

1978

## State of Utah v. Roy J. Tippetts : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
ROY J. TIPPETTS,	:	Case No. 15512
	:	
Defendant-Appellant.	:	

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BRIEF OF APPELLANT

Appeal from a verdict of guilty and a judgment based thereon by the Honorable J. Robert Bullock, Judge of the Fourth Judicial District Court.

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FILED

MAY 26 1978

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Plaintiff-Respondent,	:	
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Defendant-Appellant.	:	

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Roy J. Tippetts, appeals from a conviction of Robbery, a Felony of the Second Degree, in the Fourth Judicial District, in and for Utah County, State of Utah, the Honorable J. Robert Bullock, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Roy J. Tippetts, was charged with Robbery in violation of Utah Code Ann. §76-6-301 (1953 as amended). On the 4th day of October, 1977, the appellant was found guilty of the offense as charged by a jury. Subsequently, the appellant was sentenced to incarceration at the Utah State Prison for the indeterminate term of one to fifteen years.

## RELIEF SOUGHT ON APPEAL

Appellant seeks the reversal of this conviction and a new trial.

## STATEMENT OF THE FACTS

On the morning of trial, counsel for the co-defendant was taken ill and unable to attend trial. This development was brought to the attention of the trial court in the judge's chambers by the appellant's attorney, Mr. Michael Esplin, before the jury was impaneled (R. 1). At that time a conversation was held between His Honor, Mr. Esplin, and the co-defendant to determine whether the co-defendant should be granted a continuance, or whether he would be willing to go to trial that day represented by Mr. Esplin (R. 2). The court explained to Mr. Lopez that a conflict of interest might exist between himself and the appellant. However, the court did not advise Mr. Lopez that he had a right to separate representation, nor did he seek to ascertain whether Mr. Lopez understood the details of Mr. Esplin's possible conflict of interest and the potential perils of such a conflict (R. 2). Instead, the court merely inquired of Mr. Lopez whether he desired a continuance in the matter or whether he preferred to proceed to trial that day with Mr. Esplin representing him (R. 2). Mr. Lopez indicated his concern over not languishing in jail any longer while awaiting a new trial date (R. 2) and assented to going to trial that day with appellant's counsel as his own counsel (R. 4).

At no time was the appellant present during the foregoing conversation and at no time did the court personally warn the appellant



of the potential dangers of representation by counsel with a conflict of interest. Nor did the court ever procure a voluntary waiver of appellant's Sixth Amendment right to effective assistance of counsel.

With Mr. Esplin as counsel for both Mr. Lopez and Mr. Tippetts, the trial commenced as scheduled. The testimony showed that on August 30, 1977, at approximately 12:30 a.m. the Riverbend Lounge (located at the mouth of Provo Canyon) was robbed by two men. Lori Elliot, a part-time waitress at the Riverbend, identified the two men who robbed the lounge as the appellant, Roy Tippetts, and his co-defendant, Henry Lopez (R. 13-14). Three other witnesses testified that they were customers at the Riverbend on the morning that it was robbed (R. 27, 33, 38). All three witnesses identified the appellant and his co-defendant as the perpetrators of the robbery (R. 28, 35, 40, 41).

Trooper John Moon testified that he apprehended the appellant, the co-defendant and two other individuals in an automobile near the top of Provo Canyon shortly after he received a radio communication that a robbery had been perpetrated at the Riverbend Lounge in Provo Canyon (R. 43-46). The trooper testified that two other individuals in the car with the appellant and co-defendant identified themselves as the brothers of Mr. Lopez (R. 52). Some money was located in the automobile (R. 51), however no weapon was located in the automobile nor was any found at the scene where the car was stopped (R. 52).

At the conclusion of the State's case, the defense rested without calling any witnesses (R. 59). Based upon the foregoing the

jury found both the appellant and the co-defendant guilty of robbery.

