

2007

# Joseph Chavez v. State of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOSEPH CHAVEZ  
Petitioner/Appellant

Case # 20070133-CA

v.

STATE OF UTAH  
Respondent/Appellee

---

REPLY BRIEF OF APPELLANT

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Appeal from a denial to return evidence after conviction, in the <sup>2nd</sup> ~~1st~~ Judicial  
<sup>weber</sup> Court, ~~Spencer~~ County, State of Utah, the Honorable Judge <sup>michael Lyon</sup> ~~Spencer~~ presiding.

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FILED  
UTAH APPELLATE COURTS  
NOV 29 2007

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IN THE UTAH COURT OF APPEALS	
JOSEPH CHAVEZ Petitioner/Appellant	Case # 20070133-CA
v.	
STATE OF UTAH Respondent/Appellee	
REPLY BRIEF OF APPELLANT	

### JURISDICTIONAL STATEMENT

This appeal is from the findings and conclusions of the appellant's petition for post-conviction relief. On February 26, 2007, Judge Michael D. Lyon signed an entry of judgment denying the appellants petition for post-conviction relief.

This affirmed the appellant's unconstitutional sentence, not in accordance with the plea agreement between the petitioner and the original Deputy Weber County Attorney.

The Utah Court of Appeals has jurisdiction to consider this appeal.

## ISSUES ON APPEAL AND STANDARD OF REVIEW

### ISSUE 1 AND 2 :

Was petitioners guilty plea induced under false pretenses ?

Was petitioners plea deal made knowingly and fully informed?

*Utah rule of criminal procedure 11 g(2) requires the court to advise defendants that it will not be bound by the prosecutors recommendations.*

*Utah Court Rules Volume 4 “ Although a judge is not bound by a plea agreement it must be made perfectly<sup>CLEAR</sup> to defeendant that the judge is not bound by it . “*

### ISSUE 3:

Was the the appellant denied due process rights when the trial court admittedly failed to allow allocution ? thus mitigating any sentence?. OR CHANGING OUTCOME OF CASE?

*Utah Rules of Criminal Procedure 22(a) codifies the common law right of allocution .*

*State V. Wanosik ,79 p.3d 937, 943 (Utah 2003).*

*Utah Rules of Criminal Procedure p. 22(a) Before imposing sentence the court shall afford the defendant an oppurtunity to make a statement and to present any information in mitigating of punishment or to show any legal cause why sentence should no0t be imposed.*

ISSUE 4 : Was petitioner denied his right to effective counsel when his attorney failed to act in best interest of his client ?

*Strickland vs. Washington 466 U.S. 668, 80 led. 2d 671 1984 “ two pronged test”:*

*First: defendant must show that counsels performance was deficient.....Second: defedant must show that counsel made errors so egregious that counsel was not as counsel guareenteed the defedant by the 6<sup>th</sup> Amendment.*

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

Listed after issues.

## STATEMENT OF THE CASE

Petitioner was charged with burglary, theft, and receiving stolen property, as well as false information to a police officer, and driving on a suspended license. Petitioner believed matters were resolved by plea agreement entered on July 12, 2004.

Petitioner was sentenced to 0-5 years at the Utah State Prison for theft by receiving; one year in jail for providing false information to a police officer; six months for no auto insurance; and probation. This sentence was imposed on August 12, 2004.

On August 23, 2004, petitioner filed a notice of appeal with Utah Court of Appeals after his notice went un-answered by the trial court.

Petitioner filed his appeal because he believed he was to receive a one-year jail sentence with no probation, and because the judge told him it was a prison commitment, and he was not given work release. Petitioner specifically asked for a jail commitment, not a prison commitment. There was obvious confusion because after all was said and done the judge (according to the "Order to Sheriff" document, which is the only legal document petitioner has to go by) (See Addendum A) did in fact go exactly as petitioner requested on plea agreement: 1 year in jail, no probation, and work release. This is contrary to what the judge stated at the sentencing hearing.

