2008

State of Utah v. Amador Santonio : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	
AMADOR SANTONIO,	:	
		Appellate Court No. 20090359-CA
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

THIS APPEAL IS FROM A CONVICTION AND SUBSEQUENT SENTENCING TO AGGRAVATED ASSAULT, A THIRD DEGREE FELONY; DISARMING A PEACE OFFICER, A FIRST DEGREE FELONY; ASSAULT ON A PEACE OFFICER, A CLASS A MISDEMEANOR, AND INTERFERING WITH LEGAL ARREST, A CLASS B. MISDEMEANOR AND WAS SENTENCED TO SERVE CONSECUTIVE TERMS OF NOT TO EXCEED FIVE YEARS ON THE THIRD DEGREE FELONY AND AN INDETERMINATE TERM OF NOT LESS THAN FIVE YEARS WHICH MAY BE FOR LIVE ON THE FIRST DEGREE FELONY AT THE UTAH STATE PRISON, IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE CLAUDIA LAYCOCK PRESIDING.

THE DEFENDANT/APPELLANT IS CURRENTLY INCARCERATED AT THE UTAH STATE PRISON.

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REPLY BRIEF OF APPELLANT

ARGUMENT

This Reply Brief is a collaborative effort between appellate counsel and the appellant. The appellant directly refers to the points raised in the appellee brief by number. The appellant responds to the State's brief in general with a position that the State has relied on "Judge Davis' summary of the procedural history of the first three years of the case," (R. 1539-56). Appellant contends this document is grossly inaccurate, and appellant has pointed out a small amount of those inaccuracies in the Objection to the Procedural History of Lynn Davis. (R. 1578)

Appellant disagrees with the State's characterization of the case. As one example, the State, at page 9 of their brief, states, "Judge Davis ultimately granted the

competency petition, ordering appointment of two alienists and a stay of all other proceedings. (R. 1240-53/4; 1298-1301/5) (See footnote 1) Appellant finds R. 1245 to be identified as the minutes of the January 26, 2006, court appearance which also appears on page 51 of the trial court docket. Those minutes include the phrase "Defendant stipulates to the competency evaluation order." Appellant later explained his reasoning in the December 4, 2006, hearing reflected in the transcript at page 8 (R. 2971/8) included in Addendum E of Appellant's Brief.

Appellant contends the State's recitation mischaracterizes the case. In the course of the case, the charge of attempted aggravated murder, a first-degree felony, was reduced two levels to an aggravated assault, a third-degree felony. A separate case alleging an aggravated assault was dismissed on a motion by appellant (case #041402807). Also, after Jens Horn is cross-examined by appellant (R. 2978/83, 84, 87, 90) (included in Addendum F), the charge of use of a dangerous weapon in a fight, a class A misdemeanor, was dismissed on a motion by the State. Given these facts, appellant's conduct cannot be characterized as dilatory. Appellant is a carpenter who, when faced with an unconscionable government intrusion into the attorney-client relationship and the process of selection of counsel, worked very hard obtaining notable results.

In addressing the State's arguments, appellant responds as follows:

POINT I

THE DEFENDANT TIMELY FILED THE NOTICE OF APPEAL PURSUANT TO RULE 4(g) OF THE UTAH RULES OF APPELLATE PROCEDURE

The State argues that the defendant did not file the notice of appeal timely; and, therefore, this Court does not have jurisdiction. Rule 4(g) of the Utah Rules of Appellate Procedure provides

> If an inmate confined in an institution files a notice of appeal in either a civil or criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (g), the 14-day period provided in paragraph (d) runs from the date when the trial court receives the first notice of appeal.

In the present case, the defendant was "an inmate confined in an institution" who filed a notice of appeal by "deposit[ing] in the institution's internal mail system on or before the last day for filing." The defendant was acting in a pro se capacity at the time that he filed the notice of appeal; and as verified in the attached affidavit of Amador Santonio, he deposited the notice of appeal addressed to the district court, postage prepaid, in the Utah State Prison mailbox at the same time that he deposited the copy of the notice of appeal addressed to the Utah Attorney General. The fact that the district court failed to open its mail and enter the notice of appeal in the record is a matter beyond the control of an inmate confined in an institution, which is the reason

for Rule 4(g). The fact that the Attorney General received its copy of the notice of appeal is significant evidence supporting the declaration of the defendant that he timely mailed the notice to the district court. Unfortunately, district court clerks are occasionally dilatory in entering documents filed in the court system, as is evidenced by the affidavit of Janet Ryan, secretary for appellate counsel. (Addendum A)

