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COURT OF APPEALS, STATE OF COLORADO Court Address: Colorado State Judicial Building 2 East 14th Avenue, Suite 300 Denver, Colorado 80203	FILED IN THE COURT OF APPEALS STATE OF COLORADO MAY 22 2007 Clerk, Court of Appeals
Appeal from the District Court, El Paso County Honorable Gilbert A. Martinez, District Judge Case No. 04CR5770, Division 10	
Plaintiff-Appellee: THE PEOPLE OF THE STATE OF COLORADO **Defendant-Appellant:** TODD WILLIAM NEWMILLER	▲ **COURT USE ONLY** ▲
Attorney for Defendant-Appellant: Blain D. Myhre, #23329 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: (303) 292-5656 FAX Number: (303) 292-3152 E-mail: bmyhre@ir-law.com	Case Number 06 CA 1402
APPELLANT'S OPENING BRIEF	

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II. STATEMENT OF THE CASE

A. Nature of the case, course of proceedings and disposition in the court below

This is an appeal from a conviction for second degree murder with a deadly weapon arising out of the death of Anthony Madril on November 20, 2004. Defendant-Appellant Todd Newmiller was tried before a jury and convicted. He

was sentenced to 31 years' imprisonment. He timely appeals his conviction and sentence.

B. Statement of the Facts

Two groups of people converged on one tragic night that ended in the fatal stabbing of Anthony Madril. Though Todd Newmiller was charged and convicted of second degree murder, none of the six witnesses saw him confronting Anthony Madril. But witnesses did see Anthony Madril engaged in a bloody fight with Brad Orgill, immediately before Madril told his friends he had been stabbed.

On November 19, 2004, Todd Newmiller was celebrating his birthday with his younger brother, Joel, and with his friend Brad "Evil" Orgill, along with Michael Lee and Jason Melick. 11 R. at 15:16-20.[1] The five went to Benny's Bar, in the Colorado City area of Colorado Springs, to play pool and have some drinks. *Id.* at 7:13-8:21; 10 R. at 84:15-25; 15 R. at 42:8-11; 14 R. at 13:14-19, 14:9-13.

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[1] References to the record are to volume and page, and volume, page, and line for transcripts. Two of the record volumes contain multiple transcripts from different days. For those volumes, the specific transcript dates are also given. References to trial exhibits are simply to "Ex. __." References to other items and exhibits from other hearings are descriptive so as to direct the court to the precise item or relevant portion of the item. Key documents are attached to the brief in a separately-numbered appendix.

Later in the evening, they went to the Appaloosa Gentlemen's Club, a "strip club." 14 R. at 14:17-24; 11 R. at 12:4-12. Also at the Appaloosa that night were Charles Schwartz, his cousin Chisum Lopez, and Anthony Madril, along with their friends Aaron Hoong and Phu Ha. 10 R. at 178:11-179:14; 12 R. at 73:2-74:1.

After last call, shortly before 2 a.m., Chisum Lopez said to one of the female dancers at the club, "If you'd like to come home, we have money at home if you want to have a dance." 12 R. at 78:10-24; 15 R. at 44:15-20. In response, Brad Orgill said something to the effect of "the stripper's not going home with you, just leave. They don't want you." 12 R. at 79:4-7; 15 R. at 45:3-21. Orgill (who was sometimes referred to in testimony as "heavy-set" or as "the fat guy," and who was described as "average height" and "at least 240 pounds"), called Chisum Lopez a "hick" because he wore a cowboy hat. 18 R. at 65:9-19; 10 R. at 83:8-24. That remark "got under" Lopez's skin and upset him. 18 R. at 65:20-24. At that point, Orgill and Lopez got "in each other's face" in a "heated atmosphere" and exchanged words. 15 R. at 45:22-46:11

The club's management interceded and let Schwartz, Lopez, Madril, Hoong, and Ha leave first, while briefly holding back Orgill, Todd Newmiller, Joel

Newmiller, Melick, and Lee. 12 R. at 84:11-14; 15 R. at 49:9-15. In the parking lot, however, the confrontation renewed. Chisum Lopez and Todd Newmiller had a confrontation. Chisum Lopez said, "I was in his face the whole time out in the parking lot exchanging words." But no blows were exchanged. 18 R. at 67:2-22. Lopez testified that he was trying to get Todd Newmiller to "do something," saying things like "come on, do something," but Newmiller didn't say a word. At the time, Lopez wanted to fight Newmiller. *Id.* at 88:19-90:2.

Management again interceded, and Schwartz told Lopez and Madril "let's just go." 12 R. at 88:6-19. Lopez, Schwartz, and Madril went back to Schwartz's pickup truck. While leaving the parking lot, however, Schwartz took "the absolute longest way" out through the parking lot. 13 R. at 120:19-121:6. When the pickup passed Orgill, Newmiller, and the others, Lopez rolled down Schwartz's driver's side window, and Lopez and Madril "started cussing them out." 12 R. at 90:16-21. Verbal "back and forth" occurred. *Id.* at 90:22-25. The pickup then left the parking lot heading west on Terminal Avenue. *Id.* at 91:23-92:2. Halfway down Terminal heading toward Conrad Street, Schwartz saw the Jeep Cherokee that Joel Newmiller was driving pull out of the parking lot. *Id.* at 93:12-19.

Joel Newmiller was driving the jeep, Todd Newmiller was in the front passenger seat, and Orgill, Melick, and Lee were in the backseat. 10 R. at 88:1-12. Joel Newmiller took the same route he had driven to the club, meeting up with Schwartz, Lopez, and Madril when he turned onto Conrad Street. Schwartz's pickup was parked at an angle on the right-center side of Conrad Street. 11 R. at 21:25-22:16. Schwartz testified that Lopez and Madril both rushed out of the truck, possibly while it was still moving. Lopez got out first, followed by Madril. 12 R. at 94:20-95:2, 120:8-18. According to Schwartz, when they jumped out of the car, Madril said, "I have a knife, let's go!" Schwartz yelled at them to get back in the truck. 12 R. at 94:20-96:24; 98:3-12; 18 R. at 92:4-9. Schwartz did not get out of the truck. 12 R. at 97:10-12. The jeep stopped behind the truck. 12 R. at 97:20-21.

Lopez testified that "within a half second" of getting out of the truck, he was immediately confronted by Todd Newmiller, the same guy he confronted in the parking lot of the club. 18 R. at 92:10-19. Lopez told police that he wanted to "beat the s--- out of" Todd Newmiller. *Id.* at 92:23-25. Lopez never saw Todd Newmiller in a confrontation with or anywhere near Anthony Madril. *Id.* at 72:12-

16; 103:23-104:5. In his confrontation with Newmiller, all of Lopez's attention was on Newmiller. *Id.* at 96:21-23. Lopez said, however, that while Todd Newmiller "was in his face," out of the corner of his eye he saw someone heading from the jeep toward Madril, who was on the driver's side of the pickup. *Id.* at 97:22-98:3.

According to Lopez, though Lopez and Newmiller squared off, neither of them threw a punch or otherwise touched the other. *See* 18 R. at 72:23-73:1. Orgill and Madril, on the other hand, were fighting, throwing punches. Orgill said he approached the pickup and got into a fight immediately. 15 R. at 59:8-9. The evidence is undisputed that Orgill fought with Madril. *See, e.g.,* 12 R. at 102:23-103:7. Orgill testified he got hit in the eye, fell down, then got up and started swinging. 15 R. at 59:14-61:1; Ex. 258 (photo of Orgill's black eye). Orgill said initially Madril was "swinging pretty well," but later slowed down. 15 R. at 62:2-8. At some point, both Madril and Orgill fell down, and were "rolling" with each other on the ground. 12 R. at 103:21-105:2. Schwartz said Orgill was the only one from the jeep who was fighting at the scene. 12 R. at 144:4-12. Todd Newmiller

was not engaged in or near Madril and Orgill's fight. *Id.* at 144:4-25; 18 R. at 72:12-16, 103:23-104:5.

Meanwhile, Charles Schwartz kept yelling for Lopez and Madril to get back in the pickup. Finally, Lopez got back in the truck. 12 R. at 100:16-25; 18 R. at 74:13-24. As soon as Lopez got back in the truck, within a half second, Lopez and Schwartz heard the rear passenger tire pop. 12 R. at 100:25-101:4; 18 R. at 75:15-20. At that time, Madril and Orgill were fighting 8 to 10 feet in front of the pickup. 12 R. at 102:23-103:7. Schwartz said they were fighting hard in front of the truck, and he heard Madril yell, "It's on, let's go, Chaz, let's go, let's fight, let's rumble." *Id.* at 134:1-135:2, 135:25-136:2. Schwartz saw Madril and Orgill fall and moved the pickup forward toward them. *Id.* at 106:2-4. Lopez said the "heavy set guy" (i.e., Orgill) was 4 to 5 feet in front of the truck, lying on the ground with Madril. 18 R. at 76:17-77:8.

Orgill testified that he went back to the jeep and when he got back in, he saw Todd Newmiller crouched toward the right rear passenger side of the pickup. 15 R. at 63:18-64:1. Orgill remembered that after Newmiller got back into the jeep, Newmiller said he "got" the tire or "popped" the tire. *Id.* at 64:13-19.

After Schwartz pulled the pickup forward, he opened the door. Madril got up and got in the driver's side of the pickup. 18 R. at 76:7-9. When Madril got up, Lopez could see blood on his chest. *Id.* at 77:12-15. According to Schwartz, Madril said "I've just been stabbed," and Schwartz saw that Madril's shirt was filled with blood. 12 R. at 106:4-7. Schwartz pulled Madril in the car, "floored it" to go to the hospital, and called 911. *Id.* at 106:16-24, 110:17-20. Dispatch told Schwartz to stop the car. He pulled over, and Lopez and he lay Madril on the ground. *Id.* at 111:3-8. Lopez started CPR and applied pressure to Madril's wound. *Id.* at 111:10-12. Paramedics quickly arrived on the scene. *Id.* at 111:15-17. Madril's heart had been punctured, however, and the stab wound was fatal. 13 R. at 43:22-44:3; 59:14-17. Madril was transported to the hospital, but was essentially dead on arrival. 11 R. at 131:25-132:1.

At trial, the prosecution relied on a purported confession by Todd Newmiller, on the knife used to puncture the tire, on DNA evidence, and on crime scene analysis. *See generally* Supp. R. (CD of prosecution's closing argument powerpoint presentations); 20 R. (3/15/06 tr.) at 7-37; 79-92 (prosecution's closing

arguments).[2] Regarding the purported confession, Jason Melick testified that at some point after Todd Newmiller got back into the jeep after his confrontation with Chisum Lopez, he said, "I stabbed the guy, okay?" 10 R. at 101:4-6. But Michael Lee and Brad Orgill, both of whom were sitting with Melick in the rear seat of the jeep at the time, denied hearing Newmiller make that statement. 14 R. at 34:5-7; 15 R. at 64:13-22, 108:10-17. Joel Newmiller testified that his brother had said, "Don't worry about it. I slashed *their tire* and I stabbed one of them." 11 R. at 36:23-25 (emphasis added). At trial, the prosecution's crime scene analysis could not identify who stabbed Madril. Nor could the analysis rule out Brad Orgill being the assailant. 18 R. at 47:13-23.

After the fight, Joel Newmiller dropped his brother, Orgill, and Lee off at Benny's bar. Orgill, Todd Newmiller, and Lee went back to Orgill's house. 14 R. at 35:13-22. When they got to the house, they noticed a large amount of blood on Orgill. 14 R. at 36:9-21; 15 R. at 67:23-68:4. According to Orgill, Newmiller said something like "I hope I didn't stab somebody." 15 R. at 68:5-11. Orgill, Lee, and

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[2] During its closing arguments, the prosecution made two powerpoint computer presentations. The computer files containing those presentations are on an Office Depot CD that is part of the supplemental record.

Newmiller then examined Newmiller's knife and did not see any blood on it. Orgill testified that they wiped the knife with a wet tissue and that all that came off was a flaky, black-type residue, but no blood. 15 R. at 68:12-69:24; 14 R. at 39:2-5. Orgill and Newmiller later burned their shirts and Orgill burned his pants. Orgill testified that Newmiller was opposed to burning his clothing. 15 R. at 70:5-24, 115:13-116:14.

Expert testimony indicated a small amount of DNA evidence from Anthony Madril's blood was found on the knife. *See* 18 R. at 144-154. (Additional facts and issues regarding the knife and law enforcement's handling of it are addressed in the argument section.) It is undisputed that no blood evidence was found in Todd Newmiller's jacket pocket from which the knife was seized. 16 R. at 138:19-24. Nor was the victim's blood found on any clothing Newmiller had worn. 18 R. at 142:20-143:4; 16 R. at 138:12-140:24. Also undisputed is that Orgill's jacket and boots had a considerable quantity of Madril's blood on them. 18 R. at 137:8-138:3, 143:24-144:6. Likewise undisputed is that no one saw Todd Newmiller fighting with Anthony Madril, while everyone saw Orgill fighting with Madril, and Orgill acknowledged fighting with Madril.

The defense at trial was that Todd Newmiller stabbed the tire, but not Anthony Madril, and that his statement about stabbing "one of them" was not a confession but only a reference to stabbing the tire and an attempt to calm his younger brother who was angry and driving erratically. In addition, the defense contended that either Orgill stabbed Madril during their fight or Madril was stabbed with his own knife during that fight.

The case was tried to a jury. The jury found Todd Newmiller guilty of second degree murder with a deadly weapon, which carries a presumptive sentencing range of 16-48 years. *See* C.R.S. §§ 18-3-103, 18-1.3-401, 18-1.3-406. The court sentenced him to 31 years' imprisonment. 5 R. (5/24/06 tr.) at 132:3-6. In pronouncing sentence, the court said it was sentencing Newmiller to 31 years, "[a]nd the fact that I don't give you the minimum is because you took somebody's life, and that life can never be brought back again." *Id.* Mr. Newmiller timely appeals his conviction and sentence.

III. SUMMARY OF THE ARGUMENT

The destruction of exculpatory material evidence violated Todd Newmiller's due process right to a fair trial. The knife the prosecution claimed was the murder

weapon had a black substance on the blade when seized by the police. The substance was present when the police examined the knife. But when the knife was examined at the Colorado Bureau of Investigation ("CBI"), the substance was no longer there. The trial court concluded the evidence was destroyed by state action but erroneously concluded the exculpatory value of the evidence was not apparent at the time it was destroyed.

The evidence was destroyed by state action, as the trial court concluded. But contrary to the court's conclusion, the exculpatory value of the evidence was apparent before the evidence was destroyed. The evidence indicated that the knife was not used to stab Madril, and thus had exculpatory value. Based on the information available to the police before the evidence was destroyed, the exculpatory value was apparent. And the defense could not obtain comparable evidence by reasonably available means. Therefore, under *California v. Trombetta* and *People v. Enriquez*, the destruction of the evidence violated Newmiller's federal and state due process rights to a fair trial. The conviction must therefore be reversed.

The trial court also committed reversible error by failing to give a complete theory of defense instruction. While the court gave a theory of defense instruction, the defense did not agree with the instruction given as it did not state the full theory of defense. The complete theory of defense included additional components not included in the instruction the court gave. The instructions tendered by the defense included those additional components. In order to fulfill its obligation to give a proper theory of defense instruction, the trial court either had to give one of the defense's tendered instructions or craft an instruction that contained the full theory of defense. The trial court's failure to do so is reversible error.

Prosecutorial misconduct deprived Newmiller of his right to a fair trial. During closing arguments, the prosecution improperly denigrated defense counsel and improperly vouched for its own witnesses, including Brad Orgill, who under the defense theory was the possible killer. The misconduct so undermined the fundamental fairness of the trial as to cast serious doubt about the validity of the conviction. This is particularly true in light of the fact that there was not strong evidence of guilt.

The trial court based its sentence on an improper consideration. The court concluded it could not sentence Newmiller to the minimum sentence (16 years) because Newmiller "took somebody's life, and that life can never be brought back." But in *every* conviction for second degree murder with a deadly weapon, the defendant has taken somebody's life. The General Assembly has concluded that 16 years is an appropriate sentence for the offense. Under the trial court's reasoning, however, *no* defendant convicted of second degree murder with a deadly weapon could ever be sentenced to the minimum 16-year term. The trial court thus based its sentence on an improper consideration, and the sentence must be vacated.

Finally, even if the trial court's errors were not reversible by themselves, the cumulative effect of the trial court's errors requires reversal.

IV. ARGUMENT

A. The destruction of evidence by law enforcement violated due process and requires reversal.

1. Preservation and standard of review.

The defense filed a motion to dismiss, claiming the destruction of evidence on the knife seized from Todd Newmiller violated due process. 1 R. at 161, 170. The court denied the motion at a pretrial hearing. *See* 5 R. (2/27/06 tr.) at 83:18-84:25.

To demonstrate a due process violation for failure to preserve exculpatory material evidence, a defendant must show: (1) the evidence was suppressed or destroyed by the prosecution; (2) the evidence possessed an exculpatory value that was apparent before it was destroyed; and (3) the defendant was unable to obtain comparable evidence by other reasonably available means. *People v. Enriquez*, 763 P.2d 1033, 1036 (Colo. 1988). The most appropriate standard of review is a mixed standard. The trial court's findings of historical fact are reviewed for clear error. But whether Todd Newmiller's due process rights were violated is a question of law reviewed de novo.

2. The destruction of evidence on the knife violated due process.

The knife that was central to the prosecution's case was seized from Todd Newmiller's inside jacket pocket on November 20, 2004. 5 R. (2/27/06 tr.) at 12:15-23. The prosecution argued that Todd Newmiller, before engaging in the non-violent confrontation with Chisum Lopez and unseen by any witness, used the knife to stab Madril in the heart before Madril proceeded to fight with Brad Orgill. 20 R. (3/15/06 tr.) at 11:9-25.

After being seized, the knife was examined by Det. Richer. Det. Richer found some kind of substance or debris on the blade, and some of this "debris" appeared to him "to be from a liquid state." 5 R. (2/27/06 tr.) at 13:11-16:19. He was unable to identify any material on the knife as blood. *Id.* at 16:2-19. Richer did not collect any of the debris material, but he did recognize that it could be important to the case. *Id.* at 32:8-25. The knife was photographed, and the black substance is clearly visible on the knife blade. *See id.* at 30:1-19; Ex. KK (which was Hearing Ex. 2); Hearing Exs. 1 and 3 (Envelope #6). Just before all the evidence was placed into evidence by the police, Det. Richer and Det. Nohr

examined the knife again. They talked specifically about where the evidence was on the knife blade and had a conversation about whether or not to obtain a sample. Their consensus was that they should not obtain a sample, but instead should "just send it in as it is." 5 R. (2/27/06 tr.) at 17:20-18:6. Thus, both detectives recognized the importance of the substance as evidence and the importance of keeping it intact on the knife blade.

The knife was sent to the CBI lab for further analysis, along with other items. A total of 46 items were sent to CBI. But when the evidence was reviewed at CBI, the knife was missing. It was the only missing item. The knife was later located and driven to CBI. 16 R. at 117:23-118:4, 51:5-13, 53:17-54:8.

The first person to examine the knife at CBI was lab agent Rebecca Strub, a forensic serologist in the forensic biology section. 5 R. (2/27/06 tr.) at 33:12-20. She had been asked to examine the knife for the presence of blood. *Id.* at 36:21-37:1. When she opened up the evidence packet containing the knife, there was no trace evidence on the knife. *Id.* at 38:14-16. She did not see the dark substance nor find any substance on the knife that would be residue. Nor did she find any debris. *Id.* at 38:17-39:11, 45:3-10. She testified that the substance was not on the

knife when she received it. *Id.* at 49:9-11. Similarly, CBI lab agent Charles Reno, who examined the knife after Strub, did not see any debris or black substance on the knife. *Id.* at 53:3-15, 55:7-12.

The police handling, or mishandling, of the knife resulted in the destruction of material evidence. In a pretrial hearing, the defense demonstrated the knife was not in the same condition when it was examined by the El Paso County Sheriff's Office as it was when it was later examined by the CBI. During the hearing, the trial court recognized the problem and said to the prosecution, "somebody did something wrong, Counsel, because this knife should have been taken down to the CBI in the same condition as this photograph [Hearing Ex. 2, admitted at trial as Ex. KK] and apparently it wasn't, so somebody dropped the ball." 5 R. (2/27/06 tr.) at 75:25-76:3. The court analyzed the due process issue under *California v. Trombetta*, 467 U.S. 479 (1984), and *People v. Greathouse*, 742 P.2d 334 (Colo. 1987).

Trombetta set the constitutional standard for due process in the preservation of evidence. The Court in *Trombetta* concluded that for evidence to be constitutionally material, the evidence "must both possess an exculpatory value

that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489. In *Greathouse*, the Colorado Supreme Court concluded *Trombetta* was also the appropriate standard under the Colorado Constitution. 742 P.2d at 338-39.

In *Enriquez*, the court set forth a three-part test for a defendant to demonstrate a due process violation for failure to preserve apparently exculpatory material evidence: (1) the evidence was suppressed or destroyed by the prosecution; (2) the evidence possessed an exculpatory value that was apparent before it was destroyed; and (3) the defendant was unable to obtain comparable evidence by other reasonably available means. 763 P.2d at 1036. *See also In re People v. Wartena*, No. 06SA232, 2007 Colo. LEXIS 298, *19-*20 (Colo. Apr. 16, 2007) (Coats, J, concurring in the judgment) (in *Trombetta* and *Arizona v. Youngblood*, 488 U.S. 51 (1988), "the United States Supreme Court made clear that a defendant's constitutional right to potentially exculpatory evidence is violated by prosecutorial destruction only if the exculpatory value of the evidence was apparent prior to its destruction and the nature of the evidence was such that

the defendant would be unable to obtain comparable evidence by other reasonably available means, or if the evidence were actually destroyed by the prosecution in bad faith."). If the defendant meets the three-part *Enriquez* test, then a due process violation is established and the court must fashion an appropriate remedy.

In analyzing the issue, the trial court said it was "troubled by the fact that we don't know when the evidence was destroyed. So it makes it difficult . . . to make a determination as to whether or not it was apparent before the evidence was destroyed. There's no testimony as to how it was destroyed. There's just testimony that indeed it got down to CBI without this debris in it." 5 R. (2/27/06 tr.) at 84:1-6. The court noted that the evidence "certainly had to be destroyed by state action. They're the only ones who seemed to have had it after it was photographed." *Id.* at 84:11-13. But then the court made a less-than-clear conclusion: "I don't know when the evidence was destroyed. I, therefore, cannot make the jump that in fact the evidence was destroyed and exculpatory value was apparent before the evidence was destroyed. So the Court's going to deny the motion to dismiss and I'm going to deny the motion to suppress as well." *Id.* at 84:21-25. The court's conclusion seems to be that while the evidence was

destroyed by state action, the exculpatory nature of the evidence was not apparent before it was destroyed. That conclusion was error.

First, there is no doubt the evidence was material. The substance was found on the knife the prosecution contended was the murder weapon. The substance was black and no blood was visible on the knife. The substance therefore indicates that the knife had been used to stab the tire, but not Madril. Moreover, the black deposit would have been significant in determining the sequence of events at the crime scene. For example, a small amount of latent blood was found on the knife by the CBI. DNA analysis identified the blood as Madril's. The layering of blood on top of the black substance could indicate that the blood did not get on the knife from a stabbing but instead was transferred there from some other source, such as Orgill, who had a substantial amount of the victim's blood on him. Additionally, the existence of tire debris on the knife would indicate that Newmiller had not scrubbed the knife, contrary to the prosecution's argument at trial.

Second, the three-part *Enriquez* test is satisfied. On the first prong of the test, the evidence was plainly destroyed by state action. The court acknowledged the knife "should have been taken to the CBI in the same condition . . . and

apparently it wasn't . . . ." 5 R. (2/27/06 tr.) at 75:25-76:3. The trial court stated that the evidence had to be destroyed by state action. *Id.* at 84:11-12. The record shows the evidence was on the knife when it was first examined by Det. Richer, and it is plainly visible in the photographs of the knife taken at that time.[3] *See id.* at 13:11-16:19; Ex. KK; Hearing Exs. 1 and 3 (Envelope #6).

When the knife arrived at CBI—after CBI had to notify the El Paso County Sheriff's Office that the knife was missing and the Sheriff's office had to locate the knife and drive it to CBI—the substance was gone. *See* 5 R. (2/27/06 tr.) at 38:14-39:11, 45:3-10. The substance is not visible in the admittedly poor photographs of the knife taken at CBI. *See* Ex. 283. Since the knife was continuously in the custody of the El Paso County Sheriff's Office or CBI from the time of its seizure until the time of Strub's examination, the substance disappeared—whether by

[3] The knife was initially photographed laying on carpet, without any paper beneath to catch any debris that might fall off. Certainly, that was not proper evidence handling.

accident or otherwise—while in the custody of law enforcement.[4] The trial court's conclusion that the evidence had to be destroyed by state action was proper. Because the evidence was destroyed by state action, Newmiller has met the first prong of the *Enriquez* test.

The trial court did not expressly address the third prong of the *Enriquez* test—whether the defendant is unable to obtain comparable evidence by other reasonably available means. But that prong was certainly met here. The substance disappeared from the knife. The defense thus had no reasonable means available to obtain evidence comparable to the missing substance. Because the substance was not definitively identified, its disappearance permanently deprived the defense of the use of that evidence. Moreover, the destruction of the evidence irrevocably altered the knife, and thus the knife could not be placed back into its pre-destruction condition. Accordingly, Newmiller meets the third prong of the test.

As for the second prong of the test—whether the evidence had an exculpatory value that was apparent before its destruction—the trial court did not

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[4] It should be noted that the knife was in the custody of law enforcement at the time Orgill received his plea agreement. *See* Ex. 265 (Orgill's plea agreement, dated March 7, 2005).

determine that the evidence had no exculpatory value. Rather, the court appeared to conclude that since it did not know when the evidence was destroyed while in state custody, it could not conclude the exculpatory value was apparent before the evidence was destroyed. The court, however, failed to analyze whether the evidence had exculpatory value at the time it was examined by Det. Richer and Det. Nohr, a time when the substance was on the knife and therefore before the destruction had occurred.

Det. Richer found no visible signs of blood on the knife, but did see the black substance or debris. Photographs of the knife taken at that time show the substance. *See* Ex. KK., Hearing Exs. 1 and 3 (Envelope #6). Det. Richer and Det. Nohr specifically discussed whether to sample the substance before the knife was placed into evidence. 5 R. (2/27/06 tr.) at 17:21-18:6.

At the time Richer and Nohr examined the knife, law enforcement already knew that the tire had been punctured. *See, e.g.,* III R. at 620-22 (Schwartz statement to Officer Shive on the day of the stabbing). The police knew that according to witnesses, Todd Newmiller said he stabbed the tire. The police also knew that Schwartz had identified the person who damaged the tire as a 6'3" white

male wearing a leather coat, i.e., Todd Newmiller. Law enforcement knew the knife was suspected of being the murder weapon and that the knife had been seized from Newmiller's leather coat. The police knew that the knife had the black substance on it, but had no visible signs of blood. The police knew that there was no visible blood in the pocket of the coat where the knife was found and no visible blood on the tire puncture. While not using the word "exculpatory," Det. Richer and Det. Nohr recognized the importance of the substance on the knife and of leaving it intact on the knife. In light of the police's knowledge at the time, the substance on the knife had exculpatory value that was apparent before the evidence was destroyed.

The evidence indicated that the knife had not been used to stab Anthony Madril. Because the substance was black like a tire and the knife did not have visible blood on it, the evidence showed the knife was used to stab the tire, but not Madril. Thus, the substance and the condition of the knife at the time Det. Richer and Det. Nohr examined it supported the proposition that the knife was not used to stab Anthony Madril. The presence of the substance also negated the prosecution's argument that Newmiller cleaned the knife after the fight.

As defense counsel noted in the motion to dismiss, "In conversations with Deputy District Attorney Jeff Lindsey and also members of the El Paso County Sheriff's Office, defense counsel had been told that it is the position of the police and the prosecution that the black substance on the knife is most likely tire material. The district attorneys office informed defense counsel that a portion of the black substance on the knife was going to be removed from the knife and compared to the tire to determine if it indeed was the same substance." 1 R. at 171, ¶ 3. The prosecution and thus the police recognized the exculpatory value of the evidence before it was destroyed, believing the material was from the tire and was not blood.

In sum, the evidence had exculpatory value that was apparent before it was destroyed. Accordingly, Newmiller has also satisfied the second prong of the *Enriquez* test. Because he satisfies all three prongs of the *Enriquez* test, he has demonstrated a violation of his due process rights under both the federal Constitution and Article II, sec. 25 of the Colorado Constitution.

Because Newmiller has established a due process violation, the court must fashion an appropriate remedy. First, this court must reverse the conviction. The

knife was a critical piece of evidence in the prosecution case, and the destruction of the evidence took away the defense's ability to present exculpatory evidence about the knife and thereby show the knife was not the murder weapon. Therefore, the destruction of the evidence deprived Todd Newmiller of a fair trial, and his conviction cannot stand.

Second, the court needs to weigh whether to dismiss the case. Dismissal, as sought in the original motion, is an appropriate remedy under the circumstances. The knife was a key piece of evidence in the case. The destruction of the evidence by the state irrevocably altered the knife and calls into question the integrity of any evidence related to the knife, any substances found thereon, and the credibility of any testimony about it. The damage to Todd Newmiller's due process rights by the destruction of the evidence is so severe it cannot be fully remedied without dismissal.

At a bare minimum, however, the court should reverse the conviction and remand for a new trial at which the prosecution is barred from introducing the knife and any evidence or testimony about it or any substances on it.

B. The trial court's refusal to give the defense's proposed theory of defense instructions, or a similar instruction that fully set forth the theory of defense, denied Newmiller a fair trial.

1. Preservation and standard of review.

The defense proposed three separate versions of a theory of defense instruction. 2 R. at 281-83 (Appendix at 1-3). The trial court refused to give any of those instructions. 20 R. at 101:6-105:1. While the trial court did give a theory of defense instruction, 2 R. at 302, the defense did not agree with the version given. 20 R. at 101:15-102:8.

A defendant is entitled to a theory of defense instruction if the record contains any evidence to support such theory. *See People v. Nunez*, 841 P.2d 261, 264 (Colo. 1992). The failure to give a jury instruction on a defendant's theory of the case constitutes reversible error. *Id.* at 266.

2. The trial court's refusal to give the defense's proposed theory of defense instructions, or something equivalent, was reversible error.

The trial court declined to give the theory of defense instructions proposed by the defense, 2 R. at 281-83 (Appendix at 1-3). Instead, the court offered the following instruction, to which the defense did not agree:

"Mr. Newmiller's defense is that he did not stab Mr. Madril. Mr. Newmiller asserts that he was not in a confrontation with Anthony Madril on Conrad Street.

Mr. Newmiller's defense is that he does not know how Anthony Madril got stabbed. Mr. Newmiller believes that either Brad Orgill stabbed Mr. Madril with a knife, or that Mr. Madril was injured with his own knife during the fight he had with Brad Orgill." 2 R. at 302.

Defense counsel objected to the instruction given, arguing the theory of defense was "not just simply as it's stated in the jury instruction." 20 R. (3/15/06 tr.) at 101:15-102:8. What the defense was "left with" was not a complete theory of defense. *Id.*

The court's theory of defense instruction set forth three points: (1) Todd Newmiller did not stab Madril; (2) he did not have a confrontation with Madril on Conrad Street; and (3) either Orgill stabbed Madril or Madril was stabbed with his own knife during the fight with Orgill. This instruction was an incomplete, and therefore inadequate, theory of defense instruction.

The defense's refused instructions 1 and 2, 2 R. at 281-82 (Appendix at 1-2), asserted additional components of the theory of the defense that were not included

in the trial court's instruction. They also asserted that (1) Todd Newmiller did not confess to stabbing Madril; (2) there was no visible blood on the knife when it was examined at Orgill's house; and (3) any blood that was discovered on the knife was transferred there from Brad Orgill.

On the defense theory about the purported confession (a key part of the prosecution theory), the tendered instructions said Newmiller's statement "I stabbed a tire. I stabbed one of them" was a reference to stabbing a tire only, made in an effort to calm down Joel Newmiller who was driving fast and erratically after the confrontation on Conrad Street. *Id.* The court, however, did not allow that to be included in the instruction, concluding there was not ample evidence to support it. 20 R. (3/15/06 tr.) at 104:12-13. That conclusion was error because the record contains supporting evidence.

Joel Newmiller testified that Todd Newmiller said, "Don't worry about it. I slashed their tire and I stabbed one of them." 11 R. at 36:23-25. The statement began with the phrase "Don't worry," something said to calm someone down. Joel Newmiller testified that he perceived the statement as an effort to calm him down, and that it did in fact calm him down. *Id.* at 37:1-6, 96:11-15. Jason Melick

testified that Todd Newmiller said, "Don't worry," and Melick did not know if Todd was just trying to calm Joel down. 10 R. at 101:4-10. In addition, Brad Orgill said he remembered Todd Newmiller saying in the car something about stabbing a tire, but Orgill, like Lee, denied hearing Newmiller say he'd stabbed someone. 14 R. at 34:5-7; 15 R. at 64:13-22, 108:10-17. Taken together, this evidence was sufficient to entitle the defense to a theory of the case instruction incorporating the defense position that Todd Newmiller did not confess to stabbing Anthony Madril. Therefore, tendered instruction 1 or 2, or something similar that incorporated this additional component of the defense position, was necessary to express the complete theory of defense.

Because evidence supported this part of the defense's tendered instructions, the trial court's refusal to include it in the theory of defense instruction was error. The court erroneously concluded there was not "ample evidence" to support it, 20 R. (3/15/06 tr.) at 104:6-13, but as noted, there was supporting evidence. Moreover, contrary to the court's conclusion, the quantum of evidence required for a defendant to be entitled to a theory of defense instruction is not "ample evidence," but only a "scintilla" of evidence. *See People v. Saavedra-Rodriguez*,

971 P.2d 223, 228 (Colo. 1998).[5] A "scintilla" is simply "some evidence" to support the theory of defense. *See id.; see also People v. Platt*, No. 04CA1889, 2007 Colo. App. LEXIS 880, *10 (Colo. App. May 17, 2007) (the quantum of evidence that must be offered for a defendant to be entitled to a theory of defense instruction is "exceedingly low"). The record contains a scintilla of evidence, and more. Therefore, the trial court erred in refusing to permit that part of the theory of defense in the instruction.

Record evidence also supported the theory of defense components that there was no blood visible on the knife when it was examined at Orgill's house and that any blood on the knife was transferred from Orgill. Orgill testified that when he, Newmiller, and Lee got back to his house, they split a beer. 15 R. at 67:16-22. He also testified that a little bit later they examined the knife and saw flaky, black residue but no blood. *Id.* at 68:16-69:24. Given the substantial blood that was on Orgill at the time, it is a reasonable inference to conclude the victim's blood on

[5] The court had earlier said there was no evidence to support giving defense instructions 1 and 2. *See* 20 R (3/15/06 tr.) at 103:20-23. Regardless of whether the court concluded there was no evidence to support giving the instruction or concluded there was not ample evidence, the court erred because supporting evidence is in the record.

Orgill could have been transferred to the knife. Therefore, the evidence was sufficient to entitle the defense to a theory of defense instruction that included these two additional components. The trial court's failure to include them in the theory of defense instruction was error.

"[A]n instruction embodying a defendant's theory of the case *must be given by the trial court if the record contains any evidence to support the theory*. The rationale underlying the general rule is the belief that it is for the jury and not the court to determine the truth of the defendant's theory." *Nunez,* 841 P.2d at 264-65 (citations omitted; emphasis added). Here, the trial court did not permit an instruction on the full theory of defense, despite supporting evidence for that theory.

The supreme court has instructed that trial courts have "an affirmative obligation to cooperate with counsel to either correct the tendered theory of the case instruction or to incorporate the substance of such in an instruction drafted by the court." *Id.* at 265. To fulfill its obligation, the trial court either had to give the defense's tendered instructions 1 or 2, or craft an instruction that included all the components of the defense theory. The trial court here failed its obligation by not

giving an instruction that encompassed the full theory of defense. That failure is reversible error. *See Nunez*, 841 P.2d at 266 ("We have repeatedly held that the failure to give a jury instruction on a defendant's theory of the case constitutes reversible error.").

C. Prosecutorial misconduct during closing argument was plain error.

1. Preservation and standard of review.

No contemporaneous objections were made to the misconduct by the prosecution during closing arguments. Therefore, this court reviews for plain error, meaning an error that undermined the fundamental fairness of the trial so as to cast serious doubt on the reliability of the judgment of conviction. *See Wilson v. People*, 743 P.2d 415, 419-20 (Colo. 1987)

2. The prosecutors' misconduct was plain error.

Prosecutors may strike hard blows, but may not strike foul ones. *Wilson v. People*, 743 P.2d at 418. During closing argument, a prosecutor "may employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance, so long as he or she does not thereby induce the jury to determine guilt on

the basis of prejudice or passion, inject irrelevant issues or evidence into the case, or accomplish some other improper purpose." *People v. Petschow*, 119 P.3d 495, 508 (Colo. App. 2004). It is improper for the prosecution to express personal opinions or inflame the passions of the jury. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1050 (Colo. 2005). Similarly, statements by the prosecutor that denigrate defense counsel are improper and constitute professional misconduct. *People v. Roadcap*, 78 P.3d 1108, 1114 (Colo. App. 2003). Here, the prosecutors engaged in misconduct constituting plain error.

First, right at the beginning of rebuttal argument, the prosecution accused defense counsel of misrepresenting the facts: "Ladies and gentlemen, you're not here to guess. You're not here to imagine. And what you have just heard [in the defense closing] was guessing, imagination and speculation. That's all it was. That's all it was. *And on top of that, it was a misrepresentation of the facts.*" 20 R. (3/15/06 tr.) at 79:8-12 (emphasis added). The court interrupted, had counsel approach the bench, and warned the prosecutor that he could not say the defense closing was a lie. *Id.* at 79:13-80:2. But the court did not admonish the prosecutor in front of the jury, ask the jury to disregard the prosecutor's statement, or take any

other curative action. Therefore, the prosecutor's accusation that defense counsel misrepresented the facts stood unchallenged and uncorrected.

Accusing defense counsel of misrepresenting the facts is highly improper and constitutes prosecutorial misconduct. *See Roadcap, supra.* It was particularly harmful here where the facts of the case were hotly contested and the defense did not get the benefit of a complete theory of defense instruction.

Second, the prosecution improperly vouched for the credibility of its witnesses. In its principal argument, the prosecution attempted to bolster the credibility of Orgill and Lee, key prosecution witnesses: "How do you believe these two? *Because they're not exaggerating. They're not making stuff up after the fact.* They're telling you exactly what they heard and exactly what they remember. Do we wish they had remembered [the defendant saying "I stabbed one of them"]? Of course. . . . Of course, but they didn't. *And they're not about to come in here and lie to you and say that they did when they didn't.*" 20 R. (3/15/06 tr.) at 27:9-18 (emphasis added). This was egregious vouching for witnesses' credibility.

In rebuttal closing, the prosecution again vouched for the credibility of Orgill, the possible killer under the defense theory of the case: "Ladies and gentlemen, if you think Brad Orgill did this, he sure could have done a better job than [sic] framing one of his best friends. He sure could have done a heck of a lot better job, but he didn't. You know why? *Because he came in here and told the truth.*" 20 R. (3/15/06 tr.) at 90:4-8 (emphasis added).

"Expressions of personal opinion as to the veracity of witnesses are particularly inappropriate when made by prosecutors in criminal trials." *Wilson*, 743 P.2d at 418. Here, the credibility of witnesses was key to the prosecution's case, particularly where one of the witnesses, Brad Orgill, was the alternate suspect under the defense theory of the case and had received a favorable plea deal in exchange for his testimony, and where the evidence of guilt was not substantial.

Also, in rebuttal argument, the prosecution improperly referred to Madril as "our victim" and asked the jury to punish the defendant: "Ladies and gentlemen, I'm asking you to find this man, Todd Newmiller, guilty of second-degree murder. Anthony Madril, *our victim. The sins in the dark by a dark man carrying a dark knife need to go and have some punishment for them.*" 20 R. (3/15/06 tr.) at 91:22-

25 (emphasis added). While the court did instruct the jury to disregard the prosecutor's statement about punishment, *see id.* at 92:1-4, it did not chastise the prosecution for referring to Madril as "our victim" and thereby inflaming the passion of the jury.

Taken as a whole, the prosecutorial misconduct rose to the level of plain error. This was a highly-charged, emotional case, but one lacking strong evidence of guilt. The prosecutors' repeated attempts to improperly bolster their case, while at the same time improperly denigrating the defense and attempting to inflame the jury's passions, were so egregious as to deny Todd Newmiller his due process right to a fair trial. The misconduct was particularly unfair and harmful because the bulk of it occurred in rebuttal argument. The danger of prosecutorial misconduct improperly influencing or affecting the jury "may be exacerbated by the timing of the prosecution's remarks. Rebuttal closing is the last thing a juror hears from counsel before deliberating, and it is therefore foremost in their thoughts." *Domingo-Gomez*, 125 P.3d at 1052.

Here, the prosecutorial misconduct tipped "the scales towards an unjust conviction." *See id.* at 1052-53. It therefore was plain error, necessitating reversal of the conviction.

Moreover, the prosecution's misconduct was not limited to its closing arguments. The prosecution also delivered late discovery to the defense during trial. On the second day of trial, during Joel Newmiller's testimony and after six witnesses had already testified, the prosecution revealed in a bench conference that it had police reports that were not included in the discovery previously provided to the defense. The prosecution also said it had a tape recording of two 911 calls that had not been provided to the defense. The prosecution then gave the reports of Officers Shive and Lucky to the defense. *See* 11 R. at 67:9-22; *see also* 3 R. at 618-29 (police reports of Officers Shive and Lucky). Officer Lucky's report had been made November 20, 2004, the day of the stabbing. Officer Shive's reports were dated the next day. *See* 3 R. at 618-29. No excusable justification for the late disclosure was given. Following the prosecution's untimely disclosure, it advised the court it intended to call Officer Shive as a witness. The court, however, did not permit him to testify. 11 R. at 68:8-22.

Shive's reports included key witness interviews of Charles Schwartz and Phu Ha. 3 R. at 620-26. When the reports were finally given to the defense, Phu Ha had already testified. *See* 10 R. at 211-32 (Phu Ha's testimony). That made the late disclosure a violation of Crim. P. 16(a)(1)(I), which requires disclosure of witness statements and police reports. *See People v. Thatcher*, 638 P.2d 760, 767 (Colo. 1981). Though the defense received the reports describing Schwartz's statements before Schwartz testified, the late disclosure deprived the defense of the ability to make full use of those statements in developing its trial strategy. The failure of the prosecution to turn over the statements of key eyewitnesses for over 15 months and not until the middle of trial is inexcusable and unjustifiable misconduct. Coupled with the misconduct in closing argument, Todd Newmiller was denied his right to a fair trial and reversal is required.

D. The trial court based the length of sentence on an improper consideration.

1. Preservation and standard of review.

This issue arises from the trial court's pronouncement of sentence. *See* 5 R. (5/24/06 tr.) at 127:4-132:15. Mr. Newmiller challenges the propriety of the trial

court's stated basis for the sentence imposed. Because the asserted error occurred during the court's pronouncement of sentence, the issue is properly preserved by raising it in this brief.

Sentencing is discretionary. Therefore, this court reviews a trial court's decision to impose a particular sentence for abuse of discretion. *People v. Roadcap*, 78 P.3d at 1114.

2. The trial court's rejection of a minimum sentence "because somebody died" was improper.

As noted, Todd Newmiller's conviction should be reversed and remanded for a new trial, and thus this court need not reach this issue. But should the court address this issue, it should conclude the sentence imposed was improper.

While a defendant's due process rights at sentencing are more limited than at trial, they do not disappear. *See People v. Pourat*, 100 P.3d 503, 505 (Colo. App. 2004). For example, if the court plans to rely upon facts not described in a presentence report, the defendant must be given prehearing notice of those facts and an opportunity to contest them. *Id.* In addition, reliance by a sentencing court

on facts that are demonstrably false violates a defendant's due process rights. *Id.*, citing *Townsend v. Burke*, 334 U.S. 736 (1948).

In imposing sentence, all relevant factors may be considered, and an appellate court must uphold a sentence that "is within the range required by law, *is based on appropriate considerations as reflected in the record*, and is factually supported by the circumstances of the case." *Roadcap*, 78 P.3d at 1114 (emphasis added), quoting *People v. Fuller*, 791 P.2d 702, 708 (Colo. 1990). Here, the trial court's sentence rested on an improper consideration.

While the trial court did recognize the purposes of the criminal code with respect to sentencing expressed in C.R.S. § 18-1-102.5, the trial court ultimately based its sentence on a faulty consideration. Second degree murder is a class 2 felony, and because the jury found that a deadly weapon was used, the presumptive sentencing range was 16-48 years. *See* C.R.S. §§ 18-3-103, 18-1.3-401, 18-1.3-406.

The trial court sentenced Newmiller to 31 years and declined to impose a lighter sentence. In so doing, the court said, "the fact that I don't give you the minimum is because you took somebody's life, and that life can never be brought

back." 5 R (5/24/06 tr.) at 132:3-6. The court failed to recognize that in *all* second degree murder convictions someone's life is taken and can never be brought back. Causing the death of the victim is an element of the offense. If the prosecution does not prove that element, there can be no conviction. Thus, *every* defendant convicted of second degree murder has "taken somebody's life." Employing the trial court's reasoning, then, *no* defendant convicted of second degree murder could ever be sentenced to the minimum sentence authorized by the General Assembly.

The trial court's reasoning is at odds with the General Assembly's adoption of presumptive sentencing ranges. The General Assembly has concluded that a sentence of 16 years can be an appropriate sentence for second degree murder with a deadly weapon. The trial court improperly disregarded that legislative judgment in imposing its sentence. The trial court rejected a minimum sentence on the ground that Madril's life was taken, but because that fact was a necessary element of the offense, it is not a proper consideration in determining a sentence within the presumptive range.

While a sentencing court has broad discretion in imposing sentence, it cannot base its sentence on inappropriate considerations or improper factors. *See Pourat, supra.* Here the court plainly rejected, on an improper ground, imposing a minimum sentence. The court's rejection of a minimum sentence thus was an abuse of discretion that requires the sentence to be vacated and the case remanded for resentencing. In resentencing, of course, the court cannot impose a vindictive greater sentence. *See People v. Wieghard,* 743 P.2d 977, 978 (Colo. App. 1987).

E. Cumulative error.

1. Standard of review.

The determination whether trial court errors constitute cumulative error is a legal determination that this court must make by exercising its own independent judgment, without deference to any decisions of the trial court. *See People v. Botham*, 629 P.2d 589, 603 (Colo. 1981) (granting defendant a new trial because the cumulative effect of the trial errors deprived him of a fair trial).

2. Taken together, the trial court's errors constitute cumulative error that requires reversal.

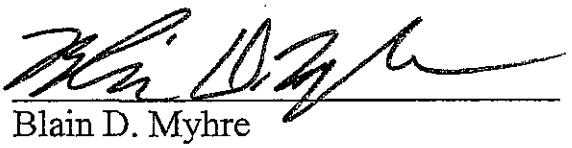
Even if this court were to conclude some of the trial errors were not reversible in and of themselves, the cumulative effect of all the errors deprived Todd Newmiller of his due process right to a fair trial and therefore requires reversal. *See Botham*, 629 P.2d at 603.

V. CONCLUSION

This court should reverse the conviction for second degree murder and order the case dismissed due to the destruction of evidence. At a minimum, the court should reverse and remand for a new trial at which the knife and any testimony or evidence related to it are suppressed.

Respectfully submitted on this 22nd day of May, 2007.

ISAACSON ROSENBAUM P.C.



Blain D. Myhre
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of May, 2007, a true and correct copy of the foregoing, was served, via United States first-class mail, proper postage affixed, addressed to the following:

Catherine P. Adkisson, Esq.
Assistant Solicitor General
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

Amy Knight

Mr. Newmiller states that he did not stab Mr. Madril. When Mr. Newmiller exited the Jeep, he walked directly toward Chisum Lopez. Mr. Newmiller was in a confrontation with Chisum Lopez at the passenger door of the Dodge pick up truck. When Chisum Lopez got back into the pick up truck, Mr. Newmiller stepped toward the back of the pick up truck, pulled out his knife and stabbed the right rear tire of the truck. At no time did Mr. Newmiller get into any confrontation with Anthony Madril. The only person that Mr. Newmiller confronted on Conrad Street was Chisum Lopez.

Mr. Newmiller believes that he got a small amount of Mr. Madril's blood on his knife, by being near Brad Orgill who was covered in Mr. Madril's blood. Mr. Newmiller believes that Mr. Madril's blood was transferred to him by touching Brad Orgill or touching things that Brad Orgill had previously touched. Mr. Newmiller believes that the blood was then transferred to the knife when he opened and closed the knife at Brad Orgill's house.

Mr. Newmiller has never stated that he stabbed a person. Mr. Newmiller stated in the Jeep that "I stabbed a tire. I stabbed one of them." Mr. Newmiller was referring to a tire. Mr. Newmiller made this statement in an effort to calm his brother Joel, who was driving fast and erratically going after the pick up truck. Mr. Newmiller made the statement to his brother to keep them from any further conflict.

A conversation occurred at Brad Orgill's house between Brad Orgill, Michael Lee and Mr. Newmiller. The conversation was trying to figure out where all of the blood on Mr. Orgill came from. Mr. Newmiller told Michael Lee and Brad Orgill that he had pulled his knife out while on Conrad Street to stab the tire. Either Michael Lee or Brad Orgill suggested that Mr. Newmiller examine his knife to see if it had any blood on it. The three men looked at the knife and there was no blood on it. Brad Orgill suggested that he and Mr. Newmiller burn their clothes because they had been in fights. Mr. Newmiller agreed to do so.

Mr. Newmiller does not know how Anthony Madril got stabbed. Mr. Newmiller believes that either Brad Orgill stabbed Mr. Madril with a knife, or that Mr. Madril was injured by his own knife during the fight he had with Brad Orgill.

Mr. Newmiller states that the prosecution has not proven that he is guilty beyond a reasonable doubt.

Δ's TENDERED #1 & REFUSED

Del Manley
People v Newmiller
04CR5770

(281)

Mr. Newmiller states that he did not stab Mr. Madril. Mr. Newmiller was in a confrontation with Chisum Lopez on the passenger side of the pick up truck and did not have any confrontation with any other person on Conrad Street.

Mr. Newmiller believes that he got a small amount of Mr. Madril's blood on his knife, by being near Brad Orgill who was covered in Mr. Madril's blood. Mr. Newmiller believes that Mr. Madril's blood was transferred to him by touching Brad Orgill or touching things that Brad Orgill had previously touched. Mr. Newmiller believes that the blood was then transferred to the knife when he opened and closed the knife at Brad Orgill's house.

Mr. Newmiller stated in the Jeep that "I stabbed a tire. I stabbed one of them." Mr. Newmiller was referring to a tire. Mr. Newmiller made this statement in an effort to calm his brother Joel, who was driving fast and erratically going after the pick up truck. Mr. Newmiller made the statement to his brother to keep them from any further conflict.

Mr. Newmiller examined his knife at Brad Orgill's home at the suggestion of Michael Lee and Brad Orgill. The three men looked at the knife and there was no blood on it. Brad Orgill suggested that he and Mr. Newmiller burn their clothes because they had been in fights. Mr. Newmiller agreed to do so.

Mr. Newmiller does not know how Anthony Madril got stabbed. Mr. Newmiller believes that either Brad Orgill stabbed Mr. Madril with a knife, or that Mr. Madril was injured by his own knife during the fight he had with Brad Orgill.

Mr. Newmiller states that the prosecution has not proven that he is guilty beyond a reasonable doubt.

Δ6 TENDERED #2 & Refused

Pv. Newmiller
04CK 5770

Mr. Newmiller asserts that he did not stab Mr. Madrie. He has pled not guilty. Mr. Newmiller asserts that he was not in a confrontation with Anthony Madrie on Conrad Street.

Mr. Newmiller asserts that he does not know how Anthony Madrie got stabbed. Mr. Newmiller asserts that either Brad Orgill stabbed Mr. Madrie with a knife, or that Mr. Madrie was injured with his own knife during the fight he had with Brad Orgill.

Mr. Newmiller asserts that the prosecution has not proven that he is guilty beyond a reasonable doubt.

D's Tendered #3 & refused
Dan Mallory
Pv. Newmiller
04DR5770