1990

The State of Utah v. Thomas W. Schnoor : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

DOCKET NO. 20330

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
THOMAS W. SCHNOOR,	:	Case No. 900330-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Forgery, a second degree felony, in violation of Utah Code Ann. § 76-6-501 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, Judge, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Rule 26(2)(a), Utah Rules of Criminal Procedure (1991), and Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1991), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following rules, statutes and constitutional provisions are provided in Addendum E:

Standard 3-5.8, ABA Standards Relating to the Administration of Criminal Justice (1979);

Amendment XIV, Constitution of the United States;

Article I, § 7, Constitution of the State of Utah.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Did the prosecutor's inaction in the face of false testimony from his primary witness concerning immunity from prosecution violate Mr. Schnoor's right to due process of law?

> Standard of Review: A conviction obtained through the use of false evidence must be reversed "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Walker v. State, 674 P.2d 687, 690-91 (Utah 1981).

2. Did the prosecutor's action constitute misconduct denying Mr. Schnoor the right to a fair trial?

> Standard of Review: Objectionable actions of the prosecutor warrant reversal of the conviction if, first, "the remarks call to the attention of the jurors matters they would not be justified in considering in determining their verdict" and, second, were the jurors "probably influenced by those remarks." State v. Troy, 688 P.2d 483 (Utah 1984).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for Forgery, a second degree felony, in violation of Utah Code Ann. § 76-6-501 (1953 as amended). A trial was held on May 1 and 2, 1990. The jury convicted Mr. Schnoor as charged.

STATEMENT OF THE FACTS

Defendant/Appellant Thomas W. Schnoor was charged by Information with Forgery, a second degree felony (R. 6-7). A preliminary hearing was held on March 29, 1990 (R. 10), and Brent Lindsey was the lone witness to testify for the State (R. 3,

10-11). Prior to Mr. Lindsey's testimony, Defendant pointed out that Mr. Lindsey was a suspect and should not be forced to testify lest he incriminate himself (R. 10). At that point, the State stated for the record that it would not charge Mr. Lindsey with any crime (R. 3, 10), and the court stated that it would hold the State to that promise (R. 3, 11). Brenda Lindsey testified for Defendant (R. 3, 11).

A trial was held on May 1 and 2, 1990 (R. 79, Transcript of the Trial). Mr. Schnoor testified at trial that he knew Brent and Brenda Lindsey through their mother and acted as their father or big brother (R. 79 at 147). Although he did not live with them, he was romantically involved with their mother and was over at their apartment often (R. 79 at 157-58). He would also occasionally provide financial support (R. 79 at 158). On January 24, 1990, Mr. Schnoor took Brent and Brenda with him to his work at Huish Chemicals to pick up his paycheck (R. 79 at 148-49). He had done this several times in the past (R. 79 at 148).

The next day, Mr. Schnoor called Brent and asked Brent if he and Brenda wanted to come along with him that afternoon when he paid his bills (R. 79 at 150-51). That afternoon, he picked the two up and went to pay some bills (R. 79 at 152). Brent told Mr. Schnoor that he had a check to cash but that he had no identification with him (R. 79 at 152). Mr. Schnoor took Brent to Mike's Pawn (Id.). Both Brent and Mr. Schnoor went into the pawn shop, while Brenda stayed in the car (R. 79 at 153). Mr. Schnoor

picked up a television set, while Brent unsuccessfully tried to cash the check (R. 79 at 153).

Mr. Schnoor, Brent and Brenda returned to their apartment, where Mr. Schnoor made several phone calls trying to find a place that would cash Brent's check (R. 79 at 153-54). Mr. Schnoor dropped Brent off at a check cashing place near 2100 South and State Street (R. 79 at 154) and took Brenda back home (R. 79 at 155). Brent told Mr. Schnoor that he would take a bus home (R. 79 at 155).

No witness other than Mr. Schnoor testified during Defendant's case. Testifying for the State were both Brent and Brenda Lindsey and four other witnesses. Robert Saupe testified that the check in question was his paycheck from Huish Chemical (R. 79 at 102-03) but that he did not know Defendant at all (R. 79 at 103). Lins Young, the manager of Cash-A-Check, testified as to the activities of Brent Lindsey in her store; however, she never saw Defendant (R. 79 at 107-116). Officer Remik testified as to her interaction with Brent Lindsey; she, also, never encountered Defendant (R. 79 at 117-124). Finally, Jack Lords testified that he knew Mr. Schnoor and saw him in the store while Brent Lindsey was there, but that he had no memory of why Defendant was in his store or if he was connected to Brent (R. 79 at 128-29).

Brent Lindsey testified to the same basic outline of occurrences as Defendant did. However, Brent said that in the phone call from Mr. Schnoor earlier in the day, Mr. Schnoor had promised to pay him fifty dollars (R. 79 at 19-20). Prior to going into the pawn shop, Brent said that Mr. Schnoor showed him the check, told

him to memorize the name on it, and go in to cash it (R. 79 at 22-23). Brent said Mr. Schnoor also told him not to mention his name (R. 79 at 24-25).

In the pawn shop, Brent misspelled Mr. Saupe's name and could not cash the check (R. 79 at 26). In addition to making phone calls at their apartment, Brent testified that Mr. Schnoor ordered Brenda to get him some scissors to cut the misspelled name off of the check (R. 79 at 33-34).

Brent further testified that Mr. Schnoor gave him instructions on what to do, while he, Brenda and Mr. Schnoor were parked in front of the check cashing place (R. 79 at 35-36). He then explained the problems that arose in the store (R. 79 at 36-37) and his interaction with Officer Demik (R. 79 at 38).

On cross-examination, Brent denied that he had been granted immunity (R. 79 at 44-47), and no attempt was made by Mr. Morgan to correct this erroneous testimony. (See R. 79 at 58-61, redirect of witness by Mr. Morgan.)

Brenda testified to her lack of knowledge of what went on in either the pawn shop or check cashing establishment (R. 79 at 73-74, 80). However, she corroborated Brent's testimony concerning Mr. Schnoor's instructions to Brent prior to each attempt (R. 79 at 70-73, 79-80). She also corroborated Brent's story about the scissors (R. 79 at 78).

Brenda admitted on cross-examination that she had previously told defense counsel that Brent found the check at Huish Chemical, while Mr. Schnoor was there to pick up his check (R. 79 at

89-90). She admitted that she had told him that Brent did this on his own (Id.).

In closing argument, the Deputy County Attorney, Kent Morgan, started with an appeal to the jury to protect Brent Lindsey (R. 79 at 202) and stated that the case was an unusually important one (R. 79 at 203). He further offered his personal opinion that Mr. Schnoor was the guilty party (R. 79 at 205), stated that Brent's trial would be for another day (R. 79 at 206), and asked the jury not let let him down (Id.). In rebuttal, he argued that Brent was credible because he had so much to lose, yet decided to tell the truth and incriminate himself (R. 79 at 215).

The case was presented to the jury, who, after deliberating, convicted Mr. Schnoor of Forgery. This appeal followed.

SUMMARY OF THE ARGUMENT

The State's main witness at trial against Defendant falsely testified that he had not been granted immunity. The prosecutor took no steps to correct this false and prejudicial impression left with the jury and, in fact, argued the false evidence to the jury with objections during cross-examination of that witness and in closing. The trial court instructed in such a way as to emphasize the false testimony.

Additionally, the prosecutor made numerous objectionable statements and asked improper questions during trial. These included remarks that drew attention to the above-mentioned false

testimony. During cross-examination of Defendant, he asked Mr. Schnoor if another witness was lying, making improper argument to the jury. And finally, in closing argument the prosecutor made comments that asked the jury to use improper considerations in coming to its verdict, used arguments designed to inflame the jury, and expressed improper personal opinions.

ARGUMENT

POINT I: THE DEPUTY COUNTY ATTORNEY'S INACTION IN THE FACE OF FALSE TESTIMONY FROM HIS PRIMARY WITNESS CONCERNING IMMUNITY FROM PROSECUTION VIOLATED MR. SCHNOOR'S RIGHT TO DUE PROCESS OF LAW.

At the preliminary hearing, Brent Lindsey, the State's only witness at that hearing and a primary participant in the alleged illegal activities, was granted immunity from prosecution by the State through Deputy County Attorney Marty Verhoef (R. 3-4, 10-11, attached as "Addendum A"). At trial, Brent was cross-examined for an extended period of time concerning this grant of immunity (R. 79 at 44-47):

> MR. GRINDSTAFF: AND YOU WERE PROMISED YOU WOULDN'T GO TO JAIL, RIGHT, IF YOU CAME AND TESTIFIED AGAINST TOM?
>
> BRENT LINDSEY: IF I WHAT? -- I DON'T GET IT.
>
> Q. WEREN'T THERE PROMISES MADE TO YOU?
>
> A. NO.
>
> Q. NO? HAVE YOU BEEN CHARGED WITH THE CRIME? HAVE YOU HAD TO GO TO THE DETENTION CENTER?

