

1988

# Jerry Joe Medina v. Gerald L. Cook, Warden, et al. : Brief of Respondent

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JERRY JOE MEDINA, :  
Plaintiff-Appellant, : Case No. 880355  
v. :  
GERALD L. COOK, et al., : Category No. 3  
Respondents. :

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BRIEF OF RESPONDENTS  
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APPEAL FROM THE DISMISSAL OF APPELLANT'S  
PETITION FOR WRIT OF HABEAS CORPUS, IN THE  
THIRD JUDICIAL DISTRICT COURT, IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH, THE  
HONORABLE J. DENNIE FREDRICK, JUDGE,  
PRESIDING.

BRIEF

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FILED

FEB. 1 1988

CLERK OF DISTRICT COURT

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BRIEF OF RESPONDENTS

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from the dismissal of appellant's Petition for Writ of Habeas Corpus in the Third Judicial District Court. Jurisdiction lies in this Court under Utah Code Ann. § 78-2-2(3)(i) (1987)(Supp. 1988) because the conviction which caused the incarceration of which petitioner complains was for a first degree felony.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether petitioner is procedurally barred from seeking a Writ of Habeas Corpus by raising matters in the petition that he raised or should have raised on his direct appeal.
2. Whether petitioner's trial and appellate counsel rendered ineffective assistance.
3. Whether the prosecutor in petitioner's trial committed misconduct in his closing arguments and whether he withheld exculpatory evidence from petitioner before trial.

4. Whether petitioner's additional claims raised in his supplemental brief, that he was denied access to the courts and that the trial judge was prejudiced, have any merit.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

For purposes of this brief, respondents rely on the following provisions:

1. Utah Code Ann. § 76-5-203 (1978).

STATEMENT OF THE CASE

Petitioner was charged with criminal homicide, murder in the second degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (1978). He was convicted as charged in a jury trial held February 26,27,28, and March 1, 1985, in the Third Judicial District Court in and for Salt Lake County, the Honorable J. Dennis Frederick, Judge, presiding. Petitioner was sentenced by Judge Frederick on March 25, 1985, to the Utah State Prison for a term of not less than five years and may be for life. Petitioner appealed that conviction and sentence to this Court in 1985 in case number 20629. The issues raised in that appeal were (1) ineffective assistance by trial counsel because she failed to object to the court giving a supplemental "Allen" instruction; (2) reversible error by the trial court in giving the "Allen" instruction; (3) insufficient evidence to support the guilty verdict; and (4) reversible error by the trial court in allowing the preliminary hearing testimony of an unavailable witness to be read into evidence at trial. This Court upheld petitioner's conviction in State v. Medina, 738 P.2d 1021 (Utah 1987).

On November 5, 1987, petitioner filed a Petition for Writ of Habeas Corpus challenging his incarceration. Even though in this circumstance such a petition should be for Post-Conviction Relief, respondents will use the title given it by petitioner for the purposes of this brief. The case was assigned to the Honorable Frank G. Noel of the Third Judicial District Court. An evidentiary hearing was held in the matter on March 25, 1988, at which time petitioner called no witnesses and did not take the stand himself. The matter was argued by petitioner pro se and by an Assistant Attorney General but no sworn testimony or evidence was presented. Subsequent to the hearing, petitioner filed several "affidavits" and "supplemental traverses" in an attempt to support his claims. On October 20, 1988, Judge Noel signed an Order dismissing petitioner's habeas corpus petition. On October 21, 1988, petitioner filed an objection to Judge Noel's Memorandum Decision; on October 28, 1988, petitioner filed a Motion for a Certificate of Probable Cause, a Motion for the Appointment of Counsel, and a Notice of Appeal.

#### STATEMENT OF THE FACTS

In this statement, citations to the trial record are to the page numbers stamped on as the record numbers, not to the reporter's pagination.

On the afternoon of Saturday, March 31, 1984, George Givens, also known as Greg Givens (Trial R. 691), met Rickey Myers in downtown Salt Lake City. Myers was walking in the city, sight-seeing (Trial R. 381). He had arrived in Salt Lake City



the previous Wednesday (Trial R. 380) or Thursday (Trial R. 504). Givens told Myers of a nearby party that he was going to and asked Myers to come along (Trial R. 381). The two walked from the downtown area to Myers' truck (Trial R. 383), which was parked near the Holiday Inn at Redwood Road and North Temple (Trial R. 458).

When they arrived at the party, which was in a duplex rented by Mike O'Mara (Trial R. 199-200,385), they discovered that there was another party next door (Trial R. 387). The party at Mike O'Mara's was attended by high school age youth (Trial R. 387). The other party, in Pete Najera's half of the duplex (Trial R. 228), was attended by people of varying ages (Trial R. 345). Myers felt more comfortable at Najera's party so he stayed there (Trial R. 387-8). Givens, meanwhile, went back and forth to both parties, which caused some minor resentment in petitioner's cousin at Najera's party (Trial R. 397).

Petitioner was also at Najera's party (Trial R. 241, 261, 344, 388, 606). He arrived at about 10:30 p.m. (Trial R. 255, 606) with his second cousin, Leonard Fernandez (Trial R. 257). Petitioner and Fernandez left after about fifteen minutes and went to La Frontera cafe until about 1:00 a.m. (Trial R. 607). They then returned to Najera's party (Trial R. 609). There was no apparent dispute or trouble between petitioner and Givens during the party (Trial R. 231, 169, 347, 397).

Myers met petitioner at the party and got close enough to see him, identify him (Trial R. 498), and remember him (Trial R. 388-9). While at the party, Myers drank some beer but never

"arrived at a state of intoxication or drunkenness" (Trial R. 389-90). The party "was slowing down" at about 3:30 a.m. (Trial R. 401-2) so Myers and Givens decided to leave (Trial R. 402).

Myers testified that he and Givens left the party through the front door of Najera's duplex (Trial R. 404). As Myers went through the door he saw "three gentlemen that opened the door" (Trial R. 405). The men were Givens, petitioner, and someone Myers recognized but did not know the name of (Trial R. 405); however, Myers later identified him as Gilbert Najera or his brother, Steven Najera (Trial R. 424), who look very much alike (Trial R. 368, 468, 493). Petitioner claimed that he left with Leonard Fernandez prior to the shooting (Trial R. 615). Gilbert Najera also testified that petitioner left prior to the shooting (Trial R. 350-1). Fernandez testified that he left with petitioner (Trial R. 285) and that he did not hear a shot but he did see a body slumped over in the entry way (Trial R. 285, 305). He did not see a bullet hole or blood (Trial R. 305), but the body made no noise nor did it move (Trial R. 318). Furthermore, because Fernandez was wearing dark glasses he could not tell whether the body was a black or a white man (Trial R. 306). Petitioner testified that he saw no one lying in the entry way when he left with Fernandez (Trial R. 615).

Myers testified that he came out of the door, shook petitioner's hand and thanked him for the good time and started toward his truck (Trial R. 409). Myers then glanced back to tell petitioner something and saw petitioner advance toward Givens (Trial R. 410). Petitioner, with a motion of his right hand

coming from his belt, said something like, "When you see your friends over there, give them this" (Trial R. 410). Myers then saw a muzzle flash from a revolver (Trial R. 410, 412) and saw Givens shot in the head (Trial R. 415). The revolver sounded like it was in the .30 caliber range (Trial R. 412) although Myers could only see that it was a blue steel revolver, and could not see the size of caliber it was (Trial R. 412). Petitioner then turned toward Myers, pointed the gun at him and asked something to the effect, "Would you like some of this, too?" (Trial R. 413). Myers turned and ran from the scene (Trial R. 413). He did not go to his truck because he simply wanted to get out of the area and did not think of going to his truck (Trial R. 414).

Myers ran a short distance (Trial R. 413) then walked (Trial R. 453). He came to the railroad tracks (Trial R. 450) and followed them back downtown, walked to the bus depot, waited four or five minutes and then called the police (Trial R. 418). The police came to the bus depot and took him to the police station (Trial R. 419). Officer Opheikens, who picked Myers up at the bus depot, stated that Myers showed signs of shock and was "visibly shaken up and he rambled on the same as somebody who had been in a serious accident and had been shaken up, the same type behavior in his mannerisms" (Trial R. 531). Myers looked at 30 to 40 photographs to identify who was with petitioner when he shot Givens in the head (Trial R. 423, 491).

Officer John Johnson was assigned to the case and went to petitioner's home with Lieutenant Leonard and Detective Jim

Leary to arrest petitioner concerning the homicide (Trial R. 516). While Johnson was at petitioner's home he asked, and received, permission to search petitioner's car for a "gun or bullets, anything related to the shooting" (Trial R. 479). Johnson "found one live round of .38 caliber ammunition on the floorboard" of the front passenger side of the vehicle he searched (Trial R. 480). The bullet had a solid lead slug that was unjacketed (Trial R. 480).

At trial, petitioner testified that the bullet was dropped in his car in late February or early March when he went target practicing with a snubnose (Trial R. 636) .38 caliber pistol (Trial R. 596). Petitioner said he borrowed the gun from his nephew (Trial R. 630), Jonathan Twittle (Trial R. 637). One of petitioner's cousins, Willie Moore, testified that he and petitioner had gone target shooting in early 1984 and had gone in petitioner's black Chevy Chevelle and may have dropped some shells in the car (Trial R. 596-7). Moore also testified that petitioner had talked to him about testifying about the target shooting in the summer of 1984 (Trial R. 597). Petitioner testified that the car he was driving the night of the homicide was a black 1972 Chevrolet Chevelle (Trial R. 607), but introduced into evidence the registration for a Chevelle Malibu (Trial R. 608). He testified that he owned three other automobiles (Trial R. 617). Petitioner's cousin, Leonard Fernandez, testified that petitioner was driving a 1971 Chevelle with no damage on it that night and that the car was a Super Sport with a "CS or SS" on the body (Trial R. 93-94). The

officer testified that he searched a black 1974 Chevrolet Monte Carlo and recalled that it was unlocked when he searched (Trial R. 479). Another officer who was present during the search also testified that the vehicle searched was a black Chevrolet Monte Carlo (Trial R. 516).

After the habeas corpus hearing, at which no sworn evidence was given, petitioner submitted "affidavits" saying that he had not been aware that the car searched was a Monte Carlo (Habeas R. 267-68, 352-53). He also sent "affidavits" purportedly from a Mark Velarde that a 1974 Monte Carlo which Velarde is "almost 100% sure" was parked at petitioner's house on April 1, 1984, belonged to a friend of Velarde's. The "affidavits" state that Velarde didn't know petitioner on April 1, 1984, but he would have testified for him (Habeas R. 270-71, 280-82, 289-90). None of these "affidavits" was executed before a subscribing witness.

After the hearing, petitioner also submitted "affidavits" of his cousin, Chris Leonard Fernandez, who had testified at his trial, that the prosecution's rebuttal witness had a vendetta against petitioner's cousin's family (Habeas R. 283-84). He also submitted "affidavits" from a Lorenzo Tuero who claims to be a part-time disc jockey at the Annex Bar where he never recalled seeing petitioner, and to have been employed at La Frontera and to have seen petitioner there often. The "affidavit" states that Tuero never saw petitioner socializing with Eli Archuleta, the State's rebuttal witness (Habeas R. 352-56). Finally, petitioner submitted "affidavits" from Ronald

Craig Warren who claims to have been incarcerated with both petitioner and Archuleta at the Utah State Prison and to have heard Archuleta say that he had lied at petitioner's trial (Habeas R. 363-70). Again, none of these "affidavits" were executed before a subscribing witness. None of the people who supposedly prepared these "affidavits" were called to testify at petitioner's habeas hearing (Habeas R. 264).

#### SUMMARY OF ARGUMENTS

Petitioner has taken a direct appeal from his conviction and does not now raise any issues which were not or could not have been raised in that appeal.

Petitioner's claim of a violation of his constitutional rights is not supported by the record of either his trial or his habeas hearing.

#### ARGUMENT

##### POINT I

THE TRIAL COURT PROPERLY RULED THAT PETITIONER COULD AND SHOULD HAVE RAISED ALL ISSUES CONCERNING HIS CONVICTION ON HIS INITIAL DIRECT APPEAL.

Petitioner asserts that the District Court erred in dismissing his habeas corpus petition. This assertion is meritless.

It is well settled law in Utah that if alleged errors could have been raised on direct appeal, this Court is "precluded under basic principles of appellate review from addressing them now." Bundy v. Deland, 763 P.2d 803, 804 (Utah 1988). In stating a post-conviction claim, a petitioner must allege an "obvious injustice or a substantial and prejudicial denial of a constitutional right in the trial of a matter;. . ." Id.

This Court in Codianna v. Morris, 660 P.2d 1101 (Utah 1983), clearly emphasized the standard for habeas corpus review:

It is therefore well settled in this state that allegations of error that could have been but were not raised on appeal from a criminal conviction cannot be raised by habeas corpus or postconviction review, except in unusual circumstances.

A much-quoted statement of the type of errors that are and are not cognizable by habeas corpus is the following from this Court's unanimous opinion in Brown v. Turner, 21 Utah 2d 96, 98-99, 40 P.2d 968, 969 (1968) (Crockett, C.J.):

[Habeas corpus] is an extraordinary remedy which is properly invocable only when the court had no jurisdiction over the person or the offense, or where the requirements of law have been so disregarded that the party is substantially and effectively denied due process of law, or where some such fact is shown that it would be unconscionable not to re-examine the conviction. If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack, except in some such unusual circumstance as we have mentioned above. Were it otherwise, the regular rules of procedure governing appeals and the limitations of time specified therein would be rendered impotent.

Codianna v. Morris, 660 P.2d at 1104-05 (bracketed material and emphasis in original). The standard of review was further detailed by this Court in Bundy v. Deland, 763 P.2d 803, 805 (Utah 1988), as follows:

On appeal from denial of habeas corpus relief, "we survey the record in the light most favorable to the findings and judgment; and we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted."

Id. at 805, quoting Velasquez v. Pratt, 21 Utah 2d 229, 232, 443 P.2d 1020, 1022 (1968)(citations omitted). In Codianna, this Court rejected the argument that ineffective assistance of counsel necessarily constitutes "unusual circumstances" that would allow petitioner to bypass the regular appellate process in favor of habeas corpus. The Court stated:

To permit the inevitable instances of attorney oversight or ignorance to qualify for the "unusual circumstances" exception would allow that exception to swallow up the rule, thereby transforming habeas corpus from an extraordinary remedy into an alternative appeal mechanism in contravention of the finality of criminal judgments that is the settled policy of this state.

Codianna, 660 P.2d at 1105.

Likewise, in Zumbrunnen v. Turner, 27 Utah 2d 428, 497 P.2d 34 (1972), this Court stated:

He [Zumbrunnen] pursued this petition, after his time for appeal from the conviction had expired. He claimed . . . his counsel, who assisted him at his request, was incompetent. [This point] could have been urged on a regular appeal. This court repeatedly has said the writ cannot be used as a substitute for such appeal. . .

Id. at 35.

Similarly, in Matthew v. Cook, 754 P.2d 666 (Utah 1988), this Court said that "[plaintiff] did not show cause why he failed to follow the route of regular appellate procedure and that he suffered prejudice as a result of his default." Id. at 667.



In Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967), this Court addressed a similar issue. In Bryant, petitioner claimed "that because of this inability to communicate he was not and could not be represented effectively by counsel." Id. at 122. The District Court denied the petition and this Court affirmed. Id. at 122-23. In discussing the case this Court said:

This proceeding is an attempt to do that which should not be done nor countenanced in our procedure: to turn habeas corpus into an appellate review. This is not its purpose, and it is not so intended. The regular steps of criminal procedure provided for in our law give adequate protections of the rights of one accused of crime and safeguards against conviction of the innocent. They afford full opportunity to present and have determined any matters of defense, and to make objections to any error or impropriety that may affect his rights. Moreover, after judgment is entered, there is assured a right of appeal within the proper time to seek redress for any such error or transgression of those rights. When this procedure has been followed the judgment should normally be final. It should not be subjected to a continual merry-go-round of collateral attacks upon various and specious pretexts as some courts are prone to permit nowadays. In our opinion such an inconsiderate attitude toward final judgments regularly arrived at by courts of competent jurisdiction robs the law of the dignity and respect it is entitled to. It tends to degrade the whole process of law enforcement and the administration of justice and thus to undermine the good order of society it is purposed to maintain.

Id. at 122 (footnotes omitted).

In a case similar to the one at bar, this Court invoked the doctrine of waiver or procedural default in affirming the summary dismissal of a petition claiming ineffective counsel. In Hafen v. Morris, 632 P.2d 875 (Utah 1981), the defendant was

convicted and sentenced to prison. The defendant appealed and his conviction was affirmed. He then sought habeas review and claimed that his trial attorney "failed to honor his request to challenge a juror who appellant knew. [He] also claims that his trial attorney failed to raise that issue on appeal although appellant had so requested." Id. at 876. Naturally, in his post-conviction action he claimed "he was denied effective assistance of counsel. . . ." Id. The lower court

dismissed his petition on the ground that he had waived any right to raise the issue of the failure of his attorney to challenge the juror. The court determined that it would not grant an evidentiary hearing on that issue since it could have been raised at appellant's trial or on appeal. . . .

Id. The Supreme Court upheld the lower court and stated:

We explained further, in Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968), that "If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack, except in some such unusual circumstances as we have mentioned above. Were it otherwise, the regular rules of procedure governing appeals and the limitations of time specified therein would be rendered impotent."

Waiver was found in Schad v. Turner, supra, where the petitioner in a petition for habeas corpus attempted to raise as an issue that the District Attorney had exceeded the bounds of propriety in his cross-examination of the petitioner at the trial. We there observed that since that was an issue which could have been raised on the petitioner's former appeal of his case to this Court, we would not take cognizance of it on a later petition for habeas corpus.

If the appellant's counsel did in fact fail to honor his request to challenge the juror, the

appellant had the adequate opportunity at the trial to have made complaint to the court. Furthermore, following his conviction that issue could have been raised by him in this Court in his appeal which pended in this Court for many months. In view of his silence, the trial judge correctly ruled that he had waived any claim of error in this regard. There are not here any of the "unusual circumstances" referred to in Bryant v. Turner, supra.

Id. Thus, this Court held that Hafen had waived review of his ineffective assistance of counsel claim because he failed to raise the issue at trial or while his direct appeal was pending.

In the present case, petitioner has claimed a violation of his constitutional rights in that he alleges ineffective assistance of counsel, prosecutorial misconduct, denial of access to the courts and prejudice in his trial judge. An examination of these claims and allegations demonstrates that petitioner was not denied due process nor would it be unconscionable to not re-examine his conviction. Petitioner had different counsel at trial and then during his appeal. His appellate counsel raised four issues, one involving ineffective assistance of counsel for failing to object to the giving of an "Allen" jury instruction, two claiming that the trial court erred by giving the instruction and by allowing a witness' preliminary hearing testimony to be read into the record at trial, and one claiming that there was insufficient evidence to support the guilty verdict.

Petitioner's general claim on habeas that his trial counsel rendered ineffective assistance was raised on his direct appeal. The appellate brief in the original case explored the allegation that trial counsel and petitioner were at odds on the handling of his case. Petitioner presented an affidavit to this appellate

court listing the conflicts that he claims to have had with trial counsel. This Court stated in its decision on that appeal that petitioner's contentions were rejected for two reasons:

First, it is based almost entirely on self-serving affidavits that are not part of the record. For obvious reasons, we cannot accept after-the-fact claims that there was a conflict with counsel, unless the defendant has made his disagreement with counsel apparent on the record.

State v. Medina, 738 P.2d 1021, 1023 (Utah 1987). The second reason given for rejecting petitioner's claim was that trial counsel's decision to accept the "Allen" charge was trial strategy and within counsel's prerogative to decide. Id.

#### POINT II

THE HABEAS COURT WAS CORRECT IN FINDING THAT PETITIONER HAS FAILED TO DEMONSTRATE THAT HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

As in petitioner's appeal, on habeas review he asked the District Court, and asks this Court now to review matters which are not in the record of the trial or the habeas evidentiary hearing. At the evidentiary hearing in the District Court, he did not present testimony nor evidence but merely argued his position and made statements to the court about his habeas claims (Habeas R. 264). Subsequently he submitted to the habeas court several "Supplemental Traverses" and "Affidavits" which evidently were intended to replace his deficiency in not presenting evidence at the hearing (Habeas R. 267-284, 286-370). None of the "traverses" or "affidavits" carry the weight of evidence nor do they raise matters which were not or could not have been raised on petitioner's direct appeal.

Petitioner's specific claims of ineffectiveness raised in his habeas petition were that trial counsel failed to conduct an investigation which would have shown that 1) the officers searched a Monte Carlo instead of a Chevelle or Malibu, 2) Myers was not a credible witness because his claims that he had served in the military, that he was starting his own business, that he worked for a firm in Omaha, Nebraska called "New Energy Consultants", that he had only met the victim for the first time that day, that he had never been convicted of a felony, and that he had walked to the bus depot and waited five minutes before calling police were false, and 3) Archuleta was not a credible witness because he had a "vendetta" against petitioner's family.

The specific claim that trial counsel was deficient because she failed to conduct pretrial investigation is not supported by the trial record. The trial record shows that trial counsel called the Chief Investigator of the Salt Lake Legal Defenders Association as a witness to testify as to the time it would have taken Myers to walk from the scene of the shooting to the bus depot (Trial R. 589-595). His testimony directly challenged the credibility of the prosecution's eyewitness, Rickey Myers. Another investigator from the Salt Lake Legal Defenders Association, Gilbert Ramirez, testified as to efforts to locate Myers' employer and failing to find the business Myers had given as his employer (Trial R. 585). This also was a direct challenge to Myers' credibility. Trial counsel proffered, with the stipulation of the prosecution, the testimony of an agent of the Department of the Army to the effect that the Department had

searched and had not found any record of Myers having served in the Army (Trial R. 656). Obviously, pretrial investigation was done and trial counsel used the information gleaned from that investigation to challenge the credibility of Myers on cross-examination (Trial R. 432-34). Petitioner's claim that other investigation could or should have been done or that further investigation would have changed the outcome of the trial is not supported by the record.

As to petitioner's claims that Myers lied when he testified as to starting his own business, that he only met the victim for the first time that day, and that he had never been convicted of a felony, petitioner has not shown any of those statements to be false. There is no evidence to disprove Myers' claim that he was starting his own business and the trial record doesn't say (as petitioner claims) that the new business was a trucking company (Trial R. 379). Myers said only that he was in the process of starting his own business, then answered the prosecutor's question about what type of business he was typically in by saying "Trucking" (Trial R. 379). Petitioner seeks to challenge Myers' statement that he had only met the victim that day by citing to an affidavit by his wife, Ruth Medina, which is appended to his Brief but does not appear in the record of his habeas petition. That affidavit is without merit. Mrs. Medina allegedly quotes an Assistant Attorney General as saying that everyone knew that Myers and the victim had hung out together and that Myers had criminal records in Utah and elsewhere. There is no evidence to that effect from Bernard

Tanner, an Assistant Attorney General working in the Tax and Business Regulations Division. Mr. Tanner may have made those statements to Mrs. Medina but they are not proof that Myers was lying. There is no evidence that Mr. Tanner has personal knowledge of Myers' supposed criminal history and these statements fly in the face of the sworn testimony of Officer John Johnson who testified that a criminal history of Myers was obtained and showed that he had no convictions in Utah nor warrants from other states (Trial R. 496, 506, 508). There also was no evidence provided that Myers and the victim had known each other before March 31, 1984. Most of these issues were thoroughly explored and challenged by trial counsel at trial and were also raised by petitioner on his direct appeal and found to be without merit. There was no new evidence before the habeas court which supports petitioner's claim that Myers was lying under oath.

Petitioner's claim that trial counsel was ineffective because the officers allegedly searched the wrong car is also without merit. Trial counsel was not present when petitioner gave consent for the search of his car nor when the officers conducted the search. While there is no testimony as to how the officers decided which car belonged to petitioner, it is difficult to believe that petitioner did not have some input as to which car was his. It is absurd to believe that the officers merely picked out a car at random near petitioner's house and searched it without establishing petitioner's possessory interest. Something or someone must have directed them to the

black Monte Carlo as belonging to petitioner. It is interesting to note that petitioner did not raise this discrepancy in the cars at the time of trial. The officers clearly testified that they searched a black Chevrolet Monte Carlo (Trial R. 479, 516). Petitioner's relatives and friends testified that he drove a black Chevrolet Chevelle (Trial R. 254-60), although Gilbert Najera testified that petitioner had a couple of cars and he didn't know which car petitioner drove that night. The prosecutor asked if Najera saw any cars described as a "black Chevrolet Super sport Chevelle" and Najera replied that he "didn't pay any attention to any Camaro" (Trial R. 362-63). Petitioner himself testified that he was driving his 1972 black Chevelle (Trial R. 607) but then identified the registration for a Chevelle Malibu for introduction into evidence (Trial R. 608). After being present in court and hearing the testimony that the car searched was a Monte Carlo, petitioner never said that the bullet was not found in his car, either at trial or on appeal. Instead, he presented evidence from a cousin that the bullet may have come from a target shooting incident earlier in the year (Trial R. 595-99). Petitioner testified himself as to the target shooting claim (Trial R. 630, 636-39) but never raised the issue of the wrong car being searched. It is possible for the jury to have believed that the Chevelle car model and the Monte Carlo were similar and the confusion was only in the name and not in whether the car searched was petitioner's. The names of Monte Carlo, Chevelle, Malibu and Camaro were all given at one time or the other at the trial. The fact that Myers saw petitioner shoot



the victim was sufficient evidence to convict petitioner even if there was confusion about the make of the car.

Petitioner's attempt through the "affidavits" of Mark Velarde to "prove" that the car searched was not petitioner's must fail. Again, these "affidavits" are not evidence and, even if they were, they really don't tell the court anything. Velarde changes his "affidavits" as time goes on. In the March 14, 1988, "affidavit" he said that the Monte Carlo must belong to a friend of his whom he does not want to name, but who supposedly told him that his car was searched on the morning of April 1, 1984. On April 3, 1988, his "affidavit" says that he would have testified for petitioner at his trial that he, Velarde, is "almost 100% sure" that his friend's Monte Carlo was parked in front of petitioner's home. It is interesting that Velarde supposedly remembers this after four years and when he claims not to have known petitioner at the time that the search took place. Velarde appears to be a prison crony of petitioner's who now remembers an occurrence of four years ago when this "memory" can help petitioner.

The claim that further pretrial investigation of Eli Archuleta, the State's rebuttal witness, would have produced a different result in the trial is also without merit. Archuleta was presented the last day of trial because he was not found until that time. When his presence was known, petitioner's trial counsel asked for, and received, time to speak with Archuleta (Trial R. 661). She spoke to him for 25-35 minutes which she indicated was plenty of time (Trial R. 661-62). She was able to

effectively challenge Archuleta's testimony as he testified that he was on felony parole (Trial R. 663, 673) and that he had been granted immunity for testifying (Trial R. 664, 673-75). His confusion about when he had sold the gun to petitioner was thoroughly explored at trial and on petitioner's direct appeal. In addition, petitioner's trial counsel called a surrebuttal witness, a friend of petitioner's, who testified to the supposed "vendetta" against petitioner's family by Archuleta (Trial R. 683). Calling other witnesses, such as Leonard Fernandez, petitioner's cousin and author of another "affidavit" (Habeas R. 283-84), would have been merely cumulative and not added any substance to the vendetta claim.

Petitioner presents an "affidavit" of Ronald Craig Warren, another prison buddy (Habeas R. 363-70). This "affidavit" purports to prove that Archuleta admitted lying on the stand in petitioner's trial. The happenstance of Warren being housed next to petitioner, then next to Archuleta, then back with petitioner is very fortuitous, to say the least. The "affidavit" does not say that Archuleta said that he was lying, only the "he knew he was in the wrong for doning (sic) it. . . ." That statement, if it really was made, could just as easily have meant that Archuleta was remorseful for testifying, having to "rat on", petitioner. The "affidavit" is not proof that Archuleta lied.

Petitioner next claims ineffective assistance by appellate counsel because they allegedly neglected to notice these problems and raise them on appeal. As has been discussed,

appellate counsel did raise most of these issues on direct appeal and any other claims now raised by petitioner are without merit.

### POINT III

THE PROSECUTORIAL MISCONDUCT CLAIMED BY  
PETITIONER EITHER DID NOT OCCUR OR IS NOT IN  
THE RECORD TO ALLOW THIS COURT TO REVIEW.

Petitioner claims that the prosecutor committed misconduct by using perjured testimony. As the basis for his claim he raises the same issues as addressed in Point II above. As discussed there, petitioner has not proven that either Myers or Archuleta were lying. Without that proof, he has not shown that the prosecutor knew or should have known that these witnesses were lying. On the issue of Myers' alleged criminal record, it would also have to be shown that the officers who ran the check on his history were lying and that the prosecutor knew or should have known that they were. There is no evidence that that is the case.

The allegation that the prosecutor injected impermissible racial slurs into his closing argument has no basis in the record. The closing arguments were not transcribed (which petitioner claims was also ineffective assistance) so this Court has no evidence before it that error occurred during closing argument. Petitioner submits with his brief a newspaper clipping which reports the closing arguments in the case. Even in the clipping there is no quote from the prosecutor calling petitioner a "macho Mexican". The article paraphrases the prosecutor as saying that "Medina was being macho with his friends the night of the party." The defense counsel is paraphrased as saying that

"the prosecuting attorney had portrayed Medina as being macho just because he is Mexican. 'Being Mexican doesn't necessarily mean being macho.'" (Brief of Appellant, Exhibit 8). None of this is evidence that the prosecutor called petitioner a "macho Mexican" as he alleges. Given petitioner's misquotes from the trial transcript throughout his brief when he had that transcript in front of him, this Court should not accept his claim that the prosecutor made any such statement.

Petitioner also alleges that the prosecutor intentionally concealed the make of the car searched until after trial and that trial counsel was in collusion with the prosecutor to conceal that information from petitioner. This argument is specious. The trial transcript clearly states the testimony about the model of the car searched and petitioner was present at trial and could hear the testimony of those witnesses. It can also be assumed that that information was divulged to petitioner's trial counsel as part of the police report given during discovery and was never concealed from anyone.

#### POINT IV

THE ISSUES RAISED BY PETITIONER IN HIS  
SUPPLEMENTAL BRIEF ARE EITHER DUPLICITOUS OR  
ARE EQUALLY WITHOUT MERIT.

In his supplemental brief, petitioner raises many of the same issues raised in his original brief; in fact, pages 3 through 11 are copies of petitioner's original brief. The only additional claims are that 1) petitioner's trial counsel was in collusion with the prosecution, 2) petitioner was denied access to the courts, and 3) the trial judge was prejudiced against petitioner.

The claim that petitioner's trial counsel was in collusion with the prosecution is based on petitioner's claims about lack of investigation, the closing arguments, and a claim that trial counsel gave petitioner a bottle of whiskey during trial which he drank. He claims that while he was drunk his attorney waived all of his rights regarding the "Allen" charge against his wishes. The first two claims are addressed above and the last is not supported by any evidence. The issue of the supposed conflict between petitioner and counsel regarding the "Allen" charge was rejected by this Court during petitioner's direct appeal.

Petitioner was not denied his access to the courts but was given his direct appeal and then was given an evidentiary hearing on his habeas petition. The fact that the habeas court did not accept any of his arguments (he presented no evidence) at the hearing did not deny him access to the court nor to due process. The habeas court heard his arguments and allowed him to file his multitudinous "traverses" and "affidavits" even after the hearing. A reading of those filings clearly supports the habeas court's findings that petitioner has not demonstrated ineffective assistance of trial or appellate counsel; has not demonstrated any newly discovered evidence; has not demonstrated an unfair trial because of prosecutorial misconduct; has not demonstrated what exculpatory evidence the prosecutor allegedly withheld; has not demonstrated that the prosecutor knowingly used perjured testimony; and has not demonstrated any improper statements by the prosecutor during closing arguments.

Petitioner's final additional allegation is that the trial judge was prejudiced against him. For the proposition, he quotes Judge Frederick (Trial R. 548) implying that the court's statement had something to do with the previous testimony about the bullet found in petitioner's car. The statement by Judge Frederick was clearly referring to the discussion occurring at that point about the State's request to present the preliminary hearing testimony of an unavailable witness. Read in context, the statement does not show any prejudice on the part of Judge Frederick.

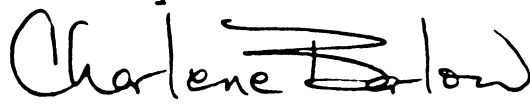
Throughout his brief and supplemental brief, petitioner misquotes, misconstrues and misunderstands the law and the testimony given. Neither his arguments at his habeas hearing nor his supplemental filings with the court presented the evidence that the court needed if it were to rule in petitioner's favor.

#### CONCLUSION

Based on the foregoing, and any information which may be brought out on oral argument, the State asks this Court to affirm the sentencing of the lower court.

RESPECTFULLY submitted this 21<sup>st</sup> day of February, 1989.

R. PAUL VAN DAM  
Attorney General

  
CHARLENE BARLOW  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondents were mailed, postage prepaid, to Jerry Joe Medina, Petitioner, P.O. Box 250, Draper, Utah 84020, this 21<sup>st</sup> day of February, 1989.

Charlene Barlow