

2000

# Utah v. Jose Mario Jimenez : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/Appellee,

v.

JOSE MARIO JIMENEZ,

Defendant/Appellant.

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Case No. 20000044-CA  
Priority No. 2

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**BRIEF OF APPELLANT**

Appeal from a judgment of conviction for manslaughter with a firearm enhancement, a second degree felony offense in violation of Utah Code Ann. § 76-5-205 (1995), and two counts of attempted manslaughter with firearm enhancements, both third degree felony offenses in violation of Utah Code Ann. §§ 76-5-205 and 76-4-101 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Robin W. Reese, Judge, presiding.

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Utah Court of Appeals  
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Julia D'Alesandro  
Clerk of the Court

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Case No. 20000044-CA

Priority No. 2

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**JURISDICTIONAL STATEMENT**

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996), whereby the defendant in a district court criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony offense. Appellant Jose Mario Jimenez ("Jimenez") was convicted of manslaughter with a firearm enhancement, a second degree felony offense in violation of Utah Code Ann. § 76-5-205 (1995), and two counts of attempted manslaughter with firearm enhancements, both third degree felony offenses in violation of Utah Code Ann. §§ 76-5-205 and 76-4-101 (1995). A copy of each judgment is attached hereto as Addendum A.

**STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**

The issues presented for review are as follows:

1. Whether the trial court erred in failing to grant a motion for a mistrial/new trial in connection with improper statements and suggestions made by the prosecutor during

cross-examination of defense witnesses.

Standard of Review: "[I]f a trial court has applied the correct legal standard, it has broad discretion in granting or denying a motion for a new trial." State v. Martin, 1999 UT 72, ¶5, 984 P.2d 975. In determining whether a prosecutor's deliberate misconduct constituted an abuse of discretion and deprived a defendant of a fair trial sufficient to warrant a new trial, this Court will apply a two-part test:

[The test examines whether] "[1] [t]he actions or remarks of [the prosecutor] call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, [2] if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result" [for the defendant].

State v. Basta, 966 P.2d 260, 268 (Utah App. 1998) (quoting State v. Tenney, 913 P.2d 750, 754 (Utah App.), cert. denied, 923 P.2d 693 (Utah 1996)); State v. Troy, 688 P.2d 483, 486 (Utah 1984); see also State v. Kohl, 2000 UT 35, ¶22, 392 Utah Adv. Rep. 3.

2. Whether the trial court erred in failing to grant a mistrial/new trial in connection with improper statements made by the prosecutor during closing argument.

Standard of Review: See the standard of review set forth above.

3. Whether the cumulative effect of the errors in the case denied Jimenez a fair trial.

Standard of Review: Reversal is appropriate if the cumulative effect of the several errors undermines confidence that a fair trial was had. State v. Dunn, 850 P.2d 1201,

1229 (Utah 1993). In assessing cumulative error, this Court considers all the identified errors as well as errors this Court assumes may have occurred. Id.

### **PRESERVATION OF ARGUMENT**

The first issue is preserved in the record on appeal ("R.") at 343:369; 344:403, 444, 450-59. The second issue is preserved at R. 345:659, 667, 701. The third issue concerning cumulative error is reviewed on direct appeal where the record is adequate. See e.g. Dunn, 850 P.2d at 1229.

### **RULES, STATUTES AND CONSTITUTIONAL PROVISIONS**

The following rule will be determinative of the issues on appeal: Utah R. Crim. P. 24 (2000). The text of that provision is attached hereto as Addendum B.

### **STATEMENT OF THE CASE**

#### **Nature of the Case, Course of Proceedings, Disposition in the Court Below.**

On July 29, 1998, the state filed an amended Information against Jimenez, charging him with one count of murder, a first degree felony offense, and two counts of attempted murder, second degree felony offenses, in violation of Utah Code Ann. §§ 76-5-203 (Supp. 1996) and 76-4-101 (1995). (R. 4-6.) The charges stemmed from an incident that occurred on or about October 20, 1996. After the preliminary hearing (see R. 48), the case was bound over for trial.

On September 13, 1999, a four-day jury trial commenced. (See R. 342-345.) At the conclusion of trial, the jury found Jimenez guilty of one count of manslaughter and

two counts of attempted manslaughter. The jury also found Jimenez guilty of using a firearm in connection with each count. (R. 282-87.) On November 29, 1999, the judge sentenced Jimenez to an indeterminate prison term for each offense. (R. 308, 311, 314.) Jimenez filed a timely notice of appeal. (R. 321.)

### **STATEMENT OF FACTS**

#### **A. THE STATE'S EVIDENCE.**

The state presented evidence at trial as follows:

##### **Police Responded to a Shooting at a 7-11 Convenience Store.**

On October 20, 1996, police responded to a shooting at a 7-11 convenience store at 4100 South Redwood Road. (R. 343:201, 216; see also 343:227, 304.) Henry David Miera ("Miera") had been shot. Two other individuals, Anthony Montoya ("Montoya") and Manuel Rios ("Rios"), claimed the suspect shooter fired a weapon at them as well. A convenience store security camera recorded most of the incident on tape and was secured by police as evidence. (R. 343:310-11.)

##### **The 7-11 Video Was Played at Trial.**

The video, played in its entirety at trial (R. 343:231), showed Rios, Miera and Montoya pulling up to the 7-11 in a white car. Rios got out of the car and entered the store to use the restroom. (R. 343:232.) A couple minutes later, a male -- later identified as Jimenez -- and his wife Monica pulled up in a black car and stepped out of the vehicle. Jimenez walked up to the white car while Monica went into the store. (R. 343:233-34.)

As Rios walked out of the store, he observed Jimenez in a confrontation with Montoya. (See R. 343:234-35, 275; 344:436.) Montoya was standing outside the white car, while Miera was sitting in the driver's seat. (R. 343:234-35, 275; 344:434.)

Rios walked up to Jimenez and asked whether he "had a problem." (R. 343:234-35.) Jimenez responded with the same question as Montoya walked around the car toward Jimenez. (R. 343:235.) According to Rios, the expression, "you got a problem," means "[do you] want to fight or something." (R. 343:243-44.)

Thereafter, Rios punched Jimenez "[p]retty good[.]" (R. 343:235-36.) According to Rios, he hit Jimenez because he was "going for something in the front of his pants[.]" (R. 343:236, 276, 278.) Other evidence presented by the state supported that Jimenez was not "going for something"; rather, Rios punched Jimenez without justification. (See R. 343:280 (Rios testified in earlier proceedings that the first time he observed the gun was after he hit Jimenez) 343:197, State's Exhibit 3 (interview with television reporter where Montoya disclosed that he and Rios contemplated punching Jimenez before they learned he had a gun); Defendant's Exhibit 3-A (transcript of interview between Montoya and television reporter).)

