

1987

# Michael A. Fajen v. Gary Deland, director, Utah State Department of Corrections : Brief of Appellant

Utah Court of Appeals

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Michael A. Fajen; In Propria Persona.

David L. Wilkinson; Attorney General; Attorneys for Respondent.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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87-0467  
MICHAEL A. FAJEN, :  
 :  
 :  
 : Case No. 87-0467-CA  
 :  
 :  
 :  
 :  
 :  
 :  
 : Respondent/Appellee. :  
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BRIEF OF APPELLANT

Appeal from order denying the Petitioner/Appellant's petition  
for a Writ of Habeas Corpus entered in the Third Judicial District Court  
in and for [redacted] County of Salt Lake, State of Utah, in Civil Case No.  
C-87-5323, the Honorable James S. Sawaya, Presiding Judge.

\_\_\_\_\_  
MICHAEL A. FAJEN  
Petitioner/Appellant  
In Propria Persona  
Post Office Box 250  
Draper, Utah 84020

DAVID L. WILKINSON  
Attorney General  
State of Utah  
236 State Capitol Building  
Salt Lake City, Utah 84114  
Attorney for Respondent

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IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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|                                  |   |                          |
|----------------------------------|---|--------------------------|
| MICHAEL A. FAJEN,                | : |                          |
|                                  | : |                          |
| Petitioner/Appellant,            | : | COURT OF APPEALS         |
| In Propria Persona;              | : |                          |
|                                  | : |                          |
| vs.                              | : |                          |
|                                  | : |                          |
| GARY DELAND, DIRECTOR, UTAH      | : |                          |
| STATE DEPARTMENT OF CORRECTIONS, | : | Civil Case No. C-87-5323 |
| et al.,                          | : |                          |
|                                  | : |                          |
| Respondents/Appellees.           | : |                          |

-----

BRIEF OF APPELLANT

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Comes now Petitioner/Appellant, In Propria Persona, and respectfully submits that this is an appeal from an order denying Petitioner/Appellant's petition for a Writ of Habeas Corpus entered in the Third Judicial District Court, in and for the County of Salt Lake, State of Utah, in Civil No. C-87-5323. Said order denying Writ of Habeas Corpus was ordered by the Honorable James S. Sawaya, Presiding Judge, on September 22, 1987.

STATEMENT OF THE FACTS

In the case at bar, Petitioner/Appellant filed a petition for a Writ of Habeas Corpus, In Propria Persona, having elicited the aid and assistance of a fellow inmate. Petitioner/Appellant filed his petition for a Writ of Habeas Corpus along with a Memorandum of Points and Authorities in support of his habeas corpus petition through service of the United States Mail.

Petitioner/Appellant's petition for a Writ of Habeas Corpus

was filed in the Third Judicial District Court, and an order was issued by the Honorable James S. Sawaya directing that the matter be brought before the Court for trial of the issues in Civil Case No. C-87-5323.

Petitioner/Appellant raised meritorious claims and issues in his petition for a Writ of Habeas Corpus, and he verily believes that even though he is a layman unversed in the law, the facts and the record support his claims. Petitioner/Appellant verily believes that he was not afforded a fair Evidentiary Hearing allowing him to properly prove his allegations. Even though Petitioner/Appellant's two main allegations centered around the ineffective aid and assistance of counsel, and the validity of his plea, and notwithstanding Petitioner/Appellant's belief that he met his burden of proof in compliance with the two-part standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and Ake v. Oklahoma, \_\_\_\_ U.S. \_\_\_\_, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), Petitioner/Appellant verily believes that, had he been afforded an opportunity to elicit testimony from his trial counsel, all of his claims would have been established.

Petitioner/Appellant verily believes that the decision of the Honorable James S. Sawaya, directing the denial of his petition for a Writ of Habeas Corpus, was biased and not based upon the facts but rather on the nature of Petitioner/Appellant's crime and the possible politics involved.

