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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

TATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	Case No. 12049
	)	
ICHAEL NIELSEN,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

MICHAEL NIELSEN

PPEAL FROM THE JUDGMENT OF THE FIRST DISTRICT
OURT FOR CACHE COUNTY, THE HONORABLE VE NOY
HRISTOFFERSEN, JUDGE

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,)
)
Plaintiff-Respondent,)
)
v.) Case No. 12049
)
MICHAEL NIELSEN,)
)
Defendant-Appellant.)

BRIEF OF APPELLANT

MICHAEL NIELSEN

STATEMENT OF CASE

The Appellant, Michael Nielsen, appeals from the judgment and sentence of the District Court of Cache County, Utah, in criminal case no. 1526, punishing Appellant by imprisonment in the State Prison.

DISPOSITION IN LOWER COURT

In the lower court, after a trial,

jury verdicts were rendered finding appellant, the defendant below, guilty of the crime of second-degree arson, a felony, and of "being a habitual criminal, a felony." Appellant was sentenced to an indeterminate term of not less than one year nor more than ten years for second-degree arson and to a concurrent indeterminate term of not less than fifteen years for being an habitual criminal.

RELIEF SOUGHT ON APPEAL

Appellant, Michael Nielsen, seeks reversal of the judgments sentencing him to the State Prison.

STATEMENT OF FACTS

Following a preliminary hearing in the City Court of Logan City, appellant was bound over to the District Court of Cache County for trial on charges of second-degree arson and being an habitual

criminal. (R. 6, 7).

Court appointed counsel for appellant, Jack Melgard of Brigham City, filed a motion supported by an affidavit signed by appellant for change of venue on the ground that a fair and impartial trial could not be had in Cache County where the action was pending. The affidavit alleged extensive pretrial publicity in Cache County, particularly in the Herald Journal, a daily newspaper widely circulated in the City of Logan and throughout Cache County, regarding both the charges then before the court and other contemporaneous criminal charges brought against appellant. The affidavit also stated that such publicity disclosed the previous felony convictions of appellant and the fact that appellant was charged with being an habitual criminal, and that said publicity had aroused wide public hatred and animosity against appellant. (R. 13, 14). Apparently

no transcript of the hearing on this motion was made, and the minute entries do not disclose what arguments were made by counsel. It states simply, "Statements are made by counsel and the motion for change of venue is denied." (R. 59). At that hearing, in fact, Mr. Molgard called to the court's attention the prejudicial nature of the pretrial publicity with particular emphasis on the fact that appellant was well known in the county and that the publicity emphasized his previous convictions and the habitual criminal charge. Mr. Molgard also stated to the court that appellant's family was well known in the community. The public feeling against appellant resulted in part from the reputation of other members of his family, appellant's brother being generally reputed throughout Cache Valley to have killed two police officers and himself while being transported by said police officers from Logan to

reform school at Ogden, Utah.

At trial before Judge Christoffersen, the State's witnesses testified in substance that on the 8th day of November, 1969, a fire suddenly occurred in the crime lab of the Cache County Law Enforcement Building and "exploded" or "gushed" out through the laboratory door (T. 50); that the fire consumed a curtain which hung beside the entrance door and a raincoat which was draped over the curtain rod (T. 85, 91), scorched and blistered the paint in the immediate vicinity (T. 79, 80), deposited soot and grime throughout the room (T. 84), melted the plastic lenses on several flourescent light fixtures (T. 15, 54, 84), melted plastic sheets which served as dust covers for laboratory equipment (T. 13, 93), and caused the edge of one acoustical ceiling tile to "smolder" or "glow" (T. 43, 78, 79, 81). The transcript discloses no evidence regarding

