1980

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	
HENRY CARL SMITH,	:	Case No. 16406
Defendant-Appellant.	:	

BRIEF OF APPELLANT

Appeal from a conviction of Arson, a felony of the Second Degree, and Burglary,a felony of the Third Degree, in the Fourth Judicial District Court, in and for Utah County, State of Utah, the Honorable David Sam, Judge presiding.

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STATEMENT OF THE NATURE OF THE CASE

Appeal from a conviction of Arson, a felony of the Second Degree, and Burglary, a felony in the Third Degree, in the Fourth Judicial District Court, in and for Utah County, State of Utah, the Honorable David Sam, Judge presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Henry Carl Smith, was charged with Arson, a second degree felony in Count One of the Information, in violation of Section 76-6-103 Utah Code Annotated (1953 as amended), and Burglary, a third degree felony in Count Two of the Information, in violation of Section 76-6-202 Utah Code Annotated (1953 as amended). (R. 15). On the 1st day of February, 1979, the appellant was found guilty on both counts as charged in the Information by a jury. (R. 48, 50). On the 2nd day of March, 1979, the appellant was sentenced to incarceration at the Utah State Prison for the indeterminate term of 1 - 15 years on Count One and 0 - 5 years on Count Two, said

sentences to run concurrently (R. 61). It is from that judgment and sentence that appellant appeals to this Court. (R. 63).

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction on both counts and a new trial.

STATEMENT OF THE FACTS

The appellant was originally charged in a Complaint in the Circuit Court of Utah County, Orem Department, jointly with two other individuals with the offenses of which he was eventually convicted. One individual, Don Eugene Herbertson, was represented by private counsel and the charges against Herbertson were ultimately dismissed. (R. at 8). The other co-defendant, Shane Hall, like appellant was appointed to be represented by the Utah County Public Defender. Both appellant and Hall were represented by Public Defend Robert Schumacher, Esq. at the Preliminary Hearing held on the 11th day of December, 1978, and both appellant and Hall were bound over for trial at the conclusion of the Preliminary Examination. (R. 13-1 On December 15, 1978, the appellant and Hall were arraigned before the Honorable J. Robert Bullock, Judge, and both parties entered pl of Not Guilty. At the Arraignment both parties were represented by Public Defender Sheldon Carter, Esq., who appeared in lieu of their mutually designated appointed counsel Mr. Schumacher. (R. 18). On the 18th day of December, 1978, trial was set before the Honorable David Sam, Judge of the Fourth District Court, for February 1st, 19

and Mr. Schumacher was notified as counsel for both appellant and Shane Hall. (R. 16). On January 22nd, 1979, Mr. Schumacher, as counsel, filed a Notice of Alibi for both appellant and Hall, (R. 19), and on January 26th, 1979, he filed an amended Notice of Alibi, as counsel for both appellant and Hall. (R. 20). Four days later on January 30, 1979, the Utah County Attorney filed an amended Information charging Hall with a Class A Misdemeanor, Attempted Burglary, arising from the incident for which he and appellant were charged. (R. 21). On the same date, Hall appearing with Mr. Shumacher and outside the presence of appellant entered a plea of Guilty to the Amended Information charging a Class A Misdemeanor, and Count Two, Arson, the second degree felony was dismissed. (R. 22). Sentencing was then continued until February 23, 1979, which was after the trial date originally set for appellant and Hall. (R. 22).

On February 1, 1979, trial commenced against appellant alone in this matter. (Tr. 1). Appearing as trial counsel for appellant was not Mr. Schumacher, his appointed counsel, but Mr. Carter, another Public Defender from the same office. No knowing substitution of counsel appears on the record, nor is there any indication that appellant waived the gross and apparent conflict of interest in that his attorney Mr. Schumacher represented Mr. Hall, who was now listed as a State's witness in the County Attorney's opening statement. (Tr. at 6 - 9). Shane Hall was called as a witness for the State pursuant to plea negotiations and in exchange for his guilty plea. (Tr. at 66). Hall's testimony provided a

crucial link in the State's circumstantial case against appellant, discrediting what was appellant's (and had been Hall's) defense of Alibi, (R. 58 - 69), and directly implicating appellant in the offense as charged (Tr. at 60). Hall admitted on direct that his attorney, Mr. Schumacher, had made him promises regarding the plea negotiations. (Tr. at 66). The deal in exchange for Hall's testimony was barely mentioned in cross-examination. (Tr. at 72 - 73); and appellant's trial counsel Mr. Carter's co-Public Defender Mr. Schumacher's role in this matter was not mentioned whatsoever. (Tr. 73). No objection was raised as to Hall's testimony based upon the apparent and gross conflict of interest.

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 assistan of counsel contemplates that such assistance be "untrammeled and

unimpaired by . . . requiring that one lawyer shall simultaneously represent conflicting interests." Glasser v. United States, 315 U.S. 60, 70 (1942). [1]

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 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

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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)).

> 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 unforseeability 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" §3.5(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. [2]

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

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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. . ."

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)

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. Such an actual conflict is apparent in the instant case.

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, 435

U.S. 475 (1978), 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 the 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 effictive assistance of counse. 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.[3] From this fact, Mr. Justice Burger concluded that the harmless error rule has no application to right to counsel cases:

> Moreover, this court has concluded that the assistance of counsel is amoung those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." (435 U.S. at 475)

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. (435 U.S. at 490-91)

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

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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.

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 exists. 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, supra, where the Court stated that "we indulge every reasonable presumption against the waiver of fundamental rights."

In Glasser v. United States, supra, we also find the roots 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 clerly 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.[4]

In Campbell v. United States, 352 F.2d 359 (D.C. Cir., 1965) the court recognized that a fundamental right - the right to effective

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4. See Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948), where the Supreme Court reaffirmed the need for affirmative judicial involvement in the waiver process.

ssistance of counsel - was unwittingly and routinely being waived y criminal defendants. In an attempt to prevent this sort of unnowing forfeiture of Sixth Amendment rights, the Court announced rule requiring a trial judge to insure that co-defendants' decision to proceed with one attorney was an informed decision. The ourt 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 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.[5]

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

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5. 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.

appears, 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.[5a]

In United States v. Foster, 469 F.2d 1 (1st Cir., 1974), a drug defendant challenged his conviction where his attorney had al represented his co-defendant. In rejecting this claim, the Court fo that there was no divergence in the interests of the co-defendants. Although the 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 int 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 prejudic 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 simil burden-shifting device to protect Sixth Amendment rights. In State Olsen, Minn., 258 N.W. 2d 898 (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 justify

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5a. Hence, this case is distinguishable from the recent decision o this Court in State v. Tippetts, Utah, 584 P.2d 892 (1978) where th conflict was apparently raised and the trial court found no conflic (584 P.2d at 893).

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 nautre 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, 543 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 no such inquity is made, the burden of proof on the question of prejudice shifts to the government.[5b]

The Eighth Circuit declined to adopt any burden-shifting procedure in United States v. Lawriw, 568 F.2d 98, (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 more 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.

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

5b. Accord: Commonwealth v. Davis, Mass. 384 N.E. 2d 181, 184 (1978).

issue of prejudice was foreclosed by Holloway v. Arkansas, supra, 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.

Since 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) (435 U.S. at 490).

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 only required a potential conflict of interest to trigger a reversal.

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) (Emphasis Supplied).

The Third Circuit also only requires a showing of a possib 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, 4 F.2d 203, 210 (3rd 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.[6] (Emphasis Supplied).

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6. Accord: Also holding holding that a possible conflict of inter is sufficient to sustain an ineffective assistance of counsel claim See Walker v. United States, 422 F.2d 374 (3d Cir., 1973); Commonwe v. Davis, Mass., 384 N.E.2d 181, 186 (1978).

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.

In the instant case the conflict of interest is obvious. Appellant, as the California Court so aptly described it, was "thrown to the wolves" for the sake of Hall.

E. THE CONFLICT OF INTEREST IN THE INSTANT CASE IS MANIFEST.

To even argue that one attorney can effectively represent co-defendants, one of whom enters into a plea agreement, part of which includes a promise for a reduction of charges in consideration for testimony against his co-defendant, borders on the absurd. The case law uniformly rejects such a situation. Commonwealth v. Westbrook, Pa., 400A.2d 160 (1979); People v. Superior Court, 94 Cal. App.3d 627, 156 Cal Rptr. 487 (1979); United States v. Mahar, 550 F.2d 1005 (5th Cir., 1977).

In the instant case two days before trial co-defendant Hall entered into a plea agreement whereby in exchange for a reduced charge he would implicate appellant in the offenses charged. At that time both appellant and Hall were represented by Mr. Schumacher. The fact that Mr. Schumacher handed the file to another public defender for trial did not eliminate this gross conflict since any such conflict extends to all members of a law firm or public defender office. This

is recognized in Holloway v. Arkansas, supra,(435 U.S. at 480 fn. 8). As was stated in Commonwealth v. Westbrook, Pa., 400 A.2d 160, 162:

> In Commonwealth v. Via, 455 Pa. 373, 316 A.2d 895 (1974), we held that members of the pbulic defender's office would be considered members of the "same firm" for purposes of presenting a claim of ineffective assistance of trial counsel. The rationale of Via, as it concerned public defenders being considered as one law firm is equally applicable to the question of conflict of interest in multiple representations.
>
> Having determined that the Public Defenders Association of Philadelphia is a "law firm", it is clear that two members of the same firm are prohibited from representing multiple clients with inconsistant defenses. (406 A.2d at 162).

Thus, the fact that Public Defender Carter pinch-hit for Public Defender Schumacher two days after the obvious conflict arose does not vitiate the denial of effective assistance of counsel claim of appellant.

A case directly on point is People v. Superior Court, 94 Cal. App. 3d 627, 156 Cal Rptr. 487 (1979). In that case the public defender represented two defendants charged with the same offense. The State offered one defendant a plea bargain arrangement whereby he could plead guilty to a lesser offense in exchange for testimony against his co-defendant. (156 Cal. Rptr. at 488). The Court held such an offer prevents the public defender from effectively representing the accused mandating the appointment of independent counsel. Accord: Commonwealth v. Westbrook, Pa., 400 A.2d at 160 (1979).

The issue is exactly on point in the instant case. The only logical conclusion mandates reversal of appellants conviction and remand for new trial.

CONCLUSION

The conflict of interest in the instant case is manifest even from the shallow record in the instant case. The appellant was denied effective assistance of counsel and is entitled to a reversal of his convictions and remand for new trial.

RESPECTFULLY SUBMITTED this 19 day of February, 1980.

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DELIVERY CERTIFICATE

I hereby certify that I delivered two copies of the foregoing Brief of Appellant to the office of the Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this _____ day of February, 1980.

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