mutely attests.

"Impartiality" within this amendment guaranteeing a fair and impartial trial is not a technical conception but is a state of mind, and deeply embedded in the right to a "fair and impartial trial" is the requirement that a jury of twelve men chosen to sit in judgement shall have no fixed opinion concerning the guilt or innocence of one on trial and that their ultimate verdict shall be based on the facts as they are submitted to them by the court under its instruction and superintendence. A "fair and impartial" trial contemplates a trial before a jury of twelve impartial and unbiased men, neither more nor less, in the presence and under the superintendence of a judge having the power to instruct them as to the law and to advise them in respect to the facts, and the establishment of guilt by a unanimous verdict of such jury. BAKER v. HUDSPETH, C.A. Kans. 1942, 129 F2d 779, cert. den. 63 Sct 201, 317 US 681, 87 LEd 546, reh. den. 63 Sct 264, 317 US 711, 87 LEd 556.

The trial was not impartial, it was not fair, and the base for such unfairness was laid with the empaneling of only eight individuals to hear the cases.

JOINT 10: THE PROSECUTING ATTORNEY WITHHELD, OR SUPPRESSED WITH THE ASSENT AND CONVICTION OF THE COURT, EVIDENCE WHICH WAS MATERIAL, MITIGATING, AND WHICH MAY WELL HAVE CHANGED THE OUTCOME OF THE TRIAL.

On June 5, 1961, Tracy Long and Carol Long were taken by their natural

rather for a month-long visit with him in Arizona. Mr. Long was aware of the charge which was at that time pending against Appellant Mildred Lairby, his former wife and the natural mother of Tracy and Carri, and carried with himself, naturally enough, some concern for the welfare of his daughters. The calumny of his later actions in the actual suborning of perjury from his daughters, or countenancing same, cannot in any way be excused by such concern, but the Appellants are willing, as of the early part of June, 1981, to give him the benefit of the doubt and allow that he was acting out of genuine concern for his daughters.

On or about June 21, 1981 Richard Long telephoned Appellant Mildred Lairby with, as he put it some good news and some bad news. The 'good' news is the subject of this POINT. Long stated that he had taken Tracy and Carri to a psychologist in Phoenix, for the express purpose of finding out of the two young girls had been the object or witness of any improprieties on the part of Appellant Timothy Lairby, a Doctor Clinton Street

Doctor Street interviewed both Tracy and Carri, and his very emphatic opinion was that the girls had neither been molested, nor had they ever seen anyone molested. This was the 'good' news that Long conveyed to Appellant Mildred Lairby.

The 'bad' news from Long, while not directly the subject of this POINT, is noteworthy, and material. He stated that he wanted the girls to stay down in Arizona beyond the month agreed on, and until the criminal matters were resolved. Appellant Mildred Lairby would not, and did not, give her permission for such action, so Long hung up the phone. The noteworthy part is this: none of the stories, written or oral, that the state relied on for a conviction on the cases at bar, had come out of Arizona at this time. Up until now Long figured he could buffalo Appellant Mildred Lairby into letting him keep the girls. Now, however, he realized

that such tactics would not work, and that he would have to take other actions if he were going to keep his girls. That this appeal exists at all is mute testimony of the other actions that he took.

While the actual content of the interviews which Doctor Clinton Street conducted with Tracy and Carri is privileged, Appellants made arrangements to take his deposition, and on August 13, 1981, the Deposition was taken. Present were Doctor Street, Ray Addington, counsel for Appellant Mildred Lairby, Richard Long. Attorney Hyman Brazlin, counsel for Long, had waived his presence at the session.

The Deposition was taken, and reflected Doctor Street's unqualified opinion that the girls were neither victims nor witnesses, and his opinion was so strong on this matter that he stated that if their stories were to change and they were to later say they were either victims or witnesses, he would believe them to be lying. (See App. Ex. 3, P. 15.)

Sometime during the first week of September, or thereabouts, a copy of this Deposition was delivered to Deputy County Attorney Woody Gwinn. He refused to stipulate to the admission of the Deposition, knowing as he did that it was a proper and legal document. One needs only to read the Deposition to see why.

At the trial, the defense attempted to have the Deposition's contents placed in the record (Tr. Vol II, p. 426) by the testimony of Richard Long, who was there at the Deposition taking, but Paul Farr objected to it, and the court sustained the objection. Mister Farr's objection was that Dr. Street was not present, and, by inference, not subject to cross-examination. Mister Farr is as aware as any attorney, competency notwithstanding, of the requirements for the admission of such a document. It was admissible under Rule 63 (3)(a), Utah Rules of Evidence, referring to Rule 32 (a)(1), Utah Rules of Civil Procedure,

wherein is stated:

(1) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds (a) that the witness is dead; or (b) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or... (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena;...

The wording of (D) above brings into play again the compulsory process to secure the attendance of witnesses. Considering the conduct of Paul Farr in the matter of Tracy Long, a witness which might be favorable to the defense, it is entirely unreasonable to believe that he would have cooperated in any effort to secure the attendance of a witness which he KNOWS would blow big holes in his case. See BRIDWELL v. ADERHOLD, page 31, supra.

The competency of Appellants' counsel is not at issue here, but in the light of other actions of the court and prosecution on matters that might have aided the defense, counsel could have probable motioned himself blue in the face, and still not recieved a proper hearing on the issue of securing the attendance of Doctor Street. With that in mind, it becomes doubly incumbent upon the state to insure that all evidence, in the best available form, be presented to the trier of fact. The deposition was proper, and Paul Farr knew it. The opportunity for cross-examination, seemingly at the heart of Paul Farr's objection, was in fact present at the Deposition session, even though it was effectively waived by the waiver of attendance by Attorney Brazlin. Attorney Addington, in fact, on page fifteen of Appellants' Exhibit Three, actually did some questioning which amounted to a partial cross examination. The Deposition was legal, proper, and the actions of County Salt Lake County Attorney Paul K. Farr, self-serving and purposeful as they are, fatally infects the State case with a denial of due process,

an act or inaction of state violated the concepts of a fair trial it offends against the due process clause of the Federal Constitution. U.S. ex rel FROSTEN v. DYE, D.C. Pa. 1952, 103 Fsupp 770, affd, 203 F2d 429, cert. den. 73 Sct 946, 345 US 960, 97 L ed 1399.

and destroys the power of the court

Suppression of material and mitigating evidence strips court of jurisdiction to proceed to verdict.... U.S. ex rel ALMEIDA v. BALDI, D.C. Pa. 1951, 104 Fsupp 521, affd. 195 F2d 815, cert. den. 73 Sct, 639, 345 US 904, 97 L ed 1361, reh. den. 73 Sct 828, 345 US 946, 97 L ed 1371.

The only possible way that Paul Farr could have properly objected to the admission of the Deposition was in accordance with Rule 32 (b), Utah Rules of Civil Procedure, wherein is stated that "objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying." There were more incidents of such blatant misconduct on the part of Paul Farr, which will be discussed as is appropriate.

POINT 11: THE PROSECUTION KNOWINGLY AND PURPOSEFULLY USED TESTIMONY IN THE TRIAL WHICH THEY KNOW OR SHOULD HAVE KNOWN WAS PERJURED.

At the Preliminary Hearing for Appellant Mildred Lairby, there was not much of a way for the State to know that the testimony they were using was perjured, except for the fact that the verbal testimony was not sustained by the medical evidence. That in itself should have been enough to kill that charge right then. Beyond that particular preliminary, however, there is absolutely no excuse for the conduct of the state officers. The perjury in the Preliminary Hearing into the charges against Appellant Timothy Lairby is not the subject here, but it is equally as obvious as that in the trial, and will be referred to as necessary to buttress the contention stated herein. The discussion will be on a count-by-count basis, starting with a melding of the single count against Appellant Mildred Lairby, and COUNT V against appellant Timothy Lairby.

Charge against Appellant Mildred Lairby & COUNT V against Appellant Timothy

Lairby: These charges revolve around an alleged incident in the bathroom of the Appellants' home, supposed to have taken place April 19, 1981.

Version One: Told at the Preliminary Hearing for Appellant Mildred Lairby, June 4, 1981, this version had Appellant Mildred Lairby perpetrating a sexual assault on the person of Virginia Lairby, while said child was sitting on the toilet. Mildred allegedly inserted the handle end of a kitchen fork into the vagina of Virginia Lairby, with sufficient vigor to produce copious bleeding, enough that it took two flushings of the toilet to get rid of the blood. Carri and Tracy Long were alleged to have walked in while this was happening, seeing the assault and making some comments about their mother hurting Virginia. (See App. Ex. 4, Police Report, p. 2; App. Ex. 1, pp. 6, 7, 10, 22, & 30.) Appellant Timothy Lairby was outside at the time, taking his oldest son, Steve to the store to get some sauce for dinner. (See App. Ex. 1, 9 & 33; App. Ex. 4, p.2) Appellant Mildred Lairby used a cold spoon to try stopping the bleeding, App. Ex. 1, pp. 7, 15, & 27. When Virginia was telling this story to her mother the following Monday, the mother, Wanda Lairby, was drying silverware, giving rise to the thought that such a circumstance would stoke the imagination of a very young girl, App. Ex. 1, pp. 7 & 11. The attention of the mother was brought to the girl by the statement by the girl, "I can finally pee." See App. ex. 1, p.9

Version Two: Told at the Preliminary Hearing for Appellant Timothy Lairby, January 7, 1982, this version implicated Appellant Timothy Lairby, by having him present in the bathtub, but yet the bleeding took place in another, bedroom incident, so evidently the bathtub in the Lairby residence is downstairs in the girls' bedroom. See App. Ex. 2, pp. 98-99. The state was allowing, even encouraging, testimony that was both confused and which was regarding other alleged

incidents which were not listed on the Information, but which were handy to carry on the water and secure a binding over. Tracy and Carri were still alleged to have walked in on the bathroom incident, (App. Ex. 2, p.114), yet Carri denied seeing anything at all in the bathroom (App. Ex. 2, p. 24), and maintained that Carri denied through the trial (Tr. Vol. 1, p. 109).