Rios testified that he was much bigger than Jimenez, and he was a boxer. (R. 343:245-46.) According to Rios, he was not the kind of person who would "back down" during a verbal confrontation. (R. 343:246.)

Rios believed the punch was enough to knock Jimenez out. (R. 343:276, 281.)

Consequently, he was surprised to see Jimenez get up from the ground. As Jimenez got to his feet, he pulled a gun from his waistband and began to shoot. (R. 343:236-37.) Rios and Montoya ran for cover and began throwing beer bottles and bundles of firewood at Jimenez. (R. 343:238.)

According to the evidence, Jimenez fired approximately seven rounds. (R. 343:308.) Two shots were fired in the direction of Miera sitting in the car. Additional shots were fired as Montoya and Rios ran across the front of the car and out of the range of the camera. (R. 343:282.) Jimenez also ran out of the range of the camera, then came back and left with Monica in the black car.

When Rios and Montoya returned to the white car, they discovered that Miera had been shot. They pulled him from the car and began to administer mouth-to-mouth resuscitation. (R. 343:241.)

According to a State Witness, Jimenez Admitted to Shooting a Man at the 7-11.

Amber Fabela testified that Jimenez drove to her home that night after the shooting. (R. 343:186.) He was hysterical and claimed that he had "just killed somebody" at a 7-11 convenience store. (R. 343:187-88.) Jimenez denied having made the statement. (R.344:589.)

Miera Died of Two Gunshot Wounds.

The medical examiner testified that Miera died of two gunshot wounds to the chest area. (R. 343:293, 298, 301.) Jimenez was apprehended in 1998 and charged with one

count of murder and two counts of attempted murder. (R. 12-14.)

B. THE DEFENDANT'S EVIDENCE.

The defense presented evidence in this case to support the determination that Jimenez fired the gun in self-defense and to protect his wife, Monica.

Jimenez and Monica Were Confronted by 3 Intoxicated Men and Felt in Danger.

Jimenez testified that when he and Monica pulled in front of the 7-11, they were confronted by three men who were intoxicated and looking for a fight. The men engaged in a verbal confrontation with Jimenez, then Rios punched Jimenez and knocked him to the ground. Jimenez felt threatened; he determined to protect himself and Monica from their attackers. (R. 344:563, 573-74.) Jimenez testified that while he was on the ground, he observed Miera open the car door and point an object at him that appeared to be a weapon. (See R. 344:563-65, 438.) Jimenez pulled a weapon out from under his shirt and began to fire. (R. 344:563.)

Although the Police Did Not Find a Weapon in Miera's Car, the Evidence Supported the Determination that the Police Investigation Was Incomplete.

After the shooting, Jimenez and Monica left the 7-11 store. According to the video, Rios and Montoya did not return to the white car for some time. They were out of the range of the video camera (R. 344:536-37), and it is unknown what they were doing. (R. 344:539.) When Rios and Montoya were back in view of the camera, they returned to the white car and began removing items from it. (R. 344:537.) One item appeared to be



cans of beer; another item was unidentified. (R. 344:538.) Rios and Montoya may have thrown the items into the garbage can. (R. 344:538.)

When officers arrived on the scene, they checked an area near the garbage can for the cans of beer, which they located immediately. Thereafter, the officers discontinued their search of the garbage cans. (R. 343:344-45.)

Jimenez maintains that Rios and Montoya hid the object or weapon that Miera used to threaten Jimenez in the vicinity. Since the officers did not describe their investigative efforts in their reports and did not appear to search the immediate vicinity or garbage cans for a possible weapon (see R. 344:524-25), the state was unable to present compelling evidence to refute the possibility that Rios and Montoya concealed a weapon in the area. (See R. 344:554 (officers investigating scene did not describe areas searched or specify that they searched the garbage cans or that they searched for weapons).)

In addition, the defense presented evidence to support that a routine investigation would have involved a thorough search of the area, including the garbage cans, and a pat-down search of victims and witnesses to determine if they were armed. (R. 344:521, 524, 529-30.) According to the evidence, such an investigation did not occur in this case. (See R. 343:317-342, 344-45; 344:524.)

C. THE JURY ACQUITTED JIMENEZ OF THE CHARGES BROUGHT BY THE STATE AND CONVICTED HIM OF LESSER OFFENSES.

The jury acquitted Jimenez of murder and attempted murder, and convicted him of

manslaughter and attempted manslaughter. (R. 282-87.) Additional facts relating to the issues on appeal are set forth below.

### **SUMMARY OF THE ARGUMENT**

Prior to the trial in this case, the defense moved to have evidence of Jimenez's alleged, prior bad acts and crimes suppressed. The state stipulated to the motion and the trial judge granted it. Thereafter, in violation of the court's order and in violation of the rules of evidence, the prosecutor interjected improper statements and innuendoes at trial. Specifically, the prosecutor made improper statements and suggestions concerning Jimenez's character, as follows: (a) The prosecutor suggested to the jury that Jimenez used numerous aliases, (b) The prosecutor suggested that Jimenez had a violent history, (c) The prosecutor asserted during Monica's examination that Jimenez's possession of a gun was a crime "in and of itself," thereby suggesting to the jury that it should consider matters that were not properly before it, and (d) The prosecutor asked Monica if she assisted in "concealing" Jimenez from police, again suggesting to the jury that it should consider matters that were not properly before it.

On appeal, Jimenez maintains that the improper statements called the attention of the jurors to matters they were not justified in considering. In addition, under the circumstances of this case, there was a probability that the jurors were influenced by the prosecutor's remarks, resulting in reversible error.

Also, during closing argument, the prosecutor compared Jimenez's appearance at

trial in a suit and tie to the appearance of Rios, a state witness who wore prison clothes and shackles to the trial. The prosecutor argued that the jury could trust Rios because they could trust his appearance; however, they should not trust Jimenez because they could not trust the way he was "packaged." The prosecutor's comments were unfair; he sought to discredit Jimenez because he had exercised his right to attend trial dressed "in the 'garb of innocence.'" State v. Mitchell, 824 P.2d 469, 473 (Utah App. 1991) (recognizing that defendant is entitled to be tried in a suit since that comports with the presumption of innocence). The improper comparison called the attention of jurors to matters they were not justified in considering. In addition, the comments were prejudicial, thereby requiring reversal of this matter on appeal.

Finally, the errors individually and collectively prejudiced Jimenez. He respectfully requests that this Court reverse the conviction in this case and remand the matter for further proceedings.

### **ARGUMENT**

#### **POINT I. THE PROSECUTOR ENGAGED IN MISCONDUCT DURING HIS EXAMINATION OF DEFENSE WITNESSES. JIMENEZ WAS ENTITLED TO A NEW TRIAL AS A RESULT OF THE MISCONDUCT.**

The prosecutor in this case committed deliberate misconduct. He circumvented evidentiary rules and defied a pretrial order on four separate occasions in order to get information in front of the jury that it was not allowed to consider. As a result of the misconduct, Jimenez requested a new trial pursuant to Rule 24, Utah R. Crim P.

Rule 24 provides that a defendant may be entitled to a new trial "if there is any error or impropriety which had a substantial adverse effect upon the rights of a party." Utah R. Crim. P. 24(a) (2000). A trial court has discretion under Rule 24 to grant a new trial, and an appellate court will not disturb the trial court's ruling unless it appears the trial court has abused its discretion to the prejudice of the defendant. See State v. Smith, 776 P.2d 929, 931 (Utah App. 1989); see also State v. Harmon, 956 P.2d 262, 276 (Utah 1998) (quoting State v. Hay, 859 P.2d 1, 6 (Utah 1993)) (other cites omitted).

Prosecutorial misconduct may be grounds for a new trial. See State v. Owens, 753 P.2d 976 (Utah App. 1988). In determining whether prosecutorial misconduct has deprived defendant of a fair trial, Utah appellate courts have applied a two-part test:

[This test examines whether] "[1] [t]he actions or remarks of [the prosecutor] call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, [2] if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result."

State v. Basta, 966 P.2d 260, 268 (Utah App. 1998) (quoting State v. Tenney, 913 P.2d 750, 754 (Utah App.), cert. denied, 923 P.2d 693 (Utah 1996)); State v. Troy, 688 P.2d 483, 486 (Utah 1984).

The first step is "clearly met" when the prosecutor has violated a pretrial order or evidentiary rules. See State v. Span, 819 P.2d 329, 335 (Utah 1991). The second part of the test is "more difficult." Id. It refers to the prejudice analysis. "If the prejudice is such that there is a reasonable likelihood the jury would have reached a more favorable

result absent the comments, we will reverse." State v. Pearson, 943 P.2d 1347, 1352 (Utah 1997). As set forth herein, Jimenez has met both parts of the test.

A. DURING WITNESS EXAMINATIONS, THE PROSECUTOR INTERJECTED IMPROPER INNUENDOS.

1. The Prosecutor's Statements and Suggestions.

Applying the first part of the test, the prosecutor in this case, Howard Lemcke, called the attention of jurors to matters they were not justified in considering. Specifically, on four separate occasions during trial, the prosecutor made improper statements and suggestions concerning Jimenez's character, as follows: (a) the prosecutor suggested to the jury that Jimenez used numerous aliases, (b) the prosecutor suggested that Jimenez had a violent history, (c) the prosecutor asserted during Monica's examination that Jimenez's possession of a gun was a crime "in and of itself," thereby suggesting to the jury that it should consider matters that were not properly before it, and (d) the prosecutor asked Monica if she assisted in "concealing" Jimenez from police, again suggesting to the jury that it should consider matters that were not properly before it.

Although the judge sustained each objection by the defense with respect to the improper matters, the rulings could not have had an effect on the jury. Specifically, with respect to the first and second matters, while an objection was recorded when the prosecutor made the improper statement, the judge did not rule on the matter until after the jury had been excused. (See R. 343:369; 344:469; 344:403; 344:472.) Consequently,

the jury was not aware that the objections had been sustained.

The timing of the ruling is relevant since the jury was instructed at the close of trial that if the court sustained an objection, the jury may not consider the matter. (R. 238.) Because the trial judge issued a ruling outside the presence of the jury, the jury was not aware that it could not consider the possibility that Jimenez used several aliases and/or had a violent past.

With respect to the third and fourth matters, although the judge sustained each objection while the jury was present, the judge did not attempt to cure the impropriety. The judge did not instruct the jury that it must disregard the prosecutor's statement that Jimenez's possession of a firearm was a crime "in and of itself," and that Jimenez concealed himself from authorities. Thus, the jury may have determined that even if Jimenez was innocent of the charged offenses, he was a bad man and may as well be punished now that he has been caught.

More specifically, the prosecutor engaged in improper conduct as follows.

(a) The prosecutor suggested that Jimenez used numerous aliases. After the state completed examination of its witnesses, the defense presented its case. The defense began by stating that it intended to call Dr. Robert Rothfeder to testify with respect to injuries Jimenez suffered when he was severely beaten in 1994, two years before the incident in this matter. (See R. 344:389-92.) According to the defense, Jimenez suffered a skull fracture, head injuries and arm fracture when he was assaulted in Los Angeles in

1994. (R. 344:386, 389-390.)

Also, the defense expected that Dr. Rothfeder would provide testimony as to what typically would occur physiologically when a person has been punched in the head. Dr. Rothfeder's testimony related to the state's evidence, which reflected the following: Immediately prior to the shooting, Rios punched Jimenez in the head knocking him to the ground. (R. 344:393-99.)

The defense intended that Dr. Rothfeder's testimony would support the determination that Jimenez was incapable of forming a criminal *mens rea* due to head injuries. Thus, Dr. Rothfeder's testimony was presented to support an acquittal in the matter.

In anticipation of Dr. Rothfeder's testimony, the defense called Jimenez to lay foundation for medical records relating to the injuries Jimenez suffered in the 1994 assault. The defense elicited testimony from Jimenez that when he suffered the earlier injuries, he provided an alias to the health care providers. He represented that his name was Antonio Sanchez. (R. 343:366.) Jimenez testified that he used the alias because he did not have money for hospital care. (R. 343:366.) Jimenez described the injuries he suffered in 1994 and he identified the medical records relating to the matter. (R. 343:368.)

Thereafter, during cross-examination, the prosecutor asked Jimenez the following: "So Mr. Jimenez, you admit you lied to the people who were providing you the medical care?" (R. 343:369.) Jimenez answered, "Yes." The prosecutor then asked, "[Y]ou used the name, what, Carlos Sanchez?" followed by, "These aren't the only other false names

that you've used, are they?" (R. 343:369.)

The prosecutor acknowledged that during the cross-examination he held up an FBI rap sheet. (See 344:466-67.) He also admitted that he had no admissible evidence to support his allegations concerning "other false names." (R. 343:369-70; 344:464, 466; see also 344:467 (judge ruled FBI rap sheet was inadmissible).) The defense objected to the examination as improper (R. 343:369). The judge did not rule on the matter until the third day of trial when the parties reconvened outside the presence of the jury. At that point, the judge sustained defendant's objection to the improper cross-examination. (R. 344:469.)

(b) The prosecutor suggested that Jimenez had a violent history. On the third day of trial, Dr. Rothfeder testified. After the defense examined him with respect to head injuries in general and Jimenez's injuries relating to the 1994 assault, the prosecutor asked during cross-examination whether Jimenez provided the doctor with his "history of violence[.]" (R. 344:403.) The defense objected to the question (R. 344:403) on the basis that it suggested to the jury that Jimenez had a violent past. (See R. 344:463.) The trial judge overruled the objection (R. 344:403) and allowed the prosecutor to proceed with the examination. (Id.)

Thereafter, during proceedings outside the presence of the jury, the trial judge reversed his prior ruling. (R. 344:472.) The judge determined that while it would have been proper for the prosecutor to ask Dr. Rothfeder whether Jimenez had disclosed any



other head injuries or trauma, the prosecutor's suggestion of violent behavior "would not be relevant. And again I sustain[] the objection, finding that [] part of the answer would not be relevant." (R. 344:472.)

(c) The prosecutor asserted during Monica's examination that Jimenez's possession of a gun was a crime "in and of itself," thereby suggesting to the jury that Jimenez had committed an uncharged crime. On the third day of trial, the defense called Jimenez's wife, Monica (Neomi Monica Jimenez), to testify. Monica was a witness to the October 20, 1996 incident. Among other things, she testified that on October 20, she and Jimenez went to a dance club and bar for a few hours (R. 344:433), then stopped at the 7-11 convenience store so that she could use the restroom. (R. 344:434.)

She testified that when they arrived at the 7-11, there was a verbal confrontation between her husband and Montoya. Rios stepped outside the 7-11 store during the confrontation and punched her husband in the face, knocking him to the ground. (R. 344:436-38.) She testified that when her husband stood up, he lifted his shirt and fired a gun. (R. 344:438-39.) After the shooting, Jimenez ran in front of the white car, then came running back. He told Monica to get into the car and they left. (R. 344:440.)

On cross-examination, the prosecutor asked Monica the following questions:

[PROSECUTOR]: Did you know when you were at [the Me Mexico dance club] [your husband] had a concealed gun on him?

[WITNESS]: No.

[PROSECUTOR]: Did you know that the concealed weapon under that circumstance would be a crime in and of itself?

(R. 344:444.) The defense objected to the question on the basis that it called the jury's attention to an alleged criminal act that was not charged. The trial judge sustained the objection. (R. 344:444, 471.) Nevertheless, the damage was done. Counsel for the defense requested a curative instruction that the judge declined to provide. (Id. at 445.)

(d) The prosecutor asked Monica if she assisted in "concealing" Jimenez from police, thereby suggesting to the jury that Jimenez unlawfully fled the jurisdiction; yet, Jimenez was not charged with such conduct in this case. Later, during the same cross-examination, the prosecutor asked Monica whether she "participate[d] in concealing" Jimenez "from the police" for a period of time between the date of the occurrence and his arrest in 1998. (R. 344:450.) Again, the defense objected to the question. Thereafter, the trial judge called a recess and excused the jury in order to deal with the issues. (R. 344:450.) The question alluded to criminal conduct on the part of Jimenez that had not been charged in this matter.

In addition, the question was meant to force Monica to incriminate herself, or to exercise her rights under the Fifth Amendment.<sup>1</sup>

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<sup>1</sup> The Fifth Amendment provides that a person cannot be compelled to be a witness against himself or herself in connection with any criminal case. The Utah Constitution likewise provides that an accused person "shall not be compelled to give evidence against himself." Utah Const. art. I, § 12.

The prosecutor acknowledged the purpose of the question and stated that earlier testimony from Monica elicited during cross-examination served as a basis for charging her with concealing the car; thus, additional testimony suggesting participation in criminal activity would be harmless:

Your Honor, noting that the witness [Monica] has already confessed to one crime of hiding the car, and we're still within the statute of limitations, and that is tampering with evidence, we're kind of almost moot at this point on that particular issue. If she, in fact, wants to consult counsel, come back and say that she either cares to take the Fifth Amendment or she cares to testify, that would be fine. And the State, of course, would have to go along with that.

(R. 344:451.) The defense objected to the prosecutor's tactics, and the trial judge sustained the objection. (R. 344:477.)

2. The Law Prohibits the Prosecutor from Interjecting Information or Making Improper Suggestions Concerning Defendant's Character.

An underlying premise of the criminal justice system is that a defendant must be tried for what he did, not who he is. Therefore, a prosecutor may not seek a conviction with suggestions that the defendant is a bad person. The prejudicial impact to a jury of the defendant's sordid background can be devastating.

In this case, prior to trial the defense moved under Rules 609, 402, and 403, Utah Rules of Evidence, to exclude evidence of Jimenez's prior crimes or bad acts. (R. 155-56.) The state stipulated to the request (see R. 193 (representing that state stipulated to motion)), and the trial court granted the motion. (R. 343:172.)

Rule 609 permits a party to present evidence of prior criminal conduct only in

limited circumstances. Specifically, the evidence may be presented to attack the witness's credibility if the witness has been convicted of a crime involving dishonesty or a crime that is punishable by death or imprisonment in excess of one year. Utah R. Evid. 609(a) (2000). Rules 402 and 403 prohibit the presentation of irrelevant evidence and evidence that is more prejudicial than probative in value. Utah R. Evid. 402, 403 (2000).

Rule 404(b) likewise provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rule specifies the circumstances under which evidence relating to such acts may be admissible. Utah R. Evid. 404(b) (2000).

In this case, inasmuch as the state stipulated to the entry of an order to exclude evidence of bad acts and criminal conduct (see R. 155-56; 193), the prosecutor's references to aliases, a violent history, and uncharged criminal conduct violated the pretrial order and evidentiary rules.

That is, notwithstanding the pretrial rulings and the Utah Rules of Evidence, the prosecutor made statements during witness examinations that called the jury's attention to matters the jury was not allowed to consider. See Utah R. Evid. 402, 403, 404(b), 609(a)(1) (2000). The prosecutor improperly referred to unidentified aliases allegedly used by Jimenez, a violent past, and uncharged criminal conduct. See Troy, 688 P.2d at 486-87 (counsel is obligated to avoid any reference to matters the jury is not justified in considering; also, prosecutor's question concerning defendant's criminal background and

alias was improper); State v. Bain, 575 P.2d 919 (1978) (prosecutor's reference to the fact that defendant fled to avoid arrest was improper).

The improper conduct was particularly contemptuous in this case where the prosecutor was well aware of the pretrial ruling, and presumably aware of the evidentiary rules. This is not a situation where the prosecutor asked an arguably innocuous question that prompted the witness to blurt out the information. Rather, in a deliberate fashion, the prosecutor interjected the improper, offensive information in an effort to influence and inflame the jury. In blatant disregard of the rules and pretrial order, the prosecutor conveyed improper information to the jury.

Pursuant to Rule 3.4(e), Utah Rules of Professional Conduct, a lawyer may not allude to any matter "that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence[.]" See Troy, 688 P.2d at 486-87 (counsel is obligated to avoid any reference to matters the jury is not justified in considering; also, prosecutor's question concerning defendant's criminal background was an improper attempt to bias the jury). The improper questions in this matter were an attempt by the prosecutor to create an impression in the minds of jury members that Jimenez was a bad person, and should not be believed because he had a violent history, went by an unknown number of aliases, and violated the law by carrying a concealed weapon and fleeing the jurisdiction.

In this case it was improper for the prosecutor to allude to the matters set forth

above. Span, 819 P.2d at 335. Jimenez has met the first prong in establishing that the trial court abused its discretion in denying the motion for a mistrial/new trial for prosecutorial misconduct. See Basta, 966 P.2d at 268.

**B. UNDER THE CIRCUMSTANCES OF THIS CASE, THE ERROR WAS SUBSTANTIAL AND PREJUDICIAL, REQUIRING REVERSAL.**

A prosecutor's misconduct constitutes reversible error when the error is "substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant." Hay, 859 P.2d at 7 (cites omitted); Harmon, 956 P.2d at 276; Pearson, 943 P.2d at 1352; Troy, 688 P.2d at 486-87; see Dunn, 850 P.2d at 1224 (citing State v. Andreason, 718 P.2d 400, 403 (Utah 1986)).

When the prosecutor improperly suggests to the jury that defendant has gone by several aliases, has a sordid or violent history, or has committed uncharged crimes, those suggestions individually and cumulatively may have an enormous impact on a defendant's case. The error is substantial.

In this case, although the prosecutor did not elicit a response to his improper questions, the effect was devastating: the jury was left with the impression that the defense objected to the questions in order to hide information about Jimenez.

The improper questions in this case presented the jury with an opportunity to assume that Jimenez was a bad person and was probably guilty of the crimes at issue

because he was violent or had committed other crimes, or that Jimenez had something to hide about his past. "The deep tendency of human nature to punish not because [the defendant] is guilty this time but because he is a bad man and may as well be condemned now that he is caught is a tendency which cannot fail to operate with any jury, in or out of court." 1 A.J. Wigmore, Evidence § 57 at 1185 (Tillers rev. 1983). "The insinuation that other evidence exists encourages the jury to determine its verdict based upon evidence outside the record and jeopardizes a defendant's right to a trial based upon the evidence presented." State v. Young, 853 P.2d 327, 349 (Utah 1993).

In this case, the suggestion that Jimenez used aliases, had a violent history, or engaged in uncharged criminal conduct may have added critical weight to the prosecutor's case, while Jimenez was powerless to dispute it. Indeed, Jimenez could not dispute the implication left by the improper questions without possibly opening a door to the presentation of information that otherwise would be inadmissible. Thus, once the improper suggestions were out, if witnesses did not answer, the suggestions left the jury with the impression that the defense had something to hide. The improper conduct constituted substantial error.

The error also was prejudicial. Utah appellate courts have ruled that prosecutorial misconduct is prejudicial when it is directed at the defendant, when the misconduct relates to an issue that the jury must decide, and when the jury is presented with a case that involves credibility issues surrounding the witnesses. See Troy, 688 P.2d at 486;

State v. Byrd, 937 P.2d 532, 536 (Utah App. 1997).

In Troy, 688 P.2d at 486, the prosecutor committed misconduct when he referred to defendant's alias and residential situation under a federal identity program, when he asked about defendant's "various criminal matters," and when he compared the defendant to criminals who have "all kinds of irrational behavior ... Hinckley is a classic example." Id. Since the misconduct was directed at the *defendant*, the supreme court determined the error was "qualitatively different" from misconduct directed at other witnesses: the jury was more likely to be influenced by the misconduct. Span, 819 P.2d at 335 (where misconduct is directed at defendant, court is more inclined to find that jury was unduly influenced by misconduct); see also State v. Wiswell, 639 P.2d 146, 147 (Utah 1981); Byrd, 937 P.2d at 536; State v. Morrison, 937 P.2d 1293, 1297 (Utah App. 1997).

The misconduct in this case was more egregious than that identified in Troy. While various defense witnesses were testifying, the prosecutor referred to an unknown number of aliases used by Jimenez and a violent past, and the prosecutor made allegations against Jimenez concerning uncharged crimes. The prosecutor's conduct was directed at the defendant. Also, the prosecutor raised the improper matters during the testimony of defense witnesses to cause the jury to believe that each witness was concealing negative information about Jimenez. The prosecutor presented the improper information in that fashion to make the jury suspicious of the defendant and the motives of each witness. On that basis, the prosecutor's misconduct was prejudicial.



In addition, prosecutorial misconduct is more likely to unduly influence the jury when the jury is presented with conflicting evidence and is required to resolve credibility issues. Troy, 688 P.2d at 486. "Courts have generally refused, however, to conclude that evidence was overwhelming in cases that ultimately rested on the jury's resolution of conflicting evidence, particularly where the defendant's credibility is involved." Byrd, 937 P.2d at 536; Andreason, 718 P.2d at 403 ("When the evidence in the record is circumstantial or sufficiently conflicting, jurors are more likely influenced by an improper argument").

If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible of differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel. Indeed, in such cases, the jurors may be searching for guidance in weighing and interpreting the evidence. They may be susceptible to influence, and a small degree of influence may be sufficient to affect the verdict.

Troy, 688 P.2d at 486; Andreason, 718 P.2d at 403.

To that end, this Court may consider the nature of the state's evidence and the defendant's case. See State v. Harrison, 805 P.2d 769, 787 (Utah App. 1991) (prejudice analysis compares impact of prosecutorial misconduct, other evidence of guilt and evidence that may absolve defendant of crime).

Here, a pivotal issue concerned Jimenez's perceptions of danger. While Rios testified that he, Miera, and Montoya did not threaten Jimenez with a weapon, Jimenez and Dr. Rothfeder testified to Jimenez's perceptions. Dr. Rothfeder testified to the impact

a head injury and trauma may have on Jimenez. In addition, Monica's testimony supported the determination that Montoya and Miera threatened her husband. (R. 344:436-38.)

It is not a coincidence that the prosecutor engaged in the improper conduct during cross-examination of Jimenez, Dr. Rothfeder, and Monica. The improper examination likely made the jury distrustful of those witnesses; the jury may have believed the witnesses were hiding information from them concerning Jimenez's alleged violent, criminal, suspicious past. Thus, the jury may have considered the witnesses unworthy of belief. There is a reasonable likelihood that in the absence of the prosecutorial misconduct, the jury would have acquitted Jimenez entirely of the crimes.

Another relevant issue in Jimenez's case was whether Miera, Montoya or Rios threatened Jimenez with a weapon, thereby justifying Jimenez's use of deadly force. Jimenez presented evidence to support the determination that officers failed to properly investigate the scene to determine whether Rios, Montoya and Miera possessed a weapon during the encounter; indeed, the officers' investigation of the crime scene was inadequate. Because the officers failed to conduct an adequate investigation, the state was unable to present compelling evidence to dispute Jimenez's claims concerning the weapon.

The state and Jimenez offered conflicting versions of the events surrounding the matter. The case came down to the word of the defense against the word of the state's

witnesses. See Byrd, 937 P.2d at 536. The jury "could have found either way." Troy, 688 P.2d at 487. The prosecutor knew that he was facing an unpredictable jury. He apparently found the prospect too daunting and determined to circumvent the rules to bolster his case. The prosecutor's tactics should not be reinforced with a finding of harmless error.

The verdict in this case reflects that the jury was not overwhelmed by the state's evidence of guilt. A reasonable likelihood exists that the jury compromised the verdict and rendered a conviction for the lesser offenses because of the improper statements and suggestions. Without the statements, the jury may have acquitted.

While evidence presented by the defense would have absolved Jimenez of the crimes, the prosecutor's improper tactics tipped the balance against him. Under these circumstances, the evidence against Jimenez was not so overwhelming as to overcome the prejudice that existed as a result of the prosecutor introducing the suggestion that Jimenez was a bad or violent person. In this case, there was a likelihood that jurors were improperly influenced by the prosecutor's improper suggestions and negative implications concerning the defendant. By alluding to criminal conduct that was not charged, a violent history, and a suspicious past, the prosecutor may have caused the jury to convict Jimenez for who he was and not what he allegedly did. Jimenez was prejudiced by the prosecutor's misconduct. The trial court erred in failing to order a new trial.

C. ALTHOUGH THE TRIAL COURT SUSTAINED THE OBJECTIONS TO THE PROSECUTORIAL MISCONDUCT, THE JURY WAS ALLOWED TO CONSIDER THE IMPROPER INFORMATION DURING DELIBERATIONS. THAT IS, IN SOME INSTANCES, THE RULINGS WERE MADE OUTSIDE THE PRESENCE OF THE JURY. ALSO, THE TRIAL JUDGE FAILED TO TAKE CORRECTIVE MEASURES IN THE FACE OF THE IMPROPER CONDUCT.

Although the trial court sustained the defense's objections to the four occasions of prosecutorial misconduct during cross-examination, the judge in two instances did not sustain the objections in front of the jury. In addition, the trial judge made no attempt to cure the damage caused by the misconduct. Thus, the jurors were not instructed to disregard the statements, and they were not informed that they may not draw any negative inference about Jimenez from the statements and suggestions.<sup>2</sup>

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<sup>2</sup> At the close of trial, jurors were generally instructed that they should "not consider as evidence any statement of counsel made during the trial." (R. 250.) That instruction may be relevant where counsel has made an assertion of fact that is not supported by the evidence. Such an instruction may not be sufficient to cure the misconduct here.

In this case, the prosecutor asked questions in such a way as to cause the jury to make an improper presumption or to draw an improper inference.

Stated another way, while the prosecutor may attack a witness's credibility with evidence of prior crimes, etc., such evidence, even if admissible, may not be used for substantive purposes. Even if the state had presented evidence of prior bad acts, the jury would only be allowed to consider the evidence for impeachment purposes.

In this case, a proper curative instruction would have advised the jury to disregard the statements in their entirety and to refrain from drawing any adverse presumptions from the statements. The jury was not instructed in that fashion in connection with the improper statements. Indeed, because the jury was not advised that the objections were sustained or the statements were improper, the jury was not aware that it was prohibited from drawing any adverse inferences from the remarks.

Also, the prosecutor added insult to injury when he made reference to his improper statements during closing argument. Specifically, during surrebuttal, the prosecutor stated, "We talked about [Jimenez] going into something with a concealed firearm because of his propensity to obey or not to obey the law." (R. 345:694.) The prosecutor was referring to the improper statement he made during Monica's cross-examination: "Did you know that the concealed weapon under that circumstance would be a crime in and of itself?" (R. 344:444.) Reference to the improper statement was one of the last statements the prosecutor made to the jury before deliberations, thereby ensuring the prejudicial effect of his misconduct.

The prosecutorial misconduct was not properly cured in this case. In some instances the jury was never informed that it could not consider the improper statements and innuendoes. For the reasons set forth herein, Jimenez respectfully requests that this Court reverse the matter and remand the case for further proceedings.

**POINT II. THE PROSECUTOR ENGAGED IN MISCONDUCT DURING CLOSING ARGUMENT WHEN HE COMPARED JIMENEZ'S APPEARANCE AT TRIAL IN A SUIT, WITH RIOS'S APPEARANCE AT TRIAL IN PRISON CLOTHES AND SHACKLES.**

**A. THE PROSECUTOR MADE IMPROPER REMARKS DURING CLOSING ARGUMENT.**

As set forth above (Point I, supra), the Utah Supreme Court has established a two prong test for reversals for improper statements of counsel. The test considers whether the remarks of counsel "call to the attention of the jurors matters which they would not

be justified in considering in determining their verdict,” and whether the jurors were “probably influenced by those remarks.” State v. Valdez, 513 P.2d 422, 426 (Utah 1973); accord State v. Emmett, 839 P.2d 781, 785 (Utah 1992); Troy, 688 P.2d at 486; State v. Palmer, 860 P.2d 339, 342 (Utah App. 1993).

In this case, during closing argument, the prosecutor called improper matters to the attention of jurors. Specifically, the prosecutor unfairly commented on Jimenez’s character and sought to place his credibility in issue by comparing him to Rios. Rios was a state witness, who attended trial in prison clothes and shackles. (R. 343:226.) Rios admitted at trial that he was imprisoned on four counts of aggravated assault and attempted aggravated burglary. (R. 343:226.) He also committed manslaughter. (R. 343:226.)

During closing argument the prosecutor argued that Rios was honest in who he was, as reflected in the fact that he wore prison clothes and shackles. The prosecutor also argued that if the jury were to compare Jimenez to Rios, the same could not be said of Jimenez: Jimenez attended trial in a suit and tie, and he had a haircut and glasses. According to the prosecutor, the jury should not trust what Jimenez said because his appearance was a lie. Specifically, the prosecutor stated the following:

Also I ask you this, in terms of the defendant and his credibility as to the events, you have had a chance to see not only the defendant in this courtroom today and this week with how he presents himself, with how he packages himself in appearance and dress and haircut and glasses and demeanor, in temper or lack thereof, you have seen him in every one of those aspects on October 20th, 1996. Is

this an honest packaging?

Manny Rios was here in chains. Manny Rios should be in chains. But Manny Rios isn't anything except what Manny Rios is. But you have – and I recall – I want you to recall Mr. Shapiro's opening statement, and he was talking about the newly – the couple, not newly married couple, but the couple, they had gotten their child a baby-sitter and they were able to go out for this date. Just your average couple. And on the other hand we had the drunken rowdy trouble making boxers cruising for trouble. Is either one of those portrayals honest now that you know the situation? Or is it part of the packaging?

(R. 345:659-60.) The prosecutor's remarks necessarily commented unfairly on Jimenez's character and they interfered with his right to the presumption of innocence. The remarks were improper; they called attention to matters that should not have been considered by jurors in reaching their verdict. The defense objected and moved for a mistrial. The trial court acknowledged a timely objection, but ruled that a mistrial was not warranted. (R. 345:667, 701, 708-09.)

This Court has recognized that a defendant has the right to be "tried in front of a jury in the 'garb of innocence[.]'" State v. Mitchell, 824 P.2d 469, 473 (Utah App. 1991). "Numerous cases support the view that this right is an essential component of a fair and impartial trial." Id.; see also State v. Bennett, 2000 UT 25, ¶¶3-4, 387 Utah Adv. Rep. 74; Chess v. Smith, 617 P.2d 341, 344 (Utah 1980). "The prejudicial effect that flows from a defendant's appearing before a jury in identifiable prison garb is not measurable, and it is so potentially prejudicial as to create a substantial risk of fundamental unfairness in a criminal trial." Chess, 617 P.2d at 344. Thus, attending trial in the "garb of innocence" comports with fundamental fairness and the basic presumption of innocence.

A prosecutor's comment on such a matter, as though the defense were attempting to present a deceptive image of the defendant, should be considered as offensive as a prosecutor's comments on a defendant's right to remain silent while in police custody, see Doyle v. Ohio, 426 U.S. 610 (1976) (a prosecutor may not refer to defendant's post-Miranda silence to suggest guilt), or a prosecutor's comments that defendant failed to take the witness stand to assert his innocence. Inasmuch as the defendant is cloaked with certain fundamental rights to ensure a fair trial, it is improper for the prosecutor to discredit a defendant and to criticize his character in front of the jury because he has exercised those rights. Indeed, such remarks on the part of the prosecutor generally have been construed to interfere with a defendant's right to a fair trial. See State v. Byrd, 937 P.2d 532 (Utah App. 1997). The prosecutor's comments in this case were improper and violated Jimenez's right to a fair trial.

**B. A REASONABLE LIKELIHOOD EXISTS THAT IN THE ABSENCE OF THE PROSECUTOR'S IMPROPER COMMENTS, THE JURY WOULD HAVE RETURNED A VERDICT MORE FAVORABLE TO THE DEFENDANT.**

Under the circumstances of this case, the jury was probably influenced by the improper statements. Specifically, the comments were made during closing argument and immediately prior to jury deliberations. They undoubtedly left an impression on the jurors during deliberations.

Also, when the defense objected to the comment, the trial court did not provide a curative instruction to alleviate possible prejudice. Rather, sometime later during



Lemcke's surrebuttal remarks, the judge reminded the jury that "nothing the attorneys say is evidence." (R. 345:689; see also R. 250 (jury was generally instructed in that same respect).)

That curative instruction was not adequate where the prosecutor sought to discredit Jimenez's character based on the fact that Jimenez exercised a fundamental right. The trial court should have instructed the jury to disregard the remarks and to refrain from drawing any adverse inference or presumption from them. The court failed to instruct the jury in that respect. Thus, the instructions here were insufficient to overcome the prejudicial effect of the improper comment. See Kohl, 2000 UT 35, ¶24 (where prosecutor alluded to facts not in evidence, instructions to jury overcame prejudicial effect).

The prosecutor compared Jimenez's appearance to Rios's specifically to impeach Jimenez's exculpatory version of the events. It directly linked the credibility of Jimenez's defense to the appearance he was entitled to present at trial. Moreover, as set forth above, the evidence against Jimenez was not so overwhelming. Jimenez presented evidence to support self-defense, including testimony to support the determination that officers failed to investigate the scene to determine if Miera, Montoya and Rios were armed to justify Jimenez's use of deadly force.

Here, the jurors were weighing Rios's version of the events against the evidence presented by the defense. The evidence was susceptible of differing interpretations and/or it created credibility issues. Thus, there was a greater likelihood that the jurors

would be improperly influenced by the comments. The jurors may have been searching for guidance in weighing and interpreting the evidence. They may have been especially susceptible to influence, and a small degree of influence may have been sufficient to affect the verdict. Under such circumstances, the prosecutor was obligated to avoid, as far as possible, any reference to matters the jury would not be justified in considering. Troy, 688 P.2d at 486-87.

The jury obviously was not overwhelmed by the state's case as reflected in the verdict for the lesser offenses. A reasonable likelihood exists that the jury compromised the verdict and rendered a conviction on the lesser offenses because of the improper comments. Since the improper remarks undermined a fundamental right, the remarks compel the entry of an order reversing the judgment.

**POINT III. THE ERRORS IN THIS CASE COMPEL REVERSAL UNDER THE CUMULATIVE-ERROR DOCTRINE.**


In the event the individual errors in this case may be harmless, the cumulative effect of the errors requires reversal. Whitehead v. American Motors Sales Corp., 801 P.2d 920, 928 (Utah 1990); see also Dunn, 850 P.2d at 1229. Here, Jimenez was effectively denied a fair trial where the prosecutor interjected improper statements during cross-examination of defense witnesses, and he engaged in misconduct by attacking a fundamental right in closing argument to discredit the defendant's case. The prosecutor was aware of weaknesses in his case, and dealt with them by circumventing pretrial

rulings, the rules of evidence, and Jimenez's constitutional right to a fair trial. Such a cynical strategy should not be allowed. The errors alone and together should undermine this Court's confidence that "a fair trial was had." State v. Finlayson, 956 P.2d 283, 295 (Utah App. 1998) (quoting State v. Alonzo, 932 P.2d 606, 617 (Utah App. 1997)), aff'd, 2000 UT 10, 994 P.2d 1243.

### **CONCLUSION**

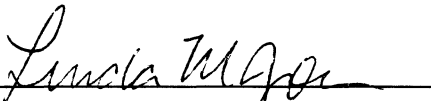
For the reasons set forth herein, Jimenez respectfully requests that this Court reverse the conviction in this case, and remand the matter for further proceedings as this Court may deem appropriate.

SUBMITTED this 31<sup>st</sup> day of July, 2000.

  
LINDA M. JONES  
DAVID FINLAYSON  
Counsel for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 31<sup>st</sup> day of July, 2000.

  
LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals Court as indicated above this \_\_\_ day of \_\_\_\_\_, 2000.

\_\_\_\_\_

## ADDENDA

## ADDENDUM A

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

Count I

THE STATE OF UTAH

JUDGMENT, SENTENCE  
(COMMITMENT)

Plaintiff,

vs.

Jose Mario Jimenez

Defendant.

DOB 5/1/70

Case No. 961022250

Count No. \_\_\_\_\_

Honorable Robert W. Reese

Clerk Marlene

Reporter \_\_\_\_\_

Bailiff \_\_\_\_\_

Date 11/29/99

☐ The motion of \_\_\_\_\_ to enter a judgement of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury; ☐ the court, ☐ plea of guilty; ☐ plea of no contest; of the offense of Manslaughter Firearm Enhancement, a felony of the 2 degree, ☐ a class \_\_\_\_\_ misdemeanor, being now present in court and ready for sentence and represented by David [unclear] and the State being represented by Gowen [unclear] is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a indeterminate term not to exceed one year. ☐ at defendant's election.

☐ to a maximum mandatory term of \_\_\_\_\_ years and which may be life;

☐ not to exceed five years;

☒ of not less than one year nor more than fifteen years;

☐ of not less than five years and which may be for life;

☐ not to exceed \_\_\_\_\_ years;

☐ and ordered to pay a fine in the amount of \$ \_\_\_\_\_;

☒ and ordered to pay restitution in the amount of Determine through Board of Pardons

☒ such sentence is to run concurrently with \_\_\_\_\_

☒ such sentence is to run consecutively with Counts II & III

☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Court(s) \_\_\_\_\_ are hereby dismissed.

☐ Defendant is granted a stay of above (☐ prison) sentence and placed on probation in the custody of

this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the

period of \_\_\_\_\_, pursuant to the attached conditions of probation.

☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the

Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be

confined and imprisoned in accordance with this judgment and commitment.

☒ Commitment shall issue

DATED this 29 day of Dec, 19 99

APPROVED AS TO FORM:

Defense Counsel

Deputy County Attorney

DISTRICT COURT JUDGE

Page \_\_\_\_\_ of \_\_\_\_\_

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

THE STATE OF UTAH

Count II

JUDGMENT, SENTENCE  
(COMMITMENT)

Plaintiff,  
vs. Jorge Mario Jimenez

Defendant.  
DOB 5/1/70

Case No. 961022250  
Count No. \_\_\_\_\_  
Honorable Calvin W. Reese  
Clerk Maureen  
Reporter \_\_\_\_\_  
Bailiff \_\_\_\_\_  
Date 11/29/99

☐ The motion of \_\_\_\_\_ to enter a judgement of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury; ☐ the court, ☐ plea of guilty; ☐ plea of no contest; of the offense of 1st Degree Murder / Firearm Enhancement, a felony of the 3 degree, ☐ a class \_\_\_\_\_ misdemeanor, being now present in court and ready for sentence and represented by David and the State being represented by Howard, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- ☐ to a indeterminate term not to exceed one year. ☐ at defendant's election.  
☐ to a maximum mandatory term of \_\_\_\_\_ years and which may be life;  
☒ not to exceed five years;  
☐ of not less than one year nor more than fifteen years;  
☐ of not less than five years and which may be for life;  
☐ not to exceed \_\_\_\_\_ years;  
☐ and ordered to pay a fine in the amount of \$ \_\_\_\_\_;  
☒ and ordered to pay restitution in the amount of \$ to be determined through Board of Parole  
☒ Firearm Enhancement to run concurrently with  
☒ such sentence is to run concurrently with Count III  
☐ such sentence is to run consecutively with \_\_\_\_\_  
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Court(s) \_\_\_\_\_ are hereby dismissed.

☐ Defendant is granted a stay of above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of \_\_\_\_\_, pursuant to the attached conditions of probation.

☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this judgment and commitment.

☒ Commitment shall issue

☒ Credit for time served from 10/17/98

DATED this 29 day of Nov, 19 99

APPROVED AS TO FORM:

Defense Counsel

Deputy County Attorney

DISTRICT COURT JUDGE

Page \_\_\_\_\_ of \_\_\_\_\_



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

THE STATE OF UTAH

Plaintiff,

vs.

Jose Mario Jimenez

Defendant.

DOB 5/1/70

Count #

JUDGMENT, SENTENCE  
(COMMITMENT)

Case No. 961022250

Count No. \_\_\_\_\_

Honorable Robert W. Reese

Clerk Marlene

Reporter \_\_\_\_\_

Bailiff \_\_\_\_\_

Date 11/29/99

☐ The motion of \_\_\_\_\_ to enter a judgement of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury; ☐ the court, ☐ plea of guilty; ☐ plea of no contest; of the offense of 1st Manslaughter / Firearm Enhancement, a felony of the 3 degree, ☐ a class \_\_\_\_\_ misdemeanor, being now present in court and ready for sentence and represented by Jimenez, and the State being represented by Jimenez, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a indeterminate term not to exceed one year. ☐ at defendant's election.

☒ to a maximum mandatory term of \_\_\_\_\_ years and which may be life;

☒ not to exceed five years;

☐ of not less than one year nor more than fifteen years;

☐ of not less than five years and which may be for life;

☐ not to exceed \_\_\_\_\_ years;

☒ and ordered to pay a fine in the amount of \$ \_\_\_\_\_;

☒ and ordered to pay restitution in the amount of \$ \_\_\_\_\_;

☒ Firearm Enhancement is to run consecutively in addition to

☒ such sentence is to run concurrently with Count II

☐ such sentence is to run consecutively with \_\_\_\_\_

☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Court(s) \_\_\_\_\_ are hereby dismissed.

☐ Defendant is granted a stay of above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of \_\_\_\_\_, pursuant to the attached conditions of probation.

☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this judgment and commitment.

☒ Commitment shall issue

☒ Credit for time served from 10/12/98

DATED this 29 day of Nov, 1999

APPROVED AS TO FORM:

Defense Counsel

Deputy County Attorney

DISTRICT COURT JUDGE

Page \_\_\_\_\_ of \_\_\_\_\_

(White-Court) (Green-Judge) (Yellow-Jail/Prison/AP&P) (Pink-Defense) (Goldenrod-State)

00314

## ADDENDUM B

## UTAH RULES OF CRIMINAL PROCEDURE

### **Rule 24. Motion for new trial.**

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

(b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.

(c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period.

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument.