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IN THE UTAH SUPREME COURT

STATE OF UTAH,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	Case No. 20160502-SC
	)	
ANH TUAM PHAM,	)	
	)	
Defendant/Petitioner.	)	

BRIEF ON CERTIORARI
TO THE UTAH COURT OF APPEALS

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THE DEFENDANT IS PRESENTLY INCARCERATED IN THE UTAH STATE PRISON.

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I. JURISDICTIONAL STATEMENT

Pham petitioned this Court from a final judgment of the Utah Court of Appeals dated May 19, 2016, Case No. 20140435-CA affirming the order of the Third District Court for the County of Utah, Judge Katie Bernards-Goodman, in which Pham was convicted on all counts. No motions regarding a request for rehearing or for an extension of time to file a petition for writ of certiorari have been filed. No cross-petition has been filed in this case. This Court granted Pham's Petition. This Court has jurisdiction under U.C.A. §78A-3-102.

II. QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1: Did the Court of Appeals incorrectly conclude that the admittance of preliminary hearing testimony of the unavailable victim/witness did not violate Pham's Six Amendment Right to Confrontation as articulated by the United States Supreme Court in *Crawford v. Washington,* 541 U.S. 36 (2004)?

Standard of review of Issue No. 1:

On certiorari, this Court reviews "the decision of the court of appeals for correctness." *State v. Hansen*, 2002 UT 125, ¶ 25, 63 P. 3d 650 (Utah 2002). The underlying questions of constitutional interpretation are questions of law that are reviewed for correctness; no deference is provided to the district court's legal

conclusions. *Id.* The district court's decision to admit testimony that may implicate the confrontation clause is also a question of law reviewed for correctness. *State v. Poole*, 232 P.3d 519, 522 (Utah 2010) (internal citations omitted).

Preservation of Issue No. 1 at page 4 Pham's Petition for Writ of Certiorari and at page 5 of Pham's Opening Brief to the Court of Appeals.

QUESTION NO. 2: Is the Court of Appeals' interpretation of the Confrontation right and reliance upon *State v. Brooks,* 638 P.2d 537 (Utah 1981) misplaced in light of *Crawford* and this Court's decisions in *State of Utah v. Timmerman,* 218 P.3d 590, 594, 2009 UT 58 (Utah 2009); *State of Utah v. Schmidt,* 2015 UT 65 (Utah 2015); *State of Utah v. Jones,* 2016 UT 4 (Utah 2016); and the Constitution of the State of Utah, Art. 1 § 12.

Standard of review of Issue No. 2:

On certiorari, this Court reviews "the decision of the court of appeals for correctness." *State v. Hansen*, 2002 UT 125, ¶ 25, 63 P. 3d 650. The underlying questions of constitutional interpretation are questions of law that are reviewed for correctness; no deference is provided to the district court's legal conclusions. *Id.* The district court's decision to admit testimony that may implicate the confrontation clause is also a question of law reviewed for correctness. *State v. Poole*, 232 P.3d 519, 522 (internal citations omitted).

Preservation of Issue No. 2 at page 4 Pham's Petition for Writ of Certiorari and was argued extensively at pages 16-26 of Pham's Opening Brief to the Court of Appeals.

III. DETERMINATIVE STATUES

The Sixth Amendment of the United States Constitution, which applies to both federal and state criminal prosecutions, is controlling. It states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
>
> Emphasis added.

Utah Constitution Art. 1 § 12 is also determinative in this case, stating in relevant part:

> Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

IV. STATEMENT OF THE CASE

Nature of the Case

Pham was involved in a confrontation with Mr. Menchaca at a convenience store parking lot, and as the confrontation escalated, Pham shot Menchaca. R. 292-Pham was criminally charged for the shooting. Menchaca, an undocumented Mexican national, was available and testified at Pham's preliminary hearing. R. 292 p. 40. Menchaca then returned to Mexico during the pendency of the case and was not available to testify at trial. One of the prosecutors read a transcript of Menchaca's preliminary hearing testimony at trial, over Pham's Sixth Amendment Confrontation as well as state law objections. R. 292 p. 40; and 293. The trial court overruled Pham's objection and allowed Menchaca's preliminary hearing testimony to be read to the jury by a District Attorney. Pham was convicted on all counts. R. 293 p. 140.

Pham timely appealed the conviction based on the admission of Menchaca's preliminary hearing testimony over his objection and a contention that the prosecution failed to produce sufficient evidence regarding Menchaca's wounds to support a conviction for discharge of a firearm causing serious bodily injury. The Court of Appeals affirmed Pham's convictions on both issues. *State of Utah v. Pham,* 2016 UT App. 105 ¶ ¶ 2-8. The issues raised by Pham in the Writ of

Certiorari concern only the admissibility of Menchaca's preliminary hearing testimony as stated above.

Statement of the Facts

Pham and his friend went to a convenience store to purchase food and drinks. Menchaca and his girlfriend went to the same convenience store. R. 292 p. 5. Menchaca and Pham became engaged in a confrontation, which escalated. R. 292 p.p. 15-68. Eventually, Pham pulled out his gun and shot Menchaca. R. 292 p.p. 15-68. Pham was apprehended by police later that night and was charged with discharge of a firearm causing serious bodily injury, receiving or transferring a stolen vehicle, obstructing justice, and failing to stop or respond to an officer's signal. R. 142-143. Pham claimed he shot Menchaca in self-defense and felt threatened by Menchaca. R. 293 p.p. 69-91.

Menchaca testified at Pham's preliminary hearing, and Pham cross-examined him for purposes of a preliminary hearing. R. 292. Defense counsel did not yet have full discovery and conducted a limited cross-examination in light of the limited purpose of a preliminary hearing. There was no cross-examination regarding his credibility and veracity. R. 292 p. 40.

It is undisputed that Menchaca moved to Mexico before the trial in this matter, and neither the United States Marshals Service nor the Mexican authorities were able to locate him. Menchaca's unavailability is not an issue. The State filed a motion in limine seeking to admit Menchaca 's preliminary hearing testimony. R. 292 p. 40. The trial court granted that motion over Pham's objection. Pham objected because the purpose of the preliminary hearing, his motives and ability to prepare for cross-examination, was different than the purpose of cross-examination during trial. R. 292-293. Credibility of a witness, for instance, is not weighed during the preliminary hearing. Pham argued the reading violated his Six Amendment right to Confrontation. *Crawford v. Washington,* 541 U.S. 36 (2004).

At Pham's jury trial, Menchaca's preliminary hearing testimony was read to the jury by one of the prosecutors. R. 292 p. 40 The Prosecution presented other witnesses and Pham testified in his own defense. Pham's testimony was in direct conflict to Menchaca's testimony, as Pham claimed he acted in self-defense. Menchaca's credibility and veracity were key issues at trial. R. 292 p.p. 5-91; 293 p.p. 50-91. However, Pham did not have the opportunity to challenge Menchaca's credibility or veracity, and the jury did not have the opportunity to evaluate Menchaca's demeanor. This failure was critical to Pham's defense. The jury found Pham guilty of all four charges. R. 293 p. 140. *State of Utah v. Pham,* 2016 UT App. 105 ¶ ¶ 2-8.

