

1988

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

880355

JERRY JOE MEDINA

APPELLANT/PETITIONER

VS

GERALD L. COOK WARDEN et al.,

RESPONDENTS

SUPPLEMENTAL BRIEF

CASE NO. 880355

SUPPLEMENTAL BRIEF

APPELLANT IN PROPRIA PERSONA HEREBY MOVES THIS COURT PURSUANT TO THE RULES OF THE UTAH SUPREME COURT 11 (h) TO SUPPLEMENT THE RECORD IN THIS MATTER WITH THIS SUPPLEMENTAL BRIEF IN REGARDS TO THE LOWER THIRO JUDICIAL DISTRICT COURTS MEMORANDUM DECISION DENYING PETITIONERS WRIT OF HABEAS CORPUS NOT BASED UPON THE FACTS AS PRESENTED, THUS DENY-
-ING EFFECTIVELY PETITIONERS CONSTITUTIONAL RIGHTS TO ACCESS TO THE COURTS AND A FULL AND FAIR EVIDENTRY HEARING GUARANTEED BY DUE PROCESS PURSUANT TO THE PROVISIONS OF THE FOURTEENTH AMENDMENT, THE
HONORABLE FRANK G. NOEL PRESIDING

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DEC 5 1988

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY JOE MEDINA

APPELLANT/PETITIONER

VS.

GERALD L. COOK, WARDEN ET AL.

RESPONDENTS

SUPPLEMENTAL BRIEF

CASE NO. 880355

SUPPLEMENTAL BRIEF OF APPELLANT

STATEMENT SHOWING JURISDICTION OF THE UTAH SUPREME COURT

APPELLANT IN PROPRIA PERSONA HEREBY MOVES THIS COURT PURSUANT TO RULE 11 (h) RULES OF THE UTAH SUPREME COURT TO SUPPLEMENT THE RECORD IN THIS MATTER BY THIS SUPPLEMENTAL BRIEF TO THE UTAH SUPREME COURT FROM THE MEMORANDUM DECISION OF THE HONORABLE FRANK G. NOEL PRESIDING.

STATEMENT SHOWING NATURE OF THE PROCEEDINGS

APPELLANT FILED A PETITION OF HABEAS CORPUS 11-2-87, ALTERNATE WRIT OF ERROR IN CORUM NOBIS, ALLEGING NEWLY DISCOVERED EVIDENCE THAT THAT THE TESTIMONY AND EVIDENCE USED TO CONVICT THE PETITIONER WAS FALSE, TAINTED, CONTAMINATED AND A FABRICATION THAT ROSE TO A LEVEL OF DEPRIVATION OF DUE PROCESS, & A FAIR TRIAL AND BY THE SAME LOGIC INEFFECTIVE ASSISTANCE OF COUNSEL AND PROSECUTORIAL MISCONDUCT, WHEREIN THE THIRD JUDICIAL DISTRICT COURT IN RENDERING ITS OPINION DENYING THE APPELLANTS HABEAS CORPUS, EFFECTIVELY DENIED ACCESS TO THE COURTS BY FAILING TO RENDER ITS DECISION BASED UPON THE FACTS AS PRESENTED FAILING TO RECOGNIZE THE FACTS ESTABLISHING INEFFECTIVE ASSISTANCE, PROSECUTORIAL MISCONDUCT AND TAINTED IDENTIFICATION.

STATEMENT OF THE ISSUE PRESENTED

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POINT I . . . Did THE LOWER THIRD JUDICIAL DISTRICT COURT EFFECTIVELY DENY APPELLANT ACCESS TO THE COURTS BY FAILING TO RENDER ITS DECISION IN DENYING APPELLANTS HABEAS CORPUS, BASED UPON THE FACTS AS PRESENTED TO THE COURT FOR ITS DETERMINATION, THUS FAILING TO RECOGNIZE FACTS ESTABLISHING INEFFECTIVE ASSISTANCE OF COUNSEL, PROSECUTORIAL MISCONDUCT AND TAINTED IDENTIFICATION, THEREBY DENYING AND DEPRIVING PETITIONER OF A FULL AND FAIR EVIDENTRY HEARING SUSPENDING THE WRIT OF HABEAS CORPUS GUARANTEED BY ARTICLE 1 SECTION 9 CLAUSE 2 OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 5 OF THE UTAH CONSTITUTION AND DUE PROCESS GUARANTEEING ACCESS TO THE COURTS UNDER THE FOURTEENTH AMENDMENT (EX PARTE HULL (1941) BOUNDS VS SMITH 430 U.S. 817 (1977) HOOTEN VS. JENNE 786 F.2d 692 5th CIR. 1986)

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DETERMINITIVE CONSTITUTIONAL PROVISIONS, STATUTES, RULES

UNITED STATES CONSTITUTION

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UTAH CONSTITUTION

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STATEMENT OF THE FACTS OF THE CASE

APPELLANT WAS CHARGED 4-1-84 WITH CRIMINAL HOMICIDE IN THE SECOND DEGREE AND CONVICTED IN FRONT OF A JURY PURSUANT TO 76-5-203. UTAH CODE ANNOTATED 1953 AS AMENDED ON 3-1-85, THE HON. J. DENNIS FREDRICKS PRESIDING, SEE THIRD DISTRICT COURT CASE NO. CR84-814

APPELLANT FILED A DIRECT APPEAL AS OF RIGHT, AMONG OTHER THINGS APPELLANT ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL, IN COUNSEL FAILING TO OBJECT TO THE GIVING OF THE SUPPLEMENTAL DYNAMITE "ALLEN" CHARGE AGAINST APPELLANTS CONSENT, KNOWLEDGE OR WISHES, WHEREIN THE HONORABLE SUPREME COURT OF UTAH FOUND THAT COUNSEL'S ACTIONS WERE STRATEGIC AND TACTIC'S AND AFFIRMED APPELLANTS CONVICTION, ON APRIL 23 1987 SEE ; SUPREME COURT CASE NUMBER 20629.

APPELLANT NEXT FILED A WRIT OF HABEAS CORPUS PURSUANT TO UTAH' R. CIV. PRO 65(B) i on NOV. 2 1987 ALLEGING THAT ALL THE CONVICTING EVIDENCE AND 3 WITNESS'S TESTIMONY AT TRIAL WAS TAINTED, FALSE AND INACCURATE AS A RESULT OF INEFFECTIVE ASSISTANCE, BY COUNSEL NOT CONDUCTING THE MANDATED INVESTIGATION REQUIRED OF COUNSEL BEFORE PROCEEDING TO TRIAL INTO THE PLAUSIBLE LINE OF DEFENSE COUNSEL EMPLOY'S AT TRIAL AND BY THE SAME LOGIC PROSECUTORIAL MISCONDUCT IN USING THE TAINTED & FALSE TESTIMONY & EVIDENCE AND PREJUDICIAL CLOSING ARGUMENTS THAT WERE RACIALLY BIASED AND FALSELY INSINUATED PREVIOUS HEINOUS MURDER CRIMES.

PETITIONER'S WRIT OF HABEAS CORPUS WAS INITIALLY ASSIGNED TO THE TRIAL JUDGE J. DENNIS FREDRICKS, PETITIONER NEVER GOT A RESPONSE FOR ABOUT 30 DAYS WHEN PETITIONERS WRIT OF HABEAS CORPUS WAS RE-ASSIGNED TO THE HONORABLE FRANK. G.

NOEL ON Dec. 3 1988, WHEREIN THE PETITIONER WAS GRANTED AN EVIDENTRY HEARING ON 3-25-88, WHERE PETITIONER WAS REPRESENTED IN PROPRIA PERSONA, WHEREIN PETITIONER BROUGHT TO THE COURTS ATTENTION ALL THE FOREGOING ① FACTS, NOW BROUGHT TO THIS COURTS DETERMINATION, IF THE PETITIONER WAS GRANTED HIS CONSTITUTIONAL RIGHTS OF ACCESS TO THE COURTS, DUE PROCESS AND A FULL AND FAIR EVIDENTRY HEARING BY THE Hon. FRANK G. Nobe's Decision 10-3-88

APPELLANT FIRST ASSERTED THAT THE CAUSE OR ORIGIN OF THE HOMICIDE WAS STILL UNCLEAR, ONLY THAT THE CHARGES OF CRIMINAL HOMICIDE AROSE OUT OF TWO NEIGHBORING APARTMENT BUILDING PARTIES LOCATED AT 320 WEST 800 NORTH IN SALT LAKE CITY, UTAH, APPELLANT STATED HE HAD JUST GOTTEN OFF WORK AT 10:PM THIS SAME EVENING IN WHICH HE WORKED AT THE UNION PACIFIC RAILROAD JUST UP THE BLOCK AS A PRESSURE SYSTEM'S SPECIALIST ON LOCOMOTIVES, WHICH HE HAD BEEN EMPLOYED APPROXIMATELY 11 YRS. AT THE TIME OF THIS OCCURANCE (TR. OF TRIAL P. 442)

APPELLANT BROUGHT ALL THE FOREGOING TO THE COURTS ATTENTION THAT HE HAD TESTIFIED AT TRIAL THAT HE AND HIS COUSIN LENARD FERNANDEZ HAD LEFT THIS PARTY BETWEEN THE EARLY MORNING HOURS BETWEEN 3:30-4:00 AM, WHICH WAS CORROBORATED BY ALL THE WITNESS'S ACCOUNTS WHO TESTIFIED THAT COULD REMEMBER WHEN THE APPELLANT HAD LEFT THIS PARTY (TR. OF TRIAL P. 18, 119, 123, 189, 210, 459) WHICH EVEN THE ALLEGED SOLE ADVERSE EYEWITNESS RICKY MYERS EVEN INADVERTENTLY ADMITTED & CORROBORATED BY SAYING THAT:

①

ANY AND ALL REFERENCE'S IN THE FOREGOING "STATEMENT OF FACTS" CONCERNING ALL AFFIDAVITS, EXHIBITS, LETTERS ETC. ARE ALREADY SUBMITTED FOR THIS COURTS CONSIDERATION IN THE INITIAL APPEAL BRIEF FILED OCT 26 1988, IN THE APPENDUM AND CAN BE LOCATED THEIR FOR THEIR CONSIDERATION.

"When everybody started leaving the party between 3:30 - *4:00 Am* Jerry Medina also left, and I didn't see him anymore after that, I would have to say that much" (Tr. of Trial P.233).

Appellants claim that he had left approximately 30-minutes before the Homicide can further be corroborated by the fact that at the time of the homicide all six (6) eyewitness's who talked to police and identified the cars and people they seen leaving the scene never identified the Appellant or his car, which these identifications were consistant, accurate and identical (See Police - Reports No. 84025540 P. 1, 7, 10, 12, and Tr. of Trial P. 43, 51).

At the time of trial the States convicting evidence and testimony consisted of three (3) witness's and closing arguments being;

- (A) Detective John Johnson, the arresting officer.
 - (B) Ricky Myers, the alleged sole eyewitness.
 - (C) Eli Archuletta, a inmate at the Utah State Prison and
 - (D) Closing arguments by the Prosecutor that mis-stated the facts and evidence and were inflammatory and prejudicial and insinuated previous heinous murder crimes.
- (A) Appellant submits in the first instance, Detective Johnson testified at trial that:

He (Detective Johnson) physically conducted a search of the Appellants (Mr. Medina) car and found a .38 Calibur bullet and that the car he searched was a 1974 Black Chevrolet Monte Carlo (Tr. of Trial P. 321) and that he Appellants Monte Carlo was parked out in the street in the circle (Catherine Circle Street) with numerous other cars (Tr. of - Trial 325) and that there were a couple vehicles also parked in the driveway (Tr. of Trial P. 316) that he (Detective Johnson) did not need no key's to enter the car because it was unlocked and that there were no alcoholic beverage containers in the car, either full or empty (Tr. of Trial P.317, 319). [1]

Appellant Mr. Medina asserts that Detective John Johnson assumed upon his search that this Black 1974 Chevrolet Monte Carlo belonged to the Appellant Mr. Medina, where in fact the car belonged to a friend of the neighbors named Mark Velarde who would of testi-

fied so at the time of Trial (EXHIBIT 2) and in further support Appellant submits the foregoing for this Courts consideration:

- (1) That Mr. Medina's car was a 1972 Chevelle Malibu that has no resemblance in any way, shape, or form to a 1974 Monte Carlo and does not have the words "Chevrolet" or "Monte Carlo" anywhere on the car for identificational purposes (Tr. of Trial - P. 446).
- (2) Mr. Medina's car was half painted grey primer from doing repairs and auto-body work on the car resulting from an automobile accident in a snowstorm after hitting "black ice" a few months previously (Tr. of Trial P. 449).
- (3) Appellants car was parked in the driveway, not in the street, where Appellant "pulled up into the house" and "parked in front of the house" "in the driveway" and further Appellants car doors were "locked" (Tr. of Trial P. 129, 489, 461).
- (4) Further its undisputed that Appellants car the night of the homicide was littered with numerous beverage (alcohol) ^{CONTAINERS} ^{FROM} the evening and Appellant drinking in his car upon leaving a bar and the Najera party (Tr. of Trial P. 129, 445, 454).
- (5) Further there were only two cars owned in the Fernandez household and only room for both of these cars in the Fernandez driveway and both the Fernandez car and the Appellants car were in the driveway at the time of Appellants arrest, which Detective Johnson testified he seen both cars in the driveway (Tr. of Trial - 316) by testifying he seen more than one car in the driveway.

Appellant Mr. Medina asserts that he was not present at the time this car was searched, nor did he witness or made aware or participate, further Appellant (Mr. Medina) was totally unaware that a bullet had allegedly been found at this time, and was not made aware of this fact until after his (Appellant) arrest when he bailed out of Jail, wherein he was notified by Court appointed trial counsel Francis Palacios, where he (Mr Medina) had informed Counsel of these facts, and also that he didn't know how a .38 could of been found in his car, and seen the bullet for the first time at trial (Tr. of Trial P. 487) ⁽²⁾ ~~See~~ Thus Appellant alleges Counsels performance was deficient and prejudicial because trial counsel not only made

[1] By all officers accounts who accurately identified the vehicle by make, model and year further stated the car searched was a Black 1974 Chevrolet Monte Carlo.
- See Police Reports No. 8402554 Page 10, 21, (EXHIBIT NO. 10) "one live round of .38 Special Ammunition was found on the passenger side floor board of a car that was a Black 1974 Chevrolet Monte Carlo"
- See also testimony of Detective Leary; "the car Detective Johnson searched was a Black Monte Carlo" (Tr. of Trial P. 357).
(4)

no attempt to investigate or explain or contradict this discrepancy involving two different car's resulting in the use of this .38 bullet, and also being the only evidence used against the Appellant, but then Counsel further stipulated to its admission (Tr. of Trial P. 495). Thus resulting a manifest injustice by having the Jury consider convicting false evidence it shouldn't have which relieved the State of having to prove it's case beyond a reasonable doubt and deprived the Appellants defense the opportunity to challenge on cross examination, which Appellant also states he never heard this discrepancy during trial do to at the time Appellant was preoccupied with how the bullet could of possibly of been in his (Appellants) car in the first place, and feels both Trial and Appellate Counsel should of caught this error, which Appellant never really knew about this error until after Direct Appeal when Appellant obtained his copies of the Trial Transcripts and Police Reports.

(B) Witness Ricky Myers, alleged sole eye witness;

Appellant Mr. Medina alleges the testimony of this States witness and alleged sole adverse eye witness was perjured, tainted and inaccurate for good reason by Ricky Myers own admission and testimony, in that at the initial confrontation at the Preliminary Hearing

[2] The record clearly shows that Appellant was never present during the search of the vehicle in question being a 1974 Monte Carlo, and further the Appellants assertion he relayed all information to Counsel in not having knowledge of how the bullet got in his car and not being present is corroborated by Counsel's and Detective Leary's testimony,

- See: Detective Leary testimony that: "No" me (Detective Leary) and Jerry Medina were not present when Detective Johnson conducted the search of the vehicle nor did we participate, after I (Detective Leary) remained with Jerry (in the patrol car) while Detective Johnson conducted the search of the vehicle which was a Black Monte Carlo and I wasn't made aware that the .38 bullet was found until after Mr. Medina's arrest (Tr. of Trial P.354,357).
- See: Francis Palacios: Now Jerry "we" know you don't have any idea how that bullet got in your car, but how can you explain it? (Tr. of Trial P. 467)

Ricky Myers testified the foregoing;

That ~~he~~ Ricky Myers denied he seen the Appellant shoot the victim 17-times in a row when asked by Francis Palacios and finally told Court appointed Lawyer Francis Palacios "I'll say it was Jerry medina because you (Francis Palacios) pressured me to say it was Jerry Medina (Tr. of Pre-lim Trial P. 52) and that at the time of the homicide he (Ricky) was intoxicated and didn't know who was allegedly standing outside with Appellant because he didn't pay no attention and that the flash of the gun came from the direction of the Appellant Mr. Medina but he couldn't say it was Medina who fired the gun because his back was to Medina at the time, and he never had any conversations with Mr. Medina only a couple of passing statements (Tr. of Pre-lim Pages 50, 53, 58) but did see the revolver which was a large Magnum type revolver approximately 10½-inches in length and that it seemed to him (Ricky) at the time that the victim was acting childish in his eyes that evening (Tr. of Prelim P. 62, 64) and that the victim never talked, argued or fought with Appellant Mr. Medina and Appellant also brings to this Courts attention that when Ricky was arrested he never identified Mr. Medina as wearing the clothes Mr. Medina was wearing that evening nor did he identify Mr. Medina as being overweia or having a beard, and a gun shot residue test that was performed on Appellant was negative and there was not one drop of blood found on the Appellants clothes when examined by a microscope at the State Crime Lab, SHORTLY AFTER The Homicide

