

1950

## State of Utah v. Fred Matteri : Brief of Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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STATE OF UTAH,

*Plaintiff and Respondent,*

vs.

FRED MATTERI,

*Defendant and Appellant.*

Case No. 7413

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## BRIEF OF APPELLANT

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APPEAL FROM THE THIRD JUDICIAL DISTRICT  
COURT, SALT LAKE COUNTY, STATE OF UAH

Hon. Albert H. Ellett, Presiding

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**FILED**

JAN 20 1950

JOSEPH C. FRATTO,  
GORDON B. CHRISTENSON,  
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Supreme Court, Utah

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

During the late afternoon of Friday, May 6th, 1949, the body of a dead man, partly submerged in water, later identified as Levi P. Delk, was discovered by two minors in Little Cottonwood Creek, in the vicinity of Pepper's Hill, Salt Lake County, Utah. An examination of the body by the coroner disclosed a laceration about seven inches in length on the back of the left side of the head, and numerous bruises and abrasions located on the forehead, nose, right eye, right knee, and left leg (Tr. 88, 126).

The body of the dead man was dressed in a khaki colored shirt, a brown suit coat, a pair of shorts, and a pair of shoes (Tr. 121). The trousers and socks were not on the body (Tr. 124, 125). An examination of the clothing disclosed a bank book bearing the name of Levi P. Delk, army discharge papers, and other miscellaneous papers in the inside coat pocket (Tr. 124). In the outside coat pocket, there was a key to the ignition switch of an automobile later identified as the key to the Willy's panel truck (Exhibit "H," Tr. 125) owned by the deceased, and also a small vial containing an unidentified liquid. This vial was later destroyed when dropped by a deputy in the sheriff's office.

No definite time was established as to when the deceased met his death (Tr. 91), and the testimony as to how the deceased died was very conjectural in nature, the doctor who examined the body merely having ventured an opinion that the head-wound described above was inflicted by a blunt instrument of some sort (Tr. 90). But there was no evidence of any blunt instrument, or for that matter, of any kind of an instrument which might have caused the wound.

About ten o'clock A. M. on Saturday, April 30th, 1949, a person, later identified as Fred Matteri, the Defendant, appeared before a notary public in Salt Lake City, Utah, and, representing himself to be Levi P. Delk, signed a certificate of title to a Willy's panel truck, identified at the trial as owned by Delk (Tr. 167). Later, the same morning, the Defendant, still representing himself to be Levi P. Delk, sold the said Willy's panel truck to Arch Browning, Inc., a car dealer of Salt Lake City, Utah (Tr. 207-212). No ignition key to the

truck was delivered to the car dealer at the time of the sale, and it was disclosed at the trial that the ignition wires had been crossed to make possible the operation of the truck without the key (Tr. 218, 221).

Between the 1st and 3rd days of May, 1949, the Defendant attempted to sell a Waltham pocket watch to his fellow workers, which watch was identified as once having belonged to Delk, and was last seen in Delk's possession in February, 1949 (Tr. 249). Unable to make the sale, the Defendant later pawned it to the National Loan Company of Salt Lake City, Utah, for the sum of \$7.50. Matteri used his own name when he pawned the watch, which had a chain on it at the time of pawning (Tr. 237, 246). The chain never was positively identified as owned by Delk at any time (Tr. 250, 251).

There was evidence that a gold-plated corn cutter, at one time used by Delk as a watch fob (Tr. 250, 253), was found in an open field some distance to the south of the building which contained the three apartments in the tourist park (Tr. 294). The corn cutter fob had been taken from among 1800 that Delk had made up for sale to his patients, and was specially gold-plated for his personal use.

The evidence showed that Mr. Delk, during the month of April, 1949, had occupied parking space in a tourist and trailer park at 3115 South State Street, Salt Lake County, owned and operated by Mr. and Mrs. L. A. Christensen. At the same time, Mr. and Mrs. Matteri and family occupied a tourist apartment in the same court, Mrs. Matteri and the children having moved away about April 20th, leaving Matteri there alone. The apartment occupied by Matteri was the eastern unit of a build-

ing containing three units, the center and the west units being unfinished and unoccupied. The building faced south, and the southwest corner of it was approximately 65 feet southeast of the space occupied by Delk with his truck (Exhibit "Q").

The last Mr. Delk was seen alive was about 5 or 6 p.m. on Friday, April 29th, when he came into the tourist park in his truck, and parked it in the rented space. He was not missed by Mr. and Mrs. Christensen until Sunday, as they understood he was going fishing (Tr. 140, 180, 203).

A pair of glasses identified as belonging to Mr. Delk was found in front of the center apartment of the building containing the three units (Tr. 180). The said center apartment was examined on May 9th by representatives of the Sheriff's office, at which time two spots on the floor, reddish brown in color, appearing like blood, were found. One spot was dried, and the other was still moist, being mixed with what definitely appeared to be vomit, as determined by the smell. Shavings, sawdust, papers and other debris were on the floor. The apartment had markings also on the floor, indicating that a struggle of some kind has taken place therein (Tr. 259-297).

There was a total lack of evidence connecting Matteri, personally, with Delk, personally, between the time Delk was last seen alive, and the time his body was discovered in the creek. No weapon was discovered to connect up the Defendant. Matteri's fingerprints were not found on the doorknob nor anywhere else in the center apartment which the State contended was the scene of the alleged homicide (Tr. 338, 345). No evidence of blood was found on Matteri's clothing. Also, no evidence was produced of trouble between Matteri and



Delk of any kind, such as quarrels, ill-will, threats, bad feelings, or revenge.

