

1987

# Claude A. Bundy v. Gerald Cook, et al. : Brief of Appellant

Utah Supreme Court

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Kimberly Hornak; Assistant Attorney General; Attorney for Respondent.

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1987

870016 IN THE SUPREME COURT

STATE OF UTAH

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CLAUDE A. BUNDY,  
Petitioner and Appellant,  
vs.  
GERALD COOK, et al,  
Respondents.

Case No. 870016  
Classification No. 2

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BRIEF OF APPELLANT

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Appeal from a denial of a Petition for Writ of Habeas Corpus  
by the Hon. Scott Daniels, a Judge of the Third Judicial District  
Court of the State of Utah, at Salt Lake County, Utah, on  
November 8, 1986.

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**FILED**  
JUL 17 1987

IN THE SUPREME COURT

STATE OF UTAH

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	:	
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IN THE SUPREME COURT

STATE OF UTAH

---oooOooo---

CLAUDE A. BUNDY,

Defendant and Appellant,

vs.

GERALD L. COOK, Warden,  
Utah State Prison, State of  
Utah, Department of  
Corrections,

Case No. 870016

Plaintiffs and Respondents.:

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the lower court err in failing to grant Petitioner's Writ of Habeas Corpus?
2. Did the court err in failing to make a detailed ruling on each of the Petitioner's points as required by Rule 65b(i)(8) of the Utah Rules of Civil Procedure?

STATEMENT OF FACTS

That on or about the 20th day of January, 1983, Petitioner was convicted after a jury trial by the Honorable Dean Conder, of rape and forcible sodomy. Petitioner was sentenced to a five to life term at the Utah State Prison in Case Number 82-528.

That Petitioner then appealed to the Utah Supreme Court, which appeal was denied in a decision dated June 29, 1984 in Case

Number 19013.

Petitioner then filed a Writ of Habeas Corpus in case number C86-4405 alleging numerous trial defects.

That on or about the 15th day of August, 1986, an evidentiary hearing was held before the Honorable Scott Daniels, Judge of the Third Judicial District Court, at which time Petitioner and various witnesses presented testimony.

That on the 8th day of November, 1986, the Court issued a Minute Entry denying Petitioner's claims.

That shortly thereafter, Petitioner filed this appeal.

#### SUMMARY OF ARGUMENT

Appellant contends numerous trial defects, including the acts of the Prosecutor and the Trial Court denied him the opportunity of a fair trial and that the actions of Trial Counsel denied him effective assistance of counsel as mandated by the Constitution. He argues that had these errors not occurred, he would not have been found guilty.

#### ARGUMENT

##### POINT I

THE OPINION TESTIMONY OF OFFICER SCOTT WAS INADMISSABLE

Rule 56 of the Utah Rules of Evidence in effect at time of trial provided as follows:



(1) If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based upon the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

(2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of special knowledge, skill, experience, or training possessed by the witness.

(3) Unless the judge excludes the testimony, he shall be deemed to have made the finding requisite to its admission.

(4) Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact.

From the record in this matter, it can be assumed that Officer Welby Scott was not testifying as an expert, thus the second part of Rule 56 does not apply. (See brief of Respondent in case number 19013 at page 12). The important determination then, in the instant matter, is whether Mr. Scott's testimony was limited to such opinions or inferences as are rationally based upon his perceptions, and are helpful to a clear understanding of his testimony or to the determination of the fact in issue. In the instant case, a clear review of the record will show that Mr. Scott indicated no facts upon which he based his inference. He simply made the gratuitous statement that the original complaint

was without merit even though he had failed to speak with the complaining witness or a Marvin Teeter who could have verified his story. The record is also clear that Officer Scott failed to make any reasonable investigation of the original complaint on the original allegations of Sheri Christiansen. Thus, the testimony of Officer Welby Scott was not rationally based. Further, his opinion did nothing to help the jury understand his testimony. The only possible reason for Officer Scott's testimony was to convince the jury that Mr. Bundy's defense was without merit. As rebuttal evidence, after the laying of a foundation of fact, no objection could have been made to Officer Scott's testimony. However, as it occurred, his testimony does not comply with Rule 56(1) of the Utah Rules of Evidence.

The Respondent argues that subpart 3 of the Utah Rules of Evidence excuses any error that may have occurred. However, in a case such as this, where the only direct evidence of the event in question came from the alleged victim and the Defendant, it can be particularly difficult for the jury to decide. As such, subtle matters and factors may adversely influence the jury. Thus, even though the testimony of Officer Scott was not objected to by Counsel for the Defendant, it is submitted that in the instant case, the improper opinion testimony constituted plain error, and the judge should have objected on his own to the testimony. Respondent would request that in the instant case,

this court closely review the evidence admitted at trial to assure that improper subtle influences and factors were not laid before the jury such that they may have based their decision on improper matters. In the case at bar, in addition to the Defendant's denial, there was evidence of both a family cover-up and of a family conspiracy against the Defendant with regard to the Defendant's actions in pending civil divorce litigation. That family conspiracy and cover-up would include Petitioner's wife, her sister the victim, and the victim's father. Therefore, this improper opinion by the detective might have been highly prejudicial and influential on the jury with regard to resolving the disputes between the Defendant and that family. As such, this court should strictly review that testimony to insure that improper factors did not influence the jury.

As to the failure of Counsel to object to Officer Scott's testimony, see IV infra.

#### POINT II

##### THE TESTIMONY BY PETITIONER'S WIFE WAS IMPROPERLY ADMITTED INTO EVIDENCE.

The record in the instant case will show that the Petitioner was not present during an in-chambers conversation where Defense counsel consented to allow Petitioner's wife to testify in a limited fashion. It is also obvious from the record that such consent was directly contrary to the wishes of Petitioner. It would appear that Counsel had erred, and although he later at-

tempted to rectify that error by asking for a mistrial, the damage had been done, and the court was reluctant to grant a mistrial. Appellant would allege that he was entitled to be present during the in-chambers conversation, and that had he been present, the error would not have occurred, and Lori Bundy would not have testified. See, 85 A.L.R.2d 1112 and State v. Aikers, 51 P.2d 1052, 1056 (Utah 1935) where the Court indicated that the Court has a duty to see that the Defendant is personally present at every stage of the proceedings, which presence cannot be waived by counsel, or denied by the Court, and any such absence is ground for reversal.

It would also appear that the consent given by Counsel was exceeded in that the Prosecutor asked Lori Bundy her age at the time of her marriage to Petitioner. Such testimony on its face appears innocuous; however, in a case where Petitioner was accused of sexual misconduct with a minor, such testimony could have a very damaging effect and influence upon the jury. Thus, the trial court erred in allowing the testimony. It erred again in failing to grant a mistrial. It should be noted that in a case such as the one at bar, where essentially the credibility of the Defendant and victim are at issue, the mere fact that a wife is willing to testify against her husband can create a prejudicial effect on the jury. It is this prejudicial effect that is the public policy behind Utah Code Annotated Section 78-

24-8, which provides that a wife is not "competent" to testify against her husband. See, State v. Brown, 395 P.2d 727 at 729 (1964). It should also be noted, that during appellant's original Supreme Court appeal, the Court did not rule on the issue of whether the rule against privileged communication applied to things other than verbal statements. Thus, the Court did not actually make a ruling on the particular issues involved. In addition, had Counsel called as witnesses those individuals suggested by Mr. Bundy, their testimony could have been used to diminish the credibility of Mr. Bundy's wife. See IV infra.

At Petitioner's Habeas Corpus hearing, Dean Mitchell testified that he did not cross-examine Lori Bundy because to do so would not have been useful. This was in fact true, since objecting after the fact to testimony regarding Lori Bundy's age at the time of the Parties' marriage would have done nothing more than draw additional attention to a fact which was already prejudicial to the Petitioner.

In the instant case, there is a reasonable likelihood that the result could have been different had she not testified. See, State v. Eaton, 569 P.2d 1114, 1116 (1977).

### POINT III

#### THE PROSECUTOR'S REMARKS WERE INFLAMMATORY

During final arguments, the Prosecutor stated that "he (the Defendant) was approaching her (the victim) and mounting her like

a dog in heat." The Prosecutor also stressed the age of Petitioner's wife at the time of their marriage and screamed the word "Bundy" several times. As to the first incident, found on page 197 of the transcript, trial counsel objected (see page 204), stating that the Prosecutor's comments were not material.

"I am trying to control my emotions and my temper right now at this time, but I can't help but say right now to Mr. Harward, your remark that my client mounted her like a bitch dog in heat was crude and was not material to this case. But there was a reason for him to make the remark. He wants you to dislike this man. He wants to portray him as something dispicable. He's saying that in that manner and it doesn't add one thing to this trial or to the evidence."

It is obvious that the sole purpose of the Prosecutor's remarks was inflammatory in nature and were clearly prejudicial, thus denying appellant a fair trial. See, Neely v. State, 61 P.2d 741 (Okla. 1936).

