

2001

# State of Utah v. Peter Victor Montoya : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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STATE OF UTAH, )  
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 Plaintiff/Appellant, )  
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 vs. )  
 ) CASE NO. 20010458-SC  
 PETER VICTOR MONTOYA, )  
 ) PRIORITY NO. 2  
 Defendant/Appellee. )

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BRIEF OF APPELLANT

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This is an appeal from criminal convictions for Homicide, a first-degree felony, and two counts of Attempted Homicide, second-degree felonies, in violation of Utah Code Ann. § 76-5-203 (1999), after a jury trial before Judge Timothy Hansen on November 8-14, 2000, in the Third District Court in and for Salt Lake County.

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**FILED**  
UTAH SUPREME COURT

OCT - 8 2002

PAT BARTHOLOMEW

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**JURISDICTIONAL STATEMENT**

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(i) (1999).

**STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS**

The following statutes, rules, and constitutional provisions are relevant to this case, and their text is set forth in Addendum A: Utah Code Ann. §76-5-203 (1999).

**ISSUES, STANDARDS OF REVIEW, AND PRESERVATION OF ARGUMENT**

ISSUE NO. 1: Did the trial court err in denying Mr. Montoya's motion for new trial based on new evidence?

STANDARD OF REVIEW: A trial court's decision to deny a motion for a new trial is reviewed under an abuse of discretion standard and this Court "assume[s] that the

trial court exercised proper discretion unless the record clearly shows the contrary." State v. James, 819 P.2d 781, 793 (Utah 1991).

PRESERVATION: This issue was raised in a motion before the trial court. R. 275.

ISSUE NO. 2: Was Montoya denied effective assistance of counsel in violation of the Sixth Amendment?

STANDARD OF REVIEW: In challenging a conviction on the ground of ineffective assistance of counsel, it is defendant's burden to show (1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error. State v. Geary, 707 P.2d 645 (Utah 1985); see also Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). This issue is properly raised for the first time on appeal. State v. Johnson, 823 P.2d 484, 487 (Utah App.1991).

ISSUE NO. 3: Was there insufficient evidence to support Defendant's convictions for Criminal Homicide and Attempted Criminal Homicide?

STANDARD OF REVIEW: An appellate court will reverse a conviction only when the evidence and all reasonable inferences, viewed in the light most favorable to the verdict, "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Pedersen, 802 P.2d 1328, 1330 (Utah App. 1990).

PRESERVATION: This issue was raised in a motion for directed verdict. R. 386:42, 387:4.

#### **STATEMENT OF THE CASE**

Pete Montoya was charged by information with one count of Criminal Homicide, a first degree felony, in violation of Utah Code Ann. § 76-5-203(1999), and two counts of Attempted Criminal Homicide, in violation of Utah Code Ann. § 76-5-203 (1999). On November 8-14, 2000, Mr. Montoya was found guilty as charged after a jury trial before the Honorable Judge Timothy Hansen. On January 12, 2001, a Sentence, Judgment and Commitment was entered sentencing Montoya to a term of imprisonment of

five years to life on Count I, and a term of imprisonment of one-to-fifteen years each on Counts II and II, the sentences to run consecutively, with a one-year firearm enhancement on each count. On January 2, 2001, Montoya filed a Motion for New Trial. On March 8, 2001, the trial court issued a memorandum order denying Montoya's Motion for a New Trial. On May 15, 2001, Montoya filed a Notice of Appeal.

#### **STATEMENT OF THE FACTS**

On the night of May 16, 1997, Kelly "Nick" Seal, Matt Seal, and Greg Ulibarri had gone to watch drag races, and were in a maroon Honda Civic belonging to Nick and Matt's mother. R. 384 at 3-20. Kelly was driving the car. R. 384 at 26:21-23. Matt was sitting in the middle of the back seat of the car, and Greg was sitting in the front passenger seat. R. 384 at 1-3, R. 385 at 42:24-25, 43:1-7, 44:4-10, 57:13-17. At around midnight, the boys left the place where the drag races were taking place, and went to an "Amoco Rainbo Mart" gas station to use the restroom and get a drink. R. 384 at 28:4-25, 29:11-12, 385 at 57:7-25. The boys ran into someone Greg knew,

named Monty, at the gas station, and talked to him for about five minutes. R. 384 at 29:23-25, 30:1-25.

Matt noticed a Red GMC truck at the gas pumps "squealing it's tires." R. 384 at 31:1-13. It was stipulated at trial that the driver of the truck was Russell Thornwall. R. 385 at 82:7-16. The driver of the truck get out of the vehicle and begin to pump gas. R. 384 at 32:15-18. At that point, Matt went inside the store. R. 384 at 75:4-10. Matt saw Pete Montoya inside the store. R. 384 at 41:4-9, 75:15-25. Matt did not know when Pete had entered the store, but simply ended up standing behind him in line at the cash register. R. 384 at 75:11-25, 77:10-11. When Matt was in line with Pete inside the store, Pete did not speak to him, and Matt and Pete did not look at each other. R. 384 at 41:20-23. Pete was simply paying for a purchase when Matt saw him. R. 384 at 41:18-19. Pete did not look at Matt, or call him names, or make any aggressive gestures toward him. R. 384 at 77:15-23.

