

1990

# Utah v. Lew Day : Brief of Appellant

Utah Court of Appeals

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James L. Shumate; Attorney for Appellant.

Paul Van Dam; Utah Attorney General; Attorney for Appellee.

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**BRIEF**

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DOCKET NO.

**900517-CA**

IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case No. 900517-CA
	)	
LEW DAY,	)	Classification Priority 2
	)	
Defendant-Appellant.	)	

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BRIEF OF APPELLANT

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Appeal from a Memorandum Decision denying Post-Trial Motions following a jury trial in the Sixth District Court of Piute County, the Honorable Don V. Tibbs presiding, wherein the Defendant was convicted of the offense of Manslaughter, a Second-Degree Felony.

---

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**FILED**

JAN 14 1991

PEALS

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
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vs.	)	Case No. 900517-CA
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THE STATE OF UTAH,	)	
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Plaintiff-Respondent,	)	
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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	Case No. 900571-CA
vs.	)	
	)	
LEW DAY,	)	
	)	
Defendant-Appellant.	)	

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JURISDICTION OF THE COURT OF APPEALS

The Jurisdiction of the Court of Appeals is established by 78-2a-3(2)(f), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from a Judgment, Sentence and Conviction in the Sixth District Court wherein the Defendant was convicted of Manslaughter, a Second-Degree Felony, and sentenced to serve one to fifteen years at the Utah State Prison.

ISSUES PRESENTED ON APPEAL

1. Was the jury improperly tampered with during the selection process and the trial in this case?
2. Was there sufficient evidence to convict the Defendant of Manslaughter in this case?
3. Did the court properly instruct the jury regarding lesser included offenses in this case?
4. Was this Defendant denied due process of law due to inadequate representation by counsel at the trial?



#### DETERMINATIVE STATUTES OR RULES

The statute which is believed to be determinative in this matter is 76-5-205, Utah Code Annotated, 1953, as amended. This statute is reproduced in total in the addendum to this brief.

#### NATURE OF THE CASE

This Defendant was charged with Second-Degree Murder in the Sixth District for Piute County and was convicted of the lesser included offense of Manslaughter, a Second-Degree Felony by jury verdict.

#### COURSE OF THE PROCEEDINGS

The Defendant was charged with Murder in the Second Degree in the Sixth Circuit Court in Piute County, State of Utah. The Defendant was held to answer after preliminary hearing to the charge of Murder in the Second Degree; and following a jury trial, he was convicted of Manslaughter, a lesser included offense. Following the conviction, the Defendant was sentenced and his trial counsel filed a Motion for New Trial and thereafter withdrew. The undersigned then appeared in behalf of the Defendant, after having been appointed by the Sixth District Court, and argued the Motion for New Trial, which was denied. This appeal followed the denial of the Motion for New Trial.

#### DISPOSITION AT TRIAL COURT

The Defendant was sentenced to one to fifteen years at the Utah State Prison. He remains incarcerated.

### STATEMENT OF FACTS

On August 10, 1989, the Defendant together with three (3) other individuals, Lewis Sudweeks, Evan Wiltshire, and David Kile, drove to various locations within Piute County, in and around Circleville, Junction, and Marysvale, Utah, and were drinking heavily.(T. 470-475) At some point in the early evening, the vehicle stopped near a gate on a dirt road outside of Marysvale,(T. 478) and the victim, Mr. David Kile, was shot with a 22 caliber firearm.(T. 482 and 568) Mr. Kile did not die at the scene (T.158-159) but died later in the hospital in Salt Lake City.(T. 134) Mr. Lewis Sudweeks claimed that he saw the Defendant shoot Mr. Kile,(T. 482) but Mr. Sudweeks testimony at trial regarding the events varied substantially from his testimony at the preliminary hearing.(Specific differences are pointed out in the Argument below) The Piute County Sheriff, Mr. Brent Gottfredson, investigated the scene,(T. 159-160) but the investigation was seriously flawed as will be shown later.

### SUMMARY OF ARGUMENT

There was jury tampering during the selection process and the trial, and the jury was not properly instructed regarding lesser included offenses. There is insufficient evidence to convict the Defendant of Manslaughter. The Defendant was denied due process of law due to inadequate representation by counsel at the trial of this matter.

## ARGUMENT

### POINT I

THE JURY INSTRUCTION ON MANSLAUGHTER WAS GIVEN IN DIRECT CONTRADICTION TO THE DEFENDANT'S WISHES.

Mr. Day wished the jury to be instructed solely on the offense of Second-Degree murder.(T.815-818) When the Court refused to instruct the jury solely on the elements of Second-Degree Murder and included an instruction on Manslaughter as a lesser included offense (T. 820) the Defendant then requested an additional instruction on Negligent Homicide.

(T. 818) The Court refused to give defense counsel's instruction on the lesser included offense of negligent homicide, a Class A Misdemeanor.

In view of the jury's reduction from Murder in the Second Degree to Manslaughter, it is easy to see that the Defendant could have been convicted on the lesser-included offense of Negligent Homicide if the jury had been so instructed.

The evidence in the case was clear that Mr. Day was highly intoxicated at the time that Mr. Kile was shot. Because of the concern about the mens rea in the case and the clear finding of the jury that there was insufficient mens rea to support a theory of Second-Degree Murder but that apparently there was a mens rea available for manslaughter, it should be pointed out that another alternative for a Class A Misdemeanor of negligent homicide should also have been examined. This Court as

well as the Utah Supreme Court have clearly distinguished the differences in the mens rea requirements between Manslaughter and Negligent Homicide.[See State v. Wessendorf, 777 P.2d 523 (Utah Ct. App., 1989) and State v. Dyer, 671 P.2d 142 (Utah, 1983)]

Conversely, Mr. Day's own wishes as shown in the record regarding the "all or nothing" position of Second-Degree Murder or not guilty could easily have given Mr. Day the not guilty verdict that he wanted since the jury clearly could not find Second-Degree Murder in the facts of the case. This issue also reflects on the competency of counsel issues as set forth hereinafter as that issue is outlined in the recent case of State v. Templin, 149 Utah Adv.Rep. 14 (Utah Sup.Ct., 1990).

#### POINT TWO

THE DEFENDANT WAS NOT ADEQUATELY REPRESENTED BY TRIAL COUNSEL AND THUS WAS DENIED DUE PROCESS OF LAW.

The Defendant's trial attorney failed to accurately elicit testimony regarding blood type testing of a cigarette butt found in the vicinity of the weapons allegedly used by the Defendant. Included in the addendum to this brief is a copy of the laboratory report on a Marlboro cigarette butt found in the vicinity of the firearms allegedly used in this crime.(T. 181) The Cigarette butt was admitted into evidence as Exhibit No. 26.

The trial counsel failed to adequately elicit testimony from Mr. Paul Hampton regarding the crime scene and failed to point out to the jury the differences in the crime scene story between preliminary hearing and trial as elicited from Sheriff

Gottfredson and Mr. Lewis Sudweeks. Included in the addendum to this brief are two sketches supplied to the undersigned by the Defendant's wife, Arva Lee Day. The undersigned was not trial counsel and was not present during either the preliminary hearing or the trial. The transcripts of the trial and the preliminary hearing are inadequate to accurately describe the scenes depicted. None of the attorney's made a clear record of the position of the parties. (see preliminary hearing transcript at 101-108, and the trial transcript at 479-486) However, the two drawings, made by Mrs. Day, clearly show the differences in the scenes at the two hearings. The vital differences in the two scenes and their adverse consequences will be pointed out below.

The Defendant's trial counsel failed to share evidence and documents with the Defendant and his wife making it impossible for the Defendant to adequately prepare for the defense of this matter.

The Defendant's trial counsel did not elicit testimony from any forensic expert regarding the crime scene, the angles of shots fired, the medical examiner's testimony, or other relevant factors regarding the crime scene investigation and the physical evidence in the case.

The Defendant's trial counsel failed to adequately investigate the relationship between the deceased, Mr. David Kile, and one Bobby Cox, who was the live-in girl friend of Mr. Lewis Sudweeks, and to point out the involvement of Bobby Cox in the investigation of the crime scene on the Monday morning

following the shooting.

The Defendant's trial counsel failed to call Peggy Palmer from the Kanab Job Service office and Pat Yero and Jim Willis, all of whom would have been favorable witnesses for the Defendant by rebutting the State's claim that the Defendant was in a hostile frame of mind on the morning of August 10, 1989.

The Defendant's trial counsel failed to point out the fact that the crime scene was subjected to a substantial rain storm, obliterating many important features, and he failed to elicit testimony to support that fact.

The most recent pronouncement on the issue of competency of trial counsel is brought forward in the case of State v. Templin, supra. In the Templin case the Utah Supreme Court followed the standard set forth by the United States Supreme Court in the case of Strickland v. Washington, 466 U.S. 668 (1984). The Strickland standard is a two-part test wherein the Defendant must first show that the trial counsel's performance was deficient. That would require errors so serious that counsel was not functioning as the "counsel" guaranteed by the United States Constitution's Sixth Amendment. Secondly, the Defendant must show that the deficient performance prejudiced the defense. This prejudice must show that counsel's errors were so serious as to deprive the Defendant of a fair trial or the result can be depended upon to be the product of minimal standards of the adversarial process. The acts or omissions of defense counsel have been set forth above. In order to point out the

prejudicial effect, they will each be analyzed in some detail.

The failure of the Defendant's trial counsel to ellicit testimony regarding blood-type testing of a cigarette butt leaves unanswered a question which could have been vital to the defense. The writer of this brief has learned that approximately eighty-five percent of the male population of the United States has a physiological characteristic of being a "secretor". This means that the person's ABO blood grouping blood type will appear in identifiable form in all bodily fluids, including saliva. The crime lab analysis of the cigarette butt found in the area of the rifles, one of which was allegedly used by the defendant, showed that there was no ABO antigen activity present on the cigarette. If Mr. Day is a secretor, his blood type could easily show up on a cigarette butt which would contain his saliva. This crucial fact could have been pointed out to the jury in order to separate Mr. Day from the site where the rifles were recovered. If Mr. Sudweeks was tested for secretor status, the results could have established substantial reasonable doubt in this case.[See State v. Goodman, 763 P.2d 786 (Utah, 1988) where secretor evidence was a key point]

At the preliminary hearing in this case, the State of Utah appears to have offered the theory that Mr. Kile was shot from some short distance from his body and that two .22 caliber casings, also found a short distance from Mr. Kile's body, were most likely the casings connected to the fatal shot.(Preliminary hearing transcript 35-36; also see diagram included in the

addendum to this brief labeled "Preliminary Hearing Scenario")

There were also two other .22 caliber shell casings recovered from the scene, but these had not been tested at the time of the preliminary hearing. (See preliminary hearing transcript 36) These casings were not tested until after the preliminary hearing, but were then identified as having come from Mr. Day's rifle. (The F.B.I. reports and the sheriff's transmittal letter are included in the addendum) These casings were found some 10 to 15 feet from the location where Mr. Kile fell, after being shot. (Trial T. 201-203)

At the trial, and after FBI analysis had linked Mr. Day's 22 caliber rifle to the expended casings found 10 to 15 feet from Mr. Kile, the State changed its theory by moving the truck and relying on the second pair of cartridges as having been connected to the fatal shot. (See "Trial scenario" diagram in addendum to this brief.)

The critical difference between the two scenes is the positioning of the truck which allegedly helped to locate Mr. Lewis Sudweeks, the State's eyewitness. In essence, Mr. Sudweeks told two substantially different versions of the facts, and took advantage of the tie between the .22 rifle and both pairs of shell casings. The vital importance to the Defendant comes when Dr. Gray, the medical examiner who did not testify at the preliminary hearing, testified at trial that the fatal shot had come from more than three feet away from Mr. Kile because there were no powder burns on the body. (T. 567) The two



casings found next to Mr. Kile's head could not have been the fatal casing because the range was too close. The casings found 10 to 15 feet away were consistent with the medical examiner's findings, but in the "Preliminary hearing scenario" drawing those casings came from the truck, the admitted location of Mr. Lewis Sudweeks. Deputy William Brewer, the man who found the "second" pair of casings, testified that they were recovered "approximately 10 to 15 feet from the blood soaked area here, and directly to the west and maybe a little south." (T. 202, lines 19-21) When considering the fact that the rifle in question is a semi-automatic weapon that ejects the expended casings to the right of the shooter it becomes almost certain that these "second" casings represent the fatal shot or shots. A shooter, with this rifle, standing in the door of the truck (as pictured in the "Preliminary hearing scenario") would leave casings exactly where Deputy Brewer found them. Mr. Sudweeks was implicating himself at the preliminary hearing because he did not know of the F.B.I. test results on the "second" pair of casings. By the time of the trial, Sudweeks had to move the truck to continue to shift the blame to the Defendant, and he did.

The failure of trial counsel to present the inconsistencies in the State's theory between preliminary hearing and trial and the further failure of the Defendant's counsel to diagram and appropriately preserve these inconsistencies in the record through visual exhibits or verbal description made it almost impossible to convincingly impeach the

testimony of Lewis Sudweeks, the State's only witness to implicate Mr. Day as the person firing the fatal shot. The lack of appropriate descriptions in the record make it difficult for the writer of this brief to adequately describe the prejudice suffered by the Defendant. The absence of a clear record on this vital issue reduces the undersigned, and the Court, to rely on the sketches of Mrs. Day. I am reluctant to do so, but the circumstances of this case and the condition of the record demand it. This state of the record, alone, may show sufficient errors of trial counsel to support a reversal of the Defendant's conviction.

The undersigned respectfully represents to the court that the Defendant's wife, when given an opportunity to review all of the files delivered to the undersigned by trial counsel, discovered many items, including the cigarette butt analysis and forensics reports, which had not been shared with her or the Defendant prior to the trial. Both Mr. and Mrs. Day, now having received copies of these vital documents, have been able to point out to the undersigned, based upon their knowledge of the case and the trial, how these documents were either improperly used or simply neglected by trial counsel. It has been this writer's practice over many years to share all of the documentary evidence together with transcripts with clients prior to proceeding to trial. If such a process had been used in Mr. Day's case, the trial outcome would likely have been different.

As pointed out above, the Defendant's trial counsel did

not elicit testimony regarding the crime scene and did not obtain any expert testimony on forensic medicine to discuss the angles of shots in view of the two inconsistent theories offered by the State at preliminary hearing and trial. A forensic expert, when presented with the two varying crime theories, could point out from the medical examiner's evidence and examination which of the two theories offered by the State is more or less conclusive and thereby help to impeach the testimony of Lewis Sudweeks.

The Defendant's trial counsel, having failed to adequately investigate the relationship between David Kile, Bobby Cox, and Lewis Sudweeks, failed to point out an important motivation for Mr. Sudweeks rather than Mr. Day to be the person to shoot David Kile. (See Memorandum In Support of Proposed Evidentiary Hearing Regarding Motion For New Trial, attached in addendum) The recent case of State v. Templin, as cited above, is a similar case where failure to interview and call witnesses has been pointed out to be substantially prejudicial to the interests of the Defendant at trial and to create the need for a reversal. The defense counsel had actually subpoenaed Peggy Palmer from the Kanab Job Service office and Pat Yero and Jim Willis, all of whom could have testified regarding the Defendant's positive mental state and good attitude prior to his departure from Kanab on the day of the shooting. None of this evidence was elicited by trial counsel.

The Defendant's trial counsel failed to point out the

fact that a rain storm passed over the crime scene and may have obliterated substantially important evidence because of its evidence on footprints and other physical evidence at the scene of the shooting.

### POINT THREE

THE PROSECUTOR, IN HIS CLOSING ARGUMENT, MISREPRESENTED THE TESTIMONY OF THE WITNESSES, AND THIS MISREPRESENTATION WAS INADEQUATELY MET BY THE DEFENDANT'S TRIAL COUNSEL THOUGH IT WAS HIGHLY DAMAGING TO THE DEFENDANT.

While delivering his final closing argument, the Prosecutor misstated evidence given during the testimony of Harold Morrill concerning the length of time that Lewis Sudweeks was gone between his two visits to the Morrill home.(T. Closing Arguments 78) Mr. Taylor did object to these misstatements, but it is claimed by this Defendant that this was prosecutorial misconduct by inferring that Mr. Sudweeks, the possible murderer, was not gone long enough to hide or otherwise dispose of Mr. Day's firearms. Mr. Morrill had testified that Lewis Sudweeks had been gone 20 to 30 minutes. (T. 620) Also in his closing argument, the prosecutor misstated the facts when he stated that the State's witness, Lewis Sudweeks, had been tested for alcohol(T. Closing Arguments 81) when there was no evidence in the trial that Mr. Sudweeks had been tested, and, in fact, Mr. Sudweeks had not been tested. Prosecutorial misconduct is grounds for reversal. (See State v. Johnson, 774 P.2d 1141.)

POINT FOUR

THERE WAS IMPROPER CONTACT BETWEEN THE STATE'S WITNESSES AND THE JURORS PRIOR TO THE SELECTION OF THE JURY AND DURING THE TRIAL CAUSING AN ADVERSE IMPACT AGAINST THE INTERESTS OF THIS DEFENDANT.

In view of this court's recent holding in the case of Logan City v. Carlson, 146 Ut.Adv.Rep.38 (Utah Ct.App., 1990), this court's specific attention is drawn to the affidavit of David Blackwell, the Defendant's co-counsel at trial who observed improper conduct and contact between Deputy Nalwalker and the jurors in this case.(Mr. Blackwell's Affidavit, together with those of Pat Yero and Joseph Johnson, are included in the addendum) This improper contact preceded the selection the jury and also continued after the selection of the trial jury as if shown by the affidavits filed in support of a Motion for New Trial. This court's specific attention is brought to the fact that the Motion for New Trial was not granted and that the evidentiary hearing requested by the defense in its Motion for New Trail was denied. For this reason, it was impossible to develop a factual basis regarding the contact between Deputy Nalwalker and Sheriff Gottfredson with potential jury members and the actual trial jury as was brought out in the Logan City case, supra. In view of the standards set by this court in the Logan City case, supra., it would appear that this contact alone is substantial argument for an immediate reversal and remand to the trial court for a new trial, or at the very least, an evidentiary

hearing regarding the improper contact between law enforcement personnel and jurors in the Motion for New Trial's setting.

POINT FIVE

THE CRIME SCENE INVESTIGATION MADE IT IMPOSSIBLE TO ELICIT SUFFICIENT EVIDENCE TO CONVICT THIS DEFENDANT. THERE WERE NUMEROUS PEOPLE WALKING THROUGHOUT THE CRIME SCENE AND DISTURBING POSSIBLE FOOTPRINT EVIDENCE ON THE CRIME SCENE. INADEQUATE PHOTOS WERE TAKEN ON THE NIGHT OF THE SHOOTING, AND IMPORTANT ESTABLISHING LANDMARKS WERE LOST ON THE NIGHT OF THE SHOOTING EITHER DUE TO FAILURE TO PHOTOGRAPH OR THE RAINSTORM AS MENTIONED ABOVE.

The Piute County Sheriff failed to establish the locations of the pickup truck before it was moved thus destroying the evidence of its location which was essential to the investigation. The Sheriff had to take Mr. Sudweeks back to the crime scene to reconstruct the homicide. (Preliminary hearing transcript 142)

The Piute County Sheriff allegedly marked the location of the recovery of expended shells with his boot in the dirt, and these marks would have been eliminated by the rain storm of that early following morning.

There was no gunshot residue testing on any of the persons present at the time of the shooting.

Only the Defendant, Mr. Day, was given an intoxilyzer test in order to determine the level of intoxication of the persons present at the shooting scene.

There was no testing of fibers or clothing analysis and no testing of Mr. Evan Wiltshire who apparently had been injured and was bleeding at the scene of the shooting.

There was no background investigation of Mr. Lewis Sudweeks either by the Piute County Sheriff's office or the Defendant's counsel.

#### POINT SIX

THE EVIDENCE USED AGAINST THE DEFENDANT AT TRIAL WAS IMPROPERLY HANDLED BY THE PIUTE COUNTY SHERIFF'S OFFICE AND, BECAUSE OF THE INADEQUATE CHAIN OF EVIDENCE, SHOULD HAVE BEEN EXCLUDED AT THE TRIAL. THIS INCLUDED THE IMPROPER HANDLING OF THE DEFENDANT'S CLOTHING AND BOOTS AS WELL AS THE DESTRUCTION OF THE DEFENDANT'S 22 RIFLE WHICH IS ALLEGED TO HAVE BEEN THE MURDER WEAPON. THE RIFLE WAS RECOVERED INTACT, BUT DURING ITS PROCESSING AND/OR MAILING TO THE FBI THE RIFLE STOCK WAS BROKEN, TO THE PREJUDICE OF THE DEFENDANT.


The testimony and record is clear that the .22 caliber rifle which was alleged to have been the murder weapon was recovered intact but at the time that it was presented at the trial in this case the rifle stock was broken.(T.177-178) The mishandling of this evidence and the failure to bring out this mishandling by the Defendant's trial counsel and object to the entry of the evidence by the trial counsel not only questions the competency of trial counsel but questions the admissibility of the evidence and the sufficiency of the evidence to support a

conviction.

CONCLUSION

For all the above reasons, the Defendant's conviction should be reversed. This Court is urged to order the dismissal of this action on remand to the trial Court, State v. Webb, 779 P.2d 1108 (Utah, 1989). In the alternative, it is requested that the Court order a remand for new trial.

DATED this 12 day of January, 1991.

  
\_\_\_\_\_  
JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. Paul Van Dam, Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 14 day of January, 1991, first class postage fully prepaid.

  
\_\_\_\_\_  
JAMES L. SHUMATE



**76-5-205. Manslaughter.**

(1) Criminal homicide constitutes manslaughter if the actor:

(a) recklessly causes the death of another; or

(b) causes the death of another under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse; or

(c) causes the death of another under circumstances where the actor reasonably believes the circumstances provide a legal justification or excuse for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.

(2) Under Subsection (1)(b), emotional disturbance does not include a condition resulting from mental illness as defined in Section 76-2-305.

(3) The reasonableness of an explanation or excuse under Subsection (1)(b), or the reasonable belief of the actor under Subsection (1)(c), shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(4) Manslaughter is a felony of the second degree.

4501 SOUTH 2700 WEST, #223 - SALT LAKE CITY, UTAH 84119

Phone (801) 965-4487

Name (Last, First, Middle)	DOB	(Filled out by Laboratory)
		Laboratory No 89-2443
Name (Last, First, Middle)	DOB	Agency Case Number
		89-80995
Name (Last, First, Middle)	DOB	Type of Report
Requesting Analysis	Requesting Agency & Address	Agency Phone
Forbes	Salt Lake Co Sheriff	
Name (Last, First, Middle)	Date & Time of Occurrence	
Inclusion of the analysis the evidence will be	Date & Time of Request	
checked up by agency <input type="checkbox"/> Mailed to agency <input type="checkbox"/> Other <input type="checkbox"/>		
Requested and Special Instructions <input checked="" type="checkbox"/> Fingerprints <input checked="" type="checkbox"/> Handwriting <input type="checkbox"/> Other <input type="checkbox"/>		

cigarette butt - saliva and typing

**DO NOT WRITE BELOW THIS LINE**

I am prepared to testify that he is employed by the Crime Laboratory Bureau and that he did on the 21st day of 1st, 1989, obtain from Ben Forbes evidence of ☒ Evidence as per property invoice ☐ Other

did make an examination and analysis of this evidence and in his opinion

lase (a prime enzyme constituent of saliva) activity was detected on the cigarette butt. No antigen activity was detected.

Conclusion of the analysis the evidence on the <u>3</u> day of <u>November</u> , 19 <u>89</u>	
<input checked="" type="checkbox"/> Released to <input checked="" type="checkbox"/> Mailed to <u>USPS P175 973 251</u>	
<u>Pike Co. S.O.</u>	
of Analyst Mr A. Shortsleeve/Criminalist	Date & Time Typed 09/20/89
	Clerk pem

Preliminary Hearing Scenario

Audience

Rail

Defense

TABLE

Gate post

Gate post

David Kile

Prosecution

Clerk's  
Table

Lewis  
Sadweeks

Truck

Reporter

Line of fire

Bench

Lew  
Day

North

Jan 10

Trial Scenario

Trial Scenario

Audience

Defense Truck  
TABLE

Lewis  
Sudweeks

Prosecution  
TABLE

Reporter

Pruch

Table

Lew  
Day

Line of fire

Gate post

Jay

of the



**FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C. 20535**

OCT 25 1989

October 23, 1989

To: Sheriff of Salt Lake County  
Metropolitan Hall of Justice  
437 South Second East  
Salt Lake City, Utah 84111

FBI FILE NO. 95-289516

Re: Attention: Detective Lieutenant  
Ben Forbes  
Homicide Division

LAB. NO. 90818021 S TH ZD NC

YOUR NO. 89-80995

LEW DAY - SUSPECT;  
DAVID KEITH KILE - VICTIM;  
HOMICIDE

Examination requested by: Addressee

Reference: Letter dated August 16, 1989

Examination requested: Firearms - Serological Analysis - Metals Analysis

Specimens:

Q1 Cartridge case (Q-2)  
Q2 \* Cartridge case (Q-3)  
Q3 Cartridge case (Q-4)  
Q4 Cartridge case (Q-5)  
Q5 \* Cartridge case (Q-6)  
Q6 Cartridge from K1 rifle (Q-7)  
Q7 Cartridge from K1 rifle (Q-8)  
Q8 Cartridge from K1 rifle (Q-9)

Page 1

(over)

This examination has been made with the understanding that the evidence is connected with an official investigation of a criminal matter and that the Laboratory report will be used for official purposes only, related to the investigation or a subsequent criminal prosecution. Authorization cannot be granted for the use of the Laboratory report in connection with a civil proceeding.

Q9            Cartridge from K1 rifle (Q-10)

Q10-Q13      Four cartridges from suspect's pocket (Q-11)

Q14           Jeans from suspect (Q-12)

Q15           Shirt from suspect (Q-13)

Q16-Q17      Right and left boots from suspect (Q-14)

Q18-Q19      Two bullet fragments from victim (Q-15)

Q20-Q21      Two metal fragments from victim (Q-15)

Q22-Q25      Four cartridges removed from K1 rifle in Laboratory  
(Not listed)

K1            .22 Long Rifle caliber Marlin rifle, Model GA 22,  
Serial Number 15366589, with scope (Q-1)

Result of examination:

Specimens Q1, Q3 and Q4 are .22 Long Rifle caliber "Stinger" cartridge cases manufactured by Cascade Cartridge Incorporated. These specimens were identified as having been fired in the same firearm. However, they were not fired in the K1 rifle.

Specimens Q2 and Q5 are .22 Long or Long Rifle caliber cartridge cases which were manufactured by Remington-Peters. They were identified as having been fired in the K1 rifle.

Specimens Q6 through Q9, Q11, and Q22 through Q25 are .22 Long Rifle caliber cartridges which were manufactured by Remington-Peters and loaded with brass-coated lead, round-nosed bullets.

Specimen Q10 is a .22 Long Rifle caliber "Stinger" cartridge which was manufactured by Cascade Cartridge Incorporated and is loaded with a copper-plated lead, hollow-pointed bullet.

Specimens Q12 and Q13 are .22 Long Rifle caliber cartridges which were manufactured by Winchester-Western and are loaded with lead round-nosed bullets.

The Q15 shirt was examined microscopically and processed chemically for the presence of gunshot residues and none were found. It should be noted that gunshot residues

are not normally found on the clothing of an individual who has discharged a firearm.

Specimens Q18 and Q19 are fragments of .22 caliber brass-coated lead bullets which were fired from a barrel or barrels rifled with sixteen grooves, whose direction of twist of the rifling could not be determined. The barrel of the K1 firearm is rifled with sixteen grooves, right twist. However, since specimens Q18 and Q19 do not bear sufficient microscopic marks of value for comparison purposes, no conclusion could be reached as to whether specimens Q18 and Q19 were fired from K1.

Specimens Q20 and Q21 are brass-coated fragments of lead which bear no observable bullet characteristics or individual microscopic marks of value for comparison purposes.

The K1 rifle was test fired in the Laboratory and it functioned normally in the condition in which it was received.

Human blood was identified on Q14 and Q15. Attempts to further characterize these specimens were precluded due to a limited amount of sample.

No blood was identified on Q16 or Q17.

Specimens Q18, Q19 and the bullets of specimens Q6 through Q8 and Q11 (.22 Long Rifle caliber Remington-Peters cartridges) were analyzed for their elemental composition by instrumental means.

Specimens Q18, Q19 and the bullet of specimen Q11 are analytically indistinguishable. The compositions of the bullets of specimens Q6 through Q8 are of close compositional association and generally similar to the aforementioned specimens.

Bullets with compositions that are analytically indistinguishable, of close compositional association or generally similar, as measured in this case, are typically found within the same box of cartridges. It is pointed out that they can also be found in other boxes of cartridges, but it is most likely that these boxes would be packaged by the same manufacturer on or about the same date.

Specimens Q1 through Q25 and K1 are being returned to your department under separate cover by Federal Express.

BRENT GOTTFREDSON  
SHERIFF

# PIUTE COUNTY

P O BOX 145  
JUNCTION, UTAH 84740

November 3, 1989

To: Director FBI  
Attention: Laboratory Division  
Bill Albrecht  
10th and Pennsylvania  
Washington D.C. 20535

RE: Lew Day-Suspect  
David Keith Kile-Victim  
Homicide

FBI File #95-289516  
Lab #90818021 S TH ZD NC

Examination Requested: Shell Casings

Dear Sir:

We are sending the following evidence in this case. The evidence described below is being submitted to the FBI Laboratory for examination in connection with an official investigation of a criminal matter. It was not nor will it be subjected to the same type of technical examination by other experts.

Items Being Submitted for Examination:

Q-26 .22 caliber casing  
Q-27 .22 caliber casing

Examination Requested:

Examine Q-26 thru Q-27 for firing pin and extractor marks against casings in your possession fired through K1.

Sincerely,

*Brent Gottfredson*  
Brent Gottfredson  
Piute County Sheriff

BG/cn



of the



**FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C. 20535**

November 29, 1989

**To:** Mr. Brent Gottfredson  
Sheriff of Piute County  
Post Office Box 145  
Junction, Utah 84740

FBI FILE NO. 95-289516

LAB. NO. 91106024 S TH

**Re:** LEW DAY - SUSPECT;  
DAVID KEITH KILE - VICTIM;  
HOMICIDE

YOUR NO.

Examination requested by: Addressee

Reference: Letter dated November 3, 1989

Examination requested: Firearms

Specimens:

Q26 Cartridge case (Q-26)

Q27 Cartridge case (Q-27)

Result of examination:

Specimens Q26 and Q27 are .22 Long or Long Rifle caliber cartridge cases which were manufactured by Remington-Peters. These specimens were identified as having been fired by the K1 rifle that had been previously submitted in this matter.

Specimens Q26 and Q27 are being returned to your department under separate cover by registered mail.

This examination has been made with the understanding that the evidence is connected with an official investigation of a criminal matter and that the Laboratory report will be used for official purposes only, related to the investigation or a subsequent criminal prosecution. Authorization cannot be granted for the use of the Laboratory report in connection with a civil proceeding.

JAMES L. SHUMATE USB# 2952  
Attorney for Defendant  
110 North Main, Suite H  
P.O. Box 623  
Cedar City, Utah 84720  
Telephone (801) 586-3772

---

IN THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR  
PAIUTE COUNTY, STATE OF UTAH

---

STATE OF UTAH,	)	
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT
	)	OF PROPOSED EVIDENTIARY
vs.	)	HEARING REGARDING MOTION
	)	FOR NEW TRIAL
LEW DAY,	)	
	)	
Defendant.	)	Criminal No. 1626

---

COMES NOW James L. Shumate, counsel for the above-named Defendant, and submits a memorandum in support of the Defendant's Motion for New Trial, such memorandum to be considered by the court on July 30, 1990. The following named persons are expected to testify in the hearing now scheduled for August 21, 1990, as follows:

Blaine Pectol  
Basin Investigators  
Route 1, Box 1056  
Roosevelt, Utah 84066  
Telephone: (801) 722-2553

Testimony of Blaine Pectol is included within his June 12, 1990, supplemental investigation and earlier report attached to the Memorandum of Points and Authorities in Support of Motion for Appointment of Investigator.

George Steven Bird  
Circleville, Utah 84723  
Telephone: (801) 577-2905

Mr. Bird is expected to testify that he heard Deputy Robert Nalwalker speaking in a cafe openly about the case to the general public involved in a fashion which would potentially prejudice any jury within Paiute County. Mr. Nalwalker specifically stated, in the presence of Mr. Bird, that all seven shells recovered from the crime scene had been identified as being fired from the Defendant's rifle and that the Defendant's footprints had been found circling the decedent's body three times. He also stated that the footprints were definitely matched to the Defendant.

Vicki Barton  
Circleville, Utah 84723  
Telephone: (801) 577-2580

Vicki Barton will testify that she heard Bo-Jon Reef, prior to the trial of this matter, state that he had heard Lewis Sudweeks threaten David Kyle, the decedent, and tell David Kyle that he would kill Mr. Kyle if Mr. Kyle did not stay away from Bobby Cox.

Bo-Jon Reef  
26278 Rd. 5  
Weldona, Colorado 80653  
Telephone: (303) 645-2305

Mr. Reef is expected to testify that he heard the threat referred to above in the Vicki Barton testimony made by Lewis Sudweeks against the decedent, David Kyle, and also is expected to testify as to an occasion where he heard the State's primary witness, Lewis Sudweeks, make violent threats against the Defendant, Lew Day, and that the witness, Lewis Sudweeks, had long held a "grudge" against Lew Day. Mr. Reef is also expected

to testify that Mr. Sudweeks' girlfriend, Bobby Cox, was having a love affair with the deceased David Kyle prior to the murder of Mr. Kyle.

Grover Smith  
874 South Hwy. 89  
Circleville, Utah 84723  
Telephone: (801) 577-2833

Mr. Smith is expected to testify that the instructions gave no express instruction on the right of the jury to find the Defendant innocent, and that the instructions gave no indication to the jury as to the approach that should be taken if it was impossible to make a decision as to either guilt or innocence.

Bill Christensen  
P.O. Box 22  
Escalante, Utah 84726  
Telephone: (801) 826-4887

Bill Christensen will testify that the State's primary witness, Lewis Sudweeks, had a conversation with Bobby Cox which Bobby Cox later related to Mr. Christensen stating that Lewis Sudweeks came home from the trial, was under the influence of alcohol, and stated to Bobby Cox, "Looks like I got away with another one". The State's witness Sudweeks also told Bill Christensen one week after the trial that the shirt belonging to the victim, David Kyle, the hat belonging to Evan Willshire, and the gloves belonging to Lew Day burned up in Mr. Sudweeks' pickup truck. Mr. Christensen will also testify as to the violent fights between Lewis Sudweeks and Bobby Cox following the trial in this matter.

Buddy Ross  
Blake's Trailer Park  
Escalante, Utah 84726

Mr. Ross heard Bobby Cox, in a fight with Lewis Sudweeks, after the trial, state that she knew that Lewis Sudweeks had killed David Kyle.

Lorie Franklin  
P.O. Box 84  
Escalante, Utah 84726  
(No telephone)

Ms. Franklin was a witness at the trial in this matter. She will testify that following the trial, Mr. Lewis Sudweeks threatened and intimidated her to the point that she was required to make a complaint against him with law enforcement authorities. Near the end of May of 1990, she was attending a party at one Delyn Norman's home. Lewis Sudweeks was present at the party and engaged in a confrontation with Lorie Franklin. Sudweeks made the following statement to Lorie: " You did you what you had to do; well, I did what I had to last summer." Ms. Franklin will testify that she was extremely frightened by the encounter with Mr. Sudweeks and that his demeanor was very threatening.

Leland Millet  
30 South 100 East  
Kingston, Utah 84743  
Telephone: (801) 326-4393

Mr. Millet's testimony is expected to be similar to that contained within the report of Blaine Pectol dated June 12, 1990.

Bobby Cox  
P.O. Box 151  
Escalante, Utah 84726  
Work phone: (801) 826-4297

Bobby Cox is expected to testify that she is the girlfriend of Lewis Sudweeks and lives with him. She will also testify that she has lived with Evan Willshire for two years prior to living with Mr. Sudweeks. Bobby Cox is expected to testify that Evan Willshire, a person also at the scene of this homicide, had become enraged while she was living with him and fired a shotgun at her son, narrowly missing the boy. She is also expected to testify that she has known Lewis Sudweeks to have blackouts from drinking and to have had no memory of events that have happened when he has been drinking heavily. She is expected to testify that after the homicide that Mr. Sudweeks claimed that he delivered David Kyle's clothing that was in his possession to Mr. Kyle's brother, Terry Kyle. (It should be noted that Terry Kyle is expected to testify that the clothing that David Kyle was wearing was never delivered to him nor was any money in David Kyle's possession ever delivered to Terry Kyle.) Bobby Cox is also expected to testify that Lewis Sudweeks told her that he had seen Evan Willshire after the shooting sitting in the pickup truck and that Mr. Willshire's eyes were full of blood and his face was cut. At the trial of this matter, Mr. Sudweeks testified that he had never seen Evan Willshire after the shooting incident. Bobby Cox is also expected to testify that when she went to the crime scene on the 14th of August 1989, that the Sheriff, Brent Gottfredson, Robert

Nalwalker, Deputy Sheriff, and Lewis Sudweeks walked over the crime scene and that the persons at the crime scene indicated that the truck was parked much closer to the gate post in the crime scene and that the gate was closed.

Larry John Norman  
Escalante, Utah 84726  
(No telephone)

Mr. Norman is expected to testify that prior to this homicide he had heard Lewis Sudweeks threaten the life of David Kyle.

Linda King  
414 North 18th Avenue  
Phoenix, Arizona  
Telephone: (602) 254-1468

Linda King expected testimony is set forth in the Blaine Pectol report.

Kelly Allen Kyle  
P.O. Box 127  
Escalante, Utah 84726  
Telephone: (801) 826-4306

Mr. Kyle is expected to testify and amplify the affidavit on file and support the statements made in the Motion for New Trial previously filed with the court. Mr. Kyle will also testify that he was with Lewis Sudweeks at the party where Lewis Sudweeks pickup truck burned allegedly destroying evidence from the crime scene. Mr. Kyle is also expected to testify that Lewis Sudweeks has make inconsistent statements regarding the destruction of his pickup and the crime-scene evidence.

Nancy Christensen  
P.O. 317  
Escalante, Utah 84726  
Telephone: (801) 826-4970

Mrs. Christensen is expected to testify that she attended the trial on March 27, 1990, and observed jurors who fell asleep. She also was present when Lewis Sudweeks related a story regarding the shooting which is inconsistent with Mr. Sudweeks' testimony at trial.

Pat Yero  
Kanab, Utah 84741  
Telephone: (801) 644-2202

Pat Yero is expected to testify that she was subpoenaed by Marcus Taylor to testify in behalf of the defense at the trial but was never called. She will also testify that she saw Robert Nalwalker violating the court's exclusionary order regarding witnesses when she observed Mr. Nalwalker talking with other witnesses after the order was invoked. She will also testify that she saw Lewis Sudweeks upstairs during the trial, sitting outside the open courtroom door, and listening to the testimony from inside the courtroom after Mr. Sudweeks had been excluded by the court and admonished not to talk to other witnesses or discuss with them their testimony. The presence of Lewis Sudweeks outside the courtroom door can also be testified by Jan Aiken, Kanab, Utah, (801) 644-5162, Darlene Marshall, Kanab, Utah, Paul and Suzie Henrie of the Henrie Ranch near Marysvale, Utah, Kent Miller of Panguitch, Utah, and Mr. Russell Primrose of Kanab, Utah, (801) 644-2202.

Terre V. Mason  
426 South Maurice Street  
Fredonia, Arizona  
Telephone: (602) 643-7146



Terre Mason will testify that she is the sister-in-law to the Defendant, Lew Day. She attended the trial and was present in the courtroom through the trial. She was called to testify during the trial just immediately after the court had called a recess and was admonishing the juror to not discuss the case during the recess. She will testify that she was called with no notice to herself and without having been subpoenaed and with no notice to the defense that she was a witness for the State of Utah. Mrs. Mason will testify that she was aware of prior inconsistent statements made by Sheriff Gottfredson regarding his investigation of the case, of prior inconsistent statements made by Robert Nalwalker regarding his investigation of the case, and specifically regarding empty cartridges on the floor boards of the Defendant's pickup truck. Mrs. Mason will testify that she could have given testimony of this type but was never requested to so testify by either the State's prosecutor or by Mr. Taylor.

Kent Mason (Husband of Terre Mason)  
426 South Maurice Street  
Fredonia, Arizona  
Telephone: (602) 643-7146

Mr. Mason will testify that he attended the trial and observed jurors sleeping during the presentation of the evidence.

David Blackwell  
108 North Main Street  
Richfield, Utah 84701  
Telephone: (801) 896-6484

David Blackwell is expected to testify that during the trial of this matter he saw Sheriff Nalwalker talking to jurors

on two different occasions-once in the morning prior to the convening of court at the top of the stairs in the Paiute County Courthouse and once at the bottom of the stairs during a lunch break.

Joseph Johnson  
Circleville, Utah 84723  
Telephone: (801) 57702580

Mr. Johnson is expected to testify to matters consistent with his affidavit already on file with the court.

DATED this 26 day of July, 1990.

  
JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing MEMORANDUM IN SUPPORT OF PROPOSED EVIDENTIARY HEARING REGARDING MOTION FOR NEW TRIAL to Mr. Kay McIff, OLSEN, McIFF & CHAMBERLAIN, P.O. Box 100, Richfield, Utah 84701, this 26th day of July, 1990, first class postage fully prepaid.

  
Secretary

MARCUS TAYLOR (3203)  
LABRUM, TAYLOR & BLACKWELL  
ATTORNEYS FOR DEFENDANT  
108 NORTH MAIN STREET  
P.O. BOX 728  
RICHFIELD, UTAH 84701  
(801)896-6484

FILED  
PIUTE COUNTY, JUNCTION, UTAH

MAY 23 1990

\_\_\_\_\_  
By \_\_\_\_\_ Clerk  
Deputy

THE SIXTH JUDICIAL DISTRICT COURT OF PIUTE COUNTY,

STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

LEW DAY,

Defendant.

\*

\*

\*

\*

\*

AFFIDAVIT OF  
DAVID A. BLACKWELL

Case No. 1626

JUDGE DON V. TIBBS

STATE OF UTAH )  
: ss.  
COUNTY OF SEVIER)

DAVID A. BLACKWELL, being first duly sworn, deposes and states:

1. Affiant is of adult age, a member in good standing of the Utah State Bar, with law offices at Richfield, Utah, and served as co-counsel for the Defendant in this cause.

2. Affiant participated as co-defense counsel during all trial proceedings of this case.

3. During the course of the trial proceedings in this cause, which occurred on March 26, 1990, through March 30, 1990, Affiant observed two conversations which occurred between Grover Smith and Robert Nalwalker.

4. Grover Smith was selected as one of the eight persons for the

Affidavit of David A. Blackwell  
State of Utah vs. Lew Day  
Case No. 1626

- 2 -

jury in this case, and completed jury service through the conclusion of the trial.

5. Robert Nalwalker is a Deputy Piute County Sheriff, participated in the preparation of this case, and testified as a witness for the State of Utah.

6. Affiant does not recall the day of the conversations which he observed between Grover Smith and Robert Nalwalker, but does recall that both such conversations occurred during recesses. One conversation occurred at the top of the stairs, near the entrance of the Courtroom. The other conversation occurred in the main hallway on the ground level floor of the Courthouse. Affiant saw Grover Smith speaking with Robert Nalwalker, and heard conversation, but affiant was not able to hear the exact content of the conversations.

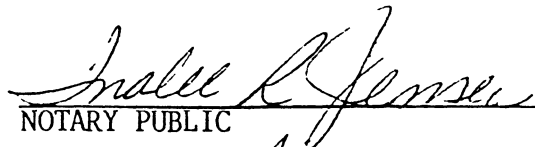
DATED this 23rd day of May, 1990.

  
\_\_\_\_\_  
DAVID A. BLACKWELL

SUBSCRIBED AND SWORN to before me this 23rd day of May, 1990.

Commission expires:

1-20-91

  
\_\_\_\_\_  
NOTARY PUBLIC  
Residing at Salt Lake City, Utah

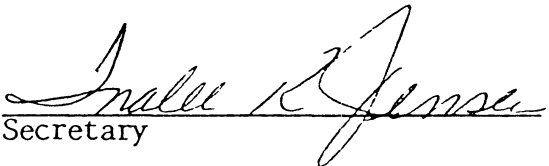
Affidavit of David A. Blackwell  
State of Utah vs. Lew Day  
Case No. 1626

- 3 -

MAILING CERTIFICATE

I herewith and hereby certify that a copy of the foregoing AFFIDAVIT OF DAVID A. BLACKWELL was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid, this 23<sup>rd</sup> day of May, 1990, addressed as follows:

Kay L. McIff, Esq.  
OLSEN, McIFF & CHAMBERLAIN  
P.O. Box 100  
Richfield, Utah 84701

  
Secretary

FILED  
PIUTE COUNTY, JUNCTION, UTAH

MAY 23 1990

MARCUS TAYLOR (3203)  
LABRUM, TAYLOR & BLACKWELL  
ATTORNEYS FOR DEFENDANT  
108 NORTH MAIN STREET  
P.O. BOX 728  
RICHFIELD, UTAH 84701  
(801)896-6484

\_\_\_\_\_  
Clerk  
By \_\_\_\_\_ Deputy

THE SIXTH JUDICIAL DISTRICT COURT OF PIUTE COUNTY,

STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

LEW DAY,

Defendant.

\*

\*

\*

\*

\*

AFFIDAVIT OF PATRICIA N. YERO

Case No. 1626

JUDGE DON V. TIBBS

STATE OF UTAH     )  
                          ) ss.  
COUNTY OF PIUTE)

PATRICIA N. YERO, being first duly sworn, deposes and states:

1. Affiant is of adult age, is a <sup>single</sup> ~~married~~ female, whose address is 352 South 250 East, Kanab, Utah 84741, and whose telephone number is 644-2202.

2. Affiant attended the trial in these proceedings which occurred on March 26, 1990 through March 30, 1990. Affiant was subpoenaed as a witness.

3. On March 29, 1990, a Thursday, following the trial proceedings on that day, Affiant went to the clerk's office to obtain a check for her witness fee and travel expenses. The clerk's office was upstairs next to the court room.

AFFIDAVIT OF PATRICIA N. YERO  
STATE OF UTAH VS. LEW DAY

- 2 -

4. When Affiant approached the clerk's office she observed one of the jurors talking to an official in the clerk's office. Affiant entered the clerk's office and approached the counter when she saw the juror talking to the clerk official, and was surprised that a juror was being paid the same way and in the same place as witnesses. In fact, Affiant wondered if she was in the right place.

5. Affiant recognized this particular juror as one who appeared to be disinterested and dozing during the trial proceedings. This juror was one who sat on the front row in the jury box, the youngest one in the jury, with a slender build and long black hair.

6. The first thing which Affiant recalls being said by the juror was something to the effect that another day was wasted and she was so busy, and that she now had to go home and do her work.

7. The clerk official sympathized with this juror, and they started talking about their boys. The juror said her boy could do nothing until the trial was over, and that he could not stay at the home of another or have anyone else over to sleep with him because she, the juror, did not know when she would get home. This juror was upset because of those reasons.

8. It appeared to Affiant that the clerk official had a child who had been in the home of this juror the night before, that the clerk official knew that these boys were miserable because they could not be together. The clerk official and the juror were calling the boys by name.

9. The juror then said that she would be glad when the trial was over, and that her husband was put out with her because she didn't have time for the trial.

AFFIDAVIT OF PATRICIA N. YERO  
STATE OF UTAH VS. LEW DAY

- 3 -

10. This juror had the definite attitude of being aggravated about being on the jury and spending her time for the proceedings. The clerk official was sympathetic and in no hurry to end the conversation.

11. Affiant stood there for some time, and the clerk official and the juror made no effort to complete the business of paying the juror for that day's proceedings, nor to make their conversation private.

12. Affiant does not remember the juror leaving, as she may have stood aside while Affiant obtained her check.

13. Affiant had been called as a witness, but had been excused at the noon recess. Affiant was in the courtroom during the afternoon proceedings of that day and heard the court give the jurors instructions not to discuss the trial with anyone. For that reason, it appeared to this Affiant that it was improper for this juror to be discussing the case openly with the clerk official.

Dated this 22<sup>nd</sup> day of May, 1990.

Patricia N. Yero  
PATRICIA N. YERO

SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of May, 1990.

Marilee Taylor  
NOTARY PUBLIC

Residing at

Richfield, Utah

Commission expires:

9-3-90



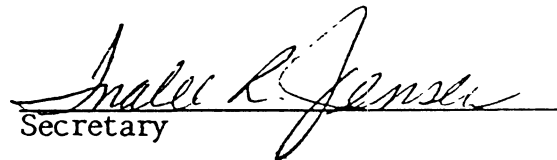
AFFIDAVIT OF PATRICIA N. YERO  
STATE OF UTAH VS. LEW DAY

- 4 -

MAILING CERTIFICATE

I herewith and hereby certify that a copy of the foregoing AFFIDAVIT OF PATRICIA N. YERO was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid, this 13<sup>th</sup> day of May, 1990, addressed as follows:

Kay L. McIff  
225 North 100 East  
Richfield, Utah 84701

  
Secretary

FILED  
PIUTE COUNTY, JUNCTION, UTAH

MAY 23 1990

\_\_\_\_\_  
Clerk

By \_\_\_\_\_ Deputy

MARCUS TAYLOR (3203)  
LABRUM, TAYLOR & BLACKWELL  
ATTORNEYS FOR DEFENDANT  
108 NORTH MAIN STREET  
P.O. BOX 728  
RICHFIELD, UTAH 84701  
(801)896-6484

THE SIXTH JUDICIAL DISTRICT COURT OF PIUTE COUNTY,

STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

LEW DAY,

Defendant.

\*

\*

AFFIDAVIT OF JOSEPH JOHNSON

\*

\*

Case No. 1626

\*

JUDGE DON V. TIBBS

STATE OF UTAH     )  
                          ) ss.  
COUNTY OF PIUTE )

JOSEPH JOHNSON, being first duly sworn, deposes and states:

1. Affiant is an adult male, who resides at Circleville, Utah, and whose telephone number is 577-2580.

2. Affiant was called for jury duty for the trial in this cause, and appeared in response when this trial began on March 26, 1990.

3. Affiant was one of sixteen potential jurors who remained available for jury selection after the completion of challenges for cause.

4. After challenges for cause had been completed, but before peremptory challenges were made, a recess in the proceedings occurred.

5. Before this recess was taken, Affiant recalls the court advising the jurors not to speak to anyone regarding the case, nor to allow anyone to

AFFIDAVIT OF JOSEPH JOHNSON  
STATE OF UTAH VS. LEW DAY

- 2 -

6. When this recess was taken, Affiant walked out the South door of the courthouse and stood on the sidewalk a few feet East of that door. Affiant was smoking a cigarette, and was standing alone, although other groups of people were standing nearby.

7. Sheriff Brent Gottfredson then came out the same South door of the courthouse, walked up to the Affiant, placed his hands on Affiant's arm or shoulder, and guided him a few feet further East, and then began a discussion with Affiant.

8. Sheriff Gottfredson stated to Affiant that he could not place his face, and stated that he didn't know who he was, and asked him concerning his identity.

9. Affiant responded by telling Sheriff Gottfredson his name. The Sheriff Godredson then stated that he still could not place Affiant.

10. Affiant then stated to Sheriff Gottfredson that his mother was Vickie Barton, and that his Grandfather was Niels Mortenson. Affiant also stated to Sheriff Gottfredson that he lived in Circleville most of his life.

11. Sheriff Gottfredson then stated that he knew who Affiant was. Sheriff Gottfredson then left Affiant and walked across the street.

12. When the court proceedings resumed, Affiant observed Sheriff Gottfredson lean over and speak to Mr. McIff, the State's Counsel, and point to your Affiant.

13. Affiant was then dismissed as one of the potential jurors who was subject to a peremptory challenge.

AFFIDAVIT OF JOSEPH JOHNSON  
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14. Your Affiant thought, initially, that the conversation that occurred between him and Sheriff Gottfredson was appropriate because of the position of the Sheriff, and did not report the incident to anyone until after the trial proceedings had been concluded.

DATED this \_\_\_\_ day of May, 1990.

\_\_\_\_\_  
JOSEPH JOHNSON

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of May, 1990.

Commission expires:  
\_\_\_\_\_

\_\_\_\_\_  
NOTARY PUBLIC  
Residing at: \_\_\_\_\_

MAILING CERTIFICATE

I herewith and hereby certify that a copy of the foregoing AFFIDAVIT OF JOE JOHNSON was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid, this \_\_\_\_ day of May, 1990, addressed as follows:

Kay L. McIff  
225 North 100 East  
Richfield, Utah 84701

\_\_\_\_\_  
Secretary