

1997

# Utah v. Tyrese Sharod Smith : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/Appellee,

v.

TYRESE SHAROD SMITH,

Defendant/Appellant

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Case No. 971332-CA

Priority No. 2

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REPLY BRIEF OF APPELLANT

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Appeal from a conviction of one count of Criminal Homicide Murder, a First Degree Felony, in the Third District Judicial Court, in and for Salt Lake County, State of Utah, the Honorable Sandra J. Peuler presiding.

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**FILED**  
Utah Court of Appeals

FEB 20 2001

Paulette Stagg  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF APPELLANT

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- I. THE TRIAL COURT’S RULING ON THE 23B REMAND WAS CLEARLY ERRONEOUS; SMITH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND WAS PREJUDICED AS A RESULT.

The Sixth Amendment of the United States Constitution and Article 1, section 12 of the Utah Constitution guarantee a defendant the right to effective assistance of counsel in defending all claims asserted against him in a court of law. The courts have consistently used the two-part test found in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to determine whether or not a party in an adversarial proceeding has been rendered effective assistance of counsel. First, the defendant must show that counsel’s performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance

prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Alvarez v. Galetka, 933 P.2d 987 (Utah 1997). The trial court's Rule 23B remand ruling on the effectiveness of Smith's trial counsel was clearly erroneous. Smith did not receive effective assistance of counsel as he is constitutionally entitled and was greatly prejudiced by the inadequate performance of his attorney at trial.

**A. Smith's Trial Counsel Failed to Fully Investigate Potential Witnesses Whose Testimony Would Have Been Beneficial to the Defendant.**

Trial counsel erred by failing to investigate and contact potential witnesses that could testify in a manner that would have aided Smith in his defense at trial. The Utah Supreme Court has held that a decision not to investigate cannot be considered a tactical decision. State v. Templin, 805 P.2d 182, 188 (Utah 1990); accord State v. Tyler, 850 P.2d 1250, 1255 & n.29 (Utah 1993), Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary). On appeal, Templin was reversed on ineffective assistance of counsel grounds due to counsel's failure to fully investigate the facts and the availability of possible defense witnesses. In the case at bar, Smith provided trial counsel with information regarding four witnesses whose testimony would have been beneficial to Smith's defense.

**1. Kenya and Tamara Ross**

Tamara Ross was jailed with Melissa Chacon, the State's primary witness and

spoke with her frequently. Melissa told Tamara that she would do anything to avoid having to go to prison, that she was not an expert in slang language and that she lied to give the State what it wanted.

Kenya Ross is Tamara's daughter and a friend of Melissa. Kenya frequently spoke with Melissa while she was incarcerated and on several occasions heard Melissa say that she would do anything to stay out of jail.

In a sworn affidavit accompanying his Rule 23B Motion to Remand memorandum, Smith declared that he notified trial counsel of the Rosses, and the truthful testimony they could provide, one week before trial when they finally met. *See Addendum A*. Without speaking to either of these potential witnesses, trial counsel determined that it was not necessary to call them to testify at trial. Contrary to Smith's account, at the Rule 23B hearing, trial counsel testified that he had not heard of Tamara or Kenya Ross prior to trial and that he had just only heard of them in preparation for the 23B hearing. R. 362: 95.

The significance of these witnesses is the statements made by Melissa that she had to lie to give the State what it wanted. In State v. James, 819 P.2d 781, 793-95 (Utah 1991), the Supreme Court held that evidence that a key prosecution witness' testimony at trial was perjured warranted a new trial. The testimony of these witnesses would have been similarly significant.

## 2. Chris Raso

Smith spoke with Chris Raso on the telephone several times in the days preceding

and following the murder. In these taped conversations, Smith told Raso that he did not want any members of the King Mafia Disciples (KMD) to do anything on his behalf or to associate their actions with the KMD gang. At trial, Raso's testimony would have confirmed Smith's defense that he withdrew from the conspiracy and was therefore not responsible for the murder of Joey Miera.