In the case at bar, Petitioner/Appellant verily believes that the denial of a Writ of Habeas Corpus amounts to the unconstitutional suspension of the Writ of Habeas Corpus, as well as the denial of Access to the Courts guaranteed under a long line of precedents and authorities beginning with Ex Parte Hull, 312 U.S. 546, 61 S. Ct. 640, 85 L. Ed.

ISSUES RAISED ON APPEAL

I. PETITIONER/APPELLANT ALLEGES THAT A REVERSAL SHOULD BE GRANTED DIRECTING THAT THE LOWER COURT'S DENIAL OF HIS PETITION FOR A WRIT OF HABEAS CORPUS BE VACATED AND SET ASIDE AND THAT A WRIT OF HABEAS CORPUS SHOULD BE GRANTED AS ORIGINALLY PRAYED FOR IN THE PETITION FOR A WRIT OF HABEAS CORPUS, FOR THE REASON THAT PETITIONER/APPELLANT WAS EFFECTIVELY DENIED THE ESSENCE OF PROCEDURAL DUE PROCESS AS SECURED AND GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN VIEW OF THE FACT THAT THE ESSENCE OF PROCEDURAL DUE PROCESS IS A FAIR HEARING. PETITIONER/APPELLANT VERILY BELIEVES THAT HE WAS EFFECTIVELY DENIED ACCESS TO THE COURTS, THAT THE COURT'S DENIAL OF A WRIT OF HABEAS CORPUS AMOUNTS TO THE UNCONSTITUTIONAL SUSPENSION OF THE WRIT OF HABEAS CORPUS IN VIOLATION OF ARTICLE 1, SECTION 5, OF THE CONSTITUTION OF THE STATE OF UTAH, AND THAT THE COURT'S DENIAL OF A WRIT OF HABEAS CORPUS WAS NOT BASED UPON THE FACTS BUT RATHER WAS A BIASED DECISION IN LIEU OF POLITICS AND THE HEINOUS NATURE OF THE OFFENSE PETITIONER/



APPELLANT WAS CONVICTED FOR, EFFECTIVELY  
CAUSES THE DEPRIVATION OF RIGHTS SECURED AND  
GUARANTEED TO PETITIONER/APPELLANT THROUGH  
THE FORCE AND EFFECT OF THE FOURTEENTH AMENDMENT  
TO THE UNITED STATES CONSTITUTION.

2. PETITIONER/APPELLANT RESPECTFULLY ALLEGES AND  
SUBMITS THAT THIS COURT SHOULD REVERSE THE LOWER  
COURT'S DECISION DENYING HIS PETITION FOR A  
WRIT OF HABEAS CORPUS FOR THE REASON THAT EVEN  
THOUGH A FAIR EVIDENTIARY HEARING WAS NOT AFFORDED,  
FACTS ELICITED THROUGH TESTIMONY OF WITNESSES  
CLEARLY ESTABLISHED AND PROVED THAT PETITIONER/  
APPELLANT WAS CONVICTED AND INCARCERATED AS THE RESULT  
OF HIS BEING DEPRIVED OF THE EFFECTIVE AID  
AND ASSISTANCE OF COMPETENT LEGAL COUNSEL DURING  
EACH OF THE CRITICAL STAGES OF THE PROCEEDINGS  
AGAINST HIM. SUCH TESTIMONY CLEARLY MET  
PETITIONER/APPELLANT'S BURDEN OF PROVING THE TWO  
PART STANDARD REQUIRED UNDER THE MANDATE SET  
FORTH IN STRICKLAND V. WASHINGTON, 466 U.S. 668  
(1984) EVEN THOUGH THE LOWER COURT FAILED TO  
CALL PETITIONER/APPELLANT'S COUNSEL TO GIVE  
PETITIONER/APPELLANT AN OPPORTUNITY TO QUESTION  
AND CROSS EXAMINE HIM OR TO ALLOW SAID COUNSEL  
TO REFUTE THE ALLEGATIONS AGAINST HIM. PETITIONER/  
APPELLANT SUBMITS THAT IN ORDER TO ASSURE THAT HE  
HAS BEEN AFFORDED DUE PROCESS AND EQUAL PROTECTION

