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# Charles Alvin Kennedy v. Lawrence Morris, Warden, Utah State Prison : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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| CHARLES ALVIN KENNEDY, | : | |
| Plaintiff-Appellant, | : | |
| -v- | : | Case No. [illegible] |
| LAWRENCE MORRIS, Warden, Utah State Prison, | : | |
| Defendant-Respondent. | : | |

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BRIEF OF RESPONDENT

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Appeal from a judgment [illegible]

habeas corpus by the Third Judicial [illegible]

County, State of Utah, on the [illegible]

the Honorable Christine M. Durham [illegible]

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IN THE SUPREME COURT OF THE

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| CHARLES ALVIN KENNEDY, | : | |
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| LAWRENCE MORRIS, Warden, Utah State Prison, | : | |
| Defendant-Respondent. | : | |

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BRIEF OF RESPONDENT

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Appeal from a judgment denying petition for writ of habeas corpus by the Third Judicial District Court, Salt Lake County, State of Utah, on the 11th day of February, 1981, by the Honorable Christine M. Durham, Judge, presiding.

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IN THE SUPREME COURT OF THE

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| CHARLES ALVIN KENNEDY, | : | |
| Plaintiff-Appellant, | : | |
| -v- | : | Case No. 17617 |
| LAWRENCE MORRIS, Warden, Utah State Prison | : | |
| Defendant-Respondent. | : | |

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BRIEF OF RESPONDENT

---

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from the denial of his petition for a writ of habeas corpus, brought in the Third Judicial District Court, in and for Salt Lake County, the Honorable Christine M. Durham, presiding. Appellant sought post-conviction relief from the judgment and sentence imposed upon him after being convicted of forcible sexual abuse.

DISPOSITION IN THE LOWER COURT

On February 11, 1981, the district court, after considering the oral arguments and written memoranda submitted by the respective parties, and after considering the transcript of the trial, denied appellant's petition for a

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writ of habeas corpus. The court founded its decision on the ground that appellant was not denied his right to the effective assistance of counsel and that appellant did not meet his burden of showing that his waiver of trial by jury was involuntary or unknowing (R. 34, 35).

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the decision of the district court denying appellant's petition for a writ of habeas corpus.

## STATEMENT OF THE FACTS

Appellant is incarcerated at the Utah State Prison, serving two concurrent sentences of zero to five years for conviction of two counts of forcible sexual abuse, imposed by the Honorable Allen B. Sorenson, Judge presiding in the Fifth Judicial District Court, Juab County. The charge was based on petitioner's causing other persons to take indecent liberties with petitioner's wife with the intent to arouse the petitioner's sexual desires.

Appellant appealed his conviction to this Court, which affirmed the judgment of the district court in *State v. Kennedy*, Utah, 616 P.2d 588 (1980).



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In his petition for a writ of habeas corpus, appellant alleged that he did not knowingly and voluntarily waive his right to be tried by a jury, and that he was denied his right to effective assistance of counsel at trial (R. 2-4). In the instant appeal, appellant alleges only that he did not knowingly and voluntarily waive his right to trial by jury.

Greg Warner, of the Utah County Legal Defender's Office, was appointed to represent appellant in connection with the charge of forcible sexual abuse (T. 4). On September 13, 1979, a preliminary hearing was held, resulting in appellant's being bound over to stand trial in the Fourth Judicial District Court for Juab County. Mr. Warner filed several pre-trial motions in the matter, including a Motion to Quash or Dismiss and a Motion to Sever (T. 10, 11). Mr. Warner met personally with appellant to discuss the motions and trial strategy on five separate occasions (T. 6, 7, 23). Additionally, Mr. Warner contacted appellant by telephone numerous times.

After conducting an investigation of the case, Mr. Warner formulated a basic plan as to how he would proceed at trial. He explained to appellant that appellant did not have to testify, that he had a right to a jury trial, and that there were two charges against appellant. Additionally, Mr.



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Warner felt it would be better to have the matter tried before a judge rather than before a jury and explained to appellant that this was a decision that appellant did not have to make at that time (T.8-10). Mr. Warner, in his initial explanation to appellant of his right to a jury trial, told appellant that he had a right to a jury trial, and that in order for that right to be waived, appellant would have to decide to waive it and then waive the right on the record at trial (T. 14).

Prior to the filing of the Motion to Sever in November, 1979, Mr. Warner suggested to appellant that he waive a jury trial, though he was uncertain whether appellant would do so. Appellant told Mr. Warner to go ahead and make the choice whether to waive the jury, but Mr. Warner responded that the choice was not his to make and that appellant would have to agree to the waiver of a jury trial on the record. Mr. Warner had already told appellant that the role of the jury was that of a fact finder, that the jury had to be unanimous in its decision to convict him of the charges, and that the jury must be convinced beyond a reasonable doubt as to his guilt. Appellant told Mr. Warner to use his (Warner's) best discretion in the matter of the waiver of the jury trial (T. 11, 12, 14, 15).

On November 21, 1979, Mr. Warner appeared before the Honorable Allen B. Sorenson, Judge of the Fourth Judicial



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District, on the Motion to Sever. Appellant was not present. Mr. Warner indicated that appellant was willing to waive a jury trial. Judge Sorenson indicated that appellant would have to make such waiver on the record (T. 12, 13).

On November 24, 1979, Mr. Warner had a lengthy discussion with appellant at the Juab County Jail. During this discussion, Mr. Warner indicated that a tentative decision had been reached to have a bench trial. Mr. Warner also indicated that if appellant wished to change his mind, Mr. Warner would call Judge Sorenson, have a jury trial set, and litigate the Motion to Sever (T. 16). Mr. Warner did not say to appellant, as alleged by appellant, that he (Warner) had waived the jury and that appellant had no chance of having a jury trial (T. 53).

While appellant testified at the habeas corpus hearing in the lower court that he had had no discussions with Mr. Warner regarding either his right to a jury trial or waiver of that right before the Motion to Sever was heard on November 21, 1979, Mr. Warner testified that he did indeed discuss with appellant the waiver of a jury trial before November 21, 1979, as evidenced by the following colloquy at the hearing between himself and State's counsel:

> Q: You heard Mr. Kennedy testify that he never discussed waiving the jury with you before



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that November 21st hearing. Do you still deny that is the case?

A: Yes, I certainly do. It would be totally ridiculous for me to go down the day of trial and say we are going to waive the jury and then, you know, have a defendant not go along with it.

Mr. Kennedy is a very forceful person. If that is what he thinks is his best interest, I certainly would not even think, aside from ethics, just the practicality, would never indicate to the court that my client was willing to do that on the record if I had not conferred regarding that with him prior to that (T. 52).

The transcript of the proceedings at appellant's trial on November 27, 1979 shows that appellant waived his right to trial by jury in open court, and that such waiver was recorded in the minutes (T. 18, 19).

In a memorandum decision on appellant's petition for a writ of habeas corpus, the lower court ruled that appellant was not denied his right to the effective assistance of counsel and that appellant did not meet his burden of showing that his waiver of trial by jury was either involuntary or unknowing (R. 34).



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## ARGUMENT

## POINT I

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE APPELLANT DID NOT MEET HIS BURDEN OF SHOWING THAT HIS WAIVER OF A JURY TRIAL WAS EITHER INVOLUNTARY OR UNKNOWING.

While it is axiomatic that the right to trial by jury in criminal cases is a fundamental constitutional right, it is also well established that an accused may waive his constitutional right to a trial by jury as long as such waiver is voluntary and intelligent. Patton v. United States, 281 U.S. 275 (1930); State v. Yeck, Utah, 566 P.2d 1248 (1977); State v. Kelsey, Utah, 532 P.2d 1001 (1975). In the seminal case of Duncan v. Louisiana, 391 U.S 145 (1966), in which the United States Supreme Court held that the right to a jury trial is a fundamental constitutional right, the Supreme Court also stated:

> We would not assert, however, that every criminal trial--or any particular trial--held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial. . . . 391 U.S. at 158.



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In the landmark case of Adams v. United States ex rel. McCann, 317 U.S. 269 (1942), the United States Supreme Court stated:

> . . . [A]n accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, . . .
> The Patton decision [281 U.S. 276 (1930)] left no room for doubt that a determination of guilt by a court after waiver of jury trial could not be set aside and a new trial ordered except upon a plain showing that such waiver was not freely and intelligently made. If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality. Simply because a result that was insistently invited, namely, a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it.

317 U.S. 269, 275 (emphasis added). See also Dranow v. United States, 325 F.2d 481 (8th Cir. 1953), cert. denied, 376 U.S. 912 (1964).

Respondent submits that appellant has not shown as a demonstrable reality that his waiver of jury trial was involuntary or unknowing. Thus, he has not sustained his burden as noted above.



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The statute concerning waiver of the right to jury trial in effect at the time of petitioner's trial was Utah Code Annotated, § 77-27-2 (1953), as amended, which provided:

> Issues of fact must be tried by a jury, but in all cases except where a sentence of death may be imposed, trial by jury may be waived by the defendant. Such waiver shall be made in open court and entered in the minutes.

In appellant's case, this statute was complied with since appellant stated on the record in open court that he waived his right to trial by jury (T. 18, 19).

Appellant argues, however, that he was "substantially and effectively denied his constitutional right to trial by jury" in that he did not make "an intelligent, knowing, and voluntary waiver" thereof (Appellant's brief at 6, 14). In attempting to substantiate his allegation, appellant contends that he was advised by his trial counsel, Gregory M. Warner, on November 24, 1979, just a few days before his trial, that Mr. Warner had waived a jury in the trial, and that Mr. Warner had not previously discussed the waiver of the jury with him. Appellant also asserts that Mr. Warner gave him no explanation of the meaning or significance of his right to a jury trial, and that he therefore had no understanding of the role of the jury and the State's burden of proof in jury cases. Finally, appellant avers that the



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trial judge failed to explain to him the full significance of his right to trial by jury at the trial itself. However, at the hearing Mr. Kennedy was unable to state what more he should have been told at or before trial concerning this right (T. 42, 45, 49).

In the lower court's decision denying appellant's petition for a writ of habeas corpus, Judge Durham determined that appellant did not meet his burden of showing that his waiver of trial by jury was involuntary or unknowing. Moreover, Judge Durham ruled that appellant was not denied his right to the effective assistance of counsel because counsel was experienced and discussed all material tactical decisions with appellant (R. 34).

In order to sustain his appeal from a denial of his petition for a writ of habeas corpus, appellant has the burden of proving the grounds on which he relies for his release by evidence which is clear and convincing. McGuffey v. Turner, 18 Utah 2d 354, 423 P.2d 166 (1967). There is a presumption that the lower court did not commit error in its ruling. Lee v. Sheriff of Clark County, Nev., 455 P.2d 623 (1969). The unsupported statements of a petitioner in a habeas corpus proceeding do not meet the requirements of proof, Corn v. Page, Okl. Cir., 428 P.2d 343 (1967), particularly because as this Court held in Maxwell v. Turner, 20 Utah 2d 163, 435 P.2d 287 (1967), recognition is given to the prerogative and the advantaged position of the trial court and his findings and judgment are given a presumption of correctness. As

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determined in Maxwell, supra, the duty of this Court in considering an appeal from a denial of a writ of habeas corpus is to survey the evidence in the light most favorable to the lower court's findings and judgment, which are not upset if there is any substantial support for them in the evidence. See also Price v. Turner, Utah, 502 P.2d 121 (1972); Velasquez v. Pratt, 21 Utah 2d 229, 443 P.2d 1020 (1968); Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968).

Evidence presented by a habeas corpus petitioner need not be taken as fact, and the trial court is not compelled to believe such evidence where there is anything about it which would reasonably justify refusal to accept it as the facts, and this includes the self-interest of the witness. Also, this Court has held that where an accused has been represented by a member of the bar in good standing, and insofar as the record discloses, the accused has been represented in a diligent and capable manner, it is fair to assume that the attorney fulfilled his duties in other respects and advised the accused concerning his rights. Johnson v. Turner, 24 Utah 2d 439, 473 P.2d 901 (1970).

In light of the foregoing standards, it is apparent that appellant has not sustained his burden of proving that he did not make an intelligent and knowing waiver of his right to jury trial. Judge Durham found that appellant was not denied



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the effective assistance of counsel, but was represented by competent, experienced counsel who discussed all tactical decisions with appellant. Appellant himself has tacitly acknowledged that he was given effective assistance of counsel by Mr. Warner because, in the instant matter, by not raising the issue of ineffective assistance of counsel on appeal, he has waived it. It is therefore fair to assume that Mr. Warner advised appellant of his right to a jury trial, particularly in light of the record in the instant case.

There is nothing in the record, save appellant's self-interested testimony, to show that Mr. Warner did not explain to appellant the meaning and significance of the right to a jury trial before Mr. Warner appeared before Judge Sorenson on the Motion to Sever on November 21, 1979. It is merely appellant's self-interested assertion that he had not discussed and approved of the waiver of a jury trial with Mr. Warner before Mr. Warner indicated to Judge Sorenson that appellant was willing to waive a jury trial. Appellant also omits stating that Mr. Warner informed him on November 24, 1979, several days before trial, that the decision to waive a jury trial was only tentative, and that if appellant wished to change his mind, Mr. Warner would call Judge Sorenson and have a jury trial set.



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It is well settled in criminal law that the credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts. Cowdill v. State, Okl. Cir. 532 P.2d 63 (1975); Hall v. State, Nev., 513 P.2d 1244 (1975). Additionally, in the instant matter, the findings and judgment of the trial court are presumed correct, particularly because evidence presented by a habeas corpus petitioner does not need to be taken as fact where such evidence is inherently self-interested, and where, as in the instant matter, there is substantial support for Judge Durham's decision in the evidence adduced at the hearing. Appellant has not met his burden of proving that his waiver of a jury trial was involuntary or unknowing; and, in light of the substantial evidence on the record supporting Judge Durham's decision denying appellant's petition (see Respondent's Statement of Facts above), this Court must sustain that decision.

## POINT II

IT IS NOT REQUIRED THAT THE TRIAL JUDGE MAKE INQUIRY ON THE RECORD OF AN ACCUSED'S KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO A JURY TRIAL OR THAT THE TRIAL COURT HAVE A WRITTEN WAIVER OF THAT RIGHT.



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Appellant suggests that it was necessary for the trial judge to advise him of the full significance of his right to a jury trial or have a written waiver from appellant of the right to a jury trial. In her memorandum decision denying appellant's petition for a writ of habeas corpus, Judge Durham rejected this contention:

> Defendant contends that the Court should have orally advised him about the significance of his right to a jury trial and should have required him to execute a written waiver after responding to questions about his understanding of the right and the waiver. Although such procedures are clearly desirable and useful, they do not appear to be constitutionally required. . . .
> In this case defendant was specifically questioned as to his desire to waive the jury; he had an opportunity to tell the court directly if he objected to the waiver or was uncertain about any part of it. He personally assented to the waiver, and has not shown by a preponderance of the evidence that the waiver was unknowing or involuntary. It is significant in that regard that he raised no point vis a vis the jury trial waiver in the appeal of his conviction undertaken after trial (R. 34, 35).

This Court, in several cases, has held that there was a valid waiver by a defendant of the right to a jury trial even where the defendant himself did not state that he waived the right. In State v. Lopez, 22 Utah 2d 257, 451 P.2d 772 (1969), this Court found that it was enough that counsel



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request that the case be tried without a jury, if that request was made in open court with the defendant standing by counsel's side, stating:

> This meets requirement of § 77-27-2, U.C.A., 1953, which provides that the waiver of a jury must "be made in open court and entered in the minuted," and the record indicates with sufficient clarity that the right was waived . . . The matter of trial tactics is not the concern of the court, but of the defendant and his counsel.

451 P.2d 772, 776. See also Barlow v. Young, 108 Utah 523, 161 P.2d 927 (1945).

Appellant contends that the federal rules, case law, and the new Utah Rules of Criminal Procedure require that the trial court must make inquiry to ascertain whether waiver by the accused is knowing, intelligent, and voluntary. Such a procedure, however, as Judge Durham determined, is not constitutionally required.

Utah Code Annotated, § 77-35-17(c) (1981 Supp.) deals with waiver by an accused of a jury trial and provides that:

> All felony cases shall be tried by a jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

The statute does not require that the trial court make inquiry to determine whether the defendant's waiver is knowing, intelligent, and voluntary.



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Even under the more restrictive Federal Rules of Criminal Procedure, which require that the defendant sign a written waiver of the right to a jury trial (Rule 23), it has often been held that it is not necessary for the judge to interrogate the defendant in order to obtain a valid waiver. Estrada v. United States, 957 F.2d 255 (7th Cir. 1972).

The United States Supreme Court, in Patton v. United States, 281 U.S. 276 (1930), determined that a trial court has the power to try a criminal case without a jury where the accused waives a jury trial; and that the waiver of a jury is effective where there is the sanction of the court, the consent of the government counsel, and the express and intelligent consent of the defendant. The Supreme Court, in Patton, established no requirement that the judge make inquiry to determine that the accused's waiver of jury trial is knowing, intelligent, and voluntary.

In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court reversed and remanded to the district court a petition for a writ of habeas corpus. The district court, in denying the petition, believed that the petitioner was deprived in the trial court of his constitutional right to counsel; but nevertheless held that the proceedings depriving the petitioner of his right to counsel were insufficient to make the trial void and justify its annulment in a habeas



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corpus proceeding. The district court determined that such proceedings constituted trial errors or irregularities which could only be corrected on appeal. In its decision, the Supreme Court determined that a habeas corpus petitioner bears a heavy burden of proof to convince the court hearing his petition that he did not properly waive such a fundamental constitutional right:

> It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not completely and intelligently waive his constitutional right to assistance of counsel. . . . If petitioner fails to sustain this burden, he is not entitled to the writ (304 U.S. at 468, 469).

As noted in Point I above, appellant, having failed to meet his heavy burden of proof, may not now allege that the trial court erred in not making inquiry to determine whether his waiver of jury trial was knowing, intelligent, and voluntary. Nor may appellant rely on his inherently self-interested testimony on this appeal to establish that his understanding of the role of the jury was limited and that therefore his waiver of jury trial was somewhat less than



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knowing, intelligent, and voluntary, particularly where substantial, credible evidence was adduced showing that appellant did indeed knowingly and intelligently waive a jury trial.

The cases relied on by appellant do not, as he alleges, require either a writing to waive the accused's right to a jury trial or an inquiry of the accused by the trial judge to determine that the waiver by the accused is knowing and intelligent.

In State v. Christean, Utah, 533 P.2d 872 (1975), the defendant contended that he did not knowingly waive his right to a jury trial because, having been charged with a capital offense and thereby being entitled to a twelve-man jury, he was erroneously asked by the trial court whether he understood that he would have to be found guilty by the unanimous verdict of eight jurors. This Court held that since the defendant had been thoroughly examined by defense counsel as to whether he (defendant) understood the consequences of waiving a trial by jury and had waived this right prior to the erroneous question by the trial court, he could not allege that his waiver was unknowing. In Christean, there was no mention by this Court that the trial court is required to independently inquire into a defendant's knowing and intelligent waiver of a jury trial.



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In Hayes v. State, Okl. Cir., 541 P.2d 210 (1975), the court discussed how one accused of a crime may effectuate a valid waiver of trial by jury, suggesting that the better practice is for the accused to waive trial by jury personally and in open court either orally or in writing, and at that time for the trial judge to make inquiry of the accused to assure in the judge's mind that the waiver is expressly and intelligently made. The court, however, did not require such an inquiry by the trial judge, and suggested that an accused's right to trial by jury may also be waived either when he and his counsel are present in open court and the accused stands by and allows counsel to waive jury trial in his behalf, or when counsel for an accused, outside the accused's presence, waives the accused's right to trial by jury, unless the accused presents evidence to show that he did not ratify the waiver in any manner.

Appellant's attempt to rely on the federal cases of McCarthy v. United States, 394 U.S. 549 (1969), and Heiden v. United States, 353 F.2d 53 (9th Cir. 1965) is also misplaced. These cases deal with Rule 11 of the Federal Rules of Criminal Procedure, which requires specifically that the court may not accept a guilty plea or a plea of nolo contendere without addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of



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the charge and the consequences of the plea. There is no requirement that a trial judge, in allowing a defendant to waive his right to a jury trial, inquire on the record as to the knowing and intelligent nature of the waiver. In addition, respondent submits that there was much evidence adduced at the hearing on appellant's petition to show that appellant did indeed knowingly and voluntarily waive his right to a jury trial.

There is no constitutional mandate that an accused execute a written waiver of his right to trial by jury or that the trial court make inquiry on the record of an accused regarding his knowing and intelligent waiver of a jury trial. Appellant therefore may not validly contend, as he attempts to do in his Point V, that the transcript and record of his habeas corpus hearing do not establish that his waiver of jury trial was not knowing and voluntary. Appellant stated on the record that he waived his right to a jury trial, and there was reasonable adherence to the federal mandates regarding waiver of the right to a jury trial in the trial and subsequent hearing on appellant's petition.

## CONCLUSION

Appellant has not met his burden of showing that his waiver of trial by jury was involuntary or unknowing.



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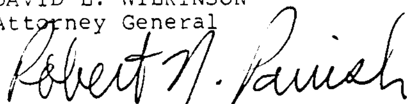
surveying the record in the light most favorable to the findings and judgment of the lower court, there is substantial evidence to support the judgment. Appellant has not, simply through his self-interested testimony and assertions, shown that he is entitled to a reversal of the judgment. There is no constitutional requirement that the appellant's waiver of trial by jury be written or that the trial court make inquiry on the record as to his knowing and intelligent waiver thereof. In light of the foregoing facts, case law, and statutes, respondent prays that this Court affirm the decision of the lower court.

DATED this 28th day of October, 1981.

Respectfully submitted,

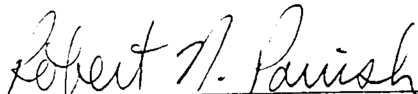
DAVID L. WILKINSON
Attorney General



ROBERT N. PARRISH
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Douglas E. Wahlquist, Attorney for Appellant, 100 Commercial Club Building, 32 Exchange Place, Salt Lake City, Utah, 84111, this 28th day of October, 1981.





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