

1956

State of Utah v. Frank DeLano Gay et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

THE STATE OF UTAH,)

Respondent,)

-VS-

Case No.

FRANK DELANO GAY,)

OLIVER TOWNSEND &)

WILLIE OLEN SCOTT,)

Appellants.)

8565.

A P P E L L A N T ' S B R I E F

Appeal from Third Judicial District Court,
Salt Lake County, State of Utah;
Honorable: Ray Van Cott, Jr., Judge.

FRANK DELANO GAY,
OLIVER TOWNSEND &
WILLIE OLEN SCOTT

In Propria Persona,
Box 250, Draper, Utah.

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~~IN THE SUPREME COURT~~
OF THE STATE OF UTAH

THE STATE OF UTAH,)

Respondent,)

-vs-

Case No.

8565.

FRANK DELANO GAY,)

OLIVER TOWNSEND &)

WILLIE OLEN SCOTT,)

Appellants.)

S T A T E M E N T O F F A C T S.

Appellants were charged in an Information with the crime of Robbery (Tr. pp. 10-13.) To which they entered a Plea of Not Guilty and were tried on the 10th and 11th days of April, 1956, Before the Hon: Ray Van Cott, Jr., in the Third District Court, Salt Lake County, State of Utah. They were convicted of Robbery as charged, and on the 24th day of April, 1956, they were all Sentenced to the Utah State Prison (Tr. pp. 41-45.) From which Final Judgment of Conviction they appealed (Tr. pp. 28-56.)

The Appellants are all Negroes, which may explain why all the errors complained of herein were allowed to be committed by the Trial Court. It seems that a callous prejudice towards Negroes has infected the Hon. Ray Van Cott, Jr.'s Court, for the trial had barely started, and in the midst of examination of the first witness, when he summarily left the Bench to talk with someone, as follows:

"THE COURT: Mr. Anderson, would you excuse me. I believe there is a man that is wanting to see me and I will see if I can take care of it. You may proceed. (Tr. p. 75, L. 7-9.)"

Which in effect, turned the Court over to Mr. Anderson the District Attorney, thereby espousing the State's cause, to the prejudice of the Defendants, before and in the eyes of the Jury; Evidently Judge Van Cott, Jr., didn't seem to think it necessary to inform Defendant or their Counsel that he was going visiting while Court was in session, but just ignored their rights

and turned the Court over to the District Attorney with the words- "You may proceed".

The crux of this case is the contention by the State on the one hand that the Appellants Robbed Ronald William Christenson on the 28th day of November, 1956, in Salt Lake City, Utah; And the contention of Appellants that at that time they were at and nearby Oklahoma City, State of Oklahoma, and therefore could not of committed the robbery charged.

These differing contentions of course, involved contradictory testimony by the State's and Defense witnesses; That therefore someone Perjured themselves, and Appellants will claim that it was some of the State's witnesses who did so, and that there are other errors that require a reversal of this case.

Taking the State's witnesses in their order, first is Mr. GIBBS, the manager of the Loan Office allegedly robbed, all his testimony amounts to is that he stated that he saw the

defendant Gay in the Office the morning before the alleged robbery, but that he could NOT identify any other (Tr. p. 78, L. 9-11.) that he left the Office to go to lunch, and when he came back he was TOLD by Mr. Christensen that they had been robbed (Tr. pp. 76-77.) All that Mr. GIBBS knew about the man allegedly giving name of Terry, was he had been TOLD (Tr. p. 81, L. 26 to p. 82, L. 14) Salt Lake City Detective DUNCOMBE testified that he could get NO information from the 2 girl Cashiers (Tr. p. 126, L. 30 to p. 227, L. 1.) when he arrived at the Loan Office to investigate the robbery, and that the only picture that Mr. GIBBS could pick out as resembling anyone he had seen in the Office was that of Gay (Tr. p. 128, L. 3-5.)

The state's main witness, Mr. CHRISTENSEN, claims he recognized the defendants as the men who robbed the Loan Office while he was there supposedly as 'Acting Manager'; But

his testimony ~~is tainted~~ and rendered ineffectual by the LIES that he told, and the PERJURY he committed while on the Witness Stand.

Mr. CHRISTENSEN said he talked to Salt Lake City Detective DUNCOMBE and looked over a number of pictures he had when he came to the Loan Office right after the robbery to investigate it on November 28, 1955. (Tr. p. 97, L. 16-30)

Whereas Mr. DUNCOMBE testified that he didn't even see Mr. CHRISTENSEN until several days after the robbery, on December 2nd, 1955 (Tr. p. 127, L. 2-4; p. 128, L. 11-15.)

That he didn't talk to Mr. CHRISTENSEN or show him any pictures on November 28, 1955, that he didn't contact Mr. CHRISTENSEN until December 2nd (Tr. P. 131, L. 6-8, 18-19.)

Further Mr. CHRISTENSEN testified that he was at a "lineup" at the Salt Lake Police Station, 105 South State Street, within 2 or 3 days after the robbery of the Loan Office, that all of the

lineup ~~were colored persons~~ (Tr. p. 101, L. 10-12, 17-26; P. 102, L. 1.) that on that day, November 30, 1955, he identified SCOTT and TOWNSEND in said lineup (Tr. p. 102, L. 7.) Whereas in fact, SCOTT and TOWNSEND were not arrested in Oklahoma until the 4th day of December, 1955, and returned to Salt Lake City December 22, 1955.

State's witness Mr. HUNTER testified that he arrested SCOTT and TOWNSEND near Chandler, Oklahoma, on December 4th, 1955 (Tr. p. 250, L. 13-3 And Salt Lake City Detective DUNCOMBE testified that TOWNSEND and SCOTT were not brought back to Salt Lake City from Oklahoma, until the 22nd day of December, 1955. (Tr. p. 130, L. 4-7, 16-17) Further Detective DUNCOMBE testified that there had been ~~NO~~ lineups in this case prior to the time defendants were brought back to Salt Lake City on December 22, 1955. (Tr. p. 131, L. 3-5.) State's witness Mr. ROY DAVIS claimed to have seen Terry (GAY) the morning before the robbery and that he saw some fellows in a car that he

thought ~~was~~ ~~15~~ ~~feet~~ but wasn't close enough to see who the men were (Tr. p. 110, L. 10-18.) and claims that he saw Terry leave the Loan Co. with someone but he didn't know who it was (Tr. p. 113, L. 11-17.)

And, State's witness Mr. HAIRSTON, who was a prisoner in the County Jail, working as a trusty or Tier Man, became a witness for the State in this case for the very obvious reason that by doing so he could collect witness Fees and curry Official favor to lighten his term as a Prisoner, and he claimed that he could identify appellants as the robbers by some purported conversations he had with them in the County Jail; But he admitted to Mr. HATCH that there was one he couldn't recognize, but that after seeing them daily for a month in the County Jail, went down and picked them out of the lineup (Tr. p. 124, L. 16 - to p. 125, L. 8.) and that all Three of the Defendants denied being the men who robbed the Loan Office (Tr. p. 125, L. 10-12.)

After the testimony of the foregoing witnesses the State rested it's case (Tr. p. 131, L. 29) whereupon Mr. HATCH Defense Counsel, made a Motion to Dismiss the charged, (Tr. p. 136, L. 13 to p. 139, L. 26) which was by the Court denied (Tr. p. 140, L. 1-2.)

Defense Witness BRENDA LOIS SCOTT, testified that she went to Chandler, Oklahoma, in SCOTT'S car from Salt Lake City on November 8th, 1955, with SCOTT, TOWNSEND, JOHN ROBINSON and GAY (Tr. p. 141, L. 13-25; p. 149, L. 12-13.) That they arrived in Oklahoma City, November 10, 1955 (Tr. p. 141, L. 2-4.) That TOWNSEND, SCOTT and GAY then left for Memphis, Tennessee (Tr. p. 142, L. 9-13.) She testified that she saw TOWNSEND and SCOTT at her mother's home in Chandler, Oklahoma, on the 27th and 28th days of November, 1955 (Tr. p. 143, L. 15-19; p. 159, L. 14-18.) that she remembered the date because they went to a 'Church Supper' (Tr. p. 145, L. 20-23.) That SCOTT was at and spent the

day and [REDACTED] 27th, 1955, at her mother's home in Chandler, Oklahoma. (Tr. p. 143, L. 30 - to- p. 144, L. 3; p. 160, L. 8.) And that she saw TOWNSEND and SCOTT again at her mother's home in Chandler, Oklahoma, on the 29th of November, 1955, (Tr. p. 158, L. 19-25.) She further testified that she never saw SCOTT with any weapon (Tr. p. 152, L. 14-26.) and that she didn't see any weapons in the possession of any of the boys (Tr. p. 157, L. 24-26.) WILLIE OLEN SCOTT, testifying in his own defense testified that the last time they had been in Salt Lake City was on November 8, 1955, when they left for Chandler, Oklahoma (Tr. p. 164, L. 14-19.) That on Sunday, November 27, 1955, he was at his mother's place in Chandler, Oklahoma (Tr. p. 170, L. 19-20.) That TOWNSEND came over to his Mother's place on November 27 (Tr. p. 171, L. 1-5.) and that he SCOTT, stayed at his mother's place on the night of November 27, 1955, and was there until

late in the afternoon of November 28, 1955, when TOWNSEND came over from Oklahoma City and they went to Tulsa, Oklahoma, then came back on the afternoon of November 29th, 1955, (Tr. p. 171, L. 5-17; p. 175, L-24-27.)

That they registered and stayed the night of November 29th, 1955, at the WAYSIDE MOTEL in Oklahoma City (Tr. P. 171, L. 18-30; P. 172, L. 7-10, 23-29.)

On the cross-examination of SCOTT, the District Attorney persisted in asking him about the conversations he had had with his Defense Attorneys (Tr. p. 176, L. 26-30) and Defense Counsel McCARTY objected upon the grounds that such conversations were privileged and improper cross-examination (Tr. p. 177, L.3-8) but the Court overruled the objections (Tr. p. 177, L. 9) and the District Attorney allowed to proceed questioning SCOTT about what he had told his Attorneys (Tr. p. 177, L. 10-17.) again Mr. McCARTY objected (P. 177, L. 18-20.) and was again overruled by the Court (L. 21-23.)

and the ~~disputed~~ ^{District} attorney allowed to go on asking what SCOTT had talked about with his Attorneys, despite objections by Mr. McCARTY and Mr. HATCH (Tr. P. 178, L. 16- 29.)

