1967

# The State of Utah v. Virgil S. Redmond : Brief of Respondent

# In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent.

v.

VIRGIL S. REDMOND,
Defendant-Appellant.

Case No. 10610



## BRIEF OF RESPONDENT



Appeal from the Judgment of the Third Judicial District Court for Salt Lake County,
Hon. Aldon J. Anderson, Judge

PHIL L. HANSEN
Attorney General

GARY A. FRANK
Assistant Attorney General

Attorneys for Respondent
State Capitol
Salt Lake City, Utah



RONALD C. BARKER
2870 South State
Salt Lake City, Utah

Attorney for Defendant-Appellant

## TABLE OF CONTENTS


Page

STATEMENT OF THE NATURE OF THE CASE ..... 1

DISPOSITION IN THE LOWER COURT ..... 1

RELIEF SOUGHT ON APPEAL ..... 2

STATEMENT OF FACTS ..... 2

ARGUMENT:

POINT I

THE COURT DID NOT ERR IN DENYING THE APPELLANT ACCESS TO CHECKS IN THE POSSESSION OF THE PROSECUTION SINCE: ..... 3

A. DUE PROCESS DOES NOT COMPEL THE PRODUCTION OF INFORMATION REQUESTED ..... 3

B. CRIMINAL DISCOVERY PROCEDURES DO NOT REQUIRE SUCH PRODUCTION ..... 3

POINT II

DISCOVERY PROCEDURES ARE ENTRUSTED TO THE SOUND DISCRETION OF THE TRIAL COURT AND THE EXERCISE OF THE COURT'S SOUND DISCRETION DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION ..... 7

POINT III

THE COURT DID NOT ERR IN PERMITTING THE STATE TO PRESENT EVIDENCE OF A CHECK OF "CAL J. COON" .... 10

## TABLE OF CONTENTS—(Continued)

Page

POINT IV

IT WAS NOT PREJUDICIAL ERROR TO ALLOW THE STATE TO CALL WITNESSES WHOSE NAMES HAD NOT BEEN ENDORSED ON THE INFORMATION ..... 12

POINT V

IT IS NOT ERROR FOR A TRIAL COURT TO DETERMINE EVIDENCE TO BE ADMISSIBLE FOR ONE PURPOSE AFTER PREVIOUSLY RULING SUCH EVIDENCE INADMISSIBLE FOR ANOTHER PURPOSE 13

POINT VI

THE TRIAL COURT DID NOT ERR IN HOLDING OTHER CHECKS OF THE SAME SERIES, DRAWN ON THE SAME BANK ACCOUNT, PAYABLE TO THE SAME PAYEE, AND CASHED AT ABOUT THE SAME TIME WITH THE SAME IDENTIFICATION TO BE INADMISSIBLE 14

POINT VII

THE STATE'S EVIDENCE THAT IT HAD SEARCHED THIS AREA FOR THE ALLEGEDLY FICTITIOUS PERSON WAS SUFFICIENT TO ESTABLISH THAT NO SUCH PERSON EXISTED ..... 16

CONCLUSION ..... 17

### Cases Cited

Cicenia v. LeGay, 357 U.S. 504 (1958) ..... 4

Leland v. Oregon, 343 U.S. 790 (1952) ..... 3

## TABLE OF CONTENTS—(Continued)


Page

People v. Gormach, 302 Ill. 332, 134 N.E. 756 (1922) .... 11
People v. Harvey, 235 N.Y. 282, 139 N.E. 268 (1923) .... 14
People ex rel. Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927) ..... 5
People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881 (1961) 5