Matt testified that after he came out of the store, and he and the other boys were talking to Monty, he saw

the driver of the red truck "throwing up his hands," and yelling "VLT." R. 384 at 33:22-25, 78 at 3-8. Matt understood the hand gestures to be "threatening [them]", and he understood "VLT" to be the abbreviation of a gang. R. 384 at 34:7-12. During this time, Matt did not see Pete Montoya leave the store. R. 384 at 79:8-24. Matt testified that the boys ignored the driver of the truck, and left the gas station to head back to the races. R. 384 at 35:13-24.

Matt testified that right after the boys left the gas station, Kelly received a call on his pager and turned around and went back to the gas station to use the payphone there. R. 384 at 36:1-12. Kelly got out of the car and began to use the phone. R. 384 at 37:4-5. After a minute Greg got out of the car and also went to the payphone. R. 384 at 37:10-15. Matt stayed in the car, sitting in the back seat. R. 384 at 36:20-21, 37:18-19. Matt testified that the front passenger window was open, but the back windows were closed. R. 384 at 37:16-19.

Matt testified that the driver of the red truck was "still yelling" at the time Kelly was using the

payphones. R. 384 at 37:23-25, 38:1-2. Greg testified that this was the first time he noticed the red truck, and looked over and saw an individual pumping gas. R. 385 at 62:8-9, 18-25. When Greg looked over at this individual, he "threw up his hands and started yelling at [Greg]." R. 385 at 63:5-24. Matt testified that he could no longer hear what the driver of the truck was saying, because of the distance. R. 384 at 38:3-10. Matt testified that he just "glanced at [the driver] really quick," and didn't see whether the driver was making any gestures at that time. R. 384 at 38:11-14.

Kelly and Greg were at the payphones for about two minutes. R. 384 at 38:23-24. Before Kelly and Greg got back to their car, the red truck pulled up and stopped behind their car, a couple of car lengths away. R. 384 at 39:1-17, 385 at 64:14-21. Matt noticed that the truck had pulled up behind them because it was "revving the engine." R. 384 at 83:23-25. Matt testified that the truck's passenger door was open, and "you could see the driver and the middle passenger." R. 384 at 39:18-25. Matt testified that the middle passenger "looked like he

was in back seat," R. 384 at 40:13-16, but that he couldn't tell for certain whether the middle passenger was in the back seat or the front seat. R. 384 at 87:1-9. At trial Matt admitted that he told a police officer, in an interview shortly after the shooting, that "all three men were in the front seat." R. 385 at 10:17-25, 11:18-25. When it was brought to Matt's attention at trial that he had previously said that all three men were in the front seat, he stated, "That's what it looked like to me." R. 385 at 12:1-5. Greg couldn't tell who was in the truck, but heard two or three voices yelling something from the truck. R. 385 at 65:9-18.

As Matt looked back at the truck, he saw Pete Montoya leave the gas station store, walk past the boys' car and get into the front passenger seat of the red truck. R. 384 at 40:1-2, 42:22-25, 43:1-9. When Pete walked passed the boys' car, he did not seem angry, and did not make any threatening gestures or any remarks. R. 384 at 84:9-25, 85:1-9. Greg did not see Pete Montoya walk out form the store or get into the truck. R. 385 at 65:19-21.

Kelly and Greg got back into the car, they were going to leave the gas station. R. 384 at 44:11-15, 385 at 66:7-10. The truck was parked behind their car, and Matt heard the "revving" of the truck's engine. R. 384 at 44:5-7. As the boys began to head for the exit of the gas station, the red truck started to follow them and then swerved toward them, almost hitting their vehicle. R. 384 at 44:18-23. He testified that the truck was momentarily side-by-side with their vehicle, directly in front of the gas station doors. R. 384 at 44:24-25, 45:1-5.

Matt testified that the driver was yelling at them. R. 384 at 46:4-8. Matt testified that the front passenger was Pete Montoya. R. 384 at 45:13-15. He testified at trial that he saw the front passenger "leaning over, yelling also." R. 384 at 11-12. He also testified at trial that the front passenger was "leaning over the driver," and "looking right at [their] car." R. 384 at 57:1-10. He testified that he "heard two or three voices" coming from the truck. R. 384 at 64:9-11. However, at a civil deposition taken eleven months after the shooting,

Matt testified under oath that he didn't look at the occupants of the truck when the truck almost hit them, but that "we still seen they were behind us. Their headlights were shining in our car." R. 385 at 13:5-7, 15:10-15, 17:11-25, 18:1-25. In fact, Matt testified at the civil deposition that the last time he actually saw the faces of the one of the occupants of the red truck was when the boys were at the pay phone, and the red truck was behind them and the driver was revving its engine. R. 385 at 20:7-20.

