

1980

State of Utah v. Thomas Wyman Berg : Brief of Respondent

Utah Supreme Court

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STATE OF UTAH

Plaintiff

-VS-

THOMAS WELAN HENE

Defendant

BRIEF OF

APPEAL FROM A CONVICTION
OF DISTRIBUTION OF A CERTAIN
MARIJUANA, WHEREIN THE
EXCHANGED, IN THE
COURT, IN AND FOR THE
UTAH, THE HONORABLE
JUDGE, PRESIDENT

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
THOMAS WYMAN BERG, : 16548
Defendant-Appellant. :
----- : -----

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with distribution of a controlled substance, marijuana, wherein nothing of value is exchanged in violation of Utah Code Ann. § 58-37-8(1)A(c) (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before the court, having waived a jury trial, and found guilty of one count of distribution of a controlled substance on May 25, 1979, in the Fourth Judicial District, in and for Utah County, State of Utah, the Honorable George E. Ballif, presiding. On June 29, 1979, appellant was sentenced to a prison term not in excess of five years at the Utah State Prison and a fine of \$1,500. The prison term was suspended and

appellant was placed on probation after serving a six month sentence in the Utah County Jail as a condition of probation.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

On November 20, 1978, Craig Wiseman contacted Jill Hales about the possibility of Ms. Hales obtaining "a pound" of marijuana for him (Tr.54,12-13). Ms. Hales agreed to procure the marijuana for Wiseman (Tr. 12-13). The next day, November 21, 1978, appellant telephoned Ms. Hales and inquired whether she and Teri Barney, Ms. Hale's friend, "wanted to drop down for a cup of coffee" (Tr.14,24). Ms. Hales then told appellant that a friend of hers had asked her to get "some stuff" and she "asked him [appellant] if he could maybe find [her] something." (Tr.14). Appellant answered that "he would try" and Ms. Hales said she "would see him at coffee" (Tr.14).

Later that day (November 21, 1978), at about 10:00 a.m., Ms. Hales and Ms. Barney drove to see appellant (Tr.15). When they arrived, Ms. Hales and appellant went

to the living room, out of the presence of Ms. Barney (Tr.15). At that time, appellant presented Ms. Hales with the marijuana and said, "I have got this for you" (Tr.16). Ms. Hales thanked appellant for the marijuana and "told him . . . [she] would bring the money to him later;" appellant responded "Okay" (Tr.17).

Ms. Hales and Ms. Barney then drove to the Golden Spike Restaurant to deliver the marijuana to Mr. Wiseman which "was what [she] had planned . . . the night before . . . [with] Craig Wiseman" (Tr.18).

(Emphasis added.) At the restaurant, Ms. Barney (who was driving) parked the car in the parking lot (Tr.19). Ms. Hales removed the marijuana from her purse (Tr.19, 46). At this point, Ms. Barney saw the marijuana for the first time (Tr.19,27-28). The marijuana was wrapped in a white windbreaker and placed in Wiseman's car (Tr.29, 48) by Ms. Hales. The two women drove "to the front of the Spike" and Ms. Hales went inside to find Wiseman (Tr.48). Ms. Hales spoke with Wiseman "for a minute" and returned alone to the car (Tr.19). Wiseman soon came out to the car and handed Ms. Hales "a wad" of money (Tr.19), determined to be \$450 (Tr.55).

As the two women began to drive from the restaurant, a police car pulled up behind them (Tr.19). Ms. Hales hid the money under the floor mat of the car

(Tr.19-20). The police officers arrested Ms. Hales (Tr.20) and Wiseman as he was driving from the scene (Tr.56). Teri Barney was not arrested (Tr.29).

Ms. Hales was read her rights and taken to police headquarters and questioned (Tr.21-22). During the conversation, the police learned that Ms. Hales was in the process of getting a divorce and she "was having problems [with a] . . . custody matter" regarding her child (Tr.38). The police, therefore, offered to forego charging her with involvement in the drug transaction (since the prosecution would be detrimental in her child custody matter, in exchange for her acting as an informant against appellant (Tr.21-23). Ms. Hales was wired with a listening device and returned to appellant's home (Tr.22). Ms. Hales was vague about the conversation she had with appellant upon returning, but she testified that appellant asked her if she was in trouble; she asked him if he had "any more stuff," to which appellant replied "maybe a little;" and appellant asked whether or not "they got it" (no explanation was given as to whom "they" referred or what "it" was) (Tr.22-23). (Judge Ballif's memorandum decision notes that this phrase meant "whether or not the cops got the 'stuff.'" (R.22)).

On the basis of Ms. Hales' information about her receipt of marijuana from appellant on the morning of November 21, 1978, a complaint and a search warrant was sworn out before Judge J. Gordon Knudsen on November 21, 1978. An information later charged appellant with distributing a controlled substance to Ms. Hales wherein nothing of value was exchanged (R.2,3-4,11).

The crime of which appellant was convicted was distribution of a controlled substance to Ms. Hales wherein nothing of value was exchanged. This distribution occurred when appellant gave Ms. Hales the pound of marijuana on the morning of November 21, 1978. (R.2,11). Although another drug transaction occurred between Ms. Hales and Mr. Wiseman at the Golden Spike Restaurant that offense is not at issue in this case.

