

2000

West Valley City v. Jasbir Singh Bhatia : Brief of Appellant

Utah Court of Appeals

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WEST VALLEY CITY,

VS.

Respondent.

Priority No. 2

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Julia D'Alesandro

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,

Plaintiff/Appellee,

vs.

JASBIR SINGH BHATIA,

Respondent.

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Appellate No. 990249-CA

Priority No. 2

**AN APPEAL FROM A CRIMINAL CONVICTION OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
WEST VALLEY DEPARTMENT DATED MARCH 11, 1999
THE HONORABLE JUDGE PAUL MAUGHAN**

OPENING BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

Jurisdiction is conferred under Utah R. App. P. 3, and this Court has appellate jurisdiction pursuant to Utah Code Ann. 78-2a-3(2)(e) (Supp. 1997) inasmuch as the issues presented to this Court on appeal arise from a criminal conviction from a court of record which is not a first degree felony or capital felony.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE 1: Is Defendant's conviction unconstitutional where he was not represented at the trial and did not waive that right to representation?

STANDARD OF REVIEW: The standard of review is whether the trial court committed plain error. State v. Irwin, 924 P.2d 5 (Utah App. 1996).

ISSUE 2: Did Defendant receive ineffective assistance of counsel when counsel violated the attorney client privilege by filing an agreement entered into by Bhatia with counsel allegedly waiving his right to a jury trial?

STANDARD OF REVIEW: The standard of review is whether the trial court committed plain error. State v. Irwin, 924 P.2d 5 (Utah App. 1996).

ISSUE 3: Is Defendant's conviction unconstitutional where he was not afforded a trial by jury despite having specifically made a jury demand where the Court did not inquiry as to the circumstances surrounding his alleged waiver of his right to a trial by jury?

STANDARD OF REVIEW: The standard of review is whether the trial court committed plain error. State v. Irwin, 924 P.2d 5 (Utah App. 1996).

DETERMINATIVE LAW ON APPEAL

The following constitutional provisions, statutes, rules, regulations and cases are believed to be the determinative law of this Appeal and are attached in full in the addendum hereto: (1) Wagstaff v. Barnes, 802 P.2d 774, 779 (Utah App. 1990); (2) U.S. Constitution Amendment VI; (3) Utah Constitution, Article I, Sections 10 and 12.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

1. On or about July 17, 1998, Bhatia a summons was issued requiring Bhatia to appear before the Third Judicial District Court in and for Salt Lake County, West Valley City Department to answer a charge for Attempted Aggravated Assault. R. 1.

2. An information was filed on or about July 6, 1998 charging Bhatia with Attempted Aggravated Assault, pursuant to Section 76-5-103, Utah Code Annotated (1953 as amended). R. 2-3.

3. On or about July 22, 1998 a certificate of service by mail of the summons was returned to the Court. R. 4.

4. A return of service was filed on or about August 11, 1998 indicating that Bhatia was personally served with the Summons in this action. R. 5.

5. An initial pretrial was scheduled for November 4, 1998. R. 8.

6. The Court appointed L. Bruce Larsen to serve as legal counsel for Bhatia and a notice of appearance was filed by Mr. Larsen on October 5, 1998. R. 5.

7. A jury trial was set in this matter on December 10, 1998, after the Defendant

specifically filed a jury demand. R. 10, 13

8. On or about December 8, 1998, Bhatia entered into an agreement with his counsel, stating, "I agree that if I do not contact Bruce Larsen, Steven Miller or Jason Rammell two working days prior to my Jury Trial that the Jury Trial can be waived in this matter and the case will be tried before the Judge only." R. 14.

9. After several continuances, a trial was ultimately held on March 11, 1999. R. 22.

10. Bhatia was not present at the time of the trial. See Trial Transcript.

11. Prior to the commencement of the trial, Bhatia's counsel, Steven Miller filed with the Court the agreement between Bhatia and counsel to keep in contact set forth in Fact No. 8 above. See Trial Transcript, P. 3 line 25 through P. 4 line 9.

12. Prior to the commencement of the trial, Bhatia's counsel orally moved to withdraw from this action. See Trial Transcript, P. 4 line 16 through P. 5 line 6.

13. The Court granted Bhatia's counsel's motion to withdraw. See Trial Transcript, P. 5 line 11-19.

14. After a trial in absentia, the Court convicted Bhatia of attempted aggravated assault and issued an amended commitment and a cash only bail set at \$15,000.00. R. 24.

15. An arrest warrant was issued. R. 25.

16. A commitment was issued sentencing Bhatia to 180 days to be served consecutively with another sentence was issued by the Court on April 26, 1999. R. 33.

17. Bhatia filed his notice of appeal on May 4, 1999. R. 35.

B. FACTUAL HISTORY RELEVANT TO APPEAL

1. On or about June 14, 1998, Bhatia was at the Redwood Road Swap Meet. Trial Transcript (hereinafter referred to as "TT"), P. 8-9.

