

1982

## State of Utah v. Zolla Hales : Petition for Rehearing

Utah Supreme Court

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David L. Wilkinson; Earl S. Dorius; Attorneys for Plaintiff and Respondent;

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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STATE OF UTAH

Plaintiff and  
Appellant,

vs.

ZOLLA HALES

Defendant and  
Respondent.

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Case No. 18,083

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PETITION FOR REHEARING

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Brief of Appellants in support of Petition for Rehearing

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**FILED**

AUG - 6 1982

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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STATE OF UTAH	:	
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Plaintiff and	:	
Appellant,	:	
vs.	:	Case No. 18,083
	:	
ZOLLA HALES	:	
	:	
Defendant and	:	
Respondent.	:	

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PETITION FOR REHEARING

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF UTAH:

COMES NOW the Appellant, within 20 days after the decision in the above-entitled case which this Honorable Court rendered, affirming the judgment of the trial court dismissing Plaintiff's Complaint; and respectfully submit this Petition for Rehearing, pursuant to and in accordance with Rule 76(e)(1) U.R.C.P., and for cause thereof show:

1. The Appellate Court may review prosecutorial misconduct despite Defendant's failure to object at trial, when the misconduct amounts to plain error or when the effect of the statements could not have been obviated at trial when the guilt of the Defendant was in doubt.

2. Statements made by the prosecutor at trial in the case of Defendant Zolla Hales amounted to plain error and as such did not require that objection be made by Defendant at trial in order to be reviewed on appeal.

3. An objection made at trial would only have increased the amount of damage done by the prosecutor and could not have obviated it.

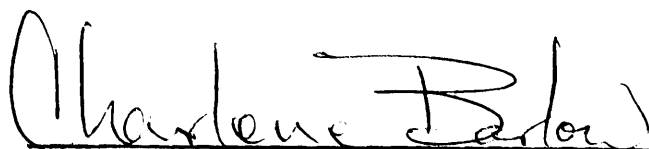
4. The guilt of Defendant was sufficiently in doubt so as to necessitate review of whether or not prosecutorial statements were grossly prejudicial and required reversal.

5. Utah case law does not prohibit review of prosecutorial misconduct so as to prevent a miscarriage of justice.

6. The argument that Defendant did not make timely objection was not raised during the hearing for new trial and was not brought up in Respondent's brief; but was brought up only on oral argument not giving Defendant an adequate opportunity to prepare to respond.

WHEREFORE, Petitioners pray that a rehearing be granted, that the Supreme Court be allowed to hear the contention of Appellant, and that the judgment of the trial court be reversed.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August, 1982.

  
for W. Andrew McCullough  
Attorney for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Petition for Rehearing, postage prepaid, to Earl Dorius, Attorney for Respondent, 236 State Capitol Building, Salt Lake City, Utah 84114, this 6th day of August, 1982.

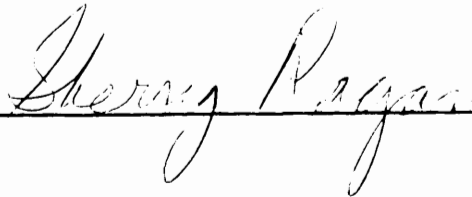
  
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## ARGUMENT

### POINT I

THE APPELLATE COURT MAY REVIEW PROSECUTORIAL MISCONDUCT DESPITE DEFENDANT'S FAILURE TO OBJECT AT TRIAL, WHEN THE MISCONDUCT AMOUNTS TO PLAIN ERROR OR WHEN THE EFFECT OF THE STATEMENTS COULD NOT HAVE BEEN OBTIATED AT TRIAL AND THE GUILT OF THE DEFENDANT WAS IN DOUBT.