## ARGUMENT

### POINT I

#### THE APPELLANT'S DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WAS PREJUDICIAL ERROR.

##### A. AN ATTORNEY'S CONFLICT OF INTERESTS IN DUAL REPRESENTATION RENDERS HIS REPRESENTATION INEFFECTIVE.

Article I, Section 12 of the Utah Constitution and the Sixth Amendment to the United States Constitution guarantee an accused the right to counsel at trial. Gideon v. Wainwright, 372 U.S. 335 (1963). It is well settled that one lawyer may represent more than one defendant so long as his representation is effective. Powell v. Alabama, 287 U.S. 45 (1932). However, effective assistance of counsel contemplates that such assistance be "untrammelled and unimpaired by . . . requiring that one lawyer shall simultaneously represent conflicting interests." Glasser v. United States, 315 U.S. 60, 70 (1942).<sup>1</sup>

The danger implicit in dual representation is that an attorney who undertakes such a task finds himself simultaneously balancing the interests of each defendant against the other. The

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1. The A.B.A. Code of Professional Responsibility precludes a lawyer from representing one client if the interests of another may impair his independent judgment. Such representation is countenanced only after full disclosure is made to the involved parties of the possible effect of such representation on the exercise of his independent judgment on behalf of each of them. [D.R. 5-105(c)].

problem is aggravated by the fact that an attorney can rarely predict when a conflict of interest will or will not arise. There are too many unknown variables in a criminal trial for an attorney to presume to know whether the interests of one client will conflict with another. One commentator has elaborated on this imbroglio which stalemates an attorney who seeks to undertake dual representation:

The interests and defenses of co-defendants are, as a general rule, antagonistic; and, given the fact of joint representation, a strong likelihood arises that a conflict exists or will ensue. The inherent difficulty in such a situation is that a single attorney must simultaneously steer the defenses of each defendant on proper course thereby wasting much of his valuable courtroom concentration on the task of preventing scrapes and collisions between multi-client interests. He can no longer freely decide what will be most advantageous for the defense of one client without first weighing against it the disadvantages that might consequently accrue to the other. He must, in short, temper his strategy to a middle-of-the-road position. This condition, of course, imposes an artificial and strained approach on a singular counsel which prevents him from developing a full, aggressive defensive strategy. The shattering impact of skilled technique which ordinarily could be leveled in full force against the opposition must be partially, and often substantially, diffused in a constant concern to calculate the possible harm each maneuver might work on the co-defendant. Counsel must pick, choose, compromise and forego various attacks because of the threat of adverse repercussions to the interests of the co-defendant. He is thereby prevented from the use of all the weapons in his legal armory. Note, 23 Ark. L. Rev. 250, 254.

Because of the unforeseeability of conflicts of interest,

the A.B.A. has advised that dual representation be undertaken only in the most extraordinary of situations. The A.B.A. "Standards Relating to the Administration of Criminal Justice - The Defense Function" 13.5(b) (1971), warns that:

Sixth Amendment representation is lacking if unknown to the accused and without his knowledgeable assent, his lawyer is in a duplicitous position where his full talents as a vigorous lawyer having the single aim of acquittal of all means fair and honorable are hobbled or fettered or restrained by commitments to others.<sup>2</sup>

The seminal case in the area of dual representation and ineffective assistance of counsel is Glasser v. United States, supra. In Glasser v. United States, supra, the government tried five co-defendants for conspiracy to defraud the government. Two of the five co-defendants, Kretske and Glasser, were initially represented by separate counsel. However, at trial Kretske became dissatisfied with his appointed counsel. The trial court then ordered Stewart, the attorney retained by Glasser, to represent Kretske. The Court agreed with Glasser that his right to effective assistance of counsel had been abridged by the dual representation. The Court stated that Stewart's "struggle to serve two masters" did impair his effectiveness. Although the Court did point to the attorney's failure to cross-examine a key witness and his failure to make certain evidentiary objections as evidence of his dual loyalties, the Court refused to require any precise degree of prejudice be shown. The Court observed

To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. 315 U.S. at 75-76. (Emphasis Supplied)

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2. Similarly, the A.B.A. Code of Professional Responsibility states that it is the "duty of a lawyer, both to his client and to the legal system, to represent his client zealously. . . ."

Later in the opinion, the Court came its closest to enunciating a standard when it stated that where it appeared from the record that Stewart's representation of Glasser might have been more effective had there been no dual representation, a new trial was necessary. 315 U.S. at 76. Thus, the thrust of Glasser v. United States, supra, would appear to be that actual prejudice need not be shown when an actual conflict develops which inhibits an attorney's ability to maneuver.

Since Glasser v. United States, supra, the Supreme Court has only recently re-examined the issue of ineffective assistance of counsel due to conflicts of interest. In Holloway v. Arkansas, \_\_\_\_\_ U.S. \_\_\_\_\_ (1978), 23 Cr. L. 3001, three co-defendants were jointly represented by a court appointed lawyer. Both before trial and later at trial, the co-defendants requested separate counsel based on their appointed attorney's representations that because of confidential information received from the co-defendants, he felt he was confronted with representing conflicting interests. On both occasions, the trial court refused to appoint separate counsel and the co-defendants were ultimately convicted.

The Supreme Court had little difficulty condemning the actions of the trial court. The Court held that the failure to either appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel, in the face of the representations made by counsel weeks before trial and again before the jury was empanelled, deprived petitioners of the guarantee of assistance of counsel. In reaching this result, the Court ruled that

an aggrieved defendant had no burden whatsoever to demonstrate prejudice.

This holding was predicated on the Court's reading of Glasser v. United States, supra, as precluding "nice calculations as to the amount of prejudice" resulting from the denial of the fundamental right to effective assistance of counsel. Although the above quoted language from Glasser v. United States, supra, presupposes that an accused was prejudiced to some extent by joint representation, Mr. Justice Burger, writing for the Holloway court, pointed out that all the caselaw cited in Glasser v. United States, supra, as supporting that proposition actually presumes prejudice regardless of whether it was independently shown.<sup>3</sup> From this fact, Mr. Justice Burger concluded that the harmless error rule has no application to right to counsel cases:

Moreover, this court ha[s] concluded that the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."  
23 Cr.L. at 3005.

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3. The Holloway court pointed out that the Supreme Court's refusal to reverse Kretske's conviction in Glasser v. United States, supra, was not contrary to its interpretation of that case. Kretske did not raise any objection on appeal to his joint representation. 315 U.S. 60, 77. Rather, some of the other co-defendants argued that Glasser's denial of effective assistance of counsel prejudiced them as alleged co-conspirators. In that context, the Glasser court required a showing of prejudice.

In reaching this conclusion, Mr. Justice Burger explained that even if the Glasser opinion did not mandate automatic reversal, such a result was logically mandated if such grievances were to be redressed. This follows because the difficulty with applying the harmless error rule to conflict of interest cases is that discerning prejudice is not susceptible to intelligent and even-handed application.

Elucidating this point, Mr. Justice Burger stated:

In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable . . . But in a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to refrain from doing . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.  
23 Cr. L. at 3005.

Thus, the Holloway court concluded that because of the masked nature of such an error, requiring a defendant to show any amount of prejudice would be too much.

The appellant concedes that the per se reversal rule announced in Holloway v. Arkansas, supra, is only triggered when the attorney brings the potential or actual conflict of interest to the attention of the trial court. However, the appellant contends that although Holloway v. Arkansas, supra, does not require automatic reversal in the instant case, Holloway v. Arkansas, supra, does hold that even in the instant case, appellant need not show any quantum of prejudice. This is so because the rule announced in Holloway v. Arkansas, supra, which presumes prejudice, regardless of whether it is shown independently, is not affected by whether the attorney does or does not alert the trial court to the possibility or actuality of



the conflict of interest. Regardless of whether the attorney who has undertaken the responsibility of dual representation warns the trial court about conflict problems, the same "unguided speculation" which persuaded the Holloway court to simply presume prejudice - ex. Certainly if the problem of "unguided speculation" precludes a reviewing court from applying the harmless error rule to the situation where the attorney has warned the trial court, then that same problem logically inheres in the situation where the attorney fails to warn the trial court.

In this regard, it is helpful to review what Holloway v. Arkansas, supra, did not decide. Significantly, the Holloway court specifically reserved ruling on how an attorney's failure to advise the trial court of the potentiality or actuality of a conflict impacts on an ineffective assistance of counsel claim. In that situation, the Holloway court observed that two issues are commonly raised: 1) how strong a showing of conflict must be made and 2) what duty does the trial court have to alert defendants to the dangers implicitly lurking in dual representation.