On May 24, 1979, appellant waived his right to a jury trial (Tr.3-5) and had his case tried before the Honorable George E. Ballif. The trial concluded on the same day and Judge Ballif's decision was delivered on May 25, 1979 (R.21-23). After outlining the facts, Judge Ballif ruled that:

On the basis of the aforesaid facts . . . Jill Hales was not an accomplice in that her receipt of [the marijuana] from the defendant

constituted the offense of possession of a Schedule I controlled substance, and not the transfer for value or otherwise of the same which the defendant is on trial for in this proceeding.

(R.22, emphasis added.)

Judge Ballif concluded that Ms. Hales' testimony did "not have to be corroborated by any other evidence" in order to convict appellant of the crime charged. (R.22). The Court cited the cases of State v. Kasia, 27 Utah 2d 326, 495 P.2d 1265 (1972) and State v. Comish, 560 P.2d 1134 (Utah 1977) as the controlling cases.

In his decision, Judge Ballif called "counsel's attention . . . to House Bill 143" which amends § 77-31-18 (1953, as amended) and provides that a conviction may be obtained on the uncorroborated testimony of an accomplice. Appellant now appeals that conviction.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY RULED THAT THE STATE'S KEY WITNESS, JILL HALES, WAS NOT APPELLANT'S ACCOMPLICE.

The major thrust of appellant's appeal (and, indeed, the entire basis of the Amicus Curiae brief filed in conjunction with this case) is that Judge Ballif im-

properly applied the new accomplice statute, Utah Code Ann. § 77-31-18 (1979), to the present matter. Yet, this basic premise ignores the fundamental finding of Judge Ballif that Jill Hales was not appellant's accomplice and her testimony alone, could therefore convict appellant. Because of this conclusion, the new accomplice statute was not relied on in admitting the testimony of Jill Hales. Ms. Hales' testimony is a complete and inculpatory indictment against appellant and was sufficient to convict appellant of the crime charged. Since Judge Ballif ruled Ms. Hales was not an accomplice the possible retroactive application of the new accomplice statute is not at issue. Respondent submits that Judge Ballif's decision (R.21-23) that Ms. Hales was not an accomplice is a logical, accurate ruling. In dicta, Judge Ballif called attention to the fact that a new trend in the area of criminal accomplice law is developing as evidenced by the Utah Legislature's enactment of the new accomplice statute. Clearly, if Judge Ballif had relied on the new accomplice statute in his decision it would have been inconsistent and unnecessary to rule that Ms. Hales was not appellant's accomplice. Respondent submits that the decision that Ms. Hales was

not appellant's accomplice was sound and justified. Utah Code Ann. § 76-2-202 (1953), as amended, outlines the requirements one must meet to be an accomplice to a crime:

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.

Here, while Ms. Hales did encourage appellant to procure the marijuana for her, she did not "engage in conduct which constitut[ed]" the same offense for which appellant is charged in the instant matter (distribution of a controlled substance not for value). "Conduct which constitutes" the same offense is necessary in order for a participant in a crime to be deemed an accomplice. In State v. Davie, 121 Utah 184, 240 P.2d 263 (1952) this requirement was clearly established:

We have construed the term [accomplice] to mean one who could be charged as a principal with the defendant on trial. State v. Fertig, Utah, 233 P.2d 347; State v. Bowman, 92 Utah 540, 79 P.2d 458, 111 A.L.R. 1393. This definition is generally recognized to be correct, see 22 C.J.S., Criminal Law, § 786, p. 1335; 14 Am.Jur., Criminal Law, § 110.

240 P.2d at 263-264.

To illustrate this point, respondent offers the following example: The principal in a "fencing" operation who seeks and buys stolen goods from thieves and burglars could not be said to be an accomplice with them in the numerous, isolated thefts or burglaries which the "suppliers" have committed. The operator's crime is the narrow offense of receiving, possessing and re-selling stolen property. The "suppliers'" crimes are those of theft, burglary or robbery. However, if the fencing operator actively participated with the thieves and burglars in the commission of the thefts, burglaries or robberies, then he would obviously be an accomplice.

Recently, this court has expanded the Davie definition of accomplice to include those actors who " . . . knowingly, voluntarily, and with common intent with the principal offender, [unite] in the commission of a crime, so that he could also be charged with the same offense." State v. Georgopoulos, 27 Utah 2d 53, 492 P.2d 1353, 1354 (1972). In accord, State v. Helm, 563 P.2d 794, 797 (Utah 1977).

Thus, in applying this additional requirement of "common intent" to the hypothetical above, comparison with the present case is apparent. The fencing operator could not be an accomplice with the thieves and burglars

because he did not have the requisite intent to commit theft, burglary or robbery—even though it could be said that he encouraged and even solicited crime. Likewise in the present case, Ms. Hales cannot be said to be an accomplice with appellant because she did not have the requisite intent to distribute marijuana not for value at the moment the drug was given to her from appellant. She only had intent to receive the marijuana.

Probably because of this very rationale this Court, in State v. Kasai, supra, ruled that "[t]he purchaser of narcotics is not an accomplice of the seller." 495 P.2d at 1266. (See further discussion of Kasai, infra.)

