

1990

# Utah v. Terry L. Hay : Brief of Appellant

Utah Supreme Court

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ET NO.

900457

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:
	:
Plaintiff/Respondent,	:
vs.	:
	:
TERRY L. HAY,	:
	:
Defendant/Appellant.	:

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Case No. 900457  
Priority No. 2

BRIEF OF APPELLANT

Appeal from a final judgment and conviction against Terry L. Hay for one count of Criminal Homicide, second degree murder, a first degree felony, in violation of Title 76, Chapter 5, Section 203, Utah Code Annotated (1953 as amended). The appellant was found guilty by a jury on July 14, 1990, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, Judge, presiding. The final judgment and conviction was rendered on June 17, 1991, whereby Mr. Hay was sentenced to the Utah State Prison for the indeterminate term prescribed by law.

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**FILED**

SEP 15 1992

CLERK SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
	:	
Plaintiff/Respondent,	:	
vs.	:	
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THE STATE OF UTAH,	:	
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TERRY L. HAY,	:	
	:	Priority No. 2
Defendant/Appellant.	:	

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STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court pursuant to §78-2-2(3)(i), Utah Code Annotated (1953 as amended) and Rule 26(2)(a), Utah Rules of Criminal Procedure, wherein a defendant in a district court criminal action may take an appeal to the Supreme Court from a final order involving a conviction of a first degree felony. Mr. Hay was convicted of Criminal Homicide, Murder in the Second Degree, a first degree felony in violation of §76-5-203, Utah Code Annotated (1953 as amended), in the Third District Court in and for Salt Lake County, State of Utah.

STATEMENT OF ISSUES

1. Did the trial court err in denying defendant's motion for a mistrial based on:

- a) ineffective assistance of counsel
- and/or
- b) prosecutorial misconduct?

2. Was counsel ineffective in allowing gruesome details into evidence which may have inflamed the jury?

#### STANDARD OF REVIEW

Issues #1(a) and 2 regarding ineffectiveness presents a mixed question of law and fact. State v. Templin, 805 P.2d 182, 186 (Utah 1990)(citing Strickland v. Washington, 466 U.S. 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1974)). See also State v. Johnson, 176 Ut. Adv. Rep. 17, 18 (Utah Ct. App. 1991). Questions of law can be independently reviewed (See Templin at 187). Questions of fact will not be disturbed unless clearly erroneous (Id at 187).

Issue #1(b), prosecutorial misconduct presents a question of law to be reviewed by this Court for correctness. State v. Ramirez, 159 Ut. Adv. Rep. 7, 16 N.3 (Utah 1991).

#### CONSTITUTIONAL PROVISIONS, STATUTE, RULES

Any constitutional provisions, statutes or rules relevant to the disposition of the appeal are set forth in the text of the brief.

#### STATEMENT OF THE CASE

This is an appeal from a judgment and conviction against Terry L. Hay for one count of Criminal Homicide, Murder in the second degree, a first degree felony.

A jury found Mr. Hay guilty on July 14, 1990, in the Third Judicial District Court in and for Salt Lake County, State of Utah,



the Honorable Michael R. Murphy, Judge, presiding. The final judgment and conviction was rendered on June 17, 1991, whereby defendant was sentenced to an indeterminate term in the Utah State Prison of 5 years to life.

Trial counsel withdrew for purposes of appeal based on a claim of ineffective assistance of counsel. New counsel was appointed to prepare and submit the appeal.

#### STATEMENT OF FACTS

On July 27, 1989, defendant Terry L. Hay, and the victim, Lony Crosby, went to Wales, Utah, in Sanpete County and stayed with Lony's grandparents. They spent the next few days working for a family friend and hunting and walking in the nearby mountains. During that time, according to Arlene Crosby, Lony's grandmother, there appeared to be no friction or arguments between the two boys. (T. Vol. II, p. 244).

On Wednesday, July 31, 1989, the two went into the mountains shortly after lunchtime. A while later, John Crosby Sr. heard what he said sounded like two gunshots in rapid succession. Later that afternoon, defendant came down the mountain alone and gathered some of his items from the Crosby trailer. Arlene inquired as to the whereabouts of Lony. Defendant responded that Lony was still on the mountain preparing for their dinner. The Crosby's did not see Lony nor the defendant again. (T.Vol II, p. 245-247.)

Jennifer Bratt testified that, in the late evening of August 1, 1989, defendant came to her home dirty, upset and shaken.

Defendant told her that he had been hit on the head by Lony and, when he awakened, Lony was gone. He surmised Lony may have gone to Nevada to see a girlfriend. (T. Vol. II. p. 270-272)

On August 2, 1989, defendant went to the home of Lony's mother and stepfather. Defendant told Mrs. Crosby that Lony had stolen a truck in Wales, and they returned to Salt Lake City. Defendant said Lony then left. (T. Vol. III, p. 319-323.)

On the morning of August 2, 1989, defendant spoke with a friend, Travis Pearce. Travis said defendant appeared shaken and nervous. Defendant told Travis that he had been asleep and, when he awoke, Lony was gone. He also told Pearce that he stole a truck in Wales to return to Murray. (T. Vol. III. p. 401-404).

Lony's mother and stepfather asked a friend who was a police officer to question defendant about Lony. Defendant told the officer, Paul Pelch, that Lony had asked him to not reveal his whereabouts, but that Lony was in Reno, Nevada. Defendant also said that he had heard from Lony (T. Vol. III p. 340-344).

During the period of Lony's absence from August 1, 1989, until his body was found on December 31, 1989, defendant told people that he had been in contact with Lony.

Crosby's family filed a missing person report on approximately August 4, 1989. Defendant was again questioned regarding the last time he saw Lony, and his response was the same. (T. Vol. III. p.324.)

On December 31, 1989, two hunters found a decomposed body, which was later identified as Lony Crosby, at Utah Lake in Utah

County.

Once the body was identified, defendant was questioned by Utah County detectives. He admitted shooting Lony and disposing of his body in Utah County at Utah Lake; however, he stated the killing was in self-defense as Lony had attacked him with a knife that had a black handle with red trim. He said the killing occurred in Murray, Utah in Salt Lake County (T. Vol. I p. 34-40). Detective Jeff Anderson with Murray Police Department took over the questioning. Again, defendant made statements implicating himself in the shooting but asserting self-defense.

Defendant told Detective Anderson that Lony had had a girlfriend, Jennifer Bratt, who was also seeing defendant. Lony confronted defendant regarding this and Lony came after him with the above-described knife. Defendant described becoming very frightened and shot at Lony in self defense. He said he threw Lony's personal items and the black handled knife in a nearby river. (T. Vol. I. pp. 75-81.)

At trial, defendant testified that the shooting occurred in Wales, Utah, up in the mountains by the trailer home belonging to Lony's grandparents. He said he took all of Lony's items down the mountain except for the red trimmed, black handled knife Lony used to attack him, which he threw south from the campsite where the shooting occurred. (T. Vol.I, III, page 449). He also testified that he tried to hide Lony's body in a fire pit. Defendant said he alone stole the truck from Wales, left it on a Salt Lake City road, and anonymously contacted police as to its whereabouts. (T. Vol. I,

III. P. 449-451). Several weeks later, he returned to the mountain in Wales and moved Lony's remains to the site where it was later located. (T. Vol. III p. 457-459). In all his statements to detectives and at trial, defendant asserted the killing was in self-defense.

During the trial, testimony by detectives regarding the search of the campsite area on the mountain indicated a number of items were found and marked for evidence, including an old knife with a black taped handle. At trial, the State moved to introduce that knife into evidence over defense objections of relevance, since it did not match defendant's description of the knife Lony used against him. (T. Vol. I,. p. 90)

After the case was submitted to the jury for deliberations, defense counsel noticed the knife with a black handle and red trim in the prosecutor's briefcase. Counsel made a motion for a mistrial on the grounds that (1) the existence of the knife should have been provided in discovery; (2) if the knife was part of the discovery, defense counsel was ineffective as she was proceeding under the assumption that no such knife was found; and (3) in any event, the State's action of introducing into evidence the black knife had the effect of misleading the jury regarding the existence of the actual knife defendant described, especially since the State actually did have the knife, which would corroborate defendant's testimony, but chose not to introduce it. (T. Vol. IV p. 592-597).