Although generally to preserve a matter for Appellate review it is necessary that timely objection be made at trial, exceptions have been made to this general rule. The rule stands to allow the Court to make corrections during the trial and to minimize the necessity of a new trial because of error that could be corrected. Courts have recognized however, that this rule does not apply in cases where "the argument complained of was so offensive as to deprive the Defendant of a fair trial," United States v. Bohr, 581 F.2d 1294, 1301 (8th Cir. 1978) cert. denied, 439 U.S. 958 (1978) or where "plain error" has occurred requiring reversal. United States v. Gilliland, 586 F.2d 1384, 1387 (10th Cir. 1978) or where a miscarriage of justice would result. United States v. Segal, 649 F.2d 599, (8th Cir. 1981).

The 10th Circuit Court held in the Gilliland case that:

Improper comments on Defendant's constitutional right to remain silent when the Defendant was being questioned by a government agent along with improper reference to prior convictions, constituted plain

error requiring reversal of . . . convictions, notwithstanding the fact that no objection was made at trial but the matter was raised on appeal as "plain error". 586 F.2d at 1390.

In the case of United States v. Segal, 649 F.2d 599 (8th Cir. 1981) although the Court affirmed the conviction of the Defendant the Court said "As recognized in Appellant's brief, Appellant's counsel did not effectively object to the government attorney's closing argument. We have considered this allegation of error as "plain error." 649 F.2d at 604. The Court goes on to explain what they consider as "plain error",

Under plain error, the question for determination is whether 'the argument was prejudicial as to have affected substantial rights resulting in a miscarriage of justice'" citations omitted. 649 F.2d at 604 for 10.

The Court upon review of the comments made by the prosecutor ruled that the jury verdict had not been affected by the argument.

The 5th Circuit held in the case of United States v. Harbin, 601 F.2d 773 (5th Cir. 1979) that the Defendant has "no duty to object and move for mistrial to preserve a matter for Appellate review" when a "prosecutor's argument is so grossly prejudicial that harm (could) not be removed by objection or by instructions," quoting Benhan v. United States, 215 F.2d 472, 473 (5th Cir. 1954) at 776 and reviewed a second statement made by the prosecutor, even though no objection had been made to it at trial.

The 6th Circuit in United States v. Graham, 325 F.2d 922 (6th Cir. 1963) held that comments by the prosecution concerning a "no contest" plea in a prior prosecution of one of the Defendants was so prejudicial that objection by Defendant's counsel was not necessary for review. The Court cited Vierek v. United States, 318 U.S. 236, 247-248 as standing for the proposition that "absence of proper objection to excessively zealous prosecution does not prevent our taking notice of the impropriety of such excesses," 325 F.2d at 928, and granted a new trial.

State courts have held similarly. In People v. Cruz, 605 P.2d 830, 162 Cal. Rptr. 1, 26 Cal.3d 233 (1980) the California Supreme Court, citing other California cases as authority, said,

Defense counsel at trial did not object to most of the complained of acts or request jury admonitions concerning them; . . . Generally both such objections and requests are required. Before allegations of misconduct will be considered on appeal, unless the act or remark is of such a character that a harmful result cannot be cured by any timely admonition. 605 P.2d at 842.

The Arizona Court in a case involving comments by the prosecutor on Defendant's failure to testify held:

Mention is made of the fact that the Defendant failed to object at trial to the statement made by the prosecution. The State contends that this is equivalent to a waiver of the objection, but we must disagree.

In Rutledge v. State, 41 Ariz. 48, 15 P.2d 255, this Court said the general rule that it would not rule on the propriety of the prosecutor's remarks if timely objection was not taken, was inapplicable if it appeared affirmatively on review that the general conduct of the prosecuting counsel was such that it must be presumed to have resulted in a miscarriage of justice. This position was given further support

in the case of State v. Marsin, 82 Ariz. 1, 307 P.2d 607, where we stated that if the claimed error is so fundamental that it is manifest that the Defendant did not have a fair trial, the reviewing Court will consider the error even though no objection was raised below. When one has been denied a constitutional right as essential as the right against self-incrimination, prejudicial effect will be presumed and the error will be deemed fundamental. State v. Smith, 420 P.2d 278, 281 (Ariz. 1966)

Courts recognize the importance of making timely objection at trial under most circumstances. However, under circumstances where "plain error" has occurred, it is reversible by an Appellate Court.