Section § 76-2-202, Utah Code Annotated (1953), as amended, (above quoted) has been relied upon in support of the proposition that such intent, as required by Georgopoulos is necessary in order for a participant to be found to be an accomplice. In State v. Comish, supra, the Court, after quoting § 76-2-202, stated:

Under that statute and under the generally accepted meaning of the term, an "accomplice" is one who participates in a crime in such a way that he could be charged and tried for the same offense. From that definition, it will be seen that it does not include a person who, without using inducement or persuasion which would amount to entrapment, merely provides an opportunity for one who is disposed to commit a crime. More specifically

applicable here, a person so acting under the direction of a peace officer in attempting to discover violations of law, is not an accomplice.

560 P.2d at 1136. In accord, State v. Kasai, supra.

Thus, in the instant case, since appellant's offense was distribution of a controlled substance to Ms. Hales, she could not have also been charged with distribution of a controlled substance wherein nothing of value is exchanged. She therefore cannot be found to be appellant's accomplice. Ms. Hales did not participate as a distributor of the controlled substance in the narrow transaction at issue here. Rather, she was the recipient of the controlled substance. Although this Court has retreated somewhat from this test of whether a participant could have been charged with the same offense as a basis of determining whether an accomplice status exists (see State v. Foust, 588 P.2d 170 (Utah 1978))¹,

1 Respondent notes further that the Foust case is an extreme case. The Court was there faced with determining whether appellant's 16 year old stepdaughter could be said to be his accomplice in the crime of incest. The Court ruled she was or could be an accomplice. Respondent suggests this case is an anomaly and is not in accord with the thrust of the other Utah cases on the subject of accomplice law, as cited herein.

it remains a useful starting point for an inquiry into a participant's connection with the crime.

In making such an inquiry, an important ruling by this Court in State v. Kasai, supra, is relevant.

Kasai holds:

The purchaser of narcotics is not an accomplice of the seller, as the offense of the purchaser is "possession" and not "selling"; and, therefore, the conviction of a defendant may be founded on the purchaser's uncorroborated testimony.

495 P.2d at 1266.

The analogy is easily made between the "purchaser" in Kasai and Ms. Hales -- a non-purchasing recipient -- in the instant case. And since Ms. Hales received the marijuana from appellant, she too can only be deemed to have been in possession of the drug. Thus, as Kasai holds, she cannot be found to be appellant's accomplice in the offense for which appellant was charged. In a similar ruling, the Court in State v. Washington, 25 Utah 2d 111, 476 P.2d 1019 (1970) rejected an appellant's claim that certain witnesses to a crime for which he was convicted were actually his accomplices.

In Washington, the defendant was convicted of receiving stolen property. Three other holders and possessors

of the stolen property testified at trial about the defendant's connection with the stolen goods. To defendant's contention that these three witnesses were his accomplices, the Court responded:

While these witnesses may have been guilty of similar offenses, the record fails to reveal that they in any way participated with the defendant in the crime here charged against him.

476 P.2d at 1021.

The same rationale is applicable in the present case. Merely because Ms. Hales "may have been guilty of similar offenses "of which appellant was herein convicted (i.e., possession or distribution to Mr. Wiseman), such a fact, can not, without more, automatically result in her being deemed appellant's accomplice. Rather, Washington requires that appellant must do more than assert that Ms. Hales may have committed similar crimes in order for her participation in the crime charged to appellant to reach an accomplice level; i.e., he must show that she "participated with the defendant in the crime charged." Id., emphasis added.

Scrutiny of the facts shows that Ms. Hales' participation did not reach such a level. Appellant's

attorney, on cross examination of Ms. Hales, elicited the following:

Q. And Craig Wiseman took the initiative to call you on the 20th?

A. Yes.

Q. And Mr. Befg [sic] was not aware of that phone call in the sense that he was not present and was not aware of when it was made?

A. No.

Q. And he did not authorize you to talk with Mr. Wiseman in any way?

A. No.

Q. This was your deal and Mr. Wiseman's deal, in a sense, and it was a conversation between the two of you?

A. Right.

Tr. 25-26 (Emphasis added.)

Thus, Ms. Hales' planning, solicitation, encouragement and intent to commit a crime was not with appellant, but was with Mr. Wiseman. Thus, Ms. Hales' major participation in this entire series of drug transactions, is with Mr. Wiseman, and not with appellant. As to the specific crime at issue here, Ms. Hales acted only as a receiving agent or conduit for Mr. Wiseman, without appellant's knowledge of the prearranged plan. Thus, under the Davie, Kasai and Washington

tests, she cannot be an accomplice of appellant even though she may have engaged in similar drug-related conduct. Her intent was not to distribute marijuana not for value. This conclusion is further supported by two Utah Supreme Court cases: State v. Gee, 28 Utah 2d 96, 498 P.2d 662 (1972) and State v. Helm, *supra*.

