

1998

Gilbert Loretto v. Galetka : Brief of Appellant

Utah Court of Appeals

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Appellant's Brief

Gilbert Loretto
v.

981831-CK

Gale KA

Thomas Brunke
II.

Gilbert Loretto
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FILED

JUL 26 1999

COURT OF APPEALS

TO: Clerk of The Court of Appeals

Date: 4/28/99

From: Gilbert Loretto

Re: Request for the most current pleading to be
accepted as my brief. Appellate Case No. 981831-CA

To Whom it may Concern:

I had, prior to submitting the current brief sent a brief with a Table of Contents and met all the Requirements of Rule 24. However, those documents were misplaced or lost. Therefore, I'm requesting that the most recent copy that I sent be treated as my brief. I am also for the second time requesting a Judgment on the pleadings as the State has not responded in over 75 days.

Sincerely,
Gilbert Loretto

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APR 02 1999

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JUL 12 1999

COURT OF APPEALS
IN THE SUPREME COURT OF STATE OF UTAH

Gilbert Loretto,
Petitioner/appellant

v.

Supplemental Memorandum
of Points and Authorities in
Support of Petition for Writ
of Extraordinary Relief
(Habeas Corpus R.65(C) Utah
R.C.P.)

Warden Hank Galetka
State of Utah et. al.

Case no. 981831-Sc:Ct. Of
App. 9818310 CA

981831-CA

Comes Now, Gilbert Loretto Pro Se, and respectfully submits

this supplemental Memorandum of points and authorities in support
of his petition for Writ of Habeas Corpus. This petition is in
accordance with established law and should be granted for the
following reasons.

GROUND FOR RELIEF

Under section 78-35a-104(1) unless precluded by section 78-
35a-106 or 78-35a-107, U.C.A. a person who has been convicted and
sentenced for a criminal offense may file an action in the district
court of original jurisdiction for post-conviction relief to vacate or
modify the conviction or sentence upon the following grounds. (It
should be noted Mr. Loretto has met and complied with the

requirements listed, supra).

(a) The conviction was obtained or the sentence was imposed in violation of the United States Constitution or the Utah State Constitution, (Mr. Loretto's rights were disregarded)...

(c) The sentence was imposed in an unlawful manner... The arguments contained in this brief are demonstrative of overt denial of Loretto's constitutionally guaranteed protections.

(d) The petitioner (i.e. Loretto) had ineffective assistance of counsel in violation of the United States Constitution or the Utah States Constitution ; the arguments listed, infra indicate this is an accurate assessment of what transpired in Mr. Loretto's matter.

Under section 78-35a-106 [there] exists [a] Preclusion of Relief-exception which is consistent with Mr. Loretto's current petition for extraordinary relief.

(1) A person is not eligible for relief under this chapter upon any ground that...

(c) Could have been but was not raised at trial or on appeal.

(2) Not with standing subsection (1) (c), a person may be eligible for relief on basis that the ground could have been but was

not raised at trial or on appeal, if failure to raise the ground was due to ineffective assistance of counsel. Mr. Loretto's position is that his rights have been violated as he was denied the effective assistance of counsel at trial and upon direct appeal.

The constitutionally guaranteed right of counsel encompasses the right of effective assistance of counsel both at trial and [upon] the first direct appeal of right. Evitts v. Lucey, 469 U.S.387, 105 S. ct. 830, 83 L. Ed. 2d. 821(1985); Strickland v. Washington, 466 U.S. 668, 685, 104 S. ct. 2052, 2063, 80 L. Ed. 674(1984). In State v. Dunn, 791 P.2d 873 (Utah 1990), the Utah Supreme Court referred to Robinson v. Black, 812 F.2d 1084 (8TH Cir.1987), the court in Robinson stated:

“Counsel did not act as an advocate for Robinson when he briefed all issues in favor of the government and concluded that Robinson's claims were merit less. Robinson had a right to expect counsel to brief and argue his case to the best of counsel's ability, showing the most favorable side of the defendant's arguments. Counsel changed the adversarial process into an inquisitorial one by joining the forces of the state and working against his client.”

Section 12 F.2d. At 1086-87. See also DeMorrias v. United States, 444 F.2d. 162.(8TH Cir.1971); Smith v. United States, 384 F.2d. 649

.(8TH Cir.1967). Dunn at 877. Mr. Loretto rightfully contends his counsel provided Constitutionally deficient representation which is proven by his own pro se arguments which are contained in this brief. In Dunn, the discussion was about an Anders brief which the Utah Supreme Court stated “should have included and addressed the issues that Dunn raised in his pro se brief. Like wise, Mr. Loretto should be granted the same type of deference. To be effective, attorney must play role of an advocate, rather than a mere friend of [the] court. U.S.C.A. Const. Amend. 6. State v. Holland, 921 P. 2d. 430 (Utah 1996). Unless an attorney represents the interests of a client with zeal and loyalty, the adversarial system of justice cannot operate. Holland II, 876 P. 2d. At 359 (citing United States v. Cronin, 466 U.S. 648, 656-57, 104 S. Ct.2039, 2045-46, 80L. Ed. 2d. 657(1984); Van Moltke v. Gillies, 332 U.S. 708, 725-26, 68 S. Ct. 316, 324, 90L.Ed.309(1948) (plurality opinion).

In ineffective assistance claims alleging a deficiency in attorney performance a defendant must affirmatively prove prejudice. Strickland v. Washington, 466 U.S. at 692, 104 S. Ct. at 2067; see also United States v. Cronin, 466 U.S. 648, 659, and n.24, 104 S. Ct. 2039, 2047n.24, 80L.Ed.2d. 657(1984). However in Sixth

Amendment claims based on actual denial of counsel, constructive denials of counsel, or conflicts of interest, prejudice is presumed.

Strickland (quoting) State v. Templin, 805 P.2d. 182(Utah1990).

(Emphasis added) If an attorney's loyalty is compromised because he believes that his client should be convicted or because he (she) is influenced by a conflict in loyalties to other defendants, third parties, or the government, the law cannot tolerate the risk that the attorney will fail to subject the prosecution's case to the kind of adversarial challenge necessary to insure the accused receives the effective assistance of counsel as guaranteed by the Sixth

Amendment. See Holland II , 876 P.2d. At 359-60. (quoting State v.

Holland, 921 P.2d. 430(Utah1996). Strickland recognized that

prejudice may be presumed when there has been actual or

constructive denial of counsel, when the government has interfered

with counsel's assistance, or when counsel has acted with a conflict

of interest. See Strickland, 466 U.S. at 692, 104 S. Ct. at 2067. State

v. Arguelles, 921 P.2d. 439(Utah1996). Both the United States

Constitution and the Utah Constitution guarantee persons charged

with a criminal offense the right of effective assistance of counsel to

assist in their defense. See U.S. Constitution Amendment VI; U.S.

Constitution Amendment XIV, section 7; Utah Constitution Article 1, section 12; see also Strickland v. Washington, supra; State v. Templin, 805 P.2d. 182(1990). Mr. Loretto was denied his constitutionally guaranteed right to due process and equal protection, and therefor, the Trial Court's verdict must be reversed.

Mr. Loretto has two(2) additional grounds for relief-section 78-35a-107 and section 78-35a-109.

Section 78-35a-107(2): Mr. Loretto's claims are meritorious and merit the interests of justice clause found in subsection (3) [that] if the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limits. The recent decision in the Julien case indicates no limit, and even if it did, Mr. Loretto has complied with every procedural obstacle that has been placed in his way prior to a review of the merits of Loretto's petition.

Mr. Loretto requests appointment of counsel and is entitled to do so under section 78-35a-109(1) [which states] "if any portion of a petition is not summarily dismissed, the court may, upon the request of an indigent petitioner appoint counsel on a pro bono basis.

The following arguments support each of Mr. Loretto's contentions-none of which is speculative or conclusary.

An ineffective assistance of counsel claim can properly be raised for the first time via habeas corpus when the allegedly incompetent counsel handled the trial and the direct appeal. Fernandez v. Cook, 783 P2d. 547(Utah 19989). In Dunn v. Cook, “a petitioner’s pro se petition for a writ of habeas corpus was improperly dismissed, where he alleged, in effect, that his prior direct appeal was a sham because of his counsel’s ineffective representation.” Mr. Loretto respectfully submits this supplemental memorandum with the rightful intention of avoiding an improper dismissal.

Habeas corpus is not to be used to review a final judgment arrived at through regular proceedings and due process of law by a court having jurisdiction, but is to be used to protect anyone who is restrained of his liberty where there exists no jurisdiction or authority, or where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term due process of law, or where some other circumstance exists which would make it wholly unconscionable not to reexamine the conviction. Bryant v. Turner, 19 Utah 2d. 284, 431 P.2d. 121(1967), overruled on other grounds, Dunn v. Cook, 791 P.

2d. 873(Utah1990); Gallegas v. Turner, 17 Utah 2d. 273, 409 P.2d. 386(1965). This is foursquare with Mr. Loretto's situation. Mr. Loretto argues in more detail the same issues raised by his appellate counsel as they were obviously preserved. Mr. Loretto, also adds several other issues and specifically requests the court to carefully scrutinize point 6-(i.e. Mr. Loretto was tried by a biased adjudicator). His trial counsel and appellant counsel, as officers of the court would be reluctant to address this issue, however, as stated in Holland, "to be effective, attorney must play role of an advocate, rather than mere friend of [the] court." U.S.C.A. Constitution Amendment 6. State v. Holland, 921 P.2d. 430(Utah1996). Unless an attorney represents the interests of a client with zeal and loyalty, the adversarial system of justice cannot operate. Holland II. The state of course must provide a trial before an impartial judge. Tumey v. Ohio, 273 U.S. 510, 71L.Ed. 749, 47 S. Ct. 437(1927). This type of error defies harmless error analysis. See Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed.2d. 182(1993); see also United State v. Wiles, 105 F. 3d. 1043(10TH Ci. 1996); Arizona v. Fulminante, 499 U.S. 219, 113 L. Ed.2d. 302,111 S. Ct. 1246(1991); Chapman v. California, 386 U.S. 18, 17L. Ed.2d.750, 87 S. Ct. 824, 24 A.L.R. 3d.

1065(1967); see also Rose v. Clark, 478 U.S. 570, 92 L. Ed.2d. 460, 106 S. Ct. 3101(1986). If Mr. Loretto's argument in point 6 is correct and, he provides sufficient indicia of having been tried by a biased adjudicator then the whole trial will be rendered n unreliable vehicle for the determination of guilt or innocence. This type of error requires automatic reversal in spite of over whelming evidence of guilt. See United States v. Wiles. The evidence linking Mr. Loretto to this crime was at the very best, minimal . Mr. Loretto's counsel was ineffective when this obvious issue was not briefed.

The Tenth Circuit Court recognized in United States v. Cook, 45F.3d. 388(10TH Cir.1995) that "an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a "dead-bang" winner, even though counsel may have presented strong but unsuccessful claims on appeal." Id at 395, A' dead bang "Winner is an issue which was obvious from the trial record, and would have resulted in reversal on appeal." Id. If Mr. Loretto's argument in point 6 is correct, then-this is a text book case of structural error and ineffective assistance of counsel which does not comport with due process nor equal protection which is a violation of Mr. Loretto's guaranteed Federal Constitutional privileges.

Point I. THE ENTIRE JURY PANEL WAS TAINTED BY A
PROSPECTIVE JUROR'S STATEMENT DURING VOIR
DIRE THAT APPELLANT'S HAIR AND CLOTHING
STYLE WERE LIKE THOSE OF MEXICAN GANG
MEMBERS.

During voir dire, a prospective juror, Mrs. Bingham, gave unsolicited information regarding her son who had recently committed suicide. Mrs. Bingham told the court she was prejudiced by seeing a young man, and that she was "an emotional basket case." R. 211-212. When asked if she could concentrate on the evidence, Mrs. Bingham replied:

"I'm a very emotional person. We live next door to a Mexican. I'm still upset at them in gangs and he—he dressed just like he did. I can't understand. Why can't he shave that thing off the back of his head? I'm sorry. I don't know if I could be fair. (The jury(sic) was referring to the defendant at this point).

R. 211-232. Appellant's brief at p.8. Defense counsel moved to quash the panel, but agreed to question the panel about Mrs. Bingham's comments. R. 275. Brief of Appellant at 9. The court asked the panel if anyone felt "they were influenced by those comments of Mrs.

Bingham in a way that would make it difficult for them to fair and impartial, based upon her comments?”

R.281. Appellant’s brief p.9 No one responded. R. 281. The court did not ask any additional questions. R. 281. The right to trial by an impartial jury lies at the very heart of due process. Irvin v. Dowd, 366 U.S. 717, 721-722, 81 S. Ct. 1639, 1641-1642, 6L.

Ed.2d.751(1961). Smith v. Phillips, 102 S. Ct. 940, 950. “If a single juror is improperly influenced, verdict is an unfair as if all were.”

Stone v. United States, 113 F.2d. 270(6TH Cir.1940). See also United States v. Hendrix, 549 F. 2d. 1225, 1227(9TH Cir.) Cert. Denied, 434 U.S. 818, 98 S. Ct. 58, 54 L. Ed. 2d. 74(1977). (quoting United States v. Delaney, 732 F. 2d. 639(1984).

“[O]ur common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose-to provide a fair and reliable determination of guilt” Estes v. Texas, 381 U.S. 532, 565, 85 S. Ct. 1628, 1644, 14 L. Ed.2d. 543 (1965). (Warren, C.J., with whom Douglas and Goldberg, J.J., joined, concurring). That purpose simply can not be achieved if the jury’s deliberations are tainted by bias or prejudice. Fairness and

reliability are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial. Smith 102 S. Ct. 950(1982).

In Irvin v. Dowd, the court stated:

“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, “indifferent” jurors. The failure to accord an accused a fair hearing violates the minimal standards of due process. In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682; Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749. “ A fair trial in a fair tribunal is a basic requirement of due process.” In re Murchisoh, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99L. Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or life. In the language of Lord Coke, a juror must be as indifferent as he stands unsworn. Co. Litt. 155b. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.” 366 U.S. at 727, 81 S. Ct. at 1642. After juror Bingham’s inflammatory statement, how likely is it that other jurors’ who harbored similar stereotypical preconceptions about Mexicans or “supposed” gang members would have openly voiced their bias amongst a group of strangers?

[Given] the human propensity for self-justification, it is very difficult “to learn from a jurors’ own testimony after the verdict whether he was in fact impartial.” Certainly, a juror is unlikely to admit that he had consciously plotted against the defendant during the course of the trial. Smith v. Phillips, 102 S. Ct. 940, 953(1982). Since all jurors in Mr. Loretto’s matter remained silent there is no way of surmising with a certainty that the minds of some of the jurors was not contaminated by juror Bingham’s comments. In fact, because of the additional focus and scrutiny of juror Bingham’s statement, other like-minded individuals may have chosen to remain silent. The only certain way, to insure that the jury was not prejudiced, would have been to quash the panel as requested by Loretto’s defense counsel. Mr. Loretto rightfully asserted that he was not tried in a fundamentally fair fashion.

POINT II: THERE WAS INSUFFICIENT EVIDENCE TO
ESTABLISH THAT LORETTO WAS A PARTY TO
THE OFFENSE .

This court will reverse a criminal case for insufficient evidence only, when the evidence is “sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable

doubt that defendant committed the crime.” Petree, 659 P. 2d. at 444; State v. Harmon, 767 P.2d. 567, 568(Utah Ct. App. 1989). The evidence is reviewed in the light most favorable to the verdict. Harmon 767 P.2d. at 568; Petree, 659 P.2d. at 444. The weight and credibility given to a witness’s testimony is an exclusive function of the trier of fact. State v. Lamm, 606 P.2d. 229, 231 (Utah 1980).

Despite this high standard, every element of the offense must be proved beyond a reasonable doubt. The reviewing court will not make a “speculative leap” to fill gaps in the evidence in order to sustain the verdict. Petree, 659 P.2d. at 444-45; State in re J.S.H., 642 P.2d. 386(Utah 1982); State v. Kourbelas, 621 P.2d. 1238, 1240 (Utah 1980). Brief of Appellant at 8-9.

Since there was no evidence that Loretto was guilty as a party to the crime. There was not sufficient evidence to establish that Loretto was an accomplice to the robbery. Appellants brief 9. See Henderschott v. People, 653 P.2d. 385, 390(Colo. 1982)(en banc) (stating that “in order to subject a person to criminal liability for a felony or serious misdemeanor, there must be a concurrence of unlawful act(actus reas) and a culpable mental state(mensrea) “(emphasis added), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232

(1983). In establishing the nexus between the intent and the act, “[t]he law can presume the intention so far as realized in the act, but not an intention beyond what was so realized.” State v. Castonguay, 663 P.2d. 1323 (Utah 1983) (quoting Thacker v. Commonwealth, 134 Va. 767, 114 S. E. 504, 505 (1992). State v. Winward, 909 P.2d. 909 (Utah App. 1995). Mr. Loretto was judged guilty for being at the scene of the crime. The brief of the appellee at p. 24-27 makes a number of subjective interpretations, conclusory, selective observations and makes a “speculative leap” when stating, “Admittedly, defendant said nothing intelligible to Ms. Flores, did not threaten her with a weapon, and did not take money from her himself.” These are objective facts which indicate no culpable behavior by Loretto as stated by the assistant attorney general, prior to conjecturing in the next sentence. [that] “Never the less, the jury could reasonably conclude that the defendant aided the man with the knife.” It is just as reasonable that because of juror Bingham’s prior comments about Mexicans and gangs, the jury drew inferences which did not exist-as no real evidence connected Mr. Loretto to the actual commission of the crime, other than being present. There was insufficient evidence to establish that Loretto was an accomplice to

the robbery.

An accomplice is a person who knowingly, voluntarily, and with common intent with the principle offender, unites in the commission of the crime. The cooperation in the crime must be real, not merely apparent. Mere presence combined with knowledge that a crime is about to be committed or a mental approbation while the will contributes nothing to the doing of the act, will not of itself constitute one an accomplice. State v. Fertig, 233 P.2d. 347,349, (Utah1951). Appellant's brief p.17. Both Appellant and appellee make argument with respect to State v. Wood, 868 P.2d.70 (Utah1993). The case is distinguishable and tangential to Mr. Loretto's matter and was a waste of legal "sparring" because of irrelevance.

It is quite possible that the ineffective representation of Mr. Loretto was because the State government prevented his counsel from fully and zealously representing Loretto because of loyalties owed to Third (3) parties(e.g. The Prosecution and The Utah Department of Corrections). See Holland II in point I supra.

POINT III: THE TRIAL COURT GAVE VERDICT URGING
“ALLEN” INSTRUCTIONS TO THE JURY WHICH
MISLED THEM AND CONSTITUTED A DIRECTED
VERDICT FOR THE STATE.

“Dynamite” instructions are grounds for reversal because of their strong coercive effect on the jury. Allen v. United States, 164 U.S. 482, 41 L. Ed. 528, 17 S.Ct. 154 (1896). A trial judge in a criminal case is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict regardless of how over whelmingly the evidence may point in that direction; this rule stems from the Sixth Amendment’s command to afford jury trials in serious criminal cases; where the right is altogether denied, the state cannot contend that the deprivation was harmless error because the evidence established the defendants guilt; the error in such a case is that the wrong entity judged the defendant guilty. Rose v. Clark, 478 U.S. 570, 92 L. Ed.2d. 460, 105 S. Ct. 3110. (1986). As is constantly pointed out in both this brief and the previous brief of the appellants and appellee, the evidence linking Mr. Loretto to the crime was minimal, at best. The verdict rendered in this matter was a result of a misguided jury that was exposed to extraneous evidence,

as well as erroneous verdict urging instructions.

Generally, district court abuses its discretion when it bases its decision on erroneous view of law or clearly erroneous assessment of facts. United States v. Rahm, 993 F.2d. 1403(9TH Cir.1993).

Whether district court's instructions to jury misstated elements of statutory crime is reviewed de novo. United States v. Shabani, 993 F.2d.1419(9TH Cir.1993). A new trial is warranted if, taken as a whole, jury instructions give misleading impression or inadequate understanding of law. Ball Banking Corp. v. U.P.G. Inc., 985 F.2d. 685(2ND Cir.1993). The manner in which the jury was instructed in Loretto's matter is at odds with the aforementioned case law.

At the states request, the trial court gave the statutory definition of robbery to the jury in instruction 14 in addition to the elements instruction, number 15. R. 150-151, 362-63. The state was not entitled to have the jury instructed on the elements of robbery twice. In State v. Clayton , 646 P.2d. 723,725(Utah1982). The court held that the defendant was not entitled to essentially two instructions on reasonable doubt because repeating the instruction had the effect of over emphasizing one point in the trial and was there for potentially misleading. Similarly, in State v. McCumber, 622

P.2d. 353,359(Utah1980). The court held that “a defendant is not entitled to an instruction which is redundant or repetitive of principles enunciated in other instructions given to the jury.”

Just as the defendant is not entitled to repetitious instructions, the state is like wise not entitled to repetitious instructions. Repetition of a jury instruction tends to place undue emphasis on a particular point or unduly highlight certain evidence. State v. White, 658 P.2d. 1111, 1115(Mont.1983). Emphasizing one issue theory or defense by repetition has the added effect of minimizing the importance of other evidence and issues. White Auto Stores v. Reyes, 223 F.2d. 298, 305(10TH Cir.1955).

A jury that receives a constitutionally flawed, burden-shifting instruction on intent (of what constitutes an accomplice) is, in effect, directed to return a verdict against the defendant. Connecticut v. Johnson, 460 U.S.37,95, and n3,74L. Ed.2d. 823,103 S. Ct.969(1983)(Powell J. dissenting). “Because a jury is the primary finder of fact, a trial judge is prohibited from entering judgment of conviction or directing the jury to come forward with such a verdict... regardless of how overwhelming the evidence may point in that direction, “Ibid., quoting United States v. Martin Linen

Supply Company, 430 U.S. 564, 572-573, 51 L. Ed.2d 642, 97 S. Ct. 1349 (1977). The erroneous instruction invites the jury to abdicate its constitutional responsibility to decide for itself whether the state has proved every element of the offense beyond a reasonable doubt. It is likely the jury will accept this invitation because “there is no reason to believe the jury would have undertaken the more difficult task” of evaluating the evidence of intent, when offered the opportunity simply to rely on presumption. The jury’s central obligation under Due Process Clause is to determine whether the state has proved each element of the offense beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 61 L. Ed.2d 39, 99 S. Ct. 2450 (1979); Connecticut v. Johnson, 460 U.S. at 85, 74 L. Ed.2d 823, 103 S. Ct. 969 (plurality opinion). When a defendant [questions] the issue of intent, a reviewing court will rarely be capable of deciding whether the error contributed to the verdict; it will have no way of knowing how the jury treated the question of intent. See Sandstrom, 442 U.S., at 526, 61 L. Ed.2d 39, 99 S. Ct. 2450; Court of Ulster County v. Allen, 442 U.S. at 175-176, 60 L. Ed.2d 777, 99 S. Ct. 2213 (Powell J., dissenting). “[A]n erroneous presumption on a disputed element of the crime

renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon the evidence. “Connecticut v. Johnson, 460 U.S. at 85, 74 L. Ed. 2d 823, 103 S. Ct. 969 (plurality opinion). The ordinary view is that a jury adheres to the instructions, Parker v. Randolph, 442 U.S. 62, 73, 60 L. Ed. 2d 713, 99 S. Ct. 2132 (9179) (plurality opinion), and there is no reason to believe that the “lay jury will know enough to disregard the judge’s bad law if in fact he misguides them.” Bollenbach v. United States, 326 U.S. 607, 613-614, 90 L. Ed. 350, 66 S. Ct. 402 (1946). Rose v. Clark, 478 U.S. 570, 92 L. Ed. 2d 460, 106 S. Ct. 3101. This argument when considered along with Loretto’s arguments on direct appeal clearly shows Loretto was denied a fair trial.

POINT IV: THE COURT REFUSED A REASONABLE
ALTERNATIVE INSTRUCTION-THERE BY,
PREVENTING LORETTO FROM PRESENTING HIS
DEFENSIVE THEORY OF THE CASE.

As a preliminary matter it should be noted that” [A] litigant is entitled to have the jury instructed as to his claims and theories of law if supported by the evidence and brought to the

attention of the court... It does not matter that the evidence was minimal or was presented in a piecemeal fashion. All that is necessary is that there be some evidence supporting a party's theory of the case. Carvel Corp. v. Diversified Management Group Inc., 930F.2d.228(2ND Cir.1991). Ball Banking Corp. v. UPG Inc., 985F.2d.685(2ND Cir.1993). In United States v. Hunt, it was determined that a "Trial judge's refusal to deliver requested instruction constitutes reversible error only if instruction is substantially correct, and is not covered in charge actually given to the jury, and it concerns important point in the trial so that failure to give it seriously impairs defendant's ability to present a given defense effectively. 794F.2d.1095(5TH Cir.1986). This is four square with the fashion in which Mr. Loretto was tried and does not comport with Due Process. In reviewing jury instructions, appellate court must consider all that jury heard and, from the standpoint of the jury decide not whether the charge was faultless in every particular, but whether the jury was misled in any way and whether it had understanding of those issues and its duty to determine those issues; the reviewing court must look at the jury instructions as a whole to determine

whether when, taken together, they properly state the [governing law.]

Robinson v. Audi NSU Auto Union, 739F.2d.1481(1984).

One of the rightful boasts of western civilization is that the state has the [sole] burden of establishing guilt solely on the basis of evidence produced in court and assuring an accused all the safe guards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind eradicably poisoned against him. Patton v. Vount, 104S. Ct.2884,2900(1984).

Mr. Loretto submits this argument along with the argument submitted on direct appeal in support of his position.

POINT V: THE TRIAL COURT ERRED BY REFUSING TO GRANT
THE APPELLANT A CONTINUANCE SO COUNSEL
COULD ADEQUATELY INVESTIGATE THE CASE BY
INTERVIEWING A POTENTIAL DEFENSE WITNESS.

Mr.Loretto stands on the argument presented in his direct appeal.

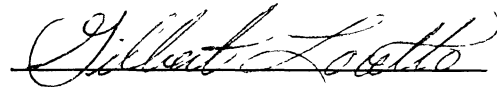
POINT VI: MR. LORETTO WAS NOT TRIED BY AN
IMPARTIAL TRIBUNAL, BOTH THE COURT AND
JURY LACKED IMPARTIALITY.

The previous five points support Loretto's position that he was not afforded a fair trial. Point 1. The entire jury panel was tainted by a prospective juror's statement during voir dire that Appellant's hair and clothing style were like those of Mexican gang member. Point 2: There was insufficient evidence to establish that Loretto was a party to the offense as pointed out by both the assistant attorney general and Loretto's appellate counsel, *supra*. Point 3: The trial court gave verdict urging "Allen" instructions to the jury which misled them and constituted a directed verdict for the state. "A trial judge in criminal case is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict regardless of how overwhelming the evidence may point in that direction. Rose v. Clark, 478U.S. 570, 92L. Ed.2d. 460, 106S. Ct. 3101(1986). Point 4: The court refused a reasonable alternative instruction-there by , preventing Loretto from presenting his defensive theory. This act was fundamentally

unfair, when considered with the coercive instructions allowed on behalf of the state, insured conviction of Mr. Loretto, not withstanding the minimal evidence of culpability. Point 5: The trial court erred by refusing to grant a continuance so counsel could adequately investigate the case by interviewing a Potential Defense Witness. The court's actions obviously favored the state and rendered Mr. Loretto's defense a mockery and sham. Point 6: Mr. Loretto was not tried by an impartial tribunal-both court and jury lacked impartiality. The state [must, of course] provide a trial before an impartial judge. Tumey. This has not been done in Mr. Loretto's matter. "When a trial judge is discovered to have some basis for rendering a biased judgement, his actual motivations are hidden from review, and the [U.S.] Supreme Court must presume that process was impaired. Vasquez v. Hillery, 106 S. Ct. 617 (1986).

Wherefore, I, Gilbert Loretto respectfully request the court to grant my petition for Writ of Habeas Corpus.

I certify that I mailed a true and correct copy of this supplemental memorandum of points and authorities to the Utah Supreme Court and the Utah Attorney General this 7th day of July 1999.

A handwritten signature in cursive script, reading "Gilbert Loretto", written over a horizontal line.

Gilbert Loretto, Pro Se