

1989

Utah v. Tolman : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

IN THE UTAH SUPREME COURT

STATE OF UTAH,)	
)	
Plaintiff/Respondent,)	Case No. <u>890332</u>
v.)	
	)	Ct. of App. No. 870407-CA
RALPH TOLMAN,)	
)	
Defendant/Petitioner.)	

PETITION FOR WRIT
OF CERTIORARI

PETITION SEEKING REVIEW OF UTAH COURT OF
APPEALS AFFIRMANCE OF THE CONVICTION OF
TAMPERING WITH A WITNESS, A CLASS A
MISDEMEANOR, IN THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF
UTAH, BEFORE THE HONORABLE RAYMOND S. UNO

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Clerk, Supreme Court, Utah

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OPINIONS OF THE COURT

State v. Tolman, Harman, Case No. 870407-CA, was filed April 27, 1989, and later published at 107 Utah Adv. Rep. 61; ____ P.2d ____ (Utah 1989).

The companion case, State v. Harman, Tolman, Case No. 870290-CA, decided January 10, 1989; 99 Utah Adv. Rep. 61; ____ P.2d ____ (Utah 1989), preceded it.

JURISDICTION

Petitioner seeks certiorari pursuant to Rules 42 and 43(a)(b)(c) and (d), Rules of the Utah Supreme Court, for review of the decision of the Court of Appeals entered April 27, 1989.

A timely filed Petition for Rehearing was denied by the Court of Appeals by Order entered May 22, 1989. Extensions of time to file this Petition were granted until July 21 and July 28, 1989.

STATEMENT OF FACTS

In May, 1983, a fire destroyed a building in Murray, Utah, which housed both private and Salt Lake County government offices. Dean C. Larsen, Assistant Murray Fire Chief, investigated and concluded that the fire originated in a county office owing to misuse of a space heater. Ralph Tolman, (Petitioner), was assigned by his boss, Don Harman, Chief Salt Lake County Investigator, to also investigate the fire's cause and origin. Tolman did so and orally reported his agreement with Larsen's opinions. Immediately thereafter, Tolman was relieved of the investigation and the county hired an independent private fire

investigator, Jim Ashby, in his stead. On June 6, 1983, Ashby reported that his investigation resulted in a different conclusion; i.e., that the fire did not originate in county space nor was it caused by the space heater. State v. Tolman, 107 Utah Adv. Rep. 61, 62, (para 2), April 27, 1989 CA.

On August 1, 1983, Tolman submitted his seven page report per his original opinion and provided a courtesy copy of the report to Larsen, contrary to office policy. Tolman's supervisor rejected the report as did Harman, (after Tolman refused to accept the other's rejection), who also ordered Tolman to prepare a second report without any conclusions or opinions. Fearing that his employment would be jeopardized if Harman learned of the courtesy copy to Larsen, Tolman contacted Larsen and told him about Harman's anger over the contents of his report and of his tenuous job security and further asked him to conceal the report so as to ensure Harman would not find out about it. (107 Utah Adv. Rep. at 62, paragraph three.)

Tolman did; however, advise Larsen that they both should tell the truth about the report and it's contents, other than to Harman, (if Harman did take an action). (Addendum K).

After vociferous objections to Harman's rejecting his report, Tolman, on August 25, 1983, submitted a one-page "report" which said virtually nothing of import and contained no opinions. Harman approved and filed that report. (At 62, paragraph 3).

The private tenants of the demised office building brought a civil action against the county in 1984. Larsen was

deposed by plaintiffs' counsel in November, 1984, but failed to produce the seven-page Tolman report because he wanted to keep Tolman out of trouble with Harman. He did so without asking Tolman or ever having spoken to him about the report since the 15-month-old discussion. (Id., at 62, para. 4.; Addendum C).

In 1986, a grand jury was called to investigate a range of potential criminality involving public officials; this case among them. The "targets" were subpoenaed to testify with accompanying written notices advising them of the specific nature of potential charges. Tolman, however, was among the group of persons receiving "mere" witness subpoenas. He appeared to testify on April 9, 1986, and was met outside the jury room by special prosecutors Rodney Snow and Larry Keller and their investigator, Lorin Brooks. He was then advised of his "target" status but only with a generic reference to evidence tampering involving the fire investigation. He was afforded an opportunity to speak with an attorney but advised that his lawyer could not be present inside the jury room with him. (All other targets and witnesses were allowed to have inside counsel.) The record reflects no advisory of his privilege against self-incrimination. Tolman at first expressed a desire to leave but opted to stay and testify when advised that counsel would have to remain outside, anyway. He testified a second time to the same matters at a later date. (Paragraph 4 at 62, summary).

On October 9, 1986, Tolman was indicted for witness tampering, evidence tampering, official misconduct and

conspiracy. He filed a number of pre-trial motions. Those denied which are pertinent hereto were motions seeking a preliminary hearing and a Bill of Particulars. (Id.)

Following a three week trial, Tolman's motion to dismiss the evidence tampering charge was granted. The jury was allowed to take Tolman's grand jury testimony into deliberation. The jury voted to acquit both Defendants (Tolman and Harman) of conspiracy; however, Tolman was convicted of felony witness tampering and official misconduct, a misdemeanor. The felony was reduced to a misdemeanor at sentencing. (Id.)

On appeal, the official misconduct conviction was reversed, (insufficient evidence), but the conviction for tampering with a witness was affirmed. (Id.) (Harman's conviction was reversed in toto.)

QUESTIONS PRESENTED FOR REVIEW

The following questions are raised owing to Petitioner's assignment of error to the Court of Appeals panel's affirmance of the verdict and decisions in trial court:

1. Does the "right to appeal" include the right to a written, responsive opinion on all issues properly raised?
2. Were Petitioner's statutory and fundamental constitutional rights violated before the grand jury and did the panel's affirmance conflict with the decisions of this Court?
3. Can the state constitutional provision regarding preliminary hearing rights be "amended" by mere legislation?

4. Was the denial of a Bill of Particulars in direct conflict with the holding of this Court in State v. Bell, infra?

5. Is the Tampering With a Witness statute unconstitutionally vague and/or overbroad?

6. Does a verdict obtained from group prayer and obedience to the authority of the Mormon priesthood as conduit of the pre-agreed dispositive revelation run afoul of the "chance" or "outside influence" exceptions to non-impeachability?

7. Did prosecutor misconduct prevent a fair trial?

8. Was the evidence of Petitioner's guilt clearly insufficient and was the panel's affirmance thereof in conflict with the same panel's decision in the companion case?

I. THE COURT OF APPEALS REVIEW OF PETITIONER'S
CLAIMS WAS SO INCOMPLETE AS TO DEPRIVE HIM OF
HIS CONSTITUTIONAL RIGHTS ON APPEAL

Appellant's Brief(s) below carefully addressed eleven substantive issues, any one of which, could require reversal.

The panel below ruled on only four of Appellant's substantive claims of error.

The Court of Appeals has simply ignored the very crucial issues this case raises by labeling them "without merit," (without explanation). This type of "opinion" renders Petitioner's "right to appeal in all cases" an empty guarantee. Article I, Section 12, Constitution of Utah.

Rule 30, Rules of the Utah Court of Appeals, requires the majority opinion in a criminal case "shall" be in writing.

Both courts' rules (at Rule 9), admonish appellant's counsel that a docketing statement which lists the basis for appeal as, "the judgment of the trial court is not supported by the law or the facts," is unacceptable. It should be equally unacceptable for the written opinion on appeal to be nothing more than, "no merit." How else can the aggrieved be assured that the review of his claims was conscientious and thoughtful, as due process requires. (In accord People v. Rojas, 118 Cal. App. 278 (1981); Ex Parte Griffiths, 118 Ind. 83 (1981)).

II. THE APPEALS COURT ERRED: PETITIONER'S GRAND JURY TESTIMONY WAS OBTAINED AND ADMITTED UNCONSTITUTIONALLY

At trial and on appeal, Tolman argued that his grand jury testimony should not have been admitted due to the state's noncompliance with the Utah Code and constitutional rights respecting notice, counsel and silence of an accused.

The Court of Appeals, in the instant case, (107 Utah Adv. Rep. 61, 64), recites Utah Code Ann. §77-11-3, which states, inter alia, that a grand jury "target" shall be advised with particularity, of his target status, his right to the presence of counsel and his privilege against self incrimination.

By finding no merit in this argument the panel ignored evidence which clearly brings this case within the ambit of State v. Ruggeri, 429 P.2d 969 (Utah 1967), deciding apposite thereto. Tolman claims plain error and relies again on the pleadings submitted at trial. (R. 188-191, 200-205; Addendum H.)

Witness Brooks' (grand jury investigator) notes indicate that upon being informed of his subject status, Tolman "was prepared to testify as a witness not knowing he was being looked at as a subject". (R. 238.) Brooks' testimony recalled that as soon as Tolman was informed of his subject status, he stated, "Color me gone". (R. 537, T. 1027.) Brooks testified that Tolman was not given a complete Miranda warning outside the grand jury room. (R. 537, T. 1026.) Nor do his notes reflect that Tolman was ever informed outside the grand jury room of the specific nature of the prospective charges. (R. 238-240.)

Once before the grand jury, Tolman was told by the prosecutor that his right to counsel meant counsel could not be present with him in the jury room. When asked if he had conferred with counsel, he replied he had not since being informed of his "subject" status. (R. 244, l. 18-23.) The nature of the investigation into tampering with evidence was mentioned, but never was it clearly stated that Tolman was the "subject" of any specific charges. (R. 245, l. 2-15.)

A "subject" is an "accused" and he must be fully advised of all of his rights in light of the potential charges against him. Ruggeri, at 969. The Ruggeri court makes two observations absolutely pertinent hereto. The first says: (quoting People v. Tomasello, 48 Misc. 2d 156, 265 N.Y.S.2d 686),

[i]f a possible defendant or target of an investigation is subpoenaed before a grand jury and there testifies, whether or not he claims or asserts his privilege against self

incrimination, his constitutional privilege is deemed violated. Id. at 690.

This statement indicates that the violation commences upon the issuance of a subpoena to appear without notice of "subject" status. That Tolman was informed, however inadequately, of that status moments prior to his appearance does not cure the defect. Nor does Brooks ever say Tolman remained voluntarily. "Color me gone," evidences, however colloquially, a desire to vacate the premises. The special prosecutors' admonitions inside the grand jury room ring hollow when they are closely scrutinized.

The second and equally compelling observation made by the Ruggeri court has to do with waiver. It states:

It would seem that a witness who is unaware that he is a target of a grand jury investigation could not intelligently determine whether or not he needed counsel unless he was fully advised of the charges being considered against him; and until he has a full knowledge regarding that matter, he will not know when to assert his constitutional claim of privilege against self-incrimination. It would be difficult to believe that he could intelligently waive the right to counsel under such circumstances." [Emphasis added.] 429 P.2d at 975.

The apparently universal standard for waiver of a fundamental constitutional right is "knowing and intelligent". Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). This pertains both to the knowledge and understanding of the actual rights involved and how they inter-face with the nature of the charge. In this Court it means "real

notice of the true nature of the charge against him, the first and most universally recognized requirement of due process". State v. Gibbons, 740 P.2d 1309 at 1312 (1987). It would have been impossible for Tolman to make a knowing and intelligent waiver of his rights since the "real" nature of the charges was never explained to him. To infer from the brief record of the grand jury appearance what was meant by the cursory admonition is to engage in the kind of speculation which Gibbons proscribes. The error of the court in allowing segments of Tolman's grand jury testimony to be read into the record during the State's case in chief, was plain error of constitutional magnitude, which, when read in light of the whole record, cannot be said to be harmless. State v. Turner, 736 P.2d 1043 (Utah App. 1987).

The Tolman opinion also should have considered constitutional principles of due process and equal protection but it ignores the fact that of all the grand jury targets, Tolman was the only one who was not given advance written notice of his status; the only one who was not told of the specific nature of the charges; the only one who was advised that his attorney would have to wait outside the grand jury room; and, was in fact the only witness whose attorney was not allowed in the room.

Neither can one waive the right to counsel when he is expressly misled as to what it is. It is pure speculation to assume he would have waived the right if properly explained.

Further, the panel completely failed to recognize the privilege against self incrimination. It is not the same as the

Sixth Amendment right to counsel. Nowhere does the record show that Tolman waived the right to silence. Nor could he know what to be silent about without knowing the nature of the charges.

III. DENIAL OF A PRELIMINARY HEARING VIOLATES THE CONSTITUTION OF UTAH

The trial court erred in denying Petitioner's request for a preliminary hearing, as did the Court of Appeals in affirming. Article I, Section 13 of the Utah Constitution provides:

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. (Emphasis added.)