Matt testified at trial that he heard the occupants of the truck yelling "VLT" and calling them "pussies." R. 384 at 45:16-18, 30:21-25, 31:1. However, at the civil deposition, Matt testified that although he could hear the occupants of the truck yelling, he could not hear anything in particular that they were saying. R. 385 at 18:2-8. Matt testified at trial that the "middle passenger" was not doing or saying anything, as far as Matt could see. R. 384 at 46:9-12. In fact, Matt testified that he could not see the middle passenger at that time. R. 384 at 64:12-14.

Kelly and the boys then began to leave the gas station by the west exit. R. 384 at 46:15-18. Matt testified that the red truck was following directly behind boys' vehicle, and headlights of the truck were shining right onto the them. R. 384 at 52:21-25, 53:1-7. Greg testified that the truck was directly "dead center" and about 15 feet behind their car as they were exiting the gas station. R. 385 at 80:8-21. As the boys were coasting out of the exit, turning left, Matt heard two or three gunshots. R. 384 at 54:9-16, 60:11-16. Greg testified that he heard two loud bangs. R. 385 at 70:3-5.

Matt testified at trial that the truck was "behind us, off to the right a little bit," when the shots were fired. R. 384 at 59:17-24, R. 384 at 59:17-25, 60:1-4. He testified that the truck took off "at a high rate of speed, revving the engine, turning right, squealing the tires." R. 384 at 60:7-8. He also testified that he heard someone shout, "VLT rules," as the truck sped away. R. 384 at 60:9-10, 65:1-8. Greg testified that after the shots were fired, he heard "a motor going up and tired

screaming, off to the right of [him]." R. 385 at 90:1-3.

After the shots were fired, the boys' car came to a stop in the middle of the road, R. 385 at 55:6-18, State's Exhibit 9. The car's back window, on the left and right side, and right pillar was hit by the gunshots. R. 384 at 54:16-25, 55:1-5, 61:15-25, State's Exhibit 6-10. Matt did not see a gun. R. 384 at 62:18-22. Matt's brother Kelly Seal was shot once in the head, and died as a result of that injury. R. 384 at 60:19-22. Greg Ulibarri was hit by a bullet in the right side of his back. R. 384 at 63:13-19. Matt Seal was not hit by gunfire or injured. R. 384 at 55:25, 56:1-3, 63:11-12.

#### Other Evidence in Support of Verdict

In addition to the facts set forth above, based on the testimony of Greg Uliberri and Matt Seal, the State presented the following evidence in support of the verdict:

#### Alicia Peterson

Alicia Peterson testified that on the night of May 16 and early morning hours of May 17, 1997, she went to the Amoco station with some friends, including a man named

Monte. R. 385 at 109:12-24. While at the Amoco station, Alicia saw a red Chevy truck pull into the gas station and squeal its tires as it went from one side of the pumps to the other side. R. 110:22-25, 111:1-16. Alicia identified photographs of Russell Thornwall's truck as the truck she saw that night. R. 385 at 114:6-25. State's Exhibit's 3 and 4. Alicia saw someone pumping gas into the truck. R. 385 at 112:10-24. She also saw people get out of the truck and go inside the store. R. 385 at 112:2-4, 128:17-20. She saw someone sitting on the passenger side of the truck who was using a cell phone. R. 385 at 113:19-25, 129:18-25. She described the individual who used the cell phone as having dark, short hair. R. 385 at 113:24-25. She thought there was a third person in the truck, but she could not recall what he looked like. R. 385 at 114:3-5.

Alicia and her friends left the gas station, but returned a few minutes later, and saw the red Honda in the middle of the street, and Greg Uliberri was leaving the vehicle. Alicia had some contact with Greg and learned that he had been shot. She testified that Greg

told her, "They were showing, giving us gang signs." R. 385 at 121:20-25, 122:1-3.

In 1999, Alicia identified Russell Thornwall and Pete Montoya from a photo lineup as individuals who were involved with the red truck that night. R. 385 at 122:4-25, 123:1-3. State's Exhibit 24. She rated her certainty regarding Thornwall (in photo 24-B) as someone who was involved with the red truck as an 8 on a scale of 1-10, and of Pete Montoya (in photo 26-A) as a 5, on a scale of 1-10. R. 385 at 123:24-25, 124:1-3, 133:11-25, 134:5-19, 174:6-11. Although Alicia believed one of these two individuals was pumping gas and one talking on a cell phone, she was not certain which of the two was doing what. R. 385 at 124:11-16, 126:12-15. Alicia also picked a photo from another group of photos as another individual, Ronnie Ontiveros, as being involved with the red truck. R. 385 at 124:17-25, 125:1-19, 134:17-25, 135:1-6, 174: 12-13. State's Exhibit 25-B. She rated Mr. Ontiveros an 8, on a scale of 1-10, as far as her certainty. R. 385 at 134:16-25, 135:1-6, 174:12-13.