The District Attorney accused SCOTT of having had several weapons in his possession when arrested, which SCOTT denied (Tr. p. 179, L. 23-30; p. 180, L. 1-4.) when there is not any evidence in the record that he ever had any. And SCOTT denied that he had ever seen any weapons among their group (Tr. p. 182, L. 1-4.) SCOTT stated that he was sure that he was in Chandler, Oklahoma, on November 28, 1955, (Tr. p. 192, L. 28.) because he made his car payment on the 28th (Tr. p. 193, L. 1-3.) That he and TOWNSEND stayed at Wayside Motel in Oklahoma City the night of November 29th, and he himself again on the night of the 30th. At. Trans. page 193, lines 25-26, the District Attorney, over objections of Defense Counsel started referring to another crime which is charged against appellants by referring to the

"Board of Education in Memphis, Tennessee",

(Tr. p. 193, L. 25 to p. 194, L. 5)

SCOTT testified on corss-examination that he was in the State of Oklahoma from the 26th to the 29th of November, 1955, (Tr. p. 202, L. 15-22) The District Attorney then accused SCOTT as follows: (Tr. p. 202, L. 25 - P. 203, L. 5.)

"Q And isn't it a fact that you gave her (Brenda Scott) a .45 automatic and told her to hide it for you at the Rufe Anderson farm, and that she hid it under a pile of hay out at the barn?

A No. She did not.

Q It is your statement that she did not hide a gun under a pile of hay?

A It is my statement that I didn't give her no gun to hide under a pile of hay, or to hide anyplace.

Q It is your statement that you didn't have an automatic of that kind at all, isn't it?

A That's correct. Of that kind, nor no other kind."

But the record shows that there was never any evidence to indicate that SCOTT had any such gun, or that his sister hid anything for him or anyone else, the District Attorney refused to ask BRENDA SCOTT if she did any such thing so that she could deny it, but made the baseless accusation to SCOTT to thereby prejudice him and his sister in the eyes of the Jury.

And the District Attorney continued such baseless accusations, as follows: (Tr. p. 203):

"Q Do you remember talking with a bar maid there by the name of Georgia Vincent Taylor?

A I don't remember any conversation that I had with her.

Q Do you remember her as an individual?

A I don't even know the name.

Q And at that time didn't you show her some bills and some pistols?

A ~~No~~ indeed I didn't.

Q You didn't?

A No.

(contd.)-

"Q And didn't you tell her at that time,
"Baby, it's all right if you know how
and if you got guts." ?

A No. No. never nothing like that. "

And there is nothing whatever in the record
to even indicate that any such person existed
or that SCOTT ever had any such conversation.

OLIVER TOWNSEND testified in his behalf that
he cameover and talked to SCOTT at Scott's
mother's house on November 27th, 1955 (Tr. p.
211, L. 29 - to- p. 212, L. 1.) that he stayed
the night of November 27th in a little Hotel
on Second Street in Oklahoma City (Tr. P. 212,
L. 1-8; p. 219, L. 25-30.) that he stayed in
Tulsa, Oklahoma, the night of November 28, 1955
(Tr. pp 212, L. 16-17; p. 220, L. 1-4; p. 222,
L. 11-16) That when they were brought back to
Salt Lake City and put in a line-up at the City
Police Station, that he and SCOTT were the ONLY
colored persons in it (Tr. p. 216, L. 2-8.)

~~TOWNSEND~~ on cross-examination denied that he had ever been in the Credit Industrial Loan Co. (Tr. p. 216, L. 17-19) and that he never had a .45 (Tr. p. 216, L. 20-21) and never owned a hand gun or pistol (Tr. p. 217, L. 1-2.) and that he did not have anything to do with the robbery of the Loan Co. (Tr. p. 217, L. 3-5.) that on the 28th day of November, 1955, he was in Oklahoma City and Chandler, Oklahoma (Tr. p. 217, L. 6-8; p. 22, L. 11-22)

And the District Attorney continued the same baseless prejudicial questioning with Townsend that he had with SCOTT, supra, as follows:

"Q Weren't you present when Scott gave a .45 automatic to Brenda and told her to go hide it under a hay stack?

A You see Brenda wasn't out there....

(Tr. p. 228, L. 28-30)

Q And you were carrying some rolls of silver, were you not, wrapped rolls?

A I might have had one or two rolls.

(cont.)-

GAY testified that he was in Salt Lake at any time between November 8th and 29th, 1955, (Tr. P. 240, L. 17-19.) that he had never been in the Loan Co. that was robbed, and never went there and signed the name 'Terry' (Tr. p. 240, L. 20-27.) and that he had never owned a gun (Tr. p. 241, L-16-22.) that he didn't even have a speaking acquaintance with ROY DAVIS (Tr. p. 247, L. 27-29.)

And the District Attorney again asked:

"Did you have any occasion with them, or without them, to visit the Board of Education in Memphis?"

MR. HATCH: At this time, Your Honor, I am going to move for a mistrial. Mr. Anderson persists, and has through three witnesses, in bringing up a matter that is entirely divorced from this business, of the Board of Education. This business of rolls of money with the Board of Education is definitely immaterial and has no place in this trial. It is improper cross examination.

THE COURT: Well, you may object to it on the grounds that it is immaterial, Mr. Hatch, but your motion for a mistrial will be denied. I don't see the materiality of it.
""
(Tr. pp 245, L. 3-13.)

In Rebuttal, the State called NORMAN HUNTER, an agent for the State Crime Bureau of Oklahoma, and he immediately brought forth another burst of 'Hearsay' evidence and references to other crimes; he stated that he arrested SCOTT and TOWNSEND on the 4th of December, 1955, at the farm of Scott's uncle 15 miles from Chandler, Oklahoma (Tr. p. 250.) that he found 2 rolls of silver with "Board of Education, Memphis, Tennessee, stamped on them (Tr. p. 252, L. 6-7) admitted that there was NO pistol in their car (Tr. p. 252, L. 16-17)

Mr HUNTER then testified that he had a conversation with Rufe Anderson, the owner of the farm the next day, about Brenda Scott, and as a result he made a search and found a gun, a .45, hidden

in the b[REDACTED] of baled hay, that he had to move about a ton of hay to get it, that this search took place on the 8th of December, four days after Scott and Townsend had been arrested (Tr. p. 252, L. 18 -to- P. 253, L. 20.) Whereupon the .45, the gun he had allegedly found was with the clip and shells commented on in detail, and handled back and forth in front of the jury (Tr. p. 253, L. 21 -- p. 254, L. 30) and the State attempted to get them admitted inevidence (Tr. p. 256, L. 10-11.)