Although the constitution provides that following indictment a preliminary hearing is optional, Utah Rules of Criminal Procedure, Rule 7(c), states that a preliminary examination shall not be held if the defendant is indicted.

The Court rejected Petitioner's argument on this point, asserting the presumption of constitutionality of a statute doctrine, requiring a statute be found to "clearly violate some constitutional provision. Tolman at 64. (Citations omitted.)

The Tolman panel reasons that since Article I, Section 13 does not require a hearing, the legislature has the power to prohibit such hearings. (Id.)

How can it not be a conflict for the constitution to say the hearing may be held and the statute to say it may not be?

Rule 7(c) is a constitutional amendment which renders the constitutional provision completely emasculated.

Article XXIII of the constitution, however, prohibits any amendments by customary legislative enactment and prescribes a lengthy process which includes a referendum.

Where other discovery processes were also denied, this issue is even more critical, especially where objectionable hearsay was freely admitted on the conspiracy charge.^{/1}

IV. DENIAL OF THE PRE-TRIAL MOTION FOR A BILL OF PARTICULARS IS CLEAR ERROR

Tolman filed a Rule 4(e), Utah Rules of Criminal Procedure, motion and memorandum for a Bill of Particulars to seek information about the nature and cause of the charges against him owing to the broad and ambiguous charging language in the Indictment and sought information not contained in the indictment, which later proved proximate to Tolman's convictions. (R. 64-67, 89-90, 275-276; Addendum I). He argued below that to rule adversely would deny him information sufficient to prepare his defense. State v. Jameson, 103 U. 129, 134 P.2d 173 (1943); State v. Strand, (on remand) 720 P.2d 425 (1986). See State v. Solomon, 93 U. 70, 71 P.2d 104 (1937).

By failing to grant a Bill of Particulars the trial court wrongly failed to limit or circumscribe the area, field or transaction as to which the special prosecutors were allowed to offer "evidence." See State v. Spencer, 101 U. 287, 121 P.2d 912

(1942), overruled on other grounds, 4 U.2d 404, 295 P.2d 345 (1956).

Only a month before oral argument in the Court of Appeals, this Court decided State v. Bell, 92 Utah Adv. Rep. 22 (S.Ct., September 30, 1988), the dispositive authority on point. In Bell the prosecution did not provide information called for in a Bill of Particulars.

The Bell decision placed heavy burdens on the state's justifying opposition to a Bill of Particulars and narrow limits on a trial court's discretion to deny the motion. The trial judge in Tolman made no findings to support his denial, nor did the prosecution even come close to meeting the Bell test.

Bell is in direct conflict with the order of Judge Uno and the summary affirmance of the panel. It is a mystery why so clear a case, directly on point, could be ignored.

V. 76-8-508(1)(b) IS UNCONSTITUTIONAL

Tolman's conviction on Count IV, "Tampering With a Witness," was predicated upon conduct which is not clearly proscribed by §76-8-508(1)(b). The law fails to adequately inform what is prohibited. Even if the law is constitutional, the court nevertheless erred in failing to instruct the jury that acts toward withholding of evidence must be intended to cause it to be withheld from the official proceeding he believes is pending.

A. The Statute is Void for Vagueness and Overbreadth.

Tolman was convicted of violating 76-8-508(1)(b):

A person is guilty of a felony in the third degree if:

(1) Believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:

* * *

(b) Withhold any testimony, information, document or thing; . . .

That portion of the statute is unconstitutionally vague and overly broad. Subpart (b) mandates what may not be withheld but not the "what" it cannot be withheld from. Presumably, the legislature meant "withheld" from the "official proceeding believed to be pending or about to be instituted." The absence of some clear nexus between subpart (b) and subsection (1) makes it a crime to have a belief coupled with an unrelated act.

One could violate the statute by believing that an Immigrations hearing was occurring in Seattle while hiding from his wife his affair with their neighbor in Tooele.

The undisputed evidence herein shows that Tolman asked Larsen to withhold not the report, but to withhold from Harman the fact that Tolman had him given the report; not to keep it from Ashby's investigation or the civil suit (without a Bill of Particulars, one can only guess which one), but only from Harman, so he wouldn't get in trouble for violating office policy.^{/2}

No nexus of intent and official proceeding exists.

The statute is so plainly unconstitutional that the court's failure to address the issue is clear error. State v. Laird, 601 P.2d 926, 927, n.6 (1979); see Page v. United States,

282 F.2d 807 (8th Cir. 1960). At trial, Tolman objected to the statute-based instruction, claiming it created an offense out of a mere belief coupled with an unrelated act. (R. 532, T. 1428.)

It is inexplicable that the panel summarily rejected the constitutionality issue which is so crucial that it may be raised at any time, remotely so, or even sua sponte. (Laird, supra); (State v. Fritt, 463 P.2d 806 (Utah 1970)). The test is, "if the person's liberty is at stake." State v. Breckenridge, 688 P.2d 440 (1983); In Re Woodward, 14 Utah 2d 336, 384 P.2d 110 (1963). State v. Cook, 714 P.2d 296, 297 (1986); State v. Schad, supra; State v. Smith, 16 Utah 2d 374, 401 P.2d 445 (1965).

State v. Carlsen, 638 P.2d 512 (Utah 1981), held that, "[I]n order to find a statute unconstitutionally vague, this court must determine that it 'failed to inform an ordinary citizen who is seeking to obey the laws as to the conduct sought to be prescribed.'" Id. at 515, citing State v. Bradshaw, 541 P.2d 800, 802 (Utah 1975).^{/3}

An ordinary citizen, reading the subject statute, would be unclear as to what the word, "thing," meant and certainly could not determine what act relates to what proceeding. "There is no doubt that a statute that affects fundamental liberties is unconstitutional if it is so vague that persons of common intelligence must necessarily guess at its meaning." State v. Lindquist, 674 P.2d 1234, 1236 (Utah 1983); In Re Boyer, 636 P.2d 1085, 1088 (Utah 1971); State v. Packard, 250 P.2d 561, 563 (Utah 1952). "When a state action impinges on fundamental rights, due

process requires standards which clearly define the scope of permissible conduct so as to avoid unwarranted intrusion on those rights." In Re Boyer, 636 P.2d at 1087-88. The United States Supreme Court stated:

It is established that a law fails to meet the requirements of the Due Process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

It cannot be gainsaid that §76-8-508(1)(d) severs the marriage between the mens rea (knowledge or belief) and the conduct proscribed.

B. The Court Erred by Giving Instruction Number 39 in Favor of Tolman's Offered Instruction.

Even if the statute in question passes constitutional muster, it was error to fail to instruct the jury that the inducement must necessarily relate to a certain official proceeding. See State v. Turner, 736 P.2d 1043 (Utah App. 1987).^{/4} In Turner, this Court stated that improper instructions were used which "violate due process because they relate to the issue of guilt and relieve the State of its burden of proof." Id. at 1045. As in Turner, Instruction number 39 absolved the prosecution's burden without requiring proof that the alleged acts were related to a particular proceeding and done with the belief that a particular proceeding would be affected.

VI. BOTH COURTS BELOW ERRED ON THE
ISSUES RE: "GOD" AND THE JURY

The only facts on the jury prayer issue are those contained in the affidavits of juror Karl Anderson. (Addendum J-1 and J-2.) But both courts below have overlooked the real issues, all of which are compatible with the authority cited in the Tolman opinion at page 65:

Generally, a juror affidavit can only be used to impeach a jury verdict when: 1) the verdict was determined by chance or bribery, Rosenlof v. Sullivan, 676 P.2d 372, 375 (Utah 1983); Hillier v. Lamborn, 740 P.2d 300, 304 (Utah Ct. App. 1987); or 2) when extraneous prejudicial information was improperly brought to the jury's attention or an outside influence was improperly brought to bear upon any juror. Utah R. Evid. 606(b); State v. DeMille, 756 P.2d 81, 83 (Utah 1988); Hillier, 740 P.2d at 304.

The facts in Tolman are easily distinguished from DeMille. It was "the priesthood" not prayer or God which purports to usurp the court's authority.

The Tolman jury, however, violated both Rule 606(b) exceptions, first by agreeing in advance to vote however the prayerleader said God answered his prospective prayer. In violation of their oaths, they submitted the verdict to one juror's non-evidentiary "revelation". Unlike the juror in DeMille, there was no need for post-prayer persuasion since those who acquiesced to the authority of the priesthood did so in advance. That is as much based upon "chance" as a coin flip.

The second issue is more disturbing. Despite the decisions of the courts below; despite media reports; despite

DeMille comparisons; and despite the thin ice such an argument suggests, the "God" issue is not about the existence of God or about prayer or inspiration or revelation. The facts are that the prayer leader/juror asserted the authority of his high calling in the L.D.S. priesthood before organizing the jury into a prayer group over which he held dominion by virtue of his priesthood and the consequential subservience of the "lesser" Mormons.

Tolman's fate was submitted to an extrajudicial power much like one would submit it to a Ouija Board, as suggested in the DeMille dissent.

The panel justified its decision on the policy of non-interference in the jurors' religious beliefs. It did not look at the "chance" aspects.

To say "God" is not an outside influence is questionable. To say the overt influence of the "priesthood" to reach a verdict is not an outside influence is ludicrous.

This Court should recognize the power a juror who is an L.D.S. priesthood holder must wield over a less authoritative member, (especially women), considering our unique religious influence which almost guarantees a jury with a Mormon majority.

VII. PROSECUTOR MISCONDUCT: SPECIFIC INSTANCES AND CUMULATIVELY, PREJUDICED THE JURY

Argument II describes the first evidence of prosecutor misconduct re denial of fundamental rights before the grand jury.

The trial record is also replete with the prosecution's repeated and intentional attempts to conceal witness testimony, block discovery, intimidate witnesses and mislead the jury. (R. 59, 60, 128-134, 1037-1055, 1160-1219, 1184.)

Keller even told the jury that Tolman could testify if he wanted his side of the story heard. (R. 460, 470, 1205, 1225.) Tolman's motion for a mistrial was denied by the court. The damage required Tolman to take the stand.

A small sampling of the pertinent case law is: State v. Eaton, 569 P.2d 1114 (Utah 1977), comments about the assertion of a privilege or non-testimony warrants reversal if any doubt of prejudice exists; State v. Jerrell, 808 P.2d 18 (Utah 1980) and State v. Knight, 734 P.2d 913 (Utah 1987), nondisclosure of exculpatory evidence or Rule 16 (discovery) materials reversible error. (See also, State v. Bell, supra.)

Pages 29 to 42 of Appellant's Brief in the Court of Appeals fully sets forth the facts and the law on these issues.

VIII. THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION FOR WITNESS TAMPERING

The undisputed record simply cannot support the conviction herein. In fact, one only has to read the entire testimony of Larsen to conclude that the verdict is not supported by the evidence.

The panel's reasoning is so flawed that it seems impossible for them to have read Larsen's testimony.

1. Official Proceeding:

(A) juror could reasonably conclude Tolman believed that an official investigation was pending. (Emphasis added.)

2. Inducement:

Tolman instructed (Larsen) to destroy the report.

3. Withhold:

(Fifteen months later) Larsen withheld (the report) from a civil proceeding despite a subpoena . . . because he did not want to cause problems for Tolman. (Emphasis added.)

The panel validates the vagueness argument by holding that Tolman's belief that an investigation was going on in August, 1983, provides a criminal mens rea nexus ("knowingly or intentionally") with Larsen's independently withholding the report from a civil lawsuit some fifteen months later.

Not only are the two "proceedings" entirely separate, the panel seems to agree by implying that Tolman should have known that his inducement to Larsen to withhold the report from an investigation would cause its later concealment in a civil suit. The culpable mental state defined by that reasoning is "reckless," not "intentional or knowing." (See §76-2-103.)

The panel is far too willing to ascribe potential inferences drawn by the jury from the evidence when, in fact, most of the testimony is undisputed.

The only testimony from which an inference of tampering can be drawn, of course, is Tolman's and Larsen's. Tolman, of course, clearly provides no basis for such an inference. Addendum K is the pertinent extracts from Larsen's testimony. No

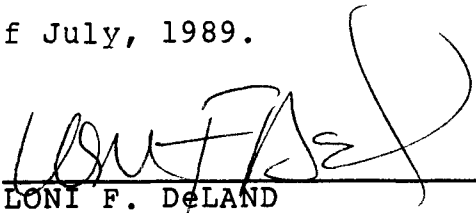
reasonable juror could have inferred guilt from that testimony.
Larsen clearly states that Tolman always told him to tell the truth but Larsen decided, on his own, to withhold his knowledge of the report. If this Court does nothing but read that addendum, this case will be reversed and remanded for entry of acquittal.

It is undisputed that Tolman actually welcomed the disclosure of his investigative findings and only sought to destroy one of numerous identical copies of the report for reasons totally unrelated to the independent investigation of Ashby or the civil suit. He, in fact, is the "whistleblower" who brought the whole matter to the media. And what is an official proceeding? Certainly not a civil tort action. "Official" proceedings are those which are done in the execution of the duties of public office, strictly within the statutory jurisdiction of government. (See §76-8-201, et seq.)

CONCLUSION

For any one of the foregoing bases a writ should issue.

DATED this 21 day of July, 1989.



LONI F. DELAND
Attorney for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21 day of July, 1989, a true and correct copy of the foregoing was mailed, with postage prepaid fully thereon, to the Utah Attorney General, 236 State Capitol, Salt Lake City, Utah 84114.



ADDENDUM

A	FOOTNOTES
B	DETERMINATIVE AUTHORITIES
C	<u>OPINION STATE OF UTAH V. RALPH TOLMAN</u> , No. 870407-CA FILED APRIL 27, 1989
D	<u>OPINION STATE OF UTAH V. DON HARMAN</u> , No. 870290-CA, FILED JANUARY 10, 1989
E	ORDER DENYING PETITION FOR REHEARING, DATED MAY 22, 1989
F	SUPPLEMENTAL ORDER (Re: Discovery)
G	ORDER DENYING DEFENDANT RALPH TOLMAN'S MOTION FOR A NEW TRIAL
H	MEMORANDUM RE: MOTION TO SUPPRESS
I	MOTION AND MEMORANDUM FOR A BILL OF PARTICULARS
J-1	AFFIDAVIT OF KARL ANDERSON
J-2	AFFIDAVIT OF KARL E. ANDERSON
K	PORTIONS OF TRANSCRIPT OF TRIAL PROCEEDINGS, FEBRUARY 25, 1987; <u>STATE V. TOLMAN AND HARMAN</u> , CR-86-1522; R. 945 et seq. (TESIMONY OF C. DEAN LARSEN)
L-1	EX PARTE MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI
L-2	ORDER
L-3	MOTION AND STIPULATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI
L-4	ORDER

FOOTNOTES

- 1/ The importance of the limitless use of "evidence," especially the admission of hearsay, without deciding the preliminary question of conspiracy is underscored and is necessarily part and parcel of this issue. Tolman was acquitted of conspiracy yet the abundance of otherwise inadmissible evidence was heard by the jury which convicted him of direct offenses. See complete argument in Tolman (Appellant's) Brief; Harman (Appellant's) Brief (supra); Utah Court of Appeals.)
- 2/ The undisputed testimony is that Tolman freely discussed the report and his opinions with the independent investigators; that Harman and others had copies of the report; that the original was kept in Tolman's regular file; that once the suit commenced the county attorneys refused to give up the Tolman report based on a work product theory.
- 3/ The Carlsen court cited a statute similar to Utah's which had been upheld against constitutional challenges in State v. Stroh, 91 Wash.2d 580, 588 P.2d 1182 (1979). Stroh construes a statute which is drafted in a way to foreclose any argument of vagueness or overbreadth. In Stroh, the court ruled that the statute need not expressly include as an element the intent to obstruct justice, since the legislature determined that "attempts to influence a witness to change his testimony or to absent himself from a trial or other official proceeding, necessarily have as their purpose and it is their natural tendency to obstruct justice". "The intent to perform the acts proscribed by the statute, with knowledge or reason to believe that the person is or probably is about to be called as a witness, conclusively shows an intent to obstruct justice". [Emphasis added.] Id.
- 4/ Held: Rule 19(c), Utah Rules of Criminal Procedure indicates that error may be assigned to an instruction with or without objection.

DETERMINATIVE AUTHORITIES

Article I, Section 12, Utah Constitution, [Rights of accused person.].

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

Article I, Section 13, Utah Constitution, [Prosecution by information or indictment - Grand jury.].

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

Article XXIII, Utah Constitution

Section 1, [Amendments: proposal, election.].

Any amendment or amendments to this Constitution may be proposed in either house of the Legislature, and if two-thirds of all the members elected to each of the two houses,

shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays taken thereon; and the Legislature shall cause the same to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election, at which time the said amendment or amendments shall be submitted to the electors of the state for their approval or rejection, and if a majority of the electors voting thereon shall approve the same, such amendment or amendments shall become part of this Constitution.

The revision or amendment of an entire article or the addition of a new article to this Constitution may be proposed as a single amendment and may be submitted to the electors as a single question or proposition. Such amendment may relate to one subject, or any number of subjects, and may modify, or repeal provisions contained in other articles of the Constitution, if such provisions are germane to the subject matter of the article being revised, amended or being proposed as a new article.

Section 2, [Revision of the Constitution.]

Whenever two-thirds of the members, elected to each branch of the Legislature, shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote, at the next general election, for or against a convention, and, if a majority of all the electors, voting at such election, shall vote for a convention, the Legislature, at its next session, shall provide by law for calling the same. The convention shall consist of not less than the number of members in both branches of the Legislature.

Section 3, [Submission to electors.]

No Constitution, or amendments adopted by such convention, shall have validity until

submitted to, and adopted by, a majority of
the electors of the State voting at the next
general election.

Constitution of the United States, Amendment VI, [Rights of
accused.]

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

Section 76-2-103, Definitions of "intentionally, or with intent
or willfully"; "knowingly, or with knowledge"; "recklessly, or
maliciously"; and "criminal negligence or criminally negligent."

A person engages in conduct:

(1) Intentionally, or with intent or will-
fully with respect to the nature of his
conduct or to a result of his conduct, when
it is his conscious objective or desire to
engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with
respect to his conduct or to circumstances
surrounding his conduct when he is aware of
the nature of his conduct or the existing
circumstances. A person acts knowingly, or
with knowledge, with respect to a result of
his conduct when he is aware that his conduct
is reasonably certain to cause the result.

(3) Recklessly, or maliciously, with respect
to circumstances surrounding his conduct or
the result of his conduct when he is aware of
but consciously disregards a substantial and
unjustifiable risk that the circumstances
exist or the result will occur. The risk
must be of such a nature and degree that its
disregard constitutes a gross deviation from

the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Section 76-8-201, Official misconduct - Unauthorized acts or failure of duty.

A public servant is guilty of a class B misdemeanor if, with an intent to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office, or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

Section 76-8-508, Tampering with witness - Retaliation against witness or informant - Bribery.

A person is guilty of a felony of the third degree if:

(1) Believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:

* * *

(b) Withhold any testimony, information, document, or thing; or . . .

Section 77-11-3, Evidence receivable - Witness to be advised of rights.

(1) The grand jury shall receive no other evidence than is given by witnesses under

oath or affirmation, or documentary evidence, or the deposition of a witness taken as provided by law. The grand jury shall receive only legal evidence.

(2) Any person called to testify before the grand jury may be advised of his right to be represented by counsel. If a witness is or becomes a subject of the investigation, he shall be advised of that fact and of his right to counsel, and of his privilege against self incrimination. On demand of a witness for representation by counsel, the proceedings shall be delayed until counsel is present. In the event that counsel of the witness' choice is not available, he shall be required to obtain or accept other counsel.

Rule 4(e), Utah Rules of Criminal Procedure.

When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment or within ten days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

Rule 7(c), Utah Rules of Criminal Procedure.

If a defendant is charged with a felony, he shall not be called on to plead before the committing magistrate. During the initial appearance before the magistrate, the defendant shall be advised of his right to a preliminary examination. If the defendant waives his right to a preliminary examination, and the prosecuting attorney

consents, the magistrate shall forthwith order the defendant bound over to answer in the district court. If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. Such examination shall be held within a reasonable time, but in any event not later than ten days if the defendant is in custody for the offense charged and not later than 30 days if he is not in custody; provided, however, that these time periods may be extended by the magistrate for good cause shown. A preliminary examination shall not be held if the defendant is indicted.

Rule 16, Utah Rules of Criminal Procedure - Discovery.

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

- (1) Relevant written or recorded statements of the defendant or co-defendants;
- (2) The criminal record of the defendant;
- (3) Physical evidence seized from the defendant or co-defendant;
- (4) Evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and
- (5) Any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

* * *

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply

with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Rule 19(c), Utah Rules of Criminal Procedure.

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

Rule 606(b), Utah Rules of Evidence . . . . .	16

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Rule 9, Rules of the Utah Supreme Court, Docketing statement.

(c) Content of docketing statement. The docketing statement shall contain the following information in the order set forth below:

* * *

(5) The issues presented by the appeal, expressed in the terms and circumstances of the case, but without unnecessary detail.

The questions should not be repetitious. General conclusory statements, such as "the judgment of the trial court is not supported by the law or facts," are not acceptable.

Rule 9, Rules of the Utah Court of Appeals, Docketing Statement.

(c) Content of docketing statement. The docketing statement shall contain the following information in the order set forth below:

* * *

(5) The issues presented by the appeal, expressed in terms and circumstances of the case, but without unnecessary detail. The questions should not be repetitious. General conclusory statements, such as "the judgment of the trial court is not supported by the law or facts," are not acceptable.

Rule 30, Rules of the Utah Court of Appeals, Decision of the court: Dismissal; notice of decision.

(c) Decision and opinion in writing; entry of decision. When a judgment, decree, or order is reversed, modified, or affirmed by the court, the reasons therefor shall be stated concisely in writing and filed with the clerk. Any judge on the panel concurring or dissenting therefrom may likewise give the reasons in writing and file the same with the clerk. The entry by the clerk in the records of the court shall constitute the entry of the judgment of the court.

cause" for refusing an employment referral was unreasonable and irrational given the Department's rule which includes economic factors as a basis for "good cause" and given the economic imperatives which plaintiffs faced.

RETIREMENT RULE

As noted above, the dispositive rule states that "[g]ood cause for failure to obtain an available job" may also be established by showing "the elements which establish good cause for quitting a job" Utah Admin. R. 475-5c-7 (1987-88). The rule detailing "good cause" for quitting a job expressly provides that "[l]eaving work solely to accept retirement benefits is not a compelling reason for quitting." Utah Admin. R. 475-5a-7(9) (1987-88).

However, the latter rule is inapplicable to the cases before us. Plaintiffs did not refuse the referral to accept retirement benefits. Commencement of those benefits was as much as two years away. Plaintiffs refused the referral to preserve the ultimate availability of the retirement benefits. The purpose of the rule is to avoid "double-dipping," an interpretation supported by other language in the rule stating that "[a]lthough it may be reasonable for an individual to take advantage of a retirement benefit, payment of unemployment benefits in such a circumstance would not be consistent with the intent of the Unemployment Insurance program." *Id.* This language clearly contemplates the impropriety of *simultaneous* receipt of retirement and unemployment benefits, a result which is not present in this case and is specifically eschewed by plaintiffs.

CONCLUSION

Plaintiffs had good cause to reject the Department's referrals to BM&T. Plaintiffs were entitled to unemployment compensation during the interim period between being laid off and, as applicable in individual cases, either commencement of their USX retirement benefits, commencement of other employment, or exhaustion of unemployment benefits in the ordinary course. These cases are remanded to the Board of Review for calculation and award of the unemployment benefits to which plaintiffs are entitled.

Gregory K. Orme, Judge

WE CONCUR:

Richard C. Davidson, Judge
Russell W. Bench, Judge

1. This distinction having been made, the Board held that plaintiffs were entitled to retain benefits they had received up to the time of their respective referrals.

2. As a general proposition, "good cause" in the context of unemployment compensation is determined objectively. *Denby v. Board of Review*, 567

P.2d 626, 630 (Utah 1977) ("such cause as would similarly affect persons of reasonable and normal sensitivity").

3. Plaintiffs claim there was substantial risk involved in working for BM&T because BM&T was merely a group of five attorneys with very little relevant experience. Of course, the success BM&T has in fact had cannot be allowed to color our assessment of how the situation would reasonably have looked to plaintiffs at the time.

Cite as
107 Utah Adv. Rep. 61

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Respondent,
v.
Ralph TOLMAN, Claude Donald Harman,
Defendants and Appellant.

No. 870407-CA
FILED: April 27, 1989

Third District, Salt Lake County
Honorable Raymond S. Uno

ATTORNEYS:

Loni F. DeLand, Scott W. Reed, Salt Lake
City, for Appellant

R. Paul Van Dam, Dan R. Larsen, Salt Lake
City, for Respondent

Before Judges Davidson, Garff, and
Greenwood.

OPINION

GREENWOOD, Judge:

Ralph Tolman (Tolman) appeals from his conviction of tampering with a witness, a class A misdemeanor in violation of Utah Code Ann. §76-8-508 (1978), and official misconduct, a class B misdemeanor in violation of Utah Code Ann. §76-8-201 (1978). Tolman raises numerous issues on appeal, including whether: 1) the evidence was sufficient to support the convictions; 2) the trial court erred in ruling that Tolman was not entitled to a preliminary hearing; 3) the trial court erred in admitting a transcript of Tolman's grand jury testimony at trial; and 4) the trial court erred in failing to consider juror affidavits concerning one juror's alleged divine revelation. We affirm the conviction of witness tampering and reverse the conviction of official misconduct.

I. FACTS

"In setting out the facts from the record on appeal, we resolve all conflicts and doubts in favor of the jury's verdict and the rulings of

the trial court." *State v. Babbell*, 103 Utah Adv. Rep. 14, 14 (March 3, 1989). Our statement of the facts, therefore, is set forth in conformance with *Babbell*.

In May 1983, a fire at the Fashion Place Professional Plaza in Murray, Utah caused extensive damage to the offices of the Salt Lake County mental health department. Dean C. Larsen (Larsen), Assistant Chief and Fire Marshall for the Murray City Fire Department, investigated the fire and reported that it originated in the mental health offices and was caused by misuse of a space heater and extension cord. The next day, Evan Stephens (Stephens), risk manager for Salt Lake County, asked the county attorney's office to investigate the fire. Claude Donald Harman (Harman), chief investigator for the county attorney's office, assigned Tolman and investigator Olin Yearby (Yearby) to assist in determining the cause and origin of the fire. Tolman and Yearby met with Larsen at the fire scene and investigated the fire. Afterwards, Tolman informed Stephens that he agreed with Larsen that the fire originated in the county offices. Stephens, who was concerned about the county's liability for the fire if it originated in the county's offices, wrote a letter to Harman, stating he was hiring Jim Ashby (Ashby) of Global Investigations to perform an independent investigation of the fire. Shortly thereafter, Tolman and Yearby ceased their investigation. In the meantime, a laboratory analyzed the extension cord and space heater and provided a report which stated that the heater could not have caused the fire because it was not energized at the time of the fire. On June 6, 1983, Ashby concluded that based on the laboratory analysis and his investigation, the fire originated in the attic above the county offices.

On August 1, 1983, Tolman submitted a seven-page report on the fire to his supervisor, Sam Dawson. The report concluded that the fire originated in the mental health department's offices. Dawson rejected the report. At Tolman's insistence, Dawson sent the report to Harman. Harman also rejected the report and ordered Tolman to prepare another report. Contrary to the county attorney's office policy of not releasing reports outside the office prior to approval by a supervisor, Tolman sent a copy of the seven-page report to Larsen. The testimony is conflicting regarding whether Tolman sent the report to Larsen before or after Harman rejected it. In any event, after Harman rejected the report, Tolman contacted Larsen, told him that Harman was angry about the contents of the report and asked him to destroy the report. Tolman also informed Larsen that he, Tolman, could get into trouble for releasing the report to Larsen. On August 25, 1983, Tolman submitted a one-page report on the fire to Harman, which did not include an

opinion as to the fire's origin. Harman approved and filed the report.

In 1984, civil litigation regarding the fire was initiated. In November 1984, Larsen received a subpoena duces tecum requesting him to appear at a deposition with all records and documents relating to the fire at the Fashion Place Professional Plaza. Larsen did not produce Tolman's seven-page report at the deposition because he did not want to cause Tolman any problems. Larsen was again deposed in November 1985 and revealed the existence of Tolman's seven-page report.

In 1986, a grand jury was called to investigate possible criminal charges related to the alleged cover-up of reports regarding the 1983 fire at the Fashion Place Professional Plaza. On April 9, 1986, Tolman was called to testify before the grand jury. Prior to Tolman testifying, special prosecutors Rodney Snow and Larry Keller, and grand jury investigator Lorin C. Brooks met Tolman outside the grand jury room and advised him that he was the subject of the grand jury inquiry. Tolman stated that he did not realize he was a subject. Snow and Keller then told Tolman that he had the right to have counsel present outside the courtroom, that he could talk to an attorney before testifying, and that he could contact an attorney at any time during his testimony. Tolman said he had an attorney and that he was aware of his rights. He also stated he was willing to appear, despite the prosecutors' offer to postpone his testimony. Tolman then took the witness stand, acknowledged that he had a right to counsel, and was informed that the investigation concerned the report he prepared regarding the fire at the Fashion Place Professional Plaza. About a month later, Tolman was again subpoenaed to testify before the grand jury and informed of his right to counsel.

On October 9, 1986, the grand jury indicted Tolman for tampering with evidence, tampering with a witness, official misconduct and criminal conspiracy. Prior to trial, Tolman's motion for a preliminary hearing was denied. After a three week trial, the jury retired to deliberate. Portions of Tolman's grand jury transcript were permitted to be taken into the jury room. The jury convicted Tolman of tampering with a witness and official misconduct. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

On appeal, Tolman claims the evidence was insufficient to support his convictions. When reviewing whether evidence is sufficient to support a jury conviction,

we review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury.

We reverse a jury conviction for

insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

State v. Booker, 709 P.2d 342, 345 (Utah 1985) (quoting *State v. Petree*, 659 P.2d 443, 444 (1983); *State v. Bishop*, 753 P.2d 439, 479 (Utah 1988)). We will not substitute our judgment for that of the jury as it is the "exclusive province of the jury to determine the credibility of the witnesses and weigh the evidence." *Steele v. Brienholt*, 747 P.2d 433, 436 (Utah Ct. App. 1987); *Booker*, 709 P.2d at 345.

A. Witness Tampering

Our first inquiry is whether the evidence was sufficient to support Tolman's conviction of tampering with a witness under Utah Code Ann. §76-8-508 (1978). Section 76-8-508 states:

A person is guilty of a felony of the third degree if:

(1) Believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:

....

(b) Withhold any testimony, information, document, or thing

In order to satisfy the elements of section 76-8-508, the prosecution had to demonstrate that: (1) Tolman believed that an official proceeding or investigation was pending or about to be instituted. See, e.g., *State v. Bradley*, 752 P.2d 874, 877 (Utah 1988) (stating that section 76-8-508 does not require proof that an official investigation or proceeding was pending, but only that defendant believed such an investigation or proceeding was pending); and (2) Tolman knowingly or intentionally attempted to induce or otherwise cause another person to withhold any testimony, information, document, or thing.]

In this case, Tolman was assigned to investigate the fire at the Fashion Place Professional Plaza and met with Yearby and Larsen at the scene of the fire to determine its cause. Tolman subsequently prepared an investigation report. Based on these facts, a juror could reasonably conclude Tolman believed that an official investigation was pending. In addition, Larsen testified that Tolman instructed him to destroy the report. Subsequently, Larsen withheld Tolman's seven-page report from a civil proceeding despite a subpoena duces tecum requiring him to produce the report. Larsen testified that he did not produce the report because he did not want to cause problems for Tolman. Based on that testimony, the jury could reasonably conclude that

Tolman induced Larsen to withhold the report from an official investigation or proceeding. Although contrary evidence was presented, "[t]he existence of contradictory evidence or conflicting inferences does not warrant disturbing the jury's verdict." *Id.* We, therefore, conclude that the record contains sufficient evidence from which the jury could conclude that Tolman knowingly or intentionally attempted to induce Larsen to withhold the seven-page report from an official investigation or proceeding. Thus, we affirm Tolman's conviction for witness tampering.

B. Official Misconduct

We next consider whether the evidence is sufficient to support Tolman's conviction of official misconduct. Utah Code Ann. §76-8-201 (1978) states:

A public servant is guilty of a class B misdemeanor if, with an intent to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office, or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

To demonstrate a violation of section 76-8-201, the prosecution was required to prove that Tolman: (1) acted in his capacity as a public servant; (2) acted with an intent to benefit himself or another or to harm another; and (3) knowingly committed an unauthorized act which purported to be an act of his office or knowingly refrained from performing a duty imposed on him by law or clearly inherent in the nature of his office. We can find no evidence in the record to establish the third element, that Tolman committed an unauthorized act which purported to be an act of his office. Although Tolman may have committed an unauthorized act by distributing the seven-page report to Larsen in violation of office policy, there is no evidence that Tolman's act purported to be an act of his office. In fact, Larsen testified that Tolman told him he would be in trouble if Harman knew Larsen had received the report. In addition, we find no evidence that Tolman knowingly refrained from performing a duty imposed by law or inherent in the nature of his office. Therefore, because we find no evidence in the record to satisfy all elements of section 76-8-201, we reverse Tolman's conviction for official misconduct.

III. PRELIMINARY HEARING

Tolman also claims the trial court erred in denying his request for a preliminary hearing. Article I, section 13 of the Utah Constitution provides:

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment.

(Emphasis added).

Although the constitution provides that following indictment an examination and commitment by a magistrate is optional, *Utah R. Crim. P. 7(c)* states that a preliminary examination shall not be held if the defendant is indicted. Tolman claims that the statute clearly conflicts with the constitution and is, therefore, unconstitutional. In order for a statute to be declared unconstitutional, a statute must "clearly violate some constitutional provision, and further, the violation must be clear, complete and unmistakable." *Trade Comm'n v. Skaggs Drug Centers, Inc.*, 21 Utah 2d 431, 446 P.2d 958, 961 (1968); see also *Zamora v. Draper*, 635 P.2d 78, 80 (Utah 1981). In examining statutory constitutionality, the court must apply every reasonable presumption favoring constitutionality, acknowledging the legislative prerogative to enact laws. *Id.* at 962; *Timpanogos Planning v. Central Utah Water*, 690 P.2d 562, 564-65 (Utah 1984). In addition, those who assert that a statute is unconstitutional bear the burden of demonstrating that it is unconstitutional. *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 191 (Utah 1984).

Article I, section 13 provides that a preliminary hearing may be held after prosecution by indictment, but is not required. The statute, however, states that a preliminary hearing shall not be held if a defendant is indicted. The constitution allows the legislature the discretion, therefore, to prohibit preliminary hearings after indictment, and such prohibition falls within the constitutional language. As a result, the statute is not in direct conflict with the constitution.

IV. GRAND JURY TESTIMONY

Tolman also asserts that the trial court erred in failing to suppress his grand jury testimony at trial. Tolman claims that his grand jury testimony was inadmissible because he was not informed of his right to counsel nor was he informed that he was the target of the investigation prior to testifying before the grand jury.

In reviewing a trial court's evidentiary rulings, we defer to the trial court's advantageous position and will not overturn its decisions absent an abuse of discretion. *Whitehead v. American Motors Sales Corp.*, 101 Utah Adv. Rep. 27, 28 (Feb. 2, 1989).

Utah Code Ann. §77-11-3 (1982) provides:

ides:

Any person called to testify before the grand jury may be advised of his right to be represented by counsel. If a witness is or becomes a subject of the investigation, he shall be advised of that fact and of his right to counsel, and of his privilege against self incrimination. On demand of a witness for representation by counsel, the proceedings shall be delayed until counsel is present.

In *State v. Ruggeri*, 19 Utah 2d 216, 429 P.2d 969, 975 (1967), the Utah Supreme Court stated that a witness, who was unaware that he was a target of a grand jury investigation, could not intelligently determine whether or not he needed counsel where he was not advised of the charges against him. In *Ruggeri*, the witness testified before the grand jury and was later indicted for alleged perjury committed during his grand jury testimony. The court held that because the witness was not aware that he was a target of the grand jury proceeding, the trial court properly excluded his grand jury testimony in his perjury trial. *Id.*

In this case, special prosecutors Rodney Snow and Larry Keller, and grand jury investigator Lorin C. Brooks met Tolman outside the grand jury room prior to his testimony and advised him that he was the subject of the grand jury inquiry. Tolman responded that he did not realize he was a subject. Snow and Keller then told Tolman that he had the right to have counsel present outside the courtroom, that he could talk to an attorney before testifying, and that if he wanted to contact an attorney at any time he could. Tolman responded that he had an attorney and that he was aware of his rights. He also stated he was willing to appear despite the prosecutors' offer to postpone his testimony. Tolman then took the witness stand and acknowledged that he had a right to counsel. About a month later, when Tolman again testified before the grand jury, he was again informed of his right to counsel. Unlike *Ruggeri*, Tolman knew he was a target of the grand jury investigation, prior to testifying. In addition, he was informed of his right to counsel. Therefore, we hold that the trial court did not err in admitting Tolman's grand jury testimony into evidence.

V. JUROR AFFIDAVITS

Tolman also asserts that his motion to arrest judgment should have been granted because a juror affidavit established that the verdict resulted from a divine revelation. Tolman contends that the trial court erred in ruling that the affidavit failed to show that an improper outside influence was present in the jury

room.

Generally, a juror affidavit can only be used to impeach a jury verdict when: (1) the verdict was determined by chance or bribery, *Rosenlof v. Sullivan*, 676 P.2d 372, 375 (Utah 1983); *Hillier v. Lamborn*, 740 P.2d 300, 304 (Utah Ct. App. 1987); or (2) when "extraneous prejudicial information was improperly brought to the jury's attention or an outside influence was improperly brought to bear upon any juror." Utah R. Evid. 606(b); *State v. DeMille*, 756 P.2d 81, 83 (Utah 1988); *Hillier*, 740 P.2d at 304. The reason for narrowly limiting the circumstances under which jury affidavits can be used to impeach a jury verdict is that otherwise, litigants would obtain juror affidavits on "all manner of things" and the process would become interminable and impracticable. *Wheat v. Denver & R.G.W.R. Co.*, 122 Utah 418, 250 P.2d 932, 937 (1952). Further, "[s]uch post mortems would be productive of no end of mischief and render service as a juror unbearable." *Id.*

In *State v. DeMille*, 756 P.2d 81 (Utah 1988), the Utah Supreme Court considered whether a juror's affidavit regarding a divine revelation could be used to impeach the jury's verdict under Utah R. Evid. 606(b). In *DeMille*, a juror affidavit stated that one juror allegedly told another juror during deliberations that she had prayed for a sign during closing argument as to DeMille's guilt and claimed to have received a revelation that if defense counsel did not make eye contact, DeMille was guilty. Defense counsel did not make eye contact and DeMille was found guilty.

In reviewing whether the juror affidavit should have been admitted under Utah R. Evid. 606(b), the court stated that construing "outside influence" to include responses to prayer could well infringe upon the juror's religious liberties. *Id.* at 84. The court stated that as long as the juror can fairly weigh the evidence and apply the law to the facts, the juror's decision cannot be challenged on the ground that the juror reached the decision by aid of prayer. *Id.* Accordingly, the court held that under Rule 606(b), prayer and supposed responses to prayer are not included within the meaning of the words "outside influence." *Id.* The court also noted, however, that a juror might be disqualified from service if he or she is unable to fairly consider the evidence and properly apply the law due to oracular signs. *Id.* The court then found that this fact did not save DeMille's challenge to the verdict for two reasons. *Id.* First, the affidavit did not aver facts which would disqualify a juror. Second, even if the affidavit averred such facts, the court stated,

[a] claim that a juror is so affected by religious conviction as to disqualify him or her from service does

not fall within these exceptions [Rule 606(b)]; rather it goes to the fitness of the person to serve on the jury, a matter that could and should have been raised at voir dire.

Id. at 85.

Applying the law to the facts in this case, we need not reach whether the affidavit alleged facts that would disqualify any juror because, according to *DeMille*, juror affidavits regarding divine revelations do not fall within the exception set forth in Rule 606(b). Therefore, we hold that the trial court did not err in excluding the juror affidavit.

We have examined the other issues raised in this appeal and conclude that those issues are without merit. Affirmed in part and reversed in part.

Pamela T. Greenwood, Judge

I CONCUR:

Regnal W. Garff, Judge

I CONCUR IN THE RESULT:

Richard C. Davidson, Judge

Cite as

107 Utah Adv. Rep. 65

IN THE UTAH COURT OF APPEALS

G.G.A., INC., an Indiana Corporation,
Plaintiff and Respondent,
v.
Toula K. LEVENTIS,
Defendant and Appellant.

No. 870546-CA
FILED: April 28, 1989

Third District, Salt Lake County
Honorable J. Dennis Frederick

ATTORNEYS:

Nick J. Colessides, Salt Lake City, for
Appellant

Bryan A. Larson, Salt Lake City, for
Respondent

Before Judges Davidson, Greenwood, and
Orme.

OPINION

GREENWOOD, Judge:

This case involves real property occupied by G.G.A., Inc., doing business as a Wendy's Old Fashioned Hamburgers restaurant, located at about 550 East 400 South in Salt Lake City, Utah. Toula Leventis (Leventis), who leased the property to G.G.A., appeals from the trial

jury on numerous felony charges including conspiracy, tampering with a witness, and tampering with evidence. After trial, the jury returned a verdict of not guilty on the felony charges but guilty on the lesser included offense of attempted tampering with evidence, a violation of Utah Code Ann. §76-8-510 (1979), a class A misdemeanor. Harman seeks reversal of that conviction claiming the evidence was insufficient to support the verdict. We reverse.

In May 1983, a fire caused extensive damage to the Fashion Place Plaza in Murray, Utah. At the time, the Salt Lake County's mental health department had its offices in the building. Dean Larsen, assistant chief of the Murray City Fire Department, began an immediate investigation into the cause and origin of the fire. The next morning, Larsen met with Evan Stephens, (Salt Lake County's risk manager) and Lou Midgley, deputy county attorney. At the meeting, Larsen stated that the fire had started in the mental health offices. Stephens testified that he thought such an opinion was premature especially since substantial county liability was possible. Stephens requested assistance in his investigation of the fire from the investigative division of the county attorney's office. The request was sent to Harman, who was then chief of the investigations division. Harman assigned Ralph Tolman and Olin Yearby to the case. Ralph Tolman and Dean Larsen were old friends.

Upon arrival at the scene, Tolman and Yearby met with Larsen, discussed Larsen's view of the origin of the fire, and then began digging through the rubble together. In spite of this joint activity, all three later testified that they each conducted an independent investigation. Larsen and Tolman became convinced that a space heater and an electrical extension cord found in the mental health offices had been the cause of the fire.

Within a couple of days, Stephens and Midgley became concerned that a truly independent investigator was needed. The county contracted with Jim Ashby of Global Investigations for that service. Harman was told of the new investigator but the evidence is conflicting whether Tolman and Yearby were to continue. It is clear that they stopped working on the case shortly thereafter.

Meanwhile, the space heater and the extension cord were sent for analysis. The laboratory report indicated that electrical current had not been present in either the heater or the cord when those objects burned. Ashby relied on this report in determining that the heater and cord could not have started the fire. He concluded the fire started in the roof above the mental health offices. Larsen disregarded the laboratory report and held firm in his earlier conclusion that the heater and cord had caused the fire.

Although both Larsen and Harman had been pressuring Tolman for his report, it was not written and submitted for approval until August. Both the laboratory report and Ashby's full investigation report preceded Tolman's report. Tolman first submitted the report to his immediate supervisor, Sam Dawson, who rejected it. Tolman objected and demanded that it be sent to Harman, who received the report and also rejected it. In a heated discussion, Harman told Tolman to write a new report. Tolman did so but kept a copy of the first report in his investigation file and also gave a copy to the Murray City Fire Chief, Wendell Coombs. Also, Harman sent a copy of Tolman's first report to William Hyde, supervisor of the county attorney's civil division, and possibly several others.

In 1985, Larsen disclosed the existence of the first Tolman report during a deposition conducted pursuant to a civil suit over Salt Lake County's liability for the fire. An inquiry by the grand jury and this case followed.

On appeal, Harman questions the sufficiency of the evidence, the admission of certain hearsay evidence, and the refusal of his request for a bill of particulars. We find the first issue dispositive so we do not reach the others.

We may review the verdict of a jury in a criminal case and reverse as a matter of law if we find the evidence is insufficient. See *State v. Cantu*, 750 P.2d 591, 593 (Utah 1988). However, the standard for reversal is high. "We reverse ... only when the evidence ... is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime" *State v. Petree*, 659 P.2d 443, 444 (Utah 1983). The weight and credibility to be given a witness is an exclusive function of the jury. *State v. Lamm*, 606 P.2d 229, 231 (Utah 1980). Furthermore, all evidence and reasonable inferences drawn therefrom must be reviewed in a light most favorable to the jury's verdict. *Petree*, 659 P.2d at 444.

Although this is a high standard, it is not insurmountable. We will not make "speculative leap[s] across ... remaining gap[s]" in the evidence. *Id.* at 445. Every element of the crime charged must be proven beyond a reasonable doubt. If the evidence does not support those elements, the verdict must fail.

Utah Code Ann. §76-8-510(1) (1978) defines the crime of tampering with evidence. To be guilty, an actor must have altered, destroyed, concealed, or removed an item with the purpose to impair its verity or availability to a pending, or potential, official proceeding or investigation.¹ A person must have the same culpability to attempt to tamper with evidence. Utah Code Ann. §76-4-101(1) (1978).

We now consider the evidence presented in this case in a light most favorable to the jury's verdict. Harman was chief of the investigations division of the Salt Lake County Attorney's Office. Part of his duties were to review and approve or disapprove reports written by investigators. Reports could be rejected for content as well as form. Harman testified he thought Tolman's first report "parroted" Dean Larsen's opinion, contained unsupported factual assertions, and was a "bad report." Furthermore, at approximately the same time as Harman rejected the report, he told William Hyde and Lou Midgley about Tolman's opinion and gave a copy of the report to Hyde. Hyde, in turn, told the county commissioners about Tolman's opinion. Hyde and Midgley had requested the investigation in the first place and, at that time, were in charge of the county's defense of any liability claims arising from the fire. Copies of the report were kept in several files, including Hyde's case file and Tolman's investigative file. The documents in these files were available to the deputy county attorneys who responded to discovery and Hyde produced his copy of the Tolman report for the grand jury. There is no evidence that Harman made any attempt to alter, destroy or remove the report from these files or to influence others who knew of the report.

On the other hand, the prosecution introduced evidence that Harman had said that the report would make the county look bad, cost the county millions, and make the county liable.

In these circumstances, it became critical for the state to show that Harman's rejection of Tolman's report was improper. The state failed to do this. Culpability can be implied from the actions and statements of the defendant, but the evidence must be clear enough that the jury does not have to guess. We believe that the evidence of guilt was so slight, so conflicting, and so inherently improbable that reasonable minds could not have concluded that Harman rejected the report in an attempt to alter, destroy, conceal or remove it to impair its verity or availability, rather than rejecting it because it was a "bad report."

We, therefore, hold that the evidence was insufficient to establish the required mental state. Since the state failed to prove that critical element, Harman's conviction is reversed.

Richard C. Davidson, Judge

WE CONCUR:

Regnal W. Garff, Judge

Pamela T. Greenwood, Judge

1. The full text of §76-8-510(1) reads:

A person commits a felony of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) Alters, destroys, conceals, or removes anything with a purpose to impair its verity or availability in the proceeding or investigation

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

FILED
MAY 1989
CLERK
COURT OF APPEALS

State of Utah,	)	ORDER
	)	DENYING PETITION FOR REHEARING
Plaintiff and Respondent,)	
)	
v.	)	Court of Appeals No. 870407-CA
)	
<u>Ralph Tolman</u> and Claude Donald)	
Harman,)	
)	
Defendant and Appellant.)	

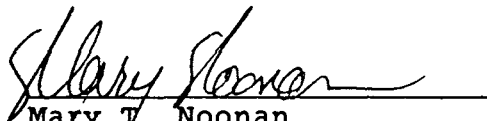
Before Judges Orme, Davidson, and Bench.

THIS MATTER having come before the Court upon
Appellant's Petition for Rehearing,

IT IS HEREBY ORDERED that the Petition for Rehearing is
denied.

DATED this 22nd day of May, 1989.

FOR THE COURT:


Mary T. Noonan
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of May, 1989, a true and correct copy of the foregoing ORDER DENYING PETITION FOR REHEARING was mailed to each of the parties named below by depositing the same in the United States mail.

Loni F. DeLand
Scott W. Reed
McRae & DeLand
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Salt Lake City, Utah 84102

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State Attorney General
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Edward K. Brass
Attorney at Law
321 South 600 East
Salt Lake City, Utah 84102

DATED this 22nd day of May, 1989.

By


Case Manager

LARRY R. KELLER #1785
No. 8 East Broadway
Judge Building, Suite 426
Salt Lake City, Utah 84111
Telephone: (801) 532-7282

FILED IN CLERK'S OFFICE
Salt Lake County Utah

RODNEY G. SNOW #3028
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FEB 10 1987
By *[Signature]*
Deputy Clerk

Special Counsel and Prosecutors Pro Tempore --
Salt Lake County Special Grand Jury, 1986 Term

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	SUPPLEMENTAL ORDER
Plaintiff,	:	
v.	:	
CLAUDE DONALD HARMAN, AND	:	Case No. CR-86-1522
RALPH TOLMAN,	:	(Judge Raymond Uno)
Defendants.	:	

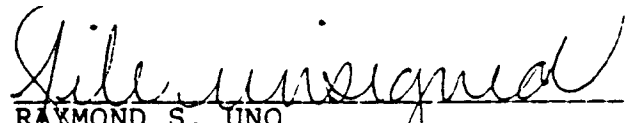
The matter of discovery came before the above-entitled Court on January 30, 1987 with Larry R. Keller present and representing Plaintiff, and Defendant Harman present and represented by Edward K. Brass. Scott Reed, representing Defendant Tolman was also present. After hearing arguments of counsel, the Court hereby ORDERS, ADJUDGES AND DECREES:

1. Counsel for Plaintiff shall provide to Defendant Harman's and Defendant Tolman's attorneys, at Defendants' expense, one copy of all transcripts of the testimony of persons who appeared

before the Salt Lake County Grand Jury on the matter which gave rise to the Indictment in the above-entitled case.

2. No person receiving a copy of the transcript of testimony before the Grand Jury shall allow any person other than a member of the staff of the attorney or the Defendant himself to view or read said transcript. Further, it is ordered that no other copies of the transcript of Grand Jury testimony shall be created without specific permission of the court. It is further ordered that any violation of the above orders shall subject the violator to the full contempt powers of this Court.

DATED this ____ day of February, 1987.


RAYMOND S. UNO
Third District Court Judge

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257 Towers, Suite 340
257 East 200 South, Box 10
Salt Lake City, Utah 84111
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FILED IN CLERK'S OFFICE
Salt Lake County Utah

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OCT 8 1987
H. Gary Hinkle, Clerk of the Court
By: *[Signature]*
Deputy Clerk

Special Counsel and Prosecutors Pro Tempore --
Salt Lake County Special Grand Jury, 1986 Term

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff,	:	ORDER DENYING DEFENDANT
	:	RALPH TOLMAN'S MOTION
vs.	:	FOR A NEW TRIAL
	:	
CLAUDE DONALD HARMAN and	:	Case No. CR-86-1522
RALPH TOLMAN,	:	
	:	Judge Raymond Uno
Defendants.	:	

Came on regularly for hearing on the 19th day of August, 1987,
Defendant's motion for a new trial and the Court having read the
memoranda filed by the parties and having considered the arguments of
counsel, and being fully advised in the premises, now therefor

IT IS HEREBY ORDERED:

1. That Defendant's motion for a new trial is denied; and

2. That the Affidavit of Karl E. Anderson be stricken from the record.

DATED this 8th day of October, 1987.

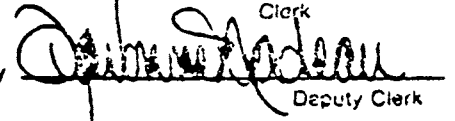
BY THE COURT:



Raymond Uno
District Judge

ATTEST

H. DIXON HINDLEY
Clerk



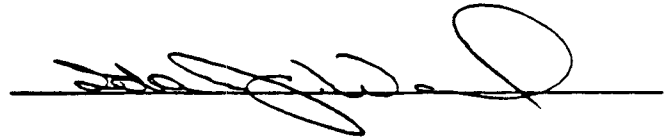
CERTIFICATE OF SERVICE

By

I hereby certify that I served true and correct copies of the foregoing, by placing said copies in the United States mail, postage prepaid, this 8th day of October, 1987, to the following:

Edward K. Brass, Esq.
321 South 600 East
Salt Lake City, Utah 84102

Loni F. DeLand, Esq.
Scott W. Reed, Esq.
McRae & DeLand
132 South 600 East
Salt Lake City, Utah 84102



261

LONI F. DeLAND (0862)
SCOTT W. REED (4124)
McRAE & DeLAND
132 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 364-1333

FEB 13 1987

[Signature]
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

Judge Raymond Uno

As Tolman was being brought before the Grand Jury for testimony, he was instructed orally by Special Prosecutor Larry Keller that he was a "target". When Tolman stated that he no longer wished to remain to testify, Keller then stated that

Tolman must stay pursuant to the subpoena, as well as the documents Tolman had brought.

On the record before the Grand Jury, it was "suggested" that Tolman was a subject of the investigation and that he had a right to have counsel "present" outside the Grand Jury room. (Tolman testimony, April 9, 1986, p.2.) At no point was Tolman informed of the potential charges against him.

It should be noted that at least two other potential subjects of the Grand Jury investigation received letters so informing them in advance of their appearance before the Grand Jury. (Harman testimony, April 17, 1986, p.5; Dawson testimony, April 15, 1986, p.2.)

ARGUMENT

With regard to the appearance and testimony before the Grand Jury of an investigation subject or "target", the Utah Supreme Court has ruled that such person is more than just a witness, but an accused within the meaning of Article I, Section Twelve of the Utah Constitution. State v. Ruggeri, 19 U.2d 216, 429 P.2d 969 (1967). In that case, a county commissioner named Brady was subpoenaed before the Grand Jury but not informed that he was a target of the investigation. Based upon his testimony, Brady was subsequently prosecuted for perjury. Prior to trial, the district court judge (Ruggeri) granted a motion to suppress the use of said testimony as evidence.

The plaintiff filed a proceeding before the Supreme Court for a writ to compel Ruggeri to reverse his decision, which the Supreme Court declined to do. The court also ruled that:

" . . . one being investigated for crime is not just a witness and cannot be treated as such. The target of an investigation is an accused within the meaning of the Constitution, and when he is detained in any significant way, he may not be interrogated unless he is advised of the charges against him then under consideration. To fail to so warn one so being investigated is to entrap him and to violate his constitutional privilege against self-incrimination."
429 P.2d at 973. [Emphasis added.]

The court further observed that the violation occurs notwithstanding any assertion of Fifth Amendment privilege, and that the immunity is complete.

The court concludes its observation as follows:

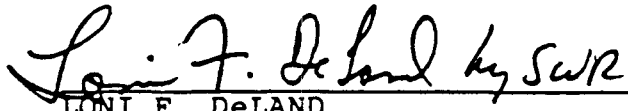
"It would seem that a witness who is unaware that he is a target of a grand jury investigation could not intelligently determine whether or not he needed counsel unless he was fully advised of the charges being considered against him; and until he has full knowledge regarding this matter, he will not know when to assert his constitutional claim of privilege against self-incrimination. It would also be difficult to believe that he could intelligently waive the right to counsel under such circumstances."
429 P.2d at 975.


It is clear that Tolman had no notice of his target status prior to appearance at the Grand Jury. Once at the Grand Jury, his appearance was "custodial" requiring complete Miranda admonition. As in Ruggeri, it is difficult to believe Tolman

could be fully apprised of his rights unless he had known and had the opportunity to share with counsel his status as a subject.

For that reason alone the indictment should be quashed or the testimony suppressed as evidence against either Defendant.

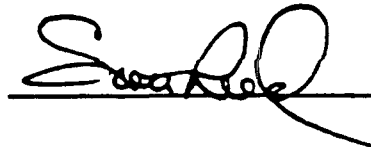
DATED this 13 day of February, 1987.


LONI F. DeLAND
Attorney for Defendant Tolman


SCOTT W. REED
Attorney for Defendant Tolman

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on the 13 day of February, 1987, a true and correct copy of the foregoing was hand-delivered to Larry R. Keller, Judge Building, #426, 8 East 300 South, Salt Lake City, Utah 84111; Rodney G. Snow, 77 West 200 South, Salt Lake City, Utah 84101; and Edward K. Brass, 321 South 600 East, Salt Lake City, Utah 84102.



FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

DEC 1 1 12 PM '86

H. DIXON HOLLEY CLERK
3rd DIST. COURT

James P. Tolman
DEPUTY CLERK

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Telephone: (801) 364-1333

Attorneys for Defendant Tolman

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	
)	
Plaintiff,	)	MOTION FOR A BILL OF
	)	PARTICULARS
v.)	
)	
DONALD CLAUDE HARMAN and	)	Case No. CR-86-1522
RALPH TOLMAN,)	
	)	Judge Raymond Uno
Defendants.)	

Defendant, Ralph Tolman, by and through his attorneys, Loni F. DeLand and Scott W. Reed, moves the court pursuant to Rule 4(3), Utah Rules of Criminal Procedure, 77-35-4 (amended 1980), to order the production of a statement of particular factual information regarding the following:

1. With regard to Count I and Count II:
 - a. State the exact date, time, location and general nature of the agreement constituting the conspiracy as charged in Count I.
 - b. State the intended conduct constituting a crime and by whom the conduct was performed.

c. Describe the nature of the official proceeding or investigation pending or about to be instigated.

d. State the specific basis for alleging that Defendant Tolman believed such proceeding or investigation as described above was pending or about to be instigated.

e. State the specific manner in which Defendant Tolman is alleged to have altered, destroyed, concealed, or removed the investigative report.

f. Specify what presentation or use of a false report was made by Defendant Tolman for the purpose of deceiving a public servant or servants, and specify which public servant(s).

2. With regard to Count IV:

a. State the specific acts alleged to have been committed by Defendant Tolman to induce or cause C. Dean Larsen to withhold testimony, information documents or things.

b. Specify which element of testimony, information, document or thing was alleged to have been the subject of such inducement or cause, beside the seven page report.

c. State whether said report was in fact withheld by C. Dean Larsen.

d. State the date, time, location and general nature of acts alleged.

e. Describe the nature of the official proceeding or investigation which was pending or about to be instituted.

f. State the specific basis for alleging that Defendant Tolman believed that such proceeding or investigation as described above was pending or about to be instituted.


3. With regard to Count V:

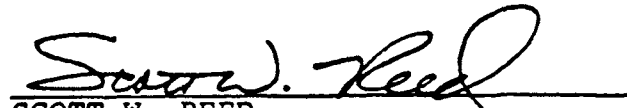
a. State the specific nature of the benefit or harm intended by Defendant Tolman.

b. State the specific acts which Defendant Tolman performed or failed to perform.

c. State the specific basis upon which it is alleged that the acts or omissions performed by Defendant Tolman were knowingly performed.

DATED this 1 day of December, 1986.


LONI F. DELAND
Attorney for Defendant Tolman


SCOTT W. REED
Attorney for Defendant Tolman

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 1 day of December, 1986, a true and correct copy of the foregoing was mailed, with postage prepaid fully thereon, to Larry R. Keller, #8 East Broadway, Judge Building, Suite 426, Salt Lake City, Utah 84111; Rodney G. Snow, American Plaza, 77 West 200 South, Salt Lake City, Utah 84101; and Edward K. Brass, 321 South 600 East, Salt Lake City, Utah 84102.

Diane Monsen

FILED IN CLERK'S OFFICE
Salt Lake County, Utah.

AUG 19 1987

LONI F. DeLAND (0862)
SCOTT W. REED (4124)
McRAE & DeLAND
132 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 364-1333

H. Dixon Hindley, Clerk of District Court
By D.

Attorneys for Defendant Tolman

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff,	)	AFFIDAVIT OF KARL
	)	ANDERSON
v.)	
	)	Case No. CR86-1522
CLAUDE DONALD HARMAN and)	
RALPH TOLMAN,	)	Judge Raymond S. Uno
)	
Defendants.)	

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Karl Anderson, being first duly sworn upon my oath,
depose and state:

1. Affiant, Karl Anderson, was a juror in the
above-captioned case.
2. After the second day of jury deliberation in this
matter, the jury was in agreement that Defendant Tolman's guilt
had not been established on any charge and the jury was 6-2 in
favor of acquittal as to Defendant Harman.

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3. Several jurors wished to break at or about 5:00 p.m. due mostly to church obligations (L.D.S.). I expressed a desire to remain since our verdict (of acquittal) seemed close at hand.

4. One juror, a professed L.D.S. seminary teacher, who was the strong force for conviction, suggested we join in a group prayer to obtain divine guidance in our deliberations.

5. I was unhappy about the interjection of religion but five other jurors seemed to follow the seminary teachers lead on most matters and agreed to participate in the prayer.

6. I essentially ignored the prayer but I did note that immediately following the prayer the seminary teacher expressed a certain knowledge gained from the exercise.

7. I do not recall whether he claimed inspiration, revelation or some other such guidance but he almost immediately convinced the other five jurors of need to find the Defendants guilty and from that point on, those six jurors became totally immovable.

8. It was obvious that from that moment on the jurors who prayed would not be swayed in spite of their previous beliefs that the evidence was insufficient.