At the 23B hearing, trial counsel claimed that calling Raso was an afterthought and had not been discussed with Smith until after trial had commenced. R. 362:85. Trial counsel claimed that he made unsuccessful attempts during trial to contact Raso by phone but regardless made the "ethical and moral" decision not to have Raso testify at trial. R. 362:85-86. Counsel made minimal efforts to contact Raso and never actually spoke with him concerning his testimony. Without actual contact, trial counsel could not make an accurate determination of the witness's reliability and then use that as a justification for not making a good faith effort to defend his client.

### 3. Elizabeth Chacon

Elizabeth Chacon is the sister of Melissa Chacon and was the girlfriend of Miguel Flores at the time of the murder. Following the murder, Elizabeth gave the police a statement regarding conversations she had with the Flores, a co-defendant. R. 362:88. She recounted to the police conversations wherein Flores and Carter admitted that they acted on their own contrary to any directions they may have gotten from Smith so they could get all of the credit for the retaliation. R. 362: 119. Elizabeth also had information regarding Melissa's inducement to make a deal because she was afraid of going to prison

and therefore losing her daughter. In addition to her statement to the police, Elizabeth also testified under oath at the preliminary hearing. Her testimony at the preliminary hearing was consistent with the police statement. R. 362:90, 120

It was following the preliminary hearing that Smith's counsel withdrew and trial counsel was appointed. Trial counsel was made aware of the potential witnesses and their willingness to testify. Prior to the trial, Elizabeth received a subpoena from trial counsel. R. 362:120. The subpoena was not court issued, nor was there a return of service filed. Elizabeth called trial counsel after she received the subpoena, but her call was never returned. Id. Elizabeth appeared all three days of the trial, but again, trial counsel did not make any attempt to speak with her. R. 362:121.

At the Rule 23B Motion to Remand hearing, trial counsel testified that he tried to contact her and that she never called him back. R. 362: 87-88. Trial counsel also testified that he did not believe the police reports and wanted to hear what the witness had to say first person. R. 362: 88. He acknowledged the fact that Elizabeth also testified under oath at the preliminary hearing and that the testimony was consistent with the statement she gave the police. R. 362:90. Trial counsel also testified that he was concerned that Elizabeth could possibly make statements that would hurt Smith. Id.

Elizabeth never made any indication that she was not being truthful or that she would change her story on the stand under cross-examination. At the remand hearing, Elizabeth Chacon testified as to her availability and willingness to give unbiased testimony regarding her conversations with Flores and her knowledge of the deal Melissa

made with the police. R. 362: 120. Trial counsel simply did not make the requisite efforts to present the best defense that he could for his client.

The State argues that trial counsel's failure to call certain witnesses was a "strategic choice" and cites several cases to support this contention. The State cites Strickland, 466 U.S. at 690, wherein the United States Supreme Court stated that, "strategic choices *made after thorough investigation of law and facts relevant to plausible options* are virtually unchallengeable." Emphasis added. The court clearly states the attorney must make a "thorough investigation" in order to make a valid strategic choice that cannot be challenged. The State cites a number of other cases also holding that a strategic choice is not error if the attorney fully investigates all of the facts and the law or if the strategic decision is legitimate. The Utah Supreme Court in State v. Templin, 805 P.2d 182, 188 (Utah 1991), stated:

If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the "wide range of reasonable professional assistance." This is because a decision not to investigate cannot be considered a tactical decision. It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons.

Quoting Strickland, 466 U.S. at 686. There is clearly a distinction between the cases cited by the State and the case at bar. Trial counsel never conducted a full investigation and there was no good faith effort to contact witnesses or ascertain their testimony. Trial counsel presented no defense at trial even when provided with four names of potential witnesses.

The complete failure to contact or fully investigate all potential witnesses cannot be considered a tactical decision or a strategic choice. Therefore, the trial court clearly erred in its ruling that trial counsel used his best judgment when he failed to investigate all potential witnesses thereby denying Smith an opportunity to present his defense.

On the issue of failure to investigate or call all potential witnesses, Smith meets both of the Strickland prongs for ineffectiveness of counsel. Since trial counsel did not make a good faith attempt to obtain witnesses to testify on behalf of the defendant, he clearly did not operate in a manner consistent with the constitutional right to effective counsel. Further, through trial counsel's failure to present any witnesses, Smith was clearly prejudiced as he was not given the opportunity to affirmatively establish his innocence of the charges at trial. Given this opportunity to present witnesses, Smith would have been able to demonstrate to the jury the unreliability of Melissa Chacon and his attempts to withdraw from the conspiracy.

**B. Trial Counsel Did Not Adequately Prepare for Trial By Failing to Fully Examine the Evidence Presented at Trial for Admissibility and Content.**

The State argues that trial counsel made sufficient objections to the content of the tapes and therefore Smith is precluded from an ineffective assistance of counsel claim on this basis. Prior to trial, the court requested that the parties meet to discuss the admissibility of the exhibits, specifically the tapes. R. 197:71. At trial, the State sought to introduce the entirety of the taped conversations between Smith and Melissa Chacon. R. 199:242. Trial counsel was given the opportunity to object, but neglected to do so at

that time. R. 199:244. The State also notified the court that they would be providing the jury with transcripts of the conversations that were prepared with the help of their primary witness, Melissa Chacon. R. 199:245. Once again, trial counsel was given the opportunity to object and contest the validity of the transcripts before they went to the jury and failed to do so. Id.

After laying a foundation for the tapes and transcripts, the State offered the taped conversations into evidence. It was at this time that trial counsel objected to the admission of these tapes saying, “Not until I hear what is on them, your Honor.” R. 199:288. A bench conference was held, the exhibits were received and the tapes were played for the jury. Trial counsel was provided with the tapes prior to trial and given opportunity to review each one for content. Had counsel reviewed the tapes, he would have been able to object to the content of the conversations and the validity of the accompanying written transcripts.

Trial counsel’s failure to make any pretrial motions regarding the admissibility of portions of the recorded conversations resulted in the jury hearing irrelevant, prejudicial evidence, such as:

U [Unknown] I just said so many words . . . “That’s exactly” . . . I go “Okay Dove” I was like “You[‘]r[e] gonna be a man about it. . . at least call me up and tell me what’s up. If you want to go to war . . . call me and tell me you want to war.” I was like “just let me know Dove.” Cause I’m gonna tell him . . . I’m gonna say “Hey . . . before this gets out of hand . . . and before . . . one of my people dies, and then five of yours dies .”

Ex. 20 at 23. (Addendum K in Appellee’s Brief). This discussion of gang warfare is

purely inflammatory. Exhibit 20 only had one statement relevant to the murder at issue here discussing news coverage.

R [Chris Raso] “We have absolutely no leads, is just the kind of case is . . . the toughest case to solve, because . . . there’s no witnesses. We don’t know if gang related, drug related, um . . . retaliation. We don’t know what it is. So . . .”

Ex. 20 at 18. (Addendum K in Appellee’s Brief). The entire tape of approximately 30 minutes was played for the jury. R 199: 315. Seven pages of the transcript went with the jury into the jury room. The remaining pages did not go to the jury room but the jury was allowed to read them which the tape was played.

There are further examples of irrelevant and prejudicial conversations that were submitted to the jury such as:

T [Tyrese] I’m gonna call you a mother fucker . . . mother fucker (chuckle).  
M [Melissa] You better stop.  
T You little bitch.  
M I hate it when you call me names . . . motherfucker . . .  
T Mother fuck . . .  
M Mother fucker.  
T Mother fuck . . .  
M Mother fucker.  
T What? You don’t like it.  
M No.  
T I going to say it like your mom says it, “mother fucker.”  
M (inaudible)  
(Tape cuts out)

Ex. 21 at 9. (Addendum L in Appellee’s Brief). This interchange does nothing to help establish murder, and only served to inflame and prejudice the jury. The jury heard extended portions of irrelevant and at times unintelligible statements about guns, drive by shootings, bullet holes, gang warfare, stolen cars, etc. Under Rule 403 of the Utah Rules

of Evidence, this evidence should have been excluded and trial counsel was deficient in not making good faith efforts to do so.

The State argued that the Raso tapes did not do anything to show that Smith withdrew from the conspiracy. The State quoted the portion of the conversation wherein Smith told the gang members not to claim the KMD gang when they carried out the retaliation. The State's witness, Melissa Chacon testified that this only referred to the cancellation of their membership in the gang and not the retaliation plan. R. 200:398.

It has been previously argued that Chacon was not a reliable witness and therefore cannot be relied upon to correctly interpret the contents of conversations that she was not a party to. Trial counsel should have sought to admit these tapes. The evidence in the tapes supported Smith's asserted defense that he withdrew from the conspiracy. Trial counsel was ineffective in his representation of Smith for failure to admit the tapes at trial.

**C. Trial Counsel Failed to Request a Jury Instruction on the Lesser Offense of Solicitation.**

The State argues that Smith's counsel was precluded from requesting a jury instruction on the lesser offense of solicitation and consequently cannot be considered ineffective for failing to make a futile motion. The State cites Utah Code Ann. § 76-4-203 (1999) subsection (5) to support the argument that Smith was not entitled to an instruction on solicitation. Subsection (5) states that A "[n]othing in the section prevents an actor who otherwise solicits, . . . another person to engage in conduct which constitutes

an offense from being prosecuted and convicted as a party . . . if the person solicited actually commits the offense.” Emphasis added. The statute does not say that the state is compelled to charge the solicitor as a party, only that they are not prevented from doing so.

It is Smith’s contention that he did not solicit the crime that was committed and that the actor’s acted independently. If the evidence presented at trial supports a verdict on another basis, then the jury should be given the opportunity to consider that offense as well. See State v. Gillian, 463 P.2d 811 (Utah 1970), State v. Chestnut, 621 P.2d 1228 (Utah 1980). In Keeble v. United States, 412 U.S. 205, 212-13 (1973), the United States Supreme Court held that “[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.” The Court further found that should the jury have some reasonable doubt, they should have an option in addition to acquittal or conviction. *Id.*

A defendant is entitled to due process and should have the benefit of the reasonable doubt standard. “[W]here proof of an element of the crime is in dispute, the availability of the third option, the choice of conviction of a lesser offense rather than conviction of the greater or acquittal gives the defendant the benefit of the reasonable doubt standard.” State v. Baker, 671 P.2d 152, 157 (Utah 1983).

In the case at bar, the evidence presented at trial supported a finding of solicitation rather than a conviction of the more serious crime of criminal homicide. Smith’s counsel was clearly ineffective in his failure to submit the instruction on solicitation and object to

the instructions as given to the jury. The trial court committed plain error because inclusion of an instruction on solicitation should have been obvious and failure to include such instruction affected the substantial rights of the defendant. See State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992) quoting State v. Morgan, 813 P.2d 1207, 1210-11 (Utah App. 1991) (citing State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, 493 U.S. 814, 110 S.Ct. 62 (1989)).

**D. Trial Counsel Made Inappropriate Statements in Closing Damaging the Credibility of Smith's Defense and Demonstrating a Lack of Loyalty to his Client.**

A defendant in a criminal trial is constitutionally entitled to effective assistance of counsel. This means that counsel must advocate the defendant's rights and not abandon him no matter how abhorrent counsel might deem his client. "A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest' and thereby fails to provide effective assistance." Davis v. Executive Director of Department of Corrections, 100 F.3d 750, 756 (10<sup>th</sup> Cir. 1996) (quoting Osborn v. Shillinger, 861 F.2d 612, 629 (10<sup>th</sup> Cir. 1988)).

In his closing statement, trial counsel made several remarks that constituted abandonment of his client. In his address to the jury, counsel stressed Smith's gang involvement, his association with other convicted murderers and further confirmed the jury's apprehension and fear that a finding of not guilty would mean that Smith would sooner be released into society to walk the streets. Trial counsel also emphasized the

brutality of the crime and planted a gruesome scene in the minds of the jurors when he described the victim's brains "splattered all over the floor."

Trial counsel's statements about the defendant and the victim's fatal injuries constituted abandonment as found in Osborn, wherein it was determined that counsel provided ineffective assistance when, in addition to statements to the press regarding the inadequacy of evidence, made inappropriate statements to the jury stressing the brutality of the crime. Osborn, 861 F.2d at 628. The court in Osborn concluded that the attorney "acted with reckless disregard for his client's best interests and, at times apparently with the intention to weaken his client's case." *Id.* at 629.

Smith's trial counsel was clearly an ineffective advocate for his client. His prejudicial statements in closing cannot be considered a tactical decision or a strategic move. The State argues that trial counsel had no choice but to make these inflammatory statements. Counsel did not merely make a questionable remark; there were numerous prejudicial comments that did nothing to advance Smith's interests. This demonstration of disloyalty and mistrust of his client evidenced a lack of loyalty and denied Smith effective assistance of counsel.

## II. THE TRIAL COURT ERRED WHEN IT FAILED TO SUBMIT THE GANG ENHANCEMENT TO THE JURY AS A FACTUAL ELEMENT OF THE CRIME.

Article I, section 7 of the Utah State Constitution requires that each element of a crime be proven beyond a reasonable doubt. Utah Code Annotated § 76-3-203.1 (2000) is the code section that governs offenses committed in concert with two or more persons.

Section (1)(a) provides for an enhanced penalty for an offense “if the *trier of fact* finds beyond a reasonable doubt that the person acted in concert with two or more persons.” Emphasis added.

In State v. Lopes, 980 P.2d 191 (Utah 1999), the Utah Supreme Court found that the portion of the gang enhancement statute as it read in 1995 was unconstitutional. The Court held that the section of the gang enhancement statute wherein the judge became the finder of fact and determined whether the defendant acted in concert with at least two other people “violated article I, section 12 of the Utah Constitution because, absent waiver, only a jury has the ability to determine when elements of a crime are established beyond a reasonable doubt.” Lopes, ¶ 17. In reaction to this judicial finding, the Utah state legislature changed the wording in the statute to specify that a penalty enhancement is an element of the crime that needs to be determined by the trier of fact, a jury in a criminal trial.

Smith is constitutionally entitled to a finding on all of the elements of the charged offenses. The omission of the gang enhancement as an element of the charge in the jury instructions constituted manifest injustice. Manifest injustice occurs where the trial judge fails to accurately instruct the jury on all of the elements of a crime. See State v. Jones, 823 P.2d 1059 (Utah 1991). The State argues that since Smith’s trial was prior to Lopes, the court couldn’t have plain error. The constitutions of both the United States and the Utah assure a defendant that his trial will be fair and carried out pursuant to due process. This has never been changed or amended and was the law at the time of Smith’s trial.

Therefore, as previously argued, Smith was entitled to a finding on all of the elements of the charged offense including the element that the crime was committed in concert with two or more people.

The State argues that Lopes has been substantively overruled by the United States Supreme Court in Apprendi v. New Jersey, 120 S.Ct 2348 (2000). The Supreme Court found that the Constitution requires that any fact increasing the penalty for a crime beyond the prescribed statutory maximum, “other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.” *Id.* at 2362-63.

The State argues that since the gang enhancement only increases the mandatory minimum term and not the maximum punishment, discretion is limited in “selecting a penalty within the range already available . . . without the special finding.” Apprendi, 120 S.Ct. at 2361 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 87 (1986)). In the case at bar, the maximum punishment is life and therefore could not be increased without imposition of the death penalty.

In the Apprendi opinion, the Court makes the distinction between a sentencing factor and a sentencing enhancement in the verdict phase. The Court cited prior cases differentiating the two, such as Williams v. New York, 337 U.S. 241, 246 - 247 (1949) wherein the court explained that, “*in contrast to the guilt stage of trial*, the judge’s task in sentencing is to determine, ‘within fixed statutory or constitutional limits[,] the type and extent of punishment after the issue of guilt’ has been resolved.” Apprendi, 120 S.Ct at 2358. Emphasis added.

In Appendi, the court summed up by stating:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.” Emphasis added.

Appendi, 120 S.Ct. at 2362-63, (quoting Jones v. United States, 526 U.S. 227, 252-53.

(1999), (opinion of Stevens, J.); see also *id.*, at 253 (opinion of Scalia, J.)). By imposing the gang enhancement on Smith, the trial court effectively “increased the prescribed range of penalties” by raising the minimum sentence from five years-to-life to nine years-to-life.

Assuming, arguendo, that Appendi applies to this appeal, this Court does not have jurisdiction to overrule the Utah Supreme Court’s ruling in Lopes. The State filed a Motion to Recall “Pour Over” Order stating their position that the Supreme Court is the appropriate forum for a determination of whether Appendi overrules Lopes. See *Addendum B*. The Supreme Court denied the State’s motion. See *Addendum C*. Rule 42 of the Utah Rules of Appellate Procedure state that “the Court may transfer to the Court of Appeals any case except those cases within the Supreme Court’s exclusive jurisdiction.” Here, the Supreme Court made the determination that there was not “exclusive jurisdiction” and that the Court of Appeals was capable of ruling on the issue.

Pursuant to Utah Code Ann. § 78-2a-3 (1996) and Utah Code Ann. § 78-2-2

(1996), only the Supreme Court has jurisdiction to find “a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution.” Utah Code Ann. § 78-2-2(3)(a). Therefore, since the Supreme Court denied the State’s Motion to Recall the “Pour Over” Order, the matter is to be determined by the Court of Appeals without overruling Lopes.

Lopes is currently the law in Utah with respect to Utah Code Annotated § 76-3-203 (2000) and enhanced penalties for group criminal activity. The trial court clearly erred when it took over the role of fact finder and imposed the gang enhancement. Whether Smith acted in concert with two or more individuals in carrying out a crime was an essential element of the gang enhancement charge and should have gone to the jury. The gang enhancement charge should be reversed and remanded for a new trial and a jury finding beyond a reasonable doubt.

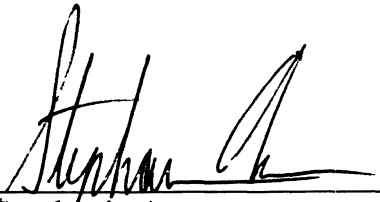
### **CONCLUSION**

Smith was denied effective assistance of counsel at trial. Smith’s attorney failed to conduct a sufficient investigation of potential witnesses to testify for the defense at trial and did not diligently prepare for trial resulting in the admission of extraneous, prejudicial evidence. Counsel was ineffective in his failure to object to the jury instructions and the trial court committed plain error by not including an instruction on solicitation. Finally, counsel harmed Smith in his closing argument when he made unfavorable statements that demonstrated abandonment of his client. Due to the ineffective assistance of counsel,

Smith requests this Court to reverse his conviction of criminal homicide and remand this matter to the trial court for a new trial.

Smith further requests this Court to reverse the gang enhancement penalties and remand the issue of enhanced penalties for acting in concert with two or more people to the trial court for a new trial.

RESPECTFULLY SUBMITTED this 20 day of February, 2001.



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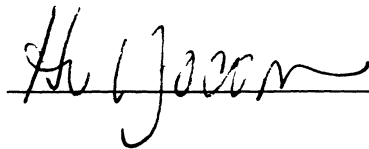
Stephanie Ames  
Attorney for Defendant/Appellant

**CERTIFICATE OF MAILING**

I hereby certify that two copies of the foregoing Reply Brief of the Appellant, together with its Addenda, were mailed, postage prepaid, to:

Christine Soltis  
Assistant Attorney General  
160 East 300 South, 6<sup>th</sup> Floor  
PO Box 140854  
Salt Lake City, Utah 84114-0854

DATED this 20 day of February, 2001.

  
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# ADDENDUM

# Addendum A

ROBERT K. HEINEMAN (5481)  
SALT LAKE LEGAL DEFENDER ASSOCIATION  
424 East 500 South Suite #300  
Salt Lake City, Utah 84111  
Telephone: 532-5444  
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	AFFIDAVIT OF TYRESE SHAROD SMITH
Plaintiff/Appellee,	:	
v.	:	
TYRESE SHAROD SMITH,	:	Case No. 970332-CA
Defendant/Appellant.	:	Priority No. 2

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STATE OF UTAH            )  
                                  ss:  
COUNTY OF SALT LAKE )

Tyrese Sharod Smith, being first duly sworn upon oath,  
deposes and says of his own knowledge as follows:

1. I am the defendant/appellant in this case.
2. I was represented at trial by Paul Gotay.
3. In addition to court appearances, I only recall meeting with Mr. Gotay on one occasion. Within a week before trial, Mr. Gotay visited me in jail for approximately half of an hour.
4. On that occasion, I informed Mr. Gotay of four witnesses who I thought should be called on my behalf at trial:
  - a. Tamara Ross. Ms. Ross was jailed with Melissa Chacon, a critical state's witness. Tamara spoke with Melissa frequently in that capacity, and was told by

Melissa that she would do anything to avoid having to go to prison, that she was not an expert in slang language, and that she had to lie to give the State what it wanted.

b. Kenya Ross. Kenya, Tamara's daughter, was one of Melissa's friends. During the time that Kenya's mother was incarcerated with Melissa, Kenya spoke on numerous occasions with both Tamara and Melissa. Melissa told Kenya that she would do anything to stay out of jail, and that she was not an expert on slang language.

c. Chris Raso. On February 21, 1996, I telephoned Chris and told him that he should tell everyone that I didn't want anyone doing anything on my behalf. I also told Chris to tell everyone not to do anything on Navajo Street. The homicide at issue in this case occurred on Navajo Street.

d. Elizabeth Chacon. Elizabeth is Melissa's sister, and was the boyfriend of Miguel Flores. After the murder, Miguel Flores and Cameron Lopes told Elizabeth that they had been told not to go on Navajo Street, and were supposed to do an apartment, not a house. They acted on their own, contrary to any directions from me, so that they could get all the credit for retaliation. The homicide at issue in this case occurred at a house on Navajo Street.

5. Without having talked to any of these witnesses, Mr. Gotay told me he did not think that it was necessary to call any of

them as witnesses at trial.

6. Mr. Gotay did not call any of these witnesses at trial. No details of their proposed testimony appears in the record. Mr. Gotay told me that he tried calling Chris Raso the first day of the trial, but was unable to reach him.

7. Mr. Gotay did not file any discovery motions. During the first day of trial, he asked Ben Lail, custodian of phone conversation recordings at the Utah State Prison, if he could provide a copy of the phone conversation with Chris Raso. R. 198:214, 198:229-230. Though not appearing on the record, on the second day of trial the State said that the recording of the phone call to Chris Raso was lost.

8. At pretrial on February 3, 1997, the trial court ordered Mr. Gotay to submit any objections to the tape recorded telephone conversations and the transcripts of those conversations to the court prior to trial. R. 197:71-2. Mr. Gotay did not present any objections prior to trial, and was reprimanded by the court during trial for not doing so. R. 199:302-3.

9. Although my previous appointed attorneys, Patrick Anderson and Candice Johnson, discussed solicitation and conspiracy with me, Mr. Gotay did not discuss these crimes with me or whether we should submit lesser included offense instructions. No lesser included offense instructions were submitted.

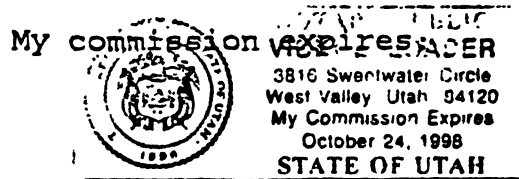
I swear that the information in this affidavit is true to the best of my knowledge.

DATED this 11<sup>th</sup> day of December, 1997.

Tyrese Sharod Smith  
Tyrese Sharod Smith

Subscribed and sworn to before me this 11<sup>th</sup> day of  
December, 1997.

[Signature]  
Notary Public  
Residing in Salt Lake County, Utah



CERTIFICATE OF DELIVERY

I hereby certify that I have caused to be delivered a  
copy of the foregoing AFFIDAVIT OF TYRESE SHAROD SMITH to the  
Attorney General's Office, 160 East 300 South, 6th Floor, Heber M.  
Wells Building, P.O. Box 140854, Salt Lake City, Utah 84114-0854,  
this 11<sup>th</sup> day of December, 1997.

[Signature]  
ROBERT K. HEINEMAN

DELIVERED this \_\_\_\_\_ day of December, 1997.

DELIVERED BY

DEC 11 1997

P. ESPINOZA

# Addendum B

CHRISTINE F. SOLTIS [3039]  
Assistant Attorney General  
JAN GRAHAM [1231]  
Utah Attorney General  
160 East 300 South - 6th Floor  
Salt Lake City, Utah 84114- 0854  
Telephone (801) 366-0180

Attorneys for Plaintiff/Appellee

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**IN THE UTAH SUPREME COURT**

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<b>STATE OF UTAH,</b>	:	
Plaintiff/Appellee,	:	<b>MOTION TO RECALL “POUR OVER” ORDER</b>
v.	:	
<b>TYRESE SHAROD SMITH,</b>	:	<b>Sup. Ct. No. 970179-SC</b>
Defendant/Appellant.	:	Ct. App. No. 971332-CA Priority No. 2

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The STATE OF UTAH, Plaintiff/Appellee, through its counsel, Christine F. Soltis, Assistant Attorney General, and pursuant to rule 23, Utah Rules of Appellate Procedure, moves this Court to recall its previous “pour over” Order on the ground that the Utah Supreme Court is the more appropriate forum to determine if *Apprendi v. New Jersey*, 120 S.Ct 2348 (2000), effectively overrules this Court’s decision in *State v. Lopes*, 1999 UT 24, 980 P.2d 181.

In 1997, defendant, Tyrese Sharod Smith, was convicted of murder and appealed.

This Court “poured-over” the first degree felony appeal to the Utah Court of Appeals, which subsequently remanded the case to the trial court for a hearing pursuant to rule 23B, Utah Rules of Appellate Procedure.

In 1999, this Court issued its opinion in *Lopes*, 1999 UT 24 ¶17, which held that court-imposition of a “gang enhancement” was unconstitutional.

In 2000, defendant filed his opening brief in the court of appeals. Defendant raised two points: (1) that his counsel was ineffective; and (2) that pursuant to *Lopes*, his court-imposed gang enhancement was unconstitutional and should be vacated.

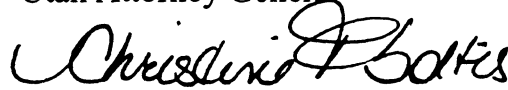
On October 10, 2000, the State filed its brief. The State responded that, based on the trial evidence and rule 23B findings, trial counsel was effective. The State also argued defendant’s gang enhancement was permissible for two reasons: (1) *Apprendi v. New Jersey* effectively overrules *Lopes*’s holding that the facts underlying imposition of a mandatory-minimum enhancement are elements of a new crime and, therefore, must be submitted to the jury and found beyond a reasonable doubt; and (2) even if *Lopes* controlled, any error was harmless. *See* Attachment A (*State’s Brief, Point II*).

No Utah decision has analyzed *Apprendi* or determined its impact on *Lopes*. The court of appeals is not the most appropriate forum to resolve this issue. Not only is the immediate appellate court constricted in its ability to overrule this Court, but also any ruling by that court would likely be subject to a certiorari petition by the losing party.

Based on judicial economy and the importance of the *Apprendi-Lopes* issue, this Court should recall its previous “pour-over” order and resume jurisdiction to resolve this case.

DATED this 11<sup>th</sup> day of October, 2000

JAN GRAHAM  
Utah Attorney General

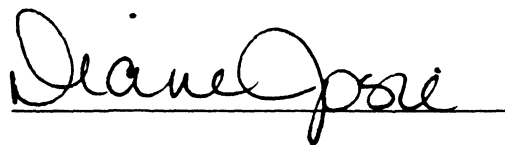


CHRISTINE F. SOLTIS  
Assistant Attorney General

### CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing MOTION TO RECALL “POUR OVER” ORDER was mailed first-class, postage pre-paid this 11<sup>th</sup> day of October, 2000 to:

KRISTINE M. ROGERS  
Attorney for Defendant/Appellant  
712 Judge Building  
8 East Broadway (300 South)  
Salt Lake City, UT 84111



# Addendum C

IN THE UTAH SUPREME COURT

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State of Utah,

Plaintiffs and Appellee,

v.

Case No.971332

Tyrese Sharod Smith,

Defendant and Appellant.

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**ORDER**

The States' Motion to Recall the "Pour Over" Order, filed on October 11, 2000, in the above entitled matter is denied.

For The Court:

Oct. 20, 2000  
Date

Richard C. Howe  
Richard C. Howe  
Chief Justice