

1989

Wade Wagstaff v. Eldon Barnes, Warden, Utah State Prison : Brief of Appellant

Utah Court of Appeals

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Barbara Bearnson; Assistant Attorney General; Attorney for Respondent.

Wade Wagstaff; Appellant Pro Se.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 890663-CA

In The Utah Court of Appeals

Appellant's Brief

In the Utah Court of Appeals
~~In the Supreme Court~~
For the State of Utah

Wade Wagstaff,
Petitioner/Appellant.

vs.

Eldon Barnes, Warden,
Utah State Prison,
Respondent.

Case No. # 890663-CA.

JAN 25 1990

"Appellate Brief"

Mary E. Jordan
Clerk of the Court
Utah Court of Appeals

Appeal From Order of Dismissal
of the 3rd District Court For Salt
Lake County. Hon Frank D. Noel.

Filed
Jan 25, 1990
Court of Appeals

Wade Wagstaff,
Attorney Pro-Se
P.O. Box #250

Draper Utah, 84020.

<Attorney For Appellant>

Barbara Bearson
Assistant Attorney General,
236 State Capitol Bldg.
Salt Lake City, Utah, 84114.
/ / / / /

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Draper V. J.B. & R.E. Walker, Inc, 121 Utah, 567, 244 P. 2d 360 (1952).

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Kuchner V. Turner, (1972) 28 U.2d 150, 499 P.2d 839.

Larsen V. Callina, 684 P.2d 52 (Utah, 1984).

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Murphy V. Halland, 776 F.2d 470, 480 (4th Cir. 1985) Vacated on
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Oliver V. Wainwright, 795 F.2d 1524, 1529 (11th Cir. 1986) Cert. Denied,
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United States V. Cronin, 466 U.S. 648 (1984).

Valley Bank & Trust Co. V. Wilken, 668 P.2d 493 (Utah 1983).

Vali Convalescent & Care Institution V. Industrial Comm. of Utah, (1982) 649
P.2d. 33.

White V Maryland, 463 U.S. _____. (1963).

United States Constitution:

Amendment Six, (Right to Counsel)

Amendment, Fourteen, (Due Process and Equal Protection of the Law).

Utah State Constitution;

Article 1, (Declaration of Rights).

Section 5, (Habeas Corpus).

Section 7, (Due Process of Law).

Section 12, (Rights of Accused Persons).

Utah Rules of Civil Procedure, et, al.,

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U. C. A. § 78-51-35 (1953),

U. C. A. § 78-51-36 (1953).

Extra Reference;

80 American Law Review, Federal. 420. (Federal Cases)

Utah Law Review, (1985) 723 (Uniform Constitutional Law).

= Statements of Fact =

1. On May 22 1989. Petitioner Submitted A Writ of Habeas Corpus, Pro-Se, Seeking Relief From An UnConstitutional Conviction Which Surmounted the Initial Trial Courts Denial of Defense Counsel Trial Representation While he was tried By Jury, in Absentia.

2. On June 10th 1989, Counsel For Respondant, Barbara Bearnson, Assistant Attorney General (A.A.G.) Responded With Motion and Memorandum to Dismiss Habeas on Grounds of Collateral Estoppel Before the Utah Court of Appeals, and in Doing So, Added Additional Contentions Against Petitioner's Intent.

3 On June 19. 1989. Petitioner Submitted A Response in Opposition to Respondant's Motion to Dismiss Clarifying the Fraudulent Means Used Upon the Court By Respondant Counsel and the Intentional Misconstruction of the Record.

4. On August 11. 1989, Hon. Judge Raymond S. Uno, in Judge Frank G. Nae's Court. Received Limited Oral Argument From Both Parties, and took the Case Under advisement For Consideration.

5. On August 16 1989. Hon Judge Frank. G. Nael, "For Reasons as Stated in Respondant's Motion and Memorandum, Granted Motion to Dismiss", therefore, Denying Habeas Corpus Relief.

6 Petitioner, as an Appellant, now Files for Relief from that Order of Dismissal, and in effect, Relief By Way of Habeas Corpus, Pursuant to Appeal Under, Utah Code Annotated, 77-35-26 (1953), and Utah Code Annotated, 78-2-4, (1953) as Amended, and shall incorporate each and every Point, as follows,

= Statement of Points =

I Respondant Counsel, committed Fraud upon the Court, By Impermissible Amendment of Petitioner's Habeas Corpus Cause of Action (Contention) Absent Consent, and Against Protestations, and Intentionally Mis-Informed the Court as to the Material Facts of the Case to Procure non-existent Defenses, Misdirection and a Fictitious Collateral Estoppel Dismissal.

II. the Presiding Judge Abused his Discretion By Allowing

the Respondants to Commit Knowing Fraud upon the Court, Failed to Scrutinize the Evidence as Presented, and Dismissed A Colorable Claim For Relief Under Habeas Corpus, While Constitutional Violations Were Factually evident, and Undisputed By Respondants, and By Basing the Dismissal upon A Factually Erroneous Collateral Estoppel Defense Induced By Misconstruance of Facts and Fraud.