The petitioner ultimately did go to work release. There were conflicting times about when petitioner was to return to work release and he was charged with felony escape. This case was dismissed after <sup>five</sup> ~~eight~~ months of fighting the charges (See addendum B). It is to petitioner's bewilderment that after the case was dismissed and the petitioner never signed a probation agreement that the petitioner ended up going to prison



on a revoked probation. The petitioner requested AP&P provide proof that they ever presented him with a probation agreement, and AP&P never responded.

The appeal was dismissed by memorandum decision (after one year went by) on August 25, 2005 not due to untimely motion to withdraw plea (conflicting with picture state painted), but because petitioner's counsel never corrected petitioner to withdraw his plea. Petitioner knew after he was sentenced he could only appeal—it was too late to withdraw it! (Utah Court of Appeals did appoint counsel for petitioner on his appeal until memorandum decision on August 25, 2005).

After case was dismissed, petitioner then filed petition for post-conviction relief on 10/7/2005, and habeas corpus on 10/14/2005.

On 2/2/2006 ruling denying post-conviction relief was made.

On 2/8/2007, motion to appeal was again filed by petitioner.

## STATEMENT OF FACTS

On July 12 , 2004 at plea hearing in Exchange for petitioners guilty plea to felony theft and two unrelated misdemeanor charges the state agreed to drop the remaining charges and recommend jail instead of prison work release concurrent sentences good time.

The petitioner didn't see any discrepancies as to what he requested and the specifics he listed on the plea agreement at the plea hearing nor did the judge or state appear to do anything other than be in total acceptance of what plea agreement showed .no one including petitioners counsel ever mentioned that judge was not bound by agreement.

On august 12 2004 at sentence hearing appearances by both the state and petitioners counsel were different,there was some confusion due to this' however the state does note that the prior prosecutor does recommend against prison.

The judge proceeded to tell that petitioner about his past criminal history then without hesitation and without offering the petitioner his right to allocution sentenced the petitioner to a suspended 0-5 prison sentence with no work release.

Petitioner filed a motion to appeal directly to the trial court and that was never answered.

On the very next day. ( Aug. 13 2004 )

The petitioner after receiving his copy of order to sheriff which is the only document petitioner had to go by noticed that judge did go by the designed plea agreement ) it showed: 1 year in jail ( not 0-5 stayed to 1 year)

It showed work release concurrent sentencing.(SEE ADDENDUM A)

Petitioner was sent to work release there were conflicting times as to when petitioners return time was. Petitioner was charged with escape. That case was dismissed .(See **Addendum B**) However petitioner gets sentenced to Prison. All the while the theft by receiving case is still on appeal. After a year goes by Randy Richards (petitioners assigned counsel by court of appeals) tells petitioner the case has been dismissed by court of appeals due to lack of jurisdiction. Petitioner files post conviction relief and Habeas Corpus that gets denied by trial court.

Petitioner then files appeal to Utah court of appeals once again .

Petitioner focuses on facts that his plea was induced and the fact that he was never told by anyone that judge was not bound by plea agreement also petitioners most important fact that he was not allowed right to allocution had he been afforded this right we would  
all probably not be in the appeals process now but would have had a trial.

## **SUMMARY OF ARGUMENT**

### **Point 1:** Petitioners plea is induced.

- A. Petitioners counsel did not review plea agreement with prtitioner.
- B. It was not made 'perfectly clear' to defendant that judge is not bound by plea agreement.

### **Point 2:** Allocution Rights were violated.

### **Point 3:**petitioner received innefactive counsel.

## ARGUMENT

1. Petitioner's plea is induced—transcripts prove judge admits petitioner is sentenced to prison commitment (see addendum C, page 5, lines 16-17 of sentencing transcripts). This is not what petitioner bargained for. *"A violation of the terms of a plea agreement involves defendant's due process rights."* Patrick v. Camden County Prosecutor, 630 F.2d 206 (3<sup>rd</sup> Cir. 1980). *"When a plea is obtained by an agreement which is based 'in any significant degree or a promise or agreement of the prosecutor, so that it can be said to be' part of the inducement or consideration, such promise must be fulfilled."* Santobello v. New York, 404 U.S. 252, 262 (1971).