Redmond v. City Court, 17 Utah 2d 95, 404 P.2d 964 (1965) ..... 2

State v. Bunk, 63 A.2d 842 (N.J. 1949) ..... 5
State v. Clark, 21 Wash. 2d 774, 153 P.2d 297 (1944) .... 8
State v. Cooper, 114 Utah 531, 201 P.2d 764 (1949) ..... 14
State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959) ..... 8
State v. Gorham, 93 Utah 274, 72 P.2d 656 (1937) ..... 11
State v. Green, 89 Utah 437, 57 P.2d 750 (1936) ..... 14
State v. Jamison, 103 Utah 129, 134 P.2d 173 (1943) .... 9
State v. King, 66 Ariz. 42, 182 P.2d 915 (1947) ..... 13
State v. Lack, 118 Utah 128, 221 P.2d 852 (1950) ..... 9
State v. Neal, 123 Utah 93, 254 P.2d 1053 (1953) ..... 14
State v. Nemier, 106 Utah 307, 148 P.2d 327 (1944) .... 14
State v. Prettyman, 113 Utah 36, 191 P.2d 142 (1948) .... 14
State v. Scott, 111 Utah 9, 175 P.2d 1016 (1947) ..... 14
State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953) ..... 5
State v. Wheeler, 70 Idaho 455, 220 P.2d 687 (1910) .... 15
State v. Willard, 3 Utah 2d 129, 279 P.2d 914 (1955) ....14, 16

United States v. Garsson, 291 Fed. 646 (S.D.N.Y. 1923) 7


### Authorities Cited


Abbott, Criminal Trial Practice § 64 (4th ed.) ..... 9
5 A.L.R.2d 444 (1949) ..... 9

Moreland, Modern Criminal Procedure 213 (1958) ..... 9


### Statutes Cited


Utah Code Ann. § 76-26-7 (1953) ..... 2
Utah Code Ann. § 77-21-9 (1953) ..... 8
Utah Code Ann. § 77-21-52 (1953) ..... 12

# In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
v.
VIRGIL S. REDMOND,
Defendant-Appellant.

Case No. 10610

## BRIEF OF RESPONDENT

### STATEMENT OF THE NATURE OF THE CASE

The appellant, Virgil S. Redmond, appeals from a conviction on jury trial for the crime of uttering a fictitious check in the Third Judicial District for Salt Lake County.

### DISPOSITION IN THE LOWER COURT

The appellant was charged with uttering a fictitious check. Prior to trial a motion for the production of certain checks in the possession of the police was made by appellant. The trial court denied the motion for production. The jury returned a verdict of guilty to the charge of uttering a fictitious check,

and the appellant was sentenced to a term in the Utah State Prison.

## RELIEF SOUGHT ON APPEAL

The respondent submits the conviction should be affirmed.

## STATEMENT OF FACTS

Respondent submits the following statement of facts.

The appellant was charged with the crime of issuing a fictitious check in violation of Utah Code Ann. § 76-26-7 (1953). The amended information stated that appellant "with intent to defraud . . . did utter a fictitious check purporting to be an instrument in writing for the payment of money of CARL J. COON, and there was then and there no such person as CARL J. COON, in existence," the appellant then and there knowing the said instrument to be fictitious (R.1).

Respondent accepts as factual the statement of facts presented by appellant as to the proceedings prior to trial. Appellant had demanded access to checks then allegedly in the hands of the County Attorney. This court affirmed the decision of the District Court in denying such access in **Redmond v. City Court,** 17 Utah 2d 95, 404 P.2d 964 (1965).

Appellant again demanded access to these checks in a request for a bill of particulars in the

Third District Court (R. 2). The court ruled that evidence concerning checks other than the one charged in the information was not material to the issue in the case (R. 617). The court also denied appellant's motion for such access at the commencement of trial (R. 625), in his motion for a continuance (R. 358), and his motion for a new trial (R. 358). Appellant admitted ample opportunity was available to see the specific check in question (R. 624) and that he had in fact had such a copy in his possession.

## ARGUMENT

### POINT I

**THE COURT DID NOT ERR IN DENYING APPELLANT ACCESS TO CHECKS IN THE POSSESSION OF THE PROSECUTION SINCE:**

**A. DUE PROCESS DOES NOT COMPEL PRODUCTION OF THE INFORMATION REQUESTED.**

**B. CRIMINAL DISCOVERY PROCEDURES DO NOT REQUIRE SUCH PRODUCTION.**

The appellant's contention that the denial of access to the requested checks is a violation of due process of law is without merit. The information supplied by the prosecution amply apprises the appellant of the charge against him. There is no dispute as to the check in question; the prosecution was based only on this single check. In **Leland v. Oregon,** 343 U.S. 790 (1952), the United States Supreme Court passed on the refusal of a state trial court to require

the district attorney to make available to defendant his confession to the crime charged. Also, in **Cicenia v. LaGay,** 357 U.S. 504 (1958), the same issue was considered by the United States Supreme Court and the contention was again rejected. The Court observed, 357 U.S. at 510:

