

1960

# State of Utah v. Jesse M. Garcia, Jr. : Brief of Respondent

Utah Supreme Court

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

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# In the Supreme Court of the State of Utah

FILED

MAY 17 1960

STATE OF UTAH,

*Plaintiff and*  
*Respondent.*

-VS-

JESSE M. GARCIA, JR.

*Defendant and*  
*Appellant.*

Case No. 9092

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## BRIEF OF RESPONDENT

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PRINTERS INC., SUGAR HOUSE

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} Case No. 9092

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

Respondent takes the following exceptions to appellant's statement of facts:

The killing was not entirely the handiwork of Rivenburgh, as is shown by the fact that Garcia, in a statement taken during the investigation and introduced at the trial admitted that he was in the attic at the time of the killing, that he grabbed Verner's legs, that he grappled with him, and that he had an ice pick in his hand. (T. 674, 685)

Garcia knew of, in advance, and participated in the plan to kill (T. 366, 674), even going so far as to make improvements in the borrowed knife (T. 161, 367).

Under examination by his attorney, Garcia claimed, contrary to statements made by him earlier and introduced into evidence by the state, that he thought Rivenburgh was joking; but it appears that the real truth of the matter is that Garcia went to the attic to kill and had no intention whatsoever to serve as a guard for sodomy.

The plan of action had been mapped out fully, in advance, and when the fight started (T. 674), Garcia did his part in executing the plan. It was not a case of his going to the aid of a stricken companion whom he supposedly feared, as he now contends.

Apparently there were two card games involved in the murder; one before it and one after, the former serving as one occasion for planning the killing (T. 383 388, 672) and the latter a circumstance set up to provide an alibi.

(It will be noted that all of respondent's references to the evidence relate to the small typewritten number at the top right margin of the transcript.)

## STATEMENTS OF POINTS

### POINT I

NO PREJUDICIAL ERROR OCCURRED IN  
THE JUDGE'S HAVING A CONVERSATION

WITH ONE OF THE JURORS OR CONVEYING THE SUBSTANCE OF IT TO COUNSEL; NOR WAS APPELLANT DENIED THE RIGHT TO BE PRESENT AT ALL STEPS OF THE TRIAL BY VIRTUE OF THE CONVERSATION.

## POINT II

THE TRIAL COURT DID NOT ERR IN NOT GRANTING APPELLANT'S MOTION TO DISMISS NOR HIS MOTION FOR DIRECTED VERDICT.

## POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 43.

## POINT IV

THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 20.

## POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 17.

## POINT VI

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS NOS. 19 and 21.



## POINT VII

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 20.

## POINT VIII

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

## POINT IX

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

## POINT X

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE TESTIMONY SHOWING A CONSPIRACY TO COMMIT MURDER.

## POINT XI

THE TRIAL COURT DID NOT ERR IN SUBMITTING THE CASE TO THE JURY ON FIRST DEGREE MURDER AFTER CONSIDERATION OF APPELLANT'S MENTAL CONDITION.

## ARGUMENT

## POINT I

NO PREJUDICIAL ERROR OCCURRED IN THE JUDGE'S HAVING A CONVERSATION WITH ONE OF THE JURORS OR CONVEYING THE SUBSTANCE OF IT TO COUNSEL; NOR WAS APPELLANT DENIED THE RIGHT TO BE PRESENT AT ALL STEPS OF THE TRIAL BY VIRTUE OF THE CONVERSATION.

Appellant Garcia was not harmed in any way by the conversation between the judge and the juror. Nothing was added to the trial and nothing was taken away. The case went to the jury exactly as it stood. The conversation had no effect. It was not a part of the trial as such; and defendant's absence was not error.

The judge made a full and honest disclosure of the substance of the conversation. It consisted of an innocent question as to whether certain evidence would be introduced and a noncommittal answer given by the judge, not dealing in any way with the merits of the case.

The judge did not give any expression of opinion as to Garcia's guilt or innocence.

In fact, at the conclusion of the trial, as a further precaution, he gave Instruction No. 25, stating:

"If, during the course of the trial, the Court has said or done something which has suggested to you that it is inclined to favor the claims or po-

sition of either party, you will not suffer yourselves to be influenced by any such suggestion.

“I have not expressed nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, you are instructed to disregard it.”

While not admitting any impropriety on the judge's part, Respondent nevertheless suggests that improper remarks or conduct of the trial judge may be cured by instruction to the jury to disregard them, unless they are so prejudicial to accused that their affect must be deemed ineradicable. 23 C.J.S. 987(b), page 339.

Our statutes intending to prevent jurors from discussing the merits of matters before them are necessary, of course. They were, however, enacted for the purpose of keeping the jury from conversing with people who might try to influence their opinions. The judge is in a different category altogether. Certainly, he is the one truly impartial person involved in the trial and by virtue of his office has had long and careful training in refraining from showing any disposition whatsoever in favor of either party.

The very nature of our judicial system requires that the judge be a man in whom trust may be reposed and whose official statements are to be believed.

The Utah cases cited by appellant in his brief seem divisible into two categories: (1) Those involving jurors

and a third person, not a judge; (2) those involving a judge in contact with jurors after the jury has retired to arrive at a verdict.

In most of the cases dealing with third parties, the nature of the conversation is unknown and therefore subject to unlimited conjecture. Here, however, the full substance of the conversation was given to counsel in the presence of the reporter and we *know* what was said. We also know that nothing in the conversation was acted upon by counsel. We know that Garcia was not hurt.

Compared with cases dealing with a retired jury, this is one in sharp contrast. Here, the conversation was known in full at a time when something could be done about it by counsel. There still was ample time for any appropriate motions and any curative instructions that might be necessary. Where a judge goes to the jury room, on the other hand, it is too late then to correct any mistake that might have been made.

Since a trial judge is not only permitted, but it is his duty, to participate directly in the trial and to facilitate its orderly progress, his remarks or conduct in performing his duty will not constitute error if they are such that do not discriminate against or prejudice the accused's case. 23 C.J.S. 987(a), page 337.

Respondent urges the absence of error in the instant case. Nevertheless, should the court consider the actions of Judge Jeppson and the juror improper, respondent still contends such error is not prejudicial.

In such event, the 1950 case of *People v. Woods*, (Calif.), 218 P.2d 981, would appear to be directly in point and its decision should be followed by this court. There the trial judge in chambers, in the presence of the reporter but the absence of defendant and both counsel, held a discussion with a certain juror. Largely, the conversation dealt with the behavior of the juror the previous day in making contact with the district attorney. However, it dealt also with matters of substantive law. The court was asked by the juror the question: "What is a hung jury?" The judge gave a full legal answer in response.

Regarding these circumstances the Supreme Court stated:

"\* \* \* Private communications between a judge and a juror with respect to matters related to the case are of course improper, but nothing took place in the conversation complained of which could possibly have prejudiced defendant and therefore it did not constitute reversible error."

An interesting case involving the conversation of a juror and a judge is that of *State v. Morris*, (Ore.), 114 P. 476. There a juror was approached with the offer of a bribe after testimony had ended but before argument. He tried to call the judge but failed and then talked to the prosecutor. The prosecutor called the judge. The judge and the juror and counsel for the state met at the police station and discussed the bribery attempt. The judge then proceeded to tell the juror not to allow the bribery try to affect his judgment in the case under consideration. The Oregon Supreme Court held this conversation not to be

prejudicial error as misconduct either of the judge or of the juror, even though it dealt somewhat with the case under consideration, and even though it was held outside the courtroom.

In *State v. Costales*, (N. Mex.), 19 P.2d 189, the judge sent a communication through the bailiff to the jury after it had retired. The rule against communication between judge and jury was treated there as follows:

"The rule has been greatly relaxed in modern times (16 C.J. 1165), and this is reflected in the decision of this court in *State v. Clements*, 31 N.W. 620, 249 P. 1003, 1008, where Mr. Justice Watson, speaking for the court, said: 'We cannot admit, therefore, that it is the law of this state that the bare fact of an unauthorized and improper communication necessitates in all cases a new trial, even in capital felonies. When it appears that there has been such communication, the important question is whether prejudice has resulted. Such a communication certainly requires explanation, not only to secure the accused his rights, but to maintain the court's authority. But if it satisfactorily appears that the communication was harmless and had no effect on the verdict, the rights of the accused do not require, and public interest does not permit, the granting of a new trial'."

In *Walter v. State*, (Okla.), 233 P. 240, where the judge answered a question of a retired jury through an intermediary, the court held that the communication was not of great importance and did not result in harm to the defendant and refused to hold that prejudicial error had occurred.

In *Lewis v. State*, (Okla.), 119 P.2d 91, the trial judge had a communication with jurors outside the courtroom in the absence of defendant or his counsel. While the court granted a new trial under the exact circumstances, it did go so far as to say that although there is a presumption of prejudice under the circumstances, the state may prove that the defendant was not prejudiced by reason of such misconduct. In *Green v. State*, (Okla.), 281 P.2d 200, the court again affirmed that the presumption of prejudice can be overcome by proper proof.

In the instant case, the court has adequately proven the absence of prejudice. The Utah court in an analogous case, *State v. Burns*, 79 U. 575, 11 P.2d 605, held that where the jury separated improperly, the state was entitled to show that no prejudice occurred therefrom. See also *People v. Alcalde*, (Calif.), 148 P.2d 627.

In *People v. Kasem*, (Mich.), 203 N.W. 135, the judge had a meal at the same table with jurors and his action was not deemed prejudicial.

In *State v. Newland*, (Mo.), 285 S.W. 400, a foreman went alone to the judge, asking about certain evidence. The judge declined to give information as to the evidence and the conversation was held to have been without prejudice.

Appellant cites a number of cases in this general area, but all of them can be distinguished easily from the one at hand.

The following are examples:

In *State v. Anderson*, 65 U. 415, 237 P. 941 (App. Brief, p. 8), a juror and the prosecuting witness had ridden together to and from court daily during the course of the trial. The effect was that the juror communicated with the prosecution, inasmuch as the witness was in continuous contact with counsel for the state. Here, in the Garcia case, the juror who talked with Judge Jeppson had no communication with any party to the action, but only with the one neutral in the courtroom. In the Anderson case the prosecuting witness performed a substantial service or favor for the juror, and this concerned the court. That is not so here.

In *Johnson v. Maynard*, 9 U.2d 268, 342, P.2d 884, the judge entered the jury room to answer a question, so the case is not in point.

In *State v. Thorne*, 39 U. 208, 117 P. 58, a juror talked with someone over the telephone after the case had gone to the jury. There was mystery as to the contents of this conversation, held with an unknown third party.

Unfortunately, the prosecution apparently made no effort to show that the conversation was not prejudicial—which it had a right to do, according to the following language of the court:

“\* \* \* It is enough that the state \* \* \* is permitted to show that the conduct, though wrongful and in disobedience of the statute and the directions



of the court, nevertheless was harmless, by showing all that was said and done, and by clearly and affirmatively showing that the accused was not, nor could have been, prejudiced thereby."

Here, Judge Jeppson put the whole substance of the conversation into the record and since it was not acted upon by counsel for either party and since he conveyed no information as to his own attitude toward either party, the verdict should not be disturbed.

In *State v. Crank*, 105 U. 332, 142 P.2d 178, the court did not go so far as to decide actually whether the conversation was reversible. There, too, it involved a juror and a prosecuting witness.

Appellant cites a number of cases in support of his proposition that appellant was denied due process in that he was not present at all stages of the proceedings. In *State v. Mortensen*, 26 U. 312, 73 P. 562, defendant refused to accompany the jury to the scene of the crime for a view of the premises. Notwithstanding this refusal, counsel on appeal claimed that the excursion to the site constituted a portion of the trial and that he was deprived of his rights to be present at all stages. The court then went on to state:

"\* \* \* but we are unable to concede that the view was either a part of the trial or the taking of evidence, within the contemplation of the Constitution or the statute."

The same rule should prevail here. The conversation between the judge and the juror was not a part of the trial

and appellant's absence therefrom did not constitute a denial of due process.

In the Mortensen case the court continued:

"\* \* \* This does not mean that the defendant must all the time be in the actual presence of the jury, but rather that he must be at the trial in court and in its presence. The court is the real thing, fixed and permanent. The jury is but a temporary adjunct for a partial purpose of the trial."

Counsel for appellant was present at the time the judge told the substance of the conversation. That *was* a part of the proceeding. The incidental conversation was not.

Appellant urges additional error in that the judge not only had the conversation with the juror, but also conveyed it to counsel. On the contrary, the placing of the conversation in the record brought all the facts to light and eliminated any mysterious circumstances that might otherwise have created doubt.

Appellant's quotation from *State v. Martinez*, 7 U.2d 387, 326 P.2d 102, is far afield from the case at hand. It deals with direct questioning of witnesses by jurors. Here, no such thing was attempted. The juror had no intention whatsoever to talk directly with any witness. He only wanted to know if counsel was going to introduce a certain tape recording in evidence. Even if the conversation here had been a direct one, without the judge as intermediary, it still would have been between the juror and an attorney and not between a juror and a witness.

Finally, neither side did anything at all about the information given by the judge. Therefore, if error did occur in the conversation, it was not prejudicial for the reasons set out above.

## POINT II

### THE TRIAL COURT DID NOT ERR IN NOT GRANTING APPELLANT'S MOTION TO DISMISS NOR HIS MOTION FOR DIRECTED VERDICT.

While it is true that the state has the burden of proving beyond a reasonable doubt that a defendant is guilty, respondent believes that appellant has tortured the law in claiming the judge was obligated to dismiss the action as to him, or to direct a verdict in his favor.

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

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 be justified in dismissing the action or directing a verdict. But that is not so here.

Our system of jurisprudence has from earliest times contemplated that a jury of a man's peers should 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 be weak or strong, in conflict, or not controverted. Evidence may be ever so convincing that an accused is guilty or innocent of the crime charged, yet it is for the jury and not for the trial judge to render the verdict. See *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.

Addressing itself to the three questions of motion to dismiss, motion for directed verdict, and motion for new trial, the court said in the recent case of *State v. Penderville*, 2 U.2d. 281, 272 P.2d 195:

"\* \* \* 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."

Appellant uses *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:

"\* \* \* 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."

*State v. Lewellyn*, 71 U. 331, 266 P. 261, was an adultery prosecution. Defendant made a motion for directed verdict. The court said:

"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.' . . .

"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, the 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’.”

Appellant presents an hypothesis, which he terms reasonable, containing ten general elements calculated to show the innocence of appellant. (App. Brief, p. 29) All go to the single point whether or not Garcia knew that Rivenburgh planned to kill Verner, and not just commit sodomy with him.

Garcia does not base his motions on a denial that he was physically present during the stabbing. His own statements on the witness stand, along with those transcribed during the investigation and introduced in evidence, were absolutely conclusive as to his participation in the killing. (T. 366, 573, 599, 677)

As to the matter of intent, Garcia knew of the proposed killing from the very beginning. While he claims he thought the threats of Rivenburgh were made in a jok-

ing manner, he specifically admits their being made and his having knowledge of them before the killing. Lt. William L. Robinson took the stand and read questions asked by Mr. Banks and answers given by Garcia at an interrogation held under formal circumstances at the prison during the first stages of the investigation. The statement was introduced in evidence. Beginning at T. 366, the colloquy is as follows:

“Q. Will you tell us when you first heard about this killing?

A. Well, as far as I can remember, it all started when all of us was up there playing cards. I think it was Bowne's cell—I ain't sure.

Q. When was that?

A. Sunday night.

Q. Go ahead, Jesse.

A. And I thought it was all a joke at first.

Q. What was said and by whom?

A. Well, Mack said that he was going to kill the Pollock.”

(T. 366, 367. See also testimony at T. 672.)

This conversation necessarily must have taken place prior to the killing. The threatening words definitely refer to a future event. No other reasonable interpretation of the language used is possible. (T. 674-675.)

Further, Garcia is quoted, in the testimony of Prison Guard William R. Haueter (T. 674-675), as having given the following statement in the presence of himself and several others just prior to the interrogation testified to by Lt. Robinson, during the original investigation, with questions being asked by Mr. Banks:



"A. \* \* \* anyway I was not thinking straight. I thought he was joking, anyway, he said 'Let's go up and kill the Polock.' The Polock was locked in his cell, somehow he got out of his cell, but I don't know nothing about that. Me and Bowne went up the front way, and we got laying on the other side of this big ventilator, I don't know what the hell it was.

He came up and then Bowne cut out over there, and then after the pounding and screaming, then I went over there, and I don't know too well about it. I know I grabbed his legs, and I had that—I had the ice pick.

Q. You had the ice pick?

A. Yes.

Q. Now who was with you when Rivenburgh said, 'Let's go up and kill the Polock'?"

"And at that time did he point at anyone?"

"A. Yes he pointed at Bowne."

"Q. Bowne was with you?

A. Yes.

Q. Did you answer that?

A. Yes.

Q. All right. The three of you were together when he said 'Let's go up and kill him.' Now did he discuss with you—you said you were supposed to be the point man?

A. Yeah. He was supposed to make a punk out of him or something. I don't know how, or how he done it, see, but he had an affair with him before, so he just went up there to make out of him, and have him for his kid, that's all, how we understood it at first, and then he pulled out this knife.

Q. That's Mack?

A. So we thought he was just joking about it, and we went up there anyway.

Q. But he said, 'Let's go up and kill him.' Is that right?"

"THE WITNESS: He nodded 'yes'."

This is clear and convincing evidence of prior knowledge on the part of Garcia, despite his denial at the trial.

Since Appellant Garcia's statements, introduced into evidence, clearly indicate a foreknowledge of the crime, respondent will not labor the matter of exactly where and when the knowledge was obtained and as to when certain card games, at one of which the planning may have been done, were actually held. (App. Brief, p. 27.)

It should be noted, however, that Randel testified at T. 269 and T. 299 to the effect that Garcia was in the next cell to that in which a conversation as to the plans for the killing took place during a card game. At T. 320 Randel testified that a person in a cell could hear another in an adjoining cell talking in the same tone of voice Randel was using on the witness stand.

Definitely, then, there was not just the one card game after the killing, but one prior to it also. (T. 388, 672.) The court had considerable discussion with counsel (T. 383) dealing with the card games at the time Mr. Hansen made his two motions, the rulings as to which have been appealed from, and this should clear up the matter.

Even so, it is not of great importance whether or not any card game pre-dated the killing in light of Garcia's own clear statement, *supra*, that he had heard Rivenburgh tell of his plan.

Further testimony as to appellant's intent is shown in the following answer from one of Garcia's statements given at the time of the original investigation:

"Q. He had screamed before Bowne went over?

A. No, he screamed, so I run over, circled all around. I was already circling around before the yelling and the kicking started.

Q. Um huh. Did you strike any of the blows?

A. I can't remember.

(T. 677.)

This shows that Garcia began to approach the victim and to maneuver for position even before any supposed cry for help was uttered by Rivenburgh or any defensive motions were made by Verner. So it was not a case of aiding a stricken buddy. It was, rather, part of a carefully preconceived plan to commit murder.

Of course it is absurd to suppose that two grown men with knives were necessary for protection in a homosexual relationship, to which relationship Verner was not adverse. The practice was somewhat prevalent and bodyguards and lookouts anyplace, let alone the attic, were uncommon and unnecessary.

The fact that Garcia went to obtain a knife from Dalton (T. 157), made some changes in it (T. 161), and

went with Bowne to the attic indicate foreknowledge and intent.

In light of clear law in Utah (See *State v. Penderville*, supra.), it would have been a serious abuse of discretion for the judge to make any other ruling than he did, considering the evidence adduced. There is no question whatsoever that evidence of Garcia's implication in every act necessary to constitute first degree murder was clearly in evidence at the time the judge ruled and that it was added to thereafter.

### POINT III

#### THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 43.

Clearly, a defendant has no right to have an instruction given in his own words where the applicable law is given by the court. *State v. Cox*, 106 U. 253, 147 P.2d 858.

Appellant asked for an instruction using the following words:

"\* \* \* you are instructed that whether you make such a recommendation is entirely within your discretion to be exercised in any manner and for any reason you see fit. You are not to be influenced or intimidated by the Court in this absolute right of yours as jurors."  
(R. 95)

The court instead gave its Instruction No. 17, which states in part:

“\* \* \* and if you find the defendant guilty of Murder in the First Degree, then you should consider the question of making such recommendations; and in considering this question, you are instructed to give it your careful and conscientious consideration, and if made, you must include it in your verdict.” (R. 115)

Appellant claims prejudice not only because of the terms used in the court’s instruction but also in view of Instruction No. 7, which states in part:

“Prejudice, passion and sympathetic feelings have no place whatsoever in your deliberations. You should disregard all bias, prejudice, and other extraneous influences.” (R. 103)

Appellant points to the instruction given in the case of *State v. Thorne*, 39 U. 208, 117 P. 58, wherein the court said:

“\* \* \* And if you should find the defendant guilty of murder in the first degree you should then consider the question of making such recommendation, *and it will be your duty to consider such question in the same manner as any other question submitted to you*, giving to it your careful and conscientious consideration; \* \* \* .” (Emphasis added.)

The court held that the italicized part of this instruction was error because in giving it, the court undertook to guide and direct the jury in the determination and exercise of a discretion which the law conferred on them in terms unlimited and unprescribed.

Things are entirely different here since all of the offensive language found in the Thorne case has been deleted.

In *State v. Mewhinney*, 43 U. 135, 134 P. 632, the court failed to find error in an instruction stating:

“In considering this question you are not restricted by any rule of law or public policy, but are entitled to decide the question from such considerations as may appeal to you as reasonably and conscientiously entitled to be weighed in determining the giving or withholding of such recommendation.”

The court found the defendant's attempt to bring the above instruction under the rule of the Thorne case untenable for the reason that the court did not attempt to direct or control the judgment of the jury. The Mewhinney instruction certainly is more questionable than the one here, especially considering its use of the terms “reasonably and conscientiously.” Therefore, it would be improper to deem Instruction No. 17 error.

Respondent cannot concede that appellant suffered any real prejudice by virtue of any relationship that might exist between that portion of Instruction No. 7 dealing with prejudice, passion, etc. and Instruction No. 17, *supra*, dealing with recommendation of mercy.

Certainly, Instruction No. 7 is a standard instruction, the essence of which has been incorporated in many cases and which clearly expresses the proper approach that

must be taken by the jury in considering the case as a whole. It cannot by its terms be considered in any way to limit the right of a jury to make any recommendation it may desire for any reason whatsoever. In fact the portions excluding "prejudice and passion," might well be considered by the jurors as an invitation to *make* a recommendation of mercy, rather than a restriction against doing so.

Appellant's claim is founded upon a supposition too vague and too remote.

#### POINT IV

#### THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 20.

Appellant objects to that portion of Instruction No. 20 which states as follows:

"You are instructed that one who keeps watch where *a crime* is being perpetrated, so as to facilitate the escape of one actually committing it, or to prevent his being interrupted, if the said keeping watch is pursuant to a common design to commit *the crime*, said person keeping watch, is aiding and abetting, and is a principal."

(R. 119) (Emphasis added)

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

The only reasonable interpretation of the court's instruction is that it applies to the crime charged, first degree murder, to which the jury was directing its sole attention. Appellant never was charged with the crime of sodomy, and the jury knew this.

It appears that appellant 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 P2d. 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, the law in Utah is 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. 28, 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."  
(R. 129)

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

“There is some evidence in this case of the commission of other crimes. There is no crime charged, however, in this case except murder and the included offenses which will be described herein. Testimony of any crime not charged is not evidence that the Defendant is guilty of murder or the included offenses.

“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.”  
(R. 102)

Appellant 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 his 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.”  
(R. 103)

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

## POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO 17.

Appellant claims error in the refusal of the court to grant an instruction directing that his motive be considered as strong evidence of the guilt or innocence of the accused and that:

"\* \* \* The absence of a motive on the part of the defendant \* \* \* strengthens the presumption of defendant's innocence and may raise a reasonable doubt as to his guilt."

The refusal was in no way prejudicial to appellant in light of all the instructions given in the trial. (See argument under respondent's Point IV.) While it is true that motive may be considered as any other fact, it is also true, as stated in the case of *People v. Tom Woo*, (Calif.), 184 P. 389, that:

"\* \* \* if the proof of guilt is nevertheless sufficient to overthrow the presumption of innocence, the appellant must stand convicted, notwithstanding no motive has been shown."

In *Glass v. State*, (Ala.), 41 So. 727, the court held that in a prosecution for murder an instruction, that if the state failed to show any motive on the part of defendant to commit the offense charged and his guilt was not clearly proven, such absence of motive considered in connection with all the evidence in the case might in the minds of the jury

create a reasonable doubt of defendant's guilt, was properly refused. See also 23 C.J.S. 1198, pg. 749.

## POINT VI

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS NOS. 19 AND 21.

Appellant was not entitled to have instructions given in his own words for the reasons set forth earlier in this brief. He was entitled only to a fair statement of the law applicable to his case. His requested Instructions 19 and 21, are substantially covered in several instructions actually given to the jury, since all go directly to the question of his intent. See Instructions Nos. 9, 11, 12 and 16.

The court did not commit error here and no harm of any kind was done to Garcia.

## POINT VII

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 20.

The legal substance of appellant's requested Instruction No. 20 (App. Brief, pg. 38) is fully set forth in the court's Instruction No. 7. The last paragraph thereof states as follows:

"To warrant you in convicting the defendant, the evidence must, to your minds, exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if after an entire consideration and comparison of all the testimony

in the case, you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him." (R. 103)

This is not an abstract instruction. It applies exactly to the facts at hand. Stated in his own way, appellant's requested instruction limits the jury to a consideration of just two hypotheses—one, standing guard for sodomy, and two, having the intent to commit the crime of murder.

The instruction given, however, does *not* so limit the jury. In fact, if the jury believes *any other* reasonable hypothesis than that urged by the state, the defendant cannot be convicted. Thus, Instruction No. 7 gives even greater leeway to acquit than does the proposed instruction.

It is possible the judge could have used more exact language even though the instruction cannot really be called abstract. Nevertheless, there is no question that by it, the jury was given to know its responsibility.

This was a clear-cut case and the court, even if it detects error, should follow the reasoning of Justice Wolfe in his dissent in *State v. Thompson*, 110 U. 113, 170 P.2d 153:

"\* \* \* A slight fault in a close case may be prejudicial whilst in a case where the evidence is such that it would be most unlikely that the jury could have been misled by error, it would not be prejudicial."

## POINT VIII

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

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.

A defendant's request must be based on an appreciable showing why such statements and recordings should be produced. That was not done. Whether or not accused has made a showing sufficient to entitle him to have the documents produced is a matter which rests in the discretion of the trial court. 23 C.J.S. 855, pg. 58.

Here, the court, for reasons satisfactory to it, did not see fit to order the prosecution to give certain wire recordings to defendant. However, they were available for inspection by the defense and, in fact, were heard by counsel for defendant, even though the recordings were not used in evidence. Copies of written statements were also provided for defendant's counsel; so, appellant's motion is without merit.

Certain statements were used to impeach Garcia and he was asked whether or not he had made the statements. In many cases, he answered in the affirmative. If appellant had told the truth all the way through from the be-

ginning 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. If, in fact, there was error, it was not prejudicial in light of all the evidence in the trial.

## POINT IX

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

Appellant claims a new trial should have been ordered for reasons set forth in his motion. But, in his argument he discusses but three of the seven grounds. Inasmuch as the others appear to be without foundation, respondent will deal only with those argued.

The first ground is that the trial was had in the absence of the defendant. The second ground is that the jury received evidence out of court. Both of these points were fully argued in respondent's Point I of this brief and any repetition here would be an imposition upon the court's time.

Appellant alleges as his third ground that a new trial should be granted because of the separation of jurors for the purpose of going to restrooms. There is no allegation or evidence whatsoever that the jurors talked with any-

body except each other at that time 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 divide into two sections.

It was held in *State v. Jarrett*, 112 U. 335, 187 P.2d 547, 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.”

## POINT X

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE TESTIMONY SHOWING A CONSPIRACY TO COMMIT MURDER.

An actual conspiracy to commit murder was entered into by all the participants in the killing, including Garcia.

The jury was convinced that Garcia knew in advance about the murder and that this knowledge derived from a conversation at which both he and Rivenburgh were present, along with others, before the killing.



That this is so, is shown in the statements of Garcia himself taken during an investigation at the State Prison, which statements were read into the record by Lt. Robinson and Sgt. Haueter under examination by Mr. Banks. See discussion under respondent's Point I.

Thus, an actual conspiracy was made out by the evidence and the judge did not err in refusing to strike evidence as to it.

## POINT XI

### THE TRIAL COURT DID NOT ERR IN SUBMITTING THE CASE TO THE JURY ON FIRST DEGREE MURDER AFTER CONSIDERATION OF APPELLANT'S MENTAL CONDITION.

Appellant urges that the jury could not rightly find beyond reasonable doubt that he was capable of premeditation and deliberation. He deems this true because of statements made by his psychiatrist, Dr. Nelson.

The state, however, placed two psychiatrists on the stand (T. 651), both of whom testified that Garcia knew the consequences of his acts, that he knew they were wrong according to law and morals, and that he could control his impulses; and one of whom gave an opinion on the matter of premeditation and deliberation contrary to that of appellant's witness.

The principles set forth at Point II, *supra*, dealing with reasonable hypothesis, etc., apply here just as in the

determination of the other facts of the case, and that argument is adopted here.

Again it is the sole and exclusive province of the jury to determine the facts even where evidence is in absolute conflict, and this is so even as to the question of sanity. *State v. Green*, supra.

The mere existence of conflict in testimony, and even the alleged closer contact of one doctor than the other with the defendant does not in any way foreclose the court from submitting the question to the jury. Any doubt as to the ability of appellant to premeditate and deliberate was a matter for determination by the jury and not by the judge. The court, therefore, committed no error.

#### CONCLUSION

Appellant was given a proper trial by an experienced and capable trial judge before a fair and impartial jury. The trial was conducted without prejudicial error. Appellant's appeal is groundless and his conviction should be affirmed.

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Respectfully submitted,

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