

1999

# Utah v. Justin Cunningham : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS  
FOR THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff/Appellees, : Case No. 990959-CA  
v. :  
JUSTIN CUNNINGHAM, : Priority 2  
Defendant/Appellant. : Appellant in custody

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BRIEF OF APPELLANT

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APPEAL FROM A CONVICTION ON TWO COUNTS OF VIOLATION OF UTAH CODE ANNOTATED §76-5-103, AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, ONE COUNT OF A VIOLATION OF UTAH CODE ANNOTATED §76-10-504, CARRYING A CONCEALED DANGEROUS WEAPON, A CLASS A MISDEMEANOR, AND ONE COUNT OF VIOLATION OF UTAH CODE ANNOTATED §76-10-505 , CARRYING A LOADED FIREARM IN A VEHICLE, A CLASS B MISDEMEANOR, IN THE EIGHT JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, THE HONORABLE JOHN ANDERSON PRESIDING.

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**FILED**

Utah Court of Appeals

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

JUN 15 2000

Julia D'Alessandro  
Clerk of the Court

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BRIEF OF APPELLANT

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**JURISDICTION**

This is an appeal on behalf of Justin Cunningham from a jury trial conviction of two counts of a violation of Utah Code Annotated §76-5-103, Aggravated Assault, a Third Degree Felony, one count of a violation of Utah Code Annotated §76-10-504, Carrying a Concealed Dangerous Weapon, a Class A Misdemeanor, and one count of a violation of Utah Code Annotated §76-10-505, Carrying a Loaded Firearm in a Vehicle, a Class B Misdemeanor, in the Eighth Judicial District Court, in and for Uintah County, the Honorable John R. Anderson presiding.

This Court obtains jurisdiction to review the appeal pursuant to Utah Code Annotated §78-2a-3(2)(f)(1953) and Rule 3(a) of the Utah Rules of Appellate Procedure.

**STATEMENT OF THE ISSUE**

Court Appointed Appellate Counsel, Julie George has reviewed the trial court file, the Court of Appeals file, the transcripts

of the Preliminary Hearing, Trial and Sentencing and has determined that any issue that the Defendant/Appellant Mr. Cunningham would wish to raise on appeal would be frivolous and therefore counsel will present in the brief any issues that may have been preserved for review on appeal and file this brief as one defined in Anders v. California, 386. U.S. 738 (1967).

In order to comply with the elements required by this Court for filing an Anders brief, counsel must do the following:

1. Review the trial court documents and transcripts in keeping with a role of an active advocate on behalf of the client with interests and loyalty to the client rather than to the court.

2. Support the client's appeal to the best of the attorney's ability.

3. In preparation of the case if the appeal is wholly frivolous, after a conscientious examination of the entire case, counsel should so advise the court and request permission to withdraw.

4. Along with a Motion to Withdraw counsel must file a brief referring to anything in the record that might arguably support the appeal.

5. A copy of counsel's brief should be furnished to the Defendant/Appellant and time allowed to the Appellant to raise



any points that he chooses.

6. Once the brief has been filed and the time has expired for the Appellant to comment or brief the case, the Court, after a full examination of all the proceedings, will decide whether the case is wholly frivolous.

7. Only when the Court determines the appeal is indeed frivolous, the Court may grant counsel's request to withdraw and dismiss the appeal.

8. If this Court decides that the appeal is not frivolous and that any of the legal points have merit (and therefore not frivolous) it must, prior to decision, afford the Appellant the assistance of counsel to argue the appeal by way of full briefing of the issues.

State v. Clayton, 639 P.2d 168, 171 (Utah 1981), citing Anders.

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

Defendant/Appellant Justin Cunningham was charged by way of information on September 12, 1997 two counts of a violation of Utah Code Annotated §76-5-103, Aggravated Assault, a Third Degree Felony, one count of a violation of Utah Code Annotated §76-10-504, Carrying a Concealed Dangerous Weapon, a Class A Misdemeanor, one count of a violation of Utah Code Annotated §76-10-505, Carrying a Loaded Firearm in a Vehicle, a Class B

Misdemeanor, and one count of a violation of Utah Code Annotated §76-10-503(1), Possession of a Dangerous Weapon, a Third Degree Felony. (R. 1-2)

A jury trial was commenced on January 6, 1998, at which time the court dismissed one count of a violation of Utah Code Annotated §76-10-503(1), Possession of a Dangerous Weapon, a Third Degree Felony, and the jury found Mr. Cunningham guilty of two counts of a violation of Utah Code Annotated §76-5-103, Aggravated Assault, a Third Degree Felony, one count of a violation of Utah Code Annotated §76-10-504, Carrying a Concealed Dangerous Weapon, a Class A Misdemeanor, one count of a violation of Utah Code Annotated §76-10-505, Carrying a Loaded Firearm in a Vehicle, a Class B Misdemeanor. (R. 94-97 & 136-39) On January 27, 1998 the Honorable John R. Anderson sentenced Mr. Cunningham to an indeterminate term of not more than five years for both Third Degree Felonies, One year on the Class A misdemeanor, and six months for the Class B Misdemeanor, with all sentences to run concurrent. (R. 144-46 & 148-50)

Following an extensive period of time during which the defendant did not have the assistance of counsel to proceed with his appeal and in the interest of justice, the Defendant was re-sentenced on September 24, 1999. (R. 190-91 & 194-96) A notice of Appeal was filed on behalf of the Defendant by attorney Julie

George on November 4, 1999. (R. 206)

On December 5, 1999, Appellate counsel filed the Docketing Statement in this matter which included statements to the effect that Appellate Counsel was not trial counsel in this matter and required additional time to review transcripts of the proceedings in this matter before making a final determination of the potential appeal issues in this matter and requested that counsel be granted permission to amend the docketing statement in order to ensure that all possible, legally relevant issues are brought to the attention of the court.

The trial transcripts were then sent to the court of appeals and appellate counsel requested an extension of time in order to secure a copy of the preliminary hearing transcript which had not been prepared and forwarded. Having now had an opportunity to read and review all transcripts, it is the opinion of appellate counsel that any issues to be brought would be frivolous and therefore hereby files this Anders brief and Motion to Withdraw.

In the event this Court accepts the brief and allows Mr. Cunningham the opportunity to comment on the brief or file his own brief, counsel requests that Mr. Cunningham be granted at least (20) twenty days in which to respond.

### RELEVANT STATUTES AND REGULATIONS

There are no relevant statutes or regulations relevant to the issues raised on appeal other than those jurisdictional provisions already cited in the brief.

### STATEMENT OF FACTS

Defendant/Appellant Mr. Justin Cunningham (hereafter referred to as Cunningham) was charged by way of information on September 12, 1997 with two counts of a violation of Utah Code Annotated §76-5-103, Aggravated Assault, a Third Degree Felony, one count of a violation of Utah Code Annotated §76-10-504, Carrying a Concealed Dangerous Weapon, a Class A Misdemeanor, one count of a violation of Utah Code Annotated §76-10-505, Carrying a Loaded Firearm in a Vehicle, a Class B Misdemeanor, and one count of a violation of Utah Code Annotated §76-10-503(1), Possession of a Dangerous Weapon, a Third Degree Felony. (R. 1-2)

Cunningham was charged based on the statements of several witnesses that stated that on the night of September 10, 1997, they had a confrontation with Mr. Cunningham at their home during which he brandished a handgun, pointed it in their direction and threatened them. The police were called and given a description of Cunningham and the truck he had left in. The truck was located by police a short time later and was stopped. Following

the stop police identified the driver as Steven Holmes and the passenger as Justin Cunningham. At the time of the stop, the driver immediately surrendered a .22 caliber pistol to officers and the truck was later searched revealing another handgun on the seat between the driver and passenger under several articles of clothing. The gun, a Llama .38 special, had one round in the next cylinder to fire. The .38 special was taken into evidence and the victims, Jeremy Colton and Dusty Colton, were brought to the scene of the stop where they positively identified Justin Cunningham as the individual who had threatened them with the gun just minutes before. Cunningham was arrested and charges were filed. (R. 1-2)

A preliminary hearing was held on November 19, 1999 and after hearing testimony from Jeremy Colton, Dusty Colton, Officer Eric Redd, Steve Holmes, Officer Shawn Lewis, and Officer John Laursen, it was the determination of the court that there was sufficient evidence to send the case to a jury and the case was bound over for trial. (Transcript of Preliminary Hearing, hereafter designated as "PL T.", PL T. 71-72) The court gave the case a second place setting for a jury trial on January 6-7, 1998 (PL T. 77) and a first place setting on March 16-17, 1998. (PL T. 76) Counsel then requested that she be given notice at least ten days notice if the case were to be tried on January 6 & 7<sup>th</sup> to

allow time to subpoena witnesses and prepare. (PL T. 77)

Defense counsel was notified on or about December 22, 1997 that the case was going to be tried on January 6-7. Counsel immediately prepared subpoenas to all defense witnesses and a Motion and Order for Transcripts requesting a transcript of the Preliminary Hearing was sent on December 24, 1997. (R.??) Due to the holidays the request was not received until December 29<sup>th</sup> and a copy of the preliminary hearing transcript was not provided prior to the trial date. According to the court clerk, defense counsel's secretary was notified by phone that the trial would go forward on the second place setting on or about December 14<sup>th</sup> but there is no record of the date this call was made or received. (Transcript of Trial, hereafter designated as "T", T. 15-18)

Prior to the trial on January 6<sup>th</sup>, defense counsel made a motion to continue the trial and that motion was denied. The court allowed defense counsel an opportunity in chambers to argue her motion for continuance and to preserve this issue on the record. (T. 15) Defense counsel argued that she had not received proper notice that the trial would go forward on the second place setting and could not proceed without a copy of the preliminary transcript. (T. 15-16) Defense counsel argued that a transcript of the preliminary hearing was necessary for proper cross examination. The court stated that it had denied the motion

because the request for transcript was too late. (T. 15-18)

A jury was selected and the jury trial commenced on the morning of January 6<sup>th</sup>. There are no issues to be raised with regard to the jury members or their selection.

The first witness called by the state was, Jeremy Colton. Jeremy Colton testified that he was standing outside his home at 148 W. 100 S. in Vernal at approximately 12:00 midnight on September 10, 1997, when he saw a white truck pull up next door and a man got out and walked to the apartment two doors down from his house. He stated that the man, later identified as the defendant, Justin Cunningham, turned to him as he was walking back to his car and asked him "What the fuck are you looking at." Jeremy replied by asking Cunningham "Are you the one who was fucking with my brother?" A verbal confrontation ensued when finally Jeremy Colton's father, Dusty Colton, came out of the house and grabbed Jeremy and began pushing him back towards the house. (T. 93-94) It was at this time that Mr. Cunningham reached behind his back and pulled out a weapon and threatened Jeremy and Dusty. (T. 97)

Jeremy identified Justin Cunningham in the courtroom as the individual who was at the apartment that evening and threatened him. (T. 95) On direct examination by the state Jeremy testified that he had seen Cunningham raise his arm but did not see the

gun. (T. 96) The prosecutor then referred him to the written statement he had prepared the night of the incident which stated that "He[Cunningham] reached to his back and grabbed a gun and pointed it at me and my father." (T. 97) When asked why he put this in his statement Jeremy replied that he "was making the assumption he pulled a gun when I only saw his arm lift up." (T. 98) The defendant then ran back to the truck and jumped in the passenger's side of the truck and it drove away. (T. 98)

On cross examination by defense counsel Jeremy testified that his brother had had an altercation earlier in the evening with the people who live in the apartment that Cunningham had gone to and that he had yelled at Cunningham. (T. 99) He again stated that he did not know if Cunningham had a gun. (T. 104)

The next witness called was Amanda Colton, Jeremy's mother. Mrs. Colton testified that she was inside the house when she heard her husband yelling at another person outside and that person yelling back and she went out on her front porch. (T. 106)

She heard her husband mention something about a gun and looked over at the other person who had his arm up and a gun in his hand. (T. 106) Her husband had his hand up as if to say stop and he was trying to get Jeremy back in the house.

Mrs. Colton pointed out the defendant in the courtroom as the man who had the argument with her son and husband. (T. 108)



She stated that she saw the gun as her husband was yelling to put the gun down and the person was pointing it toward her son and calling him an "m-effer." (T. 108) Mrs. Colton stated that "It looked kind of like a toy gun almost, but it was dark. It was a dark colored gun. Couldn't see the handle or nothing, but I could see the part that was sticking out about that far in his hand." (T. 108) In her estimation she was 40 to 50 feet away from the Defendant. She went back into the house and called 911. (T. 110)

On cross examination, Mrs. Colton testified that when she initially came outside the house she did not see anything in anyone's hand, not until after she heard her husband say there was no reason for a gun or something to that extent. (T. 112) She also stated that she surveyed the scene so she could give the police an accurate description at which time she did not notice anyone out there except for her son, Jeremy, her husband, Dusty, and man who threatened them. (T. 112)

On redirect, she testified that she did see a gun, a barrel but not the handle. Upon being shown the gun that was taken into evidence from the vehicle in which the defendant was a passenger, Mrs. Colton stated that the gun was similar to what she saw. (T. 113-114)

Following the midday lunch break the court addressed the

issue of whether or not a juvenile conviction received by Cunningham was a prior conviction for purposes of meeting the statutory requirement for those being restricted to carry a firearm. After hearing argument from both parties the court determined that the prior juvenile conviction did not meet the requirement of the statute and the charge of Possession of a Dangerous Weapon, in violation of Utah Code Annotated §76-10-503(1), was dismissed. (T. 201)

The state next called Dusty Colton, Jeremy Colton's father. Mr. Colton testified that he heard his son arguing with someone outside and when he went out he saw his son arguing with the Defendant, Justin Cunningham. (T. 130-131) He went out to bring Jeremy back into the house when Cunningham asked him if "he had a problem" and threatened to "take care of it right now." Mr. Colton then stated that he was pushing Jeremy back towards the house when he turned back to Cunningham to tell him to let things go when he noticed him reach up and pull something out of his back which he at first thought was a knife. (T. 135) He testified that Cunningham brandished a gun and said "I'll kill you right now." At this time he estimated he was approximately 21 feet from the Cunningham. Mr. Colton testified that he was certain that he saw a gun. (T. 139) He pushed Jeremy harder towards the house and Cunningham got back in the truck and left.

He also stated that during this time he had tried to maintain a position between Jeremy and Cunningham which may possibly have blocked Jeremy's view. (T. 140) Mr. Colton was unable to positively identify the gun that was taken into evidence as the gun that Cunningham pointed at him only that he saw the flash of the barrel. (T. 141)

During cross examination defense counsel referred Mr. Colton to his testimony at the preliminary hearing but due to the fact that she did not have a copy of the preliminary hearing transcript she was not able to give him a copy to refresh his memory of his testimony or to compare with his trial testimony for accuracy. When asked if he recalled testifying that he saw a flash of light on something, Mr. Colton replied "I am saying I saw a flash of light on a gun barrel." (T. 144) Despite his testimony that he clearly saw the gun, Mr. Colton also testified that it was a dark night. (T. 145)

Officer Eric Redd of the Vernal City Police was called next. Officer Redd was originally dispatched to the Colton residence following the incident. Officer Redd testified that the statements made by Dusty, Amanda, & Jeremy Colton in court were consistent with what they told when he initially arrived at the scene. (T. 151) While interviewing the victims, Officer Redd heard a call over the radio that the suspect vehicle had been

located. Officer Redd was asked to identify the hand gun that was taken into custody and the Federal .38 special cartridge taken from the gun and both were tagged and entered into evidence. Officer Redd testified that he came in possession of these items after the truck was searched and they were given to him by Officer Shawn Lewis. (T. 154)

On cross examination Officer Redd admitted that he did not take notes that night when he interviewed the alleged victims. (T. 155)

Officer John Laursen was also on duty that night. He testified that he heard the call of an altercation involving a firearm and a description of the vehicle that the perpetrator had left in. He then observed a vehicle matching the description and made the stop. (T. 158) He approached the vehicle and the driver, Steven Holmes, surrendered a .22 caliber pistol. He asked if there were any other guns in the vehicle and the driver said "not to my knowledge." When the other officer's arrived he got consent from the driver to search the vehicle and found a Llama .38 special on the front seat between the driver and passenger under several pieces of clothing. (T. 160)

Officer Laursen identified Justin Cunningham in the courtroom as the passenger and positively identified the handgun marked as Exhibit 1 and cartridge marked as Exhibit 2 as the gun

and cartridge he found in the truck. (T. 161)

The state then called the driver of the truck, Steven Holmes. Mr. Holmes testified that he had picked up the Defendant earlier that night near the top end of Main Street in Vernal near the car wash and offered to give him a ride to the apartment. He stated that he pulled up to the apartment and Cunningham got out.

He waited in the truck while Cunningham went to the door and then he noticed Cunningham yelling at somebody next door. He couldn't hear the conversation because his windows were up but could tell they were arguing. (T. 167-68) He testified that he did not see Cunningham pull a gun. (T. 168) He also testified that he saw three, four, maybe more people coming out of the house next door and Cunningham jumped in the truck and they drove away.

When questioned by the prosecutor, Holmes testified that he did give officers a written statement in which he wrote that "He" referring to Cunningham, "pulled out a gun, it looked like." (T. 176) Holmes testified that he did not see Justin with a weapon while in his truck and the .38 special found in the truck by the officer belonged to his friend Jeff Farley. He stated that he and Farley often go target shooting together and that Farley and he had been out several days earlier and Farley had left the gun in his truck by accident. (T. 179-80) Holmes testified that at

no time did he see Cunningham take the gun from the truck and that he did not appear to have anything in his hand when he jumped into the truck after the argument with the Colton's. (T. 180-84)

Officer Shawn Lewis was the last witness to be called by the State. Officer Lewis assisted in securing the truck after it was pulled over by Officer Laursen. Officer Lewis also identified the defendant as the passenger in the truck. (T. 190)

Officer Lewis stated that when he questioned Steven Holmes following the stop, Steven told him that he had picked Cunningham up and drove him to the apartment. He waited in the car while Cunningham went up to the apartment and he then saw Cunningham arguing with a neighbor. Cunningham then jumped into the truck and told him to get out of there and take the back roads. (T. 191) Officer Lewis also asked Holmes if there were any other firearms in the vehicle and he gave an uncertain response. When told it was a yes or no answer Holmes told Officer Lewis that "yes" there was another pistol in the car. (T. 192-93.)

Officer Lewis also identified the gun and cartridge marked as Exhibits 1 & 2 as the ones that were found in the truck. (T. 194) He also stated that Dusty & Jeremy Colton were brought to the scene where the truck was stopped and they made a positive identification. (T. 195)

On cross examination defense counsel elicited from Officer Lewis that during his conversation with Steve Holmes, Holmes told him that when the confrontation took place at the apartment, he saw Justin pull something from behind his back and that he assumed it was a gun. (T. 198)

Following Officer Lewis's testimony the state rested. The court then recessed. Upon returning and out of the presence of the jury, the court heard testimony from Bruce Christofferson, to determine if he was a competent witness. The state objected arguing that Mr. Christofferson's testimony was irrelevant and he had no direct knowledge of the events that occurred at or around 12 midnight on September 10, 1997. (T. 205-08) Defense counsel argued that even though he did not have direct knowledge of the incidents which occurred that night between Jeremy Colton and Justin Cunningham, he could testify as to the altercation that had occurred between the Colton's and the residents of the apartment earlier that evening which could be used to establish the mental and emotional state of the Colton family when Cunningham arrived. (T. 204-08)

Christofferson testified out of the presence of the jury that he had dropped Cunningham off at the apartment earlier that night at approximately 5:30 p.m. Afterwards he and another friend went back to the apartment at about 10:00 p.m. and they

were chased away by the several people who were at the Colton residence including Jeremy Colton, Chris Whitmore, and Larry Shostrom. (T. 210-13) After hearing his testimony the court determined that Mr. Christofferson's testimony would simply confuse the jury and his testimony was excluded as not relevant. (T. 216)

The first witness called by the defense in the presence of the jury was Jeff Farley. Mr. Farley testified that he owned several pistols, including the Llama .38 special found in Steve Holmes's truck on the night Cunningham was arrested. (T. 222-23)

Mr. Farlery testified that he had last seen the gun a couple weeks prior to hearing that the gun was taken into custody. (T. 224) He stated that he had gone target shooting with Steve Holmes and he must have accidentally left it in Steve's truck. He often left guns at Mr. Holmes's home so he didn't really notice that this one was missing. (T. 225) Farley also testified that the last time he was in Steve's truck, the same time he had left the gun, he placed the gun on the passenger side of the seat and Holmes had several items of clothing laying on the seat. (T. 226-27)

On cross examination by the state, Farley admitted that he was not with the defendant at midnight on September 10<sup>th</sup> nor had he been in Holmes's truck that day. As such, he did not have



control over who used the gun. (T. 227) He further stated that he was friends with both Cunningham and Holmes. (T. 229) He was not present at the time the incident involving Cunningham occurred nor did he see whether or not Justin took the gun and pointed in at someone. (T. 231)

Following Mr. Farley's testimony, the court recessed for the day. After the jury had been dismissed for the day, on the record in chambers the judge and counsel discussed remedying the jury instructions to eliminate any reference to the charge that the court had dismissed.

Prior to bringing in the jury the following morning, counsel met with the judge in chambers to discuss the introduction of a defense witness, Larry Shostrom, who had not been placed on the defense's witness list. The attorney for the state objected to his being allowed to testify on the grounds that the state had another witness who would testify that Mr. Shostrom was not present at the Colton home at midnight on September 10<sup>th</sup> and therefore had no personal knowledge of the events. (T. 242-43)

The court then heard testimony from Larry Shostrom out of the presence of the jury. Mr. Shostrom testified that he was at the Colton residence when Cunningham pulled up standing by the Colton's porch with Jeremy and Dusty. (T. 247-48) He stated that Cunningham got out of the vehicle and "started walking towards

the apartment when Jeremy and Dusty started going after him, talking mess to him." (T. 249) Shostrom also testified that he was uncertain of the amount of time that had passed between the earlier incident and the incident involving Cunningham. (T. 250) Nonetheless, he testified that when Cunningham arrived, Jeremy and Dusty moved towards Cunningham and started yelling at him. (T. 251) Shostrom testified that he did not remember Cunningham saying anything to the Colton's and Cunningham jumped back in the truck and they took off. (T. 251) Shostrom did say that he spoke to the police when they arrived and he had told them that he and Jeremy Colton had chased the truck down the street even though it was really Chris Whitmore who had chased after the truck on foot. (T. 251-52) He also testified that he was quite certain that he had spoken with the police on two separate occasions that evening, once when they came after the incident with the red 4-Runner and again after the incident involving Cunningham. (T. 254) Shostrom also admitted that he had a three or four beers that night but that he wasn't drunk. (T. 255)

The prosecution then called Officer Eric Redd, again this was out of the presence of the jury. Officer Redd testified that he was on duty the evening of September 10<sup>th</sup> and he responded to the Colton residence that evening at approximately 10:00 p.m. after there was a report of two vehicles racing around the block.

(T. 259) He recalled speaking with both Larry Shostrom and Jeremy Whitmore at that time and they described the incident involving the red vehicle. (T. 260) Officer Redd then testified that he also went to the home of the Colton's later that evening to investigate the alleged aggravated assault and at no time during this investigation did he speak with Larry Shostrom or notice that Mr. Shostrom was present. (T. 261-62)

Jeremy Colton was then recalled by the prosecution and he testified that Larry Shostrom was not present when Cunningham arrived around midnight and that Shostrom did not speak to the police following the incident with Cunningham. (T. 263-64)

On cross examination Jeremy admitted that Larry Shostrom was present when the officers arrived the first time. He then testified that shortly after the cops left the first time he and Larry had carried Chris Whitmore across the street to Larry's apartment and Larry was not at the Colton's when Cunningham was there. (T. 265-66)

The state then recalled Dusty Colton and he too testified that Larry Shostrom was not at his home when Cunningham arrived. (T. 267) He did however testify that there were several other people in the house that night, including his daughter Kathy Garrett, her husband, Rob Garrett, and several of their grandchildren, but Larry Shostrom was not there. (T. 268-69)

On cross examination by defense counsel, Dusty stated that Marci Allred was across the street at the apartment where Larry Shostrom was staying. (T. 269-70) On re-direct Dusty again stated that Larry Shostrom was not present the second time the police came. (T. 272)

The next witness called by the plaintiff was Marci Allred. Ms. Allred confirmed that she was familiar with the events that had occurred earlier that evening involving the chase with the red vehicle but that at the time Cunningham arrived she was across the street at Adam Smuin's apartment with Larry Shostrom. She stated that she was certain that Larry Shostrom was at the apartment from around 11:00 p.m. to 1:30 p.m. (T. 273)

The last witness called by the state with regard to the testimony of Larry Shostrom was Kathy Garrett. Mrs. Garrett testified that Larry Shostrom was at the Colton home that night the first time the officer's arrived but that he was across the street when the incident with Cunningham occurred. However, on cross she stated that she was unsure if Larry Shostrom spoke with the officers after the second incident. (T. 278-79)

When asked by defense counsel if she had gone outside the house at any time after the white truck arrived, Mrs. Garrett first stated that she did not go out of the house and then stated that she went outside after it all happened. (T. 281)

Defense counsel then recalled Larry Shostrom who admitted that he did carry Chris Whitmore across the street to Adam Smuin's apartment but that he went back over to the Colton's home and that he was standing by the edge of the Colton's driveway when the white truck pulled up. (T. 283-84) He stated that he was standing outside talking with Jeremy and Dusty when the white truck pulled up and Cunningham got out and began walking towards the door. Dusty and Jeremy began walking towards Cunningham and were yelling at him. Words were exchanged and then Justin got back in the truck and left. (T. 285) Shostrom then testified that prior to the cops arriving, he heard Jeremy and Dusty saying "Tell me he had a gun. Tell me he had a gun." (T. 286) Further, he stated that he did not see a gun at any time during this evening. (T. 286)

The court then heard argument from both counsel as to whether or not the court should allow Shostrom to testify in front of the jury. The state argued that Shostrom confused the first incident when the officers arrived with the second incident. Further, the state argued that he had lied to the officer's that evening and that numerous other witnesses have testified that Shostrom was not present during the time of the incident with Cunningham. (T. 287-88) Defense counsel argued that both Jeremy and Dusty testified that there were several

people at the house that night but that neither could tell exactly who was there. Steven Holmes testified that several people came out of the Colton house that night and pointed out that Marci Allred had contradicted herself several times during her testimony. (T. 288-89)

After hearing the testimony and argument from both counsel, the court ruled to allow Mr. Shostrom to testify before the jury. (T. 290)

The court reconvened the jury and the defense called Larry Shostrom to the stand. On direct, Shostrom testified that he had known the Colton's for about six months and spent a lot of time at the Colton residence. (T. 292) He was living across the street at Adam Smuin's apartment and he was very good friends with Jeremy Colton's brother, Chris Whitmore. (T. 292) Earlier in the evening he had been hanging out at the Colton's with Chris Whitmore and at the time Cunningham arrived he was standing at the edge of the driveway. (T. 294) Justin got out of the truck and Jeremy and Dustin started going out towards him. (T. 295-96) He said that he also recalled Amanda Colton stepping out on the porch sometime during the incident. (T. 296) He stated that Dusty and Jeremy were yelling at Cunningham and words were exchanged and the Cunningham got back in the truck and sped away. (T. 297) He testified that Chris Whitmore then ran out of the

house and chased the truck down the street and Shostrom ran after him to get him back in the house before the cops arrived. (T. 298) He said that when the cops were pulling up Dusty and Jeremy were kind of plotting things out making sure they were saying, telling he had a gun. (T. 298) The state objected to this statement arguing it was hearsay and the court sustained the objection. (T. 299) He testified that he did speak with the police when they arrived. (T. 300) He stated that he had come within 50 feet of Cunningham and had a clear view of Cunningham's hands and at no time did he see a weapon. Again defense counsel asked Shostrom if he heard Dusty and Jeremy Colton discussing the situation before the police arrived. The state objected but was overruled and Shostrom stated that he heard them discussing what they should tell the police. (T. 301) The state renewed its objection and the court dismissed the jury to hear argument on the hearsay objection. After hearing from both counsel the court again overruled the objection. (T. 304) Shostrom then testified that he heard one of them say "Tell the cops he had a gun", but he wasn't sure which one said it. (T. 305)

On cross examination Shostrom testified that he had spoken to officers twice that night. (T. 306) That Chris Whitmore had not chased the red vehicle down the street but rather the white

pickup truck. (T. 307) The attorney for the state also elicited from Shostrom that he was in jail and had been the cell mate of Bruce Christofferson at one time prior to the trial and Bruce had encouraged him to come testify, to do the right thing. (T. 310) He later testified that the area around the apartment and the Colton home is pretty well lit and there was enough light to see clearly. (T. 312-13) He was positive there was no gun (T. 313)

The state then proceeded in an attempt to discredit Shostrom's testimony by introducing evidence that Shostrom was currently in jail on another charge in which Jeremy Colton had agreed to testify against him. The state argued that this information was vital to demonstrate a motive for Shostrom to lie. (T. 315-317) Defense counsel argued that the admissibility of the evidence to impeach the witness would be dependent upon his knowledge regarding Jeremy Colton's agreement to testify against him. (T. 317) The court agreed to allow the state to question Shostrom regarding his motives to testify and granted defense counsel permission to question Jeremy Colton as to why he agreed to testify against Shostrom in the other case. (T. 319-22) The Jury was brought back in and the state questioned Shostrom as to whether he was involved in another criminal case as a defendant and to his knowledge that Jeremy Colton had agreed to testify against him. Shostrom denied any knowledge that



Jeremy Colton and Chris Whitmore had agreed to testify against him. (T. 323) On re-direct defense counsel elicited from Shostrom that he was friends with the Colton's and Christ Whitmore, that he did not know Justin Cunningham, and that he had agreed to testify because he felt it was the right thing to do. He did not feel it right for someone to go to prison for a long time for a crime they did not commit. (T. 324-325) Again he confirmed his testimony that Justin Cunningham did not have a gun. (T. 325)

The defense then called the defendant, Justin Cunningham. Cunningham testified that he was walking by one of the car washes when Steve Holmes picked him up and gave him a ride to Donovan Brown's apartment. (T. 326) When he got there he walked up and knocked on the door and as he was knocking Jeremy and Dusty Colton came out of there house and kind of jogged towards him yelling at him accusing him of messing with his brother. (T. 327-28) He said he told them he did not know what they were talking about and to "eff off". (T. 328) He said he then saw Shostrom and someone else coming up in the background and he jumped in the truck and left. (T. 328) He did not pull a weapon even though one was found later in the truck. (T. 329) He stated that he never saw the gun that was taken into custody by the officer and did not rearrange or take anything from the seat of Holmes's

truck. (T. 329) He did admit that he did make a gesture at the Colton's giving them the finger and telling them to "eff off".

(T. 329) He also testified that he was wearing a watch and a large chrome ring the night of the incident and both items were introduced as evidence and marked as exhibits 3 and 4. (T. 330) He also testified there was enough light that he could see everyone's faces pretty well. (T. 331) He saw the other guys coming up and he got scared and jumped in the truck and left. (T. 332)

Cunningham then related to the court a incident in which he was shot in the arm and how it has changed the way he reacts in these types of situations. (T. 332) He is now more cautious and more fearful of confrontations. (T. 333) He denies making any threat to kill the victims but does admit to calling them on and then telling them "fuck you." (T. 334) He then got in the truck and told Holmes to drive off quickly. He turned around as they drove away and noticed someone chasing the truck for about a half a block but he couldn't identify the person, only that they had their shirt off. (T. 334)

On cross examination, Cunningham testified that the vehicle he was ridding in that night was stopped by police. He told the officers that he got in an argument with some guys and got in the truck and left. (T. 336)

The defense called several witnesses in rebuttal including Officer Redd, Jeremy Colton, Amanda Colton, Dusty Colton, Officer Shawn Lewis and Marci Allred. Rather than repeat the testimony that has already been outlined above, counsel will simply summarize the essence of the rebuttal testimony and set forth any new testimony obtained from these witnesses during their rebuttal testimony.

Officer Redd was recalled and confirmed his earlier testimony that he had spoken with Larry Shostrom the first time he responded to the Colton home but that he did not speak with Larry Shostrom the second time he came to the Colton residence to investigate the aggravated assault. (T. 340) He testified that when he went to the Colton's the second time there were several people there that he spoke to but he did not see or speak to Larry Shostrom. (T. 344-45) He also testified that he drove Jeremy and Dusty Colton to the scene where the truck had been stopped to positively identify who they had stopped. (T. 350)

Following a lunch break the state recalled Jeremy Colton. Jeremy Colton testified as to the other people at the house including his sister, brother in law, and several nieces and nephews. (T. 355) He then testified that he too did not see Mr. Shostrom during or after the incident involving Mr. Cunningham. (T. 356) He also denied making up any stories or discussing with

Dusty about making up a story concerning whether or not the defendant had a gun. (T. 357) On cross Jeremy Colton admitted that he had agreed to testify against Larry Shostrom and in return some of the charges against him were dropped. (T. 360)

Next rebuttal witness was Amanda Colton. Mrs. Colton also denied that Larry Shostrom was present when the defendant arrived. (T. 363) But, she later stated that she couldn't see everything outside but when she went to the door she did not see Larry Shostrom. (T. 364) She also testified that she saw the defendant pointing the gun at her husband and saying "I am going to kill you old man." (T. 365) She too denied any discussion as to what to tell the police when they arrived. (T. 365)

Dusty Colton was recalled and he testified that Larry Shostrom was not present around midnight when the white truck showed up. Dusty had been sitting in his chair watching TV when the white truck pulled up. He could see Jeremy at that point and there was no one with him. (T. 371) He testified that the defendant yelled at him "I'll kill you, m-effer. I'll kill you right now old man." (T. 373) He tried to get Jeremy back into the house and when he turned back around, he[Cunningham] had a gun, in what he called a gangster style. (T. 373) He positively stated that it was a gun and not the reflection off Cunningham's watch or ring. (T. 373)

Next the state recalled Officer Shawn Lewis. He testified that when he spoke to the defendant after the truck had been pulled over, the defendant acted as nothing happened. (T. 377) When confronted about the argument he said it wasn't him, that he went there Donovan wasn't home and he left. (T. 378)

The last rebuttal witness called by the state was Marci Allred. Ms. Allred testified that she knew Larry Shostrom and that around midnight on September 10 she was with Larry Shostrom and several other people at Adam Smuin's apartment across the street from the Colton's. (T. 381) She testified that she was sure he was there because she was talking to him. (T. 382) On cross Ms. Allred admitted that she was the girlfriend of Jeremy Colton. She had been in the car with Larry Shostrom and Christ Whitmore during the earlier incident involving the red 4-Runner at around 10 o'clock. (T. 383-84) She also testified that she knew it was before midnight when she was at Adam Smuin's apartment with Larry Shostrom because she has a curfew of midnight and she has to call her mom before midnight to tell her where she was staying and she did call her mom that night. (T. 386-87) She had gone over to Adam Smuin's apartment with Larry and Chris and she wasn't sure if Chris left but she was sure that Larry was there the whole time. (T. 388)

The defense then called one witness on surebuttal. The witness, Chris Whitmore, first of all testified that Mr. Colton is his step father. (T. 390) He had been involved in the incident with the red 4-Runner and he had hid in the house when the cops arrived. (T. 391) He stayed in the house until he heard someone yell "gun" and he then ran outside and saw a white truck leaving (T. 392) When asked if anyone else ran down the street Whitmore stated that Larry Sholstrom ran with him. (T. 392)

On cross, Whitmore admitted to having a lot to drink that night. (T. 393) When asked where he woke up the next morning he testified that he thought he went across the street to Larry Shostrom's apartment that night. (T. 393) When asked how much time had expired between the time he stopped chasing the red vehicle and ran in the house and when he ran back out and chased the truck, he estimated the time to be about 20 to 25 minutes. (T. 394) He then stated that he was positive the vehicle he chased was red. (T. 395)

On re-direct, defense counsel clarified that Whitmore did not chase the red 4-Runner on foot but that he did chase the white truck on foot. (T. 395) He also admitted that he did not see a gun. On recross he testified that he did not know who pulled the gun on his brother but that he was told it was Justin. (T. 396) The defense rested.

Following the presentation of defense witnesses and rebuttal by the state, both counsel gave closing arguments and the jury was sent back to deliberate. Defense counsel had no objection to the jury instructions prepared by the State and changes were made to the jury instructions with regard to the dismissal of the charge of Possession of a Dangerous Weapon.

The jury returned a verdict that Mr. Cunningham was guilty of all counts excluding the charge of Possession of a Dangerous Weapon which had been dismissed. (T. 434-35)

A pre-sentence investigation report was prepared for sentencing and a copy was provided to defense and to the state. The defense offered no substantial objection to the report. On January 27, 1998, after hearing comments from both counsel and a brief statement from the defendant, Judge Anderson sentenced Cunningham to two terms of not less than five years for the two Third Degree Felonies, one year on the Class A misdemeanor, and six months on the Class B Misdemeanor, all sentences to run concurrent. (Transcript of Sentencing, hereafter designated as "S T.", S T. 13)

#### SUMMARY OF THE ARGUMENT

Appellate counsel has read all of the transcripts in this case from the preliminary hearing, trial and sentence. Additionally she has reviewed the defense file, trial court file

and appellate file. Counsel reviewed the case law in Utah pertinent to this case. Counsel also reviewed the standard for ineffective assistance of counsel claims.

Appellate counsel could find no issue relating to pre-trial motions or issues that should have been raised that were not. The only relevant issues, regarding the defense's request for a continuance in order to allow additional time for the preparation of a preliminary hearing transcript, which was denied, and the introduction of testimony from Bruce Christofferson, which was deemed irrelevant, were raised and ruled on by the court. There were no evidentiary issues at trial that should have been raised and were not.

Based on this review there is no issue that was preserved in the trial court that can be raised in this Court. Nor was counsel able to locate any issue that should have been raised, and therefore preserved below, that was not raised by trial counsel. Appellate counsel therefore could find no basis for a claim of ineffective assistance of counsel.

Throughout the entire record the only issues are, the court's decision not to grant the continuance requested by defense counsel, the court's ruling that the testimony of Bruce Christofferson was irrelevant, and the issue of insufficient evidence to support the convictions. However, research related



to these issues shows that they are insufficient to form the basis for a reversal and remand to the trial court.

After having reviewed the preliminary hearing transcript and the testimony provided by the witnesses at trial, appellate counsel fails to find any substantial changes in the testimony that if brought up by defense counsel would in any way have undermined the credibility of the witnesses. Likewise, it is the opinion of appellate counsel that the testimony of Bruce Christofferson would not have affected the decision reached by the jury in this matter. Finally, with regard to the sufficiency of the evidence, it may be noted that there were numerous witnesses whose testimony appeared to be in favor of the Defendant but that there were also numerous witnesses who testified that the Defendant did in fact have an altercation with the victims in which he did brandish a firearm and threaten the victims.

In reviewing a sufficiency of the evidence claim it is well established that "The standard for determining sufficiency of the evidence is that the evidence be "so inconclusive or so inherently improbable that reasonable minds could not reasonably believe defendant had committed a crime." State v. Romero, 554 P.2d 216, 219 (Utah 1976). In determining whether evidence is sufficient, the Court will review the evidence and all inferences

which may reasonably be drawn from it in the light most favorable to the jury verdict. State v. Kerekes, 622 P.2d 1161, 1168 (Utah 1980). Unless there is a clear showing of lack of evidence, the jury verdict will be upheld. State v. Logan, 563 P.2d 811, 814 (Utah 1977)." State v. Gabaldon, 735 P.2d 410 (Utah App. 1987).

It is the opinion of appellate counsel that there was sufficient evidence provided by the state on which the jury based its decision to convict and as such the appellate court would uphold the conviction.

Therefore, it is counsel's belief that this case is one that may be disposed of pursuant to the rules established in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and reiterated in State v. Clayton, 639 P.2d 168, 171 (Utah 1981), citing Anders.

No other evidentiary issues are apparent or preserved. Finally the jury instructions were corrected as requested by defense counsel and do not provide any cause for appeal. On this basis counsel will address here the issues of the denial of defense counsel's motion to continue, the exclusion of Bruce Christofferson as a witness, and the defendant's claim of insufficient evidence to support the verdict of guilty for retail theft.

### ARGUMENT

THE RULE MANDATED BY THE DECISION IN ANDERS V. CALIFORNIA IS APPROPRIATELY APPLIED IN THIS CASE IN RELATION TO THE ISSUE OF INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

As set forth above in the statement of facts, there were several eyewitnesses who placed Mr. Cunningham at the scene. In fact Mr. Cunningham himself testified that he had gone to the apartment and that he had exchanged words with the victim. As such, the most important question to be answered in this case is did Mr. Cunningham have a gun? More than one eye witness has stated that they saw Mr. Cunningham pull what appeared to be a gun from behind his back, pointed it at the victims and threatening to kill them. Shortly after the incident at the Colton residence, officers stopped a white pickup matching the description given by the Colton's which was being driven by Steve Holmes and in which Justin Cunningham was a passenger. After getting the consent of the driver the officers searched the truck and found a loaded Llama .38 special on the seat between the driver and passenger seat. Both Dusty Colton and Amanda Colton testified at trial that they saw the gun in Mr. Cunningham's hand and testified that the gun shown to them by the state during the trial, which the officers had seized from the truck, was similar to the gun used by Mr. Cunningham earlier that evening when he

threatened them.

Mr. Cunningham's counsel argued that it was dark that night and the victim's could not clearly see the hand gun and in fact the flash that they claimed to have seen did not come from a gun but rather from the defendant's watch and a large chrome ring he was wearing that night. Further, counsel argued that the gun found in the truck was owned by Jeff Farley and had been left in the vehicle several days earlier unbeknownst to the defendant or the driver of the vehicle, Steven Holmes. Defense counsel pointed out that no finger prints had been taken from the gun to establish if in fact the defendant had handled the weapon.

Nonetheless, the jury is the ultimate finder of fact especially when presented with conflicting testimony and it was the decision of the jury in this case that the testimony of the victims and other witnesses against the defendant was more reliable than the testimony provided by the defense witnesses. Case law on this issue as outlined above has set a standard by which the appellate court is required to review all evidence in the light most favorable to the jury verdict and unless there is a clear showing of lack of evidence, the jury verdict will be upheld.

THE RULE MANDATED BY THE DECISION IN ANDERS V.

CALIFORNIA IS APPROPRIATELY APPLIED IN THIS CASE IN  
RELATION TO THE ISSUES OF THE COURT'S DENIAL OF DEFENSE  
COUNSEL'S MOTION TO CONTINUE AND THE COURT'S  
DETERMIANTION TO EXCLUDE THE TESTIMONY OF BRUCE  
CHRISTOFFERSON.

Under different circumstances, both of these issues could conceivably be viable issues that could warrant the reversal of a conviction. However, in the present case the decision of the court to deny defense counsel's Motion to Continue and to exclude the testimony of Bruce Christofferson are merely harmless errors.

With regard to the issue of the court's denial of defense counsel's motion to continue, the court's decision had little to no effect on the outcome of the case. Defense counsel argued that the trial should be continued due to the lack of proper notice that the trial would proceed on the second place setting and in order to allow time for defense counsel to obtain a copy of the preliminary hearing transcript for purposes of cross examining the state's witnesses at trial. Appellate counsel has obtained and reviewed the preliminary hearing transcript and compared the testimony of the state's witnesses at the preliminary hearing with their testimony at trial and it is the opinion of appellate counsel that there were no substantial inconsistencies in the testimony of any of the witnesses called to testify at both the preliminary hearing and trial. Had there been substantial changes in the testimony of those witnesses, the

denial of defense counsel's Motion to Continue may have prejudiced the defendant's case. But, in light of the apparent consistency of the testimony of the witnesses at the preliminary hearing and trial, it appears as if the decision of the court did not in any way prejudice the defendant's case. As such, the court's decision is simply harmless error.

Similarly, the court's decision to exclude the testimony of defense witness Bruce Christofferson was also harmless error. Defense counsel argued that Mr. Christofferson's testimony was essential to demonstrate the emotional state of the alleged victims at the time of the confrontation. Defense counsel proffered that Mr. Christofferson was involved and therefore witness to the altercation, which occurred earlier that evening at approximately 10:00 p.m., between he and another friend and the Colton family in which he claimed that the Colton's chased he and his friend away from the apartment next door to their home. Although this could explain the exchange of words between Jeremy Colton and Cunningham, the state argued that Mr. Christofferson had no actual knowledge of the events on which the charges against Cunningham were based and therefore his testimony was irrelevant to the charges for which Cunningham was being tried. After hearing the testimony of Mr. Christofferson outside the presence of the jury, it was the decision of the court to exclude

Mr. Christofferson's testimony.

Again, this testimony to be offered by Mr. Christofferson would not appear to have a substantial impact on the case. Yes, his testimony would have provided some explanation as to what may have caused Cunningham and Jeremy Colton to exchange words, but it has little bearing on the jury's decision as to whether or not Cunningham was guilty of the charges against him. Regardless of what had gone on earlier that evening, it can hardly be argued that any individual would be justified in pulling a hand gun on an unarmed victim and threatening their life. Further, according to the testimony provided at the trial, Cunningham was unaware of the previous altercation and therefore his actions would only be in response to the current incident and would in no way be influenced by the earlier incident.

Based on the above, it is the opinion of appellate counsel that the exclusion of Mr. Christofferson's testimony did not substantially prejudice the defendant's case. Even if Mr. Christofferson's testimony had been allowed, it is more likely than not that the jury would still have convicted Cunningham based on the testimony of the eye witnesses who stated that Cunningham threatened the victims with a gun.

Rule 403 provides that although relevant, evidence may

nonetheless *be excluded* "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Utah R.Evid. 403. In State v. Lindgren the Utah Court of Appeals ruled that:

"When reviewing a trial court's ruling regarding the admissibility of evidence under Rule 403, 'we will not overturn the court's determination unless it was an abuse of discretion.'" State v. White, 880 P.2d 18, 20 (Utah App.1994) (quoting State v. Hamilton, 827 P.2d 232, 239 (Utah 1992)). The Utah Supreme Court has noted the term "abuse of discretion" is not capable of precise definition. State v. Pena, 869 P.2d 932, 937 (Utah 1994). Rather, the court found "a spectrum of discretion exists . . . [and] toward the broad end of the spectrum is the decision to admit or exclude evidence under Utah Rule of Evidence 403." Id. At 938. Accordingly, this court will only conclude the trial court abused its discretion if the ruling "was beyond the limits of reasonability." Hamilton, 827 P.2d 239-40. Moreover, even if we conclude that the trial court's decision regarding admissibility was error, we will not reverse unless the error was harmful, that is, "if absent the error there is a reasonable likelihood of an outcome more favorable to the defendant." White, 880 P.2d at 21.

State v. Lindgren, 910 P.2d 1268 (Utah App.1996)

Both issues outlined above involve decisions made by the court in its own discretion. It is well established in Utah that



the trial court shall make decisions with regard to the procedure of the trial and the admission of evidence at trial. Upon review, the appellate courts provide the trial court with great latitude in making decisions within its discretion and will reverse only where an error is so prejudicial and so substantial that, absent the error, it is reasonably probable that the result would have been more favorable for the defendant.

The standard for reversal was recently restated in State v. Thomas. In this case the Utah Supreme Court ruled that:

"Based upon the concept that the trial court is best situated to determine what, if any, impact an alleged error will have on the proceedings, see State v. Harmon, 956 P.2d 262, 276 (Utah 1998); Hay, 859 P.2d at 6; state v. Gardner, 789 P.2d 273, 287 (Utah 1989); State v. Speer, 750 P.2d 186, 190 (Utah 1988), we will reverse only where an error is so prejudicial and so substantial that, absent the error, it is reasonably probable that the result would have been more favorable for the defendant. See Harmon, 956 P.2d at 276; Hay, 859 P.2d at 7; Gardner, 789 P.2d at 287; State v. Lamper, 779 P.2d 1125 (Utah 1989); Speer, 750 P.2d at 190. In other words, the "mere possibility" of a different outcome occurring without the evidence is not enough; instead, "the likelihood of a different outcome must be sufficiently high to *undermine confidence in the verdict.*" State v. Knight, 734 P.2d 913, 920 (Utah 1987) (emphasis added)."

State v. Thomas, 974 P.2d 269 (Utah 1999).

As such, it is counsel's determination that any appeal of

the jury conviction of Cunningham is an appeal that lacks merit. Therefore, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967), counsel has filed this brief.

On this date counsel has sent the Defendant/Appellant Cunningham a letter explaining the findings of her review of the transcripts, record and case law regarding insufficient evidence cases in the State of Utah. Additionally, counsel informed Defendant/Appellant Cunningham that counsel does not believe he has grounds for an appeal of merit.

However, Defendant has the ultimate authority to make the decision regarding his appeal. Jones v. Barnes, 463 U.S. 745 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Pursuant to Defendant's instructions counsel filed an appeal on behalf of the client but counsel has had minimal contact with Cunningham since filing the Notice of Appeal.

Therefore, counsel hereby requests that based upon the facts set forth above, this Court offer Defendant/Appellant Cunningham, a period of time to file a brief on his own behalf or supplement this brief filed by undersigned counsel.

**PRECISE RELIEF SOUGHT**

Counsel does not request oral argument or a published opinion in this case. As the requested relief, counsel requests

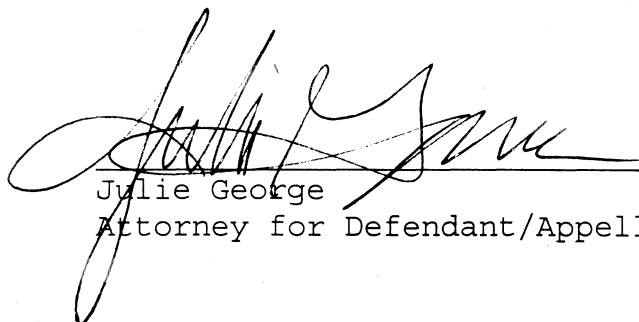
that this Court review the record and the brief and if it determines that there is no merit to any issue for appeal that the Court grant counsel's request to withdraw and affirm the trial court ruling.

#### CONCLUSION

Pursuant to the law cited above it is counsel's belief that defendant has no legitimate grounds for appealing the jury conviction or the imposed sentence. It is respectfully requested that this Court allow the Appellant to have a reasonable amount of time to file a brief or commentary as to this brief if he should so decide.

Counsel has notified the Appellant of her intent to withdraw and sent him a copy of the motion, the request for an extension of time in which he can reply and a copy of the brief filed by counsel.

Signed and Dated this 15<sup>th</sup> Day of June, 2000.

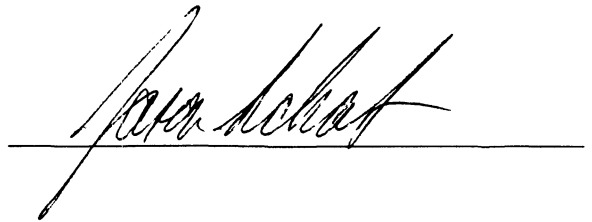
  
Julie George  
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing appellate brief was mailed first class postage, pre-paid, on this 15<sup>th</sup> day of June, 2000, to

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JUSTIN CUNNINGHAM  
C/O UINTAH COUNTY JAIL  
152 E. 100 N.  
VERNAL, UT 84078

A handwritten signature in cursive script, appearing to read "Peter Schat", is written over a horizontal line.