The court denied the motion, asserting that the corrective measures taken by the court were sufficient to remove any

prejudice. Defense counsel disagreed and renewed her motion for mistrial, which was again denied. (T. Vol. IV p. 598-600.) The court "cured" the problem by submitting the knife to the jury along with a brief statement from each side as to its importance. (T. Vol IV, P. 603-604)

Prior to trial, defendant moved the court to exclude evidence regarding transportation of the victim's corpse by defendant on the grounds that (1) such evidence was not relevant to the determination of guilt; and (2) any probative value of such evidence was substantially outweighed by the danger of unfair prejudice and confusion of the jury. That motion was denied on a limited point of relevance, but the court indicated that if the State got into gruesome aspects of the movement of the body, its ruling would be otherwise. (T. Supp. p. 14-22)

#### SUMMARY OF ARGUMENT

At trial, the defendant claimed that he killed Lony Crosby in self-defense. The knife that he claimed Crosby attacked him with was recovered. Another knife, apparently unrelated to the case, was admitted as evidence by the state over the objection of defendant. Defense counsel conducted the defense and cross examination while apparently under the impression that the knife defendant described was not available.

After the jury went into deliberation, defense counsel noticed the knife that defendant had described was in the prosecutor's briefcase. Defense counsel made a motion for a mistrial claiming

that she was ineffective for not realizing the knife was available and not using it as an integral part of her defense, or alternatively that the prosecutor committed misconduct by hiding it and misleading the jury. The prosecutor explained that he did not introduce that knife because he felt he could not lay adequate foundation for its admissibility. The motion was denied and the Court attempted to "cure" the problem. The knife was presented to the jury, during deliberations along with a very brief statement from each party regarding its evidentiary significance.

Counsel was also ineffective in allowing testimony and argument regarding some gruesome details involving the transportation of the body, after having secured a ruling that such details would be inadmissible.

## ARGUMENT

### POINT I

1. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL BASED ON; a) INEFFECTIVE ASSISTANCE OF COUNSEL.

a) Defendant contends the court erred in not granting his motion for a mistrial due to ineffective assistance of counsel.

Ordinarily claims of ineffective assistance of counsel are addressed by collateral attack in habeas corpus proceedings; however, in some circumstances the claim may be raised on direct appeal. State v. Johnson, 176 Utah Adv. Rep. 17, 18 (Utah Ct. App. 1991). Those circumstances exist when the defendant is represented by new counsel on appeal and the trial record is adequate on the

issue. Government of the Virgin Islands v. Zepp, 748 F. 2d 125, 133-434 (3d Cir. 1984); Johnson, 176 Utah Adv. Rep. at 18. The circumstances are present for this Court to review the ineffectiveness claim raised in this case on direct appeal.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. An infraction of the right to effective assistance of counsel can never be treated as harmless error. Johnson, 176 Utah Adv. Rep. at 19, (Citing Halloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173 (1978)), see also State v. Velarde, 806 P 2d 1190 (Ut. App. 1991).

In ineffectiveness claims, Utah courts have adopted the two-part test of Strickland:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687; see also State v. Templin, 805 P.2d 182, 186 (Utah 1990). The purpose of the right to effective assistance of counsel seeks to "guarantee an effective advocate for

each criminal defendant." Johnson, 176 Ut. Adv. Rep. at 19 (citing Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692 (1988)).

Defendant claims that his trial counsel was ineffective, her performance deficient and that serious errors were made in conducting his defense, such that it prejudiced the defense, depriving defendant of a fair trial. Counsel admitted as much in her motion for a mistrial.

The following exchanges took place when counsel discovered the prosecutor had the knife:

THE COURT: The State of Utah versus Terry Hay. Defendant is present, along with his counsel. Prosecution is present. It is 2:40 The jury has been deliberating about an hour. I was notified by a knock on the door that counsel for the defendant wanted to have the benefit of the records for a motion. Go ahead.

MS. PALACIOS: Your Honor, we would have a motion for mistrial, if I may state what occurred.

After the jury was excused I discovered the Mr. Behrens had in his briefcase the knife with the black handle and the red trim that was described by the defendant during the course of his testimony.

THE COURT: Just a minute. Do you want to unshackle the defendant?

TRANSPORTATION OFFICER: Fine.

MS. PALACIOS: I was advised that this was provided to me in the police reports. Quite frankly, I can't dispute that at this point whether or not they were in the police reports. If they were in the police reports, then I believe that I would simply raise the issue for appeal purposes on the grounds of ineffective assistance of counsel, because in my obvious haste to prepare for the trial -- I was sick for three days, and prepared over weekend -- I did not catch the fact that that knife existed, which would corroborate my client's story . . . (T. Vol IV p. 592-593) . . . I want to make it clear that the knife -- I'm not alleging that they hid it from me. To that extent I take responsibility. As I said, I think that I was ineffective not to do it. . . . (Id at p. 594).



. . .Mr. Scowcroft points out that we did not know that the knife existed. However, as I was -- I can't remember where it was in the record. I can't remember if it was in the reports. They have represented to me that it was. I did not get the knife. I wasn't shown the knife, and I missed out on that part. . . (Id at 595).

In fact, during the preliminary hearing, counsel cross examined Officer Anderson about the "knives" that were found. Anderson said he had found a fixed blade knife. Prelim. T. p. 79 - 84. Certainly counsel should have been aware of the knife.

The first prong of the Strickland test is met where counsel failed to discover a material piece of evidence around which to fashion a defense. Counsel was deficient since the evidence was critical and available. The error was serious because the evidence had the potential value of strongly corroborating defendant's claims of self defense and boasting his credibility. The error was prejudicial because it weakened and altered the defense.

For example, without the knife, counsel was forced to confront what the prosecution portrayed to be just another lie told by the defendant, i.e., that the victim even had a knife, much less that the victim attacked him with it; the prosecutor's medical testimony implied that the victim was not moving when shot. With the knife, the defense could have developed a sounder theory of how the wounds could have occurred if Crosby were indeed attacking with a knife. Instead of having to speculate about an attack, and the possibilities thereupon, counsel could have had a sound basis from which to argue an attack and self defense. With the knife, counsel could and should have focused more on the scene, examined it more, developed it more. This would quite probably have enhanced

defendant's credibility as well as corroborating his account of the incident. In short, counsel would not have given the scene and the attack such short shrift. That piece of evidence was critical to defendant's defense. It was the only physical evidence that could help the defendant. Counsel's examination of the defendant was affected by that lack of evidence. Counsel's argument was weakened without that evidence. She noted that the knife had not been found. (T. Vol. IV, p. 576). Defendant's entire defense was compromised and altered because of the missing evidence.

It was easier for the State as well, in disputing all the defendant's claims that he was attacked with a knife.

The "cure" administered by the trial court did not remedy the situation. It was like a band-aid on a torn jugular. Even though the jury got to see the knife, and in spite of having counsel (over objection) submit a "brief" statement of its evidentiary value, this was all too little, too late. The defense had already been compromised. Who can say what effect receiving the knife in such an odd way had on the jury? It surely only confused them, since counsel had told them in closing that the knife had not been found. Certainly a "dispassionate" reading of the stipulation accompanying the exhibit was of no benefit to defendant. (See T. Vol. IV p. 599) A three sentence statement by the defense as to its evidentiary value was hardly sufficient to emphasize its importance. (See T. Vol. IV. p. 604)

Defendant contends that counsel's ineffectiveness in failing to discover and use the knife to fashion his defense served to

compromise his defense, to his prejudice. He asks this Court to find his counsel was ineffective and reverse his conviction and grant him a new trial.

b) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY WITHHOLDING EVIDENCE AND MISLEADING THE JURY.

Defendant contends that the trial court erred in not granting his motion for a mistrial based on prosecutorial misconduct. Defendant contends the prosecutor committed prejudicial misconduct which deprived defendant of due process by his concealing and withholding from evidence the knife described by defendant. The prosecutor instead introduced an unrelated knife. This had the effect of misleading the jury. The concealment and withholding of the knife was deliberate, based on where it was located -- in the prosecutor's briefcase, not with the other evidence in boxes and bags.

Once it became obvious that defense counsel did not know that the knife was available, which was during opening argument, the prosecutor had a duty to reveal it. Instead, the prosecutor conducted his case in chief and cross examination of the defendant as if the knife did not exist. He argued through inference and omission that there was no knife.

"Well, the investigation continued and soon they found evidence in Sanpete County. They found this wood and these shell casings and the shallow hole . . . (T. Vol. 10, P. 564)

Defendant contends his due process rights were violated by the State's failure to produce the knife for admission into evidence at

his trial. He argues that the knife was material to his case and his defense and that there was a reasonable possibility that its timely introduction would have tended to exculpate him and that it would have had a significant impact on his defense as well as on the jury.

In State v. Stewart 544 P 2d. 477 (Utah 1975), this Court stated that a "deliberate suppression of evidence by those charged with the prosecution . . . constitutes a denial of due process if the evidence is material to the guilt or innocence of the defendant in a criminal case. . . ." Id at 479 (emphasis added). See also State v. Lovato, 702 P 2d 6106 (Utah 1985) and State v. Jimenez, 761 P 2d 577 (Utah 1988). That proposition was clarified in State v. Nebeker 657 P 2d 1359 (Utah 1983), where the Court said:

"The materiality required to reverse a criminal conviction for suppression or destruction of evidence as a denial of due process is more than evidentiary materiality." Id. at 1363. Rather, it must be "material in the constitutional sense." Id. (emphasis added). Constitutional materiality requires that there be a showing that the suppressed or destroyed evidence is vital to the issues of whether the defendant is guilty of the charge and whether there is a fundamental unfairness that requires the Court to set aside the defendant's conviction. Id.

The Court noted that evidence that only "might" have helped the defense does not establish constitutional materiality. Defendant contends the knife was vital to his claim of self defense since it was the very object that he claimed to have been attacked with and that he defended himself from. Defendant contends this evidence qualifies as material in the constitutional sense. As

argued in point (a) above, his entire defense and trial strategy was compromised by its unavailability. The state took advantage of its own misdeed by conducting its case as if the knife did not exist, which was dishonest and which misled the jury. Defendant argues that this violates due process and fundamental fairness.

Regardless of whether defense counsel forgot about the knife or not, the prosecutor should have revealed it. He argued that he did not introduce it based on foundational concerns (T. Vol. IV p. 596.) He did not mention why he did not say anything about having it there in case defense counsel wanted it introduced and/or would stipulate to its foundation.

In State v. Jarrell, 608 P.2d 218 (Utah 1980) this court addressed the question as to what duty a prosecutor has to disclose allegedly exculpatory evidence in a criminal case. The factors noted by the Court included the nature of the evidence, whether the defendant had made a specific request for the evidence . . . whether the defendant knew or with reasonable diligence should have known about the evidence and to a certain extent, the conduct of the prosecution. Id at 224.

"The underlying concern is, of course, to make the judicial process a search for truth and not just an arena of competition between the prosecution and the defense. For that reason the adversarial process, which generally serves well the judicial process, must yield to the quest for truth, if there is a conflict.

Both the United States Supreme Court and this Court have dealt with the standards that would be applied in determining whether evidence should have been disclosed by the prosecution. In Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963),

the Court held that the prosecutorial suppression of evidence favorable to the accused, in the face of a specific request of the evidence violates due process if the evidence is material either to guilt or to punishment. Good faith of the prosecution in such an instance is irrelevant. Accord, Moore v. Illinois, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972). In Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935), the court first addressed the situation involving a prosecutor's use of testimony which he knows or should know is perjured. Decisions following Mooney have held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). Apart from prosecutorial misconduct involving false testimony, nondisclosure resulting from the failure of the police or the members of the prosecutorial team to inform the defense attorney of exculpatory or other relevant evidence may also result in a violation of due process. Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Barbee v. Warden, 331 F. 2d 842 (4th Cir. 1964).

United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), extended the rulings of Brady, Moore, and Mooney. Agurs concerned the duty of a prosecutor to disclose exculpatory evidence which is unknown and unrequested by the defendant. The Court held that a prosecutor has a constitutional duty to volunteer obviously exculpatory evidence and evidence that is "so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce," 427 U.S. at 197, 96 S. Ct. at 2399. Specifically, the Court held that due process is violated if the undisclosed evidence, had it been disclosed, would have created a reasonable doubt as to defendant's guilt. Whether the evidence created a reasonable doubt must be evaluated in light of the entire record as viewed by an appellate court:

`If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. [Id. at 112-13, 96 S. Ct. at 2402.]

In State v. Worthen, 765 P 2d 839 (Utah 1988) the defendant had demanded all exculpatory and mitigatory evidence from the State. The court held that the prosecution has a duty to disclose such evidence [citing Brady, Jarrell U.C.A. Title 77, Chapter 35, Section 16(a)]. Indeed [that] due process requires the State to disclose even unrequested information which is or may be (emphasis added) exculpatory (citing State v. Carter 707 P. 2d 656, 662 (Utah 1985)). A Brady request for information is deemed a continuing request. Id at 849. The Court further noted that a prosecutor has a high duty to act fairly in conducting a criminal prosecution Id. at 850.

