

Mary R. Ennis, Esq.
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Aldan, PA 19018
(610) 623-9456
Attorney No. 65585

COPY

COUNSEL FOR DEFENDANT

IN THE COURT OF COMMON PLEAS OF YORK COUNTY
COMMONWEALTH OF PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

No. 753 CA 1999

v.

NOEL MATOS MONTALVO,

Defendant



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AMENDED CONCISE STATEMENT OF MATTERS
COMPLAINED OF ON APPEAL¹

Defendant, NOEL MATOS MONTALVO, by counsel, Mary R. Ennis, Esq., hereby amends the "Statement of Issues Pursuant to Pa.R.A.P. 1925(b),"² previously filed in this case on December 18, 2003, by adding the following matters complained of on appeal.

On March 19, 2003, following a jury trial before this Court, Defendant was convicted of first degree murder in the death of Miriam Ascencio, second degree murder in the death of

¹ Errors, which were found by counsel after she submitted the Amended Concise Statement of Matters Complained of on Appeal on August 1, 2005, have been corrected herein.

² The Statement of Issues Pursuant to Pa.R.A.P. 1925(b) was filed on 12/18/03 by counsel by York County counsel of record, Frank Arcuri, Esq., and is herein incorporated by reference.

Nelson Lugo, burglary and conspiracy. The penalty hearing commenced thirty-five (35) minutes after the jury returned the guilty verdict and lasted about ninety (90) minutes. After deliberating for about one hour, the jury sentenced Defendant to death.

This Court formally imposed sentence on April 14, 2003. No post-sentence motions were filed.

Defendant was represented at trial by: Francis Cutruzzula, Esq., a member of the New Jersey bar who was admitted in Pennsylvania *pro hac vice* under Pa.B.A.R. 301, for purposes of this case only; and Frank Arcuri, Esq., a member of the Pennsylvania bar, whose practice is based in York County, served as counsel of record. Mr. Cutruzzula was lead counsel in this matter at all times before and during trial.

Defendant asserts the following additional issues on appeal:

A. GUILT PHASE ISSUES

1. The prosecutor committed misconduct and violated Defendant's right to due process of law by pursuing capital murder charges against Defendant on the theory that Defendant had actually killed the victims, despite having already obtained two capital murder convictions and death sentences against Milton Montalvo (Defendant's brother), in his separate trial, on the theory that Milton had, in fact, committed the murders.
2. The prosecutor's use of factually inconsistent theories at separate capital trials is fundamentally incompatible with the Eighth Amendment's required "heightened standard of reliability" in capital sentencing.
3. There was insufficient evidence to support the guilty verdicts against Defendant because the Commonwealth's case was based solely on the non-credible testimony of admitted perjurer, Esther Soto (see, N.T. Vol. III at 26: "You essentially purged [sic] yourself;" "You

essentially lied in [Milton Montalvo's] trial, didn't you?"), who, throughout the investigation and in prior sworn testimony, repeatedly gave contradictory statements as to the killer's identity (see e.g., id., at 34, 37-38, 43-45, 49, 74-75, 77, 80).

4. Trial counsel was ineffective for failing to move that the charges against Defendant be quashed on the grounds that (1) Milton Montalvo had already been convicted and sentenced to death for the very same offenses and (2) no evidence had been discovered following Milton's conviction and sentencing which implicated Defendant.

5. In reference to 4, above, trial counsel was additionally ineffective for failing to introduce as evidence at Defendant's trial the side-bar comments made by the Court and Prosecutor Kelley (same judge and prosecutor in both Milton's and Noel's trials), regarding the lack of evidence against Defendant, in which the Court correctly pointed out that "the only evidence to even put [Milton Montalvo's] brother [i.e., Defendant] in the apartment is the statement by Esther Soto," (Commonwealth vs. Milton Noel Matos Montalvo, N.T. 1/20/00 & 1/21/00 at 180); to which Prosecutor Kelley responded, "Right. Exactly. And nothing to corroborate that whatsoever," (id.).

6. The trial judge, who had also presided over the capital trial of Defendant's brother, Milton Montalvo, should have recused herself *sua sponte*; or, in the alternative, defense counsel should have moved for her recusal.

7. Trial counsel was ineffective for failing to seek dismissal of the conspiracy charge against Defendant since Milton Montalvo, the person with whom Defendant allegedly conspired and who had already been tried and convicted of the same offenses, had not even been charged with conspiracy.

8. Defendant was denied due process of law when the prosecutor knowingly and

intentionally presented the false testimony of Esther Soto in order to convict Defendant.

9. The verdict is against the weight of the evidence.
10. Trial counsel rendered gross ineffective assistance by failing to investigate, interview and present the testimony of Angel Santos, a material witness who had informed York police on April 19, 1998 that he and girlfriend, Patricia Ascencio, were with Defendant and his wife at Defendant's home the night the murders occurred.
11. Defense counsel failed to adequately subject the prosecution's case to meaningful adversarial testing, which thereby denied Defendant of his right to the effective assistance of counsel, pursuant to U.S. v. Cronie, 466 U.S. 648 (1984).
12. Trial counsel rendered ineffective assistance by failing to move that the Commonwealth be precluded from raising the issue of Defendant's alleged "flight" since, in order to rebut, the defense would need to present evidence that Defendant violated parole by leaving Puerto Rico. Counsel's failure to object when evidence of alleged "flight" (testimony of FBI Agent Edges) was presented at trial constituted further ineffective assistance of counsel.
13. The trial court's instruction on accomplice liability impermissibly relieved the Commonwealth of its burden of proving each element of first degree murder beyond a reasonable doubt, which thereby denied Defendant his right to due process of law, pursuant to Laird v. Horn, ___ F. ___, Court of Appeals No. 01-9012 (3rd Cir. July 19, 2005).
14. The prosecutor's statement at closing about Miriam Ascencio's "shoe in a very horrendous sexual situation shoved into her crotch, ... the fact that the panties that she had on were taken off of her and put over her head, ..." (N.T. Vol. VI at 308), was prejudicial, highly inflammatory, improper, constituted prosecutorial misconduct and violated Defendant's right to due process, since the aggravating circumstance of torture, relating *inter alia* to the placement

of the shoe, had already been found against Milton Montalvo in his capital sentencing.

Defendant was also denied effective assistance of counsel when trial counsel failed to object.

15. The trial court abused its discretion by granting the Commonwealth's request to charge the jury on the issue of flight. (N.T. Vol. IV at 274-275).

16. Defendant was denied his rights to due process and effective assistance of counsel, when Attorney Cutruzzula failed to file post-sentence motions, despite having been rehired and paid \$20,000.00 to continue as Defendant's appellate counsel.

17. Lead trial counsel, Francis Cutruzzula, a member of the New Jersey bar who was admitted *pro hac vice* for purposes of this case only, rendered gross ineffective assistance by failing to familiarize himself with the Pennsylvania Rules of Criminal Procedure and relevant aspects of Pennsylvania criminal practice, specifically those relating to death penalty litigation, (see, e.g., N.T. Vol. I at 119; N.T. Vol. II at 185-188; N.T. Vol. V at 87), and thereby seriously prejudiced Defendant and violated his federal and state constitutional rights.

a. Defendant was denied his right to a preliminary hearing under Pa.R.Crim.P. 541 and 542, because Mr. Cutruzzula did not know that, in Pennsylvania, a criminal defendant is entitled to have a preliminary hearing.

b. Defendant was denied due process at penalty phase when the trial court, in violation of Pa.R.Crim.P. 806 (formerly numbered 805), directed that defense counsel make his closing argument first.

18. Trial court abused its discretion by limiting defense counsel's cross-examination of Esther Soto on the issue of her arrest and alleged assault by police during the trial of Milton Montalvo (N.T. Vol. III at 62).

19. The trial court erred when it denied Defendant's motion for judgment of

acquittal, under Pa.R.Crim.P. 606(A)(1), at the close of the Commonwealth's case-in-chief (N.T. Vol. IV at 228-231).

20. Trial court abused its discretion by sustaining the Commonwealth's objection to the questioning by defense counsel of York Police Officer Lisa Daniels regarding a prior burglary at the home of the victim with which Officer Daniels was familiar.

21. The trial court erred when it permitted Commonwealth witness, Esther Soto, to refresh her recollection by reading the prepared transcript of her tape-recorded police interview, rather than requiring that the actual tape, as best evidence, be played (N.T. Vol. III at 19-22).

B. PENALTY PHASE

22. The trial court abused its discretion and violated Pa.R.Crim.P. 806 (formerly Rule 805) when, at the penalty phase, the court required defense counsel to make his closing argument to the jury first, and thereby denied Defendant's state and federal constitutional rights.

23. Defendant's death sentence must be reversed because the trial court failed to instruct the jury that aggravating circumstance 42 Pa.C.S.A. § 9711(d)(6), "[t]he defendant committed a killing while in the perpetration of a felony," does not apply to a first degree murder conviction based on accomplice liability.

24. Defendant was denied his right to due process of law when the prosecutor misstated the law by telling the jury that, because they had convicted Defendant of murder and burglary, aggravating circumstance 9711(d)(6) had, therefore, "already" been found by them "to have been proven beyond a reasonable doubt." Trial counsel rendered ineffective assistance by failing to object to the prosecutor's misstatement of law. The trial court should have corrected the misstatement *sua sponte*.

25. Trial counsel rendered ineffective assistance by failing to object when the

prosecutor told the jury in his penalty phase opening and closing that aggravating circumstances 9711(d)(6) and 9711(d)(11) had already been proven beyond a reasonable doubt.

26. When the jury asked during sentencing deliberations if circumstantial evidence was considered a mitigating factor (N.T. Vol. V at 105), trial counsel was ineffective by failing to move for Defendant's first degree murder conviction to be set aside; or, by failing to request, in the alternative, that the court give an instruction regarding residual doubt.

27. Once Defendant was found guilty of first degree murder, trial counsel was grossly ineffective for failing to request a continuance prior to the penalty hearing.

28. It was clear from the record that defense counsel had failed to prepare the penalty phase witnesses, since Defendant and his wife both testified about issues relating to Defendant's innocence; e.g.: (1) Defendant was at home the night the murders took place; and, (2) Milton Montalvo told them that they all had to leave the area because he (Milton) had hit Miriam Ascencio and was afraid that Miriam would make trouble by informing the authorities that Defendant had violated his parole in Puerto Rico.

29. Trial counsel's closing argument at sentencing -- a mere four (4) lines of trial transcript (see, N.T. Vol. V at 87) -- constituted egregious ineffective assistance of counsel, as well as legal malfeasance and legal malpractice.

30. Trial counsel was ineffective for failing to request a jury instruction that life without the possibility of parole is the sentencing alternative to the death penalty.

C. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS REQUIRING FURTHER EVIDENTIARY DEVELOPMENT³

Once this matter is before the Pennsylvania Supreme Court, Defendant will file a petition that the case be remanded for an evidentiary hearing in order to establish a record for

³ All previous issues regarding ineffective assistance of counsel are supported by the record.

appellate review of the following ineffective assistance of counsel claims.

31. Defendant was denied his rights to due process and the effective assistance of counsel when trial counsel failed to investigate and/or present to the court an exculpatory letter dated March 16, 2003, written by or at the direction of Esther Soto (copy and translation attached hereto at Exhibit A), which defense counsel had in his possession as of late-March 2003 and prior to formal sentencing on April 14, 2003.

32. Trial counsel's failure to meet or speak with Defendant prior to his capital murder trial constituted egregious ineffective assistance which violated Defendant's rights under the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 9 and 13 of the Pennsylvania Constitution.⁴

33. Having concluded that the Commonwealth lacked sufficient evidence to convict Defendant, trial counsel failed to prepare a defense because he was confident that, at the close of the prosecution's case-in-chief, the court would grant his motion for judgment of acquittal.

34. Defendant was denied his rights under the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 9 and 13 of the Pennsylvania Constitution,⁵ because trial counsel made a conscious decision not to prepare for the penalty phase.

Defendant's Amended Concise Statement of Matters Complained of on Appeal is hereby

⁴ In late-January or early-February 2004, Frank Arcuri, Esq., advised the undersigned that Attorney Cutruzzula never went to York County Prison either before or during the trial to meet with Defendant. In fact, Mr. Arcuri said that when he offered to take Mr. Cutruzzula to the prison to see Defendant, Cutruzzula actually declined. Later, in July 2004, Attorney Cutruzzula admitted to the undersigned that he never met with Defendant prior to trial, nor did he communicate with Defendant by phone or through written correspondence.

⁵ In late-January or early-February 2004, Frank Arcuri, Esq., advised the undersigned that he offered to investigate and prepare for the penalty hearing, however, Mr. Cutruzzula specifically told him not to do so.

Respectfully submitted,



Mary R. Ennis, Esq.
Counsel for Defendant
Attorney No. 65585
612 Massachusetts Avenue
Aldan, PA 19018
(610) 623-9456

This corrected copy is dated August 10, 2005⁶

⁶ Amended Statement of Issues Complained of on Appeal was timely filed on August 1, 2005. See n.1, above.

VERIFICATION

I verify that the statements of fact made in the foregoing are true and correct to the best of my knowledge, information and belief. I further understand that any false statements made herein are subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.



Mary R. Ennis, Esquire
Counsel for Defendant
Attorney No. 65585
612 Massachusetts Avenue
Aldan, PA 19018
(610) 623-9456

Dated: August 10, 2005

CERTIFICATE OF SERVICE

I hereby certify that I am serving a true and correct copy of the foregoing document upon the persons listed and in the manner indicated below:

Service by first class mail addressed as follows:

Honorable Sheryl Ann Dorney
York County Court of Common Pleas
45 N. George Street
York, PA 17401

Lori Yost, Esq.
Office of the York County District Attorney
45 N. George Street
York, PA 17401

Noel Matos Montalvo
FH 9391
175 Progress Drive
Waynesburg, PA 15370



Mary R. Ennis, Esq.
Counsel for Defendant
612 Massachusetts Avenue
Aldan, PA 19018
(610) 623-9456
Attorney No. 65585

Dated: August 10, 2005

EXHIBIT A

Hola Noel o como sea que te digan:
Te estoy escribiendo pero no uses esta carta en mi contra porque niego todo, y mas me la escribio una amiga mia yo lo dicte lo que escribiera por si tu se la das a tus abuelos y la usan en mi contra yo voy a decir que yo no lo escribi. Ahora yo te quiero decir algo muy importante, Noe el Viernes 14, Cuando yo declare y solamente miraba a Suelo y lloraba porque no tenia valor de mirarte, yo mi Consciencia me recordia el saber que estoy declarando en contra de un inocente, y lo estoy haciendo porque el fiscal Tom Kelly hablo con Camacho para que yo testificara en tu contra, y si lo hacia me quitaban unos cargos en tu contra, y si no lo hacia me habian a meter presa, estoy siendo forzada a declarar, y Camacho no me deja tranquilo cuando me dijo que si no lo hacia si iba a encasillarme de Jodarme. Yo no puedo echar hacia atras lo que testifique. Aunque todo lo que dije es mentira y yo se que tu no tienes nada que ver con esto, mas esto lo hizo tu hermano el que los mato a los dos porque el me lo dijo, yo no puedo con esta precion de vida la cual llevo, mas Consciencia no me deja dormir. Perdoname por esto, pero primero es mi libertad y si no lo digo me van a buscar la forma de meterme presa por no cumplir, mas Camacho me dice todo lo que tengo que decir, y el sabe que tu eres inocente y el no puede dejar que tu ganes este caso, y la unica forma de acertar daño es usandome a mi como testigo, te escribi para que te deia saber que yo no...

es el fiscal Tom Kelly y Camecho y me estan uti

Esto es todo y rompe esta carta para cuando la

Att: Esther R. Sot

ESTHER REIDAN SATO
152 E. MAPLE ST.
CLARK, PA. 17403

NOEL MATOS MONTALVO
72442 - I E B 8B
3400 CONCORD RD.
CLARK, PA. 17402

Feb-2

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3/16/03

Hi Noel or whatever it is they call you.

I am writing to you but don't use this letter against me because I will deny everything, and anyhow, a friend is writing it for me and she writes what I tell her to so if you give it to your lawyers, and you use it against me, I will say that I didn't write it. Now, I want to tell you something very important, Noel. On Friday the 14th, when I testified and I was looking only at the floor and crying because I didn't have the courage to look at you, my conscience was bothering me, knowing that I was giving testimony against an innocent man. I am doing it because the prosecutor, Tom Kelly, spoke with Camacho to arrange for me to testify against you and if I did it, they would dismiss some charges against me. If I didn't do it, they were going to lock me up. I am being forced to testify and Camacho won't leave me alone—He said that if I didn't do it, he was going to make sure they nailed me good. I can't go back in what I testified. Although everything I said is a lie, and I know that you didn't have anything to do with this, that your brother did it, he killed them both because he told me, I can't go on with this pressure in my life, my conscience won't let me sleep. Forgive me for this, but first comes my freedom and if I don't say it, they are going to find a way to lock me up for not carrying through. Anyway, Camacho is telling me what to say and he knows you are innocent but he can't let you win this case and the only way to hurt you is using me as a witness. I wrote this and to let you know that I am not the one who wants to hurt you, it is the prosecutor Tom Kelly and Camacho and they are using me.

That's all, and tear up this letter after you read it.

Att: [Sincerely] Ester R. Soto

I, Tamara Al-Kasey, professional translator, certify that this translation from Spanish into English is true and correct to the best of my knowledge and ability. Punctuation has been edited to maintain clarity.

Tamara Al-Kasey, Ph.D. November 23, 2004

EXHIBIT A-2

Tamara Al-Kasey, Ph.D.
abc language solutions
P.O. Box 8833, Pittsburgh, PA 15221
Office 412.244.0769 Cell 412.897.6909

Partner and Business Manager, abc language solutions. 2001-Present.
Specialist in Spanish-English interpretation and Spanish-->English written translation.
Cultural sensitivity, intercultural communications, language acquisition and education.

Interpretation and translation experience:

- Federal Public Defender, Western district of PA, client/attorney communications (Pittsburgh, PA), simultaneous court interpretation (Johnstown, PA).
- Beaver County Court, Beaver, PA. Assistance to Public Defender, Office of Parole, simultaneous court interpretation.
- Court appointed attorneys, client/attorney communications, western PA.
- State Correctional Institution, Pittsburgh ("Western Pen"), inmate correspondence, translation of informative documents, counselor/therapy interpretation.
- Medical interpretation for determination of disabilities (PA. Dept. of Labor).
- Conference interpreting for 3 day meeting on Education. (Pittsburgh, PA).

- Written translation of legal and medical documents
- Written translation of professional articles on linguistics
- Editing of book-length research project in linguistics.

Other related experience:

- College/University Teaching. Taught a variety of Spanish language, linguistics and cultural courses.
- Penn State McKeesport, McKeesport, PA. Adjunct Instructor, 2002, 2005.
 - The College of New Jersey, Ewing, NJ. Assistant Professor, 2000-2001.
 - St. Joseph's University, Philadelphia, PA. Assistant Professor, 1999-2000.
 - Carnegie Mellon University, Pittsburgh, PA. Assistant Professor, 1992-1996, Career track Lecturer, 1996-1999.
 - University of Pittsburgh, Pittsburgh, PA. Visiting Assistant Professor, Spring 1998.
 - University of Massachusetts, Amherst, MA. Dept. of Spanish and Portuguese and Div. of Continuing Education, Graduate Teaching Assistant, 1987-1992.

Spanish language/culture courses for children, 2001-Present.

Multinational Translation Services, Pittsburgh, PA. Business Manager, consultant, translation, coordination of team translations. 1994-1999.

Education

Agnese Haury Institute for Court Interpreters. (Intensive training workshop for professional court interpreters.) University of Arizona, July 2003. Written test preparation, workshop, Nashville, June 2004.

Ph.D. Hispanic Linguistics, University of Massachusetts. May 1993.

M.A. Linguistics, Department of Linguistics, UMass. May 1993.

M.A. Hispanic Linguistics, UMass. February 1992.

B.A. Magna Cum Laude, Spanish/Art, Slippery Rock University of Pennsylvania. December 1985.

- Passed Federal Court Interpreter Written Exam. Certification expected August, 2005.
- Member NAJIT (National Association of Judiciary Interpreters and Translators).