On May 8th, Mr. Matteri was arrested and charged with murder in the first degree. In the bill of particulars (Tr. 12) furnished the Defendant by the State, Defendant was charged, first, with having killed Delk with deliberation, premeditation, and with malice aforethought, and second, with having killed Delk in the course of committing a robbery, or an attempted robbery, to which the Defendant pleaded "not guilty."

After the State closed its case at the trial, the Defendant moved for a dismissal of the first degree murder charge, for insufficient evidence. This, the court denied (Tr. 382, 384).

The defense then rested, and moved for a directed verdict of not guilty on the first degree murder charge, and the included charges of murder in the second degree and voluntary manslaughter. The motion was denied (Tr. 386).

The jury was instructed by the Court, the defense taking exception to the Court's refusal to give Defendant's Proposed Instruction No. XII (Tr. 389). The State and defense made their arguments to the jury, which thereupon retired to consider its verdict. After several hours of deliberation, the jury returned for further instructions, the defense objecting to additional comments made by the trial court to the jury at that time (Tr. 391-393). After a short deliberation, the jury returned with a verdict of guilty of murder in the first degree, with a recommendation of life imprisonment (Tr. 54).

The defense then moved for a new trial, which motion was denied (Tr. 397). The Court, disregarding the recom-

mendation of leniency made by the jury, sentenced the Defendant to be executed by shooting (Tr. 403).

## STATEMENT OF ERRORS

1. The trial court erred in denying Defendant's motion to dismiss the charge of first degree murder, for the reason that the State did not produce sufficient evidence to sustain the charge.

2. The trial court erred in denying Defendant's motion to instruct the jury to find the Defendant not guilty of first degree murder, for the reason that the State did not introduce sufficient evidence of first degree murder to submit to the jury.

3. The trial court erred in denying Defendant's motion to instruct the jury to find the Defendant not guilty of second degree murder, for the reason that the State did not introduce sufficient evidence of second degree murder to submit to the jury.

4. The trial court erred in refusing to give the jury Defendant's proposed instruction No. XII (Tr. 31), and in giving in lieu thereof, the third paragraph of its Instruction No. 7 (Tr. 36), contrary to the provisions of Section 105-32-5, Utah Code Annotated 1943.

5. The trial court erred in giving the jury Instruction No. 8 (Tr. 36, 37), for the reason that said instruction was a definition of murder, and there was no evidence of murder to submit to the jury.

6. The trial court erred in giving the jury Instruction No. 9 (Tr. 37, 38), for the reason that said instruction defined first and second degree murder, and there was no evidence of either to submit to the jury.

7. The trial court erred in giving the jury Instruction No. 10 (Tr. 38, 39), for the reason that said instruction set forth the elements of first degree murder as they pertain to this case, and there was insufficient evidence of the same to submit to the jury.

8. The trial court erred in giving the jury Instruction No. 11 (Tr. 39), for the reason that said instruction set forth the elements of second degree murder as they pertain to this case, and there was insufficient evidence of the same to submit to the jury.

9. The trial court erred in commenting to the jury, when they sought additional instructions, that he had means of investigating the Defendant, or any story the Defendant told or any statement the Defendant made, and that the court's investigation would determine whether the court would impose a life sentence or the death penalty (Tr. 391-393), for the reason that the jury was misled thereby.

10. The trial court erred in denying Defendant's motion for a new trial, which refusal is contrary to law.

11. The trial court abused its discretion in ignoring the jury's recommendation of a life sentence, and in sentencing the Defendant to be executed.

## ARGUMENT NO. I

THERE IS NO EVIDENCE OF FIRST DEGREE MURDER AGAINST DEFENDANT.

The information in this case charges that the Defendant, Fred Matteri, committed the crime of murder in the first degree, by murdering Levi P. Delk. The Bill of Particulars (Tr. 12) furnished the Defendant by the State reads as follows:

"That at the time and place alleged in the Information, the defendant willfully, deliberately and with the intent to kill Levi P. Delk, and with malice aforethought and premeditation killed Levi P. Delk by striking the said Levi P. Delk over the head with a blunt instrument, the nature and description of which is unknown to the District Attorney:

"That at the time and place alleged in the Information, the defendant killed Levi P. Delk while the said Defendant was perpetrating or attempting to perpetrate the crime of robbery in that the said defendant at said time and place was feloniously taking or attempting to take personal property in the possession of or in the immediate person of Levi P. Delk, that the said taking or attempting to take said property was against the will of the said Levi P. Delk and was accomplished or attempted to be accomplished by means of force and fear; that said personal property consisted of a truck, a watch and other personal property, the exact nature and description of which is unknown to the District Attorney."

At the conclusion of the State's case, the Defendant moved that the charge of first degree murder be dismissed, which motion was denied (Tr. 382-384). After the Defendant rested,

the Defendant moved that the jury be directed to find a verdict of not guilty of murder in the first degree, which motion also was denied by the Court (Tr. 386). However, even the Court was convinced that the State had not made out a case of murder in the course of a robbery or attempted robbery, as set out in the second paragraph of the bill of particulars quoted above (Tr. 383), and submitted the case to the jury solely on the charge of first degree murder as set forth in the first paragraph of said bill of particulars as above contained.

