

1987

# John Francis McKenna v. Gerald L. Cook : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS  
STATE OF UTAH  
---oooOooo---

JOHN FRANCIS MCKENNA, pro se :  
 :  
Petitioner/Appellant, :  
 : BRIEF ON APPEAL  
VS. :  
 :  
GERALD L. COOK, Warden, Main : Case No. 870534-CA  
Facility; DAVID L. WILKINSON, Utah :  
State Attorney General, :  
 :  
Respondents. :

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**FILED**

**AUG 30 1988**

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#### STATEMENT OF JURISDICTION

Jurisdiction is vested in this Court, over the instant case, by one or more of the following Utah State Statutes and/or Rules.

Title 78, Chapter 2a, Utah Code 1953, as amended

Rules of the Utah Court of Appeals, Title I, Rule 1, through Title II, Rule 4.

#### NATURE OF PROCEEDINGS

This is an APPEAL OF DISMISSAL, involving a COMPLAINT SEEKING WRIT HABEAS CORPUS. Said dismissal was accomplished in the Third Judicial District Court, State of Utah, on or about 2 October 1987.

#### STATEMENT OF ISSUES

The issue involved in this case are:

(1) Can an appellant raise the issue of INEFFECTIVE ASSISTANCE OF COUNSEL, as part of a Habeas Corpus proceeding, without, in effect, using Habeas Corpus as a substitute for direct appeal?

#### DETERMINATIVE CONSTITUTIONAL PROVISIONS

The determinative constitutional provisions for this case are:

1. Article I, Section 11, Utah State Constitution, which says, in pertinent part:

All courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay...

2. Article I, Section 12, Utah State Constitution, which says in pertinent part:

...and the right to appeal in all cases...

3. Article VIII, Section 5, Utah State Constitution, which says, in pertinent part:

...there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

4. Amendments V & XIV, United States Constitution, which guarantee to every citizen of the United States of America due process of law.

5. Amendment VI, United States Constitution, which guarantees to every citizen of the United States the right to a fair and impartial trial of every controversy.

#### STATEMENT OF CASE

Nature of Case --

This is an appeal from a DISMISSAL of a COMPLAINT SEEKING WRIT OF HABEAS CORPUS. The COMPLAINT was filed as Appellant's only option to post-conviction relief, under the provisions of Rule ~~65~~(8)(~~1~~), Utah Rules of Civil Procedure. Appellant was attempting, in said COMPLAINT, to seek justice in the matter of an incompetent counsel for defense, which counsel

(a) Refused, or failed, to bring strongly mitigating evidence forward at trial, evidence which, if it had been placed before the jury, may well have materially altered the outcome of the trial; and,

(b) Refused to include the above-mentioned suppression of mitigating evidence as a point in direct appeal, despite appellant's vehement advocacy of such an inclusion.

Briefly, and for the information of this Court, the facts of the basic case are as follows: The information in the case alleged that Appellant, John Francis McKenna, had committed Aggravated Burglary by entering or remaining unlawfully in his estranged wife's residence with the intent to assault her or one Steve Lujan, her new lover, and threatened the immediate use of a firearm against them. A fight ensued, during which Mrs. McKenna was accidentally shot in the shoulder, and Mr. Lujan was ejected from the home. Other details are included in the trial and appeal proceedings, and need not be reiterated here.

Appellant was charged with two counts of Aggravated Assault, and one count of Aggravated Burglary. Trial was had October 21 and 22, 1985, in the Third Judicial District Court, State of Utah, Dean E. Conder presiding, wherein Appellant was found guilty of the Aggravated Assault charges, and acquitted of the Aggravated Burglary charge. On March 31, 1986, after having completed a ninety-day diagnostic evaluation at the Utah State Prison, Appellant was sentenced to two concurrent 0-5 years terms of incarceration. He has since resided continuously at Utah State Prison. Course of Proceedings-

Direct Appeal (Case Number 860158) before the Utah Supreme Court was filed on or about 15 August 1986. The Appeal was rejected on or



about March 1987. Appellant then filed a COMPLAINT SEEKING WRIT OF HABEAS CORPUS (Case Number C87-4337) on or about 22 June 1987. The COMPLAINT was dismissed pursuant to State's MOTION TO DISMISS, on or about 2 October 1987. It is from that DISMISSAL that Appellant appeals in this action.

#### ARGUMENT

##### Points To Be Raised --

POINT 1: Petitioner is not attempting to use habeas corpus as a substitute for direct appeal.

POINT 2: Petitioner could not have known of all the grounds raised in his complaint at the time of direct appeal, because one of those grounds did not exist until after the appeal was already filed.

##### Argument --

POINT 1: Petitioner is not attempting to use habeas corpus as a substitute for direct appeal.

Respondents' single point in the MOTION TO DISMISS was

"1. Petitioner may not use the remedy of habeas corpus as a substitute for direct appeal."

It is Petitioner's contention herein that he is not attempting in any way to circumvent the intent or the letter of the law with this habeas action, nor is he attempting to use habeas corpus as a substitute for direct appeal. Counsel for Respondents raised some interesting points in her MEMORANDUM IN SUPPORT, but the cases are

twisted, and misconstrued. The true thrust of those cases, in fact, supports Petitioner in this cause. Petitioner will address these, insofar as he is able, one at a time.

Counsel for Respondents quotes STATE v. McNICOLL, 554 P2d at 204, that the burden of establishing inadequate representation is on the defendant, "and proof of such must be a demonstrable reality, and not a speculative matter." One of the points Petitioner raises in his Complaint is that his attorney failed to press for the admission of mitigating evidence, to wit, transcripts and tapes of previous testimony of state's witnesses, which testimony directly controverted testimony at trial. SUCH MITIGATING TESTIMONY, IF IT EXISTS, IS MOST CERTAINLY OF THE POWER REQUIRED TO MODIFY, OR POSSIBLY MODIFY, THE OUTCOME OF THE TRIAL, BUT THE JURY WAS NEVER GIVEN THE OPPORTUNITY TO HEAR THAT TESTIMONY. This is not "a speculative matter," but is, rather, a "demonstrable reality," because the tapes and transcripts do, in fact, exist, but counsel for the defense failed to press for their utilization. (The conference at which the decision was made not to use those tapes was held in chambers, away from the hearing and the presence of Petitioner, therefore he had no input at all into that decision. He was simply informed that his evidence would not be allowed. (See Trial Transcript, pp.142-5))

Counsel for Respondents further quotes STATE v. FORSYTH, Utah, 560 P2d 337,339 (1977); JARAMILLO v. TURNER, 24 Utah 2d 19,22,465 P2d 343, 345; and STATE v. GRAY, 601 P2d at 920, in making the point that any purported error of counsel must appear prejudicial, and that

without counsel's error, there was a "reasonable likelihood that there would have been a different result..." Again, Petitioner rests upon the exclusion of controverting, mitigating prior testimony of state's witnesses, and claims quite logically, that, had the aberrant claims of those witnesses at trial been seriously challenged by their own words, the outcome of the trial could well have been different.

In summary to this POINT, the COMPLAINT SEEKING WRIT OF HABEAS CORPUS is not at attempt to utilize this extraordinary writ as a substitute for direct appeal. The types of error which counsel for the defense committed at trial clearly elevate this case into qualifying ground on two of the three controlling criteria as stated by the Utah Supreme Court, in BROWN v. TURNER, 21 Ut 2d at 98-99, 440 P2d at 969. The requirements of law have clearly been so disregarded that Petitioner was substantially and effectively denied due process of law, in that mitigating evidence was willfully held away from the jury, and the facts of this case show clearly that it would be wholly unconscionable not to re-examine the conviction, given the very real possibility of a different outcome had all evidence been properly placed before the triers of fact.

POINT 2: Petitioner could not have known of all the grounds raised in his complaint at the time of direct appeal, because one of those grounds did not exist until after the appeal was already filed.

It is ludicrous for counsel for Respondents to use the argument that she did. To quote from Page -5- of her MEMORANDUM IN SUPPORT OF

#### MOTION TO DISMISS:

"Because all issues raised by Petitioner are issues that should have been raised on direct appeal, the petition for writ of habeas corpus should be dismissed."

Petitioner asserts that there is simply no way, logically or legally, that he could have known that the point of "failure to raise certain issues on appeal" existed before, or at the time that, appeal was filed. Petitioner's claims [See Page -2- of his COMPLAINT SEEKING WRIT OF HABEAS CORPUS, paragraph 4.(A)(4)] simply did not exist before the appeal was filed by his incompetent attorney, therefore the argument that the issue is one "which should have been raised on his direct appeal", is incompetent, irrelevant, and borders on plain stupid.

#### CONCLUSION

Petitioner was not, and is not, attempting to use the extraordinary writ of habeas corpus as a substitute for direct appeal, since the claims appeared in his initial complaint seeking such a writ fall into two exceptional categories. (1) The claims allege a denial of due process by the suppression of mitigating evidence, or (2) the claim simply did not exist before the filing of direct appeal.

It would appear that counsel for Respondents is using every tool at her disposal to insure that Petitioner's claims are not fairly heard before any judicial tribunal, completely ignoring the basic premise of a writ of habeas corpus.

Habeas corpus is sole remedy to attack constitutionality of confinement. AUSTIN v. ARMSIRONG, 473 F.Supp. 1114


And again, the body of law allowing habeas corpus cannot be ignored in this case, because without this writ, Petitioner is doomed to spend his time in prison without recourse, even though his allegations of denial of due process are serious, and worthy of consideration under competent judicial review.

This writ, especially provided for in the statutes of the United States, is the high prerogative writ of right granted upon the application of a person illegally imprisoned or in any way restrained of his liberty. U.S. v. HARDEN, D.C.N.C., 1881, 10 F. 802.

WHEREFORE, Petitioner prays this court will review the facts and law of this case, and consistent with the demands of due process, and under the restraints of the Utah Constitution and the Constitution of the United States of America, will, forthwith, issue a decree overturning the DISMISSAL which was granted by the Third Judicial District Court, State of Utah, in this case, and remand this case for further consideration under the guidelines issued by this Court.

RESPECTFULLY SUBMITTED.

Dated this 22<sup>nd</sup> day of August 1988.

  
John Francis McKenna  
Petitioner pro se

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this date he mailed or caused to be mailed a true and correct copy of the foregoing BRIEF ON APPEAL to

Kimberly Hornak  
AUAG  
236 State Capitol  
Salt Lake City, Utah 84114

by United States Mail, postage prepaid.

Dated this 22<sup>nd</sup> day of August 1988.

*John Francis McKenna*  
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Petitioner PRO SE