In Gee, the appellant argued that two witnesses to his acts of child abuse (which led to the child's death) were in fact his accomplices. This Court disagreed and ruled:

Defendant's assertion is without merit. The baby died of head injuries; there is not a scintilla of evidence to indicate the witnesses advised, instigated, encouraged or assisted defendant in the perpetration of this crime. Furthermore, mere presence combined with knowledge that a crime is about to be committed, where the person contributes nothing to the doing of the act, will not itself constitute one an accomplice.

498 P.2d at 665 (Emphasis added.)

In Helm, the appellant made a similar argument. He claimed that two witnesses, junior officers in the Highway Patrol, who were present at the scene of a crime he was convicted of were actually his accomplices.

In rejecting the claim, this Court held:

To establish that predicate, it would have to appear that the officers knowingly, voluntarily and intentionally united with the defendant and aided, abetted, or encouraged in the commission of the crime. Moreover, the mere presence where a crime is being committed, or about to be committed, without such an intent to join therein, being shown, is not sufficient to find that one is an accomplice.

563 P.2d at 797.

Ms. Hales' actions in the instant case similarly, do not support a claim that she was appellant's accomplice. Merely because she was present at the scene of the crime and had knowledge that a criminal act was about to be committed is not sufficient to find that she was an accomplice. Furthermore, as Helm establishes, where it appears that Ms. Hales did not unite with appellant in the commission of the specific crime appellant is charged with, then the accomplice claim of appellant must be rejected.

Respondent submits that a careful review of the facts in this matter coupled with an application of the relevant case law show that Judge Ballif correctly ruled that Ms. Hales was not and can not be deemed appellant's accomplice in the narrow crime under review.

POINT II

ASSUMING, ARGUENDO,
THAT JILL HALES WAS APPEL-
LANT'S ACCOMPLICE, SUFFI-
CIENT ADDITIONAL EVIDENCE,
WHICH CONNECTED APPELLANT
WITH THE COMMISSION OF THE
CRIME, WAS PRESENTED AT
TRIAL TO SATISFY THE ACCOM-
PLICE STATUTE'S REQUIREMENT
OF CORROBORATION.

Respondent again asserts the fact that Judge Ballif determined that Ms. Hales was not an accomplice in the crime at issue here and that consequently corroboration is not relevant. But inasmuch as appellant has claimed that insufficient corroboration evidence was presented at trial and should this Court rule that Ms. Hales was an accomplice, this Point is necessary.

Utah Code Ann. § 77-31-18 (1953) as amended,
(pre - May 8, 1979) provided:

A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.

Thus, if Ms. Hales were an accomplice, corroboration

of her testimony must be presented before a conviction of appellant can be sustained. At trial, two witnesses in addition to Ms. Hales testified concerning the events of November 20 and 21, 1978: Teri Barney and Craig Wiseman. Ms. Barney testified concerning her visit with Ms. Hales to appellant's home on November 21, 1978, and the subsequent activities at the Golden Spike Restaurant (Tr.43-49). Mr. Wiseman testified regarding his request of Ms. Hales on November 20, 1978, to procure marijuana for him and the manner in which the drug was later delivered and payment made. (Tr.52-58). Respondent contends that even if Ms. Hales' role in this crime can be construed as that of an accomplice, these two witnesses sufficiently support her testimony to satisfy the statutory and case law requirements of corroboration.

The landmark corroboration case in Utah is State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941). Here the Utah Court interpreted § 105-32-18, (Rev. St. 1933) -- an identical corroboration statute to the one above quoted -- and held:

. . . corroboration need not go to all the material facts testified to by the accomplice. [Citation omitted]; that the corroborative evidence need not be sufficient in itself to support a conviction; it may be slight and entitled to little consideration. [Citations omitted].

On the other hand, the corroborating evidence must implicate the defendant in the offense and be consistent with his guilt and inconsistent with his innocence, and must do more than cast a grave suspicion on him, and all of this must be without the aid of the testimony of the accomplice. [Citations omitted].

120 P.2d at 299.

The Court further defined the standards for corroborative testimony by holding that:

In order to sustain a conviction, the evidence . . . must be of such persuasive force that the mind might be reasonably satisfied of all the necessary facts constituting the defendant's guilt beyond any reasonable doubt; and where the proof of a necessary fact is dependent solely upon circumstantial evidence, such circumstances must be such as to reasonably exclude every reasonable hypothesis other than the existence of such fact and be consistent with its non-existence. It is not necessary that each circumstance in itself establish the guilt of the defendant, but the whole chain of circumstances, taken together, must produce the required proof.

120 P.2d at 302.

In accord, State v. Bruner, 106 Utah 49, 145 P.2d 302 (1944), State v. Vigil, 123 Utah 495, 260 P.2d 539 (1953), and State v. Baron, 25 Utah 2d 16, 474 P.2d 728 (1970).