Then this witness Ricky Myers admitted to meeting with the Prosecutor Michael Christiansen and discussing this Preliminary Testimony and matters and recieving additional facts and details about the case from this Prosecutor and Police shortly before trial (Tr. of Trial P. 267) where then after this contact with the Prosecutor shortly before trial and after discussing Ricky's testimony Ricky's testimony radically altered and took on a different characterization and was completely different in that then, Ricky Myers testified that:

Then he (Ricky Myers) was not any longer intoxicated at the time of the homicide and also after this talk with the Prosecutor he could also remember who was out side with the Appellant at the time of the homicide and his (Ricky's) back was no longer to the Appellant, and in fact could even remember seeing the Appellant shoot the victim and also could even remember not just the passing statements he had with the Appellant but after the talk with the Prosecutor could even remember having conversations. In fact he could even remember having a big conversation with the Appellant when he allegely shot the victim (Tr. of Trial P. 244, 245, 249) but could no longer remember the size of the large 10½-inch

revolver he seen the Appellant use just 6-months earlier (Tr. of Trial P. 252) which then this lapse of memory resulted in the Prosecutor stuffing on the Appellant in front of the Jury the smallest manufactured .38 revolver in the Continental United States being a 5-shot stainless steel Smith & Wesson "Flyweight Special" with a 1/2-inch barrel and overall length of 4½-inches being a little bit larger than a derringer and less than half as large as the revolver previously described by Ricky (Tr. of Trial P. 474, 476).

Appellant alleges Ricky Myers trial testimony was perjured from start to finish because Ricky testified at trial that:

He (Ricky) had been in the Army and had an Honorable Discharge from the Army and that at the time of the homicide he was gainfully employed with a firm in Omaha, Nebraska called "New Energy Consultants" (Tr. of Trial P. 231, 272). Further that he drove long haul semi trucks for a living and was a truck driver and in the process of starting his own trucking company and firm, insinuating he was worth the possible millions it would take to undergo such a financial undertaking and that he had only been to Utah once before as a child 20-years earlier (Tr. of Trial P. 218, 223) and had arrived at the party and place of the homicide at 12:30-Midnight and had never met the victim George Givens before the evening of the homicide (Tr. of Trial P. 231, 221) and that he Ricky Myers had never been convicted or arrested of any crimes or felonies, and that when he seen the Appellant Mr. Medina shoot the victim that he (Ricky) ran and walked to the Greyhound Bus Depot and waited 4 or 5 minutes then called the Police (Tr. of Trial P. 339, 257)

But Appellant submits all to the contrary he has learned through investigation and informed sources that:

That it was showed at trial that Ricky was never in the Army and that no such place of employment existed called "New Energy Consultants" in Omaha, Nebraska (Tr. of Trial P. 424, 494). Further Appellant ran a check on Ricky Myers drivers license D.L. E0002253 and Ricky could not of been a truck driver because his license had been revoked for a long time for D.U.I. further Ricky couldn't have been in the process of starting his own trucking company because he was a transient, further Ricky did not arrive to this party at almost 1:00 a.m., in the morning because by all witness's accounts he had been at this party drinking since 9:00 p.m., (Police Reports P. 10, See; Tr. of Trial P. 64, 69, 107, 183, 444) ^{WAS TOLD} ALSO a witness named Mrs. Schuurman after trial by Assistant District Attorney Bernard Tanner and Mr. Wendell Coombs of the F.B.I. (EXHIBITS 3, 4, 5) that Ricky Myers in fact knew the victim previously and in fact was "fall" partners in crime with the victim and had been arrested with the victim in up to seven states including in Utah and that both had extensive criminal records and further Mr. Tanner stated that everyone from the District Attorney's Office to the Jail knew both Ricky and the victim, George Givens and also Ricky's testimony that he

seen Mr. Medina shoot the victim where he Ricky then ran to the Greyhound Bus Depot and waited 4 or 5 minutes then called the Police is also false because the Appellant never shot the victim and because the walking distance to the Greyhound Bus Depot was approximately 29-minutes, and the homicide occurred at 4:20 a.m., but Ricky had not called the Police till 6:08 a.m., leaving a 1-hour and 20 minutes unaccounted for by Ricky (Tr. of Trial P. 429, 18, 340). Which was even more pronounced and incriminating on Ricky's part because at the time of his arrest he stated to Police that he was only calling them (Police) because his truck was parked at the scene of the homicide and was registered in his name and he didn't feel like digging a deeper hole for himself and he also, had negative feelings about calling the Police and that he saw the Police arrive, who had arrived in less than a minute after the homicide, but didn't want to talk to them and ran away from the area on foot (Tr. of Trial P. 296-298 339, 18).

which was indicative of guilt on Ricky Myers part and alleged and used ^{as a} defense by Trial Counsel and should have been investigated ^{That Ricky was lying} as such by Counsel before proceeding to Tri . .

(C) The only other person to implicate the Petitioner was a witness by the name of Eli Archuletta whose testimony came about after the defense rested (Tr. of Trial P. 496) when Counsel was made aware of the Prosecutors intention of calling Eli as a witness, Appellant claims that the handling of the evidence and known facts concerning this witness Eli, that Counsel's performance was again prejudicial in not comprehending the importance of investigating a witness's testimony in a murder trial when all facts known to Counsel show that this witness's testimony was inaccurate, self serving, motivated and uncorroborated, and warranted inquiry for the foregoing facts and circumstances alleged to be the basis of Appellants claims at this stage:

- (1) When Counsel was made aware of Eli's testimony and that a confession and incriminating testimony by the Appellant, Counsel stated that "she had not been aware of Eli or his testimony and was put in a bad posture, and therefore; requested she be given an opportunity to talk to Eli about his testimony and to talk to Appellant and have an opportunity to call a witness in rebuttal to Eli Archuletta or she (Counsel) would be an ineffective assistant, (Tr. of Trial P. 497) where the Judge agreed and stated

that he thought it would only be appropriate "In the light of the fact Eli has recently appeared" and therefore; recessed, and put no time limit in affording Counsel this opportunity and stated "we will recess and I'll just check with you later about when we will reconvene" (Tr. of Trial P. 498)

- (2) After recess Counsel talked to Eli (10-min.) and told by Eli that Appellant had met him (Eli) in the Annex Bar several months before the homicide resulting ^{WAS} ~~in~~ in Eli later saleing Appellant a .38 revolver, in which 1-month after the homicide Mr. Medina was alleged to of met Eli again in the Annex Bar and essentially confessed saying, "I didn't use any gun you sold me I used a .32" and that he (Appellant) shot the victim because "they were arguing" in which the alleged incidents from the initial meeting to the confession had occurred within the past year, prior to trial (Tr. of Trial P.508).
- (3) After spending approximately 10-minutes talking to Eli, Counsel then discussed Eli's testimony with Appellant (for about 10-min.) where Counsel was made aware of Eli trying to shoot Appellants cousin Leonard several month before Trial, which resulted in a confrontation with Appellant Mr. Medina at a local auto parts store also; before Trial, Counsel was also told that Eli's testimony was fabricated and a vendetta because Eli had made threats to get even with Appellant and his cousins and brother Charlie. Also; before trial (Tr. of Trial P. 515,521) in which Appellant further pointed out Eli's Rap Sheet (4) And deal which were also indicative of the motivation against the Appellant, which could also be corroborated further by the fact Eli's testimony lacked factual knowledge because Eli was going to testify Appellant confessed by saying he was "arguing with the victim" when it was undisputed by all at Trial Appellant had never argued with the ^{victim} ~~Appellant~~, which Counsel never told the Appellant at this time the alleged confessions and meetings surrounding Eli had occurred allegedly at the Annex Bar, only that they were alleged to have happened, which Appellant had told Counsel to please object to the use of Eli's uncorroborated, false testimony.