A. NO. OH, YES, ONCE.

Q. THAT WAS RIGHT AFTER YOU WERE ARRESTED; RIGHT?

A. A FEW WEEKS -- ABOUT A WEEK LATER.

Q. ABOUT A WEEK LATER YOU WENT TO COURT; RIGHT?

A. YES.

A. WELL, IT'S NOT REALLY COURT. IT WAS --

Q. YOU WENT AND MET WITH POLICE OFFICERS?

A. I DON'T KNOW IF IT WAS A POLICE OFFICER.

Q. PROBATION OFFICER? FROM THE JUVENILE SYSTEM?

A. I THINK THAT'S WHAT IT WAS.

Q. DID THEY PROMISE YOU THAT IF YOU TESTIFIED AGAINST TOM, THEY WOULDN'T PRESS ANY CHARGES AGAINST YOU?

A. NO. NO, THEY DIDN'T.

Q. HAVE THEY PRESSED CHARGES AGAINST YOU?

MR. MORGAN: WE ARE PROCEEDING IN BAD FAITH. AT THIS POINT ALL OF THAT HAS BEEN ANSWERED.

MR. GRINDSTAFF: I DON'T BELIEVE HE'S ANSWERED THAT QUESTION.

THE COURT: HE CAN ANSWER THAT QUESTION.

THE WITNESS: WILL YOU REPEAT IT?

Q. HAVE THERE BEEN CHARGES PRESSED AGAINST YOU?

A. UM, NO.

Q. NO. AND WHY HAVEN'T THERE BEEN CHARGES PRESSED AGAINST YOU?

MR. MORGAN: OBJECTION. BEYOND THE PERSONAL KNOWLEDGE OF THE WITNESS. AS PHRASED.

THE COURT: YOU CAN ANSWER THE QUESTION, IF YOU KNOW.

THE WITNESS: I DON'T KNOW.

Q. YOU DON'T KNOW WHETHER OR NOT YOU HAVEN'T BE (SIC) CHARGED BECAUSE OF YOUR TESTIMONY IN THIS CASE?

A. YES, I DON'T KNOW.

Q. YOU DON'T KNOW. YOU WERE IN COURT FOR A PRELIMINARY HEARING, WEREN'T YOU? AND DIDN'T YOU HEAR THE PROSECUTOR REPRESENT TO YOU THAT THEY WOULD NOT FILE CHARGES AGAINST YOU? FOR YOUR TESTIMONY?

A. I CAN'T REMEMBER.

Q. ISN'T THAT WHAT HAPPENED?

MR. MORGAN: OBJECTION, YOUR HONOR. MAY WE APPROACH THE BENCH?

THE COURT: YOU MAY.

(BENCH CONFERENCE OFF THE RECORD)

MR. GRINDSTAFF: NOW, HAVE YOU BEEN TOLD THAT IF YOU DIDN'T TESTIMONY (SIC) THAT YOU WOULD GO TO JAIL?

A. NO.

Q. NO? ABOUT A MONTH AND A HALF AGO, WASN'T IT TRUE THAT YOU AND YOUR SISTER SAT IN A ROOM WITH A POLICE OFFICER AND YOU TWO WERE TOLD THAT IF YOU DIDN'T COME OVER AND TESTIFY AGAINST TOM --

MR. MORGAN: OBJECTION. THIS IS GETTING ARGUMENTATIVE AND -- I MEAN, HE'S ASKED -- EACH TIME THE WITNESS HAS ANSWERED EACH TIME THAT HE HAS NOT BEEN OFFERED ANYTHING IN THIS CASE. NOW WE ARE GOING THROUGH TESTIMONY, I THINK, THAT IS GOING WAY COLLATERAL TO ANY ISSUES HERE.

> THE COURT: WELL, I'M GOING TO OVERRULE THE OBJECTION ON THE PRESUMPTION THAT A THE QUESTION IS ASKED IF GOOD FAITH.
>
> . . .

Trial counsel for the State, Deputy County Attorney Kent Morgan, made no effort to clear up this incorrect testimony from his primary witness. And, in fact, he affirmatively argued from this testimony on several occasions in his closing: "Brent is not on trial. That is for another day." (R. 79 at 206); and, "[N]ow, his testimony was that he was not promised anything, but by admitting his participation in this crime, therefore, he's going to detention? . . . He incriminates himself all the away (sic) through the case." (R. 79-at 214-15).

Furthermore, the court instructed the jury in instruction number seven that

> [a]lthough there is more than one person named in this action, the case against each person is separate from and independent of that of the other. In this action the only defendant on trial is Thomas W. Schnoor. You are not to concern yourselves with the status of any other person or defendant named in the case.

(R. 32, attached as "Addendum B"). After objections and a bench conference concerning the instruction, the court pointed out to the jury that the credibility of both Brent and Brenda Lindsey could be considered (R. 79 at 198-201). Further objections were overruled and a request for a bench conference was denied (R. 79 at 201).

A. ERROR AROSE WHEN THE PROSECUTOR ALLOWED FALSE EVIDENCE TO BE PRESENTED AND ARGUED THAT SAME EVIDENCE TO THE JURY.

> [I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.
>
> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of a witness.

(citations omitted). Napue v. Illinois, 360 U.S. 264, 269 (1959); see also Giglio v. United States, 405 U.S. 150, 153 (1971). This is true "irrespective of the good faith or bad faith of the prosecution." Giglio at 154 (citation omitted). Convictions thus obtained violate not only the fourteenth amendment's due process clause, but also Article I, Section 7 of the Utah Constitution. State v. Shabata, 678 P.2d 785, 789 (Utah 1984).

The government in Giglio had offered immunity to its main witness against the defendant through a prosecutor who was not the attorney at trial. Giglio at 152-53. At trial, the witness denied the existence of a grant of immunity on cross-examination (Id.). In closing, the prosecutor argued the lack of promises made by the government (Id.). The court in Giglio found this to be error, even though the trial attorney had no idea immunity from prosecution had been granted to his witness.

In the present case, Mr. Verhoef was the State's representative when immunity was granted; Mr. Morgan conducted the trial. However, whether these turn of events were

> a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes to the Government (citation omitted).

Giglio at 154. It was error even for Mr. Morgan to be unaware of the promise of immunity, thus negligently allowing false testimony to be presented.

Although Brent Lindsey did not understand what was being asked or did not remember what had happened at the preliminary hearing, his testimony nevertheless created a false impression for the jury. However, the witness' state of mind was not material to either the decision in Napue or Giglio. Unwitting false testimony that goes uncorrected violates principles of due process, also. Walker v. State, 628 P.2d 680, 681 (Nevada 1981).

What is important is that the State allowed the evidence to go uncorrected. In the present case, the prosecutor not only allowed the false impression to go to the jury, but he objected repeatedly to defense counsel's attempts to get Brent to acknowledge the promise that had been made to him (R. 79 at 44-46), even at one point claiming bad faith on Mr. Grindstaff's part, thus compounding the error (R. 79 at 44). Not only was the jury led to believe that Brent was testifying in spite of the effect that it may have on his own trial, but the prosecutor also insinuated that defense counsel

was being unfair by making up the whole idea of a promise to Brent in exchange for his testimony.

The prosecutor also argued in closing

> [t]hat Brent is not on trial. That is for another day.

(R. 79 at 206). And

> [h]e incriminates himself all the way through the case.

(R. 79 at 215). The prosecutor's statements hammered through the idea that no promises were made and that Brent faced his day in court later. The State's emphasis of the false testimony in order to enhance the credibility of its main witness enhanced the prejudicial nature of this evidence.

Finally, the State submitted an instruction to the court (R. 54) that was later given as instruction number seven (R. 32; see Addendum B). This instruction reinforces the false impression left in the jurors' minds and places all the authority of the trial court behind that impression. There were several objections to this instruction, although the record is unclear as to the specific nature of the objections, since the side bar conference was never put on the record (R. 79 at 198-201). However, it is clear Mr. Grindstaff had further objections to the instruction that the court overruled without discussion (R. 79 at 201).

The instruction is in error for several reasons. First, it repeats the false impression created by Brent's testimony, and suggests that Brent will indeed be tried and punished later. Second, it calls attention to a matter affecting the credibility of

the State's main witness, adding further to the false testimony's prejudicial effect, even though it is asking the jury to disregard that information. Third, the instruction fails to give important and correct information concerning the credibility of Brent Lindsey.

B. THE ERROR WAS COMPOUNDED WHEN DEFENSE COUNSEL FAILED TO MAKE AN APPROPRIATE RECORD OF THE IMMUNITY QUESTION.

Defense counsel for Mr. Schnoor was present at preliminary hearing and trial. At trial, defense counsel attempted to get Brent to admit that promises had been made to him (R. 79 at 44-46). Brent denied that he had been promised he would not go to jail if he testified (R. 79 at 44), that any promises were made (Id.), that no charges would be pressed if he testified against Mr. Schnoor (Id.). He admitted he did not know if the prosecutor would not file charges if he testified (R. 79 at 45). He said he did not remember what happened at the preliminary hearing concerning any promises (Id.). Brent did not remember, did not understand what had gone on, or was not telling the truth about the promise of immunity.

During this interchange, one bench conference was requested by the prosecutor (R. 79 at 45). Nothing from this bench conference was put on the record. Counsel for Defendant made no request on the record for a continuance to get this preliminary hearing transcript or tape into the record and read or played to the jury. Counsel for Defendant made no proffer for the record concerning the immunity grant to which he had been a witness. Counsel for Defendant made no objection to the erroneous remarks made in closing by the prosecutor

concerning a grant of immunity. Counsel made objection and argued at a bench conference concerning objections to instruction number seven (R. 79 at 198-201); however, nothing was put on the record concerning the nature of those objections nor the content of the arguments at side bar.

In short, counsel for Defendant vigorously cross-examined Brent on the issue of immunity. However, nothing has made it to the record concerning the events at preliminary hearing. Mr. Schnoor maintains that this is irrelevant, since Giglio puts the burden squarely on the government to avoid use of false testimony. The defendant has no burden to make sure that the prosecution's witnesses testify truthfully.

However, if this Court views such a record is necessary to raise this issue on appeal, then counsel has rendered ineffective assistance to Mr. Schnoor. To prevail on an ineffective assistance of counsel claim,

> [f]irst, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result was unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

There is no trial strategy that would dictate a vigorous but basically ineffective cross-examination of a lying or forgetful witness and then to not argue before the court and out of the jury's

presence. No further attention to the problem would be drawn by asking for a continuance to get a tape as evidence or by proffering a statement of the facts at preliminary hearing and arguing Giglio at that point to the court. No trial tactic would get in the way of putting on the record objections to instruction number seven.

The performance of Mr. Schnoor's counsel was deficient. He could have mitigated the impact of the false testimony by providing the jury with a tape or a transcript of the preliminary hearing. A continuance to accomplish this appears nowhere in the record. This alone would not serve to completely set things right. That could be accomplished only by the prosecutor conceding to the jury that immunity had been granted, followed by appropriate instruction from the trial court. However, defense counsel makes insufficient effort to set these things in motion.

By not doing what he could have done to correct the false impression left in the jurors' minds concerning the credibility of the main witness against Mr. Schnoor, defense counsel's performance prejudiced the defense. The court in Giglio points out that this type of false testimony creates an almost insurmountable problem. 405 U.S. at 154-55; Napue at 269.

If this conviction can be obtained through false information concerning such important matters of credibility as the immunity from prosecution of the State's main witness, then the system itself is subverted. It does not matter if this Court places the burden for this violation of due process upon the prosecution for allowing and arguing this false testimony or upon the counsel

for Defendant for not completely pointing out the problem to the judge or preserving the issue for appeal. The jury could settle the matter only by making judgments on the credibility of Mr. Schnoor, Brent and Brenda. They had false information concerning Brent's credibility. The resulting jury verdict could not have been reliable; the trial could not have been a fair one. (See Point I.C for further argument on reversibility of the error.)

C. THE USE OF FALSE EVIDENCE IN THIS TRIAL CONSTITUTED REVERSIBLE ERROR.

A conviction obtained through the use of false evidence must be reversed,

> if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

Walker, 624 P.2d 687, 690-91 (Utah 1981). Therefore, a reasonable likelihood or probability

> is a probability sufficient to undermine confidence in the outcome.

State v. Knight, 734 P.2d 913, 920 (Utah 1982), quoting Strickland at 694. Furthermore, this standard

> focuses on the taint caused by the error. If the taint is sufficient, it is irrelevant that there is sufficient untainted evidence to support a verdict. Any stricter interpretation of [this standard] . . . runs the risk of substituting [the court's] judgment for that of the jury and could be criticized as encouraging the improper admission of evidence by de facto weakening the sanctions against it. (citation omitted)

State v. Mitchell, 779 P.2d 1116, 1122 (Utah 1989).

In the present case, only one witness knows the full story as to what happened to the check. That witness is Brent Lindsey. He was promised immunity from prosecution in exchange for his testimony against Mr. Schnoor (R. 3-4, 10-11). Brent's testimony implicates Mr. Schnoor and directly contradicts Mr. Schnoor's own testimony. That the jury did not know that Brent was protected from prosecution because he testified creates an enormous false impression, a taint that is more than sufficient to distort the jury process. It must be remembered that the jury got this false information with considerable embellishment in the form of prosecutor objections, argument and a trial court instruction.

It is immaterial that some of what Brent testified to was corroborated by his sister Brenda. She herself had changed her story at least once, and her testimony is not without evidence of bias. But as the Mitchell opinion points out, even substantial corroborating evidence does not remove the taint. No one else could corroborate any details that involved Mr. Schnoor.

The situation is similar in both Giglio and Napue; the witness who was promised immunity was the key government witness. The false evidence put to the jury had to do with government promises and affected not facts of the crime, but merely the credibility of those witnesses. In both instances, the convictions were reversed, because

> [t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest

> of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue at 269.

Mr. Schnoor's conviction should be reversed, because it was obtained with the use of false information.

POINT II. NUMEROUS ACTS OF PROSECUTORIAL MISCONDUCT DENIED MR. SCHNOOR THE RIGHT TO A FAIR TRIAL.

When a prosecutor makes improper statements in opening or closing, engages in inappropriate cross-examination, or fails to act as fairness dictates, he is violating his "duty to see that justice is done." Walker v. State, 624 P.2d 687, 691 (Utah 1981).

> Thus, while he should prosecute with earnestness and vigor, it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (citations omitted)

Id.

There is a two-part test to see if the objectionable actions of the prosecutor warrant reversal of the conviction. First of all,

> did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict.

State v. Troy, 688 P.2d 483, 486 (Utah 1984), citing State v. Valdez, 513 P.2d 422, 426 (Utah 1973). And secondly,

> were they, under the circumstances of the particular case, probably influenced by those remarks.

Id.

A. ALL REMARKS DRAWING ATTENTION TO THE FALSE TESTIMONY CONCERNING IMMUNITY WERE IMPROPER.

As outlined in Point I above, the State's main witness testified falsely and the State made no effort to correct the false testimony. Instead of correcting the false impression created by this testimony, the prosecutor made objections that suggested the defense, not the State, was acting in bad faith (R. 79 at 44) and then vigorously argued in closing this lack of immunity from prosecution for its star witness (R. 79 at 206 and 214-15). Even though the prosecutor was not present for the granting of immunity, his inaction is reversible error (see Point I above); however, his vigorous pursuit of this testimony without having verified his information is misconduct. Defense counsel's repeated attempts to elicit the information and the content of the unrecorded bench conferences should have warned the prosecutor to check his information.

In State v. Walker, the Utah Supreme Court reversed a conviction, because false testimony went to the jury from the State's main witnesses. At some point during the trial, the prosecutor became aware of the problem, but refused to correct the mistake and in fact argued that mistake in closing. Walker, 624 P.2d at 690. This case should likewise be reversed.

B. SEVERAL OF THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT WERE IMPROPER.

At the very start of closing argument, the prosecutor argued as follows:

MR. MORGAN: I THINK THAT IN THIS CASE, MORE THAN ANY OTHER, I THINK WE HAVE TO CONSIDER THAT EVERYONE IN THIS COUNTRY HAS A RIGHT TO BE PROTECTED UNDER THE LAW. I THINK MR. SCHNOOR DESERVES THAT PROTECTION.

I THINK THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE DESERVE THAT PROTECTION. BRENT LINDSEY, AS WELL AS THE DEFENDANT, HAS PUT HIS FAITH IN THAT SYSTEM. BRENT LINDSEY, AS YOU HEARD HIM TESTIFY AT THE CONCLUSION OF THIS CASE, SAID, "NO, I'M NOT AFRAID OF THE DEFENDANT," EVEN THOUGH HE TESTIFIED HE WAS THREATENED BY HIM.

HE SAYS THAT BECAUSE HE HAS PEOPLE AROUND HIM THAT WILL PROTECT HIM. I'D LIKE TO THINK THE STATE OF UTAH DID IT'S JOB IN PROTECTING BRENT LINDSEY AND ALLOWING HIM TO GET UP ON THAT STAND AND GIVE HIS STORY.

NOW THIS IS AS FAR AS I CAN GO. FROM HERE ON IT'S UP TO YOU. YOU CAN EITHER LOOK AT THE EVIDENCE, COME TO A JUST CONCLUSION AND RENDER A VERDICT THAT PROTECTS MR. LINDSEY, OR YOU CAN COME TO A CONCLUSION, YOU CAN GET UPSET, YOU CAN GET ANGRY ABOUT THINGS THAT REALLY HAVE NOTHING TO DO WITH THIS CASE, AND YOU CAN WALK AWAY FROM THIS.

I'M GOING TO BE BACK HERE TOMORROW. SO IS MR. GRINDSTAFF, SO IS THE JUDGE. WE'VE LOTS OF OTHER CASES. YOU MAY HAVE NOTICED DURING THAT TRIAL THAT I GOT PRETTY ANGRY AT TIMES. THIS ISN'T A MURDER TRIAL. I'VE DONE MURDER TRIALS BEFORE, BUT I DON'T THINK I HAVE SEEN SUCH AN IMPORTANT CASE AS THIS FOR A LONG, LONG TIME.

MR. GRINDSTAFF: I OBJECT TO HIM DISCUSSING HIS PERSONAL OPINIONS. AND HIS PERSONAL VIEWS.

THE COURT: OVERRULED.

MR. MORGAN: IT'S IMPORTANT FOR THAT VERY REASON, THAT IN THIS CASE WE HAVE TO DISCUSS SOMETHING THAT ONLY JURORS CAN DECIDE.

(R. 79 at 202-03, emphasis added, entire closing arguments of both counsel attached as "Addendum C").

This is improper argument for two distinct reasons. First, it invites the jurors to make a decision based on a matter

extraneous to their deciding guilt or innocence.[1] The prosecutor is asking them to protect Mr. Lindsey by rendering a guilty verdict. He says that if they do not render a guilty verdict, they have "walked away" from their duty to protect Brent and have gotten "angry about things that have nothing to do with the case." It is the prosecutor who is asking them to decide based on things that are external to the case.

Such arguments have been found to be improper in several different contexts. Exhortations to take care of the crime problem in this country by finding guilt in the particular case is improper. Coleman v. State, 617 P.2d 243, 246-47 (Okl. Cr. 1980). Pleas to send a message to criminals, the community, or the police are improper. Id. at 246. Pleas to take a stand for the whole community are improper, also. West v. State, 764 P.2d 528, 529 (Okl. Cr. 1988).

The following argument has been found to be improper by this Court:

> Do you want people walking in stores where you shop, dressed in that fashion, dangling their genitalia and you're going to find them not guilty? See, that presumption of innocence just went out the window. It's now time for you to

---

1. ABA Standards Relating to the Administration of Criminal Justice (Second Edition 1979) provides in Standard 3-5.8(d) that
> [t]he prosecutor should refrain from argument which would divert the jury from its duty to decide the case on evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

(See Addendum E.)

> decide, to decide this case. If you want those people walking around in your stores where you shop, then you're going to find him not guilty. If you want to put a stop to it, you're going to find him guilty.

West Valley City v. Rislow, 736 P.2d 637, 637 (Utah App. 1987). This Court found the suggestion to find guilt based on the jurors' feelings about encountering a view of a person's genitalia while in public improper.

> This suggestion goes beyond the evidence and should not be considered by the jury.

Rislow at 638.

In a similar fashion, the prosecutor is asking the jurors in the present case to defend Mr. Lindsey from harm and convict Mr. Schnoor. That is not the decision they need to make. They need to decide whether or not the State has proven Mr. Schnoor's guilt beyond a reasonable doubt. That is all they must decide. The jury does not decide its cases based on sending a message on the implementation of broad social policies. A jury decides one person's guilt or innocence.

Second, the prosecutor closes this exhortation by saying that

> I don't think I have seen such an important case as this for a long, long time.

(R. 79 at 203). This case is important for all involved, in that witnesses' credibility are judged and decisions of guilt or innocence are made. However, this remark merely emphasizes that the prosecutor himself wants the jurors to protect Brent and all other witnesses. Personal opinions and beliefs such as this may not be

injected by counsel into the case. Grubb v. State, 663 P.2d 750, 752 (Okl. Cr. 1983). Additionally, this is calculated to inflame the jury to act out of improper motive.[2]

Finally, the prosecutor argued

> [t]hat defendant is guilty. He's the guiltiest defendant that has ever engaged in this business. That is a despicable crime, to use someone else to commit the crime that you, if you had the guts to, would at least commit yourself.

(R. 79 at 205). This is both impermissible personal opinion and a request to find guilt for reasons of policy to punish "despicable" people who solicit crimes to be committed. This is improper as outlined above. The prosecutor cannot give his personal opinion on the guilt or innocence of Mr. Schnoor.[3] He could properly argue Mr. Schnoor's guilt as a person soliciting the crime, but Mr. Schnoor is not more guilty under the law because his solicitation has been testified to by Brent.

These remarks were improper.

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2. Standard 3-5.8(c) (see footnote 1 above) provides that
> [t]he prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(See Addendum E.)

3. Standard 3-5.8(b) (see footnote 1 above) provides that
> [i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(See Addendum E.)

C. PROSECUTOR'S CROSS-EXAMINATION OF MR. SCHNOOR CONCERNING MR. LORDS WAS IMPROPER.

During cross-examination, the prosecutor asked Mr. Schnoor if he thought Mr. Lords, the owner of Mike's Pawns, was telling the truth, confused, or mistaken (R. 79 at 174-76, attached as "Addendum D"). This is improper because it invades the province of the jury to decide issues of credibility, it misleads the jury with an improper argument that acquittal can only follow by disbelieving the witness mentioned by the cross-examiner, and it is not probative being outside of the knowledge of the defendant whether someone else is lying, mistaken or confused. State v. Casteneda-Perez, 810 P.2d 74, 79 (Wash. App. 1991); State v. Flanagan, 801 P.2d 675, 679 (N.M. App. 1990).

In the present case, the questioning on this line was persistent and extensive. Several objections by defense counsel were overruled. Mr. Lords was the only witness besides Brent and Brenda to even see Mr. Schnoor in connection with these activities, although he saw no criminal conduct on Mr. Schnoor's part.

This cross-examination further prejudiced the jury against Mr. Schnoor with inappropriate argument that urged the jury to deal with credibility issues in an improper fashion. The credibility of Mr. Schnoor was unfairly commented on by this line of questioning.

D. THE CUMULATIVE EFFECT OF THESE ERRORS AFFECTED THE JURY'S DELIBERATIONS.

Even if one of these remarks would have been insufficient to find reversible error, all of these remarks combined cumulatively

constitute fundamental and reversible error. West at 529. The credibility of the prosecution's main witness was bolstered with improper remarks. Mr. Schnoor's credibility was attacked by improper comment on another witness' veracity. The jury was asked to consider improper material outside the evidence and had its ability to judge credibility prejudiced with improper jury argument during cross. Taken together, these remarks probably, most likely, influenced the jury in its decision making.

> If the conclusion of the jurors is based on their weighing conflicting evidence, or evidence susceptible to differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel . . . and a small degree of influence may be sufficient to affect the verdict.

Troy at 486. There was no small degree of improper influence exerted here. Mr. Schnoor's conviction, based upon a decision on his and Brent's credibility, must be reversed because of the improper actions of the prosecutor.

CONCLUSION

Appellant respectfully requests that this Court reverse his conviction and remand this case for a new trial.

SUBMITTED this 6 day of March, 1992.

JOAN C. WATT
Attorney for Defendant/Appellant

ROBERT L. STEELE
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 6 day of March, 1992.

JOAN C. WATT

DELIVERED by _____

this _____ day of March, 1992.

_____

ADDENDUM A

THIRD CIRCUIT COURT - SLC FRIDAY MARCH 30, 1990
12:36 PM

Defendant CITATION: SSL Case: 901002110 FS
Agency No.: 90-1043

SCHNOOR, THOMAS W State Felony MULTI-DEF
Judge: Michael L. Hutchings

NO CDR # FOR THIS CASE

Violation Date: 01/25/90
1. FORGERY CHECK OVER $100 76-6-501.21 5000.00
Plea: Finding/Judgment: Bound over DISTRI

Proceedings

02/21/90	Case filed on 02/21/90.	MWS
	Warrant ordered	MWS
	WARRANT OF ARREST issued - JUDGE PKP	MWS
	NEW CHARGES FILED	MWS
	Bail amount ordered:	MWS
02/26/90	Warrant recalled on 02/26/90 because Booked	PLA
	ARR scheduled for 2/26/90 at 9:30 A in room 1 with MDJ	PLA
	Fel Arr Judge Maurice D. Jones	PLA
	TAPE: 380 COUNT: 3059	PLA
	Deft present w/o counsel	PLA
	ATD None Present ATP K MORGAN	PLA
	PRE DSP scheduled for 03/06/90 at 0930 A in room ? with MLH	PLA
	Defendant to secure own counsel	PLA
	DEFT IN JAIL.	KHB
02/27/90	HUTCHINGS/KHB OFF TAPE DEFT CALLED FROM JAIL AND HAS NOT GOT	KHB
	MONEY TO RETAIN COUNSEL, REQ LDA.	KHB
02/28/90	HUTCHINGS/KHB OFF TAPE C/O REFER TO LDA.	KHB
	(LDA NOTIFIED)	KHB
03/01/90	ARR scheduled for 3/ 2/90 at 9:30 A in room 1 with MDJ	PLA
03/02/90	ARR on 3/ 2/90 was cancelled	PLA
	FILED APPEARANCE OF COUNSEL LDA: CANDICE A JOHNSON	LMG
	FILED FORMAL REQUEST FOR DISCOVERY	LMG
03/06/90	HUTCHINGS/DP T449 C1810 DPWC DAVID GRINDSTAFF, MARTY VERHOEF	DGP
	PRESENT ON STATES BEHALF. LDA MOTION TO WITHDRAW AS COUNSEL	DGP
	GRANTED. C/O PH 3-29-90 AT 2:00 PM.	DGP
	DEFT IN PRISON.	DGP
	PRE scheduled for 3/29/90 at 2:00 P in room ? with MLH	DGP
03/29/90	Arraignment scheduled on April 09 , 1990 at 09:00 am	KHB
	before Judge MICHAEL R. MURPHY in courtroom 304	KHB
	HUTCHINGS/KHB T632 C1073/1123 DPWC DAVID GRINDSTAFF. MARTY	KHB
	VERHOEF PRESENT ON BEHALF OF STATE.	KHB
	THIS MATTER COMES ON REGULARLY FOR PRELIMINARY HEARING.	KHB
	DEFT WAIVES READING OF FORMAL INFORMATION.	KHB
	ON MOTION OF DEFT, COURT INVOKES EXCLUSIONARY RULE.	KHB
	WITNESS FOR STATE SW AND TESTIFIED: 1-BRENT LINDSEY	KHB
	WITNESS ADVISED AND WAIVED RIGHT TO IMMUNITY.	KHB
	FOR THE RECORD, STATE WILL NOT CHARGE WITNESS WITH THE CRIME.	KHB
	COURT WILL HOLD THE STATE TO PROMISE ON RECORD.	KHB
	STATE EXHIBIT #1 (CHECK) ENTERED AND RECEIVED INTO EVIDENCE	KHB
	CROSS-EXAM	KHB
	STATE RESTS	KHB
	WITNESS FOR DEFENSE SW AND TESTIFIED: 1-BRENDA LINDSEY	KHB
	NO CROSS-EXAM	KHB
	DEFT ADVISED AND WAIVED RIGHT TO TESTIFY	KHB
	DEFT RESTS	KHB
	STATE SUBMITS	KHB