As to the second matter, the Prosecutor emphasized the age of Mr. Bundy's wife at their marriage, and added new evidence, not in her original testimony, that Petitioner had dated her for 1 1/2 years. Since the victim in this case was young and a sister of Petitioner's wife, it was clearly prejudicial for the jury to hear testimony and comment on that testimony which would infer that the Petitioner preferred under-age women as sexual partners.

Finally, as to the third matter, the Prosecutor unnecessarily vehemently repeated the Defendant's last name.

Since Theodore Bundy, a notorious sex criminal, was in the news at that time, the jury could not help but be tainted by the association.

Thus, the prosecutor's remark which drew improper attention to matters not in evidence, and not justified, should have resulted in a mistrial. See, State v. Andreason, 33 Utah Adv. Rep. 23, 24 (1986).

#### POINT IV

##### PETITIONER WAS DENIED EFFECTIVE COUNSEL

In the case of Strickland v. Washington, 80 L.Ed 2d 674 (1984), the U.S. Supreme Court enunciated the general rules relating to the sixth amendment right to counsel as follows:

This Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.

That a person who happens to be a lawyer is present at trial along side the accused, however, it is not enough to satisfy the Constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.

For that reason, the Court has recognized that "the right to counsel is the right to effective assistance of counsel." Strickland at 691 and 692.

A careful review of the record in this case will show that Appellant was denied this right.

A. COUNSEL FAILED TO EFFECTIVELY CROSS-EXAMINE OFFICER WELBY.

A review of the cross-examination of Officer Welby will show that the cross-examination was not fully developed to show the defects in Officer Welby's testimony. (See pages 153 through 157 of the trial transcript.) Had that cross-examination been fully developed, the jury would have clearly seen that Officer Scott's testimony was not reliable or well founded. It should also be noted that Counsel failed to object to the rendering of opinion testimony by Officer Welby Scott or, for that matter, any testimony of Mr. Scott, even though he testified as to hearsay (page 144 and 148), the Prosecutor supplied him with essential information that he could not "remember" (page 145 and 147), the Prosecutor lied the witness (page 152), and that his sole basis for a determination that the original charges were invalid was apparently limited to a conversation with the alleged perpetrator (page 151).

At this point, it also becomes important to note that defense counsel did not call any witnesses other than the Defendant in rebuttal to Officer Scott's testimony. This is particularly interesting when witnesses were available who could have testified as to the bias of Officer Scott in addition to the Defendant, and which would have lended credi-



bility to the Defendant and damaged the credibility of the Prosecutor's witness. Unfortunately, defense counsel refused to do so. Based upon the above, it is clear that defense counsel failed in its duty regarding the testimony of Officer Welby Scott. This is especially so since Officer Scott was a policeman, and as such, jurors were more likely to lend credibility to his statements than to those of the Defendant.

B. DEFENSE COUNSEL IMPROPERLY CONSENTED TO ALLOW DEFENDANT'S WIFE TO TESTIFY.

A careful review of the record will show that Defense counsel consented without the permission of his client in waiving the spousal privilege. Such a waiver could be harmless error, but in the instant case was not. The particular testimony of Lori Bundy could easily have prejudiced the jury against him, damaging both his credibility and inferring that he was a child molester. While it may be argued that this was simply a tactical error on trial counsel's part, it had a devastating effect on Petitioner, especially when Defense counsel did nothing to controvert the testimony of Lori Bundy. This is particularly important in view of the fact that Defendant had supplied to trial counsel the names of numerous witnesses, including Lisa Halverson, Monita Aaron and Milli Teeter, who could have testified as to comments made to them by Lori Bundy which would have serious-

ly limited the credibility of her testimony. Defense counsel refused to call any of these witnesses. The calling of these witnesses would have been simple enough, and would have aided Defendant in corroborating his defense and weakening the case of the prosecution. Failure to call witnesses against Lori Bundy's testimony directly damaged Defendant.

C. DEFENSE COUNSEL'S FAILURE TO INTERVIEW OR CALL WITNESSES RESULTED IN INEFFECTIVE ASSISTANCE OF COUNSEL.

As previously noted, two critical bits of evidence were not controverted effectively by trial counsel. A review of the transcript of the Habeas Corpus hearing will show that defense Counsel took an arrogant and belligerent attitude toward Mr. Bundy's attempts to assist in his defense. On the record he stated that he would not have called any of Mr. Bundy's witnesses because he didn't think they would be useful and he didn't believe him. From his attitude at the hearing, it can be assumed that Mr. Mitchell never did believe in his client's innocence and did not seriously undertake to represent him. Had he been serious, based on the amount of funds which were forwarded to him by Mr. Bundy, he would have mounted an intensive investigation and interviewed each witness to determine whether their testimony was useful. Even if that testimony had only corroborated that of Mr. Bundy, it would have lended credibility to his

defense. The failure to call any witnesses other than Mr. Bundy resulted in a seeming overwhelming tide of evidence against Mr. Bundy with his sole word of denial. While it is clear that the attorney must be given discretion in handling the case, it should be noted that in the final analysis, the client is the one whose rights are to be protected and the client must have the final say as to how his case is to be prosecuted. A blatant disregard of the Defendant's efforts to defend himself cannot be considered adequate representation, especially when the record will show that Mr. Mitchell in fact interviewed no witnesses, and only spoke to Petitioner's counsel in his divorce action as a result of that attorney calling Mr. Mitchell. It cannot be effectively argued that trial strategy was involved. Lack of preparation does not equal trial strategy. See, Codianna v. Morris, 660 P.2d 1101, 1109 (1983) and Strickland. In Moore v. U.S., 432 F.2d 730, 739 (3rd Cir. 1970) the Court stated:

We have no doubt that counsel acted in an effective manner as far as the trial judge was able to observe his conduct. The representation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance. Such omissions, of course, will rarely be visible on the surface of the trial, and to that extent the impression of a trial judge regarding the skills and abilities of counsel will be incomplete.

And, in Rummel v. Estelle, 498 F.Supp. 793 (1980) the Court stated that:

Confident cross-examination does not take the place of affirmative defense evidence built upon thorough investigation and preparation.

And again, in U.S. v. Moore, 554 F.2d 1086, 1093 (D.C. Cir. 1976) the Court stated that:

Counsel's anticipation of what a potential witness would say does not excuse the failure to find out; speculation cannot substitute for certainty.

The Appellant would argue based on the above citations that Counsel not only breeched his duty to properly cross-examine, but to investigate and interview witnesses.

D. DEFENSE COUNSEL'S FAILURE TO PRESENT EVIDENCE ON THE VENEREAL DISEASE QUESTION RESULTED IN INEFFECTIVE COUNSEL.

Argument was presented at trial that Mr. Bundy was somehow guilty through the fact that his ex-wife contacted a venereal disease. The inference was, of course, that Mr. Bundy had given it to her, and was thus a terrible person. While Mr. Bundy denied the accusation, and there was no direct proof that he in fact had been the cause, defense Counsel could have bolstered Mr. Bundy's testimony, and his credibility, by introducing evidence which had been provided to him by Mr. Bundy in a form of a medical report showing that he did not have a venereal disease. Perhaps it is interesting to note that Lori Bundy contacted that disease

from someone other than the Defendant. From the record, it would appear that defense Counsel made no effort to determine any of the facts surrounding this issue which could have been very important in substantiating the Petitioner's claim that a conspiracy existed against him by a police officer (who was having an affair with his wife), and Petitioner's wife's family.

E. DEFENSE COUNSEL'S FAILURE TO PRESENT EVIDENCE ATTACKING THE CREDIBILITY OF THE VICTIM RESULTED IN INEFFECTIVE COUNSEL.

Defense counsel introduced no evidence relative to the credibility of the victim. This is of note since Mr. Bundy had provided to defense counsel the names of individuals and information sufficient to establish that the alleged victim had a reputation for deceit and lying. Further, everyone seems to have neglected the fact that the alleged victim was still living in the home with her father and was under his domination and control. Further, an analysis of Officer Scott's testimony indicates that he mishandled the investigation of the matter in such a way as to place pressure on the alleged victim to change her story.

F. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE JURY COMPOSITION RESULTED IN INEFFECTIVE COUNSEL.

A review of the facts and evidence in this matter will show that the jury composition was unfairly weighted against

the Petitioner. A review of the jurors will show that a number of the female jurors were themselves rape victims, and that the percentage of such women to other jury members far exceeds the normal population average of rape victims. The current standard for a jury is whether the individuals can conscientiously apply the law and find facts. However, Petitioner would submit that it is virtually impossible for a rape victim to be conscientious and impartial in this type of case. Particularly where the record will show that one particular juror was crying during testimony about the alleged rape. If that sort of emotional trauma was present in a juror, it is clear that that juror could not meet the constitutional standard. Counsel's failure to object, withstanding multiple requests of Petitioner that he do so, was harmful to Petitioner. The Court, on its own motion, should have dismissed these jurors.