-
- (3) In Trial about (25) minutes after talking to Counsel Eli erroneously testified that Appellant Mr. Medina had made the confession prior to December 1983 being 4-months before the homicide had occurred (Tr. of Trial P. 500,503) And could not remember if he had sold Appellant the alleged firearm 4 or 5 months before or after the homicide, until the State used a "Time Continuum" being a blackboard with the date January 1984 to lead Eli to say "before the - homicide" over a sustained objection for leading (Tr. of- P. 508). Nor could Eli remember where he got the alleged firearm he allegedly sold the Appellant, Mr. Medina and that no one knew about this transaction and for the fact the first time he (Eli) had ever mentioned it or talked about it to anyone was here at Trial.

Wherefore Appellant alleges Counsel's performance was prejudicially deficient in allowing Eli's unfounded and inaccurate testimony by Trial Counsel's own admission in that Trial Counsel requested a recess to find a witness in rebuttal to Eli or she would be an "Ineffective Assistant", and Counsel did not call the Annex Bar to check Eli's story for rebuttal witness's and if Counsel had tried she would of called the Annex Bar (as Appellant did) and found out by the owner Joe Giron and Bartenders that Eli was lying and ^{They} would have testified so (EXHIBIT 9) but instead Counsel simply talked to Eli and Appellant for 25-minutes (Tr. of Trial P. 500) and rushed back to Trial, which really galls Appellants sense of fairness in light of witness Eli, now openly brags about having lied and gotten Appellant convicted of the very reasons alleged by Appellant (See Exhibit 12) here at the Utah State Prison.

Appellant asserts another alleged instance of prejudice was the Prosecutors use of/and Counsel's failure to object, record, and preserve for Appeal, prejudicial closing arguments dealing in matters not in fact or record that were racially inflammatory and insinuated previous murder crimes and also in which the Jury was not admonished or requested to be so by Counsel, which called to the attention of the Jury remarks they were not justified in considering, for instance when the Prosecutor stated: (EXHIBIT 6)

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- [4] At the time of Trial Eli was testfying pursuant to an agreement with District Attorney Ted Cannon and Deputy District Attorney Michael Christensen that he would not be prosecuted for dealing in stolen firearms and property and Felony Burglaries and all pending charges would be dropped thus Eli would not be sent back to prison for violating his parole in which at this time Eli had further served time at the Colorado State Prison and had an extensive criminal record since he was a juvenile and ^{is} presently back in prison for numerous other Felony Burglary and thefts.

"What more do you need a confession from Mr. Medina just the fact the bullet found in his car matched the bullet that killed the victim proves he's the murderer, further Eli Archuletta is Mr. Medina's friend and he testified Medina had confessed to him and that he had sold Medina a .38 revolver, just look at him he ain't nothing but a macho-mexican who was being macho the night he became irate with the victim and shot him, don't kid yourself you have to live with the consequences of your verdict and all you have to do to put an end to all the needless bloodletting, murdering and killing going on is simply just convict Mr. Medina, and Mr. Medina shot the victim at point blank range because he was a bad shot with a firearm when he then jumped the wall enclosing the victim and ran to his car. (5)

Appellant submit' this was plain error need^{ing} admonishment because:

Because no where in the record does it prove the bullet was found in the Appellants car or that the Appellant was a macho Mexican or become irate with the victim or Eli Archuletta's friend, or that Appellant had ever been involved in any murders. Further Appellant was awarded the highest meritorious commendation in marksmanship hitting targets at 500-ft. being an expert sharpshooter (EXHIBIT - 7) and could not of (and not proved) jumped the 4-ft. wall enclosing the victim because Appellant has a lame left leg and can't jump, which he injured in the army and can be proven by Army and hospital records, further at no time was there ever any blood or gunshot residue found on Appellant when extensive tests were conducted at the State Lab.

PETITIONER ON HIS WRIT ALSO ALLEGED COLLUSION BETWEEN COUNSEL AND THE PROSECUTOR
FOR NUMEROUS REASONS, SOME BEING BECAUSE OF COUNSEL'S FAILURES TO CONDUCT ADEQUATE INVESTIGATION OR DISCOVERY WHICH RESULTED IN THE USE OF THE FALSE EVIDENCE AND TESTIMONY AND CLOSING ARGUMENTS THAT WERE RACIALLY BIASED AND INSINUATED PREVIOUS HEINOUS MURDER CRIMES FALSELY AND ALSO BECAUSE COUNSEL'S ACTIONS AT TRIAL WERE INDICATIVE OF A "MEETING OF THE MINDS" BETWEEN COUNSEL & THE PROSECUTOR FOR INSTANCE WHEN COUNSEL GAVE THE PETITIONER AN EXHIBIT OF WHISKY TO DRINK DURING DELIBERATION AND THEN ~~THE~~ PETITIONER BECAME INTOXICATED COUNSEL WENT TO THE JUDGES CHAMBERS WITH THE PROSECUTOR AND WAIVED ALL OF THE PETITIONER'S RIGHTS TO THE GIVING OF THE SUPPLEMENTAL DYNAMITE "ALLEN" INSTRUCTION WITHOUT THE PETITIONER'S CONSENT OR KNOWLEDGE. FURTHER THE DISTRICT ATTORNEY TED CANNON & PROSECUTOR MICHAEL CHRISTIANSEN WHO EXCLUSIVELY DEALT WITH PETITIONER'S CASE WERE REMOVED FROM OFFICE SHORTLY AFTER PETITIONER'S CONVICTION FOR THE SAME TYPE OF UNETHICAL ACTIONS ALLEGED BY THE PETITIONER HEREIN.

- [5] The State has stressed by insinuation that upon leaving the party that Appellants cousin admitted he stepped over the victim's body upon his arrest, Leonard Fernandez stated there was bodies lying all over the place and upon leaving, the victim and Ricky Myers were still in the kitchen (Tr. of Trial P. 122, 124, 144, 146).

WHEN PETITIONER HAD BROUGHT THE BEFORE MENTIONED FACTS TO THE COURTS ATTENTION AT HIS EVIDENTRY HEARING ON 3-25-88, CONCERNING THE FALSE AND TAINTED EVIDENCE AND TESTIMONY OF WITNESSS AND THE CLOSING ARGUMENTS AND IT'S BASIS FOR HIS CLAIM' OF INEFFECTIVENESS AND PROSECUTORIAL MISCONDUCT ⁽²⁾ WHICH FURTHER RESULTED IN THE DENIAL OF HIS RIGHTS OF OF DUE PROCESS AND A FAIR TRIAL, THE ATTORNEY FOR THE RESPONDENTS NAMED SANDRA SOJOGREN ESSENTIALLY REBUTTED PETITIONERS CLAIMS STATING THAT PETITIONER'S WRIT SHOULD BE DISMISSED BECAUSE PETITIONER'S INEFFECTIVE ASSISTANCE ISSUE COULD HAVE OR SHOULD HAVE BEEN RAISED ON DIRECT APPEAL WITH HIS OTHER INEFFECTIVENESS CLAIM' CONCERNING THE DYNAMITE "ALLEN" INSTRUCTION (SUPREME COURT CASE NO. 20629) THUS PETITIONER'S WRIT WAS A DUPLICATE AND SUBSTITUTE FOR APPEAL, AND THAT PETITIONER HADN'T ADEQUATELY DEMONSTRATED AN INEFFECTIVENESS CLAIM IN COUNSEL NOT CONDUCTING ADEQUATE INVESTIGATION BECAUSE TRIAL COUNSEL CONDUCTED AN INVESTIGATION INTO THE ALLEGED SOLE ADVERSE WITNESS' ARMY RECORD (RICKY MYERS) AND SHOWED BY THIS AT TRIAL THAT RICKY WAS LYING, THUS COUNSEL'S ACTIONS COULD BE CONSIDERED STRATEGIC OR TACTIC'S AND FURTHER THAT THE JURY WEIGHED THE FACT THAT THEIR WERE 2 DIFFERENT CARS AND STILL FOUND THAT IT WAS SUFFICIENT ENOUGH TO CONVICT THE PETITIONER AND THAT UNDER STATE VS SMITH THE CLOSING ARGUMENTS COULD AT MOST BE CONSIDERED HARMLESS ERROR, AND EVEN IF THEY WEREN'T THEY SHOULD HAVE ALSO BEEN RAISED ON DIRECT APPEAL AND THUS ARE ALSO PROCEDURALLY BARRED FROM CONSIDERATION.

- (2) PETITIONER FURTHER SUPPLEMENTED THE ABOVE MENTIONED CLAIMS AND FACTS AFTER THE EVIDENTRY HEARING BY SUPPLEMENTAL TRAVERSE'S MAILED CERTIFIED MAIL ON 6-15-88, 6-20-88, 8-10-88, 8-16-88, 8-24-88, TO THE HON. JUDGE FRANK, G. NOEL, THE CLERK OF THE COURT H. DIXON HINDLEY AND ATTORNEY FOR THE RESPONDENTS DAVID L. WILKINSON ATTORNEY GENERAL

PETITIONER MR. MEDINA REBUTTED ASST. DISTRICT ATTORNEY SANDRA SOJOGREN'S ARGUMENTS BY BRINGING TO THE COURTS ATTENTION THAT HE PETITIONER RAISED ON DIRECT APPEAL ALL DEFENSE OBJECTIONS REGARDING HOW THE TRIAL WAS CONDUCTED AS REQUIRED BY LAW THAT WERE APPEALABLE AT THE TIME AND DID NOT RAISE THE ISSUES NOW BEFORE THE COURT BECAUSE:

PETITIONER'S INVESTIGATIVE ISSUE¹ AND CLOSING ARGUMENTS WERE NOT COGNIZABLE ON DIRECT APPEAL BECAUSE THEY CONCERN MATTERS OFF THE RECORD, WHICH THE UTAH SUPREME COURT IN STATE VS WULFFENSTEIN 657, P.2d 289, 292. (UTAH 1982) "STATED THEY WILL NOT CONSIDER CLAIMS THAT CONCERN MATTER'S OFF THE RECORD ON DIRECT APPEAL", WHICH PETITIONER FURTHER ARGUED THAT THIS WAS ALSO PROCEDURE AND PRECEDENT ALSO ESTABLISHED AND SETTLED IN THE CIRCUIT AND HIGH COURT ③ THUS PETITIONER'S WRIT WAS NOT A DUPLICATE OR SUBSTITUTE FOR APPEAL,

PETITIONER FURTHER ASSERTED THAT ALTHOUGH COUNSEL MAY HAVE CONDUCTED AN INVESTIGATION INTO THE ALLEGED SOLE ADVERSE WITNESS RICKY MYERS ARMY RECORD, AND SHOWED AT TRIAL THAT HE WAS LYING, COUNSEL WAS STILL INEFFECTIVE BECAUSE COUNSEL DID NOT CONDUCT THIS INVESTIGATION BEFORE TRIAL AS MANDATED, WHICH RESULTED IN THE PROSECUTOR EASILY REBUTTING THE EVIDENCE BECAUSE COUNSEL HAD NOT CONDUCTED THE INVESTIGATION UNTIL THE LAST DAY OF THE TRIAL AND COULD NOT OBTAIN A WITNESS FROM THE ARMY RECRUITING STATION AT THE VETERANS ADMINISTRATION ON SUCH SHORT NOTICE, BUT PETITIONER ALSO

③ See; UNITED STATES VS. GAMBINO 788 F.2d 738, 949 (3RD CIR. 1986) "INEFFECTIVE ASSISTANCE CLAIM" NOT ENTERTAINABLE ON DIRECT APPEAL WITH THE NARROW EXCEPTION OF A CLEAR CONFLICT OF INTEREST ON RECORD OR WHERE CLAIM CONCERNS AN INEFFECTIVENESS REGARDING AN OBJECTION, UNITED STATE VS. STITZER 785 F.2d 1506, (11TH CIR. 1986) CLAIMS OF INEFFECTIVENESS MAY NOT GENERALLY BE RAISED ON DIRECT APPEAL, KIMMELMAN VS. MORRISON 106 S. Ct AT 2586, IT WOULD BE ERROR TO DENY ANY DEFENDANT COLLATERAL REVIEW OF ANY INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

Pointed out Nonetheless THIS CAN NOT BE CONSTRUED AS STRATEGY OR TACTICS BECAUSE:

PURSUANT TO THE HOLDING BY THE HIGH COURT IN STRICKLAND VS. WASHINGTON 466 U.S. 668 (1983) AND NUMEROUS OTHER PRECEDENTS SET IN THE CIRCUIT AND HIGH COURT HAVE HELD THAT THE SIXTH AMENDMENT IMPOSES ON COUNSEL A DUTY TO CONDUCT A REASONABLY AMOUNT OF INVESTIGATION, BECAUSE REASONABLY EFFECTIVE ASSISTANCE MUST BE BASED ON PROFESSIONAL DECISIONS AND INFORMED LEGAL CHOICES WHICH CAN BE MADE ONLY AFTER INVESTIGATIONS OF OPTIONS AND INVESTIGATORY DECISIONS AND MUST BE ASSESSED IN LIGHT OF THE INFORMATION KNOWN TO COUNSEL AT THE TIME, THUS IF THERE'S ONLY ONE PLAUSIBLE LINE OF DEFENSE, COUNSEL MUST CONDUCT A REASONABLY SUBSTANTIAL AMOUNT OF INVESTIGATION INTO THAT LINE OF DEFENSE BEFORE PROCEEDING TO TRIAL, SINCE THERE CAN BE NO STRATEGIC CHOICES OR TACTICS THAT RENDER SUCH INVESTIGATIONS UNNECESSARY, STRICKLAND, SUPRA AT 689 (QUOTING RUMMEL VS. ESTELLE 590 F.2d 103 (CA-5 1979)) ④

PETITIONER ALSO ARGUED THAT THE STATE'S CONTENTION THAT THE JURY WEIGHED THE FACT THAT THEIR WERE TWO DIFFERENT CARS AND STILL CONVICTED THE PETITIONER WAS NOT UNDER THE CIRCUMSTANCES AN ACCURATE ASSESSMENT OF WHAT HAD OCCURED AT TRIAL, THE FACT IS THAT THE JURY WAS REPEATEDLY TOLD THAT THEY WERE THE SAME CAR THAT THE BULLET WAS FOUND IN AND THAT THE CAR BELONGED TO THE PETITIONER, NEVER WAS IT POINTED OUT BY CROSS EXAMINATION OR OTHERWISE THAT THEIR WERE TWO DIFFERENT CARS INVOLVED FOR THERE CONSIDERATION AS ALLEGED BY THE STATE, WHERE PETITIONER POINTED OUT THAT COUNSEL'S PERFORMANCE AT THIS CRITICAL STAGE WAS NOT ONLY DEFICIENT AND PREJUDICIAL FOR NOT

④

See; KIMMELMAN VS MORRISON 106 S. Ct 2574 (1986) TRIAL COUNSEL INEFFECTIVE FOR FAILING TO CONDUCT PRE-TRIAL DISCOVERY AND INVESTIGATION THAT WOULD HAVE DISCLOSED THE USE AT TRIAL OF INCRIMINATING EVIDENCE PURSUANT TO AN ILLEGAL SEARCH & SEIZURE, NEALY VS. CABANNA 764 F.2d 1173 (1985) COUNSEL'S FAILURE TO CONTACT POTENTIAL ALIBI WITNESSES THAT MIGHT HAVE AFFECTED THE JURY'S APPRAISAL OF TRUTHFULNESS OF THE STATE'S WITNESSES AND CREDIBILITY, INEFFECTIVE ASSISTANCE AND AND A DEFICIENT PERFORMANCE Id. AT 1173 DAVIS VS. ALABAMA 596 F.2d 1214, 1221 (5th CIR. 1979) TRIAL COUNSEL AN INEFFECTIVE ASSISTANT AND RENDERED A DEFICIENT PERFORMANCE WHEN COUNSEL FAILED TO INVESTIGATE POSSIBLE SOURCES OF EVIDENCE INTO THE LINE OF DEFENSE COUNSEL ASCERTAINED AS PLAUSIBLE AND EMPLOYED AT TRIAL.

Investigating this discrepancy on her copy of the Police Reports
And then stipulating to its admission, But That This Error Was
Prejudicial Requiring Reversal Because : ⑤

It had been well established and settled along time ago by
precedent set in the circuit and high court that you can not
use the mistaken identification of evidence resulting in
the jury being misled as to its reliability, because the
jury's only duty is to assess the reliability of the evidence
and if the jury is given mistaken identification of
evidence to consider then its a direct violation of due
process and a fair trial, and violative of the rules
of evidence (402) and cognizable as just plain error.

And lastly petitioner argued that he could not bring ~~the closing~~
arguments on direct appeal because they were not part of the record
because counsel failed to object, record and preserve them for appeal
which are also part of petitioner's claims on his writ, further he
petitioner argued that under Smith the closing arguments were
not harmless error because the jury in Smith had been admonished
and there was overwhelming evidence of Smith's guilt, whereas in
petitioner's case the jury was not admonished and the only evidence
and testimony used against the petitioner was false, inaccurate,
uncorroborated and inconsistent,

Petitioner further asserts for this courts consideration that he petitioner
represented himself at his evidentiary hearing because he had fired his
court appointed attorney for not being prepared or understanding petitioner's
case and not meeting with petitioner until the day before, thus counsel
could not show a willingness to identify himself with the interests of the
petitioner nor could he present or comprehend the defence's that were
available to petitioner under the law.

⑤ See; Stovall vs. Denno 388 U.S. 293 (1976) Neil vs. Biggers 409 U.S.
188 (1972) Manson vs. Brathwaite 432 U.S. 98 (1977) Foster
vs. California 394 U.S. 440, 442, N. 2 (1969) Watkins vs. Sowders
449 U.S. 341 (1981) United States vs. Shultz 689 F.2d 365 (8th Cir. 1983)

SUMMARY OF ARGUMENT

THE CONCLUSION REACHED BY THE LOWER THIRD JUDICIAL DISTRICT COURT IN DENYING PETITIONER'S WRIT OF HABEAS CORPUS WAS PLAIN ERROR OF CONSTITUTIONAL PROPORTION THAT SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY AND PUBLIC REPUTATION OF THE ABOVE STATED JUDICIAL PROCEEDINGS, BECAUSE THE DECISION REACHED HAD NO BASIS IN FACT OR EVIDENCE WHICH RESULTED IN THE FACTS AND ISSUES NOT BEING ADEQUATELY DEVELOPED AND THE MERITS OF THE DISPUTE³ UNRESOLVED, WHICH PETITIONER AS A MATTER OF LAW FILED OBJECTIONS AND A PETITION FOR REHEARING WITHIN 10 DAYS OF DECISION WHICH PETITIONER FURTHER ASSERTS THE WHOLE PREJUDICIAL SCENARIO WAS EVEN MORE PRONOUNCED BY THE FACT PETITIONER WAS FURTHER EFFECTIVELY DENIED COUNSEL AT THE EVIDENTRY HEARING BY BEING APPOINTED COUNSEL WHICH RESULTED IN IRRECONCILABLE CONFLICTS WHICH PETITIONER WAS FORCED TO FIRE, FURTHERING THE DENIAL OF A FULL AND FAIR HEARING AND DUE PROCESS BY THE DETERMINATION NOT BEING SUPPORTED BY THE FACTS OR EVIDENCE PRESENTED

ARGUMENT

POINT I

THE LOWER THIRD JUDICIAL DISTRICT COURT EFFECTIVELY DENIED APPELLANT ACCESS TO THE COURTS BY FAILING TO RENDER ITS DECISION IN DENYING APPELLANTS HABEAS CORPUS, BASED UPON THE FACTS AS PRESENTED TO THE COURT FOR ITS DETERMINATION, FAILING TO RECOGNIZE FACT'S ESTABLISHING INEFFECTIVE ASSISTANCE OF COUNSEL, PROSECUTORIAL MISCONDUCT AND TAINTED IDENTIFICATION, THEREBY DENYING OR DEPRIVING PETITIONER OF A FULL AND FAIR EVIDENTRY HEARING SUSPENDING THE WRIT OF HABEAS CORPUS GUARANTEED BY ARTICLE 1 SECTION 9 CLAUSE 2 OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 5 OF THE UTAH CONSTITUTION AND DUE PROCESS GUARANTEEING ACCESS TO THE COURTS THE FOURTEENTH AMENDMENT (EX PARTE HULL (1941) BOUNDS VS SMITH 430 U.S. 817, (1977) HOOTEN VS JENNE 786 F.2d 692 (5th CIR. 1986))

THE PETITIONER ASSERTS THAT THE BURDEN OF PROOF IMPOSED ON PETITIONER CONSISTS OF TWO-PARTS : THE BURDEN OF PRODUCTION AND THE BURDEN OF PERSUASION. THE BURDEN OF PRODUCTION IS THE BURDEN OF PRODUCING ENOUGH EVIDENCE TO PUT A FACT IN ISSUE, WHICH THEN WITH ENOUGH EVIDENCE THE BURDEN CAN SHIFT FROM ONE PARTY TO THE OTHER, IF A PARTY FAILS TO SUSTAIN ITS BURDEN OF PRODUCTION IT IS SUBJECT TO AN ADVERSE RULING, THUS IF THE STATE FAILS TO PRODUCE SUFFICIENT EVIDENCE IN REBUTTAL THE JUDGE MAY DIRECT A VERDICT IN THE DEFENDANTS FAVOR, THE BURDEN OF PERSUASION IS THE BURDEN OF CONVINCING THE FACT FINDER THAT A FACT IN ISSUE SHOULD BE DECIDED A CERTAIN WAY, THE DUE PROCESS CLAUSE PLACE'S THE BURDEN OF PERSUASION ON EVERY ELEMENT OF THE ALLEGED CONSTITUTIONAL VIOLATIONS ON THE PETITIONER, ONLY RARELY DOES THE BURDEN SHIFT TO THE RESPONDENTS, AND ANY SHIFTING OF BURDEN MUST WITHSTAND CONSTITUTIONAL SCRUTINY SEE; W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW (1.8 2d ed 1986) C. MCCORMICK, EVIDENCE, 336-37 (3d ed. 1984) THUS A RATIONAL CONNECTION EXISTS IF IT IS MORE LIKELY THAN NOT THAT THE PRESUMED FACTS FLOW FROM THE PROVEN FACTS PRESENTED BY THE PETITIONER, BARNES VS. UNITED STATES 412 U.S. 837, 846 (1973) TURNER VS UNITED STATES 396 U.S. 398, 417-19, (1970) THUS WHEN THE PETITIONER PRESENTS A PREPONDERANCE OF EVIDENCE IN SUPPORT OF HIS ALLEGED CONSTITUTIONAL VIOLATIONS AND THE RESPONDENTS PRODUCE NO EVIDENCE TO THE CONTRARY, AND IN FACT DON'T EVEN DENY THE SUFFICIENCY OF THE CLAIMS AND THE APPOINTED JUDGE RENDERS AN OPINION THAT IS NOT BASED ON THE FACTS AND EVIDENCE PRESENTED, THE JUDGE OR FACT FINDER HAS ESSENTIALLY NOT CONDUCTED A HEARING BOTH FULL AND FAIR ON THE SPECIFIC ISSUES RAISED BY THE PETITIONER,

§ THUS SUSPENDING THE PETITIONER'S WRIT OF HABEAS CORPUS See; MITCHELL VS. SCULLY 746 F.2d 951 n.2 (2d. CIR. 1984) FORD VS. PARRATT 673 F.2d 232, 235 (8th CIR.) CERT. DENIED 459 U.S. 934 (1982) WHICH THIS TYPE OF ACTION OR CONDUCT BY A FACTFINDER OR JUDGE IS PROHIBITED BY THE DUE PROCESS CLAUSE'S OF THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE THESE AMENDMENTS PROTECT PERSONS AGAINST GOVERNMENTAL DEPRIVATION OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, THUS THE DUE PROCESS CLAUSE IS DESIGNED TO PROTECT PETITIONERS AGAINST ARBITRARY GOVERNMENTAL ACTION, DENT VS WEST VIRGINIA 129 U.S. 114, 123 (1889) WHICH REQUIRES THE JUDGE'S DECISION BE BASED ON THE FACTS AND EVIDENCE AS PRESENTED TO THE COURT, OR THE PREMISE AND HOLDING'S OF THE HIGH COURT; AND CIRCUITS HAVE BEEN VIOLATED, AND THE PETITIONER HAS FURTHER BEEN DENIED A FULL AND FAIR HEARING. ON HIS CLAIMS BEFORE THE COURT. MATHEWS VS ELDRIDGE 424 U.S. 319, 334-35 (1976).

PETITIONER ASSERTS THAT NONE OF ~~THE SAFEGUARDS~~ OR PREREQUISITES TO INSURE PETITIONER A FULL AND FAIR HEARING OR DUE PROCESS WERE FOLLOWED, FOR INSTANCE, RIGHT OFF WHEN PETITIONER'S WRIT WAS FILED AND ASSIGNED TO THE TRIAL JUDGE J. DENNIS FREDRICKS, HE REFUSED TO RESPOND, WHEREIN OVER 30 DAYS LATTER IT WAS REASSIGNED TO THE HONORABLE FRANK G. NOEL WHO GRANTED PETITIONER AN EVIDENTRY HEARING AND AN ATTORNEY WHO PETITIONER WAS FORCED TO FIRE DUE TO IRRECONSIABLE DIFFERENCES IN WHICH PETITIONER HAD MADE THE JUDGE AWARE OF THIS CONFLICT 30 DAYS BEFORE THE HEARING, AT WHICH POINT DUE TO THE SERIOUSNESS OF THE ALLEGATIONS SHOULD OF ASSIGNED

ANOTHER ATTORNEY OR MADE INQUIRY INTO THE PROBLEMS ASSOCIATED WITH COUNSEL'S REPRESENTATION SO THE COURT IN ITS DETERMINATION WOULD KNOW THAT PETITIONER IN FIRING HIS ATTORNEY AT THE EVIDENTRY HEARING WAS KNOWINGLY AND INTELLIGENTLY BEING DONE IN WAVING HIS RIGHT TO COUNSEL, BECAUSE PETITIONER AT THE TIME WAS NOT BEING PROVIDED WITH THE COUNSEL THAT HE WAS GUARANTEED BY THE CONSTITUTION AT THE EVIDENTRY HEARING, LANE VS. HENDERSON 480 F.2d 544, 545 (5th CIR, 1973). BUT PETITIONER ASSERTS THAT THE CAUX OF HIS ALLEGATIONS LIES IN THE LOWER COURT'S DECISION, IN DENYING HIS WRIT OF HABEAS CORPUS WHICH WAS PLAIN ERROR AND VIOLATION OF PETITIONER'S ABOVE STATED CONSTITUTIONAL RIGHTS FOR THE FOREGOING REASONS WHICH EFFECTIVELY ESTABLISH THE ALLEGATIONS AND THAT THE DECISION HAD NO BASIS IN FACT, RECORD, OR EVIDENCE PRESENTED TO THE COURT FOR ITS DETERMINATION, BEING THAT 1

- (A) THE BURDEN OF PROFF AND PERSUASION IMPOSED ON PETITIONER TO ADEQUATELY SUPPORT HIS CLAIMS ENTITLING PETITIONER TO RELIEF REQUIRED THAT PETITIONER DEMONSTRATE AND SHOW THE COURT WITH EVIDENCE THAT HIS RIGHTS OF DUE PROCESS AND A FAIR TRIAL WERE VIOLATED PURSUANT TO THE PROVISIONS OF THE SIXTH AND FOURTEENTH AMENDMENTS, ESTABLISHED BY PRECEDENT SET IN THE CIRCUIT AND HIGH COURT, THUS TO MEET THESE BURDEN'S PETITIONER TO SATISFY THE COURT BY LAW WOULD NEED TO SHOW THAT ① THAT THE ONLY EVIDENCE USED AGAINST THE PETITIONER AT TRIAL BEING A .38 BULLET AND ALLEGED TO HAVE BEEN FOUND IN PETITIONER'S CAR, WAS NOT, WHICH PETITIONER SHOWED THE COURT ALONG WITH PROOF THAT TRIAL COUNSEL SHOULD HAVE INVESTIGATED BECAUSE THE TAINTED EVIDENCE WAS ON COUNSEL'S COPY OF THE POLICE REPORTS PROVIDED TO COUNSEL BEFORE TRIAL, WHICH COUNSEL NOT ONLY FAILED TO INVESTIGATE BUT ALSO FAILED TO BRING TO THE ATTENTION OF THE JURY BY CROSS EXAMINATION OR TRYING TO EXPLAIN OR CONTRADICT, BUT COMPOUNDED HER DEFICIENCY IN PERFORMANCE BY PREJUDICIALLY STIPULATING TO ITS ADMISSION. THUS ON THIS ONE POINT PETITIONER ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL TO A SUBSTANTIAL DISADVANTAGE. ② PETITIONER WOULD FURTHER NEED TO SHOW THAT THE ALLEGED SOLE ADVERSE WITNESS HAD LIED FROM START TO FINISH AND THAT HIS TESTIMONY WAS TAINTED, PETITIONER DID BY LETTERS AND AFFIDAVITS FROM THE F.B.I., WITNESS'S, AND TRIAL TESTIMONY

THAT SHOWED BY HIS OWN ADMISSION, AND THE PROSECUTORS, THAT THIS WITNESS HAD MET THE PROSECUTOR SHORTLY BEFORE TRIAL WHERE IT CHANGED COMPLETELY AND TOOK ON A WHOLE DIFFERENT CHARACTERIZATION WHICH COUNSEL SHOULD HAVE INVESTIGATED THIS WITNESS BECAUSE COUNSEL CLAIMED FOR A DEFENSE THIS WITNESS (SOLE) WAS LYING AND YET NEVER INVESTIGATED HIS OUT OF STATE CRIMINAL RECORD WHICH WOULD OF PROVED HE WAS IN FACT LYING FROM START TO FINISH AS ALLEGED AND PROVED. SUPRA

(STATEMENT OF THE FACTS) WHICH EFFECTIVELY ESTABLISHED ANOTHER CLAIM OF INEFFECTIVE ASSISTANCE IN COUNSEL NOT CONDUCT INVESTIGATION THAT PREJUDICIALLY WORKED TO AN ACTUAL AND SUBSTANTIAL DISADVANTAGE.

- ③ AGAIN PETITIONER SHOWED THE COURT COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO THE FALSE, INACCURATE, UNCORROBORATED SELF SERVING TESTIMONY OF A CONVICT WITH A VENDETTA WHEN SHE FAILED TO SIMPLY MAKE A PHONE CALL TO CHECK HIS TESTIMONY, ESPECIALLY IN LIGHT OF THE CIRCUMSTANCES, BECAUSE IF COUNSEL HAD SHE WOULD OF FOUND WITNESS'S IN REBUTTAL TO EXPOSE THIS WITNESS BUT INSTEAD CHOSE TO SIMPLY CORROBORRATE THIS LYING CONVICTS TESTIMONY, THUS ESTABLISHING ANOTHER CLAIM OF PREJUDICIAL INEFFECTIVE ASSISTANCE THAT WORKED TO AN ACTUAL AND SUBSTANTIAL DISADVANTAGE IN WHICH THIS SUBSTANDARD PERFORMANCE CONTINUED RIGHT THROUGH PREJUDICIAL CLOSING ARGUMENTS THAT HAD NO BASIS IN RECORD THAT WERE RACIALLY BIASED AND IMPROPER WHICH PETITIONER SHOWED BY NUMEROUS CASE LAW AND THE FACT THE JURY WAS NOT ADMONISHED.

- (B) THUS PETITIONER BY THE PREPONDERANCE OF EVIDENCE ESTABLISHED THAT HE WAS DENIED DUE PROCESS & A FAIR TRIAL BY INEFFECTIVE ASSISTANCE OF COUNSEL AND PROSECUTORIAL MISCONDUCT, ALL OF WHICH RESULTED IN THE ~~INTRODUCTION~~ AND USE OF THE FALSE TESTIMONY & EVIDENCE USED TO CONDUCT THE PETITIONER, WHICH THE STATE NEVER DISPUTED THE ALLEGATIONS OR PRESENT LEGAL EVIDENCE TO THE CONTRARY WHEN THE BURDEN OF PRODUCTION OF PROFF. HAD BEEN SHIFTED TO THE STATE, ONLY THAT PETITIONER SHOULD NOT BE ALLOWED TO RAISE THE ISSUES WHICH WAS WRONG. (LANDCASTER VS COOK 1988)

(C)

THUS THE DECISION REACHED BY THE LOWER THIRD JUDICIAL DISTRICT COURT WAS PLAIN ERRONEOUS AND ITS ACTIONS AND CONDUCT A DENIAL OF PETITIONERS CONSTITUTIONAL RIGHTS BECAUSE:

- (1). PURSUANT TO THE HOLDING OF THE COURT IN MOORE VS KEMP 809, F.2d 702, 719-30 (11th CIR.) CERT. DENIED 107 SUP. CT. 2192 (1987) THE LOWER COURT WAS FURTHER OBLIGATED IN OBTAINING THE ALLEGED SOLE ADVERSE WITNESS'S CRIMINAL RECORD TO AFFORD PETITIONER A FULL AND FAIR HEARING WHICH THE COURT HELD: NO FULL AND FAIR HEARING WHEN STATE HABEAS COURT FAILED TO FORCE PROSECUTION TO RELEASE KEY PROSECUTION WITNESS'S CRIMINAL RECORD. 28.U.S.C.2254(d)(6) 19