It seems clear that these are the issues that the Holloway court viewed as uniquely affecting the situation in the instant case where the attorney neglects to advise the trial court of the conflict problem. However nothing in the language or the reasoning of the Holloway opinion would indicate that when the attorney fails to bring the conflict to the attention of the trial court that the aggrieved defendant then must shoulder the burden of showing how that conflict prejudiced his representation. On the contrary, the thrust of the



Holloway decision makes clear that "a rule requiring a defendant to show a conflict of interests . . . prejudiced him in some specific fashion would not be susceptible to intelligent, even-handed application."

Thus, in the instant case this Court need not consider how the appellant was prejudiced by dual representation. Instead, we must hasten into the thicket avoided by the Holloway court and consider first, what duty does the trial court have to alert defendants to the dangers of dual representation, and second, how strong a showing of conflict must be made. In addition to these issues specifically noted by the Holloway court, two other issues are inextricably intertwined in a dual representation case: who bears the burden of persuasion and what is the impact of an absence of waiver.

B. THE TRIAL COURT HAS AN AFFIRMATIVE DUTY TO ASCERTAIN THAT DEFENDANTS ARE NOT DEPRIVED OF THEIR RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY JOINT REPRESENTATION OF CONFLICTING INTERESTS.

Although it is true that the right to effective assistance of counsel may be waived, a valid waiver requires an "intelligent relinquishment or abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). This standard was refined in Brady v. United States, 397 U.S. 742, 748 (1970), where the Court required that valid waivers not only be voluntary, but also be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." This standard applies whenever a fundamental right is involved. Fay v. Noia, 372 U.S. 391 (1963). The protection afforded fundamental rights was made clear in Glasser v. United States, <sup>supra</sup>, where the Court stated that "we indulge every reasonable pre-

sumption against the waiver of fundamental rights."

In Glasser v. United States, supra, we also find the root of the trend towards placing an affirmative duty on the trial court to ascertain that the fact of joint representation is not merely a fortuitous occurrence, but rather, that it reflects a knowing and intelligent decision to forego the constitutional right to conflict-free, separate counsel. The Glasser court states:

The trial court should protect the right of an accused to have the assistance of counsel. "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." (Citations omitted). 315 U.S. at 71. <sup>4</sup>

In Campbell v. United States, 352 F.2d 359 (D.C. Cir., 1965), the court recognized that a fundamental right - the right to effective assistance of counsel - was unwittingly and routinely being waived by criminal defendants. In an attempt to prevent this sort of unknowing forfeiture of Sixth Amendment rights, the court announced a rule requiring a trial judge to insure that co-defendants' decision to proceed with one attorney was an informed decision. The court explained the need for such an inquiry as follows:

The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a

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4. See Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948), where the Supreme Court reaffirmed the need for affirmative judicial involvement in the waiver process.

single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks. Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of counsel. 352 F.2d at 360.

Numerous other courts have similarly recognized the propriety of allocating this duty to the trial court.<sup>5</sup>

C. THE ABSENCE OF A WAIVER SHIFTS THE BURDEN OF PROOF TO THE STATE ON THE QUESTION OF EITHER THE EXISTENCE OF A CONFLICT OR THE PREJUDICE RESULTING FROM A CONFLICT.

The appellant submits that in the instant case where no on-the-record waiver of his right to conflict-free, separate counsel appears (R. 1-4), the burden shifts to the State to prove either that no conflict existed, or that the conflict did not impair his representation at trial. The importance of the right to counsel has sparked courts to formulate just such a prophylactic rule to insure its protection.

In United States v. Foster, 469 F.2d 1 (1st Cir., 1974), a drug defendant challenged his conviction where his attorney had also represented his co-defendant. In rejecting this claim, the Court found that there was no divergence in the interests of the co-defendants. Although the

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<sup>5</sup> See, United States v. Foster, 469 F.2d 1, (1st Cir., 1974); Morgan v. United States, 396 F.2d 110, 114 (2d Cir., 1968); United States ex rel. Hart v. Davenport, 478 F.2d 203, 211 (3d Cir., 1973); United States v. Truglio, 493 F.2d 574 (4th Cir., 1974); and United States v. Garcia, 517 F.2d 272, 275 (5th Cir., 1975), which sets out a Boykin-like procedure for the waiver of the right to conflict-free separate counsel.

