2-6-2009

State v. Mantz Appellant's Brief Dckt. 35540

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

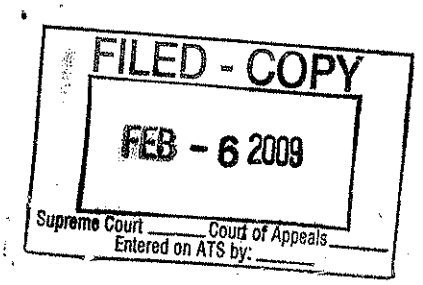
v.

TIM CARL MANTZ,

Defendant-Appellant.

No. 35540-2008

APPELLANT'S BRIEF



APPELLANT'S BRIEF

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Latah
Latah County Case No. CR 2007-01292

Hon. John R. Stegner, District Judge

ATTORNEY FOR APPELLANT:
THOMAS W. WHITNEY
WHITNEY & WHITNEY, LLP
Attorneys at Law
604 S. Washington, Suite 1
P.O. Box 8417
Moscow, ID 83843
Tele: 208.882.6872
Fax: 208.441.9575
E-mail: tww@whitneyllp.com
Idaho State Bar No. 5664

ATTORNEY FOR RESPONDENT:
LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL
700 W. State St.
P.O. Box 83720
Boise, ID 83720-0010
Tele: 208-334-2400

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes, Court Rules, and Constitutions

STATEMENT OF THE CASE

Nature of the Case

This is a Confrontation Clause case. This case presents the Court with a novel issue: how to interpret existing Idaho law regarding the use as substantive evidence of preliminary hearing testimony of an unavailable witness at a criminal trial in light of the United States Supreme Court's watershed reinvigoration of the Confrontation Clause of the Sixth Amendment to the United States Constitution in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Course of the Proceedings in the Trial Below, Its Disposition, and Concise Statement of Facts

Defendant Tim Carl Mantz was charged by criminal complaint with the felony crime of aggravated assault, Idaho Code §§ 18-901, 18-905, and 18-906. R. Vol. I, p. 22. Mr. Mantz was accused of intentionally firing a handgun near the head of alleged victim Karl A. Hoidal. *Id.* At the preliminary hearing, Mr. Hoidal testified and was cross-examined by defense counsel. R. Vol. I, p. 48. Mr. Mantz was bound over to District Court. R. Vol. I, pp. 52, 58. The criminal information upon which Mr. Mantz was tried alleged both aggravated assault and a sentencing enhancement. R. Vol. I, pp. 59-60. Before trial, Mr. Hoidal died in an unrelated accident and was therefore unavailable to testify at trial. R. Vol. I, p. 157.

The State moved the District Court in limine to introduce at trial the preliminary hearing testimony of Mr. Hoidal. R. Vol. I, p. 157. The State's position was that the evidence was crucial to the State's case and that without the preliminary hearing testimony of Mr. Hoidal

the State's case would have been "eviscerated," R. Vol. I, p. 162, because no witness other than Mr. Hoidal could testify to personally observing Mr. Mantz during the alleged act of assault. R. Vol. I, p. 165. This position is consistent with the evidence produced at the multi-day jury trial.

Mr. Mantz opposed the introduction of Mr. Hoidal's preliminary hearing at trial based upon the Sixth Amendment to the United States Constitution and Article I, Section 13, of the Idaho Constitution (R. Vol. I, pp. 184-202), and Mr. Mantz moved the District Court in limine to exclude the preliminary hearing testimony of Mr. Hoidal under the same authorities. R. Vol. I, p. 204.

The District Court admitted the preliminary hearing testimony of Mr. Hoidal pursuant to I.C. § 9-336(3), I.R.E. 804(b)(1), and *State v. Ricks*, 122 Idaho 856, 861, 840 P.2d 400, 405 (Ct.App. 1992). R. Vol. II, pp. 252-253. Mr. Hoidal's preliminary hearing testimony was presented to the jury by audio recording and written transcript during the State's case in chief at the jury trial. Tr. Vol. VI, p. 412, L. 14. Mr. Mantz was convicted. R. Vol. II, p. 366. He now appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits the State from introducing into evidence in its case in chief at a criminal trial the preliminary hearing testimony of an unavailable witness.

2. Whether Article I, Section 13, of the Idaho Constitution prohibits the State from introducing into evidence in its case in chief at a criminal trial the preliminary hearing testimony of an unavailable witness.

ARGUMENT

I.

The Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits the State from introducing into evidence in its case in chief at a criminal trial the preliminary hearing testimony of an unavailable witness

A. Introduction

In all criminal prosecutions, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, "to be confronted with the witnesses against him." U.S. Const., Amdt. 6; *Pointer v. Texas,* 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (applying Sixth Amendment to the States). Formerly, the determination of when statements admissible under an exception to the hearsay rule also satisfy the Confrontation Clause was made under the framework articulated in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Under *Roberts,* the prosecution generally had to first show the unavailability of the declarant of the out-of-court statement; once the prosecution had established unavailability, it then had to demonstrate that the statement bore adequate indicia of reliability. *Id.* at 66. Reliability was established only where (1) the evidence fell within a "firmly rooted hearsay exception," or (2) the statement carried "'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to [its] reliability." *Id.*

In 2004, the Supreme Court revisited its Confrontation Clause jurisprudence in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The *Crawford*

court definitively held that where "testimonial" hearsay is at issue, the Confrontation Clause demands that it be admitted for use against the defendant only when there exists both (1) unavailability of the declarant and (2) a prior opportunity for cross-examination. *Id.* at 68. The Court declined to articulate a comprehensive definition of "testimonial," but stated that it applies "at a minimum to prior testimony at a *preliminary hearing*, before a grand jury, or at a former trial; and to police interrogations." *Id.* (italics added). The Court concluded, "[w]here testimonial statements are at issue, the only indicum of reliability to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 69.

In *Crawford,* the defendant was charged with assault and attempted murder after stabbing victim Lee at Lee's apartment. *Id.* at 38-40. Defendant's wife Sylvia was present during the assault. *Id.* Police arrested the defendant and Sylvia, and both gave tape-recorded statements. *Id.* Their statements differed in one crucial respect: The defendant indicated that Lee may have had something in his hand as the defendant stabbed him, but Sylvia indicated that Lee may have reached for something only after he was stabbed. *Id.* At trial, the defendant claimed self-defense and invoked Washington's marital privilege to prevent Sylvia from testifying against him. *Id.* at 40. The state introduced Sylvia's tape-recorded confession under the state's against-penal-interest exception to the hearsay rule, and the jury convicted. *Id.* at 40-41.

The Washington Court of Appeals reversed the conviction; on subsequent appeal, the Washington Supreme Court reversed the appellate court, finding that Sylvia's confession was sufficiently reliable to satisfy the Confrontation Clause because it interlocked with the

defendant's confession. *Id.* at 41. The U.S. Supreme Court sidestepped the question of whether the Confrontation Clause permits the admission against a criminal defendant of an accomplice statement on the grounds that it interlocks with the defendant's statement, and instead conducted a wholesale reevaluation of its Confrontation Clause jurisprudence.

In considering whether to reevaluate the longstanding Confrontation Clause framework established in *Roberts,* the Court undertook a lengthy historical analysis of the common law confrontation right. *Id.* at 42 (citations omitted). The Court reached two conclusions. First, the Confrontation Clause was directed at prohibiting the "use of ex parte examinations as evidence against the accused." *Id.* In the 16th and 17th centuries, judicial officials would routinely conduct private examinations of witnesses, and the examinations would be read into evidence against the accused at trial, despite demands by the accused for an opportunity to confront the absent accusers. *See id.* at 43-44. Under the Court's analysis, this history supported a second conclusion: The Framers "would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54.

In overruling *Roberts*, the Court explained that the Clause provides a procedural, not a substantive, guarantee. *Id.* at 61. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* The Court did not set forth a standard for the type of cross-examination that would satisfy the Clause, but other states have addressed this issue subsequent to the *Crawford* decision.

B. The type of cross-examination afforded a criminal defendant at a preliminary hearing in the State of Idaho is inadequate to satisfy the Confrontation Clause

In *State v. Stuart*, 695 N.W. 2d 259 (Wisc. 2005), the Supreme Court of Wisconsin held that introduction at trial of the preliminary hearing testimony of an unavailable witness violated the defendant's right of confrontation guaranteed by the Sixth Amendment and remanded the case for re-trial on the charge of first-degree murder. Three things are notable about the decision. First, because of *Crawford's* reinterpretation of the Confrontation Clause, the Wisconsin court reversed existing Wisconsin law allowing the introduction of preliminary hearing testimony, much as Mr. Mantz is asking this Court to do regarding existing Idaho law. *Id.* at 263. Second, the Wisconsin Attorney General agreed with the defendant that the use of the preliminary hearing testimony violated the defendant's right of confrontation, even though some cross-examination did occur at the defendant's preliminary hearing. *Id.* at 265, 267. And third, in the rationale for its decision the Court detailed several inherent limitations of cross-examinations which occur at preliminary hearings. *Id.* at 266, 267. It is the rationale of the opinion, not the occurrence of the ruling, which should carry the greatest weight with this Court.

In *Stuart,* the defendant was charged with first-degree murder. *Id.* at 260. At the defendant's preliminary hearing, his brother testified against him and was cross-examined by defense counsel. *Id.* at 261, 262. The brother was not available at trial because he refused to testify, asserting his Fifth Amendment right against self-incrimination. *Id.* at 262. In an interlocutory appeal during the trial, the Supreme Court of Wisconsin held that the preliminary

hearing testimony was admissible. *Id.* at 263. The defendant's brother's preliminary hearing testimony was read into the record before the trial jury, and the defendant was convicted. *Id.* at 263-264.

Mr. Stuart's case came back before the Court on post-conviction proceedings, and in the intervening years between the interlocutory appeal and the post-conviction proceedings the United States Supreme Court decided *Crawford*. *Id.* at 264. In reversing existing Wisconsin law regarding the admissibility of preliminary hearing testimony, the Court explained that its earlier rulings were based in part on the subsequently overruled Confrontation Clause analysis set forth in *Roberts*. *Id.* at 256. "With the *Crawford* decision, a new day has dawned for Confrontation Clause jurisprudence." *Id.* at 265, *citing State v. Hale*, 691 N.W.2d 637 (Wisc. 2005).

In holding that the limited opportunity for cross-examination afforded Mr. Stuart at his preliminary hearing was insufficient to satisfy the right to a prior opportunity for cross-examination guaranteed by the Confrontation Clause as explained in *Crawford*, the Court's rationale included four factors applicable to all preliminary hearings. First, a preliminary hearing is necessarily limited in scope "because the preliminary hearing is intended to be a summary proceeding to determine essential or basic facts relating to probable cause, not a full evidentiary trial on the issue of guilt beyond a reasonable doubt." *Id.* at 266 (internal quotation marks and citations omitted). Second, the scope of cross-examination at a preliminary hearing is "limited to issues of plausibility, not credibility." *Id.* (citation omitted). Third, cross-examination at a preliminary hearing is "not to be used for the purpose of exploring the general

trustworthiness of the witness." *Id.* at 266 (internal quotation marks and citations omitted). And fourth, at the preliminary hearing Mr. Stuart was not allowed to cross-examine his brother about a possible motive to testify falsely. *Id.* at 267. The brother "had been facing criminal charges in 1998 when he gave his statements to police implicating Stuart in the death of [the victim]." *Id.* The Court explained this line of potential cross-examination with a quote from one of its earlier opinions:

> [The witness] may well have been testifying favorably to the state in the hope and expectation that the state would reward him by dropping or reducing pending charges. Even though that expectation were absurd, defense counsel had the right and duty to explore the witness' motives. When a witness has been criminally charged by the state, he is subject to the coercive power of the state and can also be the object of its leniency. The witness is aware of that fact, and it may well influence his testimony.

Id. at 674 (citation omitted, brackets in original).

Each of these four factors, that the scope of a preliminary hearing is naturally limited by its purpose, that cross-examination at a preliminary hearing generally does not focus on a witness's credibility, that cross-examination at a preliminary hearing generally does not focus on a witness's general trustworthiness, and that cross-examination at a preliminary hearing generally does not focus on a witness's motives for testifying falsely, is as applicable to preliminary hearings held in the State of Idaho as to preliminary hearings held in the State of Wisconsin. The last above quotation, which mentions defense counsel's "right and duty" is particularly noteworthy because the duties of defense counsel are so different in conducting cross-examination at trial as compared to a cross-examination at a preliminary hearing. Even if the time available for preliminary hearing cross-examination were unlimited, and even if full

discovery and investigation had been completed prior to the preliminary hearing, only the most ineffective and incompetent defense counsel would reveal his or her trial strategy to the prosecution, and tip off the witness to his impeachment strategy, by conducting the same cross-examination at the preliminary hearing as had been planned for trial. Such a plan would be anathema to the experienced and competent practitioner.

A more generalized rejection of preliminary hearing cross-examination as adequate cross-examination for Confrontation Clause purposes was set forth by the Supreme Court of Colorado in *People v. Fry*, 92 P.3d 970 (Colo. 2004). The Court held, "[A]lthough a defendant must have been provided with a prior adequate opportunity to cross-examine an unavailable witness before the State can admit that witness's previous testimony into evidence, the preliminary hearing does not provide an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause requirements." *Id.* at 978.

A jury had convicted defendant Fry of second degree assault and second degree murder for the death of his girlfriend, which was caused by an impact to the head. *Id.* at 972-73. At the preliminary hearing the defendant's uncle testified that Mr. Fry had essentially confessed to him. *Id.* at 973. Defense counsel did not cross-examine Mr. Fry's uncle at the preliminary hearing, and he died before trial. *Id.* The preliminary hearing testimony of Mr. Fry's uncle was admitted at trial because the trial court found that it met the two-part test of unavailability and reliability as set forth in *Roberts*. *Id.* The defendant was convicted and then appealed. *Id.* The court of appeals in Colorado reversed and the state appealed. *Id.* During the pendency of the appeal, the United States Supreme Court decided *Crawford*, and the Supreme Court of

Colorado reviewed the case in light of that decision. *Id.* at 974. The Court reiterated a previous holding regarding the admissibility of preliminary hearing testimony (*Id.* at 978) and overruled its previous holdings which were dependent on a *Roberts* reliability analysis regarding the Confrontation Clause. *Id.* at 976.

In reaching its blanket rejection of preliminary hearing cross-examination as adequate for purposes of the Confrontation Clause, the Court's rationale included six central reasons, two of which (the limited scope of a preliminary hearing and the limited focus on witness credibility at a preliminary hearing) overlap with the reasons expressed by the Supreme Court of Wisconsin in *Stuart, supra*. The remaining four reasons which add to the analysis of *Stuart* include principles of public policy and conservation of judicial resources as well as additional practical considerations regarding the conduct both of presiding judges at preliminary hearings and defense counsel at preliminary hearing.

In explaining its rationale, the Supreme Court of Colorado first addressed the limited scope of a preliminary hearing. "A preliminary hearing is limited to matters necessary to a determination of probable cause." *Fry* at 977 (citation omitted). Second, the Court explained that a defendant at a preliminary hearing lacks a right to unrestricted cross-examination of the state's witnesses, and that, if in-depth cross-examination is attempted by defense counsel, it may be restricted by the presiding judge.

> A defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary hearing. By rule, defendants have the right to a preliminary hearing under certain circumstances, and pursuant to the rule a defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. However, the preliminary hearing is not intended to be a mini-trial

> or to afford the defendant an opportunity to effect discovery. Hence, a preliminary hearing does not provide the same safeguards as a trial.

Id. at 977 (internal quotation marks and citations omitted). The Court explained this reason further. "[T]he right to cross-examination may be curtailed by the judge in all but the most unusual circumstances." *Id.* (citation omitted). Third, the Court touched on the same credibility limitation set forth in *Stuart*. "[T]he judge's findings at a preliminary hearing are restricted to a determination of probable cause. A judge may not engage in credibility determinations unless the testimony is incredible as a matter of law." *Id.* (citations omitted). The Court expanded on this reason by stating, "Aside from the exceptionally rare instance of credibility as an issue of law, defense counsel has no legitimate motive to engage in credibility inquiries and may be prohibited from doing so." *Id.* (citation omitted). "Further, the opportunity for cross-examination regarding the credibility of a witness, as a matter of fact, exists only to the extent that an attorney persists in asking questions that have no bearing on the issues before the court, and such irrelevant questioning is not prohibited by the court." *Id.*

This recognition of the motives of defense counsel at a preliminary hearing led the Court to its fourth reason for holding that preliminary hearing testimony is inadequate for Confrontation Clause purposes: that in practice defense counsel may decline to question prosecution witnesses at a preliminary hearing.

> Because credibility is not at issue and probable cause is a low standard, once a prima facie case for probable cause is established, there is little defense counsel can do to show that probable cause does not exist. Therefore, as a practical matter, defense counsel may decline to cross-examine witnesses at the preliminary hearing, understanding that the cross-examination would have no bearing on the issue of probable cause and that the judge may limit or prohibit the cross-examination.

Id. at 977. The same reason is applicable to limited questioning by defense counsel at cross-examination at a preliminary hearing in the State of Idaho.

The Court next focused on the importance of cross-examination occurring in the presence of the jury so that the jury may view the reaction of the witness as he or she endures the ordeal of in-trial cross-examination. "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Id.* at 978 (internal quotation marks and citation omitted). "[T]estimony is much more reliable when it is given under oath at trial where the witness can be cross-examined and the jury may observe the witness's demeanor." *Id.* at 975 (citation omitted).

> A skilled cross-examiner can confront a dishonest witness, or a witness who is mistaken, with questions that cause the witness to see the corner he has painted himself into and react in a way that permits the jury to judge credibility from what it hears and sees. Thus, a witness's testimony on cross-examination may be much more damning to the witness's credibility than any sort of indirect evidence the defense can offer. In sum, the opportunity for cross-examination is without equal as a tool in the search for truth.

Id. at 980. *See also U.S. v. Yida*, 498 F.3d 945, 950 (CA9 2007) ("Underlying both the constitutional principles and the rules of evidence is a preference for live testimony. Live testimony gives the jury (or other trier of fact) the opportunity to observe the demeanor of the witness while testifying. . . . Transcripts of a witness's prior testimony, even when subject to prior cross-examination, do not offer any such advantage, because all persons must appear alike, when their [testimony] is reduced to writing.") (Internal quotation marks and citations

omitted.) The importance of a jury's view of a witness during his testimony, and the critical practical distinction between reading a witness's words and watching him testify, was also explained by the United States Court of Appeals for the Third Circuit in *Government of the Virgin Islands v. Aquino*, 378 F.2d 540 (3rd Cir. 1967):

> Demeanor is of the utmost importance in determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words. Even beyond the precise words themselves lies the unexpressed indication of his alignment with one side or the other in the trial. It is indeed rarely that a cross-examiner succeeds in compelling a witness to retract testimony which is harmful to his client, but it is not infrequently that he leads a hostile witness to reveal by his demeanor – his tone of voice, the evidence of fear which grips him at the height of cross-examination, or even his defiance – that his evidence is not to be accepted as true, either because of partiality or overzealousness or inaccuracy, as well as outright untruthfulness. The demeanor of a witness, as Judge Frank said, is "wordless language."

Id. at 548, *citing Broadcast Music, Inc., v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2nd Cir. 1949). This distinction between the words spoken by a witness on cross-examination and the message conveyed to the jury through the witness's body language, facial expressions, and other wordless cues is well known to trial lawyers. This Court should call upon its collective trial experience in weighing the great significance of this rationale. Most trial lawyers go many years or even entire careers without causing a "Perry Mason moment" in trial in which the witness capitulates and changes his story under cross-examination. On the other hand it is a frequent occurrence for a trial lawyer to cause a witness to reveal some bias or motivation on cross-examination through the non-verbal cues detailed above.

Finally in *Fry*, the Supreme Court of Colorado turned to the public policy ramifications

of its holding.

> [The holding] prevents the preliminary hearing from becoming a mini-trial which would expend time and resources the judiciary does not possess. Changing the purpose of these hearings would impact all criminal cases, not just those with Confrontation Clause issues. Preliminary hearings are limited to a determination of probable cause so that they do not become mini-trials. Were we to allow extensive cross-examination by defense counsel so as to prevent any Confrontation Clause violations at trial if a witness were to become unavailable, we would turn the preliminary hearing in every case into a much longer and more burdensome process for all parties involved. Therefore, we do not expand the scope of preliminary hearings in order to allow them to satisfy Confrontation Clause requirements.

Id. at 978. This public policy rationale is as applicable to the State of Idaho as to the State of Colorado, as are the other *Fry* factors. Now that Confrontation Clause analysis has been shifted by the United States Supreme Court away from the reliability test of *Roberts* to a cross-examination test under *Crawford*, a holding by this Court that preliminary hearing cross-examination is sufficient to meet Confrontation Clause requirements set by *Crawford* would have the natural consequence of lengthening preliminary hearings across the State of Idaho as well as diminishing the number of waivers of preliminary hearings by defendants.

An application of *Crawford* to a situation analogous to the preliminary hearing context occurred in *State v. Lopez*, 974 So.2d 340 (Fla. 2008). The Supreme Court of Florida held that a discovery deposition did not satisfy the opportunity for cross-examination required by the Confrontation Clause under *Crawford*. Part of the Court's reasoning is applicable to cross-examinations at preliminary hearings in the State of Idaho. "A defendant cannot be expected to conduct an adequate cross-examination as to matters of which he first gained knowledge at the deposition. This is especially true if the defendant is unaware that this deposition would be the

only opportunity he would have to examine and challenge the accuracy of the deponent's statements." *Id.* at 350 (internal quotation marks and citations omitted). As in the discovery deposition in *Lopez*, an Idaho defense counsel does not ordinarily prepare for a preliminary hearing in the expectation that it will be his or her one and only opportunity to examine the witness, and counsel cannot adequately conduct cross-examination as to matters first revealed in the preliminary hearing. Because preliminary hearings usually occur early in a proceeding, discovery and investigation are typically far from completed.

C. The introduction at trial of Karl Hoidal's preliminary hearing testimony denied Mr. Mantz the right of confrontation guaranteed by the Sixth Amendment

In Mr. Mantz's case, the first inquiry under *Crawford* is whether Mr. Hoidal's preliminary hearing testimony was "testimonial" for purposes of Sixth Amendment analysis. *Crawford* explicitly categorizes preliminary hearing testimony as testimonial. *Crawford, supra*, at 68. Having passed this threshold test, we next apply *Crawford's* two-part test of (1) unavailability and (2) opportunity to cross-examine. It cannot reasonably be disputed that Mr. Hoidal was unavailable because he died after the preliminary hearing and before trial. Therefore, the focus of the constitutional analysis in this case, and the focus of this appeal, is on whether Mr. Mantz had an opportunity to cross-examine Mr. Hoidal in a manner adequate under *Crawford*. Of the authorities relied upon by the District Court in its ruling, I.C. § 9-336(3), I.R.E. 804(b)(1), and *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct.App. 1992), R. Vol. II, pp. 252-253, both the statute and the rule are subject to the additional Sixth Amendment

guarantees as set forth in *Crawford*, and *Ricks* has been abrogated by *Crawford* because of the *Ricks* opinion's reliance on *Roberts*. *See Ricks*, 122 Idaho at 860, 840 P.2d at 404.

From the above-cited authorities and the application of reason to the conduct of preliminary hearings in Idaho, the rationale for rejecting preliminary hearing cross-examinations as adequate for purposes of the Confrontation Clause can be synthesized into the following eight principles.

1. A preliminary hearing is by its nature and purpose limited in scope. It is a probable cause determination (I.C.R. 5.1(b)), not a mini-trial.
2. The scope of cross-examination at a preliminary hearing is focused on plausibility, not credibility, because the standard of proof for binding over the defendant – probable cause – is so low.
3. The scope of cross-examination at a preliminary hearing does not encompass the general trustworthiness of the witness because such a showing would be insufficient to prevent the defendant from being bound over, again because the standard of proof is so low.
4. The scope of cross-examination at a preliminary hearing generally excludes inquiry into the witness's motives to testify falsely or to shade his testimony in favor of the prosecution, because such a showing would be irrelevant to the magistrate's determination of probable case, would reveal defense trial strategy to the prosecution, and would prepare the witness for the cross-examination to come at trial.

5. Should defense counsel attempt an in-depth cross-examination at a preliminary hearing, the cross-examination may be properly restricted by the presiding magistrate because of the limited purpose of the hearing. It is the common experience of lawyers in Idaho that different magistrates in different jurisdictions allow different levels of defense inquiry at preliminary hearings.

6. For legitimate reasons based on the limited scope of the preliminary hearing, the preservation of trial strategy, and the limited discovery and investigation which has typically occurred prior to a preliminary hearing, defense counsel often choose to engage in limited questioning or no questioning at all of witnesses at preliminary hearings.

7. Presenting a trial jury with a transcript or recording of a witness's preliminary hearing cross-examination does not afford confrontation as required by the Sixth Amendment because the jury cannot observe the witness's demeanor and nonverbal communication, which is often more significant than the words spoken by the witness. Moreover, the impact of the proceedings on a witness, and therefore the pressure to tell the truth, is typically less at a preliminary hearing, in which only a busy magistrate focused on a probable cause determination is present, than at a jury trial, where the eyes of the entire jury panel are trained on the witness.

8. Public policy considerations regarding the conservation of the time and resources of the judiciary mandate against expanding preliminary hearings to allow extensive cross-examination to meet Confrontation Clause requirements. Common

experience across the State of Idaho is that many preliminary hearings are either very brief or are waived altogether. If this Court were to rule that preliminary hearing cross-examination must substitute for trial cross-examination, the judicial system could be significantly burdened to the detriment of all cases by defendants insisting on both the occurrence of a preliminary hearing and also on more extensive cross-examination to meet *Crawford* requirements. Defense counsel did not have this motivation pre-*Crawford* because the *Roberts* test centered on a judicial determination of reliability, not the procedural guarantee of cross-examination.

This last factor, public policy, leads to the best method for deciding the case at bar. In the interest of public policy, this Court should set a bright line rule, as did the Supreme Court of Colorado in *Fry*, that preliminary hearing cross-examination is always insufficient to pass Constitutional muster. The same result in this case, reversal of the conviction, could be reached by an analysis of the particulars of Mr. Mantz's preliminary hearing, but most of the eight principles discussed above apply equally to every preliminary hearing in every felony case in Idaho. If this Court fashions a vague, multi-prong test, as did some of the progeny of *Roberts* for the determination of reliability, magistrates and defense counsel in the State of Idaho will not know what is expected of them at preliminary hearings. Defendants will face the Hobson's choice of revealing trial strategy at preliminary hearings through extensive trial-type cross-examination of witnesses or preserving trial strategy and the element of surprise so important to most cross-examinations at the expense of potentially waiving the constitutional right to

confrontation. The result will be uncertainty, future litigation both in direct and post-conviction appeals, and a likely disparity in the type of preliminary hearing cross-examination afforded defendants by different magistrates across the State of Idaho. The better choice for this Court is to provide clear guidance to the lower courts in an already very busy judicial system.

D. The error was not harmless

If the introduction of Mr. Hoidal's preliminary hearing testimony against Mr. Mantz were harmless error, then the State would likely argue that the conviction should not be reversed. This Court need not read the entire jury trial transcript to determine this issue because the State admitted in its pleadings to the District Court that the preliminary hearing evidence was "crucial" to the State's case and that without the preliminary hearing testimony of Mr. Hoidal the State's case would have been "eviscerated" (R. Vol. I, p. 162) because no witness other than Mr. Hoidal could testify to personally observing Mr. Mantz during the alleged act of assault. R. Vol. I, p. 165. "[T]he opportunity to impeach a witness is particularly important where the [prosecution's] entire case hinges upon the testimony of the unavailable witness." *Commonwealth v. Smith*, 647 A.2d 907, 913 (Pa.Super. 1994).

II.

Article I, Section 13, of the Idaho Constitution prohibits the State from introducing into evidence in its case in chief at a criminal trial the preliminary hearing testimony of an unavailable witness

The United States Supreme Court's ruling in *Crawford* was a watershed event in

confrontation analysis. It overruled longstanding precedent regarding a defendant's rights at a criminal trial. For the reasons expressed in *Crawford* and in the above authorities, this Court should reinterpret Article I, Section 13, of the Idaho Constitution to provide the same or greater protection to accused persons as does the Sixth Amendment to the United States Constitution under *Crawford*.

CONCLUSION

For the reasons set forth above, this Court should vacate Mr. Mantz's conviction and remand this case for a new trial.

DATED this 4th day of February 2009.

WHITNEY & WHITNEY, LLP

/S/ THOMAS W. WHITNEY

By: Thomas W. Whitney
Attorneys for Appellant Tim C. Mantz

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February 2009 a true and correct copy of the foregoing document was served on the following by the method indicated.

Mr. Lawrence G. Wasden Idaho Attorney General P.O. Box 83720 Boise, ID 83720-0010	[x] [ ] [ ] [ ]	U.S. Mail, first class postage prepaid Hand delivery Facsimile Federal Express
Mr. William W. Thompson, Jr. Latah County Prosecuting Attorney Latah County Courthouse P.O. Box 8068 Moscow, ID 83843	[x] [ ] [ ] [ ]	U.S. Mail, first class postage prepaid Hand delivery Facsimile Federal Express
Hon. John R. Stegner, District Judge Latah County Courthouse P.O. Box 8068 Moscow, ID 83843	[x] [ ] [ ] [ ]	U.S. Mail, first class postage prepaid Hand delivery Facsimile Federal Express
Mr. Tim C. Mantz IDOC #14614 Idaho Correctional Institution, Orofino, C1 Hospital Drive North #23 Orofino, ID 83544	[x] [ ] [ ] [ ]	U.S. Mail, first class postage prepaid Hand delivery Facsimile Federal Express

/S/ THOMAS W. WHITNEY

Thomas W. Whitney