As noted, the prosecutor's good faith reason for not introducing the knife is of no consequence. He had a duty to voluntarily inform counsel that the knife was available even after trial commenced. Instead, he compromised the quest for truth and violated fundamental fairness by proceeding as if the knife had not been found. There is a substantial likelihood that the evidence affected the judgment of the jury. The way it was given to the jury, after deliberations began, with a brief explanation, had to have affected them. They deliberated for nine hours on Friday and

then returned on Saturday. (T. Vol IV. p. 609-610). In viewing the entire record as to the effect of the evidence, if introduced, there would have been a much stronger basis from which defendant could have argued self defense. It would have enhanced his credibility. This evidence was hardly of minor relative importance -- it was crucial. Defendant argues that the validity of the verdict should be questioned. Defendant argues that a duty to disclose was violated by the State, and it prejudiced his trial. Defendant submits that the Court erred in not granting his motion for mistrial. Defendant asks this Court to reverse the conviction based on prosecutorial misconduct and a violation of due process.

## POINT II

### COUNSEL WAS INEFFECTIVE IN ALLOWING GRUESOME DETAILS INTO EVIDENCE

Defendant contends his counsel's ineffectiveness further prejudiced his case when counsel allowed the State to present gruesome details that inflamed the jury, after the defense had secured a ruling that such evidence would be inadmissible.

At a pretrial motion, the defense argued for exclusion of evidence concerning defendant's moving the victim's body, pursuant to Rules 401 and 403, Utah Rules of Evidence, (T. Supp. p. 14-22). The motion was denied on a limited point of relevance but the court indicated that "If we were to get into the issue of some gruesome aspects of the movement of the body, my ruling would be otherwise." (T. Supp. p. 22). This court has previously held that:

Evidence is unfairly prejudicial if it has a



tendency to influence the outcome of the trial by improper means, if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or to otherwise cause the jury to base its decision on something other than the facts of the case. Terry v. Zions Cooperative Mercantile Inst., 605 P 2d 314 (Utah 1979), overruled on other grounds, McFarland v. Skaggs Cos., Inc., 678 P. 2d 298 (Utah 1984); State v. Bartley, 784 P. 2d 1231 (Utah Ct. App. 1989).

Defendant contends the evidence elicited by the prosecutor and not objected to by defense counsel regarding the movement of the body was unfairly prejudicial and inflamed the jury. Defendant contends that counsel was ineffective by allowing the evidence after the Court had indicated it would not allow it.

At the start of trial, the prosecutor read a stipulation into the records that honored the Court's ruling on this matter. (T. Vol II, p. 5). On direct examination of the defendant, his counsel was careful to avoid any gruesome details about moving the body. On cross examination, the prosecutor established that the body had been decomposing for six weeks; that it was a terrible sight; a terrible smell, that it was in terrible condition; to a point where it would almost be falling apart at the various limbs; that [his] foot broke apart; take his foot out of the back [of the boot] by the sock; . . . lay the foot down on top of him; picked up a decomposing body . . . that the body was just dumped out of the back of the truck covered with garbage (T. Vol. 111. p.488-492). The prosecutor even read the following stipulation into evidence:

"It is stipulated that when the remains of Lony Crosby were located that his sock was

located on top of his torso near the shoulders. Inside the sock were the remains of his right foot. (T. Vol IV p. 534)


Counsel failed to object to any of this inflammatory evidence and even stipulated to some of it. The only purpose the State had for eliciting it was to appeal to, and arouse the jury's sense of horror. The trial court had already ruled that such details would be inadmissible and counsel still failed to object to it. Defendant argues that the evidence was highly inflammatory in the eyes of the jury. See State v. Maurer, 770 P. 2d 981 (Utah 1989).

Defendant submits that counsel's deficient performance served to prejudice his trial. Counsel allowed inadmissible, inflammatory evidence to taint the jury. Counsel asks this court to find his counsel was deficient and to grant him a new trial.

#### CONCLUSION

Based upon the foregoing, defendant respectfully asks the Court to reverse his conviction and remand the case back to the District Court for a new trial.

Dated this 15 day of September, 1992.

  
MANNY GARCIA,  
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four (4) copies of the foregoing Brief of Appellant were delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 15 day of September 1992.

M. Concedo

## APPENDIX

## **Utah Rules of Evidence**

### **ARTICLE IV. RELEVANCY AND ITS LIMITS**

#### **Rule 401. Definition of "relevant evidence."**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

#### **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waster of time.**

Although relevant, evidence may 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.

## APPENDIX B

# Constitution of the United States

## AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.