Applying these standards to the present case, the testimony of Ms. Barney and Mr. Wiseman satisfy the outlined requirements. Even if their testimony can be considered as not "[going] to all the material facts testified to by" Ms. Hales, would not "be sufficient in itself to support a conviction" and both are "slight and entitled to little consideration," the testimonies are, nonetheless, adequate as corroborative evidence. Erwin holds that such evidence, while perhaps insufficient by itself to convict, meets the test of sufficiency for corroborative evidence purposes. That is, the testimony is sufficient if it "implicate[s] the defendant," is "consistent with his guilt" and "do[es] more than cast a grave suspicion on him." Respondent contends that these requirements have been met here. Ms. Barney's testimony placing Ms. Hales in appellant's home on the day in question, supported Ms. Hales testimony regarding the distribution of the marijuana to Mr. Wiseman and thereby implicated appellant in the instant offense. Mr. Wiseman verified Ms. Hales' testimony as to his initiating the procurement of the marijuana and substantiated the evidence as to the method of distributing the drug as Ms. Hales

testified. This linking corroboration satisfies the statute and the case law.

These requirements outlined in Erwin were stated in a similar manner in State v. Clark, 3 Utah 2d 382, 284 P.2d 700 (1955):

* * * It has been uniformly held that the test of the sufficiency of the corroborating evidence is that it need not be sufficient in itself to sustain a conviction, but it must in and of itself tend to implicate and connect the accused with the commission of the crime charged, and not be consistent with his innocence.

284 P.2d at 701, quoting State v. Cragun, 85 Utah 149, 158, 38 P.2d 1071, 1075 (1934). Clark, therefore, holds that the generally accepted rule of corroboration is that it need not be independently adequate to convict a defendant, but it must tend to implicate him with the crime and not be consistent with his innocence. Such requirements are satisfied here.

In State v. Sinclair, 15 Utah 2d 162, 389 P.2d 465 (1964), this court was faced with evaluating the sufficiency of certain corroborative evidence in a murder case. After discussing the facts of the case and analyzing the testimony given, the Court stated:

It may well be that certain of the foregoing facets of the evidence, considered separately, could be regarded as not inculpatory and thus be vulnerable to defendant's charge that it does not connect her with the crime. But that is neither the sensible nor the practical approach to the problem. Nor does the law require that the separate bits of evidence be viewed in isolation. A great many crimes are planned to be committed by stealth and in secret, as this one was. It is necessary and proper to take whatever fragments of proof can be found and piece them together in conjunction with the reasonable inferences to be drawn therefrom in order to fill in the whole mosaic of the crime. We are cognizant that our statute uses the language "without the aid of the testimony of the accomplice" and that it has been said that the corroborative evidence should be looked at separate and apart from his testimony. That is true to determine whether there is some independent evidence which tends to connect the defendant with the crime. But it is also true that the evidence can only have relevancy to the crime as it relates to the circumstances surrounding it.

389 P.2d at 469 (emphasis in original).

This broadened construction of sufficient corroborative evidence was then illustrated with a hypothetical:

Conceding the wisdom and propriety of being wary of the testimony of an accomplice, and of not permitting a conviction to rest solely upon it, nevertheless, reason dictates

that the practical exigencies of a situation may well require that all of the circumstances be viewed together in order to determine the facts. For example: witnesses see X coming from the woods. He has a knife and is smeared with blood. Considered alone, this could well be innocent. He may have killed a deer. But the body of a man, recently killed by stabbing, is found nearby. An accomplice to the murder states that he and X did it. It is obvious that the observations that were made of X near the time and place of the murder, considered in the light of the later-discovered facts, take on a different significance and could reasonably be regarded as tending to connect X with the crime. The same reasoning applies to the instant case. The corroborative evidence should be considered in relation to the other facts shown. When this is done it seems undoubted that it could be accepted by reasonable minds as evidence of substance and probative value tending to connect the defendant with this crime. This satisfies the requirement of the law.

389 P.2d at 469. In accord, State v. Kitchen, 564 P.2d 760, 762 (Utah 1977).

The same logic is applicable in the case at bar. While Ms. Barney's and Mr. Wiseman's testimonies viewed in isolation could be considered deficient for conviction, when "the whole mosaic of the crime" is analysed, the testimonies effectively and adequately corroborate Ms. Hales'

testimony. Furthermore, when the evidence is "considered in relation to the other facts shown," reasonable minds can determine that the testimonies of Ms. Barney and Mr. Wiseman probatively connect appellant to the crime. While Ms. Barney may have only seen the circumstantial events on November 21, 1978 and Mr. Wiseman the end product of his request of Ms. Hales, taken together the two witnesses' testimonies meet the requirements for corroboration.

State v. Christean, 533 P.2d 872 (Utah 1975), re-states this Sinclair rule:

. . . it may well be that certain facets of the evidence, considered separately, could be regarded as not inculpatory and thus be vulnerable to the accused's claim that it does not connect him with the crime. However, the law does not require that the separate bits of evidence be viewed in isolation, for it is proper to take whatever fragments of proof that can be found and piece them together with the reasonable inferences to be drawn therefrom in order to fill in the whole mosaic of the crime. Although a conviction may not rest solely upon the testimony of an accomplice, all of the circumstances may be viewed together to determine the facts. The corroborative evidence should be considered in relation to the other facts appearing in the evidence of record. If, in utilizing this process, it can be accepted by reasonable minds, as evidence of substance and probative value tending to connect the defendant with the crime, the requirements of the law are fulfilled.