- (2) ~~THAT~~ THAT IN THE FACE OF THE MOUNTAIN OF EVIDENCE, BOTH NEWLY DISCOVERED AFTER TRIAL, AND THE EXPULATORY EVIDENCE, THE COURT NOT ONLY DIDN'T ADDRESS THE EVIDENCE BUT ESSENTIALLY STATED "WHAT NEWLY DISCOVERED EVIDENCE" "YOU NEVER IDENTIFIED ANY" THEN ~~WENT~~ ON TO SAY IN ITS OPINION THAT THE PROSECUTOR'S REMARKS THAT "THE PETITIONER WAS ONLY A MACHO MEXICAN WHO YOU SHOULD CONVICT TO STOP ALL THE NEEDLESS KILLING, BLOODLETTING AND MURDERING GOING ON AND IF YOU THE JURY DON'T YOU HAVE TO LIVE WITH THE CONSEQUENCES OF YOUR VERDICT" AND OTHER STATEMENTS THAT WERE JUST AS ~~A~~ FALSE AND ALSO NOT PART OF THE RECORD, FACTS OR EVIDENCE, WHICH THE PETITIONER SHOWED BY PRECEDENT IN THE CIRCUIT AND HIGH COURT AND STATE SUPREME COURT TO BE WRONG, THE JUDGE SIMPLY SAYS "YOU FAILED TO DEMONSTRATE THE REMARKS WERE IMPROPER BUT FOR A JUDGE TO CONTINUE THIS SAME PATTERN OF DISREGARD OF PETITIONERS RIGHTS BY SAYING THAT (4) THAT PETITIONER FURTHER FAILED TO SHOW THAT FALSE TESTIMONY AND EVIDENCE USED TO CONVICT THE PETITIONER HAD AFFECTED THE JUDGEMENT OF THE JURY, WAS INCOMPREHENSIBLE CONSIDERING THAT IN THE TRIAL TRANSCRIPTS SUBMITTED TO THE JUDGE BY THE ATTORNEY FOR THE RESPONDENTS SANDRA SOJOGREN, THEY CLEARLY SHOW THAT NOT ONLY WAS THE JURY AFFECTED BUT SO WAS THE TRIAL JUDGE J. DENNIS FREDRICKS, IN THAT; RIGHT AFTER HEARING THE TESTIMONY OF DET. JOHNSON THAT HE HAD FOUND THAT .38 BULLET IN PETITIONER'S CAR, THE HON. J. DENNIS FREDRICKS STATED:
- "I DO NOT SEE FROM THE STATEMENT OR POSITION OF THE DEFENSE THAT THE DEFENDANT HAD NOTHING TO DO WITH THIS CRIME, AS UNDOUBLY PREJUDICING THE DEFENDANT IN THE ESTABLISHMENT OF THE TWO ELEMENTS HERE, BEING THE CAUSE OF DEATH AND SIZE OF THE WOUND (TR. OF TRIAL P. 386) THUS DENYING PETITIONER OF AN IMPARTIAL JUDGE AS WELL FURTHER IT CAN BE SHOWN THE JURY WAS AFFECTED DURING ITS DELIBERATIONS WHEN THE JURY SENT OUT A "LENGTHY SET" OF QUESTIONS WANTING MORE INFORMATION CONCERNING THE WITNESS'S & ALLEGED SOLE ADVERSE WITNESS RICKY MYERS HAVING BEEN CAUGHT LYING IN THE TRIAL, WHERE THE TRIAL JUDGE THEN INFORMED THE JURY THAT THEY WERE NOT TRYING TO WITHHOLD INFORMATION "BUT OUR SYSTEM DOES NOT ALLOW FOR PROVIDING SUPPLEMENTAL INFORMATION TO JURIES" (CTR. OF TRIAL P. 526) WHERE THE JURY REMAINED DEADLOCKED.

- (4) THUS THE EFFECT, PREJUDICE AND CONTAMINATION THIS FALSE EVIDENCE AND TESTIMONY HAD ON PETITIONER'S TRIAL CAN ALAS BE SEEN IN THE END RESULT BECAUSE WHEN THE JURY WAS DEADLOCKED FOR 8 HOURS BECAUSE OF THE FALSE TESTIMONY THE JUDGE HAVING BEEN INFECTED, INSTEAD OF GIVING THE JURY A SUPPLEMENTAL INSTRUCTION CONCERNING A "REASONABLE DOUBT OF GUILT INSTRUCTION" GAVE THE JURY THE FEDERAL "DYNAMITE" ALLEN INSTRUCTION BECAUSE HE DIDN'T BELIEVE PETITIONER'S DEFENSE HE HAD NOTHING TO DO WITH THE CRIME BECAUSE OF THE ALLEGED BULLET FOUND IN HIS CAR.

CONCLUSION WITH A STATEMENT OF THE RELIEF SOUGHT

WHEREFORE: APPELLANT RESPECTFULLY PRAYS THIS COURT
GRANTS HIS WRIT RESULTING IN HIS UNCONDITIONAL RELEASE
AND DISCHARGE FROM THE UNLAWFUL AND UNCONSTITUTIONAL
CONFINEMENT AND RESTRAINT IMPOSED UPON HIM IN
DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS, OR IN THE
ALTERNATE REMAND TO THE LOWER COURT FOR A
NEW TRIAL

THEREFORE: APPELLANT RESPECTFULLY PRAYS THAT UPON
THE CONTINUED FAILURE OF THE RESPONDENTS TO ADDUCE
LEGAL EVIDENCE TO THE CONTRARY IN REBUTTAL TO THE
APPELLANTS CLAIMS THAT THE WRIT OF HABEAS CORPUS
SHALL ISSUE FORTHWITH, THEREWITH CAUSING HIS
IMMEDIATE RELEASE AND DISCHARGE IMPOSED
UPON APPELLANT BY THE RESPONDENTS HERE AT
THE UTAH STATE PRISON

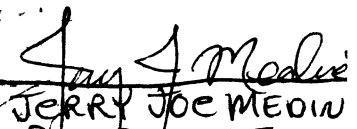
IN WITNESS WHEREOF

THIS 14th DAY OF

SEPTEMBER

2014

Respectfully Submitted


JERRY JOE MEDIN
P.O. BOX 250
DRAPER, UTAH
84020

APPENDUM

BOX 250
DRAPER, UTAH 84020

EXHIBIT One

MEMORANDUM DECISION OF THE
HONORABLE FRANK G. NOEL PRESIDING
THIRD JUDICIAL DISTRICT COURT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Jerry Joe Medina	:	
Petitioner,	:	MEMORANDUM DECISION
vs.	:	
Gerald L. Cook, Warden, et al	:	CIVIL NO. C87-7241
Respondent.	:	

Petitioner seeks a writ of Habeas Corpus on grounds that (1) he was not afforded the effective aid and assistance of competent legal counsel either on trial or on appeal; (2) newly discovered evidence; and (3) prosecutorial misconduct.

As to petitioners claim of ineffective assistance of counsel the Court is of the opinion that petitioner has failed to demonstrate that he did not received effective assistance of counsel during trial or on appeal. It is all to easy for a losing defendant to criticize the performance of his attorney after conviction. Accordingly there is a strong presumption that counsel handled the case competently. Petitioner has simply failed to overcome that presumption.

Secondly petitioner claims that there is newly discovered evidence in this matter. It is not clear what petitioner claims for this newly discovered evidence the Court must assume that petitioner is asking for a new trial. If indeed there is newly discovered evidence which would permit

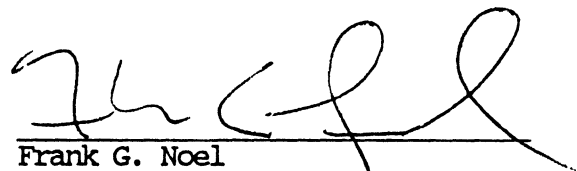
(2)

a new trial then that motion for a new trial should be made before the Judge in the criminal case in which petitioner was convicted.

Lastly petitioner claims prosecutorial misconduct in that the prosecutor knowingly used perjured testimony, failed to disclose exculpatory evidence and made improper remarks in closing argument. Petitioner has failed to identify the exculpatory evidence that he claims the prosecutor withheld. Petitioner has failed to demonstrate that the prosecutor did in fact knowingly use perjured testimony and further has failed to show that the false testimony could have effected the judgment of the Jury.

And finally petitioner has failed to demonstrate to the Court that the prosecutor's remarks during closing argument were improper, nor that the offensive comments would have probably influenced the Jury.

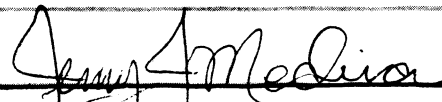
Dated this 3 day of October, 1988.


Frank G. Noel
District Court Judge

BOX 250
DRAPER, UTAH 84020

CERTIFICATE OF SERVICE

I HERE BY CERTIFY THAT 10 TRUE AND CORRECT
COPIES OF THE FOREGOING SUPPLEMENTAL BRIEF WERE
DELIVERED, POSTAGE PREPAID, TO THE UTAH SUPREME
COURT AND 4 COPIES TO THE ATTORNEY GENERAL
PAUL VAN DAMN AT 236 STATE CAPITOL, SLC UT, 84114
AND 1 COPY TO THE CLERK OF THE THIRD JUDICIAL
DISTRICT COURT ON THIS 5th DAY OF DECEMBER 1988



JERRY JOE MEDINA
PO BOX 250
DRAPER, UTAH 84020

PETITIONER IN PROPRIA PERSONA