

IN THE DISTRICT COURT OF MAYES COUNTY,
STATE OF OKLAHOMA.

THE STATE OF OKLAHOMA,)
)
) Plaintiff,))
)
) -vs-)
)
) GENE LEROY HART,)
)
) Defendant.))

Case No. CRF-77-131
CRF-77-132
CRF-77-133

FILED IN THE DISTRICT COURT
MAYES COUNTY, OKLAHOMA

PRELIMINARY HEARING

OCT 5 1978

VOLUME VII

ELDISE GIST, Court Clerk
BY *Jess B. Clanton, Jr.*
Deputy

HEARD BEFORE: Honorable Jess B. Clanton, Jr., Special Judge
June 16, 1978

A P P E A R A N C E S

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P R O C E E D I N G SJune 16, 1978

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2
3 THE COURT: This is CRF-77-131, 132, 133,
4 State of Oklahoma versus Gene Leroy Hart.

5 Let the record show that the Defendant is present
6 with counsel, State is present, and if you are ready to
7 begin with your demurrer, Mr. Isaacs, Court is ready.

8 MR. ISAACS: Judge, at this time, I'd like to
9 file in open court, a Brief in Support of our Demurrer and
10 Motion to Dismiss.

11 THE COURT: All right. Does the State have a
12 copy of your briefs, Mr. Isaacs?

13 MR. ISAACS: Yes, sir.

14 MR. WISE: We do, Your Honor.

15 MR. ISAACS: Judge, the State in this case, relies
16 solely upon what is called in law, circumstantial evidence.

17 Circumstantial evidence defined in Aday against
18 the State as that evidence which inferences must be drawn
19 at to the existence of disputed facts, and as I cite it there
20 in my brief, I think a good example of what is circumstantial
21 evidence, or indirect evidence, is from that little example
22 there.

23 If you are a police officer and see the traffic
24 light turn red for northbound traffic just as the Defendant
25 entered the intersection from the south, then that's direct

1 evidence. And if you are a police officer that has stopped
2 at an intersection, heading in a easterly direction and the
3 traffic light for that direction of traffic turned green
4 just as the Defendant entered the intersection from the
5 south, that would be circumstantial evidence.

6 It's well settled in Oklahoma that circumstantial
7 evidence can establish facts sought to be proved in a court
8 of law. But the law is clear also that when establishing a
9 fact by circumstantial evidence, that evidence cannot be an
10 inference, based upon another inference. And I cite there
11 in my brief the case Star against Brumley. And in that
12 case - it's a civil case, the law is well settled that the
13 law of evidence, rules of evidence in a civil case and in
14 criminal cases are applied in the same manner.

15 In Star against Brumley, civil case for damages,
16 personal injury, action was one of negligence. Brumley,
17 driving along a road just outside of Fairfax, Oklahoma, one
18 night had a flat tire and pulled his car off to the side of
19 the road, got out of his car and commenced to fix the flat.
20 While he was fixing the flat, several cars passed him and it
21 was dark and they had lights on. Later, Brumley was struck
22 and injured and he sued Star. At the trial, Brumley called
23 several witnesses who testified about the conditions and
24 called one witness who identified Star as the driver of the
25 vehicle that he had seen after passing Brumley. That witness

1 testified that he passed Brumley and observed Star in the
2 presence of two other men come toward him in another vehicle.
3 He further testified that Star was the driver of that vehicle
4 and that the vehicle was traveling at an excessive rate of
5 speed.

6 At the trial, the Trial Court committed the jury
7 to consider that evidence and the jury found against Star
8 in the amount of \$15,192.00. Star's lawyers appealed upon
9 the grounds that there was no inference or fact in law which
10 would be drawn from any of the circumstances which could
11 show that Star was negligent. They are argued that it's
12 elementary that an inference of facts cannot be based upon
13 another inference. That presumption cannot be based on
14 another presumption. No inference of facts or law is reliable
15 that's drawn from premises which are uncertain.

16 Where circumstantial evidence is relied upon to
17 prove a fact, circumstances must be proved and not themselves
18 presumed.

19 The Court, in ruling upon that argument, said the
20 law required an open visible connection between the principal
21 and the evidentiary facts and the deductions from them and
22 does not permit a decision to be made on remote inferences.
23 There must be a visible connection between facts by which
24 the person's presumption arises, and facts sought to be
25 established by the dependent presumption.

1 Now, Your Honor, in this case, the State relies
2 upon some pictures and their connection to the homicide at
3 Camp Scott and it is our position that this is merely an
4 inference based upon an inference. The State's case presumes
5 that the perpetrator or perpetrators of these homicides
6 stole Susan Emery's glasses and that the masking tape found
7 in the same general vicinity of the pictures and the glasses
8 was masking tape which was an instrument of the crime. The
9 State assumes further that the newspaper found at the loca-
10 tion six miles from Camp Scott was the same newspaper put in
11 the flashlight at Camp Scott. We know it's got the same
12 date on it.

13 This gives rise to inference, all these assumptions,
14 that the perpetrator or perpetrators of these homicides were
15 in the area of the cave-cellar location but there's no evi-
16 dence in the record as to who put the pictures in the cave-
17 cellar area. There's no evidence of how long the pictures
18 had been in the cave-cellar area and to infer that Gene Hart
19 developed the pictures, had them in his possession since 1969,
20 is speculation remote to this case. To infer that Gene Hart
21 put the pictures in the cave-cellar area is mere speculation
22 and the law does not deal in speculation, conjectures or
23 suspicion. To infer that the pictures were put there at the
24 same time as the other items of evidence, the tape, the
25 glasses and anything else found at that location is to base

1 failed to do in the past.

2 In the case of Sunray Oil against Burge, this was
3 an action for damages caused by a certain petroleum product
4 being emptied into Beaver Creek, a stream in Jefferson
5 County that ran into another creek called Cow Creek. And
6 these petroleum products, it was alleged, were the cause of
7 the death of several head of cattle. A witness named Climber
8 - this lawsuit was tried in 1951 and the damages arose in
9 1949, I believe - a fellow named Climber testified he was
10 fishing in Cow Creek, the creek was polluted where the
11 cattle drank the water. Climber testified that he tasted
12 the water, it had a bad taste, puckered his mouth like a
13 green persimmon. A game - State Game Pollution Officer testi-
14 fied that some time, about ten years later, he observed
15 colored water flowing in Cow Creek, which appeared to contain
16 some oil. Several other witnesses testified that similar
17 circumstances about the color of the water. One witness
18 testified that he observed sewage from Duncan, the city of
19 Duncan, located north of the Defendant's refinery, drained
20 into Cow Creek and he testified that salt water and oil
21 waste from producing oil wells was dumped into Cow Creek.
22 At the trial of the case, the Court overruled the Plaintiff's
23 - the Defendant's Demurrer to Plaintiff's case. The jury
24 awarded damages to the Plaintiff and the Defendant appealed.

25 The Court there cited Crest of Light Company, Inc.

1 an inference upon another inference, which Star against
2 Brumley says clearly cannot be done. To infer that Gene
3 Hart put those pictures there at the same time is to base
4 the case on a conjecture or suspicion and not upon any con-
5 crete evidence in the nature of circumstantial evidence.

6 I cited there Ogden against Baker; you can read
7 one of them or you can read all of them, Judge, they all
8 say the same thing about circumstantial evidence. It cannot
9 be an inference based upon an inference and in Ogden against
10 Baker, had an automobile crash, the driver of the automobile
11 stated shortly after the collision that a steering wheel
12 was - my steering wheel went out and my brakes went out.
13 The Plaintiff sued him saying that if he knew they were
14 defective at the time he was driving the car, then he knew
15 it before the accident. Therefore, he was negligent in not
16 having repaired it.

17 The Supreme Court of Oklahoma held in that one
18 that the cause or connection cannot be established by basing
19 inference upon inference. The Court there said okay, you've
20 got inference, circumstantial evidence that he knew some-
21 thing was wrong with his steering wheel. But you cannot use
22 that as a basis for going to another inference. That he was
23 negligent in not having it repaired. You cannot use that
24 as the connection between the factual act which caused the
25 injury to something that the Defendant did in the past or

1 against Hallory in ruling that in order to sustain a recovery,
2 there must be a cause or connection between the negligence
3 infered and the injury received and such cause or connection
4 cannot be established by basing inference upon inference or
5 presumption upon presumption and they cite Ogden against
6 Baker in regards to this circumstantial evidence about the
7 pollution of the creek.

8 In the case of Chickasha Cotton Oil Company
9 against Hancock, similar type of lawsuits, several deaths
10 of cattle resulted when salt water poisoned. The cases
11 based upon circumstantial evidence. Court ruled where there's
12 no direct particular medical evidence and cases based solely
13 upon circumstantial evidence, any fact may be proved by
14 direct circumstantial evidence or a combination of direct and
15 circumstantial evidence but they go on to say that you cannot
16 use an inference as a basis for another inference to prove
17 that grease from the Chickasha Cotton Oil Company caused
18 the pollution of the stream and the death of the cattle.

19 I think our research has been extensive, Judge,
20 we've been through a number of cases which I've cited there.
21 I won't belabor the point. I just say that the United States
22 Supreme Court has mentioned this rule, U. S. versus Ross,
23 Case 92 U. S. 281, and that the rule is followed consistently
24 throughout the case law of the State of Oklahoma.

25 Proposition No. 2 is that there's no identification

1 of Gene Leroy Hart as a perpetrator of these crimes and
2 therefore, no probable cause to hold him to answer to these
3 charges.

4 As Your Honor knows, hair is circumstantial
5 evidence. The witness on the witness stand testified that
6 she had compared Gene Hart's hair to the hair found in the
7 tent and the hair on the tape and she could not positively
8 identify anybody.

9 If we're going to say -- if we're going to infer
10 from that that Gene Hart - the hair found in the tent of the
11 victims, analyzed by this expert witness, the witness raised
12 the inference that Gene Hart's hair is similar in character-
13 istics, then that is to base that as an inference that there-
14 fore, therefore, Gene Hart is the perpetrator of the crime
15 and that upon this inference, we rely upon what was found
16 inside the cave as our basis for circumstantial evidence.

17 It is our position that that is an invalid infer-
18 ence and cannot be the basis for any circumstantial argument.
19 I feel like, Judge, that here the State has not shown far
20 enough, haven't put on enough evidence to show that there's
21 probable cause to believe that our client committed any
22 crime. In U. S. against Ross, Court said the very foundation
23 of evidence is established of one or more facts on which the
24 inference is sought to be made and the law requires that the
25 matter should be established by direct evidence as if they

1 were the very facts in issue. It goes on to say, whenever
2 circumstantial evidence is relied upon to prove a fact, the
3 circumstances must be proved and not themselves presumed.

4 We respectfully request that the Court dismiss
5 these charges and sustain our Demurrer to the State's evi-
6 dence.

7 THE COURT: Mr. Wise?

8 MR. FALLIS: If it please the Court, may I first
9 apologize to the Court? We did not prepare a brief. It
10 was my understanding at the conclusion of the proceedings
11 last, I believe the Court said --

12 THE COURT: It was not requested by the Court, Mr.
13 Fallis.

14 MR. FALLIS: If I may, very briefly, Your Honor,
15 I think it would be necessary, first of all, to establish
16 three basic propositions which I think one of which has been
17 slightly touched upon by counsel. The one that has been
18 completely ignored is the proposition, first of all, that
19 the Court must examine the evidence, not inferences, but
20 evidence, and keep in mind that the evidence draws, if you
21 will, attention to three actual places or a person.

22 Cave No. 1, according to the evidence, if I recall,
23 and I'm sure Your Honor will recall very well the evidence
24 from the notes I know you have been making, is tied indis-
25 putably to the person responsible for the deaths of the little

1 girls by virtue of ^{not} an inference but by virtue of the fact
2 of the masking tape that has indisputably been matched.
3 The partial roll with the tape on the flashlight back at
4 the camp area where the bodies were located. It's matched
5 also by virtue of the fact that the glasses taken during
6 this period of time from Susan Emery from the counselor's
7 tent were found there at the cave site and the State would
8 concede, perhaps, that it is possible that other people had
9 access to the same newspaper, April 17, 1977, and could have
10 put it in the back of a flashlight but when you take that
11 same flashlight and put the masking tape on the same flash-
12 light that has that newspaper and that masking tape matches
13 Cave No. 1 masking tape, undisputed - not circumstance, a
14 fact - then we have to conclude the person responsible was
15 at some time connected with that cave and that particular
16 location.

17 Now Gene Leroy Hart is connected to that cave, Your
18 Honor, in two ways: One was by virtue of the stipulation
19 by counsel. We will stipulate, he said, and we accepted the
20 stipulation that Gene Leroy Hart is very familiar, knows
21 the area, and grew up in that area and Your Honor will recall
22 testimony as to how remote, how this particular scene was
23 not one that's visible from open highway, but was remote in
24 nature.

25 And the photographs testified to by Mr. Linsey as

1 having been in the darkroom while Gene Leroy Hart was work-
2 ing at Granite, introduced as having been where - not down
3 inside the cellar, not down inside the cave, but out in the
4 open and if you will examine the particular photographs,
5 Your Honor, based and coupled with the testimony of the
6 witness Dry, who saw them in the possession of Gene Leroy
7 Hart after their escape in 1973 from the Mayes County Jail,
8 the condition of the pictures would obviously be evidenced
9 before this Court, but their condition does not suggest
10 that they had been laying there in that open area for any
11 great length of time.

12 In reference to the date of June 13, 1976 -- '77.
13 So Cave No. 1 ties two things: It ties the killer to the
14 scene and ties the Defendant Gene Leroy Hart to that cellar
15 area and we change locations.

16 At the scene where the little bodies were found,
17 there was a flashlight with the tape, with the green paper,
18 but more importantly, not discriminantly found flooding down
19 the highway but embedded between the tape on the little
20 Milner victim's hand and on the tape on her pajama top, is
21 a hair that is not inferred, as counsel says, that is not
22 similar, as counsel says, but according to the testimony of
23 that witness, was exactly the same as every characteristic
24 as Gene Leroy Hart. That was the testimony, Your Honor,
25 not that it was similar. She said that every characteristic

1 matched and she said I matched it not once but went over it
2 several times and I said, "Why?" She said, "To be sure."

3 So I'm saying for the purpose of Preliminary
4 Hearing, that Gene Leroy Hart has been attached to the cave
5 where the killer has been attached by virtue of physical
6 evidence found. That he is attached to the tent by the
7 same testimony concerning the hair where the little Farmer
8 girl and where the little Guse girl were and where the little
9 Milner girl all spent their last night. And he is physical-
10 ly attached to the body itself, Your Honor, by this hair.

11 Now, two propositions: One proposition is that
12 the State is presenting a case for the purpose of Preliminary
13 Hearing obviously, and they rely, in part, on circumstantial
14 evidence. And that's what we have in this case. As a
15 matter of fact, the State may rely entirely, if necessary,
16 on circumstantial evidence - not just for a Preliminary
17 Hearing, but for the actual trial, even in homicide cases.

18 And the second proposition is as to what quantum
19 of proof is necessary for the State of Oklahoma to sustain
20 this hearing at the preliminary level. And that quantum of
21 proof, Your Honor, is that a Defendant may be held to answer
22 on circumstantial evidence offered at the Preliminary Hearing
23 and further that the nature of the evidence offered at the
24 Preliminary Hearing need only be that a crime was committed
25 and probability that the Defendant may have committed that

1 crime. And I have a list of citations for Your Honor, and
2 I have copies of the cases if Your Honor desires to look
3 at those at this time.

4 In particular, I would call your attention to
5 two cases cited: These, by the way, are criminal cases,
6 Your Honor, not civil matters that I think are appropriate
7 to the case here.

8 Capers versus State, that's 450 P. 2d 842. A
9 1969 Oklahoma Criminal Case, using the language, we would
10 point out with reference to Defendant's contention that the
11 Trial Court lacked jurisdiction to try the Defendant because
12 the confession, et cetera, et cetera, comes on down and
13 says the following concerning the burden of proof upon the
14 State. Only to show that a crime was committed and the
15 probability that the Defendant at the bar may have committed
16 the crime. The same language is echoed in the 1971 Oklahoma
17 Criminal Case, Sutterville versus State, 489 P. 2d 1345.

18 One other matter that I would like to touch upon
19 briefly, Your Honor, and that is concerning circumstantial
20 evidence. I would not suggest in any way, nor would I agree
21 with counsel that this is building inference upon inference.
22 Physical evidence undisputed is not an inference. It's
23 from that physical evidence that Your Honor can deduce the
24 circumstances that meet the requirements that we have proven
25 here. That is that Gene Leroy Hart, the fact a crime was

1 committed, murder, that's not disputed; that venue has been
2 proven and the fact that there's been sufficient evidence
3 here to show that the Defendant Gene Leroy Hart probably
4 or may have committed the crime. Concerning circumstantial
5 evidence, further language, I think, is available to the
6 Court that is of importance here. A criminal case, accord-
7 ing to the Luke or at 552 P 2d 715, and this is a 1976
8 Oklahoma Criminal case.

9 Criminal case may be proved circumstantial and
10 reasonable inferences drawn from circumstantial evidence
11 have the same probative effect as does direct testimony.
12 Additionally, circumstantial evidence need not exclude
13 every other hypothesis or negate any possibility other than
14 guilt.

15 Now, Your Honor, I have before you and I'll submit
16 to you as has counsel here, a list of citations we have
17 relied upon and make available, if Your Honor desires, a
18 Xerox copy of the same cases.

19 THE COURT: All right.

20 MR. FALLIS: But I would finally state that in this
21 particular instance, this is not a trial. It is a Prelimi-
22 nary Hearing, although I feel at times it's been conducted
23 in the length of it at least, as a trial and well that is,
24 since the barometal case does allow certainly wide latitude
25 for the purpose of discovery since Oklahoma has limited

1 discoverability on the part of Defense. So I certainly
2 understand and appreciate that but notwithstanding the
3 fact that it may have been belabored at point and at times,
4 when you boil it down to the very bone issue of whether the
5 State of Oklahoma has, in fact presented sufficient evidence
6 to cause this Court to find that a crime was committed,
7 that it was committed in Mayes County and to find also that
8 there is a probability that the Defendant may have commit-
9 ted that crime, then I think the overrule of Cave No. 1, as
10 being designated in testimony with the evidence physically
11 found there, coupled with the scene of the tragedy itself,
12 coupled ultimately with that testimony that a hair matching
13 in all respects, every characteristic of Gene Leroy Hart is
14 found at the scene and on the body of the victim, what would
15 be the probability? What would be the possibility of Gene
16 Leroy Hart's hair being found, not only on the body of the
17 victim but his property being found at the location where
18 property taken during the commission of this crime was
19 later found, boggles the imagination.

20 I submit to Your Honor, with all respect, that the
21 State has met its burden at this point on this particular
22 case.

23 THE COURT: Mr. Isaacs, a final comment?

24 MR. ISAACS: Your Honor, we're not dealing with
25 probability here. The law is well settled. People against

1 Collins, cited in McCormack on evidence was an armed rob-
2 bery case where they charged a black male and a white
3 blond headed female, the black man having a mustache. The
4 State called an expert witness who was a mathematician.
5 That gave him these characteristics; that partly yellow
6 automobile, individual probability, one in ten; a man with
7 a mustache, probability one in four; a girl with a pony tail,
8 one in ten; a girl with blonde hair, one in three; a Negro
9 man with a beard, one in ten; and interracial couple in a
10 car and an expert testified that was a one in twelve millionth
11 possibility; and when these people were arrested, they had
12 to be the ones that committed the crime. The Court that's
13 unreliable evidence. We're reversing this conviction with
14 orders that you discharge these people.

15 It's not Gene Leroy Hart's hair at the Girl Scout
16 tent; there's no proof in the record that's his hair. It's
17 not Gene Leroy Hart's hair that's on the tape. There is no
18 proof of the record that it's his hair on the tape. What
19 the State would like to say came from Gene Leroy Hart could
20 have come from any other Indian male or female in Mayes
21 County, State of Oklahoma, any place in the United States.
22 He says that we find evidence at the cave, in the cellar
23 area, we find evidence that Gene Leroy Hart's been there.
24 We stipulate that Gene Hart grew up in the area of that cave,
25 that he has been there in the past and that he was there in

1 the past, within the past few years. But we're not going to
2 say that Gene Leroy Hart was the one that put those pictures
3 there because he didn't and there's no evidence to show that
4 he had been there, Judge. The basis for their inference
5 that Gene Leroy Hart was there with evidence coming from
6 Camp Scott is an inference upon an inference. We know the
7 pictures were there; we don't know who put them there or
8 how they got there. Mr. Dry says he's not sure that they
9 were the same pictures; he said they looked like them and
10 I now may be misquoting him but if I remember correctly, he
11 said they looked like them. Mr. Fallis says the hair is the
12 same in every characteristic and the State's own expert
13 witness says you can't identify somebody by hair. Mr. Fallis
14 talked about the quantum of proof. We're dealing with
15 probable cause and reasonable grounds to hold a man to answer
16 to these charges.

17 Judge, these are serious offenses. The most
18 serious offense that a man in our society can be charged
19 with. We cannot disregard the law of circumstantial evidence
20 because of public opinion and because of the heinous nature
21 of these crimes, Mr. Fallis cited a line of cases standing
22 for the proposition that circumstantial evidence is, and
23 only circumstantial evidence is sufficient for a conviction
24 and sufficient to bind people over to stand trial. That is
25 correct; that is the law. Mr. Fallis cited the Capers case

1 mentioned a confession in the case. Two later Oklahoma
2 Court of Criminal Appeal decisions on this subject are
3 Berryhill against the State in 568 P 2d 1306, Berryhill --
4 Berryhill was convicted. He appealed that there's not
5 enough circumstantial evidence to bind me over to stand
6 trial and the Demurrer and Motion to Dismiss should have
7 been sustained. The Court in that case lists these facts,
8 Judge:

9 A person fitting Berryhill's description was seen
10 leaving a truck which met the description of Berryhill's
11 truck and seen going into the victim's house shortly after
12 the time she returned home from grocery shopping. When
13 the investigators arrived, the grocery bag was full of
14 groceries and when the body was found, it indicated that
15 she had been assailed shortly after she got home from the
16 grocery store.

17 There were samples of hair that could have come
18 from the victim found in the pickup of Berryhill. The Court
19 in that case says there's ample evidence to bind that case
20 over to stand trial. We don't have anybody here fitting the
21 description of Gene Leroy Hart going into the tent; we don't
22 have anybody here fitting the description of Gene Leroy Hart
23 anywhere near Camp Scott; we don't have Gene Leroy Hart
24 putting pictures down in the area where other evidence was
25 found; we don't have Gene Leroy Hart anywhere in Mayes County.

1 There's no evidence from that witness stand as to his
2 whereabouts.

3 In the case of State against Edmondson, 536 P 2d
4 386, Edmondson was convicted, he appealed on the same grounds.
5 They didn't have enough evidence to hold him for trial,
6 should have been dismissed at Preliminary Hearing. That case
7 -- did I give the citation for that 536 P 2d 386, Defendant
8 had cuts on his arm and Defendant had the decedent's bill-
9 fold in his possession. Hair in the Defendant's truck was
10 similar to the decedent's. Blood found on the Defendant's
11 knife matched the decedent's blood type and the Court says
12 yes, these facts are enough to bind a man over to stand
13 trial. We don't have any evidence other than inferences
14 based upon other inferences which the law is clear in saying
15 that is not the type of evidence we're wanting to rely upon.
16 It's not circumstantial when your basis for your circumstan-
17 tial evidence is another inference and not a proven fact.

18 Judge, I know this case involves politics, it's
19 had a lot of publicity. Many judges, because they're only
20 human, wouldn't have the courage to follow the law so I state
21 to you that it may not be the path of least controversy, and
22 it may not be the most popular thing to do to dismiss these
23 charges.

24 THE COURT: Mr. Isaacs, I prefer you stick to legal
25 argument, if you don't mind.

1 MR. ISAACS: To do the right thing according to
2 the law, Judge, and the law is exact in what it demands and
3 we ask that you dismiss the charges.

4 THE COURT: Is the State desirous to respond?
5 I'll have to allow Mr. Isaacs another chance to respond.
6 Do you have anything that you wish to respond with, Mr.
7 Fallis?

8 MR. FALLIS: Only one statement. That was the
9 statement by counsel concerning the fact that he says Gene
10 Leroy Hart was not there. There's been no evidence to that
11 fact and I do want to call that to the Court's attention.
12 I believe he made that statement that he was not at the
13 cave.

14 MR. ISAACS: Well, I just say in response, the
15 burden rests with the State to prove their end of the deal,
16 not us.

17 THE COURT: Mr. Fallis, you say you have a list
18 of citations?

19 MR. FALLIS: Yes, Your Honor.

20 THE COURT: Mr. Isaacs, did you get a copy of
21 these?

22 MR. ISAACS: No, I didn't. Judge, I'd be glad to
23 submit these to the Court, if you'd like to view these.
24 They're circumstantial evidence cases.

25 THE COURT: Thank you.

1 MR. WISE: If it please the Court, do you desire
2 of any of the photostatic copies?

3 THE COURT: I don't know that I'll want to read
4 all of them, but if you have the cases?

5 MR. WISE: We have the photostatic copies of all
6 the cases.

7 THE COURT: Why don't you lay them right up here
8 in case I want to go to one of them?

9 MR. WISE: Very well, Your Honor.

10 MR. ISAACS: Here's another one, Judge. Judge,
11 could we have a little recess to go in the library?

12 THE COURT: I think we can have about a ten minute
13 recess, if you'd like.

14 (Following a ten minute recess, proceedings
15 continued as follows:)

16 THE COURT: Mr. Wise, Defense Counsel has asked
17 if the Court would permit a response to authority cited and
18 I indicated that I would.

19 MR. WISE: Very well, Your Honor.

20 THE COURT: If he desires to do so. Why don't you
21 begin, Mr. Isaacs?

22 MR. ISAACS: Judge, I'd like to point out that
23 Mr. Fallis' list of authorities in parliamenter against the
24 State does not discuss circumstantial evidence nor does it
25 deal with quantum of evidence. That the case goes to whether

1 or not you can depose the witness in a criminal proceeding
2 through a civil proceeding filed there separately and apart
3 from it.

4 Capes against the State, there is the confession.
5 Taylor against the state, eyewitness to a shooting. McAl-
6 lister against the State goes to the issue of whether or not
7 a charge has been dismissed at a Preliminary Hearing can be
8 re-filed and under what circumstance that evidence may be
9 permitted to be presented at a second Preliminary Hearing.
10 Snell against the State, the only thing it mentions is that
11 the burden of proof is less than a trial. Now we don't
12 dispute that. Mooney against the State deals with an eye-
13 witness who saw some people stealing cattle. Stevenson
14 against the State is a homicide case where there was an
15 eyewitness. Nelford against the State, a homicide, where
16 there was an eyewitness; Sutterville against the State, an
17 eyewitness. What we're dealing with here is whether or not
18 an inference based upon an inference is sufficient circum-
19 stantial evidence with which to ask that a man be held to
20 answer a homicide charge.

21 Certainly the preponderance of the evidence theory
22 in a civil case is much less than that of a criminal case to
23 find a man guilty. Where the Court won't permit an inference
24 based upon an inference to be admitted into evidence and be
25 relied upon by the trier of facts or the jury, we feel that

1 that should apply to a Preliminary Hearing and the law of
2 the State of Oklahoma says that the rules of evidence apply
3 at a Preliminary Hearing.

4 We've had our cross examination limited severely.
5 We feel like at this time that there is no evidence in this
6 case which can establish any identification of Gene Leroy
7 Hart at any place in Mayes County, much less at Camp Scott,
8 as the perpetrator of these homicides.

9 THE COURT: Mr. Fallis?

10 MR. FALLIS: Your Honor, we submit to the Court
11 copies of those same cases and I think it's apparent and
12 I notice Your Honor reading those, the basis for the presen-
13 tation of those authorities was for the language applied
14 including the language concerning -- by the State beyond
15 Preliminary Hearing, matters of those types which I think
16 you are probably aware of.

17 I think quite frankly, Your Honor, that counsel
18 keeps trying to deduce the word inference. Inference sug-
19 gesting that this matters of inferencing. I think we can
20 judge the reliability of that statement as we can his
21 statement in court before this very Judge, that he was
22 severely limited in cross-examination. I think the veracity
23 of the analogies of inferences is about as valid as that
24 statement.

25 THE COURT: This Court finds upon consideration of

1 all of the evidence presented and authorities cited and
2 arguments made by counsel, that the Demurrer and Motion to
3 Dismiss should be and are hereby overruled. Exception
4 noted the Defendant, which puts us in the position, Mr.
5 Isaacs of inquiring when you want to call your first witness
6 if it's today.

7 MR. ISAACS: Judge, I can call some witnesses
8 today if the Court would like me to. I think we'd probably
9 save a lot of time if we'd sit down and schedule -- schedule
10 ahead for quite awhile, when we're going to have certain
11 witnesses. I think we could expedite this Preliminary
12 Hearing if we do that.

13 THE COURT: Let me inquire. Is Mr. Secrest here
14 with the Girl Scouts, who represents the Girl Scout Magic
15 Empire? Apparently not.

16 MR. ISAACS: Judge, I believe he's here but our
17 agreement is that I give him one week notice. In fact, he
18 told me I could give as short as 24-hour notice and he'll
19 have some of them here. I can have the OSBI Agents here
20 pursuant to our 24-hour notice.

21 THE COURT: Do you have anyone lined up for today
22 if we wanted to proceed, say this afternoon with some of
23 your witnesses?

24 MR. ISAACS: Mr. Bunch should be here from Tulsa
25 and I could call some of the law enforcement people here. I

1 can call Mr. Newton.

2 THE COURT: Why don't we recess then until, say
3 1:30 and those witnesses that you do have available, we'll
4 hear them today and then perhaps we'll have a chance to sit
5 down and do some scheduling.

6 MR. ISAACS: Okay.

7 AFTERNOON SESSION

8 (Following the lunch recess, proceedings resumed
9 as follows:)

10 THE COURT: The record will show the Defendant
11 present with counsel. State present. Mr. Isaacs, I still
12 have under advisement a Motion to Suppress, which I under-
13 stood you wanted me to take under advisement until the end
14 of this Preliminary Hearing; is that correct?

15 MR. ISAACS: Yes, sir.

16 THE COURT: If you're ready, you can call your
17 first witness.

18 MR. ISAACS: We call Jimmy Don Bunch.

19 THE COURT: Raise your right hand. Do you swear
20 to tell the truth, the whole truth and nothing but the truth,
21 so help you God?

22 THE WITNESS: I do.

23 JIMMY DON BUNCH,

24 called as a witness on behalf of the Defendant, having been
25 first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. ISAACS:

1 Q Would you state your full name, please?

2 A Jimmy Don Bunch.

3 Q Jimmy, how long have I known you?

4 A Oh, since 1974.

5 Q Where did we meet?

6 A Just a minute. I'm out of breath from climbing
7 those stairs. Oklahoma County Jail.

8 Q And did I represent you on a matter there?

9 A Yes, sir, you did.

10 Q Did we go to trial?

11 A Yes, sir.

12 Q Get convicted?

13 A Yes, sir.

14 Q How much time?

15 A Six months in the County Jail.

16 Q Jimmy, since that time, where have you been?

17 A Oklahoma State Penitentiary.

18 Q Prior to 1974, did you have any felony convictions?

19 A Yes, sir, I have.

20 Q Will you tell us what you've been convicted of
21 before 1974?

22 A 1969, I was convicted of burglary.

23 Q Which county?

1 A Tulsa.

2 Q Any conviction in between the time and 1974?

3 A Yes, sir.

4 Q What was it?

5 A I was convicted in Mississippi for safe burglary.

6 Q Were you convicted of anything in 1974?

7 A Yes, sir, I was convicted in '74 out of Pawnee
8 County for armed robbery.

9 Q 1975, after -- well, let me just interrupt here --
10 in 1974, why was it that you came to be in the Oklahoma
11 County Jail, Jimmy?

12 A In 1974, I was in the Oklahoma County Jail for
13 assault of a police officer.

14 Q And how did you come to be in Oklahoma County?

15 A I was at the Highway Patrol Department.

16 Q For what reason?

17 A Protection.

18 Q And why were you there for protection?

19 A I testified in a case concerning Tom Lester Pugh.

20 Q Anything happen to you after you testified in that
21 case?

22 A Yes, sir.

23 Q What?

24 A I got stabbed.

25 Q Where did that stabbing occur?

1 A Mississippi.

2 Q After you were stabbed, what happened?

3 A (No response.)

4 Q Were you moved to another place for safe keeping?

5 A No, I was paroled out of Mississippi, come back
6 to Oklahoma.

7 Q After coming back to Oklahoma, what happened?

8 A What year are you talking about, Garvin?

9 Q 1974?

10 A Well, in 1974, I was convicted of armed robbery.

11 Q All right, when did you give testimony?

12 A In 1972.

13 Q And who was that for?

14 A Bill Hoff.

15 Q Prosecution or the Defense?

16 A Prosecution.

17 Q After 1974, were you convicted of escape in Hughes
18 County?

19 A Yes, sir, I was.

20 Q And why were you in the Hughes County Jail?

21 A Protection.

22 Q And in 1975, were you convicted of kidnapping?

23 A Yes, sir, I was.

24 Q And was that as a result of your escape from the
25 Hughes County Jail?

1 A Yes, sir.

2 Q On April 6th of this year, where were you housed
3 in the State Penitentiary?

4 A In April?

5 Q Yes, sir.

6 A Of this year?

7 Q Yes, sir.

8 A I've been housed on Death Row for the last three
9 years in the Oklahoma State Penitentiary.

10 Q You haven't been convicted of felony murder, have
11 you?

12 A No, sir.

13 Q Jimmy, have you told me all the convictions you
14 can remember that were of a felonious nature?

15 A Yes, sir.

16 Q On April 6th of this year, after Mr. Hart was
17 captured, did you have an occasion to see him at the State
18 Penitentiary?

19 A Yes, sir, I did.

20 Q How long have you known Gene Hart?

21 A I've knowed him ever since 1969.

22 Q And where was that?

23 A I met him - we was cell partners in the Tulsa
24 County Jail.

25 Q Cell partners? What do you mean by that?

1 A We were celling in the same cell block.

2 Q Anybody else in there with you?

3 A Yes, sir.

4 Q How many people?

5 A I'd say around ten.

6 Q Jimmy, in 1978 --

7 A We went to the penitentiary together in 1969.

8 Q In April of 1978, did you talk to Gene Hart?

9 A Yes, sir.

10 Q What did you talk about?

11 A Oh, about his case.

12 THE COURT: Excuse me, what year was in your
13 question? I didn't catch it.

14 MR. ISAACS: April of 1978.

15 THE COURT: All right, thank you.

16 Q Did he tell you at that time anything pertaining
17 to the matters here in court?

18 A I don't understand your question, Garvin.

19 Q All right, Jimmy, in April of 1978, when they
20 brought Gene Hart to the penitentiary, did he say anything
21 to you about the case?

22 A Just briefly.

23 Q And what was that?

24 A Oh, well, we discussed it several different times.

25 What do you want? Do you want me to explain what we discussed

1 or --

2 Q Did anybody ever come to you and want you to
3 testify that Gene Leroy Hart confessed to you about killing
4 them little girls?

5 A No, sir.

6 Q Did Mr. Mike Pulchny ever come to you and talk to
7 you about testifying for the State of Oklahoma?

8 A No, sir, he didn't.

9 Q On April 25th of 1978, did Mr. Mike Pulchny
10 talk to you?

11 A No, he didn't. Oh, he talked to me every day,
12 Garvin.

13 Q And what about, Jimmy?

14 A Uh- matters on Death Row.

15 Q For instance?

16 A Just me and him -- I've had several writs filed
17 against him.

18 Q Jimmy, did Mr. Pulchny ever tell you to testify
19 for the State of Oklahoma?

20 A No, sir.

21 Q Did he ever ask you about Gene Hart?

22 A Just did I know him, you know.

23 Q Did he ask you anything else about Gene Hart?

24 A He asked me if he thought Gene was guilty -- if I
25 thought Gene was guilty.

1 Q Did you tell him?

2 A I told him, yeah, I did.

3 MR. ISAACS: Your Honor, at this time, I'd like
4 to be permitted to cross-examination the witness. I've been
5 surprised by his testimony and I have here a sworn state-
6 ment that I took from him in the Tulsa County Jail.

7 MR. FALLIS: If it please the Court, at this point,
8 I would say there's been no showing of surprise. He's
9 answered the questions that have been asked of him, I believe,
10 Your Honor.

11 MR. ISAACS: How do you show surprise? Faint in
12 the courtroom? Ask somebody to revive you?

13 THE COURT: You are asking to cross-examine your
14 own witness as a hostile witness?

15 MR. ISAACS: Yes.

16 THE COURT: Because of surprise?

17 MR. ISAACS: Yes, sir.

18 THE COURT: Was it a surprise as to his last
19 answer?

20 MR. ISAACS: Yes, sir, it was.

21 THE COURT: You are in good faith in your request?

22 MR. ISAACS: Yes, sir, I am.

23 THE COURT: Very well.

24 Q Jimmy, did I come and talk to you at the State
25 Penitentiary on the 5th of June, 1978?

1 A Yes, sir, you did.

2 Q Did I take a statement from you?

3 A Yes, sir.

4 Q Take it on a tape recorder?

5 A Yes.

6 Q Did I ask you the following question and was this
7 the answer that you gave me:

8 "Have you talked - during the time that
9 Gene Leroy Hart spent here in the State
10 Penitentiary at McAlester, have you
11 seen him?"

12 And was your answer:

13 "Yes, sir, I have."

14 And was my next question:

15 "Have you talked to him?"

16 And was the answer:

17 "Yes, sir."

18 Was my next question:

19 "Have you talked any about his case?"

20 Was your answer:

21 "Occasionally, I spoke with him about --

22 MR. FALLIS: Object Your Honor. He may ask a
23 question at a time, but certainly not reading from a statement.
24 He may ask the witness if he made that statement and receive
25 a response. There's been three questions asked here. He's

1 asking a compound question. I don't think he is allowed
2 that.

3 THE COURT: Well, if you are seeking a response
4 to each of those questions and answers, I think Mr. Fallis
5 is correct in his objection. If you're just seeking to
6 show that's his prior statement which may have been incon-
7 sistent, then I think you're correct. So I can't really
8 rule until I know what your intent is in asking the question
9 is, Mr. Isaacs. Are you asking the witness to answer every
10 one of these?

11 MR. ISAACS: No, I'd like to read him some and
12 lead him into it and then ask him if he made those answers
13 to those questions.

14 THE COURT: All right. Why don't you get right
15 to the meat of it? Some of that may not be relevant.

16 Q I asked you if you talked to Gene Leroy Hart,
17 didn't I, Jimmy?

18 A Yes, sir.

19 Q On the tape, and was your answer: "Occasionally
20 I spoke with him about it."

21 A Yes, sir.

22 Q And was this question asked: "In reference to
23 what?"

24 A Garvin, you asked me so many questions, you know,
25 it's hard to remember.

1 Q Were you telling me the truth down there, Jimmy?

2 A No, sir, I wasn't.

3 Q And why did you not tell me the truth at the
4 State Penitentiary?

5 A Well, I made a deal with Gene Leroy Hart to come
6 up here and lie on the stand.

7 Q Jimmy, did you write a letter to a lady in Tulsa
8 and tell that lady to call me and tell me somebody was try-
9 ing to get you to testify against Gene Leroy Hart?

10 A Yes, sir, sure did.

11 Q And she called me and told me that and told me
12 you wanted me to come to the penitentiary and see you; didn't
13 she?

14 A You'd already come to the penitentiary and seen
15 me, Garvin.

16 Q Begging your pardon, did the woman call me and
17 tell me that you wanted me to come to the penitentiary?

18 A No, I don't believe so. I know that she - she did
19 call you and read a letter that I'd wrote her but this was
20 in reference to another woman that owned a beauty parlor
21 and this was done to convince this other lady that Gene Hart
22 was being used as a scapegoat so that she would donate some
23 funds to his - for his attorney fees. If I remember right,
24 you told me you needed about ten thousand dollars, Garvin.

25 Q Did I ask you to donate any money?

1 A No, you never asked me to donate any money.

2 Q Did I tell you where she could send the money
3 if she wanted to donate any?

4 A Right.

5 Q And Jimmy, did I ask you this question in the State
6 Penitentiary, "Has anybody been here at the Oklahoma State
7 Penitentiary, talked to you about Gene Leroy Hart?"

8 A Yes, I believe you did.

9 Q And did you give this answer: "Well, not directly
10 to me. Two officers talked to me on Death Row, the regular
11 officers, correctional officers that work on Death Row."

12 A Garvin, I admit the statement that I gave you.

13 Q Yes, sir.

14 A Oh, save you a lot of trouble from reading it. I
15 submit that I gave you that statement but I am saying that
16 that statement is completely false and you know it is.

17 Q And I know it is?

18 A Yes.

19 Q And how do I know that?

20 A Well, Garvin, me and you discussed the case several
21 times.

22 Q We discussed it at the State Penitentiary; we
23 discussed it in the Tulsa County Jail and we just got through
24 discussing it over in the Mayes County Jail, didn't we?

25 A Yes, we did.

1 Q We went over your testimony here, what you're
2 going to testify to, didn't we?

3 A Briefly.

4 Q And asked you to get on the witness stand and
5 tell the truth, didn't I?

6 A Well, I guess you could say that.

7 Q Jimmy, did I ask you this question: "Sometime
8 around April 25th or later, did you have a conversation
9 with someone concerning Gene Leroy Hart?" And you said,
10 "Yes. The first time he talked to me . . ." "he" being
11 Mike Pulchny . . . "he asked me - well, he made the state-
12 ment that I was pretty tight with Gene Leroy Hart and I
13 told him I couldn't, at the time, understand what he was
14 getting at and I said, 'we're friends'", did you make that
15 statement?

16 A Yes, sir, I did.

17 Q Did you make this statement to me, Jimmy: "He
18 said he isn't - Mr. Pulchny talking to you - and I said,
19 'Now Mike, I've been around him since 1969. I know him a
20 lot better than you. Gene Hart ain't the type of person
21 that would rape and murder three little Girl Scouts.'" Did
22 you tell me that? Is that what you told Mr. Pulchny?

23 A Yes, Garvin, but why don't you tell me what we
24 talked about between those conversations?

25 Q What did we talk about between these conversations?

1 A I asked if --

2 THE COURT: Just a moment. Just a moment. The
3 witness will be allowed to answer your question, Mr. Isaacs,
4 but a discussion between you with him, asking you questions
5 is not something that I'm going to allow. You can ask your
6 next question.

7 Q Mr. Bunch, what did we talk about between those
8 conversations?

9 A I asked you, I said, "Garvin, do you think Gene
10 Leroy Hart is guilty?" And you avoided the question. You
11 said, Jimmy --

12 Q Jimmy, that's a lie and you know it, isn't it?

13 A No.

14 MR. FALLIS: If it please the Court, I'm going to
15 object to this. This is totally improper. He's arguing
16 with this witness, so he's trying to --

17 MR. ISAACS: He's a hostile --

18 THE COURT: Sustained. You may ask your next
19 question, Mr. Isaacs.

20 Q Mr. Bunch, I taped that conversation at the State
21 Penitentiary, didn't I?

22 A Yes, you did.

23 Q And I had that tape recorder going the whole time
24 I was there talking to you, except exchanging some familiar
25 remarks when I walked into the room, didn't I?

1 A No, we spoke for about three hours. You've got
2 about thirty minutes worth of tape on it.

3 Q We spoke for about an hour, didn't we?

4 A No, I believe they got a record down there on that,
5 Garvin.

6 Q I believe they do and I believe we'd better look
7 at it. If I recall, I was there waiting for you quite awhile,
8 was I not?

9 A I don't know how long you'd been there. I know
10 how long I stayed off in Death Row in a little room with
11 you and it was approximately about three hours.

12 Q Jimmy, since - since I see now that you are going
13 to deny that you made this statement --

14 A No, I'm not denying that I made them statements.

15 Q Did you sign this statement under oath?

16 A I signed them statements under threat.

17 Q Threats from who?

18 A You.

19 Q What did I threaten you with?

20 A You told me a Tulsa law officer would kill me and
21 you said if I didn't sign that statement, then I was subject
22 to get a bullet right in between my eyes.

23 Q Boy, I mean to tell you -- Jimmy, after I talked to
24 you at the State Penitentiary, what happened?

25 A After you talked to me at the State Penitentiary?

1 Q Yes.

2 A I was approached by two OSBI Agents.

3 Q Which two?

4 A Mr. Jones and, uh -- I can't remember the other
5 one's name.

6 Q And what did they ask you about?

7 A They asked me, uh -- did you visit with me.

8 Q Did I visit with you?

9 A Yes.

10 Q What happened then?

11 A I told them you did and they asked me would I mind
12 telling them what was I supposed to testify for you or I mean
13 testify for Gene and I said I was.

14 Q Did you tell them that I had asked you that, if
15 you would testify for Gene?

16 A I went over our whole conversation just briefly.

17 MR. ISAACS: Judge, I'd like to have this marked
18 as Defendant's Exhibit No. 3 for identification. I believe
19 we had two marked previously.

20 THE COURT: That's correct.

21 Q Jimmy, at that time when I interviewed you, did I
22 ask you if you'd be willing to testify here and tell me what
23 you told me at the State Penitentiary?

24 A You're talking about May 5th; right?

25 Q That's right -- June the 5th, 1978?

1 A Uh -- yes, you asked me would I come and testify
2 to this, yes.

3 Q And did you agree to do so?

4 A Yes, I did.

5 Q Jimmy, have you been promised anything to testify
6 here today by Mr. Fallis?

7 A No.

8 Q Take those glasses off. Let's see who you're
9 looking at.

10 A All right.

11 Q Have you been promised anything to give your testi-
12 mony here today?

13 A No.

14 Q Jimmy, you're coming up on a parole docket, aren't
15 you?

16 A Coming up a year late. I go direct out. What could
17 they promise me? I dress out Christmas.

18 Q Jimmy, I hand you what's been marked for identifica-
19 tion as Defendant's Exhibit No. 3, and ask you if that's the
20 copy of the statement that bears your signature?

21 A Well, Garvin, I didn't read the statement. Last
22 night you had me so shook up, uh -- if you remember right
23 I told you --

24 Q Said you'd take my word for it, wouldn't you?

25 A You told me that you was going down to get a Notary

1 and I said I'd go ahead and sign it and I signed it. That's
2 my signature without reading it.

3 Q Would you read it right now and see if that accurately
4 reflects what we said when we were there in the peniten-
5 tiary, Jimmy?

6 A You know, Garvin, this is what we said but we're
7 leaving out some lines here, you know.

8 Q What lines are we leaving out?

9 A Where we're cutting the tape recorder on and off,
10 you know.

11 Q I cut it off once because you didn't want to use
12 Miss Campbell's name; is that correct?

13 A No, that's not correct.

14 Q Oh, that's not correct?

15 A Garvin, all this time --

16 Q Jimmy, I can't believe you're doing this to me.

17 MR. FALLIS: If it please the Court, we're going to
18 object to the statements of counsel. He may inquire of this
19 witness.

20 THE COURT: Sustained.

21 A (By Mr. Bunch) Garvin, if you remember right, I
22 even had to tell you that you'd better turn the tape recorder
23 back on and tell me you hadn't promised me anything.

24 Q I asked you that at the end, didn't I?

25 A Yes, sir.

1 Q I said we're back on the tape and did I promise
2 you anything?

3 A You don't have it on here, Garvin, where -- when
4 I asked you if you thought Gene Hart was guilty and you said
5 when you was voir direing your own jury in Holdenville, you
6 said you made a statement I very much like. You said it's
7 possible for a man to commit a crime and still be innocent;
8 do you remember that statement, Garvin?

9 Q Sure do. We said that in passing. It had nothing
10 to do with this case, did it, Jimmy?

11 MR. FALLIS: If it please the Court, I'll object.
12 Unless it is now on that statement he's now trying to get
13 introduced, there's been testimony here that the tape recorder
14 was turned on and off. May we examine the statement?

15 MR. ISAACS: I've acknowledged that it's been off
16 a couple of times.

17 Q Mr. Bunch, did I ask you to read that statement
18 before you signed it?

19 A No. No, you didn't, not last night.

20 Q Did you say you'd take my word for it?

21 A I did do that.

22 Q Did I tell you I wanted you to tell the truth and
23 nothing but the truth up here?

24 A You have made that statement, yes.

25 Q Have you told me everything you know about the case,

1 now that you -- tell me what else?

2 A I told you what Gene wanted me to say and you know
3 that. I'll take a polygraph test.

4 MR. ISAACS: Boy, Judge, I've heard some lying in
5 my life --

6 MR. FALLIS: If it please the Court, I'll object
7 to this. I think there's possibly a two-way street here.

8 THE COURT: Sustained. Mr. Isaacs, do you have
9 anymore questions?

10 MR. ISAACS: Yeah.

11 Q Did Buddy Fallis talk to you in Tulsa County?

12 A Briefly.

13 Q Mr. Shaffer there when he talked to you?

14 A Mr. Shaffer talked to me briefly.

15 Q And did you have somebody call me and tell me you
16 had been taken out of the State Penitentiary and that you
17 were being held in Tulsa?

18 A I did not.

19 Q You did not? Have you told me any time in the
20 past that you feared that you'd be killed, Jimmy?

21 A Well, you know, uh -- I've got heat on me, you
22 know. I'm not lying.

23 Q That's right, you do, don't you?

24 A Yes.

25 Q Mr. Fallis promised you he'd help you get a parole?

1 A No. No, he sure hasn't.

2 THE COURT: Any other questions, Mr. Isaacs?

3 MR. ISAACS: Judge, I'm going to offer this into
4 evidence. I'm not through yet.

5 THE COURT: Any objection?

6 MR. FALLIS: Yes, Your Honor. May we ask a few
7 questions of the witness?

8 THE COURT: I'll take it -- are you through with
9 your direct examination?

10 MR. ISAACS: Yes, I am.

11 THE COURT: Cross examine.

12 CROSS EXAMINATION

13 BY MR. FALLIS:

14 Q Mr. Bunch, in reference to what has been marked as
15 State's Exhibit No. 3 (sic), you mentioned a moment ago, did
16 you not, that the tape recorder was turned on and off?

17 A Yes, sir.

18 Q Is everything that you had conversation with the
19 Attorney for Gene Leroy Hart on that particular transcript?

20 A No, sir.

21 MR. FALLIS: If it please the Court, first of all,
22 we would object to the offer on the grounds that it is not a
23 complete and proper transcript of what was apparently a con-
24 versation had with the witness at the State Penitentiary and
25 it's been improperly identified as such.

1 THE COURT: Is there any further cross examination?

2 MR. FALLIS: Yes, sir, there is.

3 THE COURT: I'm going to take it under advisement
4 until you're through, Mr. Fallis.

5 Q Okay. Mr. Bunch, counsel asked you if you had had
6 any promises made concerning parole by myself or Mr. Shaffer
7 and I understood you said no.

8 A No.

9 Q Did counsel make any promises to you concerning
10 parole?

11 A Yes, sir, he did.

12 Q Tell the Court what he said about that.

13 A He told me he knows Charles Chestnut and he would
14 appear before the Parole Board for me.

15 Q Why?

16 A If I'd testify for Gene Leroy Hart.

17 Q Now, Mr. Bunch, you stated a moment ago that you
18 had, in fact, talked with Gene Leroy Hart at the State Peni-
19 tentiary?

20 A Yes, sir.

21 Q Is that true?

22 A Yes.

23 Q And did he talk about this case?

24 A Yes, sir, he has.

25 Q Did he make any statements concerning photographs?

1 A Yes, sir.

2 Q Would you tell the Court what he made his state-
3 ments concerning photographs about, please?

4 A Well, I was -- I asked Gene how much -- how tight
5 did they have him on the case and he said pretty tight. And
6 I said, well, you know, Gene, how much evidence do they got
7 against you? Uh -- do you want me to repeat his exact words?

8 Q Yes, sir.

9 A He said, uh -- "Well, they got them damned photo-
10 graphs." And he slapped his pocket like that.

11 Q "Got the damned photographs" and slapped his pocket?

12 A Yeah. I said "What photographs?" He said, "Oh,
13 some damned photographs I lost out of my pocket." And he
14 slapped his pocket like that.

15 Q Now, Mr. Bunch, you were called here, I take it,
16 as a witness for the Defense; is that correct?

17 A Yes, sir.

18 Q All right. Now the conversation that you had with
19 Gene Leroy Hart, did I understand from your answers to the
20 questions by Mr. Isaacs that there was more than just one
21 conversation?

22 A Oh, me and Gene had several conversations.

23 Q Where is your particular cell there on Death Row at
24 the State Penitentiary?

25 A My cell is Cell 3.

1 Q Now, do you know how many cells there are on Death
2 Row?

3 A Yes, sir.

4 Q How many?

5 A There's 71. Uh - there's 70. It goes up to 71.
6 There's about 33 cells all together.

7 Q They're not all consecutively --

8 A No, they're numbered by 3, 5, 7, 9 --

9 Q Now, are you allowed outside your cell there on
10 Death Row; is that part of the arrangement that they have
11 for the inmates, to be able to get out of their cells occa-
12 sionally?

13 A Yes, sir, we're allowed out fifteen minutes a day
14 to exercise and fifteen minutes twice a week to shower and
15 then we're allowed to clean up. One inmate is let out to
16 clean up the room, sweep, mop.

17 Q You get fifteen minutes a day; is that correct?

18 A Yes, sir.

19 Q And are you restricted to a particular area?

20 A Uh -- the Death Row inmates?

21 Q Yes, sir.

22 A Themselves, are -- see, they have -- Mr. Fallis,
23 they have a security section of the prison and then they have
24 a death section. People like me, Hart, Rex Brinlee and several
25 other people are housed in the security section of the prison.

1 Q When you take your fifteen minutes a day outside
2 your cell, where are you allowed to go?

3 A Up and down the run to the door that separates
4 Death Row itself.

5 Q Okay, I see. So, there's a run area or a walk
6 area outside your cell?

7 A Yes, sir.

8 Q Are all these cells visible to you when you walk
9 up and down the area there?

10 A Yes, sir, they're open at the front so, you know,
11 you can see inside the cell.

12 Q Just bars there?

13 A Touch -- you can have physical contact or what-have-
14 you.

15 Q And in this area you said that you were able to
16 take by regulations there showers twice a week?

17 A Yes, sir.

18 Q All right, and where was the shower - or where was
19 the shower area with reference to your cell?

20 A Right next door to it. I'm in the first cell on
21 Death Row and the shower is right beside my cell.

22 Q Would it be fair to say that all the inmates who
23 come down to take a shower have to walk by your cell?

24 A Well, they have to stand practically in front of my
25 cell as they undress and they step into the showers and step

1 back out and dress back.

2 Q Be true with Gene Leroy Hart?

3 A Yes, it would.

4 Q Is that where those conversations took place?

5 A Uh -- we had conversations during shower period,
6 but we had other conversations, too.

7 Q Now, did you have other conversations about the
8 murder of the three little Girl Scouts?

9 A Yes, sir, we did.

10 Q Would you tell the Court what all was said, please?

11 A Uh -- do you want me to give the date? We had
12 so many conversations, you know, it's hard to be specific
13 on the date.

14 Q Can you fix a month for us?

15 A Yes, sir. The first time that Gene discussed
16 the murders of the Girl Scouts was uh right after Garvin
17 Isaacs come onto the Death Row Unit, which I think was in --
18 sometime in April.

19 Q Wait a moment. Let me understand. Are you saying
20 that Garvin Isaacs came down to see Gene?

21 A Yes, sir.

22 Q And after that, Gene talked to you?

23 A Well, he had talked to me before then but after
24 Garvin come down and stopped and talked to me, Garvin -- I've
25 known Garvin since 1974.

1 Q I see. So you saw Garvin Isaacs that day?

2 A Yes, sir.

3 Q All right.

4 A It was at nighttime.

5 Q Was it after or before that that Gene first talked
6 to you about these murders?

7 A It was after Garvin come down that he opened up
8 more.

9 Q Okay. And what all did he tell you during the
10 conversation concerning the death of the little girls?

11 A Well, our first conversation was, Gene acted
12 extremely nervous. Mr. Fallis, like I say, I've known Gene
13 since 1969 and, uh, I've always had a strange feeling about
14 him.

15 Q Just what he told you.

16 A And he --

17 MR. ISAACS: I object, Judge, he --

18 THE COURT: Sustained. Not responsive.

19 Q Just what he told you.

20 A Okay. He began coming to my cell and we would
21 talk and discuss our past and what-have-you. He began to
22 open up about the trial and, uh, on the first occasion, he
23 discussed anything openly about the murders, he, uh - he
24 said, uh -- that, uh -- it's looks like that they had him
25 up tight, when I asked him, you know, what kind of evidence

1 they had against him and uh, he said, uh, if, uh, -- I said,
2 "Gene" I said, uh, I had a newspaper clipping that I had cut
3 out of the paper - the Tulsa paper - it was an article, I
4 don't know what date, but it was from a Tulsa newspaper it
5 said where Gene would be in -- if the inmates thought that
6 Gene killed the little girls that he would be in danger his-
7 self and I showed him this newspaper clipping and he asked
8 me did I think he would be in danger and I told him, I said,
9 "Yeah, if they thought you killed them, Gene." And, uh, he
10 said, uh, "My friends won't believe that." And I said, "I
11 don't know. They believe that I testified against Pugh."
12 And, uh, he said, uh, "You don't believe it, do you, Jimmy?"
13 And I said, "I don't want to believe it." And, uh, I said,
14 "Did you do it, Gene?" He dropped his head sort of and he
15 said, "I don't know." I said, uh, "I don't understand, Gene."
16 I said, "You don't know?" He said, "I don't really know."
17 And I said, "I don't understand what you're talking about."

18 Q Did he offer any explanation?

19 A Uh, he said, uh -- I said, "Explain to me what you're
20 talking about, Gene," I said, "you can be open with me." And
21 uh, he said, "Jimmy," he said, uh, "I'd been smoking a reefer."

22 Q A reefer?

23 A A reefer and drinking wine for three days. He said,
24 "All I know is I woke up in a cave and I had blood all over
25 me," and uh, then that's when I realized that he had really

1 committed murder.

2 Q Mr. Bunch, was it after that that Garvin Isaacs
3 came to you again?

4 A Um -- well, he only come to the penitentiary --
5 yeah, right; right, to take a statement.

6 Q Well, Jimmy, there's a part, according to your
7 testimony here, that are not on the statement that's been
8 offered as Defendant's Exhibit No. 3; is that correct?

9 A Yes, sir.

10 Q Is the part on there, and was it during that
11 conversation that he offered to represent you before the
12 Parole Board?

13 A No, it's not on there.

14 Q Was that part of your conversation?

15 A Yes, sir.

16 Q Did he tell you that you owed him a favor?

17 A Yes, sir.

18 Q Who told you that?

19 A Garvin.

20 Q The attorney over here?

21 A Right.

22 Q Why did he say that you owed him a favor?

23 A Because, uh, he come over to Holdenville to testify
24 for me.

25 Q Testify for you?

1 A For me in that kidnapping case.

2 Q All right, sir. Now, do I understand he said he
3 knew people with the Pardon and Parole Board?

4 A Yes, sir, he said he knowed Mr. Chestnut.

5 Q Did he promise you that if you would testify in
6 the manner that he wanted you to testify, go before that
7 Board and represent you?

8 A Yes, sir.

9 Q To your knowledge, Jimmy, at the time that he took
10 that statement from you, did he know it was false?

11 A Yes, sir.

12 MR. FALLIS: No other questions.

13 REDIRECT EXAMINATION

14 BY MR. ISAACS:

15 Q Jimmy, why did you come up here and lie like that?

16 MR. FALLIS: If it please the Court, I am going to
17 object to the comment of counsel. He called this man as his
18 witness. He's making comments --

19 MR. ISAACS: He sure surprised me.

20 MR. FALLIS: Well, I'm sure it's surprising to be
21 exposed.

22 THE COURT: Objection is overruled.

23 Q Jimmy, you told me that they were threatening to
24 kill Gene Hart, didn't you?

25 A Mr. Isaacs, here's why I come to Court to testify,

1 because there was three little girls murdered. I've got
2 three children myself.

3 Q We talk about those -- at no time have I ever
4 told you I would represent you in front of the Pardon and
5 Parole Board, have you?

6 A Yeah, you told me you'd come to the Pardon and
7 Parole Board and represent me.

8 Q Jimmy, I trusted you and I see I made a big mistake.
9 I should have had somebody with me. I didn't have anybody
10 with me there in the State Penitentiary, did I?

11 A No, you didn't.

12 Q Other than a little tape recorder?

13 A A tape should have been enough.

14 MR. ISAACS: Judge, I'd offer the statement into
15 evidence. Who's got the statement?

16 MR. WISE: Right here.

17 MR. ISAACS: At this time, for the purpose of
18 discrediting the witness.

19 MR. FALLIS: If it please the Court, we would object
20 to the offer. There's been no proper identification. We
21 don't know what all was left off of the tape. By Mr. Isaacs'
22 own admission, the tape recorder was turned on and off. By
23 the testimony from this witness, he says the tape recorder
24 was turned on and off and the testimony elicited from this
25 witness by him is in contradiction to that statement.

1 THE COURT: Well, objection will go to the weight,
2 not the admissibility.

3 MR. ISAACS: Thank you.

4 THE COURT: Defendant's Exhibit 3 is received.
5 Anything further of this witness?

6 MR. FALLIS: No other questions, Your Honor.

7 THE COURT: Is this witness still in custody with
8 the Tulsa authorities, or what's his status?

9 MR. FALLIS: Here's a Tulsa County Sergeant right
10 here.

11 THE COURT: All right. Are you here to take him
12 wherever you are going to take him?

13 OFFICER: Yes.

14 THE COURT: All right. He's released to you.

15 MR. ISAACS: Judge, before he's released from here,
16 may I have an opportunity to talk with him?

17 THE COURT: Well, I don't know. About a five minute
18 recess.

19 MR. ISAACS: Yeah.

20 THE COURT: All right. We'll take about a five
21 minute recess.

22 (Following a five minute recess, proceedings con-
23 tinued as follows:)

24 THE COURT: Mr. Isaacs, I'm ready for your next
25 witness.

1 MR. ISAACS: Judge, I move that we continue this
2 to 9:45, the 26th day of June.

3 MR. FALLIS: Your Honor, we have no objection to
4 that.

5 MR. ISAACS: I think at which time --

6 THE COURT: Well, in consideration of your earlier
7 request and due to the fact that you have indicated you have
8 a number of witnesses you need to contact and line up to
9 testify, this case will be continued on Defense Motion to
10 9:45 a. m. on Monday, June 26th, 1978.

11 The Defendant will be placed in the custody of the
12 Sheriff of Mayes County until that time for security. However,
13 this Court does recognize the possibility that the Sheriff
14 may have to have some leeway in carrying out his responsi-
15 bilities regarding security. The only thing that I would
16 request is that Mr. Isaacs be apprised of any changes in the
17 address of his client during the next week.

18 MR. WISE: I don't see the Sheriff in the courtroom,
19 Your Honor, but we will convey that message to the Sheriff
20 and assure Mr. Isaacs that we will notify him of any change
21 of venue of his client.

22 THE COURT: Very well. I might mention for those
23 in Courtroom B, that some other matters have been scheduled
24 for the Graham Building during the next week and you should
25 take all personal belongings with you and we stand adjourned

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until the 26th, at 9:45.

(WHEREUPON, the cause in hearing was recessed
until 9:45 a. m., on the 26th day of June, 1978.)