

1963

State of Utah v. Jean Sinclair : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

JEAN SINCLAIR,
Defendant and Appellant.

Case No.
9971

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third District Court for Salt Lake County
HONORABLE MARCELLUS K. SNOW, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

JEAN SINCLAIR,
Defendant and Appellant.

} Case No.
9971

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Jean Sinclair appeals from a conviction for the crime of first degree murder of Don LeRoy Foster in violation of 76-30-3, UCA 1953.

DISPOSITION IN LOWER COURT

The case was tried on a charge of first degree murder before a jury in the Third Judicial District Court in and for Salt Lake County, Utah, with Judge Marcellus K. Snow presiding. After three weeks' trial the jury returned a verdict of first degree murder with recommendation of leniency. Motion for new trial was filed

with supporting and counter affidavits being filed, was argued to the Court and denied. The Appellant was sentenced to life imprisonment and appeals from the verdict and judgment.

RELIEF SOUGHT ON APPEAL

The appellant seeks relief in the alternative; (a) reversal and discharge, (b) reversal and remand for a new trial with directions to the trial court.

STATEMENT OF FACTS

Due to the extensive testimony and great length of the record, the Statement of Facts is set forth in two parts; first, that evidence relative to the killing of Don LeRoy Foster including time, location, method and means of killing, and the cause of death. There is little material conflict as to these portions of the evidence and it is clear that there was a killing by felonious means in Salt Lake County, Utah, on January 4th or 5th, 1963, with proper identification of the deceased.

Second portion of the statement of facts relates to the connection of the defendant, if any, with the crime charged, and is necessarily set forth in some detail by setting forth the material facts testified to by each witness in the order which the presentation was made in the District Court. This is done due to the vital questions before this Court concerning sufficiency of evidence and corroboration of the claimed accomplice.

Don LeRoy Foster was killed about 12:30 a.m., Jan-

uary 5, 1963 at the Susan Kay Arms apartment parking lot in Salt Lake City, Utah. Cause of death was a gun shot wound on the right side of the face, neck and shoulder (R. 357). The gun was a shot gun, apparently a 12 gauge, containing number 5 shot. The gauge of the gun was determined from wads recovered from the central wound (R. 364), which were identified by an FBI fire arms expert (R. 499-500). The wound severed the carotid artery, both jugular veins, and damaged the spinal cord (R. 361). A combination of these injuries was the cause of death. The shot left a center pattern 7 inches in diameter (R. 357). There were also shot punctures in the dorsum of the right hand (R. 359). The shot would necessarily have been fired within 15 feet, probably less (R. 467). There is no way of determining from what weapon shot or wads were fired in an unrifled weapon (R. 512).

Foster was a married man estranged from his wife. A divorce action was filed some 16 months previous to his death and had lain dormant since that time (R. 1082). Foster operated a service station at Second West and North Temple streets and had lived at the Susan Kay Arms apartments since February, 1962. On the evening of January 4, 1963, he had been to dinner at Alex Broiler on Third South between Main and West Temple streets in Salt Lake City and to a movie at the Capitol Theatre on Second South between Main and West Temple streets with LaRae Peterson and her 8-year-old daughter, Cheryl Ann. After leaving the theatre they took the child to a baby sitter below Thirty-third South on West Temple.

They proceeded from here to the Prescription Pharmacy on Main Street where Foster purchased some bufferin, then north on Main street to Center street, along Center street to Fifth North where they turned into the parking lot of the Susan Kay Arms apartment. Foster pulled the automobile into a parking spot in front of the garage, the parking spot not being that assigned to his apartment, and being immediately north of the six-foot chain link fence. The deceased got out of the car, reached over the back seat to pick up his overcoat and straightened up when Mrs. Peterson heard an explosion, saw a flash through the left rear window and saw Foster slide down the fence to the black-top between the fence and the automobile. She got out of the car and ran around the front of the car screaming, "my God, he shot himself." She did not see anyone in the immediate vicinity and did not hear anyone running away. She knelt down, put Foster's head in her lap and tried to stop the flow of blood. She looked for a gun but she said she did not find one. However, witness Gerretadina Combee and her husband Pieter Combee, who arrived at the scene of the shooting with a flashlight on the other side of the fence shortly after they heard the shot, testified that they saw Mrs. Peterson hand a small pistol to an unidentified man standing in the shadows towards the front of the car from where Mrs. Peterson was kneeling.

Witness John Storey arrived where Foster was 15 seconds after he heard a shot followed by screams. He came around the corner of an apartment to the north and could see clear to the street but saw no one leaving the area nor did he see any person until he saw Mrs.

Peterson kneeling and holding the deceased's head. Immediately thereafter many people gathered from surrounding apartments.

The police were called and arrived at 12:40 a.m., conducted an investigation and took pictures.

LaMar B. Williams, an off-duty police officer, was at the north end of the Susan Kay apartments on the early morning of January 5th visiting his ex-wife (R. 977). He was leaving about 12:25 a.m. and had trouble starting his car. He saw a person coming out of the archway and as he backed out he observed the facial features in his rear view mirror (R. 979). Hair on the darker side, quite wavy in front going straight back, a long nose, receding chin line with a cleft chin. The person resembled Jean Sinclair. The person was dressed in dark trousers and light short coat coming somewhere between the knees and the crotch. He can't identify the type of coat. When faced by Miss Sinclair he admitted that her chin wasn't cleft or in an S curve. Her hair was not dark. The person he saw weighed between 165 and 180 lbs. and appeared to be a man (R. 983).

Boyd K. Harvey was driving home in the late hours of January 4th or early morning of January 5th, 1963. He was driving along Fifth North street between Second and First West. He heard a shot, a scream and saw a person running from the Susan Kay apartments driveway (R. 985). This person was wearing a three-quarter length car coat ending above the knees. He didn't see the head clearly. The person was running from the fence

across the lawn carrying an object high in his right hand away from the body. The object was 18 to 24 inches long (R. 987). The person appeared to be very agile and was running fast. The man ran across the parking lot on Fifth North and got into the passenger side of a vehicle which drove away before the witness could make a U turn and get close enough to get the license plate number. He described the person 5 ft. 6 in. to 5 ft. 10 in., burly and heavy set. He told the police the running person was a man. He didn't consider a woman until he read about Miss Sinclair in the newspapers (R. 988). The automobile which the person entered was a two-tone Chevrolet sedan, 1954 or 1955. The person's trousers were darker than the coat. The person was "very agile, running without deformities. I thought it was a man." (R. 990).

The State's case is centered on the testimony of Carl Kuehne, who, after being picked up on two different occasions by the police at the instance of Vaughn Humphreys, and held overnight on the second occasion, made a statement that would tend to implicate the defendant in the crime. Carl Kuehne testified he has been convicted of a felony, assault with a deadly weapon, about 1952, and confined in the Utah State Prison. While there he escaped from a fire fighting detail in 1958. He is a mathematics major at the University of Utah with a B average. He met Miss Sinclair through Vaughn Humphreys in October of 1960 and went deer hunting with Miss Sinclair, Humphreys and other persons. That he didn't see the defendant thereafter until August, 1962. (Four (4) other witnesses, including State's witness

Humphreys, indicated that he saw her various times during 1961 (R. 523). Kuehne testified that on the first meeting in 1962 he told her he had a post office clearance (R. 527), whereupon he began a discussion with her regarding what should be done with a person who was causing a woman to mistreat her child (R. 528-29) and she offered him \$500.00 to kill the person but did not identify him (R. 529). Don Foster was not mentioned during the first conversation. Kuehne first saw Foster late in October, 1962 (R. 532). (This is contradicted by LaRae Peterson's testimony that a person named Stewart (the name used by Kuehne) came to the Susan Kay apartments to talk to Foster on the 23rd of September, 1962.) Kuehne said he did not see the defendant from September to October just before deer season, but on cross examination admitted receiving a check from her on October 7, 1962 (R. 611). He went to three (3) places with the defendant to determine the best place to kill Foster (R. 504), to-wit: Mrs. Turner's (Foster's mother's home). Kuehne testified it was 3 to 4 miles west of the nursing home (R. 540). (Mrs. Turner testified her home is 1½ blocks west of the nursing home.) LaRae Peterson's home in Kearns which he described as red brick (R. 539), (LaRae Peterson testified her home in Kearns is light grey cinder block (R. 813).), and the Susan Kay apartments where Foster and LaRae Peterson were living.

He went to Foster's apartment at defendant's request to beat him up.

He testified that he gave Foster the name of Stewart

(R. 549) and told Foster to leave LaRae Peterson alone so he could marry her. He said he had never seen Foster until late October (R. 531, 619-20). (LaRae Peterson placed the date that Kuehne came to the apartment under the name of Stewart as September 23, 1962 (R. 839-40.) Kuehne further stated that the defendant brought him to the Susan Kay apartment when he went to talk to Foster and waited across the road. He had only seen Foster once. (Four (4) witnesses, including State's witness LaRae Peterson, testified the defendant was in California or on her way to California on September 23, 1962.) On December 28, 1962 at defendant's request he bought a used 12-gauge shot gun and a box of No. 5 shells at Lee's Loans on Second South between State and Main (R. 571). He gave a false name, George Stewart, and a false address, Elko, Nevada. When asked why, he stated "Just a little bit of caution on my part since the king had been threatening to kill Don Foster." Kuehne testified to many conversations with the defendant with regard to killing Foster but cannot place any dates (R. 601-2), with the exception of December 28, 1962 when he bought the shot gun and January 4, 1963 when he testified that the defendant came to his home three (3) times, the first about 6:00 p.m. o'clock when she left the shot gun to be sawed off. He said Jean arrived the second time about 8:30 p.m., received some leather goods he had made for her, wrote out a check, Exhibit No. 33, in his presence. (The check is dated January 3, 1963.) He showed her how to load the gun and how to put it on safety. She wrapped the gun in "what he found out later was a white coat" and said she was

going to "kill myself a son-of-a-bitch" and left after 11:00 p.m. (R. 578-79). She was dressed in fleece-lined boots, grey flannel pants, white shirt and a blue parka (R. 580).

When she left he went to bed, woke up and Jean was standing by the stove warming her hands. The shot gun was in the corner. She was dressed as before, but wearing the white trench coat. There was dirt and grease on the coat and right leg of the pants (R. 584). The coat hung below her knees (R. 585). She told him she had "killed the son-of-a-bitch. LaRae was present but just screamed." Jean said she couldn't get up to the chain link fence and had to crawl under a car. She told the witness he was an accomplice before and after the fact and had to get rid of the gun (R. 586). She made a phone call and left. He walked out to the car with her, returned, took the gun apart, put it in a sack with the shells from which he had emptied the shot between Jean's first and second visits (R. 656), he took the sack out behind the garage (R. 586-89). When he returned to the house he looked at the clock and it was 1.00 a.m. (R. 631). His wife returned about 3.00 a.m. and after eating and helping one of her friends move, his wife drove him up Emigration Canyon where he disposed of the gun parts and shells by throwing them from the road towards the creek at various intervals. (R. 589-91). He returned home and shaved off his beard of 5 months (R. 592). He showed the police where he had thrown the gun parts and shells, and after they had been unsuccessful in attempts to find them on the

25th or 26th of February during a recess in the preliminary hearing, following a policeman telling him they were getting a detachment of National Guardsmen to search the area, Kuehne took Vaughn Humphreys up the Canyon. They were unaccompanied by police or other persons. They found the gun stock, Exhibit No. 21, in the creek bed and brought it to the police station (R. 604, 639-40). On cross examination he admitted he could not place any conversation with Jean as to time and place (R. 608). He can't place the meeting with Don Foster, even to the month (R. 621). His testimony varied many times from his testimony in the preliminary hearing (R. 631, 645, 646, 648, 650, 654, 663, 667, 668, 669, 670, 671, 676). The police made him no threats or promises, but they did hold him over night and they discussed with him the possibility of getting a pardon for his previous felony. He saw no person other than the defendant between 6.00 p.m., January 4th and 3:00 to 3:30 a.m., January 5th, 1963. On each occasion when a question was asked concerning the shot gun and the shells, Kuehne tried to claim privilege under the Fifth Amendment.*

The District Attorney elicited testimony as to a previous felony record of Kuehne and an escape from a prison work detail together with a voluntary return (R. 521-22. The Court refused to let defense counsel pursue this question on cross examination (R. 694).

*(Each time, the court compelled him to answer (R. 569-76-87-88). Apparently on the basis that he had waived his privilege by testifying at the preliminary hearing (R. 570).)

Counsel made a Proffer of Proof (R. 717 to 737, 738, 739). The Court refused to allow counsel to pursue Kuehne's psychiatric background (R. 696). Again a Proffer of Proof was made (R. 717-738, 739).

Vaughn Humphreys testified that he had known the defendant for 15-years through her partner's son Bill Rawlins (R. 719). He had known LaRae Peterson for 7 or 8 years but had never been out with her (R. 720). He had known Carl Kuehne since the early spring of 1960 . . . was a friend of Kuehne and had introduced Kuehne to Jean Sinclair in the fall of 1960 when they went deer hunting with a group of people. In the summer and fall of 1962 he had several discussions with Jean regarding Don Fosters going with LaRae Peterson. Jean was worried about LaRae's daughter Cheryl Ann and wanted the Foster-Peterson relationship terminated. (R. 725-26). He contacted officers on two (2) different occasions trying to get them to do something about breaking up the relationship (R. 727, 730, 731). Jean talked with Vaughn about adopting Cheryl Ann. He said she talked to him about it being a good idea to disguise as Danites, catch Foster and threaten to castrate him (R. 733-34). Humphreys was at the Susan Kay Arms on New Years Eve, 1962 (R. 735). He had discussed getting dates with LaRae Peterson with Jean but she told him LaRae was too expensive for him (R. 736). In November he learned from Carl Kuehne of a plot to kill Foster and to leave his (Vaughn's) hunting jacket at the scene of the killing. Thereafter he didn't go around the rest home again until he went to see Bill Rawlins at Christmas (R. 742). He never discussed

the matter of the jacket with Jean and didn't bother to pick up his jacket (R. 742). He didn't mention Jean to either of the officers he contacted about breaking up the Foster-Peterson relationship. He had made the comment about Foster — "that son-of-a-bitch is getting some of that and I'm not" (R. 747). LaRae Peterson had gone with several men to Vaughn's knowledge while she had the beauty shop at the rest home (R. 749). He told Kuehne that Jean was a lesbian while on the original deer hunt in October, 1962 (R. 749), based on her interest in LaRae Peterson and her interest in Cheryl Ann's welfare (R. 751-52).

He had an argument with Jean in a cafe in Provo, Utah in the latter part of November and stopped going to her place (R. 755-56). He talked with her once on the phone in December, 1962 when she accused him of spreading rumors that she was a lesbian. He denied to her that he had said anything of such nature (R. 756). Ellen Rawlins was equally concerned about the child Cheryl Ann's welfare as was the defendant (R. 757). Vaughn and Bill Rawlins had called Jean "the King" for 13 or 14 years because she "ruled the roost" (R. 758). No one else called her King (R. 758). He overheard a conversation between Jean and Thayle Olsen regarding Jean's affection for LaRae and concern for Cheryl Ann (R. 762). He didn't recall what was said in the conversation (R. 763).

LaRae Peterson testified she is divorced and the mother of a 9-year-old child (R. 767). She ran a beauty shop in the defendant's rest home from October 1956

to October, 1962. She took care of the patients' hair in return for rent and utilities and also had her own customers. Jean and her partner Ellen cared for the child while LaRae was working (R. 769). LaRae left the rest home on October 6, 1962 to be closer to Don Foster's work and to take special training from Kay Butters (R. 769). She knew Vaughn Humphreys for 7 or 8 years . . . she had never seen Carl Kuehne until the preliminary hearing (R. 770). Both Ellen and Jean had given her money and groceries (R. 773). She knew Foster's divorce was not final and had not gone to court (R. 775). She had gone on trips with Jean and had visited Jean at a motel (R. 776). She had never seen Jean follow her (R. 779). She had been followed but never looked for any one car in particular (R. 779). When asked by the District Attorney if she had committed any lesbian acts with Jean Sinclair she stated on voir dire that she didn't know what lesbian acts were and didn't know if homosexual acts between women were possible.*

She kept clothes at Foster's apartment at the Susan Kay apartments and parked her car in Foster's assigned parking stall. She identified a note, Exhibit No. 30, as being in Jean's handwriting and said she found it at the shop some time between Christmas, 1961 and April 28,

*The District Attorney asked if she had had any homosexual acts with Jean Sinclair. Defense counsel objected on the grounds of ambiguity and immateriality, but objection was overruled and the witness claimed privilege under 78-24-9, U.C.A. The Court directed her to answer. She refused, and the Court informed her she would be held in contempt. She still refused (R. 787-88).

1962 after she started going with Don Foster (R. 794).**

She talked with Jean about 5:00 p.m. on January 4, 1963 by telephone and told her that she, Don and Cheryl Ann were going to a show. She doesn't think she told Jean what show or what time (R. 797). She called again about 7:30 p.m. at the rest home but Jean was not in (R. 797). LaRae and her daughter went to the Susan Kay apartments, left her car in the north parking lot and went to Don's apartment (R. 799). The three (3) went to Alex Broiler, had dinner, and went to the show at the Capitol Theatre. They left the show and took Cheryl Ann to Morgan Pace's on West Temple. LaRae and Don proceeded to the Prescription Pharmacy, then north on Main to Center street, along Center street to Fifth north and into the Susan Kay parking lot from the Fifth north entrance (R. 801). Foster pulled into the parking space by the garage, opened the car door, picked up his overcoat from the back seat and started to close the door. LaRae heard a loud noise, saw a flash through the left rear window, and Foster slipped down the fence (R. 803). She got out, and around the front of the car and knelt down and put his head in her lap (R. 804). She didn't see anyone at the time of the shooting and didn't see anyone leaving the area (R. 821). The parking space where the shooting occurred was not Foster's regular parking place. The apartment manager's

**In an affidavit filed on Motion for a new trial (R. 119-20), she recanted this testimony recollecting that the note had been received by her some two (2) years earlier.

son also used it (R. 812). Foster had a new car. LaRae had never told Jean about the new car (R. 813). LaRae's home in Kearns is grey cinder block . . . it had never been red (R. 813). Mrs. Turner (Don Foster's Mother), lives on Sunset avenue between Main and West Temple streets (R. 814). Foster normally carried a gun in the car (R. 822). LaRae thought at first he had shot himself. She has never seen Jean run (R. 823). She had never seen Jean act out physically or harm any person or animal. Jean frequently wore western type clothes. LaRae had gone with several other men while working at the rest home and had planned to marry Mr. Craven. The contemplated marriage created no problem with Jean (R.831). LaRae, Cheryl Ann and Foster went to the Worlds Fair in September, 1962 (R. 833).

LaRae licensed the beauty shop at the rest home for 1963 after she had moved out on October 6, 1962 (R. 833). She returned thereafter to do the patients' hair (R. 834). She talked with Jean about leaving after Jean returned from California early in October, 1962. There was never any trouble between Foster and Jean Sinclair (R. 837). Foster's divorce, to her knowledge, had been filed for a year and 3 months but had not gone to court at the time of his death.

A person identifying himself as George Stewart came to Foster's apartment while LaRae was there on the evening of Sunday, September 23rd or Monday, September 24th, 1962 and talked to Foster about leaving LaRae alone. LaRae placed the time as during a beauty

convention she was attending at the Terrace Ballroom (R. 839). Jean was in California delivering a horse at this time (R. 840). LaRae never had an argument or harsh words with Jean regarding Foster (R. 841). She saw Jean drive past Foster's mother's home on Mothers Day, 1962 (R. 842). She took down the license number of a car which was following her after the killing. The car was a 1954 or 1955 2-tone Chevrolet.*

Jean owned a brown deer skin jacket (R. 844).

Loren Hallen testified he is a bank officer at the First Security Bank where Jean Sinclair has an account. He identified two (2) checks on the Sinclair account dated in January, 1963 with the earlier date being on the higher numbered check (R. 855).

Ned Greenig, Court Reporter, testified to a conversation in the Courts chambers in which the defendant stated she had never been to the Susan Kay Apartments (R. 858). The statement was not made under oath but was part of a conversation between counsel (R. 858).)

David Wetzel testified he met Sinclair at Carl Kuehne's apartment on December 28, 1962. The three of them talked about a half hour. She had a bottle of Irish whiskey with her. She was dressed in jeans and a shirt. The witness left about 10:30 p.m. (R. 863).

LaRae Kuehne testified she is the wife of Carl

*The license was identified as registered to Mel Humphreys, Vaughn Humphreys' father.

Kuehne and a waitress at the Tiki Hut on Second South.* She knows Jean Sinclair. Jean wanted her to call Don Foster to get him up to the rest home to watch Jean and LaRae Peterson in "the lesbian act" (R. 869). She went to work on January 4th at 6:00 p.m. She came home at 3:00 a.m. January 5, 1963. Her husband was in bed. They went to breakfast, returned home, got the pieces of a shot gun, drove up Emigration Canyon where her husband threw them away. When they returned home Carl Kuehne shaved off his beard (R. 872).

Kenneth Forsberg owns Lee's Loans, a pawn shop on Second South between State and Main in Salt Lake City, Utah (R. 888). On December 28, 1962 he sold a 12-gauge shot gun and a box of No. 5 12-gauge shells to a person who identified himself as George Stewart of Elko, Nevada (R. 889). George Stewart appeared to be the same person as a newspaper picture of Carl Kuehne, sans beard (R. 890).

Val Jean Pace works at Grand Central Market. She knows Jean Sinclair, LaRae Peterson and Don Foster (R. 896). She had a conversation with Jean in December, 1962 in which Jean hoped LaRae would come back and work at the beauty shop. If she did, Jean would help her get a car (R. 897).

Gerritadina Combee lives with her husband at 250 West 5th North immediately south of the spot where

*The Tiki Hut is immediately west of the Capitol Theatre where Foster went to the movies on the night of the killing.

Don Foster was shot (R. 899). Sometime around Christmas, 1962 she saw a woman in a fringed leather jacket and trousers walking south from the Susan Kay parking lot. She identified that person as the defendant (R. 903). On cross examination she admitted she saw the person from the right rear and only for "a step or 4 or 5" (R. 918). She never saw the face (R. 921), and couldn't describe the hair color or clothing other than the fringed jacket. She later in the trial identified Jean Sinclair's jacket as the type and color she had seen.

Ellen McHenry testified she had been Jean Sinclair's partner at the rest home business since 1946. She remarried on October 11, 1962 (R. 922). She is still at the rest home daily (R. 923). She raised her three (3) children at the rest home with Jean's help. Her invalid husband also lived there until his death in 1949.

Her son Bill's 12-gauge shot gun is at the rest home and has been there for years (R. 933). Jean owns a brown leather jacket but has never owned a trench coat. Jean does have a full length ivory-colored leather coat (R. 925-26). Most of the Silver Spurs (a women's riding club to which both Jean and the witness belong) have fringed leather jackets similar to Jean's (R. 928).

Kenyon Donaldson in company with John Harwood, both City Water Department surveyors, found a shot gun barrel in Emigration Canyon on March 25, 1963 about 50' from the road in a small clearing.

John Harwood's testimony is substantially the same as Donaldson's.

Joe Longson, police detective, identified shot gun shells found by himself and others in his presence in Emigration Canyon, Exhibit No. 16.

Glen Cahoon, Det. Sgt. Salt Lake City Police Department, identified a cardboard shot gun shell box found by him in Emigration Canyon, Exhibit No. 17 (R. 952-53). Although there had been hip-deep snow between January 4th and the finding of the box, the box didn't appear to have been wet or water damaged (R. 957). There had been several careful searches by officers in the area indicated to them by Kuehne, including the use of mine detectors, with no part of the gun being found, but certain shells were found (R. 959-60).

The area in which Kuehne and Humphreys claimed they found the gun stock, Exhibit No. 21, is not one of the areas where Kuehne told the officers to search (R. 963). Cahoon had told Kuehne two (2) days before Kuehne and Humphreys found the gun stock that the police were going to take at least 100 National Guardsmen and comb the area (R. 973).

LaMar Bowen Williams' testimony is set forth in the first portion of the Statement of Fact as is that of Boyd K. Harvey.

Joyce Harris testified she works for a cleaners in Murray. On the morning of January 5th Jean Sinclair brought in some cleaning including several pairs of trousers, several sweaters, and a coat and a jacket. The coat was a tan trench coat. She checked the pockets

and put the clothes in a bin. Jean frequently brought in clothes to be cleaned, both her and the patients. The witness didn't notice anything unusual about the coat. Jean didn't return for the clothes for several days (R. 999).

Orvis Allred works as a cleaner in Murray. On the afternoon of January 5th he examined a coat with Salt Lake City police officer Paul (R. 1001). The coat was a tan overcoat, full length as differentiated from three-quarters. The officer had him check spots on the coat to see if they were blood. It was not blood. The spots were not excessive. They seemed to be an oil type stain. One pair of trousers were stained (R. 1004). The largest spots on the coat were about the size of a quarter. There were no spots on the arms or sides (R. 1005). Jean picked up the clothes several days later. They were not impounded (R. 1006).

Alex Paul is an officer of the Salt Lake City police department. He was sent to the Murray cleaners to examine some clothes on January 5th, 1963. He saw a tan trench coat three-quarter length with buttons on the right side. It came to the knee area or below—had marks underneath the arm, on the arms and on the bottom near the seam. Also on the back area (R. 1008). Some spots were the size of a dinner plate or larger. A grey pair of pants with dirt in the knee area and around the cuff were also examined (R. 1009). The dirt was kind of gray with darker spots. The coat was cotton gabardine. The clothes were not impounded (R. 1003).

The State rested.

Defendant made a motion to dismiss (R. 1005) et seq.

Defendant's Case:

Phillip Procter testified he works for the motor vehicle division in the State Tax Commission. He identified Exhibit 46, a registration showing Mel Humphreys at 2164 South 4th East, Salt Lake City to be the registered owner of a 1954 Chevrolet 4-door sedan with license number Utah 1963 — D9207. Was issued on February 22, 1963 (R. 1034).

John Pulsipher is from Las Vegas, Nevada and knows Carl Kuehne. He had three (3) conversations with Kuehne in which Kuehne stated he was a Nazi prisoner of war for 2 years. When he came home his wife had a 9-month old baby daughter. Kuehne said he killed them both adding "if they can't find the bodies they can't convict nobody of any crime" (R. 1008). On cross examination he testified that Kuehne broke up his first marriage. He doesn't know Jean Sinclair — never saw her before he walked into the court room.

Carl R. Andreasen is a Naturopathic physician and surgeon, in private practice for 22 years, 10 years being in Utah. He is licensed to practice medicine in Utah. He has known Jean Sinclair since 1954. Jean has consulted him about a reducing program for the last 3 years (R. 1012). She has lost weight continually for those

three years but more rapidly in the summer of 1962 when she was having dental problems (R. 1013). She has residuals from a spinal fusion giving her numbness in the lower extremities and difficulty in walking. Dr. Andreassen has treated her for injuries from falls. He has never seen Miss Sinclair run. It is his opinion that she cannot run (R. 1060). The opinion is based on her spinal injury, loss of sensation in the legs and bladder, and being unable to feel what is under the soles of her feet. Her reputation in the community for being peaceful and law abiding is good (R. 1018). On cross examination he stated she might play golf but couldn't hit the ball very far. She could not move as fast as the normal person could walk (R. 1016). The lack of balance is partially compensated by eye sight.

Counsel for the parties stipulated that the divorce action — Don Leroy Foster vs. Beth Worthin Foster was filed in the Third District Court in October, 1961. Answer and counter claim was filed November 13, 1961. No further pleading had been filed at Foster's death on January 5, 1963 (R. 1082).

Ellen McHenry testified she had been in the nursing home business with Jean Sinclair since 1946. Both partners lived at the nursing home until October, 1962 when Ellen married Bill McHenry. Her three children were raised at the nursing home and her former husband lived there until his death (R. 1014). Ellen is still at the nursing home every day. She has never seen Jean run or get on a horse without assistance. She has known LaRae Peterson for 8 years. LaRae started a beauty

shop at the nursing home at Ellen's request in 1956. LaRae did not live there and never slept there. LaRae's daughter Cheryl Ann stayed over night twice (R. 1087). The shop and equipment were furnished by the nursing home and LaRae furnished supplies for doing the patients' hair (R. 1088). Ellen and Jean took care of the child. They had had discussions about the child and the adverse effect the Foster-Peterson relationship was having on the child (R. 1090). Ellen and Thayle Olson hired a detective to follow LaRae (R. 1091). They didn't tell Jean about the detective. Ellen paid the bill. She has known Humphreys since 1946 or 1947 as a friend of her son Bill (R. 1093). Only Bill and Vaughn ever called Jean the King (R. 1093). Kuehne was at the nursing home many times in 1961 (R. 1904). Part of the time while Jean was there (R. 1095). Kuehne never referred to Jean as "King" until after Foster's shooting (R. 1095). Vaughn Humphreys was at the nursing home at frequent intervals. The witness heard Humphreys ask LaRae for dates both before and after he went in the army. Humphreys always inquired about LaRae when he came (R. 1096). Humphreys brought up the subject of adoption of Cheryl Ann — not Jean, and it was in Ellen's presence. Ellen and Jean had never discussed adoption other than that occasion (R. 1099). It was Humphreys' idea to contact the police to break up Foster and Peterson (R. 1101-1102).

Jean signed bank checks in blank and Jean, Ellen or her daughter Joane would fill them in (R. 1102-1106)). Sometimes a lower numbered check would be filled in several days after a higher numbered check (R. 1107).

On January 4th Ellen saw Jean in the afternoon at the nursing home. Ellen went bowling at Koler Lanes in Sandy and had a phone conversation with Jean about 9:30 p.m. regarding an injury to Bill Rawlins (R. 1111). She was present at a conversation regarding the book "The Twenty-Seventh Wife" when Jean and Vaughn discussed Danites, disguises, castration or harm to Don Foster were not mentioned (R. 1111).

Jean went to California to deliver a horse on either the 22nd or 23rd of September 1962 (R. 1150). LaRae moved out of the beauty shop on October 6th or 7th, 1962 (R. 1117). Jean was even tempered and never used violence even with the children (R. 1119). Her reputation in the community for being peaceful and law abiding is good (R. 1119). Justice of the Peace Mel Humphreys is Vaughn Humphreys' father (R. 1120). On cross examination she explained the plan of the living quarters of the rest home (R. 1121 et seq) and the practice of the business as to writing checks (R. 1182 et seq). She and Jean discussed personal problems including LaRae and Cheryl Ann. Both she and Jean were concerned over Cheryl Ann and the effect the Foster-Peterson relationship was having on her (R. 1143). Ellen didn't discuss hiring a detective with Jean (R. 1144). She had told Jean she didn't think Foster would marry La Rae (R. 1150). Jean wore slacks around the nursing home with boots and oxfords with a 2" heel. She always wore her hair short. Jean used lipstick and liquid makeup when she went out (R. 1165). Jean does chores around the farm. Ellen saw Jean bowl once in 1947 (R. 1167) Jean can't put a horse in a trailer

alone and had never owned a man's suit (R. 1169). Jean had a full length leather coat but never had a white, beige or tan trench coat (R. 1181). Vaughn Humphreys had a beige trench coat (R. 1181). So did Ellen's sons while they were living there (R. 1182). Jean has a blue ski jacket (R. 1181).

Mildred Sinclair testified she is Jean's sister-in-law and has lived at the nursing home since coming from California December 2, 1962 (R. 1185). On January 4, 1963 Jean was home at 4:30 p.m. when Mildred and her husband arrived from Sandy. She left at 6:30 or 7:00 o'clock and returned about 7:45 and left again. Jean returned home the second time about 8:30 and stayed the balance of the night. They ate pizza and watched TV. Jean worked on the books (R. 1189). Mildred went to bed about 2:30 a.m., January 5th after helping fix the pills for the patients and feed the dogs (R. 1190). Jean was still up when Mildred went to bed. She was never out of Mildred's sight for a period of more than 10 minutes between 8:30 p.m. January 4th and 2:30 a.m. on January 5th (R. 1191). She woke Jean up on the couch in the living room at 8:30 a.m. January 5th (R. 1163). Jean was at Mildred's home in California the latter part of September with a truck and horse trailer (R. 1197). Mildred can't remember the TV shows January 4th except Mitch Miller and Jack Paar (R. 1104). She saw nurse Reva Nelson at 8:30 p.m. while she was fixing Jean's pizza and Nurse Eatchell about 1:00 and 1:30 a.m. Nurse Nelson left at 10:00 p.m. Mildred's husband Lamond woke her up at one time during the night (R. 1210) while investigating some music playing

(R. 1212). On the morning of January 5th she heard the help talking about Foster's death and LaRae Peterson. She woke Jean to find out if it was the same LaRae Peterson who had run the beauty shop (R. 1214).

Gerretadina Combee was called for the defense. She had testified earlier. She and her husband came home on January 4th about 12:00 midnight. She saw a car in front of her home with a person on the driver's side. She didn't know whether it was a man or woman. While she was getting ready for bed she heard a shot (R. 1228). She saw someone run around the car screaming "she killed me — she killed him — help." She and Mr. Combee ran to the fence. Her husband had a flashlight. La Rae Peterson stated "I was thinking he shot himself. Look what he had in his hand." Mrs. Combee saw a small black pistol. LaRae gave it to a man standing near the front of the car. Foster was lying on the ground shot. Mrs. Combee told the police about the gun (R. 1231). Pieter Combee echoed his wife's testimony.

Lamond Sinclair testified he is the brother of the defendant and has been living at the rest home since December 2, 1962 (R. 1249). He never heard Carl Kuehne call Jean "King" (R. 1251). On January 4th he saw Jean around 5:00 p.m. in the living room of the rest home (R. 1251). Jean left twice in the Buick sedan. The station wagon was disabled (R. 1252). She left about 7:00 p.m. and was gone about an hour and then left again about 8:00 for 20 minutes to one-half hour she was back before 9:00 o'clock. Lamond, his wife and Jean ate pizza and watched TV. Jean did other things

(R. 1254). She was still there when he went to bed after TV signed off (R. 1258). Jean was in Chula Vista, California in late September (R. 1260). On the night of January 4th she was wearing light slacks and a jacket. She had one telephone call that evening (R. 1263). He remembered the Mitch Miller show and the Jack Parr show. He retired just after TV signed off (R. 1264). He saw Thelma Eatchell when he got up to investigate a noise in the early morning hours. Thelma was sitting at the dining room table. He went in the living room. Jean was asleep in a chair (R. 1266).

Thayle Olsen testified she had known Jean since 1951, sees her occasionally. She had known Vaughn Humphreys since 1952 or 1953. Knows Ellen Rawlins and LaRae Peterson (R. 1276). In the summer of 1962 she hired a detective to follow Peterson and Don Foster. She did this in conjunction with Ellen Rawlins (R. 1278). She had not told Jean about the detective prior to January 5, 1963. She didn't have a conversation with Jean in Vaughn Humphreys presence involving LaRae Peterson (R. 1280). She did go to dinner with Jean and Humphreys in the fall of 1962 after a football game. Vaughn drank all her Scotch (R. 1292). She has never known Jean to wear a man's suit or a homberg hat (R. 1283). She called Foster's wife and Foster's wife called her back (R. 1289). Both Jean and Ellen were good friends of LaRae Peterson and both were concerned over Cheryl Ann (R. 1293). Jean stayed at Thayle's place in Sandy while Thayle was on a trip. Thayle and Jean had been on trips to Mexico together.

Glen Cahoon is a Sgt. of homicide squad and had testified previously. He now testified he saw Kuehne first on January 11th. Kuehne was detained 5 or 6 hours and then put in jail over night and released the next morning (R. 1300). Kuehne was not informed of his constitutional rights (R. 1301). Cahoon remembers a conversation regarding a possible pardon for Kuehne on a former felony charge in Utah (R. 1302). Kuehne was never arrested as an accessory or accomplice though the police knew he had procured and disposed of the shells and weapon (R. 1304.) Jean Sinclair was brought to the police station for questioning on January 9th and questioned for 2-1/2 hours. She was questioned regarding her relationship with LaRae Peterson and Don Foster (R. 1309-10). She didn't refuse to answer any question (R. 1310). She submitted to a polygraph test (R. 1311). She was released that evening (R. 1314). Vaughn Humphreys was in on January 11th and went with officer Longson to pick up Carl Kuehne (R. 1312). Cahoon saw Humphreys up Emigration Canyon offering to assist in the gun search twice prior to the date he and Kuehne found the gun stock. Humphreys was with Kuehne on both occasions (R. 1315). Kuehne and Humphreys came up on their own without being asked to participate. Cahoon had a conversation with Kuehne about the use of the National Guard troops in the search for the gun. This conversation took place two or three days before Kuehne and Humphreys brought the gun stock to the police station (R. 1317).

Jean Sinclair testified she is the defendant, she lives at 2300 South State Street, Salt Lake City, Utah,

and is a nursing home operator in a partnership with Ellen Rawlins McHenry since 1947. She resides at the nursing home (R. 1328). Mrs. Rawlins, husband and children had lived there until the children grew up and the husband died of Silicosis. Jean's brother and sister-in-law came to live with her in December, 1962 (R. 1329). She described the physical plan of the nursing home (R. 1330-1337). She met Don Foster in the summer of 1962 at LaRae's beauty shop after Foster and LaRae returned from Las Vegas. She saw Foster three or four times in all (R. 1341). She was aware LaRae and Foster had exchanged rings. She never objected to LaRae marrying Foster (R. 1343). She never saw Foster after LaRae moved out of the shop on October 6th. Jean went to California about September 22nd to ship a horse to Hawaii, shipping date was scheduled for September 26 (R. 1345).

She and LaRae discussed LaRae's leaving after Jean returned from California in October, both over the phone and in the shop. Foster did not become a subject of the conversation (R. 1350). LaRae licensed the shop for 1963 after she had moved out (R. 1350). LaRae was brought to the rest home by Jean's partner Ellen. When the shop was set up Jean and Ellen furnished the room and utilities, LaRae the equipment (R. 1351-2). LaRae did the patients' hair and had her own business the balance of the time (R. 1352). LaRae never stayed there at nights (R. 1353). LaRae went with other men many times. Two of these, Peay and Craven, had contemplated marriage with LaRae (R. 1355). Jean had a disagreement with LaRae about the child Cheryl Ann

ignoring LaRae and transferring her affection to Jean and Ellen (R. 1356-7). She admitted writing the note, Exhibit 30, in January or February, 1961, long before LaRae met Don Foster (R. 1358). LaRae went with many men but with Peay, Craven, Berry and Foster more than the others. Jean never had any animosity or resentment for these four men (R. 1360). There was a conversation with Vaughn Humphreys in Ellen's presence about possible adoption of Cheryl Ann. The subject of adoption was brought up by Humphreys (R. 1362). Humphreys carried a gun and on one occasion wanted to lie in wait to shoot someone stealing gas from Jean's Cabana truck (R. 1363). Jean, Ellen and Vaughn had a discussion regarding Danites and the book "The Twenty-Seventh Wife" but neither castration nor harm to Foster were mentioned (R. 1365). Jean never mentioned Danites to Carl Kuehne (R. 1365).

Vaughn had wanted to go with LaRae Peterson. Jean told him he was wasting his time, LaRae was too expensive. Vaughn often complained with respect to LaRae — "Foster is getting it and I'm not" (R. 1368). Jean and Vaughn had an argument on a hunting trip in late November over Vaughn's vulgar language. Jean told him to walk home and called him stupid. Vaughn rode home with Jean and didn't come around again until Christmas when Bill Rawlins was there (R. 1371). She denied any conversation with Kuehne regarding a jacket of Vaughn's (R. 1371). She had a phone conversation with Vaughn regarding his spreading rumors that she was a Lesbian. Vaughn denied he had done this (R. 1373). Vaughn left his jacket in the truck on the last

deer hunt and never came around for it nor did he pick it up at Christmas when he came to see Bill Rawlins (R. 1373). Jean denied ever having mentioned harm to Don Foster to either Kuehne or Humphreys (R. 1376). Jean met Kuehne in October, 1960 on a deer hunt with Vaughn. He was around occasionally in 1961 and kept venison in Jean's locker that fall. He came around frequently starting in August or September of 1962. Kuehne never mentioned his prison record to Jean until November of 1962 (R. 1378) when he was angry at his step son for "messing up my pardon." He threatened to kill the boy (R. 1379). She denied that she ever discussed Foster with Kuehne, that she ever offered he or any person money to kill or harm anybody (R. 1380). She never discussed LaRae Peterson or Cheryl Ann with Kuehne (R. 1380), nor had she been to Kearns, the Turner house or the Susan Kay Arms with Kuehne. LaRae's house in Kearns is green or grey (R. 1381). Jean has never ridden past Foster's mother's house with Kuehne. She has been to the Susan Kay apartments twice — once during the preliminary hearing and once with the jury during this trial (R. 1383). She usually wears jeans or slacks and boots or oxfords around the rest home. Ellen gave her the jacket, Exhibit 44 for her birthday. She wears it to horse shows, auctions, and Spur meetings (R. 1386). She has bought mens suits for patients but has never owned one. She bought two suits for patients in June on Main Street below Third South (R. 1387). Kuehne always had a beard during her acquaintance with him. She went to a pawn shop with Kuehne to buy a hunting knife when they

were in town for leather. This was in November (R. 1389). She denied having Kuehne buy a shot gun or shells (R. 1390). She has several guns at home including a 12-gauge shot gun owned by Billy Rawlins. Also many types of ammunition (R. 1391).

She paid Kuehne \$28.00, Exhibit No 33, for leather work on the 3rd day of January and wrote the check sitting on the couch in Kuehne's apartment. She did not see Kuehne on the 4th of January, the day Billy Rawlins was hurt (R. 1394). Jean wrote the check, Exhibit No. 33, on the couch in Kuehne's apartment on January 3rd (R. 1428). The check Exhibit No. 37 is a check with a higher serial number and an earlier date (R. 1428). She did sign checks for the use of the rest home and she, Ellen or Joane would complete them. In each of six (6) pairs of checks in evidence the date did not necessarily correspond with the serial number and time of delivery (R. 1429). Jean's back was injured in July, 1946. She had two operations on the lower back. She was paralyzed from the hips down for a time and then used two canes. After the second operation she could walk with the canes (R. 1431). She had dates with one man after her injury. She went to a driving range with him but after one swing was unable to continue. She also went bowling once in 1947 but was unable to continue (R. 1432). She tried bowling again in June, 1962 but was unable to complete a line (R. 1433). She rides horses but cannot mount without assistance. She has tried to run but can't (R. 1433). She can walk up stairs but cannot run (R. 1434). She is 5' 3-1/2" with her shoes on. She has been losing weight since 1961. Prob-

ably weighs about 130 lbs. (R. 1435). She lost weight most rapidly in October, 1961 and March, 1962 while having dental trouble (R. 1079).

She had a conversation with Humphreys in July, 1962 regarding police officers and adoption of Cheryl Ann. Vaughn started the conversation and both the police and adoption ideas were his (R. 1437). She did not see Kuehne on January 4th. She was first aware of Thayle Olsen and Ellen hiring a detective on January 5th when they told her (R. 1438). On January 4th she went to the Lunt Motel to see Bill Rawlins between 5:30 and 6:00 p.m. (R. 1438). She went in the Roadmaster Buick, talked to Billy and his wife and saw his child. She was there 20 to 30 minutes and returned to the rest home to get epsom salts to soak Bill's broken finger. She left the epsom salts on the door step when Bill and his wife were out and returned to the rest home (R. 1439). She arrived home while Mitch Miller was on TV, ate pizza, worked on the books and watched TV. Her brother and sister-in-law were there. Her brother went to bed shortly after TV went off. She and Mildred fed the dogs and put out the patient pills. Mildred went to bed about 2:30 a.m. (R. 1441) January 5th. She saw Reva start down the stairs from the nursing home proper around 10:00 o'clock. She received a call from her book-keeper Bessie Anderson after 10:00 o'clock (R. 1441). There are four telephones in the rest home.

Jean called Ellen at the bowling alley regarding the injury to Billy about 9:30 (R. 1442). That night Jean was wearing western riding pants, a light green shirt

and light jacket. She owns a blue ski parka which she had worn in Sandy and on deer hunts with Carl Kuehne and Vaughn Humphreys (R. 1444). She owns a full length light tan leather coat but no cloth trench coat. She took cleaning to Murray January 5th about 10:30 to 11:00 o'clock. The cleaning belonged to both she and the patients and included a trench coat (R. 1444). The coat is probably still at the rest home (R. 1445). She has never fired a shot gun (R. 1446). She did not shoot Foster nor conspire with Kuehne to shoot Foster (R. 1446).

On cross examination she testified she changed her name in 1959 in the Third District Court. She is 45 years old, has worn her hair short for many years. She wears both shirts and slacks, and dresses. Dresses when out or working away from the rest home (R. 1447). She has known Humphreys for 15 years along with Ellen's boys and has had problems with Vaughn and his vulgar mouth (R. 1449-51). Vaughn wanted LaRae and other girls (R. 1452). Jean went to California around September 22, 1962 to deliver a horse (R. 1455). She stopped in Las Vegas at a motel, paid cash, and the next day drove to the Pales Verdes hills, stabled the horse and she stayed in Hollywood. She contacted Matson Lines to arrange shipment (R. 1455). Went to her brother's in Chula Vista, California, brought her brother and brother's horse back to Salt Lake (R. 1456). She knows Thayle Olsen and Thayle was with her when she bought two (2) suits for patients at a sale. She kept one suit and returned the other. She paid cash. She bought the suits because the patients were small and needed short

jackets. She tried on the jackets. Doesn't remember about the pant. Thayle gave information for delivery—Exhibit 53 (R. 1464). Neither the coat nor pants were altered to fit her (R. 1465). She has only been accused of being a Lesbian in this court room (R. 1466). When asked as to "homosexual acts on LaRae Peterson or she with you" she claimed privilege. She was never at the Susan Kay Arms prior to her arrest (R. 1465). She admitted Exhibit 30 was her hand writing. She had written the note after a heated discussion with LaRae about Cheryl Ann's neglect and transfer of affection. Jean claimed privilege under the 5th amendment to three questions regarding the note (Exhibit 30) (R. 1472). The note was written prior to when LaRae met Foster (R. 1473). LaRae was going with Cravens at the time of the note. She had advised LaRae to marry Craven to make a home for Cheryl Ann (R. 1474).

Jean was at Kuehne's on December 28th with the witness Wetzel. She brought a fifth of Irish whiskey for LaRae Kuehne. Jean had a sip of wine. She left the bottle with Kuehne for his wife (R. 1478). She went to sleep on the couch and left at 7:00 a.m. the next morning (R. 1479). Jean and Kuehne went hunting on December 30th. She saw him at the rest home on New Year's Eve with three (3) other people (R. 1480), and did not see him again until January 3rd (R. 1481). She explained check procedure on the rest home accounts (R. 1482-86). Vaughn Humphreys was having dinner with Bill Rawlins and his wife when Jean left the epsom salts (R. 1491). Jean was not aware prior to January 5th that Thayle Olsen had hired a detective (R. 1494).

She has passed Foster's mother's place on her way to Joane's but doesn't know what day. She did not drive back and forth (R. 1498). She has not been able to move faster than a walk since 1946 and has to glance down when walking. She swims, has not golfed but went to a driving range when she took one swing and quit (R. 1500). She knows Colonel Olson, drill master of the Silver Spurs. She doesn't saddle her own horse. She tries to do the drills (R. 1505) but has dropped out of several drills (R. 1507). She wrote a check for the horse's board in California on September 29, 1962. The check, Exhibit No. 57, was the board for 5 days (R. 1512). Jean explained the narcotic procedure at the rest home (R. 1517-24). She saw Reva Nelson coming down the stairs at 10:00 o'clock on January 4th (R. 1525). She saw Thelma Eatchell when she was fixing Austin's 1:00 o'clock shot. She did not change clothes on the night of January 4th or early morning of the 5th other than shoes (R. 1536). Don Foster was not mentioned while she was on the polygraph at the police station (R. 1542).

At a recess counsel made Motion for a mistrial on the basis of a magazine article in Startling Detective distributed in the Salt Lake area during the trial although it was a July issue. (See R. 1546 et seq)

She fell in the bathtub while in jail and injured her back (R. 1584). The stairs from the rest home to the basement living quarters are so set up that you can see progressively larger portions of the hall with each step

taken down the stairs (R. 1561). You can't see into the rest home living room from the hallway (R. 1566).

Morgan Pace testified he knows Don Foster, LaRae Peterson and Jean Sinclair. He has seen fringed leather jackets similar to Jean's, Exhibit 44, at the Susan Kay Arms on other women.

William Wyler testified he is a loan officer at Zions Savings & Loan, Brig. Gen. USNG retired, has known Jean since 1944 or 1945. Her reputation in the community as to being peaceable is good.

Buell G. Bryan identified shot gun Exhibit D-59 and shot gun shell, Exhibit D-60, from the rest home and demonstrated the gun could be loaded and has a firing pin.

Dewey Fillis, police officer, testified he is captain in charge of detectives. Vaughn Humphreys approached him Wednesday, January 9th at a bowling alley with regard to Jean Sinclair and informed him Jean had approached Humphreys and Kuehne about the Foster-Peterson relationship. Humphreys was present during Kuehne interrogation and may have entered into the interrogation (R. 1581). Fillis had a conversation with Kuehne about a pardon for a former felony (R. 1583). Kuehne told Fillis he had purchased the shot gun, had been three (3) places with Sinclair to determine best place to shoot Foster — had shown her how to load the gun — had sawed off the gun — had emptied the shells, and had disposed of the gun shells. Kuehne was never

placed under arrest (R. 1585-86). When questioned why he had not placed Kuehne under arrest, an objection was sustained by the Court (R. 1585). No complaint was ever filed against Kuehne.

Richard C. Dibblee testified he was chief criminal deputy of Salt Lake County Attorney's office in charge of the Sinclair case through preliminary hearing. He authorized the complaint signed against Miss Sinclair. He knew of Kuehne's statement — that Kuehne had gone various places to determine the best place to shoot Foster. He had purchased the gun — sawed it off — taken the loads out of 24 shells prior to the killing — showed Jean how to load the gun and later disposed of the gun and shells (R. 1591). When asked why he didn't have a complaint signed against Kuehne, the Court sustained the District Attorney's objection as being immaterial (R. 1592).

Bessie Anderson testified she is an auditor for the State Tax Commission and has known Jean since 1950. She had handled the nursing home taxes for the past three years (R. 1592). On January 4th at about 10.30 she called Jean at the nursing home and had a discussion with her with regard to quarterly taxes (R. 1594). The business had to do with returns due January 31st (R. 1595). She places the time by the 10:00 o'clock news on January 4th (R. 1596) and the date by dismantling of her Christmas tree. She frequently called Jean at night because that was the only time she could get her (R. 1593).

Madison H. Thomas is a physician specializing in neurology and has been certified in his specialty since 1949; is a member of the staff of the LDS Hospital and is consultant to the Utah State Hospital and Wyoming State Hospital (R. 1396). He examined Jean Sinclair on February 13th and reviewed the hospital records relative to two (2) spinal surgeries in 1946 (R. 1397).

She has impairment of her lower extremities and sensory impairment of the buttocks and saddle area (R. 1398). She has an impaired walk. No running could be elicited. He would not expect a person in her condition to be able to run over an area without a grotesque or stooped appearance (R. 14023). He talked with Dr. Stewart Wright who had done one of the spinal operations on Jean Sinclair. It would seem unlikely for her to be able to run in the usual fashion, but not impossible to run (R. 1414). The ankle jerk is entirely lacking in the left ankle and just perceptible in the right (R. 1417). A person under stress with a neurological disability will attempt things beyond what he has learned is his limit and will stumble or fall and his performance may be worse instead of better. It is more likely that a person with a neurological disability could move faster over an area in which they could see where they were putting their feet than over a dark area (R. 1419).

REBUTTAL

LaVon Turner testified she is Don Foster's mother and lives at 47 West Sunset Avenue which is between Main Street and West Temple. On Father's Day, 1962, she had her son Don, LaRae Peterson and Cheryl Ann Peterson to dinner. She saw a blue and white station wagon driving by the house a couple of times very slowly. (R. 1605). Her home is about one and one-half blocks west of Jean's nursing home and several blocks south (R. 1604). She doesn't know whether the Buick was a Roadmaster, Century or Super (R. 1604). She identified Exhibit No. 50, the defendant's station wagon as the car she saw but said the top was white and the bottom was blue. The station wagon in the exhibit is blue over white (R. 1605).

Mel Humphreys testified he lives at 2164 South 4th East, Salt Lake City, Utah and is Justice of the Peace. He is the father of Vaughn Humphreys. One of his two (2) automobiles is a 1954 Chevrolet sedan with a light blue body and an off-white top bearing 1963 Utah license number DD 9207 (R. 1607). No one but he ever drives the automobile. His son Vaughn has a 1955 Chevrolet sedan with the same colors (R. 1610).

Floyd Bertleson testified he was with John Storey and two (2) girls at the Susan Kay apartments when they heard a shot and a scream. After seeing Foster was shot he went to his own car, got a derringer and went back to the Foster car. He did not receive a gun from LaRae Peterson, nor was he between the chain link fence

and the car while he had his gun. (The derringer was not offered in evidence.)

Victor L. Olsen is an ex-cavalry man retired from the army. He is drill master for the Silver Spurs riding organization. Jean Sinclair belonged to the Silver Spurs. He described the exercises and drills the Silver Spurs went through and said Jean participated (R. 1623-24). He has never seen Jean mount or dismount from a horse (R. 1628).

LaRae Kuehne, previously sworn, testified in rebuttal and stated, over objection, that Mildred Sinclair had told her after the killing "you know, LaRae, even if sis wasn't there that night Mond and I would say she was" (R. 1633). The witness can't remember her own part of the conversation but could remember what Mildred said "because I went home and wrote it down" (R. 1635).

Bruno F. Romano, private detective, testified that Thayle Olsen hired him to follow Don Foster. The Court, over objection, allowed Romano to repeat the substances of the conversations with Thayle Olsen (R. 1637-38).

Vaughn Humphreys, recalled, testified he had seen Jean get on and off a horse at various times (R. 1642). That he has a fawn colored three-quarter length trench coat (R. 1647).

Beth Foster testified regarding telephone conversations with Thayle Olsen relative to Foster and LaRae Peterson (R. 1649-50). Mrs. Foster and her husband had never made plans to finish the divorce and she was still keeping books for Foster at the time of his death (R. 1652).

Reva Nelson testified that she worked at Jean's rest home and knows both Jean and Ellen. She worked January 4th until 10:00 p.m. when Thelma Eatchell came on to relieve her (R. 1655). At about 8:20 p.m. she saw Mildred Sinclair and Jean in the kitchen. Mildred was warming pizza for Jean. Reva came down stairs again at 10:10, she got her coat and went home. She did not see anyone but could hear people talking in the living room (R. 1658). She said you can't see much of the hall from the top of the stair but can see a little more with each step you take down.

Tim Monroe, News Editor for KCPX-TV, showed moving picture films, Exhibit Nos. 62 and 63, of the defendant walking from the jail to the courthouse on January 21, 1963, and from the courthouse to the jail April 15, 1963.

Kermit DuBois testified he is a clothing salesman at English Tailors. He saw Jean Sinclair last June or July in the Salt Lake City store with another lady. Jean was dressed in riding trousers and perhaps a jacket. She bought two (2) suits. He identified Exhibit Nos. 53 and 54 as sales slips for the purchases. He thought

she was a man (R. 1683). He testified that he fitted both suits on her but admitted that one had been returned and when the District Attorney had her try the suit coat on admitted it did not fit. (The suit coat was not admitted in evidence.)

LaRae Peterson called in rebuttal, said she did not give anyone a pistol at the scene of the shooting on January 5th. The only thing she picked up was Foster's keys (R. 1697). Pearl Maxfield picked up Don's cigarettes (R. 1696). Foster had many guns in the apartment. He carried a 38-revolver in his brief case which was normally in the car.

Thelma Eatshell knows Jean Sinclair; has worked at the rest home from July, 1961 to January, 1963 when she quit (R. 1700). On January 4, 1963, she came to work at 10:00 p.m. and relieved Reva Nelson. Narcotic shots were given to patients on order left on the patient chart and she recorded the day and the time the shots were given. The narcotic chart was in the hall of the living quarters by the sterilizer (R. 1705). In preparing a shot the syringe had to be boiled for 3 minutes and then allowed to cool (R. 1707). She heard voices in the living room when she prepared a shot shortly after 10:00 p.m. on January 4th but didn't recognize them (R. 1710). At about twenty (20) minutes to 12, January 4th, she called down the dumbwaiter for Mildred three (3) times but got no answer (R. 1750). She talked to Lamond Sinclair when she came on at 10:00 p.m. She saw Jean's legs and feet at the bottom of the stairs at about 1:20

a.m., January 5th when she went down to prepare a shot of Demerol for patient Harris. After she had given the shot to Harris she came down the stairs again and talked to Jean. She said Jean had changed clothes. After she talked to Jean she proceeded to get out the Demerol for May Austin's 1:00 a.m. shot (R. 1722). After she gave the second shot she came down and made the entrance on the narotic sheet at 1:30 a.m. (R. 1724). The nursing notes, Exhibit D-67, show May Austin was given her shot before Harris was given his. The Austin shot is charted at 1:00 a.m. Both shots were given after she saw Jean's legs at the foot of the stairs (R. 1743). You can't see the kitchen door from the top of the stair but can see a little more of the hall each time you take a step down (R. 144). When Thelma saw Jean's legs Jean was wearing blue levis and cowboy boots. Thelma testified the times on the nursing charts are wrong but admits they are her hand writing. She can't recollect what she did nor to whom she gave shots on shifts either prior to January 4th or shifts subsequent to January 4th or 5th (R. 1749-50).

POINT I

THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO DISMISS AT THE END OF THE STATE'S CASE.

POINT II

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

POINT III

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT CARL KUEHNE WAS AN ACCOMPLICE AS A MATTER OF LAW.

The defendant moved to dismiss at the end of the State's case on the grounds that Carl Kuehne was an accomplice as a matter of law and that his testimony had not been corroborated (R. 1016, et seq). The defendant further moved for a directed verdict when both parties had rested on the same reasons and grounds and thereafter requested that the Court instruct the jury that Carl Kuehne was an accomplice as a matter of law. The Court denied both motions and thereafter denied a similar motion as one of the bases for defendant's motion for a new trial.

These points are so interrelated that they are argued under one heading.

76-1-44, Utah Code Annotated 1953 defines principals, has the effect of making aiders and abettors principals and does away with accessories before the fact. The Code further obviates the necessity of persons being

at the scene of the crime to make one an aider and abettor. The statute reads as follows:

“All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission or, not being present, have advised and encouraged its commission, and all persons counseling, advising or encouraging children under the age of fourteen years, lunatics or idiots to commit any crime, and all persons who by fraud, contrivance or force occasion the drunkenness of another for the purpose of causing him to commit any crime, or who by threats, menaces, command or coercion compel another to commit any crime, are principals in any crime so committed.”

77-31-18, U.C.A. 1953, provides that a defendant cannot be convicted on the uncorroborated testimony of an accomplice. See Point IV citing cases. Kuehne's own evidence makes him an aider and abettor and therefore an accomplice. The question of who is an accomplice is a question of law for the Court.

“The question of who is an accomplice within the rule requiring corroboration of their testimony is a question of law for the Court where the facts as to witnesses' participation are clear and undisputed and one of fact for the jury where such facts are subject to different inferences.” *State v. Ripley*, 189 Tenn. 681, 227 SW 2d 26, 19 A.L.R. 1347 with Ann.

“Where the facts are in a dispute or where the acts and conduct of the witness are admitted, it becomes a question of law for the Court to say whether those acts and fact make the witness an

accomplice." 19 A.L.R. 1355 citing cases. Utah approves the above. See *State v. Corales*, 74 Utah 944, 277 P. 203; *State v. Somers*, 97 Utah 540, 90 P. 273.

In the instant case there is no conflict in what the acts done by Kuehne were and they are subject to only one inference, that he aided and assisted in preparation for the killing of Don Foster. According to his testimony, he went three (3) different places with the defendant to advise her of the best place to shoot Foster (R. 539-40-41, 603, 624, 674-75-76). He purchased a gun and shells at her request. Doing so, he gave a false name and address because "he knew what she was going to use the gun for" (R. 683). At the time he bought the gun he knew the defendant already had a shot gun (R. 684). He knew it was her "avowed purpose to kill Don Foster" (R. 716). He sawed off the gun at her request on the night of January 4th (R. 626). He emptied 24 of the 25 shells before the shooting in preparation to dispose of them (R. 628-29). He shaved off his beard because he thought the cops would be after her and get him for the killing. He procured an alibi witness because she was going to shoot Foster on December 28th. He expressed no surprise when she arrived at his home after the shooting and ordered him to dispose of the gun and shells because he was an accomplice before and after the fact. He admittedly knew the object of each step of the preparation. He did not attempt to withdraw from the scheme or plan as late as January 4th when she left his apartment to "kill myself a son-of-a-bitch."

As set forth above, 76-1-44, U.C.A. 1953 makes aiders and abettors principals and obviates the necessity of presence at the crime. Aiding and abetting "means to assist the perpetrator of the crime." *U.S. v. Williams*, 71 S. Ct. 595, 341 U.S. 58, 95 L. Ed.

Aiding and abetting and concealing are not mere terms for presupposing the existence of an argument but such terms have a broader application making a defendant a principal when he consciously shares in a criminal act regardless of existence of a conspiracy. *Per-aria v. U.S.*, 74 S. Ct. 358, 347 U.S. 1, 98 L. Ed.

To instigate means to aid, promote, or encourage commission of an offense and one of its synonyms is abet. *Nye & Nissen v. U.S.*, 168 F. 2d 846, Aff. 698 S. Ct. 766, 336 U.S. 613. A person aiding and abetting in commission of a crime can be convicted as principal under statute without regard to conspiracy or concert of action. *Nye & Nissen v. U.S.*, supra. A defendant aids or abets a person in committing an unlawful act so as to be guilty as a principal by aiding such person by acts or encouraging such person by words with knowledge of the wrongful purpose of such person. *People v. LaGrant* (Cal.), 172 P. 2d 554). See also *People v. Cowan*, 101 P. 2d 125; *People v. Green* (Wash.), 221 P. 2d 127. One aiding in or abetting by word or deed preparation for or encouraging an unlawful act resulting in another's death, is as guilty as the person committing the crime. *Cline v. State*, 148 S. 172, 25 Ala. App. 143. Criminal responsibility as at common law extends to any person who assists in the commission of the offense, counsels or

procures in the committing or assists in the commission of the offense. *Adkins v. Commonwealth*, 9 SE 2d 349, 131 A.L.R. 1312.

The following cases do not require presence at the crime. *Crow v. State*, 79 SW 2d 75, 190 Ark. 222, a murder case. Not present but a principal. *People v. Williams*, 248 P. 1078, a California case. Not present but aider and abettor. *State v. Robinett*, 279 SW 697 (Tex.), homicide encouraged by acts or deeds advising and counseling though not at scene. *State v. Allison*, 156 SE 547, 200 NC 190. Defendant gave gun to paramour that he might escape. A sheriff was killed in the escape. She was guilty as an accessory though not present. *State v. Smith*, 281 SW 285.

There are numerous holdings that a single act prior to a crime and away from the place of commission are sufficient to constitute one an accomplice or principal. A person made a key for principals in a theft from a railroad car; held guilty as an accomplice. *Bass v. State*, 62 SW 2d 127.

Miss Sinclair took the stand and denied any criminal connection with Kuehne.

“The fact that the defendant takes the stand and denies any connection with the crime or with the witness does not, however, create a disputed fact set up within the rule so as to require submission of the question to the jury as the evidence in regard to the witnesses’ connection with the crime is otherwise uncontested.” *Carter v. State* (Okla.), 28 P.2d 581, Ann. at 19 A.L.R. 1354.

There is no conflict as to Kuehne's participation as an aider and abettor other than the defendant's denial of her connection with Kuehne and his statement that he didn't think she was going to do it, as she had threatened before.

It is pointed out that at the end of the State's case when the Motion to Dismiss was made there was no conflict whatsoever.

It was error to submit the question of law to the jury. It should have been determined as a matter of law and either defendant's motion for a directed verdict granted or the question of corroborating evidence should have been submitted to the jury under proper instructions as stated in *Carter v. State*, supra, Ann. 19 A.L.R. 2d at page 1354.

“Submitting the question of accomplicity to a jury may confuse them. They might erroneously conclude that an accomplice in fact is not an accomplice and return a verdict of guilty without sufficient corroboration, which they might not have done if they had understood clearly that the witness was as a matter of law an accomplice and that corroboration was necessary.”

McKinney v. State, C.C.A. Okla., 201 P. 673, is a very clearly reasoned case with regard to instructions on accomplices. The Court states at page 676:

“Where the evidence showing that persons are accomplices is undisputed, the issue is one of law, and not of fact” citing *Cudjoe v. State*, 12 Okla. Criminal 246, 154 P. 500, L.R.A. 1916 F., 1251.

The Court further states at page 677 :

“For the error of the Court in failing to instruct the jury, as a matter of law, that Tidwell was an accomplice, and for failing to give appropriate instructions as to whether Mrs. Gregory was an accomplice, this case is reversed and remanded.”

It is interesting to note that Mrs. Gregory's only participation in the crime was furnishing one of the principals with food while he was waiting for a convenient time to commit the robbery charged. The only reason the Court held that there was a question of fact regarding Mrs. Gregory's accomplicity was due to a statute, Revised Laws of Oklahoma 2099, creating a presumption that she was acting under duress on the part of her husband. See also *Winfield v. State*, 44 Texas Criminal 475, 72 SW 182 :

“Where the undisputed evidence indicates that the witness is an accomplice, the trial Court has a right to charge the jury that the witness is an accomplice. Such charge is not on the weight of the evidence nor erroneous, and renders unnecessary any charge defining the law of accomplicity.”

The Court's instructions No. 9 and 10 made this confusion even more likely. See Point VII, this brief. This is especially true in a case such as that on an appeal where the entire fourteen days of testimony were infected with the innuendo of a homosexual relationship between the defendant and another witness, and the defendant was, in fact, being tried on a question of homo-

sexuality rather than homicide. Cases in our State, without exception, hold that corroboration of an accomplice's testimony is necessary, and that evidence showing motive or to cast grave suspicion on the defendant are not sufficient to corroborate. See Point IV.

The State's contention has been that Carl Kuehne was not an accomplice because he had no criminal intent, or in the alternative, that he didn't think that Jean Sinclair was going to kill Foster. The question of criminal intent is clear arising from his guilty knowledge of the purpose for which the gun was purchased, for which it was sawed off, why the shells were unloaded, that "she was going to kill herself a son-of-a-bitch," and that "son-of-a-bitch" was Don Foster.

The question of intent and criminal intent is discussed fully in Point VII. The intent is presumed. See *State v. Owen*, 119 Ore. 15, 244 P. 560; *Commonwealth v. Lowry*, 374 P. 594, 98 At. 2d 733, Certiorari Denied, 347 U.S. 914, 98 L. Ed. 1017, 74 S. Ct. 479. It is immaterial whether the aider and abettor has any direct or personal interest in the results of the crime or whether he will gain in any way thereby. *U.S. v. Moss*, 122 Fed. Supp. 523, reversed on other grounds. Cir. 3rd, 220 F. 2d 166.

If one person assisted another in doing a criminal act, it is presumed he shared the intent with which the person was doing the act. Wharton's Criminal Evidence, 12th Ed., Vol. 1, page 246. If a person advising or counseling the crime changes his mind he is still liable as an accessory if he does not inform the principal of

his changed desires. *State v. Allen*, 47 Conn. 121, Wharton's C.L. & P., 12th Ed. 239.

"In order to be an accessory before the fact it is necessary that the actor know that he is taking a step to promote the commission of a crime. It is not necessary that the accomplice before the fact have full knowledge of all the details of the criminal plan or the identity of all persons participating therein. It is not necessary that the defendant should have originated the design of committing the offense if the principal had previously formed the design, and the alleged accomplice encouraged him to carry it out by falsehood or otherwise, he is guilty as an accessory before the fact." Wharton's 12th Ed., citing *Keeleher v. State*, 10 Smedes & M (Miss.) 192.

POINT IV

THERE IS NO EVIDENCE TO CORROBORATE CARL KUEHNE'S TESTIMONY.

The law is well settled in this State, both by statute and case, that the defendant cannot be convicted on the testimony of an accomplice unless sufficiently corroborated by evidence tending to connect the defendant with the crime unaided by any inference from the testimony of the accomplice, and that it is not enough that such testimony show motive or possible motive or cast grave suspicion on the accused. 77-31-18, U.C.A. 1953; *State v. Irwin*, 101 Utah 365, 120 P. 2d 285; *State v. Bruener*, 106 Utah 49, 14 P. 2d 302; *State v. Somers*, 97 Utah 132, 80 P. 2d 273; *State v. Gardner*, 27 P. 2d 51, citing some thirty Utah cases.

The evidence must be to some material matter or fact which is inconsistent with innocence of the defendant . . . the evidence must do more than create a suspicion of the defendant's guilt, *State v. Laris*, 78 Utah 183, 2 P. 2d 283, and it is not enough to establish a motive merely, *Goodwin v. Commonwealth*, 256 Ky. 1, 75 SW 2d 567, unless there is corroborating evidence of a material fact tending to connect the defendant with the commission of the crime the Court should direct a verdict. *People v. Veits*, 79 Cal. App. 576, 250 P. 588; *State v. Arhantic*, 196 Iowa 223, 194 NW 209, both cited in *State v. Somers*, supra. The evidence is not corroborative if it needs interpretation and direction from the testimony of the accused. *People v. Thurmond* (Cal.), 338 P. 2d 473.

A careful scrutiny of the extensive record in the case on appeal shows it to be completely devoid of evidence to connect Jean Sinclair with the killing of Don Foster. There is no single fact or group of facts that connect her to the crime.

The State contended on argument of defense counsel's Motion to Dismiss (R. 1025 et seq):

(a) There are sufficient facts to prove beyond a reasonable doubt that Jean Sinclair had a sufficient motive to kill Don Foster.

(b) That Vaughn Humphreys' testimony regarding a discussion of Danites and a threat of castration to Don Foster shows an act calculated to inflict great bodily

harm and connects Jean Sinclair to the crime charged independent of Kuehne's testimony.

(c) That Gerritadina Combee's testimony that she saw the defendant walking away from the driveway south of the Susan Kay Apartments some weeks prior to the shooting when combined with Miss Sinclair's denial that she had been there, tends to connect her to the crime.

(d) That taking a coat with spots on it to the cleaners on January 5th tends to connect the defendant to the crime. On motion for directed verdict the State submitted the question to the Court without argument, making no additional claims of corroboration (R. 1851-52).

Discussing these items individually:

(a) While there is testimony aside from that of Kuehne showing a concern for LaRae Peterson's child due to LaRae's association with the deceased, and there are inferences arising from innuendo of a homosexual relationship between the defendant and LaRae Peterson which is substantiated only by unwarranted inference from refusal to answer questions on the ground of privilege, there is also similar inference of motive or possible motive in several other persons: Vaughn Humpherys from his desires for LaRae Peterson, Ellen McHenry in her concern for the Peterson child, Thayle Olsen in hiring a detective to follow LaRae Peterson. Possible motive is entirely consistent with innocence and the Utah cases hold without exception that establishment of mo-

tive is not sufficient to corroborate. *State v. Somers*, supra.

(b) The State claimed Vaughn Humphreys testified that the defendant propositioned him to disguise as Danites and assist she and Carl Kuehne to castrate Foster, and contends this is a threat to Foster which tends to connect her to the crime. On the interesting theory as set out by Mr. Banks (R. 1025):

“Here’s a place where Mr. Hatch and I don’t agree, but you’ll recall Vaughn Humphreys’ testimony as to his stating that Jean Sinclair contacted him and propositioned him to go along with herself and Carl Kuehne and castrate him. Now, you might on the surface say that only goes to motive. I don’t agree with that for this reason. It shows an act to inflict great bodily injury upon him which is included in murder in the second degree. Even though you don’t have an intent to kill, you have an intent to inflict great bodily injury which may result in death.

“For instance, supposing you castrated too far. Left there. Bleeds to death. Dies of shock. That’s just an example.”

This is neither the law nor the fact. An examination of Humphreys’ testimony indicates that the conversation referred to was not a request to do any affirmative act but merely a statement arising from the discussion of a book, and even construed at its worst, did not contemplate or intend bodily harm to Foster but a suggested means of frightening him. The applicable conversation is set forth at R. 733-34:

"A. Well, it was shortly just before deer season. She got me aside one night and she said 'Humphreys—

Q. Was this down at the house again?

A. Again always in her house.

Q. Was anyone else present?

A. No.

Q. Will you tell us what was said?

A. She said she'd been reading about some religion, Danites or Danites or something and they were some religion that didn't believe in—I don't know what they didn't believe in, but she said they purged the non-believers by castration. And she said that—she said, 'You know, it would be a good idea if you and I and Carl Kuehne would put some masks on some night and play like these Danites and go catch Don Foster and pull his pants down and put a knife to his testicles and tell him if he didn't leave LaRae Peterson alone that he'd lose them.' And then she said, 'He wouldn't be wanting to screw her any more if he thought he was going to lose those, would he?' And I said, 'King, you're nuts.' I said, 'It's utterly absurd. I don't want anything to do with it.' It sounded too fantastic for me to believe that someone would tell me something like that."

The conversation, if it happened, took place some months before the crime and the only possibility of connection would go to motive as heretofore discussed.

(c) Gerritadina Combee testified to seeing a woman whom she identified as the defendant walk out of the driveway south of the Susan Kay apartment house some two to three weeks prior to the killing (R. 903). Her

only identification was from a right rear view. She admits she never saw the face, could describe no part of the apparel but the leather jacket, and only saw the rear oblique view for a few steps (R. 921). The State contends that this is sufficient to independently connect her to the crime in that vicinity several weeks later, but see *State v. Baum*, 47 Utah 7, 151 P. 518. This is a burglary case wherein two accomplices testified the defendant was with them on the burglary. Fifty-four bottles of beer, a number of cans of corn and peas, and some jars of fruit were taken. The accomplices testified they hid them in brush near a trail on or near a ranch occupied by the defendant. About a week or ten days after that, two jars of fruit taken from the cellar were found hidden in the brush. About eighteen empty beer bottles were found in defendant's house, but it was not shown that they were the bottles taken from the cellar. A boy about eight years of age testified that he saw one of the accomplices and the defendant in the daytime with a horse and buggy drive into the brush, where the fruit jars were found, and heard what sounded like the rattle of bottles in a sack. He did not see anything taken in or out of the buggy. The accomplice, seeing the boy, told him to get for home, that he was snooping around to steal something, and he didn't want to catch him there any more. The Court held that this was not sufficient corroboration. Also see *State v. Somers*, supra, an arson case wherein the defendant was seen in the company of the accomplice within a half hour of the fire and was seen within a block of the fire within an hour before the fire. Held insufficient corroboration.

People v. Thurmond, supra, where the defendant was shown to have been in the apartment where the crimes were committed many times during the period over which the crimes (acts of perversion under California Penal Code 288(a)) were alleged to have been committed. Held insufficient corroboration in spite of contradictory admissions by the defendant.

(d) The State contends the fact that Jean Sinclair took certain articles of clothing to the cleaners on January 5th connects her directly to the crime, and much ado is made about certain grease spots on a trench coat among the articles taken to the cleaners. Without interpretation or direction from the testimony of the accomplice, there is nothing to connect either the spots or the coat to the crime. In fact, if Kuehne's testimony is worthy of belief, he didn't know the condition of the coat when she left his home at 11:00 p.m. on January 4th prior to the killing (R. 578-79). He stated at line 26,

"She went to the car and got what I *later learned* was a white coat, wrapped the gun in it, and said she was going to kill herself a son-of-a-bitch that night." (Emphasis added)

Again at R. 585, speaking of the coat after defendant's return at 1:00 o'clock:

"I seem to recollect that it was smudged with a bit of grease and dust."

When asked if he recollected where the grease and dust were located, he replied,

"Not too well. I'd hate to make a definite statement on it" (R. 585).

Spots on the coat mean nothing without being given direction and interpretation in the testimony of Kuehne. *People v. Thurmond*, supra.

While it is true that witness Harvey saw a person running from the scene of the shooting wearing a three-quarter length, light colored coat ending above or at the break of the knees (R. 986), he described the person as 5'6" to 5'10", a burley man with dark hair, heavy set and running very agilely (R. 988), without a limp or deformities. The defendant is 5'3½" with her shoes on, weighs 130 pounds, has grayish brown hair and a physical infirmity in the legs and buttocks. The State made no attempt to have Harvey identify Miss Sinclair as the person at the scene.

Witness Williams also testified to seeing in a rear view mirror a man in a light short coat coming between the knees and crotch. He couldn't identify the type of coat. The person had a cleft chin, long nose, hair on the darker side, and was seen at the north end of the Susan Kay Apartments at about 12:25 a.m. January 5th. He stated certain features resembled Miss Sinclair but could not point them out on cross examination when confronted by the defendant. The witness: "Would you please turn to the side. I see there isn't any S curve or cleft chin as pronounced" (R. 982). The State again made no effort to identify the defendant as the person seen by the witness.

During the trial there were several light colored trench coats hanging on the coat racks which were

pointed out by the prosecutor for type and comparison. There is also testimony that Vaughn Humphreys has a fawn colored three-quarter length trench coat, and that Billie Rawlins has such a coat. The cleaner identified the coat in his establishment as a full length overcoat. The State, other than inference, made no attempt to claim the coat at the cleaners was the same coat that was seen by either Williams or Harvey at the scene of the crime.

Without inference or interpretation from the testimony of Kuehne, the defendant's taking a coat to the cleaners on January 5th is consistent with innocence. It should also be noted that the articles were taken to her regular cleaners and not to a self-service cleaners or a strange establishment, and were not picked up for several days.

Again, *State v. Baum*, supra, cites the Utah law on the present fact situation set forth above, eighteen beer bottles similar to those stolen in the Baum case were found in the defendant's house. The Court states at page 519:

"We think the corroboration insufficient to connect the defendant with the offense of burglary, the offense with which he was charged and convicted. The empty bottles found in his house were not even shown to have been taken from the cellar."

State v. Gardner, 83 Utah 145, 27 P. 2d. 51, gives a thorough discussion of the tests of sufficiency of corroboration in this State, and cites from thirty Utah cases therein. *People v. Thurmond*, supra, a late Cali-

fornia case, discusses in detail all the State's claims for corroboration, pointing out in each instance that the contention without inference or interpretation from the testimony of an accomplice does no more than create a suspicion when related to acts with which the defendant was charged. In that case, defendant was convicted of twenty separate charges of perversion under California Penal Code 288(a), and undoubtedly as did this State's contention of a Lesbian relationship in the case on appeal, caused the jury to ignore the insufficiency of the evidence and convict on a basis of prejudice arising from what they considered to be unnatural and abhorrent. The Baum case cited above has not been overruled in this jurisdiction.

There is not a scintilla of evidence to corroborate Kuehne's testimony, and on the other hand, four witnesses testified to the presence of the defendant in her home some miles from the scene of the crime both at the time the crime was committed and during the period when Kuehne insists that she was at his apartment some thirty blocks away. See the testimony of Mildred Sinclair, Lamond Sinclair, Ellen Rawlins, and Bessie Anderson. Even State's witnesses Reva Nelson and Thelma Eatchell, used in rebuttal to impeach the alibi, tend to bear out defendant's presence at the rest home. Witness Nelson saw her there at 8:20 p.m. when Mildred Sinclair was warming pizza for Jean Sinclair (R. 1656), while Kuehne claims she was at his apartment from 8:30 to 11:00 p.m. Thelma Eatchel says she saw her when coming down the stairs at 1:20 a.m. January 5th to get the first of two shots for patients Austin and Harris. The

narcotic logs in evidence show by what witness Eatchell says was her handwriting that the second of the two shots, that given to Mae Austin, was recorded as given at 1:00 a.m.

The evidence that the State contends corroborates Kuehne's testimony in each case is consistent with the innocence of defendant and can do no more than cast a suspicion on the accused. The well settled law is that this is not sufficient. The Court should reverse and order the defendant discharged.

POINT V

THE COURT WAS IN ERROR IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A NEW TRIAL.

After verdict and prior to judgment, defendant made timely motion for new trial (R. 109-110) with supporting affidavits (R. 112 through 120) based on (a) three instances of jury misconduct, (b) the errors of the Court heretofore discussed as Points 1, 2, 3 and 4, and (c) newly discovered evidence.

The Court, after considering affidavits and counter affidavits and hearing arguments on the law, denied the motion.

The instances of jury misconduct were as follows:

(a) Richard Dibblee, the County Attorney who handled the preliminary hearing, admittedly shook hands with an alternate juror in the hall outside the courtroom and had a conversation with him. The affidavits (R.

112) and counter affidavits (R. 122-123) differ as to whether other jurors were present.

(b) Juror No. 12, Riley, talked with a spectator on three different dates during the trial and provided her with autographs and addresses of all twelve jurors prior to deliberation (R. 113-115). He also discussed the trial with her (R. 113 and 123).

(c) Juror No. 10, A. A. Firmage, who was later foreman of the jury, approached, shook hands, and had a conversation with State's witness Gerritadina Combee as she was stepping from the witness stand at a recess. This took place before the rest of the jury and the entire Court. This matter was immediately called to the attention of the Court.

The instances set forth in (a) and (b) above were unknown to the defense counsel until after the trial.

This Court stated in *State v. Anderson*, 65 Utah 415, 237 P. 941:

"The authorities, however, all agreed that any conduct or relationship between a juror and a party to an action during trial would or might consciously or unconsciously tend to influence the judgment of the juror authorizes and requires the granting of a new trial unless it is made to appear affirmatively that the judgment of the juror was in no way affected by such relationship or that the parties by their conduct waived their right to make objection to such conduct . . . but it should also be remembered that when a juror is selected by reason of his impartiality to de-

termine, not only property rights between individuals but in criminal cases, involving lives and personal liberties of the individual charged with offenses, the law requires of the juror such conduct during that time that his verdict may be above suspicion as to its having been influenced by any conduct on his part during the trial. . . .”

The Court then reviews authorities.

In *State v. Crank*, a Utah homicide case, 142 P. 2d 178, approving the *Anderson* case, this Court stated:

“In the case at the bar Ashcroft too was the prosecution’s witness and had taken a prominent part in the trial of the case. . . . The conversation in question took place as alleged in counter affidavits in open court almost within hearing of the defendants and their counsel and affidavits of both the juror and the witness are to the effect that they were not discussing the case but merely talking in a friendly fashion. In spite of these extenuating circumstances this conduct is certainly improper and is to be condemned by the Court, particularly in capital cases where the life or liberty of the defendant is at stake. In such instances the verdict of the jury, like Caesar’s wife, *must be above suspicion*. In the instant case, since a new trial must be granted on other grounds, we need not determine whether such conduct would alone be grounds for a new trial.” (Emphasis the Court’s.)

Also see *State v. Thorne*, 39 Utah 208, 117 P. 58, at page 66, and cases cited therein.

It is noted that the factual situation in *State v. Crank* is so similar to the Firmage-Combee situation

in this case as to be almost indistinguishable. The cases are both capital cases; the juror shook hands with and conversed with the State's witness before the rest of the jury, the Court, and counsel. In both instances, affidavits of the principals would indicate the case was not discussed. However, in *State v. Crank*, the Court held the conduct to be improper and refrained from ruling whether this conduct alone would be grounds for reversal only because the case was already being reversed on other grounds. It would seem that in the case on appeal, there are three distinct instances equally as adverse to jury impartiality as in the Crank case, *supra*, and involving three different jurors; one, the ultimate foreman of the jury, before the rest of the jury and the entire Court; another, an alternate juror in contact with the prosecuting official who had been responsible for the case through preliminary hearing; and the third, through his conduct involving all members of the jury by procuring their signatures and addresses to furnish a spectator who was purportedly going to write a book about the trial. The mere procuring of the signatures would create a necessary inference that he had discussed with the other jurors his conversations with the spectator in order to give a reason for requiring their signatures and addresses and in some instances phone numbers (see R. 114-115).

There is no way to determine whether these instances or any of them might have consciously or unconsciously influenced one or more jurors, *State v. Anderson*, *supra*. The burden is on the State to affirmatively show an absence of any such effect. *State v.*

Anderson and State v. Crank, supra. It would seem that any of the three instances alone would be grounds for a new trial and the combination of the three in a capital case should make a reversal imperative.

POINT VI

THE COURT ERRED IN ALLOWING PREJUDICIAL HEARSAY STATEMENTS IN EVIDENCE OVER PROPER OBJECTION.

In five instances the Court allowed the District Attorney to go into conversations between a witness and a third party, said conversations taking place out of the presence of the defendant being immaterial and incompetent and not under any exception to the hearsay rule.

(a) Vaughn Humphreys was allowed to testify to the context of a conversation between he and Carl Kuehne regarding a plot to kill Don LeRoy Foster (R. 741-742). Both Kuehne and Humphreys were State's witnesses. The conversation would appear to a jury to corroborate Kuehne's testimony, though the universal rule is that an accomplice cannot corroborate himself.

(b) LaRae Kuehne on rebuttal was allowed, over objection, to testify to a conversation between she and Mildred Sinclair out of the presence of the defendant (R. 1632-1634). The effect of the testimony was to impair the defendant's alibi, but was not impeaching evidence as to Mildred Sinclair as she had not been questioned regarding the conversation (R. 1634). The Court denied defendant's motion to strike and to admonish the jury.

(c) The Court allowed private detective B. F. Romano to relate a conversation between he and Thayle Olsen not in the presence of the defendant (R. 1637-1639) over objection by the defendant. The conversation related to hiring a detective to follow LaRae Peterson and Don Foster and is not shown to have been within the knowledge of the defendant.

(d) Beth Foster, wife of the deceased, was allowed to relate two purported conversations with Thayle Olsen (R. 1638-1651), neither conversation being in the presence of the defendant. Both conversations related to the Foster-Peterson relationship. The second conversation contained the following statement by witness Beth Foster:

“She told me that Jean Sinclair was an expert marksman, that there had been a shooting three or four years ago in Magna. I know nothing of it. This is all she said, in which Jean Sinclair had been mixed up. She said I could not underestimate her. She usually gets what she goes out for, and she says Don is in danger unless you stop it” (R. 1650).

(e) Reva Nelson was allowed to relate a conversation with Ellen Rawlins out of the presence of defendant and over objections (R. 1659-1660).

Each conversation was hearsay and incompetent, and each extremely prejudicial to the defendant, especially so Mrs. Foster's hearsay statement regarding the defendant being involved in a shooting in Magna three or four years ago.

The District Attorney claimed that the conversations go to impeachment of the various witnesses. However, in (a) above, both witnesses were the State's witnesses, and in the cases of (b), (c), and (e) a careful search of the record shows that the conversations were not gone into or mentioned in the testimony of the witnesses purportedly impeached, and in (d) above Thayne Olsen admitted to conversations with Mrs. Beth Foster but the substance of the conversation was not pursued, nor would it have been material or competent had it been pursued. Mrs. Foster's relations of the text of the conversations could only prejudice the defendant and did not impeach witness Olsen.

Warren on Homicide, Permanent Ed., Vol. 4, page 597, sets out the rule regarding prejudicial admissions of evidence:

"It is a well established fact that error in admitting illegal evidence on a trial for homicide where plainly without prejudice to the accused is not grounds for reversal. If, however, the accused *may have been* prejudiced by improper evidence, even though it be doubtful whether he was or not, that will be grounds for reversing a judgment." (Emphasis added)

Here, the text cites some fifty cases including *State v. Thorne*, 39 Utah 208, 117 P. 58.

Citing Warren, *supra*, at page 589:

"It is sufficient to authorize reversal if the testimony erroneously admitted tended or was calculated to injure the defendant with the jury." Again citing *State v. Thorne*, *supra*.

Each conversation is hearsay, incompetent and highly prejudicial to the defendant and should require a reversal. Can it be said that in any one of the five instances, the conversation was not "calculated to injure the defendant with the jury"?

POINT VII

THE COURT ERRED IN GIVING INSTRUCTIONS NO. 9 AND 10 AND REFUSING DEFENDANT'S REQUESTED INSTRUCTIONS NO. 2, 3 AND 4.

The Court erred in giving Instructions No. 9 and 10 for the reasons set forth in Point III, that under the factual set up of this case the question of accomplicity of Carl Kuehne is a question of law for the Court. The Court, after denying defendant's Motion for a directed verdict should have ruled that Kuehne was an accomplice as a matter of law and given proper instructions on corroborative evidence; or ruled as a matter of law that Kuehne was not an accomplice and refrained from giving instructions on corroboration. *State v. Ripley*, supra, with annotations at 19 A.L.R. 1355.

Further, the two instructions as given are not the law, fail to set forth adequately what constitutes an accomplice and are confusing to the jury.

The Court, in using the State's requested instruction as the Court's Instruction No. 9 in paragraph 3 thereof, uses the words "knowingly and with criminal intent aid or abet or having advised and encouraged the commission of the act charged," then in paragraph 4

uses the same words "knowingly and with criminal intent" in an attempt to define aid and abet. The Court then negatives any effect of Instruction No. 9 by stating in Instruction No. 10 "that merely aiding and assisting in the commission of a crime without guilty knowledge or intent is not criminal and the person aiding or assisting without guilty knowledge or intent is not an accomplice." The Court nowhere defines knowingly, guilty knowledge, or criminal intent.

The Court in Instruction No. 12 (R. 44) defines intent and specific intent, neither of which has the same meaning as criminal intent.

"Where a technical term or terms which have acquired particular significance in the law are employed in instructions, the Court should point out the meaning to the jury unless the meaning is already clear." *Reid's Branson Instructions to Juries*, Vol. 1, p. 174.

It was the duty of the Court in this case to define to the jury knowingly, criminal intent, and guilty knowledge. Also, it was error for the Court to combine the words "knowingly and with criminal intent" where either guilty knowledge or criminal intent are sufficient alone, the criminal intent being inferred from the guilty knowledge. Under the evidence in this case Carl Kuehne, from his own testimony, knew the purpose of Jean Sinclair when he did the acts to which he testified at the trial. As pointed out with repetition in the Statement of Facts, he gave a false name when buying the gun and shells because Jean had been threatening to kill Foster. He knew "it was her avowed purpose to kill Foster" (R. 716).

He unloaded the shells before the crime because she said she only needed one. He went with her to the various places to advise her where would be the best place to kill Foster. Kuehne had guilty knowledge and the failure to define the terms guilty knowledge, knowingly and criminal intent was error. It has been held error not to define "knowingly," *Reid's Branson Instructions to Juries*, Vol. 1, p. 175, citing *People v. Stewart*, 68 Cal. App. 621, 230 P. 221. Failure to define aiding and abetting is error. *Same citation as above.*

The Court attempts in Instruction No. 9 to define aid and abet, but merely reverses the use of the words "knowingly and with criminal intent" in Paragraph 3 of the same instruction defining accomplice. The Court, by its failure to define these terms and by using knowingly and with criminal intent in the disjunctive in Instruction No. 9 and in the conjunctive in Instruction No. 10, could have no effect but to confuse the jury.

With regard to the question of intent, there is also case law to the effect that criminal intent is presumed. The defendant in criminal prosecutions is presumed to intend the ordinary results of his voluntary acts. *State v. Owen*, 119 Ore. 15, 244 P. 560. The slightest degree of assistance or collusion is sufficient. *Comm. v. Lowry*, 374 Pa. 594, 98 Atlantic 2d 733, Cert. Den. 347 U.S. 914, 98 L. Ed. 1017, 74 S. Ct. 479. It is immaterial whether the aider and abettor has any direct or personal interest in the results of the crime or whether he will gain in any way thereby *U.S. v. Moss*, 122 F. Sup. 523, Rev. on other grounds, C A. 3d, 220 F 2d 166.

If one person assisted another in doing a criminal act, it is presumed he shared the intent with which the person was doing the act. *Wharton's Criminal Evidence*, 12th Ed., Vol. 1, p. 246. If a person advising or counseling the crime changes his mind he is still liable as an accessory if he does not inform the principal of his changed desires. *State v. Allen*, 47 Conn. 121, *Wharton's C. L. & P.*, 12th Ed. 239.

"In order to be an accessory before the fact it is necessary that the actor know that he is taking a step to promote the commission of a crime. It is not necessary that the accomplice before the fact have full knowledge of all the details of the criminal plan or the identity of all persons participating therein. It is not necessary that the defendant should have originated the design of committing the offense if the principal had previously formed the design, and the alleged accomplice encouraged him to carry it out by falsehood or otherwise, he is guilty as an accessory before the fact." *Wharton's* 12th Ed. citing *Keeleher v. State*, 10 Smedes & M (Miss.) 192.

The State contends that Kuehne had withdrawn prior to the killing. However, the evidence shows that immediately before she left to "kill myself a son-of-a-bitch" he sawed off the gun, unloaded the shells, and showed her how to load the gun and put it on safety, and expressed not the least surprise when she came back and told him to dispose of the weapon and shells.

The Court in Instruction No. 9 fails to set forth that an accomplice is a principal and that an aidor and abettor need not be present at the scene of the crime. See 76-

1-44. This in conjunction with the Court's instruction regarding alibi and the Court's failure to define guilty knowledge and criminal intent is further confusing to the jury. The evidence shows that Kuehne was an accomplice. He had guilty knowledge of the purpose of the acts he did allegedly at the request of Jean Sinclair. He aided and abetted and became an accessory to the killing of Don Foster. The Court by giving its Instructions No. 9 and 10, and refusal to give defendant's requested Instructions No. 2, 3 and 4, left the jury in a state of confusion as to the necessity of corroborative evidence.

POINT VIII

THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S INSTRUCTIONS NO. 6, NO. 17, NO. 20.

It was the defendant's contention and theory in the alternative from the opening statement on, that there was more evidence to connect Carl Kuehne to the killing of Don Foster than there was the defendant, and that Kuehne had no alibi. Secondly, that Carl Kuehne was an accomplice to the killing of Don Foster and his testimony should be viewed with distrust and must be corroborated. The Court, by its deletions of the last paragraph of the requested Instruction No. 6, and the first paragraph of Instruction No. 20, failed to present to the jury the defendant's theory of the case. The rule in Civil cases requiring the Court to instruct on all theories of the case having supported in evidence to any extent, has a like application in criminal prosecutions. See *Reid's Branson Instructions to Juries*, Vol.

1, *Section 53*, p. 170. The accused is entitled to have the jury instructed on the whole law of the case. See *Annotation of Reid's Branson Vol. 1*, p. 170, *Note 57*.

It is error for a trial court to fail to give equal stress to the contentions of the State and the defendant. This does not necessarily mean that the statements of the opposing parties be of equal length, but there is a lack of equal stress when the State's contentions are given at great length and detail while, on the other hand, the defendant's contentions are given in very brief general terms as though he had offered no evidence at all. *Reid's Branson*, Vol. 1, p. 172. The court may instruct upon all theories of the defense though they may necessarily conflict. The instruction should be given though the evidence in support of the theory is slight. The instruction should cover contentions made and argued before the jury and the theory must be presented pertinently, plainly, and affirmatively.

Where the accused in his statement presents a theory, which if true, entitles him either to acquittal or conviction of a lower offense than the one charged, it is error to refuse a written request applicable to such theory. *Dizier v. State*, 12 *Ga. App.* 722, 78 *S. E.* 203. The Court by striking the first portion of defendant's requested Instruction No. 20 and failing to instruct as requested Instruction No. 17, that the defendant's theory was that Carl Kuehne was an accomplice* has eliminated from the instructions any clear statement of the defend-

*The Court in Instruction No. 17 has endorsed the instruction given in substance. This is not the fact.

ant's theory. The only place Carl Kuehne's name is even mentioned in the instructions is in the remaining portion of defendant's requested Instruction No. 20, the Court's given Instruction No. 19 which makes Court's Instruction No. 19 incomplete and leaves a total failure of instructions as a whole to set out the defendant's theory of the case. This error compounds the errors heretofore discussed in Point VII as the Court instructs incompletely as to accomplices and aiding and abetting but refuses to instruct as to the defendant's theory that Kuehne was an accomplice. The Court gives various instructions on requirements of corroboration, but by its deletions of defendant's requested instruction No. 6 and No. 20, and failure to set forth Carl Kuehne at any point as the claimed accomplice, leaves Instructions No. 9 and No. 10 and the various instructions on corroborating, literally hanging in the air. It should be remembered that there are sixty-four (64) witnesses in the case on appeal. It should further be noted that the Court granted as written, all requests set forth by the State.

POINT IX

THE COURT ERRED IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION NO. 30.

The State's theory as set forth in the Court's instructions was that Jean Sinclair murdered Don LeRoy Foster; not that she conspired with another or was a principal, was an accomplice or an accessory before the fact to the homicide. The defendant's requested

instruction No. 30 prohibited the jury from convicting Miss Sinclair unless they found that she fired the shot that killed Don Foster. There is no evidence of nor is there any claim by the State that Miss Sinclair aided, abetted, was a conspirator or an accomplice. There was also no evidence that Miss Sinclair was at or near the scene of the crime at the time that it happened, and the evidence by Carl Kuehne was such that the jury could well have believed she conspired with him or he and others to commit the murder. "Where the indictment* charges that the defendant alone committed the offense, it is error to instruct the jury that conviction is authorized if the accused aided and abetted the commission of the crime," *Tillman v. Commonwealth*, 259 Ky. 73, 82 SW2d 222. "Where the defendant is charged as a principal, the instructions should point out clearly what acts or conduct constitutes defendant a principal," *Ellison v. Commonwealth*, 130 Va. 738, 107 SE 689.

The Court's instruction No. 9 and 10, heretofore discussed in Point VII with regard to accomplice, could well have confused the jury in their interpretation of No. 8, especially as the Court refused to instruct on the defendant's theory as to who the claimed accomplice was.

POINT X

THE COURT ERRED IN SUSTAINING STATE'S OBJECTIONS TO COUNSEL'S QUESTIONS AS TO WHY CARL KUEHNE HAD NOT BEEN ARRESTED OR CHARGED.

*In this case, the information

After laying the foundation as to knowledge of the statements of Carl Kuehne by Richard Dibblee, Chief Criminal Deputy, Salt Lake County Attorney's Office, defense counsel asked:

"Why didn't you have a complaint filed against Mr. Kuehne, Mr. Dibblee?"

Mr. Banks: "I'll object to that, your Honor, it's immaterial."

Mr. Hatch: "I don't think it's immaterial after the foundation we've laid."

Mr. Banks: "I think it is. That's an entirely separate affair." (R. 1591).

After arguments thereon the Court sustained the objection (R. 1592). The question must be material as the defense's theory in the opening statement and through the entire trial was that Carl Kuehne, by his own statements and production of evidence, had implicated himself in the murder of Don Foster, had no alibi, and was a more likely suspect for the killing than the defendant. The evidence shows that the police had discussed with Kuehne a pardon for a previous crime, after which he gave them statements sufficient to warrant a complaint against him for first degree murder as a principal, and facts sufficient for a conviction of being an accessory after the fact. There has been no charge or arrest. The only logical reason for not charging Kuehne for one crime or both would be that upon his refusal to testify there would be no evidence whatsoever against the defendant Jean Sinclair. Further, the statements given by Kuehne would not hold up as a

confession against himself, due to the methods of obtaining the statements, including failure to advise him of his constitutional rights, the thinly veiled promise of help with a pardon, and holding him incommunicado without charge.

The matter was opened first by the District Attorney when he asked Kuehne why he refused to testify (R. 698-699). Defense counsel followed up the matter on cross examination where the witness stated "that he believed that the County Attorney was acting as my attorney" (R. 713).

The question was highly material for two reasons; one, with regard to the question of whether or not Kuehne was chargeable with the crime and therefore a principal and an accessory before the fact. Witness Dibblee was the prosecutor who had authorized the complaint against the defendant solely on Kuehne's statements. The Court itself emphasized the materiality of this question in instruction No. 9, second paragraph, as follows:

"An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial" (R. 40).

It is apparent that the question of why Kuehne was not charged was material to the defense's theory of accomplicity of Kuehne. Secondly, the question is material in laying a foundation for proper impeachment of Kuehne on the basis of promises not to charge him if he testified or threats to issue a complaint if he refused

to testify. True, Kuehne denied threats or promises, but the examination by the District Attorney at R. 698-699 and the cross examination at R. 713 shows not only evidence of promises not to prosecute but an indication that either the police or one of the prosecuting officials had informed him that the County Attorney was acting as his attorney.

This ties in directly with Kuehne's late effort to invoke privilege arising from self-incrimination to questions regarding the shot gun and shells.

Witness Dibblee was the person having authority to issue a criminal complaint, and the reason he did not authorize such a complaint is material to the defense's theory and was not incompetent for any reason.

POINT XI

THE COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN COMPELLING CARL KUEHNE TO TESTIFY OVER CLAIM OF PRIVILEGE.

Carl Kuehne refused to answer questions regarding the purchase of a shot gun for Jean Sinclair on the basis that the answer might tend to incriminate him. The Court, after argument, compelled the witness to testify. Apparently upon the reasoning set forth by Mr. Banks:

“Your Honor, I will invite the Court's attention to the preliminary hearing transcript which you have read and this defendant has waived any immunity he might have by reason of that, in my opinion, and request the Court to compel him to answer.” (R. 569).

The Court compelled the answer (R. 570).

The Court: "It's the finding of the Court, Mr. Kuehne, that you must answer all questions involved."

The Witness: "All questions in regard to this?"

The Court: "That's correct."

Whereupon, defense counsel requested an objection to each question involving the shot gun (R. 570).

The witness Kuehne endeavored again and again to refuse to answer questions regarding the shot gun, the shells, the purchase of them, giving them to Miss Sinclair, and disposal of the gun and shells. The Court was in error in requiring the witness to testify after he claimed his privilege. There is no argument that the privilege is personal to the witness. However, the witness claimed the privilege and was compelled to answer by the Court. There can be no doubt that any question with regard to the shot gun and shells would or might tend to incriminate Kuehne either for the crime of murder in the first degree or as being an accessory after the fact. The law is clear that the privilege attaches to each hearing and the fact that a witness testified at a coroner's hearing, before a grand jury, or at a preliminary hearing of the instant trial, or to the same facts in another case, does not constitute a waiver of the privilege when claimed by him. See *State v. Allison*, 116 Mont. 352, 153 P.2d 141; *Ex parte Sales*, a California case, 24 P. 2d 916; *Overand v. Superior Court*, 131 Cal. 280, 63 P. 372; *In re Berman*, 105 Cal. App. 37,

287 P. 126; also under Hill's Criminal Evidence, Vol. 2, Section 358.

That the testimony was prejudicial to the defendant is too clear to require argument. Without Kuehne's testimony regarding procuring of the gun and shells, alteration of the gun and shells, delivery to her of the gun and one shell, and disposal of the gun and shells, there would be no case at all against Miss Sinclair. While it is true that the privilege is personal and cannot be claimed by the defendant in lieu of the witness, the witness did claim the privilege and was improperly compelled to testify. The testimony is involuntary and under compulsion of the Court. There can be no question that the witness was entitled to the privilege. The Court could not have found that the testimony did not or might not, or the answers did not or might not, tend to incriminate Kuehne. See *United States v. Burr* (In re Willie), 25 Federal cases, page 38, No. 14692E, where Chief Justice Marshall lays down the rules with regard to the nature of the self-incrimination. If the Court had not erroneously compelled this testimony, there could have been no conviction.

Professor Wigmore discusses this question and seems to advocate that only the witness can object to compelled testimony, and that the party should not be so allowed. However, he points out that the majority of Courts allow a party to take exception under what he calls the "sporting rule," see 8 Wigmore on Evidence, 3rd Ed. 2196. *Commonwealth v. Kimball*, Mass. 24, Peck 366 and 368, allows objection by a party and bases a

reversal thereon using the following language:

"It could not be held that the verdict was supported by legal evidence."

Commonwealth v. Shaw, 4 Cush. 594, approves *Commonwealth v. Kimball*. *State v. Olin*, 23 Wis. 309, at page 318 discussing the question, states: "It seems that a party may appeal." This Court in *State v. Cox*, 277 P. 972, at page 973 under a claim of error from compelled testimony of an accomplice, refuses to discuss the question on the basis that the witness was not compelled to answer any particular questions over his objection on the ground of privilege.

This is but another example of the apparent prejudice of the Court in its ruling throughout the trial with regard to admission and exclusion of evidence (see Point VI).

LaRae Peterson was compelled to take a contempt rather than answer the incriminating question.

POINT XII

THE DEFENDANT'S TRIAL AND CONVICTION WERE UNCONSTITUTIONAL UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Fifth Amendment of the United States Constitution provides among other privileges and immunities to the person as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Fourteenth Amendment provides that:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.

The Supreme Court of the United States in the case of *Mapp v. Ohio*, 6 L. Ed. 2d 1081, holds that the right of security of a person under the Fourth Amendment makes an unreasonable search and seizure unconstitutional when applying the Fourteenth Amendment guaranteeing the privileges and immunities of citizens of the United States, Justice Black in concurring therein points out that the rights granted under the Fourth and Fifth Amendments are part of the privileges and immunities guaranteed by the Fourteenth Amendment. The *Mapp* case, *supra*, reversed the stand the Court had taken some 34 years before with relation to the Fourth and Fifth Amendments of the United States Constitution applying to State Courts.

The same reasoning used in the *Mapp* case as to unreasonable search and seizure is applicable to cases arising under the guarantee of the privileges and immunities set forth in Fifth Amendment. In making the above argument the writer is aware of the case of *Hurtado v. California*, 110 U.S. 516, where the defendant claimed that his homicide conviction was unconstitutional on the same basis as the claim here made. However, the case of *Mapp v. Ohio*, *supra*, would appear to reverse

the Hurtado case by implication without expressly doing so.

Jean Sinclair was proceeded against by complaint (R. 3) and information (R. 10) in a prosecution for murder in the first degree, a capital case (76-30-3 and 76-30-4, UCA 1953). The Utah Constitution, Article 1, Section 3 states as follows:

“The State of Utah is an inseparable part of the federal union and the Constitution of the United States is the supreme law of the land.”

Utah Constitution, Article 1, Section 7:

“No person shall be deprived of life, liberty or property without due process of law.”

Utah Constitution, Article 1, Section 13, provides for prosecutions by information, or indictment in the alternative.

The case of *In re McKee*, 57 P. 23, 19 Utah 231, is informative on the subject, as is *Maxwell v. Dowell*, 176 U.S. 581, 44 Ed. 597, 20 Supreme Court 448, with Justice Harlan dissenting, affirming 19 Utah 495, 57 P. 412. That case holds that the liberties and immunities guaranteed by the Fourteenth Amendment are not violated by Section 10, Article I of the Utah State Constitution in its application to the Sixth Amendment to the United States Constitution. However, it should be observed that Amendment VI is a general guarantee of speedy trial by impartial jury, and requires that defendant be informed of the nature and cause of the accusation, to be confronted by witnesses, to have com-

pulsory process for obtaining witnesses, and to have the assistance of counsel. On the other hand, Amendment V provides that no person shall be held to answer for a capital crime unless on presentment or indictment, and allowing prosecution of a capital crime by information is a distinct violation and abridgement of one of the privileges and immunities guaranteed by the Fourteenth Amendment.

The Maxwell case, *supra*, rules on the question of prosecution of a non-capital felony by information, which is nowhere prohibited by the Constitution of the United States.

POINT XIII

THE COURT, AFTER ERRONEOUSLY COMPELLING LaRAE PETERSON TO TESTIFY, OVER CLAIM OF PRIVILEGE AND COMPELLING AN ANSWER WHICH SHE REFUSED TO GIVE, FAILED TO ADMONISH THE JURY THAT NO INFERENCE OF WHAT THE ANSWER WAS OR MIGHT HAVE BEEN, CAN BE DRAWN FROM THE REFUSAL TO ANSWER, AND THE DISTRICT ATTORNEY COMPOUNDED THE ERROR BY ARGUING THE MATTER IN HIS SUMMATION.

The Court compelled LaRae Peterson to answer an improper question over proper objection.

Mr. Banks: "I'll ask you if you or Jean have ever committed any Lesbian acts with each other."

Mr. Hatch: "Objected to as ambiguous."

Mr. Mitsanaga: "Also may the record show counsel does invoke the privilege pursuant to 70

Utah Code in reference to Mr. Banks' question" (R. 427).

Thereafter, on voir dire examination, Mrs. Peterson admitted she did not know whether it was possible for two women to have sexual relations with one another, and that she did not know what Lesbian acts were. The Court indicated that the objection was well taken as being ambiguous at R. 783, the Court: "I think to an extent it might be, especially in the light of the fact that it is difficult to define, and that this witness does not seem clear on what you mean by that term, as used." Further questions by Mr. Banks: "Well, I'll put it this way then, have you had any homosexual acts with Jean or Jean with you?" Mr. Hatch: "Same objection." Defense counsel later added the objection that the question was immaterial. Mrs. Peterson, on advice of counsel, refused to answer the question, and the Court ordered her to do so. The witness still refused (R. 788).

Miss Sinclair, when asked the same question, also invoked the privilege. The Court did not admonish the jury that they could not draw any inference from the refusals to answer as to what the answer may have been. Such failure, even without request by counsel, is error.

"Refusal of a witness to answer questions on the ground that answer may tend to incriminate may not be used as a basis for inferring what the answer may have been. . . . If the prosecution knows when it puts the question that privilege will be claimed, it is charged with notice of the probable effect of the refusal on the jury's mind." *U.S. v. Malone, etal.* 262 F 2d 535.

In the *Malone* case the conviction was reversed on the basis that the Court did not give an admonition to the jury with regard to the creation of an inference from the refusal to answer. It comments that the prosecutor is charged with the notice of the probable effect of the refusal if he is aware that the refusal is coming.

U.S. v. Five Cases, Second Circuit, 179 F. 2d 519, 523, it was held that the District Attorney is charged with notice of the probable effect of the refusal on the jury's mind if he knew or had reasonable cause to know that the answer would result in a claim of privilege, and in *U.S. v. O'Conner*, Second Circuit, 237 F. 2d 466 and 472, the Court held that failure of the Court to admonish the jury resulted in reversible error although the accused did not ask for such admonition or instruction. This was done apparently on the theory as set forth in *U.S. v. Malone*, *supra*, that the necessity of a request of the defendant before the jury aggravated the possibility of an improper inference to the extent that it outweighed the admonition.

The U.S. Supreme Court in *Namet v. the United States*, No. 134 October term 1962, published May 13, 1963, fully discusses and approves the reasoning in the *Malone* case but differentiates that case from the *Malone* case on the basis of the conduct of the District Attorney. See also *United States v. Hiss*, 185 F. 2d 822, 823; *United States v. Amodio*, 215 F. 2d 605, 614, Seventh Circuit.

In the case on appeal, the District Attorney was well aware that privilege would be claimed, especially as to the question using the word "homosexual" as the

matter had been thoroughly argued in chambers (R. 784). Mr. Banks was on notice of the claim of privilege and still pursued the matter. As in the Malone case, *supra*, the District Attorney compounded the error by improper argument in his summary, where he stated:

"Now the question of homosexuality has nothing to do with this case and the Court has instructed you only so far as it may refer to motive. We are not trying Jean Sinclair for any relationship between LaRae Peterson and herself, but it does come into this case, unfortunately, because it provides motive. What is motive to kill? Through past experience, we have found a great love, a great hate, to be sufficient. There are great loves between women as there are between men. In fact, I think when this is found it is probably a more jealous love. There is certainly evidence in this case of a great jealousy. There is no wrath like a woman's wrath." (R. 1877-1878).

The possible inferences from the refusals to answer are the only evidence of a homosexual relationship in this case, though there is inference through the entire record that the State accused Jean Sinclair of being a Lesbian. There are no other claims of "Lesbian acts or homosexual acts," as used by the District Attorney in his questions to Mrs. Peterson and Miss Sinclair.

The District Attorney's argument was also highly improper and prejudicial as there is no evidence in the case of the jealousy of loves between man and man, man and woman, or woman and woman. His statement: "There are great loves between women as there are between men. In fact, I think when this is found it is

probably a more jealous love" is not supported by either evidence or logic. It could only be calculated to inflame a jury with regard to an inferred and unnatural sexual relationship, of which there is no evidence.

This is reversible error.

POINT XIV

THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO QUESTIONS REGARDING LESBIAN ACTS AND HOMOSEXUAL ACTS PUT TO LaRAE PETERSON AND TO THE DEFENDANT BY THE STATE.

The question set forth in Point XIII, *supra*, were objected to by the counsel for the defendant as being ambiguous and immaterial. As pointed out heretofore, Mrs. Peterson admitted to voir dire she didn't know what a "Lesbian act" was and did not know whether there could be homosexual acts between women. "Lesbian" is defined as follows:

"1. Of or pertaining to Lesbos (now Mytilene), one of the Aegean Islands. 2. Erotic; — in allusion to the reputed sensuality of the people of Lesbos. 3. Of or pertaining to Lesbianism." Webster's New Collegiate Dictionary, Second Edition, 482.

None of the definitions connote an act or action. "Homosexual" as used in the question to Mrs. Peterson:

"Well, I'll put it this way then, have you had any homosexual acts with Jean or Jean with you?"

is also ambiguous. Webster defines "homosexual" as follows: "Eroticism for one of the same sex." What

a homosexual act or a Lesbian act may be can differ with as many people as there are different individuals. The questions were not understood by either the witness or the jury, gave an improper inference, and were immaterial. One has only to ask in a group, "What is a Lesbian act or what is a homosexual act" and it will elicit as many different statements as there are people in the group. If the District Attorney would ask the specific question with regard to kissing, fondling of breasts, cunilingus, sodomy, or other acts having a common as well as legal meaning, the question would not only have lost its ambiguity but would possibly have avoided the claims of privilege and the inference necessarily going to the jury as to what the answer might have been. See *U.S. v. Malone, supra*.

POINT XV

THE COURT ERRED IN STRIKING THE WORD "DISTRUST" FROM DEFENDANT'S REQUESTED INSTRUCTION NO. 7 GIVING THAT SAME INSTRUCTION AS COURT'S INSTRUCTION NO. 16 USING THE WORD "CAUTION" IN PLACE OF "DISTRUST."

The defendant, where there is a claimed accomplice called by the people, is entitled to an instruction governing the jury's consideration of the accomplice's testimony though he made no request therefor. *People v. Miller*, 8 Cal. Reporter 91, p. 105 citing cases. The cases without variation, indicate that the requirement in the instruction is that the testimony of an accomplice ought to be viewed with distrust. The failure to give the latter instruction, when an accomplice is called as a witness by

the State, may constitute reversible error. *People v. Dail*, 22 Cal. 2d 642, 653-656, 140 P. 2d 822, citing cases. The words "caution" and "distrust" are not synonymous. Caution connotes wariness or prudence in regard to danger. Webster's New Collegiate Dictionary, 2d Ed., p. 132; while distrust is to feel no trust or confidence in, to mistrust, or pointing out an active danger in the testimony of an accomplice rather than merely a caution to look for something wrong. Utah cases, without exception in discussing the question of accomplices, hold that their testimony is to be viewed with distrust due to their involvement in the matter concerned and the opportunity to better their own position by testimony incriminating to the person against whom they are testifying. See *State v. Gardner*, supra, citing cases. The defendant was entitled to requested instruction No. 7 in its original form and failure to give the same was prejudicial error.

POINT XVI

THE COURT ERRED IN RESTRICTING DEFENSE COUNSEL'S CROSS EXAMINATION OF CARL KUEHNE.

The Court refused to let counsel cross examine Carl Kuehne with respect to his prior convictions, although the District Attorney had "opened the door" by going beyond the statutory questions in his direct examination (R. 110). He went into an escape from the penitentiary fire-fighting detail (no felony charged), and a voluntary giving himself up in Nevada, and into the question of length of time served. The Court would not allow cross examination by defense counsel on the subject (R. 694).

The Court refused to let counsel examine as to the psychiatric background of Carl Kuehne (R. 698). Counsel made proffers of proof with regard to both lines of testimony (R. 737 et seq). Defendant was prepared to submit psychiatric evidence as to Kuehne's being a psychopathic personality with schizophrenic tendencies creating a compulsion to act out in a violent manner when under stress, and casting doubt on his ability to tell the truth. The line of questioning went both to his credibility and competency and it was necessary to lay a foundation with Carl Kuehne for introduction of the psychiatric evidence to get around the patient-physician privilege and to impeach Kuehne if he denied the psychiatric evaluations and treatment.

The District Attorney in questioning Kuehne with regard to his previous felony conviction at R. 170 went far beyond the scope of the allowable statutory questions regarding felony convictions. We do not attack this examination on the basis of improper impeachment of the State's own witness, *State v. Holley*, 34 N.J. 9, 166 At. 2d 758, Certiorari Denied 368 U.S. 884, where such was held to be good trial strategy, but on improper restriction on the defendant's cross examination. See *State v. Cude*, Utah Supreme Court No. 9619, July 2, 1963, where defense counsel opened the felony question with the defendant and the prosecutor was allowed to cross examine thereon. In the case on appeal, the prosecutor not only opened the felony question, but questioned regarding an escape on which no felony was charged and the method or means of return to the prison (a purported turning himself in in Nevada), and the length

of incarceration. The Court refused to allow cross examination regarding the witness' criminal record beyond the questions of type and number of felonies.

Carl Kuehne was the State's principal witness, without whom the State could make no connection between the defendant and the homicide charge. The Court unduly restricted cross examination with regard to the background and competency of the witness.

"The right of cross examination in a criminal case is basic and is zealously guarded by the Courts . . . cross examination of a witness is a matter of right . . . counsel often cannot know in advance what pertinent facts may be elicited. For that reason, it is necessarily exploratory. . . . It is the essence of a fair trial that reasonable latitude be given the cross examiner, even though he is unable to state to the Court what a reasonable cross examination might develop. . . ." *Alford v. the U.S.*, 282 U.S. 687, 51 Sup. Ct. 218, 75 L. Ed. 624.

In the case on appeal, counsel told the Court by his proffers of proof precisely what he intended to develop (R. 737 et seq), and that evidence went to both the competency and credibility of the State's prime witness, Carl Kuehne.

The Washington Supreme Court sitting en banc on June 6, 1963, reversed a first degree homicide conviction on the ground of a denial of substantive due process of law, even though the Court allowed a wide latitude and abundant time for cross examination of the key witness, where the defendant was obliged to excessive restraint for fear of being blamed by the jury of goading a preg-

nant woman. *State v. Swenson*, 382 P. 2d 614. In that case the Court didn't restrict the cross examination by sustaining objections, but showed great concern for the witness and called numerous recesses during cross examination due to her physical condition.

The Court unduly restricted the defendant's examination of the State's key witness on questions material to his background, mental condition, and competency. The judgment should be reversed.

POINT XVII

THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL AND SUBSTANTIVE DUE PROCESS OF LAW BY THE GENERAL ATMOSPHERE OF THE TRIAL AND BY AN AFFIRMATIVE SHOWING OF PARTIALITY TO THE STATE BY THE TRIAL JUDGE THAT MUST NECESSARILY HAVE INFLUENCED THE JURY.

The entire atmosphere of the three-week trial was one of multitudes seeking sensationalism, arising not from the crime of murder but from an expected showing of evidence of a deviate homosexual relationship between two women which never did emerge in the form of affirmative evidence. Through fourteen days of evidence, the trial Court consistently ruled with the District Attorney whenever a controversy arose as a matter of law or where there was discretion in the Court, and often did so summarily.

The Court allowed hearsay evidence for the State over objection in many instances (Point VI), but denied the defendant's right to put on evidence material to the

issue on the prosecutor's bare statement that the issues were immaterial to the case (Points X, XI, XII, and XIV).

Invariably where a point was argued before the jury, the Court sustained the point of view taken by the prosecution. Probably the most lucid example of this is at R. 569-570, where witness Kuehne had claimed privilege against self-incrimination. The District Attorney informed the Court that it was his opinion that Carl Kuehne had waived his privilege by testifying at the preliminary hearing. This is so obviously not the law that the District Attorney must have been necessarily aware of his misstatement. Defense counsel offered to cite cases thereon, but the Court summarily ruled compelling an answer, and did so again and again on Kuehne's attempts to claim privilege.

The Court, over defense's objection and on motion of the prosecutor, took the jury to the scene of the homicide although the State did not contend the conditions were similar to the night of the killing and had had numerous pictures of the area without objection by the defense and though the defense did not dispute any of the evidence by the State regarding the location or what happened at the location other than the presence of the defendant at that place at the time of the shooting.

The Court gave all the State's instructions as requested, but refused to give any instructions regarding the defense's theory of the case. The best example of the Court's attitude is illustrated by the defendant's re-

quest for a certificate of probable cause following judgment and sentence. The motion for certificate was presented to the Court, together with citations of the law showing that the certificate is a matter of right unless there is no probable theory for appeal, and the request is factitious or for delay only. The Court asked, "Does the State oppose the motion"? Mr. Leary, appearing for the State, said, "Yes, we oppose it" but did not argue the question of law. The Court denied the motion (R. 136) and when asked for a statement of grounds said, "The Court has no grounds for the record at this time."

Off the record but in the presence of Deputy District Attorney Peter F. Leary and C.S.R. B. M. Goodpasture, when pressed for his grounds for denial of the certificate, the Court stated: "To be frank with you, Bud, it's a matter of public policy."

The writer is the first to admit that the above two paragraphs are not a part of the record, but they graphically illustrate the prejudicial atmosphere of the entire trial which deprived the defendant of any semblance of substantive due process of the law and the right to be tried before an impartial jury and an impartial forum. United States Constitution, Amendments IV, V, and VI, as guaranteed by United States Constitution, Amendment XIV: Also see *State v. Swenson*, *supra*.

SUMMARY

Jean Sinclair was convicted of first degree murder on the uncorroborated testimony of an accomplice.

Under Points I, II, III, and IV, or any combination thereof, the judgment should be reversed and the defendant discharged as the defense motions for dismissal and for directed verdict were improperly denied.

On a finding of error on any other point or combination of points, the case should be reversed and remanded for new trial with proper and explicit directions to the trial Court.

The jury, under inadequate instructions regarding accomplices and aiding and abetting, and ignoring the defendant's theory of the case entirely, discounted the testimony of two doctors as to the defendant's infirmity and four alibi witnesses in taking the unsupported testimony of an ex-convict who admitted accomplicity, and thereon found a verdict of murder in the first degree.

There is no question that the homicide charged was an ambush slaying or that the District Attorney pleaded for the death penalty. In spite of the cold blooded, lying-in-wait nature of the killing and the request by the State for the death penalty and absence of any plea by the defense for leniency, the jury unanimously recommended leniency. Can there be any plainer inference that the jury ignored the evidence or lack of evidence and convicted solely on the oft-inferred but never proved innuendo that there was some kind of homosexual relationship between the defendant and LaRae Peterson? They therefore refused to make an obligatory death penalty because there was no evidence on which they could find that Jean Sinclair killed Don Foster, but there was an

inference of a not understood and apparently undesirable and abhorrent sexual relationship for which the defendant was not on trial but for which she should be "gotten off the streets" and away from society.

The judgment should be reversed and the defendant discharged, or in the alternative, the judgment should be reversed and remanded with adequate directions to guide the trial Court.

Respectfully submitted,

SUMNER J. HATCH
Attorney for Defendant