Rob Nielson

Sheriff Rob Nielson testified that he had an encounter with Russell Thornwall on June 20, 2000. R. 385 at 136:6-25, 137:1-2. Nielson attempted to do a felony stop on the vehicle that Thornwall was in, and Thornwall exited the vehicle and ran on foot. R. 385 at 137:5-10. Thornwall fired several rounds at Nielson's vehicle and at Nielson. R. 385 at 137:12-15. Thornwall used his right hand to fire the shots at Nielson. R. 385 at 137:18-20. Thornwall ran behind a building and shot himself in right side of the head. R. 385 at 138:4-10.

John Campbell

John Campbell was a police officer who was called to the scene of the shooting at issue in this case. R. 385 at 139:17-25, 140:1-25. Campbell observed and made a diagram of the crime scene. R. 385 at 141:17-25. State's Exhibit 27, Defendant's Exhibit 41. Although Campbell made various measurements from a "reference point," the reference point's location has no particular significance. R. 385 at 144:4-18. Campbell recovered two bullet casings from the crime scene at the points

marked 1 and 2 on his diagram. R. 385 at 148:10-25, 149:1-3, State's Exhibits 29 and 30. The points at which the bullet casings were found were marked by orange cones in photographs taken at the scene. R. 385 at 151:8-24, State's Exhibit 34, 43. Campbell testified that there was sufficient room for a car, exiting and heading south, to drive between the casing and the curb. R. 385 at 160:20-23.

Campbell also took photographs of the car's interior, showing a bullet entry "wounds" on the passenger's side of the car, the back of the front passenger's seat, and the back seat of the car where the bullet passed through before entering the passenger's seat. R. 385 at 152:17-25, 153:1-25, 154:1-6. State's Exhibits 35-39. Campbell also took photographs of the outside of the vehicle showing the bullet entry "wound" into the right portion of the vehicle, and the shattered back window. R. 385 at 154:15-25. State's Exhibits 6, 9, 10. Officer Campbell testified that he was unable to determine exactly how many bullets pierced the car, but knew that at least two had pierced the car, and perhaps up to four hit the car.

R. 385 at 155:23-25, 385 at 163:6-17. Campbell testified that the bullet that entered the right rear of the car appeared to have traveled through the back seat, into the front passenger's seat, and hit the front passenger. R. 385 at 156:1-12. The back window was broken by another bullet. R. 385 at 13-16. Officer Campbell believed that the bullet that broke the rear window was the one that killed Kelly Seal. R. 385 at 158:12-17. Defendant's Exhibit 40.

Richard Montanez

Richard Montanez, a detective with the Salt Lake Metro Gang Unit, got involved in the investigation of the instant case in February of 1999, after receiving leads from confidential informants. R. 385 at 166:1-29. Through these leads, detective Montanez was able to verify that the red truck from which the shots were fired belonged to Russell Thornwall. R. 385 at 166:15-25. It was stipulated at trial that the truck did indeed belong to Russell Thornwall. Id. Detective Montanez also identified a picture of Pete Montoya, and a tattoo on Pete Montoya's arm which said, "VLT." R. 168:11-21,

State's Exhibits 1, 2. Detective Montanez testified that Pete Montoya was right-handed, R. 385 at 169:6-21, and it was stipulated at trial that Pete Montoya was right-handed. R. 385 at 169:22-24.

Detective Montanez located and inspected the truck that was used in the shooting. R. 385 at 176:24-25, 177:1-25, 178:1-4. He described and diagramed the truck's interior, including the front bench seat and back bench seat. R. 385 at 179:4-9, and a gear shifter of approximately 2 feet in length in the center of the floor in the front. R. 385 at 179:10-20. State's Exhibit 44.

Detective Montanez testified that he is right-handed and typically shoots with his right hand. R. 385 at 181:2-10. He testified that although he has shot a gun with his left hand, it is "less accurate" being his "weaker hand." R. 385 at 181:10-16.

#### Matt Sotuyo

Matt was working as a store clerk at the Amoco station the night of the shooting. R. 386 at 32:18-25, 33:1-11, 34:13-25. Matt heard two gunshots and then saw the red truck speeding out of the station, heading

southbound. R. 386 at 34:22-25, 35:1-8. Matt could see the passenger side of the truck as it sped out of the parking lot. R. 386:6-13. Matt did not see anything sticking out of the passenger window. R. 386 at 37:13-22. Matt saw the passenger looking back, as if to see what happened, and then turning back around. R. 386 at 38:7-18.

Dr. Grey

Dr. Todd Grey is the Chief medical Examiner for the State of Utah. R. 385 at 45:9-14. Dr. Grey performed an autopsy on Kelly Nicholas Seal on May 17, 1997. R. 385 at 46:8-11. Dr. Grey testified that Kelly died from a gunshot wound to the back of the head. R. 385 at 47:19-23, 48:14-15. He also testified that the size of the projectile which caused the gunshot wound was "anywhere from . . . a .32 to a .30 caliber." R. 385 at 47:6-12. He also testified that the projectile entered the back of the head a little to the right of the mid-line, and lodged just above the left eye. R. 385 at 47:16-23. Dr. Grey could not determine the distance from which the shot was fired, but could say from the that it was fired

from distance of over three feet. R. 385 at 3-8. The autopsy report, State's Exhibit 17, and some diagrams of the injuries, State's Exhibits 18-20, supported Dr. Grey's testimony. Dr. Grey testified that he could not determine the position of the shooter in relation to the victim, and stated, "Whether the person was turning and the shooter was to their side versus they were looking straight ahead and the shooter behind them, I cannot tell you." R. 385 at 53:4-10, 53:21-25, 54:1-5. Dr. Grey testified that it was his opinion that the bullet that killed Kelly passed through glass, and not metal, before it struck Kelly. R. 385 at 55:4-14.

#### **SUMMARY OF ARGUMENT**

The trial court abused its discretion by denying Mr. Montoya's Motion for New Trial where the proposed new evidence, a witness who stated that he was the front seat passenger in Russell Thornwall's truck and saw Russell Thornwall fire the gun, could not have been with reasonable diligence discovered and produced at trial by counsel, and would clearly result in the probability of a different outcome at trial. In the alternative, if

this Court finds that trial counsel could have discovered and produced the new evidence with reasonable diligence, then Montoya received ineffective assistance of counsel when his trial counsel failed to exercise reasonable diligence to discover and produce critical defense witnesses. Finally, there was insufficient evidence to support Montoya's convictions for Homicide and Attempted Homicide where the evidence only established Montoya's presence in the vehicle and his brief participation in a verbal altercation, and was simply inconclusive with regards to who actually fired the gun.

### **ARGUMENT**

#### **I. The Trial Court Erred When it Denied Montoya's Motion for a New Trial.**

Mr. Montoya, through his trial counsel, filed a motion for a new trial on January 22, 2001, approximately one month after the trial in this matter, asserting that critical new evidence had become known to defense counsel. R. 276-280. This evidence consisted of the statements of two witnesses: One witness stated to

defense investigators that he was the third passenger in the red truck the night of the shooting, and that he was the front seat passenger that night, not Pete Montoya, and that he was using a cell phone during the time Thornwall began yelling at the victims, and that Russell Thornwall was the shooter. R. 281-283. This witness's identity was not revealed in Montoya's Motion for New Trial, apparently based on an agreement with Montoya's trial counsel and defense investigators that the witness would give a statement only if his identity was not revealed. R. 284-287. The second witness was Jason Thornwall, Russell Thornwall's brother, who stated that Russell talked to him about the instant case, and said: "Pete Montoya is in jail for something I did." R. 288-289.

In State v. Goddard, 871 P.2d 540, 545 (Utah 1994), this Court noted that a "trial court has a wide range of discretion in determining whether newly discovered evidence entitles a litigant to a new trial." The Goddard court added, "[i]f the trial court's decision is within the limits of responsibility, we will uphold it."

Id. (citing State v. Hamilton, 827 P.2d 232, 239-40 (Utah 1992)). The Goddard court also set out a three-part test which must be met in order to grant a new trial based on new evidence, as follows: (1) The new evidence must such as could not with reasonable diligence have been discovered and produced at trial; (2) it must not be merely cumulative, and (3) it must be such as to render a different result probable on the retrial of the case. Goddard at 545 (internal citations omitted).

The three-prong test was clearly met in the instant case. Montoya's trial attorney submitted an affidavit to the court setting forth his extensive efforts to locate the witness who was a passenger in the red truck that night. R. 284-287. The affidavit also sets forth the circumstances under which Montoya's trial counsel learned, by sheer chance, and after the trial, that Russell Thornwall had made an incriminating statement to his brother. R. 284-287.

Moreover, the testimony of the proposed witnesses was not merely cumulative, and was clearly such as to "render a different result probable on retrial." The

prosecution's theory at trial was that Pete Montoya was the shooter, although there was no direct evidence in that regard. The prosecution relied on Mr. Montoya's position as front seat passenger to argue that only he, of the three individuals in the truck, could have fired the shots. The new witness would testify that he was the front seat passenger in the truck, and that Russell Thornwall was the shooter. The witness's statement is especially credible because, by testifying in that manner, he would place himself in the exact same position of Pete Montoya with regards to possible criminal prosecution. With regards to Jason Thornwall, his statement that Russell Thornwall told him that Pete was in jail for something Russell did supports the confidential witness's statement in that regard.

Clearly, these witnesses, and especially the witness who was a passenger in the truck that night, were critical to Mr. Montoya's defense. Trial counsel, through affidavits, established that diligence was exercised to locate this witness, and that the witness could not have been discovered or produce prior to trial. Accordingly,

the trial court abused its discretion when it denied Mr. Montoya's motion for a new trial.

II. Montoya Received Ineffective Assistance of Counsel.

If this Court finds that the new evidence could have been discovered and produced for trial with "reasonable diligence," then Montoya clearly received ineffective assistance of counsel when his trial counsel failed to exercise reasonable diligence.<sup>1</sup>

Generally, to successfully claim ineffective assistance of counsel, a defendant must satisfy a two-part test established by the Supreme Court in Strickland and recognized by the Utah Supreme Court in State v. Lairby, 699 P.2d 1187 (Utah 1984). Under this test, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient

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<sup>1</sup>Generally, an appellant cannot raise an ineffective assistance of counsel claim for the first time on appeal because the trial record is insufficient to allow the claim to be determined. See State v. Humphries, 818 P.2d 1027, 1029 (Utah 1991). An appellant, however, can raise such a claim if the trial record is adequate to permit determination of the issue and there is new counsel on appeal. Id.; State v. Johnson, 823 P.2d 484, 487 (Utah App.1991).

performance prejudiced the defense. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; Lairby, 699 P.2d at 1203-04.

To show counsel's performance was deficient, a defendant must identify counsel's specific acts or omissions that "fall outside the wide range of professionally competent assistance." State v. Frame, 723 P.2d 401, 405 (Utah 1986); see also Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. To show prejudice, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687, 104 S. Ct. at 2064. Under this prong of the test, the defendant must show that a "reasonable probability" exists that the trial result would have been different if counsel had not erred. Id. at 694, 104 S. Ct. at 2068; Frame, 723 P.2d at 405. "A reasonable probability is a probability sufficient to undermine confidence in the reliability of the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Lairby, 699 P.2d at 1205-06.

In the instant case, trial counsel failed to discover

and produce the only eyewitness to the actual shooting, besides the defendant himself. Neither Matt Seal nor Greg Ulibarri saw the gun, and neither of them knew who fired the shots. The State relied on circumstantial evidence, primarily based on testimony from Matt Seals that Pete Montoya was the front seat passenger in the truck. The third occupant of the truck would have testified that he, not Pete Montoya, was the front seat passenger, and that Russell Thornwall was the shooter. Although trial counsel submitted an affidavit setting forth his extensive efforts to locate this witness, trial counsel did not request a continuance in order to locate this critical witness, and in fact opposed the State's request for a continuance.

In State v. Templin, 805 P.2d 182 (Utah 1990), the Utah Supreme Court recognized that the failure to conduct a reasonable investigation into possible defense witnesses constitutes ineffective assistance of counsel. Templin at 188 (internal quotations omitted). In Templin, counsel's inadequate representation was deemed prejudicial where the prospective witnesses would have

provided testimony that contradicted the testimony of the State's main witness against the defendant. Id. The Templin court noted that such testimony was particularly important "because it affect[ed] the credibility of the only witness who gave direct evidence of defendant's guilt,[and thus] affect[ed] the entire evidentiary picture." Id.

In the instant case, the testimony of the proposed witness would not only have affected the credibility of Matt Seal, with regards to Pete Montoya's location within the vehicle, but would have provided the only testimony as to who actually fired the shots that killed Kelly Seal and wounded Greg Ulibarri. Clearly, such testimony is even more critical than that described in Templin, and the failure to discover and produce this witness, or to request a continuance for the purpose of doing so, clearly constituted prejudicial error by Montoya's trial counsel.

In sum, the overall effect of counsel's error clearly and plainly prejudiced Montoya's defense, and severely "undermines confidence in the reliability of the

outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Lairby, 699 P.2d at 1205-06.

**B. The Trial Court Erred When it Denied Appellant's Motion for Directed Verdict.**

Motions for directed verdicts in criminal proceedings are governed by U.C.A., 1953, § 77-17-3 and Rule 17(o) of the Utah Rules of Criminal Procedure (U.C.A., 1953, § 77-35-17(o)). Section 77-17-3 requires the immediate discharge of a defendant "[w]hen it appears to the court that there is not sufficient evidence to put a defendant to his defense." Rule 17(o) of the Utah Rules of Criminal Procedure authorizes the dismissal of an entire information or indictment, or any count thereof, either at the end of State's evidence or at the close of all the evidence " upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense."

The standard for determining whether an order denying a motion for directed verdict is erroneous is the same as that applied by an appellate court in determining whether a jury verdict should be set aside for insufficient

evidence. Under that standard, a trial court may arrest a jury verdict when the evidence, viewed in the light most favorable to the verdict, is so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element. State v. Petree, 659 P.2d 443, 444 (Utah 1983); State v. McCardell, 652 P.2d 942, 945 (Utah 1982); State v. Romero, 554 P.2d 216, 219 (Utah 1976).

**A. Count I**

Count I charged Pete Montoya with Criminal Homicide, Murder, under Section 76-5-203 of the Utah Code, alleging that Mr. Montoya:

Intentionally or knowingly caused the death of Kelly N. Seal and/or intending to cause serious bodily injury to another, committed an act dangerous to human life that caused the death of Kelly N. Seal, and/or acting under circumstances evidencing depraved indifference to human life, engaged in conduct which created a grave risk of death to another, and thereby caused the death of Kelly N. Seal, and [that a dangerous weapon as used, giving rise to enhanced penalties.]

In reviewing all of the evidence in the light most favorable to the verdict, and all of the inferences that can reasonably be drawn from such evidence, it is clear

that the evidence that Pete Montoya was the shooter is so lacking that "reasonable minds must have entertained a reasonable doubt."

It was undisputed at trial that Russell Thornwall instigated a an altercation with the victims in this case, yelling at them, throwing up his hands, and maneuvering his truck in an aggressive manner while Pete Montoya was inside the gas station. It is undisputed that Russell Thornwall was the driver of the truck, and that Russell followed the boys as they began to leave the gas station and veered toward them, nearly colliding with them. Shots were fired from Thornwall's truck, which killed Kelly Seal and injured Greg Ulibarri, but none of the State's witnesses saw the gun or knew who had fired the gun. The following is a review of the evidence linking Pete Montoya to the shooting:

1. Presence

The evidence showed that Pete Montoya was a passenger in the red truck driven by Russell Thornwall at the time of the shooting.

## 2. Position in the truck

Although the evidence was contradictory regarding Pete Montoya's position in the truck, Matt Seal testified at trial that he saw Pete Montoya walk out of the store and get into the passenger side of the truck.

## 3. Yelling

Matt Seal testified that, at the moment when Russell Thornwall drove his truck aggressively toward the boys' Honda and nearly collided with them, he looked up and saw Pete Montoya leaning forward and yelling something, along with Russell Thornwall. He testified that he heard two or three voices yelling "pussies" and "VLT." Greg Ulibarri also testified that he heard two or three voices yelling something from the truck, both at the payphones and at the time of the near collision.

## 4. Physical Evidence

The prosecution's case relied heavily on arguments that the path of the bullets, which followed a slight right to left path, could not have been fired from the driver's side of the vehicle. Yet, the evidence regarding

the location of the truck when the bullets were fired was simply inconclusive. Although Greg Ulibarri testified that the truck was "dead center" and about 15 feet behind them when he glanced up, this was prior to the bullets being fired. Greg testified that as Kelly began to turn left, out of the exit, he heard two loud bangs. Matt testified that he saw the truck's headlights directly behind their car as they exited the gas station, and that the truck was "behind [them], off to the right a little bit," when the shots were fired. Both Matt and Greg testified that after the shots were fired they saw or heard the truck speeding off to the right of them. Clearly, the testimony of Greg and Matt merely establishes that the truck was behind them prior to the shots being fired, and the truck raced off the right after the shots were fired. The evidence does show however that the boys' car was in motion when the shots were fired, and that the truck may have been in motion when the shots were fired, and was definitely in motion immediately after the shots were fired. The testimony of Greg and Matt simply does not pinpoint the position of

the truck in relation to the car at the moment of the shooting, and thus simply does not support the State's argument that the shots had to have been fired by the passenger in order to create the slight right-to-left angle of the bullet's path. If the boys' car was turning left and the truck was veering right at the precise moment of the shooting, the right-to-left path of the bullets could have easily been attributed to the driver of the truck, or even to the middle passenger. Moreover, the location of the bullet casings, as shown in State's Exhibits 34 and 43, simply does not establish that the shots must have been fired by the front seat passenger, rather than the driver or the middle passenger.

The State also argued that Russell Thornwall could not have fired the shots while he was driving the vehicle and changing gears. But according to the testimony of Matt Seals and Greg Ulibarri, Thornwall began racing away and squealing his tires after the shots were fired and not before. It is common knowledge that there are drive-by shootings, and that drivers of vehicles are able to fire shots as they maneuver a vehicle. In this case,

Thornwall was stopped behind the boys' vehicle, and was moving slowly, if at all, when the shots were fired. Moreover the State's theory that Pete Montoya was the shooter clearly required him to lean partially out of the window to fire shots across the hood of the truck, and yet, Matt Sutoyo testified that he looked up at the moment he heard the gunshots and did not see anyone or anything hanging or leaning out of the passenger side window.

In sum, the evidence simply showed that shots were fired from Thornwall's truck, and that Pete Montoya was present in the truck and may have joined the verbal altercation in which Thornwall was engaged with the victims. The evidence simply does not implicate Pete Montoya as the shooter over the other two occupants of the truck. This is a case where the evidence "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Pedersen, 802 P.2d 1328, 1330 (Utah App. 1990).

## **B. Counts II and III**

Counts II and III charged Pete Montoya with Attempted Criminal Homicide, under Section 76-5-203 of the Utah Code, alleging that Mr. Montoya "intentionally and knowingly attempted to cause the death of Matt Seal" in Count II, and "intentionally and knowingly attempted to cause the death of Greg Ulibarri" in Count III.

As argued above, there was insufficient evidence to prove beyond a reasonable doubt that Pete Montoya was the shooter. But even assuming, for argument's sake that there was sufficient evidence to show that Mr. Montoya was the shooter, there was simply no evidence that Pete Montoya intended to kill Matt Seal or Greg Ulibarri.

The evidence, as outlined above, shows that someone in the red truck shot gunfire at the back of the Honda. Although intent can usually be inferred from circumstantial evidence, see State v. Lemons, 844 P.2d 378, 381 (Utah Ct. App. 1992) (aiming gun at victim for five to seven seconds was sufficient evidence of intent to kill), in this case there was simply no evidence

whatsoever that Pete Montoya intended to kill Matt Seal or Greg Ulibarri. As stated above, the evidence simply showed that Pete Montoya joined in a verbal altercation that was commenced by Russell Thornwall, and that someone fired gunshot at the rear of the victim's vehicle. Moreover, the evidence simply does not show that three shots were fired at the boys' car. John Campbell testified that he recovered two bullet casings from the scene of the shooting. He testified that he could not determine the number of shots fired, but that at least two, and perhaps four, shots were fired. Greg Ulibarri testified that he heard two loud bangs. Matt Seal testified that he heard two or three shots. Matt Sotuyo testified that he heard two gunshots. Clearly, at the very least, the State would have to have shown that three shots were fired in order to convict Pete Montoya of attempted homicide of Greg Ulibarri and Matt Seal. Moreover, there was no evidence that the gun was aimed at anything other than the vehicle in general.

Clearly, the evidence of Pete Montoya's intent to kill Matt Seal and Greg Ulibarri "is sufficiently

inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Pedersen, 802 P.2d 1328, 1330 (Utah App. 1990).

**CONCLUSION**

Based on the foregoing, Montoya respectfully asserts that he was wrongfully convicted of Homicide and Attempted Homicide, and requests that his conviction be vacated.

DATED this 30<sup>th</sup> day of September, 2002.



SHARON PRESTON

Attorney for Pete Montoya

**CERTIFICATE OF SERVICE**

I certify that on the 30<sup>th</sup> day of September, 2002,  
I deposited two copies of the foregoing brief in the U.S.  
mail, postage prepaid, and addressed as follows:

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SHARON PRESTON

Attorney for Pete Montoya

# **ADDENDUM A**

**76-5-203. Murder.**

- (1) As used in this section, "predicate offense" means:
- (a) violation of Section 58-37d-4 or 58-37d-5, Clandestine Drug Lab Act;
  - (b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;
  - (c) kidnapping under Section 76-5-301;
  - (d) child kidnapping under Section 76-5-301.1;
  - (e) aggravated kidnapping under Section 76-5-302;
  - (f) rape of a child under Section 76-5-402.1;
  - (g) object rape of a child under Section 76-5-402.3;
  - (h) sodomy upon a child under Section 76-5-403.1;
  - (i) forcible sexual abuse under Section 76-5-404;
  - (j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;
  - (k) rape under Section 76-5-402;
  - (l) object rape under Section 76-5-402.2;
  - (m) forcible sodomy under Section 76-5-403;
  - (n) aggravated sexual assault under Section 76-5-405;
  - (o) arson under Section 76-6-102;
  - (p) aggravated arson under Section 76-6-103;
  - (q) burglary under Section 76-6-202;
  - (r) aggravated burglary under Section 76-6-203;
  - (s) robbery under Section 76-6-301;
  - (t) aggravated robbery under Section 76-6-302; or
  - (u) escape or aggravated escape under Section 76-8-309.
- (2) Criminal homicide constitutes murder if:
- (a) the actor intentionally or knowingly causes the death of another;
  - (b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;
  - (c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another;
  - (d) (i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense; and
  - (ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense;
  - (e) the actor recklessly causes the death of a peace officer while in the commission or attempted commission of:
    - (i) an assault against a peace officer under Section 76-5-102.4; or
    - (ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer;
  - (f) commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(3); or
  - (g) the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5.
- (3) Murder is a first degree felony.
- (4) (a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:
- (i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or
  - (ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.
- (b) Under Subsection (4)(a)(i) emotional distress does not include:
- (i) a condition resulting from mental illness as defined in Section 76-2-305; or
  - (ii) distress that is substantially caused by the defendant's own conduct.
- (c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.
- (d) This affirmative defense reduces charges only as follows:
- (i) murder to manslaughter; and
  - (ii) attempted murder to attempted manslaughter.

Amended by Chapter 101, 2000 General Session

Amended by Chapter 125, 2000 General Session

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