In the instant case, to make out murder in the first degree, it is necessary that the State prove, among other elements disputed by the Defendant and dealt with elsewhere in this argument, that the Defendant killed Delk with malice aforethought, that the killing was deliberate and with premeditation, and the result of a specific intention on the part of Defendant to kill Delk. If the State failed to prove any one of the foregoing elements, then no first degree murder charge was made out. Please see *State vs. Russell*, a Utah case, 145 Pac. (2) 1003.

The Defendant contends, however, that there was absolutely no evidence of premeditation, deliberation, nor of malice aforethought, nor of a specific intent on the part of the Defendant to kill Delk, nor of other elements of first degree murder, and that as a result, the State failed to make out its case.

(A) When we speak of "deliberation," "premeditation," and "malice aforethought," and "specific intent," we are speaking of the state of mind, the mental attitude or intent of the accused formed prior to the commission of a homicide. Not

being able to probe the mind itself, such state of mind must of necessity be determined by actions of the accused.

In *State vs. Russell*, supra, this Court very ably discussed the state of mind as related to first and second degree murder, and distinguished between the two. This Court, in that case, held that malice aforethought, being an essential element in murder at the common law, was adopted by our criminal code as a necessary element, but that in order to make out murder in the first degree, the killing itself, not merely the malice, must be with deliberation and premeditation. The lack of deliberation and premeditation in the killing itself, the other elements of murder being present, would reduce the homicide to second degree murder.

In the *Russell* case supra, this Court said:

“ . . . The terms *premeditation* and *aforethought* both mean to think out, plan or design beforehand. Some courts make a slight distinction between those terms and the term *deliberation*, holding that it requires more calmness of mind and coolness of blood for deliberation than merely to premeditate and think out beforehand, but other courts refuse to make such a distinction.”

The *Russell* case, in speaking of murder in the first degree requiring a “willful, deliberate, malicious and premeditated killing,” says:

“This simply means that the fatal blow must be struck after deliberately and premeditatedly forming a specific intention or design to kill.”

These are universal principles, and are subscribed to by 1 Warren on Homicide, Sections 70 and 71; 1 Wharton's Criminal Law, 12th Ed., Sections 506, 507, 515, 516, 517, and Section 420 at page 631; together with many other references contained in the Russell case.

Keeping in mind that in this case, we are concerned with the state of mind of Matteri before and at the time the alleged fatal blow was struck (there being no evidence that Matteri struck the fatal blow), what evidence is there of such a state of mind? The state of mind is determined by the actions of the accused prior to, and at the time of the commission of the act with which it is connected. In searching the record, we find absolutely no acts of Matteri's prior to the alleged homicide which show any state of mind whatsoever in relation to Delk. There were no acts of preparation, no securing or selecting of weapons, no lying in wait; there were no boasts, no threats, no arguments, nor other difficulties between the accused and Delk.

In substance, the evidence was that Delk was found dead with a gash on the back of his head several days after the alleged killing; Matteri was in possession of Delk's truck and his watch, he having sold the truck by representing himself as Delk, and having pawned the watch in his own name. But these are events which occurred *after* the alleged homicide, and could not possibly show any state of mind whatsoever that may have existed many hours earlier. These facts show neither premeditation, deliberation, malice aforethought, nor specific intent; for that matter, neither do they show heat of passion, reckless disregard of life, negligence, nor self-defense. In fact,

it is impossible to conceive of a case wherein there could be less evidence of a condition of the mind at a given time.

The only actions of an accused after an alleged homicide which would show a state of mind existing at or before the killing, would be statements or confessions of such accused. These are totally lacking in this case.

The absence of evidence of the state of mind of one accused of murder in the first degree is discussed in *People vs. Howard*, a California case, 295 Pac. 333. In that case, there was evidence of a homicide implicating the Defendant, but except for a purported confession, there was no evidence of the state of mind of the accused. The Court said:

"To be murder of the first degree, under our statute, the killing must be premeditated, except when done in the perpetration of certain felonies; that is to say, the unlawful killing must be accompanied with a deliberate and clear intent to take life. If the act be preceded by, and be the result of, a concurrence of will, deliberation and intent, the crime of first-degree murder is proved. *People vs. Bellon*, 180 Cal. 706, 182 P. 420. When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree. *People vs. Knapp*, 71 Cal. 1, 6, 11 Pac. 793; *People vs. Ford*, 85 Cal. App. 258, 263, 258 P. 1111.

"In the present case, the prosecution relied principally on the defendant's confession to prove his connection with the



offense. If the confession be disregarded, *the record is entirely destitute of evidence tending to establish the circumstances and conditions actually existing just prior to and at the time of the striking of the fatal blow.* (Italics ours). If, as urged by the people, the jury in weighing and considering the evidence might properly reject as untrue that portion of the confession wherein defendant charged the decedent with having been the aggressor in a quarrel which led up to the homicide, there remains no evidence from which it might reasonably be deduced that the killing was the result of a willful, deliberate, and premeditated intent to kill. We do not question the propriety of the jury's action in rejecting any portion of the defendant's evidence or confession which to it was unworthy of belief. However, if it be assumed that this was done in the present case, there is a dearth of evidence tending to show the conditions as they existed at the time of the homicide, and from which it might reasonably be held that the murder was, in fact, willful, premeditated, and intentional. In this regard, the state failed to satisfy the burden of proof."

Applying the rule of the Howard case here, "the record is entirely destitute of evidence tending to establish the circumstances and conditions actually existing just prior to and at the time of the striking of the fatal blow."

Thus, under the law as contained in the Russell and Howard cases, the State in the instant case produced no evidence whatsoever of premeditation, deliberation, malice aforethought or specific intent to kill Delk, the lack of any one of these elements being fatal to the State's case. Consequently, there was nothing to submit to the jury insofar as first degree mur-

der was concerned, and the trial court should have either dismissed that charge, or directed the jury to bring in verdict of not guilty to such charge.

(B) There is another criterion which definitely rules out first degree murder in this case.

Section 103-28-2, Utah Code Annotated 1943, provides that malice may be express or it may be implied. In 1 Warren on Homicide, paragraph 67, at page 276, express and implied malice are discussed as they relate to first degree murder. Therein, the author states the law to be that express malice is absolutely essential to murder in the first degree, implied malice reducing the crime to murder in the second degree.

In paragraph 68, Warren defines *express* malice in this manner:

"Express malice is where the killing is the product of a sedate deliberate mind and formed design. It exists when there is manifested a deliberate intention unlawfully to take the life of a fellow creature, or to do him some great bodily harm from which death might result . . . A design to kill, or to inflict serious bodily harm, endangering life, though without lawful excuse or justification, and though fully formed and fixed in the mind, is not express malice without such design having an inception and origin in a sedate, deliberate mind."

Then Warren defines "a sedate, deliberate mind" as a "mental condition sufficiently composed, calm, and undisturbed to admit of reflection on the design to kill, or to inflict bodily harm endangering life, and to comprehend the nature and probably consequences of the act designed."

On the other hand, Warren, in Section 69 at page 285, defines *implied* or *constructive* malice, as "not a fact, but an inference or conclusion founded upon the particular facts and circumstances of the case as they are ascertained to exist. It means that the fact has been attended with such circumstances as carry with them the plain indication of a malevolent and diabolical spirit; and it is inferred from any deliberate cruel act committed by one person against another; from the intentional doing of an unlawful or wrongful act with a wrongful purpose."

It is evident from the discussion of deliberation, premeditation and aforethought, as they relate to the evidence in this case, and as discussed above, that there is no express malice under Warren's definition, inasmuch as evidence of the accused's state of mind at the time of the alleged homicide just does not exist. There just is no evidence that Matteri killed Delk with a sedate deliberate mind, or that he even struck the fatal blow. Thus, malice, if it existed at all in this case, could not possibly be more than implied.

Consequently, in applying Warren's rule, supported by the cases therein cited, there is a total absence of express malice in the instant case. Thus, for this reason also, the State failed to make out a case of murder in the first degree, and, as a result, there was insufficient evidence for the case to have been submitted to the jury.

(C) In addition, not only has the State failed to make out deliberation, premeditation, malice aforethought, specific intent to kill Delk, and express malice, it also has failed to produce evidence that the killing was at the hands of Matteri.

Evidence connecting Matteri, personally, with Delk, personally, at the time of the alleged offense, or at any other time, for that matter, just does not exist. There was no evidence that Matteri took the truck from the physical possession or presence of Delk. The fact that the wires were crossed on the ignition to enable its operation (Tr. 218, 221), and the further fact that Delk, when his body was discovered in the creek, had the ignition switch key in his pocket, (Tr. 125 and Exhibit "H") would indicate that no physical contact was had between Matteri and Delk in regard to the truck.

At the time Delk's body was found in the creek, there was no evidence that his pockets or their contents had been disturbed in the least. He had on no trousers (Tr. 124, 125), so there is no evidence that the watch, a pocket model, had been removed from his person. In fact, the last time the watch was established to have been in his possession was in February (Tr. 249), almost three months earlier.

There was an absolute lack of evidence that Delk and Matteri had been seen together during the interval in question, or at any other time. Consequently, nothing in the record connects these parties, physically, during the period of time the alleged homicide took place. In fact, the crossed wires on the truck, and the ignition key being on the dead body, would tend to negative any personal connection between the two parties.

The dark spots on the floor of the apartment next to that occupied by Matteri were not proved to contain human blood, as the tests were inconclusive. True, blood on a paint stick

and on a small piece of brown paper, found in the apartment, had blood type A on them, which was the same type as that of Delk (Tr. 319, 329). But this classification extended only to these two samples. However, Mr. Duncan, the F. B. I. laboratory technician, testified that 42 per cent of the people of the country were of the same blood type (Tr. 328). It is only by bare supposition that the blood on the paint stick and brown paper was Delk's.

Thus, it was not established that the alleged homicide took place in the center apartment as theorized by the State. And even though one concludes that it did, there is still a total lack of evidence connecting Matteri with the apartment. Matteri's fingerprints were not on the doorknob, nor elsewhere in the apartment (Tr. 338, 345). Not only was there no weapon produced by the State, but also lacking were fingerprints of the accused on any weapon. The key to the apartment was of the commonest variety (Tr. 142, 146-148), so that the apartment was readily accessible to many persons besides the accused. Consequently, the State failed, completely, to tie Matteri in with the killing.

If, as the State contended, the homicide was committed by the accused in the apartment next to his, someone must have moved the body to the creek, and it is only reasonable to assume that it was done by the assailant. But in doing so, the assailant would have had tell-tale blood on his clothing. However, there was no such evidence on that of Matteri's.

Thus, to summarize Argument No. 1, only the following conclusions can be reached:

The elements of premeditation, deliberation, malice aforethought, and specific intent to kill Delk, absolutely necessary to first degree murder, are totally lacking.

Malice, if it existed at all, was only implied, the universal legal requirement being express, in order to constitute first degree murder.

There was a complete lack of evidence connecting the person of Matteri with the person of Delk at the time of the alleged homicide, or at any other time.

The State, having failed to establish the foregoing elements, or any one of them, did not make out a case of first degree murder, and for that reason, the trial court should have dismissed the charge of first degree murder, or should have instructed the jury to bring in a verdict of not guilty of the same. Having done neither, the trial court should have granted Defendant's motion for a new trial.

## ARGUMENT NO. 2

### THERE IS NO EVIDENCE OF SECOND DEGREE MURDER AGAINST DEFENDANT.

In the Russell case, *supra*, which clearly states the law of murder in the first and second degrees, this Court discusses statutory and common law murder, stating in effect that the provisions of Section 103-28-1, Utah Code Annotated 1943, adopted the common law definition of murder. This Court then went on to say that those common law murders in which the killing itself is the result of deliberation and premeditation,

or which are committed in the perpetration of one of the four named felonies, are murder in the first degree. All other homicides which are murder under the common law, are murders in the second degree.

The Court then said:

"In order to have the necessary *malice* to commit murder (not necessarily murder in the first degree), the killing must be unlawful, it must result from or be caused by an act or omission to act committed with one of the following intentions: (1) An intention or design previously formed to kill or cause great bodily injury; or (2) an intention or design previously formed to do an act or omit to do an act, knowing the reasonable and natural consequences thereof would be likely to cause death or great bodily injury; or (3) a previously thought out intentional or designed perpetration or attempt to perpetrate one of certain kinds of felonies. This is not limited to arson, rape, burglary and robbery mentioned in Sec. 103-28-3, U. C. A. 1943, but it does not include all felonies. 1 Warren on Homicide, Secs. 62, 71 to 76, 78 and 79; 1 Wharton's Criminal Law, 12th Ed., Sections 420, 421, 447, 504, 507, 509 to 512, and 515 to 518; 2 Brill's Cyc. of Criminal Law, Sections 619 to 636; *People vs. Davis*, supra (8 Ut. 412, 32 P. 670); *People vs. Halliday*, supra (5 Ut. 467, 17 P. 118)."

Insofar as the instant case is concerned, that part of No. (1) above referring to a design or intention to kill, which would show first degree murder, has been disposed of in Argument No. 1. Thus, we have remaining that part of (1) referring to an "intention or design previously formed" to "cause great bodily injury," and in (2) above, the question whether

there was "an intention or design previously formed to do an act or omit to do an act, knowing the reasonable and natural consequences thereof would be likely to cause death or great bodily injury." The trial court, in referring to second degree murder, submitted the case to the jury on these two propositions (Tr. 39, Instruction No. 11, paragraph 3). From these quotations from the Russell case, should either (1) or (2) be proved, along with the other elements of second degree murder, then the State has made out its case.

The foregoing references to the Russell case are really dealing with *malice aforethought*. On this point, the Russell case further states:

"The statute requires not only that the killing be done with malice, but that the malice must have been 'aforethought.' This simply means the *malice* was thought out before hand, or previously planned or designed or premeditated. 1 Warren on Homicide, Sec. 79 'Deliberation and Premeditation'; 1 Wharton's Criminal Law, 12th Ed., Sections 421 and 507; 2 Brill's Cyc. of Criminal Law, Sec. 617."

As set forth in Argument No. 1 herein, when we speak of *intention*, *premeditation*, *deliberation*, and *aforethought*, we are speaking of a state of mind. In this connection, the state of mind with which we are concerned is that existing before and at the commission of an act. However, according to the Howard case, *supra*, it is the actions of the accused at such times which evidence his state of mind.

Now let us consider the facts of this case. As pointed out in Argument No. 1, there are no actions whatsoever of Matteri's which evidence any state of mind at the time of the alleged



homicide. In fact, we do not even know with any definiteness when the alleged killing actually did take place. The only evidence we have is that Matteri had possession of the truck and watch, and that he sold the former representing himself as Delk, and pawned the latter in his own name. But these are not actions that are prior to, or concurrent with the alleged homicide. Thus, they do not show any state of mind whatsoever that may have occurred at the time of the alleged homicide, as pointed out in the Howard case.

But this is not all. Most important is the complete lack of evidence that Matteri's possession of the truck and watch was connected in time and place with the alleged assault. As pointed out in Argument No. 1 herein, there is not only a total lack of evidence connecting the victim and the accused, but the crossed wires on the truck show a disconnection between the two persons. The lack of trousers on Delk show a disconnection also in regard to the pocket model watch. Thus, there is a total absence of evidence that Matteri was the one who committed the assault.

To recapitulate: The State has failed to produce any evidence showing an intention or design previously formed to cause great bodily injury; it failed to produce evidence of an intention or design previously formed to do an act, knowing the reasonable and natural consequences thereof would be likely to cause death or great bodily injury; and it has failed to produce evidence that any assault whatsoever was committed by the accused.

Consequently, the only conclusion that can be reached is that the State has completely failed to make out either *malice*

or *aforethought*, required by (1) and (2) quoted above from the Russell case, and has failed to connect Matteri with an alleged assault, which allegedly resulted in Delk's death.

Insofar as (3) is concerned in the quotation from the Russell case, even the trial court did not think there was sufficient evidence of robbery, or of any other felony, for that matter, to go to the jury (Tr. 383). Thus, no felony has been established to bring the case within the requirements of murder in the second degree.

Therefore, the State did not make out a case of second degree murder against Matteri, and the trial court should have instructed the jury to bring in a verdict of not guilty of this charge, as moved by the Defendant. The trial court, having failed to grant this motion, should have granted Defendant's motion for a new trial.

### ARGUMENT NO. 3

#### THE TRIAL COURT MISDIRECTED THE JURY IN MATTERS OF LAW.

We next turn our attention to erroneous instructions given to the jury by the trial court.

(A) The Defendant requested the trial court to instruct the jury as follows (Defendant's requested Instruction No. XII, Tr. 31):

"If you find from the evidence that the Defendant has committed a public offense and there is reasonable ground of doubt in which of two or more degrees he is guilty, under the

law of this state you *must* find him guilty of the lowest of such degrees only.” (Italics ours.)

In requesting this instruction, the Defendant followed substantially the wording of Section 105-32-5, Utah Code Annotated 1943.

However, the trial court refused to use the word *must*, which is the language of the statute, but use the word *can* (Instruction No. 7, Tr. 36), to which the Defendant excepted (Tr. 389).

The defense contends that these two words are not interchangeable, as they do not convey the same or similar meaning. According to Webster “can” means to have ability, skill, knowledge, capacity, or means. But “must” means compulsion, requirement or necessity.

Thus, the trial court in using *can*, instructed the jury that it had ability, skill, knowledge, capacity or means to find the Defendant guilty of the lowest of such degrees. But the statute referred to provides, in using the word *must*, that the jury is compelled to, required to, or of necessity should find the Defendant guilty of the lowest of such degrees. In other words, by the instruction as given, the jury could not understand that it was compelled or required to bring in a verdict of the lowest degree, should there be reasonable doubt in which of two or more degrees Defendant was guilty.

Consequently, the trial court not only committed error in using *can* in place of *must*, but the jury was misled thereby.

(B) It is the position of the Defendant that, inasmuch as the State did not produce evidence of either first or second

degree murder, the trial court should not have submitted such charges to the jury in the instructions given. Rather than re-argue these points, suffice it to say that in Arugments Nos. 1 and 2 herein, we have pointed out the following:

The State did not produce any evidence that Matteri assaulted Delk which resulted in Delk's death.

The State did not produce any evidence of malice aforethought.

The State did not produce any evidence of willfulness, deliberation, premeditation, or specific intent on the part of Matteri to kill Delk.

The State did not produce any evidence of Matteri's intent to do great bodily harm to Delk.

Thus, the charges of first and second degree murder failing, and Matteri not being connected with the killing or with any assault on Delk, the following instructions should not have been given by the trial court to the jury:

Instructions No. 8 (Tr. 36, 37), which sets out the statutory definition of murder, wherein malice aforethought is required, and is defined.

Instruction No. 9 (Tr. 37, 38), which distinguishes between first and second degree murder.

Instruction No. 10 (Tr. 38, 39), which sets out the essential elements of first degree murder, including willfulness, deliberation, premeditation, specific intent to kill Delk, and malice aforethought.

Instruction No. 11 (Tr. 39), which sets out the essential elements of second degree murder, including malice aforethought and specific intent to do great bodily harm to Delk.

Consequently, the trial court should have dismissed the two charges of first and second degree murder as moved by the Defendant (Tr. 385, 386), and should not have given the instructions enumerated.

(C) After the jury had been deliberating several hours, the trial court called in the jury to make inquiry concerning their progress (Tr. 390). Mr. Christensen, the foreman, told the court that Instruction No. 15 was not clear (Tr. 391). After considerable explanation by the trial court on the matter of recommendations, Mr. Christensen, the jury foreman, proceeded further with this question: "We ask the recommendations, just what is it—what we would like to know is how you look at it." (Tr. 392).

In response, the trial court said (Tr. 392): "Oh, well, what that means—now, I tell the jury now that I will make investigations before I act one way or the other. If you make recommendations, all you do is to untie my hands so that I may not order the defendant executed. If you do not sign that, then you do not permit me to make any investigation or to determine. I can't tell you now what I am going to do because I don't know. I would need more information than I now have before I would act in a matter of this weighty importance. I have ways and means of securing information that this jury would not have, but you do not tie my hands nor compel me to follow your recommendations. You merely give me the right

to do it if after making an investigation I feel that it should be done, then I can, but I am not obligated to."

However, the question Mr. Christensen asked was for the purpose of obtaining from the trial court his opinion as what he would do in the event a recommendation was made by the jury. But the trial court, in answering, took this occasion to make an elaborate statement as to how he would reach a decision in the event the jury brought in a verdict of murder in the first degree and recommended a life sentence, which statement was uncalled for and gave the jury information to which it was not entitled.

In addition, the explanation quoted above misled the jury, particularly that part of it in which the trial court stated that he would need more "information than I now have before I would act in a matter of this weighty importance." When the trial court made this statement, he had as much evidence as the jury had on which to base a judgment; but by telling the members of the jury that he needed further information, he led them to believe that they did not have all the facts. Therefore, they were willing to take the trial court at his word that he had ways and means of obtaining information that the jury would not have. Thus, the jury brought in a verdict of first degree murder with a recommendation, instead of a lesser degree of homicide, which they might well have done, had the trial court not told them that he had ways and means of obtaining information which the jury did not have, and that he needed more information than had come out in the trial.

As the result of the erroneous instructions given the jury

by the trial court, as fully set out above, prejudicial error occurred. For this reason, the trial court should have granted Defendant's motion for a new trial.

#### ARGUMENT NO. 4

THE VERDICT OF THE JURY IS NOT SUPPORTED BY THE EVIDENCE OR THE LAW.

The Defendant contends that the jury's verdict of guilty of murder in the first degree, against Fred Matteri, is totally unsupported by the evidence produced by the State, and was contrary to the law of the case as contained in the trial court's instructions.

Particular attention is called to the trial court's instruction No. 10 (Tr. 38) wherein nine elements of the crime charged against this Defendant must be proved in order to warrant a conviction of murder in the first degree.

(A) In the first item, the jury was instructed that they must find "that on or about the 30th day of April, 1949, . . . the defendant, Fred Matteri, killed Levi P. Delk." However, as shown in Arguments Nos. 1 and 2 herein, there was absolutely no evidence whatsoever to support such a contention. Nothing linked Matteri personally, with Delk personally, at the time of the alleged homicide, or at any other time. Thus, the jury found that Matteri killed Delk in spite of this complete lack of evidence.

(B) The fifth requirement of Instruction No. 10 is that the killing was deliberate. In the fourth paragraph of In-

struction No. 14, "deliberate" is defined as a "cool state of blood and not a sudden passion. It connotes the commission of a crime under circumstances in which the perpetrator weighs the motives for his act, its consequences and its nature, and all other circumstances upon which his decision to commit such act is based."

As argued in Argument No. 1 herein, there was a total absence of evidence of Matteri's state of mind at the time of the alleged homicide, for nowhere in the record is there evidence of any actions which could be interpreted as "deliberation" or otherwise. There was no evidence that he was in a cool state of blood, or that he weighed the motives for any act, or its consequences and nature. Thus, there was no evidence which would support a conclusion that Matteri had "deliberately" committed any act involving Delk. The jury completely disregarded the court's instruction in so finding.

(C) The sixth requirement as set out in Instruction No. 10 is that the killing was with malice aforethought. "Malice aforethought" is defined in Instruction No. 8 (Tr. 36) as pre-existing malice. "Malice" means that condition of mind which prompts a person to do a wrongful act intentionally, without justification or excuse.

However, in considering the evidence produced by the State, there was none showing Matteri did a wrongful act intentionally, insofar as homicide is concerned. As argued heretofore, there was no evidence whatsoever connecting him and Delk personally. In regard to "aforethought," again we are concerned with the state of mind of Matteri at the time of



the alleged offense. But again, as argued in Arguments Nos. 1 and 2, there was no evidence of a state of mind at such a time.

Consequently, the jury had absolutely no evidence to find that Matteri did any act connected with the alleged killing with "malice aforethought," or "preexisting malice." Thus, the finding of the jury was totally unsupported by the evidence, and was contrary to the law of the case as contained in the trial court's instructions.

(D) The seventh requirement of first degree murder as contained in Instruction No. 10, is that said killing was premeditated. "Premeditate" is defined in Instruction 14 as the "act of meditating, contriving, or designing beforehand and for any length of time. The time must be sufficient, however, for some reflection on and consideration of the act in contemplation during which the alternative choices of killing and not killing are debated in the mind of the actor and for the formation of a definite purpose to kill."

Again, all that can be said is that such evidence is totally lacking, as set forth in Argument No. 1. There is a complete absence of any evidence which would show that Matteri meditated, contrived or designed beforehand, or for that matter, at any time, the death of Delk. Nor is there any evidence which the jury could possibly find that Matteri reflected upon the act of killing, or that he debated in his mind, or that he formed a definite purpose to kill.

Thus, the jury, in finding that Matteri premeditated the act of killing Delk, did so in the face of absolutely no evidence in support of the same, which was contrary to the law of the case.

(E) The eighth element as contained in Instruction No. 10 is that the killing was the result of a specific intention on the part of Fred Matteri to take the life of Delk. "Specific intent" is defined in Instruction No. 14 as "a fixed direction of the mind to a particular object or a determination to act in a particular manner."

Again, we are compelled to repeat that there was a total lack of Matteri's mental state. Nowhere in the record is there evidence that Matteri ever had a "fixed direction of the mind" toward Delk, or a "determination to act" in any manner toward Delk, either to take his life or in regard to any other thing concerning him.

Inasmuch as the State failed in this particular, the jury was totally unwarranted in finding such specific intent. Again, the finding was contrary to the evidence and the law of the case.

To summarize Argument No. 4, we find that the jury disregarded the evidence and the law of the case in the following particulars: (A) In finding that Matteri killed Delk; (B) In finding that the killing was deliberate; (C) In finding that the killing was with malice aforethought; (D) in finding that the killing was premeditated; (E) In finding that the killing was the result of a specific intention on the part of Fred Matteri to take the life of Delk.

Thus, in five particulars, the jury disregarded the evidence and the law of the case. Had the jury done so in only one of the foregoing items, it would be sufficient to warrant a new trial.

## ARGUMENT NO. 5

THE COURT ABUSED ITS DISCRETION IN DISREGARDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

Section 103-28-4, Utah Code Annotated 1943, in providing the penalty for murder, reads as follows:

"Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the state prison for life, in the discretion of the court."

This Court, in *State vs. Markham* (1941), 112 P. (2) 496, held that where a Defendant is convicted of murder in the first degree with a recommendation for life imprisonment, it is not mandatory on the trial court to follow such recommendation, but the arbitrary exercise of this discretionary power of the trial court is reviewable.

Defendant contends that the trial court abused its discretionary powers in this case, when it disregarded the recommendation of the jury.

If ever there was a case with little or no evidence to support the charge against an accused, this is it. As shown in the foregoing arguments, evidence was completely lacking in support of essential elements of first degree murder. To call it a case of circumstantial evidence supporting first degree murder, is to give it a dignity to which it is not entitled.

Undoubtedly, it was because of the skimpy case presented by the State that the jury recommended life imprisonment.

In addition, as explained in Argument No. 3 (C) herein, the jury was concerned with how the trial court would look at the recommendation of life imprisonment. Having been assured by the trial court that he had access to information not available to the jury, it reached a verdict at once of first degree murder, with a recommendation of life imprisonment. It might well have been that the jury would have brought in a second degree murder conviction in place of first degree, had it not been for the reassurance given by the trial court that he had other means of ascertaining the facts relating to the Defendant.

However, the trial court, in preparing the Defendant for the sentence which he intended to impose, made it very clear at the time the jury announced its verdict and recommendation, that he expected the Defendant to make a statement the court would believe, if he hoped at all to receive any mercy from him (Tr. 395, 396). But the trial court was not entirely clear as to just what he expected the Defendant to tell him, until Mr. Fratto, one of Defendant's counsel, was pleading for his life at the time of sentence (Tr. 400). In response to Mr. Fratto's plea, the trial court said:

"Except that he (the Defendant) must stand the full inferences. That is the only thing I can say, that while I hold that not against him, if he should avoid the inferences that the evidence shows, the burden is on him to tell how he got that possession (of the truck and watch), *if he is not guilty as charged and as found.*" (Italics ours.)

In other words, the trial court said that if the Defendant, after having been convicted by a jury of twelve men, could say something to the court which he would believe, to convince

him that he, the Defendant, "is not guilty as charged and as found," he would then become the subject of leniency in the eyes of the trial court.

In view of the basis upon which the jury undoubtedly predicated its recommendation, and the further attitude of the trial court in asking that the Defendant convince him that he (the Defendant) was not guilty as charged and as found, the Defendant submits without further argument, that this was abuse of discretion—gross abuse, and that the sentence of execution pronounced by the trial court is reviewable, and should be reversed by this Honorable Court.

## SUMMARY

By way of recapitulation, the Defendant summarizes the foregoing arguments as follows:

1. The State produced absolutely no evidence of first degree murder against this Defendant.
  - A. The record contains no evidence of premeditation, deliberation, malice aforethought, or specific intent to kill Delk.
  - B. Express malice, essential to prove first degree murder, is totally lacking.
  - C. The State completely failed to produce evidence that the Defendant committed the alleged assault that resulted in death.
2. The State produced no evidence of second degree murder against the Defendant.

- A. There is no evidence of an intention or design by Matteri to cause great bodily injury to Delk.
  - B. There is no evidence of malice aforethought.
  - C. There is no evidence that Matteri killed Delk.
3. The trial court misdirected the jury in matters of law to the prejudice of the Defendant.
- A. In instructing the jury that should there be reasonable doubt as to which of two or more degrees the Defendant is guilty, the jury *can* find Defendant guilty only of the lowest degree, the trial court erred; it should have used *must* as provided in Section 105-32-5, Utah Code Annotated 1943, and as proposed by the Defendant.
  - B. Inasmuch as the State failed to produce evidence of either first or second degree murder, the trial court should not have submitted those charges to the jury, and should not have given the jury instructions thereon.
  - C. The comments of the trial court to the jury that he had ways and means of securing information that the jury did not have, gave the jury information to which it was not entitled, and it was misled thereby.
4. The jury's verdict of guilty of murder in the first degree is not supported by the law nor the evidence.
- A. There is no evidence that Matteri killed Delk.
  - B. There is no evidence of deliberation.

C. There is no evidence of malice aforethought.

D. There is no evidence of premeditation.

E. There is no evidence that Matteri had specific intent to kill Delk.

5. The trial court abused its discretion when it disregarded the recommendation of the jury that Defendant be imprisoned for life, and sentenced him to be executed.

## CONCLUSIONS

In view of the foregoing arguments, we cannot avoid reaching the following conclusions: (1) The State totally failed to prove a case of first degree murder against the Defendant; (2) The State did not even prove a case of second degree murder against the Defendant; and (3) The trial court grossly abused its discretion when it sentenced the Defendant to be executed, in the face of a recommendation of life imprisonment, made by the jury at the time it brought in its verdict.

Consequently, the trial court should have granted Defendant's motion to dismiss the charge of first degree murder against Fred Matteri. Having not done so, then it was the duty of the trial court to direct the jury to bring in a verdict of not guilty to the first and second degree murder charges, as moved by counsel for the Defendant. Having done neither, and having misdirected the jury in matters of law, as herein set forth, and the jury having brought in a verdict of first degree murder completely unsupported by the law and the evi-

dence of the case, it was incumbent upon the trial court to grant Defendant's motion for a new trial.

Thus, counsel for the Defendant urges this Honorable Court to remand this case to the trial court with instructions to dismiss the charges of first and second degree murder.

Should it be that the conviction of Fred Matteri be sustained, then counsel for Defendant urges this Honorable Court to remand this case to the trial court with instructions to follow the recommendation of the jury, and re-sentence the Defendant to life imprisonment.

Respectfully submitted,

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