V. SUMMARY OF THE ARGUMENT

The issue presented by this appeal affects a fundamental right of all Utah residents who are charged with a serious crime and request a preliminary hearing. A witness who testifies at a preliminary hearing and then is unavailable at trial is not generally subject to the type of cross-examination necessary to protect a defendant's rights at trial. The fundamental right at issue is the right of Confrontation provided by the Sixth Amendment to the United States Constitution. Given the purpose and scope of a preliminary hearing in Utah, as defined by Utah Constitution Art. 1 § 12 and recent decisions of this Court, testimony given at preliminary hearings should generally not be admissible at trial. The Utah Court of Appeals held otherwise, relying on a 1981, pre-*Crawford* case: *State of Utah v. Brooks,* 638 P.2d 537 (Utah 1981). The Court of Appeals, however, questioned the viability of *Brooks* given the change in the Utah Constitution regarding preliminary hearings. *See, Pham,* FN 3 citing *State of Utah v. Timmerman,* 218 P.3d 590, 594 (Utah 2009) without discussion.

Furthermore, none of the recent Court of Appeals' decisions analyze the impact of this Court's recent decisions in *Timmerman, State of Utah v. Schmidt,* 2015 UT 65 (Utah 2015), and *State of Utah v. Jones,* 2016 UT 4 (Utah 2016) on

these issues. In *Timmerman, Schmidt,* and *Jones* this Court articulated the scope, purpose, and evidentiary burden at a preliminary hearing. In fact this Court held in *Timmerman* that a defendant does **not** have *Crawford* rights of confrontation at a preliminary hearing and that such rights are trial rights. *Timmerman* at ¶ 13. Generally, preliminary hearing testimony should not be admissible at trial when a witness is unavailable, given the distinct purpose and limitations of a defendant at preliminary hearings. Based on the limited scope and purpose of a preliminary hearing a defendant may be forced by circumstance to limit cross-examination or may not cross-examine a witness at all.

VI. ARGUMENT

A. The Standard of Sixth Amendment Confrontational Rights as Articulated in *Crawford* was Not Properly Considered by the Court of Appeals

In this case as well as recent similar cases, the Court of Appeals has stated that a defendant's *Crawford* rights under the Sixth Amendment are satisfied by the "opportunity" to confront the witness at a preliminary hearing. The Court of Appeals relies on the statement that "cross-examination takes place at preliminary hearing and at trial under the same motive and interest [as trial] as found in *State v Brooks*, 638 P.2d 537, 541 (Utah 1981). However, as explained below, the Court of Appeals

questions the viability of this holding in *Brooks*. In any event, such a holding does not reflect the purpose or practice of Utah preliminary hearings.

The history behind the Confrontation Clause as protected by the Sixth Amendment is discussed extensively in *Crawford*. A brief review the Clause's history as articulated in *Crawford* (541 U.S. at 43-57) will illustrate the importance of the right to confrontation in our system of law. The concept that an accused has the right to confront the witnesses against him dates back to Roman times, but was incorporated into English law in the 1600s. *Id.* English courts developed the right, allowing out of court testimony only if the witness was unable to testify in person. *Id.* English courts further developed the common law to require that statements made before trial were admissible only if the accused had a prior opportunity to cross-examine the witness. *Id.* Although several state constitutions included a right of confrontation, the United States Constitution did not originally include that right. *Id*. Following criticism regarding the omission, the First Congress included the right in the Sixth Amendment. *Id.*

The purposes behind both the federal and state Confrontation Clauses are well articulated. The Confrontation Clause is designed to ensure that convictions are not obtained through the use of *ex parte* affidavits. *See, Crawford* at 59. It has long been have recognized that testimony 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. *People v. Fry,* 92 P.3d at 978-979.

The right of an accused to confront the witnesses against him has been regarded as a fundamental right for hundreds of years. It was included in the United States to ensure that persons would not be convicted on the basis of *ex parte* testimony and without the benefit of cross-examination. This right remains crucial to our adversarial system of law. *Id. Crawford* refines this right to ensure that a defendant as a right to *effective* cross-examination. Preliminary hearings in Utah do not allow, because of their limited nature, for purposeful and rigorous cross-examination as is done at trial.

In the current case, as well as the cases of *State of Utah v. Garrido,* 2013 UT App. 245 and *State of Utah v. Goins,* 2016 UT App. 57, ¶ 18, the Court of Appeals relied, in part, on *State v. Brooks*, 638 P.2d 537 (Utah 1981) and other authority decided before *Crawford* and prior to the changes made in preliminary hearing standards in Utah in 2001. *See, State v. Clark*, 2001 UT 9 at ¶ 10 (Utah 2001). The *Goins* Court incorrectly concluded that the case of *State v. Brooks*, 638 P.2d 537 (Utah 1981) was controlling, holding:

> The Supreme Court concluded in *Brooks* that "counsel's motive and interest are the same in either [the trial or preliminary hearing] setting; he acts in both situations in the interest of and motivated by establishing the innocence of his client. Therefore, cross-examination takes place at

> preliminary hearing and at trial under the same motive and interest." *Id.* at 541

Goins at ¶ 19.

But in this case the Court of Appeals raises serious concerns regarding *Brooks* by stating at 2016 UT App. 105 ¶ 17 FN 3:

> On the other hand, we are also *not convinced* that a preliminary hearing always provides the opportunity for cross-examination guaranteed by the Confrontation Clause….
>
> Moreover, thirteen years after *Brooks* was issued, the nature of preliminary hearings in Utah was changed by the passage of the Utah Victims' Rights Amendment. As relevant here, the Utah Constitution was amended to provide that "[w]here the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists" and to provide that "reliable hearsay evidence" is admissible at a preliminary hearing. *See* Utah Const. art. I, § 12. *In light of these changes, the Utah Supreme Court overruled State v. Anderson, 612 P.2d 778 (Utah 1980), upon which the relevant portion of Brooks had partially relied. See State v. Timmerman, 2009 UT 58, ¶¶ 14-16, 218 P.3d 590. It is therefore unclear whether Brooks's blanket statement that "cross-examination takes place at preliminary hearing and at trial under the same motive and interest" is still true insofar as Confrontation Clause rights are concerned. See Brooks, 638 P.2d at 541.*

Pham, 2016 UT App 105, ¶18 n. 3 (emphasis added).