OF THE LAW AS GUARANTEED TO HIM UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, HE SHOULD HAVE BEEN AFFORDED AN OPPORTUNITY TO QUESTION AND CROSS EXAMINE COUNSEL IN ORDER TO CLEARLY PROVE HIS CLAIM OF INEFFECTIVE AID AND ASSISTANCE OF COMPETENT COUNSEL DURING EACH OF THE CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM. SAID TESTIMONY OF COUNSEL WOULD HAVE FURTHER PROVEN EACH OF PETITIONER/APPELLANT'S OTHER CLAIMS.

3. BECAUSE OF THE INEFFECTIVE AID AND ASSISTANCE OF COUNSEL, PETITIONER/APPELLANT'S PLEA OF GUILTY WAS NOT ENTERED FREELY, VOLUNTARILY AND UNDERSTANDINGLY BY ONE FULLY AWARE OF THE CONSEQUENCES THEREOF, BUT INSTEAD SAID PLEA WAS ENTERED AS THE RESULT OF THREATS, PROMISES AND INDUCEMENTS. THEREFORE, SAID PLEA OF GUILTY MUST BE VACATED AND SET ASIDE AS CONSTITUTIONALLY NULL AND VOID BECAUSE OF THE DEPRIVATION OF PETITIONER/APPELLANT'S RIGHTS AS SECURED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

4. THAT THE TRIAL COURT OF THE HONORABLE JAMES S. SAWAYA OF THE THIRD JUDICIAL DISTRICT COURT IN CASE NO. C-87-5323, FAILED BY NOT GRANTING THE PETITIONER/APPELLANT A HEARING BEFORE MAKING THE DETERMINATION TO DISMISS THE PETITIONER/APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS.

### SUMMARY OF ARGUMENT

In summarizing his argument on appeal, Petitioner/Appellant submits that he has shown denial of access to the courts pursuant to the mandates set forth in the long line of authorities following Ex Parte Hull, 312 U.S. 546, 61 S. Ct. 640, 85 L. Ed. 1034 (1941). Based on the fact that the decisions of the lower Court was not based upon the facts adduced at the lower Court without hearing, and the fact that he was deprived of a full and fair evidentiary hearing Petitioner/Appellant further verily believes he has shown the unconstitutional suspension of the Writ of Habeas Corpus in violation of Article 1, Section 5, of the Utah Constitution and the mandate set forth in Jones v. Smith, 505 P. 2d 194.

Petitioner/Appellant submits that he has established that he has been deprived of his Sixth and Fourteenth Amendment rights to the effective aid and assistance of competent legal counsel under the authorities of Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and Ake v. Oklahoma, \_\_\_\_ U.S. \_\_\_\_, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

And finally, Petitioner/Appellant has established that his Plea of Guilty must be declared constitutionally null and void pursuant to the long line of authorities beginning with Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), through Ake v. Oklahoma, \_\_\_\_ U.S. \_\_\_\_, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

Petitioner/Appellant verily believes that he has established his cause and that he has raised meritorious issues and is entitled to plenary consideration.

#### ARGUMENT POINT ONE

Petitioner/Appellant respectfully submits that the right of prisoners to be afforded access to the courts embraces and includes the right to a fair hearing. The essence of due process is the right to a fair hearing. The United States Supreme Court mandated that prisoners are entitled to access to the courts in a long line of authorities beginning with Ex Parte Hull, 312 U.S. 546, 61 S. Ct. 640, 85 L. Ed. 1034 (1941), Smith v. Bennett, 365 U.S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961), Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 718 (1969), Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, L. Ed. 2d 652 (1972). The right of prisoners to have an "adequate" opportunity to present their claims fairly is set out in Ross v. Moffitt, 417 U.S. at 616, 94 S. Ct. at 2446. The Court is here further referred to the authorities of Younger v. Gilmore, 404 U.S. 15, 92 S. Ct. 250, 30 L. Ed. 2d 142 (1971), and Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977).

