

1994

# Utah v. Juan Anthony Portillo : Brief of Appellant

Utah Court of Appeals

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Jan Graham; Utah Attorney General; Marian Decker; Assistant Attorney General; Attorneys for Appellee.

Margaret P. Lindsay; Utah County Public Defenders Assoc.; Attorney for Appellant.

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## Recommended Citation

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## STATE OF UTAH,

Case No. 940387-CA

**vs.**

Priority No. 2

Defendant/Appellant.

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH COUNTY,  
STATE OF UTAH, FROM A CONVICTION OF SIX COUNTS OF FELONY AND  
MISDEMEANOR CONTROLLED SUBSTANCE VIOLATIONS BEFORE  
THE HONORABLE LYNN W. DAVIS

JAN GRAHAM  
Utah Attorney General  
MARIAN DECKER  
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236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Appellee

UTAH DISTRICT COURT  
DOCUMENT  
KEY  
45.9  
.S9  
DUCKET NO. 940357CA

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**FILED**  
Utah Court of Appeals

Attorney for Appellant

NOV 01 1995

Marilyn M. Branch  
Clerk of the Court

## TABLE OF CONTENTS

STATEMENT OF RELEVANT FACTS . . . . .	1
ARGUMENT . . . . .	2
CONCLUSION AND PRECISE RELIEF SOUGHT . . . . .	3
ADDENDUM . . . . .	4
EXHIBIT 1 - Transcript of June 6, 1995, hearing. . .	TAB #1

**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff/Appellee,

vs.

JUAN ANTHONY PORTILLO,

Defendant/Appellant.

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Case No. 940387-CA

Priority No. 2

**STATEMENT OF RELEVANT FACTS**

On March 7, 1995, Portillo filed a conforming Appellant's Brief with this Court. At Point III of Appellant's Brief, Portillo alleged that the trial court either committed plain error or abused its discretion when a non-presiding judge answered a jury question without consulting with counsel or the defendant. The appellate record indicates that the presiding judge had a conflict, but that Judge Harding would be available to receive and answer any jury questions after consultation with counsel (R. 162 at 426-428). A question was submitted by the jury, but only the question and Judge Harding's answer were made part of the record (R. 106).

On April 17, 1995, the State filed a stipulated motion to remand the case to the trial court for proceedings with respect

to Appellant's Point III.<sup>1</sup> This court granted the State's motion on May 12, 1995.

On June 6, 1995, an evidentiary hearing was held on the issue in the Fourth District Court, the Honorable Lynn Davis presiding. Appearing for the State at the hearing was Jim Taylor, Deputy Utah County Attorney. Also present at the hearing was Portillo, Margaret Lindsay--Portillo's appellate counsel, and Dean Zabriskie--Portillo's trial counsel.

At the hearing, Taylor and Zabriskie proffered that Judge Harding informed them of the jury's question, that he showed them the question and his intended answer, and that they agreed the answer was proper (R. 176-77). Under oath, Zabriskie also asserted that he couldn't remember any discussion pertaining to the jury instructions, but that he remembered the jury's question because "it indicated that the jury was thinking in terms of acquittal" (R. 179). Taylor also indicated that the jury reached a verdict approximately fifteen minutes after the response to their question (R. 180).

#### **ARGUMENT**

Based upon the above evidence introduced at the June 6, 1995, hearing in district court, Portillo withdraws Point III of his Argument located at pages 26-32 of Appellant's Brief. In addition, Portillo withdraws any argument asserting that the

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<sup>1</sup>On or about May 2, 1995, the State also filed with this court a Motion to stay the case pending a decision by the Utah Supreme Court in State v. Hunt, Case No. 940267. This court denied the motion on August 30, 1995.

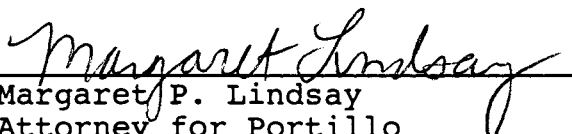
trial court erroneously handled the jury's question which may appear elsewhere in Appellant's Brief.

Portillo also requests that Zabriskie's belief that the jury was considering an acquittal (R. 179), and Taylor's recollection that the jury reached a verdict approximately fifteen minutes after the court's response to their question (R. 180), be incorporated into Points II, IV and V of Appellant's Brief.

**CONCLUSION AND PRECISE RELIEF SOUGHT**

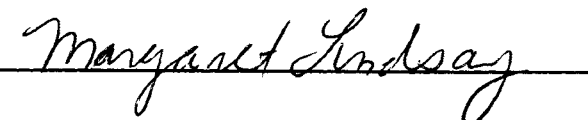
Based upon the arguments set forth in Appellant's Supplemental Brief, and in Points I, II, IV and V of Appellant's Brief, Portillo respectfully requests that this court vacate his conviction and remand the case for a new trial.

DATED this 30 day of October, 1995.

  
Margaret P. Lindsay  
Attorney for Portillo

**CERTIFICATE OF MAILING**

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Brief Of Appellant this 30 day of October, 1995, to the following: Jan Graham, Utah Attorney General, Marian Decker, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114.



Tab 1

Addendum

TRANSCRIPT OF JUNE 6, 1995, HEARING.

1 IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

2 STATE OF UTAH

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FILED 6-6-95  
Fourth Judicial District Court,  
of Utah County, State of Utah  
CARMA B. SMITH, Clerk  
Deputy

8 STATE OF UTAH

9 Plaintiff, )

11 vs. )

Criminal No. 921400129

12 ) HEARING TRANSCRIPT

13 JUAN ANTHONY PAUL PORTILLO )

14 Defendant. )

18 BE IT REMEMBERED that on Tuesday the 6th day of  
19 June, 1995, the HEARING in the above-entitled matter  
20 was taken by Richard C. Tatton, a Certified Shorthand  
21 Reporter and Notary Public in and for the State of Utah  
22 before the Honorable Lynn Davis, at the Fourth Judicial  
23 District Court Building, Provo, Utah.

24  
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FILED

JUN 12 1995

COURT OF APPEALS



1                                    A P P E A R A N C E S

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4    For the State of Utah:   Mr. Jim Taylor  
                                 Deputy Utah County Attorney  
                                 Provo, Utah 84601

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11   For the Defendant:   Ms. Margaret Lindsay  
                                 Attorney at Law  
                                 Provo, Utah 84601

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15                                    P R O C E E D I N G S

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18                THE COURT:   Let's go on record in reference to  
19    Case No. 921400129.   Ms. Lindsay is here on behalf  
20    of Mr. Portillo who has been transported   from the  
21    Gunnison Facility.

22                MR. TAYLOR:   I would like to make a brief  
23    preliminary statement.   I would like to inform the court  
24    as to why we are here.

25                THE COURT:   Mr. Taylor is here in behalf of the

1 State of Utah, Deputy Utah County Attorney.

2 MR. TAYLOR: This matter is currently on appeal  
3 pending before the Court of Appeals. In appellant's  
4 brief with substitute appellant counsel, he has  
5 alleged that this court committed plain error during  
6 the jury deliberations by allowing a substitute Judge  
7 to answer a jury question without prior consultation  
8 with the defendant or counsel. Is that right?

9 MS. LINDSAY: That is correct.

10 THE COURT: Let's see if we can place it in  
11 context. As I recall the case, I did handle the jury and  
12 I also took the verdict.

13 MS. LINDSAY: Yes, and I believe what happened  
14 was that at 4:00 O'clock approximately, as soon as the  
15 jury had been instructed, you needed, and they were about  
16 to deliberate, you needed to go to a soccer game or  
17 something.

18 THE COURT: Yes, I was a soccer coach either for  
19 a son or a daughter and their respective teams. I think I  
20 consulted with counsel at that point and time.

21 MS. LINDSAY: You did and that is on the record that  
22 you consulted with counsel and arranged for Judge Harding  
23 to be available to answer any questions. That he would  
24 consult with counsel and the defendant if such questions  
25 were submitted.

1           A question was in fact submitted. The question was,  
2     'If we find the defendant not guilty on Counts 1 and 2  
3     can we find him guilty of Count 3?'

4           Beneath the question is the one word answer, "no"  
5     by Judge Harding. That is all that appears on the record.

6           So basically we are here to build a record as to  
7     whether or not counsel was consulted and what sort of  
8     discussions took place.

9           THE COURT: We would need to place you under oath  
10    I suspect?

11          MR. TAYLOR: Well, let me finish my sentence now.  
12    Dean Zabriskie is subpoenaed to be here. I am here and  
13    I have counsel here if needed. I can proffer and I have  
14    discussed it with Mr. Zabriskie. The recollection of  
15    both of us is that at the time the question came both of us  
16    were here in the courtroom with the defendant. Judge  
17    Harding came to the door. He indicated that he had a  
18    question. We approached. He showed us the question.  
19    He showed us the answer. He indicated that it was his  
20    intent to give that answer. We both agreed that was the  
21    proper answer. It was then taken to the jury.

22          I would testify that way and I think Mr. Zabriskie is  
23    here and he would testify in that manner too.

24          THE COURT: Mr. Zabriskie if you were called and  
25    you have been subpoenaed , and if you were called to be a

1 witness in this case would your testimony be consistent  
2 with that presented by Mr. Taylor?

3 MR. ZABRISKIE: That is my recollection, Your Honor.  
4 And as represented by Mr. Taylor that Judge Harding came  
5 to the door and he showed us the question. I can't remember  
6 the exact how the question was worded, excepting that  
7 we agreed the answer was appropriate and should be put to  
8 the jury.

9 THE COURT: Okay, Ms. Lindsay do you wish either  
10 one of these counsel to be placed under oath relative  
11 to that or are you satisfied with the proffer that has  
12 been made by both of them?

13 MS. LINDSAY: I am satisfied with the proffer. I have  
14 a couple of questions.

15 THE COURT: If you have questions then let's have  
16 them placed under oath rather than just have them respond.

17 MR. TAYLOR: Who do you wish to question?

18 MS. LINDSAY: Mr. Zabriskie.

19 THE COURT: Mr. Zabriskie if you would step forward  
20 and be sworn by the Clerk of the Court and then take the  
21 witness stand and answer any questions that Ms.  
22 Lindsay may have for you.

23

24

DEAN ZABRISKIE

25 called as a witness by and on behalf of the defendant being

1 first duly sworn by the Clerk of the Court was examined  
2 and testified as follows:

3  
4 EXAMINATION

5  
6 BY MS. LINDSAY:

7 Q I just have a few questions, Mr. Zabriskie, if that  
8 is all right?

9 A Yes.

10 Q The first question is do you recollect whether or not  
11 any discussion was had concerning the question?

12 A Discussion?

13 Q In regards to the propriety of the answer, what the  
14 answer should be?

15 A With whom?

16 Q With the Judge , with the defendant, with Mr. Taylor?

17 A I can recall some discussion. I can't recall  
18 the length of the discussion or otherwise.

19 Q You will have to excuse me because of my inexperience  
20 here this morning. I have never conducted an evidentiary  
21 hearing before.

22 A I have never been a witness before.

23 Q I am Margaret Lindsay. Mr. Zabriskie, did you in fact  
24 represent Mr. Portillo in this matter?

25 A I did.

1 Q And you remember that there was a question submitted  
2 by the jury?

3 A Yes.

4 Q The question was according to the record was.  
5 If we find the defendant not guilty, the third charge  
6 Instruction No. 5, Element No. 7 refers to this charge  
7 and the subsequent violation. If Count 1 and Count 2  
8 are not guilty can a guilty verdict or not guilty, can  
9 a not guilty verdict be given for Count 3? There is a  
10 one word answer, "no", and then Judge Harding's signature.  
11 Do you recall , at all, any discussion in regards to the  
12 question, were the jury instructions pulled and examined  
13 before when Judge Harding consulted you?

14 A No, I don't recall any discussion. I do recall  
15 the question simply because the question as it came from  
16 the jury , at least on its face, indicated that the  
17 jury was thinking in terms of an acquittal. That is why  
18 I recall it. We were very pleased with the question.  
19 As it turned out, he of course wasn't acquitted. I can't  
20 remember any discussions that relates to jury instructions.

21 Q Okay. I believe that is all the questions I have.

22 A Thank you.

23 THE COURT: You may step down. Do you have any  
24 questions for Mr. Taylor?

25 MS. LINDSAY: I don't believe so.

1 THE COURT: Is there any necessity to make any  
2 further record regarding this issue? My recollection,  
3 of course, does not involve this incident because I was  
4 probably on a soccer field some place for an hour and then  
5 came back and then waited sometime.

6 MR. TAYLOR: I think you were on your way back. We  
7 had a verdict about 15 minutes ~~after~~ the question.

8 THE COURT: And then I, at that point and time,  
9 took the verdict and may have in fact polled the jury. I  
10 don't know.

11 MR. TAYLOR: The record ~~will reflect~~ that and my  
12 notes certainly reflect that ~~the~~ jury was polled.

13 THE COURT: Okay, any additional record that needs  
14 to be made Ms. Lindsay?

15 MS. LINDSAY: Give me one moment, Your Honor.

16 THE COURT: Okay.

17 MS. LINDSAY: Nothing further.

18 THE COURT: Anything further from the State?

19 MR. TAYLOR: No.

20 THE COURT: We will be in recess then, thank you.

21 MS. LINDSAY: Thank you.

22 (WHEREUPON, this HEARING was concluded)  
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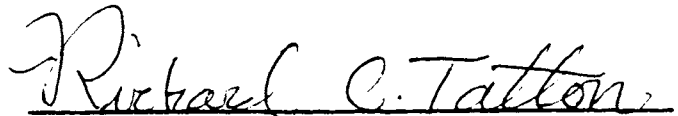
C E R T I F I C A T E

STATE OF UTAH       )  
                              : ss.  
COUNTY OF WASATCH )

THIS IS TO CERTIFY that the HEARING was reported  
by me in Stenotype, and thereafter caused by me to be  
transcribed into typewriting by Richard C. Tatton and that  
a full, true and correct transcription of said testimony  
was so taken.

I FURTHER CERTIFY that I am not of kin or otherwise  
associated with any of the parties to said cause of action  
and that I am not interested in the event thereof.

WITNESS my hand and official seal at Midway, Utah,  
this 6<sup>th</sup> day of June, 1995.

  
RICHARD C. TATTON, CSR

My commission expires:  
June 15, 1997