III, that the Dismissal Constitutes An Unpermissible Denial of Due Process and Equal Protection of the Law, Under Both State and Federal Constitutional Standards.

= Determinative Law =

Pursuant to Rule 24 (F), R. Utah. S. Ct., Reproduction of Statutes, Rules, Regulations, Documents, etc., All Relevant Parts Not Previously Setforth Shall Be Presented More Appropriately in Appellants Arguments and Brief, as Attached hereto, as all are Lengthy and/or extensive.

= Statement of Case =

On June 30, 1987, in the Court of Hon. Judge Venay Christofferson, in the First District Court of Cache County, Appellant,

As A Defendant Was tried By Jury in Court Determined Absentia, For the Offense of Burglary a 2nd Degree Felony, and Assault, a Class A. misdemeanor, pursuant to Utah Code Annotated 77-35-17, (1953, As Amended). the Court Found Judicial Voluntary Absentia on the Ground that Defendant Fled the State and Failed to Keep Contact With Counsel and Court, Because of County Attorney Misconduct which led to threats and Repeated Assaults upon Defendant's Life. As Defendant could not be contacted, Counsel for Defendant motioned to withdrawal, which the Court, Very Contrary to Applicable Statutory Application, Allowed and Failed to Re-appoint a New Attorney for Replacement, and Scheduled a New trial date in Absence of Any Notice to Defendant. Prior to trial, Defense Counsel, though no Longer Counsel of Record, Represented that Defendant Retained no Knowledge as Notice of trial as Counsel Withdrawal, yet the Court Proceeded with trial Absent all Adversarial Representation as Waiver to Counsel, whether written, Oral, as By Judicial Determination as to the Possibility of Waiver in Absentia. Thereupon, the Judge, Jury, Prosecutor and Witnesses "Against" Defendant held trial and Returned a Verdict of Guilty, Including the Statement from the Judge that, "... And it makes it a Lot Shorter When We Have Only One Side Here, But I do appreciate your Response, in Adjourning the Court. A Direct Appeal Issued, and Appellant Counsel Appointed. As Appellate Counsel Refused to Raise the

Issue of No Counsel at trial upon Request of Defendant, and Filed Appeal Briefs on that, the State did not Sustain its Burden of Proof in Showing that the Defendant was Voluntary Absent From the trial So as to entitle it to Proceed in his Absence, and that, the Information Shown By Defendant to the Court With Regards to a Leak in Information By the County Attorneys Office, Subsequent Death threats to the Defendant, and Lack of Actual Notice of trial entitled Defendant, to a new trial. Due to Counsel's Refusal to File Additional Points and Contentions, Defendant Filed with the Court of Appeals a Four Page Supplemental Letter of Points, Requesting that the issues of No trial Counsel, and Appellant Counsel's Failure and Refusal to Raise the issues upon Demand From Defendant, Be Addressed, As Appellate Counsel Gave Oral Argument Before the Court of Appeals, he had Mis-directed the Court Under the Presumption that Defendant had Been Represented By A Court-Appointed Attorney. Therefore, Inducing the Court to Forgo Any Review of Defendant's Supplemental Attachment, and Intentionally Failed to correct Any Mis-Understanding the Court had, in Avoidance of Raising the Very Issue at Question, in the Court's Affirmation of Conviction Denying new trial, the Court had entirely Failed to Address the Issue of trial Counsel and Supplemental Letter. Defendant then Filed For Relief By Way of Habeas Corpus, on the One Issue of 'No trial Counsel,' in the Third District Court of Judge

Frank G. Noel. in A Pro-Se Capacity, in Response, Counsel For Respondants, in Avoidance of the Single Undisputable Claim, had Impermissably Amended New Contentions to Fraudulently Formulate A Collateral Estoppel Defense, Along with that of ineffective Assistance of Counsel. Factually Erroneous in All Concepts. Further, Respondent Counsel Failed to explain the Facts to the Court, Namely that, the Court of Appeals had Been Misdirected and Was in Gross Error By Representing that Defendant had Counsel at trial, and intentionally misdirected the Court to Base the Decision of Dismissal upon Fraudulently Procured, and non-existent, Grounds. As Defendant Informed the Habeas Court about the extensive Respondent Counsel misconduct, the Court Abused its Discretion By Unadventent Negligence. By Refusing to Review the Claim and Supporting evidence, And Dismissed A Substantial Constitutional Claim For Relief that Was Never Factually Disputed By the Respondants in the First Place, As Respondants Only Defended Against the Claims, "She Wrongfully Amended to the Petition", which was the Grounds For Dismissal

= Summary of Arguments =

Argument, I.

"Can An Adverse Party to An Action, mis-
-Inform By Fraudulent means, the material

Facts of A Case, Including the Arbitrary
Amending of Cause of Action, to Intentionally
Misdirect the Court for Dismissal.

Argument, II.

Did the Presiding Judge Abuse his
Judicial Discretion By:

A- Allowing the Respondents to, Per-Se, Amend
the Cause of Action Claiming one Contention, By
Adding more Contentions Against Petitioner's
Content, Only to Confuse the Court, Misdirect
the Judicial Remedy at Law, and Induce Dismissal;

B- By Failing to effectively Scrutinize the
Record and Any Exhibits of Evidence as Sub-
mitted By Petitioner;

C- the Dismissal of Habeas Action While Sub-
stantial Violations were Factually Evident at
Both State and Federal Constitutional Levels,
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D- the Dismissal of Habeas Action on the

Grounds of A Factually Erroneous Collateral Estoppel Defense:

Argument, III.

Did the Dismissal of Habeas Corpus Deny Petitioner What is Included in the term Due Process and Equal Protection of the Law:

= Argument, I. =

Can An Adverse Party to An Action, misinform By Fraudulent means the material Facts of A Case, including the Arbitrary Amending of Cause of Action, to Intentionally misdirect the Court For Dismissal:

In Respondant's Initial Response to Petitioner's writ of Habeas Corpus, Barbara Bearson, (A.A.G.) had misconstrued the Actual Cause of Action that Petitioner was Denied Trial Counsel Representation (Simply One Contention), and By Fraudulent Means Amended three Additional Contentions that, 1, the Court of Appeals Failed to Address this Issue; 2, that his Appellate Counsel was Ineffective For his Refusal to Raise this

Issue on Direct Appeal, and, 3, that Petitioner was Denied Due Process and Equal Protection of the Law, which She is Simply not at Liberty to do without adverse Party Consent.

In Addition Barbara Bearnson, (A.A.D.) misdirected the Court that Petitioner's Claim was Barred By Collateral Estoppel Pre-requisites, As the Issue was Raised On Direct Appeal, and that the Utah Court of Appeals had made the Findings that Petitioner "had Been Represented at trial, By A Court Appointed Attorney". At this Point Barbara Bearnson (A.A.D.) had Failed to Disclose the Complete Facts that the Court of Appeals had Been in Gross error and had Been Misinformed As to trial Counsel's Presence as Appointment During Petitioner's Jury trial, and Further went On to Negate Against An In-effective Assistance of Counsel Claim, that "She" Arbitrarily Added, in An Attempt to Formulate A Collateral Estoppel Defense, that was never a Claim For Relief Initiated By Petitioner.

On June 14, 1989 Petitioner Submitted his Response in Opposition to Respondent's Motion to Dismiss and Memorandum, (Her Equivalent to An Affirmative Defense) and Set forth the Fraudulent misdirection Applied By Barbara Bearnson, and in effect, Reiterated the Only Contention Claimed, and that is, "Petitioner was Deprived and Denied Constitutional Protections to Assistance of Counsel For trial Represent-

-ation to Due Process and Equal Protection". And Clarified that Any Additional Information Used throughout his Petition was mere Supporting Surplusage For the Benefit of the Court, and in Short, Petitioner Was Not Denied Right to effective Assistance of Counsel, Which Would Annul An Ineffective Claim, "He was Denied trial Counsel altogether", By the Court's Granting Counsel's motion to Withdrawal Prior to Trial, and Neglecting to Replace the Attorney with Competent Adversarial Representation For Trial, and then Tried Petitioner in Absentia.

Petitioner had Clearly Presented his Claim For Relief, Cause of Action and Supporting Evidence, Which in Fact, Was Never Disputed By Respondant Counsel. As they could not Dispute the Evidence Admitted (Preliminary/Trial transcripts, P 15, to Conclusion.) And the Amending of the Habeas Corpus, Adding Contentions, Constitutes Manifest Error and an Unpermissible Fraud, as it's Contrary to Petitioner's Well as Intent, and Was Used to Intentionally Mislead the Court Under the Presumptive Direction of A non-existent Collateral Estoppel Dismissal, and Factually Procured that Result on the Same Grounds. Fraud upon the Court Under Circumstances As Prescribed herein, Constitutes Reversible Error, entitling A Decree For Relief From Judgment and Vacating of Order, McGowan V. McGowan, 27 Utah, 2d 200, 494 P.2d 283 (1972); and Boyer V.

Bayce. 609 P.2d 928 (Utah, 1980).

