

1                                   **IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
2                                   **IN AND FOR THE COUNTY OF MULTNOMAH**

3  
4 State of Oregon,

5                                   Plaintiff,

6                                   vs.

7 Jerrin L. Hickman

8                                   Defendant.

**Case No. 0812-35225**

**ORDER DENYING  
Motion for New Trial**

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10                   Defendant’s motion for new trial was heard February 18 and 19, 2010. The state appeared  
11 through counsel, Chief Deputy District Attorney Rodney D. Underhill and Deputy District Attorney Heidi  
12 Moawad. Defendant appeared through counsel, Dianna J. Gentry, and argued as well on his own  
13 behalf. The hearing was concluded on February 19, 2010, but I held the record open to February 26,  
14 2010, to allow the defendant to provide affidavits or declarations of Tyrone Miller and Patrick Johnson.

15                   **Original Evidence:** Although it would serve no purpose to recount all trial facts, it is useful to  
16 outline facts at stake in the question of what impact defendants’ proffered new evidence might have in  
17 light of the requirement, discussed below, that a new trial motion cannot be granted without a  
18 demonstration that the “new” evidence would “probably” change the outcome were a new trial held.  
19 For purposes of that evaluation, the “original” evidence includes at least that produced at the bail  
20 hearing, that relevant to the state’s motion to gain admission of gang evidence, and that produced at  
21 trial.<sup>1</sup>

22                   *The Bail Hearing (Feb 11, 2009):* The state’s evidence led to my finding that the proof was  
23 “evident” and the “presumption strong “(ORS 135.240(2)(a)), although either is sufficient (*Rico-*

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<sup>1</sup> ORCP 64E provides that “[i]n the consideration of any motion for a new trial, reference may be had to any proceedings in the case prior to the verdict or other decision sought to be set aside.”

1 *Villalobos v. Giusto*, 339 Or 197 (2005)), and in spite of vigorous defense participation to discredit and  
2 rebut that evidence. The core evidence that led to my conclusion continues to this day, although the  
3 nature and extent of inconsistencies and impeachment have certainly varied.

4 The defendant's DNA was on the mask worn by the shooter, although Dontae Porter also  
5 contributed to DNA on the mask. Defendant met the murder's size approximation given by almost all  
6 purported witnesses, including witnesses who did not know the identity of the shooter. That size  
7 approximation tended strongly to exclude Dontae Porter as the shooter, and initially plausible suspects  
8 other than Porter and defendant were eventually proved highly unlikely for various reasons. The  
9 defense stressed obvious inconsistencies and lies to the police, evidence plausibly impeaching  
10 prosecution witnesses, and the bases for identifying others as the shooter. Tosha Granberg's immediate  
11 claim that "Cello" (Moncello James) was the shooter misled the investigation substantially, but was  
12 ultimately persuasively discarded as inaccurate by the police (and as recanted by Granberg). "Cello"'s  
13 height was clearly closer to defendant's than to Dontae Porter's. Gang evidence had not been  
14 excluded, and played a minor role in explaining reasons for bias and lies from defendant's fellow gang  
15 members, but also in rendering plausible explanations why the defendant's DNA could be on the mask  
16 yet not prove he was the shooter.

17 *State's Motion to Receive Gang Evidence (Aug. 12, 2009 and Sept. 16-17, 2009)*: This hearing  
18 explored the role of gang evidence, including photographs, for legitimate purposes in the state's case, as  
19 opposed to the obvious prejudicial risks strongly asserted by the defense. I concluded from the  
20 evidence offered then that only the state's need for a motive for the obviously senseless murder  
21 properly competed against the risk of substantial and improper prejudice: that a jury might substitute  
22 propensity inferences from gang membership for legitimate evidence of guilt. I concluded that the  
23 state's theory reduced to the prohibited propensity notion that gang members kill lightly if disrespected;

1 defendant is a gang member; he was disrespected by Christopher Monette who was bigger than he; and  
2 therefore defendant was motivated to kill Christopher Monette.

3 Witnesses' statements suggested that Tosha Granberg's claim that the shooter shouted "Cello"  
4 was really a misinterpretation of a shout of "Six O." That inference might support a finding that the  
5 shooter was a "Rollin' 60s" gang member, and plenty of evidence supports the state's position to that  
6 effect. But identifying the shooter as a gang member did not do much to make the defendant the  
7 shooter, as it was obvious that there were other members of the gang around, and that gang members  
8 who were not the shooter could have been shouting gang brands or boasts in the surrounding turmoil.  
9 It was not suggested that Christopher Monette was a gang target or that his killing was a gang project.

10 I denied the state's motion and held gang evidence, including photographic evidence,  
11 inadmissible under applicable law. *State v. Hampton*, 317 Or 251, 254 (1993). I am satisfied that  
12 intervening amendments to OEC 404(4) do not alter these results due to the fundamental fairness  
13 exceptions applicable through the constitutional references in the statute.<sup>2</sup> The parties both expressed  
14 understanding that my decision denying the state's motion to receive gang evidence amounted to a  
15 preliminary determination subject to change due to evidence adduced pending or during trial –  
16 including a possible defense choice to attempt to exploit gang evidence to explain the sharing of ski  
17 masks by gang member to minimize the force of defendant's DNA on the shooter's mask.

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<sup>2</sup> ORS 40.170(4), Oregon Evidence Code Rule 404(4), expanded the availability of evidence of other crimes, wrongs, and acts by a defendant in a criminal action

. . . . except as otherwise provided by:

(a) ORS 40.180, 40.185, 40.190, 40.195, 40.200, 40.205, 40.210 and, to the extent required by the United States Constitution or the Oregon Constitution, ORS 40.160;

(b) The rules of evidence relating to privilege and hearsay;

(c) The Oregon Constitution; and

(d) The United States Constitution.

1           *Trial Evidence:* The defendant’s testimony actually supplied support for many of the state’s  
2 contentions<sup>3</sup> (generally also supported by evidence from numerous other witnesses), even though his  
3 testimony directly denied any participation in the shooting of Christopher Monette, handling the gun or  
4 the mask that night – or arguing with the victim that night.

5           The defendant’s testimony from the state’s perspective admitted, and at least reasonably  
6 supports inferences, that he was immediately at the site of the shooting at the time of the shooting, saw  
7 the gun pointed at Marco, and knew who “Chris was arguing with”;<sup>4</sup> that “Cello” [though not the person  
8 in the argument with the victim] was close to defendant’s height; that he did not “know” “Cello was the  
9 killer”; and that he “would never tell the jury that Dontae Porter killed him, it’s not my job to tell the jury  
10 who killed him, you arrested me.” Defendant’s testimony also places Brandon Miller at the  
11 confrontation at the location of the shooting shortly before it occurred; he described “Junior” and  
12 Marco Anderson pushing Christopher, and added that he saw Brandon Miller coming down the driveway  
13 after the shooting.

14           The defendant said the shooter was definitely not Brandon Miller, Junior, or Joaquin. When  
15 asked if he were suggesting “Cello” James was the killer, at one point he replied “that’s a good question  
16 for” “Cello,” and later that “I would never identify anyone doing anything in that situation. I’m not here  
17 for that, I’m strictly here for my own behalf, you arrested me, I’m here for that. Obviously, the only  
18 person arguing with Chris Monette isn’t 5-7, so why are you making 5-7 relevant now?” This was  
19 apparently a reference to Dontae Porter, the state’s first witness, who is 73 inches tall [measured twice

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<sup>3</sup> It is not significant to my analysis, but I suspect the defendant’s choice to testify was contrary to counsel’s advice – often a difficult issue between defense counsel and their clients.

<sup>4</sup> Such quotations are based on my notes and verified for purposes of this motion by my listening to the official audio record. Anyone challenging their accuracy has access to the official record for any appellate review of this decision.

1 in front of the jury], and who testified that he exchanged words with Christopher Monette. Porter  
2 testified he did not see but suspected that defendant was the shooter.

3 When asked, repeatedly, whether he was suggesting that Dontae Porter was the shooter, the  
4 defendant responded “I would never do that. I would never tell jury that Dontae Porter killed him, it’s  
5 not my job to identify anybody; you arrested me. That’s what we’re dealing with in here.” Arguably  
6 inconsistently with his implication that the shooter was obviously not his height, the defendant, having  
7 agreed that the shooter wore a mask and argued with the victim, testified:

8 I’m 5-6, 5-7, maybe even shorter. That’s the problem with that description,  
9 man, when you compare me and Chris you don’t even use numbers like 5-7,  
10 you say the guy that was huge and the guy that looked like a midget, *I*  
11 *thought he was gonna’ get pounded.* The fact that everything was 5-7, I’ve  
12 got a huge issue with that. [*emphasis added*]

13 The defendant admitted he was the shorter of two men leaving the scene when officers arrived  
14 who was not stopped and interrogated , that police stopped Dontae Porter while defendant continued  
15 and eventually fled over fences furiously enough to leave behind his shoes and a watch [which he did  
16 not realize he’d lost until later], jumped another fence and broke a leg because he did not realize the  
17 other side of the fence was a high concrete retaining wall, and lied to medical emergency responders  
18 the next morning when he claimed he knew nothing of the shooting.

19 The defendant explained that his was the major DNA contributor to the mask he agreed was  
20 worn by the shooter because he wore it not as a ski mask but as a cap after a party on December 22 for  
21 Dontae Porter’s cousin, Marcus, while outside an “after hours” at which, “typical of these places,”  
22 “some people” and Marcus “got shot.”

23 The state seemed satisfied that it obtained the equivalent of the evidence it sought to introduce  
24 through the excluded gang evidence (as proper motive evidence) when the defendant conceded, in

1 essence, that he's proud of a reputation of not backing down from a fight just because his opponent is  
2 bigger than he.

3 As outlined by defendant Hickman's personal argument on the motion for new trial, the state's  
4 primary witnesses at trial offered to prove defendant was the shooter were two white women from  
5 West Lynn who claimed to see defendant shoot the victim, shoot four more rounds into the air, then run  
6 up to the car from which they observed the shooting; Dontae Porter, who testified under a cooperation  
7 agreement hoping for relief from substantial pending prison time; and Brandon Miller. Brandon Miller  
8 testified that defendant and the victim got into an altercation, defendant tried to calm down the victim  
9 who was amped up from some previous event, Marco Anderson supported the victim by trying to  
10 separate him, that defendant went off, and everyone moved to the driveway area where the shooting  
11 occurred and Brandon Miller stood by a telephone pole. Brandon Miller testified that defendant wore  
12 the mask, shot the victim, and removed the mask. Some contradictory testimony suggested that  
13 Brandon was not at the scene of the shooting when the killing occurred. Brandon conceded a long  
14 record of impeachable crimes, that he was serving a 10 year sentence for recent crimes including an  
15 Assault II, and that he hoped his cooperation would reduce his sentence expected in a Nevada weapons  
16 charge.

17 Marco Anderson testified that he had drug felony convictions, that he'd known Chris Monette  
18 since 6<sup>th</sup> grade, that he tried to calm Chris down at the driveway where Chris was "hyped," that he saw  
19 him arguing with a Black American around 5-7 or 5-8 who Marco did not know; he told them both to  
20 "chill," but the shooter turned, put on a mask, came back with a gun, pointed the gun at Marco to back  
21 him off, that Marco backed off, and the shooter shot four or five times. He couldn't remember whether  
22 he saw all the shots or turned, "I knew the game was up." His description of defendant was only that his  
23 build and height was "relatively right" but he couldn't be sure.

1 In defense closing argument at trial, counsel stressed the many inconsistencies in the testimony  
2 of witnesses, and characterized state witnesses including Dontae Porter, Brandon Miller, and Raymond  
3 Grant as “the liars, felons and deal makers.” He listed the impeachable crimes and argued the strong  
4 incentives of cooperation agreements and the witnesses’ hopes that cooperation would reduce  
5 incarceration by years. He restated the powerful testimony of Prof. Daniel Reisberg stressing the  
6 various factors that undermine the accuracy of cross-race identifications, challenging the usefulness of  
7 testimony from Rachyl Newman and Dana Dreibelbeis [the “West Lynn women” – at least one of whom  
8 conceded discomfort among black people].

9 The jury had asked questions during the trial demonstrating their wisdom, responsibility, and  
10 care. The jury worked long and hard, and returned a unanimous verdict of guilty.

11 **Evidence Proffered for and Against the Motion for New Trial:**<sup>5</sup> The Motion for New Trial filed  
12 personally by the defendant predicted that “Junior” [which distinguishes one “Johnny Wesley Miller,  
13 Jr.,” from the other] would identify the actual shooter; claimed to have evidence that Dontae Porter  
14 admitted that he was the murderer; represented that Marco Anderson would testify that he, not  
15 defendant, was the person who ran up to the car occupied by the West Lynn women after the shooting;  
16 explained that evidence would establish that Brandon Miller was in the house when the killing occurred;  
17 argued that evidence would contradict testimony about which people arrived at the party in which  
18 vehicle; and set out that Tyrone Miller would testify that he heard Dontae Porter admit “in so many  
19 words” that he was the killer .

20 In his affidavit, however, “Junior” makes it clear that he saw defendant try to break up a fight  
21 between Chris Monette and Dontae Porter [contrary to defendant’s trial testimony that he never argued  
22 with the victim that night but the shooter did], that “Junior” was not an eye witness and was not

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<sup>5</sup> I discuss briefly the elements necessary for a new trial below.

1 indicating that Dontae was “anywhere” by the scene of the shooting. He did state that Brandon Miller  
2 was not “outside.”

3 Tyrone Miller’s affidavit (ultimately executed February 19, 2010) asserts that in or around April,  
4 2008, he heard Dontae Porter, identified to him as “Buzz” by Patrick Johnson (whose affidavit was  
5 finalized on February 20, 2010), as follows:

6 I heard the taller darker male talking loudly about he got away with a  
7 murder on New Years. He seemed drunk because of the volume of his  
8 voice. He said “it was a close call.” He was talking as if he did it – like he got  
9 away with something. He seemed excited to be talking about it.

10 At the hearing on the motion for new trial, the state objected on a variety of grounds to  
11 receiving any evidence in the absence of timely and executed affidavits.<sup>6</sup> To facilitate efficient  
12 resolution and case management, given the absence of a jury, I received all of the evidence offered by  
13 the defense as an offer of proof, and promised to include necessary decisions as to what evidence was  
14 properly before me, as well as whether and how the evidence presented would or would not affect the  
15 result.<sup>7</sup> I did agree with the state, and hold, that Oregon law limits the evidence upon which a new trial  
16 can be granted to those facts set out by affidavit.<sup>8</sup>

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<sup>6</sup> ORCP 64 D requires that a motion for new trial such as this one shall “be upon affidavit or declaration setting forth the facts upon which the motion is based” and “no cause of new trial not so stated shall be considered or regarded by the court.” The state emphasized that “applications for a new trial upon the ground of newly discovered evidence are not favored, are viewed with distrust and suspicion, and are construed with great strictness.” *Newbern v. Exley Produce Exp., Inc.*, 208 Or 622, 630-33 (1956).

<sup>7</sup> This practice was informally known to me in the local jurisdiction in which I practiced before arriving here in 1974 as “taking evidence under the rule” – when, of course, there was no written rule. I believe it properly reduces the risk of avoidable and unnecessary remand and review cycles by giving the appellate level the greatest likelihood of a complete resolution of issues before it.

<sup>8</sup> For reasons stated below, I do not reach the question whether any constitutional principles bundled within the umbrella “fundamental fairness” must relax these strict limits. I do not hold that they cannot, but they do not here.

1           At the hearing, Tyrone Miller gave essentially the same evidence with some variation – in  
2 relevant part, a jury could certainly believe (or not) that Tyrone Miller *believed* he heard a person  
3 identified by Patrick Johnson as Dontae Porter brag that he was the person who shot someone on New  
4 Year’s Eve. The state’s cross examination elicited a weaker version that the speaker “seemed to be  
5 saying he did it.” Continuing inquiry introduced issues of jargon (“taking care of business”) and the vast  
6 range of ambiguities that followed. At one point, Tyrone Miller said he never used “I” to refer to  
7 himself, “maybe he said ‘he’ instead of ‘I.’” But a jury surely could believe that Tyrone Miller  
8 understood that Dontae Porter was bragging that he shot Christopher Monette.

9           The state’s cross examination also pursued the earlier availability of this testimony to the  
10 defense since Tyrone Miller attended much of the trial, was aware that Porter identified Hickman as the  
11 murderer in the trial, and didn’t tell anyone of the April incident. Tyrone Miller’s answer was: “I’m not a  
12 freakin’ cop to arrest someone,” and he conceded that he is a good friend of the defendant.

13           Patrick Johnson testified that he didn’t hear any of the statements by “Buzz,” but identified him  
14 when asked by Tyrone Miller, wondered why he was asked, and was told by Tyrone that he’d heard  
15 street talk like “handled his business” – and knew he was talking about “Buzz” getting away with murder.

16           The state offered a substantial amount of evidence that Patrick Johnson belongs to the same  
17 gang as defendant, and has strong, long-standing ties to the defendant.<sup>9</sup>

18           Johnny Miller “Junior” testified he would have invoked his right to silence if called by the  
19 defense at trial, but now was willing to testify because defendant was convicted. He testified he was at  
20 the scene of the murder, and that defendant did not shoot the victim “based on what I did witness,” and

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<sup>9</sup> The state offered evidence to demonstrate acquittal to be unlikely upon retrial under affidavits, including several purporting to subsume evidence gathered by police during investigation and interviews with witnesses. This was to adhere to the state’s position on the strictness appropriate to such motions (*fn 6, supra*) and the provision of ORCP 64 F: “If the motion is supported by affidavits or declarations, counteraffidavits or counterdeclarations may be offered by the adverse party.”

1 that Marco Anderson ran up to the car as he was leaving. He conceded he gave officers a false name  
2 because he thought he had an outstanding warrant, lied to officers, and that he had felony convictions.

3 Junior did not return the next day; the parties agreed that the direct and cross examination be  
4 stricken, and that the affidavit stands. I do not consider the stricken testimony. What also remains is  
5 evidence of prior inconsistent statements, covered by the state’s counteraffidavits, that “Junior” told  
6 each of his parents that defendant was the murderer of Chris Monette.

7 **Law Governing a Motion for New Trial:** The parties at times asserted substantially divergent  
8 views of the standards that direct my analysis of the motion for new trial.<sup>10</sup> A concise statement of the  
9 prerequisites to a successful motion for new trial is from *State v. Arnold*, 320 Or 111, 119 (1994):

10 Newly discovered evidence which will justify a court in granting a new trial  
11 must meet the following requirements:

12 (1) It must be such as will probably change the result if a new trial is  
13 granted; (2) it must have been discovered since the trial; (3) it must be such  
14 as, with due diligence, could not have been discovered before the trial; (4) it  
15 must be material to the issue; (5) it must not be merely cumulative; (6) it  
16 must not be merely impeaching or contradicting of former evidence.<sup>11</sup>

17 The first three requirements are independently essential, whereas the last three requirements  
18 are closely related to the first. *State v. Toth*, 30 Or App 285, 289-90 (1977).

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<sup>10</sup> Defendant’s initial self-authored motion cited *U.S. v. Contreras-Mendoza*, 366 F Supp 2d 446, 451 (N.D.Tex.,2005), as recognizing an exception to these widely cited prerequisites to a successful motion for new trial. The case, like any federal court opinion below the United States Supreme Court, does not bind Oregon judges (even if on a question of federal law), but may be considered for the persuasiveness of its analysis. The only way this *U.S. v. Contreras-Mendoza* could properly influence the result in this matter is within the constitutional principles discussed below encompassed by “fundamental fairness.” Only constitutional law can modify Oregon statutes (or their “rule” equivalents, such as ORCP 64).

<sup>11</sup> Footnotes and sub quotation marks are deleted. The language is traceable to *State v. Davis*, 192 Or 575, 579 (1951).

1           The state stressed restrictions on the availability of a new trial set out in part in footnote 6,  
2 *supra*, and argued, briefly, that facts must be “undisputed” to satisfy the “will probably change the  
3 result” requirement. At the other extreme, the defense argued that all that is required is that a jury  
4 could reasonably accept that new evidence and *could* acquit the defendant based on that evidence in a  
5 new trial under the reasonable doubt standard. Discussions of both of these contentions [must be  
6 undisputed vs. could be accepted by a jury and could result in acquittal under the reasonable doubt  
7 standard] can be found in *State v. Farmer*, 210 Or App 625, 641-45 (2007).

8           Both contentions illustrate a common form of mutation in caselaw. Many appellate and trial  
9 judges explain in decisions why under applicable law the circumstances of the instant case lead to a  
10 particular result. When an advocate writing a brief or author of an appellate opinion sees support for  
11 the "correct" decision in that explanation, what was previously a case-specific explanation is not  
12 infrequently later recited as if it were itself a *requirement* of the law. When the issue is important,  
13 careful tracing of the mutation may reveal logical error - though the task is a bit different from the trial  
14 level than within an appellate level. As a trial judge, I have to determine, to the extent necessary to  
15 resolve an issue before me, what an opinion meant and whether it is still good law, as I am bound by  
16 appellate decisions in Oregon (and of the United States Supreme Court if applicable). There is the  
17 additional question of whether a revised statement of law is correct under binding precedent.<sup>12</sup>

18           I conclude from a careful reading of the cases and statutes that apply that the five prerequisites  
19 are as quoted above from *State v. Arnold*. I reject as a “requirement” that proffered new evidence must  
20 be “undisputed.” In assessing the probability of success upon new trial, I am to assume that a jury may  
21 accept any *new* evidence available under the second and third listed requirements unless I would be  
22 permitted to exclude that evidence from the jury. In other words, in assessing the probability of a

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<sup>12</sup> A notable example: *State v. Acree*, 205 Or App 328, 333-34 (2006), misquotes and garbles the statement of new trial requirements from *State v. Arnold*, 320 Or 111, 120 (1994).

1 change in the result assuming that the new evidence reaches a jury, I must assume the same range of  
2 available inferences lawfully available to any jury, and proceed from the assumption that any available  
3 new evidence could be accepted by the jury if the evidence is admissible and the inferences sought by  
4 the defense *from that evidence* are logically and legally available to the jury.

5 On the other hand, I reject the notion that the question is whether a jury *could* reasonably reach  
6 reasonable doubt (or find itself unable to overcome that burden of persuasion) once it believed the new  
7 evidence. The test is whether the new evidence *probably* would change the result, not whether there is  
8 no reasonable possibility that the jury could acquit the defendant under the reasonable doubt standard  
9 in light of the new evidence. In this part of the analysis, I am not to give the defendant the benefit of  
10 the doubt that the jury might draw inferences favorable to the defense from *all evidence in addition to*  
11 *the “new” evidence*.

12 My assigned role, if other requirements do not prevent considering the probability of change  
13 due to the new evidence, is to assess that probability. In that sense, I am a “trier of fact.”<sup>13</sup>

14 I agree with the state’s second line of defense on the merits – that the line between merely  
15 cumulative, impeaching, or contradicting evidence (requirements five and six) and probably likely to  
16 change the result is a “continuum” on which I must locate the evidence properly before me.

17 As above, I read Oregon law to limit the evidence upon which a new trial can be granted to  
18 those facts set out by affidavit.<sup>14</sup>

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<sup>13</sup> The defendant submitted a letter “for the record” ably arguing his motion after the hearing, and his mother sent a long letter arguing the motion, and adding in essence, that her son was innocent and was the victim of an attack on her based on long-standing family rancor. I caused copies to be forwarded to counsel for both sides promptly. Neither is a source of evidence upon which I can rely, and I cannot permit a non-attorney nonparty to argue a case. Attempting to influence a judge other than in trial in the courtroom (or in a duly served memorandum or brief filed by a party or the party’s attorney) is indeed “improper,” but I do note that the defendant’s mother’s assertion that I am the “trier of fact” is correct in the sense stated in the text, and I assure her that I do not hold her understandable and heart-felt attempt to help her son against the defendant in any sense.

1           *Fundamental fairness:* The defense understandably urges that what is critical is the *possibility*  
2 that the defendant is wrongly convicted, innocent, and sentenced to spend at least 25 years in prison.  
3 Constitutional principles such as due process are associated with the concept of fundamental fairness,  
4 and many factors come to mind that I suspect are unspoken but frequently operative in this judicial  
5 business. At least speaking for myself, I must say that I am acutely aware that there are mothers on  
6 both sides – the victim’s mother and the defendant’s mother –and loved ones who undoubtedly will  
7 suffer greatly depending on the outcome of this motion. I am also acutely aware that we ultimately rely  
8 on a process that cannot claim mathematical certainty, but must make a final decision without excluding  
9 to absolute certainty the possibility of a wrongful conviction. The jury instruction on reasonable doubt  
10 recited in part, without objection,

11           A reasonable doubt is an honest uncertainty as to the defendant’s guilt.

12           “Proof beyond a reasonable doubt” is proof that leaves you firmly  
13 convinced of the defendant’s guilt. There are very few things in this world  
14 that we know with absolute certainty, and in criminal cases the law does not  
15 require proof that overcomes every possible doubt. If, based on your  
16 careful consideration of all of the evidence, you are firmly convinced that  
17 the defendant is guilty of the crime charged, you must return a verdict of  
18 guilty. If on the other hand you think there is a reasonable possibility that  
19 the defendant is not guilty, you must give the defendant the benefit of the  
20 doubt and return a verdict of not guilty.<sup>15</sup>

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<sup>14</sup> Footnote 6, and associated text, *supra*. For reasons stated below, I do not find constitutional notions bundled within “fundamental fairness” contentions to require relaxation of this restriction in this case. I do not old that those notions can never require relaxation of this restriction.

<sup>15</sup> This is a version I have used for years to avoid the common misunderstanding of the phrase “moral certainty” often part of the “standard” reasonable doubt instruction. The quoted instruction states the meaning of “moral certainty” in terms intelligible to contemporary citizens. “Moral certainty” is a *qualification* of certainty,

1 Even at the trial, convicting a defendant when there is a theoretical possibility that he is not actually  
2 the murderer is *not* inconsistent with “fundamental fairness,” and it obviously follows that that  
3 *possibility* is insufficient to satisfy the requirement that new evidence would “probably” change the  
4 outcome.

5 Justice, fairness, and such concepts have been heavily debated since the ancient philosophers.<sup>16</sup>  
6 The notion that “might is right” is properly the test of “justice” is ubiquitous at least implicitly in gangs,  
7 sports, nations, economies, co-evolutionary competition among species on our planet,<sup>17</sup> and within the  
8 “lines of tribe”<sup>18</sup> that all people experience. That notion is subject to varying levels of regulation to  
9 restrict its impact – presumably in protection of important supervening social requirements.

10 It is inherent in the process of governance, and in the necessity for resolving disputes including  
11 criminal charges, that we must accept some risk of error or accept chaos – because absolute certainty is

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recognizing that in such matters, demonstrable mathematical certainty is simply unattainable. The phrase was never intended to *elevate* the meaning of “certainty.” See, e.g., *Victor v. Nebraska*, 511 US 1, 10-14 (1994).

<sup>16</sup> Plato argued that ancient Athenians doomed democracy by defining justice and virtue based the notions that might makes right, and that this corruption led to atrocities committed by Athenian democracy and the demise of democracy at the conclusion of Peloponnesian War. He argued that ideal governance is by philosopher kings from an oligarchy enlightened to understand the equality of men and women [blasphemy in his time], to embrace the true nature of justice and virtue, to escape greed and ownership, to prefer communal over nuclear families, and to accept the satisfaction of benign governance as a sufficient reward for ruling society. See generally, Plato, THE REPUBLIC, <http://classics.mit.edu/Plato/republic.html>, <http://classics.mit.edu/Plato/republic.mb.txt>, <http://faculty.frostburg.edu/phil/forum/PlatoRep.htm>.

Probably the most persuasive counterarguments are based on the atrocities associated with many who have invoked Plato to justify tyranny, and the dilemma of creating human beings with sufficient purity to fill the role and getting them into power without employing corrupting means to get power from the powerful.

The prevailing defense of democracy in modern times often invokes the concept of pursuit of “enlightened self-interest” as expressed by Alexis de Tocqueville in DEMOCRACY IN AMERICA, [HTTP://WWW.ADTI.NET/TOC\\_BOOK/CH2\\_08.HTM](HTTP://WWW.ADTI.NET/TOC_BOOK/CH2_08.HTM).

<sup>17</sup> See, e.g., Michael Pollan, THE BOTANY OF DESIRE (Random House, New York 2002) <http://www.randomhouse.com/catalog/display.pperl?isbn=9780375760396&view=tg>.

<sup>18</sup> A profound expression of optimism in President Obama’s inaugural address was his prediction that “that the lines of tribe shall soon dissolve.”

1 rarely within our grasp.<sup>19</sup> All important decisions by government risk some avoidable harm – whether  
2 those decisions govern investment in schools, prisons, services, public safety, health care, or military  
3 tactics. Everything we do inherently risks “collateral damage” along a very broad spectrum – which  
4 certainly includes innocent deaths and other tragedies.

5 In this case and on this motion, then, fundamental fairness has considerable but limited impact.  
6 Because the defendant initially asserted that he would produce a witness who would be an eye witness  
7 who would identify someone else as the murderer, and because he insisted that he is wrongfully  
8 convicted of a crime of which he is innocent, I felt it appropriate to exercise the discretion I had to  
9 extend time limits to ensure that he have every opportunity I could afford within the law to make his  
10 best attempt to obtain a new trial.<sup>20</sup>

11 On the other hand, “fundamental fairness” to society and to the victim’s loved ones is relevant to  
12 the reasons new trials are not lightly afforded:

13 It is hornbook law that applications for a new trial upon the ground of newly  
14 discovered evidence are not favored, are viewed with distrust and  
15 suspicion, and are construed with great strictness. Such applications are  
16 always entertained with reluctance and granted with caution, not only  
17 because of the danger of perjury, but also because of the manifest injustice  
18 in allowing a party to allege that which may be the consequence of his own  
19 neglect in order to defeat an adverse verdict. To prevent, so far as possible,

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<sup>19</sup> Unfortunately, mainstream sentencing seems willing to cling to faith instead of best efforts to act on the best data we can extract from our experience on what works to serve the actual (and constitutional) purposes of sentencing. <http://www.smartsentencing.com>.

<sup>20</sup> ORCP 64F(1) provides that “A motion to set aside a judgment and for a new trial, with the affidavits or declarations, if any, in support thereof, shall be filed not later than 10 days after the entry of the judgment sought to be set aside, *or such further time as the court may allow*. In this context, I chose to allow all available time to ensure that any result not rest on technical objections within my discretion to overcome.

1 the fraud and imposition which defeated parties may be tempted to  
2 practice as a last resort to escape the consequence of an adverse verdict, an  
3 application setting up the discovery of new evidence should always be  
4 subjected to the closest scrutiny by the court. Before any court is justified in  
5 granting a new trial upon the ground of newly discovered evidence, certain  
6 requirements must be met.

7 *(Newbern v. Exley Produce Exp., Inc., 208 Or 622, 630-33 (1956))*

8 I cannot preclude the possibility of defendant's innocence to a mathematical certainty. I believe he  
9 has had the best version of fundamental fairness available in the real world. There is no suggestion that  
10 the crime of which he stands convicted – murder – is the product of a democratic process corrupted by  
11 purchased undue influence in law making or immoral manifestations of distorted justice or virtue.<sup>21</sup> The  
12 defendant concedes the murder was senseless (although from his testimony, "understandable" in  
13 context), and he certainly urged no defense based on the murderer being somehow in the right – he  
14 insists someone other than he was the shooter.

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<sup>21</sup> There surely is room for fear that the force of Plato's critiques of democracy may reach into the judicial branch. In a five-four decision, the United States Supreme Court has arguably read the United States Constitution as guaranteeing the right of corporations (perhaps even global corporations) and other enormous groups to attempt to purchase the outcomes of all elections. *Citizens United v. Federal Election Commission*, 558 US \_\_\_\_ , 130 S Ct 876 (2010). Surely corporations have provided us all with profound benefits of technology, allocation of resources, medical devices, and other advances inconceivable without corporations. But critics have no trouble marshalling evidence that "enlightened self-interest" is a weak limitation on the "might is right" influence on corporate dominance. Corporations and other nonhuman entities, after all, have no capacity for empathy or virtue not imposed by their human controllers. Add the implications of *Republican Party of Minnesota v. White*, 536 US 765 (2002) [restrictions on judicial candidates' campaigns based on issues are unconstitutional], and some concerned with the judicial branch are understandably gravely concerned that self-interested groups can control elections of judges in the many jurisdictions (including Oregon) in which judges stand election. And elected officials who have the power to appoint judges, after all, include those who appointed all members of the United States Supreme Court, and those who certainly campaign on issues that have reached court decisions.

Whether the power of citizen-consumers will be sufficient to avoid the worst distortion of democracy by the wealth of interest groups remains to be seen. See, e.g., Michael Pollan, *THE BOTANY OF DESIRE*, *supra* n. 17, at pp. 184-238, including footnotes. The enclave of this trial, however, is surely the best form of representative democratic justice anyone can expect in the real world: Judges have not yet run on issues in Oregon; the laws at stake in this case (arguably as compared with the judiciary's participation in the ill-fated "drug war" – See, e.g., Michael Pollan, *THE BOTANY OF DESIRE*, *supra* n. 17, at pp. 113-79) were not corrupted by the self-interest of law-makers, their need to seek re-election, or the interests of their campaign supporters; and this trial received the best efforts of the most ideal citizen jurors available.

1           What the defendant received was a trial that represents the purest version of representative  
2   democracy existent at any time in our experience: a panel of concerned and profoundly responsible and  
3   attentive jurors, who did not have to consider re-election while performing their duties, who could not  
4   be lobbied privately or offered incentives to favor one side or the other, and had no motivation  
5   whatsoever other than to get it right. All evidence upon which they relied, and all arguments that were  
6   made to them, were delivered in open court in the presence of both sides and all counsel. All legal  
7   issues were clearly set forth in the record to facilitate review by an appellate court. My driving principle  
8   was to pursue fairness, accuracy, and justice – meaning not “might is right,” but including accurate  
9   application of the law of evidence and avoidance of bias in either side’s favor or to either side’s  
10  improper prejudice<sup>22</sup> in all respects in the presentation of evidence and argument.

11           **Decision:** Notwithstanding the tragedy posited by the theoretical possibility that the defendant is  
12  in fact innocent, and while I am poignantly aware of the enormous emotional impact granting or  
13  denying a new trial would have on the many fellow citizens who are connected with this case –  
14  particularly the victim’s mother and family, and the defendant’s mother, child, and fiancé<sup>23</sup> – my duty  
15  comes down to assessing whether the available “new” evidence would make acquittal the probable  
16  result of a new trial.

17           Had the defendant succeeded in producing an eye witness who would in fact testify that that  
18  witness personally observed another person kill Christopher Monette, that sort of evidence might get to

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<sup>22</sup> Anything that helps an opponent is “prejudicial” to the adversary; it is only aspects that are *improperly* prejudicial are objectionable – such as evidence or argument seeking to substitute bias or propensity for lawful evidence or argument.

<sup>23</sup> The defendant’s post-trial communication with the court, shared with counsel, recites that he is a loving father, a massage therapist, and, in essence, a good citizen. The tragedy to which the victim’s mother so graciously referred at sentencing may include this reality: human beings are complex; they can have good and bad in their lives and their behavior; they may cause terrible harm through an intricate chain of choices and chances. That the defendant is guilty of murder does not necessarily mean he could not also have been a loving father and family partner. If so, these factors just compound tragedy; they do not change the analysis.

1 the “probably change the result” point of the spectrum, beyond the realm of evidence that is “merely”  
2 cumulative, impeachment, or contradicting. And evidence that further supported arguments that  
3 important prosecution witnesses were lying (or, in the case of the West Lynn women, simply wrong) at  
4 least went in that direction.

5 But without the strength of the evidence the defendant predicted, and regardless of all nuances  
6 about whether the testimony or only the affidavits proffered by the defense is properly considered on  
7 this motion, the defense fell short on the “probability” scale.<sup>24</sup> The West Lynn women may well be  
8 unreliable as to the notion that the shooter was the defendant and the same person who ran to their  
9 car, but they were strong on less specific evidence about the relative size of the shooter. They also  
10 provided the most accurate description of the number of shots, given the number of casings recovered  
11 from the site of the shooting.

12 The defense attempts to discredit the witnesses who provided the most direct evidence of  
13 defendant’s guilt. But as recited above, Junior’s new affidavit input could well help to convict the  
14 defendant anew. The defendant himself excluded most plausible alternate shooters; his testimony was  
15 arguably inconsistent as to the height of the shooter and may well be read as suggesting that “midget”  
16 was the person he would have felt like if he hadn’t shot Chris Monette. His explanations of the DNA are  
17 likely not to persuade a jury of his innocence; his refusal to identify the shooter when he claims to know  
18 who the shooter is; his dance around the implication that Porter was the shooter and the overwhelming  
19 consistency that the shooter was his size and not Porter’s – all weaken tremendously the likelihood that  
20 new evidence would change the result of a retrial.

21 Moreover, all of the impeachment evidence proffered by the state that would be available in  
22 response to the new evidence, and the gang evidence that may well be properly admissible to explain

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<sup>24</sup> I do assume that the defense satisfied the requirements that the new evidence was discovered since the trial and that it could not have been discovered with due diligence before the trial.

1 why bias discredits exculpatory new evidence, mean his chances of acquittal would not only not be  
2 better in a new trial but would probably be worse. The defense argument that evidence that Brandon  
3 Miller was not present for the shooting he claimed to observe would probably change the result is  
4 profoundly weakened by the state’s proffered impeaching and contradicting evidence.

5 Defendant’s arguments that his new evidence must be true because not optimal for the defense are  
6 not different than the arguments that the “cooperating” state witnesses must be truthful because their  
7 testimony is not optimal for the state.

8 **Decision:** Defendant has been justly convicted of murder. The theoretical possibility, present in  
9 almost every case, that a convicted defendant is actually innocent does not diminish the justice of that  
10 result. I find that the proffered new evidence, in the context of this case, does not reach a probability  
11 that the defendant would be acquitted in a new trial.<sup>25</sup>

12 Defendant’s motion for new trial is DENIED.

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15 March 5, 2010



Michael H. Marcus, Circuit Judge

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<sup>25</sup> For the record, this assessment does not depend upon whether evidence existing solely as testimony at the hearing on the motion for new trial is before me; the result is the same whether or not I am limited to affidavits and declarations.