1974

State of Utah v. Brian Edward Maguire : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Re

vs.

EDWARD MAGUIRE,
Defendant-Ap

BRIEF OF RESP

---

peal from Judgment of th
Judicial District, in and
of Utah, the Honorable
ng.

VERNO
Attorney
M. F
Chief A
EARL E. D
Assistant A
236 State C
Salt Lake City, U
Attorneys

R. KELLER
Legal Defender Association
Sixth East
City, Utah 84102
ney for Appellant

1207 SOUTH MAIN STREET SALT LAKE CITY,

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

CASES CITED

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

CONSTITUTIONS CITED

STATUTES CITED

OTHER AUTHORITIES CITED

R=RECORD

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

BRIAN EDWARD MAGUIRE,
Defendant-Appellant.

Case No. 13386

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal brought by the appellant Brian Edward Maguire from a judgment rendered in the District Court of the Third Judicial District of Utah, the Honorable Ernest F. Baldwin, finding appellant Maguire guilty of murder in the second degree.

DISPOSITION IN THE LOWER COURT

The appellant Brian Edward Maguire was charged with the crime of murder in the first degree and appeared before the Honorable Ernest F. Baldwin, where said ap-

pellant moved for a trial without jury. The motion was granted and appellant Maguire was found guilty of murder in the second degree and was committed to the Utah State Prison for a term of ten years to life.

RELIEF SOUGHT ON APPEAL

Respondent respectfully seeks affirmation of the trial court, finding the appellant Maguire guilty of murder in the second degree, and denying appellant's request for a new trial.

STATEMENT OF FACTS

The respondent agrees with the facts set forth in appellant's brief with the following additions or corrections:

1) The altercation on the evening of October 29, 1972, concerned itself with an argument between the appellant Brian Maguire and Peter Petersen in Petersen's home about Maguire "messing around" with Petersen's girlfriends (R. 240-245). The appellant later took Mr. Petersen's girlfriend, Sheryl, to the apartment of Mr. Petersen's wife, Susan Nelson. Because the appellant so acted, Mr. Petersen found Mr. Maguire and Sheryl at the apartment (R. 174), cuffed the appellant (R. 187) and slapped Sheryl (R. 187). The appellant and Petersen then exited to the parking lot after which Mr. Petersen returned and said to his wife that Maguire had a .38 caliber gun, but that he wasn't scared (R. 188).

2) The appellant testified that soon after leaving

the motel he had trouble with his automobile lights and that Mr. Petersen stopped, offered assistance, and asked the appellant if he wanted a lift home (R. 254-256).

3) Maguire testified that upon arriving at an alleyway he refused to get out of the car after Mr. Petersen told him to do so (R. 260-262). Appellant continued to refuse to get out of the car even though he testified that he had always retreated from Mr. Petersen before (R. 319-320).

4) Mr. Maguire testified that his memory was somewhat hazy but indicated in his testimony that he snapped out of his "condition" (R. 313) to remember the incidents leading to the shooting. He further testified that he could not recall Mr. Petersen reaching to the glove compartment for the gun even though he would have had to reach over the appellant to get it (R. 135).

5) Appellant Maguire admitted lunging for the gun after which it went off (R. 262), but nothing was said as to it causing injury. Mr. Petersen's left hand was admittedly on the left side of the steering wheel at the time appellant lunged for the gun. Mr. Maguire testified that Mr. Petersen then lunged at him and the gun went off and hit the deceased in the forehead (R. 263). Dr. Taylor testified that two bullets entered the head, one in the forehead and one entering the rear of the head (R. 137). Either bullet would have caused instant unconsciousness (R. 137). Mr. Maguire testified about only the bullet in the forehead.

6) At trial, the appellant moved to waive trial by jury (R. 61). Discussion ensued with the appellant as to his understanding of that request after which the motion was granted (R. 51, T. 62). Later in the proceedings after the prosecution rested, the court ruled that first degree murder would not be considered and that second degree murder and voluntary manslaughter would be the only two possibilities (R. 214).

7) The lower court found that sufficient evidence existed for the malice aforethought needed for second degree murder and ordered that Mr. Maguire be imprisoned in the Utah State Prison for ten years to life.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE APPELLANT TO WAIVE TRIAL BY JURY IN THE CASE AT BAR.

A.

THE COURT'S RULING IN A PREVIOUS CASE OF MURDER IN THE FIRST DEGREE WHERE THE JUDGE AND DEFENSE ATTORNEY WERE THE SAME AND UPON WHICH THE DEFENSE ATTORNEY APPARENTLY RELIED, GOVERNED THE PROCEEDINGS OF THE CASE AT BAR EXCLUDING ALL POSSI-

BILITY THAT THE DEATH PENALTY COULD BE IMPOSED.

Appellant Maguire relies upon Utah Code Ann. § 77-27-2 (1953), in support of his argument that he could not waive jury trial in the present case. The pertinent language of the statute is as follows:

> "Issues of fact must be tried by a jury, *but in all cases except where a sentence of death may be imposed, trial by jury may be waived by the defendant.* Such waiver shall be made in open court and entered in the minutes." (Emphasis added.)

A cursory reading of this language makes it appear that in every capital case a trial by jury is an absolute which cannot be waived. Respondent contends, however, that the standard so claimed is not absolute, but hinges solely on the determination whether the "death penalty" may be imposed.

Since the United States Supreme Court rendered its decision in *Furman* v. *Georgia*, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the status of the death penalty has been relatively uncertain in Utah as well as throughout the United States. Despite this fact, effects of *Furman* on the present case need only be examined lightly, since respondent submits that the death penalty did not apply to his particular case, and since it did not, the alleged "absolute" standard of Utah Code Ann. § 77-27-2, *supra*, did not apply.

In *State of Utah* v. *Donald Leith Christean and Vernon Wayne Rogers*, Case No. 13510, presently pending before this Court, Judge Baldwin ruled on March 12, 1973, on the opening day of trial, that Utah's death penalty was unconstitutional and that it could not be applied. Mr. Gil Athay of the Legal Defender's Association was the defense attorney in that action and had previously requested Judge Baldwin to make a ruling on that issue.

In the present case, Mr. Gil Athay, once again was the attorney before Judge Baldwin. Following the same procedure he used in the *Christean* case, Mr. Athay moved for the jury to be waived. This motion was made on April 30, 1973, just six weeks after Judge Baldwin's previous ruling in the *Christean* case. Again, Mr. Athay's motion was granted.

Whether Judge Baldwin misconstrued Furman in the previous case is not paramount. What is important is the fact that the judge ruled that the "law of the case" was that the death penalty would not be imposed. Likewise, in the present case, Judge Baldwin allowed the defendant to waive a trial by jury. It was not necessary for Mr. Athay to obtain another ruling regarding Utah's death penalty because Mr. Athay was fully aware of the Judge's ruling in the *Christean* case. The ruling made in the previous case became the law of that court and as such continued to control all subsequent situations of like nature coming before the judge since the judge never specifically ruled otherwise.

Since Mr. Athay undoubtedly conversed with his client regarding Judge Baldwin's previous ruling in the *Christean* case and knew perfectly well that the court would so rule again if called upon, the appellant cannot now claim that irreparable damage was done. It is difficult to see how the appellant can claim prejudice when before the defense presented its case the court ruled that only second degree murder or voluntary manslaughter would be considered, and that the charge of first degree murder was dismissed. Furthermore, all parties knew that the court would not apply the death penalty. This was known prior to the commencement of and during the trial. The transcript, as well as all circumstances surrounding the trial make this point clear. Despite this, appellant Maguire was not even convicted of that for which he claims prejudice, but was instead convicted of a lesser charge. Thus, no prejudice took place, and appellant Maguire was given the benefit of the doubt in dropping of the charge of first degree murder by the Court.

Appellant Maguire cites *State* v. *James*, 30 Utah 2d 32, 512 P. 2d 1031 (1973), and *Roll* v. *Larsen*, 30 Utah 2d 271, 516 P. 2d 1392 (1973), in support of his position that a jury trial in his case could not be waived. Neither case is on point. A careful reading of *James* and *Roll* indicates that the court merely held that "capital" cases still exist in Utah. The entire opinions center around discussions of the "classification" theory of offenses and how that theory stands in light of *Furman*. Respondent

concedes and agrees with the court's opinions in *James* and *Roll* that certain offenses are still capital in nature. The Court said in *James*:

> "The Constitution of the state has provided a system of classifying certain serious offenses as capital cases and then mandated a specific procedural structure for the administration of justice based on that classification. *Furman* v. *Georgia* cannot be rationally construed as abrogating our fundamental law."

The procedural structure referred to is that defendants may waive a jury trial in all cases *except where the death penalty may be imposed.* Therefore, in capital cases where a death penalty may be a reality, one must be tried by a jury of twelve. In the present case, however, it was the "law of the case" that the death penalty could not be imposed, thus allowing a waiver of jury trial, which means a waiver of the twelve man jury as prescribed by *James.* See *Straka* v. *Voyles,* 69 Utah 123, 252 P. 2d 677 (1929), which discusses the concept of "law of the case." Thus, it must be concluded that capital offenses still exist in Utah, but that the waiver of the jury trial in the instant case was and is not governed by the *James* and *Roll* cases as asserted by the appellant.

The respondent therefore submits that no prejudice exists which would demand the reversal for a new trial. The understanding of all parties involved made the possibility of the death penalty a nullity and the court further eliminated the possibility of a conviction for first degree

murder. Therefore, the trial court's findings should be sustained.

B.

JURY TRIAL IS WAIVABLE BY DEFENDANTS IN CAPITAL CASES, AND UTAH CONSTITUTIONAL AND STATUTORY LANGUAGE IS NO BAR THERETO.

Though a first reading of Utah constitutional and statutory provisions appear to indicate otherwise, there is strong reason to allow waiver of jury trials in those cases raised by appellant. Absolute standards can be detrimental to those whom they are designed to protect. Flexibility must exist to prevent undue prejudice if the defendants in particular instances feel such would take place.

"Supposed fairness" is the argument used to establish the sanctity of a jury trial — especially in capital cases. This philosophy of fairness is deeply rooted in the common law. Such background led to Utah's enactment of Utah Code Ann. § 77-27-2 on which appellant's arguments are based. Basically, this protection was used to protect individuals from the tyranny of the state. Today's "Due Process" procedures make available to an accused the protections upon which the jury trial system was based. The standards now insure that protections will be afforded and followed — the courts being the determiner of their effectiveness. The langauge empha-

sized by the appellant is merely a verbal expression pointing out the importance of keeping the right to jury trial a reality. This simply means that such a right cannot be destroyed or ignored and that such a right shall always exist.

Art. I, § 10 of the Utah Constitution says:

> "In capital cases, the right of trial by jury remain *inviolate*." (Emphasis added.)

"Inviolate" has been defined in jurisdictions such as Washington, *State* v. *Furth*, 5 Wash, 2d 1, 104 P. 2d 925 (1940), to mean that the right cannot be "impaired" or "abridged" in any way, but must always exist. Utah Code Ann. § 77-27-2 takes this language and attempts to make the standard absolute. In other words, the statute attempts to make jury trials absolute in certain instances even though the Constitution does not go that far. The propriety of attempting to expand the constitutional lanugauge without constitutional amendment is clearly questionable. The Constitution merely provides that the *right* is absolute, but does not state that the application of that right is absolute or that the right can never be waived.

Respondent contends that many circumstances can arise where an accused charged with murder in the first degree would desire to waive a jury trial. The article "Waiver of Trial by Jury in Criminal Cases," 25 Michigan Law Review 695 (1927), lists what could be con-

sidered a few of the reasons. The list contain the following:

1) The charge is af a revolting nature.
2) The entire state or community is aroused.
3) The past record of accused is bad.
4) Public sentiment might influence jury.
5) Great deal of publicity before trial.
6) It is a prosecution involving race.
7) Judges' greater experience can be valuable to the accused.
8) Feeling that the jury will convict on general principles instead of evidence.
9) Confidence in fairer trial by judiciary.
10) Reluctance to go to trial on complicated issues.
11) A desire to avoid the cumbersomeness and delay of a jury trial.

Certainly, these eleven reasons are not all inclusive, but they show that an absolute standard could work as a detriment in specific instances. It is obvious that in many cases it may be advantageous to have a trial by a judge without a jury — to deny such a choice might in itself deny the accused the right to a fair trial and make the jury an instrument of oppression rather than a means of "fair protection."

The Ohio Supreme Court held many years ago in

Hoffman v. *State*, 98 Ohio St. 137, 120 N. E. 234 (1918), that:

> "Clearly this right [of jury trial] is for the benefit of the accused. If he regards it in the particular case as a burden, a hardship, a prejudice to a fair trial, why in the name of reason should he not be permitted to waive it and submit his cause to the magistrate . . . What was given to him generally as a shield should not be used as a sword in case he feels that a jury trial in such a case would so result."

The Utah Supreme Court recognizes that circumstances exist in which a jury trial may be waived without ever trying the case to establish the facts. The court has openly acknowledged through its decisions that the plea of guilty, made in open court, takes the place of trial and verdict. Thus, if an accused in a first degree murder case enters a plea of guilty it is clear that he effectively waives jury trial even though the offense may be punishable by death.

In *State* v. *Stewart*, 110 Utah 203, 171 P. 2d 383 (1946), the Utah Supreme Court established that a plea of guilty dispenses with the jury because the plea is the same as if a jury had found the accused guilty. The court said:

> "He contends that the evidence shows that he pleaded guilty as a matter of convenience, and that a plea of guilty does not amount to a conviction. Such novel argument is specious. Unless timely withdrawn, a plea of guilty places

> a defendant in the same position as a verdict of a jury finding him guilty of the charge after a fair and impartial trial. A plea of guilty is a confession of the correctness of the accusation which dispenses with the necessity of proof thereof."

This holding was recently reaffirmed in *Coombs* v. *Turner*, 25 Utah 2d 397, 383 P. 2d 437 (1971), when the court said:

> "A plea of guilty dispenses with the necessity of proof, and the issue of innocence or guilt cannot here be relitigated any more than it could be after a jury verdict of guilty."

Patton v. *United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930), involved the interpretation of Art. III, § 2, paragraph 3 of the United States Constitution requiring jury trial in all criminal cases. In rejecting this absolute standard and language the Court stated:

> "In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused . . .
>
> Upon this view of the constitutional provisions we conclude that article 3, § 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. to deny his power to do so is to convert a privilege into an imperative requirement . . .

> After an extensive review of the authorities and a discussion of the question on principle, the court concluded that, since it was permissible for an accused person to plead guilty and thus waive *any* trial, he must necessarily be able to waive a *jury* trial." . . .

See also *Mason* v. *United States*, 250 F. 2d 705 (10th Cir. 1957).

In light of the foregoing authority, it seems unreasonable to permit an accused to dispense with every stage of trial by a plea of guilty, and yet forbid him to dispense with a particular form of trial (trial by jury) by consent or waiver. These inconsistencies must give way to the better reasoned rule that the right to trial by jury — even in light of the statutory language of Utah Code Ann. § 77-27-2 — is not absolute but must depend on circumstances in each particular case. Such a waiver is not contrary to sound conceptions of fairness or public policy. If, for instance, the court rules that the death penalty will not apply in a particular case, then it is not error for the accused to waive the jury.

The law permits venue to insure a fair trial, or to allow the accused the best position. Why then, if an individual honestly feels he would be judged more fairly by a judge sitting without a jury should we force him to have his case heard by a jury? This type of force runs counter to Utah's as well as the United States' conception of justice.

New York had no difficulty in realizing that this

force should not be used. Art. I, § 2 of the New York Constitution is as explicit as Utah's statute and yet, the Court allowed waiver. The pertinent language of the New York Constitution is as follows:

> "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever * * * A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense."

This constitutional provision was interpreted by the New York Court in *People* v. *Duchin*, 12 N. Y. 2d 351, 190 N. E. 2d 17 (1963), where an individual charged with rape in the first degree, assault in the second degree, carnal abuse of a child . . ., waived jury trial and later challenged that waiver on appeal. The court held that the jury trial may be waived in all cases despite the language of the constitution. The majority held that if an intelligent and knowing waiver is made, the jury may be waived. The court said:

> "The provision is designed for the benefit of the defendant. When, choosing to be tried by a judge alone he requests a waiver, he is entitled to it as a matter of right once it appears to the satisfaction of the judge of the court having jurisdiction that, first, the waiver is tendered in good faith and is not a stratagem to procure

> an otherwise impermissible procedural advantage — . . . and, second, that the defendant is fully aware of the consequences of the choice he is making."

Further, Article 12 of the Massachusetts Constitution contains the following language regarding jury trials:

> "And the legislature shall not make any law that shall subject any person to a capital or infamous punishment . . . without trial by jury."

In interpreting this language, the Massachusetts Court held in *Commonwealth* v. *Rowe*, 153 N. E. 537 (Mass. 1926), that:

> "We find nothing in the words of our Constitution which declares or manifests an intention to deprive the individual of power to refuse to assert his constitutional right to trial by jury."

Thus, it can be clearly seen that there is support to the proposition that an individual can waive jury trial in capital offenses such as the one at bar.

It is further established that nearly all rights granted by the United States Constitution may be waived. The only ones which appear to conflict with such a statement are "due process" or "equal protection" rights which themselves are made up of the other waivable rights — such as trial by jury.

The United States Supreme Court has accepted the philosophy and subsequently established it by holding

that "knowing and intelligent waiver of constitutional guarantees is only needed for those guarantees affecting due process." *Scheckloth* v. *Bustamonte*, 412 U. S. 218, 93 S. Ct. 2041, 361 F. 2d 854 (1973). The court recognizes that it is wrong to force rights upon an individual if he does not want their protection. Rights are afforded individuals to insure their protection. If such protections are not wanted, not needed, or possible detriments to an accused, he should have the unalterable right to say "I don't want that right."

The following are some of the rights which have been held to be waivable. (1) Right to jury trial in criminal cases. *Patton* v. *United States*, 281 U. S. 276, 50 S. Ct. 353 (1930). (2) Right against self-incrimination. *Schmerber* v. *State of California*, 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). (3) Right to confront witnesses. *Illinois* v. *Allen*, 397 U. S. 337, 90 S. Ct. 1057, 25 L. Ed. 353 (1970). (4) Right to a speedy trial. *Barker* v. *Wingo*, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). (5) Right to Counsel. *Argersinger* v. *Hamlin*, 407 U. S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). (6) Search and Seizure protections. *Katz* v. *United States*, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). (7) Grand Jury indictment. *Smith* v. *United States*, 360 U. S. 1, 79 S. Ct. 991, 31 L. Ed. 2d 1041 (1959).

These few cases are, of course, only a representative sample of the many waivable rights. An individual of normal competence and intelligence should have some power over determining his future. He had that right

when the crimes were committed. He should also have that right in relation to the consequences thereto.

It is, therefore, submitted that public policy supports the view that an accused should be permitted to waive his right to jury trial.

POINT II.

THE APPELLANT SHOULD NOT BE PERMITTED TO CLAIM REVERSIBLE ERROR (IF ERROR THERE WAS) SINCE SUCH ERROR WAS INDUCED BY THE APPELLANT AND WAS NOT PREJUDICIAL.

Utah, along with numerous other jurisdictions, limits the rights of appellants in what can and cannot be appealable errors. Such situations come into existence where defendants plead error to some facet of the trial which they induced the court to make and did not object or acquiesced to the decision made. This "after-the-fact" argument is exactly what appellant Maguire is making on this appeal. Simply stated, he is attempting to better his chances by claiming error to the ruling of the court which he asked the court to make. This "afterthought" approach claims "prejudice" when in fact no such prejudice existed.

Appellant was charged with murder in the first degree but was not found guilty of that offense. He was found guilty of murder in the second degree — a lesser offense — and received a lighter sentence than if he had

been convicted of the capital offense. The appellant claims this is "prejudice." Respondent cannot understand how this conclusion is reached. It is not prejudicial for an accused to get a lighter sentence when, as in this case, the evidence is arguably strong enough to convince a jury that premeditated murder took place and that the appellant was guilty of that greater offense. The respondent urges the Court to recognize this non-prejudicial decision of the court and not that claimed by the appellant.

A leading case of the United States Supreme Court in this area, *Johnson* v. *United States*, 318 U. S. 18, 63 S. Ct. 549, 87 L. Ed. 704 (1943), held that the practice of claiming error on appeal from self-induced requests at trial cannot be sustained. The Court said:

> "We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However, unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. The court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal. The fact that the objection did not appear in the motion for new trial or in the assignments of error makes clear that the point now is a 'mere afterthought.' "

If a party adheres to a particular mode of strategy in open court and either misleads or joins in any error induced by his strategy, and does not raise or claim such error at the time made, he should not be permitted to complain of unfairness by repudiating the course of trial he originally called for. Justice is not a system made up of accepted standards where parties can go back on their word — if you lose, repudiate your motions, agreements, and acts — but one where procedures are established to allow the orderly objection and handling of errors which do take place. (See also *Peole* v. *Pijal*, 33 Cal. App. 3d 682, 109 Cal. Rptr. 230 (1973)).

Whether the cases have been criminal or civil, the Utah Supreme Court has been quick to uphold the position referred to above. In *State* v. *Aikers*, 87 Utah 507, 51 P. 1052 (1935), the court said:

> "We think the rule applicable that a party cannot successfully assign as error a ruling which he himself induced the court to make."

This position was reaffirmed in the brief opinion of the court in *State* v. *Fair*, 28 Utah 2d 242, 501 P. 2d 107 (1972), where the defendant's counsel chose to examine a witness outside of the presence of the jury and claimed on appeal that it was prejudicial error for the judge to have granted such motion. The court made clear that the error complained of was self-induced and that it would not be permitted to stand on appeal. The court said:

> "Counsel chose not to do so, whether as a matter of strategy or otherwise — and it does not lie in the mouth of defendant now to claim error having either wittingly or unwittingly invited it"

In the present situation, it is not totally clear why appellant Maguire wanted a trial without jury. Discussions pertaining thereto are off the record and are guarded by the attorney-client privilege, but, whether the appellant's separate counsel convinced him "wittingly or unwittingly" to move for such waiver is now of no concern. The fact is such motion was made, the judge was forced to rule, he did so, and the appellant accepted the ruling because it was what he desired. The appellant should not be allowed to now claim, as he looks back over his conviction, that prejudicial error of any magnitude took place.

The Utah Supreme Court has spoken on this issue on many other occasions. Many of them, however, concerned themselves with civil cases which do not have the same gravity of effect. The respondent submits, however, that the principles and law laid down in those cases apply just as well to the case at bar as to the situations under which the holdings were rendered. *Ludlow* v. *Colorado Animal By-Products Co.*, 104 Utah 221, 137 P. 2d 347 (1943), held:

> "A party who takes a position which either leads a court into error or by conduct approves the error committed by the court, cannot later take advantage of such error in procedure."

Later, in *Pettingill* v. *Perkins*, 2 Utah 2d 266, 272 P. 2d 185 (1954), the court expanded and reaffirmed what it had said many times before. The court said:

> "Furthermore, it is well established that a party cannot assign as error the giving of his own requests. He cannot lead the court into error and then be heard to complain thereof . . ."

Decisions from other jurisdictions supporting respondent's position are voluminous. Some recent cases in support thereof are: *People* v. *Delgado*, 32 Cal. App. 3d 242, 108 Cal. Aptr. 399 (1973), holding that a party is estopped from asserting error on appeal that was induced by his own conduct. "He may not lead a judge into *substantial* error and then complain of it." (Emphasis added); *Mack* v. *United States*, 310 A. 2d 234 (D. C. App. 1973), holding that one cannot invite error and complain of prejudice; *People* v. *Shackelford*, 511 P. 2d 19 (Colo. 1973), holding that the party who was the instrument of injecting error must abide by the consequences of such error; *People* v. *Miles*, 13 Ill. App. 3d 45, 300 N. E. 2d 822 (1973), which held that a defendant would not be permitted to argue an alleged error where his counsel of record actually invited and affirmatively participated in the procedure which he now claimed as error.

In the present case, Mr. Athay, counsel for appellant Maguire, communicated with the court regarding waiver of jury trial (R. 61-62). It becomes apparent from the

record that the appellant desired to waive the jury trial, and the counsel for the appellant explained his efforts of informing Mr. Maguire of his right to jury trial, after which the court went into detail regarding such rights and waiver.

Simply because the appellant is represented by different counsel on appeal cannot mean that the appellant can now reject his and his former counsel's actions and motions before the trial judge. Certainly, the record points out that appellant Maguire led the trial court into allowing the waiver of jury trial.

In light of the foregoing analysis and authority, as well as the clear implications and statements contained in the record, it is respectfully submitted that appellant Maguire cannot now claim injury for something he himself led the court to do. This is especially significant in light of the fact that no prejudice took place, for the entire history and record of his case contains no evidence of such. It is therefore, submitted that on this ground alone, the contentions of appellant Maguire should be rejected.

POINT III.

THE APPELLANT'S WAIVER OF JURY TRIAL WAS KNOWLEDGEABLY, COMPETENTLY, AND INTELLIGENTLY MADE AND WAS NOT BASED ON ALLEGEDLY MISLEADING INSTRUCTIONS REGARDING THE NUMBER OF JURORS.

The respondent adheres to the philosophy that the waiver of jury trial must be looked at with an eye focused on fairness and understanding. Respondent contends that the record clearly indicates that this was accomplished and that the appellant Maguire knowledgeably, competently and intelligently waived the jury trial and that such was done after serious deliberation on the part of appellant.

Mr. Justice Frankfurter said in *Adams* v. *United States*, 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268 (1942), that:

> ". . . Whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case."

The "unique circumstances" of the present case substantiate the trial court's finding that the appellant properly waived his right. Mr. Athay told the court that the appellant discussed the matter "in detail" with him, that he as counsel believed the appellant understood the consequences in full, and further that the defendant/appellant answered Mr. Athay's question that he did so understand (R. 61).

In *State* v. *Thornton*, 22 Utah 2d 140, 449 P. 2d 987 (1969), this Court entertained an appeal regarding the effective waiver of the Miranda warning. The court found the dialogue between counsel and appellant sufficient

to sustain the finding of the court that the waiver was competently made. The court said:

> "After the confession had been introduced, counsel for defendant conducted a highly protracted intelligence test by question and answer, and except for some answers noted out of context, defendant's testimony, in our opinion, did not detract from a conclusion that there was voluntariness of the confession.
>
> ". . . the question must be resolved from examining the whole record, — which we have done in the instant case . . ."

The respondent contends that the court in the case at bar carried on such a "protracted intelligence test" to see what frame of mind, what knowledge, what desires and understanding the appellant had for the waiver to be valid . Judges must act with what they have available. They are given power to accept waivers. This power and authority is a mere folly if every time such a waiver is effectuated one can claim incompetence for such waiver. Counsel is provided to help eliminate such conduct. Here, the court made its decision and that upon which the appellant bases his appeal is not shown to have influenced his decision. There is no evidence showing the trial judge erred in ascertaining a valid waiver.

The second time Mr. Athay spoke — immediately after all parties said they were ready, he moved the court pursuant to Utah Code Ann. § 77-27-2 (1953), that the jury be waived (R. 61). Thus, it is apparent that even

before the judge mentioned the jury or his interpretation that eight jurors would be the number chosen, the appellant moved to waive it. Obviously, some consideration had been given to the subject of waiver before coming to court as substantiated by Mr. Athay's own words (R. 61). Therefore, the two or three times that the court said "eight jurors" was not paramount or decisive to the decision that was made.

In *James*, the error was carried to completion with the eight man jury sitting instead of the twelve man jury. As such, active error was continuous. In the present case, however, the major issue is "a jury or no jury." The fact that no jury was chosen as the alternative and that the defendant wanted the judge to hear the case should carry sufficient weight in light of the fact that the appellant decided on waiver before the false instruction. To sustain the finding that the mere mention of eight jurors was error is a misinterpretation of justice. There is no indication of reliance on the instruction, as well as no indication that the defendant was thinking anything different.

Because of this reasoning coupled with the fact that before the defense began its part of the trial the court ruled out the capital nature of the crime by reducing to voluntary manslaughter or murder in the second degree the crime under consideration, no prejudice or injury came to the appellant. At all times he was benefited by these rulings. First, he knew the death penalty would not be applied. Second, the capital nature of the offense

was dismissed. Third, the court went along with his wishes regarding the jury.

The appellant had ample opportunity to question and challenge the instruction but did not do so. No exception was taken, and no indication exists that the instruction played any role in the appellant's decision to waive jury trial. Thus, no prejudicial error took place which would warrant the reversal or remand of the present case.

Respondent therefore submits that if any error did exist, it was not prejudicial. Since there exists ample evidence to distinguish this case from that of *James* as well as the fact that no prejudice existed it is requested that this court find that the appellant's waiver was knowingly, competently, and intelligently made.

POINT IV.

SUFFICIENT EVIDENCE EXISTS TO SUBSTANTIATE THE TRIAL COURT'S FINDING OF SECOND DEGREE MURDER.

Appellant alleges that insufficient evidence exists to support his conviction. This court has periodically reaffirmed standards for reviewing evidence which the respondent feels are controlling. As early as *State* v. *Ferguson*, 74 Utah 263, 279 P. 255 (1929), this Court said:

> ". . . As we view the testimony, the contention made that the evidence is insufficient to

> justify the verdict is wholly untenable. This court, on appeal from conviction, cannot weigh the evidence, and has held in effect that in the absence of legislation to the contrary, the appellate court has no right to say what quantum of evidence shall be necessary to establish a given fact or set of facts, so long as there is *substantial evidence* in support of such fact or facts." (Citations omitted.) (Emphasis added.)

Several years later this "substantial evidence" test was affirmed as it related to a jury verdict. The court did, however, expound on the application of the test. In *State* v. *Ward,* 10 Utah 2d 34, 347 P. 2d 865 (1959), the court held:

> "The rules governing the scope of review on appeal as to the sufficiency of the evidence to sustain the verdict are well settled; that it is the prerogative of the jury to judge the credibility of the witnesses and to determine the facts; that the evidence will be reviewed in the light most favorable to the verdict; and that if when so viewed it appears that the jury acting fairly and reasonably could find the defendant guilty beyond a reasonable doubt, the verdict will not be disturbed."

Just recently, this court once again made plain that only when there is no reasonable basis for the conclusion of guilt would a verdict be overturned. The statement in *State* v. *Schad,* 24 Utah 2d 255, 470 P. 2d 246 (1970), is as follows:

> "Unless upon our review of the evidence, and the reasonable inferences fairly to be deduced therefrom, it appears that there is no reasonable basis therein for such a conclusion, we should not overturn the verdict." (Citations omitted.)

Is there in the facts presented below a "reasonable basis" upon which the judge could convict? The appellant contends that the malice aforethought required for murder in the second degree was not or could not be proven and offered as sole evidence the testimony of the accused — to say the least self-serving testimony. A closer look at the totality of the facts indicates with profound meaning that the judge or a jury could find and actually did find all requisites needed for the conviction of appellant.

The testimony given at trial did bear out that the victim had a known disposition for violence. Further, it was confirmed that he owed the appellant money and that on the evening of the homicide he had been the instigator of an argument at his wife's motel room.

Many other facts were introduced which would lead one to believe that more than a fit of passion caused the death of the victim. First, when the appellant testified that he was offered a ride, he also testified that the victim did not want the gun in the car and yet the appellant went to his own vehicle, got the gun and took it back to the victim's car (R. 256-258). Second, at the motel room the victim's wife testified that the victim said that

the appellant had a .38 but that the appellant wasn't going to scare him with it. This took place after the argument between the appellant and Mr. Petersen and indicates that something had been said about the gun during the argument (R. 188).

Third, Dr. Taylor testified that two bullets were shot in the head of the victim, one from the front and one from the back (R. 137). All testimony of the appellant indicated two shots, but that the first went off when they were struggling for the gun which, according to appellant's testimony, did not hit anyone, and the second shot went in the forehead of the victim at which time the victim collapsed forward and was dead (R. 263, 35 seq.) Dr. Taylor indicated that one bullet traveled down into the skull and the other upward (R. 138) which would indicate different positions. He further testified that he could not tell which one was fired first or which bullet caused death. The respondent claims that this evidence alone is sufficient to warrant a finding that the appellant wanted the victim dead. Dr. Taylor testified that either bullet would have caused instant unconsciousness. Further, all evidence substantiates that the shots were fired from different locations, thus the reason for the angle changes as well as the points of entry. Such evidence refutes the theory that it was not intended.

Further, in order for the victim to get the gun (which he did not want in the car in the first place) he would have had to reach across the car, in front of the appellant, undo the glove compartment and remove the gun. All

this was examined on direct and cross, and the appellant said he could not recall what happened at that instant (R. 315).

Next, the appellant testified that he had scratches on his arm from the struggle over the gun. He did say, however, that the victim's left hand was useless being trapped on the outside of the steering wheel when he went for the gun (R. 365). If this is so, how could the arm have been scratched? The appellant denied receiving the scratches in moving the body out of the car.

Testimony further indicates that the appellant in all previous encounters with the victim had retreated when arguments took place between them, but on this occasion he refused to move or retreat and took the offensive in grabbing for the gun (R. 319-320). The appellant further admitted that he knew the deceased had lived with his wife while the appellant was in prison (R. 288) and that he could have made threats against the victim (R. 289).

Based on the foregoing analysis of the facts and the questionable areas raised, it becomes apparent that sufficient evidence exists to establish the "beyond a reasonable doubt" requirement needed for the finding of malice aforethought. The court correctly found that the unlawful killing was murder in the second degree.

CONCLUSION

The respondent therefore submits that the trial court did not err in allowing waiver of the jury and in no event

was such a waiver prejudicial. The appellant further waived the jury through intelligent, methodical, and knowledgeable means and did not rely on the purported error of instruction. Finally, the evidence contained through testimony at trial substantiates that the trial court was correct in its finding that the appellant was guilty of murder in the second degree.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

M. REID RUSSELL
Chief Assistant Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent