

1960

# State of Utah v. Mack Merrill Rivenburgh, Jr. and Leonard Warner Bowne : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

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.

Walter L. Budge; Vernon B. Romney; Attorneys for Respondent;

---

## Recommended Citation

Brief of Respondent, *State v. Rivenburgh*, No. 9089 (Utah Supreme Court, 1960).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/3400](https://digitalcommons.law.byu.edu/uofu_sc1/3400)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

# In the Supreme Court of the State of Utah

FILED

STATE OF UTAH,

APR 4 1960

*Plaintiff and  
Respondent,*

Supreme Court, Utah

-vs-

MACK MERRILL RIVENBURGH, JR.,  
and LEONARD WARNER BOWNE,  
*Defendants and  
Appellants.*

Case No. 9089

---

## BRIEF OF RESPONDENT

---

WALTER L. BUDGE  
*Attorney General*

VERNON B. ROMNEY  
*Assistant Attorney General*  
*Attorneys for Respondent*

---

---

PRINTERS INC., SUGAR HOUSE

# TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	1
STATEMENT OF POINTS.....	2
ARGUMENT .....	4
POINT I. (Rivenburgh)	
THE VERDICT CONFORMS TO THE EVIDENCE	4
POINT II. (Rivenburgh)	
THERE IS NO PROOF THAT THE JURY IN ITS DELIBERATION WENT OUTSIDE THE EVIDENCE AND TOOK INTO CONSIDERATION THE OPENING STATEMENT OF COUNSEL FOR APPELLANT BOWNE. EVIDENCE WAS ADDUCED TO SUPPORT SAID STATEMENT. IF ERROR WAS COMMITTED, IT WAS NOT PREJUDICIAL ERROR IN LIGHT OF ALL THE CIRCUMSTANCES.....	12
POINT III. (Rivenburgh)	
THE HYPOTHETICAL QUESTION ASKED DR. CLARK WAS ENTIRELY PROPER AND ITS ADMISSION DID NOT CONSTITUTE REVERSIBLE ERROR.....	13
POINT IV. (Bowne)	
APPELLANT BOWNE WAS NOT DENIED DUE PROCESS UNDER THE FEDERAL OR STATE CONSTITUTION; HE WAS NOT DENIED A FAIR AND IMPARTIAL JURY; HE WAS NOT DENIED EQUAL PROTECTION OF THE LAWS; NOR IS SECTION 77-30-2, UTAH CODE ANNOTATED 1953, VIOLATIVE OF EITHER THE FEDERAL OR STATE CONSTITUTION .....	15
POINT V. (Bowne)	
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING BOWNE'S MOTION FOR A SEPARATE TRIAL.....	20

## Table of Contents (Cont.)

	Page
POINT VI. (Bowne)	
THE TRIAL COURT DID NOT ERR IN NOT GRANTING BOWNE'S MOTION TO DISMISS.....	29
POINT VII. (Bowne)	
THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 15.....	40
POINT VIII (Bowne)	
THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 26.....	44
POINT IX. (Bowne)	
THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE BOWNE'S INSTRUCTION NO. 13.....	45
POINT X. (Bowne)	
THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL.....	46
POINT XI. (Bowne)	
THE TRIAL COURT DID NOT ERR IN FAILING TO COMPEL THE PROSECUTION TO FURNISH TAPE RECORDINGS AND COPIES OF STATEMENTS MADE BY WITNESSES AND DEFENDANTS.....	52
POINT XII. (Bowne)	
THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT EVIDENCE CONCERNING THE CHARACTER AND REPUTATION OF THE DECEASED.....	53
CONCLUSION .....	54

## AUTHORITIES CITED

15 California Jurisprudence 407, Sec. 79.....	19
16A Corpus Juris Secundum 579, p. 623.....	16
16A Corpus Juris Secundum 599, p. 655.....	17
23 Corpus Juris Secundum 1045.....	50

## Table of Contents (Cont.)

### CASES CITED

	Page
<i>Bridges v. U. S.</i> , 199 Fed.2d 811.....	41
<i>Carter v. People of State of Ill.</i> , 67 S.Ct. 216, 329 U.S. 173.....	17
<i>Christiansen v. Harris</i> , 109 U. 1, 163 P.2d 314.....	15
<i>Commonwealth v. Lombardi</i> , (Penn.), 70 A. 122.....	48
<i>General Electric v. Thrifty Sales</i> , 5 U.2d 326, 301 P.2d 741.....	17
<i>Leback, et al. v. Nelson</i> , (Idaho), 107 P.2d 1054.....	20
<i>Lucas v. U.S.</i> , (D.C.), 104 Fed.2d 225.....	22
<i>Martinez v. People</i> , (Colo.), 235 P.2d 810.....	13
<i>Morletti v. People</i> , (Colo.), 209 P. 796.....	51
<i>Muller v. Hale</i> , (Calif.), 71 P. 81.....	19
<i>People v. Braune</i> , (Ill.) 2 N.E.2d 839.....	21
<i>People v. Fisher</i> , (N.Y.), 164 N.E. 336.....	24
<i>People v. Friday</i> , (Calif.), 63 P.2d 303.....	24
<i>People v. Isby</i> , (Calif.), 186 P.2d 405.....	51
<i>People v. Marsh</i> , (Ill.), 85 N.E.2d 715.....	41
<i>People v. O'Laughlin</i> , 3 U. 153,1 P. 653.....	18
<i>People v. Pilbo</i> , (Calif.), 260 p. 303.....	19
<i>People v. Thomas</i> , (Calif.), 27 P.2d 765.....	27
<i>People v. Tom Woo</i> , (Calif.), 184 P. 389.....	50, 51
<i>State v. Clark</i> , (Wash.), 286 P. 69.....	25, 26
<i>State v. Cooper</i> , 114 U. 531, 201 P.2d 764.....	46
<i>State v. Cox</i> , 106 U. 253, 147 P.2d 858.....	45
<i>State v. Erwin</i> , 101 U. 365, 120 P.2d 285.....	31
<i>State v. Evans</i> , 74 U. 389, 279 P. 950.....	42
<i>State v. Green</i> , 78 U. 580, 6 P.2d 177.....	30
<i>State v. Hendricks</i> , 123 U. 267, 258 P.2d 452.....	42
<i>State v. Hoffa</i> , (Iowa), 71 N.W. 235.....	48
<i>State v. Iverson</i> , ____ U. ____, ____ P.2d ____, ____	34
<i>State v. Jarrett</i> , 112 U. 335, 187 P.2d 547.....	46
<i>State v. Lewellyn</i> , 71 U. 331, 266 P. 261.....	32
<i>State v. Mellor</i> , 73 U. 104, 272 P. 635.....	46

## Table of Contents (Cont.)

	Page
<i>State v. Miller</i> , 111 U. 255, 177 P.2d 727.....	21, 24
<i>State v. Montgomery</i> , 37 U. 515, 109 P.2d 815.....	46
<i>State v. Moore</i> , 111 U. 458, 183, P.2d 973.....	47
<i>State v. Nemier</i> , 106 U. 307, 148 P.2d 327.....	18
<i>State v. Priestley</i> , 97, U. 158, 91 P.2d 447.....	4
<i>State v. Penderville</i> , 2 U.2d 281, 272 P.2d 195.....	31
<i>State v. Peterson</i> , 121 U. 229, 240 P.2d 504.....	13, 31
<i>State v. Rosenberg</i> , 84 U. 402, 35 P.2d 1004.....	45
<i>State v. Thatcher</i> , 108 U. 63, 157 P.2d 258.....	34
<i>State v. Zeimer</i> , ____ U.2d ____, 347 P.2d 1111.....	42
<i>Taylor v. State</i> , (Okla.), 208 P.2d 185.....	42
<i>U.S. v. Gilbert</i> , 31 Fed. Supp. 195.....	25
<i>Untermeyer et al. v. State Tax Comm., et al.</i> , 102 U. 214, 129 P.2d 881.....	16
<i>Webb v. Olin Mathieson Chem. Co.</i> , 9 U.2d 275, 342 P.2d 1094.....	6

## STATUTES CITED

### United States Constitution

Fifth Amendment.....	16
Fourteenth Amendment.....	16

### Utah Code Annotated, 1953

Section 77-1-10.....	48
Section 77-30-2.....	3, 15
Section 77-31-6.....	20, 24
Section 77-38-3.....	5
Section 77-38-3(6).....	5

# In the Supreme Court of the State of Utah

---

STATE OF UTAH,

*Plaintiff and  
Respondent,*

-vs-

MACK MERRILL RIVENBURGH, JR.,  
and LEONARD WARNER BOWNE,  
*Defendants and  
Appellants.*

Case No. 9089

---

## BRIEF OF RESPONDENT

---

### STATEMENT OF FACTS

Respondent agrees with many of the facts set out in Appellant Bowne's brief, but deems it necessary to take exception to certain parts thereof, and to add other pertinent facts necessary to a clear understanding of the case.

Rivenburgh told Bowne he planned to kill Verner by cutting off his head (or that Verner should have his head cut off). T. 220-223, 574-576, 790-691, 815-818, 832, 865. Bowne joined in the planning. Several methods of

killing Verner were discussed, including shooting him in the arm with oil. T. 246. Randel tried to talk Bowne out of having any connection with the murder. T. 247. The pretense of sodomy was only a trick used to get Verner to the attic. T. 815. The defendants went separately to the attic and together killed Verner—Bowne holding Verner in a headlock or a scissor hold during the stabbing by Rivenburgh. T. 350, 364, 372, 379, 380, 709, 807.

## STATEMENT OF POINTS

### POINT I

(Rivenburgh)

THE VERDICT CONFORMS TO THE EVIDENCE.

### POINT II

(Rivenburgh)

THERE IS NO PROOF THAT THE JURY IN ITS DELIBERATION WENT OUTSIDE THE EVIDENCE AND TOOK INTO CONSIDERATION THE OPENING STATEMENT OF COUNSEL FOR APPELLANT BOWNE. EVIDENCE WAS ADDUCED TO SUPPORT SAID STATEMENT. IF ERROR WAS COMMITTED, IT WAS NOT PREJUDICIAL ERROR IN LIGHT OF ALL THE CIRCUMSTANCES.

### POINT III

(Rivenburgh)

THE HYPOTHETICAL QUESTION ASKED DR. CLARK WAS ENTIRELY PROPER AND ITS ADMISSION DID NOT CONSTITUTE REVERSIBLE ERROR.



## POINT IV

(Bowne)

APPELLANT BOWNE WAS NOT DENIED DUE PROCESS UNDER THE FEDERAL OR STATE CONSTITUTION; HE WAS NOT DENIED A FAIR AND IMPARTIAL JURY; HE WAS NOT DENIED EQUAL PROTECTION OF THE LAWS; NOR DOES SECTION 77-30-2, UTAH CODE ANNOTATED 1953, VIOLATE EITHER THE FEDERAL OR STATE CONSTITUTION.

## POINT V

(Bowne)

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING BOWNE'S MOTION FOR A SEPARATE TRIAL.

## POINT VI

(Bowne)

THE TRIAL COURT DID NOT ERR IN NOT GRANTING BOWNE'S MOTION TO DISMISS.

## POINT VII

(Bowne)

THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 15.

## POINT VIII

(Bowne)

THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 26.

POINT IX

(Bowne)

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE BOWNE'S INSTRUCTION NO. 13.

POINT X

(Bowne)

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL.

POINT XI

(Bowne)

THE TRIAL COURT DID NOT ERR IN FAILING TO COMPEL THE PROSECUTION TO FURNISH TAPE RECORDINGS AND COPIES OF STATEMENTS MADE BY WITNESSES AND DEFENDANTS.

POINT XII

(Bowne)

THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT EVIDENCE CONCERNING THE CHARACTER AND REPUTATION OF THE DECEASED.

ARGUMENT

POINT I

(Rivenburgh)

THE VERDICT CONFORMS TO THE EVIDENCE.

The general rule in this state is expressed in *State v. Priestley*, 97 U. 158, 91 P. 2d 447, to the effect that jurors cannot impeach their verdict except in instances

expressly made exceptions by legislative enactment. In Section 77-38-3, Utah Code Annotated 1953, seven grounds for a new trial are given, one of them being:

“(6) When the verdict or decision is contrary to law or evidence.”

This subsection is relied upon by Appellant Rivenburgh at Point I of his brief.

Respondent believes that the affidavits submitted by Rivenburgh are of no consequence and in fact cannot be used to buttress his argument that the verdict was contrary to the evidence. This is for the court alone to determine and lay jurors can add nothing whatsoever by affidavit or otherwise to a proper consideration of this problem.

As a matter of fact, it appears clear that the only subsections of Section 77-38-3 as to which jurors' affidavits or testimony could be of any use are (2), (3) and (4), relating to evidence received out of court; to situations where the jury has separated without leave of the court after retiring for deliberation, or where misconduct has occurred; and to situations where the verdict has been determined by lot or means other than a fair expression of opinion by all jurors. Any statements or evidence prepared or given by jurors as to the other four subsections of the statute would be completely immaterial.

Rivenburgh's defense rests on his mental condition after having swallowed what he alleges were a great many amphetamine pills, commercially known as Drinalfas. The jury did not choose to adopt this theory and apparently

concluded that Rivenburgh was able to form the intent necessary to commission of first degree murder.

The jurors must have believed either that Rivenburgh did not take the dosage claimed, or that Dr. Clark's testimony proved that what he did take was not enough to prevent his forming the intent necessary to commit the act. Disregarding for the present any belief the jury may have had as to the number of pills consumed by Rivenburgh immediately prior to the killing, respondent will turn to a consideration of what was in evidence as to the effect of the drug.

At page 4 of his brief, Rivenburgh quotes from Dr. Clark's testimony, skipping here and there and taking only short fragments. It would seem advisable, therefore, at this point, to set forth additional excerpts from the transcript for the use of the court. Rivenburgh quotes, at page 4 of his brief, the statement of the doctor that he had had no experience with a certain dosage of amphetamine over a seven-hour period. Since Dr. Clark was an expert witness, he was not limited to his own observations, but could testify on what he had learned by study *Webb v. Olin Mathieson Chem. Co.*, 9 U. 2d. 275, 342 P. 2d 1094, and through conferences with other doctors. At page 463 of the transcript, Dr. Clark states as follows:

"On the other hand, the stimulant drugs, a stimulant can do so much, so to speak, and the addition of even a major increase in the dose will commonly not produce all of that additional effect.

"I had a talk with Dr. Winkler a year ago, in which we talked about some of his work, with amphetamine and he pointed out that by slowly

raising the dose, one could get up to 1400 milligrams a day, without seriously disorganizing the individual.

"We were discussing the question of tolerance development, and effects, and that actually it was quite possible, if one had the courage, that you could take,—you for instance and give you 1400 milligrams right now—

"Q. I don't have that much courage.

"A. It might not produce delirium. It might kill you, or might produce only the same effect as a fairly modest dose, but no one has dared to do such an experiment."

Dr. Clark's testimony continues at line 22, T. 445:

"Q. Now is his behavior more important to you in arriving at that conclusion, than knowing the amount of Drinalfa he had taken during this period?

"A. The behavior is all that we have to judge by, and it would be more important than knowing the precise dose, in that there is evidence, for example, that even a very massive amount could have been taken, and no delirium occur, which we cited instances on."

Important answers are given regarding large dosages at T. 433:

"Q. Do you know of any instances or case histories, where large doses of this has been used?

"A. Yes. There are cases reported of the gestation of 250 milligrams a day for long periods of time. One case is 700 milligrams a day for several months, one of 250 per day for 5 years. The com-

mon dose use by addicts is about 200 or 250 milligrams a day.

"Q. So that on this 700 per day, it would be approximately—I believe you said 700 milligrams per day; is that correct?

"A. Yes, this is citing amphetamine, which is a closer related drug.

"Q. That would be 350 of these pills per day; is that correct?

"A. If my arithmetic is right, 5 grams into 700—5 milligrams into 700 would be 140.

"Q. That is 140 of these tablets in a day; is that correct?

"A. Yes.

"Q. Can you tell us what effects were observed on these particular case histories?

"A. These cases were cited to illustrate the remarkable tolerance of these drugs which can develop. I am not familiar with the actual behavior of these individuals during this time. But they are not incompatible with their functioning reasonably well in terms of work, etc.

"I have personal experience of addicts who have taken this amount of drugs and functioned relatively well.

"However, it is cited that at the end of this prolonged addiction, there did occur, a toxic reaction to the drug whereby their behavior became disturbed.

"Q. In these three cases you cited, how long a period did they take them?

"A. One case cited 250 milligrams a day for five years, the other 700 milligrams a day for several months."

At page 5 of his brief, Rivenburgh quotes a statement of Dr. Clark (T. 442) to the effect that, "Yes, I would say that amphetamine does alter mental state, changes self-awareness," etc. However, at T. 475, the following colloquy occurs, with the questions being asked by Mr. Banks:

"Q. Doctor, would a person's behavior change to a point, while he is under the influence of Drinalfa—would it change to a point he would do something, under that influence, which he would not do under circumstances when he had not taken the Drinalfa?

"A. No, I would not expect it."

At T. 442, the following questions and answers occur:

"Now with reference to the mental processes, as to destroying mental processes, would there also have to be toxic delirium present?

"A. I do not like the word 'destroy', because to me, this implies a total obliteration of functions.

"Q. Let us use the word 'impair', doctor.

"A. Yes. I would say that amphetamine does alter mental state, changes self-awareness, gives us an increased feeling of alertness, etc. but so far as producing a disturbance that would disrupt the whole pattern of the individual's behavior, this would not occur, unless there was occurrence of delirium."

Furthermore, at T. 470, Dr. Clark states as follows:

"A. No, sir, I cannot agree with this step-wise thing you describe. The experimental work I have done with these drugs, where one was testing a specific thing of controlling what one was saying,

I found that all of the drugs I studied, up to the point that the individual became unconscious, he was able to perform extremely well in the express measures I was using, which involved ego control or the control of what one said or did not say, and I could cite these details if you wish."

In answer to a hypothetical question, utilizing the facts of the case introduced in evidence but not assuming any specific amount of amphetamine taken by Rivenburgh, Dr. Clark testified at T. 444, that doing such acts as were indicated by the question would not mean that the amphetamine he had taken had impaired his mind to the point of destroying his ability to determine the difference between right and wrong.

On redirect examination, Dr. Clark at T. 475 states that even though a person does perform a spur-of-the-moment action, it does not mean that he does not know what he is doing. At T. 438, Dr. Clark says that short of toxic delirium the brain process is not disturbed by the use of the pills nor is it impaired. He further states that amnesia does not derive from use of the drug nor does the drug have any particular effect either to stimulate or suppress sexual desires.

Rivenburgh's own testimony as to the events which occurred prior to, at the time of, and after the killing is clear, comprehensive, and precise as to details. This alone should completely answer the allegation that he was not in control of his faculties. Rivenburgh knew on the day of the murder and knew at the time of the trial exactly what was happening at the crucial times. His acts were premeditated and were not the result of taking the pills.



This is shown by the following excerpt from the transcript, beginning at line 17, on page 634:

(By Mr. Banks.)

Q. But it was the pills causing your action Sunday?

A. Pardon me, sir?

Q. That it was the pills causing your action on Sunday?

A. I just got mad, sir.

Q. You knew what you were doing Sunday, except when you got mad?

A. I believe I did, yes; at least I think."

Furthermore, Rivenburgh had been on the pills, according to his own testimony (his brief, page 12) ever since June. Thus, he had managed to build up a great tolerance for them and the 55 to 60 pills he claims he took, if in fact he did take them (T. 520), could have had nowhere near the effect on him as upon one not accustomed to regular use.

Here there was overwhelming evidence that Rivenburgh was not so affected as to be unable to form the necessary intent.

Nor, can Rivenburgh, not having introduced expert evidence at the trial to combat Dr. Clark's statements, now present to the court for the first time on appeal excerpts from medical texts as he has presumed to do in his brief at pages 14 through 17.

## POINT II

(Rivenburgh)

THERE IS NO PROOF THAT THE JURY IN ITS DELIBERATION WENT OUTSIDE THE EVIDENCE AND TOOK INTO CONSIDERATION THE OPENING STATEMENT OF COUNSEL FOR APPELLANT BOWNE. EVIDENCE WAS ADDUCED TO SUPPORT SAID STATEMENT. IF ERROR WAS COMMITTED, IT WAS NOT PREJUDICIAL ERROR IN LIGHT OF ALL THE CIRCUMSTANCES.

Bowne attempted to show that he feared Rivenburgh enough to do what Rivenburgh demanded of him. While he did not testify in full detail as to Mr. Hansen's comments at page 18 of Rivenburgh's brief, Bowne did testify that he performed all the acts asked of him or demanded of him by Rivenburgh relating to such things as standing point, coming to assist him and attempting to find his knife, and in establishing an alibi to help him. Such references are numerous and appear among other places at T. 582, 590, 693, 694, 699, 710, 721, 726, 733, 735, 792, 834, 839 and 843.

Mr. Hansen's comments were not evidence and were not so regarded by the jury.

Rivenburgh could not possibly have been hurt by any failure on the part of Bowne to produce evidence concerning matters in Mr. Hansen's opening statement. Quite to the contrary, any omissions definitely were in his favor. Additional evidence of compulsion on the part of Rivenburgh and fear on the part of Bowne would only have increased the jury's belief as to Rivenburgh's guilt.

Furthermore, Rivenburgh's counsel did not object to Mr. Hansen's statement nor request an instruction for the purpose of curing the supposed error. It is, of course, not error for the court not to give an instruction where it is not asked. *State v. Peterson*, 121 U. 229, 240 P.2d 504. So much of a derogatory nature was adduced as to Rivenburgh that any affect Mr. Hansen's statement might have had would have been insignificant. Therefore, if error did occur, it did not constitute reversible error.

### POINT III

(Rivenburgh)

THE HYPOTHETICAL QUESTION ASKED DR. CLARK WAS ENTIRELY PROPER AND ITS ADMISSION DID NOT CONSTITUTE REVERSIBLE ERROR.

•

Appellant Rivenburgh makes many objections in his Point IV to the hypothetical question presented to T. 444 and 445, but does not go into any of them in detail, nor does he present law supporting them.

The fairness of a hypothetical question is largely a matter resting in the discretion of the trial court, whose ruling thereon will not be grounds for reversal in the absence of a showing of abuse of such discretion. *Martinez v. People*, (Colo.), 235 P.2d 810.

Respondent believes Rivenburgh's argument can be answered fully by pointing out that the district attorney asked two hypothetical questions, each eliciting a separate answer from Dr. Clark. To the first question and answer, beginning at T. 444, Rivenburgh's counsel did not object

and therefore waived any objection he might have had. Even if the court, despite Dr. Clark's answer at line 23 of T. 444, should regard the hypothetical questions as a single question, however, the objections of Rivenburgh are not well taken. The only ground there relied on is that no mention was made of the amount of amphetamine consumed.

The contention of counsel for Rivenburgh that the hypothetical question was based on facts not in evidence is not true. With possibly one minor exception, all were clearly in evidence before the question was asked. The following references are only a few of many showing this in the transcript.

As to securing a knife or knives, see T. 225, 307, 344 and 423.

As to a disguise (for example, using someone else's clothes), see T. 224 and 357.

As to change of clothing, see T. 224, 346 and 357.

As to preparations for and the actual attempt to sever the head of the victim, see T. 221, 350 and 360.

As to the death of the victim, see T. 146 and 366.

As to the destruction of clothing, see T. 240, 368 and 390.

As to the creation of an alibi, see T. 257, 343 and 393.

Respondent has not found testimony introduced prior to the asking of the question relating specifically to the cleaning of Rivenburgh's shoes; but again, no objection to the question was made on this or any other ground and, therefore, it is waived.

The other contentions of Rivenburgh's Point IV are without merit and have been answered heretofore in this brief.

## POINT IV

(Bowned)

APPELLANT BOWNE WAS NOT DENIED DUE PROCESS UNDER THE FEDERAL OR STATE CONSTITUTION; HE WAS NOT DENIED A FAIR AND IMPARTIAL JURY; HE WAS NOT DENIED EQUAL PROTECTION OF THE LAWS; NOR DOES SECTION 77-30-2, UTAH CODE ANNOTATED 1953, VIOLATE EITHER THE FEDERAL OR STATE CONSTITUTION.

Appellant Bowne does not present a strenuous argument for either his due process of law or fair and impartial jury theories but does seem to lay great stress upon the matter of equal protection of the laws.

As to the question of denial of due process of law under the Utah Constitution, this court has held in *Christiansen v. Harris*, 109 U. 1, 163 P.2d 314, that the essentials of due process are:

“\* \* \* (a) the existence of a competent person, body, or agency authorized by law to determine the questions; (b) an inquiry into the merits of the question by such person, body, or agency; (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard; (d) right to appear in person or by counsel; (e) fair opportunity to submit evidence, examine and cross-examine witnesses; (f) judgment to be rendered upon the

record thus made. In the absence of statute laying down other or more specific requirements, the above conditions meet the demands of due process. \* \* \*

In the same case the court said that while many attempts had been made to further define due process of law, all of them revolve around the idea that a party shall have his day in court.

The case of *Untermeyer, et al., v. State Tax Comm., et al.*, 102 U. 214, 129 P.2d 881, held that since our due process clause is substantially the same as those in the Fifth and Fourteenth Amendments to the Constitution of the United States, U. S. Supreme Court decisions are to be considered highly persuasive by this court.

With reference to the Federal Amendments, it has always been held that due process of law is not to be turned into a destructive dogma against the states in the administration of their system of criminal justice; and the procedure followed by the states shall not be held to violate the requirements of due process unless it violates the very essence of a scheme of ordered liberty and unless to continue it would violate a principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental. 16A C.J.S. 579, at page 623.

The prosecution of crime is a matter for the individual states except for the limited scope of the federal criminal code; and the due process clause does not require that criminal procedure be uniform throughout the states, but each state can choose the methods and practices by which crime is brought to book as long as the ultimate

dignities of man assured by the Federal Constitution are observed. *Carter v. People of State of Illinois*, 67 S.Ct. 216, 329 U. S. 173.

As far as the Federal Constitution is concerned, due process of law does not in and of itself require jury trial at all in a criminal case; and the Federal Constitution does not prohibit the states from regulating and restricting the right of trial by jury in their own courts, as they may deem proper, or in the manner in which states may select jurors, as long as the method employed does not exclude persons from jury service because of race, color or previous servitude or does not violate some principle of fairness deeply rooted in the court's legal consciousness. 16A C.J.S. 590, at page 655. Nor has any federal or state constitutional provision come to respondent's attention which by its terms or necessary implication would grant the defendant any peremptory challenges at all.

Rivenburgh and Bowne were tried in accordance with due process and the requirements of our statutes were fully met in every instance.

Clearly, in construing a statute, all doubts should be resolved in favor of constitutionality, *General Electric v. Thrifty Sales*, 5 U.2d 326, 301 P.2d 741.

That Bowne had a fair and impartial jury is shown by the scrupulous care taken by Judge Jeppson in impaneling it. His questioning, aided by defense counsel, was exhaustive, covering the first 66 pages of the transcript. A reading thereof should satisfy the court that the jury could not have been anything other than fair and impartial.

Bowne lays great stress on what he claims amounts to unequal protection of the laws. In this regard, Bowne provides us, at page 9 of his brief, with a quotation from the case of *People v. O'Laughlin*, 3 U. 153, 1 P. 653. The court, after quoting the substance of the defendant's case, demolishes his argument in the next sentence with this statement:

“\* \* \* This reasoning, although plausible and ingenious, is not good. \* \* \*”

There a defendant had a right to three peremptory challenges and the court pointed out the absurdity of 13 defendants receiving 39 peremptory challenges.

That Bowne's assertion is not the law in Utah is clearly shown by the court's holding in the case of *State v. Nemier*, 106 U. 307, 148 P.2d 327. There three defendants were tried for assault with a deadly weapon. The court held that they were entitled to ten peremptory challenges but that they must be exercised collectively and that each defendant was entitled to two additional challenges which he could exercise separately. The court said:

“\* \* \* Where there are two or more defendants, the statute does not provide for additional separate challenges if defendants refuse to join in the collective challenges.”

The court said that each “side” should have an equal number of challenges.

While the Utah court did not concern itself with the constitutionality of the act, this aspect of the problem has been considered by courts in other jurisdictions.



In the case of *Muller v. Hale* (Calif.), 71 P. 81, the court upheld the constitutionality of a statute which stated:

"Either party may challenge the jurors; but where there are several parties on either side, they must join in a challenge before it can be made."

The court stated:

"The appellant concedes that the ruling of the court was justified by the statute of this state, but contends that it violates the Fourteenth Amendment of the Constitution of the United States in that it denies persons equal protection of the laws. We see nothing in this contention, \* \* \*."

It is true that this was a civil case, but where the matter of equal protection of the laws is involved, there is no essential difference between civil and criminal rights. For example, in *People v. Pilbo*, (Calif.), 260 P. 303, a criminal case, the court expressly relied on the holding in the *Muller* case and held that:

"The requirement that defendants or parties must join in the exercise of peremptory challenges is not violative of any constitutional provision."

The court also quotes from 15 Calif. Juris. 407, Sec. 79, to this effect:

"In criminal cases when several defendants are tried together, they cannot sever their challenges but must join therein. And in civil actions where there are several parties on either side, they must join in the challenge before it can be made. In construing these provisions, it has been held in

criminal cases that defendants must join in peremptory challenges as well as in those for cause. The provisions of the Code of Civil Procedure do not deny persons the equal protection of the laws, and thus violate the Fourteenth Amendment, for the same rule applies to all the parties to an action where they are united with others either as plaintiffs or defendants."

In the case of *Leback, et al v. Nelson*, (Idaho), 107 P.2d 1054, the court, in dealing with a statute similar to that cited in the Muller case, failed to find it offensive to the constitution. It is not an unreasonable classification to require defendants tried together to join in their peremptory challenges or take a lesser number thereof.

It is interesting to note too that Mr. Hansen did not demand a formal ruling from the court on the matter of the challenges at the trial.

## POINT V

(Bowne)

### THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING BOWNE'S MOTION FOR A SEPARATE TRIAL.

Section 77-31-6, U.C.A. 1953, reads as follows:

"When two or more defendants are jointly charged with any offense, whether felony or misdemeanor, they shall be tried jointly, unless the court in its discretion on the motion of the prosecuting attorney or any defendant orders separate trials. In ordering separate trials, the court may order that one or more defendants be each separately tried and the others jointly tried, or may order that several defendants be jointly tried in

one trial and the others jointly tried in another trial or trials, or may order that each defendant be separately tried."

Judge Jeppson carefully considered the representations made to him at the time the motion for separate trials was made. He was, of course, clothed with wide discretion under the circumstances; and while it is true that a judge may not exercise his discretion in an arbitrary way, a careful examination of the transcript clearly indicates that the judge did not do so.

In the case of *State v. Miller*, 111 U. 255, 177 P.2d 727, the court held that since an accused cannot demand severance as a matter of right, it must have appeared that the trial court had before it facts indicating the accused would be unduly prejudiced by a joint trial before the Supreme Court could hold it had abused its discretion.

Contrary to the claim of Bowne, the defenses which he and Rivenburgh put forth, while somewhat different, to be sure, were not antagonistic. There were no such circumstances as were reported in the case of *People v. Braune*, (Ill.), 2 N.E.2d 839, so strongly relied upon by Bowne at page 18 of his brief. There the court stated that in the petitions seeking separate trials, each defendant:

"\* \* \* declared the other would take the witness stand and testify to a state of facts which would be exculpatory of the witness and condemnatory of his codefendant."

This is not true in the instant situation nor in fact did Bowne so allege in his motion for a new trial. Rivenburgh at no time, as far as respondent can ascertain, ac-

cused Bowne of perpetrating the act nor did Bowne himself at any time attempt to urge that he was not present at the scene.

Even, however, if each party had alleged that the other perpetrated the crime, the court still would have been on solid ground in refusing separate trials under the holding in *Lucas v. U. S.*, (D.C.), 104 Fed.2d 225, wherein the court said:

“\* \* \* If the government had been compelled to try each separately, Johnson would have placed the blame on Lucas and Lucas on Johnson, and the probable result would have been an acquittal of both. In these circumstances it was within the sound judicial discretion of the trial court whether to grant separate trials. . . . In examining the evidence certified, we find nothing which shows that either accused sustained any prejudice by the course adopted.”

During the course of the trial both parties admitted their presence at the scene of the crime even though advised by separate attorneys at all times. The evidence of both defendants was consistent in every substantial way under direct examination, each claiming the reason for going to the attic was the commission of an act of sodomy by Rivenburgh.

It is true that the defenses were somewhat different—Bowne's turning on his denial of any implication in the act of killing and Rivenburgh's being based essentially on his taking of drugs, making it impossible for him to control his actions or to create the intent to commit murder. This difference, however, did not make the defenses an-

tagonistic to each other. The jury at all times was aware of the claims of the parties and undoubtedly treated them separately, applying evidence, as indicated, to a particular individual and not to both indiscriminately.

Furthermore, a conspiracy was proven and thus, the acts of one apply to the other.

Bowne strongly urges that an abuse of discretion occurred in the court's not proving separate trials for another reason, that is, alleged statements made by Rivenburgh's attorney to the effect that the defense set forth by Rivenburgh "was the only defense in [the] case and if [they] didn't go along with him in that defense, he would make first degree murderers of Jesse M. Garcia, Jr. and Leonard Warner Bowne."

This, of course, cannot sensibly be construed as a genuine threat. Mr. Huntsman is a reputable member of the bar and, of course, would not make this statement in any other way than to show the importance and urge the adoption of his point of view. It was merely the innocent use of colorful language. To ascribe to this remark the nature of a genuine threat is totally absurd and at the very best a frivolous contention.

Respondent cannot understand how the evidence as to the use of amphetamine drugs, all of which related to Rivenburgh, could in any way have prejudiced Bowne. Furthermore, the evidence was adduced in his own defense by Rivenburgh and if it were thought by the jury to apply also to Bowne, it would have constituted a matter of defense for him too.

At page 21 of his brief, Bowne points to certain testimony applicable to Rivenburgh and inferentially suggests that it might have been applied improperly to Bowne and be prejudicial to him. Counsel for respondent has checked this evidence and has found that it did not relate even by implication to Bowne. As to Rivenburgh's conversation with decedent (T. 498), Rivenburgh admitted that Bowne was outside the cell where the conversation took place and seven or eight feet away, nor was Bowne mentioned in the conversation set out at T. 511. As to Rivenburgh's conversation with Dalton (T. 513), Bowne was not mentioned. Rivenburgh's conversation with Dripps (T. 333), related to standing point, something which Bowne never denied doing. As to Rivenburgh's statement to Stark about a dead man in the attic (T. 366), the court specifically admonished the jury that this statement was not to be considered as to Bowne at all. Nor is prejudice toward Bowne evident in any of the other statements cited in his brief.

Bowne points to the holding in *State v. Miller*, supra, to the effect that the matter of separate trials should be decided upon any abuse which may have arisen at the time of the ruling and not on prejudicial error. See *People v. Friday*, (Calif.), 63 P.2d 303. This would rule out, of course, the holding in *People v. Fisher*, (N.Y.), 164 N.E. 336, (Bowne's Brief, page 22) and would make it unnecessary for the court to consider the specific points of evidence raised now on appeal.

In the *Friday* case, which revolved around a similar statute to our Section 77-31-6, U.C.A. 1953, the court said:

"\* \* \* Order for separate trial must be based upon some legal ground which satisfies the trial court that the regular procedure must be departed from."

Bowne urges that any supposed antagonism between the defendants could not be overcome by proper admonitions or instructions to the jury, made for the purpose of protecting the interest of each. However, in the case of *U.S. v. Gilbert*, 31 Fed. Supp. 195, the court approved the trying of fifty-three defendants together in a mail fraud case and said:

"\* \* \* The rights of each defendant can be carefully guarded by the trial judge in a charge to the jury."

While, as Bowne states (his brief, page 24), the question whether or not the trial judge has abused his discretion in refusing to grant a separate trial is a problem peculiar to each case, we do have enough holdings of neighboring state courts to give adequate guidance here.

In the case of *State v. Clark*, (Wash.), 286 P. 69, prior to the beginning of the trial the appellant moved the court for a separate trial on three grounds, summarized as follows:

(1) that evidence against the two was different;

(2) that evidence might be admissible against one but not against petitioner and that such evidence would be prejudicial; and

(3) that the interests of defendants "are or may prove to be antagonistic and adverse," that the parties could

not join in the selection of a jury and that petitioner would be deprived of his proper challenges.

The trial court denied the motion and was sustained on appeal. The Supreme Court pointed out that prior to the enactment of the statute involved, a defendant could demand a separate trial as a matter of right but that the new law made this a discretionary matter with the court. This circumstance is identical to that in Utah. The court mentioned that this was a most radical change. It said that it had passed earlier on the question of separate trials with the simple statement that "the question was one within the discretion of the trial court."

Then the court made the following holding, which applies directly to the instant situation:

"\* \* \* The question arose again in *State v. Ditmar*, 132 Wash. 501, 232 P. 321, and a similar ruling was made, although we there intimated that the discretion exercised might be the subject of review for manifest abuse. It is said, however, that the present case is distinguished from the cited cases in the fact that there is in the present case a showing of necessity for a separate trial, while in the cited cases there was not. But this fact cannot affect the rule. While the showing may aid the court in the exercise of its discretion, it neither adds to nor limits its powers. The question is still one on which the court may exercise its discretion, and, if the manner of its exercise is reviewable at all, it is only so for manifest abuse.

"But, conceding that the ruling may be reviewed for the latter reason, we see nothing in the showing here made which would even indicate that a denial of a separate trial would amount to an abuse of discretion. It would be difficult to con-



ceive of a case where two or more persons are tried for the same crime in which some one or more of the conditions pointed out will not arise, and, if they are to be regarded as requiring a separate trial, it is at once plain that the statute is rendered nugatory, and joint trials will be the exception and not the rule. But such was not the intent of the Legislature. There were some real evils which the Legislature sought to correct by the change in the statute; the principle one, doubtless, being to lessen the excessive costs to the public which separate trials entailed. But, be the intention what it may, inasmuch as the Legislature has vested the right in the discretion of the trial court, there must be reasons more persuasive than those here shown before the reviewing court would be warranted in interfering."

The California case of *People v. Thomas*, 27 P.2d 765, says:

"We find no error in the trial court's ruling denying appellant's motion for a separate trial. Since the amendment in 1921 of section 1098 of the Penal Code (St. 1921, p. 90), defendants jointly charged are not longer entitled to separate trials as a matter of right. The granting or refusing of separate trials now rests largely, if not wholly, within the discretion of the trial court, and it is well settled that the ruling of the trial court denying a motion for a separate trial will not be disturbed in the absence of a claim showing of an abuse of discretion. *People v. Dowell*, 204 Cal. 109, 266 P. 807; *People v. Perry*, 195 Cal. 623, 234 P. 890; *People v. Erno*, 195 Cal. 272, 232 P. 710; *People v. Rodcrick*, 118 Cal.App. 457, 5 P.2d 463; *People v. Burdg*, 95 Cal. App. 259, 272 P. 816; *People v. Nelson*, 90 Cal.App. 27, 265 P. 366; *People v. Wilson*, 76 Cal.App. 688, 245 P. 781; *People v. Swoape*, 75 Cal.App. 404,

242 P. 1067. Appellant's motion was in written form and specified four grounds: (1) That Matlock's confession would be introduced in evidence and would be prejudicial to appellant; (2) that on a joint trial, appellant's right to exercise peremptory challenges would be limited; (3) that each of the defendants had his own theory of defense and that said theories were conflicting; and (4) that defendants had recently quarreled over their conflicting views on the conduct of the trial. Practically all of these grounds were urged in support of the motions for separate trials made in the cases above cited, but they were held insufficient to show any abuse of discretion in denying the motions. We find no abuse of discretion in the present case."

Any ill will which may have existed between counsel for the parties is not of importance since each attorney had the opportunity fully to cross-examine statements made by the other defendant. As a matter of fact, each of the attorneys cooperated carefully in helping bring out evidence from the other's client on cross examination.

The Miller case, *supra*, held that where a proper motion was timely made, the failure to grant a severance on the grounds of confession of a codefendant was not prejudicial where the court properly instructed the jury as to the use of the confession.

Bowne, rather than being hurt through being tried with Rivenburgh, was instead greatly helped. Bowne undoubtedly appeared to the jury less culpable than Rivenburgh whose callous disregard for humanity was so clearly evident throughout the trial, especially in his own testimony. The contrast between the parties could only have resulted in benefit for Bowne and this, of course, was shown in the jury's recommendation of mercy for him.

In the absence of a showing that the trial court has abused its discretion, the Supreme Court should not interfere with its action in denying separate trials.

## POINT VI

### THE TRIAL COURT DID NOT ERR IN NOT GRANTING BOWNE'S MOTION TO DISMISS.

(Bowne)

The trial judge made the only proper holding in denying Bowne's motion for dismissal. Thereafter, he wisely gave Instruction No. 8, quoted by Bowne in his brief, properly placing the responsibility for the determination of the facts of the case where it belonged, on the jury. Then, as an added safeguard for Bowne, he gave Instruction No. 24, as follows:

"In this case, the defendant Leonard Warner Bowne has made a motion to dismiss on the ground that there was insufficient evidence to support a verdict against him, which motion was denied by the court.

"You are instructed that said motion was denied as a matter of law, and in no way reflects the opinion of the Court relative to the guilt or innocence of the defendant, Leonard Warner Bowne. You should not be influenced either for or against said defendant, Leonard Warner Bowne, because said motion was made or because it was denied by the Court. You are to decide the case on the facts."

While it is true that the state has the burden of proving beyond a reasonable doubt that a defendant is guilty, respondent believes that Bowne has tortured the

law in claiming the judge was obligated to dismiss the action as to him.

If the court were to adopt Bowne's theory that whenever the evidence indicates a "reasonable hypothesis" of innocence, the case should not be allowed to go to the jury at all, normal criminal practice would indeed be stifled and perhaps eventually destroyed. Any defendant could be expected to conjure up evidence of such nature as to constitute a *prima facie* "reasonable hypothesis" of innocence and the state's case would automatically dissolve. This is not the law in Utah and such a conclusion would be absurd beyond belief.

It is true that if the state were to fail to produce evidence sufficient to make out the elements of the crime, the court would, of course, be justified in dismissing the complaint. But that is not so here.

Our system of jurisprudence has from earliest times required that a jury of a man's peers find the facts of his case, with the law to be determined by the judge. It is the sole and exclusive province of the jury to determine the facts in all criminal cases, whether the evidence offered by the state is weak or strong, is in conflict or is not controverted. Evidence may be ever so convincing that an accused is guilty of the crime charged, yet it is for the jury and not for the trial judge to render the verdict. *State v. Green*, 78 U. 580, 6 P.2d 177.

Where there is adduced, in a criminal prosecution, competent evidence from which a jury can find beyond reasonable doubt that the defendant perpetrated the crime with which he is charged, there can be no error in failing

to direct a verdict of acquittal. *State v. Peterson*, 121 U. 229, 240 P.2d 504.

As to the three questions of motion to dismiss, motion for directed verdict and motion for a new trial, the court has recently spoken in the case of *State v. Penderville*, 2 U.2d 281, 272 P.2d 195. The court said:

“\* \* \* It has been repeatedly held by this court that upon a motion to dismiss or to direct a verdict of not guilty for lack of evidence that the trial court does not consider the weight of the evidence or credibility of the witnesses, but determines the naked legal proposition of law, whether there is any substantial evidence of the guilt of the accused, and all reasonable inferences are to be taken in favor of the state. \* \* \* As is pointed out in one or more of these cases, the trial court has a discretion in the case of a motion for a new trial that it does not have in case of a motion to dismiss or to direct a verdict of not guilty. Nevertheless, in either case if there is before the court evidence upon which reasonable men might differ as to whether the defendant is or is not guilty, he may deny the motion.

Bowne uses the case of *State v. Erwin*, 101 U.365, 120 P.2d 285, to say that if the facts relied on by the state are not inconsistent with defendant's innocence, it is established as a matter of law. The court there affirmed the decision against appellant and went on to say this:

“\* \* \* It is not necessary that each circumstance in itself establish the guilt of the defendant, but the whole chain of circumstances, taken together, must produce the required proof. *State v. Crawford*, 59 Utah 39, 201 P. 1030; *State v. Marasco*, 81 Utah 325, 17 P.2d 919; *Terry v. United States*, 9 Cir., 7 F.2d 28; *State v. Burch*, Utah, 115 P.2d 911.

"On the other hand, if there is any substantial evidence which satisfies the above requirements, then the weight of the evidence is for the jury, and the court will not disturb the verdict. *State v. Lewellyn*, 71 Utah 331, 226 P. 261; *State v. Odekirk*, 56 Utah 272, 190 P. 777."

The case of *State v. Lewellyn*, 71 U. 331, 266 P. 261, was an adultery prosecution wherein defendant made a motion for a directed verdict. The same reasoning would seem to apply to a motion to dismiss, of course. The court there stated the following:

"In 16 C.J. 935, the conclusions of various courts are condensed in the statement:

" 'As a general rule the court should direct a verdict of acquittal \*\*\* where there is no competent evidence reasonably tending to sustain the charge; or where the evidence is undisputed and so weak that a conviction would be attributable to passion or prejudice, or where it is so slight and indeterminate that a verdict of guilty would be set aside, as where the evidence consists solely of the uncorroborated testimony of an accomplice, or is insufficient to overcome the presumption of innocence, or to show defendant's guilt beyond a reasonable doubt. But the case should be submitted to the jury and the court should not direct a verdict of acquittal, if there is any evidence to support or reasonably tending to support the charge, as where it is sufficient to overcome prima facie the presumption of innocence, or where the evidence of a material nature is conflicting."

"From *Pace v. Commonwealth*, 170 Ky. 560. 186 S.W. 142, we quote the syllabus on this point as follows:

“‘It is only in the absence of any evidence tending to establish the guilt of the accused that the trial court will be authorized to grant a peremptory instruction directing his acquittal.’

“The same principle is decided in *State v. Gross*, Ohio St. 161, 110 N.E. 466.

“An able discussion and determination of the bounds of judicial authority in considering a motion for a directed verdict is contained in *Isbell v. U.S.* 142 C.C.A. 312, 227 F. 788, in which it is made clear that the court in such case does not consider the weight of evidence or credibility of witnesses but determines the naked legal proposition of law whether there is any substantial evidence of the guilt of the accused. This is undoubtedly the correct rule. See annotation ‘Directing Acquittal,’ 17 A.L.R. 910. The function of a court in dealing with an application for a directed verdict must not be confused with that in considering a motion for a new trial upon the grounds of insufficiency of evidence. The court has a discretion in the latter case which he does not properly have in the former. The reason for the distinction is that the order sought in one case acquits the accused and finally ends the prosecution, while in the other, the order, if granted, does not discharge the accused but merely gives him the advantage and benefit of another trial. The rule is controlled by the same principles in criminal cases as in civil procedure. And in a civil case, *Stam v. Ogden P. & P. Co.*, 53 Utah 248, 177 P. 218, this court said:

“‘It is familiar doctrine in this jurisdiction and perhaps in nearly every other where the jury system prevails, that, if there is any substantial evidence whatever upon which to base a verdict, the court will not withdraw the case from the jury or direct what their verdict should be.’”

See also *State v. Thatcher*, 108 Utah 63, 157 P. 2 258; and *State v. Iverson*, —Utah — decided by this court March 7, 1960.

Counsel has presented a number of references to the transcript — each tending, if unanswered, to establish Bowne's innocence. Perhaps standing alone, they might constitute a reasonable hypothesis. However, whether it is reasonable must be determined by reference to the entire body of testimony given by both sides in the case.

Because Bowne has set forth so many references to the transcript, tending to substantiate his claim, the state deems it necessary to refer to some, though by no means all, of the evidence tending to prove Bowne's guilt beyond any reasonable doubt. They will be set out in the chronological order of the case. (References correlate with the small typewritten number at the top, right-hand margin of each page, rather than the larger stamped red number at the bottom.)

- T. 220-223: Billie Randel testifies to Rivenburgh's statement that he intended to kill Verner by cutting off his head and that Bowne was present at the time. Randel did not remember whether or not Bowne said anything at that time.
- T. 232: Randel on hearing a scream goes to Rivenburgh's cell, indicating knowledge that Rivenburgh's remarks had in fact been serious.
- T. 234: Randel goes to Bowne's cell, sees him trying to stop the flow of blood from his leg and has a conversation in which Bowne says he was stabbed.
- T. 237: Randel tells of bloody knives being washed in Bowne's cell.



- T. 241: Randel testifies about blood on Bowne's pants.
- T. 246: At the time of the conversation about the impending murder, Randel testifies he suggested shooting olive oil into the arm of Verner and Bowne's reaction is shown by his statement, according to Randel, that Bowne had previously shot Verner in the arm.
- T. 247: The fact that Bowne was serious about Rivenburgh's statement is shown by Randel's testimony that he cautioned Bowne not to have anything to do with the murder.
- T. 287: Randel admits having made the following statement at the preliminary hearing: "Warner said that he had walked over to this Verner and that Verner had kicked him and knocked him down, and that he grabbed his legs to keep him from kicking him again, and somebody had stabbed him in the leg."
- T. 325: Randel admits that he knew of only one previous occasion where a "point man" had been used in an instance of sodomy.
- T. 339-343: Harold Dalton testifies that Bowne came down from the attic covered with blood; that he proceeded to clean up and to receive aid for his leg.
- T. 350: Dalton makes an extremely damaging statement as follows: "Bowne said he had his head [Verner's] in a scissors lock, and his hand in his mouth, and pretty hard to hold him down." The testimony appearing at T. 548 is a clarification of this.
- T. 356: Robert L. Dripps testifies as to Bowne's borrowing a knife and wrapping the handle.
- T. 362-363: Dripps tells of Bowne's taking bloody clothing off and washing himself.

- T. 364: A very serious admission of Bowne's is referred to by Dripps wherein Bowne says he had a scissor lock on the Pollock [Verner].
- T. 366: Dripps quotes Bowne as saying that Verner's head had almost been cut off.
- 3 T. 372: Dripps again quotes Bowne as follows:  
 7 "Well, as I walked out Rivenburgh was saying that the way his head was, it was sure hard to cut, he had to saw, and Bowne said, 'when I had that headlock on him he stabbed me with the knife.'" The court's attention is next called to lines 24 through 29 of this same page dealing with Bowne's sticking his hand into the deceased's mouth.
- T. 379-380: There appears here a clarification of previous statements as to Bowne's having a headlock or scissors lock on the deceased.
- T. 552: Rivenburgh testifies that after stabbing Verner, he called for assistance in finding his knife and that there was much scuffling and bumping on the floor as they attempted to find it.
- T. 578: Rivenburgh testifies he got Bowne to put on different clothing than he normally wore.
- T. 616: Rivenburgh testifies that during the struggle while Verner was still alive, Bowne was physically present.
- T. 651: Rivenburgh testifies he does not know what Bowne and Garcia were doing, if anything, to Verner because he was not paying any attention.
- T. 691: Bowne testifies about Rivenburgh's statement about cutting off Verner's head.
- T. 704: Bowne testifies that in looking for Rivenburgh's knife, he had contact with someone.

- T. 709: Bowne admits that in a discussion at the prison he had said that he had a headlock or scissor lock on Verner's head with his legs.
- T. 736: Bowne admits having a knife in his hand in the attic.
- T. 744: Bowne admits throwing knives in the sink, changing clothes and trying to stop his leg from bleeding.
- T. 763: Bowne does not know if he felt Verner at all and admits feeling blood.
- T. 772: Bowne is confused as to whether he heard hollering or moaning.
- T. 781: Bowne admits having made a statement that he had expected there to be about 150 cuts in Verner's body.
- T. 807: Bowne admits that the previous day on direct examination he said that he previously made the statement that he had Verner's head in a scissor lock. See also T. 860-862.
- T. 815-818: Mr. Banks quotes from an interrogation made previously which is set out in part:  
 "With the indulgence of the Court and counsel,  
 I will start over.
- MR. BANKS: I think there is only one answer you could give me that I couldn't tell you on this thing, and it puzzles me.
- MR. BOWNE: What is that?
- MR. BANKS: That is the taking off of the clothes.
- MR. BOWNE: You don't know that, do you?
- MR. FERRIS ANDRUS: They were taken off voluntarily. If you are going to cut somebody's head off, I can't see this punking act coming in.

MR. BOWNE: All right. I will tell you something. Did you figure maybe that's just a way to get him up there?'

Q. Did you make that statement?

A. If it is there, I guess I did.

\* \* \*

'MR. BANKS: We thought this out right from the start. In reflection we can look back and analyze it pretty well. That is the thing that confuses—with his pants off so neat, and his shirt not torn, so he had to take them off voluntarily; the blanket in the attic and everything else. We couldn't understand it was going to be a quick job. We figured he was enticed up there for that specific purpose, but with the damn blanket rolled up that way, and with him on his back.

