

1956

# State of Utah v. Eugene Myers : Reply Brief of Appellant

Utah Supreme Court

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Eugene Myers;

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I N T H E S U P R E M E C O U R T  
O F T H E  
S T A T E O F U T A H

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STATE OF UTAH

Respondent

vs.

Case Number

EUGENE MYERS

8504

Appellant  
-----

R E P L Y B R I E F O F A P P E L L A N T  
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EUGENE MYERS

In Propria Persona  
Box 250, Draper, Utah

# TABLE OF CONTENTS

<u>CASES CITED</u>	<u>Page</u>
U.S. v. VAL R. LORWIN - Loyalty Case No. 54..3	
U.S. v. COOKE, 517, 45, S. Ct. 390, 69 L. ED. 767.....	22
FRANKLIN v. STATE of So. Carolina, 218, U.S. 161, 30 S. Ct. 640, 54, L. Ed.....	23
POWELL v. ALABAMA - 287, U.S. 45, S. Ct. 55 77 L. Ed. 158, A.L.R. 527.24	
U.S. v. PATON, 281 U.S. 276, 312, 50, S. Ct. 2 53, 263, 74, L. Ed. 854, 70, A.L.R. 263 . . . . .	27
STATE v. PENDERVILLE, 272 Pac. 2d. 820. . . .	28
COMM. v. JESTER, Pa. 441, 100 A. 993 . . . .	29
ROGERS v. PECK, 199, U.S. 425, 26, S. Ct. 87 50 L. Ed. 256 . . . . .	23
6. R. c. l. P. 446 . . . . .	23
SNYDER v. MASS. 291 U.S. 97, 105, 54 S. Ct. 330, 333, 78, L. Ed. 674, 90 A.L.R. 575.....	32
BROWN et al v. STATE of Miss. 297, U.S. 278, 56 S. Ct. 461, 80, L. Ed. 682. . . . .	34
WHITNEY v. CALIFORNIA, 274, U.S. 357, 373, 47, S. Ct. 641, 647, 71 L. Ed. 1095 . . . . .	37
BARTON v. STATE, 6 U. 264, 21, P. 998 . . . .	41
SMITH v. GRISWOLD, Hun.(N.Y.) 273. . . . .	43
MILLER v. BRYDEN, 34 Mo. App. 602. . . . .	44
BROOKS v. STATE 28 Nebr. 389, 44, N.W. . . .	45
LOUISVILLE & NASHVILLE Ry. v. SCHMIDT, 117 U.S.	
230, 20 S. Ct. 620, 44, L. Ed. 747 . . . . .	23

# CONTENTS - II,

STATE v. THOMPSON, 58 U. 291, 296, 199 P. 161 38 A.L.R. 697 . . . . .	41
PEOPLE v. CHALMERS, 5 U. 201, 14 P. 131 . . . . .	36
PEOPLE v. KERM, 8 U. 268, 271 30 P. 998 . . . . .	41
PEOPLE v. COLE, 54 Mich. 238, 19 N.W. 968 . . . . .	47
PEOPLE v. COMYNS 114 Cal. 107, 45, Pac. 1034 . . . . .	52
HOOKEK, v. LOS ANGELES 188 U.S. 314, 23, S. Ct. 395, 47, L. Ed. 487, 63, L.R.A. 471 . . . . .	23
6. R. C. L. 443 . . . . .	23
EDMONDS v. STATE 42 Nebr. 684, 60 N.W. 957. . . . .	44
ENGSTER v. STATE 11 Nebr. 539, 10 N.W. 453. . . . .	44
MOONEY v. HOLOHAN 294, U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791. 98 A. . . . .	34
STATE v. HADLEY, 65 U. 109, 234 P. 940 . . . . .	48
STATE v. MANNION 19 Utah, 505, 57 Pac. 542, 45 L.R.A. 638, 75 AM. St. Rep. 753 . . . . .	49
WHIZENANAT v. STATE, 71 Ala. 383 . . . . .	50
GIBSON v. STATE 114 Ga. 34, 39 S. E. 948 . . . . .	50
R. Co. v. MAYER 91 Ill. App. 372 . . . . .	51
BROWN v. STATE 105, Ala. 117, 16 So. 929 . . . . .	52
STATE v. MCKEE 19 U. 231, 57 P. 23 . . . . .	57
STATE v. MAXWELL, 19 U. 156, 61 P. 557 . . . . .	57
BUCHANAN v. STATE, 109 Ala. 7, 19 So. 410 . . . . .	49
STATE v. DUE, 27 N.H. 26 . . . . .	49

# CONTENTS - III

STATE v. HARGRAVE, 97 N.C. 457, 1. S.E. 774 .....	50
THORTON v. BRITTON, 144 Pa. St. 126, 131, 22 Atl. 1048 .....	51
PENNOYER v. NEFF, 95, U.S. 714 (24.L.Ed.565).	23
MOORE v. DEMPSEY, 261 U.S. 86, 91, 43, S. Ct. 265, 67, L. Ed. 543 .....	34
STATE V. HAWKINS, 95 Ga. 20, S.E. 217 .....	48
THOMPSON v. STATE 23 Tex. App. 356, 5. S.W. .	49
SCOVILLE v. HANNIBAL Etc. R. Co. 94. Mo. 84, 876. S. W. 654 .....	51
REG. v. WISHAW C. & M. 45, 41 E.C.L. 84 ..	51
COMMONWEALTH v. MCKENNA, 158 Mass. 207, 33, N.E. 389 .....	51
PEYSER v. LUND 89 N.Y. App. Div. 195, 85 N.Y. Suppl. 881 .....	44
BROWN v. HUMMEL 6 Pa. 86, 97, 47 Am. Dec.431	59
SACHER v. UNITED STATES, 343 U.S. 1. (1953).	59

## STATUTES CITED

77-15-1 Utah Code Annotated 1953 .....	17
77-24-13 Utah Code Annotated 1953 .....	31
77-27-1 Utah code Annotated 1953 .....	41

IN THE SUPREME COURT  
OF THE STATE OF UTAH

-o-o-o-o-o-o-o-0-o-o-o-o-o-o-  
:  
STATE OF UTAH  
:  
Respondent  
:  
vs.  
:  
EUGENE MYERS  
:  
Appellant  
:  
-o-o-o-o-o-o-o-0-o-o-o-o-o-o-

Comes now the Appellant in this Cause having failed to obtain the effective assistance of legal Counsel, to attempt to file a REPLY BRIEF to the Brief of the Respondent.

Appellant submits that he has had no formal training in law and is somewhat ignorant of legal procedures; however, handicapped, with what the Respondent at page 17 of his Brief calls " Misconception of the Law" the Appellant attempts to submit an acceptable REPLY.

In the absence of Counsels who in fear of the "heat" of what Honorable, Lewis Jones has called a "HOT POTATO" (R.-46) and those Lawyers

having strictly adhered to an apparent tribun-  
al ultimatum of "hands off the Myers' case",  
the Appellant now stands alone - seeking some  
form of the "Justice for all" that he was told  
he was fighting for during thirty (30) months  
of "Honorable" service in the U. S. Navy (1943-  
1946 - 274-96-14).

Appellant submits this Reply Brief for  
the purpose of pointing out misleading conno-  
tations, prejudicial suppositions and generali-  
zations and appeals beyond the issue; all of  
which are contained in the Respondent's Brief  
and should suffice only to insult the integrity  
of this Honorable Court and strengthen the  
Appellant's contentions of having been grossly  
wronged throughout the expiration of almost  
twenty-eight (28) months of continuous imprison-  
ment.

The Respondent apparently labors under an  
un-American motto of "Upholding a Conviction  
obtained by any means". Which position, if taken,  
is frowned upon and proved fatal in all Courts  
of Justice.

**In one of Mr. Joseph McCarthy's "Loyalty**

Cases" - Case No. 54 - U. S. v. VAL R. LORWIN.  
 A Justice Department Prosecutor, Mr. William  
 A. Gallagher was no doubt working under the  
 "CONVICTION BY ANY MEANS" theory and forgot his  
 " Oath of Office" and sought a conviction of  
 Lorwin by unjust means, in that he obtained an  
 indictment on false promises to the Grand Jury.  
 When U. S. Attorney- General, Herbert Brownell  
 Jr. learned of such travesty of Justice, he  
 caused the dismissal of the said Prosecutor,  
 William A. Gallaher and issued the following  
 statement to all other men of America who are  
 part of a prosecuting body - "WE HAVE A DUTY  
 OVER AND ABOVE PROSECUTIONS AND CONVICTIONS -  
 THAT IS, TO SEE THAT JUSTICE IS DONE".

Appellant submits that no attempt at see-  
 ing that justice is done in this case is enter-  
 tained by the Respondent as evidenced by his  
 decision to pursue further this case that is  
 almost two and one-half (2½) years old and which  
 case has been termed by legal authorities as  
 " IRREGULAR" , " UNUSUAL" , " BUTCHERED" "  
 " Appellant left holding the bag" and " HOT  
 POTATO".



4

Aside from any possible contention of "duty" it is plain from the record in this matter and in view of additional weight of authority herein cited, that a disregard for constitutional justice and a position that a conviction by unjust and illegal means should be supported are evidently the dominating factors preventing the Appellant from receiving long over-due "redress of grievances".

Appellant has observed very possible deliberate twistings and alterations and inconceivable slantings in the Respondent's "Statement of Facts" but refuses to be lured into a long rebuttal of testimony that should never have been heard and would have<sup>e</sup> been impeached, if had, if the Appellant would have been accorded his " CONSTITUTIONAL GUARANTEES" ... specifically - A " Fair Trial" - in the sense of having prepared and willing counsel; being confronted by one of two complainants against him; having a compulsory process to compel the attendance of witnesses ("MATERIAL WITNESSES") in his behalf and "Not twice being put in jeopardy for the same offense".

It is interesting to note that at page 3 of Respondent's Brief, he states that the Appellant was returned to the County Jail on October 26, 1955 and was not called over to Court and informed of his trial date until November 16, 1955 ... TWENTY DAYS LATER....

can one justly say that the Court did not know that the Appellant was back at the jail - consistent with its orders ? That the Court was not aware of the Appellant's impecuniosity and his not being represented by Counsel, when a look at the record would have clearly shown such? How are the twenty (20) days of SILENCE from the Court justified when contrasted with the " INSUFFICIENT AMOUNT OF TIME THEREAFTER GIVEN COUNSEL TO PREPARE A DEFENSE FOR THE APPELLANT" ??

At the bottom of page 3 of the Respondent's Brief, he admits that the Court ordered that Counsel for the defendant (App.) motion for a Continuance be denied<sup>2</sup>. Which motion only sought what the " Supreme Law of The Land" guarantees the accused i.e., "a fair trial" in which the accused among other requisites would

have the "assistance " of PREPARED and WILL-  
ING COUNSEL IN HIS BEHALF. That Counsel for  
the Appellant did not have ample time to get  
these constitutional guarantees for the Appell-  
ant is clearly set forth in his own words which  
constitute his Motion for a Continuance which  
is as follows: - (Verbatim)...

" Comes now the defendant, Eugene Myers  
and moves the above entitled Court for an order  
continuing his trial date from the 25th. day  
of November, 1955 to the 5th. of January, 1956  
or some date there-after within the discretion  
of the Court. This motion is based upon the  
grounds that Counsel for the defendant was  
appointed on the 17th. day of November, 1955  
and seven (7) days is not sufficient to prepare  
a defense in the defendant's behalf. Further,  
that the defendant has a material witness at  
80 Stone St, Newark, New Jersey and another at  
525 Fifth Avenue, Seattle, Washington, which  
he feels would be aids in his defense, and the  
time allotted counsel to contact these witness-  
es before trial is not sufficient.

Dated this 19th. day of November, 1955

At Page 10 of Respondent's Brief, he attempts to paint the picture that this case began on July 1, 1954 with a Mr. Callicott signing a Complaint charging the Appellant with Grand Larceny - Case No. 14608; whereas on the contrary this case began on March 29th. 1954 as Case 14571 under the name of Robbery. And on the date mentioned by the Respondent - July 1, 1954 - the District Attorney, Mr. Aldon J. Anderson (in Judge Van Cott's Court) on July 3, 1954 -(Sat.) described that day accurately in his answer to his honor's question of why the Appellant was before the Court...MR.

ANDERSON: " The STATE was on 'SHAKEY GROUNDS', your Honor and we let this man plead guilty".

THE COURT: " There is nothing in the record to show that , you better get the record straight".

The "SHAKEY GROUNDS " on which the Dist. Att., admitted the STATE (No Appellant) stood became "SHAKEY" at the following time:

L. After the jury had been impaneled and sworn to try the Appellant and his codefendant, OLIVER TOWNSEND,

2. After the Assist. Dist. Att., a Mr. D. Christiamn Ronnow had been "reprimanded" by the Court for making a "predjudicial statement" before the jury in his opening address.

3. When one of the complainants, DEAN JONES, was about to take the witness stand and a Mr. John J. Berger, (a Caucasian) raised his hands for the attention of the Court and told Judge, Lewis that he would like to speak with him in his chambers... ( while in the judge's chambers) Mr. Berger stated that he knew the State's first witness who was about to take the stand - DEAN JONES, and proceeded to tell the judge what a "drunkard " and " No good thing" he knew Jones to be and that Jones had "Secretly married a nice girl named" Joann Harrington" and if he stayed on the jury he would find "FOR THE DEFENDANTS".

Appellant has since learned that true to the Dist. Attorney's statement, the STATE was indeed on "SHAKEY GROUNDS".

When the Appellant refused the STATE'S DEAL to get itself off "SHAKEY GROUND", Appellant's lawyer, Ben D. Browning looked at the

clock and said " we have two minutes," either  
'Cop out to Grand Larceny or I'll withdraw...  
(R. 7-9). Appellant submits that he was afraid  
and confused and under the coercion and threats  
of Counsel he unwillingly pled guilty to the  
SECOND INFORMATION alleging the identical crime  
for which he had allready been placed in jeopardy  
along with a co-defendant, Oliver Townsend  
and was still in jeopardy at the very moment  
that he was FORCED to enter the said plea of  
guilty.

Again at page 10 of his Brief, the Respondent makes an ambiguous reference to the Appellant's former attorney, stating that he was a "GOOD" attorney...? ... Good in what respect? Good for the state? ...Good at explaining away the Court's errors?... Good at deserting and forcing a client to plead guilty while the STATE - not the defendant is on "SHAKEY GROUND" the latter is supported by documentary evidence (R. 7-9)... What does a lawyer's "goodness" or even genius mean to a defendant who cannot benefit by such assets because he is the victim of a "HOT POTATO".



Also at page 10 of his brief, the respondent would have the Court believe that from May 17, 1954-(date of preliminary hearing on the instant case which at that time was called "Robbery") to July 1, 1954 - the date of the trial on said robbery, Appellant's lawyer did not have time to "investigate" Appellant's case but went into Court to defend the Appellant in a Robbery trial with the idea of "investigating" as the trial proceeded ?? . .... States Respond. " After his attorney made an investigation of the case he felt that Appellant would be best served by entering a plea of guilty to Grand Larceny"... Appellant submits that the record shows the contrary of what the Respondent calls an "Investigation" the Record at Pages 7-9 shows a desertion by Counsel for the Appellant and the use of Coercion and threats etc. - A "deal" in which someone (Not appellant) waived Appellant's Preliminary hearing on the instant case and the record shows (Ibid) that an obvious pact existed between Appellant's lawyer and the prosecution which pact the Appellant's lawyer refused to break

guilty) to Grand Larceny.

Surely an " Investigation" by Appellant's lawyer would have revealed (As the Dist. Att. so accurately stated) - that the "STATE WAS ON SHAKEY GROUNDS". And if the Appellant's lawyer is as "good" as that Respondent would have the Court believe he is, then an investigation would not have been necessary to detect the State's "SHAKY GROUNDS", especially in view of the juror's revelation and the Dist. Att. (Assist. District Attorney's "REPRIMAND" received from the Court in the presence of the jury.

Also at page 10, of his brief, the Respondent labels the Appellant's attempt to realize receipt of the " Equal protection of the laws", along with other "Constitutional Guarantees" he fought "to preserve" during World War II., as unlimited Substitution" and goes on to state that "Six" attorneys were appointed by the Court to represent the Appellant. Who were they?...Ans.

1. Mr. Allan Swan: - who was appointed to prepare an affidavit in which the Appellant told the Court about the illegal tactics employed by the State and the Appellant's attorney. After



completing this task, Mr. Swan withdrew and he will state that he did not have a single difference with the Appellant.

2. A. Mr. Houston: - who has a deep Southern accent walked into the visiting booth at the jail and said to the Appellant - a balding negro who was twenty-eight years of age (at that time)...

MR. HOUSTON: "Hello 'BOY', what's wrong?..."

Appellant at this point was somewhat speechless - a man was before him - he didn't know his name nor his occupation; ... something about the stranger's eye-sight gave him the delusion that the Appellant was a "BOY" and by some deduction he was able to arrive at the conclusion that something was wrong. Above all, he brought his daughter (or a little girl about ten (10) years of age ) along with him to discuss the Appellant's case. Appellant was hesitant to discuss his case in the presence of the young lady and when Mr. Houston asked... " What color were these people - 'white or colored'?" - Appellant felt that this man who ever he was, apparently wanted to make a "Race Issue" out of

the case which of course the Appellant definitely didn't want or he would have sought the services of the NAACP. Appellant submits that he could not cooperate with a man of such disposition.

A Mr. DONN CASSITY: Mr. Cassity's connection with the prosecuting agency should have, consistent with ethics, prevented him from being appointed as counsel for a defendant in a FELONY complaint. However, he did let the Appellant know that he did not wish to defend him when he walked over to the jail phone and called someone (supposedly the District Attorney) and came back to the booth and said " the District Attorney said that if he didn't convict you for the Grand Larceny he would place one of several other charges against you -'so you better go to trial right away'. Appellant knowing such a threat to be without any possible merit, told Mr. Cassity he would go to trial as soon as his witnesses were subpoenaed but Mr. Cassity gave no regard to the Appellant's request for his witnesses. Letters to Hon. Clarence E. Baker related all

of the foregoing discourses between the Appellant

and Court-appointed Counsel.

Mr. Lee W. Hobbs,: Appellant submits that Mr. Hobbs was very interested in his case and at first spent quite a bit of his time trying to help the Appellant. Appellant further submits that after having been deserted by his attorney Mr. Browning and having been treated as stated by Messrs. Houston and Cassity, he was "overly-suspicious" and found it rather difficult to grasp any acts of honesty from what to the Appellant appeared to be a "Vicious Circle" which enclosed and protected the comparatively wealthy few.

Mr. Hobbs perfected what he told the Appellant was a "Very strong Prima Facie case of Double Jeopardy on a Writ of Habeas Corpus", (In behalf of the Appellant) which Writ was apparently as strong or stronger than Mr. Hobbs had concluded because the Court (Judge Van Cott) had to switch from the "very strong case" to the man and made the following "Against the man" ruling...." Mr. Hobbs, this man (referring to the Appellant) 'is using sleight of hand tactics -trying to outwit the Court - Writ

denied". The foregoing "Against the Man" ruling made Mr. Hobbs angry and he said he should take the Writ to the Federal Court but later said " the information is wrong; I will get you out on 'Petit Larceny' which is the most that the state can make out of the case".. ... this was on the fourteenth of December, but after Christmas, Mr. Hobbs came over to the Jail and appeared to be a completely different man in regard to Appellant's case - despite his former promise to pursue the question of Double Jeopardy further and get the Appellant's witnesses before going to trial- Mr. Hobbs wanted to go to trial without those "Constitutional Guarantees. Appellant could not accept such domination by "might alone" in the complete absence of any legal basis.

On Jan. 13, 1955, Honorable, Lewis Jones sitting for Judge Ellette in a proceeding to determine whether the Appellant was ready to go to trial. After the Appellant explained the tactics having been employed in his case , to date, and the state's contention that the Defendant should go to trial without his witnesses

etc. the Judge said: " Mr. Anderson, we can't make this man go to trial without his "MATERIAL WITNESSES", and ordered that the witnessses whose names and addresses Appellant gave the Court, "be subpoenaed" and ordered that Mr. Hobbs "perfect" Appellant's appeal (from Judge Van Cott's "Against the Man" ruling) to the Supreme Court of Utah. At this point Mr. Hobbs asked to withdraw from the case and his request was denied. Mr. Hobbs, like other lawyers appointed in this case, was determined to disregard the Court's orders and even went up to the Supreme Court in an attempt to be relieved and was given the assistance of another attorney but still did not perfect the Appellant's Habeas Corpus to the Supreme Court. This is the same Mr. Hobbs who stood silently by while the Appellant was sent to the State Hospital AGAINST HIS WILL. ... the same Mr. Hobbs who wrote the "Card-stacking" perjured letter noted on page 11 of Respondent's Brief.

Mr. Ashworth: who will be discussed on other pages.

with ~~the~~ prosecuting agency, the Appellant requested his services because he has the reputation of going all the way with a client or not starting on the case - Mr. Giles chose the latter. It is noted however that <sup>MR. GILES</sup> requested and received a continuance of the Appellant's date of sentencing to December 24, 1955 but the Court - probably fearful of his sternness etc. had the Appellant brought before the Court ONE DAY EARLIER THAN THE DATE GRANTED MR. GILES IN THE CONTINUANCE - (December 23rd.) and sentenced the Appellant above his requests for Mr. Giles to represent him at that " Stage of the proceedings against him". (See Record - Pages 109 & 113).

Respondent admits such action by the Court in the second paragraph of page eight (8) of his Brief. This incident was also mentioned in Appellant's Brief.

"Right to Counsel means right to Counsel at every stage of the proceedings"

77-15-1 U.C.A. 1953.

It is noted on page 12 of Respondent's Brief in addition to page 3 that he admits that it was on the Court's own motion that the Appellant was examined by two Psychiatrists, George Roberts, and S. Wayne Smith, it is recalled that in the case of Dr. S. Wayne Smith who committed the Appellant to the State Hospital has since been acclaimed one of the Country's leading Psychiatrists and now heads the State Mental Hospital in Idaho. Yet in view of this, the Respondent claims that the Appellant "duped" him into committing him to the said hospital. The minutes of the sanity hearing will show that the Appellant DID NOT WANT TO GO TO THE STATE HOSPITAL and asked the Court if somehow he could prevent such action to which the Court (Judge Ellett) said "no".

Also at pages 12 and 3 of the Respondent's Brief, he states that the Appellant was found to be INSANE by Dr. Owen P. Henninger and his staff; which action the Respondent also discredits as having been without merit as is seen on page 12 of his Brief in which he states that the Appellant "duped Dr. Henninger and his staff" into



believing that he was insane. Which raises the question of whether or not the staff including the Superintendent, Dr. Henninger is so incompetent that a layman ( as the Respondent states) can "dupe" them into beleiving the opposite of what is true. If the Respondent really believes that the taxpayers money is being misappropriated in the manner of paying an incompetent staff at the State Mental Hospital, his silence on this matter renders guilt on his part.

On the other hand, if the respondent who apparently has had little or no training in the field of Psychiatry believes that the Appellant, a layman can "Dupe" such nationally known men (Doctors of Psychiatry) as Doctors, S. Wayne Smith and Owen P. Henninger into believing he is or was " Insane". What is there to assure the untrained (in the field of psychiatry) Respondent that the Appellant is NOT "duping" him into believing that he is SANE ??

At the top of page 13 of his Brief, Respon. claims that Mr. Ashworth never showed unwillingness nor unpreparedness such a claim is



completely defeated by the record at page 81 where Mr. Ashworth's Motion For a Continuance exist in which he states that he DID NOT HAVE SUFFICIENT TIME TO PREPARE A DEFENSE IN BEHALF OF THE APPELLANT. The Court's abuse of its discretion in denying such valid request brought about overt unwillingness to go on as seen in Mr. Ashworth's Notice of Withdrawal Record - Page 89.

The Utah Statute provides that " A defendant shall have at least two days in which to prepare for trial; However, it was never intended by the legislature that TWO DAYS would be sufficient in all cases and under all circumstances. The determining factor is not "TWO DAYS" but a reasonable time wherein Counsel can prepare his case or defense consistent with every right guaranteed a defendant by the constitution and the procedural statutes of the State Criminal Code. If more than two days are required, the Court should not, even in the exercise of its discretionary powers refuse to extend the trial date, for to do so would be a clear abuse of its discretionary powers.

The two days provided by statute constitute a limitation upon the discretionary powers of the Court. Such a provision protects a defendant from being forced to go to trial without preparation - adequate for his defense. If more time is required, it should be the duty of the Court to extend the trial date to such time as may be determined by the circumstances peculiar to the case at bar. Any thing less than this is a denial of Counsel. Common law and statute fully support this theory.

Mr. Ashworth, (Counsel for defendant) was denied his motion for a continuance of the trial date despite the fact that he was appointed Counsel on November 17, 1955 and felt that he needed additional time. This denial which meant a deprivation of Constitutional guarantees for the Appellant prompted Mr. Ashworth to file a second motion wherein he stated that he had withdrawn as Counsel for the defendant - November 21st. - four days prior to defendant's trial. The motion was denied that denied <sup>being</sup> November 22, 1955. It is clear that Counsel WAS NOT PREPARING TO GO TO TRIAL WHILE AWAITING THE COURT'S

POSITION ON HIS TWO MOTIONS. Hence, Mr. Ashworth had November 23rd. and 24th. to prepare which was insufficient and not "Seven full days" as contended by the Respondent.

From the foregoing fact the following conclusions are evident:

1. Counsel went on record as saying that he could not prepare for trial as of November 25, 1955 without a continuance.
2. His withdrawal as counsel, or attempt to do so is tantamount to an UNWILLINGNESS TO PROCEED HALF-PREPARED.
3. Counsel was therefore denied within the meaning of the Appellant's Constitutional Guarantees.

Respondent's reference to Appellant's apparent ability to cross-examine certain witnesses is without merit. For even a competent attorney is entitled to Counsel and it is no argument that education nor the lack of it is what determines the need for counsel. This fact is clearly set forth in the famous case of COOKE v. UNITED STATES 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed 767: An ATTORNEY was brought into Court charged with contempt of Court (Not committed however in open Court) and his request for time and opportunity to secure Counsel and Witnesses and prepare his defense was refused.

In reversing the adjudication against Cooke, Chief Justice Taft, speaking for the Court says at Page 537 of 267 U. S. 45 S. Ct. 395:

" Due process of law therefore in the prosecution for contempt except that committed in open Court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this include the assistance of Counsel, if requested and the right to call witnesses to give testimony, relevant with to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed". A like rule as to necessity for due notice and reasonable opportunity to prepare a defense is declared in:

FRANKLIN v. STATE of So. Carolina 218 U.S. 161  
30 S. Ct. 640, 54 L. Ed. 980

ROMERS v. PECK 199 U. S. 425, 26, S. Ct. 87,  
50 L. Ed. 256.

HOOKE v. LOS ANGELES, 188 U. S. 314, 23, S.  
Ct. 395, 47 L. Ed. 487, 63 L. R. A. 471

LOUISVILLE & NASHVILLE Ry. v. Schmidt, 177 U. S.  
230, 20 S. Ct 620, 44 L. Ed. 747

6 R. C. L. P. 446 states that: " The essential elements of due process of law are NOTICE and OPPORTUNITY TO BE HEARD AND TO DEFEND IN AN ORDERLY PROCEEDING adapted to the nature of the case".

"The term 'Due process of Law' when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our Jurisprudence for the protection and enforcement of private rights".

PENNOYER v. NEFF, 95 U. S. 714 (24 L. Ed. 565).

The reference to " six attorneys being appointed to aid the Appellant. The essence of such appointments has already been discussed in preceding pages. If the number of chimed attorneys impresses the Respondent, it should be pointed out that the WHOLE BAR ASSOCIATION was appointed in the famous case of POWELL v. ALABAMA, 287 U. S. 45 S. Ct. 55, the United States Supreme Court held that the appearance of Counsel was simply Pro Forma rather than zealous and active and that the defendants were not accorded the right to Counsel in any substantial sense. Among other things, the U. S. Supreme Court said at pages 68-69 of 287 Pages 64 of 53 S. Ct. ... " What then does a hearing include? historically and in practice in our country at least it has always included the right to the aid of Counsel when desired and provided by the party asserting the right. The right to be heard in many cases would be of little avail if it did not comprehend the right to be heard by Counsel. EVEN THE INTELLIGENT AND EDUCATED LAYMAN HAS SMALL AND SOMETIMES NO SKILL IN THE SCIENCE OF LAW. If charged with a crime, he is incapable of generally determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence Left without the aid of counsel, he may be put on trial without a proper charge and convicted upon INCOMPETENT EVIDENCE, or even evidence irrelevant to the issue or otherwise INADMISSABLE. He lacks both the skill and knowledge adequate to prepare his defense even though he may have a perfect one. ...

"HE REQUIRES THE GUIDING HAND OF COUNSEL AT EVERY STEP IN THE PROCEEDINGS AGAINST HIM. without it though he be innocent he faces the danger of conviction because he does not know how to establish his innocence."

At page 15 the Respondent attempts to show a discrepancy in the statements of the Appellant to the Court when a check of the record would have prevented suchj and error on the part of the respondent ... the minutes of January 13th. taken by Miss. Miriam E. Parker Hon. Lewis Jones presiding, will show that his honor said "(To the Dist. Att.,) " WE CAN'T TRY THIS MAN WITHOUT HIS 'MATERIAL WITNESSES". And "Mr. Hobbs it is the Court's orders that you 'perfect the defendant's Writ of Habeas Corpus to the Supreme Court". It was on the foregoing orders that the Appellant's statement quoted by the respondent (P. 15.) (R. 360) was made. The respondent vainly tries to suggests other-wise.

Respondent apparently labors under the belief that Counsel for the defendant is a matter of "Either or else" ... Either stand bye silently and let Court-appointed lawyers compromise with the state, take " short cuts" to effect an unjust conviction; remain on the case

"against their will" and infer that the wrath of the prosecuting body forces them to stay on "unwillingly", OR stand alone. Such a belief, if entertained, appears to be definitely contrary to the expressed provisions of the Constitution of Utah - Article I. Sec. 12 (In part)

"In criminal prosecutions the accused shall have the right to appe~~ar~~ and defend in person ~~or~~ AND BY COUNSEL".... There is nothing whatsoever to indicate that the defendant must~~e~~ remain silent while his "guaranteed rights are being denied him"... there is nothing at all to indicate that the defendant cannot say something about the possibility of a prison that HE ALONE will have to serve - not the attorney. There is not even the slightest suggestion that there cannot be a mutual understanding on the Course to be pursued on a question of whether the accused is to be or not to be freed. Even the men on Utah'S Prison Death Row are said to have a choice of how their life should be taken - surely the defendant should have some voice relative to his liberty or the infringement of it.



at page 16, (Respondent's Brief) Respondent cites a case of PEOPLE V. ADAMSON which has no application to the instant case at all for there is no showing in the record nor elsewhere that the Appellant sought to delay his trial indefinitely.

As to the Respondent's decision to cite MITCHELL v. THOMPSON, surely the "NOTICE OF WITHDRAWAL -R.89 submitted by Mr. Ashworth and the substance of his motion for a Continuance R. 81 that GOOD CAUSE HAD BEEN SHOWN WHY THE COURT SHOULD HAVE APPOINTED ADDITIONAL COUNSEL AS THE CITED CASE INDICATES IN VIEW OF THE STATED REQUISITES HAVING BEEN MET.

This contention is supported in the following cases:

PATON v. UNITED STATES: 281 U. S. 276, 312, 50 S. Ct. 2. 53 263, 74 L. Ed. 854, 70 A. L.R. 263.

" The Court should protect the right of the accused to have the assistance of Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge in determining whether there is a proper waiver by the accused. While the accused may waive the right to Counsel, whether there is a proper waiver should clearly be determined by the trial Court and it would be fitting and appropriate for that determination to appear upon the record.

also see: JOHNSON v. ZERBST, 304 U. S. 458, 465 58 S. Ct. 1019, 1023, 82 L. Ed. 1461.



This Honorable Court has ruled that it would be A PREDJUDICIAL ERROR TO FORCE AN ATTORNEY UPON A DEFENDANT IF HE DIDN'T WANT HIM.

In the Appellant's case, the Appellant was compelled to not want his attorney, Mr. Ashworth upon receipt of his Attorney's NOTICE OF WITHDRAWAL (R. 89) which notice followed his visit to the County Jail at which time he told the defendant that he did not want to handle his "BUTCHERED CASE" especially after the Court had made it clear to him that he could not give the Appellant a "FAIR TRIAL" in view of the Court's denial of his "Motion for a continuance" (R.76) Which Motion is quoted (verbatim) on page 6, of this brief. Not only was the Appellant forced to NOT WANT his attorney but the Attorney, Mr. Ashworth was FORCED TO STAY ON THE CASE OF APPELLANT AGAINST HIS OWN WILL AND AGAINST THE WILL OF THE APPELLANT.

On this point, this Court has reversed the conviction of Ronald Penderville. (STATE v. PENDERVILLE 272 Pac. 2d. 820). In the Penderville case Lawyers were forced to stay on the

case when Penderville did not want their  
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services. It may be noted that in the Penderville case his Lawyers were WILLING and PREPARED . Which is just the opposite of the Appellant Myers's case - his lawyer, Mr. Ashworth was neither WILLING nor PREPARED, as clearly evidenced by his notice of withdrawal and His Motion for a Continuance respectively. Hence, paralleled to the Penderville case and equal if not stronger merit existent, - PREJUDICIAL AND REVERSIBLE ERROR HAS BEEN SHOWN.

Respondent continually emphasizes the ~~disappointment~~ appointments of Counsel to represent the defendant - two attorneys from the prosecuting agency and the others fearful of tribun<sup>ments</sup>al wrath. Such appoint<sup>ments</sup> and abuse of discretion appears to be a wide spread problem, as noted in the following cases.

COMMONWEALTH v. JESTER, PA. 441, 100 A. 993 holds that under the state Constitution, a defendant must be given a fair opportunity to present his defense and to that extent support our conclusion in the instant case, although under different facts. Our State Constitution Article 1, Sec. 9 Provides that the accused cannot be deprived of his liberty or property unless by the judgement of his peers or the law of the land. The "Law of the Land" like Due Process of Law" requires timely notice and an opportunity to defend. It is vain to give the accused a day in Court with no opportunity

to prepare for it, or guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case. Nor to secure reasonable time to prepare the defense... Every man is presumed innocent and when accused, entitled to a reasonable opportunity to prepare his defense, a citizen cannot be deprived of due process of law, though ever so guilty; if he could, it would be excuse for mob violence... (COOKE v. U.S. /cited/).

At page 18 of his Brief, Respondent (in his first paragraph) attempts to make what is "Common Practice" and what is Legal, synonymous in their meaning which is contrary to reason and the truth of law.

"Common Practice" may date from the burning of "heretics during religious persecutions in Ancient Rome to the burnings of "crosses" in America and in neither case were such actions condoned as being LEGAL however they were "COMMON PRACTICE" during their era. Appellant feels that the Respondent has again gone beyond the issue for if "Common Practice" and the "many instances" in which an act occurs is a criteria of acceptance or approval, then consistently, the "many instances" of crimes and their obvious "common practice" would render them legal.

evidence whatsoever, the Respondent attempts to sell another supposition in stating that the Appellant promised to plead guilty to a lesser offense. If such a promise was made, it would logically have been ~~made~~<sup>made</sup> to a person called by some name, yet the Respondent cannot NAME ONE - NOT ONE PERSON TO WHOM THE APPELLANT MADE SUCH A PROMISE OR EVEN SUGGESTED IT OR IMPLIED IT\* Not one such person can the Respondent name nor produce.

Respondent quotes 77-24-8 U.C.A. 1953 in an effort to substantiate his claim; however, he by-passes the fact that there is a time element involved in regard to the application of this rule. Surely it would not apply when THE DEFENDANT HAS BEEN PLACED IN JEOPARDY and the STATE is on " SHAKEY GROUND" as is clearly shown in: 77-24-13 U.C.A. 1953.

"When the defendant is convicted or acquitted or HAS BEEN ONCE PLACED IN JEOPARDY upon an information or indictment, the Conviction, acquittal or JEOPARDY shall be a bar to another information or indictment for the offense charged in the former, or for an attempt to commit the same or for an offense necessarily included therein of which he might have been convicted under that information or indictment".

(Underlining that of Appellant)

When "~~Common Practice~~" proves to be an infringement upon the "Guaranteed rights" of the accused it is fatal to acceptance as is seen in.

SNYDER v. MASSACHUSETTS, 291 U. S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674, 90 A.L.R. 575,

" The State is free to regulate the procedure of its Courts in accordance with its own conception of policy, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked Fundamental".

Still again at page 19 of his Brief, the Respondent asks the Court to attach some merit to still another supposition not borne out by the Record in this matter, and the Respondent admits this - " Though Appellant's Consent does not appear in the record, it is most logically presumed that he did either personally or by and through his attorney agree to plead guilty to Grand Larceny if the Robbery Charge was dismissed"...

Appellant submits that it is clearly seen amid the evident uncertainty of the Respondent as to just how he should state his claim that it may sound "logical" in his employment of

employment of such guesses as "personally"  
"or by and through his attorney"...

Whereas a look at the Record Pages 7-9 will show why the Respondent could not land his supposition and had to leave it dangling in an air of uncertainty. At those pages is the TRUE STORY that has not unto this day been disputed that the Appellant was FORCED TO PLEAD GUILTY TO GRAND LARCENY UNDER THE THREATS AND COERCION OF HIS ATTORNEY. It is defined in Law that "CONSENT" under any "agreements, Promises prompted by threats, Coercion, duress etc. are VOID, and declared for naught in a Court of Justice wherein Hon. David T. Lewis evidently presided in view of his granting the Appellant a change of a Plea that was FORCED upon him. Another point as to consent rests in the fact that the party against whom the affidavit was based could not (truthfully) and did not dispute the Appellant's truth of his using threats and coercion to effect the said guilty Plea.

The United State Supreme Court took the following position relative to Mississippi

officials using Corrcion and brutality to HORROR



three negroes to CONSENT to signing confessions.

" Because s State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and the torture chamber may not be substituted for the witness stand. The State may not permit the accused to be hurried to Conviction under mob domination where the whole proceeding is but a mask without supplying corrective process.

BROWN et al v. STATE of MISSISSIPPI v. 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682.

MOORE v. DEMPSEY, 261 U. S. 86, 91, 43 S. Ct. 265, 67 L. Ed. 543;

POWELL v. ALABAMA 287, U. S. 45, 53 S. Ct. 55 77 L. Ed. 158, 84 A. L. R. 527....

"Nor may a state through the action of its officers, contrived a conviction through the PRETENSE OF A TRIAL which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of Court and jury... "

MOONEY v. HOLOHAN 294 U. S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791. 98 A.L.R 406

At bottom of page 21 of his Brief, Respondent implies that what would be "an undesirable situation# to the state should work to deprive the accused of the Appellant of an over-due receipt of Justice. ... Respondent States:

" It would seem to be a very undesirable situation where, because of a minor procedural mistake on the the part of the Prosecuting attorney such as occurred in this case, the defendant in a criminal action should be turned"loose".

aware that the APPELLANT SHOULD GO FREE but he requests the contrary. Surely the Respondent is aware that the following fatal items are contained in what he terms " A minor procedural mistake". :

1. The Jury had been impaneled and sworn to try the accused (& Oliver Townsend)
2. Consistent with the fact of No. 1. the Appellant was in jeopardy.

HENCE

3. Having been placed in jeopardy, the State could not LEGALLY bring an "included offense" - (Grand Larceny) against the Appellant lest such action clearly violate 77-24-13 U.C.A. 1953 which expressly declares that jeopardy would be a BAR to an included offense thus giving the Court no jurisdiction over a BARRED OFFENSE.
4. Under Article I, SEC. 12 Const. of Utah Appellant could not twice be put in jeopardy for the same offense

At page 20 of his Brief, Respondent readily

admits: " There is no question about the law in Utah concerning former jeopardy. When the jury has been once impanelled and sworn the accused is placed in 'double jeopardy' when or if he is again called into Court to answer an information charging him with a crime based upon the same facts. "

However, faulty the Respondent's of Consent on the part of the Appellant may be, Appellant asks - HOW COULD CONSENT BE LEGALLY HAD IN A PROCEEDING THAT IN ITSELF IS UNLAWFUL



ALREADY ~~BLEN~~ IN JEOPARDY FOR THE ACTS (identical acts) constituting the Grand Larceny as attested by the Bill of Particulars furnished by the District Attorney -Record -P. 35.

Thus he could not enter consent in a subsequent proceeding because any such proceeding forbidden by State's own Statute .... 77-24-13 UCA.1953 which is quoted (verbatim) on page 31 of this Brief and which definitely BARS the information of Grand Larceny from ever being legally brought against the Appellant after having been placed in jeopardy on the Robbery charge which the District Attorney states are "One and the same offense". (See Record P. 35).

The foregoing is substantiated People v Chalmers.....

" A discharge of the jury trying a party charged with a felony, unless for an overwhelming necessity, such as death, insanity and the like, or at the request of such party effects his acquittal, because the accused party is placed in jeopardy when the jury is sworn".

PEOPLE v. CHALMERS 5 U. 201, 14 P. 131.

Nevertheless, the Respondent asks the Court regard such a State and Constitutional violation as a "Minor Procedural Error" to allow the injustice to age further although



the Appellant has been continually imprisoned in excess of twenty-seven (27) months.

Relative to the Respondent's admission of a "Minor Procedural Error" and asking that such be over-looked, such a request disregards the Due Process clause of the Fourteenth Amendment as set forth by Mr. Justice Brandeis.

WHITNEY v. CALIFORNIA. 274, U. S. 357, 373, 47, S. Ct. 641, 647, 71 L. Ed. 1095

" Despite arguments to the contrary which had seemed to me persuasive, it is settled that the Due Process Clause of the Fourteenth Amendment applies to matters of substantive law AS WELL AS MATTERS OF PROCEDURE."

Respondent at page 22 (2nd. paragraph) of his Brief states that the Appellant was given "an unfair advantage over the state" It is beyond any reasonable hypothesis that the Respondent can really believe a poverty-stricken negro of limited education could get an "unfair advantage over the competency and genius that populated the Court. Such an insult to intelligence reaches its zenith when the Respondent states - in the same paragraph, that..." At this point Appellant was in the VERY ENVIABLE POSITION OF GOING TO TRIAL



not on the Robbery trial as originally set up but under the lesser charge of Grand Larceny a charge he had already pled guilty to".... (UNDER FORCE).

It is somewhat unbelievable that the Respondent after admitting that the Appellant had "TWICE BEEN IN JEOPARDY" (P. 20 of his Brief) and knowing such to be definitely contrary to the Rights of the Appellant, would say that the appellant subsequently should have gone to trial at all. Above all, he states that the Appellant was in the "very enviable position of going to trial ....

Not going home to his pregnant wife (at that time) and two infant daughters who needed his support...

Not going HOME because he had twice been put in jeopardy for the same offense and refused to help the State get off "SHAKY GROUNDS" BUT there is something to be "envied" in a mockery of justice wherein an American Citizen and Honorably discharged Veteran is kept from his family after being twice put in jeopardy, forced to enter a guilty plea, sent to the State

Hospital when he sought "Constitutional Guarantees", and finally forced - without Counsel (Prepared & Willing Counsel), without any "Material Witnesses" in his behalf, and without being confronted with one of two com-plaintants against<sup>him</sup>/and as the duration of such unjust treatments exceed twenty-seven months of continuous imprisonment, Respondent pleads " don't release him - we only made a 'MINOR PROCEDURAL ERROR'" which of course is <sup>a</sup>/name for gross injustice.

It is noted that the Respondent dealt at length with the question of of the Appellant not being allowed~~d~~ to enter~~e~~ an amended plea of not guilty by reason of insanity - Respond. Brief PP. 22-24. Which question Appellant feels he has sufficiently covered in his Appellant's Brief.

It is also noted that the Respondent failed to mention an "AMENDED PLEA" that the Appellant WAS ALLOWED TO ENTER. That Plea being "Former Jeopardy". The disregard of the Respondent relative to this Plea; is understandable in view of the Trial Court having made (committed)





a "REVERSIBLE ERROR" in disregarding such a Plea in view of this Court's rulings accordingly.

AT RECORD - Page 173

APPELLANT: Your Honor does the Record show, I'm sorry, that I entered an AMENDED PLEA OF NOT GUILTY BECAUSE OF PRIOR JEOPARDY. Does the record show that.

THE COURT: Well, Mr. Myers, I am not prepared to say. The file here is very thick and it consists of a lot of your papers and letters and ~~it~~ pleadings and you are at liberty to look at the file and determine for yourself what it shows.

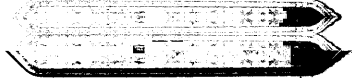
APPELLANT: Well, I would like to know if the Court was going to be recognized well then I would be allowed to say something about it, something on the prior Jeopardy. That Plea was entered before Judge Lewis (Judge Ellett) Because of Prior Jeopardy.

THE COURT: That matter is not in issue at this time in this case, so far as I know.

APPELLANT: Yes Sir.

THE COURT: The only Plea that is here that is officially made is that of not guilty and upon that ~~issue~~ we will try the case.

The foregoing extract from the record  
the record in this case shows that the issue  
is not being ~~raised~~ for the first time on appeal.  
Nor has the Appellant chose this time to raise  
the point as is seen in the APPELLANT'S BRIEF  
(heretofore filed /May 7, 1956) PP. 26-27).



That the forestated positions taken in regard to the Appellant's "Amended Plea" of "Former Jeopardy" constituted a "REVERSIBLE ERROR" is corroborated as follows:

UTAH CODE ANNOTATED 1953 - 77-27-1.

"Under this section the defense of Once in Jeopardy raises an issue of fact to be determined by a Jury and the Court Commits no error in refusing to rule as a matter of law upon the evidence that the defendant had been placed in jeopardy by a former trial. The Court should require this of the jury and should not discharge them until they do so. A judgement on the verdict without such finding will be reversed. In re: Barton, 6 U. 264, 21 P. 998 PEOPLE v. KERM, 8 U. 268, 271, 30 P. 988. This section was also Applied in STATE v. THOMPSON, 58 U. 291, 296, 199 P. 161, 38 A.L.R. 697.

Documentary Proof of the Appellant having entered said Plea of former jeopardy is attached in the form of certified copies of the original transcript of proceedings at the time of Plea.

It is interesting to note that the District Attorney who represented the state at the time the Appellant entered said plea and Hon. A. H. Ellett who allowed the Appellant to enter the Plea WERE BOTH PRESENT IN COURT WHEN THE APPELLANT (at Record - P. 173) CALLED THE COURT'S ATTENTION TO THE FACT THAT HE HAD ENTERED SUCH A PLEA. Neither his Honor, nor the

District Attorney informed the Court of their participation in the proceeding wherein the Plea raised was entered.

At page 24 of his Brief, Respondent possibly overly-conscious of the fact that the Appellant should have been released at the robbery trial states that the jury found the Appellant guilty of ROBBERY which of course is not correct.

Respondent goes on to state that Luck testified that a watch which he had purchased A YEAR PRIOR to the robbery (1953) was "HE GUESS" worth about fifty dollars at the time of the taking despite the fact that he only paid seventy-three dollars for it.

A sharp contrast is noted between the "GUESS" of LUCK relative to his property and the expert opinion of the District Attorney at pages 152 and 38 respectively. The District Attorney stated at page 38 that Luck's watch was only worth \$10.00 - surely the authoritative appraisal of the District Attorney is not to be discarded in favor of a "GUESS" of a complainant whose "Guess" could contain the sentiment of

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of having associated the watch with a relative or girlfriend. What the value of the watch is to luck is not in issue for personal attachment and/or fondness in conjunction with sentiment and other irrelevant but influential factors would have a natural tendency to cause an exaggerated appraisal on the part of the owner.

"Where it is not first shown that an article has market value, the answer of a witness when asked what is the Market value is inadmissible"

SMITH v. GRISWOLD, Hun. (N. Y.) 273

In this connection at Record. P. 152:

MR. ANDERSON: Now what is the value of the watch that you had? what kind of watch is exhibit one that you say that you had at that time?

MR. LUCK: It is a twenty-one jewel Lord Elgin.

MR. ANDERSON: And when had you purchased it ?

MR. LUCK: Oh, about a year prior to that.

MR. ANDERSON: What had you paid for it?

MR. LUCK: Seventy-three dollars.

MR. ANDERSON: And do you have an estimate of the value at the time it was taken from you?

MR. LUCK: Well, I GUESS about \$50.00

Appellant submits that probably if Luck's mother had given him the watch his answer would

probably have been "I wouldn't take a

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a thousand dollars for it.

Various Courts have this to say about

"GUESS" work and personal appraisals:

"What a party paid for property furnishes by itself no test of value".

MILLER v. BRYDEN, 34 Mo. App. 602

In PEYSER v. LUND, 89 N. Y. App. Div. 195, 85 N.Y. Suppl. 881.

"Holding that proof that Plaintiff paid a certain sum to the owner for loss of goods while in his possession was not proof of their value".

It is apparent that in the foregoing line of questioning by the district Attorney that he

was asking for LUCK'S opinion and even after

he answered Mr. Anderson repeated (R. 152)

...MR. ANDERSON: Is that your best OPINION ?

MR. LUCK: YES.

Hence, Luck answered as to his opinion.

Such establishment of value has been not been

accepted in other Courts....

"Evidence of value by mere opinion of a witness is not sufficient unless he is shown to possess knowledge of the subject".

EDMONDS v. STATE 42 Nebr. 684, 60 N. W. 957

"Opinion of value can be given ONLY by an EXPERT"

ENGSTER v. STATE 11 Nebr. 539, 10 N. W. 453

"The owner not being an expert cannot testify to the value of the goods to him".

BROOKS v. STATE 28 Nebr. 389, 44 N. W.

Respondent admits at page 24 of his Brief that the value is determined by what the Property's Market Value would have been at the time of the Larceny.

Yet a discredit to this rule is seen in the Record at Page 107 which contains a SUBPOENA issued for the State's witnesses .. at Mid-page are the words ..."DEAN JONES AND WAYNE LUCK ARE DIRECTED TO BRING THEIR WALLET AND WATCH INVOLVED IN THIS ACTION".

Obviously the property mentioned, if the same, had been released from evidence near sixteen (16) months (July 1, 1954 - November 25, 1955)... sixteen months out of the evidence room ... sixteen months away from the Officers who claimed to have "Initial the property and placed it in evidence"... and still such property, or some other property is requested by the state to use in a proceeding that bore the name of a trial.

If property having been out of custody, out of the evidence room approximately sixteen (16) months was returned and not replaced Mr.



Luck ~~stated at~~ Page 154 of the record that the band had been originally broken ... at the trial the watch had A NEW BAND, if the same watch as substantiated by Arlene Thompson - R. 285:

APPELLANT: Miss Thompson when you saw those watches down in the lower Court sometime in May (1954) when my preliminary hear was there watches look like that then ?

MISS. THOMPSON: No, I don't believe so, this one was broken down there and this, there are different bands on them if I remember correctly.

That NEW WATCH~~X~~ BANDS WERE VIEWED BY THE JURY; that improved property PART OF WHICH WAS NOT CONTENTED AS HAVING BEEN STOLEN BY THE APPELLANT WAS view<sup>d</sup> by and ruled on by the jury "Was of little consequence". states the Respondent.

Surely not, agrees the Appellant - the illegal admission of IMMATERIAL EVIDENCE on which the jury's verdict had to be based consistent with the offense as charged - surely it was "OF LITTLE CONSEQUENCE" to the Respondent and the prosecuting agency - their/liberty was not and is not in jeopardy.

A completely NEW BAND is put on the watch and the Respondent states at the bottom of page 29 (of his Brief) "THERE WAS NO MATERIAL CHANGE IN THE APPEARANCE OF THE WATCH". despite the

BANDS would naturally be a part of the jury's appraisal and despite the fact that Luck stated that he had the watch fixed. (?)

" The value to be proved is that at the time and place of the Larceny"

PEOPLE v. COLE, 54 Mich. 238, 19 N. W. 968.

Respondent attempts to have the HEARSAY testimony as to DEAN JONES pass as admissible despite the fact that at page 152 of the record LUCK admits freely that all he knew about what happened to JONES - IS WHAT JONES TOLD HIM...

MR. ANDERSON: Now while you were inside and this robbery was going on did you observe what happened to Mr. Jones what he was doing?

MR. LUCK: he was over against the <sup>other</sup> wall. I could only see him out of the corner of my eye and the other fellow was over him. Actually I couldn't see very well"

MR. ANDERSON: You don't know what happened to him specifically?

MR. LUCK: NOT EXCEPT WHAT HE TOLD ME.

Surely there is no question about what Jones told Luck being PURELY HEARSAY and should not have resulted in its admission nor the receipt of any property supposedly belonging to a DEAN JONES which admission stemmed from such

" A witness cannot express opinion bottomed on HEARSAY information"

STATE v. HADLEY 65 U. 109, 234 P. 940

" Where the only evidence should have been excluded as hearsay, a conviction cannot be supported"

STATE v. HAWKINS 95 Ga. 20, S. E. 217.

Appellant submits that Dean Jones or some one answering to that name was the only person according to the allegations, that could say that the property alleged to have been stolen, was taken without his consent and/or that the property taken was actually his property, thus his presence was definitely needed if evidence supposedly stolen from him was to be entered and ruled upon by a jury, for the Jury had no way of knowing that a Dean Jones actually owned a watch and wallet; that he did not consent to his property, if his, being taken; nor that a Dean Jones whose property had been taken illegally, actually exists - DEAN JONES, if there is such a party having been injured, should have been present in court as held by this Court ...

" The accused is entitled to be in a position where he can both see and hear the witness" ..

(Ibid) " Where the question of the Constitutional right of the accused to be confronted with the witness against him was involved, Mr. Justice Miner, the writer of the opinion in speaking of the rights guaranteed the accused by our constitution (Art. I. Sec. 12) said: " By our Constitution it is clearly made manifest that no man shall be tried and condemned in secret and unheard".  
STATE v. MANNION, 19 Utah, 505, 57 Pac. 542, 45 L. R. A. 638, 75 Am. St. Rep. 753..

Respondent (P, 25) states that Luck testified at pages 181-83 of the Record as to exhibit having the "general appearance of Jones' property whereas the contrary is noted on page 183:

BY MR. MYERS: Mr. Luck would you definitely say that this is Mr. Jones's watch?

MR. LUCK: No I couldn't say that.

MR. MYERS: You couldn't say that? it could be anybody's watch as far as you can say.

MR. LUCK: AS FAR AS I KNOW YES.

Thus one of the most important features was not established that is ownership of the watch claimed to be the property of an unknown man to the Court and jury - named DEAN JONES.

"Ownership must be proved by sufficient evidence or the conviction cannot be supported"  
THOMPSON v. STATE, 23 Tex. App. 356, 5. S. W.

" Identity cannot be proved by mere similarity". BUCHANAN v. STATE, 109 Ala. 7, 19 So. 410. Also STATE v. DUE, 27 N. H. 256

claimed ownership by a un-produced witness supposedly named Dean Jones should not have been introduced upon the testimony of Luck as it has been already shown that all that Luck knew about what supposedly happened to Jones is what Jones told him - hence, HEARSAY and following Courts hold....

" Hearsay evidence cannot be introduced for identification".

WHIZENANAT v. STATE, 71 Ala. 383

GIBSON v. STATE 114 Ga. 34, 39, S. E. 948

STATE v. HARGRAVE, 97 N. C. 457, 1. S. E. 774.

The foregoing applies to the wallets that in the subpoena (R. 107) the men (JONES & LUCK) are asked to bring them to court- (BRING WALLETS TO COURT THAT HAVE BEEN IN THEIR POSSESSION APPROXIMATELY 16 Mos.)

Naturally, Mr. McHenry's Initials were not still on the wallets after sixteen months in the possession of Luck & Jones; therefore, Mr. McHenry had to take Luck's word for it that the same Wallet was being introduced in evidence thus another usage of HEARSAY evidence contrary to the foregoing authority against such.

At pages 30-31 of the APPELLANT'S BRIEF

attempt to excuse the absence of A N JONES before eliciting the hearsay testimony of Luck as to Jones. In answer to a letter he attempted to enter the Court told him he may "file it but it was "hearsay" as to the fact".

The following Courts have held that the production of the witness is not excused by sickness at the time of the trial.

R. Co. v. MAYER 91 Ill. App. 372

THORNTON v. BRITTON, 144 PA. St. 126, 131, 22 Atl. 1048

SCOVILLE v. HANNIBAL etc. R. Co. 94 Mo. 84, 876. S. W. 654.

(Paralysis) Reg. v. WILSHAW, C&M 145, 41 E. C. L. 84.

COMM. v. McKenna, 158 Mass. 207, 33, N. E. 389

STATE v. STAPLES 47 N. H. 113, 119, 90, A. M. Dec. 565

"Sickness" was the grounds on which Mr. Anderson sought to excuse the Appellant's right to be confronted by a DEAN JONES.

Appellant submits that only because property alleged to be owned by and having been taken from a DEAN JONES without his consent (consent) was entered in evidence against him

does he complain about his not being present at the trial and especially because it is clear that the property of someone other than Luck had to be entered to satisfy the State's version of Grand Larceny. The only expert testimony in this case as to value was made by the District Attorney (Record P. 38) at which page he states that the total value of property taken from Wayne Luck was \$ 22.00 dollard . Therefore the property of unestablished ownership had to be added to attempt a figure in excess of fifty dollars - as required under the information and "HEARSAY EVIDENCE" had to be entered.

The following Courts have taken this position as to such practice:

" The values of articles of property stolen from different owners or even from the same owner at different times CANNOT BE COMBINED TO MAKE OUT AN OFFENSE OF GRAND LARCENY".

ALABAMA - BROWN v. STATE 105, Ala. 117, 16 So. 929.

"The Conviction must be for petit Larceny if the Prosecution does not affirmatively prove the value required for Grand Larceny".

PEOPLE v. COMYNS 114 Cal. 107, 45 Pac. 1034.



In the foregoing pages the Appellant has affirmatively shown beyond any reasonable hypothesis to the contrary that rights guaranteed him through the virtue of the state and Federal Constitutions have been somewhat wholly denied in such specific acts as follows:

(1.) Appellant has been twice placed in jeopardy for the same offense under informations Nos. 14608 and 14571 both of which the District Attorney admits at page 38 of the record "are one and the same" offense. The Respondent at page 20 (3rd. Paragraph) of his Brief stated that the Appellant was twice put in jeopardy for the same offense but asks that such a violation be excused as a "MINOR PROCEDURAL ERROR."

(2.) That in violation of the State's own CODE 77-24-13 U.C.A. 1953, another information(14608) was brought against the Appellant alleging that he committed the "identical" and "same" acts) for which he and his codefendant, Oliver Townsend were already in jeopardy at the very moment that the additional information was brought before the Court and the Appellant was forced by coercion and threats to enter a plea of guilty against his will.

(3.) The Appellant was denied "Due Process of law" under the Guarantees afforded under the Fourteenth Amendment to the U. S. Constitution in that he was denied the right to the assistance of competent counsel in his behalf. despite the "COMPELLED" services of an UNWILLING and UNPREPARED Mr. Ashworth (RECORD PP.89 & 82 Respectively). Appellant was denied a compulsory process to compel the attendance of witnesses "MATERIAL WITNESSES" in his behalf and to be confronted by an important witness against him.

That is DEAN JONES who, if existent, is claimed to own the property entered against the Appellant in persuading the Jury that such property had been stolen by the accused.

(4.) Contrary to the Provisions of UTAH's 77-27-1 U. S.A. 1953, the Appellant's "Amended Plea" of FORMER JEOPARDY was not recognized by the Court nor put before the Jury. The Jury was dismissed without any knowledge of nor ruling on the Appellant's herein attested Plea of former Jeopardy hence consistent with former rulings by this Honorable Court in State v. Kerm & STATE v. BARTON ... A reversible error was committed.

(5.) Mr. Wayne Ashworth, Att., was forced to stay on the Appellant's case against the will of the Appellant and against his own will as seen in his Notice of Withdrawal, (R.89) Such force as to Counsel for a defendant who did not want such compelled services, was found to be PREDJUDICIAL and REVERSIBLE in STATE v. Penderville, (U. 272 Pac. 2d. 820).

(6.) After the State failed to affirmatively establish value in excess of \$50.00 as required and only succeed in showing that \$22.00 was the only admissable and competent evidence, such evidence, if really admissable, should have in itself demanded a verdict not exceeding PETIT LARCENY.

In view of the foregoing numerically arranged injustices, the question naturally arises - IS A CONVICTION REALLY SO PRECIOUS THAT IT MUST BE SOUGHT BY SUCH ILLEGAL MEANS??

As forestated, Attorney General, Hon., Herbert Brownell Jr., contends that the prosecution has a "duty over and above prosecutions and

Justice in this case would have meant that when the Appellant's Co-defendant, Oliver Townsend, held under the same "Ear-witness" "identification" as the Appellant was released "in the interest of justice" on July 1, 1954 despite the fact that at the time of his release, he was still under the Jurisdiction of Judge, Mays for having shot off some part of his wife's nose. The Appellant, NEVER HAVING BEEN UNDER THE SLIGHTEST SUSPICION FOR ANY CRIME OF VIOLENCE, - Under the "Equal protection Clause" and "equal justice for all theory" the Appellant should ALSO have been released "in the interest of justice". Instead of being forced to plead guilty to an information that the State's own CODE -(77-24-13 UCA. 1953) says could not legally be brought against the Appellant i.e., "AN INCLUDED OFFENSE" after having been put in jeopardy.

The Respondent has relied heavily upon showing ( contrary to reason) that the matters complained of by Appellant were all within the scope of the Academic or Law Library, Funding for acquisition provided for Institute of Museum and Library Services

discretion of the trial Court, which of Course is a theory completely unsupported by the Constitution of the State of Utah.

The following has been said for the benefit of those who would try to persuade with such a contention...

" It is authoritatively stated that the right of a citizen to "Due process of Law" must rest upon a basis more substantial than favor or discretion" .. 6. R. C. L. 443.

The Respondent at page 4 of his Brief calls attention to a supposition or rumor that the Appellant had "threatened to sing the Star Spangled Banner". Any expressed desire on the part of the Appellant, a World War II., honorably discharged Veteran should go to the credit of his patriotism from having spent 19 months of "Honorable Service" in the Pacific Theater of War and should not be a factor against him in a Court of Justice.

Appellant submits that the conduct of the accused was that of "Myers a former mental patient" and not "Myers the Appellant", and such conduct - however, "reprehensible" should not have deprived the Appellant of " Even-handed

Appellant of "even-handed Justice" afforded him through the Fourteenth Amendment ..(STATE v. ST. CLAIR).

In re: McKEE, 19 U. 231, 57 P. 23 and in re: MAXWELL 19 U. 156, 61 P. 557.

The following position is taken relative to the conduct of the accused:

" Every citizen regardless of his action OR condition, is entitled to the equal protection of the law whether it applies to his personal or property rights. Every law which offends against that principle in the Federal Constitution is necessarily invalid".

A close parallel is noted between the case of the Appellant and " THE SMITH CASE" (Sat. Evn. Post, -8-15-53 PP. 30 & 102-106) James Colbert Smith is a negro; he has a history of mental illness; he has an extensive prior criminal record. ... " The Smith case was Justice's lonely orphan. The web that was woven in it gave Supreme Court Justice Felix Frankfurter " an unrelievable feeling of disquietude" ... the Smith case was kept alive for five years only because A HAND-FULL of



men believed the principles it embodied were vital to us all...

" .. To be specific do the courts have an obligation to protect the accused who come before them? Do the prosecutors share in this obligation? or is the task of guarding defendants, the unique and lonely function of defense attorneys" are the

...These questions that go to the heart of the Smith Case and indeed they rise to the level of the United States Constitution itself.

..." Justice feeds on precedence and every time a thug such as Smith is denied his Constitutional rights, it becomes much easier to deny these rights to the presumably innocent.

" As white-haired Federal District Court Judge, George A. Welsh - one of the key figures in this case - observed: ..... " I'll tell you gentlemen, the Constitution of the United States is ABOVE US ALL, and all I am attempting to do is see if the law of Pennsylvania compels him - (SMITH) TO GO INTO THE RING WITH ONE HAND TIED AND EXPECTS HIM TO FIGHT A BATTLE...this is a most important situation... we are dealing with the Constitution , - that is a document that will be torn to shreds unless the judges do their duty every bit of erosion, - every time you belittle it, every time you ignore it, even though the crime may be heinous, is destructive to the fundamental rights of humanity".

... Yet, let it be said: the questions of law that have been raised here were not posed in any attempt to whitewash Smith or deny the callousness and brutality of the killing. The one issue is whether what was done to him, erodes the Constitutional Guarantees intended to protect us all.."

Again the Appellant asks it a conviction so precious to the state that it must be sought in the absence of any regard for " Constitutional Guarantees intended to protect us all"???

With what the Respondent at page 17 of his Brief calls "the Appellant's misconception of the law", the Appellant now comes before this Honorable Court seeking justice on the foregoing denials of " Guaranteed rights".

Mr. Justice Coulter had this to say about the appearance in his Court of those persons often termed - " underprivileged", "forgotten men at the bottom of an economic pyramid" and " Cursed like chickens that still come home to roost"...

Mr. Justice Coulter: "When the humblset citizen comes into this Court with the Constitution of his Country in his hand, we dare not disregard the appeal". BROWN v. HUMMEL, 6. Pa. 86, 97, 47 Am. Dec. 431.

That a conviction by any means other than those expressly set forth in the Constitution of the United States should not be condoned, has already been shown in the foregoing cases cited.

Mr. Justice Frankfurter has taken a position synonymous with rulings by this Court ...

In re: SACHER v. UNITED STATES 343 U. S.



1. (1953) - "Bitter experience has sharpened our realization that a major test of true democracy is the fair administration of justice... time out of mind this Court has reversed convictions for the most heinous offenses even though no doubt as to the guilt of the defendants was entertained. They were reversed because THE MODE BY WHICH GUILT WAS ESTABLISHED, disregarded those standards which are so precious and so important to our society".

The Appellant should no longer be held in excess of the near twenty-eight (28) months that he has spent continuously behind prison walls, during which time clearly violated rights have gone without any form of redress.

Respectfully submitted,

  
EUGENE MYERS, Appellant