Respondent submits that in viewing the corroborative evidence in relation to the other facts appearing in the record, reasonable minds can properly accept the evidence as substantive and probative in value, tending to connect appellant to the crime. Thus, the requirements of the accomplice corroboration law are fulfilled. Furthermore, respondent claims that the tests outlined in State v. Erwin, supra, are satisfied in this case and that therefore, if, arguendo, Ms. Hales was appellant's accomplice, sufficient corroborative evidence was presented to support Ms. Hales' testimony and, in addition, Judge Ballif's determination of appellant's guilt.

POINT III

ASSUMING, ARGUENDO,
THAT JILL HALES WAS AP-
PELLANT'S ACCOMPLICE AND
THAT THE TRIAL COURT DID
APPLY THE NEW ACCOMPLICE
STATUTE, UTAH CODE ANN.
§ 77-31-18, SUCH APPLI-
CATION WAS PROPER.

As noted above, respondent contends that Jill Hales was not an accomplice in this matter and that consequently, there is no need to discuss any accomplice statute. Yet, since this Court has permitted an Amicus Curiae brief to be filed, respondent will answer the legal

issues raised therein. The Amicus brief deals entirely with the constitutional issue of application of ex post facto laws; the primary brief's major emphasis also focuses on this issue.

This issue centers on the disparate requirements of the two Utah accomplice statutes which were both in effect at various times throughout the crime's commission and the trial. The earlier statute, § 77-31-18, Utah Code Ann. (1953) as amended, provided:

Conviction on testimony of accomplice.
- A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.

The statute, § 77-31-18, as enacted by the Utah Legislature, effective May 8, 1979, now provides:

Conviction on uncorroborated testimony of accomplice-Cautionary instruction.-(1)
A conviction may be had on the uncorroborated testimony of an accomplice.
(2) In the discretion of the court, an instruction to the jury may be given to the effect that such uncorroborated testimony should be viewed with caution, and such an instruction should be given if the trial judge finds the testimony of the accomplice to be self contradictory, uncertain, or improbable.

It is undisputed that the offense at issue here was committed while the earlier statute was in effect and, therefore, it is the controlling law, in most circumstances. Calder v. Bull, 3 Dall. (U.S.) 386 1 L. Ed. 648, (1798). Respondent submits, however, that an exception to the general rule is applicable here inasmuch as changes in statutory requirements that are procedural may be applied retroactively. (See Beazell v. Ohio, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925) and discussion, infra.) This new statute procedurally alters the former law of accomplice corroboration and thus can be so applied.

The landmark case in the area of ex post facto laws and their general prohibition is Calder v. Bull, supra. There the United States Supreme Court outlined four categories of laws which must be regarded as ex post facto and, hence, void in application:

I will state what laws I consider ex post facto laws, within the words and intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment and inflicts a greater punishment, than the law annexed to the crime, when committed.

4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence [sic], in order to convict the offender.

3 Dall. (U.S.) at 390. (Emphasis in original.) The first three categories are not applicable here; the fourth one is. The Calder Court itself recognized, however, that "[e]very ex post facto law must necessarily be retrospective; but every restropective law is not an ex post facto law: the former only are prohibited." Id., at 390. (Emphasis in original.) Therefore, in this most important landmark case, exceptions to the general rule are alluded to.

The fourth category of Calder's list has been eroded and interpreted more than the other three, especially as to Calder's statement that only ex post facto retrospective laws are prohibited. In 16 Am. Jur. 2d 735, Constitutional Law § 396, the following observation is made:

Doubts have been entertained, however, by some of the courts and authorities as to whether the fourth class does not include cases outside the prohibition and whether every law that alters the legal rules of evidence and receives different testimony from that which the law required at the time of the commission of the offense, in order to convict the offender, is an ex post facto law.

See Moore v. State, 43 NJL 203 (1881); Beazell v. Ohio, supra; Mallett v. North Carolina, 181 U.S. 589, 21 S.Ct. 730, 45 L. Ed. 1015 (1901); King v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L. Ed. 506 (1882); and Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L. Ed. 262 (1894).

In Beazell v. Ohio, supra, this exception and modification of Calder's fourth category is clearly outlined. The statute in question in Beazell affected "only the manner in which the trial of those jointly accused shall be conducted." Id., at 170. The United States Supreme Court ruled:

Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure [citations omitted]. And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition [citations omitted]. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges the class of

persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an ex post facto law. [Citation omitted] nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible, [citation omitted] or which changes the place of trial, [citation omitted] or which abolishes a court for hearing criminal appeals, creating a new one in its stead. [citation omitted].

269 U.S. at 170-171. (Emphasis added.)

Thus, where the statutory changes only have a limited and unsubstantial effect to the accused, there such statute, while ex post facto in application, is not prohibited as a retrospective law. Furthermore, the Beazell Court stressed that the prohibition of retrospective laws generally applied to statutes:

. . . which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

269 U.S. at 170. Such harsh consequences are not present in the instant matter. The act the appellant committed

herein was just as criminal before the new accomplice statute was passed as after. Respondent submits that the long history of the repugnancy of ex post facto retrospective laws lies in the general prohibition of laws which make criminal an act which was innocent when committed and the imposition of a greater penalty on an offense than was present when committed. In other words, the first three Calder categories must be interpreted strictly to protect the innocent or less culpable; yet, the fourth category must be construed more liberally so as to allow the courts flexibility in applying newly enacted procedural legislation where the accused's fundamental rights are not threatened by such new laws.