> . . . He argues that he was deprived of due process because New Jersey required him to plead to the indictment for murder without the opportunity to inspect his confession.
>
> The Fourteenth Amendment does not reach so far. As stated by the Supreme Court of New Jersey in the earlier proceedings in this case, 6 N.J. 296, 299-301, 78 A.2d 568 at 570, 571, the rule in that State is that the trial judge has discretion whether or not to allow inspection before trial. This is consistent with the practice in many other jurisdictions. See, e.g., **State v. Haas,** 188 Md. 63, 51 A.2d 647; **People v. Skoyec,** 183 Wisc. 764, 50 NYS 2d 438; **State v. Clark,** 21 Wash.2d 774, 153 P.2d 297. In **Leland v. Oregon,** 343 U.S. 790, 801, 802, 96 L. ed. 1302, 1311, 72 St. Ct. 1002, this Court held that in the absence of a showing of prejudice to the defendant it was not a violation of due process for a state to deny counsel an opportunity before trial to inspect his client's confession. It is true that in **Leland** the confession was made available to the defense at the trial several days before its case was rested, whereas here the petitioner pleaded non vult without an opportunity to see the confession. We think that the principle of that case is nonetheless applicable. As was said in **Leland** (343 U.S. 801), although it may be the 'better practice' for the prosecution to comply with a request for inspection, we cannot say that the dis-

> cretionary refusal of the trial judge to permit inspection in this case offended the Fourteenth Amendment.

In **People v. Rosario,** 9 N.Y. 2d 286, 173 N.E.2d 881 (1961), the appellant contended that he was denied due process of law and, in addition, that it was error for the trial judge to refuse to turn over to defense counsel statements given before trial by three prosecution witnesses. The New York Court of Appeals rejected the argument and affirmed the conviction. See also **People ex rel. Lemon v. Supreme Court,** 245 N.Y. 24, 156 N.E. 84 (1927), where Justice Cardozo ruled that there was no requirement for general discovery by the defendant in a criminal case. Some courts have felt that this constitutes the work product of the prosecuting attorney. **State v. Bunk,** 63 A.2d 842, 845 (N.J. 1949).

One of the most instructive opinions on the question of whether or not liberal discovery in criminal cases should be allowed was rendered in **State v. Tune,** 13 N.J. 203, 98 A.2d 881 (1953), by Chief Justice Vanderbilt, long a supporter of law reform. He stated, 98 A.2d at 884:

> In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense . . . Another result of full discovery would be that the criminal defendant who is informed of the

names of all the State's witnesses may take steps to bribe or to frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime . . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and it constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole . . . . To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.

In considering the problem it must be remembered that in view of the defendant's constitutional and statutory protections against self-incrimination, the State has no right whatsoever to demand an inspection of any of his documents or to take his deposition, or to submit interrogatories to him.

. . . .

Except for its right to demand particulars from the defendant as to any alibi on which he intends to rely, Rule 2:5-7, the State is completely at the mercy of the defendant who can produce surprise evidence at the trial, can take the stand or not as he wishes, and generally can introduce any sort of unforseeable evidence he desires in his own defense. To allow him to discover the prosecutor's whole case against him would be to make the prosecutor's task almost insurmountable.

Judge Learned Hand, in **United States v. Garsson,** 291 Fed. 646 (S.D.N.Y. 1923), observed, 291 Fed. at 649:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . . Our dangers do not lie in too little tenderness to the accused.Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.

Consequently, it is manifestly apparent that there is no merit to appellant's contention that due process of law somehow requires this information. Such information was unrelated to the specific charge before the Court. The respondent submits that the above discussion is responsive to appellants points one through four.

## POINT II

**DISCOVERY PROCEDURES ARE ENTRUSTED TO THE SOUND DISCRETION OF THE TRIAL COURT AND THE EXERCISE OF THE COURT'S DISCRETION DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION.**

As stated in appellant's brief, this court has denounced as "dangerous" a procedure whereby the prosecution would "screen" evidence to be made available to the defendant and has held that this function is a judicial function to be performed by the court. **State v. Faux,** 9 Utah 2d 350, 345 P.2d 186 (1959). The respondent does not question this statement. It is incumbent on the court system to protect the rights of the accused in all cases. The trial court's function is to insure that the defendant is granted all the rights, privileges, and immunities guaranteed by the United States Constitution and the respective state constitutions. Who else is better qualified to do so? The respective functions of the prosecutor and the court was set out by the Washington Supreme Court in **State v. Clark,** 21 Wash. 2d 774, 778, 153 P.2d 297, 299 (1944):

> **A prosecuting attorney is under no obligation to submit any evidence he has in his possession to counsel for a person charged with crime . . . . The state is not required to submit its evidence to counsel for the accused. The accused is not, as a matter of right, entitled to have for inspection before trial evidence which is in the possession of the prosecution. Such matter is peculiarly within the trial court's discretion, with which we will interfere only when there has been a manifest abuse of discretion.** [Emphasis added.]

The appellant was heard several times in his attempts to gain access to the information held by the prosecution (R. 358, 625). Appellant alleges that Utah Code Ann. § 77-21-9 (1953) permits him an additional discovery device. However, in **State v. Lack,** 118 Utah

128, 221 P.2d 852 (1950), this court observed that a bill of particulars was not available as a discovery device, stating, 118 Utah at 134:

> Sec. (77-21-9, U.C.A. 1953) was designed to enable a defendant to have stated the particulars of the charge which he must meet, where the short form of indictment or information is used. It was not intended as a device to compel the prosecution to give an accused person a preview of the evidence on which the state relies to sustain the charge.

In **State v. Jamison,** 103 Utah 129, 134 P.2d 173 (1943), this court stated, 103 Utah at 132:

> He demanded a further bill of particulars showing the exact time, the exact place, whether in or out of a car, and what other person, if any, was present. The court did not err in refusing this request. The purpose of a bill of particulars is to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense . . . . The bill of particulars furnished informed him of the nature of the offense, the time and place of its commission, and was therefore sufficient. The bill of particulars need not plead matters of evidence.

The trial court found the complaint with the additional information supplied by the prosecution to be sufficient to apprise the appellant of the nature of the accusation. It is uniformly settled that a bill of particulars may not be used as a means of gaining information concerning the prosecution's evidence. Abbott, **Criminal Trial Practice** § 64 (4th ed.); Moreland, **Modern Criminal Procedure** 213-14 (1958). This rule is stated in Annot. 5 A.L.R.2d 444 at 457 (1949):

> The particulars sought by an accused often are such that the furnishing of them would amount to a disclosure of the prosecution's evidence. In some instances the demand is obviously an exploratory maneuver. Except in those cases in which such information is essential to the accused in order to enable him to prepare for his defense, the courts are not inclined to favor the granting of such particulars.

## POINT III

### THE COURT DID NOT ERR IN PERMITTING THE STATE TO PRESENT EVIDENCE OF THE CHECK PURPORTEDLY UTTERED BY APPELLANT.

The check on which the information was based purports to be one for the payment of money of Prudential Federal Adjusters, with the authorized signature being "C. Coon" (R. 20). This check has been referred to as plaintiff's Exhibit 6 in the record (hereinafter referred to as "P. 6"). A witness for the State identified P. 6 as the one appellant cashed at Makoff's (R. 303, 342). There is no issue that P. 6 was the check on which appellant was given a preliminary hearing (R. 624), that P. 6 was the check mentioned in the information (R. 624), and that P. 6 was the check which appellant was convicted of uttering (R. 115).

The information was amended several times: to add middle initial "S." to appellant's name (R. 596); to substitute the name of "Carl J. Coon" for that of "C. J. McCall" (R. 605); to change the date of the alleged uttering from the "8th" to the "11th" day of April (R. 606). In none of these instances did appel-

lant object to the amending of the information. In only one instance did the appellant object to an amendment and that objection was denied. The information showed the alleged event to have occurred in "1965"; the prosecution considered this a typographical error and requested it be changed to read "1964" (R. 624). At that time appellant admits that he had seen a copy of the check in question, since he attached a thermofax copy of it to one of his motions (R. 624).

The check mentioned in the information bore the name "Cal J. Coon" as the purported maker. Assuming arguendo that the State should have amended the information to read "Cal J. Coon," the fact that this was not done has not been a denial of appellant's rights under the law. At best, this discrepancy would be an immaterial variance and would not constitute reversible error. A mere variance in the letters with which the name of the victim of an offense is spelled is not fatal. **People v. Gormach,** 302 Ill. 332, 134 N.E. 756 (1922).

In **State v. Gorham,** 93 Utah 274, 72 P.2d 656 (1937) this court considered the rule of idem sonans as applied to forgery and uttering cases. It stated, 93 Utah at 288:

> **We concede it to be well established in criminal prosecutions for forgery that the named charged to be forged must be proved as alleged in the indictment or information . . . . It is not essential, however, that the names be spelled in the same way, or that they be correctly spelled. If substantially the same sound is preserved, a variant of orthography will make**

no difference. The test always is, are the names as spelled idem sonans—have the same sound?

## POINT IV

## IT WAS NOT PREJUDICIAL ERROR TO ALLOW THE STATE TO CALL WITNESSES WHOSE NAMES HAD NOT BEEN ENDORSED ON THE INFORMATION.

Utah Code Ann. § 77-21-52 (1953) requires the prosecution to list on the face of the information the names of witnesses on whose evidence the information is based. This is done to allow the defendant an opportunity to learn on whose testimony the state relied in bringing the charge against the defendant. In the instant case, the four names of the witnesses who testified at the preliminary hearing were so endorsed on the information, thus satisfying the requirements of the statute.

The statute continues, ". . . the prosecuting attorney shall endorse on the information or indictment at such time as the **court may rule or otherwise prescribe** the names of such other witnesses as he purposes to call." (Emphasis added.) It is clear, therefore, that the statute allows the trial court to determine when and if such names are to be endorsed. Since this matter is discretionary with the court, the failure to require the naming of prospective witnesses will stand unless the appellate court determines such actions to be an abuse of discretion. The respondent submits that appellant was not so prejudiced as to have required either a new trial or a continuance to prepare to meet this testimony.

The fact alleged by appellant that the district attorney promised to give appellant the names of any additional witnesses which might be called and then failed to do so was not such as to require a continuance in the interest of justice. The failure to keep this pledge may be a matter of faulty memory or even poor judgment; however, no case will be reversed because of technical errors not amounting to a deprivation of substantial justice. **State v. King,** 66 Ariz. 42, 182 P.2d 915 (1947).

## POINT V

**IT IS NOT ERROR FOR A TRIAL COURT TO DETERMINE EVIDENCE TO BE ADMISSIBLE FOR ONE PURPOSE AFTER PREVIOUSLY RULING SUCH EVIDENCE INADMISSIBLE FOR ANOTHER PURPOSE.**

The point at issue discussed here concerns the right of trial courts to allow evidence on a given subject to reach the jury after having previously ruled the evidence inadmissible when offered for another purpose. This could well be characterized as nothing more than a change of the judicial mind or a redetermination of admissability which would be discretionary by the court and subject to reversal only when there is a showing of manifest injustice which results in substantial prejudice to the defendant. Here, the evidence in question, the driver's license and the check cashed at Albertson's was admitted for one purpose, i.e., the establishment of the identity of the appellant. It was not admitted to show propensity to commit the crime as this court has condemned on numerous occasions. As appellant points out in

Point IX of his brief, the courts will allow evidence of similar incidents when such tends to establish the identity of the person charged with the commission of the crime on trial. **People v. Harvey,** 235 N.Y. 282, 139 N.E. 268 (1923). That such was the case is not in dispute.

This court has faced this issue in a series of criminal cases wherein the accused's history of similar criminal activity was being used by the prosecution in an attempt to show a propensity to commit the specific crime charged. The court has uniformly held this to be error. **State v. Neal,** 123 Utah 93, 254 P.2d 1053 (1953); **State v. Cooper,** 114 Utah 531, 201 P.2d 764 (1949); **State v. Prettyman,** 113 Utah 36, 191 P.2d 142 (1948); **State v. Scott,** 111 Utah 9, 175 P.2d 1016 (1947); **State v. Nemier,** 106 Utah 307, 148 P.2d 327 (1944). However, the court also held, in **State v. Willard,** 3 Utah 2d 129, 279 P.2d 914 (1955), that evidence admissible for one purpose is not inadmissible because it fails to meet requirements for admissibility for another purpose, but the jury should be instructed not to use it for the inadmissible purposes. See also **State v. Green,** 89 Utah 437, 57 P.2d 750 (1936).