WARNER BOWNE: It was supposed to be a quick job. He said, "As soon as I get up there I am going to kill him."

MR. BANKS: Mack said that?

MR. BOWNE: Yes, but he kept stalling and stalling and stalling. He had the knife out there all the time. I seen the knife.

FERRIS ANDRUS: How did he get started on him?

WARNER BOWNE: Just "Bang", that's it. That guy let out a holler, and boy, was he kicking and jumping all over. It sounded like a train driving through up there.

W. L. ROBINSON: Where did he hit him first?

MR. BOWNE: I guess he hit him in the back. He was on the floor.

FERRIS ANDRUS: But he got him down ready for the punking and that is when he hit him?

MR. BOWNE: Yes, that is how the deal was, yes. But why didn't the guy start fighting sooner.'

Q. Did you make those answers to those questions?

A. Yes.

Q. I will ask you if the following questions were asked and if you made the following answers:

MR. BANKS: Well, I will tell you, when we first started working with Billie, we felt Billie was in on it, we really did.

WARNER BOWNE: Boy, you were really wrong that time too, because Billie was pretty near the only one that went against him.

W. L. ROBINSON: We soon realized that.

WARNER BOWNE: He said, "Mack, you are making a mistake. You can't do that." He said, "if you kill one stool pigeon" he said "there are 490 more of them in here" and he said "you can't get them all, so you might as well leave them alone". He says, "it is senseless". He said "I am not going to tell you what to do, but I am telling you you should not do it, there is no sense to it. I am not going to help you do it."

Q. Did you make those answers to those questions?

A. Yes."

T. 838: Bowne testifies he does not know what his intent was when he opened his knife and started toward Verner and Rivenburgh.

T. 850: There is much testimony about a possible alibi and about contradictory statements made

by Bowne as to Rivenburgh. Randel throughout his portion of the transcript, beginning at this page, tells Bowne to blame it all on Rivenburgh.

- T. 858: Bowne admits that Randel did not cause him to make statements about having a scissors lock around Verner's head.
- T. 866: Bowne suddenly remembers a portion of a conversation which he had not remembered previously involving preparations for the commission of an act of sodomy.
- T. 875: Bowne admits that he does not know whether there is any purpose for a point man or lookout man in the attic during the perpetration of an act of sodomy.
- T. 882: Bowne changes his story as to whether or not he was able to see the participants in the struggle leading to Verner's death.

In light of the above evidence, it is inconceivable that the court could have dismissed the information as to Bowne for insufficient evidence.

## POINT VII

(Bowne)

THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 15.

No error was committed by the court in giving Instruction No. 15. As far as pertinent, the instruction reads as follows:

"You are instructed that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and

abet in its commission, are principals in any crime so committed.\* \* \*

Bowne says the jury could have construed the terms "a crime" and "Any crime" so as to refer to the act of sodomy. This, of course, is untenable.

In the first place the only reasonable interpretation of the court's instruction is that it applies to the crime charged and to which the jury was directing its sole attention. Neither defendant was ever charged with the crime of sodomy. As a matter of fact, it was introduced into the case only by Bowne himself as a matter of defense.

It would appear that Bowne is dealing in semantics, intending to hang his case on single words and phrases as against the entire instruction and, in fact, as against all the instructions taken as a whole. In *Bridges v. U.S.*, 199 Fed.2d 811, the court said:

"\* \* \* Instructions given in a criminal prosecution may not be taken apart and a phrase here and a clause, or even a sentence or paragraph, there used to find error."

In *People v. Marsh*, (Ill.), 85 N.E.2d 715, the court stated:

"\* \* \* Accuracy in the use of language in an instruction containing a correct proposition of law would, of course, be desirable, but it is not always obtainable. For that reason we announced the rule that it is sufficient if the series of instructions, considered as a whole, fully and fairly announce the law applicable to the theories of the People and of the defendant, respectively. *People v. De Rosa*, 378

Ill. 557, 39 N.E.2d 1; *People v. Hichette*, 324 Ill. 170, 155 N.E. 39."

In *Taylor v. State*, (Okla.), 208 P.2d 185, it was held that even where it appeared that the instruction complained of was "most poorly worded," but not misleading in light of *all* the instructions, it did not constitute reversible error.

In *State v. Zeimer*, \_\_\_ U. \_\_\_, 347 P.2d 1111. decided January 5, 1960, the court treated a similar question where, in an habitual criminal matter, the instructions referred to the charge as an "offense," to the question of defendant's "guilt," and to the burden of proof necessary to "conviction." There the court said:

"While defendant is semantically correct, he is legally without reversible error because the instructions are not prejudicial. The jury was instructed upon the meaning of habitual criminal and upon the required elements and burden of proof."

Furthermore, it is clearly the law in Utah that all instructions are to be considered together and construed as a whole. *State v. Evans*, 74 U. 389, 279 P. 950. *State v. Hendricks*, 123 U. 267, 258 P.2d 452. The jury in the instant case knew this was so by virtue of Instruction No. 31 which states as follows:

"These instructions are to be considered altogether as a whole, and not as if each instruction were a complete statement of the law by itself. And even though a rule, direction or thought is stated in different ways and repeated in more than one instruction you should not give it undue emphasis



and ignore others. But you should consider all of the instructions as a whole and apply them all to the evidence in the light of all of the instructions."

Considering all the instructions together, as we must do, any possible error is corrected by Instruction No. 6:

"There is some evidence in this case of the commission of other crimes. There is no crime charged, however, in this case except Murder. Testimony of any crime not charged is not evidence that either of the defendants is guilty of Murder.

"If another crime is connected with the alleged murder, you may consider said other crime as you would any other act relating to the alleged circumstances connected with the alleged murder."

Bowne claims the jurors were biased and prejudiced against him for the reason that sodomy, "the crime against nature," for which he claimed to have been a lookout, is capable of engendering deep-seated prejudices against anyone connected with it, and says it would be difficult for the jurors to appreciate the fact that no one was being prosecuted for perversion. Instruction No. 7 would tend to eliminate this objection in stating:

"Prejudice, passion and sympathetic feelings have no place whatsoever in your deliberations. You should disregard all bias, prejudice, and other extraneous influences. \* \* \*"

Of course, it is true that in this jurisdiction where no request is made, no error can be assumed to have occurred when an appropriate instruction is not given.

Even if error occurred, it was fully cured by all the instructions taken as a whole and there was no prejudicial error.

## POINT VIII

(Bowne)

### THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 26.

There is no merit whatsoever in Bowne's Point V. Only the most strained construction possible of Instruction No. 26 could lead to the misconception claimed to have resulted from it. No reasonable person could be misled. Bowne's claim is too farfetched to warrant serious consideration.

In the course of the trial, the judge admonished the jury that certain evidence as to one defendant was not to be applied to the other. The jury was well trained by the end of the trial.

Furthermore, Instruction No. 11 should cure any defect created by Instruction No. 26. Whenever counsel requested the court to admonish the jury, it did so; and if the parties failed to request proper admonitions or an instruction to cure any supposed defect, it is too late now to complain.

Since admissions are nothing other than evidence, and stipulations are equivalent to evidence adduced by examination, the admonitions given by the court take care of the matter.

## POINT IX

(Bowne)

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE BOWNE'S INSTRUCTION NO. 13.

Bowne was fully and carefully protected by all of the instructions given in the case considered as a whole. This is all he could ask. See reasoning at respondent's Point VII (Bowne).

The attention of the court is called particularly to Instructions Nos. 2, 6, 15, 16 and 21, all of which considered together clearly cover Bowne's defense. It is, of course, not necessary that his defense be stated in his own words if the applicable law is given the jury by the court. *State v. Rosenberg*, 84 U. 402, 35 P.2d 1004. *State v. Cox*, 106 U. 253, 147 P.2d 858. These words of Instruction No. 21 are particularly applicable:

"You are instructed that in the event you find that the State has proved, beyond a reasonable doubt, that a defendant intended to and did in fact commit the crime charged, or the included offense, but that the State has failed to prove beyond a reasonable doubt that the other defendant ever did intend to participate in the killing, or if you find that the State has failed to prove that the said other defendant committed the crime charged, or has failed to prove he committed the included offense, you are then instructed to find said other defendant not guilty. \* \* \*"

No error occurred here and certainly defendant suffered no prejudice.

## POINT X

(Bowne)

Generally speaking, the matter of whether or not a new trial should have been granted is for the trial court to determine and its holding will not be interfered with on appeal by the Supreme Court. See the following cases: *State v. Montgomery*, 37 U. 515, 109 P. 815; *State v. Mellor*, 73 U. 104, 272 P. 635; *State v. Cooper*, 114 U. 531, 201 P.2d 764.

Bowne assigns six reasons why the judge should have granted him a new trial. Respondent will treat them in the order set forth. (Bowne's brief, page 37.)

1. Bowne says a new trial should have been granted because of prejudice developed during the trial. This was discussed at Point II, page 16, of his brief. The state's answer is contained in Point IV (Bowne) of this brief.

2. Bowne complains because the jury was separated during its deliberations in that the bailiff took several jurors at a time downstairs on an elevator to go to the restrooms.

There is no evidence whatsoever that the jurors talked with anybody except each other on this excursion and the fact that the elevator would not accommodate a dozen jurors and a bailiff without creating a dangerous hazard made it imperative that if they were to avail themselves of this means of transportation, and the desired relief, they would have to be divided into two sections.

This subject was considered in the case of *State v. Jarrett*, 112 U. 335, 187 P.2d 547, decided in 1947. There

it was held that an interpretation preventing jurors from separation for purposes of necessity would be an unreasonable construction of the statute. The court said:

“\* \* \* The right of a defendant to have a jury secluded from outside influences while deliberating should be jealously guarded. However, this right must not be founded on an unreasonable and an unwarranted construction of a statute. The statute must be construed in regard to the correlative rights of the defendant and the jurors.”

3. Bowne is concerned because early in the morning the bailiff informed the court that the jury was still deadlocked. At that time a juror asked for an additional fifteen minutes deliberation before leaving for the hotel. The extension was granted. The jurors, ten minutes later, came in with a verdict of guilty. Bowne urges that the verdict was reached by means other than a fair expression of opinion by all the jurors. This allegation is without proof and is based on a most flimsy premise. The circumstances do not even suggest the conclusion urged.

In the case of *State v. Moore*, 111 U. 458, 183 P.2d 973, the court said:

“\* \* \* Courts examine verdicts objectively in the light of competency, relevancy, and materiality of the evidence, sufficiency of the evidence, and factors which might tend to create prejudice or to mislead a jury. In reviewing records on appeal, we assume, unless the contrary be shown, that qualified jurors have served, and that the verdict returned was in consonance with the oath which they, as jurors, took. The motion for new trial on the alleged ground of misconduct of the jury was properly denied.”

In regard to this and the preceding point, the court said in *Commonwealth v. Lombardi*, (Penn.), 70 A. 122:

“\* \* \* A trial really fair and proper should not be set aside for the mere suspicion or appearance of irregularities shown to have done no actual injury.”

If there was error, it was not prejudicial.

4. Bowne says the court erred in allowing Jesse Garcia to take the witness stand. It is true that Garcia was involved in the events leading to the instant prosecution and that he was scheduled to be tried at the conclusion of this trial. Nor does the state quarrel as to Garcia's absolute right not to testify. See Section 77-1-10, U.C.A. 1953.

It is, however, the right of the defendant alone, and not of counsel who happens to be representing another defendant in a case involving the same facts. The Rivenburgh-Bowne case was an entirely different matter from the Garcia case.

The district attorney sincerely desired the testimony of Garcia and had it been given, the state's case probably would have been aided materially. Respondent believes there was no misconduct whatsoever on the part of Mr. Banks. However, mere misconduct of counsel is not grounds for reversal unless prejudicial enough to deprive a defendant of a fair trial. *State v. Hoffa*, (Iowa), 71 N.W. 235. Mr. Banks' actions did not truly constitute, as suggested, a grandstand play for the jury with the effect of prejudicing the rights of Bowne. An indication of this is the statement of Mr. Banks at T. 503:

"Jesse Garcia at one time told me he wanted to take the stand, your Honor."

It is extremely difficult to see how Bowne could have been damaged. The only statements made about Garcia whatsoever in the hearing of the jury are set out in full as follows:

"MR. BANKS: We will call Jesse Garcia."

MR. HANSEN: At this time I have substantial law to argue. Would you like it within or without the presence of the jury?

THE COURT: We will excuse the jury."

(Proceedings held outside the presence of the jury.) After the conference:

"THE COURT: Call the jury.

(Jury returned to courtroom and resumed their seats.)

THE COURT: Members of the jury the State called as its next witness Jesse Garcia. Mr. Garcia stands charged with First Degree Murder, and the case has not yet been tried. It is scheduled for trial, and he refused to testify on the grounds his testimony may incriminate him.

The court did not insist that he testify.

MR. HANSEN: Would you further admonish the jury, your Honor, that I so advised him, in the capacity of his lawyer for the trial that is to follow, and not in the capacity of Mr. Bowne's lawyer in this trial.

THE COURT: Mr. Hansen states that he advised him, as his lawyer, not to testify. Is that sufficient?

MR. HANSEN: As Jesse Garcia's lawyer, your Honor.

THE COURT: Your next witness, for the State.

There is a constitutional right a man does not have to testify where it will incriminate him.

MR. BANKS: Counsel has indicated they would stipulate that Jesse Garcia is charged with Murder in the First Degree and that his trial is set to follow this trial.

THE COURT: Will you so stipulate, Mr. Hansen?

MR. HANSEN: Yes, your Honor.

MR. BANKS: Will you so stipulate, Mr. Huntsman?

MR. HUNTSMAN: Yes, your Honor."

Garcia's actual refusal to testify was made in chambers and out of the presence of the jury. The court committed no error.

5. Bowne says that a new trial should have been granted because of the unusual order of the case. The problem is complicated by the presence of two defendants whose defenses, while in no way antagonistic, were somewhat different. The court had wide discretion in the matter, however, 23 C.J.S. 1045. The judge was careful to give it the most orderly course possible, to adduce all the relevant facts, and to secure fair play for all concerned. There was no error here.

6. Bowne believes a new trial should have been ordered for the reason that the state failed to show a motive for Bowne's participation in the crime. He relies on *People v. Tom Woo*, (Calif.), 184 P. 389. Respondent fails to see, however, how this case can give Bowne much comfort since it clearly supports the state's position in the following words:



“\* \* \* But the presence or absence of motive is essentially a question of fact, and, like any other fact, is not necessary to be proved, if the crime can otherwise be established by sufficient competent evidence. So, in this case, the absence of proof of motive is a fact to be reckoned on the side of innocence; but, if the proof of guilt is nevertheless sufficient to overthrow the presumption of innocence, the appellants must stand convicted, notwithstanding no motive has been shown.”

The California court adopted the holding of the Tom Woo case in *People v. Isby*, (Calif.), 186 P.2d 405, decided in 1947, and quoted extensively therefrom.

In *Morletti v. People*, (Colo.), 209 P. 796, the court stated:

“\* \* \* It often happens that the motive for crime escapes the shrewdest investigator. If the jury is otherwise convinced beyond a reasonable doubt, the absence of motive is no grounds for acquittal.”

In this instance, Bowne's guilt was clear beyond question and while the matter of motive was not explored in depth by the state, it is of no importance.

Some of the above grounds now set forth by Bowne were not mentioned in his motion for a new trial except possibly in the most general terms, and this is late in the day for them to be raised.

## POINT XI

(Bowne)

THE TRIAL COURT DID NOT ERR IN FAILING TO COMPEL THE PROSECUTION TO FURNISH TAPE RECORDINGS AND COPIES OF STATEMENTS MADE BY WITNESSES AND DEFENDANTS.

It is a discretionary matter with the trial judge as to how far a defendant should be allowed to go in the examination of notes, statements and recordings made prior to trial by the prosecution.

Here, the court, for reasons satisfactory to it, did not see fit to order the prosecution to give certain wire recordings to Bowne. However, they were available for inspection by the defense and, in fact, were heard by counsel for both defendants, even though the recordings were not used in evidence. Copies of written statements were also provided for defendants' counsel.

Certain statements were used to impeach Bowne and he was asked whether or not he had made the statements and, in many cases, he answered in the affirmative. If Bowne had told the truth all the way through from the beginning of the investigation to the end of the trial, his testimony would have been consistent at all times, and possession of the statements would not have been of any assistance to him.

The judge did not err in limiting the scope of the production of documents in this matter. He did, in fact, order that a great many of the instruments, writings,

photographs, reports, etc., requested by Bowne, be given to him. If, in fact, there was error, it was not prejudicial in light of all the evidence adduced during the course of the trial.

## POINT XII

(Bowne)

### THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT EVIDENCE CONCERNING THE CHARACTER AND REPUTATION OF THE DECEASED.

It is true, of course, and there is no controversy about it, that the character and reputation of the deceased generally is inadmissible as being immaterial. Bowne cites no cases in support of his view that an exception should have been made here.

While character evidence, as the term is ordinarily construed, was not allowed as to Verner, still, much testimony was introduced to show that he was a depraved pervert, that he had engaged in acts of sodomy according to both definitions of that term, and that just the day before he had been misused by five inmates, including two negroes. No evidence was given as to any possible decent characteristics the deceased might have possessed, so there was no necessity for introduction of evidence to the contrary. It is doubtful that any evidence of the type Bowne desired to use could in any way have further damaged the character of the deceased, or shown a greater tendency to commit sodomy.

## CONCLUSION

Both appellants, Rivenburgh and Bowne, were given a fair trial, conducted with scrupulous care by an experienced and capable trial judge before a fair and impartial jury. The trial was conducted without prejudicial error. Appellants' appeal is groundless and the conviction of each should be affirmed.

Respectfully submitted,

WALTER L. BUDGE  
*Attorney General*

VERNON B. ROMNEY  
*Assistant Attorney General*  
*Attorneys for Respondent*