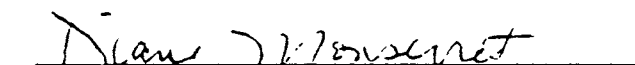
9. As stated in my prior affidavit, I eventually gave in to convictions because the majority wouldn't consider changing and I was not aware we could be a hung jury. There is no question that the seminary teacher's call for prayer and subsequent

expressions of his knowledge of what was required of the jury was the reason for guilty verdicts.

DATED this 14 day of August, 1987.


KARL ANDERSON

SUBSCRIBED AND SWORN to before me this 14 day of August, 1987.


NOTARY PUBLIC
Residing at Salt Lake City, Utah
My Commission Expires: 6-6-90

FILED IN CLERK'S OFFICE
Salt Lake County Utah

LONI F. DeLAND (0862)
SCOTT W. REED (4124)
McRAE & DeLAND
132 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 364-1333

MAY 4 1987

By Karl E. Anderson
Deputy Clerk

Attorneys for Defendant Tolman

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff,	)	AFFIDAVIT OF KARL E.
	)	ANDERSON
v.)	
	)	Case No. CR-86-1522
CLAUDE DONALD HARMAN and)	
RALPH TOLMAN,	)	Judge Raymond Uno
)	
Defendants.)	

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, KARL E. ANDERSON, being first duly sworn upon my
oath, depose and state:

1. I am a resident of Salt Lake County, State of Utah,
residing at 3421 South 7860 West in Magna, Utah.

2. Commencing on February 17, 1987 until March 6,
1987, I served as one of eight jurors in the case of State of
Utah v. Claude Donald Harman and Ralph Tolman.

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3. At no time during the trial or jury deliberations did I form any opinion or belief that Ralph Tolman was guilty of any of the charges.

4. At no time was I instructed or led to believe that I need not return a verdict or could withhold my verdict resulting in no decision by the jury.

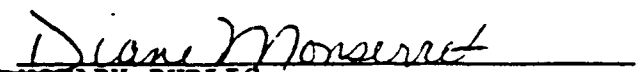
5. Had I known or been instructed that withholding my vote and maintaining a position of not guilty was allowable and would not result in prolonged deliberation, I would not have cast a vote of guilty in this case.

6. Since the time of trial and deliberation, my belief in this matter has not changed.

DATED this 4 day of May, 1987.


KARL E. ANDERSON

SUBSCRIBED AND SWORN to before me this 4 day of
May, 1987.


NOTARY PUBLIC
Residing at Salt Lake City, Utah
My Commission Expires: 6-6-90

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on the 4 day of May, 1987, a true and correct copy of the foregoing was hand-delivered to Edward K. Brass, 321 South 600 East, Salt Lake City, Utah 84102; Larry R. Keller, Judge Building #426, 8 East 300 South, Salt Lake City, Utah 84111; and Rodney G. Snow, American Plaza, 77 West 200 South, Salt Lake City, Utah 84101. *on Office of Grand Jury at Suite 328, American Tower III, SLC, UT. SL*

S. R. Snow

ADDENDUM K

PORTIONS OF TRANSCRIPT OF TRIAL
PROCEEDINGS, FEBRUARY 25, 1987;
STATE V. TOLMAN AND HARMAN,
CR-86-1522; R. 945 ET SEQ.

TESTIMONY OF C. DEAN LARSEN
SELECTED PAGES
RE: TOLMAN TAMPERING ALLEGATIONS

Mr. Snow's Direct: 951-954
Mr. DeLand's Cross: 957, 959-964
Mr. DeLand's Redirect: 999, 1001, 1002
Mr. DeLand's Recross: 1006, 1007

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-oo0oo-

THE STATE OF UTAH,
Plaintiff,
vs.
CLAUDE DONALD HARMAN and
RALPH TOLMAN,
Defendants.]

Criminal No. CR-86-1522

COPY

TRANSCRIPT OF PROCEEDINGS

February 25, 1987

BEFORE THE HONORABLE RAYMOND S. UNO
District Court Judge

A P P E A R A N C E S:

For the State of Utah:

RODNEY G. SNOW
Attorney at Law
77 West 200 South
Salt Lake City, Utah 84101

-and-

LARRY R. KELLER
Attorney at Law
8 East Broadway #426
Salt Lake City, Utah 84111

COPY

1 tell defendant Tolman you had not destroyed the report?

2 A. No.

3 Q. After your second deposition, did you have
4 a telephone call with defendant Tolman, a telephone
5 conversation?

6 A. Yes.

7 Q. And were you in your office?

8 A. Yes.

9 Q. Did you call Mr. Tolman?

10 A. Yes.

11 Q. This would be sometime in November of 1984, SIC
12 I take it?

13 A. That's correct.

14 Q. Was there anyone present in your office when
15 you made the telephone call, sir?

16 A. No.

17 Q. Do you know whether anyone else was on the
18 line when you talked to Mr. Tolman?

19 A. I don't know.

20 Q. Can you tell us what you said to him and what
21 he said to you on this occasion?

22 A. I told Ralph that his report was coming out
23 in the deposition and his response was, "Dean, do what
24 you have to do, tell the truth, Ralph will take care of
25 himself and he will tell the truth."

1 Q. Okay. Did you tell him anything else about
2 how you handled the report in the first deposition?

3 A. No.

4 Q. Do you recall whether you told him you had
5 skated around the issue?

6 A. Yes.

7 Q. The report issue?

8 A. Yes.

9 Q. You didn't tell him the report had actually
10 come out?

11 A. I believe I told him that --

12 Q. I mean that --

13 A. They talked about the report in the deposition.

14 Q. All right. Did defendant Tolman say anything
15 else? Did he express any concern at that point?

16 A. Just "Here, Dean," that for me to tell the
17 truth and that Ralph would take care of himself and he
18 would tell the truth.

19 Q. Did he express that he wished it hadn't come
20 up?

21 A. Yes, he did.

22 Q. What do you recall him saying in that regard?

23 A. "I wished it wouldn't have to come out, but
24 if it does, here, Dean, tell the truth."

25 Q. Okay. You understood him to be telling you

1 to tell the truth about what Ralph's opinion and conclusions
2 might have been about the cause and origin of the fire?

3 A. That's correct.

4 Q. After the second deposition in December of 1985,
5 did you again -- and after you had released the report at
6 the deposition, did you again telephone Mr. Tolman?

7 A. Yes.

8 Q. Do you recall whether you telephoned him before
9 this deposition or was it after?

10 A. As far as I can recall, after the deposition.

11 Q. Do you recall when you first made the telephone
12 call to the office, the County Attorney's Office, whether
13 you spoke to Ralph?

14 A. I talked to -- I asked for Ralph. Ralph was
15 not in. I talked to Olin Yearby.

16 Q. What did you tell Olin Yearby?

17 A. That the report had come out and they had copies
18 of it.

19 Q. What did Olin Yearby say?

20 A. "Oh, shit, Larsen. I wish it wouldn't have.
21 Ralph is probably in deep trouble."

22 Q. Did you thereafter receive a telephone call
23 from Tolman?

24 A. I don't recall if Ralph called me back or if
25 I called him.

1 Q. But subsequent to the Yearby conversation, you
2 had another conversation about the deposition with Mr. Tolman?

3 A. That's correct.

4 Q. Where were you when that conversation occurred?

5 A. In my office.

6 Q. As far as you know, Mr. Tolman was at work?

7 A. As far as I know.

8 Q. What was said in that conversation?

9 A. I wished it wouldn't have come out, but it has,
10 you was under oath. You told the truth. Ralph will tell
11 the truth. Ralph can take care of himself.

12 Q. Did defendant Tolman express any concern to
13 you about what was going to happen next?

14 A. He was worried. He knew there was problems
15 with his job and he was very concerned about that.

16 Q. Okay. Sir, I am going to hand you your grand
17 jury testimony of April 9th. If you could turn to page
18 17, please. Now, Mr. Larsen, turning to the conversation,
19 telephone conversation, you had with defendant Tolman in
20 August of 1983 after you had received the report in which
21 he suggested to you you get rid of the report or burn it
22 or destroy it, I would like you to read, if you would, please,
23 lines 13 through 19.

24 A. "He thinks we're friends and I am helping you
25 on the investigation of the fire," something to that effect.

1 A. Yes.

2 Q. And was that testimony accurate when you gave
3 it before the grand jury?

4 A. Yes.

5 MR. SNOW: Thank you.

6

7 CROSS-EXAMINATION

8 BY MR. DeLAND:

9 Q. Morning, Chief. You told us yesterday that
10 this report, this report of Ralph Tolman's came to your
11 attention by way of Chief Coombs; is that correct?

12 A. That's correct.

13 Q. Who was your boss?

14 A. Yes.

15 Q. And so your understanding is that the report
16 went from Mr. Tolman to Chief Coombs to yourself?

17 A. That's correct.

18 Q. You don't recall receiving any report directly
19 from Mr. Tolman to you?

20 A. I don't recall.

21 Q. Do you recall picking up any reports at
22 Mr. Tolman's office from Joan Binkerd or from any other
23 source?

24 A. No.

25 Q. Do you recall being over there during that period

1 THE COURT: He may answer.

2 Q. (By Mr. DeLand) Did he ever make such a
3 statement to you?

4 A. Could you reask the question again, please?

5 Q. Yes. Did Chief Coombs, at or about the time
6 he gave you the Tolman report, say anything such as "Ralph
7 gave me this report and told me not to use it unless we
8 had to, not to disclose it to Don Harman," that we had it
9 but that he would tell the truth and we should?

10 A. I recall some sort of a conversation like that.

11 Q. All right. And in fact a conversation you have
12 not told us about yet today occurred at the very time Ralph
13 talked to you about concealing this report or destroying
14 this report or getting rid of it; isn't that true? There
15 was a conversation you had with Ralph at that time that
16 you haven't reported. Isn't that correct? You haven't
17 been asked about it?

18 MR. SNOW: Your Honor, I don't think the question
19 is clear. I would object --

20 MR. DeLAND: Maybe it's not. It wouldn't be
21 the first time I asked an unclear question.

22 Q. Let me ask you this: You had a conversation
23 with Ralph Tolman at the time you already told us about
24 concerning his request that you conceal this report, for
25 lack of a better word; is that right?

1 A. That's correct.

2 Q. All right. And at that time you have testified
3 that he said "Destroy the report. Get rid of the report,"
4 words to that effect?

5 A. That's correct.

6 Q. All right. He also told you not to physically
7 destroy the report, didn't he?

8 A. I don't recall the exact verbiage.

9 Q. All right. In fact, you do recall vividly that
10 he said "Harman is hot"?

11 A. I do recall that.

12 Q. All right. You don't remember the exact verbiage
13 of anything else, what was said at that time, do you?

14 A. No.

15 Q. But you have repeated certain understandings
16 that you had about the conversation?

17 A. That's correct.

18 Q. And isn't it true that you understood that he
19 merely wanted the fact that you had the report concealed
20 from Mr. Harman?

21 A. That's my opinion.

22 Q. He told you in fact at that time, "If you have
23 to use it, use it, tell the truth about this report"?

24 A. That's correct.

25 Q. He never asked you to lie at any time?

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A. No.

Q. In any proceeding?

A. No.

Q. And in fact the term "destroy," that's your
characterization of what was said, isn't it?

A. I don't recall if that was correct verbiage
of my interpretation.

Q. All right. And in fact in your grand jury
testimony you used the word "not disclose"; isn't that right?

A. I believe I used both words destroy and not
disclose.

Q. All right. Wasn't it the prosecutor that suggested
the word destroy?

A. No.

Q. Would you turn to page 21 of your grand jury
testimony of April 9th of 1986?

A. Which page?

Q. Page 21. I will read the question of Mr. Keller's
at line 11 and will you read your response?

"Question: Did you suggest to him," meaning
Tolman, "did you suggest to him that you would
destroy the report or -- "

A. "Yes. I told him I would not disclose it."

Q. "Question: Were those your words that you
wouldn't disclose it?"

1 Answer?

2 A. "I can't remember the exact verbiage."

3 Q. You did use the word "destroy" in the prior

4 deposition, the second deposition; isn't that correct?

5 A. That's correct.

6 Q. And the prosecutor recalled to you you did use

7 that word then?

8 A. That's correct.

9 Q. But you didn't know what the verbiage was?

10 A. I don't recall the exact verbiage.

11 Q. You know it's your testimony today your

12 understanding was physically retain the report, just don't

13 let Mr. Harman see it?

14 A. That was my interpretation.

15 Q. All right. And so at the time the report is

16 received, your information is "Don't tell any lies about

17 my opinions about this report," correct?

18 A. That's correct.

19 Q. And, again, after the first deposition when

20 you notify Mr. Tolman that you have skated around the truth,

21 shall we say, he again told you, "Tell the truth. Ralph

22 can take care of himself"?

23 A. That's correct.

24 Q. And then the second deposition, "Don't worry

25 about it. You tell the truth. I am going to tell the truth.

1 Ralph can take care of himself"?
2 A. That's correct.
3 Q. And so the concealment, if any, was your loyalty
4 to a friend, thinking you were doing what was best for him
5 in front of that group of attorneys.
6 A. Yes.
7 Q. Protecting his job from Mr. Harman.
8 A. Yes.
9 Q. Who you knew he was having very bad relations
10 with at that time.
11 A. Yes.
12 Q. And so when he said, "I wished it hadn't come
13 out," he wished it hadn't come out so Mr. Harman would know
14 about it; isn't that your understanding?
15 A. That's my impression.
16 Q. At the time you spoke with -- during the first
17 deposition, Mr. Snow pointed out that the business about
18 the report coming up -- came up and there was some concern,
19 apparently on your part, and there was a break. It's not
20 reflected in the transcript of the deposition; is that right?
21 A. That's correct.
22 Q. You went out in the hall with Mr. Craig Hall.
23 A. Yes.
24 Q. Craig Hall is the Murray City attorney.
25 A. Yes.

1 Q. Who was representing you.

2 A. Yes.

3 Q. And in that break you disclosed to Mr. Hall
4 that there physically was a report over in your office,
5 didn't you?

6 A. Yes.

7 Q. And I take it that Mr. Hall then advised you
8 to do what you did thereafter, to skate around the report?

9 A. That's correct.

10 Q. So other than what you were requested by
11 Mr. Tolman to prevent his boss from finding out about this,
12 he had at all times encouraged you to tell the truth.

13 A. That's correct.

14 Q. That's all.

15

16 CROSS-EXAMINATION

17 BY MR. BRASS:

18 Q. Let's talk about your investigations, since
19 that was one of the things that Mr. Snow talked to you about.

20 You think that Jim Ashby is an expert in this
21 area, don't you?

22 A. He's good.

23 Q. Okay. And you think that you're every bit as
24 good as he is; is that right?

25 A. That's correct.

1 Q So there wasn't any question in your mind that
2 at least some people in the Salt Lake County Attorney's
3 Office knew what defendant Tolman's conclusions were?

4 A That's correct.

5 Q You didn't feel a need to tell them at that
6 point in time, did you?

7 A No.

8 Q Because you assumed they already knew, based
9 on what you had heard in conversation?

10 A That's correct.

11 Q Now, you have been good friends with defendant
12 Tolman as of May of 1983 for quite some time.

13 A That's correct.

14 Q You understood he wasn't in love with defendant
15 Harman?

16 A I had heard those rumors.

17 Q Did defendant Tolman ever tell you that?

18 A I had heard comments.

19 Q Comments about his boss?

20 A Yes.

21 Q From the defendant Tolman?

22 A Yes.

23 Q In that conversation in May of 1983, I am sorry,
24 in August of 1983, the telephone conversation you got, is
25 there any question in your mind defendant Tolman suggested
to you that you destroy or get rid of the report?

1 Q Didn't disclose it until Tom Green came out,
2 and in that conversation you thought you better tell them
3 about it?

4 A That's correct.

5 Q And you understood that if you disclosed the
6 report to anyone that had anything to do with the fire,
7 defendant Harman would find out about it?

8 A That's correct.

9 Q So we weren't just playing, if I may, sir, keep-
10 away, from defendant Harman here, were we?

11 A No.

12 Q Now, the first time you recall a telephone
13 conversation with defendant Tolman where he tells you you
14 have to do what you have to do, Ralph will take care of
15 himself, just tell the truth, is after your deposition in
16 1984.

17 A That's correct.

18 Q And defendant Tolman knew at that point you
19 hadn't physically produced a report?

20 A Yes.

21 Q But he understood you made some reference to
22 it in your deposition.

23 A Yes.

24 Q You said you wished you hadn't done that, but
25 you had to do what you had to do?

1 A That's correct.

2 Q And as you testified previously on direct

3 yesterday and again on cross today, when you came back from

4 your conversation with Craig Hall, it wasn't quite accurate

5 to say you hadn't seen a copy of the report.

6 A That's correct.

7 Q And that you did that to protect defendant Tolman

8 because you had that conversation with defendant Tolman

9 in August of 1983.

10 A Yes.

11 Q Then another 13 months goes by and the report

12 remains wherever it was for that -- before the deposition

13 for the next succeeding 13 months.

14 A That's correct.

15 Q You don't look for it?

16 A No.

17 Q You don't dig it out or produce it?

18 A No.

19 Q It's only when your deposition is noticed up

20 again and it becomes an issue that you dig it out and you

21 finally produce it.

22 A That's correct.

23 Q Now, with respect to your deposition in December

24 of 1985, where you testified that, I believe under oath

25 for the first time, about this conversation with defendant

1 Q Would it be fair to say you were very anxious
2 to keep from being indicted?

3 A Yes.

4 Q Anxious to please these gentlemen who were the
5 prosecutors there, perhaps?

6 A No.

7 Q You didn't care if you pleased them or not?

8 A No.

9 Q And so any changes in your testimony really
10 didn't have anything to do with any conversations you had
11 with Mr. Keller and Mr. Snow, did it?

12 A No.

13 Q You were aware that the significance of the
14 Tolman report was that it merely corroborated the report
15 that you prepared yourself?

16 A That's correct.

17 Q And it was a second opinion, if you will?

18 A Yes.

19 Q And you also knew that whenever that was litigated
20 with or without the report, Mr. Tolman was going to come
21 in and tell the truth, give his opinions?

22 A That's correct.

23 Q And so not to beat a dead horse, but it's also
24 true, then, that at the time these words "get rid of and
25 destroy" are being used, it was not to physically get rid

1 of that report but to conceal the fact it went to you from
2 this man?

3 A In my opinion.

4 Q And any concealment that you may have engaged
5 in, any lies you may have told in depositions thereafter
6 were not suggested by Mr. Tolman but were the product of
7 your own decision, thinking you were going to protect him.

8 A That's correct.

9 Q You didn't know for a fact that if you told
10 someone else it would get to Harman necessarily, did you?

11 A No.

12 MR. DeLAND: That's all.

13

14 RECROSS-EXAMINATION

15 BY MR. BRASS:

16 Q Let's start with the \$2 million. You were
17 telling Mr. Snow and the jury that your recall actually
18 has improved since your deposition was taken; is that right?

19 A That's correct.

20 Q So as more time goes by, you're recalling more
21 details?

22 A A few.

23 Q Okay. And maybe if we came back in another
24 year you might recall some more?

25 A Possible.

LONI F. DeLAND (0862)
McRAE & DeLAND
132 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 364-1333

Attorney for Defendant/Appellant Tolman

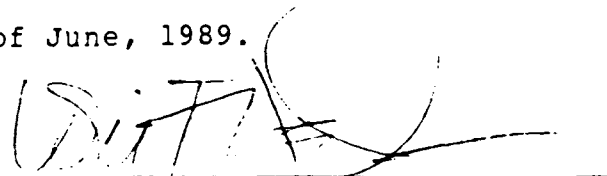
IN THE UTAH SUPREME COURT

STATE OF UTAH,)	
)	
Plaintiff/Respondent,	)	EX PARTE MOTION FOR
	)	EXTENSION OF TIME TO
v.	)	FILE PETITION FOR WRIT
	)	OF CERTIORARI
RALPH TOLMAN,)	
	)	Supreme Ct. Case No. _____
Defendant/Appellant.	)	Ct. of Appeals No. 870407-CA

Defendant, Ralph Tolman, through his counsel, Loni F. DeLand, pursuant to Rule 45 of the Rules of the Utah Supreme Court, requests that this Court grant a 30 day extension of time within which to file his Petition for Writ of Certiorari in the above-entitled matter, for the reason that counsel for Defendant needs additional time to prepare said Petition due to the extensive record and complex issues.

The Petition is presently due on June 21, 1989.

DATED this 7 day of June, 1989.



LONI F. DeLAND
Attorney for Defendant/Appellant

✓

LONI F. DeLAND (0862)
McRAE & DeLAND
132 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 364-1333

Attorney for Defendant/Appellant Tolman

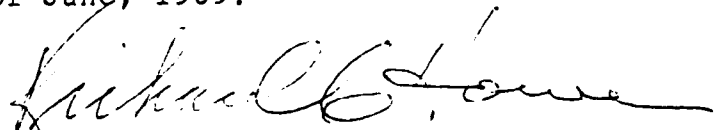
IN THE UTAH SUPREME COURT

STATE OF UTAH,)	
)	
Plaintiff/Respondent,)	
	)	ORDER
v.)	
)	
RALPH TOLMAN,	)	Supreme Ct. Case No. _____
)	
Defendant/Appellant.	)	Ct. of Appeals No. 870407-CA

Based upon the foregoing motion, and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendant/Appellant is granted a 30 day extension of time within which to file his Petition for Writ of Certiorari in the above-entitled matter. Said Petition shall be filed on or before July 21, 1989.

DATED this 9 day of June, 1989.



UTAH SUPREME COURT

LONI F. DeLAND (0862)
McRAE & DeLAND
132 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 364-1333

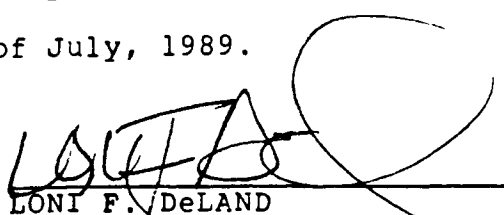
Attorney for Defendant/Appellant Tolman

IN THE UTAH SUPREME COURT

STATE OF UTAH,)	
)	
Plaintiff/Respondent,	)	MOTION AND STIPULATION
	)	FOR EXTENSION OF TIME TO
v.	)	FILE PETITION FOR WRIT
	)	OF CERTIORARI
)	
RALPH TOLMAN,	)	Supreme Ct. Case No. _____
)	
Defendant/Appellant.	)	Ct. of Appeals No. 870407-CA

Defendant/Appellant, Ralph Tolman, through his counsel, Loni F. DeLand, requests that this Court grant a seven (7) day extension of time within which to file his Petition for Writ of Certiorari, which is presently due on July 21, 1989, for the reason that counsel for Defendant has a family emergency and is unable to complete said Petition by July 21, 1989.

DATED this 20 day of July, 1989.



LONI F. DeLAND
Attorney for Defendant/Appellant

STIPULATION

I, Dan R. Larsen, attorney for Plaintiff/Respondent, hereby agree and stipulate to a seven (7) day extension of time

within which Defendant/Appellant may file his Petition for Writ
of Certiorari.

DATED this _____ day of July, 1989.

DAN R. LARSEN
Attorney for Plaintiff/Respondent

LONI F. DeLAND (0862)
McRAE & DeLAND
132 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 364-1333

Attorney for Defendant/Appellant Tolman

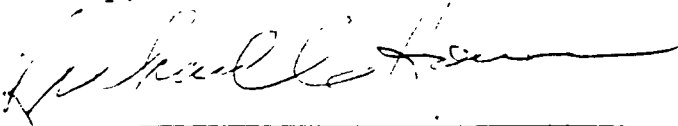
IN THE UTAH SUPREME COURT

STATE OF UTAH,)	
)	
Plaintiff/Respondent,)	
	)	ORDER
v.)	
)	
RALPH TOLMAN,	)	Supreme Ct. Case No. _____
)	
Defendant/Appellant.	)	Ct. of Appeals No. 870407-CA

Based upon the foregoing Motion and Stipulation, and
good cause appearing therefore,

IT IS HEREBY ORDERED that Defendant/Appellant is
granted a seven (7) day extension of time within which to file
his Petition for Writ of Certiorari in the above-entitled matter.
Said Petition shall be filed on or before July 28, 1989.

DATED this 22 day of July, 1989.

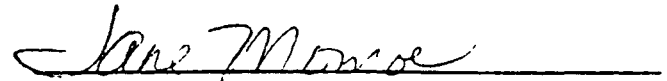


UTAH SUPREME COURT

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on the 20 day of July, 1989, a
true and correct copy of the foregoing was hand-delivered to Dan

R. Larsen, Attorney for Plaintiff/Respondent, 236 State Capitol,
Salt Lake City, Utah 84114.

A handwritten signature in cursive script, reading "Kane Monroe", is written over a horizontal line.