A. Transcripts prove counsel for petitioner did not review plea agreement with the petitioner (see addendum D, page 30 lines 21-23 of evidentiary hearing).

*"Although a judge is not bound by a plea agreement, it must be made perfectly clear to the defendant that the judge is not bound by it"* (UT. Court Rules Vol. 4).

2. Allocution rights were violated—transcripts prove judge admits he did not ask petitioner if he had anything to say in the form of an allocution (see addendum D, page 6, lines 15-18 of evidentiary hearing; also see page 3, lines 11-14 of the sentencing hearing).

This right must always be due! By every judge to each and every defendant prior to sentencing—no exceptions! This court rule must not be overlooked!

Utah Rules of Criminal Procedure 22(a) codifies the common-law right of allocution. State v. Wanosik, 79 P.3d 937, 943 (UT 2003).

Rule 22 states that “*before imposing sentence, the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or show any legal cause why sentence should not be imposed.*”

The fact that petitioner wants to withdraw guilty plea before he’s sentenced and exercise his right to trial is a legal cause why sentence should not be imposed.

3. Petitioner received ineffective assistance of counsel—transcripts prove there were different attorney and prosecutor at the sentencing and plea hearings, causing confusion and misunderstanding (see addendum E, front page of plea hearing and sentencing hearing transcripts), which prove different appearances by both counsel and prosecutor that drafted the plea agreement.

There are many deficiencies by counsel. The fact that counsel did not review plea agreement with petitioner and how it wasn’t mentioned to petitioner that judge was not bound by plea agreement are major factors.

A. What’s deficient on counsels behalf is the fact that after petitioners escape case is dismissed that counsel did not advise or argue on petitioners behalf that there was never a probation agreement signed by petitioner and petitioner was sent to prison.

## CONCLUSION

Right to due process of law is expressly written our United States Constitution ,it is just as it says : a process due to us in court. Also court rules are just that;rules that are to be followed in court .

Rules and due process rights violations have been proven repeatedly by petitioner they were by no means harmless errors but errors that would have definitely changed the outcome of the case ,(especially since petitioner would of asked for a trial had petitioner known judge was not bound by the agreement. Why even make an agreement if all parties do not agree ?)

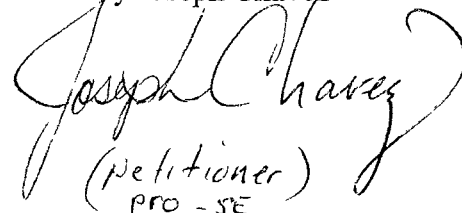
***Rule22states:***"Before imposing sentence" ,the court shall afford the defedant an oppurtunity to makeastatement.....or to show any legal cause why sentence should not be imposed" The petitioners reason(s) are in fact legal cause-It gets no more legal than that mentioned above.

**These due process laws, rights rules etc...are to be understood by strict definition of the law as lawmakers intended. Not just anybody's personal interpretation of law.**

The trial courts dismissal of the petition for post conviction relief must be overturned-It is in the line of justice.

Respectfully submitted this 24<sup>th</sup> day of November 24, 2007

By Joseph Chavez

  
(petitioner)  
PRO - SE

# **ADDENDUM A**



STATE OF UTAH DISTRICT COURT  
ORDER TO SHERIFF

Date 9/2/04 Case No. 041901031 No. 5/4/04 OTS 14030910  
☒ Sheriff of Utah ☐ Ogden City ☐ Rio City ☐ Morgan ☐ DCV

Charged Chavez 13- Trust by R. Sloan Corp Alfred

To the Sheriff of Weber County, you are hereby ORDERED to: ☐ May be released to JAIL  
☐ Release defendant from jail ☐ Book and release ☐ Release to probation ☐ Community service program  
☒ Receive and keep defendant at jail until 9/2/04 date 9/2/04 to 9/2/04  
☐ Probation to APP ☐ 10 for 30 ☒ Under Sentence ☐ 3 for 1 ☒ Probation ☐ Probation  
☐ Release the defendant upon payment of \$ ☐ Bail ordered \$ 5000  
☒ Bring the defendant before the court on 9/2/04 at 9:00 a.m. 10/2/04

JUDGE: ☒ Philip M. Baldwin ☐ Robert S. Dutton ☐ Kerrie W. Jones ☐ Pamela G. Heffernan  
☒ Noel D. Levin ☐ Scott M. Hadley ☐ W. Brent West

*[Signature]*

# **ADDENDUM B**

SECOND DISTRICT COURT  
ORDER TO SHERIFF

Date 1/10/05 Case No. 041905287 DOB 5/4/64 OTN 140571008  
☒ District Court ☐ Ogden City ☐ Roy City ☐ Morgan ☐ DCV 140571008  
Chavez Joseph Hindman  
 Charge(s) F3 - Escape from Official Custody

To the Sheriff of Weber County, you are hereby ORDERED to: ☐ May Be Released to ICE  
☒ Release Defendant from Jail ☐ Book and Release ☐ Release to Jail Diversion ☐ Community Services Program  
☐ Suspend and keep defendant in jail/SP ON THIS CASE days/years stayed in  
☐ Probation to APW ☐ 10 for 30 ☐ Credit for Time Served ☐ 12 for 1 ☐ Concurrent ☐ Consecutive  
☐ No jail for 30 ☐ Since Last Arrest/Arrest ☐ West Release Kiosk/PAAG  
☐ Release the defendant upon payment of \$ \_\_\_\_\_ fine. Bond ordered \$ \_\_\_\_\_  
☐ Release the defendant to MUCO now/after \_\_\_\_\_  
☐ Bring the defendant before the court on \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.

CASE IS DISMISSED

JUDGE: ☐ Bailey R. Gelsbach ☐ Roger S. Bahr ☐ Ernie W. Jones ☐ Pamela C. Hoffmann ☒ Michael D. Lynn  
☐ Scott M. Hatley ☐ W. Brent West ☐ John R. Morris

[Signature]  
 COURT CLERK

# ADDENDUM C

1 will reserve an issue -- or reserve ruling on his exposure of  
2 liability in that hearing.

3 The Court also orders that as a part of your probation  
4 that you complete a theft reform class, that you have no  
5 contact with the victims. Do you have any questions about  
6 the Court's sentence?

7 MR. GRAVIS: Shall we set a hearing date?

8 THE COURT: Do you have any questions about the  
9 Court's sentence?

10 MR. GRAVIS: Any questions?

11 (Counsel and defendant confer.)

12 THE DEFENDANT: Sir, if I (inaudible) work release?

13 THE COURT: No. This is a --

14 THE DEFENDANT: But I'm supposed to pay  
15 restitution --

16 THE COURT: As I've expressed before, this is a  
17 prison commitment, and the only reason that you're not going  
18 to prison is because of the affirmative plea bargain  
19 agreement by the -- with the State. And I'm accepting that  
20 agreement with reservations, so I want you to feel the full  
21 impact of a jail sentence. You've earned one.

22 THE DEFENDANT: How am to pay restitution with no  
23 work?

24 MR. GRAVIS: After you get out of jail.

25 THE COURT: You'll take care of that when you get

# **ADDENDUM D**

\* (NO ALLOCATION)

Page 31

3

1 wouldn't oppose work release.

2 MR. GRAVIS: The Court may want to review the plea  
3 agreement. He says that's all in there. Mr. Laker obviously  
4 drew it up, so I haven't seen it, but Mr. Laker's notes show  
5 all these things in there.

6 THE COURT: It does provide for a concurrent  
7 sentencing. Well, but for the recommendation of the State  
8 this Court would send you to prison, Mr. Chavez. You have an  
9 extensive history. You've been to prison before. You have  
10 violated parole three times. It's with great reservation  
11 that I'll go along with the recommendation.

12 It's the sentence of this Court that -- in Case No. 1031  
13 that you be committed to the Utah State Prison for a period  
14 of five -- from zero to five years and in case -- but that  
15 prison sentence is stayed. You are placed on probation.

16 The Court further, in Case No. 3489, sentences you to  
17 serve one year in jail on the class A misdemeanor conviction  
18 and six months on the class B misdemeanor convictions. All  
19 of these sentences shall run concurrently with each other.

20 The Court orders that you serve one year in the county  
21 jail. You may have credit for the time that you have served,  
22 no good time.

23 MR. GRAVIS: Work release, Your Honor?

24 THE COURT: No.

25 The Court orders also that you sign a standard probation

26

1 But I have no memory, Mr. Chavez, of ever granting both.  
2 I think you get one or the other. And I think that my  
3 initial impression was that you ought to go to prison, and --  
4 but I acquiesced to the agreement between both the State and  
5 yourself and went along with probation. But I will tell you  
6 that my mind was you're going to just serve a straight jail  
7 sentence.

8 In the end I made a concession, one that I didn't really  
9 like. I gave you work release, but there is just no way this  
10 Court was going to give you also good time on a work release.  
11 You don't get one or the other -- you get one or the other in  
12 my courtroom. And I don't know about -- I can't speak for  
13 other judges. I just don't grant both.

14 The second point that I want to say, and I think I -- I  
15 know I addressed this in my decision, is that -- and I regret  
16 that I -- after all of the exchange that I did not expressly  
17 ask you if you had anything else to say in the form of  
18 allocution, but I sense that probably that got lost on me  
19 because there had been a free exchange between us. You  
20 had -- you had asked me for work release. You had also  
21 protested that what was coming down at the time -- initially  
22 at sentencing was not what had been agreed, and so it was my  
23 impression that you had been free to say what you wanted to  
24 say.

25 But be that as it may, it's the Court's judgment that



# **ADDENDUM E**

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IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

\*\*\*\*\*

STATE OF UTAH,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	VIDEO TRANSCRIPT
	)	
JOSEPH ANDREW CHAVEZ,	)	CASE NO. 041901031
	)	
DEFENDANT.	)	

\*\*\*\*\*

PLEA HEARING

JULY 12, 2004

HONORABLE MICHAEL D. LYON

\*\*\*\*\*

APPEARANCES:

FOR THE STATE:	SANDRA L. CORP
FOR THE DEFENDANT:	STEVEN A. LAKER

\*\*\*\*\*

REPORTED/TRANSCRIBED BY DEAN OLSEN, CSR  
2525 GRANT AVENUE  
OGDEN, UTAH 84401  
(801) 395-1056

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COPY

IN THE SECOND DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

\*\*\*\*\*

STATE OF UTAH,

Plaintiff,

vs.

JOSEPH ANDREW CHAVEZ

Defendant.

)

)

)

)

)

)

)

)

)

VIDEO TRANSCRIPT

CASE NO. 041901031

\*\*\*\*\*

SENTENCING

AUGUST 12, 2004

JUDGE MICHAEL D. LYON

\*\*\*\*\*

APPEARANCES:

FOR THE STATE: GARY HEWARD

FOR THE DEFENDANT: MARTIN GRAVIS

\*\*\*\*\*

COPY

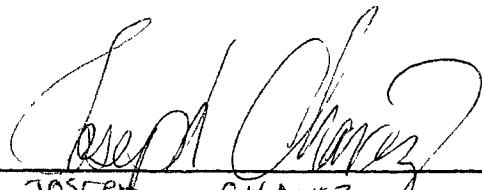
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THE 27TH DAY  
OF NOVEMBER, 2007 I SENT 2 COPIES OF  
OF REPLY BRIEF TO ASSISTANT ATTORNEY  
GENERAL BRETT DELPORTO. TO ADDRESS BELOW  
AND 1 COPY ~~OF~~ OF REPLY BRIEF TO UTAH  
COURT OF APPEALS TO ADDRESS BELOW  
BY U.S. MAIL.

BRETT J. DELPORTO  
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UTAH COURT OF APPEALS  
450 S. STATE, 5TH FLOOR  
P.O. BOX 140230  
SALT LAKE CITY UT. 84114-0230

BY:   
JOSEPH CHAVEZ  
(Petitioner pro-se)