The affidavit of appellant (attached as Addendum B) establishes the date of mailing and other circumstances attendant thereupon. In the present case, the defendant timely mailed the notice of appeal on April 20, 2009. It was understood that the State had stipulated to the timely filing of the notice (R. 2858). The defendant therefore did not file the supporting affidavit until the State declared that they were not agreeing to that stipulation. Rule 4(g) does not specify when the affidavit or written declaration must be filed; however, it would be presumed that it would be some time after the opposing counsel objects to the late filing, particularly when the inmate incarcerated in an institution deposited the notice of appeal in the prison mail system six days prior to the expiration of the appeal. It can be presumed that if one mails a notice of appeal in Salt Lake County, first-class postage prepaid, it would be delivered to the court address in Salt Lake County within one to two days.

In the case of *State v. Parker,* 936 P.2d 1118, 1119 (Utah App., 1997), this Court denied the appellant's request to invoke the federal prison mail rule due to the fact that the Utah Code did not have a similar provision. In that case the Court

lamented its inability to adopt that rule, citing favorably to the Supreme Court decision of *Houston v. Lack,* 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), as follows:

> Such prisoners cannot take steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30 day deadline. Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the *pro se* prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least ... follow [the notice's] progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. *Pro se* prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them. Worse, the *pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the *pro se* prisoner delivers his notice to prison authorities, he can never be *sure* that it will ultimately get stamped "filed" on time.

Since the rule has now been changed with the addition of Rule 4(g), all of these concerns noted above would apply directly to the case at hand. Based upon the foregoing, the defendant respectfully requests this court to apply the prison mailing ruling and deem the notice of appeal timely filed.

POINT II

Prior to completion of the brief, appellant was moved to the Gunnison prison, a move brought about by the close associates of the reported victims. The distance to the Gunnison prison, the overly expensive long distance phone charges, and the limited out of cell time afforded appellant have become barriers to counsel's ability to access appellant's knowledge of events and support for the facts which establish appellants' claim of error.

All of the facts purported in the brief are also supported in the record, as noted below.

Fact #1 is supported at R. 0117/2-3; R. 2774/2-3; R. 2835/2-3; R. 2961/78; and R. 2971/20. No. 2 at R. 2774/2-3; R. 2835/2-3; R. 2961/13-14. No. 3 at R. 0465/ 0549; R. 0372; R. 1245 (R. 2774 and R. 2835 are both labeled the same on the Judgment Roll. One may be a different document. Appellant cites both out of precaution.) Exhibit "C" of R. 2835; Addendum "A" – "C" of R. 1801-1846; R. 2961/92-93 (page 83 is inaccurate, as is R. 0062). No. 4 at R. 2774/4; R. 2835/4; R. 2961/14; and should include the statement, "This initial attorney expressed his fear of pressing the issue of a contact visit because he had a dependent kind of relationship with the deputies at the jail, not only for access to his other clients, but also for his personal protection in the community where he worked and lived." No. 5 at R. 2774/4-5; R. 2835/4-5; Addendum "C" of R. 1801-1846; R. 2961/15; R. 2973/96-98. No. 6 at