First Circuit held that dual representation had not adversely affected the defendant in that case, the Court went on to announce a rule that the lack of a satisfactory judicial inquiry into dual representation shifts the burden of proof on the question of prejudice to the government. In such a situation, the government is required to demonstrate from the record the unlikelihood of prejudice by a preponderance of the evidence. In stating this rule, the Court specifically recognized the difficulties associated with an after-the-fact reconstruction of prejudice.

The Minnesota Supreme Court has recently announced a similar burden-shifting device to protect Sixth Amendment rights. State v. Olsen, 258 N.W. 2d 898 (Minn., 1977), the rule is stated this way: whenever a satisfactory inquiry does not appear on the record, the burden shifts to the government to prove beyond a reasonable doubt that a prejudicial conflict of interest did not exist. In justifying this rule, the Minnesota court explained that it has the benefit of protecting Sixth Amendment rights in such a way that it promotes effective judicial administration by providing an independent basis for appellate courts to easily assess the voluntariness of the waiver of this right. To insure that defendants voluntarily and knowingly opt for dual representation, the Minnesota court requires a comprehensive, Boykin-like inquiry by the trial court:

The court should address each defendant personally and advise him of the potential danger of dual representation. The defendant should have an opportunity and be at liberty to question the trial court on the nature and consequences of dual representation and the entire procedure should be placed on the record for review.  
258 N.W. 2d at 907.

Significantly, the dissenting opinion in Holloway v. Arkansas, supra, also endorses the burden-shifting rules announced in United States v. Foster, supra, and State v. Olsen, supra, as an alternative to the per se rule announced by the majority opinion. In his dissenting opinion, Mr. Justice Powell writes:

I would follow the lead of the several Courts of Appeals that have recognized the trial court's duty of inquiry in joint representation cases without minimizing the constitutional predicate of "conflicting interests".

In footnote 3, Mr. Justice Powell cites United States v. Carrigan, 43 F.2d 1053 (2nd Cir., 1976), as illustrative of one of the "duty of inquiry" cases which he would endorse in lieu of the per se rule adopted by the majority opinion. In that case, two defendants were jointly represented by a single attorney. The record reflected that the trial court made no inquiry into the possibility of a conflict of interest. On appeal, the Second Circuit reversed the convictions of both defendants. The Court held the trial court has an affirmative duty to inquire into the possibility of a conflict of interest. When such inquiry is made, the burden of proof on the question of prejudice shifts to the government.

The Eighth Circuit declined to adopt any burden-shifting procedure in United States v. Lawriw, \_\_\_\_ F. 2d \_\_\_\_, (8th Cir., 1977), 22 Cr. L. 2369, although it does require the trial court to conduct a Boykin-like inquiry into the decision of co-defendants to accept dual representation. Without shifting the burden of persuasion on the issue of prejudice, the Lawriw court effectively accomplishes the same result. This is done by focusing pre attention on the validity of the waiver of a constitutional

right. As the Court explains:

While the potential for prejudice is not so inherent as to require a per se rule of conflict, it is nonetheless sufficiently persuasive that only a minimal showing of conflict should be required to invoke constitutional protection. Thus, in most cases the question will not be so much whether a conflict existed, but whether the defendant effectively waived it. 22 Cr. L. 2370.

Accordingly, the Lawriw court warns:

. . . that without such an inquiry a finding of knowing and intelligent waiver will seldom, if ever, be sustained by this Court . . . Considering the minimal showing needed to establish the substantial possibility of a conflict of interest, the importance of an adequate record to underpin a finding of waiver cannot be overstated. The administration of justice is best served by such an inquiry and we now require it.

Thus, although it is the appellant's position that the issue of prejudice was foreclosed by Holloway v. Arkansas, supra, if it is an issue, then the State bears the burden of proof on that issue since the record clearly shows that the trial court made no inquiry whatsoever into the possibility of a conflict of interest.

D. THE APPELLANT NEED ONLY SHOW THAT A CONFLICT OF INTEREST EXISTED.

Assuming arguendo that the absence of a waiver is not dispositive of the issue in the instant case, appellant submits that he need only show that the conflict of interest did exist. Appellant submits that the unique feature of conflict of interest cases is that it is extremely difficult to point to tangible evidence of the conflict. This is so because the attorney who undertakes dual representation may strive to reconcile the conflict. The majority opinion in Holloway v. Arkansas, supra, recognized this peculiar problem when



it stated:

But in a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to refrain from doing . . . (Emphasis in original) 23 Cr. L. at 3005.

In Austin v. Erickson, 477 F.2d 620 (8th Cir., 1973), the Court warned that the appearance of having consciously chosen one defense over another may be misleading, and often belies the efforts of an attorney "to reconcile conflicting interests rather than to enforce, to their full extent, the rights of the party whom he should alone represent. . ." 477 F. 2d at 625.

The Court in Austin further noted:

It must be remembered that in cases involving conflicts of interest, the conflict does not always appear full-blown upon the record since counsel may throughout endeavor to reconcile the conflict. 477 F. 2d at 626.

Accordingly, the Austin court, in granting a writ of habeas corpus, concluded that once an actual conflict of interest had been established the petitioner had met her burden.

In People v. Gallardo, 74 Cal. Rptr. 572 (1969), the California Court applied the harmless error rule in reversing the convictions of two co-defendants represented by the same attorney. In that case, the Court only required a potential conflict of interest to trigger a reversal. The facts in Gallardo bear a marked resemblance to the facts in the case at bar. In that case, both defendants informed the trial court on the day of trial that they felt a conflict of interest precluded their court appointed attorney from effectively representing both of their interests at trial. The court appointed attorney

informed the court that he did not feel there was any conflict. The trial court denied the defendants' requests for separate counsel. At the trial which immediately followed, the defendants presented no evidence.

Noting that the record may be silent as to the existence of a conflict, the Gallardo court held that a potential conflict suffices:

Separate counsel for each defendant, throughout the proceedings might have employed tactics for the best interest of his defendant, including a vigorous assault on the remaining defendant, without having to consider the interest of such other defendant. Where, on the other hand, counsel represents both defendants, he must . . . "make common cause" for both clients. If he does not he runs the risk of throwing one client to the wolves, to benefit the other . . . If he chooses the former course, the record is not likely to contain any positive evidence of an actual conflict. 74 Cal. Rptr. at 575-576.

In the instant case, while there is no question as to the good faith of appellant's court appointed attorney, the fact of the matter is that just as in People v. Gallardo, supra, he was mistaken in his belief that there was no conflict.

The affidavits of the appellant and Sandra Gibson attached hereto as Appendix A and B, leave no doubt that the appellant and the co-defendant had antagonistic defenses. In the case at bar, just as in People v. Gallardo, supra, no evidence was presented. If we view this decision not to put on a defense as the "tip of the iceberg", it is readily apparent that counsel for appellant adopted this middle-of-the-road strategy to appease the conflicting interests of his two clients.

The Third Circuit also only requires a showing of a



possible conflict of interest to sustain an ineffective assistance of counsel claim. The Third Circuit explained its view of the legal standard to be applied in conflict of interest cases in Hart v. Davenport, 478 F.2d 203, 210 (3d Cir., 1973):

On the other hand, we have rejected the approach that before relief will be considered the defendant must show some specific instance of prejudice [Citations omitted] Instead, we have held that upon a showing of a possible conflict of interest or prejudice, however remote, we will regard joint representation as constitutionally defective. (Emphasis Supplied)<sup>6</sup>

In Sawyer v. Brough, 358 F.2d 70 (4th Cir., 1966), Sawyer denied his guilt while his co-defendant admitted in a confession his own complicity, accused Sawyer of participation in the robbery, and endeavored to pass most of the blame onto Sawyer. In granting Sawyer's writ of habeas corpus, the Fourth Circuit agreed with him that he was denied the effective assistance of counsel where his court appointed attorney also represented his co-defendant.

A closer examination of the facts in Sawyer reveals a startling similarity to the facts in the case at bar. In Sawyer, the trial court viewed the confession as only implicating the co-defendant, and accordingly, ruled that it was admissible against him alone. At Sawyer's habeas corpus hearing, his court appointed lawyer testified that he did not feel any conflict of interest existed between the co-defendants since he never viewed the co-defendant's statement as inculcating the defendant. Thus, the clear implication

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<sup>6</sup>. Also holding that a possible conflict of interest is sufficient to sustain an ineffective assistance of counsel claim. See Walker v. United States, 422 F.2d 374 (3d Cir. 1973).

of the attorney's testimony was that his representation of Sawyer was not hampered by any attempt to accomodate both co-defendants.

Notwithstanding the attorney's representations, the Fourth Circuit stated that "despite these appearances, we cannot be persuaded that the jealously guarded constitutional right to effective assistance of counsel has been accorded to Sawyer." 358 F.2d at 73. In reaching this result, the Court in Sawyer construed the Glasser formulation as follows:

The salient fact remains that divergent interests did exist, and therefore an opportunity was presented for the impairment of Sawyer's right to the unfettered assistance of counsel. It is not necessary that Sawyer delineate the precise manner in which he has been harmed by the conflict of interest; the possibility of harm is sufficient to render his conviction invalid. 358 F.2d at 73.

In Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir., 1975), it was held that merely foreclosing a plausible defense required a reversal. In that case four teenage inmates had been charged with the murder of a fellow inmate. The petitioner and two of the other co-defendants were represented by the same court appointed attorney. The fourth co-defendant was represented by a retained attorney. The Court held that a conflict of interest did exist where because of petitioner's joint representation, he was unable to accuse one of the boys as being the sole perpetrator. The Court explained that it was not necessary to show that the defense would have been successful:

Rather, if the record shows that a plausible defense (one that might have influenced twelve reasonable jurors) was foreclosed because it might have prejudiced the other defendants represented by the same appointed counsel, the conviction must be overturned. 516 F.2d at 1079.

In the instant case, appellant's joint representation precluded him from accusing the co-defendant and his brother of being the two that robbed the Riverbend Lounge (See Appendix A and B). However, had the appellant been represented by an attorney whose loyalties were unimpaired by a conflict of interest, he could have cross-examined the co-defendant and both his brothers to show that he never entered the Riverbend Lounge on the evening it was robbed. This version of the facts is not without support in the record. Trooper Moon testified that the appellant had only two dollars in his pocket when arrested (R. 53) whereas one of the Lopez brothers had fifty or sixty dollars in his pocket (R. 53).

#### CONCLUSION

The appellant was denied the effective assistance of counsel because his attorney's conflict of interest precluded him from zealously asserting a plausible defense in his behalf, to-wit: the co-defendant and his brother robbed the Riverbend Lounge; the appellant did not. Mr. Esplin could not point to Lopez' guilt to shield the appellant because he also represented Lopez. The conflict was thus real.

Because the trial court never advised the appellant of the dangers of dual representation, and because no waiver of the right to conflict-free, separate counsel appears on the record, the burden shifts to the State to prove either that no conflict of interest existed, or that the conflict did not prejudice the appellant.

Even if this Court should reject the burden-shifting procedure

adopted by the Foster, Olsen, and Carrigan courts, appellant's conviction should still be reversed since he has demonstrated that an actual conflict of interest did exist. Glasser v. United States supra, prohibits this Court from indulging in "nice calculations" as to the amount of prejudice resulting from the denial of conflict-free, separate counsel. 315 U.S. at 75-76.

Although the per se rule announced in Holloway v. Arkansas supra, was couched in terms of the situation where the attorney brought the potential conflict of interest to the attention of the trial court, appellant contends that limiting the holding to that particular set of facts is unwarranted. Certainly it would be unfair to penalize the appellant because his court appointed lawyer failed to warn the trial court that a conflict of interest existed between the co-defendants. The Supreme Court has expressly recognized the fact that few defendants can, realistically, protect their own rights or appraise the quality of their representation. Johnson v. Zerbst, 304 U.S. 458, 462-463 (1938). Scant justification exists for imputing responsibility for the attorney's conduct to the defendant.

