

1982

State of Utah v. Richard Allen Bradshaw : Brief of Appellant

Utah Supreme Court

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Richard Allen Bradshaw; Pro Se;

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STATE OF UTAH,

Plaintiff-Respondent,

-v-

RICHARD ALLEN BRADSHAW,

Defendant-Appellant.

Case No. 18255

Case No. 18430

BRIEF OF APPELLANT

Appeal from the judgment and conviction of producing a controlled substance (Marijuana) a 3rd degree felony, and Possession of a controlled substance a class B misdemeanor in the Fifth Judicial District Court in and for Beaver County, the Honorable Robert F. Owens, Judge Pro Tem, presiding.

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FILED

SEP 20 1982

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-v-

RICHARD ALLEN BRADSHAW,

Defendant-Appellant.

Case No. 18255

Case No. 18420

BRIEF OF APPEALLANT

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STATEMENT OF FACTS

On October 7, 1980 alledged officers Richard Hanna and Dennis Cox went upon the defendants property in an illegal trespass (Consult property survey and note footage) at approx. 3:00 P.M. knowing defendant was at the hospital with his wife who was about to have a baby. (Trans. pg. 160 L-6-10 Pg 164 L. 4-5. Acting on their own, motivated by Dennis Cox political ambitions (Consult pg. 161 L. 5-9 and pg. 209 L. 10-11) running against Lynn Cartwright for sheriff. The two alledged officers picked three leaves of white material called it marijuana and used said leaves to obtain an illegal and unsigned search warrant. (Consult Motion to Dismiss trans. pg 81 line 8). Both alledged officers knew they were prohibited from acting as peace officers (Consult letters from police academy and Attorney Generals opinion). But they convinced the justice of the peace to issue search warrant not under oath or affirmation (Consult Motion to Dismiss pg. 122 L. 10-25 pg. 123 L. 1-10) However the J.P. wasn't going to assume any responsibility so he crossed out that he certified to any truth therein. At 6:50 P.M. after calling in more uncertified peace officers they again illegally searched defendants property, home automobile ect. (In reading through this brief bear in mind there was seven uncertified officers who know they could possibly be liabable for each others actions).

Arugument 1.

Illegal trespass which was stated in court and evidence surpressed (Consult, Motion to Dismiss pg. 109 L. 20-3 - pg 110 L. 20-25- Pg. 161 L. 15-17 - Prelimin Trans. pg. 64 L.13-25 pg. 65 L. 1-2. There was no record kept of evidence changing hands for thirteen months.

marijuana. All the evidence was suppressed, P-1-2-3-4-5 and yet due to the conspiracy and prejudice involved defendant was found guilty.

P-1. Trans. Pg. 203 L. 5-10 pg. 202 L. 11-25. No identifying evidence tag pg. 100 L. 3-9. No sample tested. Supposedly evidence taken from house, Judge Ronnow ruled the house could not be searched under this warrant (Prelimin. trans pg. 65 L. 1-2.

P-2. No sample tested pg. 206 L. 11-18 pg. 205 L. 1-9. Sample supposedly taken from south of house, which was where the first three leaves were taken from (which were also suppressed).

P-3. Largest bag where the alleged 110 plants were placed and where P-5 was supposedly taken from. (Negative for marijuana). Pg. 205 L. 25 pg. 206 L. 1-10 Pg. 204 L. 8-10 Pg. 204 L. 22-23. pg. 200 L. 15-25 Pg. 212 L. 1-3.

P-4. Was a letter supposedly sent by Lynn Cartwright to the State Toxicology lab. Suppressed Pg. 202 L. 7-10 Pg. 203 L. 20-25. Pg. 204 L. 1-4.

Judge Owens then excused the jury (pg. 212 L. 8-9) At approx 5:30 P.M. until 6:30 P.M. Then went on to confirm his suppression orders (pg. 213 L. 5-13 - L. 22-25- Pg. 214 L. 1-14 pg. 215 L. 1-9- pg. 216 L. 1-25. At this point the prosecution is trying to locate a box which was taken from P-3 which tested negative for marijuana (pg. 217 L. 1-9 Pg. 218 L. 1-18 pg. 219 L. 1-15- pg. 220 L. 1-16 pg. 220 L. 1-9. While defendant and counsel were to dinner the judge and prosecutor met in his chambers and apparently decided many things (consult pg. 222 L. 3-13) This meeting smacks of conspiracy and malicious prosecution as well as official misconduct- (Consult- pg. 284 Vol 2 L. 5-8). The alleged evidence is turned over to an uncertified peace officer.

to be transported to Salt Lake City, Utah 220 miles away with said officer knowing he was liable to defendant if evidence were negative. Consult pg. 284 L. 11-12. Also consult Attorney Generals brief stating the evidence was placed in black garbage bags, first paragraph pg. 3. and consult Richard Hanna's own testimony Vol 1. Pg. 94 L 2-5. Pg. 97 L. 2 and 3. Black garbage bags were presented at trial consult pg. 240 L. 4-8. Pg. 240 L. 4-5. Using Judge Owens own words pg. 217 L. 3-4 there's never a motive for substitution, but, then, there the opportunity.

P-5. Was a sample which supposedly was taken from P-3 which had been tested as negative for marijuana and had been misplaced for 13 months (pg. 233 L. 10-18 pg. 234 L. 11-20- pg. 253 L. 1-16. the box had been opened several times (consult pg. 233 L. 3-13 pg. 250 L. 5-12 Pg. 255 L 5-11 this shows Dennis and Clarence both access to the alledged evidence knowing of possible liability. Bruce Beck (Consult Pg. 257 L. 12-13 Pg. 267 L. 16-25 pg. 268 L 1-8 pg. 276 L. 14-21. Raymond Goodman another uncertified officer pg. 280 L- 5-14 pg 281 L-1-15. Richard Hanna contended that Clarence Hutchinson gave the box to him pg 288 L. 10-13 but Hutchinson contended he never seen it since November 6, 1980 pg. 234 L. 11-14. This box supposedly tied up the loose ends in the chain of possession even though it had been lost for thirteen months passed through numerous persons not authorized by law to handle it. And then is found and brought to court by Richard Hanna the arresting officer and the most likely one to change or substitute the evidence because of his lack of certification. (Consult pg. 293 L. 9-22) He opened to show the prosecuting attorney who is a blind man.

ARGUMENT 2

Throughout all hearings conspiracy, perjury and inconsistent statements were made. False material statements were made by, Richard Hanna, Dennis Cox, Clarence Hutchinson, Lynn Cartwright and Raymond Goodman.