Appellant and amicus argue that the change in the law at issue here was a substantive change because under the new law the "quantum and kind of proof necessary to establish guilt" has been altered to appellant's disadvantage. (See Beazell v. Ohio, supra, and Amicus brief , at p.9.) However, a close reading of Beazell, and Hopt v. Utah, supra, --which appellant and amicus rely upon--does not hold so narrowly.

Beazell, as above quoted, clearly holds that the

prohibition of retrospective statutes does not apply to laws "which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner." Id., at 170. Only those after-the-fact statutes which work a serious disadvantage against an accused are proscribed.

Hopt, supra, also supports this view. There the United States Supreme Court distinguished ex post laws which "deprive the accused of a substantial right" with a second category of laws that:

. . . do not attach criminality to any act previously done and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. . .

Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence [sic] was committed, might, in respect of that offence [sic] be obnoxious to the constitutional inhibition upon ex post facto laws.

110 U.S. at 589-590. (Emphasis added.)

Therefore, this second category of laws may be applied retroactively. Respondent admits that while Hopt holds certain legislative changes in the rules of evidence

"might . . . be obnoxious to the constitutional inhibition" prohibiting retrospective ex post facto laws, Hopt recognizes that the reverse is also true. That is, the ex post facto prohibition has no application to changes which relate to various modes of procedure.

Numerous cases support the view that procedural changes are not proscribed by the ex post facto rule: Thompson v. Utah, 170 U.S. 343, 18 S.Ct. 620, 42 L. Ed. 1061 (1898), rules of criminal procedure; Thompson v. Missouri, 171 U.S. 380, 18 S.Ct. 992, 43 L.Ed. 204 (1898), changes in admissibility of circumstantial evidence permitted; Ashe v. United States, 270 U.S. 424, 46 S.Ct. 333, 70 L. Ed. 662 (1926), granting or withholding of peremptory challenges; Marion v. State, 20 Neb. 233, 29 N.W. 911 (1886), allowing jury rather than court to fix punishment and determining that court rather than jury will be judge of the law; People v. Campbell, 59 Cal. 243, (1881), change from indictment to information; State v. Kavanaugh, 32 N.M. 404, 258 P. 209 (1927), change in the number of grand jurors; Hope Mutual Insurance Co. v. Flynn, 38 Mo. 483, (1866) and State v. Barrett, 138 N.C. 630, 50 S.E. 506 (1905), alter the force to be given to designated facts in determining

whether certain presumptions should arise; Beazell v. Ohio, supra, changes in mode of presenting questions and proof of the relative credibility of evidence; State v. Morton, 338 S.W. 2d 858, (Mo., 1960), judge may hear evidence of prior convictions out of jury's presence; People v. Edenburg, 88 Cal. App. 558, 263 P. 857 (1928), court may make initial examination of veniremen; People v. Gibson, 39 Cal. App. 202, 178 P.338 (1919), qualifications for jury service; Beazell v. Ohio, supra, joint trial of offenders; People v. Qualey, 210 N.Y. 202, 104 N.E. 138 (1914), entering deposition of deceased witness was no violation of right to "face-to-face" confrontation of accusers or witnesses; State v. Clevenger, 69 Wash. 2d 136, 417 P.2d 626 (1966), abandonment of prohibition on inter-spousal testimony allowed even though prospective; State v. Pope, 73 Wash. 2d 919, 442 P.2d 994 (1968), changes in restrictions on competency of certain classes of witnesses; and Splawn v. California, 431 U.S. 595, 97 S.Ct. 1987, 52 L. Ed. 2d 606 (1977), alteration in jury instruction statute was constitutionally sound even though passed after defendant's criminal offense.

A most recent United States Supreme Court case further clarifies under what circumstances ex post facto

statutes may be retroactively applied. In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L. Ed. 344 (1977), a first degree murder conviction was challenged and the Court was faced with deciding if the changes in Florida's death penalty statute between the time of the murder and the time of trial were "procedural and on the whole ameliorative, and hence . . . [not an] ex post facto violation." Id., at 283. The court held that it is a well-settled principle of law:

. . . that "[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed." [citation omitted]. "[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, [citation omitted], and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." [citation omitted].

Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto.

* * *

In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime. The following language

from [Hopt v. Utah, supra,] applicable with equal force to the case at hand, summarizes our conclusion that the change was procedural and not a violation of the Ex Post Facto Clause:

"The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute." 110 U.S., at 589-590, 4 S.Ct., at 210.

In this case, not only was the change in the law procedural, it was ameliorative. It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law. Petitioner argues that the change in the law harmed him because the jury's recommendation of life imprisonment would not have been subject to review by the trial judge under the prior law. But it certainly cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life.

432 U.S. at 293-294 (Emphasis added.) It should be emphasized here that the Supreme Court in Dobbert rejected the "work-to-the-disadvantage-of-a-defendant" test as the measure in determining whether an ex post facto law will be prohibited or allowed. Rather, the Dobbert test seems to be that a reviewing court must only determine whether the new law alters substantive or procedural rights of

the accused. If found to be the former, then the law may not be retroactively applied; if found to be the latter, then it may. Also, the Dobbert test examines whether the new law is more onerous than the former and prohibits or allows the law's application accordingly.

It is also crucial that Dobbert re-asserts the ex post facto rule of Gibson v. Mississippi, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) that an accused has no vested right "to be tried, in all respects, by the law in force when the crime charged was committed." Id., at 590. In accord, Thompson v. Missouri, *supra*; Van Voorhis v. D.C., 236 F. Supp. 978 (D.D.C. 1965); Adelman v. Adelman, 58 Misc. 2d 803, 296 N.Y.S. 2d 999 (1969); Merchants Despatch Transp. Co. v. Arizona State Tax Comm., 20 Ariz. App. 276, 512 P.2d 39 (1973); Oklahoma Water Res. Bd. v. Central Oklahoma Master Con. Dist., 464 P.2d 748 (Okla. 1969); Allen v. Fisher, 118 Ariz. 95, 574 P.2d 1314 (1977); In Re Marriage of Bouquet, 128 Cal. Rptr. 427, 546 P.2d 1371 (1976); and State v. Malone, 9 Wash. App. 122, 511 P.2d 67 (1973).

Respondent contends that the principles outlined in Dobbert are dispositive of the present case: (1) appellant cannot expect all laws and procedural rights in force at the time of the offense to be unchanged and effective at the trial; (2) while an additional hardship may fall on

appellant because of the change, such burden does not per se make the law void as per the ex post facto clause; and (3) the crime, the punishment and the elements needed to be proven have all remained unchanged throughout the course of this matter. (In regards to this last point, see State v. Coleman, 540 P.2d 953 (Utah 1975); Paul v. State, 483 P.2d 1176 (Okla., 1971); Johnson v. Morris, 87 Wash. 2d 922, 557 P.2d 1299 (1976); and State v. Jones, 214 Kan. 568, 521 P.2d 278 (1974)). All of these principles are applicable herein and respondent urges the court to rule that the new § 77-31-18 Utah Code Ann. (1979) is a procedural alteration of the accomplice statute and may be validly applied retroactively.

Finally, respondent recognizes that a similar case has been decided by the Third Circuit Court of Appeals. Amicus cites the case of Government of Virgin Islands v. Civil, 591 F.2d 255 (CA 3, 1979) in which the repeal of the Virgin Islands' corroboration of accomplice statute was held to substantially affect the defendant and therefore the trial court could not retroactively apply the statute's repeal.

This however is not the case here. The Utah accomplice statute, § 77-31-18 Utah Code Ann. (1953) as

amended, was replaced with the new statute. (See supra for the quoted laws.) Recognizing the need to qualify the new statute, the Legislature included a second subsection (§ 77-31-18(2) (1979)), which makes adequate provision for the trial judge to caution jury members of the possible improbable, uncertain or contradictory nature of an accomplice's testimony. The Virgin Islands statute, on the other hand, was repealed and no new statute nor qualifying modification was put in its place. Thus, the ex post facto principles above discussed regarding changes in statutes or altering procedural modes of trial, etc. are inapplicable to the Civil case. Clearly, where a change in the law is as drastic as Civil, the ex post facto prohibition is justified. No such drastic action is present in the instant case.

In conclusion, respondent urges that each ex post facto law must be carefully scrutinized on a case-by-case basis in order to determine whether the law should be proscribed or allowed. In the words of Justice Stone in Beazell v. Ohio, supra:

Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against

arbitrary and oppressive legislation, [citation omitted], and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. [citations omitted.]

269 U.S. at 170. (Emphasis added.)

This same view was well-stated in Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation," 73 Harvard Law Review 692 (1960):

[W]hen one considers the great variety of cases, it becomes clear that no one factor is sufficient to explain the results which the Court has reached. Rather it is submitted that the constitutionality of such a statute is determined by three major factors, each of which must be weighed in any particular case. These factors are: the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters. Since the great variety of cases in this field do not lend themselves to sweeping generalizations, it seems inappropriate to attempt to develop an ideal scheme for the Court to follow in cases involving retroactive statutes nor even to offer a formula for predicting the result in any given class of cases.

73 Harvard Law Review at 696-697.

Respondent urges that once this Court specifically considers the public interest served by the new statute, the

modification of appellant's rights thereunder, and the nature of the right affected by the change that the new accomplice statute will be deemed to alter only procedural modes of trial and that it may therefore be retroactively applied.

CONCLUSION

The trial court had sufficient evidence and legal support to rule that Jill Hales was not appellant's accomplice. Thus, her testimony alone could convict appellant.

Assuming that Jill Hales was appellant's accomplice, there was nonetheless ample corroborative evidence offered at trial to support Ms. Hales' testimony.

Finally, even if the trial court applied the new accomplice statute (which respondent contends was not applied in this case), its application would have been proper since an analysis of the legal rules of ex post facto principles shows that the law at issue only procedurally changes preexisting modes of trial.

On the basis of the above authority and the evidence against appellant presented at trial, respondent

prays that the verdict and sentence be affirmed.

Respectfully submitted,

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