

1967

## The State of Utah v. Virgil S. Redmond : Appellant's Brief on Petition For Rehearing

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### Recommended Citation

Petition for Rehearing, *Utah v. Redmond*, No. 10610 (1967).  
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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

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THE STATE OF UTAH,

*Plaintiff-Respondent,*

vs.

VIRGIL S. REDMOND,

*Defendant-Appellant.*

} Case No.  
10,610

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**APPELLANTS BRIEF**

**ON PETITION FOR REHEARING**

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**FILED**

SEP 11 - 1967

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CLERK OF SUPREME COURT

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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## PETITION FOR REHEARING

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Comes now the Defendant-Appellant, Virgil S. Redmond, and petitions the above entitled Court for an order permitting a rehearing of Point VII contained in his original Appellant's Brief filed herein for the reason that the Court erroneously concluded that he failed to request that names of additional witnesses be endorsed on the information or that he be furnished with their names. (See last paragraph of Court's Opinion).

### STATEMENT OF THE CASE

Criminal prosecution for allegedly uttering a fictitious check.

### DISPOSITION IN LOWER COURT

Defendant was found guilty by a jury and sentenced to a term in the Utah State Prison.

## DISPOSITION IN SUPREME COURT

The Supreme Court affirmed the conviction in an opinion Filed August 15, 1967.

## RELIEF SOUGHT IN THIS PETITION

Defendant-Appellant, Virgil S. Redmond, seeks an order permitting a rehearing of Point VII contained in his Appellants Brief filed herein, and for a new trial after argument of said rehearing.

## STATEMENT OF FACTS

The facts of the case are fully explained in the Appellant's Brief filed herein and it is unnecessary to repeat those facts here, except to the extent that facts are recited and emphasized in the argument.

## POINT I

THIS COURT ERRED IN CONCLUDING THAT DEFENDANT FAILED TO REQUEST THE DISTRICT COURT TO REQUIRE THE DISTRICT ATTORNEY TO ENDORSE ADDITIONAL NAMES ON THE INFORMATION.

Defendant incorporates by reference Point VII of Appellant's Brief filed herein at pages 20 through 25, and the statement of facts found on page 4 of that brief pertaining to the failure of the prosecution to furnish names of witnesses who were not endorsed on the information and his objection to said additional witnesses being permitted to testify at the trial.

Some additional citations from the record may be of assistance to the Court in understanding the efforts made by Defendant to obtain the names of witnesses to be called by the prosecution at the time of trial, and the unfairness suffered by him at his trial as a result of being denied the names of those witnesses until they were actually called at the trial.

Forty-six (46) days before trial Defendant applied to the Court for an order limiting the prosecution witnesses to those listed on the information, or in the alternative requiring the prosecution to furnish the names of additional witnesses to be called by the prosecution at the trial. The District Attorney, Jay Banks, agreed to furnish the names of additional witnesses but failed to do so. The motion made by counsel for Defendant and the agreement by the District attorney are found at page 607 of the record as follows:

“MR. BARKER: Your Honor, may we have an order limiting the witnesses to the . . . ones listed on the information or in the alternative, requiring them to give us the names of all additional witnesses at this time.”

“MR. BANKS: *We will be glad to supply additional witnesses on the Bill of Particulars or as they become known to the State. These were the only ones that testified at the Preliminary Hearing. Right now I have no personal knowledge of any additional witnesses but we will supply them as they become known.*” (italics supplied)

The information lists the following four persons as witnesses:

1. Clara Francis
2. Denyon Fineschreiber
3. Carroll Syphys
4. Jack E. Holstrom

No additional names were ever endorsed upon the information and no additional names were ever furnished to Defendant or his counsel. The following fifteen persons were called as witnesses at the trial by the prosecution: (R. 163-165)

1. Thomas D. Stoker
2. Mary Halliday
3. Laurene F. Shaw
4. Kurt Madsen
5. Charles J. Shepherd
6. Karl Gustaveson
7. Kenneth Lee McPhail
8. Bert Wells
9. George J. Bonebrake
10. Fred Denman, Jr.
11. Gary Milo Jenkins
12. Dave Nicholson
13. Georgia Rytting
14. Guy Redmond
15. N. D. Hayward

Counsel for Defendant Redmond objected to the prosecution calling of any witnesses not listed on the information as follows (R. 355-356):

“MR. BARKER: Thank you. I object to the calling of any witnesses whose names were not included on the Information or not furnished to the defense on the ground and for the reason that at the time of the arraignment in this matter request was made to the Court for the names or requiring prosecution to

furnish names of any other witnesses who were not included on the Information and that as I recall the Court ordered and the agreement for Mr. Winder at arraignment was, the names were to be furnished not later than ten days before the trial. No names have been furnished and there are certain witnesses to which I have been alluded to before the Court and when we approached the bench whose names have not been furnished. I object to them now being called as a denial of our right to be confronted by the witnesses against us in sufficient time to interview those witnesses and be prepared to meet their testimony and I believe Mr. Winder agrees with that."

"MR. WINDER: I don't recall ever making that agreement and ever being ordered to furnish you the names of the witnesses."

...

"THE COURT: The motion is denied."

Mr. Winder did not recall having made the agreement to furnish the names of witnesses or the motion referred to because Mr. Banks handled the motion and made the agreement as indicated on page 3 above, but the damage to and unfairness to the Defendant is just as real whether the failure to supply names of additional witnesses was intentional or the result of lack of communication between the District Attorney and his deputies.

When the prosecution attempted to call witnesses whose names had not been endorsed on the information Defendant's counsel objected as follows (R. 376):

"MR. BARKER: Your Honor, may we have a continuing objection to the witnesses not listed on the Information as I previously indicated."

"THE COURT: You may."

Counsel for Defendant repeatedly objected to the calling of witnesses whose names were not endorsed or the information or furnished to Defendant by the prosecution as the District Attorney had expressly agreed to do (See page 3 of this brief). (R. 358; 401; 402; 430; 463; 469. The numerous objections made by counsel for Defendant certainly advised the Court of Defendant's position and gave the Court ample opportunity to change its ruling and to correct its error.

Counsel for Defendant also moved for a continuance to prepare to meet the surprise witnesses in accordance with 77-21-52, UCA, 1953 follows (R. 401-402):

"MR. BARKER: Your Honor, in order to make a record of the matter we discussed when we approached the bench, I move the Court for an order prohibiting this witnesses from testifying . . . My objection is based upon several grounds. Number one, *his name is not listed on the Information as one of the witnesses*. We have not been provided with his name until now and have had no opportunity to prepare to meet this testimony. It takes us by unfair surprise. *My motion is to continue the matter to give us an opportunity to do so because of this unfair surprise . . .*

"We have been prevented from obtaining this witness and other witnesses and interviewing them prior to the hearing so we could obtain evidence to counter this . . ."

“THE COURT: The objection is overruled. The Court concedes that the issue of discovery is a matter of great concern to the defendants and should a conviction result, would be certainly a good cause to consider the matter on appeal . . . *The record does not disclose any motion for a Bill of Particulars and hence the objection to his testifying is denied and the claim of surprise is denied . . .*”

It is obvious from the foregoing that in making that ruling the Court did not recall the agreement to furnish names of witnesses made at the motion prior to trial by Mr. Banks, yet that agreement was most certainly made in open Court by the District Attorney (R. 607 - Page 3 of this brief) and was relied upon by Defendant in preparing for trial. Defendant had no opportunity to prepare to meet the testimony of 15 of the 19 witnesses called by the State. Defendant relied upon the representation by Mr. Banks that the names of witnesses would be furnished and when none were in fact furnished expected to be confronted with only the four witnesses listed on the information. This made the preparation of a defense impossible under the circumstances and resulted in a denial to Defendant of a fair trial and a denial of Due Process.

The reasons why a Defendant is entitled to know the names of prospective witnesses for the prosecution well in advance of the trial are discussed in the cases cited at pages 21 through 25 of Appellants Brief and will not be repeated here.

## CONCLUSION

Defendant's Counsel applied for an order requiring

the names of witnesses for the prosecution to be endorsed on the information or furnished to Defendant's counsel. No order was made because of the agreement in open court (R. 607) by the District Attorney to furnish names of witnesses as they became known to him. No names were furnished except the four that were originally listed on the information. Defendant was met at the trial with fifteen (15) witnesses whose names were not listed on the information and were not furnished to Defendant until each witness as in turn called to testify. Defendant moved for a continuance to give him an opportunity to prepare to meet the testimony of those witnesses (R. 401-402) and repeatedly objected to persons whose names were not endorsed or furnished testifying at the trial. The Court obviously did not recall Mr. Bank's agreement to furnish those names and Mr. Winder who tried the case for the State of Utah was not present when Mr. Banks made that agreement so the Court concluded that no such agreement had been made and denied Defendant's motions and objections. Mr. Redmond relied upon that agreement and had no opportunity to prepare to defend against the other 15 witnesses whose names were not furnished to him. The right to confront one's accusers is effectively denied for all practical purposes if the Defendant and his counsel do not know the identity of those accusers until they are called to the witness stand to testify.

It appears that this Court erred in arriving the conclusions reached by it on the last page of its decision to the effect that Defendant failed to object and/or to request the names of additional witnesses. Defendant re-

spectfully urges the Court to reconsider point VII of his original brief filed herein in the light of the additional information and citations contained herein which show that Defendant did in fact request those names and object to the testimony of witnesses whose names had not been furnished or endorsed on the Information.

Done this 31st day of August, 1967.

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