Moreover, it must be remembered that any conflict of interest case is really a problem of ineffective assistance of counsel. The very fact that appellant's counsel failed to appreciate that a conflict of interest existed and thereby neglected to warn the trial court is the heart of appellant's assignment of error. Under the circumstances, appellant's counsel had no business even acquiescing to the court's request to represent the co-defendant. Mr. Esplin's loyalties should have been uncompromisingly committed to the appellant. It would be ironic indeed, if Mr. Esplin's failure to recognize the

conflict of interest - the very error appellant now complains of - renders his claim somehow unripe, or waived. The fact that neither the trial court nor appellant's lawyer appreciated the possibility that appellant's constitutional right to effective assistance of counsel was being infringed by dual representation should not prejudice appellant's claim. Persuasive on this point is Holland v. Boles, 225 F. Supp. 863 (N.D.W. Va., 1963), wherein the Court made these apt observations:

There remains for consideration the effect, if any, of the fact that the record here is devoid of proof that either the regular judge or the special judge was sufficiently aware of the factual situation to recognize and appreciate the inevitable conflict of interests. The effect upon the accused is the same whether or not the court knew Holland was improperly represented. He has not been accorded the effective representation by counsel to which he is constitutionally entitled. . . Judge Denman, of the Ninth Circuit, in the original opinion in Hayman v. United States, 187 F.2d 456, at page 460 (1951), has this to say: "If, unknown to the court, the accused's counsel were bribed by an enemy of the accused to throw his case and the accused learned of it after conviction, the fact that the court had nothing to do with the wrong done, does not deprive him of his right to the writ." (Emphasis Supplied)

For these reasons, appellant respectfully submits that the Court below should be reversed and the matter remanded for a new trial.

Respectfully Submitted,

*Walter F. Bugden, Jr.*  
WALTER F. BUGDEN, JR.  
Attorney for Appellant

## APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH,	:	AFFIDAVIT
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
ROY J. TIPPETTS,	:	Case No. 15512
	:	
Defendant-Appellant.	:	

---

I, ROY J. TIPPETTS, being first duly sworn according to law depose and say:

1. That I am the defendant-appellant in the above entitled action.

2. That I believe that a conflict of interest with my co-defendant prevented me from receiving effective assistance of counsel.

3. That I know that my attorney, Mr. Michael Esplin, was fully cognizant of this conflict.

4. That I know he was aware of this conflict because of a conversation I had with him sometime in September, at his office. Both Joy Anderson, my sister, who lives in Seattle, Washington, and Sandra Gibson, 648 East Ramona Avenue, Salt Lake City, Utah, were present at this conversation. On that occasion, I specifically told Mr. Esplin that although I was in the car when we were apprehended by the state Trooper, I was not one of the two who robbed the Riverbend Lounge. I told Mr. Esplin that my co-defendant and one of his brothers - whom I specifically named - were the ones who committed the robbery.

5. That I asked the co-defendant's brothers to testify in my behalf, but that they both flatly refused.

6. That I told Mr. Esplin that the Lopez brothers refused to voluntarily appear and testify for me.

7. That Mr. Esplin indicated he would subpoena the Lopez brothers for trial, but he never did.

DATED this 25<sup>th</sup> day of 25<sup>th</sup>, 1978.

*x Roy Tippetts*  
\_\_\_\_\_  
ROY J. TIPPETTS  
Defendant-Appellant

STATE OF UTAH                    )  
                                      : ss.  
County of                        )

On the 25<sup>th</sup> day of 25<sup>th</sup>, 1978, personally appeared before me ROY J. TIPPETTS, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

*Kenneth D. Cook*  
\_\_\_\_\_  
NOTARY PUBLIC  
Residing in

My Commission Expires:

\_\_\_\_\_  
Notary Public, State of Utah



## APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH,	:	AFFIDAVIT
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
ROY J. TIPPETTS,	:	Case No. 15512
	:	
Defendant-Appellant.	:	

---

I, SANDRA GIBSON, being first duly sworn according to law depose and say:

1. That I was present when the appellant, ROY J. TIPPETTS, was interviewed sometime in early September by his attorney, Mr. Michael Esplin, at the Utah County Legal Defender Association Office, 107 East 100 South, #29, Provo, Utah 84601. Also present at that interview was Joy Anderson, now residing in Seattle, Washington.

2. That at that interview, the appellant told his attorney that he did not rob the Riverbend Lounge; he did specify by name the two men who did.

DATED this 26<sup>th</sup> day of May, 1978.

*Sandra Gibson*  
SANDRA GIBSON

SUBSCRIBED AND SWORN to before me this 26<sup>th</sup> day of May, 1978.

*Kenneth B. Cook*  
NOTARY PUBLIC

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My Commission Expires: