

1989

Utah v. Webb : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Respondent, : Case No. 880283
v. :
CHARLES WEBB, : Priority No. [REDACTED]
Defendant/Appellant. : 89

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT AND CONVICTION FOR
AGGRAVATED ROBBERY, A FIRST DEGREE FELONY
IN VIOLATION OF UTAH CODE ANN. §76-6-302
(1978), IN THE THIRD JUDICIAL DISTRICT
COURT IN AND FOR SALT LAKE COUNTY, STATE OF
UTAH, THE HONORABLE JAMES. S. SAWAYA,
JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Respondent, : Case No. 880283
v. :
CHARLES WEBB, : Priority No. 2
Defendant/Appellant. :

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October 10, 1988


Mary Noonan
Clerk of the Court
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

Re: State v. Charles Webb, Case No. 890256-CA

Dear Ms. Noonan:

Pursuant to R. Utah Ct. App. 24(j) (1989), respondent cites State v. Buck, 756 P.2d 700 (Utah 1988) as supplemental authorities for the court's consideration relevant to Point IV A. of respondent's brief in support of the above entitled case.

Sincerely,


DAN R. LARSEN
Assistant Attorney General

DRL:bks

cc: Samuel Alba

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Respondent, : Case No. 880283
v. :
CHARLES WEBB, : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

Mr. Webb appeals from his conviction of aggravated robbery, a first degree felony, in the Third Judicial District Court in and for Salt Lake County, State of Utah. Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §77-35-26(2)(a) (Supp. 1988) and Utah Code Ann. §78-2-2(3)(i) (Supp. 1988).

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented in this appeal:

1. Was the defendant denied the effective assistance of counsel at trial due to a conflict of interest affecting his trial counsel?
2. Was there insufficient evidence to sustain a conviction for aggravated robbery?
3. Did the cumulative effect of the prosecutor's improper remarks at trial amount to misconduct warranting a new trial?
4. Did the trial court err in failing to suppress

evidence seized during the arrest of the defendant?

5. Were the increased penalty provisions of Utah Code Ann. §76-3-203(1) (Supp. 1988) improperly applied to the defendant?

6. Was the defendant prejudiced by an instruction which was in part argumentative and an improper comment on the evidence?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The applicable constitutional provisions, statutes and rules for a determination of this case are:

1. Fourth Amendment, United States Constitution.
2. Sixth Amendment, United States Constitution.
3. Article I, §12, Utah Constitution.
4. Article I, §14, Utah Constitution.
5. Utah Code Ann. §76-3-203(1) (Supp. 1988).
6. Utah Code Ann. §76-6-302 (1978).
7. Utah Code Ann. §76-10-501 (Supp. 1988).
8. Utah Code Ann. §77-32-1 (Supp. 1988).
9. Utah Rules of Professional Conduct, Rule 1.7.

which texts are set forth in the attached Appendix.

STATEMENT OF THE CASE

This is an appeal from a judgment and conviction for aggravated robbery, a first degree felony, in violation of Utah Code Ann. §76-6-302 (1978) and an enhancement of one to five years for use of a firearm pursuant to Utah Code Ann. §76-3-203(1) (Supp. 1988) in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge, presiding.

STATEMENT OF FACTS

At about 3:30 p.m. on October 21, 1987, King's Custom Jewelers in Trolley Square, Salt Lake City, Utah was robbed of jewelry, diamonds and cash, valued at approximately \$40,000 dollars (T. 83-84, 174). In the store at the time was the owner, Karekine Karmelian and a Trolley Square security guard, Stephen Church, who had entered the store while the robbery was in progress (T. 82-83, 96, 101). Subsequently, both witnesses identified co-defendant John Humphrey as the lone robber (T. 85, 187-188).

The robbery lasted only minutes (T. 103, 138). During the robbery, Mr. Karmelian was busy removing cash and jewelry from the safe and display cases (T. 114-15, 125-130). At the robber's direction, Mr. Church was occupied with handcuffing himself to Mr. Karmelian (T. 200-02, 204). There was minimal conversation (T. 84-85, 90, 95, 102-103, 128-129). The witnesses varied in their physical description of the robber in regards to his height, weight and clothing (T. 132-33, 136-37, 211-12, 214).

The two witnesses also varied in their description of the robber's weapon. Mr. Karmelian described it as a big shotgun with a rusty colored barrel (T. 84, 88); Mr. Church as a twelve-gauge pump shotgun with a silver barrel (T. 188, 191). Neither witness could identify Exhibit 1, the shotgun subsequently seized from Mr. Webb's home, as the gun used in the robbery (T. 155, 219). In fact, the shotgun seized from Mr. Webb did not have a rusty or silver colored barrel

(T. 148, 192). Additionally, Exhibit 1's handle is uniquely wrapped in black tape (T. 153); yet, neither witness noticed nor reported anything unusual about the handle of the shotgun used in the robbery (T. 153, 192).

On November 3, 1987, Britt Martindale gave a statement to the police implicating Mr. Webb and Mr. Humphrey in the robbery (T. 330). On November 4, 1987, Mr. Webb and Mr. Humphrey were arrested at the home of Mr. Webb and his girlfriend, Renae Gregersen (T. 300, 330).

Early in the morning of that day, police officers knocked on the Webb-Gregersen's door. As Ms. Gregersen unlocked the door, the police pushed it in and knocked her down (T. 687, 696). The officers had guns drawn, pointed at everyone including Ms. Gregersen's young son (T. 665, 672, 696).

While Ms. Gregersen was kneeling on the floor, crying and very agitated (T. 659, 668, 688), she was arrested and asked to sign a search consent form (T. 301-02). Her only concern at the time was for her young infant, who was on a heart monitor since the infant's twin had died from Sudden Infant Death Syndrome (T. 688, 696). The infant was crying all during this time (T. 673), and Ms. Gregersen has no memory of having signed any consent form (T. 697).

After a three-hour search of the house, the only items recovered were the shotgun as previously described, a ring and a watch (T. 318-19; Exhibits 1, 2 & 3 respectively, R. 166). The ring was found inside a jewelry case in the

master bedroom (T. 304). The watch was found in Ms. Gregersen's purse (T. 318). No evidence of the robbery was found in a search of Mr. Webb's car (T. 342).

On the day of the robbery, October 21, Mr. Webb, who had been traveling as part of his business, was in Ely, Nevada (T. 505-06). He put a dated receipt in evidence from his stop in Ely (T. 506). He purchased the ring and watch from Britt Martindale on November 2, 1987, and gave the ring to Renae (T. 510). The shotgun he had bought and modified for Renae a long time ago (T. 514).

Britt Martindale testified that on October 21, 1987, Mr. Webb and Ms. Gregersen drove up to her house around four o'clock p.m. (T. 255); Humphrey was hidden in the trunk of their car (T. 227-28). They brought in a canvas bag (T. 230) and a shotgun (T. 231) and began sorting through jewelry taken out of the bag (T. 232). Humphrey, who was living at the Martindale home at the time, went into the bathroom and shaved off his beard (T. 229). The shotgun and bag were hidden in the Martindale home for several hours (T. 239). According to Britt, that night Webb, Humphrey and her husband, Russell Martindale, left for Las Vegas (T. 241).

Ms. Martindale never gave any explanation why this took place at her house. She admitted that at the time of the robbery she and her husband were estranged but had since reconciled (T. 248). She knew that Russell had stolen the vehicle used as the get-away car for the robbery (T. 252). At trial, it was established that Russell Martindale had been

granted immunity for the theft of the vehicle (T. 249). No search was ever made of the Martindale home (T. 340-41).

Prior to trial, Mr. Webb filed a Motion to Suppress the evidence seized from his home at the time of his arrest (R. 65-66; argued T. 645-708). The motion was denied (R. 68-69). He then filed a Supplemental Motion to Suppress Evidence (R. 102; argued Supp. T. 7-38) which was denied R. 119). The motion was raised and denied again at the start of trial (T. 60-61).

Additionally, Mr. Webb moved to sever his trial from Ms. Gregersen's and Mr. Humphrey's trial (R. 82). This was granted as to Ms. Gregersen (R. 68-69). In Mr. Webb's post-trial Motion for a New Trial (R. 285-286), he again raised the severance issue as well as the conflict of interest created by two public defenders serving as counsel for himself and Humphrey at their joint trial (R. 287-288). The motions were denied (T. 743).

At the end of the State's case, Mr. Webb moved for a directed verdict of acquittal based on the insufficiency of the evidence (T. 425). This motion was renewed prior to jury deliberation (T. 622) and in Mr. Webb's Motion for a New Trial (T. 741-42; R. 285). All of the above motions were denied (T. 425, 622, 742-43).

Prior to trial, Mr. Webb moved in limine to exclude all evidence of any claimed prior bad acts of his (R. 105-06; Supp. T. 3-7). The motion was granted (Supp. T. 6-7). The admonition against such evidence was restated at the start of

trial (T. 61-62). Despite this, during the trial, the prosecutor made or elicited references concerning a previous police stop of Mr. Webb (T. 488-89, 523, 617; objections T. 488, 523, 746), evidence of other crimes (T. 304-05; objection T. 305; argued T. 323-24), and Mr. Webb's alias (T. 327; objection T. 327; argued T. 428-429). Other specific instances of prosecutorial misconduct will be discussed infra as appropriate to the argument.

Prior to the giving of instructions, Mr. Webb objected to the language of Instruction No. 16 (T. 624-25, misidentified there as No. 17).

On June 22, 1988, after a jury trial, Mr. Webb and co-defendant Humphrey were found guilty of aggravated robbery, in violation of Utah Code Ann. §77-6-302 (1978).

SUMMARY OF ARGUMENT

Defendant Webb was denied his right to the effective assistance of counsel because his appointed counsel, the Salt Lake Legal Defender Association, improperly represented both Mr. Webb and his co-defendant Humphrey at their joint trial. This conflict of interest warrants a reversal of Mr. Webb's conviction.

The prosecutor continually and intentionally violated a pre-trial order limiting inquiry into other alleged bad acts of Mr. Webb and otherwise solicited improper remarks. The cumulative effect of the prosecutor's conduct created prejudice to Mr. Webb justifying reversal in light of the general insufficiency of the evidence against Mr. Webb.

Evidence seized during the arrest of the defendants should have been suppressed since it was not seized pursuant to a search warrant, nor incident to arrest nor pursuant to any consent. In light of the insufficiency of the evidence, the improper introduction into evidence of the items so seized prejudiced Mr. Webb and warrant a reversal of his conviction.

The imposition of an enhanced penalty based on the use of a firearm was improper due to the structure of the aggravated robbery statute. Even if permissibly imposed, the maximum enhanced penalty is limited to an additional five years. The case should be remanded for resentencing.

The language of Instruction No. 17 prejudiced Mr. Webb by improperly presenting argument and comment on the evidence. In light of the insufficiency of the evidence, Mr. Webb's conviction should be reversed.

ARGUMENT

POINT I

MR. WEBB WAS DENIED THE EFFECTIVE
ASSISTANCE OF COUNSEL DUE TO A
CONFLICT OF INTEREST AFFECTING
HIS TRIAL ATTORNEY'S PERFORMANCE.

A. Requirement of Separate State Analysis.

Article I, Section 12 of the Utah State Constitution provides, in pertinent part, that:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed.

The state provision clearly differs in language from the Sixth Amendment of the federal constitution which guarantees an accused in a criminal prosecution the "assistance of counsel for his defense."

The federal provision has been universally interpreted as requiring the reasonably effective assistance of counsel. Strickland v. Washington 466 U.S. 668, 104 S. Ct. 2052, 25 L.Ed 2d 763 (1984). Utah has adopted the same standard in applying the federal provision. State v. Lovell 758 P.2d 909, 913 (Utah 1988). Under either federal or state case law, a defendant who claims that his rights to the assistance of counsel under the Sixth Amendment were violated must show that his trial counsel "rendered a deficient performance in some demonstrable manner ... and that [his] counsel's performance prejudiced" him. State v. Julian, Case No. 870351 (Utah S. Ct., March 28, 1989); State v. Speer, 750 P.2d 186 (Utah 1988) and State v. Archuleta, 747 P.2d 1019 (Utah 1987). A defendant is prejudiced when "a reasonable probability exists that except for ineffective counsel, the result would have been different." State v. Lovell, 758 P.2d 909, 913; Strickland v. Washington 466 U.S. 668, 694. Any modification of the federal interpretation of the federal constitutional standard has been expressly rejected by the Utah Court. State v. Verde, 101 Utah Adv. Rep. 37, 41 n. 2 (1989).

However, despite repeated requests for separate analysis of the state constitutional provision, State v. Lafferty, 749 P.2d 1239 (Utah 1988) and State v. Ashe, 745 P.2d 1255 (Utah

1987), no Utah decision has ever considered the parameters of the state guarantee. This omission has created state case law which simply "march[s] lock-step with interpretation given to . . . the United States Constitution." State v. Bishop, 717 P.2d 261, 272 (Utah 1986) (J. Durham, concurring opinion).

But:

The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law - for without it, the full realization of our liberties cannot be guaranteed.

Wm. Brennan, State Constitutions and the Protections of Individual Rights, 90 Harvard L. Rev. 489, 491 (1977).

Unfortunately, because the Utah courts until 1986 failed to even note the need for any separate analytic comparisons of state and federal constitutional provisions, earlier case law is of little value. To compound the void of precedent, there is virtually no legislative history discussing the intent of the Utah founders in not adopting the federal language. Yet, the failure of prior Utah cases to fully articulate the parameters of state constitutional protection cannot excuse passivity now. For even where the state and federal prohibitions are textually identical, state court decisions interpreting the state provision remain state law despite subsequent federal doctrinal changes. State v. Caraher, 293 Or. 741, 653 P.2d 942 (1982); Carson, "Last Things Last": A Methodological Approach to Legal Argument in State Courts, 19 Willamette L. Rev. 641 (Fall, 1983).

This Court is then faced with a "clean slate" in analyzing Article I, Section 12 of the Utah State Constitution. While the state may claim that this Court should not generally construe the Utah constitutional provision more narrowly, such an argument fails to recognize that:

Because United States Supreme Court decisions ... mark the minimum guarantees of individual rights, state courts that give truly independent force to their own constitutions generally reach results more protective of those rights than the Supreme Court.

The New Federalism: Toward a Principled Interpretation of the State Constitution, 29 Stan. L. Rev. 297, at 297 (1977). The federal decisions may persuade, but they cannot compel, the acceptance of the federal minimum guarantee as the state's maximum defense of individual rights. State v. Jewett, 500 A.2d 233 (Vt. 1985).

The application of this analysis will be discussed below.

B. Requirements of a Conflict of Interest.

As discussed, before the alleged deficiencies of a counsel's performance will be considered by an appellate court, the defendant must establish that he "suffered unfair prejudice as a result of the alleged deficiencies." State v. Lovell, 758 P.2d 909; State v. Archuleta, 747 P.2d 1019 (Utah 1987). Absent actual prejudice, a claim of ineffective assistance of counsel will not warrant reversal of a conviction. Id.

But, an entirely different approach is taken where the claim of ineffectiveness is, as here, based on a conflict of interest in the representation of the defendant.

[I]f a criminal defendant is represented at trial by an attorney, either appointed or retained, who labors under an actual, and not merely a potential conflict of interest, the defendant has been denied effective assistance of counsel as a matter of law; and, unless he has knowingly and intelligently waived his sixth amendment right to conflict-free representation, reversal is automatic. No prejudice need be shown. (Citations omitted).

United States v. Martinez, 630 F.2d 361, 362 (5th Cir. 1980) relying on Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L.Ed 2d 426 (1978).

In Holloway v. Arkansas, 435 U.S. 475, the United States Supreme Court reversed the convictions when it concluded that the trial court had improperly required a public defender to jointly represent three defendants despite timely objections that such representation created a conflict of interest. Where the potential of a conflict had been raised at trial, the Court held that prejudice would be presumed. 435 U.S. at 490.

Two years later, the United States Supreme Court refined its standard. In Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed 2d 333 (1980), unlike Holloway, the defendant first claimed that his lawyers represented conflicting interests in a post-conviction habeas corpus action. Noting that under the facts, the defendant had not established that an actual conflict of interest existed but

merely had demonstrated the possibility of conflict, the Court held that reversal was not mandated. 466 U.S. at 350.

From this, two rules evolve. Where a potential conflict is brought to the attention of the trial court prior to or during trial and the trial court fails to act, the mere fact of a potential or possible conflict will warrant reversal without any further showing of prejudice. Where, however, the conflict is not brought to the attention of the trial court but only raised on appeal, the defendant "must demonstrate the existence of an actual conflict of interest." People v. Jones, 520 N.E.2d 325, 328 (Ill. 1988); United States v. Newman, 733 F.2d 1395 (10th Cir. 1984).

Stated another way, it is now recognized:

. . . that prejudice would be irrelevant if it could be shown that [the attorney's] conflict of interest had any actual effect whatever on his representation of [the defendant].

Sanchez v. State, 756 S.W.2d 452, 454 (Ark. 1988). It is only:

. . . necessary that a conflict of interest must have actually existed or have been inherent in the facts of the case from which the possibility of prejudice flowed.

State v. Thompson, 108 Ariz. 500, 502 P.2d 1319, 1323 (1972).

Turning to the facts at bar, Mr. Webb was arrested on November 4, 1987 and a legal defender was appointed to represent him (R. 9). A preliminary hearing was held for Defendants Webb and Humphrey on November 24 and 25; both were represented by members of the Salt Lake Legal Defenders

Association. (R. 16-18). On December 11, 1987, at the time of the district court arraignment, the L.D.A. withdrew from representing Mr. Webb and Mr. Webb privately retained Mr. Ray Stoddard to represent him (R. 21). Subsequently, Webb and Humphrey's trial was severed from that of Mr. Webb's girlfriend, Renee Gregerson (R. 68-69). On March 10, 1988, Mr. Stoddard filed a Motion to Sever Defendant Webb from Humphrey but moved to withdraw as counsel at the same time (R. 81-82). On March 22, 1988, the Salt Lake Legal Defenders Association was again appointed to represent Mr. Webb. (R. 88). This appointed representation continued through trial. No ruling was ever made on the motion to sever Mr. Webb from Co-defendant Humphrey. No minute entry shows the withdrawal of the motion. Co-defendant Humphrey raised the issue pro se (R. 98). Mr. Webb re-raised the severance issue in his Motion for New Trial (R. 287-88).

Entwined with Mr. Webb's repeated requests for severance from Humphrey, is his claim that there was both an inherent and actual conflict of interest in the Salt Lake Legal Defenders Association jointly representing himself and Humphrey under the facts and circumstances of his case (R. 287-88).

To be clear, it is not Defendant Webb's position that the joint representation by associated attorneys is per se prohibited. Batchelor v. Smith, 555 P.2d 871 (Utah 1976). Nor, is it his position that he was entitled to severance as

a matter of right. State v. O'Brien, 721 P.2d 896, 898 (Utah 1986) and cases cited therein. Rather, where the evidence was strong against Co-defendant Humphrey as the actual robber and only suspect or weak against Mr. Webb as an accomplice, the joint representation by L.D.A. in a joint trial precluded Mr. Webb's trial attorney from affirmatively arguing that Humphrey was indeed guilty and that Mr. Webb was being drawn in through mere association. As stated in Holloway v. Arkansas, 435 U.S. at 490-491,

In a case of joint representation of conflicting interest the evil . . . is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain sentencing trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interest in the attorney's options, tactics and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation. (Emphasis added.)

The issue is whether a potential conflict existed such that trial counsel would have been affected in her representation of Defendant Webb.

In determining whether a conflict existed, one first must look to ethical considerations. The American Bar

Association Standards for Criminal Justice state:

Standard 4-3.5(b): Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that:

- (i) no conflict is likely to develop;
- (ii) the several defendants give an informed consent to such multiple representation; and
- (iii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that an attorney sometimes encounters in defending multiple clients.

American Bar Association, Standards for Criminal Justice, 2d Ed. Vol. I, Defense Function, §4-3.5 "Conflict of Interest."

Similarly, the Rules of Professional Conduct of the Utah Supreme Court require, in pertinent part:

Rule 1.7(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) Each client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation to each client of the implications of the common representation and the advantages and risks involved.

Both in the Comments to the Utah rule and the Commentary to the A.B.A. standard, the writers recognized that the "potential for conflict of interest in representing multiple defendants in a criminal case is so grave" that normally joint representation by the same lawyer or law firm should not occur. A.B.A., Standards for Criminal Justice, 2d Ed. Vol. I, Defense Function, §4-3.5, Commentary at 4-41; Utah Code of Judicial Administration, Rules of Professional Conduct, Rule 1.7, Comments at 185 (Conflicts in Litigation). Moreover, the obligation of the attorney to explore and explain the situation is particularly strong in criminal cases because a criminal defendant is often either willing or coerced into accepting any representation. A.B.A. Standards, Id.

Utah law has even codified the minimum standards governing appointed counsel, requiring among others the "undivided loyalty" of appointed counsel in representing an indigent defendant. Utah Code Ann. §77-32-1(4) (Supp. 1988).

While Utah courts have never held that joint representation by a legal defender organization of co-defendants in a criminal trial is per se prohibited, this Court has concluded that such representation is suspect and should be examined. State v. Smith, 621 P.2d 697 (Utah 1980). In Smith, one legal defender represented two defendants at the

preliminary hearing stage. When one defendant subsequently plead guilty, a different public defender represented the remaining defendant at trial. No objection was made at trial but only raised on appeal. The Utah Supreme Court determined that a conflict did exist in the representation but found no actual prejudice. Despite this lack of prejudice, reversal was warranted because:

...the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

621 P.2d at 699, quoting Chapman v. California, 386 U.S. 18, 23, 87 S. Ct. 824, 31 L.Ed 2d 483 (1967).¹

Other courts have taken a similar approach to State v. Smith, 621 P.2d 697. In Commonwealth v. Westbrook, 400 A.2d 160 (Penn. 1979), the conviction was overturned where separate public defenders represented two brothers with adverse interests even though not co-defendants. In State v. Robinson, 662 P.2d 1341 (N. Mex. 1983), the court concluded factually that no actual conflict existed where a public defender had briefly represented a potential co-defendant turned witness because independent counsel had been appointed

¹ Now Chief Justice Hall dissented in State v. Smith based on the defendant's failure to object at trial and the facts of the case, 621 P.2d at 700-701. Such a position is still consistent with the rule stated on page 13 of this brief; either an actual conflict must exist or the conflict must be inherent from the facts such that a "possibility of prejudice flows." Neither case requires proof of actual prejudice. See also State v. Tippetts, 584 P.2d 892 (Utah 1978), where the trial court did inquire about a potential conflict but the defendant affirmatively waived any objection.

to represent the the defendant. Relying on State v. Smith, supra, the New Mexico court cautioned public attorneys to avoid even the appearance of impropriety.

Still others have demanded that any time that there is multiple representation by public defenders or any law association, there must be an inquiry and appraisal made as to any potential conflicts. State v. Bell, 447 A.2d 525 (N.J. 1982). This inquiry has often been in a Rule 11 format, i.e., a narrative discussion with the defendant and counsel concerning any potential conflicts and if appropriate a knowing an voluntary waiver of those rights. United States v. Petz, 764 F.2d 1390, 1392 (11th Cir. 1985). These courts have recognized that in the assignment of attorneys for co-defendants assignment to outside independent counsel should be the norm, and not the exception.²

In the case at bar, a potential conflict existed by the mere fact of the legal defenders jointly representing co-defendants - not a per se conflict, but a potential. No inquiry was made. The conflict was further brought to focus when Mr. Webb sought severance from Humphrey in order to

² Interestingly, even a decade ago, seventy percent (70%) of all public defender offices surveyed cautioned against multiple representations and forty-nine percent (49%) refused such representation. 447 A.2d at 530 n.8, citing Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L.Rev. 939, 950 n.40 (1978).

fully pursue his defense (R.81-82). Still no hearing was held. Even when Mr. Webb expressly raised the conflict issue (R.287-288), the trial court refused to adequately address the issue (T. 743).

Clearly, the facts of the case raised actual conflict questions. In brief, independent counsel would have bolstered the identification of the eyewitnesses that Humphrey committed the crime. Independent counsel would have attacked the credibility of Humphrey. Emphasis would have been placed on the facts that at the time of the robbery Humphrey was living with the Martindales, that Humphrey and Russ Martindale traveled together the night of the robbery and that Humphrey lived at the Martindales after the robbery. Independent counsel would have brought out that Britt Martindale needed a "patsy" to protect her husband and used Webb because he knew Humphrey. Knowing that Webb would buy jewelry, Britt Martindale sold Webb a few pieces from the robbery and then immediately called the police knowing they would find Webb with the evidence. Independent counsel would have pointed out that even if the jury believed that the gun found in Webb's home was the gun used in the robbery that Humphrey had access to the gun as it was merely left under the bed for Renee Gregerson's protection.

Independent counsel would have actively sought a severance from Humphrey and would have distanced Webb from Humphrey in all aspects - as opposed to joint motions and

joint voir dire (R.159-164). Just how confusing this lumping together can be became apparent when the trial judge insisted that all defense witnesses were joint witnesses for purposes of examination (T.360). Independent counsel would have sought a lesser included instruction on possession of stolen property. State v. Baker, 671 P.2d 152 (Utah 1983).

Instead, what was presented to the jury was a united front where both defendants would succeed or fail together. Unfortunately, such was not in the best interest of Mr. Webb nor done with his agreement as evidenced by his post-trial Motion for a New Trial (R.287-288). What occurred was a "diminution in [the] zeal of representation" of Mr. Webb caused by the joint representation of co-defendants by the same law association. A.B.A. Standards for Criminal Justice, 2d Ed. Vol. I, Defense Function §4-3.5, Commentary. This lack of undivided loyalty, though not intentional on the part of trial counsel, denied Mr. Webb the effective assistance of counsel.

Therefore, this Court must decide if Utah's right to counsel grants to an accused any rights beyond those minimally guaranteed under federal law. Specifically, if the Utah constitution guarantees that no money or fees need be advanced to secure the right of representations, it becomes incumbent on this Court to require appointed counsel to act without conflicts in the same manner as required of private counsel. If a single attorney or a private law firm could not ethically or constitutionally represent both Mr. Webb and his

Co-defendant Humphrey then no lesser standard can be imposed where counsel is appointed. Utah Code Ann. §77-32-1(4) (Supp. 1988).

Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. . . . In this tradition, our own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no insidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system - all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court."
(Citations omitted).

Griffin v. Illinois, 351 U.S. 12, at 16-17, 76 S. Ct. 585, 100 L.Ed 2d 891 (1956). While it is true that convenience and economic considerations may encourage a "wink and nod" from the trial courts in allowing legal defender associations to routinely represent co-defendants, justice dictates a more circumspect approach.

Inquiry at the trial level should be mandated in all cases of multiple representations of co-defendants by the same law association. While heavy reliance should be placed on counsel's evaluation of whether or not a conflict exists, the trial court must also inquire of the defendant as to his understanding of his right to conflict-free representation in the context of the circumstances of the case.

If a potential conflict appears, remedial measures should be required. These could include severance, appointment of independent counsel and/or an on-the-record waiver of the conflict by defendant in a Rule 11 format. Most

importantly, attorneys must be encouraged to review their representation for conflicts early on in the case. Any doubts must be resolved in favor of the defendant.

POINT II

THE EVIDENCE ADDUCED AT TRIAL IS
INSUFFICIENT TO SUSTAIN A
CONVICTION FOR AGGRAVATED
ROBBERY.

The standard employed when reviewing the sufficiency of evidence and reversing a jury verdict is well-established. The appellate court must:

. . . review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted. (Citations omitted).

State v. Petree, 659 P.2d 443, 444 (Utah 1983). However,

. . . this Court still has the right to review the sufficiency of the evidence to support the verdict. The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt . . . [T]he reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict.

Id. at 444-45.

Such impermissible speculative leaps have been identified by this Court in a number of cases. When accomplice and witness testimony is insufficient in that it

"cast[s] a mere suspicion on the defendant," a conviction cannot be sustained on the mere possession of stolen property. State v. Laris, 2 P.2d 243, 248-49 (Utah 1931). If the evidence tends to show a person other than the defendant stole the property now in the possession of the defendant, the evidence is insufficient. State v. Potello, 40 Utah 56, 119 P. 1023, 1029 (1911). Mere possession of a gun used in a burglary without more is insufficient. State v. Nichols, 145 P.2d 802, 806 (Utah 1944).

The evidence adduced at Mr. Webb's trial is insufficient to support his conviction for aggravated robbery, Utah Code Ann. §76-6-302 (1978). Neither the store owner nor the security guard identified Mr. Webb as the armed robber (T. 85, 187-188). None of Mr. Webb's fingerprints were found in the alleged get-away vehicle found near Trolley Square (T. 368-69, 379), a vehicle which Russell Martindale stole (T. 262, 344, 394). The only evidence against Mr. Webb consisted of the testimony of Britt Martindale and the gun, ring and watch seized from Mr. Webb's apartment some two weeks after the robbery. Without Britt Martindale's testimony, there was no evidence to support a robbery conviction against Mr. Webb, at best, it could be argued that he had possession of stolen property. State v. Kalisz, 735 P.2d 60 (Utah 1987).

What the evidence did establish is that Mr. Humphrey robbed the jewelry store (T. 85, 187-188). Further, the evidence established that the person who stole the get-away

vehicle was Russell Martindale (T. 262, 344, 394), that Humphrey was living at the Martindales at the time of the robbery (T. 277, 343), that immediately after the robbery, Humphrey shaved off his beard at the Martindale's home (T.229) and that same night left for Las Vegas, Nevada with Russell Martindale (T. 241). Subsequently, Humphrey returned to stay at the Martindale's (T. 293-294, 434).

In this context comes Britt Martindale, wife of Russell Martindale (T. 222). The Martindales had been separated prior to the robbery, (T. 248) despite this, Russell Martindale as well as Humphrey were at the Martindale home the night of the robbery (T. 241). By her own admission, the jewelry stolen as well as the shotgun used were left at her house immediately after the robbery (T. 239). She did not deny that she knew the items were from a robbery. She also knew her husband had stolen a car (T. 252). Wanting to help her husband, she testified that she called the police about two weeks after the robbery (T. 330). As a result, her husband was not charged with any crimes in Utah (T. 572) and the Martindales reconciled (T. 248). However, at the time of her testimony at Mr. Webb's preliminary hearing, Russell Martindale had been given no immunity (R. 18; T. 288-289, 383). In fact, only one week before Mr. Webb's trial, and only because the defense had subpoenaed him to testify, was Russell Martindale granted immunity (T. 249, 384, 573). The immunity was not in regard to the robbery charges but only for stealing

the vehicle in question (T. 572-573). Thus, Britt Martindale's testimony that it was Mr. Webb and not her husband who aided and abetted Defendant Humphrey must be viewed as suspect and not compelling.

The evidence must be viewed with the defense evidence that Mr. Webb was out of state on the day of the robbery (T. 508), had purchased the jewelry items from Britt (T. 510), and merely owned a gun somewhat similar but significantly dissimilar to the one described by the eyewitnesses (T. 155, 219). The evidence as a whole suggests that it was the Martindales who were accomplices to the robbery, and not Mr. Webb. Given the suspect accomplice and witness testimony, the reasonable hypothesis that others committed the crime and the lack of direct evidence of Mr. Webb's participation or encouragement of the crime, Mr. Webb's conviction should be reversed.

POINT III

THE CUMULATIVE EFFECT OF THE
PROSECUTOR'S REMARKS AT TRIAL
AMOUNTED TO MISCONDUCT WARRANTING
A MISTRIAL.

This Court has consistently stated that in reviewing improper statements of counsel:

. . . the test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks.

State v. Troy, 688 P.2d 483, 486 (Utah 1984), quoting State v. Valdez, 30 Utah 2d 54, 513 P.2d 422, 426 (1973). In accord, State v. Tillman, 750 P.2d 546 (Utah 1987) and State v. Lafferty, 749 P.2d 1239 (Utah 1988). Step one is generally satisfied when the remarks call "the jury's attention to matters suggesting that something other than the question of the defendant's guilt or innocence is before the jurors." State v. Andreason, 718 P.2d 400, 402 (Utah 1986).

Step two is more difficult and involves a consideration of the circumstances of the case as a whole. In making such a consideration, it is appropriate to look at the evidence of defendant's guilt . . . [I]n a case with less compelling proof, this Court will more closely scrutinize the conduct.

State v. Troy, 688 P.2d 483, 486.

Such remarks, even though harmless when taken separately, may necessitate a new trial based on their cumulative effect. Owens v. State, 654 P.2d 657, 659 (Okla. Crim. App. 1982). Even one remark in violation of a court order limiting a certain line of inquiry can be grounds for reversal, if not "cut short . . . before any prejudice occur[s]." State v. Smith, 675 P.2d 521, 525 (Utah 1983). More so, deliberate and repeated violations of court orders and instructions to the prosecution "may [more strongly] constitute misconduct requiring a new trial." State v. Musgrave, 102 N.M. 148, 692 P.2d 534, 536 (N.M. App. 1984).

In the case at bar, the prosecutor repeatedly and flagrantly disregarded the trial courts pretrial order prohibiting any references to other bad acts of Defendant Webb (R. 105-06, T. 61-62) in the following areas:

1. OREGON POLICE STOP

On October 29, 1987, a second-hand store called "Mike The Traders" in Portland, Oregon was under surveillance by a police stake-out. Messrs. Webb and Humphrey were observed talking to Mike Vaden the owner of the store. Messrs. Webb and Humphrey left but were stopped a short distance away for a minor traffic violation. The stake-out and stop were in no way connected to the investigation of the Salt Lake City robbery.³

In this context, the prosecutor extensively cross-examined Mr. Humphrey about the stop over objection by Mr. Webb's trial counsel (T. 488-490; objection T. 488-489). He continued the same tactic in cross-examining Mr. Webb to the point of even directly asking:

PROSECUTOR COPE: THOSE THINGS THAT YOU

SOLD WERE STOLEN, WEREN'T THEY?

DEFENDANT WEBB: NOT THAT I KNOW OF, SIR,

AND ANYTHING THAT WAS SOLD UP THERE WAS NOT

OUT OF A ROBBERY HERE EITHER, SIR.

³ These facts are uncontested and are derived from the investigative reports of the Salt Lake County Attorney's Office supplied to trial counsel through discovery, including statements given the police by Russell Martindale on November 11 and 13, 1987. They were some of the facts specifically referred in Defendant's Motion in Limine (T. 4-7).

Q. DO YOU REMEMBER WHO YOU SOLD IT TO?

A. YES, I DO.

Q. ARE YOU FAMILIAR WITH WHAT THAT PERSON
TOLD THE POLICE REGARDING THE CONVERSATION
HE HAD WITH YOU WHEN YOU SOLD THE THINGS?

MS. WELLS: OBJECTION.

(T. 523). The prosecutor reemphasized these improper facts during his closing (T. 617). None of this information was permissible. Both defendants had admitted to being in Portland together on the date in question (T. 48, 522-523). Indeed from the night of the robbery, October 21st, to the date of their arrest, November 4th, there was no dispute -- nor particular relevance -- to the whereabouts of Mr. Webb or Co-defendant Humphrey. Neither defendant "opened the door" to the testimony. State v. Speer, 750 P.2d 186 (Utah 1988). Neither defendant had put his character into dispute, Utah Rules of Evidence Rule 404(a), State v. Tarafa 720 P.2d 1368 (Utah 1986); nor, was the evidence relevant to prove motive or intent, Rule 404(b), State v. Speer, supra. It was solely elicited for the improper purpose of persuading the jury that Mr. Webb had been involved in other bad acts. As such, it should have been specifically excluded.

2. OTHER CRIMES

Similiarly, the prosecutor continually attempted to paint Mr. Webb as generally a criminal. The prosecutor elicited from Detective Lomax that rings found in Mr. Webb's

home could be connected to uncharged crimes (T. 304-305; objection T. 305). Just prior to Detective Lomax's testimony, the prosecutor elicited from Britt Martindale that other robberies were contemplated by the defendants at other locations (T. 291; objection T. 291-292) and that she did not believe that Mr. Webb was a legitimate jewelry trader because he sold expensive pieces cheaply (T. 292; hearing on objection T. 323). A motion for mistrial based on the cumulative prejudicial effect of the above witnesses' comments was made but denied (T. 323-324).

Additionally, the prosecutor elicited testimony that Mr. Webb used an alias (T. 327; objection T. 327; argued T. 428-29). During his cross-examination of Mr. Humphrey, the prosecutor intentionally elicited an answer which he knew would be that both defendants were in jail (T. 491; objection T. 540).

In two outrageous instances, the prosecutor's determination to portray Mr. Webb as a bad person and a criminal become clear. Ronda Blanchard, a defense witness called to testify as to Britt Martindale's reputation for veracity, was asked on cross-examination:

PROSECUTOR COPE: ISN'T IT TRUE THAT SHE
[BRITT MARTINDALE] TOLD YOU THAT MR.
HUMPHREY AND MR. WEBB WERE BAD PEOPLE AND
THAT THEY WERE STEALING THINGS?

(T. 502; objection sustained T. 502, see also T. 500-501).

Similiarly, the prosecutor recalled Detective Ray Dalling on rebuttal (T. 547) to ask if the detective had questioned Mr. Webb and if the detective had attempted to verify that information (T. 552; objection T. 552-552). The prosecutor stated, in front of the jury, in opposing the objection,

PROSECUTOR COPE: YOUR HONOR, THE
DEFENDANTS TOOK THE STAND AND BECAME
WITNESSES BY SO DOING, I BELIEVE WE ARE
ALLOWED, AT THIS POINT, TO INDICATE, BY
OPINION OR REPUTATION, THAT THE
TRUTHFULNESS AND VERACITY IS POOR OR BAD.
THAT'S ALL I AM TRYING TO DO.

Again, none of these references were admissible under the Utah Rules of Evidence Rules 404, 405 and 608, State v. Speer, 750 P.2d 186, nor by the pretrial court order (R. 105-106, T. 61-62). The effect, in light of the totality of the evidence, cannot be considered harmless where the evidence against Mr. Webb was not compelling but suspect. State v. Peterson, 681 P.2d 1210 (Utah 1984). Less flagrant and less cumulative prosecutorial misconduct has required reversal. Where the prosecutor elicited comments that the defendant had an alias, had been a protected federal witness and involved in "other criminal matters" the effect was prejudicial, State v. Troy, 688 P.2d 483, 486. Where the prosecutor in closing argued that the pervasiveness of the crime required conviction to send a message to others, reversal was warranted, State v.

Andreason, 718 P.2d 400, 402. Where the jury observed the defendant in handcuffs and the prosecutor commented in closing on a prior unrelated arrest, prejudice was found. Owens v. State, 654 P.2d 657, 659.

3. OTHER PROSECUTORAL MISCONDUCT

In addition to the above, the prosecutor referred to the fact that the defendants had not volunteered hair samples for analysis (T. 373; objection T. 426); and, to Mr. Humphrey's refusal to take part in a line-up (T. 615; objection T. 623; and R. 289-90, T. 748). Such comments either directly or inferentially on a defendant's failure to give evidence are prohibited. State v. Tillman, 750 P.2d 546, 554; State v. DeAlo 748 P.2d 195, 198-99 (Utah App. 1987).

In his closing, the prosecutor mischaracterized the facts and the law by referring to Russell Martindale as "always being a defense witness" (T. 572,) and that Martindale had only been given immunity because "he was subpoenaed by the defense and there's no point in having him take the stand and claim his fifth amendment privileges" (T. 573). The prosecutor referred to other crimes in other jurisdictions as being the reason Martindale was "circumspect" in his testimony (T. 572). In actuality, no charges had ever been brought against Mr. Martindale. While there is wide latitude in a closing argument, these deliberate comments and misstatements merely add to the cumulative prejudice created by the prosecutor. State v. Valdez 513 P.2d 422, 426.

This is not a case where the factual events surrounding the crime are uncontested. State v. Speer, 750 P.2d 186. Rather, the facts are very much in dispute. In this context, the repeated and flagrant misconduct of the prosecutor prejudiced Mr. Webb's right to a fair trial and warrant the reversal of his conviction. State v. Troy, 688 P.2d 483.

POINT IV

THE TRIAL COURT ERRED IN FAILING
TO SUPPRESS EVIDENCE TAKEN DURING
THE ARREST OF MR. WEBB.

A. The Shotgun, Watch and Ring Were
Seized Pursuant to an Unlawful Arrest
and Should Have Been Excluded at
Trial.

Utah law requires that when a peace officer makes an arrest that he:

inform the person being arrested of his
intention, cause and authority to arrest
him.

Utah Code Ann. §77-7-6 (1982). But, no notice is required if:

there is reason to believe the notice will
endanger the life or safety of the officer
or another person or will likely enable the
party arrested to escape.

Utah Code Ann. § 77-7-6(1). Similarly, a peace officer in effecting an arrest may "break the door or window of the building in which the person to be arrested is," Utah Code Ann. §77-7-8 (1982), but only if he has complied with the notice provisions of §77-7-6 or falls within the exceptions of §77-7-6(1).

The purpose behind knock-and-wait statutes
is to effect a peaceful arrest, for:

When an officer bursts in with gun drawn
immediately after knocking, but without
waiting for a reply, and without announcing
his purpose... there [is] a potential for
violence to both occupants and police
arising from the manner of entry.

State v. Chichester, 48 Wash. App. 257, 738 P.2d 329, 332
(1987). Equally, of concern, is the protection of the right
to privacy of the occupants. State v. Johnson, 716 P.2d 1006
(Alaska App. 1986). Thus, where a defendant makes a prima
facie case of the police failing to comply with the notice
provisions, the burden shifts to the State to demonstrate that
compliance did in fact occur or that exigent circumstances
existed at the time of the arrest. United States v. Murrie,
534 F.2d 695 (6th Cir. 1976); State v. Johnson, supra; State
v. Chichester, supra; People v. Lujan, 174 Colo. 554, 484 P.2d
1238 (1971). Proof of exigent circumstances must be made by
"pointing to specific, articulable facts and the reasonable
inferences therefrom which justify the intrusion", State v.
Chichester, 738 P.2d at 332. Thus, where the police had
received a specific prior warning from the suspect's wife that
the suspect would fight if arrested and, upon knocking, the
officer heard suspicious noises inside indicating that the
suspect was searching for a weapon, exigent action was
warranted. Id. Failure to comply with a knock-and-announce
statute creates an illegal entry and any evidence derived from
the illegality should be suppressed. State v. Johnson, 716 P.2d
1006.

Similarly, this Court has held that §77-7-6 notice requirements are not merely directive, but mandatory. "To be lawful, an arrest must be effected in accordance with statutory dictates," McFarland v. Skaggs Companies, Inc., 678 P.2d 298, 302 (Utah 1984).

In the present case, the police knocked on the Webb's door and without further warning or announcement pushed the unlocked door open (T. 687, 696). "Opening a closed but unlocked door constitutes a 'breaking' for the purposes of knock and announce requirements," State v. Johnson, 716 P.2d at 1008, citing Sabbath v. United States, 391 U.S. 585, 588-90, n.5, 88 S. Ct. 1755, 20 L.Ed 2d 828, (1968).

No specific facts creating an exception to the statutory requirement for prior warning were alleged. Detective Jackson did testify that the arresting officers assumed that the defendant was armed since a weapon was used in the robbery (T. 651). However, such an assumption is generally true of most felony arrests. Danger can be created, under such circumstances, by entering without warning as well as by giving warning. No exigent circumstances existed justifying the police's failure to comply with Utah Code Ann. §77-7-6 and § 77-7-8.

Because the statutes were not complied with, Mr. Webb's arrest was unlawful and in violation of the Fourth Amendment to the United States Constitution and Article I, Section 14 of

the Utah Constitution.⁴ State v. Chichester, 738 P.2d at 332. Any evidence seized pursuant to the arrest and illegal entry should be excluded. The shotgun, ring and watch (Exhibits 1, 2 and 3, respectively, R. 166) should not have been admitted at trial.⁵ Without this evidence, there would have been no physical evidence to tie Mr. Webb to the crime. (See Point II re. insufficiency of the evidence.) Therefore, admission of the illegally seized evidence was prejudicial and Mr. Webb's conviction should be reversed and remanded for a new trial.

B. Even if the Arrest Is Found to Be Lawful, the Subsequent Search of the Premises Was Not Incident to the Arrest nor Was There Valid Consent.

An appellate court will generally not disturb a lower court's factual evaluation underlying its decision to deny a motion to suppress unless the trial court's findings are clearly erroneous, State v. Mendoza, 748 P.2d 181, 183 (Utah 1987); State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987). However, to properly assess the trial court's legal conclusions based upon its factual findings, the appellate court can afford no such deference but must apply a

⁴ For purposes of a defendant's right to be lawfully arrested, both the federal and state constitutional provisions are uniform. This right is so universally recognized that no separate constitutional analysis is required. The issue here is whether there was compliance with a state statute defining the procedure for a lawful arrest.

⁵ Mr. Webb was arrested in his home which he shared with Ms. Renae Gregersen, originally a co-defendant in this case. Also, arrested at the location, was the third co-defendant, Mr. Humphrey. The evidence seized was found in a search of the premises. The police had arrest warrants but no search warrants (T. 300-02).

"correction of error" standard. Oates v. Chavez, 749 P.2d 658, 659 (Utah 1988).

As discussed in Point I(A) of this brief, United States Supreme Court decisions interpreting constitutional rights merely mark the minimum guaranties of those individuals rights. State appellate courts must independently construe the full extent of their state constitutional protections.

Any analysis of the legality of a search and seizure must start with the assumption that any search conducted "outside the judicial process, without prior approval by a judge or magistrate, [is] per se unreasonable" under either the state or federal constitution. State v. Griffin, 626 P.2d 478, 482 (Utah 1981) (J. Wilkins concurring opinion), quoting Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed 2d 576 (1967). This prohibition is subject to only a few specifically defined exceptions; two of which are a limited search incident to arrest and a valid consent search. State v. Griffin, 626 P.2d at 482 n.2. But it is the state's burden to justify a warrantless search by establishing an exception to the warrant requirement from the totality of the circumstances. State v. Iacono, 725 P.2d 1375 (Utah 1986); Schneekloth v. Bustamonte, 412 U.S. 218, 92 S. Ct. 204, 36 L.Ed 2d 854 (1973).

An arrested suspect may consent to a warrantless search of his property or premises, State v. Griffin, 629 P.2d 478, but to be valid such a consent must be "properly obtained

and freely given." State v. Iacono, 725 P.2d 1375. The consent may not be merely a "peaceful submission by the arrested suspect to the authority of a law enforcement officer", but must be "an intelligent and intentional waiver of a constitutional right." Thurlow v. State, 81 Nev. 510, 406 P.2d 918, 921 (1965).

The test of the voluntariness of the waiver is threefold. First, there must be clear and positive evidence that the consent was specific and unequivocal; second, the consent must be given without duress or coercion; and, third, the factual evidence surrounding the consent must be viewed with a presumption disfavoring a waiver by the individual of his constitutional rights. State v. Anderson, 754 P.2d 542, 544 (N. Mex. App. 1988). The presumption against a waiver of constitutional rights is particularly strong where the alleged consenting person is in custody at the time of questioned consent. Weed v. United States, 340 F.2d 827 (10th Cir. 1965).

Courts have universally held that there can be no free and intelligent waiver where the consent was obtained through intimidation or duress. State v. Iacono, 725 P.2d 1375; Weed v. United States, 340 F.2d 827; State v. Kananen, 97 Ariz. 233, 399 P.2d 426 (En banc 1965). Such coercion is necessarily implicit where there are drawn guns, Weed, or officers demanding entry upon the mere authority of their badges, Kananen.

In Mr. Webb's case, some ten arresting officers in the early morning hours broke into the home with guns drawn, knocking down Ms. Gregersen, who was dressed only in her nightgown and robe. (T. 696, 650, 652). Throughout the arrest, Ms. Gregersen was distraught over her crying infant who was on a heart monitor (T. 659, 668, 688, 696). She was worried about her older son, who the officers also had at gunpoint (T. 687, 672, 696). Ms. Gregersen was crying and upset when approached to give her consent (T. 668). She could not remember signing any form (T. 696-697).

The totality of the circumstances establish that Ms. Gregersen had been threatened at gunpoint and was being held in custody. She believed her children were in danger. In the midst of the drama of her arrest, she did not freely consent but acquiesced out of fear and confusion. Under these circumstances, there is no way to tell what the scope of any alleged consent would have been absent the intimidation and duress. Acting without a search warrant, the police failed to obtain valid consent.

Despite the lack of a warrant or consent, Utah law allows a limited search pursuant to a lawful arrest. State v. Griffin, 626 P.2d at 482, n. 2.

The underlying justifications for a warrantless search of an arrestee's person and the area within his immediate control are twofold: (1) to remove weapons the arrestee may use to resist an arrest or effect an escape, (2) to prevent concealment or destruction of evidence linking the arrestee with the crime.

State v. Harris, 671 P.2d 175, 180 (Utah 1983). But, the area

of search must be limited to that "within the immediate control" of the arrestee, for:

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.

Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L.Ed 2d 685 (1969). Thus, once an arrestee is handcuffed and removed from a room, a search of that room cannot be justified as incident to arrest since the room is no longer under the arrestee's immediate control. State v. Minear, 47 Ore. App. 995, 615 P.2d 416 (1980).

Under this doctrine, if the arrest of the Mr. Webb is found to be lawful, areas within his immediate control - but only such areas - could be validly searched for weapons. Here, Mr. Webb was lying on a bed in a bedroom at the time of his arrest (T. 328, 665). Simultaneously, Mr. Humphrey and Ms. Gregersen were arrested (T. 665). All were handcuffed (T. 666). Ms. Gregersen was at the kitchen table; Messrs. Webb and Humphrey were handcuffed and forced to lie on the kitchen floor (T. 667-669). Only after Mr. Webb was removed from the bedroom and handcuffed was the bedroom searched and Exhibit 1, the shotgun, located under the bed (T. 660, 674-675). The shotgun was then placed on the kitchen table, in the very room where the handcuffed defendants were being held, and left there while a further search of the home was made. (T. 662, 667-669). It becomes far-fetched for the State to argue that the gun was seized incident to arrest when it was the police

who seized the gun in an unoccupied room and thereafter left it in an area within the control of the defendant. Nor, factually, can the seizure of the shotgun be justified as consensual where the police admit that the gun was seized prior to any consent being given (T. 674-675).

Even more tenuous is any claim that the ring taken from a jewelry case in the bedroom (Exhibit 2; T. 304) or the watch taken from Ms. Gregersen's purse (Exhibit 3; T. 318) fall with a valid search incident to arrest. After securing all the defendants (T. 660, 667-669), a three-hour search of the apartment occurred (T. 318-319). While a walk-through search of a house looking for weapons may validly yield evidence of criminal activity in plain sight, State v. Rocha, 600 P.2d 543, 545-46 (Utah 1979), it cannot be used to justify the seizure of items not in plain view. Additionally, once the suspects are arrested, the police should look to other alternatives to a warrantless arrest, such as securing the premises and obtaining a search warrant. State v. Harris, 671 P.2d at 180. No exigent circumstances can exist where "there is no likelihood that evidence still in the room would be apt to disappear once the occupants of the [apartment] had been removed," State v. Minear, 615 P.2d 416, 417. Here, the three adults were taken to jail and an aunt was called to remove the children (T. 667). There was no danger of evidence being hid or destroyed at the time of the arrest (T. 318); and, there was opportunity to secure the premises subsequently. A warrant could have been obtained but was not.

Since the consent was invalid and no other justification for the warrantless search exists, Mr. Webb's rights under the Fourth Amendment, United States Constitution and Article I, Section 14, Utah Constitution were violated. Exhibits 1, 2 and 3, having been illegally seized, should have been suppressed at trial. Where a reasonable possibility that erroneously admitted evidence contributed to defendant's conviction, the conviction should be reversed. Thurlow v. State, 406 P.2d 918, 922 (See Point II re. insufficiency of the evidence.)

POINT V

THE INCREASED PENALTY PROVISIONS
OF UTAH CODE ANN. §76-3-203(1)
(SUPP. 1988) WERE IMPROPERLY
APPLIED TO MR. WEBB'S CONVICTION
FOR AGGRAVATED ROBBERY.

A. Principles of Statutory Construction
Require the Application of a Specific
Statute over a General Provision.

Utah Code Ann. §76-3-203(1) (Supp. 1988), otherwise known as the enhancement statute, provides that a person convicted of a first degree felony may be sentenced to imprisonment:

In the case of a felony of the first degree, for a term at not less than five years and which may be for life but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

Consistently, the enhancement provision has been interpreted as not charging a separate and distinct offense from the crime charged but as more accurately describing how specifically the felony was committed. State v. Angus, 581 P.2d 992 (Utah 1978). Thus, where a statute generally prohibits a crime from being committed with a deadly weapon, the defendant's penalty may be increased when that weapon is a firearm. State v. Speer, 750 P.2d 186 (Utah 1988). The enhancement is merely part of the penalty based on the specific type of weapon used. Id.

This approach makes sense where the substantive statute only prohibits the use of force in generic terms. Examples are aggravated burglary, Utah Code Ann. §76-6-203 (Supp. 1988), punishing burglary committed with the use of "a dangerous or deadly weapon," State v. Speer, 750 P.2d 186; aggravated assault, Utah Code Ann. §76-5-103 (1978), prohibiting assault by use of a "deadly weapon," State v. Angus, 581 P.2d 992; or the homicide statutes, Utah Code Ann. §76-5-201 et seq., (Supp. 1988) which do not characterize the offense by weapon use, State v. Schreuder, 712 P.2d 264 (Utah 1985). In each of these cases, this Court recognized the legislative prerogative to distinguish between degrees of dangerous weapons. No clearer example is found than in the statutory definitions of "dangerous weapon" being:

. . . any item that in the manner of its use or intended use is capable of causing death or serious bodily injury...;

Utah Code Ann. §76-10-501(2)(a) (Supp. 1988), and, the

definition of "firearms" as,

. . . pistols, revolvers, sawed-off
shotguns or sawed-off rifles, or any device
that could be used as a weapon from which
is expelled a projectile by any force.

Utah Code Ann. §76-10-501(2)(b) (Supp. 1988). All firearms
are dangerous weapons but not all dangerous weapons are
firearms.

But a very different statutory scheme exists under
the aggravated robbery statute, Utah Code Ann. §76-6-302
(1978) by which Defendant Webb was convicted. Prior to 1975,
aggravated robbery was defined as robbery committed by use of
a deadly weapon. (See Utah Code Ann. §76-6-302 (1953)). The
pre-1975 statute was consistent with the generic language of
the current aggravated burglary and aggravated assault
statutes. However, a 1975 amendment to the aggravated robbery
statute changed this language to its present specific form,
that is:

A person commits aggravated robbery if in
the course of committing robbery, he . . .
uses a firearm or a facsimile of a firearm,
knife or a facsimile of a knife or a deadly
weapon . . .

Utah Code Ann. §76-6-302(1)(a). The change in the language is
critical. Under the burglary or assault statutes, a defendant
has one punishment if no weapon is used, an increased
punishment if a deadly weapon is used and the possibility of
enhancement if that deadly weapon is a firearm. Three stages
of distinct dangerousness; three levels of punishment.
However, under the robbery statutes, a defendant has one

punishment if no weapon is used, an increased punishment if a firearm is used and still, according to the lower court, a mandatory enhancement for the use of the same weapon, a firearm. Two stages of dangerous; yet, three levels of punishment.

Such a statutory structure was rejected under nearly identical facts in Simpson v. United States, 435 U.S. 6, 55 L.Ed.2d 70, 98 S. Ct. 909 (1978). Under the federal statutory scheme, bank robbery had one punishment while aggravated bank robbery, defined as robbery with a firearm, had an increased penalty. The issue was whether the federal enhancement provision could also be imposed based on the use of the same specified weapon, the firearm. In remanding for re-sentencing, the United States Supreme Court held that the pyramiding of a sentence already increased by the use of a firearm under the substantive offense:

would violate the established rule of construction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' (Citations omitted.)

435 U.S. at 14.

... 'This policy of lenity means that a Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended'. (Citations omitted.)

435 U.S. at 15. Additionally, the Court held that as a corollary to the rule of lenity, precedence must be given to

the more specific statute (robbery by use of a firearm) over the more general enhancement provision where both were focused on the same concern. 435 U.S. at 15.⁶

These same principles of statutory construction have been recognized and adopted by the Utah courts.

It is well-established that ambiguities
in criminal statutes must be resolved
in favor of lenity, . . .

State v. Egbert, 748 P.2d 558, at 562, n. 3 (Utah 1987),
citing Simpson v. United States in regards minimum mandatory
sentencing schemes.

Turning to the Utah statutes, it is not sufficient to merely dismiss that fact that in 1975, after the Utah enhancement statute was enacted, the Utah legislature amended the general language in the aggravated robbery statute to include specific reference to the use of a firearm. It must be assumed that the legislature had a specific purpose to its actions, especially where it declined to amend other "aggravated" statutes. While it is true that the result is replete with ambiguities, such a situation has been recognized in other interpretations of the enhancement statute. See for example, State v. Willett, 694 P.2d 601 (Utah 1984).

The language of Utah Code Ann. §76-6-302(1)(a) is clear. Where a person commits a robbery with a firearm his

⁶ The Simpson Court also based its decision on double jeopardy grounds finding that the substantive statute and the enhancement statute were separate offenses. 435 U.S. at 10. Such an approach was specifically rejected by this Court in State v. Angus, 581 P.2d 992 (Utah 1978) decided subsequent to Simpson but without reference to it.

punishment will be increased to a first degree felony, five to life. No principle of statutory construction allows for the further pyramiding of punishment by imposition of the enhanced penalty under Utah Code Ann. §76-3-203(1). Mr. Webb's case should be remanded to the lower court for resentencing.

B. Even if the Enhancement Provisions
Are Found Applicable, the Total
Increase Allowable Is Limited to Five
Years.

Even if the enhancement provisions of Utah Code Ann. §76-3-203(1) (Supp. 1988) are found to be applicable to Mr. Webb's aggravated robbery conviction, the trial court erred in imposing a six year term of enhancement.

The Judgment and Commitment Order (R. 280) reads:

Pursuant to UCA 76-3-203(1), the Court further sentences defendant Charles William Webb to serve a mandatory one year for use of a firearm and discretionary five years for use of a firearm, each to run consecutively to the sentence of five years to life.

However, the lower court's only authority was to impose a total enhancement of five years. State v. Willett, 694 P.2d 601, 603 (Utah 1984). This case should be remanded for correction of the sentence.

POINT VI

MR. WEBB WAS PREJUDICED BY AN
INSTRUCTION WHICH WAS IN PART
ARGUMENTATIVE AND AN IMPROPER
COMMENT ON THE EVIDENCE.

Language in an instruction which is more properly part of counsel's argument is inappropriate. It is a misplaced comment on the evidence of the case and not a clear statement

of the law for the jury's benefit. State v. Pecora, 619 P.2d 173, 175 (Mont. 1980). Instruction No. 16 (R. 245), which was objected to in a timely fashion (T. 624-25), contains such argumentative language. The first sentence of the instruction reads:

[Y]ou are instructed that every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

(R. 245). This is merely a verbatim reading of Utah Code Ann. §76-2-202 (1978) and is not contested.

However, the second and final sentence reads:

. . . [a]ssisting a person who is known to have just committed a crime to flee from the scene of that crime would render one criminally liable for that crime to the same degree as the actual perpetrator.

(R. 245). This more properly belongs in a closing argument, since it is an application of the law to the facts of the case based on a particular theory of the case. It is not merely a statement of the law but unduly comments on the evidence and gives it greater emphasis than is proper.


Since Mr. Webb was prejudiced by this instruction, which pointed the jury toward the prosecution's theory of Mr. Webb's culpability, his conviction should be reversed.

CONCLUSION

For the foregoing reasons Appellant respectfully requests this Court to reverse Mr. Webb's conviction and

remand this case for dismissal or a new trial; or, in the alternative, remand for resentencing.

Respectfully submitted this 15 day of May, 1989.



CHRISTINE F. SOLTIS
Attorney for Defendant/
Appellant

CERTIFICATE OF DELIVERY

I hereby certify that ten copies of the foregoing were delivered to the Utah Supreme Court, 332 State Capitol, Salt Lake City, Utah 84114 and four copies to the Utah Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114 this 15 day of May, 1989.



CHRISTINE F. SOLTIS

APPENDIX

United States Constitutional Provision

Utah Constitutional Provisions

Utah Statutes and Rules (in Numerical Order)

AMENDMENTS

TO THE

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES AMEND XII

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The first ten Amendments were proposed by the first Congress and were ratified as follows New Jersey, Nov 20, 1789 Maryland, Dec 19, 1789, North Carolina, Dec 22, 1789, South Carolina, Jan 19, 1790, New Hampshire, Jan 25, 1790 Delaware Jan 28, 1790, Pennsylvania, Mar 10, 1790 New York, March 27, 1790, Rhode Island, June 15, 1790, Vermont, Nov 3, 1791, Virginia, Dec 15, 1791 Connecticut, Georgia and Massachusetts ratified them on April 19, 1939, March 18, 1939 and March 2, 1939, respectively.

AMENDMENT XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State

History Proposed by Congress on September 5, 1794, declared to have been ratified by the legislatures of three fourths of all the states on January 8, 1798

AMENDMENT XII

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an

Land Registration Act.

The Torrens Act was not unconstitutional as conferring judicial powers on registrar of titles. *Ashton-Jenkins Co. v. Bramel*, 56 U. 587, 192 P. 375, 11 A. L. R. 752.

Limitation of actions.

This section does not preclude the legislature from prescribing a statute of limitations for time within which to assail the regularity or organization of an irrigation district. *Horn v. Shaffer*, 47 U. 55, 151 P. 555.

Occupational disease law.

Occupational Disease Disability Law, in excluding compensation for partial disability from silicosis, and in rendering remedy under that act exclusive so as to abrogate common-law right of action therefor, is not unconstitutional as depriving such employee of his remedy by due course of law for injury done to his person. *Masich v. United States Smelting, Ref. & Min. Co.*, 113 U. 101, 191 P. 2d 612.

Waiver of rights.

Right to apply to courts for redress of wrong is substantial right, and will not be waived by contract except through unequivocal language. *Bracken v. Dahle*, 68 U. 486, 251 P. 16.

Workmen's compensation law.

Employers are entitled to have recourse to courts under Workmen's Compensation

Act concerning question of their ultimate liability. *Industrial Comm. v. Evans*, 52 U. 394, 174 P. 825.

Workmen's Compensation Act is not invalid because it delegates to industrial commission the power to hear, consider and determine controversies between litigants as to ultimate liability, or their property rights. *Utah Fuel Co. v. Industrial Comm.*, 57 U. 246, 194 P. 122.

Dependents of employee killed by acts of third party, a stranger to employment, are not limited to recovery under Workmen's Compensation Act exclusively, unless they have assigned their rights to insurance carrier. *Robinson v. Union Pac. R. Co.*, 70 U. 441, 261 P. 9.

Collateral References.

Constitutional Law 322, 324, 327, 328.
16 C.J.S. Constitutional Law §§ 709, 711, 714, 719.

16 Am. Jur. 2d 718-721, Constitutional Law §§ 382-385.

Law Reviews.

The Doctrine of Forum Non Conveniens. *Edward L. Barrett, Jr.*, 35 Calif. L. Rev. 380.

The Doctrine of Forum Non Conveniens in Anglo-American Law, *Paxton Blair*, 29 Colum. L. Rev. 1.

No-Fault Automobile Insurance in Utah —State Constitutional Issues, 1970 *Utah L. Rev.* 248.

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Comparable Provision.

Montana Const., Art. III, § 16.

Cross-References.

Defendant as witness, 77-44-5.

Double jeopardy, statutory provision, 77-1-10.

—acquittal notwithstanding defect in information or indictment, 77-24-12.

—acquittal or dismissal without judgment, 77-24-11.

—acts punishable in different ways, punishment limited to one, 76-1-23.

Sec 14. [Unreasonable searches forbidden—Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized

Comparable Provision.

Montana Const., Art III, § 7

Cross References.

Controlled Substances Act, search warrants, 58 37-10.

Liquor, search, seizure and confiscation, 32 S 16 et seq.

Statutory provisions generally, 77 54 1 et seq.

In general.

Neither under a subpoena duces tecum nor under a motion to examine will an examination be permitted of a nature to contravene provision against unreasonable searches and seizures *Evans v. Evans*, 98 U 189, 98 P. 2d 703

It is generally recognized that the legitimate use of a search warrant is restricted to public prosecutions, and in no event may such proceeding be invoked for the protection of a mere private right. *Allen v. Trueman*, Judge, 100 U. 36, 110 P 2d 355

It is use to which it is put that renders property, otherwise lawful and rightful to have, use and possess, subject to seizure and forfeiture *Hemenway & Moser Co. v. Funk*, 100 U. 72, 106 P 2d 779.

For general discussion of Fourth Amendment to federal Constitution, see *City of Price v. Jaynes*, 113 U 89, 191 P 2d 606.

Where police officers have obtained evidence by illegal methods, such as an unlawful search in violation of this section, it should not be used to convict a person of crime *State v. Loudon*, 15 U. (2d) 64, 387 P 2d 240

Relying on tip, officers obtained permission from proprietor of motel to enter defendant's room where they found a pistol in a drawer which they identified as having been stolen in a burglary of a shopping center. After replacing the pistol in the drawer they waited outside for the return of the occupants of the motel room. The officers, on obtaining defendant's permission to search the room, in addition to the pistol, found wrist watches and crow bars which also came from the shopping center. On the trial of defendant for second degree burglary, trial court properly admitted evidence obtained during such search as the search was not unreasonable *State v. Loudon*, 15 U (2d) 64, 387 P 2d 240

Whether a search and seizure is reasonable is to be determined by the trial court, and evidence in plain view of the officer pursuing a felon may be rightfully seized and such seizure is not a violation of the federal constitutional protection as set forth in *Mapp v. Ohio*, 367 U S 643, 6 L Ed. 2d 1081, 81 S. Ct 1684 *State v. Allred*, 16 U. (2d) 41, 395 P. 2d 535

Automobile search.

Evidence taken from automobile defendant was driving and subsequently used to convict him of burglary and grand larceny did not violate constitutional proscription against unreasonable searches and seizures, even though taking was not connected with cause of arrest and was done without search warrant in view of facts that car was lawfully taken into possession and impounded when defendant was arrested for driving automobile which did not belong to him and without valid driver's license and since, under such circumstances, it was responsibility of police impounding car to take inventory of its contents *State v. Criscola*, 21 U. (2d) 272, 444 P. 2d 517.

City ordinance.

City ordinance allegedly enacted pursuant to powers granted by 10 8 50, providing that right of people of city "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated," and making violation thereof misdemeanor, was void for vagueness and uncertainty in failing to define or prescribe standards to determine what acts constitute unreasonable searches or seizures *City of Price v. Jaynes*, 113 U. 89, 191 P. 2d 606

Drugs.

Marijuana taken during the search of defendant's home pursuant to warrant was unlawfully taken and evidence should have been suppressed on defendant's motion because search warrant was based on police officer's oral deposition rather than on oath or affirmation *State v. Jasso*, 21 U (2d) 24, 439 P 2d 844

Liquor.

Where police officers were investigating rooming house under city ordinance to determine if liquor was being sold there,

violation. Any time spent by a person outside of confinement after commission of a parole violation shall not constitute service of the total sentence unless the person shall be exonerated at a hearing to revoke the parole. Any time spent in confinement awaiting a hearing or decision concerning revocation of parole shall constitute service of the sentence and, in the case of exoneration at such hearing or upon a decision rendered, the time spent shall be included in computing the total parole term.

(4) Whenever any parolee, without authority from the board of pardons, shall absent himself from the state or avoid or evade parole supervision, the period of absence, avoidance, or evasion shall toll the parole period.

(5) Nothing in this section shall preclude the board of pardons from paroling or discharging an inmate at any time within the discretion of the board of pardons unless otherwise specifically provided by law.

History: C. 1953, 76-3-202, enacted by L. 1973, ch. 196, § 76-3-202; L. 1983, ch. 88, § 4.

Compiler's Notes. — The 1983 amendment inserted "or in the case on parole without violation" in the first sentence of subsec (1), inserted "or in the case on parole without violation" in subsec (2)(a), inserted "or ten-year, as the case may be" in the first sentence of subsec. (3), and added "unless otherwise specifically provided by law" to subsec. (5).

Authority of trial court.

Defendant's request that the trial court or-

der that credit be given for the period of time he spent in pretrial detention was outside the limits prescribed and therefore beyond the court's power, since the power to reduce or terminate sentences is exclusive with the Board of Pardons *State v Schreuder*, 712 P.2d 264 (Utah 1985)

Board of pardons, not the trial court, had authority to grant defendant credit for the time he served prior to conviction *State v Alvillar*, 748 P.2d 207 (Utah Ct. App. 1988)

76-3-203. Felony conviction — Indeterminate term of imprisonment — Increase of sentence if firearm used.

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

(1) In the case of a felony of the first degree, for a term at not less than five years, unless otherwise specifically provided by law, and which may be for life but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

(2) In the case of a felony of the second degree, for a term at not less than one year nor more than 15 years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

(3) In the case of a felony of the third degree, for a term not to exceed five years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of

the felony, the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently

(4) Any person who has been sentenced to a term of imprisonment for a felony in which a firearm was used or involved in the accomplishment of the felony and is convicted of another felony when a firearm was used or involved in the accomplishment of the felony shall, in addition to any other sentence imposed, be sentenced for an indeterminate term to be not less than five nor more than ten years to run consecutively and not concurrently.

History: C. 1953, 76-3-203, enacted by L. 1973, ch. 196, § 76-3-203; L. 1976, ch. 9, § 1; 1977, ch. 88, § 1; 1983, ch. 88, § 5.

Compiler's Notes. — The 1983 amendment inserted "unless otherwise specifically provided by law" in subsec (1)

ANALYSIS

Increased penalty for use of firearm
Notice
Cited

Increased penalty for use of firearm.

Information need not state that the enhanced penalty for use of a firearm will be applied upon conviction, it is sufficient if it alleges either the defendant is being charged under this section or that a firearm was used in the commission of the offense *State v Angus*, 581 P 2d 992 (Utah 1978)

It is not required that a specific and separate finding of use of a firearm must be made in order to impose the enhanced penalty for use of a firearm in the commission of a felony *State v Angus*, 581 P 2d 992 (Utah 1978)

The increased penalty for use of a firearm in the commission of a felony does not impose double punishment for the same criminal act nor does it create a separate offense that must be pled as a separate charge *State v Angus*, 581 P 2d 992 (Utah 1978)

The total maximum enhancement sentence that a court may impose for use of firearms in

first and second degree felonies is five years, therefore, trial court did not have authority to impose two consecutive enhancement sentences, one for one year and another for five years, for a total of six years, upon defendant's guilty plea to second degree murder involving use of a firearm *State v Willett*, 694 P 2d 601 (Utah 1984)

Notice.

The enhancement statute is merely part of the penalty, and adequate notice is given if the information alleges either that the enhancement statute may apply or that a firearm was used in the commission of the offense *State v Speer*, 74 Utah Adv Rep 16 (1988)

Cited in *State v Schreuder*, 712 P 2d 264 (Utah 1985), *State v Rodriguez*, 718 P 2d 395 (Utah 1986)

Law Reviews. — *Potter v Murrah City* Another Interpretation of Polygamy and the First Amendment, 1986 Utah L Rev 345

76-3-205. Infraction conviction — Fine, forfeiture, and disqualification.

Cited in *State v Neeley*, 73 Utah Adv Rep 53 (1988)

Evidence.

In prosecution for robbery, based on defendant's alleged act of taking money from person and presence of another, where defense was that, if defendant actually was guilty of such act, he took money under claim of ownership and in honest belief that he had right to it, defendant had the right to testify as to his intent, belief, and motive at time of alleged robbery; it was error for trial court to refuse to permit him to answer question, asked while he was testifying in his own behalf, as to whether at time when he allegedly took the money, he honestly believed money was his and that he had a right to take it. *People v. Hughes*, 11 U. 100, 39 P. 492.

Possession of stolen property alone was not sufficient to sustain conviction for robbery, but its quality as evidence was of such high degree that only slight corroborative proof of other inculpatory circumstances would warrant conviction of felony murder based on intent to rob. *State v. Boyland*, 27 U. (2d) 268, 495 P. 2d 315.

Indictment or information.

Indictment which charged felonious taking by defendant by means of force, violence and fear from the immediate presence of a party against his will was

sufficient, though statutory language was "person" rather than "presence." *People v. Kerm*, 8 U. 268, 30 P. 988.

Indictment for robbery, which failed to charge that property taken from person of prosecutor was taken "by means of force or fear" was insufficient, since those words constituted necessary element found in definition of robbery. *State v. Davis*, 23 U. 10, 76 P. 705.

Information for robbery which used word "robbed" sufficiently informed accused of nature and cause of accusation, at least in absence of demand for bill of particulars; there was but one crime of robbery and words such as "by means of force or fear" were unnecessary, as indicated in short form prescribed by 77-21-47. *State v. Robbins*, 102 U. 119, 127 P. 2d 1042.

Instructions.

Fact that instruction defined robbery in language of statute did not render such proper definition improper because instruction did not also define included offenses of grand and petit larceny, where court at defendant's request gave instruction that precluded consideration of included offenses and no request was made for instructions defining them. *State v. Sullivan*, 73 U. 582, 276 P. 166.

76-6-302. Aggravated robbery.—(1) A person commits aggravated robbery if in the course of committing robbery, he:

- (a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon; or
 - (b) Causes serious bodily injury upon another.
- (2) Aggravated robbery is a felony of the first degree.
- (3) For the purposes of this part, an act shall be deemed to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

History: C. 1953, 76-6-302, enacted by L. 1973, ch. 196, § 76-6-302; L. 1975, ch. 51, § 1.

Compiler's Notes.

The 1975 amendment substituted the present language of subd. (1)(a) for "Uses a deadly weapon; or."

"Facsimile of a firearm."

Instruction defining "facsimile of a firearm" as "any instrument that by its appearance resembles a firearm" was proper. *State v. Turner*, 572 P. 2d 387.

Unloaded firearm.

Aggravated robbery may be committed with an unloaded firearm. *State v. Turner*, 572 P. 2d 387.

Collateral References.

Robbery—11.
77 C.J.S. Robbery § 23.
67 Am. Jur. 2d 31, Robbery § 4.

Law Reviews.

Utah Legislative Survey—1975, 1975 Utah L. Rev. 834.

76-10-309. Infernal machine—Venue of prosecution for shipping—Any person knowingly delivering any infernal machine to any railway, express, or stage company, or to any person or company whatever, for transmission to any person in another county may be prosecuted in the county in which he delivers it or in the county to which it is transmitted

History: C. 1953, 76-10-309, enacted by
L. 1973, ch. 196, § 76-10-309.

Collateral References.

Explosives \Rightarrow 5
35 C J S Explosives § 12
31 Am Jur. 2d 892, Explosions and Explosives § 123.

Part 4

Fences

76-10-401. Fencing of shafts and wells—Any person who has sunk or shall sink a shaft or well on the public domain for any purpose shall inclose it with a substantial curb or fence, which shall be at least four and one-half feet high. Any person violating the provisions of this section is guilty of a class B misdemeanor.

History: C. 1953, 76-10-401, enacted by
L. 1973, ch. 196, § 76-10-401.

Collateral References.

Negligence \Rightarrow 144.
65A C J S Negligence § 306
57 Am Jur 2d 625, Negligence § 242.

Cross-References.

Miscellaneous offenses respecting mines,
40 5 1 et seq

Part 5

Weapons

76-10-501. Definitions.—For the purpose of this part

(1) “Dangerous weapon” means any item that in the manner of its use or intended use is capable of causing death or serious bodily injury. In construing whether an item, object, or thing not commonly known as a dangerous weapon is a dangerous weapon, the character of the instrument, object, or thing; the character of the wound produced, if any, and the manner in which the instrument, object, or thing was used shall be determinative.

(2) “Firearms” means pistols, revolvers, sawed-off shotguns, or sawed off rifles, and/or any device that could be used as a weapon from which is expelled a projectile by any force

(3) “Sawed-off shotgun” means a shotgun having a barrel or barrels of less than eighteen inches in length, or in the case of a rifle, having a barrel or barrels of less than sixteen inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification or otherwise) if the weapon as modified has an overall length of less than 26 inches

(4) “Prohibited area” means any place where it is unlawful to discharge a weapon.

(5) "Crime of violence" means murder, voluntary manslaughter, rape, mayhem, kidnaping, robbery, burglary, housebreaking, extortion, or blackmail accompanied by threats of violence, assault with a dangerous weapon, assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable by imprisonment for more than one year, or an attempt to commit any of the foregoing offenses

(6) "Bureau" means the Utah state bureau of criminal identification

History C. 1953, 76-10-501, enacted by L. 1973, ch. 196, § 76-10-501, L. 1974, ch. 32, § 27

Compiler's Notes.

The 1974 amendment substituted "projectile" for "projective" in subsec. (2)

Substitution of "gun" for "dangerous weapon" in jury instructions

Jury instructions which stated that to convict defendant he must have "had a gun in his possession" and that "a pistol

type handgun is a dangerous weapon" under law, but that "gun clip alone with or without cartridges is not a dangerous weapon" were not error because consonant with statute and not prejudicial to defendant, State v. Nielsen, 544 P.2d 489

Collateral References.

Weapons C-8
94 CJS Weapons § 1
79 Am. Jur. 2d 3, Weapons and Firearms § 1

76-10-502. When weapon deemed loaded—For the purpose of this section, any pistol, revolver, shotgun, rifle, or other weapon described in this part shall be deemed to be loaded when there is an unexpended cartridge, shell, or projectile in the firing position, except in the case of pistols and revolvers, in which case they shall be deemed loaded when the unexpended cartridge, shell, or projectile is in a position that the manual operation of any mechanism once would cause the unexpended cartridge, shell, or projectile to be fired, and a muzzle loading firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinders

History C. 1953, 79-100-502, enacted by L. 1973, ch. 196, § 76-10-502, L. 1974, ch. 32, § 28.

Compiler's Notes

The 1974 amendment substituted "projectile" for "projective" in two instances

Collateral References.

79 Am. Jur. 2d 7, Weapons and Firearms § 3.

76-10-503 Possession of dangerous weapon—Persons not permitted to have—(1) Any person who is not a citizen of the United States, or any person who has been convicted of any crime of violence under the laws of the United States, the state of Utah or any other state government, or country, or who is addicted to the use of any narcotic drug or any person who has been declared mentally incompetent shall not own or have in his possession or under his custody or control any dangerous weapon as defined in this part. Any person who violates this section is guilty of a class A misdemeanor, and if the dangerous weapon is a firearm or sawed-off shotgun he shall be guilty of a felony of the third degree

(2) Any person who is on parole for a felony or is incarcerated at the Utah state prison shall not have in his possession or under his custody or control any dangerous weapon as defined in this part. Any person who

CHAPTER 32

COUNSEL FOR INDIGENT DEFENDANTS

Section 77-32 1	Minimum standards provided by county for defense of indigent defendants	Section 77 32 5	Expenses of printing briefs, depositions and transcripts
77-32-2	Assignment of counsel on request of defendant or order of court		

77-32-1. Minimum standards provided by county for defense of indigent defendants.

The following are minimum standards to be provided by each county, city and town for the defense of indigent persons in criminal cases in the courts and various administrative bodies of the state

- (1) Provide counsel for every indigent person who faces the substantial probability of the deprivation of his liberty,
- (2) Afford timely representation by competent legal counsel,
- (3) Provide the investigatory and other facilities necessary for a complete defense,
- (4) Assure undivided loyalty of defense counsel to the client, and
- (5) Include the taking of a first appeal of right and the prosecuting of other remedies before or after a conviction, considered by the defending counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings

History: C. 1953, 77-32-1, enacted by L. 1980, ch. 15, § 2; 1981, ch. 67, § 1; 1983, ch. 52, § 1.

Compiler's Notes. — The 1983 amendment substituted 'substantial probability' for 'possibility' in subsec (1), and deleted 'or other serious criminal sanction' at the end of subsec (1)

Law Reviews. — Utah Legislative Survey — 1981, 1982 Utah L Rev 125 202

Nordgren v Mitchell Indigent Paternity Defendants Right to Counsel 1982 Utah L Rev 933

Judicial Jabberwocky or Uniform Constitutional Protection? Strickland v Washington and National Standards for Ineffective Assistance of Counsel Claims, 1985 Utah L Rev 723

77-32-2. Assignment of counsel on request of defendant or order of court.

Counsel shall be assigned to represent each indigent person who is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison if

- (1) The defendant requests it, or
- (2) The court on its own motion or otherwise so orders and the defendant does not affirmatively waive or reject of record the opportunity to be represented

with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

The term "another" in paragraph (b)(1) includes a person, organization and government.

Paragraph (b)(2) does not apply where a lawyer is employed after a crime of fraud has been committed to represent the client in matters ensuing therefrom.

Dispute Concerning Lawyer's Conduct

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending himself. Such a charge can arise in a civil, criminal or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is not prevented by the rule of confidentiality

from proving the services rendered in an action to collect it.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is defined differently in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 1.13, 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Use of Information

A lawyer may not make use of information relating to the representation in a manner disadvantageous to the client. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

Rule 1.7. Conflict of Interest: General Rule.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) Each client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation to each client of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall not simultaneously represent the interests of adverse parties in separate matters, unless:

- (1) The lawyer reasonably believes the representation of each will not be adversely affected; and
- (2) Each client consents after consultation.

COMMENT

Loyalty to a Client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representa-

tion is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.14. Where more