

1955

H. William Nalder, Catherine Nalder and H.  
William Nalder, Jr. v. Kellogg Sales Company :  
Answer to Petition for Rehearing

Utah Supreme Court

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Ray, Quinney & Nebeker; Albert R. Bowen; Attorneys for Defendant and Appellant;

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IN THE SUPREME COURT  
of the **FILED**  
STATE OF UTAH **NO. 2 - 1955**

Clerk, Supreme Court, Utah

H. WILLIAM NALDER, CATHERINE  
NALDER AND H. WILLIAM NALDER,  
JR.,

*Plaintiffs and Respondents,*

vs.

KELLOGG SALES COMPANY,  
a corporation,

*Defendant and Appellant,*

Case  
No. 8313

ANSWER TO PETITION FOR REHEARING

RAY, QUINNEY & NEBEKER  
and ALBERT R. BOWEN  
*Attorneys for Defendant  
and Appellant*

IN THE SUPREME COURT  
of the  
STATE OF UTAH

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H. WILLIAM NALDER, CATHERINE  
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ANSWER TO PETITION FOR REHEARING

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ARGUMENT

In their petition for rehearing respondents complain of this court's ruling that when penalties of differing severity may possibly be applied only the least or lesser penalty provided by law will be given application. While respondents challenge the correctness of such ruling they

confess their inability to cite any authority in support of their position.

All damages assessed by the lower court in excess of actual damages were true penalties and being punitive in their nature they are clearly akin to penalties imposed for the violation of criminal statutes or ordinances.

The cases hold, in harmony with this court's decision, that when there is uncertainty or doubt as to which of two penalties may be imposed the accused is entitled to the imposition of the lesser penalty.

In *People v. Hoaglin*, 247 N. W. 141, 144, the Supreme Court of Michigan held that:

“If any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of two penalties administered.”

See also, *People v. Lockhart*, 219 N. W. 724.

The Michigan cases and the decision of this court are in harmony with each other and with the accepted legal philosophy that statutes prescribing penalties are strictly construed in favor of persons accused of violation.

Except for the foregoing all matters referred to in respondents' petition were fully covered by the briefs and oral argument.

The petition for rehearing should be denied.

Respectfully submitted,

RAY, QUINNEY & NEBEKER  
and ALBERT R. BOWEN

## TABLE OF CONTENTS

	Page
ARGUMENT .....	1

### CITATION OF AUTHORITIES

People v. Hoaglin, 247 N.W. 141, 144 .....	2
People v. Lockhart, 219 N.W. 724 .....	2

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# In the Supreme Court

of the State of Utah

FILED  
JAN 19 1955

Clerk, Supreme Court, Utah

State of Utah,

*Plaintiff,*

vs.

Case No. 8314

CLARENCE E. BRIDGE,

*Defendant.*

---

DEFENDANT'S BRIEF

ON APPEAL

---

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# INDEX

	Page
FACTS, STATEMENT OF.....	1-2
POINTS, STATEMENT OF.....	2
ARGUMENT .....	2-12
CONCLUSION .....	12

## Cases

Sacher vs. United States, 343 U.S. 1.....	8
Glasser vs. United States, 315 U.S. 60 .....	9
Powell vs. Alabama, 287 U.S. 45 .....	10
Wood vs. United States, 128 Fed. 2d, 265.....	11

## Statutes

### UTAH CODE Annotated, 1953:

77-15-1 .....	5, 11
77-31-18 .....	3, 4, 12
Constitution of Utah, Article 1, Section 12.....	5, 12
Constitution of the United States, 14th Amendment.....	5, 12

## Texts

Rep. of Committee on the Judiciary of Hse. of Rep. (US).....	8
20 A.B.J. 77 .....	8

# In the Supreme Court of the State of Utah

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State of Utah,

*Plaintiff,*

vs.

CLARENCE E. BRIDGE,

*Defendant.*

Case No. 8314

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## DEFENDANT'S BRIEF ON APPEAL

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### STATEMENT OF FACTS

DEFENDANT was charged with the crime of robbery, to-wit: on or about the 19th day of April, 1954, robbing one Edna Brennan in her residence located at 23 North 1st West, Salt Lake City, State of Utah. Accomplices named in the complaint were Herbert Schlosser and Milton B. Head, the former having pleaded "guilty" to the charge and the latter having been convicted after a trial by jury.



