

1980

The State of Utah v. Henry Carl Smith : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

HENRY CARL SMITH,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF
FELONY OF THE SECOND DEGREE, AND
A FELONY OF THE THIRD DEGREE,
JUDICIAL DISTRICT COURT, 1ST
COUNTY, STATE OF UTAH, THE
SAM, JUDGE PRESIDING.

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

HENRY CARL SMITH,

Defendant-Appellant.

Case No. 16406

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with arson in violation of Utah Code Ann. § 76-6-103 (1953) as amended, and burglary in violation of Utah Code Ann. § 76-6-202 (1953) as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty of one count of arson and one count of burglary on February 1, 1979, in the Fourth Judicial District Court, in and for Utah County, State of Utah, the Honorable David Sam presiding. On March 2, 1979, appellant was sentenced to an indeterminate term of not less than one year nor more than fifteen on the arson conviction and for a period not to exceed five years

on the burglary conviction. The two sentences were to run concurrently (R. 61). Appellant was released from the Utah State Prison on an appeal bond on September 4, 1979, and has been out of prison since that time.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the verdict and judgments of the lower court.

STATEMENT OF THE FACTS

On November 11, 1978, at approximately 10:30 p.m., a fire broke out in the trailer-home office of the St. George Steel Company (formerly Randall Steel Company) located at 350 North Geneva Road in Lindon, Utah (Tr. 12, 13; 56-57). The trailer was destroyed and the metal petty cash box, which was kept in the trailer, was empty when Mr. Dennis Randall, general manager of St. George Steel Company, investigated the damage the next morning on November 12 (Tr. 18-21). Mr. Randall testified that according to ledger records, (State Exhibit 5) \$239.28 had been in the cash box on November 11, 1978 (Tr. 17-19). Appellant, an employee of St. George Steel, would often make minor purchases for the company using the cash from the petty cash box (Tr. 15-17).

An investigation of the fire by Lynn Borg, an arson investigator for the State Fire Marshall, was conducted on November 14, 1978 (Tr. 25-27). Mr. Borg testified that the

fire was "very obviously an accelerated man made fire" (Tr. 29) and that the arsonist most likely used gasoline to start the fire (Tr. 27, 29).

Kent Bear, a friend of appellant's who worked at Randall Steel with appellant, testified that they had both been angry at Mr. Randall because a newly-hired employee was being paid more money than Mr. Bear and appellant. Mr. Bear said appellant told him that he would like to "get back at Randall" by "rip[ping] off his cash box" and "blow[ing] up his trailer" (Tr. 36). This idea was expressed to Mr. Bear by appellant "three to four times" over "a week, week and a half" period of time (Tr. 37).

Don Hebertson, who was originally charged with the same two offenses at issue here but had them dismissed, testified that he, appellant and Shane Hall, another co-defendant originally charged with the offenses, all participated in the arson and burglary of the St. George Steel trailer-house (Tr. 42-46). Mr. Hebertson drove appellant and Mr. Hall to the trailer, dropped them off and then returned a few minutes later to pick the two up (Tr. 43-45). Mr. Hebertson testified that appellant first brought up the idea of stealing money from the petty cash box during the evening of November 11, 1978 while the three men were playing pool in Mr. Hall's grandmother's basement (Tr. 42-43; 59-60).

Mr. Hall pleaded guilty to attempted burglary, a Class A misdemeanor, in violation of Utah Code Ann. § 76-6-202 and § 76-4-101 (1953) as amended (R. 21-22) before appellant's trial. He corroborated the testimony of Mr. Hebertson that appellant was the instigator of the crimes and that the three were all participants (Tr. 59-60). He testified, as did Mr. Hebertson, that the money was divided three ways: Mr. Hall received \$49.00; Mr. Hebertson received \$47.00 and appellant received the balance (Tr. 65;45). Appellant's name as a possible suspect was given to the Lindon Police Department (Tr. 74-77). Chief LaMar Jolley interviewed appellant at St. George Steel Company on November 14, 1978 and arrested him at that time for the crimes at issue here (Tr. 77-78).

Inasmuch as the sole question on appeal concerns the issue of alleged conflict of interest, respondent will mention the factual basis for this claim. As noted above, all three participants were charged in the original complaint with arson and burglary (R. 8). Mr. Hebertson retained a private attorney and through negotiations with the Utah County Attorney's Office, the charges were dropped in exchange for his cooperation in the prosecution of Mr. Hall and appellant (R. 6-7:13-14).

Mr. Hall and appellant were originally represented

at the preliminary hearing on December 11, 1978 by Robert Schumacher of the Utah County Public Defender's Office (R. 6-7;13-14). At this time the two co-defendant's defenses and strategies for trial were identical and Mr. Schumacher properly represented both. At the December 15, 1978, arraignment, another Public Defender, Sheldon Carter, represented both co-defendants. Again the strategies and defenses were the same; both pleaded not guilty (R. 18).

On January 22, 1979, both co-defendants, through their attorney Mr. Schumacher, filed a notice of alibi defense (R. 19). On January 26, 1979, they both filed an amended notice of alibi defense which added additional defense witnesses to support the claimed defense (R. 20). The amended notice was also prepared by Mr. Schumacher (R. 20).

The crux of this appeal lies in the events of the next five days. Mr. Hall chose to enter into plea negotiations with the Utah County Attorney's Office. On January 31, 1979, Mr. Hall pleaded guilty to the amended information of attempted burglary (R. 21) and the arson charge was dismissed (R. 22). Mr. Hall's change of plea was taken by Judge Sam and Mr. Schumacher represented Mr. Hall (R. 22). At that point in this criminal case, Mr. Schumacher no longer represented appellant. Appellant was then represented by Mr. Carter, who was familiar with the case and who had, in fact, represented

appellant (and Mr. Hall) at the December 15, 1978, arraignment (R. 18). Mr. Carter commendably represented appellant at trial (Tr. 10-11; 21-25; 30-32; 37-41; 47-54; 56-58; 67-73; 74; 82-90; 90-103; and 115-121) and did a competent job in cross-examining Mr. Hall (Tr. 67-74; 90-92).

Appellant now contends that Mr. Carter's representation denied him his right to conflict-free counsel. Allegedly Mr. Schumacher's joint representation of appellant and Mr. Hall during the critical last five days of January, 1979, prejudicially denied appellant of effective assistance of counsel at trial.

ARGUMENT

POINT I

JOINT REPRESENTATION IS ONLY PROSCRIBED
WHEN ACTUAL CONFLICTS OF INTEREST BETWEEN
CO-DEFENDANTS BECOME MANIFEST.

Throughout appellant's brief reference is made to "dual representation at trial" and the dangers of prejudicial denials of effective assistance of counsel in conflict-ridden joint representation. However, no joint representation occurred at appellant's trial. Appellant was represented by a single attorney at trial.

Respondent concurs in the general legal development outlined in appellant's brief regarding the repugnancy of conflicts of interest in joint representation cases. However,

the facts of the present matter show that, at trial, no joint representation existed.

A

JOINT REPRESENTATION OF
CO-DEFENDANTS IS NOT PER
SE INVALID.

Two important United States Supreme Court decisions indicate that although dual representation often results in abuses and conflicts of interest it is not ipso facto prohibited. In the landmark case of Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed 680 (1942) the Court establishes that the Sixth Amendment right to assistance of counsel includes the right to have "untrammelled and unimpaired" representation Id., at 70. Petitioner Glasser, in that case, strongly objected to being represented at trial by the same counsel for his co-defendant. The trial court refused to appoint separate counsel when the need for such was apparent and, consequently, Glasser's conviction was reversed.

In the recent case of Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), the Court reversed the petitioners' convictions but then went a step further than Glasser. Referring to a comment made in the Glasser dissent, the Court ruled:

One principle applicable here emerges from Glasser without ambiguity. Requiring or permitting a single attorney

to represent co-defendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." Glasser v. United States, supra, 315 U.S., at 92 (dissenting).

435 U.S. at 482-483.

Dual representation is not per se improper according to the standard used by numerous state courts: eg. State v. Jeffery, 515 P.2d 364 (Mont. 1973); Commonwealth v. LaFleur, 1 Mass. App. 827, 296 N.E.2d 517 (1973); State v. George, 100 Ariz. 350, 414 P.2d 730 (1966); and State v. Thompson, 108 Ariz. 500, 502 P.2d 1319 (1972). In Thompson, which is representative of all the cases addressing this issue, the court stated:

. . . the mere fact that a single attorney represents two defendants in a joint criminal trial is not ipso facto evidence of lack of effective assistance. Rather it is necessary that a conflict of interest must have actually existed. . .

502 P.2d at 1323.

Thus in the present case, Mr. Schumacher's dual

representation of appellant and Mr. Hall must be given presumptive validity and must not be viewed as suspect unless and until a conflict arises. It is unclear from the record the precise moment when Mr. Hall's case came in conflict with appellant's, but it is clear that as late as January 26, 1979, the two codefendants' defenses were identical (R.20). Thus, at least until that date, Mr. Schumacher properly represented the two.

B

JOINT REPRESENTATION BECOMES
IMPROPER ONLY WHEN ACTUAL CONFLICTS
OF INTEREST ARISE OR ARE SHOWN BY
COUNSEL TO EXIST.

As was noted in Thompson, the non-per se violative rule ceases to operate when a conflict of interest between the codefendants becomes manifest. This principle was recently stated by this Court in State v. Tippetts, 584 P.2d 892 (Utah 1978). There the appellant's counsel represented both appellant and codefendant at trial when appellant's codefendant's counsel became ill the day of the trial. Appellant argued that such an event prejudiced his defense and claimed that alleged conflicts of interest present between him and his co-defendant denied his right to effective assistance of counsel. This Court rejected the claim and ruled "[t]here is nothing in the record to indicate that the dual representation . . . in any way prejudiced the defense of appellant." Id. at 893.

The Court then noted that "[a] careful examination of the entire record reveals that no conflict of interest existed between Tippetts and [codefendant] Lopez. . . ." Id. Thus, this case stands for the proposition that where no conflict of interest is present at trial, claims of ineffective assistance must be rejected and the non-per se violative rule upheld.

This exception to the non-per se violative rule is also observed in State v. Huizar, 112 Ariz. 489, 543 P.2d 1118 (1975), and State v. Andrews, 106 Ariz. 372, 476 P.2d 673 (1970). Huizar holds that "[a]n attorney may represent codefendants until a conflict arises." 543 P.2d at 1120. Likewise in Andrews, the Arizona court ruled:

In order for assistance by counsel for an accused to be impaired by representation of the same attorney, actual conflict must in fact have existed or be inherent in the facts of the case from which a possibility of prejudice flows.

476 P.2d at 678.

Numerous other courts have reached the same conclusion as this Court did in Tippetts--that actual conflict of interest must exist before dual representation will be deemed prejudicial: State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), cert. den. 385 U.S. 1043, 87 S.Ct. 784, 17 L.Ed.2d 687; In Re Watson, 100 Cal.Rptr. 720,

494 P.2d 1264 (1972); State v. West, 578 P.2d 287 (Kan. App. 1978); Patterson v. State, 81 N.M. 210, 465 P.2d 93 (1970); Wright v. State, 505 P.2d 507 (Okla. Cr. 1973); and State v. Myers, 86 Wash.2d 419, 545 P.2d 538 (1976).

In the present case, it is clear that Mr. Schumacher recognized he could no longer represent appellant after one of his joint clients chose to enter a plea of guilty to the amended information (R.21,22). While respondent acknowledges that "no knowing substitution of counsel appears on the record" (Appellant's Brief p. 3), it is clear from the record that appellant's trial counsel, Mr. Carter, had previously represented both defendants at arraignment and that Mr. Carter did represent appellant at trial. Mr. Carter was therefore familiar with the case and the joint offense before the January 31, 1979, change of plea by Mr. Hall. As soon as the conflict of interest became apparent, appellant was competently represented by separate counsel. Although the record is silent as to exactly when Mr. Schumacher's representation of appellant ceased and Mr. Carter's began, it can be inferred that such substitution was done soon after the January 26, 1979, amended notice of alibi defense was filed and before the January 31, 1979, guilty plea of Mr. Hall was entered. For these reasons, respondent contends that the substitution of counsel here properly safeguarded appellant's right to effective assistance of counsel, since arrangements for separate counsel were made as soon as the

conflict of interest became apparent.

C

APPELLANT HAS THE BURDEN OF SHOWING
THAT A CONFLICT OF INTEREST EXISTED
AND THAT HIS TRIAL COUNSEL INEFFECTIVELY
REPRESENTED HIM.

In State v. Tippetts, supra, this Court stated that since "Tippetts did not object to Esplin [the joint-representation trial attorney] undertaking to defend Lopez nor did Tippetts move for a new trial or to set aside the verdict" (584 P.2d at 893), that such acquiescence demonstrated that the representation of Tippetts by Esplin was effective. In other words, Tippetts requires that appellants who claim ineffective assistance of counsel due to conflicts of interest must bring such complaint to the trial court's attention, by objection, motion for new trial or motion to set aside the verdict. This procedure protects the integrity of the claim and requires those who are jointly represented to preserve their objection by registering the complaint at trial.

In United States v. Glasser, supra, the Supreme Court ruled that the conflict must be "brought home to the court" by the party who believes he is being denied effective assistance of counsel. 315 U.S. at 71, 76.

In State v. Johnson, 25 Utah 2d 46, 475 P.2d 543 (1970), this Court agreed with this Glasser requirement and ruled that when a defendant desires to attack the effectiveness of his representation:

. . . the burden is upon him
to show that there was some impropriety and
that there is at least some likelihood that
there was unfairness to him. . . .

475 P.2d at 546 (emphasis added).

This conclusion was also reached in People v.
Romero, 189 Colo. 526, 543 P.2d 56 (1975), wherein the court held:

In cases where the claim of ineffective
assistance of counsel is based on multiple
representation, "some specific instance of
prejudice, some real conflict of interest,"
must be demonstrated. [Citation omitted.]
The mere fact of multiple representation,
standing alone, does not amount to a conflict
of interest. [Citations omitted.]

543 P.2d at 57.

And in State v. Henry, 582 P.2d 321 (Mont. 1978), the
Montana Supreme Court said:

. . . a defendant has the burden of
establishing that joint representation
. . . in fact created an actual conflict
of interest prejudicing his defense.

582 P.2d at 323.

In the instant case, the record is void of any
objection or showing by appellant of some specific instance
or actual conflict of interest existing either during the pre-
trial joint representation or at trial. Thus, appellant fails
to comply with the Tippetts standard of affirmatively
preserving his alleged ineffective assistance claim on the
record.

D

CLAIMS OF CONFLICT OF INTEREST IN
JOINT REPRESENTATION MUST BE TIMELY
MADE AT TRIAL AND CANNOT BE RAISED
FOR THE FIRST TIME ON APPEAL.

State v. Tippetts, supra, in arriving at the
conclusion that no conflict of interest existed between
the two codefendants, set out a crucial defect in the claim:

The issue of whether Tippetts had
been deprived of his right to effective
counsel was first raised on appeal.

584 P.2d at 893.

The Court could not find enough evidence of an
actual conflict of interest from the record and this,
together with the fact that the issue was only then being
raised on appeal, led the Court to hold that Tippetts'
representation was effective.

The danger of after-thought issues of conflict
of interest as the basis for appeals was mentioned in
Holloway v. Arkansas, supra. The Holloway holding is
proper and not unexpected: where a defense counsel
jointly representing two defendants makes two pre-trial
motions that probable conflicts of interest require the
appointment of separate counsel, the trial court's
refusal to grant separate counsel is prejudicial error
and requires reversal. The state in Holloway expressed
concern that to give undue, blind credence to defense

counsel's representations would take too much discretionary control away from the trial judge. Yet, the Holloway court countered this contention by ruling:

[W]hen an untimely motion for separate counsel is made for dilatory purposes, our holding does not impair the trial court's ability to deal with counsel who resort to such tactics.

435 U.S. at 436-437.

Thus, it is clear that motions or objections concerning conflicts of interest must be timely made. Courts must be wary of dilatory, suspect claims of conflict of interest that arise late in the proceeding or for the first time on appeal.

The questionable nature of a claimed conflict being raised for the first time on appeal was explored carefully in State v. Meidinger, 160 Mont. 310, 502 P.2d 58 (1972). The Montana court concluded:

. . . we feel . . . that where two defendants desire to retain one counsel their decision should be honored. Too, that later, when on hindsight after conviction, they should not be allowed to change that decision by alleging on appeal the inadequacy of their chosen counsel, especially when raised for the first time on appeal.

502 P.2d at 66 (emphasis added).

Although appellant was not jointly represented at trial and neither counsel was retained and the record is silent as to whether appellant or Mr. Hall "desired" or "chose" either Mr. Schyracher or Mr. Carter, the language

from Meidinger, nonetheless, warns against untimely allegations of conflicts of interest.

In the present case, nowhere in the pre-trial record nor in the trial transcript is any mention of possible conflicts of interest, except the obvious guilty plea of Mr. Hall (R.21,22). Nowhere does Mr. Carter or Mr. Schumacher object or move the trial court to appoint separate counsel. At no time during the trial, or immediately preceding it, did Mr. Carter indicate his inability to adequately represent appellant. As was stated in Holloway, "attorneys are officers of the court" and have a responsibility to "address the judge solemnly [and] . . . virtually under oath" when conflicts of interest are apparent (435 U.S. at 486). The fact that objections or statements were made to Judge Sam by either Mr. Schumacher or Mr. Carter about conflicts of interest not only distinguishes the present case from Glasser and Holloway, but indicates the questionable nature of this appeal. Because of that fact, the present case is most analogous to the Tippetts case and, respondent submits, should be resolved in the same manner.

E

CASES SIMILAR TO THE INSTANT MATTER
HAVE REJECTED CLAIMS OF INEFFECTIVE
ASSISTANCE OF COUNSEL BASED ON ALLEGED
CONFLICTS OF INTEREST BETWEEN
CODEFENDANTS.

Appellant's claim is not a new one. Numerous cases

have arisen in state courts which refuse to find merit in conflict of interest assertions under fact situations similar to the present matter.

In Ortega v. People, 178 Colo. 419, 498 P.2d 1121 (1972), the appellant and his codefendant were both represented by the same attorney in a police lineup prior to trial. The attorney later was appointed to represent the codefendant and the codefendant chose to negotiate with the prosecution and testify against appellant at trial. Appellant asserted:

. . . that the attorney who represented him at the line-up was, therefore, unable to effectively assist his subsequently appointed defense counsel in preparing for cross-examination of witnesses who appeared at the line-up identification. Based on this reasoning, the defendant concludes that the line-up was conducted improperly. . . .

498 P.2d at 1123.

The Colorado Supreme Court rejected the argument that pre-trial substitution of counsel was prejudicial to Ortega's right to effective counsel and held:

The defendant was represented by competent counsel at the line-up, and there is no evidence in the record that counsel failed to safeguard the rights of the defendant or that counsel was ineffective in eliminating the hazards which make the line-up a critical stage of the proceedings [citation omitted]. Moreover, the record does not reflect, as the defendant contends, that the change in defense counsel which occurred prior to trial deprived the defendant of adequate representation.

498 P.2d at 1123.

A key factor in the Colorado court's decision was that "the record [did] not reflect" a deprivation of Ortega's Sixth Amendment right. Thus, as in this case, where the record is silent as to claimed conflicts of interest, courts will give great deference to the verdict and judgments below.

A Utah case also parallels the present matter. In Combs v. Turner, 25 Utah 2d 397, 483 P.2d 437 (1971), a defendant and his wife were jointly charged with using an invalid credit card. Both were represented by a single attorney. Defendant Combs, on advice from his counsel, pleaded guilty to the offense and the charge against his wife was dismissed. The State appealed from an order granting Combs' petition for writ of habeas corpus. The claim of alleged ineffective assistance of counsel, raised at the habeas corpus hearing, was analyzed and rejected. This Court held:

To us the evidence of the proceedings at the time of plea is clear that Mr. Combs was adequately represented by counsel and that he knowingly, understandingly, and voluntarily entered the plea of guilty. True it is that one of his motives was to free his wife from the felony charge, but a bargain to that effect with the district attorney does not necessarily amount to coercion.

483 P.2d at 438.

Cases from four other jurisdictions support these decisions: In Re Watson, supra--where codefendant pleads guilty, an attorney is not necessarily "in a position where he had to make any choice between clients, prefer one against the other, or sacrifice one's position in order to better that of another."

494 P.2d at 1272; State v. Williams, 122 Ariz. 146, 593 P.2d 896 (1979)--where different attorneys jointly represented two defendants at various pre-trial stages, no ineffective assistance of counsel claim may be asserted where separate counsel was appointed as soon as a conflict arose; State v. Soders, 106 Ariz. 79, 471 P.2d 275 (1970)--where a codefendant confesses at trial on the stand only to his own guilt, appellant was not denied effective assistance of counsel where both were jointly represented by a single attorney; State v. Oldham, 92 Idaho 124, 438 P.2d 275 (1968)--where codefendant pleads guilty, effect of such on appellant is not conclusive proof of ineffective assistance of counsel where both defendants were jointly represented; and State v. Johnson, 74 Wash.2d 567, 445 P.2d 726 (1968)--where codefendants were initially represented by one attorney, that a different attorney actually representing appellant at trial is not evidence of ineffective assistance of counsel.

Appellant argues that even though a separate attorney represented appellant at trial, "[t]he fact that Mr. Schumacher handed the file to another public defender for trial did not eliminate this gross conflict. . . ." (Appellant's Brief, p. 19). Also, the fact that this conflict became apparent and the substitution on counsel made only "two days before trial" indicates that Mr. Carter's representation could not have been effective (Appellant's Brief, p. 19-20). Respondent contends that Mr. Carter was

very familiar with the case and had even represented both defendants at arraignment. Appellant's counsel did not seek a continuance. Clearly the defenses appellant presented at trial were not tied to the length of time his attorney had for preparation. Thus, the strategy used by Mr. Carter cannot be used to determine whether he was effective or whether the conflict between appellant and Mr. Hall was prejudicial. As was noted in State v. Huizar, supra, "[s]trategic decisions are not the kind which the courts permit convicted felons to indulge in second guessing." 54 P.2d at 1120.

From the above authorities, therefore, it is clear that joint representation is not per se violative of Sixth Amendment rights and where adjustments are made to provide separate counsel as soon as a conflict arises, then the accused's right of effective assistance of counsel has been protected. Such is the case here and respondent submits that appellant was competently and effectively represented at trial by separate, conflict-free counsel.

POINT II

THE UTAH COUNTY PUBLIC DEFENDER'S OFFICE
MAY PROPERLY REPRESENT TWO CODEPENDANTS
EVEN WHEN A CONFLICT OF INTEREST EXISTS
BETWEEN THE TWO DEFENDANTS.

The last point made in appellant's brief (p. 19-20) raises the issue of a single law office representing clients with conflicting interests. The appellant argues that since

footnote 8 in Holloway (435 U.S. at 486) and the Commonwealth v. Westbrook, 400 A.2d 160, 162 (Pa. 1979) case suggest that public defenders offices are to be construed as traditional law firms, then such offices should be restricted from representing clients with conflicting claims.

The various county legal defender offices were established in order to comply with the dictates of Utah Code Ann. § 77-64-1, et seq. (1953), as amended. Section 77-64-1 provides:

The legislature of the State of Utah hereby declares the following to be minimum standards to be provided by each county for the defense of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts and various administrative bodies of the State of Utah:

(1) Provide counsel for every indigent person unable to employ counsel who faces the possibility of the deprivation of his liberty or other serious criminal sanction.

(2) Afford representation which is experienced, competent, and zealous.

(3) Provide the investigatory and other facilities necessary for a complete defense.

(4) Come into operation at a sufficiently early stage of the proceeding so as to fully advise and protect the defendant.

(5) Assure undivided loyalty of defense counsel to the client.

(6) Include the taking of appeals and the prosecuting of other remedies, before or after a conviction, considered by the defending counsel to be in the interest of justice.

(7) Enlist community participation and responsibility and encourage the continuing co-operation of the organized bar.

Sections 77-64-6 and 77-64-7 state:

The board of county commissioners may, at county expense, either:

(1) Authorize the court to provide the services prescribed by this act by appointing a qualified attorney in each case and awarding him reasonable compensation and expenses; or

(2) Arrange to provide those services through nonprofit legal aid or other associations. If any incorporated city or town wishes to donate moneys for any of the purposes specified in this section, such action is hereby authorized.

and

All expenditures by the counties and incorporated cities or towns which are necessary and proper to carry out the purposes defined in this chapter are hereby declared to be legitimate and proper uses of public funds and the counties and incorporated areas of this state are hereby authorized to levy and collect taxes for such purposes.

The public defenders, therefore, perform an essential, constitutional service for indigent criminal defendants. The public defenders, out of administrative necessity, must represent all those who cannot otherwise afford counsel.

The issue of a public defender's office representing codefendants with alleged conflicts of interest was raised to this Court in the case of State v. Heaps, No. 16264, decided October 31, 1979. There this Court evaluated the claim that the appellant there was denied effective assistance of counsel due to his codefendant being represented by the same legal defender association. This Court ruled:

Significantly, the defendant never asked for different counsel at any time during the pre-trial proceedings and he never registered any dissatisfaction with the performance of his counsel until after he was convicted and sentenced. Although the defendant claims there was conflict of interest, he does not specify what it was, other than the fact that he was "represented in pre-trial proceedings by the Legal Defender's Association, who also represented the untried co-defendant" and that this "may require" reversal of his conviction and a new trial.

To prevail on his claim, it would be necessary for it to appear that there was a conflict of interest which in some manner may have reacted to the defendant's detriment. Nothing of that character appears in this case and none can be presumed merely because different attorneys from the Legal Defender's office had represented defendant.

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Thus, this Court has rejected the per se rule of the Legal Defender's Office being unable to represent codefendants whose interests may be in conflict and stated the requirement that for a successful claim to be made, appellant must show "that there was a conflict of interest" which adversely affected him to his detriment. Id.

Here appellant has pointed to the pre-trial maneuverings of his codefendant as the only basis for the conflict and has not shown how the conflict "reacted to [his] detriment" at trial. Id. Thus, respondent submits that the Heaps rule should be applied in this case. Appellant may not prevail on his dual representation by the same legal

defender office claim unless there is actual, detrimental conflict of interest evident from the record which prevented appellant from receiving a fair trial. In accord: State v. Jelks, 105 Ariz. 175, 461 P.2d 473 (1969); State v. Krutchen, supra; State v. Gutierrez, 116 Ariz. 207, 568 P.2d 1105 (1977) and State v. Gross, 221 Kan. 98, 558 P.2d 665 (1976).

Respondent concurs in the view expressed by this Court in State v. McNichol, 554 P.2d 203 (Utah 1976), that an accused:

. . . is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the profession.

554 P.2d at 204. Yet, respondent also concurs with McNichol that appellant "bears the burden of establishing the inadequacy or ineffectiveness of counsel, and proof of such must be a demonstrable reality and not a speculative matter." Id.

Here, while Mr. Carter and Mr. Schumacher are associated with the same legal defender office, both appellant and Mr. Hall were represented by separate, competent, conflict-free counsel as soon as the conflict of interest arose. To require that appellant seek and the people pay for private counsel because a potential conflict is possible is too great a burden. This Court must concern itself with the competent representation and a fair

trial for indigent defendants. Appellant enjoyed both rights in this case.

CONCLUSION

Since joint representation of codefendants is only proscribed when actual conflicts of interest become manifest, Mr. Schumacher's proper and timely withdrawal as appellant's counsel effectively safeguarded appellant's right to effective assistance of counsel. Nothing in the record indicates that Mr. Carter improperly or incompetently represented appellant at trial.

The Utah County Legal Defender Association may properly represent two codefendants and the office is only required to withdraw when appellant's interests are in danger of being detrimentally affected at trial. This was not the case here nor can such be shown from the record.

On the basis of the above authority and the evidence presented against appellant at trial, respondent prays that the verdict, judgment and sentence below be affirmed.

Respectfully submitted,

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