Defendant CITATION: SSL Case: 901002110 FS
Agency No.: 90-1043
SCHNOOR, THOMAS W State Felony MULTI-DEF

03/29/90	COURT FINDS PROBABLE CAUSE TO BELIEVE DEFT IS CRIMINALLY	KHB
	RESPONSIBLE FOR COMMISSION OF THE CRIME.	KHB
	C/O BOUND OVER TO THIRD DISTRICT COURT FOR ARRAIGNMENT ON	KHB
	4-9-90 AT 9:00 A.M. BEFORE JUDGE MICHAEL R. MURPHY.	KHB
	EXHIBIT #1 (CHECK) RETURNED TO POSSESSION OF MARTY VERHOEF FOR	KHB
	STATE.	KHB
	COURT ADMONISHES DEFT TO NOT COMMUNICATE WITH ANY WITNESS, ONLY	KHB
	THRU ATTY.	KHB
	DEFT IN PRISON.	KHB
03/30/90	Entered case disposition of: TRANSFERRED	CPN
	Case transferred to District Court.	CAN

Accounting Summary
Citation Amount: 5000.00

Additional Case Data

Case Disposition
Disposition....: TRANSFERRED DATE: 03/30/90

Parties
Atty for Plaintiff
VERHOEF, MARTY
Work Phone: (801) 363-7900

Atty for Defendant
GRINDSTAFF, DAVID
Work Phone: (801) 363-1370

Personal Description
Sex: M DOB: 02/03/54
Dr. Lic. No.: State: UT Expires:

SCHEDULED HEARING SUMMARY

ARRAIGNMENT	on 02/26/90	0930 A in room 1 with MDJ
PRELIM CALENDAR CALL	on 03/06/90	0930 A in room ? with MLH
PRELIMINARY HEARING	on 03/29/90	0200 P in room ? with MLH

End of the docket report for this case.

Circuit Court, State of Utah

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

Calendar - Log Sheet

PRELIMINARY HEARING

Microphone Placement:
#1 Judge   #2   #3   #4 Witness   # Lectern

CASE NUMBER 901002110 FS
TAPE NUMBER 632
CLERK K. Bussinger
DATE 3-29-90 TIME ______ thru ______
JUDGE Michael L. Hutchings
COUNSEL FOR STATE Mirty Vanhoeff
DEFENSE COUNSEL David Grindstaff

STATE OF UTAH

—VS—

Schnoor, Thomas W.

DEFENDANT

CHARGE: Forgery Check over $100

COUNTER	PROCEEDINGS
______	DEFENDANT NOT PRESENT. COURT ORDERED B/W BAIL $ ______
______	ON MOTION OF ______ COUNSEL, COURT ORDERED CASE DISMISSED
______	ON MOTION OF ______ COUNSEL, COURT ORDERED HEARING CONTINUED TO ______
______	DEFENDANT ELECTED TO MAKE A STATEMENT UNDER OATH.
______	DEFENDANT ADVISED OF ______ RIGHTS. ______ DEFENDANT WAIVED ______ RIGHTS.
______	DEFENDANT WAIVED PRELIMINARY HEARING, STATE CONSENTING THERETO,
______	COURT ORDERED DEFENDANT BOUND OVER TO DISTRICT COURT. BAIL ______
______	UPON STATES MOTION, COURT ORDERED INFORMATION AMENDED TO READ ______
______	DEFENDANT PLEAD GUILTY TO AMENDED INFORMATION.
______	COURT ORDERED SENTENCE ______
______	INFORMATION READ ______ WAIVED READING OF INFORMATION 1138
______	ON MOTION OF ______ COUNSEL, COURT ORDERED WITNESSES EXCLUDED 1148

1138	Deft waives reading of formal information
1148	On Mot of deft court invokes exclusionary rule
1165	Brent Lindsay - SW + testified behalf of State
1182	Deft states witness has juvenile record & is a suspect - may incriminate himself.
1240	Deft & Court examine witness
1257	Deft Questions
1318	State [illegible]

SLD9

000010

TAPE NUMBER 632 PAGE NUMBER 2

CASE NUMBER 9010 2.10 FS

COUNTER	PROCEEDINGS
1339	Deft request immunity
1340	Court rules held State responsible to not immunities
1362	Deft examines witness
1429	Witness identifies deft
1623	State Exhibit #1 - Deft - entered & admitted into evidence
1655	cross - exam - deft
1981	Objection - irrelevant / overruled
2172	State rests
2210	Brenda Lindsey - S.W. Testified behalf of deft
2365	No cross - exam - Deft advised his right to testify
2374	Deft Rests
2375	Deft & State Submit
2380	Court finds probable cause to believe deft is reasonably responsible for commission of the crime
C/n	3/10 4-9-90 @ 9:00 ref on Michael E Murphy
	Exhibit #1 - returned to atty Vorhees
2427	Court admonishes deft to not communicate with any witness - only thru atty

SLD4

ADDENDUM B

INSTRUCTION NO. 7

Although there is more than one person named in this action, the case against each person is separate from and independant of that of the other. In this action the only defendant on trial is Thomas W. Schnoor. You are not to concern yourselves with the status of any other person or defendant named in this case.

ADDENDUM C

NOT IN ANY WAY TO SUGGEST THAT YOU ARE NOT TO CONSIDER THE BELIEVABILITY OR THE CREDIBILITY OF BRENT AND BRENDA LINDSEY IN THE SAME MANNER THAT YOU CONSIDER THE CREDIBILITY OF ANY OTHER WITNESS.

YOU HAVE TO CONSIDER THAT ISSUE. YOU WILL CONSIDER THAT IN THE SAME WAY AND UNDER THE SAME INSTRUCTIONS AS YOU WOULD CONSIDER THE CREDIBILITY OF MR. SCHNOOR OR ANY OTHER WITNESS WHO TESTIFIED HERE.

DOES THAT TAKE CARE OF YOUR PROBLEM?

MR. GRINDSTAFF: MAY I APPROACH THE BENCH?

THE COURT: DOES IT OR DOES IT NOT?

MR. GRINDSTAFF: I BELIEVE IT SHOULD BE A LITTLE MORE CLEAR.

THE COURT: ALL RIGHT. FURTHER OBJECTIONS OVERRULED. ARE YOU READY FOR CLOSING?

MR. MORGAN: STATE IS, YOUR HONOR.

THE COURT: GO AHEAD, MR. MORGAN.

MR. MORGAN: MAY IT PLEASE THE COURT, MR. GRINDSTAFF, MR. SCHNOOR, LADIES AND GENTLEMEN: THIS IS CLOSING ARGUMENT.

AS MR. GRINDSTAFF STAFF INDICATED EARLIER, I WILL BE GIVING A STATEMENT OF THE STATE'S CASE, HE WILL BE GIVING HIS ARGUMENTS THE CASE, AND THEN I WILL BE BACK FOR REBUTTAL ONE LAST TIME.

I WILL TRY AND BE BRIEF IN REBUTTAL. I WOULD ASK

YOU TO BEAR WITH ME AS I GIVE MY VERSION OF WHAT I THINK THE STATE HAS SHOWN IN THIS CASE.

I THINK THAT IN THIS CASE, MORE THAN ANY OTHER, I THINK WE HAVE TO CONSIDER THAT EVERYONE IN THIS COUNTRY HAS A RIGHT TO BE PROTECTED UNDER THE LAW. I THINK MR. SCHOOR DESERVES THAT PROTECTION.

I THINK THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE DESERVE THAT PROTECTION. BRENT LINDSEY, AS WELL AS THE DEFENDANT, HAS PUT HIS FAITH IN THAT SYSTEM. BRENT LINDSEY, AS YOU HEARD HIM TESTIFY AT THE CONCLUSION OF THIS CASE, SAID, "NO, I'M NOT AFRAID OF THE DEFENDANT," EVEN THOUGH HE TESTIFIED HE WAS THREATENED BY HIM.

HE SAYS THAT BECAUSE HE HAS PEOPLE AROUND HIM THAT WILL PROTECT HIM. I'D LIKE TO THINK THE STATE OF UTAH DID IT'S JOB IN PROTECTING BRENT LINDSEY AND ALLOWING HIM TO GET UP ON THAT STAND AND GIVE HIS STORY.

NOW THIS IS AS FAR AS I CAN GO. FROM HERE ON IT'S UP TO YOU. YOU CAN EITHER LOOK AT THE EVIDENCE, COME TO A JUST CONCLUSION AND RENDER A VERDICT THAT PROTECTS MR. LINDSEY, OR YOU CAN NOT COME TO A CONCLUSION, YOU CAN GET UPSET, YOU CAN GET ANGRY ABOUT THINGS THAT REALLY HAVE NOTHING TO DO WITH THIS CASE, AND YOU CAN WALK AWAY FROM THIS.

I'M GOING TO BE BACK HERE TOMORROW. SO IS MR. GRINDSTAFF, SO IS THE JUDGE. WE'VE LOTS OF OTHER CASES.

YOU MAY HAVE NOTICED DURING THAT TRIAL THAT I GOT PRETTY ANGRY AT TIMES. THIS ISN'T A MURDER TRIAL. I'VE DONE MURDER TRIALS BEFORE, BUT I DON'T THINK I HAVE SEEN SUCH AN IMPORTANT CASE AS THIS FOR A LONG, LONG TIME.

MR. GRINDSTAFF: I OBJECT TO HIM DISCUSSING HIS PERSONAL OPINIONS. AND HIS PERSONAL VIEWS.

THE COURT: OVERRULED.

MR. MORGAN: IT'S IMPORTANT FOR THAT VERY REASON, THAT IN THIS CASE WE HAVE TO DISCUSS SOMETHING THAT ONLY JURORS CAN DECIDE.

I LIKE TO COME INTO A CASE AND SAY, LADIES AND GENTLEMEN OF THE JURY, RECONCILE THE FACTS AS FAR AS YOU CAN, BECAUSE THAT'S WHAT THE INSTRUCTIONS TELL YOU. AND IN THIS CASE IT MIGHT HAVE BEEN AN APPROPRIATE ARGUMENT TO COME UP AND SAY, LADIES AND GENTLEMEN, WHAT IS GOING ON HERE IS THAT WE HAVE THE FOLLOWING SITUATION: THERE IS NO DISPUTE IN THE FACT THAT THE DEFENDANT DROVE BRENT LINDSEY AROUND. THERE IS NO DISPUTE IN THE FACT THAT THIS CHECK WAS FORGED.

THERE IS NO DISPUTE IN THIS CASE THAT THAT CHECK WAS CUT OFF. THERE IS NO DISPUTE IN THE FACTS THAT THIS AND THAT AND THAT, AND YOU CAN SEE THAT ALL FOR YOURSELVES.

YOU'RE VERY INTELLIGENT PEOPLE, WE CAN SEE THAT. BUT THE ONLY DISPUTE IN THIS CASE HAS TO BE WHETHER OR NOT THE DEFENDANT KNEW, AND I BELIEVE YOU CAN COME TO THE

CONCLUSION THAT HE KNEW WHAT WAS GOING ON.

AND, THEREFORE, HE IS A PARTY TO THE OFFENSE. BUT THIS ISN'T SUCH A CASE. IN THIS CASE SOMEBODY IS LYING. AND IT'S EITHER THE DEFENDANT, WHO HAS GIVEN HIS UNLUCKIEST DAY OF HIS LIFE SPEECH, OR IT'S BRENT AND BRENDA LINDSEY. AND ONLY JURORS CAN MAKE THAT DECISION.

AND WHEN YOU COME BACK TO FACE MR. SCHNOOR IN THIS CASE, YOU'RE GOING TO HAVE THE TOUGHEST JOB OF YOUR LIFE, BECAUSE YOU'RE GOING TO HAVE TO SAY WHETHER OR NOT HE TOLD THE TRUTH. THAT'S WHAT THIS CASE COMES DOWN TO.

FROM THE STATE'S PERSPECTIVE, THE EVIDENCE IN THIS CASE SHOWS BEYOND A REASONABLE DOUBT THAT THE DEFENDANT ENGAGED BRENT LINDSEY TO CASH A $300 CHECK, NOT ONCE, BUT TWICE, ON JANUARY 25, L989. FIRST, AT MIKE'S PAWN, THEN AGAIN AT CASH-A-CHECK.

THE DEFENDANT'S CLEAR INTENT IN THIS CASE WAS TO PLACE ALL THE RISK OF BEING CAUGHT ON BRENT LINDSEY AND OBTAIN ALL THE BENEFIT OF THE CRIMINAL ACT, AND HE DID THAT BECAUSE HE'S A CRIMINAL.

BECAUSE THE DEFENDANT KNEW THAT THE CHECK WAS NOT AUTHORIZED FOR PAYMENT AND HE KNEW IT BECAUSE THAT CHECK CAME FROM THE VERY BUSINESS HE HE WORKED AT. THE DEFENDANT KNEW THAT BRENT WAS HANDICAPPED. HE KNEW THAT HE WAS A JUVENILE AND I CAN'T NOT APPRECIATE THE RISK PERPETRATING A CRIME FOR A MERE $350. COULD GET HIM

THROWN IN PRISON.

HE KNEW THE RISK OF BRENT GETTING CAUGHT WAS EXTREMELY HIGH. HE KNEW THAT THE OFFENSE WAS WITNESSED ONLY BY BRENT AND HIS SISTER, AND THAT THEIR CREDIBILITY WOULD BE IN QUESTION.

HE KNEW THAT THE CRIME ITSELF WOULD BE WITNESSED BY A NUMBER OF PEOPLE. AND HE KNEW, UNLIKE BRENDA, HE KNEW WHY THOSE SCISSORS WERE GOING TO BE USED ON THAT CHECK.

LADIES AND GENTLEMEN OF THE JURY, THAT DEFENDANT IS GUILTY. HE'S THE GUILTIEST DEFENDANT THAT HAS EVER ENGAGED IN THIS BUSINESS. THAT IS A DESPICABLE CRIME, TO USE SOMEONE ELSE TO COMMIT THE CRIME THAT YOU, IF YOU HAD THE GUTS TO, WOULD AT LEAST COMMIT YOURSELF.

THE DEFENDANT WOULD HAVE YOU BELIEVE THAT THIS CASE TURNS ON THE CREDIBILITY OF BRENT LINDSEY. THE STATE WOULD HAVE YOU BELIEVE THAT THE TRIAL, INSTEAD, IS BASED ON THE CORROBORATION OF BRENT LINDSEY'S STATEMENTS, AND YOU HAVE SEEN THAT CORROBORATION.

YOU HAVE SEEN THE CHECK; THAT CORROBORATES IT. YOU HAVE HEARD THE TESTIMONY OF JACK LORDS; THAT CORROBORATES IT. YOU HAVE HEARD THE HAD TESTIMONY OF LINDA YOUNG; THAT CORROBORATES IT. AND THERESA DEMIK.

ALL OF THOSE WITNESSES, WHEN YOU RECONCILE THOSE FACTS AND PUT THEM TOGETHER, YOU CAN SEE POINT BY POINT BY POINT BY POINT THAT EVERYTHING SUPPORTS BRENT'S

VERSION OF WHAT OCCURRED HERE. AND NOTHING SUPPORTS THE DEFENDANTS VERSION.

KEEP IN MIND, I WOULD ASK YOU, THAT BRENT IS NOT ON TRIAL. THAT IS FOR ANOTHER DAY. THE DEFENDANT IS ON TRIAL. IT IS HIS CREDIBILITY THAT I WOULD SUGGEST IS REALLY IN ISSUE IN THIS CASE. THAT IS REALLY THE ISSUE.

DON'T LET US DOWN. RENDER A TRUE AND JUST VERDICT. THANK YOU.

THE COURT: THANK YOU, MR. MORGAN.

MR. GRINDSTAFF?

MR. GRINDSTAFF: LADIES AND GENTLEMEN: YOU'RE HERE BECAUSE THERE IS A GREAT DISPUTE AS TO WHAT TOOK PLACE ON JANUARY 25TH. WE HAVE A LEARNING DISABILITY JUVENILE. AND WE'VE A SISTER WHO BELIEVES THAT THEY HAVE COMMITTED NO CRIMES.

SHE SAID THAT SHE WAS GUILTY OF NOTHING. HER BROTHER WAS GUILTY OF NOTHING. OBVIOUSLY, A LEARNING DISABILITY PERSON CAN COMMIT CRIMES. A LEARNING DISABLED PERSON IS JUST AS ABLE TO COMMIT A CRIME OF FORGERY AS ANYONE ELSE IS.

AND THERE IS NO REASON TO BELIEVE THAT HE COULDN'T HAVE AND THAT HE DIDN'T. WHAT YOU NEED TO LOOK AT IS NOT ONLY THE FACTS HERE, BUT THE EVIDENCE THAT ISN'T BROUGHT FORTH.

MR. MORGAN: OJECTION. YOUR HONOR, THAT IS A

WE ALL HAVE, OR MOST OF US PROBABLY HAVE BROTHERS ON SISTERS. IF SOMETHING SERIOUS HAS HAPPENED TO ONE OF YOUR BROTHERS ON SISTERS, IT'S REALLY EASY, I WOULD SUBMIT, TO GET SOMEONE, A BROTHER OR A SISTER, TO HAVE THE BROTHER OR SISTER LIE FOR YOU.

HER STORY COMES OUT THREE WEEKS LATER, ON THIS WRITTEN DOCUMENT, STATE'S EXHIBIT THREE. THREE WEEKS LATER. IF THAT STORY WAS A CORRECT STORY, WHY DIDN'T SHE REVEAL THAT TO THE POLICE AT THE TIME? WHY DIDN'T SHE SAY, "THIS IS WHAT HAPPENED, WHY DOES SHE WAIT 3 WEEKS TO COME UP WITH HER STORY?

BRENT AND BRENDA BOTH TESTIFIED THEY DIDN'T DISCUSS THIS CASE. THEY DIDN'T DISCUSS THE TESTIMONY. YOU HAVE BRENT, WHO FACES A POSSIBLE LONG TERM DETENTION. HE'S ADMITED THAT HE FORGED THE CHECK.

MR. MORGAN: YOUR HONOR, I'M GOING TO MOVE TO STRIKE THAT LAST STATEMENT. THERE IS NO TESTIMONY THAT BRENT FACES A LONG TERM DETENTION. IN FACT, THAT TESTIMONY IS TO THE CONTRARY.

THE COURT: WELL, I BELIEVE THERE WAS SOME TESTIMONY OF MR. SCHNOOR TO THAT EFFECT. IT MAY NOT HAVE COME FROM THE BRENT, BUT IT MAY COME FROM BRENDA. I'M GOING TO OVERRULE THE OBJECTION BECAUSE OF MY MEMORY OF THE TESTIMONY.

MR. GRINDSTAFF: YOU'RE INSTRUCTED TO LOOK AT

AND ANOTHER PERSON ANOTHER STORY, THEN CAN YOU CAN LOOK AT HER AND SAY, "WELL, SHE WILL LIE. SHE WON'T BE TRUTHFUL."

IF YOU LOOK AT THIS CASE AND ALL THE EVIDENCE AND THE LACK OF EVIDENCE PRESENTED, YOU WILL HAVE TO FOLLOW THE JUDGE'S INSTRUCTION WHERE IT STATE'S THAT IF THERE IS A REASONABLE DOUBT AS TO THE EVIDENCE, YOU MUST FIND THE DEFENDANT NOT GUILTY. THANK YOU.

THE COURT: THANK YOU, MR. GRINDSTAFF.

MR. MORGAN?

MR. MORGAN: THANK YOU, YOUR HONOR. ONCE AGAIN, MAY IT PLEASE THE COURT, MR. GRINDSTAFF, LADIES AND GENTLEMENO OF THE JURY. I HAVE BEEN SITTING HERE FOR QUITE SOME TIME, YOU HAVE BEEN SITTING HERE FOR QUITE SOME TIME, AND I'LL KEEP MY PROMISE TO BE BRIEF.

MY COMPLIMENTS TO MR. GRINDSTAFF. HE IS DONE A VERY PROFESSIONAL JOB IN THIS CASE, AND HE HAS PRESENTED DEFENDANT'S CASE AS BEST HE COULD UNDER THE CIRCUMSTANCES. AND I DO NOT MEAN TO DISPARAGE HIM.

HOWEVER, I DO TAKE ISSUE WITH A NUMBER OF THINGS THAT HE IS BROUGHT OUT IN HIS CASE. AS ABLE COUNSEL HE RAISES THE ISSUE OF FINGERPRINTS FOR THE FIRST TIME NOW, WHEN HE HAS HAD EQUAL ACCESS TO THE TESTING AND THE EVIDENCE AS THE STATE DOES.

AND NOW HIS CASE NO LONGER TURNS UPON THE PIVITOL

TESTIMONY OF ATTACKING THE CORROBORATION, BUT TURNS ON WHETHER OR NOT THIS PIECE OF PAPER HAS THE DEFENDANT'S FINGERPRINTS ON IT. WELL, THAT WAS NEVER BROUGHT UP UNTIL CLOSING ARGUMENT, AND THAT GIVES THE STATE CAUSE FOR CONCERN.

THE NEXT ISSUE THAT MR. GRINDSTAFF RAISES IS THAT THIS WHOLE CASE SHOULD BE THROWN OUT BECAUSE HE FINDS FROM THE DEFENDANT'S POINT OF VIEW THAT BRENT AND BRENDA LINDSEY ARE NOT CREDIBLE. HE DOESN'T TALK ABOUT THE CREDIBILITY OF JACK LORDS.

HE DOESN'T TALK ABOUT THE CREDIBILITY OF THERESA DEMIK, HE DID NOT TALK ABOUT THE CREDIBILITY OF LINDA YOUNG, BUT HE DOES TALK ABOUT THE TESTIMONY THAT THE DEFENDANT DISPUTES ALL THE WAY DOWN THE LINE HERE.

ALL RIGHT. HE SAYS THIS FOR THE FOLLOWING REASONS, AS I UNDERSTAND IT: BROTHERS AND SISTERS TEND TO LIE FOR EACH OTHER. WELL, BROTHERS AND SISTERS ALSO TEND TO TELL THE TRUTH FOR EACH OTHER.

BRENT IS GOING TO DETENTION IF THERE'S A SHOWING HE DIRECTLY COMMITTED AN OFFENSE, SO THEREFORE, BRENDA IS BIASED. ALL RIGHT. BECAUSE HE'S GOING TO GO TO JUVENILE COURT. NOW, HIS TESTIMONY WAS THAT HE WAS NOT PROMISED ANYTHING, BUT BY ADMITTING HIS PARTICIPATION IN THIS CRIME, THEREFORE, HE'S GOING TO DETENTION? THEREFORE, HE IS GETTING UP AND TESTIFYING THAT HE IN FACT COMMITTED A

CRIME.

NOW, WHERE IS THE LOGIC THERE? BECAUSE EVERYTHING THAT BRENT SAYS, HE SAYS THAT I AM GUILTY OF CASHING THIS FORGED CHECK, AND I KNEW EXACTLY WHAT I WAS DOING. DOES THE PART WHERE HE SAID YES HE GOT FIFTY BUCKS FOR IT MAKE HIM A LIAR? IT DOESN'T. HE INCRIMINATES HIMSELF ALL THE AWAY THROUGH THE CASE.

SO THAT BIAS IS MISGUIDED. "THE STATE IS OUT TO GET SOMEBODY. STATE'S GUYS ARE MEAN PEOPLE." THEN HE SAYS, "BRENT IS THE MASTERMIND, ALONG WITH BRENDA, WHO NOT ONLY CONCOCTED THE CRIME, BUT HE CONCOCTED THE STORY THAT IMPLICATES THE DEFENDANT."

REMEMBER BRENT? IS THIS THE SAME GUY THAT THE STATE OBSERVED ON THE WITNESS STAND, WHO PUT TOGETHER THIS MULTIPLE FORGERY AND TRICKING MR. SCHNOOR INTO DRIVING HIM AROUND TOWN, CONCEALING THIS CHECK, THEN SUDDENLY WHEN HE GETS CAUGHT HE HAS THE PRESENCE OF MIND TO GO IMPLICATE THE DEFENDANT TO GET OUT OF THIS, AND OFFER HIS TESTIMONY IN EXCHANGE FOR NOT GOING THROUGH DETENTION?

OKAY. IF SCISSORS ARE RELEVANT, AS MR. GRINDSTAFF BROUGHT OUT, THERE IS SOMETHING VERY INTERESTING GOING ON HERE. NOW, BRENDA TESTIFIES THAT SHE DOES NOT KNOW WHAT THE SCISSORS ARE BEING USED FOR. THEREFORE, BRENDA IS LYING. AND BRENDA LIED ON THAT, THEN NONE OF HER TESTIMONY SHOULD BE BELIEVED; RIGHT?

WELL, LET'S THINK ABOUT THAT. IF THE SCISSORS WERE USED AT ALL, THEY WERE REQUESTED BY THE DEFENDANT AND EVEN THOUGH SHE DIDN'T KNOW ABOUT THEM, THEN THAT IMPLICATES THE DEFENDANT.

NOW, WHICH IS IT? IS SHE TELLING THE TRUTH, OR IS SHE LYING? WHY IS SHE BRINGING UP THE SCISSORS AND LYING ABOUT HER KNOWLEDGE ABOUT IT. YOU KNOW, EITHER SHE'S TOO CONSISTENT OR SHE'S INCONSISTENT; I'M NOT SURE WHICH.

THERE IS A SMOKING GUN IN THIS CASE. REMEMBER, THE DEFENDANT TESTIFIED THAT THE REASON THAT THEY LEFT MIKE'S PAWN SHOP AND WENT HOME WITHOUT GETTING THE CHECK CASHED IS BECAUSE HE ASSUMED THAT THE ATTEMPT WAS UNSUCCESSFUL BECAUSE BRENT HAD FORGOTTEN HIS I.D.

NOW, THEY GO HOME, AND HE SAYS THAT HE NEVER SAW THIS CHECK. HE SAYS THAT HE NEVER CUT OFF THE CHECK. AND HE NEVER SAW IT DURING THIS ENTIRE TIME. NOW, HE'S AT HOME, AND NOT SEEING THIS CHECK, HE FORGETS HIS I.D. AND HOME THEY GO TO BRENT LINDSEY'S HOUSE, NOT AT HIS, WERE HIS I.D. IS. BUT HE DOES NOT GO BACK TO MIKE'S PAWN WITH THE I.D.. HE CLEARLY KNOWS AT THIS POINT THAT THE REASON HE COULDN'T CASH THE CHECK IS BECAUSE HE DOESN'T HAVE HIS I.D., BECAUSE HE ASSUMED HE LEFT IT AT HOME.

INSTEAD OF GOING TO MIKE'S PAWN, HE MAKES THREE PHONE CALLS TO PLACES OTHER THAN MIKE'S PAWN, AND THEN HE SAYS, "LET'S GO TO CASH A CHECK." ALL HE'S GOT TO DO IS

GET THE CHECK. HE SAYS, "DON'T FORGET YOUR I.D." BUT "DON'T FORGET YOUR I.D." TO GO BACK TO MIKE'S? NO.

"DON'T FORGET YOUR I.D. BECAUSE WE ARE GOING TO CASH A CHECK", AFTER HE CHECKED ANOTHER THREE PLACES. IF HE DIDN'T SEE THE CHECK, IF HE DIDN'T CUT IT OFF, IF HE DIDN'T PUT BRENT UP TO THIS, WHY DIDN'T HE GO BACK TO MIKE'S PAWN? BECAUSE HE'S GUILTY.

THANK YOU.

THE COURT: THANK MR. MORGAN. MR. UNSWORTH, WILL YOU STEP FORTH AND BE SWORN.

(WHEREUPON, BAILIFF IS SWORN BY CLERK.)

THE COURT: MEMBERS OF THE JURY, CONTRARY TO EACH OF THE THE OTHER TIMES WHEN YOU LEFT THE COURTROOM, I'M NOT NOT GOING TO INSTRUCT YOU NOT TO DISCUSS THIS MATTER. IN FACT I'M GOING TO INSTRUCT YOU JUST THE CONTRARY, THAT YOU ARE TO DISCUSS THIS MATTER, BUT ONLY AMONG YOURSELVES.

MR. UNSWORTH WILL ACCOMPANY YOU BACK TO THE JURY ROOM AND YOU WILL BEGIN YOUR DELIBERATIONS. HE'LL BE CHECKING WITH YOU IN TEN OR FIFTEEN MINUTES TO SEE IF YOU WOULD LIKE LUNCH BROUGHT IN TO YOU. IF SO, WE'LL SEND MENUES IN, AND YOU CAN CHECK OFF WHAT YOU WANT.

IF FOR ANY REASON YOU NEED TO COMMUNICATE WITH THE COURT OR ANYONE ON THE OUTSIDE, WHAT YOU SHOULD DO IS WRITE A NOTE TO THE BAILIFF, AND HE WILL EITHER TAKE CARE

ADDENDUM D

Q. WERE YOU PRETTY CLOSE TO HIM, OR WERE YOU AT THE TIME?

A. I WAS TRYING TO GET CLOSE. HE'S BEEN A HARD CHILD TO GET A HOLD -- OR CLOSE TO.

Q. WERE YOU AT LEAST CLOSE ENOUGH TO PICK HIM UP AT WORK AND HELP HIM CASH HIS CHECK??

A. I WOULD HELP HIM OUT ANY WAY I COULD. IF HE ASKED ME TO HELP HIM CASH A CHECK, I COULD HAVE AND WOULD HAVE.

Q. WHY DIDN'T YOU TELL HIM THAT?

A. HE DIDN'T ASK ME FOR HELP, OTHER THAN IF I KNEW A PLACE THAT HE COULD CASH THE CHECK AT.

Q. BRENT DIDN'T ASK YOU TO DRIVE HIM THERE, DID HE?

A. I JUST HAD HIM WITH ME. HE JUST ASKED ME. HE ASKED ME AFTERWORDS IF I WOULD DROP HIM OFF, YOU KNOW, AND I TOLD HIM I WOULD WAIT. BUT HE WANTED TO -- SO --

Q. YOU HEARD MR. LORDS TESTIMONY THAT HE SERVED BRENT AND THAT HE RECALLS VERY DISTINCTLY THAT HE IS THE ONE THAT TOOK THE CHECK FROM BRENT ON THAT OCCASION AND IT WAS MISSPELLED ON THE BACK?

A. YES, I DID HEAR MR. LORDS SAY THAT.

Q. IS THAT DIFFERENT WHAT THAN WHAT YOU'RE TELLING THE JURY NOW? IT IS, ISN'T IT?

A. YES. BUT -- WHAT I DO REMEMBER IS MR. LORDS

HELPING ME, AND DANNY HELPING BRENT.

Q. SO JACK IS NOT TELLING THE TRUTH?

A. I AM SURE JACK IS TELLING WHAT HE CAN REMEMBER.

Q. WELL, A MISSPELLED CHECK, THAT WAS AN UNUSUAL OCCURRENCE, ISN'T IT?

A. AWE, I --

MR. GRINDSTAFF: OBJECTION. YOUR HONOR, I DON'T THINK IT'S RELEVANT.

THE COURT: OVERRULED. IT'S CROSS-EXAMINATION.

Q. (BY MR. MORGAN) WOULDN'T YOU AGREE THAT A PERSON WHO ENDORSES A CHECK MADE OUT TO HIM AND MISSPELLS THEIR OWN NAME IS AN UNUSUAL OCCURRENCE?

A. YES.

Q. AND WOULDN'T YOU REMEMBER THE PERSON WHO PRESENTED YOU A CHECK AND MISSPELLED HIS OWN NAME?

MR. GRINDSTAFF: OBJECTION, ASKING FOR CONJECTURE.

THE COURT: OVERRULED.

A. YES.

Q. SO WHY DO YOU THINK JACK LORDS IS CONFUSED?

A. I DON'T THINK IT'S --

MR. GRINDSTAFF: OBJECTION, I DON'T THINK HE HAS THE--

THE COURT: SUSTAINED.

Q. (BY MR. MORGAN) WHY, UNDER THESE CISCUMSTANCES, DO YOU BELIEVE THAT JACK LORDS IS MISTAKEN?

A. I BELIEVE--

MR. GRINDSTAFF: I DON'T THINK IT'S RELEVANT. WHAT HIS OPINION IS AS TO JACK LORDS --

THE COURT: I'M GOING THE SUSTAIN THE OBJECTION.

Q. (BY MR. MORGAN) IT'S YOUR TESTIMONY THAT BRENT HELPED YOU OUT WITH THE TV??

A. YES.

Q. YOU HEARD BRENDA LINDSEY'S TESTIMONY THAT YOU BROUGHT THE TV OUT ALONE?

A. YES, I DID.

Q. YOU HEARD JACK LORDS' TESTIMONY THAT YOU WERE OVER WITH THE TV, AND BRENT IS OVER CASHING THE CHECK?

A. YES.

Q. AND BY YOUR OWN TESTIMONY, YOU'RE AT LEAST A COUNTER AWAY WITH THE STEREOS?

A. THAT'S RIGHT.

Q. YES.

Q. AT WHAT POINT DID YOU ASK BRENT TO HELP YOU OUT WITH THE TV?

A. WHEN I WAS GETTING READY TO LEAVE AND HE WAS STANDING THERE WAITING TO LEAVE, SO I ASKED HIM, "ARE YOU

ADDENDUM E

of such evidence, it should be tendered by an offer of proof and a ruling obtained.

Standard 3–5.7 Examination of Witnesses

(a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily. Proper cross-examination can be conducted without violating rules of decorum.

(b) The prosecutor's brief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination. A prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully.

(c) A prosecutor should not call a witness who the prosecutor knows will claim a valid privilege not to testify for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, as defined in codes of professional responsibility, doing so will constitute unprofessional conduct.

(d) It is unprofessional conduct for a prosecutor to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

Standard 3–5.8 Argument to the Jury

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

Standard 3–5.9 Facts Outside the Record

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of 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.

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

COLLATERAL REFERENCES

Utah Law Review. — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265.

Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.

Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.

Am. Jur. 2d. — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.

C.J.S. — 16A C.J.S. Constitutional Law § 472 et seq.; 39 C.J.S. Habeas Corpus § 5.

A.L.R. — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.

Key Numbers. — Constitutional Law ⇐ 83(1), 121 to 123.

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3.

Compiler's Notes. — Laws 1983, Senate Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

NOTES TO DECISIONS

ANALYSIS

Prospective application.
Regulation of right to bear arms.

Prospective application.

The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. State v. Wacek, 703 P.2d 296 (Utah 1985).

Regulation of right to bear arms.

This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent. State v. Beorchia, 530 P.2d 813 (Utah 1974).

COLLATERAL REFERENCES

Utah Law Review. — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.

Am. Jur. 2d. — 79 Am. Jur. 2d Weapons and Firearms § 4.

C.J.S. — 16A C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons § 2.

A.L.R. — Gun control laws, validity and construction of, 28 A.L.R.3d 845.

Validity of statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Key Numbers. — Constitutional Law ⇐ 82; Weapons ⇐ 1, 3, 6 et seq.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

History: Const. 1896.

Cross-References. — Eminent domain generally, § 78-34-1 et seq.