G. DEFENSE COUNSEL'S FAILURE TO MAKE TIMELY OBJECTIONS RESULTED IN INEFFECTIVE COUNSEL.

A review of the evidence brought in this particular matter, and a review of the Supreme Court decision on Mr. Bundy's criminal appeal, will show that he was substantially harmed by the failure of defense counsel to raise an alibi defense or allege defects in charging language. As the Supreme Court indicated, the failure of defense counsel to

raise those issues was the basis for the Supreme Court's denial of those issues on appeal. Had counsel made timely objection, at least these issues could have been heard on appeal, and perhaps a favorable ruling made for the Petitioner.

It should also be noted that a careful review of the record will show that counsel made very few objections to testimony, even though in many instances he could have done so. This lack of careful attention to detail is particularly shown when contrasted with the actions of the prosecutor in zealously objecting at each opportunity. Petitioner would assert that Counsel's numerous trips to the water cooler prevented his attention to detail and resulted in ineffective counsel.

#### H. DEFENSE COUNSEL'S FAILURE TO COOPERATE WITH PETITIONER RESULTED IN INEFFECTIVE COUNSEL.

It is clear from a review of the record that defense counsel at no time attempted to review police records and other evidence with the Petitioner in an attempt to prepare for trial. As such, Petitioner was effectively prevented from assisting in his own defense. In addition, the fact, as has already been commented upon, that defense counsel maintained a belligerent and superior attitude towards the evidence and material supplied to him by Petitioner indicates

that Petitioner was effectively prevented from assisting in his own defense.

I. DEFENSE COUNSEL'S INEBRIATED CONDITION AT TRIAL RESULTED IN INEFFECTIVE COUNSEL.

The weight of the testimony presented in this matter is that Mr. Mitchell made frequent trips to a bar, had alcohol on his breath, and in the presence of witnesses indicated that he was going to "tip a few." While the trial record is bare relating to any such condition in trial counsel, the trial record would not normally contain such evidence. Therefore, the Court must determine, based upon the evidence presented, whether in fact counsel had been drinking, and whether said drinking affected his trial conduct. The weight of the evidence, however, points to the fact that there was in fact an impact, which may have prejudiced the Petitioner. See, State v. Keller, 223 N.W.2d 698 (N.D. 1929).

POINT V

DEFENSE COUNSEL HAS AN OBLIGATION TO ZEALOUSLY REPRESENT HIS CLIENT.

The disciplinary rules require that a lawyer should be adequately prepared (DR6) should zealously represent the interests of his client (EC7). 21A Am.Jur.2d Criminal Law Section 751 states:



It has been observed that counsel for a defendant in criminal proceedings should confer with his client without undue delay and as often as necessary, advise him of his rights, and elicit matters of defense or ascertain that potential defenses are not available; counsel should further conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed and to allow himself sufficient time for reflection in preparation of trial. He should procure available evidence on behalf of the accused; . . .

In the instant case, the Petitioner would argue that the record shows that trial counsel failed to meet this burden.

#### POINT VI

THE STANDARD OF PROOF IN A HABEAS CORPUS MATTER IS A PREPONDERANCE OF THE EVIDENCE.

The case law is clear that the appropriate standard in a case such as this is a preponderance of the evidence. Therefore, this Court is not required to determine the merit of Petitioner's case beyond a reasonable doubt. It must simply determine that the acts or events complained of have a reasonable probability of having occurred, and as such could have been prejudicial to the Petitioner. See Strickland.

#### POINT VII

THE DEFECTS IN PETITIONER'S TRIAL WERE NOT HARMLESS ERROR


Petitioner would argue that even if each of his complaints taken separately would not have prevented his conviction, they should be considered as a whole; and as such cannot be considered harmless error.

CONCLUSION

Based upon the above, Petitioner respectfully requests that his conviction be set aside and that he be released forthwith.

DATED this  7<sup>th</sup>  day of  July , 1987.

MCCULLOUGH, JONES, JENSEN & IVINS

  
-----  
Philip G. Jones  
Attorney for Appellant

ADDENDUM

CERTIFICATE OF SERVICE

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Appellant, postage prepaid, to the Attorney General's Office, Attention Kimberly Hornak, 236 State Capitol Building, Salt Lake City, Utah 84114, this \_\_\_\_ day of \_\_\_\_\_, 1987.

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