1972

# Benny Salazar v. John v. Turner, Warden, Utah State Prison : Brief of Respondent

IN THE

# SUPREME COURT

OF THE

# STATE OF UTAH

BENNY SALAZAR,

*Plaintiff-Appellant,*

vs.

JOHN W. TURNER, Warden, Utah State Prison,

*Defendant-Respondent.*

BRIEF OF RESPONDENT

APPEAL FROM THE DENIAL OF PLAINTIFF-APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BY THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOSEPH G. JEPPSON, JUDGE, PRESIDING.


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CASES CITED

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*Defendant-Respondent.*

Case No. 12803

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE NATURE OF THE CASE

In 1966, appellant pled guilty to second degree burglary. No appeal having been made, appellant was granted a hearing on the petition for a writ of habeas corpus on January 6, 1972.

### DISPOSITION IN THE LOWER COURT

The lower court heard evidence to determine whether appellant demonstrated need for an interpreter and found that appellant did not sustain his burden of proof.

### RELIEF SOUGHT ON APPEAL

Respondent prays that the finding of the lower court be affirmed.

## STATEMENT OF FACTS

On August 31, 1966, at arraignment, appellant was represented by Mr. George Miller. Appellant pled guilty to the crime of burglary in the second degree (see Exhibit 1). At the habeas corpus hearing on January 6, 1972, appellant attempted to show ineffective representation by counsel because of the failure of his counsel to obtain an interpreter for appellant.

During the hearing, appellant responded in English to all questions he was asked. He replied intelligently to complex questions (Transcript of habeas corpus proceeding, page 10, hereinafter referred to as "T"). He even asked questions to clarify the questions presented to him (T. 12).

Mr. Miller was a well-qualified attorney (T. 16, 17). Since neither appellant (T. 14) nor his counsel (T. 17) remembered much of what went on in 1966, Mr. Miller testified that it was his general practice when a client was pleading guilty to make sure his client understood what he was doing, and that his plea was voluntarily and knowingly entered (T. 20). Mr. Miller testified that he could not remember having any client who could not understand him (T. 19).

## ARGUMENT

### POINT I.

### APPELLANT WAS EFFECTIVELY AIDED BY COUNSEL, EVEN THOUGH HIS COUN-

SEL DID NOT OBTAIN AN INTERPRETER FOR HIM, BECAUSE APPELLANT DID NOT NEED AN INTERPRETER.

Appellant states in his brief on page 3 that the "only issues to be resolved" are (1) whether appellant sufficiently demonstrated at his habeas corpus hearing that he needed an interpreter and (2) whether appellant was ineffectively aided by counsel for his failure to obtain an interpreter.

The record shows that appellant had no need for an interpreter. Appellant responded intelligently to complex questions such as (T. 10):

> "MR. SALAZAR, you allege in your petition for a writ of habeas corpus that the reason for your incarceration in the penitentiary at this time is because of a charge and a conviction in burglary in the second degree, is that correct?"

Appellant understandingly responded in English to this and all questions presented to him. He even asked questions to clarify the questions presented to him so that he could better respond (T. 12). The court in *State* v. *Masato Karumai*, 101 Utah 592, 126 P. 2d 1047, 1050 (1942), commented, "A person may understand much more than he speaks." Since appellant responded so well to questions and since his English was no better at the habeas corpus hearing than six years prior when he pled guilty (T. 8), appellant had no need of an interpreter when he pled guilty.

Appellant was not denied effective counsel because of counsel's failure to obtain an interpreter even if appellant could have better understood the court proceedings with the aid of an interpreter. The standard for competent counsel is set forth in *Alires* v. *Turner*, 22 Utah 2d 118, 449 P. 2d 241, 243 (1969), where Justice Crockett said:

> "The requirement is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused. The entitlement is to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the defendant and present such defenses as are available to him under the law and consistent with the ethics of the profession."

The record shows that Mr. Miller was a qualified member of the Bar (T. 16, 17). Although neither appellant (T. 14) nor Mr. Miller (T. 17) remember much of what went on six years prior to the habeas corpus proceeding when appellant pled guilty, Mr. Miller testified as to his general practice when dealing with guilty pleas (T. 20):

> "Q. Was it your practice, Mr. Miller, with one of your clients entering a guilty plea, to make certain he understood what he was doing?
>
> A. Yes.
>
> Q. And was it your practice to make certain that he did it voluntarily?
>
> A. Yes.

Q. And knowingly?

A. Yes."

Mr. Miller could not remember having any clients who could not understand him (T. 19). Certainly these facts do not manifest "a sham or pretense of an appearance." Appellant has the burden of showing ineffective assistance of counsel, which burden has not been met.

Judge Lewis, writing for the majority in *Cervantes* v. *Cox*, 350 F. 2d 855 (10th Cir. 1965), held:

> "There is no constitutional right, as such, requiring the assistance of a court-appointed interpreter to supplement the right to counsel. Nor is there a duty to an accused to furnish counsel who can communicate freely with the accused in his native tongue." *Id.*

Although there is no constitutional right to an interpreter, the determination whether a court-appointed interpreter should be used is a matter within the sound discretion of the trial court judge. *United States* v. *Rodriquez*, 424 F. 2d 205 (4th Cir. 1970). Trial court discretion turns upon the fact of whether the defendant is able to understand English. For example, in *State* v. *Kabinto*, 480 P. 2d 1 (Ari z. 1971), failure to grant a Navajo Indian an interpreter was not error where it appeared that the defendant was able to understand English and answer the questions put to him. In the present case, the trial court judge found as did the court in the habeas corpus hearing that appellant could communicate and understand well enough not to need an interpreter.

Even if it were error not to provide an interpreter, appellant alleges no prejudice thereby. It was held in *State* v. *Masato Karumai, supra*:

> "Even though the court erred in not furnishing an interpreter, the case will not be reversed unless it is shown that the defendant was prejudiced thereby in his defense." 126 P. 2d 1050.

Since appellant makes no allegation as to the validity of his guilty plea, the lower court's decision should not be overturned.

Appellant cites the cases of *Parra* v. *Page*, 430 P. 2d 834 (Okl. Cr. 1967) and *United States* v. *Negron*, 310 F. Supp. 1304 (E. D. N. Y. 1970) to support his position. However, these two cases can readily be distinguished from the present case because in both cases the defendant could neither speak nor understand English; in the present case appellant could both speak and understand English.

## CONCLUSION

Appellant both understood and spoke English. He did not need an interpreter. Therefore, appellant was effectively aided by counsel even though his counsel did not obtain an interpreter for appellant. The decision of the lower court should be affirmed.

Respectfully submitted,

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