1986

The State of Utah v. Derek Andreason : Brief of Respondent

Utah Supreme Court

David L. Wilkinson; Attorney General; Attorney for Respondent.
G. Fred Metos; Yengich, Rich, Xaiz and Metos; Attorney for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 20616
-v-	:	Priority No. 2
DEREK ANDREASON,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF THEFT, A THIRD DEGREE FELONY, IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SEVIER COUNTY, STATE OF UTAH, DON V. TIBBS, PRESIDING.

DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

G. FRED METOS
YENGICH, RICH, XAIZ & METOS
72 East 400 South, Suite 355
Salt Lake City, Utah 84111

Attorney for Appellant

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236 State Capitol
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Attorneys for Respondent

G. FRED METOS
YENGICH, RICH, XAIZ & METOS
72 East 400 South, Suite 355
Salt Lake City, Utah 84111

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES CITED

STATUTES CITED

OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether defendant's retained counsel had an actual conflict of interest which denied defendant his right to effective assistance of counsel.

2. Whether there was sufficient evidence to establish that defendant exercised unlawful control over the property of Utah Power and Light Company and that the value of the property taken exceeded $250.00.

3. Whether the prosecutor's remarks in closing argument constituted harmless error.

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Defendant, Derek Andreason, was charged with the offense of theft, a second degree felony.

Defendant was convicted in a jury trial held March 18-20, 1985, of the offense of theft, a third degree felony in the Sixth Judicial District Court in and for Sevier County, State of Utah, the Honorable Don V. Tibbs, presiding. The defendant was sentenced to a term of not more than five years in a Utah State Prison. The sentence was suspended and defendant was placed on probation.

STATEMENT OF FACTS

Defendant occupies two buildings in Salina, Utah that receive Utah Power & Light electricity (Tr. 492). The Sampson Dairy Barn which defendant uses as his office (Tr. 492) and a large red brick warehouse building just north of the Sampson Dairy Barn (Tr. 492). Prior to establishing his construction business, defendant was an employee for Utah Power and Light Co. for a period of ten years (Tr. 488). He is a graduate in

building construction and has studied electrical engineering (Tr. 489).

On September 4, 1984, Larry Mills, an employee of Utah Power and Light, received a call from an independent party requesting power service (Tr. 78). While servicing the customer at premises across the street from defendant's properties, Mills observed defendant's new warehouse building and the electrical hookups (Tr. 79).

Mills went over to the warehouse and observed someone inside using power for both lights and equipment (Tr. 79). Mills removed the meter covers from the meters at the warehouse and found that the meter had been improperly bypassed by jumper cables being hooked to wires going into the meter box (Tr. 80).

Defendant's father, an ex-employee of Utah Power and Light and office manager in Salina for many years, approached Mills and asked what he was doing (Tr. 87). Mills said he was checking on the source of the electricity for the warehouse to which Ray Andreason replied that it came from the Sampson Dairy Barn and, further, it was none of Mills' business (Tr. 88).

Mills traced the cables through the lower portion of the meter box and into the warehouse (Tr. 80, 81). Mills called the Utah Power & Light Salina Office and requested Shawn Smith come to the warehouse (Tr. 101). When Smith arrived, they used a volt meter to measure the electricity and ascertained live voltage (Tr. 101, 106). They went inside the warehouse and took inventory of the electrical appliances that showed evidence of recent usage (Tr. 86, 108). During the investigation, Mills and Smith took photographs of the improper meter hookup (Tr. 105-108).

The following day, Mills and Ron Rasmussen, a Utah Power & Light employee, investigated the Sampson Dairy Barn, also owned by the defendant (Tr. 89, 225). Mills opened the two meters at this location and found that one had been connected so that electricity flowing would not be metered (Tr. 90-92, 226). Again, Ray Andreason confronted Mills and in response to Mills' questions stated that the wire from the improper meter served three area lights (Tr. 92-93). Mills tested the meter base and measured for electricity passing through it and ascertained there was electricity present (Tr. 229).

Mills gave the inventory list computed from the warehouse and the specifications from the Sampson Dairy Barn's three outdoor lights (Tr. 93) to his district manager, Reed Burrows, (Tr. 277). Burrows took the warehouse inventory list, assigned kilowatt hours that these appliances would use if they were on 20% of the time based on a formula that Utah Power & Light routinely uses. Burrows then billed the defendant from April of 1983 to August of 1984, totaling $2,899.45 (Tr. 280). The three area lights were assessed at 157 Kilowatt hours a month for a 33-month period for $567.00.

As a result, defendant and his father were jointly charged, as co-defendants, with theft of services (R. 1). At trial, both were represented by the same retained counsel (R. 8). Defendant was convicted of the offense of theft, a third degree felony (R. 68). Ray Andreason was found not guilty (R. 69).

SUMMARY OF ARGUMENTS

Defendant received the effective assistance of retained counsel who represented both defendant and a co-defendant. Defendant fails to meet his burden of demonstrating a conflict of interest.

The evidence was sufficient to support the jury's verdict. It established that defendant exercised unauthorized control over Utah Power & Light property and that the value of this property was over $250.00. The prosecutor's remark was harmless error under the facts and circumstances of this case.

ARGUMENT

POINT I

DEFENDANT'S RETAINED COUNSEL, WHO ALSO REPRESENTED A CO-DEFENDANT, DID NOT PRESENT INCONSISTENT DEFENSES OR OTHERWISE HAVE AN ACTUAL CONFLICT OF INTEREST SO AS TO DENY DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The constitutional right to assistance of counsel for defense in all criminal prosecutions means the right to adequate or effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 355 (1980). Inherent in this right is a correlative right to representation that is free from conflicts of interest. Wood v. Georgia, 450 U.S. 261 (1981); see Cuyler v. Sullivan, 446 U.S. at 348-350; Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942). However, requiring or permitting a single attorney to represent co-defendants, is not per se violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases certain advantages might result from joint representation

and may strengthen a common defense. Holloway v. Arkansas, 435 U.S. at 482-483.

In Cuyler v. Sullivan, 446 U.S. at 346, 347, the Supreme Court stated:

> Holloway requires state trial courts to investigate timely objections to multiple representation. But nothing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case. Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist . . . "An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." 435 U.S., at 385, quoting State v. Davis, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973). Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.

See also United States v. Unger, 700 F.2d 445 (8th Cir. 1983), United States v. Benavidez, 664 F.2d 1255 (5th Cir. 1982); United States v. Burney, 756 F.2d 787 (10th Cir. 1985).

Defendant's retained counsel did not raise the issue of a potential conflict of interest either prior to or during trial. Nor did the defendant voice any concern whatsoever to the trial court that his attorney's performance was in any way adversely affected by any conflict of interest. Without such an objection or other signal to the trial judge that a conflict might have

existed, the defendant must demonstrate that his attorney's performance was adversely affected by an actual conflict of interest. Cuyler v. Sullivan, 446 U.S. at 348; Parker v. Parratt, 662 F.2d 479 (8th Cir. 1981); Greer v. Black, 758 F.2d 327 (8th Cir. 1985). A similar analysis applies under Rule 44(c) of the Federal Rules of Criminal Procedure cited for comparative purposes in defendant's brief at 15. In analyzing Rule 44(c), courts have held that a trial court's failure to comply with the Rule does not, of itself, require reversal of a conviction. See United States v. Alvarez, 696 F.2d at 1309 (11th Cir. 1983); United States v. Arias, 678 F.2d 1202 (4th Cir. 1982); United States v. Benavidez, 664 F.2d 1255 (5th Cir. 1982). The rationale for these decisions is that "neither the inquiry nor the advice is itself the goal of the rule; that goal is preventing conflicts." Benavidez at 1258.