## POINT II

STATEMENTS MADE BY THE PROSECUTOR AT TRIAL IN THE CASE OF ZOLLA HALES AMOUNTED TO "PLAIN ERROR" AND AS SUCH DID NOT REQUIRE THAT OBJECTION BE MADE BY THE DEFENDANT AT TRIAL IN ORDER TO BE REVIEWED ON APPEAL.

The prosecutor, during his closing argument, made the following comments regarding the Defendant's not testifying in her own behalf.

Now the only testimony, really, if testimony it is regarding how it occurred, how the burning occurred, comes from the statement of the Defendant that you will have as an exhibit. She would be the only one to come in and say how it happened, because apparently her husband was not home at the time, and yet he's the one who testifies as to what occurred. Now it seems to me the Defendant's argument to you is asking you to absolutely disregard your senses with regard to who has proved what. I'm surprised he made no comment on the issue of motive. That's strange. (T. 142, 143.)

These comments "come perilously close to, if they do not exceed, the limits of permissible comment under this standard." State v. Hales opinion by J. Oaks No. 18083

(July, 1982). We contend that these comments do exceed the limits under the standard set by the U.S. Supreme Court in Griffin v. California, 380 U.S. 609 (1965) which ruled that comments by the prosecutor concerning Defendant's refusal to testify would violate a Defendant's privilege against self-incrimination. The prosecutor's language in Griffin was very similar to that made by the prosecutor in the instant case. The prosecutor said:

We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt. 380 US at 615.

The error in this case was as prejudicial as that of Griffin and the Defendant's right to a fair trial was impaired and constituted "Plain Error" as defined in United States v. Segal Supra. As such, no objection need be made by Defendant's attorney for the matter to be reviewed by the Appellate Court.

### POINT III

AN OBJECTION MADE AT TRIAL WOULD ONLY HAVE SERVED TO INCREASE THE AMOUNT OF DAMAGE DONE BY PROSECUTORIAL MISCONDUCT AND COULD NOT HAVE OBIATED IT.

As mentioned above, the courts do not require that objection be made at trial if the objection could not serve to obviate the damage resulting from improper comments made by the prosecutor. People v. Cruz, Id. at 842.

In the case of Zolla Hales the error was one that could not have been obviated by objection made at trial. The damage had already been done. The comments were made in the prosecutor's closing argument, after the entire trial had already taken place. Although Defendant's counsel could have objected at the point, to do so would have served only to draw more attention to the fact that the Defendant had not testified. Even if this objection were made out of the hearing of the jury, an objection at that time would have served only as an exclamation point to the prosecution's comments, causing the jury members to pause and reflect at that point on the damaging comments. The second reason that an objection at this point would not have been beneficial is that the judge did not feel that these comments were prejudiced or harmful, as indicated in his remarks during the Motion for new trial. He said, "I have doubts that it was improper, but, in any event, I don't think it was prejudicial . . . (Transcript of Hearing on Motion for New Trial at 98). For Defendant's counsel to object during the prosecutor's closing argument would have only hurt his client's cause and not helped her. For this reason, objection was not made at trial but was made immediately after in the form of a Motion for New Trial, which was denied by the trial court judge.

Because the trial court judge refused to consider the harmful effects of statements made by the prosecutor, plain

error has occurred and needs to be reviewed by the Appellate Court to prevent a miscarriage of justice.

#### POINT IV

THE GUILT OF DEFENDANT WAS SUFFICIENTLY IN DOUBT SO AS TO NECESSITATE REVIEW OF WHETHER OR NOT PROSECUTORIAL STATEMENTS WERE GROSSLY PREJUDICIAL AND REQUIRE REVERSAL.

By reviewing the transcript, particularly the testimony of the Salem City Fire Chief Brent Hanks and more particularly the testimony of the State Fire Marshall, Steve Kennedy, it is clear that the guilt of Defendant was in doubt. In the testimony of the State Fire Marshall (T. 75-86) the Fire Marshall gives no alternative means whereby the fire might have started; but testifies that it could have happened the way Defendant argued it did happen. The rest of his testimony is full of contradictions and lack of any definite opinion. The Fire Chief, who arrived on the scene several hours before the Fire Marshall indicated that the fire could have occurred exactly as Defendant said it had; and that in fact he had no other explanation for the occurrence of the fire than that given by Defendant and Defendant's husband, who testified at trial. (T. 72-74.) There were no contradictions in Defendant's story and no testimony indicated that the fire occurred in any other manner than that related by Defendant. Defendant's story was a completely logical explanation of the occurrence as supported by the testimony of her husband as to her habits and her explanation to him over the phone. (T. at 93, 99.)

Because of the doubt of Defendant's guilt, a review of prosecutorial statements is necessary to determine whether or not these statements contributed significantly to the Defendant's conviction. In light of the lack of substantial evidence presented at trial as to Defendant's guilt, Appellant contends that statements made by the prosecutor during closing argument were grossly prejudicial and require a reversal of Defendant's conviction.

#### POINT V

UTAH CASE LAW DOES NOT PROHIBIT REVIEW OF PROSECUTORIAL MISCONDUCT IN THE ABSENCE OF OBJECTION AT TRIAL WHEN IT SERVES TO PREVENT A MISCARRIAGE OF JUSTICE.

The necessity of timely objection has been upheld by the Utah Supreme Court in order to prevent waste of the Court's time and money in hearing new trials when correction could be made during the trial. State v. Winger, 485 P.2d 1398 (Utah 1971). However, Utah case law does not prohibit the raising of an issue on appeal not objected to at the trial level when to not raise it would result in miscarriage of justice. The Court's concern has been rather that:

When there is a reasonable doubt as to whether the error below was prejudicial, that doubt should be resolved in favor of the Defendant. This is especially true where the error involved is one which transgresses against the exercise of a constitutional right. State v. Eaton, 569 P.2d 1114, 1116 (Utah 1977).

The Utah Supreme Court has ruled on the importance of objection at trial to preserve matters for appeal to obviate



the Court also outlined the rule when the Court said, "The Supreme Court was not constrained to canvass a matter raised for the first time on appeal," State v. Starlight Club, 406 P.2d 912 (Utah 1965) thus demonstrating the Court's reluctance to review matters not raised at trial but at the same time leaving the door open for the "exceptional" cases mentioned in Winger.

In the case of the Defendant Zolla Hales, the trial Court Judge did have an opportunity to review the matter unlike the trial Court Judge in Winger, but he ruled that he felt the comments were not improper or prejudicial. This ruling by the trial Court Judge amounts to reversible error. This error should be considered on review in light of the exceptional circumstance of doubt as to the Defendant's guilt and a clear violation by the prosecutor of acceptable standards for a comment on Defendant's failure to testify, thus denying her the constitutional right to remain silent.

#### POINT VI

THE ARGUMENT THAT DEFENDANT DID NOT MAKE TIMELY OBJECTION WAS NOT RAISED DURING THE HEARING ON MOTION FOR NEW TRIAL AND WAS NOT BROUGHT UP IN RESPONDENT'S BRIEF; BUT WAS BROUGHT UP ONLY ON ORAL ARGUMENT, NOT GIVING APPELLANT AN ADEQUATE OPPORTUNITY TO PREPARE TO RESPOND.

The point on which the Court's earlier decision in this case appears to have turned is that of whether Defendant raised objection at the right time to the closing remarks of the prosecutor at trial. When Defendant filed

the necessity for a new trial State v. White, 577 P.2d 552, 555 (Utah 1978) and on the duty of counsel to the Court to make timely objections so that the Court can make correction, Johnson v. Simons, 551 P.2d 515 (Utah 1976). The Court has not said however, that when a timely objection could not have obviated the effect of misconduct and when a plain error has occurred resulting in the miscarriage of justice that failure of Defendant's counsel to object at trial prevents them from reviewing egregious error. The Court made the standard of review clear in the case of State v. Winger, 485 P.2d 1398 (Utah 1971) where the Court held:

No motion for mistrial or a new trial was made predicated on these errors. The trial court had no opportunity to rule on this matter and correct any of the alleged errors. This is a court of review, which will not, in the absence of exceptional circumstances . . . rule on a matter which is raised for the first time on appeal. 485 P.2d at 1400.

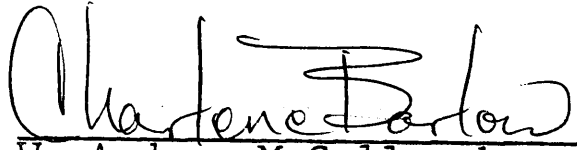
This is precisely the same standard adhered to in other jurisdictions as cited above, but stated in different words. The purpose of this exception to the general rule is to allow review in cases such as the one at hand where "exceptional circumstances" make Appellate review necessary to prevent prosecutorial misconduct which results in unwarranted convictions. The Utah Supreme Court in Winger cites as authority for the above quote, two cases, 1) State v. Anderson, 251 P.362, 363, 68 Utah 551, 554-555, (1928) a longstanding case and 2) State v. Peterson, 240 P.2d 504, 121 Utah 229 (1954) another longstanding case. In 1965

his Motion for New Trial, the County Attorney failed to object either in his Memorandum in Opposition or his oral arguments to Defendant's supposed lack of timeliness. The State, in its brief in response to Defendant's Appellate claims also did not make that argument. In fact, counsel for Appellant was only notified a couple of days in advance by telephone that such argument would be made during oral arguments. It seems the double standard asked for by the Attorney General in the instant case is inappropriate here. Counsel for Defendant at trial made his decision that objection during argument would be more harm than good in the heat of battle without time to research the point. On this lack of spontaniety, apparently the rights of his client to fair trial appear to turn. On the other hand, the Utah County Attorney and the Utah Attorney General had months in which to prepare their responses to Defendant's Motion for New Trial and her brief on appeal. It is now the contention of Defendant and Appellant that no double standard should prevail. If Defendant did in fact make a mistake by not objecting fast enough during trial, it was not as serious a mistake as made by the County Attorney and Attorney General in not bringing up that point in time for proper response by Appellant. Again, Appellant cites this as prosecutorial misconduct and asks that the Court not reward it by failing to review fully the question of whether Defendant received a fair trial.

## CONCLUSION

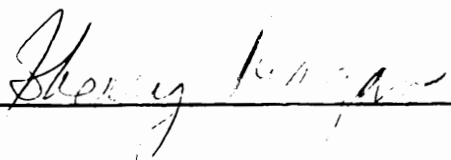
Appellate Courts may review prosecutorial misconduct in the absence of objection during trial when the misconduct amounts to egregious error. Utah case law allows the review of matters not raised during trial when there are "exceptional" circumstances or when objection at trial could not have obviated the error. In the case of Appellant there was considerable doubt as to her guilt at trial as reflected in the lack of incriminating evidence. The comments made by the prosecutor were very similar to those made in the landmark case of Griffin v. California, 380 U.S. 609 (1964) and as such constitute a violation of Defendant's constitutional right to remain silent. Based on Appellant's lack of opportunity on appeal to respond to cases cited by Respondents during oral argument and on additional cases cited herein, Appellant respectfully urges the Court to grant her Petition for Rehearing.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August, 1982.

  
For W. Andrew McCullough  
Attorney for Defendant and  
Appellant

## CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Brief in Support of Petition for Rehearing, postage prepaid, to Earl Dorius, Attorney for Respondent, 236 State Capitol Building, Salt Lake City, Utah 84114, this 6th day of August, 1982.

  
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