Article 1, Section 5, of the Utah Constitution guarantees that the Writ of Habeas Corpus shall not be suspended unless in the "case of rebellion or invasion of the public safety requires it." And the Utah Supreme Court has declared that:

"There is no reason why Habeas Corpus cannot be brought anytime a person is wrongfully restrained of his freedom, whether before trial or after trial." Jones v. Smith, 550 P. 2d 194.

#### ARGUMENT POINT I

Petitioner/Appellant submits that the decision of the lower Court was not based upon the evidence and facts as presented, and he was not afforded an adequate opportunity to present his claims fairly

as required under the authority of Ross v. Moffitt, 417 U.S. at 616, 94 S. Ct. at 2246.

Petitioner/Appellant submits that he has met his burden of proof in establishing his Sixth and Fourteenth Amendment rights were denied under the two part standard set forth in Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), Ake v. Oklahoma, \_\_\_\_ U.S. \_\_\_\_, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). In assessing whether someone is functioning as the "counsel" guaranteed by the Sixth Amendment, Justice O'Connor indicated that the proper standard is that of "reasonable effective assistance" — this was not the case in the case at bar. Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist his client, the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.

#### ARGUMENT POINT THREE

Petitioner/Appellant's conviction should have been vacated and set aside under the authority of Boykin v. Alabama, 395 U.S. 328, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), based upon the fact that the evidence adduced at the lower Court evidentiary hearing clearly shows Petitioner/Appellant's constitutional rights were violated under the two part standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and Ake v. Oklahoma, \_\_\_\_ U.S. \_\_\_\_, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). In the case at bar, Petitioner/Appellant's plea of guilty was entered and accepted without Petitioner/Appellant being made aware of the requisite elements of the offense to which his plea was entered. SEE: Henderson v. Morgan, 426 U.S. 637 (1976).

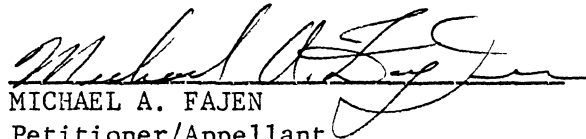
CONCLUSION

WHEREFORE, based upon the facts of record and the evidence adduced at the lower Court hearing, Petitioner/Appellant respectfully submits that he verily believes that he has a meritorious cause of action and that this Court should reverse the decision of the lower Court, directing that he be granted a Writ of Habeas Corpus as prayed for, or in the alternative, that the matter be returned to the lower Court for a full and fair evidentiary hearing with a decision to be rendered upon the facts and evidence as presented.

Petitioner/Appellant respectfully prays that this Court afford his cause of action plenary consideration.

DATED this 10 day of November, 1987.


RESPECTFULLY SUBMITTED,



MICHAEL A. FAJEN  
Petitioner/Appellant  
In Propria Persona  
Post Office Box 250  
Draper, Utah 84020

CERTIFICATE OF SERVICE

I, Michael A. Fajen, hereby certify that four copies of the foregoing BRIEF OF APPELLANT will be delivered to the Attorney General's Office at 236 State Capitol Building, Salt Lake City, Utah 84114, this 10 day of November, 1987.

  
MICHAEL A. FAJEN  
Petitioner/Appellant

Delivered by \_\_\_\_\_ on this \_\_\_\_\_ day of  
November, 1987.

FILE NO. 087-5373

TITLE: (✓ PARTIES PRESENT)

COUNSEL: (✓ COUNSEL PRESENT)

Michael Q. Fegenpro. se.v.Gary Deland, et. al.David B. Thompson

CLERK

REPORTER

BAILIFF

HON.

Sawyer

JUDGE

DATE:

9/22/87

Respondents' motion to dismiss, having been presented without oral argument on the grounds that Petitioner's petition is fatal on its face, is granted.

Q.S.

Copies to parties & counsel