Therefore, under both Cuyler and the decisions interpreting Rule 44(c), the defendant must demonstrate an actual conflict of interest, pointing to specific instances in the record to suggest conflict that is real rather than hypothetical. United States v. Mers, 701 F.2d 1321 (11th Cir. 1983); United States v. Fox, 613 P.2d 99 (5th Cir. 1980). Additionally, where co-defendants' statements are largely corroborative, repetitive, or serve the same purpose, there is no conflict. United States v. Medel, 592 F.2d 1305 (5th Cir. 1979). As the court in Benavidez noted, cases of actual conflict usually involve situations where:

> (1) The conflict was brought to the trial court's attention at the outset of the trial or at the time when the conflict first became apparent; (2) one defendant

> had evidence that would have exculpated himself but inculpated a codefendant; (3) the prosecution's evidence offered defendant a theory under which he could prove his own innocence by proving his codefendant's guilt.

Benavidez, 664 F.2d at 1259 (footnotes omitted).

This case involves none of these situations. The trial court's attention was never brought to a possible conflict of interest. The defendant's were jointly charged (R. 1), retained the same counsel (R. 8) and from the outset of the trial, both defendants presented a united front defense strategy. Ray Andreason, defendant's father, testified that he and defendant had nothing to do with the improper wiring (Tr. 465, 466, 471, 477, 484, 1501); defendant's corroborative testimony was that he had hired men to do the wiring and that defendant had personally not done any wiring within the meter base (Tr. 510, 511, 522, 523, 525, 526, 535, 538). They both offered corroborative testimony that the power to the warehouse came from either the Dairy Barn or the temporary pole behind the warehouse (Tr. 471, 493, 496, 500, 514, 523). Both defendant and his father admitted there was an improper hookup meter (Tr. 483, 530).

The only specific instance defendant can point to in the entire transcript of trial where the trial court arguably might have been apprised of a possible conflict was where Ray Andreason was being cross-examined as to what happened when Mr. Mills confronted him stating, "I've got reason to believe you're diverting power" (Tr. 481). Ray insisted he knew nothing about it, as it was defendant's building, he had no reason to know about the cable sticking out of the meter (Tr. 480-483). Taken in

context, this statement does not directly imply that the defendant did the improper hookup, but simply that Ray Andreason was not aware of the improper hookup at that time (Tr. 481). Ray further stated that defendant also knew nothing about it (R. 482).

The claims of conflict are based entirely on appellate counsel's theory and speculation taken from the single statement discussed above that Ray Andreason implicated the defendant in order to assert his own innocence. Such a theory is unsupported in the context of the entire record. Defendant has thus failed to establish that the co-defendants, Ray Andreason, exculpated himself by inculpating the defendant or that there was an actual conflict of interest which adversely effected his own retained counsel's performance.

POINT II

SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE JURY'S CONCLUSION THAT DEFENDANT EXERCISED UNAUTHORIZED CONTROL OVER PROPERTY OF UTAH POWER & LIGHT COMPANY AND THAT THE PROPERTY HAD A VALUE OF MORE THAN $250.00.

The standards which this Court applies to determine whether evidence is sufficient to support a conviction are as follows:

> 1. The evidence and all inferences which may reasonably be drawn from it are to be reviewed by the appellate court in the light most favorable to the verdict. State v. Kerekes, 622 P.2d 1161, 1168 (Utah 1980).
> 2. It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses, and it is not the prerogative of this Court to determine guilt or innocence or to substitute its judgment for that of the fact finder. State v. Lamm, Utah, 606 P.2d 229, 231 (1980); and State v. Romero, 554 P.2d 216, 218 (Utah 1976).

> 3. Reversal for insufficiency of evidence is appropriate only when the evidence so viewed (under the first principle) is: "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, 659 P.2d 443 (Utah 1983).

Focusing on the more narrow issue of whether there is sufficient evidence to establish the elements of the offense, this Court announced the following standard of review in State v. Coffey, 564 P.2d 777 (Utah 1977).

> [I]t was the responsibility of the jury to determine whether the elements of the crime have been proved beyond a reasonable doubt. This court on appeal examines the evidence in the light most favorable to the verdict; and if it appears that the jury acted fairly and reasonably, the judgment will not be disturbed.

The statutory elements of theft applicable to the facts of this case are set forth in Utah Code Ann. §§ 76-6-404, 409 and 412 (1953), as amended, as follows:

> 76-6-404: A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.
>
> 76-6-409: (1) A person commits theft if he obtains services which he knows are available only for compensation by deception, threat, force, or any other means designed to avoid the due payment therefor.
> (2) A person commits theft if, having control over the disposition of services of another, to which he knows he is not entitled, he diverts such services to his own benefit or to the benefit of another who he knows is not entitled thereto.
> (3) As used in this section "services" includes, but is not necessarily limited to, . . . public utility, and transportation services . . . electricity . . . and the like . . . .

> 76-6-412: (1) Theft of property and services as provided in this chapter shall be punishable as follows:
>
> (b) As a felony of the third degree if:
>
> (i) The value of the property or services is more than $250 but not more than $1000.

The jury was properly instructed on the above statutory elements in Instruction No. 10 which required the jury to find beyond a reasonable doubt:

> (1) That on or about the 1st day of January, 1983 and continuing until September 4, 1984, at Salina, Sevier County, State of Utah, the Defendants did obtain or exercise unauthorized control over the property of Utah Power and Light Company, and
>
> (2) That the defendants had a purpose to deprive Utah Power and Light Company of such property, and
>
> (3) That the property had a value of more than $250.00 but less than $1,000.00.

(R. 46).

The evidence, and all reasonable inferences that may be drawn therefrom when viewed in the light most favorable to the jury's verdict were sufficient to establish the jury acted fairly and reasonably in finding beyond a reasonable doubt that defendant was guilty of the crime of theft, a felony of the third degree.

A. THE STATE ESTABLISHED THAT THE DEFENDANT DID OBTAIN OR EXERCISE UNAUTHORIZED CONTROL OVER THE PROPERTY OF UTAH POWER AND LIGHT COMPANY.

Defendant does not dispute that there was sufficient evidence to establish some of the elements of theft. He focuses solely on two elements: whether the State established unauthorized control over property of Utah Power & Light, and whether the property had a value of more than $250.00.

In the instant case, the electrical meters had been tampered with (Tr. 79, 80, 90, 92). The defendant was the owner of the property serviced by the tampered meters (Tr. 492) and defendant admitted that there was an improper electrical meter hook up (Tr. 530). Mills and Smith ascertained that there was electricity at the improper hookup at the warehouse (Tr. 101, 106). There was testimony that electricity had been used in the building (Tr. 79, 240-242). Mills and Rasmussen tested and ascertained that there was electricity flowing from the tampered meter servicing the area lights at the Sampson Dairy Barn facility (Tr. 90-92, 229-234). This service had been disconnected in 1976 (Tr. 170) and the electricity had since passed through the unmetered connection (Tr. 178).

It is unreasonable to assert that the defendant, a prior employee of Utah Power & Light (Tr. 488) and student of electrical engineering (Tr. 489) did not know that electricity was being improperly and purposely diverted through the meters for the benefit of his property. The facts proven: (1) alteration of the meters, (2) electrical power from the tampered meters and (3) use of electricity in the serviced premises, satisfy the standard of proof required for the jury to have found that the defendant did obtain or exercise control over the property of Utah Power & Light Company with a purpose to deprive the Company of services normally available only for compensation. Specifically, defendant diverted such services (electricity) to his own benefit which he knew he was not entitled to.

Although the question of theft of electricity has not often been the subject of adjudication, cases confronting the issue have found that theft or asportation of electricity occurs when there is an alteration with the meter so that electrical current will flow through the meter without registering. The moment the electricity is taken away the subscriber is instantaneously in possession of stolen property. People v. McLaughlin, 402 N.Y.S.2d 137 (1978). In State v. Kriss, 654 P.2d 942 (8th Cir. 1982), the court found:

> The alteration of an electric meter so that electrical current will flow through the meter without registering serves to benefit only one person--the occupant of the premises served by the electric line. . . . It is not likely that one who would receive no benefit would alter an electric meter, unless at the request of the person whose premises were being served; and it is also unlikely that the person who is receiving free electricity does not know that such is the fact--and why. 654 P.2d at 946.

The fact that defendant was the owner of the property and that he was the one who primarily benefited from the free electricity raises a strong presumption that he was either directly responsible for or had knowledge of the fact that electricity was being stolen for his benefit. As owner of the property, defendant at the very least, exercised unauthorized control over the property of Utah Power & Light and certainly had the expertise of how to bypass an electrical meter to obtain unmetered electricity as a past employee of Utah Power & Light. The defendant failed to provide any other reasonable explanation and, indeed, there is none.

B. THE STATE ESTABLISHED THAT THE STOLEN PROPERTY HAD A VALUE OF MORE THAN $250.00.

After Mr. Mills had recorded the measurement of electricity at the warehouse (Tr. 101, 106) and the Sampson Dairy Barn facility (Tr. 90-92, 229-234), and had taken inventory of the equipment in the warehouse serviced from the improper meter hook-ups, he gave the data to his District Manager, Mr. Reed Burrows (Tr. 277). Mr. Burrows took a 20% load factor of the appliances evidencing current usage at the warehouse (Tr. 279) and calculated the bill from April of 1983 to August of 1984 at $2,899.45 (Tr. 280). The three area lights assessment was $567.00 (Tr. 281). To further demonstrate that the calculation by Burrows was a fair assessment of the unmetered electricity to the defendant's premises, the State pointed to the Utah Power & Light bills submitted as evidence by defendant's wife (Tr. 456) noting that the first full month's reading after the meters were properly reconnected had tripled (Tr. 592). The defendant failed to offer his own expert witness to contradict Burrows' assessment methods.

The nature of electricity, being what it is, the only way the value of the stolen services, in the instant case, could be calculated was by taking the amount of Kilowatts assigned to defendant's property serviced by the tampered meters and assign the rates normally charged by Utah Power & Light for such service. This is what Mr. Burrows did (Tr. 277-307) finding the value of the stolen property was more than the required $250.00.

POINT III

THE PROSECUTOR'S REMARKS IN HIS CLOSING ARGUMENT CONSTITUTE HARMLESS ERROR.

Defendant asserts that the prosecutor made certain remarks that called the jury's attention to matters to which they would not be justified in considering. In Utah, the law is clear that the prosecutor has the right and the duty to analyze the evidence as a whole and to evaluate any statements or deductions reasonably to be drawn from such evidence. State v. Kazda, Utah, 540 P.2d 949, 951 (1975); State v. Eaton, Utah, 569 P.2d 1114, 117 (1977). Furthermore, the trial judge is allowed considerable latitude of judgment as to what is permissible for counsel to argue. Hales v. Peterson, 11 Utah 2d 411, 360 P.2d 412 (1961).

In State v. Bautista, 30 Utah 2d 112, 514 P.2d 530 (1973), the defendant in a rape case claimed that the prosecutor, in closing argument was guilty of misconduct. This Court, however, held that there was no misconduct since the prosecutor, in summing up his case, has "wide discretion and is entitled to exercise considerable freedom in expressing to the jury his view of the evidence." Id. at 533. As noted in State v. Creviston, Utah, 646 P.2d 750 (1982):

> Considerable latitude is allowable in closing argument. Counsel may discuss fully both the evidence and all legitimate inferences arising from the evidence. Such argument may merit reversal if (1) the remarks called to the jurors' attention matters which they would not be justified in considering in reaching a verdict, and (2) under the circumstances, the jurors were probably influenced by the remarks. State v. Valdez, 30 Utah 2d 54, 60, 513 P.2d 422, 426 (1973).

656 P.2d at 754.

The portion of the prosecutor's closing argument in issue is as follows:

> Now, if these two gentlemen were our only concern, we would probably let them go but they're not. Ladies and gentlemen, we have a concern for all of society, we have concerns if this goes on and that this is not an isolated incident. This type of conduct is pervasive and when we're--
>
> MR. MOWER: I object. I think the prosecutor is trying to paint the picture that there are others who are not charged and who are not before the Court.
>
> THE COURT: Objection's overruled. This is argument, Counsel.
>
> MR. BROWN: Perhaps the Defense would have you believe that nobody else is doing it but they are and everytime we have a jury trial, people are watching. People are watching to see how we administer justice and so, before you determine that there is some reasonable doubt--and I'm not sure what it is--but before you determine that, you need to consider that we're not--we've heard a lot about these two Defendants but they are not the only ones here and they are not the only ones we need to be concerned about. We've got to be concerned about the law.
>
> Now, we give the Defendants a lot of rights to insure that we never convict an innocent man but while we're insuring that, we need to be concerned about how many who aren't innocent are turned loose and how it affects them and us but also how it affects others, others who are going to base their decisions on conduct and what they know about how our system works.
>
> So it is a weighty decision but you need to consider everyone who is involved here. (Tr. 588-590).

Admittedly, the prosecutor's remarks may have called the jurors' attention to matters which they would not be justified in considering; however, given the substantial evidence supporting appellant's guilt (as noted in this brief's statement of facts and Point II, supra,) there is little probability that the jurors were

influenced by the remarks. See State v. Smith, 675 P.2d 521, 527 (Utah 1983) (holding that although the prosecutor's remarks in closing argument were improper, they were harmless).

In determining whether or not conduct by a prosecutor is prejudicial to an appellant, a two-pronged test has been set forth by this Court. In State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973), the Court states that a prosecutor's statement must "call to the attention of the jurors matters which they would not be justified in considering."

In the present case the statement by the prosecutor in closing argument emphasized to the jury the importance of their duty to weigh all the evidence. The trial judge, through his instructions, specifically Instruction Number 5 (R. 43), admonished the jury that they were the determiners of the facts and judges of credibility (R. 41-43).

Secondly, under Valdez, the question arises whether the jury was "under the circumstances of the particular case, probably influenced by those remarks". The remark by the prosecutor in the present case, even if found to be improper, has not been shown to have influenced the jury in the outcome of the decision. Certainly the statement by the prosecutor was not so overwhelming that the jury would totally disregard any and all evidence presented by either side and convict the defendant based on the prosecutor's remark. Under the circumstances, if the prosecutor's comments were error, such was harmless, in that even without the error there was not "a reasonable likelihood of a more favorable result for the defendant." State v. Fontana, Utah, 680 P.2d 1042,

1048 (1984), quoting State v. Hutchison, Utah, 655 P.2d 635, 637 (1982). See also Rule 30, Utah Rules of Criminal Procedure (Utah Code Ann. § 77-35-30 (1982). This is demonstrated by the overwhelming evidence in this case: (1) the alteration of the meters, (2) electricity flowing through the meters, (3) use of electricity for the defendant's property serviced from the tampered meters, (4) defendant's expertise in electrical wiring, and (4) evidence of equipment being used on defendant's electrically unmetered premises.

CONCLUSION

Based upon the foregoing, the defendant's conviction should be affirmed.

DATED this 4th day of March, 1986.

DAVID L. WILKINSON
Attorney General

Earl F. Dorius

EARL F. DORIUS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing brief, postage prepaid, to G. Fred Metos, attorney for appellant, YENGICH, RICH, XAIZ & METOS, 72 East 400 South, Suite 355, Salt Lake City, Utah 84111, this 4th day of March, 1986.

Earl F. Dorius