whether said ceiling tile was installed in such a manner as to be an integral part of the Cache County Law Enforcement Building. The State's witnesses further testified that appellant was in the building at the time of the fire and was observed to be walking in a leisurely manner six or seven feet from the laboratory door at the time the fire "gushed" out (T. 9, 40, 67); that the fire occurred behind a locked metal door (T. 10, 94); that appellant was observed by a trusty at the jail kicking the door and then kneeling near the door a short time before the fire occurred (T. 66); and that a book of matches was taken from appellant's person approximately 25 minutes after the fire was discovered (T. 41, 42; pl. Exh. 7). The trusty, who testified that he saw appellant before the laboratory door, also testified that shortly after the fire and before officers searched appellant, appellant told him

that he had no matches and that the trusty slipped a few matches and part of a striking paper from a book of matches beneath the door of the cell where appellant was lodged following the fire so that the latter could smoke. (T. 68, 76). A piece of blackened ceiling tile was introduced by the State, partially melted light fixtures and damaged furnishings together with numerous photographs of the crime lab taken after the fire, were also admitted over Mr. Molgard's objections that they were prejudicial and not relevant or material to the issues involved. (T. 31-35). Only two of the photographs showed the area of the crime lab where the fire actually occurred (pl. Exhs. 1 and 6), none showed the ceiling tile where the "burning" is alleged to have occurred. All showed superficial damage to the room and its contents from smoke and heat and a general condition of clutter and

messiness throughout the laboratory. (pl. Exhs. 1, 2, 3, 4, 5 and 6). At the close of the State's case, the defense rested and the court charged the jury regarding the crime of second-degree arson. The jury brought back a verdict of guilty.

The habitual criminal count was then read to the jury. An employee of the State Prison testified for the State that the appellant had spent time in the prison upon two prior occasions. (T. 100, 101, 102). The court took judicial notice of plaintiff's Exhibit 14 which consisted of minute entries entered in criminal cases numbers 1058 and 1355, each of which was styled <u>State of Utah v. Michael Nielsen</u>. (T. 101) The court instructed the jury on the charge of being an habitual criminal and gave the foreman prepared forms of verdicts which could be returned to the court. The jury returned the following verdict:

> "We the jury, duly impaneled and sworn, find the defendant guilty of being a habitual criminal, a felony, as charged in the information." (T. 105; R. 50) [Emphasis added]

At the sentencing hearing February 9, 1970, at Brigham City, Utah, Mr. Molgard moved to have the verdict on the habitual criminal count set aside on grounds which he had previously raised in motions for dismissal of the habitual criminal count (T. 97, 108), that the verdict was based on a void conviction for injuring a public jail (criminal case no. 1058), in which case appellant had been without representation of counsel. The motion to set aside the verdict was denied on the ground that appellant had voluntarily waived counsel (T. 110), and appellant was sentenced to a term of from one to ten years on the second-degree arson count and to a term of not less than fifteen years on the habitual criminal count, with the sentences to run concurrently. (T. 112).

ARGUMENT

POINT I

THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

In an effort to prevent local publicity from interfering with the right to a fair and impartial jury, a defendant may request that the place of trial be changed. While it is generally recognized that a ruling on such a request rests within the discretion of the trial court, the United States Supreme Court has held that the due process of law enjoined by the Fourteenth Amendment of the United States Constitution requires a trial before an impartial jury and that when a change of venue has not been granted and the circumstances are sufficiently compelling, a criminal conviction following pretrial publicity should be set aside even in the absence of a showing of demonstrable

unfairness in the trial itself. Shepherd v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963).

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. ... [T]o perform its high function the best way 'justice must satisfy the appearance of justice'." In re Murchison, 349 U.S. 133, 136 (1955); Offutt v. United States, 348 U.S. 11, 14 (1954); Estes v. Texas, 381 U.S. 532, 543 (1965).

The argument that honest jurors ought not to be affected by pretrial publicity as been ably refuted by Chief Justice Taft. His classic statement from Tumy v. Ohio, 273 U.S. 510, 532 (1927) has been more recently quoted by the majority in the Estes Case, regarding the problem of extrajudicial publication of material bearing on a criminal matter then before the court:

> "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and greatest self-sacrifice should carry on without danger of injustice. Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict a defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." 381 U.S. 543.

In Shepherd, supra, Estes, supra, Rideau, supra and in Turner v. Louisiana, 379 U.S. 466 (1965), the United States Supreme Court did not consider the actual effect of extrajudicial utterances on the juries, but struck down the convictions of the appellants on the ground that prejudice was inherent in them.

In other older cases, the United States Supreme Court has found some actual unfairness resulting from extrajudicial publicity and has set aside criminal convictions, e.g., Irvin v. Dowd, 366 U.S. 717 (1961); Stroble v. California, 343 U.S. 181 (1952). Even in the older federal

cases voir dire examination of jurors has not been considered sufficient protection for the defendant where the prospective jurors have been exposed to pretrial publicity. See Marshall v. United States, 360 U.S. 310, 312-13 (1959); Irvin v. Dowd, supra.

It was unfair to require appellant to stand trial at the site of the alleged crime before veniremen who had presumably been exposed to prejudicial publicity. A fair trial for appellant would require that the jury not consider appellant's prior convictions until after it had completed its deliberations on the arson charge. The rule of evidence in criminal cases which renders evidence of wholly independent offenses irrelevant and inadmissible is based on due process considerations, a jury exposed to such evidence being more likely to convict a defendant because he is a bad

man than because of specific guilt of the crime with which he is charged. _See_, 1 Jones, Evidence § 162 (5th ed. 1958). This basic due process requirement is incorporated into the habitual criminal statute itself. Utah Code Annot. § 76-1-19. Pretrial newspaper publicity in the instant case clearly and repeatedly set forth both appellant's prior record and the fact that he was charged with being an habitual criminal. Appellant's appointed counsel found himself in an impossible position. Pointed examination regarding each veniremen's exposure to pretrial publicity could not be made because such questions would themselves create prejudice. Such examination would have revealed the fact that appellant had a prior criminal record and that he was charged with being an habitual criminal.

The family background of appellant and the pretrial publicity, combined with

the inadequacy of a voir dire examination to insure an impartial jury under the circumstances presented by this case, made a change of venue an absolute prerequisite to due process of law.

POINT II

THE LOWER COURT ERRED IN ADMITTING THE PHOTOGRAPHS AND DAMAGED FURNISHINGS AND FIXTURES FROM THE CRIME LAB.

Count I of the information charged appellant with the crime of second-degree arson, a felony, in the language of Utah Code Ann. (1953), § 76-6-2: "That on the 8th day of November, 1969, the said defendant did wilfully and maliciously set fire to and burn the Cache County Jail, a public building."

The information raises and places upon the State the burden of proving three issues of fact: (1) was there a "burning"

or "setting of fire" to the Cache County Jail; (2) was there criminal instrumentality, i.e., wilful and malicious acts, involved in the burning; and (3) was the defendant the person responsible. The photographs of the crime lab and the damaged curtain rod, flourescent fixtures and flood lamp which were introduced by the State over the objections of appellant's counsel (Exhs. 1-6, 9, 10, 12, 13), were not legally relevant nor material to the issues raised by the information. This evidence, at most, tended to show only collateral facts and circumstances which had no direct probative value with respect to any of the above issues. Neither does the evidence tend to link up other probative evidence since nothing was introduced to show that anything burned or was otherwise damaged that constituted a part of the building.

The items in question logically tend to show only that there was heat and smoke in the Cache County Law Enforcement Crime Lab at some time before the pictures were taken and the fixtures and furnishings removed, but neither heat nor smoke, nor even the burning of movables are issues in an arson case if no fire is communicated to the building itself. Dedieu v. People, 22 N.Y. 178 (1860); State v. Levesque, 146 Me. 351, 81 A.2d 665 (1951); O'Daniel v. State, 188 Ind. 477, 123 N.E. 241 (1911); Van Morey v. State, 112 Tex. Cir. P. 439, 17 S.W.2d 50 (1928); Annot., 1 A.L.R. 1163, 1166 (1919). Evidence, although logically relevant, is irrelevant in the legal sense, and therefore inadmissible when it tends to prove that which is not at issue. See, 1 Jones, Evidence §§ 152, 153 (5th ed. 1958). None of the State's witnesses testified that the pictures showed a "burning" or

"setting of fire to" the building itself, i.e., door, walls, floor, ceiling, fixtures or other integral part. None of the fixtures or furnishings introduced, except perhaps the acoustical tile, had been burned or consumed in any degree. None of them, except possibly the flourescent ceiling fixtures which were not burned, and the ceiling tile which may have been, were parts of the building itself. While the fact of damage to furnishings, if shown, has some tenuous logical relevancy to the issue of "burning", this alone does not justify their admission. To be admissible, evidence must have some probative force over and above logical relevancy, which probative force is properly referred to as legal relevancy or materiality. 29 Am. Jur. 2d Evidence § 253.

Evidence of collateral facts which are incapable of affording any reasonable presumption or inference as to a principal

fact or matter in dispute is irrelevant and inadmissible. In the absence of an independent showing that something burned was part of the building itself, evidence tending to show the collateral facts of damage to the room by heat and smoke and of burning of, or damage to, movables, cannot afford any reasonable presumption or inference regarding that principal fact of burning of the building.

Legally irrelevant and immaterial evidence of damage to the laboratory and its accouterments in this case should have been excluded not only because of its probable prejudicial effect upon taxpaying jurors who would naturally feel outrage as a result of the assault upon their own pocketbooks inferred by the offered evidence, but also because its admission had a tendency to draw the jury's attention away from the real issues in the case. This latter point is particularly important

in a criminal case since the accused is expected to come prepared to answer only those things forming the subject matter of the information on which he is charged and matters relevant thereto. The information in this case gave the appellant no clue that he would be required to produce evidence to rebut the State's evidence of damage to movable items of personalty and fixtures or to any item which was not in fact burned. Having no notice of such prejudicial and immaterial matter, he should not have been expected to be prepared to rebut it, and in the absence of such opportunity for rebuttal, it should not have been admitted.

POINT III

THE LOWER COURT ERRED IN SUBMITTING THE CASE TO THE JURY IN THE ABSENCE OF SOME EVIDENCE TO SUPPORT A FINDING ON EVERY ESSENTIAL ELEMENT OF THE CORPUS DELICTI.

All of the evidence submitted, except part of the testimony of the trusty regarding appellant's behavior before the fire was discovered, consisted of circumstantial evidence. No evidence, real or circumstantial, was introduced by the State to prove that any of the items with respect to which evidence was submitted of burning, were integral parts of the Cache County Law Enforcement Building. The circumstantial evidence introduced tended to show that a curtain and a raincoat were burned and that an acoustical tile was caused to "smolder" or "glow." No evidence was adduced to demonstrate how any of these items were, if at all, attached to the structure of the Cache County Law Enforcement Building.

Some testimony was introduced to the effect that the raincoat was simply hung over the curtain rod and that the rod itself fell to the floor in the course of the fire.

The Court's instruction to the jury virtually ruled out the possibility of the curtain being treated as an integral part of the structure in determining whether there had been a burning or setting fire to the structure. Instruction No. 5(E) properly instructed the jury that a building means only those parts of the permanent structure or items which are attached to the building so that they become an integral part of the building, and this does not include "personal property such as chairs, tables, desks or curtains that are unattached by some fixed method such as screws, nails, glue or some method distinguishes it from a temporary arrangement where it is moved from the building as the occupiers of the building move from it." (R. 46). No evidence of the existence of such "screws, nails, glue or other method" distinguishing the curtain from a temporary arrangement was introduced by the State.

Similarly, no evidence of any kind was introduced to show how, if at all, the acoustical ceiling tile was affixed to the structure of the building. Acoustical ceiling tile is often installed by "suspension" which renders it easily removable without tools or without damaging the structure of the building in any way. In such an installation the tiles rest upon a light metal framework which is suspended by wires from the ceiling of the room. The wires are in turn attached to hooks which are screwed into the walls or ceiling of the structure. In such an installation the dantiest of women could probably remove any given tile from the installation unassisted, simply by raising the tile from the framework on which it rests, tilting it slightly and lowering it through the resulting aperture. If the acoustical ceiling tile in the Cache County Law Enforcement Building was installed in such

a manner it would no more constitute an integral part of the structure than would the curtains or other such easily removed embellishments.

To sustain its burden of proof, the State must introduce evidence to show a burning of the building. This burden of proof is not discharged by introduction of circumstantial evidence, whether constituting proof of a few facts or a multitude of facts which are merely consistent with the supposition that a crime has occurred and that the defendant is guilty. So long as one alternative hypothesis is available under any state of facts with respect to which evidence has been introduced, which is in any way inconsistent with either the fact that a crime has been committed or that the defendant is guilty, no verdict of guilty is warranted, and the defendant should be acquitted. <u>State v. Wells</u>, 35 Utah 400,

100 P. 681 (1909); State v. Burch, 100 Utah 414, 115 P.2d 911 (1941). In this case a reasonable hypothesis or theory of innocence exists: that there was no burning of any integral part of the building. Even if it were taken as an established fact that the curtain and the raincoat were burned and that the acoustical ceiling tile was caused to "smolder" or "glow" the reasonable hypothesis still exists that none of these items constituted a part of the integral structure of the building, that therefore there was no burning or setting of fire to an integral part of the structure of the building within the meaning of Utah Code Anno. § 76-6-2, and that therefore no crime was committed and appellant could not possibly then be guilty. When circumstantial evidence is such that reasonable men would not differ upon the fact that it includes an hypothesis of innocence, it is not a question for the

jury but one for the court. A judgment of acquittal should then be entered without submitting the case to the jury. State v. Burch, supra, 115 P.2d 912.

If on the other hand circumstantial evidence concerning the guilt of the accused is of such a nature that reasonable men could differ upon the fact of whether it includes an hypothesis of innocence, and the matter is submitted to the jury, it must be accompanied by an instruction that to convict on such evidence the evidence must exclude every reasonable hypothesis of innocence, and such an instruction implies that there is a question for the jury to decide concerning whether the evidence does exclude that hypothesis. State v. Burch, supra. In the instant case, no such instruction was given.

POINT IV

THE LOWER COURT ERRED IN CONCLUDING THAT

APPELLANT VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL IN A PRIOR CASE ON WHICH THE HABITUAL CRIMINAL CONVICTION IS BASED.

The United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963), held that the right of an accused to counsel for his defense which is guaranteed by the Sixth Amendment of the Constitution is made obligatory on the states by the Fourteenth Amendment, and an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him. The doctrine has retrospective application. Doughty v. Maxwell, 376 U.S. 202 (1964); Pickelsimer v. Wainwright, 375 U.S. 2 (1963); Berryhill v. Page, 349 F.2d 984 (10th Cir. 1965).

Although the right to counsel can be waived, certain formalities are necessary before such waiver is effective: "The record must show, or there must be an

allegation and evidence, which shows the accused was offered counsel but intelligently and understandingly rejected the offer." Carnley v. Cohran, 369 U.S. 506, 516 (1962). In the case of an indigent defendant the right to counsel is not intelligently and understandingly waived unless the defendant has been warned "not only that he has the right to consult with an attorney but also that if he is indigent a lawyer will be appointed to represent him." Cf., Miranda v. Arizona, 384 U.S. 436 (1966). Although the Miranda Case is distinguishable as a Fifth Amendment case, the statements made therein regarding the standard of procedural safeguards required have been properly interpreted as definitive enunciations of the Federal Constitutional Law on the right to counsel under the Sixth Amendment. See, Abercrombie v. State, 428 P.2d 505 (Ida. 1967).

In Burgett v. Texas, 389 U.S. 109

(1967), the record of a prior conviction necessary to establish habitual criminality was silent with regard to the offer of counsel to assist the indigent defendant. The trial court admitted the record into evidence, but subsequently instructed the jury not to consider the prior offenses for any purpose, and the punishment imposed by the jury was not enhanced under the Texas recidivism statute. The United States Supreme Court nonetheless reversed the conviction of the defendant on the first count holding (1) the records of the prior conviction raised a presumption that the defendant had been denied his right to counsel and that the prior conviction was void, and (2) the admission in evidence of the record of the prior conviction resulted in defendant's suffering anew from the deprivation of his Sixth Amendment right and was inherently prejudicial and required reversal of the conviction even

though enhanced punishment had not been imposed. In the course of its opinion the court made the following pronouncement:

> "In this case the certified record of the Tennessee convictions on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceedings, and therefore that his conviction was void. Presuming waiver of counsel from a silent record is impermissible. . . . To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. 114, 115. [Emphasis added]

In a habeas corpus case which arose under the Utah habitual criminal statute, the question of denial of right to counsel on the occasion of a previous felony conviction was raised. In Clark v. Turner, 283 F. Supp. 909 (C.D. Utah 1968), the defendant had been informed of his right to counsel and asked if he desired the assistance of counsel, but he had not been

told, or at least the record did not disclose the fact that he had been told, of his right to court-appointed counsel. The Federal District Court, following the *Burgett* decision, held that the defendant in that case had not waived his right to counsel because one cannot understandably waive a right he does not know he has. 283 F. Supp. at 913.

The decision of the United States Supreme Court in the *Burgett Case*, *supra*, was handed down after the decision of this Court in *Clark v. Turner*, 16 Utah 2d 197, 398 P.2d 202 (1965), in which this Court summarily rejected the primary contention made here regarding right to counsel. The *Burgett* decision led to reversal of the position taken by the Federal District Court for the Central District of Utah and by the Tenth Circuit Court of Appeals in *Clark v. Turner*, 350 F.2d 294 (10th Cir. 1965) wherein it had

been held that the improper habitual criminal sentence could not be attacked so long as the conviction and sentence on the first count of the defendant's conviction still stood and his sentence on that count had not been terminated. Clark v. Turner, 274 F. Supp. 285 (C.D. Utah 1968). More recently the United States Supreme Court has squarely faced the question of whether a concurrent sentence bars consideration on appeal of defects in another conviction and has fully repudiated the "concurrent sentence doctrine." Benton v. Maryland, 395 U.S. 784, 787 (1969). It is clear, therefore, that this Court should not fail to set aside the invalid habitual criminal conviction of appellant in the instant case even if it should sustain the second-degree arson conviction.

In the instant case, the appellant was only 18 years of age and poorly educated when convicted without aid of counsel

of the crime of injuring a public jail. There are no facts which would indicate that appellant was aware that he had a right to have counsel appointed by the court in the absence of his being so informed by the court. No evidence of appellant having prior experience with criminal procedure appears in the record. The _Burgett Case_ makes it clear that where the record is silent on whether the court informed a defendant of his right to have court-appointed counsel, no presumption may be indulged that such information was given. In fact, prior to the Supreme Court's decision in _Gideon v. Wainwright_, _supra_, information concerning right to appointed counsel was generally not given to defendants by the courts. Only since the _Miranda Case_, _supra_, has it been standard practice for courts to inform defendants of their right to court-appointed counsel.

Appellant's age and his lack of education and experience at the time of his conviction for injuring a public jail clearly distinguish this case from other cases in which this Court has found that the appellants in fact suffered no disadvantage by not being informed of their right to court-appointed counsel because they in fact were sufficiently experienced in matters of criminal procedure to know that they were entitled to such counsel. Distinguish, e.g., Mayne v. Turner, no. 11922 (decided April 21, 1970); Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968).

POINT V

THE VERDICT RETURNED ON THE HABITUAL CRIMINAL COUNT IS VOID ON ITS FACE.

This Court has made it clear in two separate cases that the Utah habitual criminal statute does not create a crime. Being an habitual criminal is a status,

and to be charged with being an habitual criminal is not to be charged with a crime. The sole purpose of the habitual criminal statute is to make more severe the punishment for the third in a series of three felony convictions. State v. Wood, 2 Utah 2d 34, 268 P.2d 998, 1000 (1954); Zeimer v. Turner, 14 Utah 2d 232, 381 P.2d 721 (1963).

The lower court erred in submitting a form of verdict to the jury which allowed a finding that appellant had committed an additional felony in being an habitual criminal. The form of verdict submitted in the instant case could only have confused the jury and created a misunderstanding of what the jury was required to consider and to find. The inference thus raised that appellant may have committed not only three crimes with respect to which proof had been introduced at trial, but also an additional crime of

being an habitual criminal, was obviously prejudicial. In any event, the verdict returned on the second count of the information did not correspond to the allegation of the information or to the habitual criminal statute, and the jury's intention is thus rendered unclear. It purported to find appellant guilty of a nonexistent crime with which he had never been charged. Although verdicts are liberally construed when the jury's intention is clear, they must be set aside where there is irreconcilable inconsistency between them and the formal criminal charge. _Patterson v. United States_, 2 Wheat. 271 (1817); _Smith v. State_, 177 P.2d 523 (1947); _State v. Kolkow_, 110 Kan. 722, 205 P. 639 (1922); _Donovan v. People_, 520, 522, 74 N.E. 772 (1905). The verdict in this case is void on its face and should be reversed under general due process considerations completely apart from double jeopardy

arguments which have heretofore been rejected by this Court in Clark v. Turner, 19 Utah 2d 210, 429 P.2d 262 (1967).

POINT VI

THE LOWER COURT ERRED IN IMPOSING TWO SEPARATE CONCURRENT SENTENCES ON APPELLANT WHO WAS CONVICTED OF ONLY ONE CRIME AND THE SENTENCES ARE VOID.

Since being an habitual criminal is not a crime, no sentence may be separately imposed upon a verdict that the defendant is an habitual criminal. The verdict of the jury on an habitual criminal charge affects only the severity of the sentence to be imposed for the third felony conviction. Utah Code Anno. § 76-1-18 (1953). Otherwise the habitual criminal statute itself would be invalid as a scheme to place defendants twice in jeopardy for the same offense. In this case a sentence of from one to ten years was imposed on

appellant for the crime of second-degree arson, the only real crime of which he was found guilty in this proceeding. The additional sentence of a minimum of fifteen years is an entirely gratuitous and erroneous sentence which is not authorized by the habitual criminal statute. Even if the conviction for second-degree arson should stand, the additional sentence imposed for the separate "felony" of being an habitual criminal should be vacated. Benton v. Maryland, 395 U.S. 784, 787 (1969); Clark v. Turner, 274 F. Supp. 285, 913 (C.D. Utah 1968).

CONCLUSION

The appellant's defense was unfairly disadvantaged in defending against the information through the lower court's refusal to transfer the case to another location where appellant and his family were not held in disrepute and where

prejudicial pretrial publicity regarding previous offenses had not been circulated by the news media. His defense was further prejudiced with respect to the second-degree arson charge by admission of irrelevant and immaterial damaged furnishings from the Cache County Crime Lab and by admission of irrelevant and immaterial photographs of the crime lab, in the absence of prior evidence or any evidence at all, that some part of the integral structure of the building had been burned or consumed in any degree or that would tie this evidence of purely collateral facts to the issues in the case. Furthermore, in the absence of some evidence of a burning of the building itself, appellant was entitled to a judgment of acquittal, or at least to an express instruction that the jury must find that the evidence excluded every reasonable hypothesis of innocence to convict.

Regardless of what view the Court may take of the conduct of the trial on the second-degree arson charge, appellant is entitled to have the additional "felony" sentence on the second count of the information voided because he did not waive his right to counsel in criminal case number 1058, on which the status of habitual criminality is dependent, because the verdict on this count was inconsistent with the information and the statute and because a separate sentence on this count is not authorized by law in any event.

RESPECTFULLY SUBMITTED,

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