On cross-examination Mr. HUNTER admitted that he was already at the farm, before SCOTT and TOWNSEND drove up, that he had never seen them there before, that neither of them was near the 'haystack' where he said he later found a gun, that he did not have a warrant of arrest for them, that he had had them under surveillance for several days (Tr. p. 257, L. 15-26.)

Mr. HUNTER said that he had already arrested JOHNNY ROBINSON, who was already at the farm in the house, that he had the Mercury car (Tr.

p. 259, L. 2-9, ~~that~~ ~~neither~~ TOWNSEND or SCOTT was out to the barn (and pile of hay) (Tr. p. 259, L. 16-17) and that he had never seen them at the farm before (P. 259, L. 18-20) Mr. HUNTER further stated that he had the Three men under surveillance from November 20th to December 4th, 1955 (Tr. p. 260, L. 16-21; P. 261, L. 15-17.) that he lost contact with them on the morning of November 26th. stated that they weren't in Lincoln County between the 26th and 31st, but admits that his conclusion was because: "They weren't seen by any officer." (Tr. p. 262, L. 24-30.) He stated that they were going around wearing guns, but admits that he didn't see them wearing any guns (Tr. p. 264 L. 24-28; P. 265, L. 24-28.) that it was just something that he had been told (Tr. p. 264, L. 29; P. 265, L. 1.).

But the record shows that Mr. HUNTER who contributed so much 'Hearsay' and prejudicial evidence of alleged guns and other crimes, also PERJURED himself repeatedly in his eagerness to

convict the appellants, ~~and~~ he testified under oath, as follows:

"Q When was it that you saw them there?

A You mean prior to their arrest?

Q Prior to the 4th day of December?

A On the evening of the 31st of November.

(Tr. p. 259, L. 26-30)

"A They weren't in Lincoln County very much... between the 26th and the 31st; the evening of the 31st. (Tr. p. 261, L. 24-26.)

"Q And when did you next make contact with them and know that they were in the County?

A The evening of the 31st.

Q The evening of the 31st?

A Yes sir.

Q Now what was the condition, or when did you first see the Buick car after the 30th of November? Did you see it on the 31st?

A After the 31st, yes.

Q Did you see it on the 31st, for example?

A Yes sir. I saw it on the evening of the 31st. (Tr. P. 262, L. 6-15.). ""

Proof that ~~these foregoing~~ statements of State's witness Mr. NORMAN HUNTER are PERJURY, appears on any calendar, for there is NO such day as the 31st of November.

MINNIE LOIS BROWN the last Rebuttal witness for the State, was a Clerk at the WAYSIDE MOTEL in Oklahoma City during November of 1955, and was so working on the 29th of November (Tr. p. 270, L. 13-27.) and identified the pictures of GAY, SCOTT and TOWNSEND as having been there on the 29th of November, 1955 (Tr. P. 270, L. 28-- P. 271, L. 8). She testified that she first saw the Three Appellants between 6:30 and 7:00 in the evening of November 29th, 1955, in the office of the Motel (Tr. p. 271, L. 18 - to - P. 272, L. 6.) that they came in an automobile, a '55 Buick, that SCOTT registered for cabins 4 and 5, that she gave them a card to sign in brown ink (Tr. p. 272, L. 10-30) she said that there were Three men and Two women in the car (Tr. p. 273, L. 13-20)

MINNIE LOIS BROWN ~~testified~~ that she observed the appearance of appellant's car, and that it had BUGS spattered on it, on windshield (Tr. P. 273, L. 5-14) stated that she drove herself and that she had observed the presence of BUGS during the driving in Oklahoma City and thereabouts (Tr. p. 274, L. 22-27) That it happens (BUGS) in the early evening and at night (Tr. P. 275, L. 3) And on cross-examination Miss MINNIE LOIS BROWN again said there were BUGS on appellant's car (Tr. p. 279, L. 2-4) that there were BUG spatters on it (L. 27-30) that car had both MUD and BUGS on it (Tr. p. 280, L. 11-12) and she identified appellant SCOTT in the courtroom as the man who signed the registration card at the Wayside Motel on the evening of November 29, 1955 (Tr. p. 281, L. 1-8) Miss BROWN identified the registration card (Ex. 6) and her writing on it (Tr. P. 282, L. 17-30) Finally at Transcript page 284, L. 1-13, the Court sustained Defense objections to the gun.

~~Refusing to admit it as evidence,~~ but the gun and shells and clip were allowed to remain in front of the Jury, and it was not until after the jury had retired to deliberate, that Mr. Anderson withdrew the Gun, etc. after they had done their full measure of harm to the accused defendants (Tr. p. 290, L. 24 - P. 291, L. 3.) The record further shows that NO admonition was ever given the jury to disregard such items as the Gun and shells offered but not received as evidence, or to disregard any of the highly prejudicial comments and questions made by the District Attorney during the Trial.

At the close of the Trial, Mr. HATCH excepted to the Court's instructions No's 4, 5 and 6, and it's failure to give Defendant's Requested Instruction No. 1., at Transcript page 290, L. 11-23, as follows:

" MR. HATCH: Just a couple, Your Honor. Except to Instruction No. 4 on the grounds that by the wording thereof it puts defendants and their testimony under a differ-

rent basis as to the consideration of bias and prejudice than it does to the other witnesses in the case.