The key holding in *Brooks* is no longer persuasive, reasonable, or constitutional. The *Brooks* case was decided over twenty (20) years before *Crawford* and thirteen years before the amendment to the Utah Constitution as it relates to preliminary hearings. *See Utah Constitution, Art. 1, § 12.* There simply is

not the same protection of a defendant's Sixth Amendment right to Confrontation at a preliminary hearing because of the very limited issues at play and the fact that such hearings are held early on in a case before all the facts and issues are as fleshed as they are for a trial. *See, People v. Fry,* 92 P.3d 970 (Colorado 2004).

B. The Purpose of, and the Issues Presented by, a Preliminary Hearing in Utah are Very Limited and Therefore do not Protect a Defendant's *Crawford* Rights

In *State of Utah v. Timmerman,* 218 P.3d 590, 594 (Utah 2009), 2009 UT 58 ¶ 13 this Court declared: "Accordingly, we hold that the federal Confrontation Clause does not apply to preliminary hearings. In so doing, we note that a substantial number of jurisdictions have reached the same conclusion." This effectively means the rights as explained in *Crawford* do not apply at a preliminary hearing. Yet, according to the Court of Appeals, if a defendant is allowed to cross-examine a witness at a preliminary hearing, such "confrontation" satisfies the requirements as articulated in *Crawford.* This is inconsistent with this Court's decision in *Timmerman*.

In *Goins* 2015 UT App. 57, n. 7 the Court of Appeals states: "It may behoove defense counsel in such cases to take full advantage of any opportunity to cross-examine such witnesses. Then, if the testimony is read at trial, counsel's cross-examination is part of what will be read, and the jury will have a less one-sided

version of the witness's testimony." This declaration may be justifiably interpreted by defense counsel as a warning to thoroughly cross-examine witnesses during the preliminary hearing, as the testimony may be admissible at trial. Effectively, the defendant's right to Confrontation is always at stake in a preliminary hearing and must be exercised. This declaration is inconsistent with the scope and purpose of preliminary hearings in Utah. *See Timmerman*, *Schmidt* and *Jones; See, also Fry,* 92 P.3d at 977-980.

This Court held that *Crawford* rights are trial rights and do not apply at a preliminary hearing. *Timmerman* at ¶ 10. Yet, the Court of Appeals holds that *Crawford* rights are satisfied by a hearing where no such rights exist. This Court's decision in *Timmerman* was based, in part, on the Amendment to Utah Constitution Art. 1 § 12 in 1995. This amendment must also be considered, and is part of the basis for this Court deciding that a defendant has no *Crawford* rights at a preliminary hearing.

Recently, this Court thoroughly analyzed the purpose and scope of preliminary hearings in Utah in *Schmidt,* 2015 UT 65 (Utah 2015) and *Jones,* 2016 UT 4 (Utah 2016). At a preliminary hearing the prosecution must only demonstrate probable cause that a crime was committed and that the defendant committed the crime (the same burden for obtaining a warrant). *Schmidt at* ¶ 17. The magistrate

may not weigh evidence and has limited discretion to evaluate credibility - essentially evaluating only impossible testimony. *Schmidt* at ¶ 13. In fact, in *Jones* this Court stated; "We have said that it is not appropriate for a magistrate to evaluate the totality of the evidence in search of the most reasonable inference at a preliminary hearing." *Id.* ¶ 41 (internal quotations omitted). This Court went on to hold, in *Jones,* that the probable cause standard can be met by the prosecution even if the evidence produced at the preliminary hearing may lead to an inference that acquittal is *more likely* than a conviction. *Id. ¶ 41* (citation omitted). The probable cause standard is much different from the trial standard, guilt beyond a reasonable doubt. *See, Timmerman,* ¶ 10. Under the preliminary hearing standard, a defendant simply does not have a legitimate purpose, or ability, to conduct a thorough cross-examination exercising Confrontation rights.

Brooks is challenged by the purpose and limited nature of preliminary hearings. Defense counsel's motives and interests in cross-examining witnesses are not the same in preliminary hearing as during trial. Incontestably, under the directives from this Court in *Schmidt* and *Jones* the interests and purpose of a defendant at a preliminary hearing vary extensively from trial. Credibility of opposing witnesses is a critical part of trial, as it was in this case, and is effectively non-existent at a preliminary hearing. *See, Schmidt*; *Jones.* A large part of the finder of fact's duty at trial is to weigh the evidence presented by witnesses based on

credibility and demeanor, and such weighing of evidence does not exist at a preliminary hearing. *Schmidt; Jones.*

In this case, Pham claimed that he was acting in self-defense when he shot Menchaca. The testimony of Menchaca was directly opposed to this claim. The credibility of each witness at the trial was critical. The jury heard Menchaca's testimony as read by a prosecutor. There was no chance for cross-examination regarding Menchaca's credibility and veracity. No observing of his demeanor as he was cross-examined. Under the circumstances of the trial in this case, such testimony is but a shell of the type of examination needed to protect Pham's Sixth Amendment rights to Confrontation.

There is also a significant practical argument supporting a holding that preliminary hearing testimony should not generally be allowed at trial. Considering the issue in the context of judicial resources, if every preliminary hearing becomes a "mini-trial," there may be little time left for judges to conduct actual trials. It is a fair assumption that there are thousands of cases in Utah involving defendants who are charged with serious criminal offenses and are entitled to a preliminary hearing. If each of these cases resulted in preliminary hearing "mini-trials" wherein full and fair cross-examination as required under *Crawford* by going to every facet of a witness' credibility and all other matters defense counsel wished to preserve for trial,

were to be allowed, the burden on already strained judicial resources would be mammoth. *See, Fry* at 977-980.

Prior to the ruling by the Court of Appeals in this case and in *Goins* and *Garrido* defense counsel often did not cross-examination most witnesses at all, as cross-examination would be both premature and would serve no useful purpose in frustrating the prosecution's ability to establish probable cause at a preliminary hearing. However, if the climate of uncertainly that currently exists regarding this issue is allowed to continue, defense counsel out of necessity will have to do extensive cross examination in an attempt to exercise a defendant's rights to confrontation of adverse witnesses.

The State would have it both ways: a criminal defendant is provided the "opportunity" to fully and fairly confront the witness at preliminary hearing yet the purpose of a preliminary hearing is solely to establishing probable cause. *See, Timmerman,* ¶ 10. The State takes diametrically opposed propositions. The two can only be reconciled if the preliminary hearing court chooses to allow defense counsel ample latitude to cross-examine in areas which may have nothing to do with establishing probable cause. Even then, it is questionable whether that sort of "opportunity" satisfies the needs of defense counsel when it comes time to cross-examine a witness before a jury at trial and therefore satisfies the Sixth Amendment

under the *Crawford* standard. (As stated, *supra, Timmerman* holds that no such rights exist at a preliminary hearing.)

Oftentimes, certainly more often than not, discovery is in its seminal stages just prior to a preliminary hearing. Many times defense counsel will request a preliminary hearing with the intention of discovering the witnesses and other evidence the prosecution will use in the case. The defense has no intent, or even the ability, to prepare and conduct the type of cross-examination as contemplated by *Crawford.* In order to meaningfully cross-examine, counsel must have all the information which would be available at trial. It is very troubling that one would feel compelled to cross-examine to the fullest extent possible, perhaps bringing forth inadmissible testimony or otherwise unfavorable testimony, without the benefit of discovery which would later be produced prior to trial. And again, it second guesses defense counsel, as well as the magistrate, to a considerable degree.

Finally, under the current climate there is much uncertainty and a lack of uniformity among the trial courts on how a preliminary hearing is conducted in regards to the issue of cross-examination. Some magistrates allow extensive cross-examination, while others allow very limited cross-examination. This practice creates an uneven and possibly unconstitutionally defective system, because defendants receive unequal treatment depending on how each magistrate perceives what rights a defendant has at preliminary hearing. The best practical method to

solve this dilemma is to continue to follow *Timmerman* and restrict preliminary hearing testimony and its accompanying cross examination to its declared purpose, probable cause, and eliminate the perceived fiction that a preliminary hearing as currently constituted in Utah protects a defendant's *Crawford* rights to confrontation of witnesses.

This Court should rule that, generally, that the Right of Confrontation, as examined in *Crawford*, is not protected during preliminary hearings in Utah and therefore is not admissible at trial absent exceptional circumstances.

C. Other Jurisdictions Have Disallowed the Use of Preliminary Hearing Testimony at Trial

As acknowledged by the Court of Appeals, other jurisdictions have not allowed preliminary hearing testimony to be admitted at trial, given the purpose of Confrontation and the scope of a preliminary hearing. *See, People v. Fry,* 92 P.3d 970 (Colorado 2004); *State v. Stuart*, 695 N.W.2d 259, at 266, ¶¶ 30, 32 (Wisconsin 2005).

In *Fry*, the Supreme Court of Colorado held that testimony at preliminary hearings is not admissible at trial based on an analysis of the basic purpose of the right of confrontation and cross-examination as detailed in *Crawford. Fry* at 974-76, 978-80. The purpose and nature of preliminary hearings in Colorado is limited, and

the preliminary hearing standards and procedure are similar to Utah. The *Fry* Court found that testimony is "much more" reliable when a witness is cross-examined before a jury because the jury can observe the demeanor of the witness. *Fry* at 975.

The *Fry* court found that under Colorado law, a preliminary hearing is limited to the determination of probable cause (the same standard as Utah) and the rights of the defendant are therefore curtailed. *Id.* at 976-78. Evidentiary and procedural rules are relaxed, and the right to cross-examine witnesses, or introduce evidence, is limited to the question of probable cause. *Id.* Once the prosecution has established probable cause, defense counsel has limited legal and practical legitimacy to pursue credibility inquiries. *Id.* at 976-77. The Colorado court concluded that legitimate cross-examination at a preliminary hearing is limited and therefore, "a preliminary hearing does not provide the same safeguards as a trial." *Id.* at 977. Similarly, this Court has held the confrontational cross-examination rights of a defendant are trial rights and do not exist at a preliminary hearing. *Timmerman,* at ¶¶ 9-11. Therefore, because of the limited nature of a preliminary hearing, a defendant's critical Sixth Amendment rights to confrontation of witnesses are not protected at a preliminary hearing in Utah.

It cannot be disputed that Colorado's preliminary hearing is essentially the same as explained by this Court in *Timmerman, Schmidt*, and *Jones,* as analyzed

above. The purpose of a preliminary hearing in Utah is limited to a determination of probable cause, and the defendant does not have all the rights available at trial. *See, Timmerman,* at ¶ ¶10-13.

The Texas courts have favorably cited *Fry* and the principles it stands for regarding the *Crawford* right of confrontation and cross-examination in the case of *Coronado v. Texas,* 351 S.W. 3d 315, 324-30 (Texas Ct. of Crim. App. 2011). *Coronado* did not involve preliminary hearing testimony but witness testimony made outside trial in a child abuse case. Regarding the importance of *Crawford* rights the Texas Court stated:

> Indeed, it is that personal presence of the defendant and the right to ask probing, adversarial cross-examination questions that lies at the core of an American criminal trial's truth-seeking function. As the Supreme Court stated in *California v. Greene,* a 1970 Confrontation Clause case, the right of confrontation forces the witness to submit to cross-examination, the "'greatest legal engine ever invented for the discovery of truth.'"
>
> *Id. at 325-26.*

The Texas Court also stated that the main purpose for meaningful cross-examination is to test the veracity and credibility of a witness. *Id*. at 326. This is best done at a trial or, if not, the process must be sufficient to provide for proper exercise of Confrontation. The Texas Court compared the situation of out of court interviews of child witnesses (with the limited opportunity to protect *Crawford*

rights) to a preliminary hearing by citing *Fry*. *Id*. at 327-28 (citing *Fry*). The court explained that preliminary hearings are usually restricted to an assessment of probable cause and limit the defendant's right of cross-examination on credibility issues. *Id*. Such hearings do not provide an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause. *Id.*; *See also, Blanton v. State,* 978 So. 2d 149, 154-56 (Florida 2008) (In order to satisfy *Crawford*, a defendant must have the opportunity to cross-examine a witness in a process designed to engage the adversarial testing of evidence).

Furthermore, *Fry* has been followed and distinguished since its publication, but the basic principles for which it stands have never been effectively challenged. The Supreme Court of Wisconsin followed the reasoning of *Fry* holding that the scope of cross-examination in a preliminary hearing, "is limited to issues of plausibility, not credibility," and, "is intended to be a summary proceeding to determine essential or basic facts relating to probable cause." *State v. Stuart*, 695 N.W.2d 259, at 266, ¶ 30 and ¶ 32 (Wisconsin 2005). Consequently, in *Stuart* the Supreme Court of Wisconsin concluded that the defendant's right to Confrontation had been violated and further that the missing witness had real issues regarding motivation and credibility, requiring more extensive cross-examination. The jury in *Stuart* also heard evidence regarding the missing witness's criminal history, recent burglary, and dishonest statements to police, during trial. *Id*., at 266-67, ¶ ¶ 34-38.

Idaho distinguished *Fry* in *State v. Mantz*, 222 P.3d 471 (Idaho App. 2009). In *Mantz*, the Idaho appellate court explained that the Idaho Supreme Court had previously precluded the introduction of preliminary hearing testimony of a witness not present at trial for reasons similar to the holdings in *Fry* and *Stuart*, but changed course after explicit legislative action in 1989 allowing the testimony. *Mantz*, at 475-76 (citing *State v. Elisondo*, 757 P.2d 675, 677 (Idaho 1988)).

The court in *Elisondo* specifically found the admissibility of preliminary hearing testimony to be an issue of policy, rather than constitutionality. *Mantz* at 476 (citing *Elisondo* at 678). Idaho now analyzes the admissibility of preliminary hearing testimony on, "a case-by-case approach," to determine adequacy of the opportunity for cross-examination. *Mantz* at 477 (citing *State v. Ricks*, 840 P.2d 400, 440 (Idaho App. 1992)). The appellate court of Missouri also declined to follow *Fry*, and despite finding similar policy considerations governing preliminary hearings, ruled that preliminary hearing testimony is admissible. *State v. Aaron*, 218 S.W.3d 501, at 516-17 (Mo. App. W.D. 2007).

Fry has been distinguished in *State v. Hannon*, 703 N.W.2d 498 (Minn. 2005), *State v. Henderson*, 136 P.3d 401 (N.M.App. 2006), *State v. Stano*, 159 P.3d 931 (Kan. 2007), *Chavez v. State*, 213 P.3d 476 (Nev. 2009), and *State v. Mohamed*, 130 P.3d 401 (Wash. App. 2006). *Hannon* distinguished *Fry* because the defendant was provided a full opportunity to cross-examine the missing witness at his prior trial of

the case, not a preliminary hearing. *Hannon* at 507. *Henderson* explained that *Fry* is distinguishable based on procedural rules governing preliminary hearings, and that New Mexico does bar the admission of prior testimony when the circumstances of a case show, "a real difference in motive or other limitation in the prior cross examination." *Henderson* at ¶ 11, ¶ 18 (internal citations omitted).

Stano similarly distinguished *Fry* finding that the procedural aspects of a preliminary hearing are different in that Kansas allows witnesses to be cross-examined on credibility during preliminary hearings and therefore is adequate. *Santo* at 945. *Chavez* also distinguished *Fry* on procedural grounds stating, "Nevada law is generally more permissive with regard to a defendant's right to discovery and cross-examination at the preliminary hearing," and "we do not find anything in our state law that would hinder a defendant's opportunity to cross-examine a witness at a preliminary hearing." *Chavez* at 484.

Finally, *Mohamed* similarly distinguished *Fry* on procedural grounds finding that the pretrial hearing testimony admitted at trial was subject to credibility determinations, not limited to probable cause, and was subject to appropriate motivation on direct examination. *Mohamed* at ¶ 20, ¶ 21.

This Court has recently examined the preliminary hearing process in Utah very thoroughly. As now mandated by this Court, the preliminary hearing process does not contemplate nor provide for a defendant's right of Confrontation under the

Sixth Amendment. *See, Timmerman.* The preliminary hearing process has such a low standard of proof, and its purpose so limited, that an adequate opportunity for cross-examination as required by *Crawford* does not generally exist under Utah's current preliminary hearing process. Again, in Utah a preliminary hearing is not designed to use the adversarial process to test witnesses and evidence as a trial is designed to do. Defendant Pham's *Crawford* rights were not met in this case and the prior testimony of the Menchaca should have been excluded.

The Court of Appeals incorrectly concluded that Pham had a full and fair opportunity to cross-examine Menchaca at the preliminary hearing. Menchaca's credibility was not at issue at the preliminary hearing. The existence of probable cause was the only matter of relevance. Pham did not have the right to confrontation at the preliminary hearing, and discovery was not complete. Pham requests that this Court reverse the Court of Appeals decision and hold that his Sixth Amendment right to confrontation was violated by the admission of Menchaca's preliminary hearing testimony where Pham did not have a full and fair opportunity to cross-examine him. The jury did have the opportunity to view Pham's testimony and demeanor, but viewed the demeanor of a prosecutor instead of Menchaca's. Pham could not challenge anything about Menchaca at trial, as is contemplated by Confrontational rights under the Six Amendment.

VII. CONCLUSION

This Court should vacate Defendant Pham’s conviction and remand the case for a new trial excluding Menchaca’s preliminary hearing testimony.

Dated this ____ day of November, 2016.

____
Michael J. Langford
Attorney for the Appellant

CERTIFICATE OF RULE 24 COMPLIANCE

Appellant certifies pursuant to Rule 24(f)(1)(c) Utah R. App. P. that the foregoing principal brief of appellant contains less than 13,100 words.

____
MICHAEL J. LANGFORD
Attorney for the Appellant

CERTIFICATE OF SERVICE

I, Adrianna Sandall, hereby certify that I have caused to be hand-delivered or mailed, postage pre-paid, an original and 7 copies of the foregoing to the Utah Supreme Court, together with a searchable CD, to 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 2 copies, together with a searchable CD, to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, on the _____ day of November, 2016.

____
Adrianna Sandall

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
ANH TUAN PHAM,
Appellant.

Opinion
No. 20140438-CA
Filed May 19, 2016

Third District Court, Salt Lake Department
The Honorable Katie Bernards-Goodman
No. 121903503

Michael J. Langford, Attorney for Appellant

Sean D. Reyes, Cherise M. Bacalski, and John J. Nielsen, Attorneys for Appellee

JUDGE MICHELE M. CHRISTIANSEN authored this Opinion, in which SENIOR JUDGE RUSSELL W. BENCH concurred.[1] JUDGE J. FREDERIC VOROS JR. concurred, except as to Part II, in which he concurred in the result, with opinion.

CHRISTIANSEN, Judge:

¶1 Defendant Anh Tuan Pham challenges his convictions. He argues that the admission of preliminary hearing testimony infringed upon his Confrontation Clause rights and that the State failed to produce sufficient evidence at trial to support one of the convictions. We affirm.

1. Senior Judge Russell W. Bench sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11-201(6).

BACKGROUND

¶2 Defendant and his friend went to a convenience store to replenish their party supplies. The victim (Victim) and his girlfriend went to the same convenience store to get water for their baby. After they arrived, they saw Defendant "picking on" or "bullying" two younger men outside the store. Victim approached, and the younger men asked Victim for a ride. Defendant turned to Victim and asked him several times if he "wanted problems too." Victim responded each time that he did not. Nevertheless, the situation escalated. Defendant pulled out his gun and shot Victim; the bullet entered Victim's lower abdomen and exited through his scrotum, before lodging permanently in Victim's left leg.

¶3 Two police officers were across the street from the convenience store and, upon hearing the gunshot, ran to the store, yelling "stop now" and "police." Defendant and his friend fled in a van, later ditching it and stealing an SUV whose owner had left it running. Defendant was apprehended later that night and was charged with discharge of a firearm causing serious bodily injury, receiving or transferring a stolen vehicle, obstructing justice, and failing to stop or respond to an officer's signal.

¶4 Victim was taken to a hospital, where he stayed for three days. For two weeks, he could not walk without pain. Victim later returned to the hospital for further treatment, believing that the bullet had hit a nerve and caused problems in his foot.

¶5 Victim testified at Defendant's preliminary hearing, and Defendant cross-examined Victim without any limitation by the trial court. However, Victim moved to Mexico before the trial in this matter, and neither the United States Marshals Service nor the Mexican authorities were able to locate him. The State therefore filed a motion in limine seeking to admit Victim's preliminary hearing testimony. The trial court granted that motion over Defendant's objection.

¶6 At Defendant's jury trial, Victim's girlfriend, Defendant's friend, and the responding police officers testified for the State. Victim's preliminary hearing testimony was also read to the jury. Defendant testified in his own defense. The jury found Defendant guilty of all four charges, and Defendant timely appealed.

ISSUES AND STANDARDS OF REVIEW

¶7 Defendant contends that the trial court erred in allowing Victim's preliminary hearing testimony to be read at trial, because doing so violated his constitutional right to confrontation. We review a trial court's decision to admit testimony that may implicate the Confrontation Clause for correctness. *State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519.

¶8 Defendant also contends that the State did not produce sufficient evidence of Victim's injuries to support Defendant's conviction for discharge of a firearm causing serious bodily injury. We will reverse a jury's guilty verdict due to insufficiency of the evidence only when the evidence, viewed in the light most favorable to the verdict, is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crimes of which he or she was convicted. *See State v. Kennedy*, 2015 UT App 152, ¶ 19, 354 P.3d 775; *State v. Labrum*, 2014 UT App 5, ¶ 17, 318 P.3d 1151.

ANALYSIS

I. Confrontation Clause

¶9 Defendant first contends that the admission of Victim's preliminary hearing testimony violated his Confrontation Clause rights. "The Sixth Amendment to the United States Constitution states in relevant part, 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

against him . . . .'" *State v. Marks*, 2011 UT App 262, ¶ 13 n.6, 262 P.3d 13 (ellipses in original) (quoting U.S. Const. amend. VI). "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *see also State v. Garrido*, 2013 UT App 245, ¶ 20, 314 P.3d 1014. *Cf. State v. Brooks*, 638 P.2d 537, 541 (Utah 1981) (noting, in a pre-*Crawford* case, that for purposes of a hearsay challenge, "cross-examination takes place at preliminary hearing and at trial under the same motive and interest" because defense counsel "acts in both situations in the interest of and motivated by establishing the innocence of [his or her] client"); *but see infra* ¶ 17 n.3.

¶10 Defendant does not contest that he was given an opportunity to cross-examine Victim at the preliminary hearing, but rather that "cross examination at a preliminary hearing is limited in scope and opportunity and therefore inadequate." Furthermore, Defendant "admits that he was not expressly limited in his cross-examination, but rather the nature of the preliminary hearing necessarily constricts confrontation." The essence of Defendant's argument is that preliminary hearings, as they are conducted under Utah law, are limited so as to preclude defendants from fully exercising their opportunity for cross-examination as guaranteed by the Confrontation Clause.

¶11 Though Defendant "requests that Utah reconsider its opinion" on this issue, he concedes that our appellate courts have determined that the opportunity to cross-examine a witness at a preliminary hearing can satisfy a defendant's right to confrontation at trial. Defendant cites to this court's opinion in *State v. Garrido*, 2013 UT App 245, 314 P.3d 1014, which addressed the use of a witness's preliminary hearing testimony when that witness was unavailable at trial. There, the defendant's trial counsel chose not to cross-examine a witness at the preliminary hearing, likely because her preliminary hearing testimony contradicted her earlier statements to police and thus was favorable to the defendant. *Id.* ¶ 5. When the witness largely

failed to appear at trial,[2] her preliminary hearing testimony was read to the jury. *Id.* ¶ 6. On appeal, the defendant argued that the admission of the witness's preliminary hearing testimony violated his Sixth Amendment right to confrontation. *Id.* ¶ 9. This court held that, under the facts of that case, "it was the opportunity to cross-examine [the now-unavailable witness], not the actual undertaking of cross-examination, that satisfied the requirements of *Crawford*." *Id.* ¶ 20.

¶12 We will overrule a decision previously made by this court only when we are "clearly convinced that the rule was originally erroneous or is no longer sound [due to] changing conditions and that more good than harm will come by departing from precedent." *State v. Tenorio*, 2007 UT App 92, ¶ 9, 156 P.3d 854 (citation and internal quotation marks omitted). Defendant does not explicitly indicate under which of these paths he seeks abrogation of *Garrido*. In any event, neither *Garrido* nor *Crawford* state a blanket rule that an opportunity to cross-examine a witness at a preliminary hearing will always, as a matter of law, satisfy a defendant's right to confrontation. Rather, we understand those cases to set forth the general proposition that it is *possible* for the cross-examination opportunity at a preliminary hearing to satisfy that right. It is in this light that we consider Defendant's claim that Utah preliminary hearings are structurally limited such that defendants are denied an opportunity to cross-examine witnesses in a manner that satisfies their Confrontation Clause rights.

¶13 Defendant states that "Confrontation requires an opportunity for full and unfettered cross-examination in order to discover and display credibility, consistency, and fact." He

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2. "[J]ust as her testimony from the preliminary hearing was about to be read aloud [to the jury] by a stand-in, [the witness] appeared in the back of the courtroom, shouted that she refused to testify, and fled from the courtroom." *State v. Garrido*, 2013 UT App 245, ¶ 6, 314 P.3d 1014.

asserts that "Utah preliminary hearings provide an inadequate opportunity for Confrontation" because Utah's "preliminary hearings do not allow Judge's to make substantial credibility determinations, are heard in favor of the prosecution, whom do not have to eliminate alternative inferences, and do not allow a defendant to deeply explore issues of credibility or fact." Thus, according to Defendant, "testimony elicited during [Utah preliminary hearings] is not subject to adequate cross-examination."

¶14 Defendant refers us to a Colorado case, *People v. Fry*, 92 P.3d 970 (Colo. 2004), which was decided shortly after *Crawford*. The Colorado Supreme Court held that a defendant's right to confrontation was violated when the court admitted a deceased witness's preliminary hearing testimony at trial. *Fry*, 92 P.3d at 973, 981. In doing so, the court expressed concern that, because credibility is not an issue at a preliminary hearing, a defendant's cross-examination might not explore a witness's credibility. *Id.* at 977–78. The court explained that "allow[ing] extensive cross-examination by defense counsel so as to prevent any Confrontation Clause violations at trial if a witness were to become unavailable . . . would turn the preliminary hearing in every case into a much longer and more burdensome process for all parties involved." *Id.* at 978. The Colorado Supreme Court noted its belief that other states had elected to do exactly that and, consequently, had preliminary hearings that amounted to mini-trials in order to provide defendants a full cross-examination opportunity. *Id.* at 977. The court concluded that Colorado's "preliminary hearing [procedure] does not provide an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause requirements," and it refused to "expand the scope of [Colorado] preliminary hearings in order to allow them to satisfy Confrontation Clause requirements." *Id.* at 978.

¶15 Defendant "insists that Utah's preliminary hearing standards are essentially the same as Colorado" but provides no comparative analysis of Colorado and Utah standards. We are

therefore unable to measure how closely Utah's preliminary hearing standards track those of Colorado.

¶16 However, Defendant does describe some facets of Utah's preliminary hearing process. For example, he notes that "'the bindover standard [of the preliminary hearing] is intended to leave the principal fact finding to the jury.'" (Alteration in original) (quoting *State v. Virgin*, 2006 UT 29, ¶ 21, 137 P.3d 787). Defendant also explains that the "'evidentiary threshold at [the preliminary hearing] is relatively low'" and "'a showing of "probable cause" entails only the presentation of "evidence sufficient to support a reasonable belief that the defendant committed the charged crime."'" (Alteration in original) (quoting *State v. Ramirez*, 2012 UT 59, ¶ 9, 289 P.3d 444). And Defendant reminds us that the magistrate's role in assessing credibility at a preliminary hearing is limited and that the magistrate is to take reasonable inferences in the prosecution's favor.

¶17 These statements, while true, do not limit the ability of a defendant to conduct a full cross-examination at a preliminary hearing. Although "principal fact finding" and determinations of credibility are left until trial, such considerations impose no obvious structural limitation on the scope or depth of cross-examination a defendant may conduct at a preliminary hearing. We are therefore unable to conclude that cross-examinations conducted within Utah's preliminary hearing framework can never satisfy a defendant's Sixth Amendment right to confrontation. *See, e.g.*, *State v. Brooks*, 638 P.2d 537, 541–42 (Utah 1981) (holding that the defendants' opportunities for cross-examination during a preliminary hearing were constitutionally adequate for Confrontation Clause purposes, despite defense counsel being unaware of the witnesses' prior statements to police and thus being unable to cross-examine the witnesses about those statements, because defense counsel "apparently

advisedly and intentionally decided to refrain" from cross-examining the witnesses about the challenged topics).[3]

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3. On the other hand, we are also not convinced that a preliminary hearing always provides the opportunity for cross-examination guaranteed by the Confrontation Clause. The State filed a letter of supplemental authority pursuant to rule 24(j) of the Utah Rules of Appellate Procedure, citing *State v. Brooks*, 638 P.2d 537, 541 (Utah 1981), for the proposition that "cross-examination takes place at preliminary hearing and at trial under the same motive and interest." We note that counsel's possession of the same motive and interest in conducting cross-examination does not necessarily mean counsel had the same opportunity to cross-examine. *See Garrido*, 2013 UT App 245, ¶ 20 ("We conclude that it was the opportunity to cross-examine . . . , not the actual undertaking of cross-examination, that satisfied the requirements of *Crawford*."). Indeed, the *Brooks* court separately considered whether "certain omissions in cross-examination at preliminary hearing precluded [the defendants] from an adequate exercise of the right to confrontation." *Brooks*, 638 P.2d at 541.

Moreover, thirteen years after *Brooks* was issued, the nature of preliminary hearings in Utah was changed by the passage of the Utah Victims' Rights Amendment. As relevant here, the Utah Constitution was amended to provide that "[w]here the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists" and to provide that "reliable hearsay evidence" is admissible at a preliminary hearing. *See* Utah Const. art. I, § 12. In light of these changes, the Utah Supreme Court overruled *State v. Anderson*, 612 P.2d 778 (Utah 1980), upon which the relevant portion of *Brooks* had partially relied. *See State v. Timmerman*, 2009 UT 58, ¶¶ 14–16, 218 P.3d 590. It is therefore unclear whether *Brooks*'s blanket statement that "cross-examination takes place at preliminary hearing and at trial under the same motive and interest" is still

(continued…)

¶18 We need not decide today whether the inverse is true. It is true that some courts have considered changes in a defendant's motive to cross-examine and court-imposed limitations on cross-examination as factors relevant to determining whether a defendant had a full opportunity to cross-examine a witness during a preliminary hearing. *See, e.g.*, *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (holding that "[by] cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated [the defendant's] rights secured by the Confrontation Clause"); *State v. Henderson*, 2006-NMCA-059, ¶ 19, 136 P.3d 1005 (concluding that a defendant's right to confrontation was not violated where he had the same motive to cross-examine the witness at the preliminary hearing and enjoyed "an unrestricted right to cross-examine" the witness); *State v. Stuart*, 2005 WI 47, ¶ 38, 695 N.W.2d 259 (vacating a defendant's conviction where a court "did not allow [the defendant] to cross-examine [a witness] at the preliminary hearing about the effect the pending charges had on his decision to cooperate"). In the case before us, however, Defendant does not allege that his motivation to cross-examine Victim changed between the preliminary hearing and trial. Nor does he claim that the trial court limited his cross-examination in any way. Under the circumstances of this case, we cannot conclude that Defendant was prevented from exercising his Confrontation Clause right to, in Defendant's words, "unfettered cross-examination in order to discover and display credibility, consistency, and fact."[4]

(...continued)
true insofar as Confrontation Clause rights are concerned. *See Brooks*, 638 P.2d at 541.

4. On appeal, Defendant does not identify any shortcomings in the cross-examination actually conducted at his preliminary
(continued...)

¶19 Defendant has not demonstrated that Utah's preliminary hearing procedures limit cross-examination of a witness in such a way that a defendant's Confrontation Clause rights are necessarily violated if that witness's testimony is read at trial due to the witness's unavailability. Defendant does not claim that the specific circumstances of his preliminary hearing resulted in such a limitation. Consequently, we hold that the court did not err in allowing Victim's preliminary hearing testimony to be read to the jury at trial.

II. Serious Bodily Injury

¶20 Defendant next contends that the State did not provide sufficient evidence for the jury to conclude that Victim suffered serious bodily injury. Specifically, he argues that there was no evidence that the gunshot created a substantial risk of death.

¶21 Defendant was convicted of the first degree felony of unlawful discharge of a firearm causing serious bodily injury. *See* Utah Code Ann. § 76-10-508.1 (LexisNexis 2012). The Utah Criminal Code defines serious bodily injury as "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." *Id.* § 76-1-601(11). We consider only the third criterion—substantial risk of death.[5]

(...continued)
hearing. Rather, Defendant simply urges us to hold, as a matter of law, that Utah preliminary hearings never provide defendants with sufficient opportunity to cross-examine witnesses so as to satisfy the Confrontation Clause.

5. The State argues that the jury could also have found that the evidence of Victim's injuries satisfied the "protracted loss or impairment of the function of any bodily member or organ"
(continued...)

¶22 "[I]t is within the province of the jury to consider the means and manner by which the victim's injuries were inflicted along with the attendant circumstances in determining whether a defendant caused serious bodily injury." *State v. Bloomfield*, 2003 UT App 3, ¶ 18, 63 P.3d 110 (citation and internal quotation marks omitted). In addressing an insufficiency-of-the-evidence claim, we review the evidence and all reasonable inferences drawn therefrom in the light most favorable to the jury's verdict. *State v. Kennedy*, 2015 UT App 152, ¶ 39, 354 P.3d 775.

¶23 Defendant admits that Victim's preliminary hearing testimony described his being shot in the leg, bleeding, feeling dizzy, spending three days in a hospital, having trouble walking for about two weeks, and experiencing considerable pain during those two weeks. Defendant neglects to mention that Victim also testified that the bullet struck and lodged permanently in his leg only after first passing through Victim's abdomen and scrotum. *See State v. Mitchell*, 2013 UT App 289, ¶ 31, 318 P.3d 238 (noting that marshaling the evidence is "prudent tactical advice" because, generally, "[a]n appellant cannot demonstrate that the evidence supporting a factual finding falls short without giving a candid account of that evidence.").

¶24 Defendant does not refer us to any case in which an appellate court has determined that evidence of a gunshot wound was insufficient to support a jury's finding. Rather, he cites a single case in which a defendant beat his victim into unconsciousness, stomped on the victim's head, and ripped out the victim's eyebrow ring. *Bloomfield*, 2003 UT App 3, ¶ 3. There, this court held that the evidence presented to the jury was

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prong, on the ground that two weeks was a protracted length of time. *See* Utah Code Ann. § 76-1-601(11) (LexisNexis 2012). Because we conclude that the evidence was sufficient to support a jury finding of "substantial risk of death," we need not address that argument.

sufficient to support the jury's finding that the defendant had caused serious bodily injury. *Id.* ¶ 18.

¶25 Defendant baldly asserts that his case "simply does not present facts" like those in *Bloomfield* and that the jury's finding of serious bodily injury here therefore must have been unreasonable. But he does not argue that *Bloomfield* marks the boundary between bodily injury and serious bodily injury. Thus, the fact that the evidence of a severe beating in that case *was sufficient* to sustain the jury's finding of serious bodily injury has no bearing on Defendant's claim that the evidence of a shooting in his case *was not sufficient* for the jury to find that he caused serious bodily injury.

¶26 In any event, Defendant fails to cite any authority suggesting that gunshot wounds do not or cannot create a substantial risk of death. On the contrary, a cursory search reveals several cases in which gunshot wounds to the leg have been fatal. *See, e.g., Hawkins v. Lafler*, No. 11-cv-11250, 2015 WL 2185970, at *1 (E.D. Mich. May 11, 2015) (after being shot in the leg, the victim ran away to take refuge in a house, where he died from blood loss); *Ostling v. City of Bainbridge Island*, 872 F. Supp. 2d 1117, 1121 (W.D. Wash. 2012) (a man was shot in the leg and then bled to death); *People v. Payton*, No. 257402, 2006 WL 548917, at *1–2 (Mich. Ct. App. Mar. 7, 2006) (per curiam) (noting that a defendant shot a victim in the leg, that "the natural tendency of such behavior is to cause death or great bodily harm," and that the victim did in fact die). Even if the wound is not directly fatal, a gunshot to any part of the body can cause infections that lead to death. *See, e.g., People v. Fedora*, 65 N.E.2d 447, 455–56 (Ill. 1946) (two doctors' opinions that a victim's death had been caused by peritonitis resulting from a gunshot wound were "sufficient evidence" to support a jury finding that the shooter was responsible for causing death); *State v. Davis*, 295 S.W. 96, 97–98 (Mo. 1927) (testimony from two doctors that a victim's death had been caused by peritonitis resulting from being shot in the abdomen by the defendant approximately two months before death was "amply sufficient to support the

verdict" of manslaughter); *see also, e.g.*, *State v. Hamilton*, 192 S.E.2d 24, 25 (N.C. Ct. App. 1972) (considering the admissibility of a doctor's opinion that a victim died from "pneumonia [that] was secondary to the peritonitis which was secondary to the gunshot wound."); *State v. Nix*, No. C-030696, 2004 WL 2315035, at paras. 3, 16 (Ohio Ct. App. Oct. 15, 2004) (victim died in hospital, after being shot in the abdomen, from "acute ischemic colitis with peritonitis" or "dying bowel due to inadequate vascular supply due to injur[ed] vessels due to gunshot wound" (internal quotation marks omitted)); *Adams v. State*, 202 S.W.2d 933, 934 (Tex. Crim. App. 1947) (noting that a decedent's death from peritonitis was traceable to a gunshot wound caused by the defendant, who was therefore guilty of capital murder). Because being shot can lead to death, it is not inherently unreasonable for a jury to find that a particular shooting resulted in serious bodily injury by creating a substantial risk of death.

¶27 We will vacate a defendant's conviction after a jury trial due to the insufficiency of the evidence only if we determine that the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt as to whether the defendant committed the crime of which he or she was convicted. *State v. Kennedy*, 2015 UT App 152, ¶ 39, 354 P.3d 775. Defendant has not demonstrated that a reasonable jury, after hearing evidence that Defendant fired a bullet that penetrated Victim's abdomen, scrotum, and leg, causing Victim to be hospitalized for three days, must have entertained a reasonable doubt as to whether Defendant created a substantial risk of death.

CONCLUSION

¶28 The trial court did not err by admitting Victim's preliminary hearing testimony to be read to the jury after determining that Victim was unavailable, because Defendant had a full opportunity to cross-examine Victim at the preliminary hearing. Defendant has failed to show that the

evidence was insufficient to support a jury finding that Victim suffered serious bodily injury.

¶29 Affirmed.

VOROS, Judge (concurring in part and concurring in the result in part):

¶30 I concur in the majority opinion except as to Part II, in which I concur in the result only.

¶31 I would reject Pham's sufficiency challenge on marshaling grounds. True, our marshaling rule no longer requires the appellant to present "every scrap of competent evidence" supporting the verdict. *See State v. Nielsen*, 2014 UT 10, ¶ 43, 326 P.3d 645. But an appellant still bears the burden of persuasion. *Id.* ¶ 42. And to persuade a court that an injury was not so serious as to satisfy the statutory definition of "serious bodily injury" an appellant must at minimum accurately describe the injury.

¶32 Here, Pham argues that Victim did not suffer serious bodily injury without acknowledging all the bodily injury Victim suffered. Pham states that Victim "testified that the bullet struck his leg." In fact, the record shows that the bullet produced three wounds: it entered Victim's body above his penis on the right side, passed through his scrotum on his left side, and lodged in his leg. The first two wounds are not mere "scraps" of evidence; they are additional evidence that Victim's injury qualified as serious. Without acknowledging them, Pham cannot show that the evidence of serious bodily injury fell short.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article I, Section 12 [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.