= Argument II. =

Did the Presiding Judge Abuse his
Judicial Discretion By:

A - Allowing the Respondents to, Per-Se, Amend
the Cause of Action Claiming One Contention,
By Adding more Contentions Against Petitioner's
Content, Only to Confuse the Court, misdirect
the Judicial Remedy at Law, and induce Dismissal:

Appellant hereby incorporates the foregoing claim here,
(Point I Supra). therefore, Also claiming Abuse of
Judicial Discretion For the Presiding Judge's inadvertent
Negligence in Not Preventing Fraud and Misdirection
Upon the Court, When he knew, and/or Should. have
known of Respondent Misconduct, Upon Petitioner's
Objection's. Larsen V. Collina, 684 P.2d 52. (Utah 1984).

B - By Failing to effectively Scrutinize the
Record and Any Exhibits of Evidence As
Submitted By Petitioner:

Had the Honorable Judge Presiding effectively Scrutinized the Evidence in the instant Case, Namely, Petitioner's Preliminary and Trial transcripts, the Court would have Reviewed Undisputable Evidence Supporting the Only Claim Petitioner had Presented, and Further could have Prevented Respondents' From misconstruing the Record to the extent of inducing An Erroneous Dismissal, which can hardly be considered A Justifiable or Excusable Error As the Judge in Basing his Decision of Dismissal was of the Opinion that By Petitioner Voluntarily Absenting himself From trial (Actually the trial court Found him in Voluntary Absentia), and "thereby not Available to Assist Counsel in Defense."

Petitioner therefore Couldn't Complain that he was Denied effective Assistance of Counsel, which Clearly Reveals the Court's Misunderstanding of the Material Facts, had the Judge Read the Evidence As Prescribed he would have Seen that Prior to the Commencement of trial, After the Court's Determination of Voluntary Absentia, and with Permission From the Court, Herm Olson, Defense Counsel Withdrew From the Case and thereby, Leaving the Judge, Prosecutor, Jury and Witnesses "Against" Petitioner to Proceed with trial. Indifferent to Absence of Adversarial Representation, the Court Knowingly Failed to Re-Appoint Counsel For at Least Fair Procedure Pursuant to, U.C.A., 78-51-34, 78-51-35, and 78-51-36 (1953 As Amended) Which Clearly Set Forth Statutory Requirements When Counsel is

Allowed to withdrawal. Furthermore, the issue of Counsel Waiver would have been clear to the Court, simply, that there was none, whether written, oral, as Judicially Determined which is an Impermissible Representation Under U.S. Supreme Court, and Constitutional Mandate. The Fact that the issue of no Counsel at trial was not disputed by Respondant Counsel is of Major Importance here, the Court in Goelty v. Continental Bank and Trust Co. 5. Utah 2d 204, 299 P.2d 835 (1956). Held, Defendant was not entitled to Amendment of Pleadings, So As to assert a different defense of Statute of Limitations, where all of the facts necessary were pleaded and there was no new evidence, and where Respondant Counsel had ample opportunity to present contrary evidence and defense and did not object to Petitioner's Evidence and Claim, on the Grounds of Negligence, that it was not within issues of case, cannot complain on new findings based on this evidence, Draper v. J.B. S. & R.E. Walker, Inc. 121 Utah 567, 244 P.2d 360 (1952). and in, General Ins. Co. of Am. v. Carricero Dynasty Corp. 545 P.2d 502 (Utah 1976). Where the Court declared, "Where the Defendant Failed to deny in Answer the Claim Presented, the Plaintiff Fact should be taken As Admitted." and therefore cannot be raised at a later date. Valley Bank and Trust Co. v. Wilken, 668 P.2d 493 (Utah 1983). The Records set forth the undisputed facts verifying that the findings held by the Utah Court of Appeals were factually

Erroneous in All Aspects. As Petitioner is A Pro-Se Un-educated Litigant Liberal exception and Scrutiny of the Record is to Be expected From this Court; Hill v. Lunn, 720. P 2d 1352 (Utah 1986) And As the Repeated Judicial Errors were Material in Rendering Judgement of Dismissal, it Constitutes Abuse of Discretion, Because the Court Should have Known the Facts, As was Presented; Richards v. Siddoway, 24 Utah 2d 314, 471 P. 2d 143 (1970). and, United States v. Auen, 846 F. 2d 872, 878 (2nd Cir. 1988).

c- the Dismissal of Habeas Action while Substantial Violations were Footcally Evident At Both State and Federal Constitutional Levels, including State Statutory Application.

Under Utahs Standard Application of Habeas Corpus Review, Habeas may not Be Used For Review of A Final Judgement. Achieved through Regular Proceedings and Due Process of the Law By A Court Having Proper Jurisdiction. . . . 'But, as to Be Used to, 1, Protect Any one who is Restrained of his Liberty where there exists no Jurisdiction or Authority . . . or, 2, where the Requirements of the Law have Been So Ignored or Distorted, that the Party is Substantially Denied what is included on the

term Due Process of Law . . . , as 3. Where other Circumstances exist which would make it wholly Unconscionable Not to Re-examine the Connection: Bryant V. Turner, 19 Utah 2d 248, 431 P.2d 101 (1967) One, Gallegas V. Turner, 17 Utah 2d 273, 409 P.2d 386 (1965) and, Romwell V. Smith, 560 P.2d 1108 (1977). Under Article 1, Section 5. Utah State Constitution, (Habeas Corpus).

In Relying on Sub-Divisions (2) and (3) of the Above Analysis, Petitioner's Case Fits Well Within that Narrow Sphere of Habeas Corpus Relief, in so-much-as he is Constitutionally ¹ to Counsel Attendance and effective Representation at trial or Any Critical Stage thereof; and the Complete Absence of Counsel Throughout trial Proceedings constitutes "Reversible Error" Where no Valid and Intelligent Waiver is Evident Upon the Record, Pape V Smith, (1974) 373 F. Supp. 462, and Kuehnert V. Turner, (1972) 28 LL 2d 150, 499 P.2d 839.

Application Under Uniform Federal Standards exist Under the 6th Amendment U. S. Constitution, which Provides that, "In all Criminal Prosecutions the Accused Shall enjoy the Right . . . to have Assistance of Counsel." the 6th Amendment Right to Counsel encompasses All Federal and State Criminal Prosecutions, that Result in Imprisonment, and is Clearly Protected For Uniform Application Under the 14th Amendment's Due Process and Equal Protection of the Law. Further, it is Clearly

evident that no express Request Be made By the Accused For Counsel, Especially Under these Circumstances, Murphy v. Holland, 776 F. 2d 470, 480 (4th Cir. 1985). Vacated on other Grounds, 475 U.S. 1138 (1986)

In the instant case, Counsel had Been Retained By Petitioner, yet the Court in its Description Allowed Withdrawal of Counsel on the day of trial, Without the Required Appointment of New Counsel, As More Clearly Setforth in Sub-Section (B). herein, and explicitly Carried By Application Under State Statutory Law, Pursuant to Utah Code Annotated, (U.C.A.) 77-35-17 (1953). A Defendant is entitled to "Either" Counsel Representation "or" to Represent himself Upon Valid Waiver, But At no time must he Be Forced to Forego Both.

Pursuant to U.C.A. 78-51-34, 78-51-35, and 78-51-36. (1953 As Amended) An Attorney is Required to Motion the Court Should he Withdrawal As Counsel, and "Must" Give Adequate Notice to Defendant including the Substitution of New Counsel, immediately Appointed As Replacement By the Court, And Until Such time, "No Further Proceedings are to Be held," and Until new Counsel is Appointed the Old Counsel "Cannot" Be Allowed to Withdrawal and must Be Recognized As Counsel of Record Until Such time As Defendant Appears "in Person", or "New Counsel Appears on Behalf of Defendant." Respondents' Clearly Admit

that the Court Allowed defense Counsel to Withdrawal Before trial, But Fail to inform the Court that no Counsel was Appointed as Replacement as the Facts that no Waiver to Counsel was Procured Before trial. Contrary to Any "Presumption of Waiver", the Issue of Voluntary Counsel Waiver was not made manifest, Whether by Court Determination or By Petitioner, either Orally or in Writing.

therefore Failing in Complete Assessment of a Constitutional Requirement. A "Defendant" may choose to Waive Right to Counsel, But Only to Represent himself, and Only then if Such Choice is made "Knowingly and Intelligently", State v. Ruple, (1981) 631 P.2d 874. the U. S. Supreme Court in Faretta v. California, 422 U. S. 806 (1975), Requires trial Judges to Inquire into A Defendant's Awareness of Dangers and Disadvantages of Self-Representation, Including Any Technical Problems, this Standard would even more so Apply to A Judicially Procured or Determined Counsel Waiver in Absentia, if it is even Constitutionally Possible at Law.

Still So, in the instant case, "no Presumed Waiver to Counsel" Can Constitutionally Stand upon A Silent Record...

the U. S. Supreme Court in, Strickland v. Washington, 466 U. S. 668 (1984), explained that, Because of the Purpose of the 6th Amendment Right to Counsel to ensure A "Fair trial", the Bench mark for Judging Any Claim of Ineffectiveness of

Counsel must be whether Counsel's Conduct So Undermined the "Proper Functioning of the Adversarial Process, that the Trial Cannot Be Relied on as Having Procured A Just Result." Also in Strickland, and United States v. Cronie, 466 U.S. 648 (1984), the Supreme Court identified the narrow category of cases in which Prejudice is Automatically Presumed, "and that Presumption Applies When there has been an actual or constructive Denial of Assistance of Counsel Altogether"; Such as the instant case has Proven Beyond Doubt.

In Short, A Colorable Constitutional Claim of this Magnitude Cannot Be Unadversantly Dismissed, Dabbs v. Kemp, 809 F. 2d 750, 751 (11th Cir.) (Per-Curiam) the Court held, Habeas Review Cannot Be Precluded When Low Permitted Prisoners to Raise Federal Constitutional Claims in Post-Conviction Proceedings Absent Knowing and Intelligent Waiver of Claim, and the State had Asserted no Such Waiver). Cert. Denied, 107 S. Ct. 2203 (1987). And is clearly evident Under Article 1, Section 5, 7, and 12, of the Utah State Constitution, and Utah's Supreme Court Habeas Corpus Standard of Purpos. Sub-Sections, (2) and (3) Further, Supported By Utah Low Review, Judicial Tabernacle, as Uniform Constitutional Protections? Strickland v. Washington and National Standards For effective Assistance of Counsel Claims, 1985. Utah Low Review, 723. and A. L. R. - What constitutes Assertion of Right to Counsel Following Miranda Warning's - Federal Cases,

80 A & R Federal, 622.

therefore, Contrary to the Courts' Conflicting Findings of Fact and Conclusions of Law, Petitioner has in Fact Been Deprived of Substantial Constitutional Rights, and is therefore, entitled to Relief By Way of Habeas Corpus. Because Habeas Renew Cannot Be Precluded By An Erroneous State Court Ruling of Procedural Bar, Because Under Law, An Attorneys Failure to Belabor A Point Raised on Appeal and Faults in the Proper Conducting of Assessment and Ruling of the Case, Cannot Be Deemed as a Legitimate Default under Estoppel. Senclair V Wainwright, 814 F.2d 1516, 1521, (11th Cir, 1987).

V. the Dismissal of Habeas Action on
the Grounds of A Factually Erroneous
Collateral Estoppel Defense.

the Courts Reliance upon Erroneous Information in Supporting A Collateral Estoppel Bar, and Dismissal Was "manifest Error mandating Reversal, As More Clearly Presented in the Forgoing Points and Sub-Sections As Petitioner Incorporates each Claim.

the Wrongfully Induced Presumption that Proper and Adequate Appellate Procedure was Afforded Petitioner is Clearly evident, Namely, the Court of Appeals Was 'mis-led to Believe that

Petitioner had trial Counsel Representation. As Petitioner, had Court Appointed "Appellate" Counsel on Direct Appeal, who Presented Oral Argument, and knew of the Appeals Court's mis-interpretation of the issue of trial Counsel (See, Attached Exhibit "A.") But Counsel failed to correct the clear misunderstanding in Avoidance of Raising Petitioner's Contentions to Counsel issues, and ineffective Appellate Counsel issues, and therefore leaving Stand and Erroneous Presumption that Resulted in the Appeals Court's Complete Failure to Assess the Validity of the Claim or Produce Conclusions of Fact and a Final Ruling Regarding Petitioner's Supplemental Attachment, which can hardly be held valid Bar Against Petitioner for Appellate Counsel's intentional failure, as "no" Attorney will litigate an ineffective claim against himself, as the instant case presents, and which effectively misdirected the Habeas Court to rely on an Erroneous, "misstatement" in their Findings of Fact, Point (4) in Part, which states, "... the Court of Appeals found that the Petitioner was "Represented By Counsel", but Voluntarily Absent-yeed himself from trial and was therefore, "Properly tried in Absentia" the Factual Wording of the Court of Appeals' Opinion was, Page 2, Paragraph, (4), "Appellant's Jury trial commenced On June 30th 1987, Although Represented By a Court-Appointed Attorney". Appellant was not Present at trial, the Jury found Appellant Guilty in Absentia on Both Burglary and

Assault Charges". (Emphasis Added). the Court of Appeals in holding that the Court acted within its discretion in holding the trial in Absentia, was Eggnarant of the Material Facts, and Barbara Bearnson (A.A.G.), in the Court's Conclusions and Findings of Fact, Only Affirmed that A Defendant "Cannot" Be Tried Properly in Absentia with out an Attorney in the Court Room, By Her Erroneous Finding and Statement that, "...the Court of Appeals Found that Petitioner was Represented By Counsel" " and was therefore, Properly tried in Absentia." Had the Proper Facts Been Presented to the Court of Appeals, and the Habeas Court, Petitioner's Conviction Can in no Way Be Sustained As Valid Under Uniform Constitutional Law, and where no Waiver Was Made Manifest, no incarceration Could Legally Stand upon A Silent Record. "Because that Record Speaks For the Petitioner. White V. Maryland, 463 U.S. ____ (1963).

Therefore, the Previous Dismissal of Petitioner's Writ, Constitutes Unadvertant Negligence and An Abuse of Judicial Discretion Amounting to Sufficient Justification of Vacating Previous Court Orders, and the Granting of Habeas Corpus Relief. Because Habeas Review Cannot Be Precluded When the State Court's Findings were Factually Erroneous, as Was An Unconsistent Application of State Law. Olines V. Wainwright, 795 F.2d 1524, 1529 (11th Cir. 1986), cert. Denied, 107 S. Ct. 1380 (1987). and, Sinclair V. Wainwright, 814 F.2d 1516, 1521 (11th Cir. 1987), holding that, Habeas

Review Cannot Be Precluded By An Erroneous State Court
Ruling of Procedural Default.

Argument, III.

And, the Dismissal of Habeas Corpus
Writ Petitioner What is Included in
the Term Due Process and Equal
Protection of the Law;

Petitioner hereby incorporates each and every Point as
Contained throughout this Brief, to Substantial What
is Considered Valid and Legitimate Violations of Due
Process and Equal Protection of the Law, Under Article
1, Sections 5, 7, and 12, of the Utah State Constitution, the
6th and 14th Amendments to the United States Constitution,
and the Utah Rules of Civil Procedure and Practice, et. al,
Further, Pursuant to, Bishop's Sheet Metal Co. v. Luras, 11
Utah 2d 357, 359 P.2d 21 (1961). Any Party Claiming
and Establishing A Lack of Due Process of the Law and
Equal Protection, is entitled to Relief of Judgment or Order.
And Any Decision Relating to either the 5th or 14th Amend-
-ments of the United States Constitution and the Uniform App-
-lication thereof, are highly Persuasive When Interpreting the

Due Process Clause of the Utah Constitution. Vale Convalescent
S Care Institution v. Industrial Comm. of Utah. (1982) 649 P. 2d
33.

= Conclusion =

Where the Appellant was Denied Actual Adversarial Representation and Presence of Court Appointed Counsel throughout his Trial in Absentia, Denied effective Appellate Counsel Assistance for Proper Appellate Review of Counsel Denial, and the Habeas Courts Misdirection upon Erroneous Findings of Fact, As a Direct Result of Respondant Counsel Fraud upon the Court, Appellant is entitled to A New Trial and the Immediate Vacating of Any and All Previous Judgements of Conviction and Sentencing and Any other Order in Concern of the Instant Case, including the Immediate Release from Appellants UnConstitutional Incarceration, And this Court should So Order;

Respectfully Submitted,

Executed this 22 day of JANUARY 1990

at the Utah State Prison:

Wade Wagstaff

Wade Wagstaff

Attorney Pro-Se:

= Certificate of Service =

this certifies that I mailed a true and correct
copy of the foregoing, "Appellants Brief", Postage
Pre-Paid, to:

Barbara Bearmson,
Assistant Attorney General.
at 236, State Capitol Bldg.
Salt Lake City, Utah, 84114.

On this 22 day of JANUARY 1990.

Wade Wasloff

(Exhibit "A")

"Appellate Attorney Letter, 'After', Denial of
Direct Appeal."

NATHAN HULT

ATTORNEY-AT-LAW

P O BOX 171

326 NORTH 100 EAST

LOGAN, UTAH 84321

PHONE (801) 753-3391 OFFICE
(801) 752-7538 HOME

April 25, 1989

Wade Wagstaff
Utah State Prison
PO Box 250
Draper, Utah 84020

Dear Wade:

Enclosed is a copy of the court's opinion denying you a new trial. As you can see, despite the possibility of misconduct by the County Attorney's office, the court did not feel that your total failure to maintain contact with anyone involved with the case including your own attorney was reasonable under the circumstances.

NOT TRUE

While the court misstates that you were represented by an attorney at the trial, the law with regards to waiver of counsel would be exactly the same as waiver or right to be present at trial and a decision thereon would be exactly the same, that you waived such by failure to maintain contact with the court or make such a request to the court.

The appeal was a long shot that did not come in. Hopefully everything is going well for you at the prison and that you will be out fairly shortly.

Sincerely,



Nathan Hult

NH:db
Enclosure

(Exhibit "B")

= Minut Entry =

= Findings of Fact, and Conclusions of Law, =

= order, =

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

WAGSTAFF, WADE	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 890903190 HC
	:	DATE 08/16/89
VS	:	HONORABLE FRANK G NOEL
	:	COURT REPORTER
BARNES, ELDON	:	COURT CLERK NP
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY. WAGSTAFF, WADE
D. ATTY. BEARNSON, BARBARA

AFTER HEARING ORAL ARGUMENT ON DEFTS MOTION TO DISMISS AND AFTER READING DEFTS MEMO AND THE OTHER PLEADINGS FILED IN THIS MATTER AND HAVING TAKEN THE MATTER UNDER ADVISMENT, THE COURT NOW RULES AS FOLLOWS: FOR THE REASONS STATED IN DEFTS MEMO THE COURT GRANTS THE MOTION TO DISMISS. THE COURT IS FURTHER OF THE OPINION THAT BY VOLUNTARILY ABSENTING HIMSELF FROM THE TRIAL AND THEREBY NOT BEING AVAILABLE TO ASSIST COUNSEL IN HIS DEFENSE, PETITIONER CANNOT NOW BE HEARD TO COMPLAIN THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL FOR DEFT IS TO PREPARE AN ORDER CONSISTENT WITH THIS RULING AND SUBMIT IT TO THE COURT FOR SIGNATURE. PETITIONER IS ADVISED THAT IF HE WISHES TO APPEAL THIS RULING IT MUST BE DONE WITHIN 30 DAYS OF THE COURTS RULING.

OFFICE OF
THE ATTORNEY GENERAL



STATE OF UTAH

R. PAUL VAN DAM - ATTORNEY GENERAL

236 STATE CAPITOL • SALT LAKE CITY, UTAH 84114 • TELEPHONE: 801-538-1015 • FAX NO. 801-538-1121

JOSEPH E. TESCH
CHIEF DEPUTY ATTORNEY GENERAL

July 17, 1989

Honorable Frank G. Noel
Third District Court Judge
Third District Court
240 East 400 South
Salt Lake City, Utah 84111

Re: Wage Wagstaff v. Eldon Barnes,
Case No. 890903190

Dear Judge Noel:

The original findings of fact, conclusions of law and order in the above entitled case are enclosed for your signature. I have also enclosed a courtesy copy for your file.

If you have any questions or concerns, please contact me. Thank you.

Sincerely,

A handwritten signature in dark ink, appearing to read "Barbara Bearnson".

BARBARA BEARNSON
Assistant Attorney General

BB:bks

Enclosures

R. PAUL VAN DAM (3312)
Attorney General
BARBARA BEARNSON (3986)
Assistant Attorney General
Attorneys for Respondent
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1135

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

WADE WAGSTAFF,	:	
	:	FINDINGS OF FACTS AND
Petitioner,	:	<u>CONCLUSIONS OF LAW</u>
v.	:	
ELDON BARNES, Warden,	:	Case No. 890903190
Utah State Prison,	:	
	:	Judge Frank G. Noel
Respondent.	:	

The petition for post-conviction relief came on for hearing on August 14, 1989, at the hour of 10:30 a.m. before the Honorable Raymond S. Uno. Petitioner, Wade Wagstaff, appeared pro se. The respondent was represented by Barbara Bearnson, Assistant Attorney General. The Court being fully advised in the premises hereby enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Petitioner is confined at the Utah State Prison following a conviction for burglary, a second degree felony and assault, a class B misdemeanor. Petitioner was convicted by a jury in First District Court, in and for Cache County. Petitioner was represented by counsel up to the date of trial

when, because of petitioner's lack of cooperation, trial counsel was allowed to withdraw. Petitioner voluntarily absented himself from the trial. He has filed a petition for post-conviction relief pursuant to Utah R. Civ. P. 65B(i).

2. Petitioner claims that: (1) he was denied the right to counsel at trial; (2) that the Court of Appeals failed to address this issue; and (3) that appellate counsel was ineffective for failing to raise this issue on appeal.

3. Even though appellate counsel did not brief the issue, petitioner supplemented the brief with a four page letter to the Court of Appeals in which he presented legal argument and support for his contention of error.

4. The Court of Appeals found that petitioner was represented by counsel but voluntarily absented himself from trial and was, therefore, properly tried in absentia.

Based on the foregoing Findings of Fact, the Court hereby makes its

CONCLUSIONS OF LAW

1. By voluntarily absenting himself from trial, and thereby not being available to assist counsel in his defense, petitioner cannot now be heard to complain that he was denied effective assistance of counsel.

2. Petitioner has not been denied a substantial constitutional right and is, therefore, not entitled to relief by way of habeas corpus.

3. The respondent's motion to dismiss is granted.

DATED this _____ day of August, 1989.

BY THE COURT

FRANK G. NOEL
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Findings of Fact and Conclusions of Law was mailed, postage prepaid to Wade Wagstaff, P.O. Box 250, Draper, Utah, 84020, on this 25th day of August, 1989.

Brenda Ahl

R. PAUL VAN DAM (3312)
Attorney General
BARBARA BEARNSON (3986)
Assistant Attorney General
Attorneys for Respondent
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1135

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

WADE WAGSTAFF,	:	
Petitioner,	:	ORDER
v.	:	
ELDON BARNES, Warden	:	Case No. 890903190
Utah State Prison,	:	
Respondent.	:	Judge Frank G. Noel

The above matter having come before this Court on respondent's motion to dismiss petitioner's petition for post-conviction relief, with petitioner appearing pro se and respondent represented by Barbara Bearnson, Assistant Attorney General, and this Court having reviewed all pleadings filed in this matter and being fully advised in the premises and the Court having entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the motion to dismiss is granted and that, therefore, petitioner's petition be dismissed.

DATED this _____ day of August, 1989.

BY THE COURT:

FRANK G. NOEL
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Order was mailed, postage prepaid to Wade Wagstaff, P.O. Box 250, Draper, Utah, 84020, on this 25th day of August, 1989.

Brenda Stubbs