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State of Utah v. andrew George Kish, aka William Walter Snyder : Brief of Appellant

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.J. Macarthur Wright; Attorneys for AppellantVernon B. Romney, David S. Young, David R. Irvine; Attorneys for Respondent

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. ANDREW GEORGE KISH, a/k/a WILLIAM WALTER SNYDER, Defendant-Appellant.	)))))))))))	Case No. 13004

BRIEF OF APPELLANT

I. ISSUES

1. Failure to Appoint Separate Counsel for Appellant.

2. More Severe Sentence Imposed Upon Appellant Because He Demanded His Constitutional Right to a Jury Trial.

3. Failure of Court to Categorically Exclude for all Purposes an Improperly Obtained Statement Allegedly

Made by Appellant.

4. Failure of Prosecutor to Indorse Witnesses Upon the Information and to Indorse the Names of Other Witnesses Upon the Information Until the Morning of Trial.

II. STATEMENT OF THE NATURE OF THE CASE

The Defendant, Andrew George Kish, also known as William Walter Snyder, hereinafter referred to as "Kish" or "Appellant", was arrested with two other men, Charles William Morris and Lloyd Plaz Vincent, Jr., and charged with "Attempt to Commit the Crime of Robbery with a Deadly Weapon". The charge was subsequently amended to read "Assault with Intent to Commit Robbery".

III. DISPOSITION IN LOWER COURT

The two other defendants pled guilty to a lesser charge and Defendant, Kish, after trial before a jury, was found guilty of said charge and sentenced to a term of five (5) years to life.

IV. RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of his conviction.

V. STATEMENT OF FACTS

The Defendant, Andrew Kish was arrested in an automobile (TR. p. 881, 1,12) on the 4th of February 1972 (TR. p. 86, L. 17) along with two other men, Charles William Morris and Lloyd Plaz Vincent (TR. p. 88, ll. 18-20). There were also two females in the car when Defendant was arrested (TR. p. 87, ll. 23), neither of whom were ever identified during the trial.

A prosecuting witness, Albert Dean Stock, testified that at approximately 3:00 a.m. of the morning of February 4, 1972, an automobile in which he saw only three occupants, drove into his Chevron

Station and asked for gasoline, that he filled the tank and was presented with an American Oil Credit Card. The Witness testified that though American Oil Credit Cards were often mistakenly given to him, and were acceptable by Chevron Dealers in some states, he could not accept the card. When the driver indicated he did not have cash, the Witness stated he suggested they wait until the American Oil Station across the street opened and that he was sure he could clear the charge through their machine. That would be a three or four hour wait.

The Witness testified that the car pulled to a parking spot, that the car was in bad shape and it was cold and he hated to see them have to run the car to keep warm, so suggested they move it into the Service Station Bay. Sometime later three men came from the Bay, one

carrying a knife, robbed him, tied him up and departed after rifling the money box. Moments later he loosened himself and contacted the police and sometime thereafter Appellant, Vincent and Morris and two girls were arrested in an automobile on Highway I-15 East and North of St. George. (TR. pp. 23-32)

Appellant, Kish, was taken to St. George, Washington County Police Station by the arresting officers. There a statement was taken from Kish by officer Jerry Sandburg of the St. George Police Department (TR. Hearing held March 17, 1972, p. 41 Et. Seq.)

Subsequently Jim R. Scarth, Esq. was appointed to represent Charles William Morris (Preliminary Hearing TR. p. 4, ll. 10-11) and Darwin C. Fisher, Esq., was appointed to represent the Defendants Lloyd Plaz Vincent, Jr., and Appellant,

Kish (Preliminary Hearing TR. p. 4, ll. 16-17).

A Preliminary Hearing was held on the 10th day of February, 1972 in the District Courtroom at St. George, Utah (Preliminary Hearing TR.) The co-defendant Charles William Morris was 17 years of age and had only turned 17 a few days before the Preliminary Hearing was held. (Preliminary Hearing TR. pp. 6, 11, 8-10).

Ultimately J. MacArthur Wright, Esq., was substituted as attorney in the place of Fisher, Esq., for Kish, the Appellant herein, and for Lloyd Plaz Vincent, Jr., co-defendant, in the proceedings below.

Subsequent to the Preliminary Hearing, various motions were filed on behalf of the three co-defendants including the Appellant herein, including

a Motion to Substitute Counsel on behalf of the Appellant, Kish, and a Motion to Suppress certain evidence on behalf of all three of the co-defendants, Morris, Vincent and the Appellant, Kish. (TR. dated March 17, 1972)

With respect to the Motion to Substitute Counsel, the Court severed the case for trial between the Defendant Vincent represented by counsel J. MacArthur Wright, Esq., and Appellant, Kish, also represented by the same counsel, and denied the Motion to Substitute Counsel (TR. dated March 17, 1972, p. 14, ll. 6-7).

However, the Motion to Substitute Counsel was renewed by Counsel for the Appellant, Kish, on the morning of the trial, March 20, 1972, in Chambers, when it was indicated for the first time that the co-defendant, Vincent, would be

called as a witness on behalf of the State against the Appellant, Kish. (TR. p. 14, 1.30 and pp. 15, 11, 1-22).

During all times pertinent hereto, the undersigned Counsel represented both the co-defendant, Vincent, and Appellant, Kish. During the times after his assuming the defense of the said two co-defendants, Vincent and Kish, said Counsel engaged in a series of negotiations with the County Attorney of Washington County and the District Attorney, representing the State of Utah, with the intent of obtaining an agreement with the State whereby one or both of the Defendants might plead guilty to a lesser charge than that then currently lodged against them.

The co-defendant, Vincent, did subsequently plead to a lesser charge (see TR. dated March 17, 1972, p. 12, 1.14 and p. 13, 1.7)

At the same time that these negotiations were going on, Counsel was also negotiating with Counsel for the State in an attempt to obtain from him a recommendation to the Court that, upon a plea of guilty by the co-defendant, Vincent, the sentence would be suspended pending, and for the sole purpose of permitting authorities from the State of Kentucky, from which State the Defendant, Vincent, was wanted as a parole violator to come and return Vincent to the State Reformatory of that State. Ultimately such a recommendation was made by the District Attorney, and a similar request was made by Counsel for the co-defendant, Vincent, to the Court. Thereafter the Court did suspend the sentence of Defendant, Lloyd Plaz Vincent, Jr., conditioned upon the authorities from the State of Kentucky coming after the said Vincent and

returning him to Kentucky to serve the balance of his term in the Kentucky State Reformatory.

At the same time, Counsel for Appellant, Kish, had informed him of the possibility that a similar reduction could probably be obtained on his behalf in exchange for an agreement to plead guilty to said lesser charge if he so desired to do so. (TR. March 17, 1972 p. 3, 1.13 to p. 4 1.1).

Out of these negotiations by Counsel on behalf of the co-defendant Vincent and the Appellant, Kish, arose the Petition for Appointment of Separate Counsel by Appellant as reflected in the hearing held March 17, 1972 (See TR. March 17, 1972, p. 2 to p. 4).

On March 20, 1972 co-defendant Vincent did plead guilty to a lesser charge, Assault with a Deadly Weapon and

the Appellant, Kish, was scheduled for trial before a jury on the charge of Assault with Intent to Commit Robbery. On that same day prior to the convening of the jury for the trial of the Appellant, Kish, the Court ruled on the Motions to Suppress Evidence which had been previously filed and argued before the Court, denying the same as to all items except an alleged statement taken from Appellant, Kish, on the morning of his arrest at the police station in the City of St. George. (TR. p. 2, 1.21-p. 5, 1.6). At the time, however, the Court stated that the statement which it had ruled inadmissible, might be used for impeachment purposes in the event the Appellant, Kish, were to take the stand in his own behalf. (TR. p. 4, 1.25-p. 5, L. 1).

Thereafter on the same morning after the jury had been examined and qualified and sworn, the Court granted the motion of the State's Attorney to permit the filing of an amended information in the matter against the Appellant, Kish. At that time it was learned by the Counsel for Appellant and the Appellant, himself, that witnesses were intended to be called by the State who had not been indorsed on the Amended Information nor any of the previous informations that had been filed by the State's Attorney in the case prior thereto. (TR. p. 12, l 13- p. 14, l.19) Objection was made to the filing of the Amended Information without the indorsement of all witnesses to be called by the State upon it, and the Court granted the Motion of Appellant's Counsel to have all such witnesses indorsed upon said

Amended Information. At that point in time, it was learned by the Appellant and his Counsel that the State intended to call as a witness against the Appellant, the co-defendant, Lloyd Plaz Vincent, Jr. (TR. p. 14, 11.20-25).

Thereupon Counsel for the Appellant renewed his objection to the Court's failure to appoint separate counsel for the Appellant, Kish, based upon the fact that Counsel was in fact representing the co-defendant, Vincent, whom it was now learned was possibly going to be called as a witness for the State, and a Motion for Mistrial was made by Counsel for the Appellant. (TR. p. 15, 1, 10-12).

The Court denied the Motion for a Mistrial on the grounds that the co-defendant, Lloyd Plaz Vincent, Jr., had not yet and may not actually be called, even though he was indorsed, as a witness

by the State, upon the Amended Information.

The Appellant, Kish, thereupon plead not guilty to the Amended Information (TR. p. 19, ll.27-28) and the trial on the charge was immediately thereafter held. The Appellant called only one witness in his defense, Albert D. Stock, as an adverse witness, who had previously been called as a witness for the State. (TR. p. 154, L. 13), and did not take the stand himself, (TR. p. 164, l.26 - p. 165, l.9)

At the conclusion of the trial, the Appellant was found guilty by the jury and a verdict of guilty was ordered by the Court. (TR. p. 173, ll.22-24).

On April 19, 1972, the Appellant was sentenced to incarceration in the Utah State Penitentiary for a period of time not less than five years and which may

be for life. (Sentencing Transcript, dated April 19, 1972, p. 6, ll.19-22).

VI. ARGUMENT

1. Failure to Substitute Separate Counsel for Appellant.

The Appellant, Andrew George Kish and co-defendant Lloyd Plaz Vincent, Jr., having both been arrested and charged with the crime of Assault with a Deadly Weapon with the Intent to Commit Robbery, being indigent and unable to afford to hire Counsel, were appointed Counsel by the committing magistrate of Washington County. The Counsel appointed was appointed for both Defendants.

A series of negotiations were initiated by Counsel for Appellant and his co-defendant with the State's Attorney.

At the onset, a slight difference in the goals of the two co-defendants

existed. Vincent, was, regardless of disposition of charges here, a parole violator from the State of Kentucky and he soon made it evident to his Counsel that it would be his desire to be sent back to Kentucky, even though he would have to be reincarcerated there, primarily because he would be closer to his family and friends and hoped that the prison environment there would be more conducive to his rehabilitation than being incarcerated such a long distance from his family and others interested in his welfare in the State of Utah.

The Appellant, Kish, had no such motivation, and in fact insisted upon his innocence of the charges filed against him.

Counsel, while engaged in negotiations with the State's Attorney, was

faced with the implication that an agreement to accept a plea on a lesser charge by the Defendant, Vincent, might be accepted only if both co-defendants agreed to do the same. Though this turned out not to be the case, it was a constant consideration in the mind of Counsel in his attempt to make the desired arrangements on behalf of his client, Vincent.

At the same time, Counsel in his attempt, to adequately and to the best of his ability, represent the Appellant, in a trial of the matter which became necessary when the Appellant desired not to enter a plea of guilty even to a lesser charge and to assert his innocence of the charges filed against him, was still faced with the necessity of avoiding upsetting the delicate negotiations involving his second client,

Vincent. Therefore, that consideration inevitably loomed, in Counsel's mind, in his dealing with his client, Kish.

Furthermore, when Counsel's efforts on behalf of Vincent, were close to fruition, additional complications entered the picture, when, it became apparent that, after a plea of guilty to a lesser charge by co-defendant, Vincent, the State's Attorney, previously unbe-known to Appellant's Counsel, intended to call said co-defendant, Vincent, as a witness against the Appellant, Kish.

Even though, at that point, an agreement had been reached whereby Vincent would be allowed to plead to a lesser charge, there still remained the question of whether or not a suspended sentence would be granted to him whereby he might be returned to the State of Kentucky and reincarcerated in the

Reformatory in that State, closer to his home, family and friends, rather than in Utah. That issue still remained to be resolved and obviously would not be for several days after the trial of the Appellant, Kish, who was scheduled to go on trial the morning of the day in which Vincent was to plead guilty to the lesser charge.

At this point Counsel for both co-defendants was plagued with an additional dilemma. If Vincent were placed on the witness stand, either by the State or by the Appellant, Kish, and if there were an attempt by the Appellant, Kish, to cast the blame or the major responsibility for the alleged offense upon the co-defendant, Vincent, as would be the logical tactic under the facts as related to Counsel by Kish. Counsel would be faced with the position of attacking one

client for the benefit of another client, an untenable position under any circumstance. Furthermore, such a course of conduct on behalf of the Appellant, Kish, might easily have upset the delicate balance of negotiations and the chance of obtaining a suspended sentence for and on behalf of co-defendant, Vincent.

Even though Appellant, Kish, through his Counsel, did in fact express objection to the placing of Vincent upon the witness stand during his trial, it nevertheless, under other circumstances might have been to Kish's advantage to call Vincent to the stand where his Counsel might have the opportunity to engage in a probing and incisive cross-examination of Vincent had Kish have had independent Counsel.

Because of the dilemma that Counsel for both co-defendants found himself in,

the decision, after discussion with Kish, was made to try to avoid having Vincent placed upon the stand as a witness, partly because of the conflict, and partly because of the threat that if Vincent took the stand and chose to attempt to enhance his chances for a suspended sentence by testimony he considered favorable to the State's case, the Appellant would certainly then have to take the witness stand himself and rebut such implication of the co-defendant, Vincent, and Kish would then be faced with the threat of having the previously suppressed statement admitted to impeach him as will be more fully explored in Section 3 below.

In Commonwealth v Wheeler, 281 A. 2d 846, 444 Pa. 164, on page 847, is found the following statement,

"It is axiomatic Constitutional

> Law that the Sixth Amendment Guarantee of effective assistance of counsel requires inter alia, that an attorney representing multiple defendants not be faced with conflict of interest.
>
> 'In Whitling we reversed the Supreme Court, which had placed the burden on the accused to demonstrate that ineffective representation was a consequence of the conflict of interest, and pertinently stated, if in the representation of more than one defendant, a conflict of interest arises, the mere existence of such conflict vitiates the proceedings even though no actual harm results. The potentiality that such harm may result rather than that such harm did result, furnishes the appropriate criterion.'" (emphasis added).

The Appellant herein believes that that statement of the law most precisely fits the situation that developed in the proceedings prior to and during the trial in the District Court below in this case. While both the Appellant, himself, and his Counsel moved to have separate counsel appointed, said motion was denied by the District Court and Counsel was faced

with the potential conflict of interest.

Counsel, even in his explanation to the Court, below, of the potential conflict was faced with the further concern, in arguing for the Motion to Appoint Separate Counsel, that until he knew his loyalty would be to only one or the other of the two men he now represented, he could not say anything to the Court, in support of the Motion to Appoint Separate Counsel, that might in fact be harmful or deleterious to the cases of one or the other of his two clients.

Therefore, Counsel though certainly not desiring to withhold information from the Court, was unable to argue and expound upon the reasons for the appointment of a separate counsel for the Appellant, Kish, as freely and candidly as he might have done had he not also had to bear in mind the interests of his

other client, Mr. Vincent.

In People v Ramsey 95 Cal. Rptr. 231 on page 233 is found this enlightening statement,

> "In examining the record we look not only for manifestations of actual conflict, but for areas of potential conflict. This is because the appointment of a single counsel may mask the conflict between co-defendants and it makes no difference whether the conflicts may have been apparent to the participants at the time of the trial or not." (emphasis added)

In the present case, Appellant confided to his Counsel that he had been picked up, as a hitchhiker, a few days before, by the other four occupants of the car, and that on the night in question, he had been sleeping in the automobile when it was pulled into the service station garage to help keep the occupants warm while they waited for a service station across the street to

open.

He further stated that he was awakened out of a deep sleep and while still partly groggy from sleep was led into the office portion of the service station by the other two male occupants of the automobile, where he first fully realized that one of his companions had a knife and the purpose of the sally into the station office was to rob the attendant. He stated to Counsel that he yelled at the other two to put the knife away and to stop, but that it was apparent by that time that things had already gone too far and that the scheme hatched by the other two men in the car could, or would not be halted. Kish, having no funds of his own, no transportation and alone in the middle of a winter's night in a strange town, felt at that moment, rightly or wrongly, that he had

no choice but to remain with his companions and take a chance on getting out of town with them.

That story was never told and does not appear anywhere in the record and whether it was true or whether it would have been believed by the jury were it told, will never be known. Kish reported at various times to his Counsel that his co-defendants, prior to the trial sometimes indicated willingness to verify his story and at other times indicated that they would not.

Without the freedom to actively and vigorously cross-examine co-defendants, and with the threat of a statement being used against him, which had been obtained while Kish was unrepresented, without proper advice as to its ramifications and while he was plunged in virtual mental incapacity by the fear, despair and

confusion brought on by the night's events, and which was found by the Court to be sufficiently tainted as to be inadmissible, Kish was trapped into being unable to fully, completely lay before the jury his defense.

The Court attempted to resolve the conflict by severing the cases of the two defendants and giving separate numbers to the cases involving the co-defendant, Lloyd Plaz Vincent, Jr., and the Defendant, Andrew George Kish. However, the court in Commonwealth v Booker, 280 A.2d 561 stated that where dual representation continued throughout the trial, the conflict of interest was not cured by granting a severance.

In the instant case it may be argued that because one Defendant either had agreed to or had plead guilty, prior to the trial of the Appellant, that the

question of the conflict is less important than it might otherwise be. However, in Commonwealth v Shank 281 A. 2d 746 the Appellant there, was sentenced immediately after testifying for his co-defendant and assuming much of the blame. In that case he was represented by the same attorney who represented the co-defendant for whom he had testified. There, like here, the Appellant in that case, had also plead guilty earlier to the charge as did the co-defendant, Vincent, here, whom it must be remembered, was still Counsel's client. He was granted a severe penalty and the Court held that the conflict of interest in the same attorney representing both defendants was too great to overlook and that the potentiality that harm might result from joint representation by Counsel rather than that such

harm did actually result furnishes the appropriate criterion for determining whether there was a conflict of interest prejudicial to the Defendant.

In this case, the Appellant, Kish, argues that the precise situation existed, in that the potentiality for conflict did in fact exist and that therefore the proceedings should be wiped clean from the slate and the Appellant's conviction should be reversed.

The writer of this brief, who was also Kish's Counsel in the trial below, wishes to state that he made a sincere and desperate attempt to be fair to all concerned in the trial below, to the Court, and to his two clients, and that only after lengthy reflection has the full impact of the ramifications of the untenable position in which Counsel and Appellant were placed during the trial

and the prior negotiations, become apparent to the writer.

2. More Severe Sentence Imposed Upon Appellant Because He Demanded His Constitutional Right to a Jury Trial

The Appellant, because he insisted upon his innocence and required a jury trial, a right all are entitled to who are accused of committing a crime, under the American system of justice, ended up with a harsher penalty than did his co-defendants in this case. It is hardly equitable that one who insists upon his constitutional rights must be penalized for doing so. This is most true when two or more are arrested for the same crime and under identical circumstances, but one finally ends up with the harsher penalty than do the others.

Courts have condemned policies which require that one, insisting upon

his rights, be punished more severely if he is nevertheless found guilty, than one who decides not to take the chance and pleads guilty to a lesser charge. See: Gillespie v State, 355 p. 2d 451; and United States v Wiley 267 F. 2d 453.

It is easy to see the potential abuse which can come to the rights of defendants when such an unhappy result occurs to him who asks for a trial.

In the present case, the Appellant, Kish, believed his involvement was different than and less culpable than those with whom he was arrested and demanded a trial, even though his companions accepted an opportunity to plead to lesser charges, and as a result ended up with the harshest sentence of all!

There is no evidence that his guilt was greater than the others, so that though his unhappy plight came about as a result of a common practice, in the field of criminal prosecution and defense--Plea Bargaining--the result in this case was a most unfortunate miscarriage of justice insofar as Appellant was concerned.

3. Failure by Court to Categorically Exclude, for all Purposes, an Improperly Obtained Statement Allegedly Made by Appellant

The Appellant, Andrew Kish, moved, prior to trial, for the exclusion of an alleged statement taken from him by certain arresting officers during the morning of his arrest. The Court, after taking testimony determined that the statement was improperly obtained from the Appellant and that it was not admissible. Had the Court gone no further,

the Appellant would have no quarrel on this point; however, the Court, upon the insistance of the Prosecuting Attorney, went further, and, in the opinion of the Appellant, totally destroyed the affect of the suppression of the statement, by making this statement,

> "Now, I am not ruling on that, Mr. Wright, (whether or not the statement would be admissible for the purpose of impeaching the Defendant, Andrew Kish, in the event he were to take the stand in his own defense) and I think you should know that in the event the Defendant, William Walter Snyder, (Andrew George Kish) gets on the witness stand it may be that upon a proper presentation the District Attorney can use that for impeachment purposes and you may stand forewarned of that fact." (emphasis added) (TR. p. 4 l 25-30).

Though the Court did mitigate the effect of the statement to a certain extent by stating that the, "...statement may, upon proper presentation be used for impeachment purposes," the possibility

was distinctly presented to the Appellant and his Counsel that a statement which was otherwise found to be improperly obtained and therefore should be suppressed might resurface--be resurrected--at a point when it could and would cause possibly far more damage to the Defendant than if it had been initially admitted.

Whether a Defendant should take the stand in a criminal case is always a decision of great significance and involves one of the most sensitive decisions to be made by the Defendant and his Counsel. Regardless of the innocence of a particular Defendant, because of foreign and alien factors and other reasons totally unrelated to his guilt or innocence, to take the witness stand and submit to cross-examination may do more to convict a man than all other evidence presented. By the same token, a good

presentation as a witness, might have the opposite effect.

Whatever might have been the effect, however, of the Appellant appearing as a witness in his own defense, it might have been completely nullified or discredited by the use of a statement which had previously been ruled to have been improperly obtained and inadmissible in the trial.

The use of the word "forewarned" by the Court in stating to Appellant and his Counsel that the statement might be used if he were to take the stand, could only inhibit him and greatly influence the decision by him and his Counsel whether he should or should not take the stand and testify. It would appear axiomatic if the statement were tainted to the extent that it is inadmissible for one purpose it would be inadmissible for the purpose suggested by the Court, that is,

as an impeachment weapon by the State.

In People v Byrd 266 p2d 505, 42C 2d 200 Cert. Denied 75 S.Ct. 73, 348 U. S. 848, 99 L. Ed. 2d 668, the Court on page 510 stated,

> "The portion of Defendant's argument which is directed to the point that an involuntary confession may not be used either for the purpose of proving the crime confessed or for the purpose of impeaching the Defendant is sustained by authority."

Even though the question of whether to put a Defendant on the stand in his own defense is a delicate question, it is well within common knowledge that in most cases it is to the distinct disadvantage of the Defendant if he does not take the stand in the eyes of a jury of laymen, and any such external factors such as the warning involved in this case should not be imposed upon the Defendant or his Counsel in making that

important decision.

Furthermore, in this case, the decision to take the stand or not to take the stand, was influenced not only by the warning by the Court, concerning the previously suppressed statement, but also by the implied threat that if the Appellant, Kish, were to take the witness stand, the co-defendant, Vincent, who had already plead guilty to a lesser charge, would be called as a witness for the State and Appellant and his Counsel would be again confronted with the dilemma of the dual representation by Counsel,all of which served, cumulatively, to discourage the Appellant, Kish, from taking the witness stand in his own behalf.

In <u>People</u> v <u>Speaks</u> 319 p. 2d 709, 156 C.A.2d 25, the Court after a lengthy explication of the fact situation, said on page 715,

> "Procedure similar to that followed in the present case--introducing the alleged confession by way of impeachment and by way of rebuttal, without proof that it was voluntary--was condemned in People v Rodriques 58 Cal. Ap. 2d 415, at page 418, 136 P2d 626, at page 628 at which this court said: 'The alleged confession to Officer Story was not offered as a part of the People's case in chief. It was held back to be offered in rebuttal and in the guise of impeachment of Defendant and after his denials upon cross-examination. Apparently both Counsel and the Court considered this to be a proper procedure. Not only that, but it appears to have been assumed that a confession enlisted by way of impeachment was admissible without proof that it had been given voluntarily....it was no more proper for the District Attorney to offer the evidence as rebuttal after the Defendant's denial of the alleged statements, under the pretense that it was offered to impeach the Defendant, than it would have been to offer it in rebuttal if the Defendant had not been questioned about it at all."

In the present case, the alleged statement was not in fact used. But the Court warned that it might be used, and

in the opinion of the Appellant and Appellant's Counsel, they could not take the risk of the Appellant taking the stand and testifying and then upon the State's Attorney attempting to use the statement in an exercise in impeachment, find that the Court would allow the use of the tainted statement. Consequently the threat of using the statement was a serious inhibiting factor in the decision whether or not Defendant should take the stand in his own defense. This statement by the Court clearly and definitely taints the entire proceeding and is justification for the reversal of the conviction of Appellant.

3. Failure of Prosecutor to Indorse Witnesses Upon the Information and to Indorse the Name of Other Witnesses Upon the Information Until the Morning of Trial

Section 77-21-52 of the Utah Code Annotated (1953) states as follows:

> "When an information or indictment is filed, the names of all the witnesses or deponents on whose evidence information or indictment was based shall be indorsed thereon before, it is presented, and the prosecuting attorney shall indorse on the information or indictment at such time as the court may by rule, or otherwise, prescribe the names of such other witnesses as he purposes to call. A failure to so indorse the said names shall not affect the validity or sufficiency of the information or indictment, but the court in which the information or indictment was filed shall, upon application of defendant, direct the names of such witnesses to be indorsed. No continuance shall be allowed because of the failure to indorse any of the said names unless such application was made at the earliest opportunity and then only if a continuance is necessary in the interest of justice."

In the instant case when the Amended Information was prepared and filed on the morning of the trial, _after_ the jury had been qualified and sworn, in chambers,

out of the presence of the jury, the said Amended Information included the names only of witnesses Albert Dean Stock, Hyrum Ipson, Joseph Pfoutz and George Anderson. (TR. p. 12, ll.29-30).

Upon an inquiry being made by Appellant's Counsel whether or not those were the only witnesses to be called by the State, the Prosecuting Attorney advised that others would be called and the Appellant objected that the names of the additional witnesses had not been indorsed upon the Information as required by Section 77-21-52 of the Utah Code Annotated (1953). The Prosecuting Attorney pointed out that other names had been provided in a Bill of Particulars. The additional name provided there, was George Lang. (See Bill of Particulars, Paragraph 1.)

The Prosecuting Attorney then stated that, in addition to those already mentioned, he wished to indorse upon the Information at that late date the name of Lloyd Plaz Vincent, Jr., the co-defendant in the proceedings before the Court. (TR. p. 14, ll.20-21)

Also during the trial, the prosecution called as a witness, Joe Hutchings, a witness who had never been indorsed upon the Information or provided in the Bill of Particulars.

Clearly these oversights or omissions, until the last moment before the trial commenced, or in the case of Joe Hutchings, during the trial, place the Appellant under an accumulating disadvantage when considered in conjunction with the fact that his Counsel had already been placed in a position of conflict, and with the fact that he, the Appellant, was faced

with a coercive influence in making relevant and highly important decisions, due to the warning by the Court that the tainted statement might be admitted for impeachment purposes.

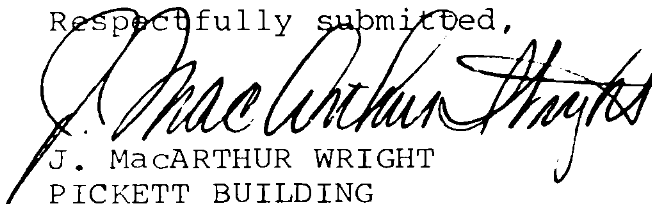
Even though Section 71-2-52 states that a failure to indorse the said names shall not affect the validity or sufficiency of the Information or Indictment, nevertheless, the statute is provided for a purpose and that purpose is to permit the Defendant to evaluate and consider possible testimony and make plans for his defense in advance and when that information is denied him, that purpose is thwarted and an additional disadvantage is heaped upon the Defendant's burden which he must overcome in defending himself and obtaining justice.

VII. CONCLUSION

Appellant strongly believes that where he was forced to share defense counsel, equally committed to representing a co-defendant with whom he had a conflict, not only as to the evidence concerning the alleged offense, but as to goals he desired to achieve through the court proceedings below, and where his other co-defendants, arrested at the same time, by pleading guilty to lesser charges, and who were _at least_ equally involved if not more so, received lesser sentences than he received by asserting his claim to innocence, and where an inadmissible statement was held over his head in an improper and wrongful manner, causing an adverse influence, upon important and crucial defense decisions, and finally, where the untimely

indorsement of witnesses on the information and outright failure to indorse on the information, one witness used by the Prosecutor, that the rights of Appellant have been so abused as to require in the interests of justice that the Appellant's conviction be reversed.

Respectfully submitted,



J. MacARTHUR WRIGHT
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