R. 0627. No. 7 at R. 2961/7-22 (mistakenly left out of Addendum "E" of the Brief). No. 8 at R. 2963/98; R. 2973/10-12. No. 9 at R. 0898; R. 2963/46-47. No. 10 at R. 1056/3, 7. No. 12 at R. 1056/7-8; R. 0995. No. 13 at R. 1032. No. 15 at R. 1071. No. 16 at R. 1091. No. 17 at R. 1101. No. 18 at R. 1121. No. 21 at $. 1184/1-2. No. 22 at R. 1227. No. 23 at R. 1233. No. 25 at R. 1245; R. 1272/4. No. 27 at R. 1530. No. 29 at R. 1724. No. 31 at R. 1764. No. 32 at R. 1801-R. 1846; R. 2973/6-98. No. 33 at R. 2973/10-20. No. 34 at R. 2835/Exhibit #71025. No. 35 at R. 1497/1-2; note, the date should read August 7, 2006. No. 36 at R. 1497/2. No. 37 at R. 1497/3. No. 38 at R. 1497/4. No. 39 at R. 0019; R. 0054/1; R. 1497/6. No. 40 – this transcript is not included in Brief's addendums, in numerical order. No. 42 at R. 2137. No. 46 at R. 2213. No. 50 is a half edited statement, which should read: On or about November 14, 2007, defendant submitted Proposed Jury Instructions to the court (as reflected on the trial court's docket at page 81 but not reflected on the Judgment Roll). On December 7, 2007, defendant again submitted proposed jury instructions to the court including proposed jury instruction No. 14.2, the statutory definition of "attempt." R. 2348. Defendant's proposed instruction, stamped by the court as R. 2348 and certificate of mailing are included in Addendum "K" of the Appellant's Brief. No. 52 at R. 2980/10-12 ("attempt" is spoken on page 12). No. 53 at R. 2977/44-49 (R. 2971 is an incorrect reference). No. 58 at R. 2774. (It should be noted that at page 29 of appellant's brief, the citing of R. 0656/93 should be R. 2961 and that Addendum E

omits citing from pages 7-22 of R. 2961. Also, that citings from R. 2961/58 should be 56; page 64 should be page 58; page 77 should be 64; page 78 should be 77; page 98 should be 78; page 93 should be 87; and the end citing should be 93.)

Appellant disagrees with State's assessment and characterization of appellant's legal arguments. The State contends appellant is claiming the finding of a waiver of the right to counsel is "premature." Appellant's true argument is that it is erroneous for the reason it ignores the government intrusion into the attorney-client relationship by monitoring appellant's phone calls to attorneys, (R. 1801-46/Addendum A) and the contacting of attorneys by close associates of the reported victims. (R. 2971/3) The State claims appellant had a "subjective belief" that confidentiality was a "precursor" to retaining counsel. Appellant is, more accurately, pointing out that the constitutional and statutory right of confidentiality (*State v. Johnson,* 2008 UT App5, ¶ 20, 178 P.3d 915), was being denied by government intrusion (*U.S. v. Amlani,* 111 F.3d 705, 711 (9th Cir. 1997); *Shillinger v. Haworth,* 70 F.3d 1132, 1142 (10th Cir. 1995); *U.S. v. Kelly,* 790 F.2d 130, 137 (D.C. Cir. 1986)) and such intrusion created a barrier to the process of selection of counsel. Appellant sought an unbiased professional opinion on the reasonableness of his cautious approach to securing counsel (R. 2673/98) and received confirmation of its reasonableness.

The court's order for unmonitored phone calls to attorneys is addressed at R. 2970/22 and the State does not object. However, personnel at the jail, who are close

associates of the reported victims, had interfered prior to that time (R. 2970/20-21; Addendum "A" and "C" of R. 1801-1846) and continued to so often since the order (R. 2971/7;R. 1721; R. 1733; R. 1764/see Exhibit 301; R. 2972/5). When the close associates of the reported victims refused to comply with the judge's order, the "court was without recourse to enforce their own order because the agency in contempt is the agency that is the enforcement arm of [the] court" (R. 2961/64), something that also occurred earlier in the case. The court's response to the jail's refusal to obey the order for unmonitored phone calls demonstrates bias in favor of the reported victims and against appellant.

The court's statements that appellant was seeking "the equivalent of a law school education" (R. 2970/18) or that appellant enjoys acting as his own attorney (R. 2971/11-12) are not based on any document nor statement of appellant in the record.

The Motion to Address Barriers to Process of Selection of Counsel (R. 1800-46) along with the Memorandum Re: Barriers, are never addressed by the court. (R. 2973/6). Appellant again files a Motion for a Hearing on Barriers to an Attorney (R. 2172), but that motion also is never addressed by the court.

A similar development occurred in *United States v. Welty,* 674 F.2d 185, 190 (3rd Cir. 1982), where the court held, "...in the total absence of any inquiry into the cause of Welty's dissatisfaction with Pedicini, we have no way of knowing whether Welty may have had some valid ground for seeking a substitution of counsel." (Citing

United States v. Williams, 594 P.2d 1258, 1260 (9th Cir. 1979)(court made no inquiry into cause of defendant's dissatisfaction with counsel); and (*Brown v. Craven,* 424 F.2d 1166, 1169 (9th Cir. 1970)). Although the district court was of the view that Welty's request for new counsel was contrived for purposes of delay, the record is barren of any evidence which would support the court's view that Welty's objection to Pedicini was groundless."

In the present case, there was evidence submitted to the court that shows appellant's complaints of government intrusion were real and were creating barriers.(R. 2971/9; R. 2673/98)

Again in *Welty,* the court reasoned, "Even if Welty's attempt to replace Pedicini with new counsel was, as the district court judge believed, designed merely to delay the trial, once Welty's request for substitution of counsel was denied and the possibility for delay obviated – the court still had the obligation to ensure that Welty's choice between his remaining options, retention of Pedicini or self-representation, was intelligently made." Id. At 191.

The government intrusion into the attorney-client relationship renders the court's finding of a waiver erroneous. Appellant's conduct is reasonable under the circumstances.

POINT III

The trial court's finding of contempt and assessment of a monetary sanction to be paid to the court establishes the incident as a criminal contempt as a matter of law. Judge Laycock again denied due process and rules against the weight of the evidence (it should be noted that appellant wears glasses, and as he was in handcuffs, was unable to make note of the next hearing. R. 2971/5).

Appellant contends the State misunderstands and misinterprets the issues at hand. The Court of Appeals, in considering appellant's prior challenges, cited *Von Hake v. Thomas,* 759 P.2d 1162 (Utah 1988) and somehow missed the impact of Fn5 where the Supreme Court of Utah stated, "For all future cases, we will follow the rule that a contempt order is criminal if the fine or sentence imposed is fixed and unconditional, but is civil if the fine or imprisonment is conditional such that the contemnor can obtain relief from the contempt order merely by doing some act as ordered by the court." Fn5 is therefore binding authority.

Since the sanction imposed by the court is fixed and unconditional, the contempt is criminal and State and Federal Due Process rights attach. Those rights were not afforded the defendant; therefore, the finding of contempt should be overturned.

POINT IV

Some confusion has arisen by virtue of incomplete editing in Appellant's Brief under Summary of Arguments. Out of the three sentences therein, the first should be

kept; the last two deleted and replaced with the following: "The judge's order eliminates mental illnesses which are situationally activated by psychological triggers which the statutory definition does not eliminate. Such elimination impermissibly shifts the burden of the affirmative defense."

Appellant reads U.C.A. §76-2-305(1)(a) to outline two prongs to the affirmative defense of mental illness: first, that the defendant suffers from a mental illness as defined in §76-2-305(4)(a); and second, that as a result of the mental illness, the defendant lacked the mental state required as an element of the offense charged.

The second amended order of the court serves to remove from the jury the factual findings which pertain to the result of the mental illness. Such violates Rule 704 of U.R.E. as it calls for an opinion on an ultimate issue, is in opposition to the *Herrera* ruling (see *State v. Herrera* 895 P.2d 359 (Utah,1995)), and misleads the jury when combined with the prosecutor's statement that "Insanity and mental illness are not the same thing" (R. 2981/35). State v. Herrera, 895 P.2d 359 (Utah,1995)

Also, the judge held the view that, "If you want to go forward on your not guilty by reason of insanity plea, then you go forward using the two doctors that examined you with that regard." (R. 2975/17) In light of the judge's position and the question presented to the psychologist in the second amended order (R. 2217), the affirmative defense of mental illness was narrowed so as not to include a group of mental illnesses which do meet the statutory definition. And as such, due process was not satisfied.

POINT V

The pro se appellant's right to access to the disk which held the crime scene photos is supported by *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (U.S.Md. 1963) and *State v. Bakalov,* 1999 UT 45, 979 P.2d 799 . The exculpatory value was fully explained to the court. (R. 1271/5-7; R. 1327/Exhibits 220-232; R. 1957; R. 2243; R. 2418/see also Exhibit 111 of this record.)

39 Geo. L. J. Ann. Rev. Crim. Proc. 356 (2010) reports, "In *Brady v. Maryland,* the Supreme Court held that due process requires the prosecution to disclose upon request evidence favorable to an accused when such evidence is material to guilt or punishment. A Brady violation occurs when: (1) evidence is favorable to accused because it is exculpatory or impeaching; (2) evidence is suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued."

Exhibit 111 of R. 2418, a memorandum from the Utah County Attorney on the subject of "Further Request for Discovery" states: "Copies of photographs, audio and video tapes will be made upon request for the cost of the reproduction." In the many documents cited (R. 1271/5-7; R. 1327/ Exhibits 220-232; R. 1957; R. 2243; R. 2418), appellant outlined his reason for the request and sought a copy of the disk which held these photographs. Enlargements of those photographs were needed to present impeachment evidence to the jury in a non-confusing form and to expose issues relating to falsification of evidence. The request for a copy of that disk was denied and

prejudice ensued. The incarcerated appellant, at this point acting as his own attorney, did not have the ability to view a disk, and certainly did not have the ability to print pictures for trial exhibits. The court's ruling in this regard demonstrates a total disregard of these obvious impediments to the appellant and inappropriately restricted his ability to defend himself at trial.

POINT VI

The issue of admissibility of very like evidence had been fully briefed, considered and ruled upon by the Utah Supreme Court in the cases cited. Appellant has only asked for compliance with binding authority. The Utah Supreme Court has considered these questions in previous cases and has established binding authority in that regard. The arguments in appellant's brief are persuasive and the appellant was prejudiced by the exclusion of this evidence. The verdict should be vacated and the case remanded to another county.

POINT VII

The Utah Court of Appeals has ruled upon the issue of taking judicial notice, and the trial court has ruled in line with those cases when moved by the State but in opposition to those cases when moved by appellant. (R. 1865; R. 2980/39-45)

In the transcripts of the first day of trial (R. 2975/15), appellant is citing *Stephens County v. Hefner,* 16 S.W.2d 804, 807, (Tex. Com. App 1929) where the court states: "It has been repeatedly held that a proposition assumed or decided in order

to establish another proposition which expresses the conclusion of the court is as effectively passed upon and settled as the very question decided." And also, "All the propositions assumed by the court to be within the case, and all the questions presented and considered, and deliberately decided by the court, leading up to the final conclusion reached, are as effectively passed upon as the ultimate questions solved."

In the U. S. District Court's Findings of Fact and Conclusions of Law (Exhibit 28), the federal court found appellant to be suffering from a mental disease or defect, and as a result of such, was incompetent. By the above reasoning, the finding that appellant suffered from a mental disease or defect was effectively passed upon and relevant to the statutory definition of "mental illness" as defined in U.C.A. §78-2-305(4)(a).

In Exhibit 29, the trial court also found appellant to be suffering from a mental illness as defined in the statute. Both exhibits are relevant to the first prong of the affirmative defense of mental illness. The exhibits were excluded and appellant was ordered not to mention the earlier findings of mental illness to the jury. (R. 2975/11-22)

The legal principle that the law presumes the mental condition of a person adjudicated mentally ill continues until the contrary is show, is supported by *State v. Klein,* 124 P.3d 644 (WA 2005), *Sypers v. Gladden,* 368 P.2d 942, 947 (Or. 1962), and *People v. Baker,* 268 P.2d 705, 713-14 (Cal. 1954).

The exhibits were relevant, they're admittance was denied. Prejudice ensued. The verdict should be vacated.

POINT VIII

Appellant did not invite the error of omitting the legal definition of "attempt." Appellant was unaware the definition had been omitted, did not raise that issue in the Motion to Amend the Verdict (R. 2623), heard the definition referenced at trial (R. 2980/12), and was opposed to the omission of proposed jury instructions (R. 2975/5-22; R. 2980/27-29, 37, 106).

Under the law, the instruction on the legal meaning of "attempt" is an absolute necessity to distinguish the word "attempt" from its everyday vernacular connotation, as briefed by appellant. In the "in chambers" meeting on the first day of trial (R. 2975), appellant was told, "we're not going to go there;" "That's a ruling, I'm done…The dialogue is finished on the issue," (at page 10); "No, you're not," in response to appellant's statement, "I'm confused, your honor," (at page 17); "I'm not going to let you" (at page 18); and "Be quiet. Be quiet. Yes, I've told you several times. I don't care. I heard enough" (at page 21). Appellant had actively contested the exclusion of jury instructions.

On the third day of trial (R. 2980/8), appellant raises the issue of attempt and how it "affects the alleged count #2." To which the court responds, "…take it up on appeal."

From appellant's earlier objections with the court, appellant has done all that can be done with this judge. As that session continues, appellant hears a reference to the "attempt" instruction (R. 2980/12) as other business is addressed; reports "on jury instructions, your honor, I'm way over my head. I'm just way over." (R. 2980/28-29); and later admits "I'm swimming" (R. 2980/37). Under these circumstances, appellant did not invite the error of omitting the jury instruction on "attempt." In accordance with the judge's instruction, appellant seeks to raise this issue on appeal.

POINT IX

Appellant did not acquiesce to the judge's rulings on matters of admissibility and legal theories that constituted a defense, but made several efforts to place those issues and objections on the record (R. 2975/5-22). The copy of appellant's proposed jury instruction No. 14.2, included in Addendum K, is clearly stamped as R. 2348. It was submitted and omitted. All the elemental facts necessary for claiming the error are established. The vacating of the verdict is a matter of law.

The intrusion into the attorney-client relationship by the close associates of the reported victims at the jail interfered with the process of selection of counsel and so denied appellant of his right to choice of counsel. The intrusion was purposeful and appellant suffered damage (R. 1738; R. 1741; R. 1764; R. 1800-1846; and Addendum "B" and "C" of this record.)

In the many issues argued in appellant's brief are the same issues raised in the Motion for Arrest of Judgment. It is appellant's contention that binding authority supported a vacating of the verdict on the "other good cause" prong of the statute. In failing to acknowledge the facts and dictates of the law, the judge demonstrates a bias in favor of the reported victims and against appellant. Appellant contends this issue is adequately brief and has, in this response, added the appropriate recitations to the record. Appellant was not afforded a fair trial.

POINT X

The effect of the numerous errors made by the trial court undermines the confidence of the reasonable person that a fair trial was had. Recusal of the trial judge and a change of venue would have been appropriate. The Utah Ethics Advisory Committee was asked, "Does Canon 3E of the Code of Judicial Conduct require disqualification of a trial judge in every case where a court employee or a member of the employee's family is a party?" (Informal opinion #96-2) To resolve this question, the committee reviewed the canons, stating, "Canon 3E requires judicial disqualification when 'the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding.'"

"Canon 2B states that a judge 'shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment.' These Canons

require a judge to closely scrutinize his or her involvement in a court proceeding when the judge is familiar with a participant. The scrutiny is not limited to whether the judge feels that he or she could be impartial. The judge must also objectively consider the perceptions of others."

"The Oregon Judicial Conduct Committee, in its Opinion 89-6, stated that a judge may not hear cases involving the judge's court reporter's spouse. The spouse was a police officer and appeared occasionally as a prosecution witness. The Oregon Committee found that the police officer's appearance before the judge would create the appearance of impropriety, which must be avoided."

"This committee believes that the Oregon opinion provides a good reference point. The appearance of impropriety noted in that opinion is more pronounced when a court employee is involved in a proceeding. The committee is therefore of the opinion that, absent emergency circumstances, a judge should not adjudicate or participate in any proceeding involving employees of the judge's judicial district. It is possible that a judge may have little or no contact with certain district employees. However, an observer may presume that such contact occurs, and therefore the requirement of disqualification must extend to all cases where a district employee is a party."

Jens Horn and Raymond E. Edwards are employees of the judge's judicial district and high ranking officers within the sheriff's department. Their fellow officers work as bailiffs in the court, and their other fellow officers provide security in the court

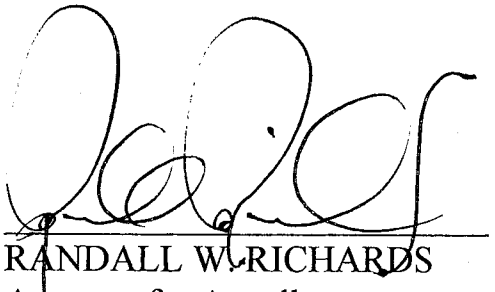
and courthouse. These fellow officers have demonstrated that they can defy court orders with impunity (i.e. order for unmonitored phone calls) and such produces an appearance of impropriety.

Under these conditions, recusal and a change of venue were appropriate. Appellant contends the cumulative effect of these errors herein briefed demonstrate a pervasive bias such that appellant did not receive a fair trial. Appellant further contends that upon vacating the verdict, remand to another county would be appropriate (appellant opposes a remand to Salt Lake County (R.1616)).

CONCLUSION

Based upon the foregoing, the appellant respectfully requests that this Court reverse his conviction; and depending on the grounds for reversal, either dismiss the case or remand for further proceedings.

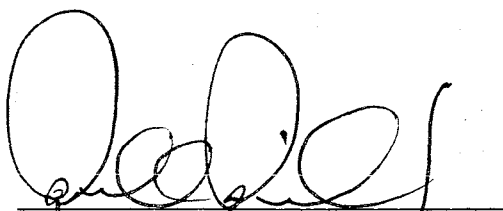
DATED this 23 day of June 2011



RANDALL W. RICHARDS
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Reply Brief of Appellant to Utah Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0180, postage prepaid this 23 day of June 2011.



RANDALL W. RICHARDS
Attorney for Appellant

ADDENDUM A

RANDALL W. RICHARDS #4503 of
ALLEN, RICHARDS & PACE, PC
Attorney for Appellant/Defendant
2550 Washington Boulevard, Suite 300
Ogden, Utah 84401
Telephone: (801) 399-4191

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	**AFFIDAVIT OF JANET M. RYAN**
Plaintiff/Appellee,	:	
vs.	:	
AMADOR SANTONIO,	:	District Court Case No. 031402469
Defendant/Appellant.	:	Appellate Court No. 20090359-CA

STATE OF UTAH)
:ss
COUNTY OF)

Janet M. Ryan, being first duly sworn upon his oath, states as follows:

1) I am a resident of the State of Utah, over the age of 18, and fully competent to make this Affidavit.

2) The matters stated below, unless stated to be made upon information and belief, are based upon my own personal knowledge, and if I were called to testify as a witness, I could and would competently attest thereto.

3) I am the legal assistant for attorney Randall W. Richards.

4) One of my duties in the office is to file all of the notices of appeal for Mr. Richards.

5) I have developed a practice of getting a stamped copy of the notice of appeal at the same time that it is filed with the district court.

6) On at least two occasions I have filed a notice of appeal within the 30 day statutory limit, have received a stamped copy of that notice of appeal, and later discovered that the district court did not timely filed a notice of appeal.

7) On these two occasions the fact that I have received a stamped copy of the notice of appeal established that the notice was timely filed.

8) In the case of Vincent Keith Calhoun, Case Nos. 20061074SC and 20061076SC, the notices of appeal were filed on and date stamped on November 12, 2006, at 12:18 p.m., yet the court did not docket and enter the notice of appeal until November 16, 2006.

9) In the case of Milton Smith, Case No. 20060473, the notice of appeal was filed on May 11, 2006, yet the court did not date stamp the notice of appeal until May 12, 2006.

10) Mr. Richards's office was not retained to represent Amador Santonio until October 2009, which was seven months after the sentence, and six months after the notice of appeal had been filed.

11) Further your Affiant sayeth naught.

DATED this 23 day of June 2011.

Janet M. Ryan
Legal Assistant

SUBSCRIBED AND SWORN to before me this 23 day of June 2011.

RAELYN E. HAZEN
NOTARY PUBLIC • STATE of UTAH
COMMISSION NO. 581545
COMM. EXP. 02/23/2014

NOTARY PUBLIC

ADDENDUM B

In the Utah Court of Appeals

State of Utah,
plaintiff/appellee,
v.

Amador Santonio,
defendant/appellant.

Affidavit of Appellant

Trial Ct.# 031402469

Appellate Ct.# 20090359-CA

State of Utah }
County of Weber } :ss

I, Amador Santonio, being first duly sworn, do depose and say:

1) I am the Defendant/Appellant in the above-entitled matter.

2) I was taken to the Utah State Prison on March 27, 2009, and was confined in the intake area.

3) My legal papers were removed and I drafted a Notice of Appeal from memory.

4) I was indigent and only allowed one envelope a

week. I did not know how to apply for extra legal mail. (request for information, etc., are often ignored in the intake process. I had heard that such is common.)

5) I mailed a Notice of Appeal to the trial court on April 14, 2009. Thereafter, I mailed a copy of the Notice of Appeal to the Attorney General on April 17, 2009. Both were deposited in the prison mail box.

6) It is my understanding that both envelopes had first class postage and were promply mailed.

7) Further, this Affiant sayeth naught.

Dated this 23 day of June, 2011.

Amador Santonio

Amador Santonio

Subscribed and sworn to before me this 23 day of June, 2011.

JANET M. RYAN
NOTARY PUBLIC • STATE of UTAH
COMMISSION NO. 580368
COMM. EXP. 11-16-2013

Notary Public