

1949

The State of Utah v. Joe G. Trujillo : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

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.

Keith Brown; Attorney for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *State v. Trujillo*, No. 7269 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1014

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 (pre-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

THE STATE OF UTAH,

Plaintiff
and Respondent,

vs.

Case No.

JOE G. TRUJILLO, also
known as JOE GARCIA
TRUJILLO,

7269

Defendant
and Appellant.

FILED
JAN 22 1949

CLERK, SUPREME COURT, UTAH

BRIEF OF APPELLANT

KEITH BROWNE

Attorney for Defendant and
Appellant

INDEX

	Page
STATEMENT OF CASE	1
GENERAL STATEMENT OF FACTS	2
Testimony of Joe Herrera	3
Testimony of Joe Mondragon	5
Testimony of Defendant	6
Other testimony	8
STATEMENT OF ERRORS	8
ARGUMENT	
I. THE DISTRICT COURT DOES NOT HAVE JURISDICTION IN A FELONY CASE UNTIL THE PROCEEDINGS FROM THE COMMITTING MAGISTRATE ARE FILED IN THE DISTRICT COURT	12
II. THE DISTRICT ATTORNEY DOES NOT HAVE AUTHORITY TO FILE AN INFORMATION UNTIL THE PROCEEDINGS FROM THE COMMITTING MAGISTRATE ARE FILED IN THE DISTRICT COURT	21
III. THE TRIAL COURT IN DISTINGUISHING BETWEEN FIRST AND SECOND DEGREE MURDER MUST INSTRUCT THAT MORE COOL CONSIDERATION IN FORMING PLAN, DESIGN OR INTENTION IS REQUIRED IN FIRST DEGREE MURDER THAN IN SECOND DEGREE MURDER	22
IV. AN INSTRUCTION THAT DEFENDANT ACTED WILFULLY AND WITH THE DELIBERATE AND PREMEDITATED DESIGN AT THE TIME THE SHOTS WERE FIRED IS NOT AN INSTRUCTION THAT HE ACTED WITH MALICE AFORETHOUGHT	25

- V. A TRIAL COURT MAY NOT INSTRUCT IN SUCH BROAD TERMS THAT THE JURY MAY RESORT TO CONJECTURE UNDER THE INSTRUCTIONS TO ARRIVE AT A THEORY UPON WHICH TO BASE GUILT 24
- VI. AN INSTRUCTION ON SECOND DEGREE MURDER RESULTING FROM AN ASSAULT WITH A DEADLY WEAPON WITH INTENT TO DO GREAT BODILY HARM MUST ALSO CONTAIN INSTRUCTION ON OTHER ESSENTIAL ELEMENTS OF SECOND DEGREE MURDER 25
- VII. AN INSTRUCTION ON VOLUNTARY MANS- LAUGHTER MUST CONTAIN AN INSTRUCTION THAT AN INTENT TO KILL IS AN ESSENTIAL ELEMENT OF THIS OFFENSE 26
- VIII. AN INSTRUCTION TO THE JURY ON INVOLUNTARY MANSLAUGHTER MUST INCLUDE INSTRUCTION THAT THE UNLAWFUL ACT OR ACTS OF THE DEFENDANT WAS THE PROBABLE CAUSE OF DEATH 28
- IX. INTOXICATION, IN CONNECTION WITH THE FORMATION OF AN INTENT TO KILL, MUST, IF EVIDENCE WARRANTS THE INSTRUCTION, BE GIVEN IN INSTRUCTING ON THE CRIME OF VOLUNTARY MANSLAUGHTER 29
- X. INTOXICATION MUST BE CONSIDERED IN DETERMINING ABILITY TO DELIBERATE OR MEDITATE AS WELL AS IN DETERMINING THE ABILITY TO FORM AN INTENT TO KILL 30
- XI. PRIOR CONVICTION OF CRIME INSTRUCTION SHOULD CONTAIN INSTRUCTION THAT SAME IS NOT EVIDENCE OF GUILT WHEN GIVEN AS PART OF AN INSTRUCTION ON CREDIBILITY 31
- XII. A TRIAL JUDGE SHOULD INSTRUCT AN INTERPRETER AND ALL COUNSEL ON CONDUCT AND MANNER OF INTERPRETATION,

AND ACTIVELY SUPERVISE, CONTROL
AND EXACT ADHERENCE TO SAID
INSTRUCTIONS AND DISPENSE WITH
AN INTERPRETER WHEN IT APPEARS
THAT ONE IS NOT NECESSARY 32

XIII. THE VERDICT IS CLEARLY AGAINST
THE WEIGHT OF THE EVIDENCE 48

CONCLUSION 55

Texts Cited

Wigmore, Evidence, Third Edition, Sec. 811 39, 43

Statutes Cited

Utah Code Annotated 1943, Chapter 105-28-3 28
Utah Code Annotated 1943, Chapter 105-16-19 13, 15
Utah Code Annotated 1943, Chapter 105-16-23 12, 14-11
Utah Code Annotated 1943, Chapter 105-16-1 20
Utah Code Annotated 1943, Chapter 105-17-1 13, 15
Utah Code Annotated 1943, Chapter 105-20-4 20, 21
Utah Code Annotated 1943, Chapter 105-23 20
California Penal Code, Section 802 14, 15
California Penal Code, Section 872 15
California Penal Code, Section 944 21

Cases Cited

Birmingham v. Jung, 161 Ala. 481, 49 So. 434 36
Dureff v. Commonwealth, 192 Ky. 31, 232 SW 47 39
Gregory v. Chicago R. I. & P. R. Co., 147 Iowa
715, 124 NW 797 33
Hilbert v. Kudioff, 204 Cal. 485, 268 Pac.
905 38
Hept v. Utah, 104 U. S. 831, 26 L. Ed. 873 51
Kelly v. State, 96 Fla. 348, 118 So. 1 44
Lawrence v. State, 33 Okla. Cr. 71, 242 Pac.

Oblaser v. Wayne, Circuit Judge, 189 Mich. 685, 124 N. W. 590	18
People v. Bomar, 73 Cal. App. 372, 238 Pac. 758	19
People v. Lacang, 213 Cal. 68, 1 Pac. (2d) 7	36
People v. Lee, 2 Utah 441	21
People v. Scott, 10 Utah 59, 37 Pac. 335	53
People v. Tarbox, 115 Cal. 57, 46 Pac. 696	14, 17, 19
People v. Thompson, 84 Cal. 598, 24 Pac. 384	19
People v. Wong Ah Bank, 65 Cal. 305, 4 Pac. 419	34
People v. Wright, 89 Mich. 70, 50 N.W. 792	18
Prokop v. State, 148 Neb. 582, 26 N.W. (2d) 200, 172 A. L. R. 916	39
Rajnowski v. Detroit, 74 Mich. 15, 41 N.W. 849	39
Hex v. Burke (English), 8 Cox Cr. 45	43
State v. Burch, 100 Utah 414, 115 Pac. (2d) 911	54
State v. Cobe, 90 Utah 89, 60 Pac. (2d) 953	27
State v. Crawford, 59 Utah 39, 201 Pac. 1030	31, 52
State v. Deslovers, 40 R. I. 89, 100 A. 64	34, 47
State v. Freeman, 93 Utah 125, 71 Pac. (2d) 196	17
State v. Laub, 102 Utah 402, 131 Pac. (2d) 305	52, 53
State v. Lopez, 81 Cal. App. 188, 131 Pac. 104	58

State v. Laris, 78 Utah 185, 2 Pac. (2d) 243	18
State v. Newhinney, 43 Utah 135, 158, 134 Pac. 632	26
State v. Riley, 41 Utah 225, 126 Pac. 294	54
State v. Russell, 106 Utah 116, 145 Pac. (2d) 1003	23, 24, 54
State v. Severson, 78 Iowa 653, 45 N.W. 533	47
State v. Stenback, 78 Utah 350, 2 Pac. (2d) 1050, 79 A. L. R. 878	50, 54
State v. Thompson, 110 Utah 113, 170 Pac. (2d) 153	23, 24, 31
State v. Vasquez, 101 Utah 444, 121 Pac. (2d) 903, 140 A. L. R. 755	40, 44
Turner v. People, 33 Mich. 363	18

IN THE
SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,)

Plaintiff)
and Respondent,)

Case No.

vs.)

7269

JOE G. TRUJILLO, also)
known as JOE GARCIA)
TRUJILLO,)

Defendant)
and Appellant.)

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal by the defendant from a verdict of a jury of guilty of murder in the first degree of one Max Lopez, entered in the Seventh Judicial District in and For Carbon County. The order holding the defendant to answer to said charge was signed by S. J. Sweetring, committing magistrate, on July 1, 1948. The District Attorney filed his information herein on July 2, 1948, and on July 6, 1948 the committing magistrate filed in the District Court the record of

the proceedings had before him. The defendant filed a Motion To Quash the information on July 12, 1948 on the ground that the District Court did not have jurisdiction of him or the offense, which was denied, and the defendant entered his plea of not guilty thereafter. Trial of the action commenced on July 19, 1948 and continued from day to day until the jury reached its verdict of murder in the first degree without recommendation on July 23, 1948. A motion for a new trial was filed on July 28, 1948. Sentence of death by shooting was pronounced by the Court on July 28, 1948 and the defendant thereafter filed his Notice Of Appeal on September 25, 1948.

FACTS

Max Lopez, a resident of Hiawatha, Carbon County, Utah, was found dead in his automobile with two gun shot wounds in his body at a point about five or six miles from Price on the highway leading from Price to Hiawatha in said county. The death was first reported to Douglas Jensen, a traveler on the highway, by one Joe Herrera, who flagged Mr. Jensen as he approached the scene of the shooting (R. 183). Only four persons were present at the time of the shooting--Max Lopez

Sponsored by the S. A. Quinby Manuscript Library, funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library
Machine-generated OCR, may contain errors.

and Joe Herrera, who had arrived at the scene of the offense in a car owned by Lopez and driven by Herrera, and Joe Mondragon and the defendant who had arrived at the scene of the offense in a car owned and driven by the defendant.

Because the testimony of the defendant and the witnesses Mondragon and Herrera is conflicting and differs materially on many points, a brief statement of the testimony of each is separately set forth.

Herrera testified as follows: That he had gone from Hiawatha to Price with Lopez and arrived about nine P. M. and was at the Carbon Bar and White Star Bar with Lopez (R. 17) and later at the Kentucky Bar and New Deal Bar. That he first saw the defendant at the White Star and saw defendant talk to Lopez at the New Deal Bar and saw them go away somewhere together (R. 22). Then he and Lopez went to the car of Lopez but he doesn't remember how they got to the car (R. 24, 26). Lopez drove a short distance toward Hiawatha and then asked Herrera to drive. That Trujillo passed them in his car and stopped immediately in front of them. That Herrera applied the brakes and stopped

(R. 28). (For Mondragon testimony on this point see R. 143, 144.) (For defendant's testimony on this point see R. 398.) That he put out the car lights in stopping suddenly and while readjusting the lights defendant came to the Lopez car by walking and asked what was the matter (R. 30, 33, 38). That Herrera asked why defendant stopped in front of them and defendant said "Come this way and I will take both of you on." That Herrera and Lopez got out of the car and Lopez followed Herrera to the other side of the road where defendant was and Herrera saw a gun in his hand (R. 35). That defendant said he was going to shoot them (R. 38). That Herrera offered to fight if gun was thrown away, then took off his shirt, then came in closer and grabbed defendant's wrist (R. 39). That Mondragon and Lopez were out of the cars and near him and defendant (R. 38). Defendant hit him in stomach as they wrestled. Herrera became dizzy and then heard a shot (R. 40, 41, 42) and while in this dizzy condition he heard two more shots and saw defendant go from Lopez car to his own car and enter it and drive away (R. 46, 47). That he didn't see anyone else around as he went to the Lopez car

(R. 47). That he opened the door of the Lopez car and saw Lopez inside (R. 47). On cross examination Herrera admitted he was drunk on the highway at the time of the shooting (R. 82, 85); that the defendant talked friendly to him on second conversation at a bar in Price; and that there hadn't been any trouble during the second conversation (R. 71, 77, 78, 79). That he offered to fight defendant out on the highway and took off his shirt to do so (R. 89, 90, 101) and that he did not remember that Mondragon ever came near him after any of the shots (R. 121, 142).

Mondragon testified as follows: That he was with defendant when he saw the Lopez car parked by the road (R. 143, 144). That defendant said he was going to stop and see the boys, went past and parked and got out and went in the direction of the Lopez car. That he got out when he heard one shot and saw defendant and Herrera talking. That Herrera asked defendant if defendant was going to kill him and defendant said "No, but don't get near me." Herrera went to Trujillo and they started to wrestle. That he didn't see anything in defendant's hand (R. 145). Heard another

shot as they wrestled and Herrera fell (R. 150).

Lopez was at the side of Mondragon or near him when the wrestling started (R. 153). When Herrera fell Mondragon went to where he lay and helped him to the rear of the Lopez car where he left him and went to defendant's car and passed defendant where the latter was in front of and to the left of the Lopez car (R. 151). After he passed defendant he heard another shot behind him and he looked back and saw defendant coming behind him (R. 152). Both got in the car of defendant and drove away and that defendant admitted shooting (R. 154). Mondragon admitted he was drunk (R. 160) and that he lied to the police when apprehended with the defendant.

The defendant testified as follows: That on the day of the shooting he took Mondragon and others from Castle Gate to Helper where all did errands including purchase of whisky for defendant and wine for Mondragon and then all returned to Castle Gate in the car of defendant (R. 366, 367). Mondragon put the whiskey in the glove compartment of the car of defendant which already contained the pistol involved (R.

388). That defendant and Mondragon again left Castle Gate later in the evening and went to Helper and then to Price (R. 389, 390). They met and drank with Herrera and Lopez in various bars in Price and in the Trujillo car (R. 392, 393, 395). The two groups separated and defendant and Mondragon left later for Hiawatha to get the daughter of defendant (R. 397). That he saw Herrera and Lopez parked on the road to Hiawatha at a point about 5 or 6 miles from Price and that Herrera was waving in the road to stop. That defendant stopped ahead of parked car (R. 398, 399). That he got out and Herrera was walking toward him and told him the lights were wrong and called him a vile name, took off his shirt and commenced to fight with defendant (R. 399, 400). That Lopez and Mondragon were out of their cars and that Mondragon called Lopez a vile name and ordered Lopez to stay out of the fight (R. 401). That during the fight between defendant and Herrera Mondragon fired five shots from gun of defendant taken by Mondragon from glove compartment, called to defendant asking him to leave. That defendant, hearing the shots, let go of Herrera and saw Lopez fall

in the road (R. 401). That Mondragon and defendant drove away and agreed on a false story if Lopez was dead because Mondragon had done the shooting and the gun was owned by defendant (R. 407, 408, 409). That defendant adhered to the agreed falsehoods through his testimony at the inquest but told the truth when Mondragon did not adhere to the agreed falsehoods at the inquest (R. 409, 416). That defendant and Mondragon went toward Hiawatha, turned back toward Price, again turned toward Hiawatha, and then again toward Price and were apprehended on the highway. That Mondragon threw the gun and shells from the car (R. 414).

Other testimony:

Albert Passic, a deputy sheriff, found five empty shells by the side of the road connecting Price and Hiawatha (R. 216, 219) and the gun (R. 221, 224) in the vicinity where defendant had told officers it had been thrown from the car by Mondragon.

STATEMENT OF ERRORS

1. The trial court erred in overruling and denying ground No. 2 of the Motion To Quash of defendant,

to-wit: "That the Court has no jurisdiction of the offense charged, or the person of the defendant" and also erred in denying the motion to arrest judgment made on the same grounds.

2. The trial court erred in overruling and denying ground No. 3 of the Motion of defendant to Quash the information, to-wit: "That the District Attorney had no authority to file the information herein."

3. The trial court erred in its Instruction No. 2 in its definition of murder in the second degree because said instruction was incomplete, misleading, inaccurate and failed to adequately distinguish between murder in the first degree and murder in the second degree.

4. The trial court erred in paragraph No. 1 of its Instruction No. 6 in its definition of "malice aforethought" in that said instruction is misleading, too narrow, inaccurate and does not correctly state the law on the subject.

5. The trial court erred in the last paragraph of Instruction No. 6 in allowing the jury too great latitude in the matter of theories of the crime; and in

not placing reasonable limits or restrictions on the theories of the evidence the jury could use in determining guilt.

6. The trial court erred in giving paragraph No. 3 of Instruction No. 7 in instructing the jury that it is second degree murder if death results from an assault with a deadly weapon with intent to do great bodily harm without instructing the jury concerning malice and the pertinent essentials of murder in the second degree.

7. The trial court erred in Instruction No. 8 in failing to instruct the jury that intent to kill is a necessary element of the crime of voluntary manslaughter.

8. The trial court erred in Instruction No. 9 in failing to instruct the jury that it must find that the unlawful act or acts of the defendant was the proximate cause of death.

9. The trial court erred in its instruction No. 12 and gave to the jury an incomplete, misleading and inaccurate instruction because of the failure or omission to instruct that intoxication must be considered in connection with the formation of intent in the crime of voluntary manslaughter.

10. The trial court erred in Instruction No. 12 and gave to the jury an incomplete, misleading and inaccurate statement of the law governing intoxication in such cases by its failure to also instruct on intoxication in relation to premeditation and deliberation.

11. The trial court erred in its Instruction No. 19 in that the instruction does not accurately state the law of evidence of prior conviction of a felony and does not give a rule for guidance of the jury in applying the law on prior conviction to a definition of credibility.

12. That the trial court did and allowed acts in the trial of the action that were prejudicial to the substantial rights of the defendant in permitting the interpreter to dictate, dominate and control the proceedings of the court and the examination of three witnesses examined by interpretation during the proceedings; in failing to perform its duty to instruct, supervise and control the interpreter and all counsel in the use of an interpreter; and in continuing the taking of testimony of the witness Herrera by the use

of interpretation when it clearly appeared that an interpreter was not necessary to adduce his testimony.

13. That the verdict is contrary to the evidence in the case.

ARGUMENT

I.

THE DISTRICT COURT DOES NOT HAVE JURISDICTION IN A FELONY CASE UNTIL THE PROCEEDINGS FROM THE COMMITTING MAGISTRATE ARE FILED IN THE DISTRICT COURT.

The judgment roll contains a Complaint (JR 1), a copy of Commitment (JR 3), a Motion To Quash Information (JR 11) and an Affidavit of S. J. Sweetring (JR 50), committing magistrate, to the effect that the commitment was not signed in the presence of the defendant and the officer having him in charge nor delivered to the officer with the defendant at the time of making the order holding defendant to answer as required by Utah Code Annotated 1943, Chapter 108-15-25, and a Motion In Arrest Of Judgment (R. 466, 467). Chapter 108-15-23 provides:

"If the magistrate orders the defendant to be committed, he must make out a commitment, signed by himself with his official title, and deliver it with the defendant to the officer to whom he is committed,

or, if that officer is not present, to a peace officer, who must immediately deliver the defendant into the proper custody, together with the commitment."

It is contended that compliance with said section is jurisdictional. That unless there is compliance with said section there has not been an examination and commitment as provided by law that will invest the District Court with jurisdiction. The Utah Code Annotated 1943, Chapter 105-17-1 provides:

"When a defendant has been examined and committed as provided in this code it shall be the duty of the district attorney, within thirty days thereafter, to file in the district court of the county in which the offense is triable an information charging the defendant with the offense for which he is held to answer. If the district attorney fails to file the information within the time specified, or when required so to do by the court, he shall be deemed guilty of contempt, and may be prosecuted for neglect of duty as in other cases."

Two significant matters are contained in this provision: First, the word "committed" and the question as to what it means; second, the clause "examined and committed as provided in this code." Our code requires a magistrate to make an order holding the defendant to answer (Chapter 105-15-19) and that said order must be endorsed on the Complaint; that the magistrate must also make and deliver a commitment and

deliver it with the defendant to the officer and he must include the fact of issuing an order of commitment in his order holding the defendant to answer (Chapter 106-15-23). The affidavit of the committing magistrate shows a failure to comply with one of the above essentials.

The cases on the point of when the committing magistrate divests himself of jurisdiction and the District Court thereupon acquires it are not numerous but recent cases appear to hold uniformly against the argument in this assignment since the case of People v. Tarbox held that the district court acquired jurisdiction when the committing magistrate signed the order of commitment. That all else thereafter was merely ministerial. People v. Tarbox, 115 Cal. 57, 46 P. 896. An examination of the California Penal Code to determine the definition of an order of commitment indicates a difference in the requirements between Utah and California on the point of when the committing magistrate divests himself of jurisdiction and indicates that the California order of commitment is an order holding defendant to answer. California Penal Code §809 pre-

vides: "Information to be filed. When a defendant has been examined and committed as provided in sec. 872 of this code * * *." California Penal Code §872 provides:

"Defendant, when and how committed:

"If, however, it appears from the examination that public offense has been committed and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or endorse on the complaint an order signed by him, to the following effect: 'It appearing to me that the offense in the within complaint mentioned (or any offense according to the fact), stating generally the nature thereof, has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order him to be held to answer to the same.'"

Under the Tarbox case jurisdiction is acquired when the order holding a defendant to answer is signed as provided in the aforesaid section 872 of the California Penal Code. Our section 105-15-19 is similar. But the California section 872 is headed: "Defendant, when and how committed". Our section 105-15-19 is headed "Defendant held to answer - order". But our statute 105-17-1 which corresponds with the California section 809 is broader than the California statute. It does not only require compliance with 105-15-19, it requires compliance "as provided in this code". The

defendant contends that this is not a case of an act properly done as in State v. Laris, 78 N. 183, 2 Pac. (2d) 243 where the oversight was corrected, but a case where an act necessary to jurisdiction was not, in fact done. It is contended that the reasonable meaning of the phrase "as provided in this code" means that all acts required to be done by the committing magistrate must be done to confer jurisdiction on the district court unless defendant waives compliance or performance of said acts.

It is, therefore, contended further that the Seventh District Court did not have jurisdiction of this action at the time of filing the information herein for the reason that the committing magistrate had not, at the time of filing said information, performed all the acts required by the code. He had not filed the proceedings in the district court. Defendant contends that the filing of the complaint, warrant and transcript in the district court is the act of divestment of his jurisdiction under our statutes and the act conferring jurisdiction on the district court. Even the Tarbox case, which is to the contrary, condemned the practice

of filing in the district court before the arrival of the return of the committing magistrate and had to resort to the theory of ministerial acts to justify its holding.

It is submitted that the rule prior to the Tarbox case is the better one. That rule held that the filing of the certified transcript, attached to the complaint in the office of the clerk of the district court conferred the jurisdiction on the court. Lawrence v. State (Okla.), 262 Pac. 862; State v. Freeman, 95 U. 125, 71 Pac. (2d) 196. The Freeman case announced the rule contended for by the defendant but is not thought that full reliance can be given it because not in the point involved here. It is submitted that the rule advanced by the defendant as proper and correct is more consistent with good practice and is less likely to result in confusion. It prevents overlapping of activity between courts, it makes for certainty and correctness of dates, names and witness lists. Under the holding of the Tarbox case the district attorney may become a legal runner between courts basing his information on notes of his making or that of his clerk.

To base jurisdiction on the filing of the record in the district court is more in accord with other established law. Only the record of the committing magistrate on file in the district court may be used by the district court to determine the regularity of the proceedings before the committing magistrate. Turner v. People, 33 Mich. 363. If it is not in his court he is helpless or must make a trip to a lower court if we follow the Tarbox case.

It has also been held that a committing magistrate may amend his commitment at any time, Oblaser v. Wayne, Circuit Judge, 159 Mich. 665, 124 N. W. 590; People v. Wright, 89 Mich. 70, 50 N. W. 792. What is the situation in the district court if an information is filed on a felony bind over and an amended order does not hold the defendant to answer? What is the situation in the district court if jurisdiction is conferred by an order holding defendant to answer and an information is filed before receipt of the proper papers from below and the order of the committing magistrate is vacated for further proceedings or to correct subsequent obvious error before the proceedings are transmitted to the district court?

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
This document was generated by eOCR, may contain errors.

It has also been held that the function of a district attorney is ministerial only in filing an information, People v. Bomar, 73 Cal. App. 372, 238 Pac. 758. Should a ministerial act be done in a case of a felony except in connection with a matter already of record in the court? Care and precision in procedure and administration of justice is in favor of the rule advanced by the defendant. Where an information is filed based on a defective order of commitment, there is no action pending before the court and the court requires no jurisdiction over the defendant. People v. Thompson, 84 Cal. 598, 24 Pac. 384. The same rule ought to apply to a case where the information is filed at a time when it can't be determined whether it does or does not have jurisdiction because filed when order of commitment as provided by our code is not before the court. The Tarbox case and those which follow it announce and legalize bad practice indeed and should not be followed in our courts.

The Tarbox case, in view of its reference to section 872 of the California Penal Code, is not in point and, as explained and in view of our broader

statute, does not control the question here. That the few cases which follow it have done so without prior determination of the scope of the California statute upon which the case is based, and therefore are not in point or controlling here.

The only statute of Utah found by defendant on the point of whether or not filing the proceedings of the committing magistrate in the district court is the act conferring jurisdiction is on the subject of indictments by grand juries, Utah Code Annotated 1943, Chapter 106-20-4, requiring them to be presented in person by the foreman to the court and filed with the clerk. Indictments and informations perform similar functions, are not treated separately in our statutes, but are covered by the same statutes in our laws, Utah Code Annotated 1943, section 105-16-1, section 105-23. Grand juries and committing magistrates perform a similar function, to inquire into complaints and make findings thereon as a basis for prosecution of persons in the district court. The Utah Code Annotated 1943, Chapter 106-20-4, provides that an indictment when found by the grand jury must be presented by their

foreman in their presence to the court and must be filed with the clerk. The only Utah case construing this provision from the point of view of jurisdiction is that of the Mountain Meadow Murder case, People v. Lee, 2 Utah 441, where the jurisdiction of the court was attacked on the ground that the record did not show that the indictment was presented to the court. The court did not rule on the question because it found that the indictment was in fact presented as required by law.

California Penal Code 944 is identical with our section 105-20-4 and the California Penal Code requires that an indictment be set aside if not presented as provided by section 944. Therefore, it appears that presenting and filing of an indictment in the district court confers the jurisdiction in California. It is contended that there should be no difference between an indictment and information and that the district court of Carbon County did not have jurisdiction herein because the proceedings were not on file in said court on the date of the filing of the information.

II.

THE DISTRICT ATTORNEY DOES NOT HAVE AUTHORITY TO

FILE AN INFORMATION UNTIL THE PROCEEDINGS FROM THE COMMITTING MAGISTRATE ARE FILED IN THE DISTRICT COURT.

The argument on the Statement of Error No. 1 applies also to this assignment. The errors numbered one and two are set forth separately because they are set forth separately in the statute as grounds for Motion To Quash the information. In connection with this assignment, attention to the argument on Error No. 1 is respectfully directed with the comment that if there is merit to Error No. 1 defendant contends that No. 2 has merit on the basis that a district attorney should be without authority to file an information unless the district court has jurisdiction of the offense or the person of the defendant.

III.

THE TRIAL COURT IN DISTINGUISHING BETWEEN FIRST AND SECOND DEGREE MURDER MUST INSTRUCT THAT MORE COOL CONSIDERATION IN FORMING PLAN, DESIGN OR INTENTION IS REQUIRED IN FIRST DEGREE MURDER THAN IN SECOND DEGREE MURDER.

The trial court committed prejudicial error in not properly distinguishing between murder in the first

degree and murder in the second degree. A perusal of Instruction No. 2 leads to the belief that the court in instructing on second degree murder used the case of State v. Russell, 106 Utah 116, 145 Pac. (2d) 1005 as a basis, but did not instruct also so as to include the modifications of the Russell case contained in State v. Thompson, 110 Utah 113, 170 Pac. (2d) 165 and in not doing so failed to properly distinguish between murder in the first and second degrees.

The trial court in its charge in Instruction No. 2 on the offense of murder in the second degree did not instruct on the requirement of more cool consideration in forming the required plan, design or intention in cases of first degree murder than in second degree. It, therefore, didn't properly present to the jury for its consideration and determination the matters of deliberation and premeditation in its instruction on second degree murder.

IV.

AN INSTRUCTION THAT DEFENDANT ACTED WILFULLY AND WITH THE DELIBERATE AND PREMEDITATED DESIGN AT THE TIME THE SHOTS WERE FIRED IS NOT AN INSTRUCTION THAT HE ACTED WITH MALICE AFORETHOUGHT.

Defendant contends that the trial court improperly charged the jury in paragraph 1 of Instruction No. 6 in the following words: " * * * that at the time such shots were fired the defendant acted wilfully and with the deliberate and premeditated design to kill said Max Lopez" and that said instruction is inaccurate. That said instruction is not the equivalent to "malice aforethought", which means planned, designed or thought out beforehand. State v. Thompson, 110 Utah 113 170 Pac. (2d) 153 at page 159; State v. Russell, 106 Utah 116, 145 Pac. (2d) 1003 at page 1009. The charge to the jury as given by the court in its first paragraph of this instruction used the words "at the time such shots were fired". It is submitted this minimizes the requirement of planning, designing and thinking out beforehand and is therefore misleading and prejudicial.

V.

A TRIAL COURT MAY NOT INSTRUCT IN SUCH BROAD TERMS THAT THE JURY MAY RESORT TO CONJECTURE UNDER THE INSTRUCTIONS TO ARRIVE AT A THEORY UPON WHICH TO BASE GUILT.

Defendant contends that it was prejudicial error for the court to give the instruction contained in the last paragraph of Instruction No. 6. The words "from any theory of the evidence in this case" are leave to go beyond the evidence, especially in view of the fact that the court had instructed on every theory permitted by the evidence. That this charge amounts to overemphasis, grant of greater latitude than allowed by law and amounts to an instruction to the jury from the court to the effect that "if I haven't figured out how the defendant did it, you go ahead and do it". That the court ought to have qualified the phrase "from any theory" by a descriptive word or phrase of limitation or restriction.

VI.

AN INSTRUCTION ON SECOND DEGREE MURDER RESULTING FROM AN ASSAULT WITH A DEADLY WEAPON WITH INTENT TO DO GREAT BODILY HARM MUST ALSO CONTAIN INSTRUCTION ON OTHER ESSENTIAL ELEMENTS OF SECOND DEGREE MURDER.

That the court incorrectly stated the law in paragraph three of Instruction No. 7. That neither the evidence nor any theory of guilt based on the evidence

warranted this instruction. A reasonable analysis of this instruction leads to the conclusion that the court considered it second degree murder to kill while committing an assault or an assault with a deadly weapon. It is murder if committed in the perpetration of arson, rape, burglary or robbery even in the absence of intent, deliberation and premeditation. Utah Code Annotated 1943, Chapter 103-28-3, State v. Newhinney, 43 Utah 135, 158, 154 Pac. 632. If it is murder in the second degree to kill while in the perpetration of any offense not enumerated in section 103-28-3 it is submitted that it is second degree murder only if the elements of second degree murder are proven and that those elements must be enumerated in an instruction of this nature and that this was not done in paragraph 5 of Instruction No. 7. That prejudicial error resulted.

VII.

AN INSTRUCTION ON VOLUNTARY MANSLAUGHTER MUST CONTAIN AN INSTRUCTION THAT AN INTENT TO KILL IS AN ESSENTIAL ELEMENT OF THIS OFFENSE.

Defendant contends that Instruction No. 8 is in-

accurate and that the giving of the same constituted prejudicial error. The instruction does not charge that a necessary element of voluntary manslaughter is the intent to kill, State v. Cobo, 90 Utah 89, 80 Pac. (2d) 953. The error appears obvious in each paragraph. Each paragraph instructs on a separate theory of this offense.

In each paragraph of this instruction the court instructed that it was voluntary manslaughter if defendant fired into the body intentionally in a heat of passion or upon a sudden quarrel. It may well be that the jury thought that voluntary manslaughter had no application to the state of facts they arrived at because such state of facts included a belief that defendant intended to kill. It may well be that the jury would have found defendant guilty of voluntary manslaughter because of the sudden quarrel disclosed by the testimony if the instruction had permitted them so to find and also find that the killing was intentional. At any rate it seems reasonable to conclude that this instruction did not give them this aspect to determine or to determine whether the act of intentional killing

was murder in the first degree or voluntary manslaughter

It is contended that firing into the body intentionally is not the same as an intent to kill nor an instruction that must find an intentional killing in this degree of homicide.

Further, the instruction is inaccurate because it makes no reference to state of mind except heat of passion and intentional firing. Nowhere in the instruction is found the word "kill" or "slay". Reference only to firing is made.

VIII.

AN INSTRUCTION TO THE JURY ON INVOLUNTARY MANS-
LAUGHTER MUST INCLUDE INSTRUCTION THAT THE UNLAWFUL
ACT OR ACTS OF THE DEFENDANT WAS THE PROBABLE CAUSE
OF DEATH.

The defendant feels that Instruction No. 9 is misleading and inaccurate in that it fails to instruct the jury that the unlawful acts of defendant must be the probable cause of the death of Lopez. Defendant contends that the testimony required an instruction to the effect stated because the witness Herrera testified that he grabbed defendant (R. 39) and that

he grabbed defendant's left wrist when the gun was in it (R. 40) and because of the strong evidence that Herrera was the aggressor.

Attention is called to the definition of voluntary manslaughter contained in Instruction No. 2. Defendant contends that Instruction No. 2 does not cure the defect in Instruction No. 9 and that the jury, on the whole instructions, were erroneously charged on this degree of homicide.

IX.

INTOXICATION, IN CONNECTION WITH THE FORMATION OF AN INTENT TO KILL, MUST, IF EVIDENCE WARRANTS THE INSTRUCTION, BE GIVEN IN INSTRUCTING ON THE CRIME OF VOLUNTARY MANSLAUGHTER.

Instruction No. 12 is incomplete and therefore inaccurate as a statement of the law on intoxication in connection with intent. To correctly state the law in this instruction the court should have included all the offenses in the information that have intent to kill as an essential and necessary element of the offense. The court in instructing on intoxication did not inform the jury that intoxication must be considered in

connection with voluntary manslaughter. Intoxication must be considered on the intent in each degree of homicide except involuntary manslaughter, State v. Stenback, 78 Utah 350, 2 Pac. (2d) 1050, 79 A. L. R. 878. It is submitted that the court committed reversible error because the court was incorrect and too limited in not including voluntary manslaughter in this instruction.

I.

INTOXICATION MUST BE CONSIDERED IN DETERMINING ABILITY TO DELIBERATE OR MEDITATE AS WELL AS IN DETERMINING THE ABILITY TO FORM AN INTENT TO KILL.

It is further contended that Instruction No. 12 fails to state the law correctly on intoxication and its relation to the essential elements of premeditation and deliberation; that the court, in a proper instruction should instruct the jury on all the three elements of intent, premeditation and deliberation and that the expressions used by the trial court "to think out and form the specific design and intent" and "to form an intention" are inadequate, misleading and inaccurate and that defendant was prejudiced by said instruction.

State v. Thompson, 110 Utah 113, 170 Pac. (2d) 153;

Nept v. Utah, 104 U. S. 651, 26 L. Ed. 873.

II.

PRIOR CONVICTION OF CRIME INSTRUCTION SHOULD
CONTAIN INSTRUCTION THAT SAME IS NOT EVIDENCE OF GUILT
WHEN GIVEN AS PART OF AN INSTRUCTION ON CREDIBILITY.

Prior conviction of a crime is not evidence of
guilt. State v. Crawford, 69 Utah 39, 201 Pac. 1030.
Instruction No. 19 does not point this out to the jury.
It merely instructs that evidence of prior conviction
shall be considered only so far as it affects the
credibility of the defendant. And the instruction does
not define credibility. What it means is left to
conjecture. Therefore, under the instruction this
evidence could be given undue weight or importance if
the word credibility is not defined. This is especially
true here because two full pages of the record are
devoted to the prior record of the defendant. Nowhere
in the entire instructions is credibility defined but
reference to it in Instruction No. 16 in the same
sentence by way of enumeration with weight of testimony,
immediately followed by a definition in the same

instruction of weight of evidence, which includes some matters within the legal meaning and scope of the definition of credibility, could very well lead the jury to a misconception of the meaning of credibility. If so, an improper and erroneous consideration could have been given to the prior conviction of the defendant. It is submitted that Instruction No. 19 did not go far enough, was incomplete, inaccurate and misleading and was prejudicial to the defendant.

XII.

A TRIAL JUDGE SHOULD INSTRUCT AN INTERPRETER AND ALL COUNSEL ON CONDUCT AND MANNER OF INTERPRETATION, AND ACTIVELY SUPERVISE, CONTROL AND EXACT ADHERENCE TO SAID INSTRUCTIONS AND DISPENSE WITH AN INTERPRETER WHEN IT APPEARS THAT ONE IS NOT NECESSARY.

One of the points argued to the trial court in the motion of the defendant for a new trial was the entire matter of the use of the interpreter in the taking of the testimony; the failure of the court to control and supervise the taking of testimony; the failure of the court to instruct all persons concerned in the use of the interpreter, including the interpreter; and the

failure of the court to dispense with interpretation in connection with the witness Herrera, and in so failing the court failed to exercise the sound discretion in the matter allowed and enjoined by law, with the result that the defendant did not have a fair trial and acts were permitted that were prejudicial to the substantial rights of the defendant.

The cases are few which provide a standard or rule of duty for the court. Probably the leading case on the subject is Gregory v. Chicago R. I. & P. R. Co., 147 Iowa 718, 124 N. W. 797, where the court intervened during the examination through an interpreter and enjoined "the use of some common sense in this matter" in connection with the method of examination. The remarks of the court were assigned as error. On Appeal the court laid down the following rule for guidance of courts and counsel in future cases.

"There is no hard and fast rule as to the method by which a witness shall be examined through an interpreter. It is necessarily a difficult and unsatisfactory proceeding and the method of conducting it must be left to the sound discretion of the court in view of all the circumstances. In our view the ideal way to examine a witness through an interpreter is to require the interpreter to be impersonal and to require the attorneys to address no question nor remark to the interpreter. On the contrary, all questions

should be directed to the witness in the second person. These questions should be repeated by the interpreter without any remarks of his own. That is to say, the interpreter should be a phonograph for the time being. Some interpreters find it impossible to suspend their personality and they talk to the witness in the third person. The attorneys often forgetfully address their questions to the interpreter and then ask him what the witness said. It is a time when the common sense enjoined by the court is a great desideratum and it needs to be well distributed and reasonably active in order to obtain the best results.

In the case of People v. Wong Ah Bank, 65 Calif.

306, 4 Pac. 419, the trial court ordered the interpreter not to translate obvious hearsay and the appellate court in reviewing the trial court's action ruled as follows:

"It is the duty of the interpreter to interpret and report to the court every statement made by the witness. The court should so instruct the interpreter and require a strict compliance with such instruction. The interpreter is not selected for the discharge of a duty essentially judicial."

The court in the Wong case went on to say that it would be error requiring a new trial if the interpreter did not translate all that the witness answered.

Other courts have held that the court cannot delegate powers or functions to an interpreter and that he acts in a ministerial capacity only. State v. Deslovers, 40 R. I. 89, 100 Atl. 64; that he is to be considered

by the court merely as a witness, Birmingham v. Jung,
161 Ala. 461, 49 So. 434.

The defendant herein contends that the court
committed error in failing to apply the rules laid down
in the following particulars:

(a) In failing to control and supervise the
interpreter and to require him to act within limits
and in permitting the interpreter to dictate, dominate,
control, intrude or participate in the examination of
the witnesses and the proceedings of the court. The
following excerpts from the record are illustrative of
the conduct referred to:

"Mr. Sheya: Just a minute, just a minute,
I want to make an objection to the question and to the
conversation on the ground that it is hearsay and not
binding on this defendant.

"Interpreter: Just a minute, let me make my
interpretation. Let me make a complete interpretation
because these boys won't go on if I stop them once or
twice. They are hard to get to talk anyway." (R. 23).

"Question: Who was present when you talked
back and forth.

"Interpreter: His answer is off the question.
I will ask it again." (R. 34).

"Maybe this is a misinterpretation. Strike
the first one." (R. 43).

"The Court: The objection is sustained.

"Question: After you stopped this car--

"Interpreter: I have the answer if you want it, Mr. Shera. The objection is sustained.

"Answer: I told him --

"Mr. Darr: Wait a minute, the court sustained the objection." (R. 51)

"Question: What does he mean, follow. You haven't got that right.

"Interpreter: Max followed me and you can strike my other interpretation out. Max followed me to the edge of the road and from the edge of the road I left Max there and I crossed the road to face Trujillo.

"Question: Now let's see, the edge of the road. Do you mean over here?

"Interpreter: Show him the direction first. Now what is your question? (R. 92)

"Interpreter: It would be better to have him go up and show those positions." (R. 171)

"Interpreter: The question was where was Mr. Lopez, Herrera, Trujillo and Mandragon when I lifted Herrera." (R. 171)

"Interpreter: Will you reask that question part of it at a time so I won't miss any of it.

"Question: That is when Herrera went to Trujillo and started to wrestle?

"Interpreter: They haven't wrestled as yet, they went to wrestle. Now the question." (R. 176).

(b) In failing to instruct the interpreter as

to the method, manner and scope of translation and to require adherence to said instructions. As a consequence of the failure so to do the record of the testimony contains changes of interpretation at the will of the interpreter, from direct to literal interpretation, changes first to second person, changes in the question, explanations of the testimony or the version of the interpreter. In the record (R. 27) the interpreter advises that he is going to give a direct translation and shortly afterward he advises he is giving direct English and two sentences later advises that he is not giving direct translation any more (R. 28); gives his versions of questions and answers (R. 98), (R. 107, 108, 138, 153, 165, 172, 171 and 172) and incorrectly (R. 20, 177) condenses questions to avoid explanation (R. 182, 366), fails to give answer of witness for reasons of his own (R. 34, 163), gives questions not propounded by counsel (R. 79).

(c) In failing to control counsel.

The court allowed counsel to direct the interpreter at a number of points. (R. 51, 366, 65, 64, 63, 59, 23, 27, 72, 40, 41) Counsel for both the state and

the defense engaged in the practice. At one point counsel joined in giving direction (R. 60). Counsel asked the interpreter the meaning of testimony (R. 27, 28, 48). The court allowed counsel to enter into discussions with the interpreter (R. 64, 72, 95, 72). The court allowed counsel to give direct orders to the witness concerning his manner of testifying (R. 17, 66).

(d) In failing to dispense with the services of the interpreter or reducing him to a standby status during the testimony of the witness Herrera when the court knew or reasonably ought to have known that an interpreter was not necessary.

The laws of Utah provide: When a witness does not understand and speak the English language an interpreter must be sworn to interpret for him. Utah Code Annotated 1945, Chapter 104-49-5. Our statutes are otherwise silent on the subject of interpreters. The general rule is that it is within the sound discretion of the court as to whether or not an interpreter is necessary.

Hilbert v. Kundicoff, 204 Calif. 486, 266 Pac. 906;

People v. Leang, 215 Calif. 65, 1 Pac. (2d) 7;

State v. Lopez, 21 Cal. App. 188, 151 Pac. 104; Wignore

on Evidence, Third Edition, § 811.

It has also been said that the conditions under which an interpreter is to be resorted to are the simple dictates of cautious common sense, and that interpretation is proper to be resorted to whenever a necessity exists; but not till then. Wigmore, Third Edition, § 811, page 221. Where witnesses are able to understand and speak the English language, even imperfectly, but so as to make themselves understood and to convey their thoughts and ideas, no interpreter should be called. This is true even in cases where the witness does not at first understand the question and it has to be repeated to him, if he can be made with reasonable effort to understand the question. Duroff v. Commonwealth, 192 Ky. 31, 232 S. W. 47. That nothing but practical necessity can justify the intervention of an interpreter between counsel, witness and jury. Rajnowski v. Detroit, 74 Mich. 15, 41 N. W. 849; Prokap v. State, 145 Neb. 582, 28 N. W. (2d) 200, 172 A. L. R. 916. It is contended that an interpreter should be dispensed with when the court commences the use of one with a witness and then, from the words or

conduct of the witness knows or should know that the testimony can be had, though with difficulty, directly from the witnesses. It is also contended that the court should have known that the testimony of the witness Herrera could be had without an interpreter. Nowhere in the record is there found any representation by counsel or Herrera concerning a handicap. The interpreter Goni was present to act only in connection with Joe Mondragon and his wife Elvira. (R. 4) The state desired an interpreter for Herrera in the interest of consistency, not necessity, and the interpreter advised the court that the witness informed him that he preferred to testify in Spanish (R. 17, 18). No necessity is shown nor can necessity be inferred from the record. It is contended that the trial court should have followed at this point the suggestion of Justice McDonough and invited an inquiry into the handicap of the witness before proceeding, State v. Vasquez, 121 Pac. (2d) 903, 140 A. L. R. 755, 101 Utah 444 at page 463. Thereafter the witness Herrera was asked this following question: "While you were doubled up and after you heard this first shot will you state whether or not you saw anything (R.

42) to which he answered through the interpreter,

"Later after I regained from my dizziness I saw Max Lopez going in the direction of his car." Immediately following this answer the record shows as follows:

"Interpreter: Maybe this is an interpretation. Strike the first one.

"Answer. After my straightening up and getting out of the dizzy spell I saw Mr. Trujillo coming from the direction of his car toward the car of Max Lopez.

"Witness: No.

"Interpreter: No. I am still wrong.

"Witness: He went from Max Lopez car to his car. After I regain, after I get up out of the dizzy moment I see Trujillo going from Max's car toward his car (R. 43.)"

Just prior to this question and answer the witness had answered directly in English (R. 42) and had answered directly earlier in English and had been directed not to do so by the district attorney (R. 17). The record at page 43 indicates considerable understanding of the English language. The question propounded consisted of 21 words containing the phrases "doubled up", "whether or not" and the seldom used verb "state". The answer given in English in 31 words indicates a complete grasp of the meaning of the sentence and of

Sponsored by the Utah State Library, funded by the National Endowment for the Humanities, through the Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

what was wanted. The translation into English of the answer given by the witness was understood, completely so, and readily, for it was corrected by the witness and finally given directly by the witness when the interpreter gave a second translation which did not meet his approval. The witness Herrera indicated an understanding of and ability to speak the English language comparable to the average native born witness. Although the trial court did not know until late in the testimony of Herrera that he did not require an interpreter in the inquest on the death of Lopez, such is the fact (R. 123). The display of understanding and ability to speak at page 43 of the record took place midway in the direct examination of the witness and before any cross examination whatsoever. Did the failure of the trial judge to dispense with the interpreter or restrict his use to occasions of real necessity at this stage of the trial deprive defendant of a substantial right, deny him a fair trial and constitute reversible error? The cases cited concerning supervision and control appear to set forth the duties of the trial judge in this matter irrespective of counsel or their motions

and appear to be rules he should apply on his own motion or initiative.

Defendant contends that he was deprived of a substantial right by the court for the reasons aforesaid and in connection with his right to cross examine Herrera. Cross examination is a valuable right. It is the means of testing credibility, of exhibiting the witness to the jury for belief or disbelieve, of giving to the jury all that it should have to properly weigh the evidence. Cross examination through interpreters has been discussed in the writings and cases on the subject. Wigmore, Third Edition, § 511 cites with approval the language of an English case, Rex v. Burke, 6 Cox Cr. 45:

"The value of this test (cross examination) is very much lessened in the case of a witness, having a sufficient knowledge of the English language to understand the question put by counsel, pretending ignorance of it, and gaining time to consider his answers while the interpreter is going through the useless task of interpreting the questions which the witness already understands."

It has been declared that the whole examination and cross examination of the witness is impeded, dulled and made inaccurate when had through interpretation. That an advantage is gained by a witness on cross examination

who understands English in being able to deliberate on each answer while the interpreter is unnecessarily repeating the question. Kelly v. State, 96 Fla. 348, 118 So. 1; while the Vasquez case in our Supreme Court concerned the use of an interpreter for a defendant, the remarks of the court on the subject are equally applicable to witnesses. The Court in that case, in the opinion of Justice Wolfe, had this to say:

"While a defendant is entitled to an interpreter where he cannot adequately express himself the jury is also entitled to have the benefit of his testimony directly if it can be conveyed to them in English. All of us who have sat as trial judges know that there have been times when witnesses who are familiar with a foreign tongue have sought to testify through interpreters because it has enabled them to fashion a story with a facility impossible if their testimony must be expressed in the simple English terms with which they are familiar. Certainly the reaction of the witness, his demeanor on the stand is much more discernible to the juror when questions and answers are framed in English. And the intelligent judge and juror does not have much difficulty in determining after a short period whether the continuance of the attempt to convey the witnesses impressions in English are fruitful or whether he is pretending or honestly having difficulty. This in itself is a valuable index to demeanor." State v. Vasquez, 101 Utah 444 at page 456.

The record indicates that examination of Herrera was impeded, dulled and made inaccurate in various ways; by the interpreter asking questions (E. 19, 40

41, 61, 71, 72, 74, 76, 77, 79, 83, 84, 85, 86, 88, 91, 92, 96, 97, 100, 101, 102, 104, 105, 109, 111, 113, 116, 124, 128); by the interpreter's explanations (R. 37, 40, 42, 45, 48, 60, 62, 63, 67, 69, 74, 76, 79, 83, 91, 97, 98, 106, 107, 108, 111, 119, 123); by his changes in manner of interpretation or tense or person (R. 28, 48, 60); by questions of counsel made necessary because of interpretation (R. 27, 28, 55, 64, 80); by incorrect interpretations (R. 34, 43); that examination was impeded for other and various reasons such as the confusion of the court, intrusions of the interpreter, etc. (R. 51, 76, 91, 99, 106, 109, 124, 126, 134); and especially in the efforts of defendant to impeach the testimony of the witness Herrera on cross examination (R. 59, 60, 63, 64, 69, 72, 73, 80, 81, 82, 85, 91, 92, 127, 128, 129, 130, 131, 132, 135, 136, 139). Reading the testimony indicates that interpretation affected many of the important issues to be determined, such as the commencement of the quarrel on the highway, who commenced it (R. 34) and the location of Lopez during the quarrel (R. 43).

The record of the testimony suggests to the reader

more about the personality of the interpreter than of the witness. Was the personality and demeanor of Herrera clearly and properly portrayed to the jury. If not, would the absence of an interpreter have given a better portrayal? Was the evidence of Herrera clearly portrayed through interpretation? Would the absence of an interpreter have resulted in a clearer, less hectic, more detailed statement presenting the witness directly to the jury for appraisal? Was the best gauge to measure credibility given the jury? It is contended that the record indicates clearly that the use of the interpreter during the testimony of Herrera was a handicap to the proceedings. That this fact ought to have been apparent to the court at an early stage in the direct examination of Herrera (R. 43); that the failure to resort to the direct use of the English language at this point by order of the court was an abuse of discretion by the court depriving the defendant of a substantial right; that the cumulative detrimental effects of the use of an interpreter amount to a failure or a denial of a fair trial and is prejudicial error.

If the law is that the court must either deny or allow an interpreter at the commencement of the examination of a witness, such denial or allowance depending on the demonstration of the witness as to his knowledge and understanding of the English language, it seems logical that said rule should be applicable at any stage of the testimony of said witness, and should be applied by the court at the earliest point in the testimony that the witness demonstrated his ability to understand and use the English language. That if sufficient knowledge and use is so demonstrated, as in this case, it was error, as an abuse of discretion, to continue the testimony by interpretation.

It is error not to change interpreters during the testimony of a witness when the incompetence is made known to the court. It is the duty of the court to appoint another one. State v. Deslovers, 40 N. Y. 89, 100 Atl. 64. It was held not to be error to secure an interpreter after some testimony in English when the testimony disclosed a very imperfect knowledge of the language. State v. Severson, 78 Iowa 653, 43 N. W. 533.

From the above it seems logical to say that a court

may intervene at any time and should dispense with an interpreter when no necessity for one continues to be apparent. No case on the point has been found. The defendant does not believe there are any. The cases on interpretation are very few in the reports. It is thought that this is a case of first instance, but that fact should not be detrimental to the defendant due to the small number of cases reported.

It is submitted that the defendant did not have a fair trial herein and that the record, on the matter of the use of the interpreter in the manner allowed by the court and the continued use for the witness Herrera was such an abuse of discretion by the court that reversible error resulted.

XIII.

THE VERDICT IS CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE.

The testimony of Mondragon is of doubtful probative value. If this is not true then the testimony of Herrera is of doubtful probative value. The testimony of each cannot be accorded great probative value. Both were drunk. Mondragon stated that the car of Lopez

was parked when he and defendant arrived on the scene (R. 143). Herrera has an entirely different version of the arrival on the scene. Mondragon testified that he did not leave defendant's car until he heard a shot (R. 146) and when he got out of the car Herrera and defendant were not yet locked in quarrel (R. 146). Herrera testified that no shots were fired until after they had engaged in hand to hand combat and that Mondragon was outside when the first shot was fired. Neither definitely knows where Lopez was after he got out of his car. Mondragon said he helped Herrera to the rear of Lopez car (R. 150, 151). From the testimony it appears that Herrera was never aware of this assistance. Mondragon testified that he was outside the cars and near defendant when defendant fired the second and last shot (R. 152). Herrera saw defendant, he says, but doesn't indicate whether he saw or could see Mondragon. Mondragon admitted that he lied to the police, (R. 162, 163). Herrera admitted he was bitter toward defendant (R. 140). He had been belittled by the defendant earlier in the evening (R. 80) but defendant was friendly (R. 71, 77-79). The state failed

to prove or even show a motive. The attempt to do so by the testimony of Mrs. Lopez is not convincing. The evidence shows no malice on the part of the defendant, the evidence is preponderately circumstantial and of not strong probative value.

On the other hand, the testimony of the defendant provides the only clear and complete version of the incident that reconciles every inconsistent aspect.

He had a reason to be on that highway at that time (Record, testimony of Viola Trujillo). He saw the Lopez car parked, which is corroborated by Mondragon. Its lights were out. Mondragon gives no testimony on this point. Herrera admits they were out but gives another and different version (R. 29). Defendant testified that Herrera was in the road flagging him and asked if he could fix the lights (R. 399) and then cursed him (R. 400). Did Herrera then recognize defendant and being drunk recall the belittling statements made earlier in the evening? Herrera then insisted on fighting, pulled off his shirt and then hit defendant (R. 400). Herrera freely admitted in his testimony that he took off his shirt. It appears indisputable

that Herrera was the aggressor. If defendant had a gun and intended to kill why did he stand with a gun in his hand while Herrera took off his shirt? Defendant and Herrera thereupon fought and Herrera was down. He freely admits being down and being dissy. Max Lopez objected to Herrera being hit while he was down (R. 400). Then Mondragon orders Lopez to let defendant and Herrera fight and to leave them alone (R. 401). Then Mondragon shoots Lopez twice and later shoots three times (R. 401) and calls to defendant to leave and defendant lets go of Herrera. That Mondragon told defendant later in defendant's car that he shot Lopez when Lopez was going to stick a knife in defendant (R. 407). That because Mondragon did the shooting and because the gun was owned by defendant they agreed to lie about the matter and both did.

The testimony of the defendant is direct, clear, complete, logical and inclusive on all points. It is the only testimony that reconciles all conflicts of testimony or inconsistencies. The examination of the state indicates that essential links in the chain of circumstantial evidence are lacking. It is therefore

insufficient to sustain a conviction. C. J. S., Vol. 5, p. 817, Note 78; State v. Crawford, 89 Utah 39, 201 Pac. 1050; State v. Laub, 102 Utah 402, 131 Pac. (2d) 805.

An essential link in the chain of evidence is the identity of the person firing the shots. Another is when the shots were fired. Another is which of the shots fired caused death. Since the jury under the instruction had to decide which shot caused death and since there is conflict or vagueness as to when and how they were fired, as shown by the instructions of the court, it is contended that the number of shots fired is an essential link in the evidence necessary to find the defendant guilty. The testimony of the state is not convincing on this point. That of the defendant is when he testified that Mondragon fired five times. One of the most convincing pieces of testimony is that of Albert Passic who testified that he found five shells (R. 218, 219). The state never accounted for five shells being fired or five shots being fired. Only the defendant did in his testimony concerning Mondragon. The state believed that five shots were fired and considered

this an essential link in the evidence and attempted to explain the omission of its witnesses to account for five shots at the scene of the offense through the testimony of Herrera that he heard shots on the highway near the swamp (R. 26, 27) and failed to do so. The state must not only show by a preponderance of the evidence that an offense was committed, and that the alleged facts and circumstances are true but they must also be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than defendant's guilt. All the circumstances as proved must be consistent with each other and they are to be taken together as proved. Being consistent with each other, and taken together, they must point surely and unerringly in the direction of guilt. Hence if two reasonable hypotheses are pointed out by the evidence and one of them points to the defendant's innocence, it would then be difficult to see how any jury could be convinced beyond a reasonable doubt of defendant's guilt. State v. Leub, 102 Utah 402, 131 Pac. (2d) 804; People v. Scott, 10 Utah

217, 37 Pac. 335; State v. Burch, 100 Utah 414, 115 Pac. (2d) 911.

The testimony of Mondragon is readily explainable. He was present at a homicide. He was in jeopardy. His testimony is obviously weakened by that of his wife Elvira which can reasonably be classed as exaggerated, especially in the remark she attributed to defendant "shoot the other boy" (R. 366) and her efforts to avoid admitting that her husband knew anything about a gun (R. 368). Mondragon did not rebut any of the testimony concerning a gun in the car or knowledge on his part as to its whereabouts.

It is submitted that the circumstantial evidence and the evidence is insufficient to sustain a verdict of guilty or a verdict of murder in the first degree if defendant is guilty of the slaying of Max Lopez.

This is a capital case and this court may and should of its own motion consider manifest errors and prejudicial errors which are neither assigned nor argued. State v. Stenback, 78 Utah 360, 2 Pac. (2d) 1060, 79 A. L. R. 878; State v. Riley, 41 Utah 226, 126 Pac. 294; State v. Russell, 106 Utah 116, 145 Pac. (2d)

CONCLUSION

It is submitted that the trial court committed serious errors during the trial of this case. As herein demonstrated, it erroneously denied the motion to quash attacking its jurisdiction, conducted the proceedings in a manner depriving the defendant of a fair trial, committed prejudicial error in instructing, and the jury reached a verdict contrary to the evidence.

Under the circumstances it is most respectfully submitted that this court should reverse and remand the verdict and judgment below, with instructions to either dismiss the information or grant a new trial.

KEITH BROWNE

Attorney for Defendant
and Appellant