On the 28th day of October, 1954, the defendant was placed on trial in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Clarence E. Baker presiding. From his conviction by the jury and the imposed sentence this appeal is taken. Discussion of the evidence so far as it relates to the questions which this appeal raises will be made as the various matters upon which appellant relies are discussed.

### STATEMENT OF POINTS

The argument in this case will follow the point below given:

#### POINT I.

That the Court below committed error in denying defendants objection to the introduction of a confession made by defendant to the Salt Lake City police, subsequent to his arrest and while being held in the Salt Lake City jail (Tr. 15), and, that this error is inevitably linked with the trial courts subsequent refusal to grant defendants motion for dismissal (Tr. 39) on the grounds of denial of counsel and on the related grounds of the use of uncorroborated testimony of an accomplice on which to sustain a conviction.

### ARGUMENT

#### POINT I.

“That the Court below committed error in denying defendants objection to the introduction of a confession made by defendant to the Salt Lake City police, subsequent to his arrest and while being held in the Salt Lake City jail (Tr. 15), and, that this error is inevitably linked with the trial courts subsequent refusal to grant

defendants motion for dismissal (Tr. 39) on the grounds of denial of counsel and on the related grounds of the use of uncorroborated testimony of an accomplice on which to sustain a conviction."

It is the contention of defendant that Section 77-31-18, Utah Code Ann. (1953), which is the general statute as to testimony of accomplices and the need for corroboration of such testimony in order to support a conviction is applicable in the instant case.

An examination of the testimony of four of the State's five witnesses conclusively establishes their individual and collective inability to place the defendant at or even near the scene of the crime.

(1) The victim, Mrs. Edna Brennan, was asked by the District Attorney, (Tr. 9)

"Did you see Mr. Bridge in your apartment the night this happened?"

"No sir, I did not."

(2) Mr. McDonough, neighbor and friend of the victim, who came upon the scene while the robbery was in progress, was asked on cross-examination, (Tr. 12)

"Mr. McDonough, on the night of this event you have just talked about, did you see the defendant?"

"Who do you mean, please?"

"Stand up." (indicates defendant)

"Oh, Mr. Bridge, no sir."

"You didn't see that man?"

"No sir."

(3) Salt Lake Police Officer Dean Anderson merely testified about finding a box allegedly containing certain property stolen from Mrs. Edna Brennan and, in his

testimony, did not even attempt to place the defendant at or near the scene of the crime. (Tr. 23)

(4) Salt Lake Police Officer Don Pearson, who investigated the robbery, was not able to place the defendant at or near the scene of the crime except by reference to the statement made by the defendant and to the introduction of which and the use of which as corroborating evidence (as well as the methods employed in obtaining same), defense counsel interposed an objection, the denial of which forms the basis of this appeal. (Tr. 15) (Tr. 39)

As a matter of record, the accomplice, Milton B. Head, who was convicted for his participation in the crime at an earlier trial, was the only prosecution witness who was able to place the defendant at or near the scene of the crime and to otherwise implicate him with participation therein, and to the testimony of this witness defense counsel also interposed objections. (Tr. 24) (Tr. 38) (Tr. 39)

It would appear beyond any shade of rebuttal that the only corroborating evidence to the testimony of the witness, Milton B. Head, was the confession or signed statement of the defendant. Accordingly, it seems apparent that, if the signed statement of the defendant was inadmissible, as urged by the defendant, then the requisites of Section 77-31-18, Utah Code Ann. (1953) were not met and the conviction cannot stand.

In support of this contention, defendant urges upon this Court that the constitutional factors herein involved are determinative, since, in essence, the admissibility

or non-admissability of defendant's statement depends on constitutional interpretations and the practical application thereof, to-wit: was the "taking" of such a statement or confession by a police officer tantamount to a denial of the rights of due process guaranteed by the Constitution of the State of Utah and the Constitution of the United States when such "taking" diametrically ignored and was in the face of the defendants repeated requests for legal counsel before making any statements. It is on this question and the related question of the practical use made at the trial of such a signed statement that defendants appeal is predicated.

Article 1, Section 12, Constitution of Utah provides:

"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 right herein guaranteed . . ."

The Statutes of Utah have extended the constitutional guarantees implied and expressed in the above-quoted portions by providing, in Section 77-15-1, Utah Code Ann. (1953):

"When the defendant is brought before the magistrate upon an arrest . . . the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel *in every stage of the proceedings.*" (Italics added)

While it may be contended that the words of the Statute, as quoted above, "every stage of the proceedings," should be judicially interpreted in their narrowest sense as applying only to formal court proceedings,

such an interpretation, if supported by this Court, would achieve only the questionable and undesirable result of frustrating and denying the very purposes of constitutional and statutory guarantees for all the people and would set a penalty on ignorance and poverty and suspicion. Can it rightly be maintained that procedural due process is merely a pretty catch-word like a flower which is expected to nurture and grow on a rockbed of inquisition, coercion and pressure? If its foundation is rotten, must not the house itself soon fall? If the prisoner accused of a crime is subjected to the infamies of physical and mental torture, of solitary confinement, of protracted questioning and cross-questioning, of soft-spoken promises to "go easy" and "cooperation," then does not the later observance of constitutional niceties at formal court proceedings, where statements obtained without even a minimum regard for legal standards of decency and fairplay are introduced, become in reality a mere mockery of those guarantees neatly calculated to mask the earlier disregard for fundamental rights?

The attention of the Court is respectfully invited to the testimony of police officers Pearson, on cross-examination, (Tr. 17-22, incl.) In this exchange between the witness and defense counsel is set forth the whole sordid story of a "police power" (and the exercise thereof) which offends every cannon of decency and fairplay, and which certainly is considerably outside of the area of contemplation of the authors of the Statutes and Constitution of the State of Utah and the Nation.

Here is the frank revelation, not unaccompanied with

a certain degree of cynicism in the witnesses references to "feeding time at the jail" and "time for me to go off shift," of a young, inexperienced, poor, and hopeless boy being questioned, questioned, and again questioned about a serious crime—of repeated requests for legal counsel — of empty and vapid agreement with the prisoners requests by the police officer but without a single effort to do something in compliance — of an inevitable "breaking" by the prisoner and the "taking" of a confession which eventually became the one single piece of corroborating evidence which convicted the defendant.

And it is just this situation, as revealed by the testimony of the prosecution witness which affords this Court a golden opportunity to judicially uphold and re-affirm its adherence to constitutional guarantees without which this State and this Nation cannot long hope to survive.

Here are the crossroads where a clear cut and unimpeachable decision must be reached, regardless of the guilt or innocence of the individual whose particular problem happens to be the medium by which the question has come before this Court. Here is a parallel to the very situation which gave birth to those memorable lines written by Mr. Justice Frankfurter in *SACHER vs. UNITED STATES*, 343 U.S. 1 (1953):

"... Bitter experience has sharpened our realization that a major test of a true democracy is the fair administration of justice . . . Time out of mind this Court has reversed conviction for the most heinous offenses, even though no doubt

about the guilt of the defendants was entertained. *It reversed because the mode by which guilt was established disregarded those standards which are so precious and so important to our society.*" (Italics added)

The defendant urges upon the Court an acceptance of a memorandum which was submitted to the Committee on the Judiciary of the House of Representatives of the Congress of the United States by a Committee on the Bill of Rights of the American Bar Association which, in part, stated:

*"A person accused of crime needs a lawyer right after his arrest more than at any other time . . . investigation is made easier if the prisoner is hidden away from lawyers who might advise him of his rights with respect to interrogations and confessions . . ."* (Italics added)

Reference is also made to a comment by Dean Justin Miller, (Duke University School of Law) one of the foremost authorities in the field of criminal law, published in the 20th Volume of the American Bar Association Journal, page 77 (1934):

*" . . . although competent counsel is of great value at that time (time of trial), the time when an accused person really needs the help of a lawyer is when he is first arrested and from then on until trial. The intervening period is so full of hazards for the accused person that he may have lost any legitimate defense long before he is arranged and put on trial."* (Italics added)

The defendant submits to the Court that, the formal wording of the Utah Constitution and its Statutes notwithstanding, he was denied effective counsel at the trial

because of the events which preceded that trial. By the time the trial stage was reached the damage had been done and no attorney, no matter how skilled, could have overcome that damage. The confession of the defendant was obtained without the knowledge on his part that it, as a single entity, would be the corroborating evidence necessary to convict him, a danger which proper legal counsel, immediately after his arrest, would have been able to bring to his attention after the briefest discussion of the facts surrounding the commission of the crime. It would appear that this fact, standing alone, would be more than sufficient to meet the possible argument that a deprivation of due process, in order to become the basis of appellate review, must be seriously prejudicial to an appellant in order to bring about a reversal. It is, however, submitted to the Court that no such minute inspection of the degree of prejudice arising from a denial of due process is necessary. In the words of Mr. Justice Murphy, speaking in *GLASSER vs. UNITED STATES*, 315 U.S. 60 (1942):

“To determine the precise degree of prejudice . . . is . . . difficult and unnecessary. *The right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial*” (Italics added)

In the instant case there would appear to be little question as to the degree of material prejudice suffered by the defendant as the result of the police officer's tacit or implied refusal to take some affirmative step calculated to provide counsel for the defendant, after



the latters many requests, before continuing with the questioning. The record of the trial provides ample proof that a tired and worn out youngster, after having his repeated requests for legal representation effectually denied by his questioners, finally broke down and said (Tr. 19):

“Oh, I will give it to you, I guess it doesn't make any difference.”

In that short, simple statement, this Court is presented with a graphic picture of what denial of counsel “at every stage of the proceedings,” as set forth in the Statutes of Utah, really means. Surely it must have been just such a realization which prompted Mr. Justice Frankfurter, in *POWELL vs. ALABAMA*, 287 U.S. 45 (1932) to write:

“... he requires the guiding hand of counsel at every step in the proceedings against him.”

It will presumably be argued that the safeguards to human liberty encompassed in the 14th Amendment to the Constitution of the United States are merely “generalities” established by the Congress of the “guidance” of the several States and that the scope of interpretation and application thereof by the individual State courts is within the province of local sovereignty. While there unquestionably exists a certain degree of foundation for such a viewpoint, it would nevertheless appear that the 14th Amendment imposes upon each State a duty to follow its legislative, constitutional and statutory policy, as set forth in its particular laws and rules of procedure. Within this category should lie the right of a prisoner to have his requests for counsel honored—not after a case

has been built up against him, but, as the Utah Statutes require, at every stage of the proceedings, which should certainly include the interrogation stage. Any other policy will inevitably lead to the very type of situation which is before this Court now, where denial of counsel has resulted in a prejudicial statement being taken from a prisoner who was not made fully aware of its import and the use to which it would subsequently be put. For this Court to subscribe to any other viewpoint would, in effect, be to sanction an abridgement of its own standards of due process of law, as set forth in its own Statutes and in compliance with its own constitutional requisites. It is respectfully submitted to the Court that, while the provisions of the 14th Amendment to the Constitution of the United States may be generalities, they are nevertheless armed with the authority and dignity of purpose which demand adherence from the several States. As to the applicability of those provisions to the particular problem presented by this appeal, e.i., a denial of counsel by local police officials at the interrogation stage, the words of Judge Rutledge (later on the bench of the Supreme Court of the United States), in his decision from the Court of Appeals for the District of Columbia in *WOOD vs. UNITED STATES*, 128 Fed. 2d, 265 (1942) said:

*“ . . . the aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary inquisition which would squeeze out conviction or prejudice by means unconstitutional, if used at the trial . . . the better and fairer practice would be to provide counsel for the accused before permitting him to speak even as a volunteer.”*  
(Italics added)

It must necessarily be reiterated here that the Statutes of Utah stand squarely behind the words of Mr. Justice Sutherland and Mr. Justice Rutledge since Section 77-15-1, Utah Code Ann. (1953) specifically refers to,

“... defendants right to the aid of counsel at *every stage of the proceedings.*” (Italics added)

### CONCLUSION

In view of the provisions of the 14th Amendment to the Constitution of the United States, the provisions of Article 1, Section 12 of the Constitution of the State of Utah, and the provisions of Section 77-15-1, Utah Code Ann. (1953), the appellant submits to the Court that the taking of his confession, despite his repeated requests for legal counsel before making such a statement, was a prejudicial violation of his rights to the due process of law and that such a statement should therefore not have been accepted as evidence by the Trial Court. If this be so, as appellant contends, then, under the provisions of Section 77-31-18 Utah Code Ann. (1953), the statutory requisites of proper corroboration for the evidence given against a defendant by an accomplice were not met, and his conviction should be reversed.

respectfully submitted,

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