## POINT VI

**THE TRIAL COURT DID NOT ERR IN HOLDING OTHER CHECKS OF THE SAME SERIES, DRAWN ON THE SAME BANK ACCOUNT, PAYABLE TO THE SAME PAYEE, AND CASHED AT ABOUT THE SAME TIME WITH THE SAME IDENTIFICATION TO BE INADMISSIBLE.**

At the time of the trial there was no issue before the court as to the maker of the check in question. The charge of "uttering" concerns itself with the passing of the instrument knowing the same to be fictitious. This is the only matter to be determined. The respondent can see no possible materiality in the other checks. The fact remains that only one charge was before the court — the utttering of a check for the sum of $186.35. It was of no import that there were other checks in existence that were nearly identical to the check which formed the basis of the information.

The rule that evidence should be confined to matters in issue applies to criminal as well as civil cases and evidence offered of matters having no bearing on questions of fact in issue should be excluded. **State v. Wheeler,** 70 Idaho 455, 220 P.2d 687 (1950).

What could appellant have proved had other checks been admitted? He claims to be able to show that the check in question as well as the other checks were all endorsed by the same individual. He asserts a handwriting analysis would prove that appellant did not in fact endorse any of the instruments. This reasoning shows the basic error in appellant's case. The appellant was charged and convicted of uttering and not of fraudulently endorsing the check. Since uttering is complete when one attempts to pass

a fictitious check, only evidence as to defendant's identity and knowledge at the time of the alleged passing is relevant. Appellant exercised the right of cross-examination of the witnesses for the prosecution to discredit their testimony. The trier of fact chose to believe the prosecution witnesses. The appellate court should not reverse a jury verdict unless there is a showing of error so damaging to the defendant as to impair justice.

## POINT VII

### THE STATE'S EVIDENCE THAT IT HAD SEARCHED THIS AREA FOR THE ALLEGEDLY FICTITIOUS PERSON WAS SUFFICIENT TO ESTABLISH THAT NO SUCH PERSON EXISTED.

The appellant made several objections as to the foundation laid prior to the officer's testifying of his inability to locate anyone in the vicinity of Salt Lake County by the name of C. J. Coon, C. Coon, or Carl Coon (R. 440), and to the jury instruction respecting adequacy of search (R. 589). The officer stated that he had checked the local phone book; called up the utilities in the valley; called the Secretary of State's office; and had checked the city and county directories for the current year and going back four years (R. 440).

This specific issue was presented to this court in **State v. Willard,** 3 Utah 2d 129, 279 P.2d 914 (1955),

wherein the defendant contended an instruction almost identical to that given here (instruction 16) was erroneous in limiting the territory within which the person by that name must reside or be found. As was stated by the court, 3 Utah 2d at 132:

> Under a statute similar to ours, the California courts . . . . held that in a prosecution for issuing a fictitious check under such statute proof beyond a reasonable doubt that no person in the world exists bearing the name appended to the check is not required but that it is only necessary to prove to a common certainty that there is no such person as the one who purportedly made such check in the vicinity of the counties connected with the act charged.

The court continued, 3 Utah at 133:

> We further point out that this statute does not require that there be no person in existence who bears the name appended to the check, but **it does require that there be no person in existence who purportedly, or is claimed to have made such check.** [Emphasis added.]

The trial court required proof beyond a reasonable doubt of the nonexistence of the person who purportedly made the check. The respondent submits that this ruling was correct and that it was in fact proved to a common certainty.

## CONCLUSION

It is apparent that the jury was convinced beyond a reasonable doubt of the appellant's guilt. These

findings of fact and conclusions of law are not erroneous.

This court should affirm.

Respectfully submitted,

PHIL L. HANSEN
Attorney General

GARY A. FRANK
Assistant Attorney General
State Capitol
Salt Lake City, Utah
Attorney for Respondent