Oh:

Version Two (B): The only incident which Appellant Timothy Lairby participated in was the bedroom incident, never charged on the Information. (App. Ex. 2, pp. 98-99), and Virginia implicated Appellant into the bathroom incident the very day of the preliminary. Yet, Appellant was charged with that complicity on December 15, 1981. In this version, Virginia waited for a full two days after her mother's initial examination (four days after the alleged crime) to state that she could "finally pee". (App. Ex. 2, pp. 115-118).

Oh: Version Two (C): Appellant Timothy Lairby is outside again, and the fork incident is entirely the work of Appellant Mildred Lairby (App. Ex. 2, p. 120).

Version Three: Told at the trial, says that Appellant Timothy Lairby was not in the bathroom (Tr. Vol. 1, p. 50), and there was the oft-repeated copious bleeding. (Tr. Vol. 1, 50-56, 16-167)

Oh:

Version Three (b): The tines of the fork were inserted instead of the handle, which had been the consistent version until now (Tr. Vol. 1, pp. 110-112), and Appellant Timothy Lairby was in the bathtub watching, along with BOTH Tracy and Carri (Tr. Vol. 1, p. 116-119), and Appellant Mildred Lairby first used the fork on Virginia, then on Tracy and Carri in turn (Tr. Vol. 1, p.116).

According to Virginia, the bleeding was so bad that Appellant Mildred

could not arrest it (Tr. Vol. I, p. 167), but yet there were never any blood-stained panties brought forward (Tr. Vol. I, p. 9), despite the claims of the estranged, former wife of Appellant Timothy Lairby to the contrary, (App. Ex. 4, pp. 2 & 7). Even Wanda Lairby had to admit that there was no evidence to lend credence to Virginia's story, Tr. Vol. II, pp. 309-313.

Charge of Rape, COUNT I against Appellant Timothy Lairby. This incident was alleged to have taken place March 14, 1981, at the home of the Appellants, according to the Information 81CRS1784.

The foundation of this charge has been discussed in POINT 4, supra, but a review is in order. Appellant Timothy Lairby was arrested for the Rape charge July 22, 1981, on the strength of an insufficient, improper, and unconstitutional Information filed by Officer Guy W. Blunck of the Salt Lake City Police. There had been no contact with the alleged victim of this crime, prior to the filing of the charge (App. Ex. 2, pp. 116-117), and the written documents, which amounted to no more than letters, which had been extracted from Carri Long in Arizona by her stepmother, said absolutely nothing which could have served as a basis for a rape charge (App. Ex. 2, p. 74). The arrest was unreasonable and unconstitutional, and it is beyond any reasoning of rational minds, barring the manipulating of evidence or witnesses, or both, that such a charge could be maintained in the face of a complete lack of evidence.

Version One: Told at the Preliminary Hearing for Timothy Lairby, January 7, 1982, this version is a menage of multiple offenses, not mentioned in the Information. According to Wanda Lairby, Appellant Timothy Lairby had raped Virginia not once but twice, once on February 7, 1981 (not charged, but that didn't matter to Woody Quinn; he still elicited the testimony) and once in March of that year.

(App. Ex. 1, pp. 103-104) According to Martin Lairby, who was the mouthpiece in the Preliminary Hearing for Virginia, and the source of all the hearsay, the primary incident was downstairs in the girls' bedroom, and the second, March incident, was upstairs (App. Ex. 2, p. 104). Lairby, however, stated that the March incident (wherein she did not see anything like a rape) took place downstairs (App. Ex. 2, p. 74) Virginia alleged bleeding and pain (App. Ex. 2, pp. 106-108), but the doctor's testimony was that her hymen was still intact, that there was no evidence to support the fork story, much less an alleged rape, wherein something considerably larger than a fork handle would have been forced into a four-year-old vagina.

Version two: Trial version, directly from Virginia.

Virginia alleged a painful instance, where she felt entrance into herself by the penis of Appellant Timothy Lairby, (Tr. Vol I, pp. 49, 57-60, 154-158), and she alleged that she viewed an orgasm, and seminal emission. That such an event would be traumatic is beyond question, enough to burn memories very deeply into a child's consciousness. Yet, when asked about the color of the discharge, Virginia variously described it as "little green spots" (Tr. Vol. I, p. 50) or "yellow and brown mixed" (Tr. Vol. I, p. 158).

Significantly, on page 105 of the trial transcript, she alleges that she learned what penetration felt like from an experience from her brother. Virginia's lapses into fantasy (Tr. Vol. I, pp. 145-149, 173-176), coupled with her admission that it didn't matter if she lied (Tr. Vol. I, p. 69), destroy her credibility as a witness, something both the court (Tr. Vol. I, pp. 121-126, 169) and Paul Patton conveniently ignored, both the inconsistencies and the total lack of credibility in the witness serving their ends.

Forcible Sexual Abuse, COUNT II, and Forcible Sodomy, COUNT IV, against Appellant

Timothy Lairby: These two counts involve Carri Ann Long, the daughter of Appellant Mildred Lairby. The Abuse was supposed to have transpired on March 21, 1981, and the Sodomy on April 4, 1981.

Count IV was dismissed for lack of evidence. That in itself says something for the tangled web of perjury which the state used in this case, since Wanda Lairby testified at Timothy Lairby's Preliminary Hearing that BOTH Appellants had committed sodomy on Virginia. then Carri and Tracy, while they were all in the same room (App. Ex. 2. pp. 109-112)

In addition to the incident quoted on pages 15-16, *infra*, where Carri denied ever having been touched by Appellant Timothy Lairby, there were other times that Carri denied seeing or remembering untoward in the conduct of the Appellant (App. Ex. 2, pp. 34, 59-60). That in itself should have been the end of the Forcible Sexual Abuse charge, but the prosecutor pressed on, and the court helped him in the effort. (See App. Ex. 2, pp. 16, 17, 19, 21, 26-28, 31, 33). That effort achieved a binding over of Appellant Timothy Lairby on extremely questionable hearsay.

At the trial, to begin with, Carri felt no particular compunction to tell the truth, Tr. Vol. II, p. 346. That in itself impeached her testimony before it ever started. Then she began to impeach herself.

She denied having seen Appellant touch Virginia on at least two occasions, Tr. Vol. II, pp. 353, 359; she stated emphatically that one incident took place a week after Easter, (Tr. Vol. II, p. 358); she denied that the penis of Appellant ever touched her, (Tr. Vol. II, p. 356-357); she brought up an entirely new incident about Appellant Timothy Lairby allegedly touching her genitals with some sort of toy, which she could not identify, (Tr. Vol. II, pp. 371-374), and she

state that she had said "yes" to certain questions previously asked her in the preliminary hearing. (Tr. Vol. II, p.391, and compare to extract on pages 15-16, supra.)

Carri steadfastly maintained during her testimony at trial that her memory was better than then before, but she could give no rational explanation as to why. (Tr. Vol. II, p.392) Despite her claims of a vastly improved memory, Carri could remember little except specifically lurid details of the alleged incidents. It is a matter of psychological fact that when a person undergoes a severely traumatic experience, they either completely block it out, or they remember every little detail, important and unimportant. Carri's testimony was fraught with lapses of memory, so many, in fact that everything she says is under suspicion. She had been so "brainwashed" that she was even ambiguous about how she felt about her own mother, Tr. Vol. II, p.350. There have never been any credible accusations from anyone, including Tracy and Carri, that their mother had ever done anything to them, and they had lived with her continuously since birth.

Carri Long's testimony cannot be given any credibility, considering all the conflicts in testimony, included in her own words. When considered in light of her previous testimony, she loses all credibility that a person would be inclined to give her trial testimony, and it was all in the hands of Paul Carr.

Forcible Sodomy, COUNT III against Appellant Timothy Lairby: This alleged offense involves Virginia Lairby, the daughter of the Appellant, then aged four.

Virginia, too, impeached herself right at the start, with her own words. First, she said she never lies, Tr. Vol. I, pp. 35-36, then she said that it doesn't matter if she lies, Tr. Vol. I, p. 09, as well as admitting that she didn't know whether she had to tell the truth, Tr. Vol. I, p.40.

The only incident she alleged is referred to in pages 61-62 of Volume I,

trial Transcript. therein she accuses both appellants of sodomy, and she says that both on Mildred's girls were present at the time, and the scene shifts back and forth from the bedroom to the bathroom. The story does not agree with Garri's testimony, is disjointed, rambling, and almost impossible to follow. This testimony, which may well have been coached into her by her mother (Tr. Vol. I, pp. 140-141) cannot be credited with enough weight to sustain a conviction, because there is enough doubt present in her words alone, not even considering the prior inconsistencies and the conflicts with other witnesses, to relieve her of any believability.

In addition, the opinion of the trial court notwithstanding, there are far too many references to influence on this youthful witness to credit her testimony, (See Tr. Vol. I, pp. 82, 84, 85-87, 92, 103, 108-109, 134-136, 137, 140-141, 150-153, 157, 168-169, 170, 173-176), and they implicate her mother, her grandmother, Paul Farr, and at least one other person who had to pass information back and forth between the households in Arizona and Orem, Utah. The expected denials were there, too, in Wanda Lairby's testimony, that anyone ever "helped" Virginia to remember. (Tr. Vol. II, pp. 301-305).

Collusion was a distinct possibility, with Paul Farr (Tr. Vol. I, p. 92), and with Officer Blunck (Tr. Vol. II, pp. 433-440, especially 440, line 10). The possibility is very real that Officer Blunck was guiding the questioning of Garri, and using tactics through the girl's stepmother that Blunck could not legally use himself. Also, since he was the only person who had free access to both homes in the two states, the Longs by telephone, and the Lairbys in person, his name surfaces as the prime suspect in the shuttling of information which had to take place. See RULF 24, infra.

by United States Attorney of evidence which he knows or should know to be false would be patently antithetical to standards required by Department of Justice and that use is unacceptable conduct by any attorney, whether public prosecutor or civilian. ABA Journal Professional Responsibilities, 102-103; 102-104; 102-104.

That is a mild way of saying that an attorney, who does perjured testimony, when he either knew it was perjured or ought to have known that say he should have known it was perjured, is an accessory to that perjured act, and his conduct is so reprehensible that it destroys the possibility of fairness in a trial, and quite literally opens him to criminal sanctions for that reason. Paul Barr was an accessory to using evidence which he knew was perjured. At least, if he did his job and read the transcripts of the two preliminary hearings he knew it was perjured. If he was so lazy and biased in the cases that he did not bother to read the preliminary transcripts, then the liability and responsibility still attach to him because he did not do his job, period, simple.

POINT 1.7: THE PROSECUTING ATTORNEY ALLOWED AND EVEN ENCOURAGED IMPROPER CERTIDY ABOUT UNRELATED INCIDENTS NOT CHARGED ON THE INFORMATIONS, IN AN EFFORT TO OBTAIN A CONVICTION BY SHEER WEIGHT OF EVIDENCE.

There were five distinct incidents charged on the Informations, after a full eighteen months of police investigation, which included at least two separate police departments, and the efforts of numerous, self-serving family members who would have been only too glad to bring more incidents to light, if they were there. Those five incidents were, by way of review:

- (1) March 14, 1981, Rape of Virginia, by Appellant Timothy Lairby;
- (2) March 21, 1981, Forcible Sexual Abuse of Carri, by Appellant Timothy Lairby;
- (3) April 4, 1981, Forcible Sodomy on Virginia, by Appellant Timothy Lairby;
- (4) April 4, 1981, Forcible Sodomy on Carri, by Appellant Timothy Lairby;
- (5) April 18, 1981, Forcible Sexual Abuse on Virginia, by both appellants, in bathroom.

Testimony was elicited, encouraged, and used to good advantage by Paul Farr about at least the following incidents:

- (1) Rape and Sexual abuse of Virginia, February 7, 1981, by both Appellants, or at least with both appellants present (Tr. Vol. 1, pp. 42-47).
- (2) Sexual abuse of Tracy, upstairs, by Appellant Mildred Lairby, date never established (Tr. Vol. 1, p. 47).
- (3) "Almost a hundred times", quote from Virginia as to number of abusive incidents by both Appellants (Tr. Vol. 1, p. 51).
- (4) Bathroom incident, fork in privates, by Appellant Mildred Lairby, April 18, 1981 (Tr. Vol. 1, pp. 52-57) only this time an ice cube was used to try

and Tracy and Carri were both victimized as well.

(4) Sodomy on Virginia, by both Appellants, date never established, (Tr. Vol. I, pp. 92-97). Tracy and Carri were present for this one, too.

(5) Another bathroom incident, this time while Tracy and Carri were taking a nap, involving both Appellants (Tr. Vol. I, p. 100).

(6) Another version of bathroom incident, or another incident, this time with Tracy, Carri, and Appellant Timothy Lairby in bathtub watching Appellant abuse Virginia with a fork (Tr. Vol. I, pp. 116-119).

(7) Statement here that Appellant Timothy Lairby was outside playing baseball, then was called in to join the others already in the very crowded bathroom (Tr. Vol. I, p. 117).

(8) Another rape, date never established, which took place in the living room of the Lairby home, where Virginia saw a yellow and brown seminal emission, with Tracy and Carri present to watch, as well as Appellant Mildred Lairby, (Tr. Vol. I, pp. 155-157).

All of the foregoing came from the mouth of Virginia Lairby, a pretty, seemingly intelligent six year old girl. Fair trial?

It is an obvious part of due process that an accused be apprised of the charges against him, and that he be given a chance to prepare a defense against those charges. There is simply no rational way that the Appellants in the instant case could have prepared a viable defense against such an unscrupulous onslaught of allegations.

Due process requires that one accused of crime be fully apprised of nature and cause of charge against him. ALINAB v. U.S., C.A. Alaska, 1960, 277 F2d 914.

To prepare a defense, an accused must know what it is that he is supposed to defend against.

an accused is entitled under this Amendment, to be advised as to every element in respect to which it is necessary for him to prepare a defense. State v. BAI, 176 N.J. 315 (1987), 89-13, 300, and 303.

and further,

the specific charge, and the chance to be heard in a trial on the issues as raised in the specific charge to be found in the indictment or information, if desired, are among the constitutional rights of every accused in all courts. State v. STRACCHIAN, 1979, 80-134, 1, 29 (a 1979) (emphasis added)

The defendant was misled by a prejudicial strategy which in both preliminary hearings, first, claiming for the sake of the public's ear on the up and up, the entire conduct at the trial which defendant's trial might have been accomplished in the proceeding. For the first time, Article I, Section 13, New Constitution, was used.

The provisions of this section were not complied with in a prosecution for having carnal knowledge of a female, where defendant was subjected to preliminary examination for act committed on one date specifically stated in information and tried for another act alleged to have been committed on a later date. STATE v. BELSOR, 176 N.J. 360, 89-1317, distinguished in 89-1140b.

Belser, supra, in the words of this Court, rebukes the State's trial tactics, because even though there were no specific charges in the charges from preliminary to trial, the de facto result was the same; a fair trial is impossible where the defense is not apprised of what they are expected to defend against. The State, in the case at bar, did not allegation upon allegation, none of which were substantiated in the trial, the place to say things of believability, and all of which were directly contradicted by the testimony of at least one other witness, all of which proceeded forth from the mouth of a child who lapsed into freestyle testimony, never to stay, and who could not relate specific, highly noticeable incidents or events which, had they in fact taken place, would have turned themselves into a memory.

The police maintained that defendant had either witnessed or were involved in the same incident, the pivotal incident in the entire State case,

Carri actually and adamantly maintained that she never saw or took part in any incident in the bathroom. Lies, put into Virginia's head by a self-serving mother and will stop at nothing to keep her children.

Virginia and Carri both adamantly maintained stories of serious if not massive bleeding (the version of the bathroom incident wherein the bleeding was so bad that it could not be arrested (i.e. Vol. I, p. 177) could only be characterized as massive) but Doctor Gruweel equally adamantly maintained that there was no evidence to support the allegation around the fork in the bathroom, much less all the other times that blood was supposedly present. Lies, put into Virginia's and Carri's heads by self-serving parents who will stop at nothing to keep their children.

Paul Farr knew what he was doing with his "shotgun" antics was improper. Whatever else could be said about him, it cannot be stated that he is stupid, so he did what he did with a full knowledge of the abuses inherent in his actions. He knew his case was weak. The rape charge and the forcible sexual abuse charge which allegedly involved both Appellants were both destroyed by Doctor Gruweel, and the other charges, coming from the same mouths which spoke the lies surrounding Virginia (one, two, or three rapes - your choice - and the insertion of a fork, tines or handle, or some other instrument - your choice) are destroyed by the serious weight of this unbellevability. The only way Mr. Farr could secure his personal conviction was if he succeeded in confusing the jury, and if he were allowed to throw out so much evidence that a conviction could be had on the basis of "He must have found a kind with all these stories." He was allowed to do that, and his tactic succeeded. This Court cannot allow his tactics to be taken the second time. Appellate review, no matter how small it is to open the door to conviction based on tactics or evidence which in no way is constitutionally

equally proper. In the past, this Court has said that it will reverse a jury conviction if the evidence is so "inconclusive or inherently improbable" that it cannot create reasonable doubt as to guilt, People v. Ruffolo, Green Sheets, 19915. Appellants submit that the perjured testimony just stated before this Court is so improbable and inconclusive that it will not result in a conviction. The convictions must be reversed.

POINT 13: WITHHOLD AS WITHOUT MERIT. The attorney pro Se has only recently been apprised of all the material which the State made available to the former attorney of record; the State laid their foundations properly, even if only marginally so.

POINT 14: THERE WAS A PREJUDICIAL DENIAL OF DUE PROCESS IN THE COURT'S REFUSAL TO GRANT A DEFENSE MOTION FOR FURTHER PSYCHIATRIC OR PSYCHOLOGICAL EVALUATION OF TWO OF THE STATE WITNESSES.

The strong possibility of influence being brought to bear improperly on Virginia had been addressed before, see page 45, supra. In line with this very real possibility, counsel for the defense motioned before the court for further psychiatric evaluation of Virginia Lairby and Wanda Lairby. There had been no previous opportunity for the defense to compare directly the testimony of these two state witness, since the state relied on the hearsay of Virginia's testimony through Wanda at both preliminaries. The trial was the first time that all could see just how much influence had possibly passed between mother and daughter on this matter.

Counsel for the defense had, prior to the morning of October 27, 1982, the second day of the trial, submitted a copy of the psychiatric evaluation done on Wanda Lairby by Dr. Barbara Liebroder to an independant psychologist (with, of course, all references to Wanda Lairby, and her gender eradicated). The opinion of that independant source was that such a personality was indeed capable of such influence on her own child, to serve her own ends. Defense counsel raised the spectre of improper influence in asking for the testing, but, unbelievably, the Court, despite having heard all the same evidence as the Appellants and the jury, said "...that there is nothing before the Court at this time that indicates that that child was influenced in any manner whatsoever by her mother as to her testimony." (Tr. Vol. I, p. 174)

Also, at this time, prior to the second day of testimony (Tr. Vol. I, pp. 13-14) the defense made their request to secure the attendance of Tracy Long at the trial. The Court played dumb on the provisions of Title 77, Chapter 21,

Utah Code of Criminal Procedure, and Deputy State Attorney Paul Farr acted as though the state were under no obligation to secure the attendance of a witness unless that witness were going to be used by or favorable to the state.

The Supreme Court has held that "fair play" is "at the heart of due process of law", BOLLING v. SHARPE, 347 US 497 (1954); GALVAN v. PRESS, 347 US 522 (1954). Any half wit can understand that tampering with witnesses, or unduly influencing witnesses violates any code of fair play, and it is beyond reason that the Court in the cases at bar would countenance such a refusal to look into that possibility as was exhibited by Judge Leary in the trial court. Judge Leary was, more than once, more interested in keeping things going, and in proceeding to the end of the trial than he was in granting a motion which might be in the furtherance of justice, but which might delay the process. See Tr. Vol. I, pp. 120-126, Vol. III, pp. 468-469. 627.

POINT 15: THERE WAS AN IMPROPER JOINING OF OFFENSES IN THE INFORMATION FILED AGAINST APPELLANT TIMOTHY LAIRBY, WHICH WAS COMPOUNDED BY THE JOINING OF THE TRIALS OF THE TWO APPELLANTS.

Under the provisions of 76-1-402, Utah Criminal Code, provides that

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode....

In the case of the Appellants, the state alleged five separate acts, encompassing crimes with three separate sets of elements to be proven, those of rape, sodomy, and forcible sexual abuse. There was no single criminal episode, under the definition given in 76-1-401:

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

In addition to the actual different acts, the time element destroys the possibility of joining the offenses which were filed against Appellant Timothy Lairby.

where defendant committed a robbery in one county, and later, in another county some 65 miles away, picked up two hitchhikers, and after having picked them up, formed the criminal objective to kidnap them as hostages, the difference in time, location, and the criminal objectives for robbery and kidnapping, rendered the conduct separate crimes rather than one single criminal episode. STATE v. IRELAND, 570 P2d 1206

The Appellant was charged with five crimes over as many weeks, allegedly against two separate victims, and requiring the proving of separate (and non-included) sets of elements of the crimes. The misjoinder of offenses was highly prejudicial for the Appellant, since the confusion of issues, blurring of facts, and sheer weight of evidence precluded the jury from making any intelligent sifting of the crimes and possibly finding the Appellant guilty of some and not guilty of others. Judging by the weight of unrelated testimony solicited by the prosecutor, Paul Farr, that was precisely his intent.

There would have been nothing prejudicial in a joinder of the offense charged against Appellant Mildred Lairby, and COUNT V against Appellant Timothy Lairby. The crime was the same alleged incident, and the jury could have intelligently weighed the evidence. Appellant Mildred Lairby was fatally prejudiced by the procedure as it transpired, because she was caught up in the same oppressive burden of improper evidence as was Appellant Timothy Lairby, as extracted by Paul Farr.

As far as the other three counts which were pressed forward to verdict against Appellant Timothy Lairby, the different crimes with their different elements, and the different victims places it squarely into the same category as STATE v. GORMLEY, (1974) 508 P2d 1325, wherein this Honorable Court held that there had been an improper misjoinder of charges, charges precisely like those in

the case at bar.

Sodomy charge involving defendant's stepson should have been severed from charges of rape involving his two stepdaughters.

In the case of the Appellants, there should have been three trials, to be entirely proper: one for the sexual abuse charge alleged against both Appellants; one for the sodomy charges alleged against Appellant Timothy Lairby; and one for the alleged rape.

Appellants, at the time of trial, did not even know that such a concept as 'misjoinder' even existed, and that was why they innocently agreed to the State's proposal to join the trials. The fact that it was the State's suggestion places the burden of abuse and denial of due process squarely on their shoulders, because they would have known that such a confused, complicated trial, addressing as it would such inflammatory crimes, would almost surely be highly prejudicial to the Appellants. Judging by the conduct of the Prosecution at the most recent proceeding, Appellant Timothy Lairby's Preliminary Hearing, the Prosecution would appear to have been planning on a severe clouding of issues and blurring of evidence to obtain their conviction, and a joining of trials would make such tactics even easier. As a matter of law, Prosecutor Paul K. Carr had to know that such a trial was and would be a misjoinder in the first place.

JOINT 10: WITHDRAWN AS WITHOUT MERIT. The offense did occur at the hands of Paul Barrett. Vol. II, p. 445), but it was cured by a cautionary instruction from the Court, it is at that would be the assumption.

JOINT 12: THE COURT ALLOWED THE QUASHAL OF A SUBPOENA FOR CERTAIN EVIDENCE REQUESTED BY THE DEFENSE, AND THEREBY WAS PARTY TO THE WITHHOLDING OF MATERIAL AND MITIGATING EVIDENCE FROM THE DEFENSE.

April, June of 1982, Appellants arranged through the office of Deputy

County Attorney Woody Gwinn to have the former wife of Appellant Timothy Lairby undergo a psychological evaluation, to determine, in the interest of justice, if that person were psychologically capable of influencing her daughter to the extent fully, freely, and consistently alleged by Appellant Timothy Lairby. Pursuant to this agreement, the battery of tests was duly administered at the offices of and by Dr. Barbara Liebroder, at the expense of the Appellants, some \$350.00.

Very soon after the conclusion of the testing, Appellant Timothy Lairby was asked to sign a release so that a copy of the test results could be sent to a Dr. Robert Card, who was currently interviewing the Appellants. The release was signed, and the test results were forwarded to Dr. Card. By that action, Dr. Liebroder ended any realistic claim that the results could not be given to the Appellants by reason of Doctor-Patient privilege. She had forwarded to Dr. Card a copy of same on the strength of Appellant Timothy Lairby's signed release, thereby acknowledging that he did in fact have the power to determine where and to whom they went, this in addition to the simple fact that the Appellants, and the defense in any future proceedings in court, owned the results by their having paid for them. But the defense was denied those results, until the very week of the trial, by the actions of Paul Farr.

From the time that Paul Farr replaced Woody Gwinn as the Prosecuting Attorney in the Appellants' cases, he acted as though the agreement entered into previously with Dr. Gwinn was no longer binding. Alleging the moribund Doctor-Patient privilege argument, plus an argument that the original agreement had been in fact a trade-off (the test results for a polygraph exam on Appellant Alfred Lairby), Farr refused to give the defense the test results, until he was finally overruled by a Court Order from Judge Sawaya. Even then, the

Appellants were denied the right to read the results; Judge Sawaya, evidently ascribing to the privilege argument of Paul Farr, said that only Counsel for the defense could read the report. Not only was such a condition preposterous as an effort by State officers to deny the Appellants access to evidence, but also it was against the original agreement entered into by Appellants and Mr. Gwinn.

It would appear from hindsight that as soon as Paul Farr was charged with the cases, anything he could do to deny the defense something which could injure the state case was acceptable. It was only after extended efforts that the Appellants were granted any access at all to the test results, something that was already legally theirs, but the deprivation continued right on into the trial. (See Tr. Vol. III, pp. 456-468.)

Defense had Dr. Liebroder subpoenaed to the trial, for her testimony surrounding the test results in question, and the Court allowed the subpoena to be quashed, essentially because it was inconvenient for the doctor to attend.

The contention by the Court that her testimony would be the same as that which he had already denied to the state is without merit, but the defense never received the opportunity to show their side.

The psychological tests which the State was going to try entering into evidence against the Appellants was that from a Dr. Victor Cline, and Cline's tests, as administered to the Appellants, were incomplete. Any testimony which Dr. Cline might have given would have been based almost entirely on his opinion, and which, by his own admission, was heavily biased because of all the unpunished child abuse to which he is privy. On the other hand, Dr. Liebroder's tests consisted of a complete battery of the best, most accepted tests in current use, and Dr. Liebroder's testimony would have been much more than a prejudiced opinion. The testimony would have afforded the jury some credible base for judging the extent to be placed on the testimony of Sandra and Virginia Kirby, something

significantly different from the repetition of evidence before the jury, directly responsible to both the Court and the prosecution.

PARLIS and CHURCH, IN ITS INSTRUCTIONS TO THE JURY, FAILED TO GIVE THE PROPER "LAY EVIDENCE" INSTRUCTIONS IN AT LEAST SIX (6) AREAS, THEREBY PREJUDICING THE JURY AGAINST THE DEFENSE IN THESE CRIMINAL CASES, AND PRECLUDING THE POSSIBILITY OF A FAIR VERDICT.

The six areas in which the Court failed to properly instruct the jury are:

- (1) No instruction on the defense's theory of the crimes;
- (2) No instruction on character witnesses for the defense;
- (3) Improper instruction on the burden of proof required for conviction;
- (4) Improper instruction on the competence of child witnesses;
- (5) Improper instruction on the charge of rape; and
- (6) Improper instruction on the charges of sodomy.

They will be discussed in order.

(1) No instruction on the defense theory of the crimes. It is a matter of fairness, since fair play has been held to be at the heart of due process of law, PAULINE v. SHANNON, and GALVAN v. FRESSO, p. 59, *supra*, and

"due process of law" means fair play and is that process of impartial law which is binding because it is right. U.S. ex rel MONTGOMERY v. RACON, D.C. Ill., 129, 30 Supp 352.

that the jury be allowed, even cautioned to consider both sides of a story, and give to those versions the weight that they deem proper. There was no instruction to that effect in this case, and the jury, therefore, would logically consider the state version of the crimes more heavily than they would the defense version. After all, the state is supposed to be telling the truth, and the accused are just there accused of crime, and therefore prejudged to be possibly lying to save

...the defense was entitled to an instruction as to their version of events. In fact, the child witness, as, test had been given, entirely within the parameters of a trial heavily prejudicial to the defense.

(c) The instruction given on character witnesses for the defense. Just possibly this point is being considered earlier than it should, but it will, nevertheless, be considered in the order stated. For a complete discussion on the denial of character witnesses by the prosecution, see POINT 19, infra.

Paul Farr tried desperately to deny the defense any character testimony, and he figured he had, Tr. Vol. IV, p.670. He continually argued against the giving of an instruction on character witnesses, despite some evidence to that effect having been given. The defense was entitled to this instruction, simply on the weight of what little character testimony did get in around Paul Farr's obstructions. The Court, however, agreed with the Prosecution, and the character instruction was withdrawn (Tr. VOL. IV. p. 673). The Court, quite literally gave the prosecution everything they wanted, and gave the defense nothing on this point.

The Court specifically stated that "those precise issues that are to be testified to by character witnesses were not testified to by any of the witnesses." when he denied the defense efforts to have a character instruction inserted. The Court was referring back to a point in the trial, Tr. Vol. III, pp575-577, where it ruled that character testimony had to be on "the general reputation in the community." H. Lionel Farr, defense counsel, tried to point out the error of that, but the Court was adamant, again displaying an abiding prejudice towards the defense.

Rule 404(b), of the Rules of Evidence, states, as one of the exceptions to the hearsay rule,

(2) reputation as to character. If a trait of a person's character at a certain time is material, evidence of the reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed; (Emphasis added.)

State clearly specifically denied the Defendant something which is granted them by the laws and statutes of the state, even over the objections of the defense counsel, exhibiting a total disregard for the rights of the accused.

When the defendant did not testify and crime with which he was charged was not one involving falsehood, there was no error in excluding evidence of his reputation for truth and veracity, but the defendant was entitled to introduce evidence of his reputation for honesty and integrity and as a law abiding citizen, and there was plain error in refusing such evidence and not giving an appropriate instruction. U.S. v. DANLAND, 626 F2d 1235, 5th Cir. 1980. (Emphasis added.)

(3) Improper instruction on the burden of proof required for conviction.

The counsel for defense specifically requested a change to the instruction on the state being required to prove guilt beyond a reasonable doubt (Tr. Vol. IV, pp. 574-577) but the Court refused, saying that the words said it in effect, and that the specific words asked for by the defense were not needed.

There is constitutional error in a state case when the defendant requests an instruction along the lines of the text and the Court refuses the request. CAMPBELL v. KENTUCKY, 101 Sct 1112, \_\_\_ US \_\_\_, 67 LEd2d 241.

The Court committed serious error here, and it was adamant despite repeated efforts by counsel for defense (Tr. Vol. IV, pp. 683-684)

(4) Improper instruction on the competency of child witnesses.

The same old initial argument holds sway here as held in the immediately-previous sub unit. The Defendants' counsel asked that the instruction be changed to conform to the specific guidance under STATE v. WILKESBROOK, (Citing unknown) and ask that the phrase "has a sense of moral duty". The prosecution argued against the instruction, showing full well as he did that neither of the child witnesses in the case at bar had exhibited such a moral duty to tell the truth.

anyhow, in fact, both admitted that it was permissible to lie (Tr. Vol. I, p.40; Vol. II, p. 346) under certain unspecified conditions, conditions which were articulated out well enough to preclude the possibility of lies being told in any circumstances.

Again, the Court blatantly refused to change the instruction to conform to the guidelines of the text, and thereby committed reversible error. See CARTER v. KENTUCKY, p. 57, supra.

(5) Improper instruction on the charge of rape.

The Court again refused (Tr. Vol. IV., p. 681) to change an instruction to conform to the text of the statute. By inserting the words which it did, the Court left open a guilty verdict even on the piecemeal and inconclusive evidence of the state, which, considering the allegations of bleeding, did not in any way prove that any penetration had in fact occurred. The instruction was prejudicial, and should have been changed to conform to the statute. See CARTER v. KENTUCKY, p. 57, supra.

(6) The Court simply ignored the defense counsel (Tr. Vol. IV, p. 682) on this point, brushing it aside, and going on to another subject. There should have been a cautionary instruction to the effect that the touching must be within the definition of the term sodomy as delineated in 76-5-403, Utah Code, and that the touching had to be proven beyond a reasonable doubt.

Both the reversible errors of the Court, and the prejudice of the Court in the instant case are easily apparent. The Court, it would appear, was willing to go ever backwards to grant the prosecution what they wanted, and equally as willing to deny the defense the requested changes to the jury instruction. The instruction denied the appellants due process of law, and cannot be allowed to stand as a basis for conviction.

RIGHT OF THE ACCUSED, WITH THE ASSISTANCE OF THE COURT, BEHIND THE  
 PROSECUTOR'S OBLIGATION TO PRESENT ALL THE EVIDENCE AS TO  
 GUILT, CRIMINAL RESPONSIBILITY, OR IN THOSE CASES WITH WHICH THEY HABITUALLY  
 DEAL.

It is the duty of the Court to look out for the rights of the accused, and  
 to take such actions as are required to protect those rights.

The Court has the duty of seeing that the trial is conducted with solici-  
 tude for the essential rights of the accused.... GLASSER v. U.S., Ill.1942,  
 62 Sct 497, 315 US 60, 86 LEd 680.

and it is a fulfillment of the spirit and purpose of the Constitution for  
 the Court to exercise its discretion in such protections, GLASSER v. U.S., 1955,  
 22 F2d 627, 90 U.S. App. D.C. 162, cert. den. 70 Sct 324, 350 US 949, 100 LEd 827;  
WILLIS v. RUTHER, C.A. Kans. 1948, 166 F2d 721, cert. den. 68 Sct 1499, 334 US 884,  
 42 LEd 1772.

The prosecutor, Paul Farr, repeatedly objected to the attempted admission  
 of character witnesses' testimony (Tr. Vol. III, pp. 480-492, 507-515, 574-579),  
 and his efforts were aided by the Court which improperly interpreted the law as  
 stated in Rule 53 (23), Utah Rules of Evidence (see pp. 50-57. supra). While the  
 actions of Paul Farr were technically within the bounds of his calling, there  
 comes a point where additional duties befall him, whether he likes it or not,  
 and whether he will admit it or not. It is the

....duty of court and prosecution to observe, and correct incompetent  
 counsel. JOHN V. CALFEPPI, D.C.N.J. 1990, 127 Supp 27; STATE V. OLDFHAM,  
 1979, 126 Kans 337, 285 P2d 775.

It is a matter of substance, not merely form, that the court maintain an  
 outlook for the rights of the accused, and its solemn duty to do so. That the  
 court did not do so in the instant case is beyond contention, even to the point  
 of attempting and failing the law to accommodate the prosecution.

THE PROSECUTION INTRODUCED THE LAST PARTIAL EVIDENCE IN AN EFFORT  
TO PROVE THAT TIMOTHY LAIRBY, WITH THE INTENTION OF THE COURT,

During the trial in 1962, Appellant Timothy Lairby wrote a letter to the  
Longs, Richard Long, Richard L. Long. In that letter, Appellant  
explained partially, but completely the position of the Appellants with regard to  
what they saw as a conspiracy to both take the children and convict the Appellants  
of crimes that they had not committed.

In addition to the expository portion of the letter (the first two pages,  
if memory serves) Appellant Timothy Lairby wrote another portion of the letter  
in which he used his priesthood of the L.D.S. Church to deliver up Richard Long  
and Kathleen Lausten Long to whatever befits their calumny. Appellant is not  
herein arguing the merits of that second portion of the letter. It was not, in  
light of what Appellant Timothy Lairby has since learned, a proper thing for him  
to do. He wrote a follow-up letter to the Longs, apologizing for any reference to  
the Church in the initial epistle.

During the fourth day of the trial, or somewhere thereabouts, Richard Long  
gave a copy of the entire letter to Paul Farr, and Farr used it in an impeachment  
effort during Appellant Timothy Lairby's cross-examination. (Tr. Vol. III, pp.  
616- 630, 636-640, 48-556). The defense had not been apprised of the existence  
of the letter in the hands of the Prosecuting Attorney, and they had no chance to  
prepare any defense to its effects. It is a long-established tenet of law that  
the prosecutor is under a continuing obligation for discovery, but such was not  
the case here.

Initially, Paul Farr separated the last section of the letter from the  
explanatory portion, and attempted to have it introduced by itself. The Court  
refused, and properly required that the entire letter be introduced, even though

Paul did not want the entire letter before the jury (Tr. Vol. III, p. 620).

The prosecutor, at this point, on the verge of being able to throw the State case into a fatal disarray, with the contents of the first three pages of the letter, when the evening recess interrupted. The letter was a complete statement of everything the defense was trying to put in front of the jury, in such words, and in such a compact form, that the State case could easily have been destroyed by it. Even defense counsel made reference to "a whole new field of examination" which was being opened (Tr. Vol. III, p. 627), and at this point, the chances of an acquittal looked at least possible to the defense. The counsel for the defense never got the chance.

Monday morning, November 1, 1982. Paul Barr made as contradictory a statement as has probably ever been made in a court of law. Referring to Tr. Vol. III, p. 629,

MR. PAUL BARR: "The State's position, your Honor, is that the content of these letters, or this particular letter, is not being offered simply with regard to whether or not the defendant had testified truthfully when he indicated whether or not he had made a threat. The only purpose for offering that particular paragraph is as rebuttal evidence to his testimony."

THE COURT: "As to what?"

MR. BARR: "Affecting his credibility."

Any portion of that statement is not needed; it is nonsense. The Court mentioned neither both parts of the letter. An attempt to have the latter introduced by the defense was denied, Tr. Vol. III, p. 640.

The prosecutor then called as a witness the former L.J.S. Bishop of the Episcopate, John Keith Thomas, and questioned him about the letters, even though the letter had not yet been introduced into evidence, and the Court had specifically

the defense the opportunity to have the evidence read the letter before the jury (Vickrey, 1969), in numerous cases the defense obtained - rightfully - the right to view a letter. Bishop Thomas of the diocese of Albany - Kirby was a co-ordinator of the Bishop's relationship with the diocese, and it was not open to testimony, and the testimony by Archbishop's secretary was entirely all overruled by the court. It was stated the prosecution had admitted it had specifically and explicitly denied to the defense.

There is no evidence was suppressed, and testimony concerning evidence previously denied was also inadmissible. Smith v. Sullivan, 11 1972, 95 A2d 967.

even though we are not speaking of illegally seized evidence, the same rationale must take away here. If evidence is obtained or improper that the court will not in any way allow a defense counsel to comment on it or to elicit testimony about it, then surely the same prohibition must fetter the prosecution.

The defense again tried to have the entire letter admitted, after Paul Farr had beat the jury over the head with it, and the action was again denied (Tr. Vol. III, p. 620). However, when Paul Farr asked that only the third page be admitted, the court immediately accommodated him, and therein was the fatal error. With the previously refused-to-prejudice a full part of the court in playing favorites between the prosecution and defense (the jury of the state were not aware, the court now allowed a piece of evidence to the jury which could be sustained as inadmissible by anyone outside the jury's reach, and for which they refused to give explanation.

The "redaction doctrine" required in the admission to be admitted in its entirety, and it is necessary to explain the admitted portion, to place it in context, and to avoid misleading the jury of fact. U.S. v. MARR, 1972, 100 F.2d 100.

the court said,

"The trial court, in introducing the evidence, was not to mislead the jury. The evidence of guilt was not to be introduced. U.S. v. MARR, 1972, 100 F.2d 100.



... and the Court pointed out the obvious unfairness that the State had not done.

THE STATE'S CASE WAS A DENIAL OF THE CHIEF'S BELIEF IN THE STATE'S CASE.

The conclusion of the State's case, covering of October 28, 1942, counsel for the defense moved for the dismissal of all counts, alleging that the State had not proven any of the elements of any of the charges. There was evidence of previously withheld evidence (Fr. Vol. II, pp. 447-448); there was evidence of serious conflicts in the verbal testimony, not only within the testimony of individual witnesses, but also between witnesses who HAD TO AGREE TO SUSTAIN THE STATE'S CASE (Fr. Vol. II, pp. 450-451); there were apparent instances of witness tampering (Fr. Vol. II, pp. 452-453); and finally, there was the all-encompassing, all-impeaching medical evidence that negated every allegation in the State's charges wherein the claim was alleged. The Court took the under advisement (Fr. Vol. II, p. 454), and never bothered to rule on it at all. The process in this case was simply left hanging.

THE STATE'S CASE WAS A DENIAL OF THE CHIEF'S BELIEF IN THE STATE'S CASE.

Under the provisions of 77-35-23, Regulations of Criminal Procedure, the Court is granted extremely broad powers to grant relief where appropriate, to protect the safety of justice before the justice surfaces that a higher Court could reverse its decision.

RIGHT OF JUDGMENT. At any time prior to the imposition of sentence, the Court upon its own initiative may, or at the motion of a defendant shall, set aside its judgment if the facts proved or admitted do not constitute a public

offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arraignment, judgment the court may, unless a judgment of acquittal of the offense or of its entree or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or enter any other order as may be just and proper under the circumstances.

The Court in the instant case, had it been disposed to carefully examine and digest the evidence, would have, and should have, seen that the wild blast of unverified allegations were not sufficient to support a verdict of guilty. The Prosecutor had proceeded by the "shotgun effect" of filling the air with so many different versions of so many different stories, most of which were not proper since they weren't charged in the first place, and such would have been obvious to any analytical efforts of an unclouded and unprejudiced Court. The Court should have dismissed all charges, with explicit instructions to the Deputy County Attorney, Paul Farr, that these allegations be dropped, permanently, that they were based on tampered and influenced witnesses, and outright perjury, and that the Defendants should not be put through such a travesty for a second time.

POINT 23: THERE WAS A DENIAL OF DUE PROCESS IN THE COURT'S REFUSAL TO GRANT THE DEFENSE MOTION FOR A NEW TRIAL.

The Court is granted the power to order a new trial under 77-35-24, Rule 54 of the Utah Rules of Criminal Procedure.

Action for new trial. (a) The Court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

Counsel for Appellants, Lionel M. Farr, brought five grounds before the Court of Peter F. Leary, on December 18, 1982, alleging the following reasons for the granting of a new trial.

- (b) The denial of the request to limit the deposition of the minor children, (see POINT 11, supra.)
- (c) The denial of the request to limit the deposition of minor Eunice regarding the child's sleeping, and the statement that the defendant children "did not know" as attorneys (see POINT 11, supra.)
- (d) The denial of the request to determine for the Court to qualify the witnesses, Gerri Long and Virginia (Lisa) Lairby. Particularly in view of the fact that when Virginia (Lisa) Lairby testified it became obvious that she was not a qualified witness. (see POINT 11 & 12, supra.)
- (e) The denial of the request of the defendants that the complete letter of Timothy E. Lairby, Jr. to Richard Long be admitted in evidence and not just a portion of it. (see POINT 10, supra.)
- (f) The denial of defendants' request that Wanda Lairby and the daughter Virginia (Lisa) Lairby have a psychiatric evaluation. (see POINT 14, supra.)

While the treatment of points in the Motion for New Trial was not as extensive as is this submission, considering the fact that the Attorney Pro Se has access now to evidence of constitutional and statutory abuses not apparent at the time that Motion was filed, the Motion was timely, appropriate, lawful, and the abuses alleged therein by both the Court and the prosecution were more than sufficient to justify a new trial. This is, of course, presupposing that a Court is tending towards fairness in the first place. Judge Leary was not, so the Motion for a New Trial was summarily dismissed, and the grounds for the request remain without merit.

REMARKS: THERE WAS A COMPLETE LACK OF CREDIBLE AND REAL EVIDENCE TO PROVE A FILING OF GUILTY, OF TO SUPPORT AN INFLECTION OF JUDGMENT, FOR EACH AND EVERY POINT OF THE APPLICATIONS.

Very possibly, the most precious of tenets of American law is that one

... a crime is presumed to be innocent until proven guilty by a preponderance of evidence, beyond a reasonable doubt.

The Appellants, respectfully, refer the attention of this Honorable Court to JNBS 10, 11, 12, 13, & 20, supra, for a review of the fatal errors in the presentation or denial of evidence in their trial. It is their contention herein that (1) they were not given the benefit of an assumption of innocence, (2) there was no preponderance of evidence possible by which they could have been proven guilty, and (3) there was no rational way that they could have been judged guilty beyond a reasonable doubt.

There is little in the way of tangible evidence with which the Appellants can support their allegation that they were denied a presumption of innocence. Since we cannot crawl into the minds of the jurors, that area is essentially closed, with the possible exception of the shortness of deliberation which they took before rendering a guilty verdict. It is not possible for them to have sifted and sorted through all the garbage that Paul Farr threw at them in one hour and forty minutes, but whether or not that sin of omission was the result of a predisposition towards a guilty verdict, or the direct result of Paul Farr's "shotgun effect" is impossible to say. It is reasonable to consider that very possibly the societal outrage at the recent spate of sexually-related crimes directed at children could have influenced the jury to return a guilty verdict solely on the chance that the Appellants were guilty of something out of all that the prosecution threw out, and that such a possibility prejudiced the Appellants, in that it is the extent of any conjecture on the jury's conduct.

Lacking tangible proof of such a prejudice, however, the Appellants do submit, through this, numerous incidents of prejudice on the part of the Court and the prosecutor, a 1 of which denied a fair appraisal of what was entirely

(b) the use of evidence that guilty verdicts

could be reached;

(c) the use of material and immaterial evidence, which could have easily misled the jury to a guilty verdict;

(d) the use of evidence which he could know was hearsay, all of which amounted to a bait and switch in the jury, leading the jury to a guilty verdict. (A few little details as allowing the testimony of Virginia about the tines of the fork having been used on her vagina, despite his knowing that the version for almost two years had included the handle end of the fork. The tines are more tire tining, and would have a deeper effect on any juror.)

(e) the use of a virtual mountain of testimony about unrelated incidents which were never charged officially by the State, thereby effectively masking a basic lack of credible or tangible evidence to support the charged offenses. The Appellants are aware that testimony about certain, related incidents is proper to prove a propensity on the part of an accused to commit the charged crime, but such testimony must take the form of a prior conviction, or in some other way rise above the cesspool of unverified rumors, or self-serving accusations made by persons who have a real interest in seeing the accused convicted.

There is some or possibly improper partial evidence to convict an impeachment of Appellant Timothy Fairby. While his actions were unambiguously improper, and possibly tantamount to criminal, Paul Barr cannot be labeled as stupid, or as an unkillable prosecutor. He had to know that what he was doing was wrong, that he was using evidence improperly, but, it just didn't seem to matter to him.

Paul Barr's case collapses under just the weight of the four points listed above. It would appear, and this is the salient point of this argument, that Paul Barr did, in effect, tried the Appellants before they ever got to trial,

the public, and, during and after the trial, justified whatever means were necessary to obtain a conviction.

The Court, after all, can be advised:

(a) denial of further psychological examination of two of the State witnesses, even after it had become glaringly apparent that there was some collusion, and some witness tampering on the part of the mother of Virginia Lairby. The Court simply closed its eyes to, and denied the very existence of, and evidence of influence or coaching.

(b) denial of a defense request to secure the attendance of a witness. Again, the Court played dumb, and ignored the provisions of the Uniform Act by which he could have exercised the necessary compulsion to secure the attendance of a defense-requested witness.

(c) denial of defense motion to strike the testimony of Virginia Lairby, saying by such denial that the Court believed the girl to be a competent and qualified witness, and that she was being truthful. (Tr. Vol. 1, pp. 109.)

(d) denial of admission of a lawful and proper deposition. Judge Leary has been a magistrate far too long to not know about the admissibility of such depositions. They would prejudice the State case, so they were not allowed.

(Tr. Vol. 11, p. 9-10)

(e) denial of any effort by the defense to impeach a state witness. The Court certainly rebuffed an impeachment effort on the Appellant Timothy Lairby, stating the witness was above such things. (Tr. Vol. 11, pp. 427-429)

(f) repeated denials of character testimony for the Appellants. The Court misquoted and misused the law to deny the Appellants what they should have had in such testimony, and that erroneous interpretation surfaced many more times. Therefore, the Court denied proper testimony to the defense.

... of the length of the trial, even though out of hearing of the jury, and thus was adding prejudice towards any efforts to delay the proceedings. Even if such delay would be in the interest of justice. (Tr. Vol. 11, p. 371)

(the denial of defense motion to bring into evidence prior sworn testimony of Carl Ront, when it was obvious to the defense (and had to be to the prosecution) that her testimony had altered materially from earlier statement. Again, granting such a motion would delay the proceedings, so the Court summarily denied the defense a right to impeach a witness. (Tr. Vol. 11, p. 391)).

(1) improper jury instructions, not only those that depart from the approved text, but also those which make it extremely easy for the jury to ignore material evidence as submitted by the defense. On the incidents cited in POINT 18, supra, where the Court simply and inexplicable flatly refused to change the instructions, it would appear that either (1) the Court was simply too lazy to rearrange his thoughts to accommodate the defense, (2) thought his version of the instructions were better than that which had been decided on by the higher court, or (3) figured it didn't matter anyway, since these two crews were so obviously guilty.

While the appellants realize that the foregoing is not, to be perfectly correct, exactly to the point of an insufficiency of evidence, it is material to this case in that there was absolutely no effort, on either the part of the Court or the part of the prosecution, to get to the real evidence. The prosecutor contented himself with a case that was made up of sheer weight of unrelated evidence without bothering to attack the charges as stated, relying on fantasies, perjury, and suppressed and mitigating evidence, and the Court contented itself with letting the prosecutor have free reign to do whatever he figured could secure a conviction, while the spending up proceedings even at the expense of the defense.

...of the body, and appellant's admission that he had no evidence of the incident, being the only person who had been with her at the time of the incident, and the fact that she had no other evidence of the incident.

Tr. Vol. 1, p. 45.

It is now to be believed the testimony of Virginia Lairby, the following incidents had occurred to her:

...in the presence of both Appellants, Tr. Vol. 1, pp. 45-47).

Accused by insertion of Appellant Timothy Lairby's finger, p. 47.

She was hurt "almost a hundred times" at home of Appellants, p. 51.

Witnessed sexual emission of Appellant Timothy Lairby, and such emission was described as being the color of "little green spots", p. 58.

Sodomized by both Appellants, pp. 61-64.

Abused by the insertion of the tines of a kitchen fork, pp. 110-112, told in a number of versions, with varying witnesses and participants.

Witnessed sexual emission of Appellant Timothy Lairby, and such emission was described as being the color of "yellow and brown mixed", p. 155.

Victimised by incest in her home in Orem, p. 166.

Incident from fork incident was so bad that it couldn't be stopped, p. 167.

Appellant William Lairby applied an icecube to arrest bleeding, p. 56.

Witnesses were to believe her mother, Wanda Lairby, the following was practiced on Virginia:

...was treated with a cold spoon (same bathroom incident), Tr. Vol. 1, p. 176.

...treated at least twice by Appellant Timothy Lairby, App. Ex. 2, pp. 103-104.

...sexually assaulted in past years by Appellant Timothy Lairby, App. Ex. 2, p. 104, App. Ex. 3, p. 104.

the wounds it would inflict were not all present before the jury, but they do not deny it, this point: The State would have you believe that this young girl, from the group of three, could be subjected to blows and sexual assault by at least two individuals, using fingers, forks, and various other bodily parts, over a long period of time, and yet, when examined by a physician some 94 hours after she was allegedly assaulted by a kitchen fork, which assault was accompanied by some terrible bleeding, her hymen would be intact, and that there would be no evidence of scarring, tears, punctures, laceration, stretching, or any other of the tell-tale signs of violent physical abuse.

One can only be led to believe that this young lady possesses either a remarkable capacity for tissue regeneration, bordering on reptilian, or she possesses a remarkable imagination, one being actively led and curried by her mother.

The rape simply did not take place. If Appellant Timothy Hairby were such a sexual deviant as to force himself on his own daughter at such a tender age, there is absolutely no rationality to the thought that he would be so careful, and so much in control of himself, that at the height of such moments of illicit passion, he could or would restrain himself from rupturing her maidenhead. If Virginia Hairby, and her mother in allegedly repeating what Virginia had told her, do not alleged the bleeding that she did, and had only alleged a touching or rubbing between herself and Appellant Timothy Hairby, then the Appellant would have no serious problem. She DID allege bleeding, however, and she DID allege entry. Therefore, given the disparity in size between a four-year-old virgin, and a fully mature male penis, must be some physical evidence substantiated to her story. There is none, so the conclusion is obvious. Again the evidence of a very active imagination, or something much uglier in a legal context, the facts were planted in her consciousness by a mother who felt

... incident of the attack, that he is a good father and he told the girl to  
be good and take care of her children.

... incident of sexual abuse, ...

... the jury was presented with ... that this incident might  
have actually occurred, the testimony in which ... was given by a  
nine-year-old girl who said it was all right to her, and admitted to problems with  
credulity in the past. When the testimony of Carri is taken as it should  
have been seen by the jury, it will not sustain a guilty verdict, and such a  
viewing by the jury could only have taken place if the Court had been a bit more  
aware of the rights of the accused, and allowed an impeachment of Carri by her  
previous testimony. See pp. 15-16, supra, for a reference to what she had pre-  
viously said, which would have given the jury a basis for crediting her testimony.  
The incident didn't happen, as can be seen easily by Carri Long's previous test-  
imony. The fact that she testified as she did testified in and of itself of the  
pressure she had to be put under somewhere between January 7, 1962, and October  
27, 1967.

... incident: ... County, Virginia ...

... incident with the stories of a ten-year-old girl, and the way  
they fit in the face of all other testimony. ... denied, consistently, ever  
seeing anything that ... ever touch Virginia improperly, yet, Virginia,  
in every story she tells, states equally as emphatically that either Carri or  
... present to witness the episode. In addition, many of the incidents  
... included as an integral part, an abuse perpetrated on either or both  
... by their mother, something they have never corroborated in any  
way, shape, or form. The evidence is based on the parapatetic testimony of a  
... girl, who changes and rearranges her testimony to suit whomever

appears to be in her evidence at the time. The jury was obviously swayed in the presentation of these girls' testimony by the absence of any meaningful cautioning from the Court, and by a statement the Court made at the beginning of the trial, referred to by Paul Barr in his opening remarks, on page 7 of the transcript. There is no way the testimony of these two obviously-unqualified witnesses can be credited as would the testimony of adults.

CHARGE V, and charge against Appellant Mildred Fairby, Forcible Sexual Abuse, Virginia Fairby.

The simple, unimpeachable testimony of Dr. Grawell (Tr. Vol. i. pp. 8-17) entirely and absolutely destroys any and all State evidence on these charges, relating to the alleged insertion of a fork (handle or tines, you choose) into the tender, vascular tissues of a baby's vagina. There is no evidence to support the charge, something ignored by two police departments, a Division of Family Services caseworker, half-a-dozen assorted judges of assorted jurisdictions, two county attorneys (two more if you count Juvenile Court), and, most importantly, the mother of the child. Even Wanda Fairby had to admit that she saw no evidence of damage to her daughter's genitals which could account for such severe bleeding. (Tr Vol. II. pp. 309-313), but that had not stopped her, over the previous twenty months from destroying lives and families, and perjuring herself in an effort to prove something that wasn't there to begin with, and thereby secure her custody of four children.

The State would have you believe, in addition to the monstrous body of perjury that came out at the trial, that the appellants were Saturday perverts. If you will. All the allegations, charged and uncharged, happened always on a Saturday, and they always conveniently happened when the children of Appellant Mildred Fairby were present on a visit to witness the dastardly deeds. There

was at least two months of silence, almost total, in communication between the appellant and her mother and Carri, since the beginning of visits from the appellant's father, appellant Timothy Fairby, and nothing happened during that time. Appellant Timothy Fairby, an attorney at law of Berkeley, was alone with the appellant and Carri for at least an hour every day, even before the appellants were married. Nothing happened, at least nothing happened that two girls (who have since demonstrated a very willing ability to talk about a myriad of alleged abusive incidents) have mentioned. One can be sure that if anything improper had taken place, that the detecting efforts of a mother living at Phoenix would have brought it out. Then after the cessation of visits from the Fairby children, there was another six weeks before Tracy and Carri went down to Arizona, and no allegations have come from that time. There was one allegation at the trial, from Carri, that an incident of abuse took place the week after Easter, but that is pure perjury, since she alleged that the Fairby children were present (again, conveniently as witnesses!) and it is a matter of record that there were no visits after Easter weekend.

In this Court, in People v. Hillaby, Brown Book Co., 1967, addressed the complex question of the establishment of the corpus delicti accompanied with a reasonable body of convicting evidence.

While the evidence was sufficient for the jury to conclude that the death involved criminal activity (the woman's death), the evidence was not sufficient to show, beyond a reasonable doubt, that defendant caused (the) death.

In the instant case, we are faced with not only an insufficiency of evidence to establish guilt beyond a reasonable doubt, but also a deficiency of evidence with which to fairly establish the corpus delicti, the proven delicti in a rape case.

It is not to be understood that there is no evidence of the victim, but that is

against the defendant. The evidence agrees with her version of the story. The victim's story is the uncorroborated testimony of the victim, and since there is substantial doubt about those charges which were negated by that external witness, it follows logically that one can well be lying about the rest of the charges as well. The defendant Burns is the victim, and that issue was also presented by this Court in McKale, supra.

We reverse a jury conviction for insufficient evidence only when the evidence, as viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted. (Quoting State v. BERNICE, 627 P.2d 1141, 1168 (1981); State v. BERNICE, 695 P.2d 761, 762 (1979); State v. BARNES, 594 P.2d 800, 822, 832 (1979); State v. ROLAND, 594 P.2d 216, 217 (1979).)

Appellants submit that the evidence used by the state against them in the case at bar was BOTH sufficiently inconclusive and inherently improbable, to such a degree as to vitiate the convictions.

Appellants have a quarrel with the concept of a reviewing court taking a stance most favorable to the state. In BARNES, supra, this Court stated that

The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt (supra, p.2)

and, further, that

...the reviewing court will stretch the evidentiary fabric as far as it will go, but this does not mean that the court can take a speculative leap across a remaining gap in order to find a conviction (supra, p.2)

It is by a common sense and judicial reasoning that the evidence as presented at the trial of appellants could support the guilty verdicts. The evidentiary fabric is rent fatally by, first and foremost, the medical evidence, then, ethically and repeatedly by the material changes of the different versions of all the stories, and the outright lies mixed in for good measure. Not only was there insufficient evidence to support the charges in the first place, but even

and in the totality of evidence as vomited forth by the prosecutor, it was  
 exposed, as a matter of fact, and no argument that it collapsed under its own  
 weight. But what counsel did with his tactical conclusion was to implicate himself  
 in an important, and very possibly criminal, action to obtain a conviction at any  
 cost.

When a prosecutor in a state court is guilty of such unfair, dishonest, or  
 ignoble conduct as to prevent a fair trial for defendant, then defendant  
 has been denied due process called for by this (the Fourteenth) amendment.  
BUKWELE v. TOLTS, C.A. Cal.1957, 245 F2d 194; cert. den. 78 Sct 271 (2 mems),  
 355 US 896, 2 LEd2d 194; reh. den. 78 Sct 394 (2 mems), 355 US 927, 2 LEd2d  
 393.

The evidence, when viewed most favorably for the State, will not sustain a  
 conviction, something amply demonstrated herein, but, appallingly, something that  
 was known by the Prosecuting Attorney, Paul K. Farr, before the trial ever started.

### CONCLUSION

There was a glaring lack of probable cause for either of the arrests of the Appellants at the outset of the police investigation, and an equally glaring denial of the termination of same in the absence of issuance of warrants, and (2) the preliminary hearings into the charges. The Appellants' trials were put off for fifteen to seventeen months, depending on which one you're looking at, and every delay, save one, was due to actions of the prosecution. The Court docket problems also lie at the feet of the State.

The trial court was not vested with the requisite jurisdiction to either try or to sentence the Appellants.

The trial itself was a portrait painted in the colors of suppressed evidence, perjury, and testimony about improper, unrelated incidents. The Court consistently denied the defense motions for anything which might delay the end of the proceedings, even if that delay were proper and in the interest of justice. Such actions included: denial of further psychological evaluation of two closely-related State witnesses; quashing of subpoena which would have allowed the admittance of testimony favorable to the defense; denial of meaningful character testimony about the Appellants; denial of defense motion to admit prior testimony of State witnesses, despite the possibility of perjury; denial of defense motions to strike obviously unqualified testimony of child witnesses; and, at the last, a denial of defense motion to dismiss - or more properly, the ignoring of the motion, since the Court never ruled on the motion at all.

The prosecutor elicited testimony about the exercising of MIRANDA rights by appellant Mildred Fairby, and while such is not, in and of itself, grounds for reversal, it does once again show the depths to which the prosecutor was willing to stoop for a conviction. He used improper, partial evidence in an

apparent effort to prevent Appellant Timothy Leary, and generally was the purpose of the trial what he had to know (or, the appellants are willing to admit, what he should have known) was false and perjured testimony.

The court refused to modify its jury instructions to conform to the more proper text, and gave otherwise improper instructions to the panel. The court denied later motions to arrest judgement, and for a new trial, all of this, before, during, and after the trial, in the face of a complete lack of proper, credible evidence to support the charges.

This Honorable Court should reverse the verdicts of the lower court, and enter a verdict of acquittal on all charges, and such order may be based, generally, on either or both of two sets of circumstances.

(1) The totality of circumstances surrounding a mockery of justice

If (defendant) was falsely imprisoned and subjected to a fraudulent trial in a criminal case and a wrongful conviction by reason of a wilfull and malicious conspiracy designed to that end and carried out by state officials and others acting under guise of state law, such conduct would amount to a deprivation of (defendant's) liberty without due process of law. Beatty v. McHugh, U.A. Mich.1949, 172 Mich 1016.


(2) The sheer weight of errors/committed by the state and the court, even if none of the errors, standing alone, would justify a reversal, which is not the case.

where none of alleged errors specified constitute reversible error, only way in which combination thereof could open to to prejudice defendant would be in situation where error, although standing alone might not be prejudicial, in combination with other factors would create prejudice. STATE v. MOORE, Ill. 2. 486, 183 Ill 973.

Accordingly, Appellants pray this honorable court to grant them a judgement of acquittal on all charges, and to enter an order to the effect that the state be enjoined from any further proceedings in this matter, given the obvious impossibility of obtaining justice through the instrumentality of a new trial, further, or otherwise, new and CREDIBLE evidence, or, failing that, Appellants

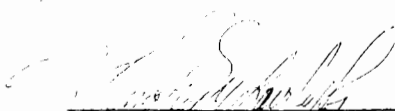
by this honorable court grant them whatever relief it feels appropriate under the circumstances.

Respectfully submitted,

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief of Appellants was duly served on Counsel for Respondent, Earl F. Dorius, Deputy Attorney-General, State Capitol Building, Salt Lake City, Utah, by hand delivering three (3) copies thereof, this 24<sup>th</sup> day of September, 1983

  
\_\_\_\_\_  
Timothy M. Lairy, Jr., pro se