The due process guarantee and the fair trial right of the accused are destroyed when a prosecutor obtains a conviction with the aid of evidence which he actually knows, or should know, to be false and allows it to go uncorrected. Deliberate deception of a court and jurors by the presentation of false evidence is reprehensible and incompatible with "rudimentary demands of justice" *Giglio v. U.S.*, 405 U.S. 150 (1982); *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935). It is immaterial whether the prosecutor consciously solicited the false evidence. It is also immaterial whether the false testimony directly concerns an essential element of the crime charged or it bears only on the credibility of a witness. *U.S. v. Barham*, 595 F. 2d 231 (5th Cir. 1979). If there is any reasonable likelihood that the false testimony could have affected the jury's judgement, a new trial must be ordered. *U.S. v. Runge*, 593 F. 2d 66 (8th Cir.), cert. denied, 100 S. Ct. 63 (1979); *U.S. v. Antone*, 603 F. 2d 566 (5th Cir. 1979). The prosecutor's duty to correct the false testimony arises when the false evidence appears, *U.S. v. Sanfilippo*, 565 F. 2d 176 (5th Cir. 1977), or as soon as he becomes aware of inaccuracies, *U.S. v. Glover*, 588 F. 2d 876 (2d Cir. 1978).

To prove conspiracy, it is not necessary that conspirators formally meet or agree to conspire as understanding that the parties accomplish the unlawful design may be sufficient to prove conspiracy, and presence, companionship, and conduct before and after the commission of the alleged offence may be considered by the jury and are circumstances which may give rise to an inference of the existence of a

conspiracy. Price v. State 270 S.E. 2d 203. (Ga. App. 1980).
D.C. Md. 1980. In a conspiracy prosecution, proof that at least one
overt act was committed in furtherance of the conspiracy is sufficient.
U.S. v. Holland 494 F. Supp. 918. C. A D.C. 1980. A party who know-
ingly joins an unlawful conspiracy may be held responsible for acts
done in furtherance of the conspiracy both prior to and subsequent
to his joining- U.S. v. Jackson 627 F. 2d 1198.

18 U.S. C.A. 1623. United States v. Lococo 450 F. 2d 1196,
1199 (9th Cir 1971). It is sufficient for the government to prove
that the testimony was relevant to any issue under consideration
by the grand jury. If the falsity of the testimony would have the
natural tendency to influence the grand jurys investigation it is
material. 450 F 2d 1199.

In Carothers V. Rhay (1979 CA 9 Wash.) 594 F. 2d 255 and in
Lindhorst V. United States (1978), CA 8 Iowa 585 F. 2d 361. The
prosecution knowingly relied upon prejuried testimony.

In Moore V. Dempey (1923) 261 U.S. 86, 67 L Ed 543, 43 S Ct 265
the claim in Moore, that the petitioners criminal trial had been
controlled by a mob, arguably conformed to the existing frame work.
A mob dominated trial may be no trial at all, and it is a short step
to the conclusion that the trial court in such a case had no jurisdiction.

---The trial judge relied upon false information in imposing
the sentence. Gelfuso V. Bell (1978, CA 9 Cal) 590 F 2d 754;
Moore V. United States (1978, CA 3 NJ) 571 F 2d 179.

The trial judges conduct rendered the trial unfair, Moore V.
United States (1979, CA 5 Ga) 598 F 2d 439; Buckelew V. United States
(1978, CA 5 La) 575 F 2d 515.

ARGUMENT 3

Violations of Due Process

In State of Utah vs. Richard Allen Bradshaw case # 80CR9. A misdemeanor charge of possession of big game which came about as a result of the same false arrest and illegal search and seizure as case #539. This case was tried right in front of # 539. Judge Owens denied defendant counsel four different times and then May 1981 in Circuit Court Judge Owens found defendant guilty of the class B-misdemeanor. Defendant appealed to district court and the honorable Judge J. Harlan Burns remanded case back to Circuit court stating that there had been insufficient inquiry into the defendants need for appointed counsel and therefore was without due process of law, June 2, 1981-June 9, 1981 review was held again in front of Judge Owens who again denied appointment of counsel. On the 8th of September, 1981 defendant filed a motion to dismiss and a motion to surpress. Trial was held on the 24th of September, 1981, with defendant being forced to represent himself. Judge pro-tem Christian Ronnow denied hearing the motions and tabled them. Held the trial and found defendant guilty, then scheduled motion hearing in October just two weeks before trial of case #539. After motions were heard Judge Ronnow took them under advisement and has never made an official ruling even today. In this case # 80 CR-9 Defendants rights were severely violated and impaired by this denial of due process in both cases. Pursuant to Utah Rules 77-35-8 Rule 8- Rule 9 (1) and 76-1-402 (1) conviction on case #80 CR-9 a class B misdemeanor should have acted as a bar to prosecution of case #539 a felony. 76-1-402 (2) & (3). Violations in case # 80 CR-9 pursuant to Utah rules, rule 12 (c)- should have been settled before case # 539 was heard. Pursuant to Rule 30 (a) the errors and defects of # 80-CR-9 more than substantial denied defendants rights.

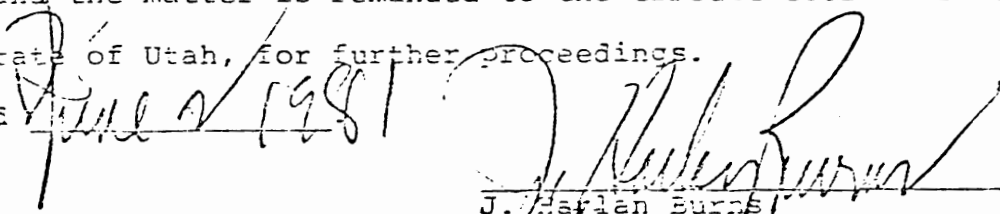
IN THE DISTRICT COURT FOR BEAVER COUNTY, STATE OF UTAH

STATE OF UTAH,)	ORDER REMANDING CASE TO
Plaintiff,)	
)	CIRCUIT COURT
vs.)	
)	
RICHARD ALLEN BRADSHAW,)	Crim. No. 541
Defendant.)	

The defendant, Richard Allen Bradshaw, having been convicted in the Circuit Court for Beaver County, State of Utah, of the commission of the crime of Possession of Big Game Illegally Taken, a class A misdemeanor, being case no. 80-CR-9 in said Circuit Court, and said defendant having appealed said conviction to the District Court for Beaver County, State of Utah, upon the alleged ground that he had asserted before said Circuit Court that he was indigent and unable to provide his own legal counsel and had requested the appointment of the legal defender to represent him in that action, and the matter having come on for hearing before said District Court on the 18th day of May, 1981, and it appearing to the court that there had been insufficient inquiry at the Circuit Court level as to the need of the defendant for an appointment of the public defender and that ~~the~~ conviction of the defendant without his being represented by legal counsel was, therefore, without due process of law:

IT IS HEREBY ORDERED that the conviction of said defendant is reversed and the matter is remanded to the Circuit Court for Beaver County, State of Utah, for further proceedings.

Dated June 2, 1981


J. Harlan Burns
District Judge.

On the 2nd day of May, 1981, I mailed a copy of the foregoing
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Where as Judge Owens tried case # 80- CR-9 and found defendant guilty, by denying him counsel. Then sentenced the defendant, after which the defendant appealed. Said Judge should have disqualified himself from case # 539.

ARGUMENT 4

Lack of Jurisdiction

Public Notice which was filed in the record five days before trial pursuant to title 28 U.S.C.A. 1331 and title 42 U.S.C.A. 1983. Then before trial claimed immunities and reserved all rights pursuant to title 5 U.S.C.A. 101-706. This changed the courts jurisdiction from the state to the federal district court, because of prior constitutionally guaranteed rights and immunity violations, like false arrest, false impersonation, not swearing under oath or affirmation to probable cause, illegal search and seizure, denial of counsel, denial of speedy trial etc. Therefore due to these violations, particularly the United States fourth amendment violations, the state did not have jurisdiction. Neither in District Court or the Utah Supreme Court.

Said Public Notice was sent to the Utah State Attorney General on the 1st of October for protection of defendants rights in case # 80- CR-9 and as a warning against further violations of defendants constitutionally guaranteed rights and immunities. On October 29th defendant submitted to the Attorney General all the pertinent information concerning case #539 and again requesting protection. Both were ignored or denied. Thus allowing a total miscarriage of justice, without any regards of defendants rights as a citizen of the State of Utah and of the United States of America.

CONCLUSION

The only excuse the State could offer would be that they had acted in good faith. But, (Good Faith) means Honest, honest in fact.

Good faith means observance of reasonable standards of fair dealings.

Surely, False impersonation for over six years, preventing more capable and honest men (and there have been several) from becoming the city policeman. Perjury by false documents and under oath, on the stand, in court. Conspiracy in an effort to profit not only politically but monetary ways, cannot and should not be considered good faith. Where the prosecutor know or should have known that the alledged officers were not certified and in fact pursuant to 67- 15- 7 U.C.A. were prohibited from exercising any peace officer powers the case should have never been prosecuted. This prosecution was continued in bad faith and without jurisdiction, denying defendants rights of equal protection, due process, of any priveledges, immunities or constitutional rights.

Its only one short step to the conclusion, that case # 539 has been a preversion of our most basic constitutionally rights. That good faith is an absolute must in the American Judicial system, that in order to uphold the law you have to obey the law. In view of these facts, totaling all the arguments there is only one conclusion to be reached. Case # 539 has been a total miscarriage of justice, therefore it is respectfully submitted that the Supreme Court of Utah, correct the errors by reversing the defendants conviction and sentence forthwith.

—Dated this 20th day of September 1982.

Richard Allen Bradshaw
Pro Se Richard Allen Bradshaw

CERTIFICATE OF VERIFICATION

Richard Allen Bradshaw
Richard Allen Bradshaw

IN THE SUPREME COURT FOR THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff & Respondent,	:	
	:	
vs.	:	Case No. 18255
	:	
RICHARD ALLEN BRADSHAW,	:	
	:	
Defendant & Appellant.	:	
	:	

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE FIFTH JUDICIAL DISTRICT
COURT FOR BEAVER COUNTY, STATE OF UTAH;

HONORABLE ROBERT F. OWENS, DISTRICT JUDGE PRO TEM

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MAY 13 1982

Clerk, Supreme Court, Utah

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Staples v US, 320 F 2d 817	10
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IN THE SUPREME COURT FOR THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff & Respondent,	:	
	:	
vs.	:	Case No. 18255
	:	
RICHARD ALLEN BRADSHAW,	:	
	:	
Defendant & Appellant.	:	
	:	

BRIEF OF DEFENDANT AND APPELLANT

STATEMENT OF THE KIND OF CASE

This is a criminal case where the Defendant and Appellant, RICHARD ALLEN BRADSHAW, is charged with Count I, Third-Degree Felony offense of producing or growing marijuana; and Count II, possession of Marijuana with the intent to distribute for value.

DISPOSITION IN LOWER COURT

The case was tried by a Jury which found the Appellant guilty of producing or growing marijuana, a Third-Degree Felony, and guilty of the lesser included offense of simple possession, a Class "B" Misdemeanor. He was sentenced to 0 - 5 years in the State Prison.

RELIEF SOUGHT ON APPEAL

Defendant and Appellant seeks reversal of the Judgment,

and Judgment in his favor as a matter of law; or that failing, a new trial.

STATEMENT OF FACTS

The Defendant lives in Milford, Beaver County, State of Utah. His home in Milford consists of a city lot and a small house located thereon. The house is located on a small hill or rise in a terrain, that requires a retaining wall along its south boundary between the Defendant's property and the neighbor's property. (Defendant's Exhibit #2, Record, P. 131). The retaining wall is approximately 3-1/2 to 4 feet high, and then the Defendant's property slopes up at an angle from the top of the retaining wall up to the south edge of his house. At the time this incident took place, a plastic fence or shield about 18 inches high was constructed on the Defendant's property up the slope from the top of the retaining wall. (Motion to Suppress Transcript, Pp. 103 and 104).

Acting on information from a confidential informant, whose name was not disclosed to the Defendant, that marijuana was growing on BRADSHAW's property, Milford City Chief of Police Officer RICHARD HANNAH and other officers went to the Defendant's neighbor's property on October 7th, 1980. (Record, P. 80, Paragraph 9). The three officers from Beaver County and the City of Milford went upon the neighbor's property to the south of Defendant's house, and walked up to

the retaining wall. According to Officer HANNAH's testimony, they observed suspect plants growing about 2 or 3 feet back on Defendant's property behind the blind or plastic fence-type structure, which was obviously built to shield or hide the plants. Officer COX, a Beaver County Deputy Sheriff, then leaned across the retaining wall and reached into the Bradshaw property and plucked three leaves of the plant. (Motion to Suppress Transcript, P. 102, line 14).

The officer then proceeded to the Justice of the Peace's office with the three plucked leaves, with the purpose of contacting the Justice of the Peace and requesting a search warrant, authorizing a search of Defendant's premises. On the basis of their observations, and on the basis of the leaves which they had plucked and taken with them, they requested a search warrant from the Justice of the Peace. (Motion to Suppress Transcript, P. 109, lines 20 - 23; P. 111, lines 18 - 25; P. 112, lines 1 - 4). A search warrant was issued by the Justice of the Peace (Record, P. 26), and the three officers, who first had gone to the Defendant's property, and several other police officers of Beaver County and Milford City, under the direction of RICHARD HANNAH, returned to the Defendant's premises at about 6:15 p.m., on the evening of October 7th, 1980. Upon arriving at the BRADSHAW premises, the officers went upon the Defendant's property, and began to search the same. During the process of searching the premises, the officers pulled up

many suspect plants, and placed them in three black garbage sacks. Some of the suspect plants which were seized were those which the officers had originally seen and plucked leaves from, prior to the search. Other plants were obtained from a structure located behind the house, described as a false wall with window panes over it alongside a root cellar. The officers also took suspect plant out of the root cellar itself, and remnants of suspect plants and other paraphernalia out of the house itself. (Motion to Suppress Transcript, Pp. 84 - 88). Shortly thereafter, the Defendant returned to his house after dark just as the search was being concluded, whereupon the officers advised him of the search, and placed him under arrest for producing a controlled substance and possession of marijuana with intent to distribute for value.

The only written evidence of the search warrant proceedings held before the Justice of the Peace are the affidavit and the search warrant themselves. No record of evidence taken by the Justice of the Peace was kept, and no verbatim recording of testimony or evidence taken was kept. In addition, the original affidavit in support of the search warrant was not executed by the requesting officer, Officer RICHARD HANNAH, in the proper place located at the bottom of the affidavit form, which requires his signature and oath before the Justice of the Peace. However, the requesting officer, RICHARD HANNAH, did write in his name at the top of

the affidavit form in the blank provided for the purpose of identifying the person filling out the affidavit. He testified that he wrote his name at that point on the form, for the purpose of identifying himself, and that otherwise he did not sign it as an affirmation that the affidavit was correct. (Motion to Suppress Transcript, P. 122, lines 110 - 125; P. 123, lines 1 - 10). The search warrant was issued to "any peace officer of the State of Utah." (Record, P. 26).

Other proceedings took place before the Milford Justice of the Peace, the Circuit Court, and the District Court for Beaver County which are significant to this Appeal. Primarily, they involve the Defendant's objections to the appointment of an attorney as Public Defender in his case, who suffered a conflict of interest, because the same attorney was the Milford City Attorney, and therefore, represented the Milford City Police Chief, the Chief Officer in this case. The Beaver County Attorney, in the prosecution of this case, attempted to force the Defendant to accept the services of the said Beaver County Public Defender, in spite of the conflict of interest. (See Record, Pp. 11 - 14).

Also, prior to the trial on this case, the Defendant filed his Motion to Suppress Evidence seized under the search. (Record, P. 55). The Motion to Suppress alleged that the evidence seized was inadmissible for the reason that the search was illegal and contrary to the constitu-

tional rights of the Defendant. It also alleged that the search warrant was faulty, for the reason that it was based on false or incorrect affidavit and was, therefore, issued without probable cause, and was obtained by other unlawful means. After hearing evidence on Defendant's Motion to Suppress, the District Court judge ruled that the initial plucking of the three leaves was an unreasonable search, and suppressed that evidence, but allowed the search warrant to stand, and found that the search conducted after the search warrant was issued was lawful, and that the evidence seized after the warrant was admissible evidence against the Defendant. (Motion to Suppress Transcript, Pp. 171-174).

At the trial, the District Court Judge did not allow the admission of the three leaves into evidence, but did allow Exhibits 1, 2, and 3 which were the suspect plants seized after the search warrant was issued. However, the Court initially would not allow the admission of the evidence obtained after the search, for the reason that the Prosecution could not lay a proper foundation for the admission, because it had misplaced a box or container in which some of the evidence had been mailed to the State Chemist's office to be analyzed. Over the objection of the Defendant, the Court granted the Prosecution's motion for continuance, to allow Prosecution to see if it could find the missing box and samples required for the foundation and introduction of the seized evidence against the Defendant. After a two-day

continuance, the trial was reconvened and the Prosecution recalled all of its witnesses, and reintroduced all of its evidence, including the missing box or container, which had been mailed by the Beaver County Sheriff's Office to the State Chemist's office in Ogden, UT, and then returned by mail, but misplaced approximately one year's time before it was found, and introduced at the trial.

ARGUMENT I

DEFENDANT AND APPELLANT'S CONSTITUTIONAL RIGHTS AGAINST UNLAWFUL OR UNREASONABLE SEARCH AND SEIZURE WERE VIOLATED, AND THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED BY THE COURT. SINCE THE ONLY EVIDENCE AGAINST THE DEFENDANT WAS THE UNLAWFULLY SEIZED EVIDENCE, HIS CONVICTION MUST BE REVERSED.

The Chief of Police, RICHARD HANNAH, and two other officers, acted on information received from an informant about marijuana growing on RICHARD BRADSHAW's home property located in Milford, Utah. They went to a neighbor's property for the purpose of viewing Defendant's yard, and looking for marijuana. They walked up to a retaining wall between the neighbor's property and the Defendant's and saw the suspect plants. DENNIS COX, Deputy Sheriff, acting on instruction from RICHARD HANNAH, reached up and into the Defendant's property, and picked three leaves of the plants. They then went directly to the Justice of the Peace's office. There, they telephoned the County Attorney, and advised him of what they had seen and the leaves that they had picked. The

County Attorney prepared the affidavit and search warrant, and it was transported to Milford. A search warrant was issued by the Justice of the Peace. (Record, P. 26).

The issue is whether or not the proceeds of the search should have been suppressed, under the Fruit of the Poisonous Tree doctrine. Generally stated, the rule is to "the effect that evidence which is located by the police as a result of information and leads obtained from illegally seized evidence, constitutes the fruit of the poisonous tree, and is inadmissible in a criminal prosecution." (43 ALR 3d 385). The exclusionary rule is applicable to state criminal prosecution. (Mapp v Ohio, 367 US 643, 6 L Ed 2d 1081). The rule has been characterized as a means of enforcing a Defendant's rights against unreasonable search and seizure. (43 ALR 3d 394).

In this case, Officer HANNAH and Officer COX testified that they used the three illegally seized leaves as the part of the basis for obtaining the search warrant. (Suppression Hearing Transcript, Pp. 109, 111, 132 - 134). After obtaining the warrant, the officers went back and seized the plants from which the leaves were plucked, and quantities of other plants which were used to convict the Defendant. Without that evidence, there would have been no other evidence against the Defendant, and therefore, his conviction may stand or fail based on whether or not it should have been excluded under the Fruit of the Poisonous Tree doctrine.

In U. S. v Paroutian, 299 F 2d 486, an agent of an apartment owner let peace officers into Graziani's apartment. The officers did not have a search warrant. While there, they discovered a false wall in one of the closets. Two days later, an officer returned to the apartment and linked Defendant Paroutian to the apartment. A month later, the officers returned and discovered drugs behind the false wall in the closet and a letter which convicted the Defendant. The United States Court of Appeals, Second Circuit, found that the first two entries into the apartment were unlawful; and since the false wall was first noticed during the illegal entries, the subsequent discovery of the drugs and letter behind the wall were "fruits of the poisonous tree", and should have been suppressed by the trial court. The Court stated at Page 488, last paragraph, that:

"the purpose of the rule against admission of illegally seized evidence is the protection of the rights of privacy; by quarantining evidence gathered in this manner, it is hoped that the zeal of enforcement agencies for such methods of procuring evidence will be curbed....consistent with this broad purpose, the rule extends beyond evidence directly seized in an unlawful search, to prescribe use of all evidence obtained as an indirect result of such illegal activity -- the "fruit of the poisonous tree". See also United States v McCunn, 38 F 2d 246; Staples v United States, 320 F 2d 817; Simmons v State, 277 P 2d 196.

The Prosecution in this case argued that the suspect plants were in "plain view" and, therefore, they could have obtained the search warrant without the unlawful seizure of

the leaves, and the Court so found. Perhaps, they could have, but the fact is they did not. They proceeded to violate Defendant's rights against unreasonable search and seizure, and went upon his property and picked leaves from behind his fence or shield. (Suppression Hearing Transcript, P. 157, Lines 13 - 25; P. 158, Lines 1 - 3).

The illegal seizure of the leaves cannot be severed from the search warrant, and the search justified on the basis that plain view would have justified the search without the illegal seizure.

The limits on Plain View are as follows:

1) Plain view alone is never enough to justify a warrantless seizure; and

2) The discovery of the evidence must be inadvertent (Coolidge v New Hampshire, 403 US 443, 29 L Ed 2d 564. See also 68 AmJur 2d, Search, Section 88). The majority opinion of the Supreme Court of the United States conclude in the case that the Plain View doctrine operates only, where officers have a prior justification for intrusion and came inadvertently across a piece of evidence.

In this case, the Chief HANNAH and Deputy COX did not inadvertently view the alleged marijuana behind the plastic shield or guard located 5 - 6 feet up on the BRADSHAW premises. They went there specifically looking for the suspect marijuana plants, as a result of information from a confidential informant. When they got there, they reached over or

went upon the BRADSHAW property, behind his shield or fence, and picked some of the plants. They went directly to the Justice of the Peace, and procured a search warrant. Then, they went back and seized the plants, and used them as the only convicting evidence against the Defendant.

A similar situation is found in State of Washington v Johnson, 559 P 2d 1380, where the Prosecution attempted to justify a search of a suitcase and car trunk on the basis of the Plain View doctrine. The police stopped a car they suspected of carrying a suitcase containing drugs. The driver gave her consent to open the trunk. The officers saw what they said were drugs, through a crack in the suitcase. The evidence lead to the confession of the Defendant. The Supreme Court of Washington held that the search of the suitcase was unreasonable, even though the officers could see the contents through the crack, because they did not inadvertently discover the drugs. They had been informed earlier by informants and other information that the suitcase probably contained drugs. They went looking for them in the suitcase -- very similar to the way Officer HANNAH and Deputy COX went looking for marijuana plants behind the BRADSHAW fence in this case. The Plain View doctrine did not render admissible the narcotics in the Johnson case just cited, and does not allow the admission of the seized plants in this case under the search warrant, because the plain view relied on by the Prosecution did not meet the requirements

of the Coolidge v New Hampshire case cited above.

Since the evidence seized under the search warrant was the fruit of the first unlawful search, it should have been suppressed by the Trial Court.

ARGUMENT II

THE SEARCH WARRANT WAS ILLEGAL, FOR THE REASON THAT IT WAS ISSUED ON AN AFFIDAVIT THAT WAS NOT PROPERLY EXECUTED OR SIGNED, AS REQUIRED BY THE LAW.

The Utah Code of Criminal Procedure 77-23-3(1) states that "a search warrant shall not issue except upon probable cause supported by oath or affirmation." 77-23-4(1) states constitutional provision that "all evidence to be considered by a magistrate in the issuance of a warrant shall be given on oath...." The Constitution of Utah similarly requires an oath to support the issuance of a search warrant.

The affidavit in support of the search warrant was not properly signed by the requesting officer, RICHARD HANNAH. (Record, P. 26). HANNAH testified that he wrote his name in at the top of the affidavit form, for purposes of identification, but did not sign his name as an affirmation to the affidavit.

On redirect examination, Mr. HANNAH testified that he put his name on the top of the affidavit form to identify himself as the peace officer requesting the warrant. (Suppression hearing Transcript, P. 118, Lines 7 - 25). On re-

cross examination, Officer HANNAH stated again that he wrote his name on the affidavit to identify himself, and specifically the question was asked:

Line 14, Page 22

Q "And it was not placed on the document as affirmation of your oath that the affidavit was correct, was it?

A "No. Not -- not the top signature."

Lines 3 - 9, P. 123

Q (By Mr. Anderson) I'm talking about the one that's in the Court's file. [Record, P. 26] If you want to look at it again, you may. I think you've looked at it several times."

A "No, I did not sign that one."

Q "You did not sign that one that's in the Court's file under oath then, did you, before Judge Cook?"

A "No."

Then Officer HANNAH testified that the affidavit served on RICHARD BRADSHAW at the time of his arrest was also not signed by him on the bottom line, and was a copy of the original in the file which did not contain his signature. (Suppression Hearing Transcript, Pp. 124 - 126.)

Since the warrant was not based on an oath or affirmation in writing, it was not properly based in law, and therefore, it was illegal. The proceeds of the search should have been suppressed by the Court.

ARGUMENT III

EVIDENCE WAS INTRODUCED AGAINST THE DEFENDANT WITHOUT THERE BEING A PROPER FOUNDATION OR CHAIN OF POSSESSION ESTABLISHED, WHERE THE SAMPLE WAS MAILED TO THE STATE CHEMIST AND LOST FOR A YEAR.

In this case, the chief and only evidence against the Defendant were three black plastic bags of material seized in the search.

Exhibit #1 was a plastic bag containing items taken from inside the house belonging to the Defendant. (Transcript of Trial, P. 103). Exhibit #2 was a bag containing material seized from the slope along the south of the house. (Transcript of Trial, P. 104). Exhibit #3 was a bag containing material seized from a planter built along the root cellar directly behind the house. (Transcript of Trial, P. 108).

It is important for the Court to note that the trial in this case was tried in two days, or two segments. The first day of the trial was November 9th, 1981; the second day was November 12th, 1981. The Court will note that there are two transcripts. The first is dated November 9th, 1981, and is the proceedings of that day; the second is dated November 12th, 1981, and is the proceedings for that day.

During the first day of the trial of November 9th, 1981, the Prosecution offered Exhibits 1, 2, and 3. All three were objected to by the Defendant, and the objections were sustained. The Court sustained Defendant's objection

to Exhibit #1, because there was no evidence that it contained marijuana. (Transcript of Trial, P. 203). Objection to Exhibit #2 was sustained, because there was no evidence that it contained marijuana. (Transcript of Trial, P. 206). Defendant's objection to Exhibit #3 was sustained, because a chemical analysis had been run on the material in Exhibit #3, and the test results were negative. (Transcript of Trial, Pp. 204 -206).

The Prosecution also introduced testimony over the objection of Defendant, concerning test run on a box of material that was mailed to the state lab, which was not available in Court. No exhibit number had been assigned, but it was referred to by the number which the State Chemist lab had assigned to it: #808. (Transcript of Trial, P. 184, Lines 20 - 25; P. 185 - 188). The Prosecution then attempted to link the box with Exhibit #3, and use it as foundation that Exhibit #3 contained marijuana, and was therefore admissible. The Court denied the attempt. In fact, the Court sustained the Defendant's objections to all the material evidence against the Defendant (see above for page references) on the grounds that there was no proper chain of possession, allowing the admission of any of the exhibits or samples. (Transcript, Pp. 213 - 219).

At any rate, on Page 219, Lines 12 - 20, the Court stated:

"Unless these gaps can be patched up in the

chain of evidence, I'm afraid my ruling all the way through is going to have to be the same, in granting the proffer of Plaintiff's Exhibit 3 in evidence [meaning Defendant's objection would be sustained like it had been on other items of evidence]. I will, however, give you an opportunity if you feel that you have the witnesses or the ability to bridge over these gaps to do that. On the other hand, if it doesn't appear that that's going to be possible, then, probably, we shouldn't take any more time trying."

At this point in the trial, it was clear to the Court, the Prosecutor, and the Defense, that no prima facie case had been made out by the Prosecution. He had called all his witnesses, and offered all his evidence, and fully presented his case to the Jury. The Court was ready to dismiss the case and not waste any more time.

The situation, at this point, in the trial was this:

Exhibit #1 was not admissible, because no sample had been taken from it, and no evidence had been offered that it contained marijuana.

Exhibit #2 was not admissible for the same reason.

Exhibit #3 had been found inadmissible, because the chemical test on the sample taken from it was negative.

However, the Prosecution was attempting to reoffer Exhibit #3, by claiming a second sample was taken and mailed in a box to the State Chemist lab, and the test result of that sample was positive. The Court refused to allow the Exhibit #3, because a proper chain of possession could not be laid for the sample, primarily because it was not available at the trial, and no one seemed to know where it

was. (Transcript, Pp. 220 - 221).

The Court then recessed to give the Prosecution a chance to find the missing link or package. (Transcript, P. 221, Lines 18 - 19).

At 6:30, Court was reconvened. The Prosecution had not found the missing link, and requested a continuance to give them more time to find the evidence. (Transcript, P. 222, Lines 18 - 21). The Defense objected to the continuance. (Transcript, P. 222, Lines 23 - 25; P. 223, Lines 1 - 8).

At this point, the Prosecution had presented its case to the Jury, and did not have enough evidence for the case to go to the jury; and he was not sure the evidence was available. He just wanted a continuance to look for more, or more aptly put, START OVER AGAIN. And that is exactly what the Prosecution did. The Court required the Defendant held under the charge, and ordered him back in Court November 12, 1981, at 8:00 a.m., to start trial again. During the three-day recess, the Prosecution obtained a Court order allowing Officer HANNAH to take Exhibits #1, #2, and #3 to Salt Lake City. (Transcript, P. 284, Lines 5 - 8. Also, see P. 290, line 25; P. 291, Line 291; Record, P. 122). Exhibits #1, #2, and #3 were turned over on November 10, 1981, to BRUCE BECK, the chemist who had testified the day before. Chemist BECK analyzed the substance in Exhibits #1, #2, and #3 on the 10th; and on the 12th, he was back in Court testifying against the Defendant, stating that all three exhibits con-

tained marijuana. (Transcript, Pp. 261 - 264).

In addition to the new test and Mr. BECK, the Prosecution recalled CLARENCE HUTCHINSON, GARY LYNN CARTWRIGHT, and RICHARD HANNAH, who had all been witnesses during the November 9th trial, and rehashed all the testimonies previously solicited, plus testimony on new items of evidence, which they did not have at the November 9th trial. In addition, the Prosecution called two additional witnesses against the Defendant, RAYMOND C. GOODWIN and PAUL BARTON, who supplied the missing link in the evidence that was unavailable or lost to the November 9th trial.

One of the items of evidence rehashed by the Prosecution was the box that was mailed to the State Chemist lab. It had not been in the possession of the Prosecution during the November 9th trial, because it had been misplaced and lost for a year, and no one knew where it was at. So, no exhibit number had been assigned to it. BRUCE BECK, the chemist, referred to the Test # 808, as coming from the box.

At the November 12th trial, the box was produced, having been located during the three-day recess by Officer HANNAH in the file cabinet in Milford. (Transcript, Pp. 288, 290, Lines 1 - 11). The history of the box is as follows:

About November, 1981, CLARENCE HUTCHINSON, Deputy Sheriff, jailor and keeper of evidence in Beaver County, took a sample from Exhibits #1, #2, and #3. He thought maybe it

was from #3, and put it in a box, which he wrapped and prepared for mailing, by writing the Sheriff's return address on the wrapping. (Transcript, P. 230). Mr. HUTCHINSON really did not know for sure where he got the sample. (Transcript, P. 229, Lines 22 - 25; P. 230, Lines 1 - 6. See also, Trial Court's Comments, P. 216, Lines 17 - 22). But he did not write the mailing address because he did not know it. Instead, he put it on the Sheriff's desk, and called the Sheriff to advise him to mail it the next day. This took place about November 6th, 1980, in the evening and night hour when Deputy HUTCHINSON was on duty. He went off duty at midnight. (Transcript, P. 236).

Sheriff CARTWRIGHT came to work the next day at 8:00 a.m. He found his door locked, but each of his deputies have a key. (Transcript, P. 250, Lines 8 - 9). He found the box, looked up the address, and addressed the box to the State Medical Examiner's office, but not particularly to BRUCE BECK, who he did not know. (Transcript, P. 250, Lines 17 - 23). The box sat around the Sheriff's office until noon, when he mailed it. (Transcript, P. 252, Line 18). That was the last time he saw it until November 12th, 1981, at the trial. (Transcript, P. 252).

BRUCE BECK, State Chemist, testified as follows: He got the box in the mail, November 18th, 1980 (Transcript, P. 256, Line 16) through a mailroom downstairs in the building he works in. Sixty people work in the building. Two or

three or more work in the mailroom. (Transcript, P. 269, Lines 21 - 25; P. 270, Lines 1 - 6). The mail people put the mail in different slots, then the secretary or somebody picks up the mail in the mailroom and delivers it to the various departments. This is what happened to the box, now marked Exhibit #5, to the best of Mr. BECK's knowledge, but he really did not know who had handled the box, or how he came to have it. (Transcript, P. 269 - 271).

The package was returned to Mr. GOODWIN, on December 22nd, 1980. (Transcript, P. 279, Lines 2 - 5). Then it was lost, until discovered after the November 9th trial, and brought to the November 12th trial.

The issue is whether or not Exhibit #5, the box containing a sample from maybe Exhibits #1, #2, or #3, which was mailed through ordinary mail, which was or could have been handled by dozens of unknown persons, can be properly used as evidence against the Defendant.

"Articles or objects which relate to or tend to elucidate or explain the issues...are admissible in evidence, when duly identified and shown to be in substantially the same condition as at the time in issue. In most cases, it is not possible to establish the identity in question by a single witness, since the object or article has usually passed through several hands before being analyzed or examined, or being produced in Court, and under such circumstances, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian, and if one link in the chain is missing, the object or article cannot be introduced.

The party offering the object or article in

evidence must show that, taking all the circumstances into account, including the ease or difficulty with which the particular object or article could have been altered, it was reasonably certain that there was no material alteration..." (29 AmJur 2d, P. 844, 845, Section 774).

In this case, Exhibit #5 was passed to an unknown number of postal clerks, and an unknown number of state or private workers in the building where Mr. BECK works. It cannot be said that the Prosecution satisfied with a reasonable certainty that there was no material alteration of the Exhibit #5 before it was introduced into Court, or for that matter, before it was tested on or about November 18th, 1980, and therefore, reasonably certain that the test results were admissible against the Defendant.

Exhibit #5 should have been denied admission by the Court, and also Exhibit #3, the plastic bag containing the material from which Exhibit 5 came, because Exhibit #3 cannot be any more reliable than its sample, and also because during the November 9th trial, the sample taken from Exhibit #3 was negative.

The Trial Court also allowed evidence introduced without a proper chain of possession, because Utah Code of Criminal Procedure, Section 77-23-8, requires the officer seizing the property to be responsible for it and its safekeeping and maintenance "UNTIL THE COURT OTHERWISE ORDERS." In this case, the seized evidence was turned over by Officer HANNAH to Officer HUTCHINSON, who turned over some of it to

the Sheriff, who gave it to an unknown number of postal clerks. Other items were delivered to the State Chemist office, who returned them to Officer GOODWIN. Then some of the items were misplaced for nearly a year. The handling of the evidence in this case grossly violates the requirements of UCA 77-23-8, and common law requirements of proper chain of possession in order for it to be properly introduced into evidence against the Defendant.

ARGUMENT IV

THE DEFENDANT WAS TWICE PLACED IN JEOPARDY
CONTRARY TO HIS CONSTITUTIONAL RIGHTS.

Reference is made to the factual sequences of the trial set out above in Argument No. III. As pointed out, at the end of the trial on November 9th, 1981, the Prosecution had presented all of its evidence, called all of its witnesses, and was unable to muster up enough evidence against the Defendant to even put the question to the Jury. (Transcript, P. 219).

A continuance was granted the Prosecution until November 12, to allow time for the Police to see if they could find more evidence against the Defendant. To that end, they took Exhibits #1, #2, and #3 to Salt Lake, and had them tested by Witness BECK. Then on November 12th, 1981, the Prosecution started over again and recalled all of its witnesses, and reoffered all of its evidence, plus offered new-

ly discovered evidence against the Defendant, all over Defendant's objection of surprise and prejudice. (Transcript, P. 222, Line 23; Motion to Dismiss Transcript, P. 228, Line 9; Record, P. 120 - 121).

The Utah Constitution, Article I, Section 12, provides that: "...Nor shall any person be twice put in jeopardy for the same offense." The Utah Criminal Code provides, at UCA 76-1-403(2), that:

"there is an acquittal if the Prosecution resulted in a finding of not guilty by the trier of facts, or in a determination that there was insufficient evidence to warrant conviction." (Emphasis added.)

Certainly, the Defendant was placed in jeopardy when the jury was empanelled on November 9th, and the Prosecution presented all the evidence it had at that time against the Defendant. Certainly, the Trial Judge was ready to dismiss the case for insufficient evidence, even though he was careful not to articulate his feelings in so many words. Certainly, there was in fact insufficient evidence at that point to warrant a conviction as a matter of law. Generally, the discharge of the Jury on account of the Prosecution being unable to proceed with the trial operates as an acquittal, and the accused cannot be again prosecuted for the same offense. (21 AmJur 2d, Criminal Law, Section 196; Cornero v U. S., 48 F 2d 69; Hipple v State, 191 S.W. 1150; Pizarro v State, 20 Tex. app. 139; Allen v State, 52 Fla. 1, 41 So. 593.)

In Hunter v Wade, 169 F. 2d 973, the Court stated:

"However, the constitutional guaranty protects an accused against a second trial, where the jury in the first trial was discharged solely on the ground that witnesses for the government were absent, and therefore, their testimony could not be adduced."

In the Utah case of State v Ambrose, 598 P2d 354, the Supreme Court of Utah declared that a mistrial after improper remarks by the Prosecution, was a bar to subsequent trial under the Double Jeopardy Clause of the Utah's Constitution. Certainly, there is no difference between the substance of a mistrial and the substance of this case. By all equitable and legal standards in our American system of justice, RICHARD ALLEN BRADSHAW had been placed in jeopardy and tried that day, November 9th, 1981, and the Prosecution was found completely lacking. But rather than dismissing the case, the Trial Judge and the Prosecution used the technicality of continuance in order to allow the Prosecution a chance to reconstruct, redo, and represent its case to the Jury. As a result, RICHARD ALLEN BRADSHAW was again placed in jeopardy on November 12, 1981, when the same case was retried contrary to his constitutional rights, and his conviction should be reversed and the case against him dismissed.

ARGUMENT V

THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL AND STATUTORY RIGHT TO A SPEEDY TRIAL, AND TO AN ATTORNEY WITH UNDIVIDED LOYALTY OFFERING DEFENDANT TIMELY REPRESENTATION.

Utah Code of Criminal Procedure 77-32-1 requires that the following minimum standards of representation be provided by government entities for the defense of indigent persons:

"(1) Provide counsel for every indigent person...."

(2) Afford timely representation by competent legal counsel...

(4) Assure undivided loyalty of defense counsel to the client."

Also, the Utah Constitution, Article I, Section 12, provides for a speedy public trial.

Defendant was arrested on this offense on October 7th, 1980. (Record, P. 11). On October 24th, he appeared before the Justice of the Peace, and was formally charged with the offense. (Record, P. 11 and 25). On that day, he requested a Public Defender, and one LEO KANELL of Milford was appointed. (Record, P. 11). Thereafter, the Defendant objected to LEO KANELL acting as his counsel, because he also represented the City of Milford which employed several of the officers who searched his premises and arrested him, and who would be witnesses against him. (Suppression Hearing Transcript, P. 28 - 41). Defendant BRADSHAW discharged Mr. KANELL on November 13th, 1980, and the County Attorney was so advised. (Record, P. 12). On November 19th, 1980, Attorney KANELL filed his Motion for Withdrawal, which was approved by Judge Cook. (Record, P. 31). On December 30th, 1980,

the Defendant again requested an attorney other than KANELL. (Record, P. 12). The Beaver County Attorney, JOHN CHRISTIANSEN, advised Mr. BRADSHAW that Mr. KANELL was the Public Defender, and no other attorney would be appointed. (Record, P. 13, Paragraph C).

On January 19th, 1981, the Defendant filed an affidavit pro se, asking for an attorney other than KANELL. (Record, P. 36). On January 28th, 1981, the County Attorney filed Notice of Preliminary Hearing and of Appointment of Public Defender, LEO KANELL, and advised the Defendant he must accept LEO KANELL as his attorney, or proceed without an attorney. (Record, P. 39).

On February 2nd, 1981, RICHARD BRADSHAW filed another Request for Appointment of Public Defender other than LEO KANELL, because of his conflict of interest. (Record, P. 41 - 42). Again, on February 4th, 1981, the County Attorney filed his response, and again demanded that Defendant BRADSHAW accept Mr. KANELL or proceed with Preliminary Hearing without an attorney. (Record, Pp. 43 - 44).

Thereafter, about February 26th, 1981, SCOTT THORLEY was appointed to represent RICHARD BRADSHAW, who filed a Motion to Dismiss for Failure to Prosecute and Failure to Provide Defendant with Counsel meeting the minimum standard provided by 77-35-8. (Record, P. 6). Preliminary Hearing was held March 26th, 1981, 170 days after the Defendant's arrest, contrary to Rule 77-35-7(4)(c) of the Utah Rules of

Criminal Procedure, which provides for a Preliminary Hearing within 30 days when the Defendant is not in custody.

SCOTT THORLEY withdrew April 10th, 1981. (Record, P. 47). Defendant BRADSHAW filed another Request for Legal Counsel April 10th, 1981 (Record, P. 48). JUDGE BURNS allowed the withdrawal of SCOTT THORLEY April 22nd, 1981. (Record, P. 50). DEXTER L. ANDERSON was appointed to represent the Defendant April 15th, 1981, (Record, P. 52) and advised of trial about June 8th, 1981. (Record, P. 53). A Second Motion to Dismiss for Failure to Prosecute and Provide an Attorney was filed August 7th, 1981. (Record, P. 66). Trial was finally held on this case on November 9th, 1981, or 398 days following Mr. BRADSHAW's arrest.

A reading of the record discloses that the primary reason for the delay was the Prosecution's attempt to force the Defendant to accept the services of LEO KANELL, who was under a conflict of interest in the case, and could not provide the minimum standards required. Such violation of the Defendant's rights under 77-32-1, and such a substantial delay in the Defendant's prosecution as a result certainly was a denial of his right to a speedy trial, and his conviction should be reversed.

ARGUMENT VI

THE EVIDENCE WAS INSUFFICIENT FOR A JURY TO
FIND THE DEFENDANT GUILTY BEYOND A REASONABLE

DOUBT AS A MATTER OF LAW, BECAUSE THERE WAS ABSOLUTELY NO EVIDENCE IDENTIFYING THE DEFENDANT WITH THE CORPUS DELICTI.

In this case, if all of the Prosecution's evidence are allowed; i.e., 3 bags of plant material, samples, and testimony of the police that the materials were found growing on the BRADSHAW premises, and of the State Chemist who testified that the plants were marijuana, then the Prosecution proved the Corpus Delicti of the crime, or that the crime was committed. However, the Prosecution failed to prove identity. They failed to prove that RICHARD ALLEN BRADSHAW was the person who committed the crime.

"Proof beyond a reasonable doubt of the identity of the accused as the person who committed the crime is essential to a conviction." 30 AmJur 2d, Evidence, P. 319, Section 1143.

The Prosecution's evidence was to the effect that the Defendant BRADSHAW was not present when the search was made. He was arrested when he came back to the house from the hospital. He never made any confession or admission against interest. No marijuana was found on his person, none was found in the vehicle he drove up in. No one saw him working with the alleged marijuana.

In addition to the Defendant, his wife lived at the residence, and during the Christmas tree cutting season, a Mr. FORDHAM lived at the house. Many other people came and went at the house, including brothers of the Defendant, his mother, and friends. (Transcript, Pp. 144 - 149). There sim-

ply was no evidence at the trial which pointed to the Defendant over any one of a number of different people. There was no identification of the Defendant as being the person who produced or cultivated the alleged marijuana or processed it. All of the evidence cut against everyone else who lived at or frequented the house. Such evidence fails to prove the Defendant guilty beyond a reasonable doubt on the element of identify, and the Jury's verdict on that point was pure speculation. The Defendant's conviction should be reversed by the Supreme Court, for failure of any evidence pointing to the Defendant as the one responsible for the offense as against any number of other people.

CONCLUSION

RICHARD ALLEN BRADSHAW was convicted of a Third-Degree Felony and a Class "B" Misdemeanor of producing marijuana and possession of it. The first search against him was ruled illegal by the Trial Court. But the Trial Court allowed the use of evidence seized during the second search, following the obtaining of a search warrant, even though the search warrant was in effect based on the first illegal search. The evidence seized during the Second Warrant Search should have been suppressed and the case dismissed because it was the only evidence against the Defendant.

The evidence should also have been suppressed for the reason that the affidavit upon which the warrant was issued

was unsigned as an oath or affirmation by the officer requesting it. Once the evidence was suppressed, there would have been no case at all against the Defendant, and it should have been dismissed.

The evidence against the Defendant should also have been suppressed because the Prosecution failed to establish a proper chain of possession. The Court erred when it allowed the use of sample evidence against the Defendant that had been mailed by ordinary mail to be analyzed, and which had to be handled by many unknown people. Also, the Prosecution failed to show proper chain of possession where evidence and sample were passed haphazardly from one person to the next, with the Court order required by the Utah Code of Criminal Procedure.

The Defendant was twice placed in jeopardy when the Prosecution presented all its evidence and testimony on November 9th, 1981, and failed to make a case; but the Court allowed a continuance for two days to allow the Prosecution to redo its case. Thereafter, on November 12th, 1981, the Prosecution reoffered all its evidence and testimony plus new evidence, and retried the case against the Defendant.

The Defendant was denied his right to a speedy trial and minimum representation, when the Prosecution attempted to force him to accept the services of a Public Defender who suffered a serious conflict of interest.

The Prosecution also failed to produce any evidence

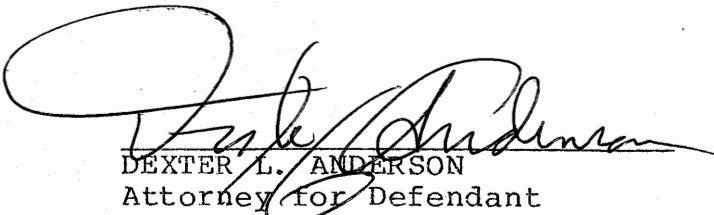
that identified the Defendant as the one who committed the offenses alleged.

The search warrant and proceedings also failed to meet the requirements of the Utah Code of Criminal Procedure.

Any one of the arguments presented above is sufficient to reverse the Defendant's conviction. But when all the errors are added up, the case is a complete miscarriage of justice and a perversion of the American criminal process by both the Police and the Prosecution.

It is respectfully submitted that the Supreme Court of Utah correct the errors by reversing the Defendant's conviction.

DATED this 12 day of May, 1982.



DEXTER L. ANDERSON
Attorney for Defendant

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF to DAVID L. WILKINSON, Attorney General, and ROBERT N. PARRISH, Assistant Attorney General, both of 236 State Capitol, Salt Lake City, UT 84114; to JOHN CHRISTENSEN, Beaver County Attorney, Beaver, UT; and to RICHARD ALLEN BRADSHAW, Defendant, Utah State Penitentiary, Draper, UT., postage prepaid, this 12 day of May, 1982.



DEXTER L. ANDERSON