Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1972

Milton Curtis Zumbrunnen v. John W. Turner, Warden Utah State Prison : Brief of Appellant

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.David B. Rhode; Attorney for Appellant

Recommended Citation
Brief of Appellant, *Zumbrunnen v. Turner*, No. 12754 (1972).
https://digitalcommons.law.byu.edu/uofu_sc2/5578

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

IN THE SUPREME COURT
of the
STATE OF UTAH

MILTON CURTIS
ZUMBRUNNEN,

Plaintiff-Appellant,

-vs-

JOHN W. TURNER, Warden
Utah State Prison,

Defendant-Respondent.

Case No.
12754

BRIEF OF APPELLANT

Appeal from the judgment of the Third
Judicial District Court, Salt Lake County,
State of Utah, Honorable Ernest F. Baldwin, Judge.

DAVID P. RHODE
231 East Fourth South
Salt Lake City, Utah
Attorney for Appellant

VERNON ROMNEY
Attorney General, State of Utah
State Capitol
Salt Lake City, Utah
Attorney for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	4
POINT I	4
THE COURT BELOW ERRED IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE HIS GUILTY PLEA WAS NOT INTELLIGENTLY AND VOLUNTARILY ENTERED BECAUSE HE WAS NOT PROPERLY ADVISED OF ITS CONSEQUENCES.	
POINT II	5
THE COURT BELOW ERRED IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE HE WAS NOT AFFORED THE UNDIVIDED INTEREST AND EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS COUNSEL ALSO REPRESENTED FOUR OTHER CO-DEFENDANTS WITH DIVERGENT INTERESTS.	
CONCLUSION	19

TABLE OF CONTENTS — Continued

Page

CASES CITED

Baker v. State, 202 So. 2d 563 (Fla. 1967) ... 14

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) ... 4, 5

Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965) ... 17

Carnley v. Cochran, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962) ... 16

Commonwealth v. White, 214 Pd. Super. 264, 252 A.2d 204 (1969) ... 10, 13

Commonwealth ex rel. Whitling v. Russell, 406 Pd. 45, 176 A. 2d 641 (1962) ... 14

Craig v. United States, 217 F.2d 355 (6th Cir. 1955) ... 16

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1941) ... 9, 18

Glavin v. United States, 396 F.2d 725 (9th Cir. 1968) ... 11, 14

Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1937) ... 16

Kent v. State, 11 Md. App. 293, 273 A.2d 819 (1971) ... 12

King v. State, 93 Idaho 87, 456 P.2d 254 (1969) ... 17

Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967) ... 13

TABLE OF CONTENTS—Continued

Page

Morgan v. United States, 396 F.2d 110 (2nd Cir. 1968) 18

McIver v. United States, 280 A.2d 527 (D.C. App. 1971) 18

People v. Chacon, 73 Cal. Rptr. 10, 447 P.2d 106 (1968) 10

People v. Gellardo, 269 A.C.A. 25, 74 Cal. Rptr. 572 (1969) 11, 12, 13

People v. Odom, 236 Cal. App. 2d 876, 46 Cal. Rptr. 453 (1965) 11, 12

People v. Robinson, 42 Cal. 2d 741, 269 P.2d (1954) 10

Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966) 14

United States ex. rel. Small v. Rundle, 442 F.2d 235 (3rd Cir. 1971) 12

United States v. Williams, 429 F.2d 158 (8th Cir. 1970) 18

White v. United States, 396 F.2d 822 (5th Cir. 1968) 14

STATUTES CITED

U.S.C. 3006 A (b) 18

OTHER AUTHORITIES CITED

American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function 6, 7

American Bar Association Code of Professional Responsibility 7, 16

Comment, 74 Dick. L.Rev. 241 (1969) 15

IN THE SUPREME COURT
of the
STATE OF UTAH

MILTON CURTIS ZUMBRUNNEN, *Plaintiff-Appellant,* -vs- JOHN W. TURNER, Warden Utah State Prison, *Defendant-Respondent.*	Case No. 12754

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Milton Curtis Zummbrunnen, appeals from a decision of the Third Judicial District Court denying his release from the Utah State Prison upon a Petition for a Writ of Habeas Corpus.

DISPOSITION IN THE LOWER COURT

On September 21, 1971, Milton Curtis Zummbrunnen filed a petition for a Writ of Habeas Corpus in the Third Judicial District Court, Salt Lake County, alleg-

ing that his committment to the Utah State Prison was invalid. An Amended Petition was filed on November 12, 1971. The matter came on for hearing on November 18, 1971, before Judge Ernest F. Baldwin, who denied the Petition on November 29, 1971.

RELIEF SOUGHT ON APPEAL

Appellant, Milton Curtis Zummbrunnen, seeks the reversal of the judgment and order of the court below.

STATEMENT OF FACTS

On April 5, 1971, in the District Court of Wasatch County, State of Utah, appellant plead guilty to the charge of second degree burglary. (Exhibit 1, R. 27) At that change of plea hearing, appellant was represented by counsel, James R. Hall. (R. 27) Mr. Hall testified at the habeas corpus hearing that he represented appellant and four other codefendants. (R. 27) He had been asked on an appointed basis to represent appellant and four others in connection with a forgery charge. (R. 27) He later represented appellant and four others on a burglary charge. (R. 27) Appellant and the others asked Mr. Hall to represent them on the burglary, but they did not pay him. (R. 40).

At this change of plea hearing on April 5, 1971, which was the day before the day on which trial was to be had, appellant plead guilty to second degree burglary and two other counts of second degree burglary were dismissed (R. 28, Exhibit 1, pp. 4, 5) One of the codefendants, Mr. Banken, also received the same deal. (Exhibit 1, R. 27) The other three codefendants plead guilty to grand larceny. (R. 27) Part of the reason for the deal was so that the other three codefendants would get some other disposition than pleading guilty to the second degree burglary charge. (R. 28, 35, 26)

When appellant plead guilty to the second degree burglary, the court asked if anyone had applied any pressure to get him to plead guilty, or if anyone had made any promises to him. (Exhibit 1, p. 2) The court asked appellant if he understood that he had the right to a trial by jury. (Exhibit 1, p. 1) He was told on two other occasions that his guilty plea would take the place of trial by jury. (Exhibit 1, pp. 2, 7) Appellant was asked if he knew what he was charged with, and the charge was explained to him by the court. (Exhibit 1, pp. 3, 4) Appellant was asked his age and was asked what happened in the matter. (Exhibit 1, pp. 4, 5)

ARGUMENT

POINT I.

THE COURT BELOW ERRED IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE HIS GUILTY PLEA WAS NOT INTELLIGENTLY AND VOLUNTARILY ENTERED BECAUSE HE WAS NOT PROPERLY ADVISED OF ITS CONSEQUENCES.

From the record of the change of plea hearing on April 5, 1971, it is clear that appellant was not adequately informed of and did not knowingly and intelligently waive his rights. The record (Exhibit 1) reveals that appellant was made aware of the fact this his guilty plea would take the place of a trial. However, the record is silent as to his other rights that he waived by entering a plea of guilty; that is, his privilege against compulsory self-incrimination and his right to confront his accusers.

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969) held that it was error on the part of the trial judge to accept guilty pleas without a showing that the plea was intelligent and voluntary. The United States Supreme Court held that the record must show a waiver of rights, to show if the guilty plea is voluntarily made.

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination, guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth [citation] Second, is the right to trial by jury. [citation] Third, is the right to confront one's accusers. [citation] We cannot presume a waiver of these three important federal rights from a silent record. 395 U.S. at 243.

The court did ask appellant if any pressure had been applied to him or if any promises had been made, but nowhere in the record is it shown that appellant was made aware of his privilege against self-incrimination or his right to confront his accusers. Nowhere in the record is it made apparent that appellant intelligently and knowingly waived these important rights. Therefore, under the clear mandate of *Boykin v. Alabama, supra,* appellant's plea of guilty was not knowingly, intelligently, and voluntarily entered. As in *Boykin,* the judgment must therefore be reversed.

POINT II.

THE COURT BELOW ERRED DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE HE WAS NOT AFFORDED THE UNDIVIDED INTEREST AND EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS COUNSEL ALSO REPRESENTED FOUR OTHER CODEFENDANTS WITH DIVERGENT INTERESTS.

Appellant contends that he was not afforded the undivided interest and assistance of counsel because his appointed attorney also represented four other co-defendants with divergent interests. Thus, there was a conflict of interest which prejudiced appellant and as a result, his plea fo guilty was not entered voluntarily, knowingly, and intelligently, and so should be set aside.

Without attempting to impugn James R. Hall, the attorney who represented appellant, and without attempting to show any incompetence whatever, it is apparent that Mr. Hall should not have represented all five defendants on the burglary matter in Wasatch County (or should not have been appointed to represent all five defendants). The American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (Tent. Draft, March, 1970) has put forth standards to be followed. In Standard 3.5, Conflict of Interest, it is stated:

> (b) Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the *duty to one of the defendants may conflict with the duty to another.* The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in un-

> usual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. (emphasis added)

The official commentory to the above standard states in part:

> In many instances a given course of action may be advantageous to one of the defendants but not necessarily to the other. The prosecutor may be inclined to accept a guilty plea from one of the codefendants, either to a lesser offense or with a lesser penalty or other consideration, but this might harm the interests of the other defendant. The contrast in the disposition of their cases may have a harmful impact on the remaining defendant . . . Defense counsel must necessarily confront each with any conflicting statements made by the other in the course of planning the defense of the cases. In this situation he may find that he must 'judge' his clients to determine which is telling the truth, and his role as advocate would inevitably be undermined as to one if not both defendants.

Further, the American Bar Association Code of Professional Responsibilities, adopted by this court on February 19, 1971, contains instruction relevant to this problem. In Disciplinary Rule 5-105 (B) it is stated:

> A lawyer should not continue multiple employment if the exercise of his independent judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105 (C)

DR 5-105 (C)

> In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independant professional judgment on behalf of each.

Appellant's case comes directly within the dictates of the above standards. It is clear from the very nature of the situation that one attorney could not represent five defendants, and advise them to plead differently and have all their interests equally in mind. His duty to one clearly conflicted with his duty to another. It is also clear that all the defendants did not give an informed conset after full disclosure of the possible complications that could arise from such multiple representation. James R. Hall testified that appellant asked him to represent them (the five defendants), but Mr. Hall was not paid by appellant and was indeed appointed by the court. (R. 27) The record does not disclose that on April 5,

1971, one day before the trial was to be had, that Mr. Hall had explained the possible conflicts that might arise.

It is necessary to explore just exactly what the conflict of interest was or could have been, whether the conflict prejudiced appellant, and whether or not the judge, the defense attorney, and appellant fulfilled their roles in regards to exploring the issue of conflict of interest.

The United States Supreme Court has made it clear also that an attorney is not to represent conflicting interests. *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed 680 (1941) In *Glasser,* it was held that Glasser's right to counsel under the Sixth Amendment had been infringed over objection, the attorney he had was appointed by the court to represent his co-defendant. The Court said that the "Assistence of Counsel" guaranteed by the Sixth Amendment contemplated that such assistance be "untrammeled and unimpaired" by a court order requiring that one lawyer shall simultaneously represent conflicting interests. Further, the Court said that

> The right to have the assistance of counsel is too fundamental and abosolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. 315 U.S. at 75-76.

The Court also pointed out that counsel's 'representation of Glasser was not as effective as it might have been if the appointment had not been made." Further, the Court said that "irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness."

The above quoted language has caused some confusion on jus what a "conflict of interest" is. Dual representation may impair effectiveness and thus constitute a conflict itself.

Some court have hinted that dual representation may be a conflict in itself. In *People v. Chacon,* 73 Cal. Rpts. 10, 447 P.2d 106 (1968), the Califoria court said:

> If counsel must represent conflicting interests or is ineffective because of the burdens of representing more than one defendant, the injured defendant has been denied his constitutional right to effective counsel.

In *People v. Robinson,* 42 Cal. 2d 741, 269 P.2d 6 (1954), the court said that entirely apart from any factually apparent diversity of interest, the defendant is entitled to the undivided loyalty and untrammeled assistance of his own counsel. In *Commonwealth v. White,* 214 Pa. Super, 264, 252 A.2d 204 (1969), there were three co-defendants. The defendant plead guilty to conspiracy, larceny and carrying a firearm without a license. He

plead not guilty to burglary, arson, and receiving stolen property. The second co-defendant plead not guilty to all charges. The court held that under these facts where two defendants' positions were of variance (that is, one pleads guilty and one pleads not guilty), the two defendants may not be represented by the same counsel. Such a variance, the court held, creates the possibility of harm that amounts to a conflict. The California Court of Appeals in *People v. Odom,* 236 Cal. App. 2d 876, 46 Cal. Rptr. 453 (1965) set forth exactly what constitutes a conflict of interest in California. The court said that, among other things a conflict exists among co-defendants when one defendant has a record of prior felony convictions and the others do not.

Some courts state that a conflict need not be shown to be an actual conflict, but that a potential conflict is enough to deprive a defendant of the effective assistance of counsel. Also, where one defendant is more heavily involved than the others, there is a sufficient possibility of conflict of interest to merit separate representation. *People v. Gellardo,* 269 A.C.A. 75, 74 Cal. Rptr. 572 (1969) The Court of Appeals, Ninth Circuit, in *Glavin v. United States,* 396 F. 2d 725 (9th Cir. 1968) said in dicta if there is "some possibility that appellants have divergent interests so that one or both might not receive 'untrammeled and unimpaired' assistance, then the denial of counsel's motion to be relieved from representing one

defendant was reversible error. The court in *Kent v. State,* 11 Md.App. 293, 273 A. 2d 819 (1971) held that the right to counsel is denied if there is an actual conflict of interest or one that is "imminently potential." It was held in *United States ex. rel. Small v. Rundle,* 442 F. 2d 235 (3rd Cir. 1971) hat there must be a showing of a possible conflict of interest, however remote.

While it is true that most conflict of interest situations arise during trial, it is apparent from appelant's case that conflicts of interest can arise prior to trial and evidence themselves at the stage of the plea. In appellant's case, the fact that there were five codefendants in a burglary charge itself leads one to the conclusion that all codefendants would not be equally involved. *People v. Gellardo, supra,* noted that this in itself may be enough to warrant separate representation. Further, the attorney, James R. Hall, knew that appellant had a prior felony record and was on parole from Minnesota. (R. 28) He (Mr. Hall) was aware that if appellant plead guilty he would likely go to prison for up to twenty years and that his chances for probation were very remote. (R. 28, 29) The fact one defendant has a prior record and others do not was mentioned in *People v. Odom, supra,* as a condition that makes for conflict of interest. In appellant's case it is clear that Mr. Hall could not have had the best interests of all defendants equally in mind. While the deal worked out may have benefitted some of the five co-defendants, it is clear that appellant did not

receive the benefit of the deal. Mr. Hall was placed in the position of making common cause for all defendants or run the risk of "throwing one clinet to the wolves to benefit the other." *People v. Gellardo, supra.* Thus, the conflict in this case was how to treat all five co-defendants. To benefit some, others (appellant included) had to have their interests sacrified. That is scarcely the "untrammeled and undivided" assistance of counsel that is constitutionally required. Under *Commonwealth v. White, supra,* it is clear that inconsistent pleas among co-defendants cannot adequately handled by one counsel without a conflict of interest.

Commonwealth v. White, supra, and reason indicate that whether or not the matter goes to trial, a conflict of interest can still exist, especially in a case such as appellant's where the change of plea was made one day before the date set for trial and the attorney had made no effort apparent on the record to withdraw from representation from some of the co-defendants.

Once the conflict of interest is established, it remains to explore whether or not prejudice must be shown. The court in *Lollar v. United States,* 376 F.2d 243 (D.C. Cir. 1967) said that:

> It is settled that some prejudice, some conflict of interest resulting from the joint representation must exist before one can be said to have been denied the effective assistance of counsel.

> What constitutes sufficient prejudice, however, is uncertain, some courts apparently requiring a very strong showing of actual prejudice [citations], others suggesting the possibility of prejudice is sufficient . . . [citing *Glasser v. United States, supra*] The obvious reason against insisting on a precise delineation of the prejudice suffered is that such a task is made difficult when one must rely on a cold printed record . . . [referring to the trial record] 376 F.2d at 246

Thus, the court held that

> Only where we can find no basis in the record for an informed speculation that [defendant's] rights were prejudicially affected can the conviction stand. 376 F.2d at 247.

In *Sawyer v. Brough,* 358 F.2d 70 (4th Cir. 1966) the court held that the defendant need not delineate the precise manner in which he has been harmed by the conflict of interest. "The possibility of harm is sufficient to render his conviction invalid." See also, for the same rule, *White v. United States,* 396 F. 2d 822 (5th Cir. 1968) The Pennsylvania Court has held that if a conflict arises, "the mere existence of a conflict vitiates the proceedings, even though no *actual* harm results. The potentiality that such harm *may* result, rather than that such harm did result, furnishes the appropriate criterion." *Commonwealth ex. rel. Whitling v. Russell,* 406 Pa. 45, 176 A. 2d 641, 643 (1962). In *Baker v. State,* 202 So. 2d 563 (Fla. 1967), the court held that if a conflict

exists, no prejudice need be shown. See generally, Comment, 74 Dick L. Rev. 241 (1969).

If a finding of prejudice is necessary, even though the conflict of interest exists, it is apparent from the record that appellant was prejudiced. Mr. Hall knew that appellant had a prior record and that he was on parole from another state. Mr. Hall knew that it was reasonably certain that appellant would go to prison. Nevertheless, he allowed appellant to plead guilty to second degree burglary. There was even some misunderstanding as to just what appellant was charged with and what he would plead guilty to (Exhibit 1, p. 3), though the record was finally made clear that appellant knew he was pleading guilty to second degree burglary. (Exhibit 1, pp. 4, 5) It is idle to speculate what would have happened had appellant had single representation, but it is almost beyond question that if there had not been the element present of trying to get consideration for the co-defendants, a guilty plea would not have been entered where there was almost a certainty that a sentence in prison would be imposed. Mr. Hall testified that he wanted to see the girls (the three other co-defendants) released, even though he was quite certain that appellant would go to prison in order to accomplish this result. (R. 28) Had appellant had single representation, this problem would not have evidenced itself, and appellant would not have been prejudiced by being the subject of a deal that benefited others.

Numerous cases indicate that the trial court and the defense attorney have obligations to make the defendant aware of the possible conflict of interest and the possible consequences that may result. There was testimony at the habeas corpus hearing that 'they" asked Mr. Hall to represent them. However, it also made clear that Mr. Hall was indeed appointed and was not paid by appellant nor any of his co-defendants. (R. 27, 40)

From this record it is clear that there was no valid waiver of the right to counsel. A waiver is an intentional relinquishment or abandonment of a known right or privilege, which must be made by a defendant who has been appraised of his rights and who has an intelligent conception of the consequences of his act. See *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1937); *Carnley v Cochran,* 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962). The record does not indicate that appellant was made aware of the possible results of a conflict of interest in accordance with the ABA Code of Professional Responsibility, DR 5-1-5 (C), *supra* If the record does not show that appellant was aware of the possible difficulties with multiple representation, the waiver of the right cannot be presumed from a silent record. See *Johnson v. Zerbst, supra; Craig v. United States,* 217 F.2d 355 (6th Cir. 1955).

Exactly what appellant knew as to the conflict is clearly relevant to this issue of voluntariness of the plea.

In *King v. State,* 93 Idaho 87, 456 P.2d 254 (1969), the court said, 450 P. 2d at 259:

> When one accused person is represented by counsel who also represent three co-defendants on the same charge, it is less likely that the individual accused will receive the kind of assistance of counsel which would discriminate between the individual degrees of involvement in the alleged crime and their perhaps different legal consequences. These are matters about which an accused layman knows little and unless he is fully and effectively informed he may make a thoughtless plea . . . [in preference to a possible death penalty which existed in that case.] Thus, the type of representation of counsel afforded [defendant] in the prior proceedings as shown by this record is quite relevant to the question whether the guilty plea was made voluntarily and understandingly.

In *Campbell v. United States* 352 F. 2d 359 (D.C. Cir. 1965) the record was silent as to whether the defendants were aware of the importance of having separate attorneys.

> When two or more defendants are represented by a single counsel, the [trial court] has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it.

This duty is imposed, the court said, because a layman is not likely to be aware of his rights so as to object to a possible conflict of interests. The court went on to say that it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or had advised his clients of the risks.

> Trial judge should make sure that codefendants have affirmatively and intelligently chosen to be represented by the same attorney, and that their decision on the availability of counsel.

For the same basic rule that the trial judge should make sure the defendant is aware of the difficulties and intelligently chooses multiple representation. See *United States v. Williams,* 429 F. 2d 158 (8th Cir. 1970); *McIver v. United States*, 280 A. 2d 527 (D. C. App 1971); *Morgan v. United States,* 396 F.2d 110 (2nd Cir. 1968). The federal cases reaching this result rely on the Criminal Justice Act, 18 U.S.C. §3006(b), which provides:

> The court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel . . .

This statute really says no more than *Glasser v. United States, supra;* both simply forbid multiple representation when there is a conflict of interest.

The record does not reveal that either the trial court of defense counsel explained the problems associated with multiple representation. Therefore, it cannot be presumed that appellant made a knowing and intelligent choice to have multiple representation. As a result, as there was a conflict of interest present in the multiple representation, and resulting prejudice, appellant was denied the effective and undivided assistance of counsel. Because of this, his guilty plea was not knowingly, intelligently and voluntarily entered and should be set aside.

CONCLUSION

For the reasons above stated, that appellant did not enter his plea of guilty knowingly, intelligently and voluntarily because he was not properly advised of the consequences of his plea and because he was denied the effective and undivided assistance of counsel, appellant respectfully submits that the judgment and order of the court below be reversed.

Respectfully submitted,

DAVID P. RHODE
Attorney for Appellant

Delivered three (3) copies of the foregoing to the Attorney General's Office, State Capitol Building, Salt Lake City, Utah this 8 day of Feb., 1972.