2. An altercation broke out between Bhatia and his cousin, Gurpeet Singh Bhatia. TT, P. 8, 12.

3. As set forth in the procedural history above, Bhatia was charged with attempted aggravated assault. R. 2-3.

4. Bhatia was appointed counsel to represent him. R. 5.

5. Bhatia entered into an agreement with his counsel which stated, ""I agree that if I do not contact Bruce Larsen, Steven Miller or Jason Rammell two working days prior to my Jury Trial that the Jury Trial can be waived in this matter and the case will be tried before the Judge only." R. 14.

6. After several continuances, the matter was set for trial on March 11, 1999. R. 22.

7. Bhatia did not appear on the day of trial. TT, P. 3-5.

8. At the commencement of the trial, the following dialogue occurred:

Mr. Stoney: Your honor, the record should reflect that Mr. Bhatia is not present in the courtroom at this time, that both Mr. Miller and I are familiar with Mr. Bhatia, as well as the witnesses. They have not seen him today.

We should back up and note for the record that this trial was originally scheduled for January 21st, that it was continued from that date and that since

that date--and I probably should let Mr. Miller put this on the record then, that Mr. Miller has had contact with Mr. Bhatia on the 21st of January and on the 1st of February regarding this date.

Furthermore, Mr. Bhatia has signed a--an agreement with Mr. --with the office of Larsen & Rammell, that counsel represents, and I'll present that to the Court to put in the Court's file. That is basic--

THE COURT: Is that correct, Mr. Miller, what's been represented?

MR. MILLER: Yes, it is, your honor.

THE COURT: Okay.

MR. STONEY: And I believe that indicates that he agrees to remain in contact with their office.

And then I think the record needs to be supplemented by counsel as well.

MR. MILLER: Your honor, I would make a motion to withdraw in this case based on that the --or that the defendant has not made himself available to me or my office to properly prepare and defend him today.

And--and just to back up a little bit more, that--that apparently the case was originally continued on--on plaintiff's motion, and that on the 21st of January, I did speak with him and then also, on the 1st day of February, I spoke with him.

I attempted to contact him yesterday on the phone that I had been given

and that had been good in the past, but it was disconnected. And then I had another message phone, I did leave a message, I believe with his mother and she had not been in touch with him for a couple days and apparently she was not able to deliver that message.

THE COURT: On the times you did have contact with him, was he aware of the trial date set for today?

MR. MILLER: Yes, he was, your honor.

THE COURT: Okay. All right. I'll grant, based on your representations today, I'll grant your motions to withdraw and note that in the file, you've given us a copy of the contract where Mr. Bhatia agreed to be in contact with your office at least two days--two working days prior to the jury trial. If he fails to do so, that the case will be tried before the Judge only and he waives his right to jury trial. That's dated December 2nd of 1998. TT, P. 3-5.

9. No inquiry was made at the time of trial as to the voluntariness of Bhatia's absence from the court. See TTP generally.

10. No inquiry was made at the time of trial as to whether Bhatia had waived his right to be represented at the trial. See TTP generally.

11. After counsel withdrew, the jury was dismissed and the matter was tried before the Judge in Bhatia's absence. TT, P. 6 and TT generally.

12. At the conclusion of the trial, the Court convicted Bhatia and issued a bench warrant. TT, P. 23, Lines 6-7.

13. A bench warrant was issued for Bhatia's arrest. TT, P. 24.

SUMMARY OF ARGUMENTS

Bhatia's conviction was unconstitutionally obtained because he was not represented by counsel, had not appeared pro se, and had not waived the right to counsel. Bhatia received ineffective assistance of counsel when counsel violated the attorney client privilege and filed with the Court the document whereby Bhatia allegedly waived his right to a trial by jury. Bhatia's conviction was unconstitutionally obtained where the court failed to inquire concerning the circumstances surrounding Bhatia's alleged waiver of his right to trial by jury.

ARGUMENT

I. THE DEFENDANT'S CONVICTION WAS UNCONSTITUTIONALLY OBTAINED WHEN HE WAS UNREPRESENTED AND HAD NOT WAIVED THE RIGHT TO COUNSEL.

Generally speaking, a claim of ineffective assistance of counsel may not be brought to the attention of the Court of Appeals on a direct appeal, unless "unusual . . . narrow circumstances exist." State v. Vessey, 967 P.2d 960, 964 (Utah App. 1998)[citations omitted]. Such unusual circumstances exist when "there is new counsel on appeal and there is an adequate trial record" for the Court of Appeals to review the allegations. Id. The present case fits the unusual narrow circumstances exception which should permit this Court to review the ineffective assistance of counsel issues on direct appeal.

In order to prevail on a claim of ineffective assistance of counsel, Bhatia must show that his attorney's performance was deficient and that performance prejudiced him. State v. Oliver, 820 P.2d 474, 476 (Utah App. 1991). Performance is deemed deficient, when on the specific record, it falls below the objective standard of reasonableness. Id. at 478. In assessing trial counsel's performance,

an appellate court must "indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Id. In the present case, Bhatia's counsel's performance fell below the objective standards of reasonable professional assistance and Bhatia was thereby prejudiced.

Bhatia's conviction was unconstitutional where he was not represented at the trial and did not waive that right to representation. Under both the United States Constitution and the Utah Constitution, Bhatia had the right to assistance of counsel at all critical stages of his criminal proceeding. State v. Hamilton, 732 P.2d 505, 506-07 (Utah 1986); U.S. Const. amendment VI; and Utah Const. art. I, Section 12.

Utah law is settled on this point. "Absent evidence in the record of affirmative, knowing and intelligent action by [the Defendant] that might reasonably be construed as a waiver, . . . there has been no waiver and [the Defendant] is entitled to be represented by counsel at trial even if he chose not to be there himself. Because [the Defendant] was not represented by counsel at trial, his conviction was unconstitutionally obtained." Wagstaff v. Barnes, 802 P.2d 774, 779 (Utah App. 1990).

In the present case, the record is completely devoid of any affirmative, knowing and intelligent action by Bhatia which might be construed as a waiver of the right to be represented at trial. Rather, the record reflects that immediately prior to the commencement of the trial, Bhatia's counsel sought leave of the Court to withdraw with full knowledge that the court intended to go forward in absentia. TTP3-5. It is clear from the fact that Bhatia was not present at the time of either the motion or court order permitting his counsel to

withdraw that Bhatia reasonably believed that his attorney was representing him in these proceedings even if he was absent.

It is clear that Bhatia did not waive the right to be represented at trial. The court having permitted his attorney to withdraw based solely on Bhatia's absence, Bhatia was unrepresented at trial. Because the record is devoid of any evidence of waiver of the right to be represented at trial, Bhatia's conviction was unconstitutionally obtained and must be overturned.

II. BHATIA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY VIOLATED THE ATTORNEY-CLIENT PRIVILEGE RESULTING THE IN THE FILING OF A DOCUMENT EXECUTED BY BHATIA TO HIS COUNSEL WHEREBY HE ALLEGEDLY WAIVED HIS RIGHT TO A JURY TRIAL.

Bhatia received ineffective assistance of counsel when his attorney violated the attorney client privilege. Based on that violation, counsel for Bhatia filed with the court a document by which Bhatia allegedly waived his right to a trial by jury.

The attorney client privilege belongs to the client. Salt Lake Legal Defenders Assn v. Uno, 932 P.2d 589 (Utah 1977). "The privilege belongs to the client and he may waive it or enforce it as may seem proper. . . . The sole purpose of the privilege was [and is] to protect the client's interests." In Re: Young's Estate, 33 Utah 382, 387, 94 P. 731 (1908). Admittedly, the attorney client privilege may be waived by the client and there are exceptions thereto. As set forth in Doe v. Mare, 984 P.2d 980 (Utah 1999),

In accordance with long-standing principles of common law, Rule 504 affords a client a privilege protecting confidential attorney-client communications subject to five exceptions. Specifically, the rule does not recognize a privilege when (1) the legal

services were sought in furtherance of a crime or fraud, (2) the client has died and the lawyer-client communications are relevant to an issue between parties making claims through the deceased client, (3) the lawyer and client are themselves in dispute regarding an issue of breach of duty, (4) the communication is relevant to a document to which the lawyer was an attesting witness, or (5) a dispute arises between joint clients of the lawyer.

Id. None of the foregoing exceptions applies to the case at hand. While Rule 504 of the Utah Rules of Evidence addresses exceptions to the attorney client privilege, it does not discuss waiver of that privilege. Pursuant to Rule 507 of the Utah Rules of Evidence, "a party may also waive the privilege by placing attorney-client communications at the heart of a case, as where a party raises the defense of good faith reliance on advice of counsel." Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162-63 (9th Cir. 1992). Specifically, Rule 507(a) provides, "A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure." Utah R. Evid. 507(a). In the present case, Bhatia made a communication solely to his counsel. Said communication was at the time of its execution subject to the attorney client privilege. There is no evidence that at the time of the execution of the document, any exceptions to the privilege applied. Further, there is no evidence that pursuant to Rule 507 of the Utah Rules of Evidence that Bhatia took any action through by which he waived that privilege.

Bhatia believes that the document executed by him which was directed to his counsel

was subject to the attorney client privilege. No exceptions applied and Bhatia did not waive the privilege. Bhatia believes that the disclosure of the document to opposing counsel and the court violated the attorney client privilege and is per se evidence of ineffective assistance of counsel evidencing clear conduct by his attorney which falls below an objective standard of reasonableness.

Bhatia believes that he was clearly prejudiced by the violation of the attorney client privilege and resulting ineffective assistance of counsel. By submitting said document to the Court, counsel waived Bhatia's right to a trial by jury. Bhatia was not afforded his constitutional right to a trial by jury and to be found guilty beyond a reasonable doubt by a jury of his peers pursuant to Article I, Section 10 of the Utah Constitution and the Sixth Amendment to the United States Constitution.

III. THE COURT COMMITTED PLAIN ERROR BY ACCEPTING BHATIA'S ALLEGED WRITTEN WAIVER OF HIS RIGHT TO A TRIAL BY JURY WITHOUT INQUIRING AS TO THE CIRCUMSTANCES SURROUNDING THE EXECUTION OF SAID WAIVER.

The trial court accepted the document executed by Bhatia as a waiver of his right to a trial by jury in this case, despite Bhatia having previously specifically having filed a jury demand and the presentation of said document in violation of the attorney client privilege. TT. P. 3-5 and R. 14. Without evidence of the voluntariness and knowing nature of Bhatia's waiver of his right to a trial by jury, Bhatia's conviction was unconstitutionally obtained.

Bhatia admits that the right to a trial by jury may be waived by the Defendant. Salazar v. Warden, Utah State Prison, 852 P.2d 988, 991 (Utah 1993). However, the Courts

of this State have recognized that the right to a jury is a fundamental constitutional right. State v. Moosman, 794 P.2d 474 (Utah 1990). In Moosman, the cited to State v. Cook, 714 P.2d 296 (Utah 1986), following a nonjury trial granted to the prosecution at a pretrial at which the Defendant was absent and following the Court granting the Defendant's counsel the right to withdraw from the proceeding,

There is nothing in the record before the Court to show that defendant's statutory right was properly waived by defendant....This unexplained vacation of the jury trial setting is unjustifiable in view of the statute's express language... In any event, no waiver of a jury was ever made by defendant in open court or on the record. Such waiver will not be presumed from a silent record.

Id. Similarly, in the case at bar, the jury trial was vacated without any evidence on the record as to the voluntary nature of the waiver and following the withdrawal of Bhatia's counsel and in Bhatia's absence.

A criminal defendant's right to a jury trial is substantial and valuable and should be carefully safeguarded by our courts. Id. In State v. Garteiz, 688 P.2d 487 (Utah 1984), Justice Durham stated: "I urge trial courts to undertake a careful explanation of the nature of the right to a jury trial before accepting a defendant's waiver thereof, particularly where the defendant's circumstances may appear on their face to create obstacles to his clear understanding of the choice he is making." In Garteiz, the Defendant was not a native to the United States and required an interpreter in order to fully understand the nature of waiver. Similarly, in this case, Bhatia was not a native and required an interpreter in order to fully understand the nature of the waiver he allegedly voluntarily executed.

It was plain error for the Court to vacate the previously demanded jury trial without

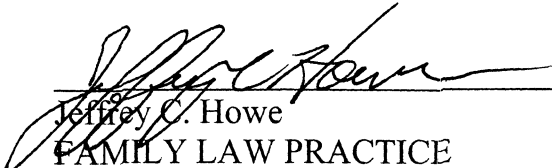
any evidence before the Court of the voluntariness of the execution of the alleged waiver and without any evidence that Bhatia understood the nature and consequences of his actions. The result of such error was to abridge Bhatia's constitutionally protected right to a trial by jury. As such, his conviction was unconstitutionally obtained.

CONCLUSION

Bhatia's conviction was unconstitutionally obtained when he was not represented by counsel, had not appeared pro se, and had not waived the right to counsel. Without evidence of a knowing and voluntary waiver of his right to counsel, any conviction obtained following the withdrawal of counsel, even if Bhatia was absent from the trial, was unconstitutionally obtained. Bhatia received ineffective counsel when counsel violated the attorney client privilege and filed with the Court the agreement that he allegedly waived his right to a trial by jury. Bhatia was prejudiced by the filing insofar as he was denied a trial by jury which he had specifically requested. Finally, the Court committed plain error when it accepted the alleged waiver of the right to a trial by jury where there was no evidence in the record of the circumstances surrounding the execution of the alleged waiver and therefore no evidence that such a waiver was knowingly, intelligently, voluntarily and freely given. For the above stated reasons, Bhatia's conviction

was be overturned.

Dated and Signed this 5th day of April, 2000.

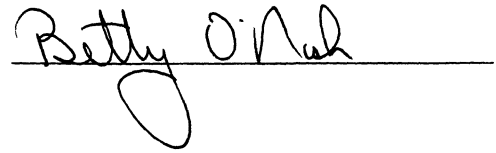


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Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing **Opening Brief** was **MAILED**, postage prepaid, on this 5 day of April, 2000 to:

Keith Stoney
West Valley City Prosecutor
Attorney for Appellee
3636 Constitution Blvd.
West Valley City, Utah 84119

A handwritten signature in cursive script, reading "Betty O'Neil", is written over a horizontal line. The signature is fluid and includes a large loop at the end of the last name.

ADDENDUM A

Determinative Law of the Appeal

Wagstaff v. Barnes, 802 P.2d 774, 779 (Utah App. 1990)
United States Constitution Amendment VI
Utah State Constitution Article I, Section 10 and 12
Trial Transcript, PP's 3-5

**149 Utah Adv. Rep. 48, 802 P.2d 774 WAGSTAFF V. BARNES (Ct. App. 1990)
1990 Utah App. Lexis 177**

Wade Wagstaff, Plaintiff and Appellant,

vs.

**Eldon Barnes, Warden, Utah State Prison, Defendant and
Appellee**

No. 890663-CA

COURT OF APPEALS OF UTAH

149 Utah Adv. Rep. 48, 802 P.2d 774, 1990 Utah App. LEXIS 177

December 3, 1990, Filed

PROCEEDINGS. - Wagstaff's counsel withdrew, and Wagstaff voluntarily absented himself from his trial. He was convicted; he appealed and his conviction was affirmed. His petition for habeas corpus was denied, and he appealed.

RESULT. - Reversed. Per Bench; Garff & Orme concur.

HELD. - Wagstaff's right of assistance of counsel at his criminal trial could be raised in a habeas corpus petition, though not raised on direct appeal. The finding that Wagstaff was represented by counsel at trial was clearly erroneous. Wagstaff did not waive his right to counsel at his criminal trial.

COUNSEL

Wade Wagstaff, Draper, Pro Se Appellant.

R. Paul Van Dam and Barbara Bearnson, Salt Lake City, for Appellee.

JUDGES

Russell W. Bench, Judge. Regnal W. Garff, Judge, Gregory K. Orme, Judge, concur.

AUTHOR: BENCH

OPINION

Appellant Wade Wagstaff appeals from the district court's dismissal of the habeas corpus petition he filed after his conviction of assault and burglary. Wagstaff argues that the trial court erred in dismissing his petition because he was deprived of the assistance of counsel at his trial and he did not knowingly and intelligently waive his right to counsel.

After his conviction, Wagstaff appealed directly to this court alleging that he had been deprived of his constitutional right to be present at trial. This court affirmed Wagstaff's conviction, holding that he voluntarily absented himself from trial and accordingly had waived that right. *State v. Wagstaff*, 772 P.2d 987, 990 (Utah Ct. App. 1989). Wagstaff then filed a habeas corpus petition in the Third District Court alleging a deprivation of his constitutional right to be assisted by counsel at his criminal trial. The trial court granted the state's motion to dismiss the petition concluding that "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."

I.

We must initially determine whether Wagstaff's contention that he was deprived of his right to counsel was properly placed before the trial court by Wagstaff's habeas corpus petition. A habeas corpus petition cannot be used as a substitute for regular appellate review. **Codianna v. Morris**, 660 P.2d 1101, 1104 (Utah 1983); **Summers v. Cook**, 759 P.2d 341, 343 (Utah Ct. App. 1988). Nor may a habeas corpus petition be based on an issue previously raised on direct appeal. See, e.g., **Poe v. Turner**, 28 Utah 2d 60, 497 P.2d 1384, 1385 (1972). "It is... well settled... that allegations of error that could have been but were not raised on appeal from a criminal conviction cannot be raised by habeas corpus or post-conviction review, **except in unusual circumstances.**" **Codianna**, 660 P.2d at 1104 (emphasis added).

In the present case, Wagstaff's claim that he was denied his constitutional right to the assistance of counsel could and should have been raised on direct appeal, but it was not¹ The issue therefore becomes whether the facts of the present case are sufficiently "unusual" so as to validate Wagstaff's use of the habeas corpus procedure.

This determination is not subject to bright-line rules and must be decided on a case-by-case basis according to generally established guidelines. The Utah Supreme Court recently discussed the circumstances in which an alleged deprivation of a constitutional right validly may support a habeas corpus petition notwithstanding the petitioner's failure to raise the issue on direct appeal:

The function of a writ of habeas corpus as a post-conviction remedy is to provide a means for collaterally attacking convictions when they are so constitutionally flawed that they result in fundamental unfairness....

This Court has frequently held that while habeas corpus is not a substitute for appeal, a conviction may nevertheless be challenged by collateral attack in "**unusual circumstances**," that is, where an **obvious injustice** or a **substantial and prejudicial denial of a constitutional right** has occurred, **irrespective of whether an appeal has been taken.**

In fact, this Court has frequently addressed and resolved the merits of claims asserted in petitions for writs of habeas corpus even though the issues raised were known or should have been known at the time of conviction or initial appeal.... It follows, and it has long been our law, that a procedural default is not always determinative of a collateral attack on a conviction where it is alleged that the trial was not conducted within the bounds of basic fairness or in harmony with constitutional standards.

Hurst v. Cook, 777 P.2d 1029, 1034-36 (Utah 1989) (footnotes and citations omitted; emphasis added). The record in the present case supports Wagstaff's contention that his petition sets forth "unusual circumstances" justifying habeas corpus relief in that his conviction was the product of both "obvious injustice" and a "substantial and prejudicial denial of a constitutional right."

"One instance of an obvious injustice would be the failure of an attorney to take an appeal when there is a substantial claim of a deprivation of a constitutional right which goes to the basic fairness of the trial." **Chess v. Smith**, 617 P.2d 341, 343-44 (Utah 1980) (citations omitted). On direct appeal, Wagstaff's appointed counsel failed to raise the representation argument, contrary to Wagstaff's expressed desire. This places the case squarely within the language of **Chess v. Smith** and constitutes an "obvious injustice" justifying habeas corpus relief. **Accord Jensen v. DeLand**, 795 P.2d 619, 621 (Utah 1989).

Furthermore, the denial of Wagstaff's right to the assistance of counsel at trial is presumptively a substantial and prejudicial denial of a constitutional right. "The assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" **Holloway v. Arkansas**, 435 U.S. 475, 489, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (quoting **Chapman v. California**, 386 U.S. 18, 43, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); see also **United States v. Cronic**, 466 U.S. 648, 659 n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.").

The accused's right to the assistance of counsel during the critical stages of a criminal proceeding has long been recognized as a fundamental constitutional right. See, e.g., **Cronic**, 466 U.S. at 653, 104 S.Ct. at 2043; **State v. Farnsworth**, 13 Utah 2d 103, 368 P.2d 914, 915 (1962). We decline to foreclose Wagstaff's opportunity to vindicate his fundamental right to counsel because of a procedural default. Consequently, we proceed to address the merits of Wagstaff's claim that the trial court erred in dismissing his habeas corpus petition.

II.

Wagstaff was arraigned on May 13, 1986, and thereafter retained attorney Herm Olson to represent him. On March 13, 1987, Olson moved to withdraw as counsel for Wagstaff and supported the motion with an affidavit in which he stated that "defendant has failed and refused to contact [Olson] and therefore it has become impossible for [Olson] to adequately prepare a defense for Defendant Wade Wagstaff." On May 4, 1987, Olson's motion to withdraw was granted. The record is unclear whether Wagstaff received notice of Olson's withdrawal and there is no indication whether the trial court ascertained Wagstaff's financial status and eligibility for appointed counsel.

On June 30, 1987, a jury trial was held. The first page of the trial proceeding transcription indicates that Olson appeared for Wagstaff. The record is clear, however, that Olson attended the pretrial proceedings only at the request of the state's attorney and for the limited purpose of discussing with the court whether Wagstaff had knowledge of the trial date. Olson recited to the court his numerous efforts to correspond with Wagstaff and also explained that Wagstaff had telephoned him between March 19 and May 7, 1987. Olson could not recall whether he informed Wagstaff of the trial date during that conversation. Nor did Olson recall instructing Wagstaff to remain in contact or warning Wagstaff that his failure to communicate with his attorney might be construed as a waiver of his constitutional right to be assisted by counsel.

Based on this pretrial discussion, the district court concluded that Wagstaff's "lack of appearance at this time set for trial is a voluntary action on the part of the defendant and [the court] would acquiesce in the request of the state to proceed in his voluntary absence." After this preliminary proceeding, Olsen then left the courtroom and neither attended nor participated in Wagstaff's trial. Wagstaff was convicted on charges of burglary and assault. After trial, but before sentencing, the court appointed Nathan Hult to represent Wagstaff in his post-trial motions and sentencing. Thus, the record clearly demonstrates that not only was Wagstaff absent from trial, but also, that he was not represented by an attorney during the trial proceeding.

In this court's decision on Wagstaff's prior direct appeal, addressing the unrelated issue of Wagstaff's right to be present at his trial, this court commented that "although represented by a court-appointed attorney, Wagstaff was not present at trial." **State v. Wagstaff**, 772 P.2d 987, 988 (Utah Ct. App. 1989). Based upon this statement, the trial court concluded in its findings of fact that "the Court of Appeals found that petitioner was represented by counsel but voluntarily absented himself...." In observing that Wagstaff was represented by appointed counsel, this court did not purport or intend to engage in fact-finding. "It is not the function of an appellate court to make findings of fact." **Rucker v. Dalton**, 598 P.2d 1336, 1338 (Utah 1979).

To the extent the trial court found in the habeas proceeding that Wagstaff was represented **at trial**, the finding fails under the "clearly erroneous" standard of review set forth by rule 52(a) of the Utah Rules of Civil Procedure. See, e.g., **State v. Walker**, 743 P.2d 191, 193 (Utah 1987); **Jeffries v. Jeffries**, 752 P.2d 909, 911 (Utah Ct. App. 1988). Applying this standard, the conclusion that Wagstaff was represented at trial is against the clear weight of the evidence -- indeed it has no support in the evidence -- and we have reached a definite and firm conviction that a mistake has been made. See, e.g., **Smith v. Linmar Energy Corp.**, 790 P.2d 1222, 1224 (Utah Ct. App. 1990) (citing **Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.**, 744 P.2d 1376, 1377 (Utah 1987)).

III.

In dismissing Wagstaff's habeas corpus petition, the trial court concluded that "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." Wagstaff argues that this conclusion is erroneous because his voluntary absence from the trial, without further evidence of an affirmative waiver, could not have constituted waiver of his constitutional right to be assisted by counsel.

In reviewing an appeal from a dismissal of a habeas corpus petition, "we survey the record in the light most favorable to the findings and judgment; and we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted." **Medina v. Cook**, 779 P.2d 658 (Utah 1989) (quoting **Bundy v. DeLand**, 763 P.2d 803, 805 (Utah 1988)); see also **Fernandez v. Cook**, 783 P.2d 547, 549 (Utah 1989) (in considering an appeal from dismissal of a habeas corpus petition, no deference is accorded the lower court's conclusions of law, which are reviewed for correctness). Viewing the record in the light most favorable to the findings of the trial court, we conclude that there is no reasonable

basis to support the trial court's decision to dismiss Wagstaff's petition on the stated grounds.

Under both the United States Constitution and the Utah Constitution, Wagstaff had the right to the assistance of counsel at all critical stages of his criminal proceeding. **State v. Hamilton**, 732 P.2d 505, 506-07 (Utah 1986); U.S. Const. amend. VI; Utah Const. art. I § 12. Although of constitutional origin, "the right to assistance of counsel is personal in nature and may be waived by a competent accused if the waiver is 'knowingly and intelligently' made." **State v. Frampton**, 737 P.2d 183, 187 (Utah 1987); **see also Johnson v. Zerbst**, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). "'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." **Johnson v. Zerbst**, 304 U.S. at 464 (quoting **Aetna Ins. Co. v. Kennedy**, 301 U.S. 389, 393, 57 S. Ct. 809, 81 L. Ed. 1177 (1937)); **see also United States v. Williamson**, 806 F.2d 216, 220 (10th Cir. 1986) (doubts concerning a waiver of counsel must be resolved in the defendant's favor). In ascertaining whether a criminally accused has knowingly and intelligently waived the right to the assistance of counsel, the trial court bears a heavy responsibility to adequately protect the rights of the accused. **State v. Lafferty**, 749 P.2d 1239, 1248 (Utah 1988). Moreover, "waiver may not be presumed from a silent record. 'The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.'" **State v. Hamilton**, 732 P.2d at 507 (quoting **Carnley v. Cochran**, 369 U.S. 506, 516, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962)). The traditionally preferred method employed by trial courts in ascertaining whether the accused has knowingly and intelligently waived the right to the assistance of counsel is a colloquy entered on the record between the trial court and the accused in which the court questions the accused about the decision to waive counsel. **See, e.g., State v. Hamilton**, 732 P.2d at 507. Even absent an express colloquy, however, a valid waiver may be demonstrated on the record, but

to discharge [his] duty properly in light of the strong presumption against waiver..., a judge must investigate as long and as thoroughly as the circumstances of the case before him demand.... To be valid such waiver [of counsel] must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances.

Von Moltke v. Gillies, 332 U.S. 708, 723-24, 68 S. Ct. 316, 92 L. Ed. 309 (1948) (footnotes omitted).

The trial court concluded that "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." This conclusion fails in two respects. First, this conclusion mischaracterizes the nature of Wagstaff's argument. In his habeas corpus petition, Wagstaff indicated that his claim was founded "upon total absence and denial of counsel representation during [a] critical stage of trial, and the court's erroneous failure to insure said representation." Wagstaff further alleged that "defendant granted 'no' waiver to counsel,"

because counsel withdrew upon permission of the court without defendant's knowledge. Wagstaff's petition was not, therefore, premised on an ineffectiveness of counsel argument, but rather, on a total denial of the constitutional right to counsel.

Secondly, our review of the record and the applicable law supports Wagstaff's contention that his voluntary absence from trial, in and of itself, was not a waiver of his right to counsel and that there is no further evidence in the record to indicate such waiver. The trial record is devoid of evidence of a colloquy between Wagstaff and the trial court in which the court explained the nature of the charges, the range of allowable punishments, and possible defenses to the charges of mitigating facts. Nor is there any indication that Wagstaff understood the risks of declining legal counsel and was aware of the legal ramifications of that decision. To the contrary, the undisputed facts of this case demonstrate that Wagstaff was represented by counsel at early stages of the proceeding, that sometime before his trial, communications between him and his retained counsel ceased, and that his retained counsel withdrew from the case. The facts further demonstrate that the trial court took no action to investigate whether Wagstaff knew that his retained counsel had withdrawn, whether Wagstaff had retained or desired substitute counsel, or whether Wagstaff was financially entitled to appointed counsel. Absent evidence in the record of affirmative, knowing, and intelligent action by Wagstaff that might reasonably be construed as a waiver, we must conclude that there has been no waiver and Wagstaff was entitled to be represented by counsel at trial even if he chose not to be there himself.² Because Wagstaff was not represented by counsel at trial, his conviction was unconstitutionally obtained.

Accordingly, we reverse the trial court's dismissal of Wagstaff's petition and remand for further proceedings not inconsistent with this decision.

DISPOSITION

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, reversed and remanded for further proceedings in accordance with the views expressed in the opinion filed herein.

OPINION FOOTNOTES

¹ The trial court concluded that the issue had been raised on direct appeal. It stated that "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 [that he had been denied his right to counsel]." The implication of the trial court's finding is that Wagstaff's lack of representation at trial has already been addressed on direct appeal, in which case relief by habeas corpus petition would be inappropriate.

Wagstaff's four-page handwritten letter addressed to this court and referred to by the trial court in its finding of fact, explained that, contrary to Wagstaff's wishes, his appointed counsel had not argued his lack of trial representation claim on appeal. This case is not an **Anders** case where the criminal defendant is expressly allowed to file documents and pleadings in addition to those filed by appellate counsel. See **Anders v. California**, 386 U.S. 738, 87 S. Ct. 1396 (1967); **State v. Clayton**, 639 P.2d 168 (Utah 1981). Wagstaff's counsel filed a main brief and a reply brief. "No further briefs may be filed except with leave of

court " Utah R App P 24(c) Wagstaff made no motion to this court to amend or supplement his briefs, and leave of the court to do the same was never expressly or implicitly given Wagstaff's letter was, in fact, indexed as a miscellaneous letter in this court's files The letter therefore may not properly be considered a supplemental brief or an amendment to Wagstaff's previously filed briefs Consequently, any argument that the absence of counsel issue has already been raised on direct appeal is without merit

2 Even though counsel will be less effective in the absence of his or her client, counsel can do much for the absent client Skilled counsel can still, for example, interpose objections, cross-examine witnesses, and make arguments to the jury about such matters as the burden of proof

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Sec. 12. [Rights of accused persons.]

Statute text

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

1 IN THE THIRD DISTRICT COURT - WEST VALLEY DEPARTMENT
2 SALT LAKE COUNTY, STATE OF UTAH

3 -oOo-

4 WEST VALLEY CITY,)
5 Plaintiff,) Case No. 981103111
6 vs.) TRIAL
7 JASBIR SINGH BHATIA,)
8 Defendant.)

9 -oOo-

10
11 BE IT REMEMBERED that on the 11th day of March,
12 1999, the above-entitled matter came on for hearing
13 before the HONORABLE PAUL MAUGHAN, sitting as Judge in
14 the above-named Court for the purpose of this cause, and
15 that the following proceedings were had.

16 -oOo-

17 A P P E A R A N C E S

18 For the City: KEITH L. STONEY
19 West Valley City Prosecutor
3600 South Constitution Blvd.
West Valley City, Utah 84119
20 For the Defendant: STEVEN D. MILLER
21 Attorney at Law
3600 South Market Street
22 West Valley City, Utah 84119
23
24
25

COPY



P R O C E E D I N G S

THE COURT: Mr. Stoney, what are we doing on Bhatia?

MR. STONEY: May we approach, your Honor?

THE COURT: Yes, you may.

(Whereupon, an off-the-record discussion was held at side bar.)

THE COURT: This is the matter of West Valley City versus Jasbir Bhatia, Case No. 981103111.

MR. STONEY: Your Honor, the record should reflect that Mr. Bhatia is not present in the courtroom at this time, that both Mr. Miller and I are familiar with Mr. Bhatia, as well as the witnesses. They have not seen him today.

We should back up and note for the record that this trial was originally scheduled for January 21st, that it was continued from that date and that since that date--and I probably should let Mr. Miller put this on the record then, that Mr. Miller has had contact with Mr. Bhatia on the 21st of January and on the 1st of February regarding this date.

Furthermore, Mr. Bhatia has signed a--an

1 agreement with Mr.--with the office of Larsen & Rammell,
2 that counsel represents, and I'll present that to the
3 Court to put in the Court's file. That is basic--

4 THE COURT: Is that correct, Mr.
5 Miller, what's been represented?

6 MR. MILLER: Yes, it is, your Honor.

7 THE COURT: Is this a copy that we
8 can put in the Court's file?

9 MR. MILLER: Yes, it is, your Honor.

10 THE COURT: Okay.

11 MR. STONEY: And I believe that
12 indicates that he agrees to remain in contact with their
13 office.

14 And then I think the record needs to be
15 supplemented by counsel as well.

16 MR. MILLER: Your Honor, I would make
17 a motion to withdraw in this case based on that the--or
18 that the defendant has not made himself available to me
19 or my office to properly prepare and defend him today.

20 And--and just to back up a little bit more,
21 that--that apparently the case was originally continued
22 on--on plaintiff's motion, and that on the 21st of
23 January, I did speak with him and then also, on the 1st
24 of February, I spoke with him.

25 I attempted to contact him yesterday on the

1 phone that I had been given and that had been good in the
2 past, but it was disconnected. And then I had another
3 message phone, I did leave a message, I believe with his
4 mother and she had not been in touch with him for a
5 couple days and apparently she was not able to deliver
6 that message.

7 THE COURT: On the times you did have
8 contact with him, was he aware of the trial date set for
9 today?

10 MR. MILLER: Yes, he was, your Honor.

11 THE COURT: Okay. All right. I'll
12 grant, based on your representations today, I'll grant
13 your motions to withdraw and note that in the file,
14 you've given us a copy of the contract where Mr. Bhatia
15 agreed to be in contact with your office at least two
16 days--two working days prior to the jury trial. If he
17 fails to do so, that the case will be tried before the
18 Judge only and he waives his right to jury trial. That's
19 dated December 2nd of 1998.

20 MR. STONEY: Your Honor, the record
21 should probably also indicate that Mr. Bhatia, according
22 to the witnesses that are present and here, was at the
23 swap meet on Sunday, so he is in the vicinity, as well as
24 he was seen in the courthouse two days ago, obtaining
25 information on another case from another judge.