I except to Instruction No. 6 on the basis that it is confusing to the jury in that there was no, or has been no evidence to indicate that there were persons aiding, abetting or accomplices in the matter, other than the three principals.

I except to Instruction No. 5 insofar as it contains the words "If proven" on the fifth line thereof.

And, of course, as usual, I except
to the Court's failure to give my requested
Instruction No. 1. " "

P O I N T O N E

THE CONVICTION OF APPELLANTS WAS
OBTAINED BY THE KNOWING USE OF
PERJURED TESTIMONY, AND IS THEREBY
IN VIOLATION OF THEIR CONSTITUTIONAL
RIGHTS TO "DUE PROCESS OF LAW",
UNDER SECTION ONE OF THE FOURTEENTH
AMENDMENT OF THE CONSTITUTION OF
THE UNITED STATES.

**_*_*_*_

As stated in the 'Statement of Facts' at
pages 4 and 5 supra, Mr. CHRISTENSEN, the
State's Chief Witness testified to a number
of matters deeply concerning this case, which
are shown by the diametrically opposed testi-
mony of Salt Lake Police Detective DUNCOMBE,
to be PERJURY on the part of Mr. CHRISTENSEN,
Appellants submit that Mr. DUNCOMBE who was
merely a Police Officer doing his duty in the
investigation of this case, would have no
reason to deliberately lie about Mr. CHRISTENSEN

and what ~~Mr. CHRISTENSEN~~ did; Whereas on the other hand, Mr. CHRISTENSEN, who was left in charge of the Loan Office and had full charge of the money in the drawers and the handling (or mishandling) of it (Tr. p. 75, L. 24 - to - P. 76, L. 5) could very easily have reasons to commit Perjury in regards to the robbery to coverup what he may have done or known to have been done; Therefore Appellants submit that as the Record herein shows that one of these two State's witnesses committed PERJURY, that Mr. CHRISTENSEN is the one who PERJURED himself.

To recap, Mr. CHRISTENSEN testified that he talked to Detective DUNCOMBE and looked at a number of pictures with him right after the alleged robbery (Tr. p. 97, L. 16-30) Whereas Detective DUNCOMBE testified that he didn't even see Mr. CHRISTENSEN until several days after the robbery (Tr. p. 127, L. 2-4; P. 128, L. 11-15; P. 131, L. 6-8, 18-19)

Why did not Mr. CHRISTENSEN stay and talk to

The Police ~~who came right~~ after the robbery?

Inasmuch as he was the ONLY witness able to describe the robbery, why did he absent himself for several days? Appellants submit that it was to gain time to makeup a plausible story of the alleged robbery. And the two girl cashiers offered NO information (Tr. P. 126, L. 30 to P. 127, L. 1)

Further Mr. CHRISTENSEN testified that he was at a lineup at the City Police Statation within 2 or 3 days after the robbery and identified

Scott and Townsend (Tr. p. 101, L. 1 to P. 102, L. 7.) whereas Scott and Townsend were not brought back to Salt Lake City from the State of Oklahoma until December 22, 1955, and NO lineups were had in this case until after they were brought back (Tr. p. 130, L 4-7, 16-18; P. 131, L. 3-5)

And State's witness NORMAN HUNTER, who was the State brought from Oklahoma to testify, in addition to a mass of 'Hearsay' and other evidence relating to other alleged crimes, that

~~had nothing whatever to do with the charge at~~
bar but were related solely to prejudice the
Defendants, as set forth in the "Statement of
Facts' at pages 18-21, supra; is shown by the
Record in this case to have deliberately and
consistently PERJURED himself, by his various
testimony as to what happened on the non-exi-
tent 31st day of November, 1955. See:
(Tr. p. 259, L 26-30; P. 261, L-24-26;
P. 262, L 6-15).

It only needs a reading of the Transcript
in this case, of Mr. HUNTERS testimony, pages
219 to 265, to perceive that most of it
never should have been admitted, and was, even
if it had of been true, very prejudicial to
the Defendants, and perhaps played a large part
in persuading the jury to convict defendants.

And appellants contend, that having shown
that both Mr. CHRISTENSEN and Mr. HUNTER, have
as shown by the Record, PERJURED themselves,
their testimony and the conviction of the

Appellants ~~thereby and~~ thereunder, can NOT LEGALLY STAND. And it cannot be said that the District Attorney, Mr. ANDERSON, did not know that these witnesses PERJURED THEMSELVES, for the simple reason that he examined them and heard them make their statements in Court himself, and made NO attempt to correct them.

It is stated in the Constitution of the United States, Annotated, 19 3 Edition, at page 1124:

" When a conviction is obtained by the presentation of testimony known to the prosecuting authorities to have been perjured, the constitutional requirement of due process is not satisfied. That requirement "Cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to have been perjured. Such a contrivance * * * is as inconsistent with the rudimentary demands of justice as is the obtaining of like result by intimidation."

(1) MOONEY v. HOLOHAN, 294 U. S. 103, 112

55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R.

See also, ~~the cases of~~ :

PYLE v. KANSAS, 317 U.S. 213, 216,
65 S. Ct. 177, 87 L. Ed. 214;

NEW YORK ex rel. WHITMAN v. WILSON,
318 U. S. 688, 63 S. Ct. 840, 87 L. Ed.
1083;

WHITE v. RAGEN, 324 U. S. 760, mid. p. 764,
65 S. Ct. 978, mid right p, 980;

CHESSMAN v. TEETS (1955) 76 S. Ct. 34-35.

Appellants submit that where PERJURED testimony
is mingled with whatever valid testimony there
is to uphold a case, that the good cannot be
separated from the bad, but that the convictions
must fall as a whole. See the case of:
COMMUNIST PARTY v. SUBVERSIVE ACTIVITIES
CONTROL BOARD (1956) 76 S. Ct. 663, at 668

P O I N T T W O .

THE APPELLANTS WERE DENIED THEIR
CONSTITUTIONAL RIGHT TO A "FAIR
TRIAL", BY AN IMPARTIAL JURY, AND
TO "DUE PROCESS OF LAW", UNDER
SECTION ONE OF THE FOURTEENTH
AMENDMENT TO THE CONSTITUTION
OF THE UNITED STATES.

* * * * *

IN THAT:

(i) The trial Court erred in summarily absen-
ting itself from the Bench and favoring the
District Attorney before the Jury.

As set forth in the 'Statement of Facts' page
2, supra, Judge Ray Van Cott, Jr., absented
himself from the Bench to go 'visiting' in
the midst of the questioning of the first
witness, ignoring the Defense and their Counsel,
and in effect turning the Court over to the
District Attorney with the words: "You may
Proceed". (Tr. p. 75, L. 7-9.): And Appellants

submit ~~the~~ ~~this~~ ~~motion~~ Although it might not have been harmful if it was the only one, is in view of all the other cumulative errors which followed, the one which 'paved the way' so to speak, to deny Appellants a 'Fair Trial'.

(ii) The Trial Court erred in refusing to dismiss the case upon Motion of Defense Counsel Mr. Hatch, after the State rested it's case.

Appellants submit the MOTION made by Mr. HATCH at Trans. pages 136 - to - 139, as sufficient

(iii) The Trial Court erred in refusing to declare a ~~M~~istrial upon Motion of Mr. Hatch, in regards to the District Attorney's continued reference to another alleged crime and rolls of meoney allegedly taken therein.

At Trans. page 192, L. 25-26, the District Attorney started his series of references to another crime charged against appellants in Memphis, Tennessee, having nothing whatever to do with the one charged in the instant case,

by refer~~ence~~ to ~~the~~ Board of Education in Memphis, Tennessee (Tr. p. 195, L. 25 - to - P. 194, L. 5.) and continued on a mounting scale with witness TOWNSEND as set forth at pp. 15-16, supra; wanting to know where and how TOWNSEND got some rolls of money in Tennessee, and as to whether they had "Board of Education of Memphis, Tennessee", on them, etc. (Tr. p. 229, L. 10-19.) and again as stated at page 17, supra, the District Attorney did the same thing with Defense witness GAY, and Mr. HATCH made the MOTION FOR A MISTRIAL, as follows:

" Mr. HATCH: At this time, Your Honor, I am going to ask for a Mistrial. Mr. Anderson persists, and has through three witnesses, in bringing up a matter that is entirely divorced from this business, of the Board of Education. This business of rolls of money with the Board of Education is definitely immaterial and has no place in this trial. It is improper cross-examination."

And the Trial Court denied this Motion made by Mr. Hatch (Tr. P. 245, L. 3-13.):

And Appellants submit, it was impossible for them to have a "Fair Trial" with such prejudicial matters regarding other crimes and such rolls of silver the defendant may have had in the State of Oklahoma, having absolutely NO connection with the instant case, for as stated before at page 16, supra, there were no coins taken in the robbery in Salt Lake (Tr. p. 76, L. 26 - to - P. 77, L. 3.) and such references to other crimes had no possible purpose other than to prejudice the jury against defendants.

It is a well settled rule of Law in the State of Utah, that evidence of other and unconnected crimes is inadmissible, and its reception is reversible error, See:-

STATE v. LEEK (Utah 1934) 39 P. 2d. 1091 1096;

STATE v. CRAGUN (Utah 1934) 38 P. 2d. 1071, 1079;

STATE v. GREGORIOUS (Utah 1932) 16 P. 2d. 893, 897

(iiii) ~~The Trial Court~~ erred in permitting the District Attorney, over the objections of Defense Counsel, to ask Defendant-witness SCOTT the details of his conversations with his Defense Attorneys Mr. McCarty and Mr. HATCH, as shown by the Transcript at P. 176, L. 26-30; P. 177, L. 3-23.) Appellants submit that such conversations were privileged just as contended by Mr. McCARTY (Tr. P. 177, L. 3-8.)

(v) The Trial Court erred in admitting, and in not cautioning the jury to disregard, the large amounts of 'hearsay' evidence and comments of State's Counsel, thus depriving the Defendants of their Constitutions Right to a 'Fair Trial' by an 'Impartial Jury' on Legal Evidence.

- The record in this case is replete with 'Hearsay' evidence and baseless accusations by the District Attorney; Even the first witness Mr. GIBBS, admitted that all he knew about the robbery was what he had been TOLD

by Mr. ~~CHRISTENSEN~~, ~~the~~ man who avoided the Police for Two days and then Perjured himself on the Witness Stand (Tr. pp. 76-77.) and likewise was TOLD that a man came in and wrote the name TERRY on the 'Traffic Sheet', which was NEVER produced. (Tr. p. 81, L. 26 - to - P. 82, L14) And the District Attorney, at Trans. pp. 202--203, was permitted to make a lot of baseless and prejudicial accusations to SCOTT, as pointed out at pages 12 - to - 14, supra, in regards to a supposed plan to have his sister hide a nonexistent gun, and a mythical conversation with a Bar Maid in Oklahoma, of none of which was there any evidence whatsoever, but were simply more of the bludgeoning tactics used by the District Attorney with the blessing of the Trial Court, to so prejudice the jury and lead them astray from the real issues that a 'Fair Trial' was impossible.

And the District Attorney was permitted to do the same thing to TOWNSEND, as pointed out at pp. 15-16, supra; (Tr. P. 228, L. 28 - to - P. 229, L. 19.)

State's ~~Witness~~ ~~NORMAN~~ HUNTER, as pointed out at pages 18-22, supra, contributed more than his share of 'Hearsay', mythical and unverified testimony, all adulated to prejudice the jury against the Defendants (Tr. pp. 252 - to - 26.) and that in his eagerness to convict the defendants he even tried to cheat them out of a day or that they were in Oklahoma City, Oklahoma, by testifying repeatedly to a non-existent 31st day of November (Tr. pp. 259, 261.) and thereby PERJURED himself on the witness stand; Among his most damaging testimony was that about a 'Gun' he was supposed to have found at a farm in Oklahoma, under a haystack, four days after the appellants had been arrested, in a search based on a supposed conversation, whose subject was not mentioned, in the absence of defendants and everyone else; But he intended and no doubt succeeded in conveying the impression to the Jury, that SCOTT'S Sister a frail woman had hidden a .45 pistol for him under a ton of baled hay (Tr. p. 252, L.18-to-p. 253, L. 20.)

regarding ~~the fact that~~ JOHNNY ROBINSON was already at said farm and had ample opportunity to hide such a gun there if he had one, as pointed out supra, there is no showing that appellants ever had any such gun, or that they were ever at said farm before, yet it was allowed to be handled back and forth before the Jury until they retired, and then withdrawn (Tr. p. 253, L. 21 to - P. 2-4, L. 30; P. 290, L. 24-- to page 291, L. 3.)

In STATE v. NICHOLS (Utah 1944) 145 P. 2d. 802, a case in which such a 'Gun' was sought to be connected with the defendant in a Burglary case by 'Hearsay' testimony, this Supreme Court said, at page 803, bottom right:

"The damage was already done by this incompetent testimony, as will be observed from a detailed examination of all the testimony, and as evidenced by the verdict returned by the jury. Even had the trial court explained its incompetency to the jury and instructed them expressly to disregard it, it is doubtful that the injurious effect could have been overcome."

Appellants ~~submit that the~~ record in this case is replete with innuendo and bare-faced 'Hear-say' evidence, which in view of the fact that at no time was the jury instructed to disregard such conduct on the part of the District Attorney, could not do other than violently prejudice the jury against appellants and cause them to convict solely on surmise, speculation and suspicion instead of legal evidence.

In STATE v. POTELLO (Utah 1911) 119 Pac.

1923, at 1028, this Court Held:

" It is a familiar rule that one presumption or inference cannot rest upon another mere inference or presumption. It can only rest on proven facts."

(vi) The Trial Court erred in giving Instruction No.4, which places Defendant's testimony on a different basis than the other witnesses in the case.

Instruction No 4, places emphasis on the fact that the jury may take into consideration defendant's 'INTEREST' in weighing their testi-

mony..; ~~the same as they~~ would any witness under similar circumstances (charged with crime) but it places NO such burden on any of the other witnesses, who are interested in the case, but not charged with a crime; and this Appellants submit, is an unfair Instruction (Tr. P. 386.)

(vii) The Trial Court erred in giving Instruction No.5 (Tr. pp. 286-287.) because it places the burden of proof on defendants to prove their Alibi, and gives the wrong definitions.

The Fourth line to Ninth line of Instruction No. 5, reads as follows:

" You are instructed that such defense is proper and legitimate, if proven, as any other defense. If in view of all the evidence the jury has a reasonable doubt as to whether the defendants were in some other place when the crime was committed, they should given the defendants the benefit of the doubt and find them not guilty."

~~Appellants take exception~~ first to the words in the fourth line of Instruction No. 5, "IF PROVEN", and submit that the burden can NOT thus be cast on the defendants TO PROVE their defense of Alibi; "That the burden of proof does NOT shift to the defendant in regards to an Alibi, but that the State, in all cases where the presence of the accused is necessary to render him responsible, must prove that he was there, and if from all the evidence there exists a reasonable doubt of his presence, he should be acquitted, and where a Court expresses the belief that the burden is on the defendant to establish defense of alibi, conviction will be reversed." See:

STATE v WHITELEY, 100 Utah 14, 110 P. 2d. 337;
PEOPLE v. ELMORE, 277, N.Y. 397, 14 N. E. 2d.
451, at 254-255-

Appellants submit that the Court's words ---
"doubt as to whether the defendants were in
some other place (Oklahoma)", is wrong, that

the Instruction ~~should be~~.

"doubt as to whether the defendants were in Salt Lake City (scene of crime),"

Appellants submit that the whole theory of the defense of an Alibi is to raise a doubt that they were at the scene of the crime, that if they were not at the scene of the crime, they could not have committed it; And is NOT as this Instruction No. states- "doubt that they were somewhere else; for example, just supposing the defendants were not in Oklahoma when the crime was committed, still that would not prove that they were in Salt Lake City, and the appellants submit that the Trial Court's words in Instruction No. 5- doubt as to whether defendants were in some other place (Oklahoma)", is wrong as placing the burden of proof on them to prove their innocence beyond a reasonable doubt, for it misconstrues and misinforms the jury of the meaning and purpose of an alibi.

(viii) ~~The trial Court~~ erred in giving it's Instruction No 6, which merely confused the jury upon theories as to "Aiders", "Abettors" and "Accomplices", not in evidence or in issue.

Appellants believe that a reading of this Instruction No 6. at Trans. p. 287, and Mr. Hatch's remarks at mid page 290 are sufficient.

(ix) The Trial Court erred in failing to give the Defendant's Requested Instruction No. 1, thereby depriving them of an accurate definition of the purpose of an alibi, and their right to present their "DEFENSE" of an ALIBI to the Jury in a legal manner, to "DEFEND" themselves against the charge against them.

Appellants submit that their Requested Instruction No. 1, set forth at Trans. page 28, gives an accurate and precise definition of the purpose of, and operation of, the legal Defense known as an 'Alibi' in plain words that any Juror could understand, and inasmuch as there was NO good instruction on Alibi given

that in ~~fact the one~~ given was a very bad one,
as set forth at pages 41-43, supra; Therefore
the failure of the Court to give Defendant's
Requested Instruction No. 1, deprived them of
a substantial Right, the Right to "DEFEND"
themselves and to their Constitutional Right to
"DUE PROCESS OF LAW", graranteëd them by the
Fourteenth Amendment to the Federal Constitution.

In their presentation of evidence in regards
to Alibi, Appellants proved beyobd a doubt by
the State's own witnesses that they were in
Oklahoma on the morning of November 26th, 1955,
(Tr. p. 262, L. 2-5.) And the State's witness
MINNIE LOIS BROWN, testified and produced
documentary evidence that they registered at
the WAYSIDE MOTEL in Oklahoma City, between
6:30 and 7:00 O'clock on the evening of the
29th day of November, 1955 (Tr. p. 271, L. 13-20:
Page 281, Line 1-7; P. 282, L. 25-30; P. 285,
L. 3-6.)

The ~~evidon e in this~~ case shows that the alleged robbery in Salt Lake City took place at between about 1:40 P. M. and 2:00 P. M. on the 28th day of November, 1955 (Tr. pl 75, L. 19-22; P. 76, L. 9-18.) therefore the time elapsing between the robbery at about 2:00 P. M. Salt Lake time, and 2:00 P. N. of the next day Oklahoma City time was not over 28 hours.

In his sworn AFFIDAVIT, Mr. ALDON J. ANDERSON, the District Attorney of Salt Lake County, State of Utah, at Trans. pages 18-19, ATTESTS in two separate places that the round-trip distance between OKLAHOMA CITY, OKLAHOMA, and SALT LAKE CITY, UTAH, is 3, 920 miles. Dividing by 2 leaves a one-way distance of 1960 miles, and appellants submit that it is next to impossibel to travel by car the distance between Salt Lake City, Utah, and Oklahoma City, Oklahoma, in the time of 28 hours, in the winter-time, on the 28th and 29th days of November, over the mountain roads that must be travelled.

also ~~pertinent is the fact~~ that State's Witness MINNIE LOIS BROWN, testified that when Appellants registered and stayed the night of the 29th of November, 1955, at the Wayside Motel in Oklahoma City, Oklahoma, that she observed their car, that there were BUGS SPATTERS and MUD on it (Tr. P. 274, L. 5--14; P. 279, L. 2-4, 27-30.)

That she drove herself, and she had observed the presence of BUGS during the driving in Oklahoma City and thereabouts (Tr. P. 274, L. 22-27.) That it happens (BUGS) during the early evening and night (Tr. P. 275, L. 3.)

Appellants submit that it would be very unlikely for them to get any 'BUGS' on their car on a drive through the mountains on the way from Salt Lake City to Oklahoma City in the wintertime during the night of November 28th, and the day of November 29th, 1955, Whereas if they ~~had~~ stayed around Oklahoma City and Tulsa as they testified they did during that time, or even if they went to Tennessee, and robbed the "Board of Education" there, as the State of Tennessee

by it's ~~Detainer~~ against them charges, then they would probally have accumulated lots of BUGS on their car, as both Oklahoma City and Memphis are, as any Map will show, over 400 miles further South than Salt Lake City, Utah, which has NO BUGS on it's highways on the 28th and 29th days of November; And TOWNSEND testified that when they were running around between Meeker and Chandler, Oklahoma, that some of the roads they were on were dirt roads, and everyone knows that it is easy to pick up Mud and Bugs on dirt roads, or out at a farm, like that where they were arrested in Oklahoma.

All these matters tend to prove, Appellants submit, that there is merit in their contentions that they wer³ in the State of Oklahoma when the alleged robbery took place in Salt Lake City, and that in a 'Fair Trial', one in which their Legal Rights would be respected they would in all probability be acquitted. And they submit, that for all the reasons

and authorities cited herein, they have NOT, in any sense of the word, been given a 'Fair Trial' as guaranteed by the Constitution.

In the case of- STATE v. BIGGS (Or, 1953) 255 P. 2d 1055, at bottom right of page 1063, the Supreme Court of Oregon Held:

" (14) Denial of a fair and impartial trial in a criminal case, whether the crime charged is either a felony or misdemeanor, would be a violation of the Fourteenth Amendment to the Federal Constitution. It would constitute a denial of due process."

IN CONCLUSION, Appellants submit that they have shown good cause and sufficient reasons that according to Law and the Decisions applicable thereto, their Conviction should be Reversed, and a new trial if any, accorded them in which their Legal Rights may be respected according to Law and Justice.

Respectfully submitted by:

Frank D. Gay,
Frank Delano Gay,

Oliver Townsend,
Oliver Townsend,

Willie Olen Scott
Willie Olen Scott.