

1992

# John H. Schmidt v. State of Utah, and O. Lane McCotter, Warden of the Utah State Prison : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jan Graham; Attorney General; Attorney for Appellees.

John H. Schmidt; Pro Se.

---

## Recommended Citation

Brief of Appellant, *Schmidt v. State of Utah*, No. 920713 (Utah Court of Appeals, 1992).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/3700](https://digitalcommons.law.byu.edu/byu_ca1/3700)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
KFU  
50

.A10  
DOCKET NO. 920713CA

IN THE UTAH COURT OF APPEALS

---

|                             |   |                            |
|-----------------------------|---|----------------------------|
| John H. Schmidt,            | : |                            |
| Petitioner/Appellant,       | : | Opening Brief of Appellant |
| vs.                         | : |                            |
|                             | : |                            |
| State of Utah, and          | : | Case No. 920713-CA         |
| O. Lane McCotter, Warden of | : |                            |
| the Utah State Prison,      | : | Priority No.3              |
| Respondent/Appellee.        | : |                            |

---

This an appeal from a final judgement entered against appellant in the second judicial district court, in and for Weber County. The honorable Stanton M. Taylor, Judge, presiding. Appellant was denied extraordinary writ of Habeas Corpus as described in Rule 65B, Utah rules of civil procedure, Utah code Ann. (1953 as amended).

John H. Schmidt  
Attorney Prose  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020

Attorney for Petitioner/Appellant

Jan Graham  
Attorney General for the  
State of Utah  
236 State Capital Building  
Salt Lake City, Utah 84114

Attorney for Respondents/Appellees

**FILED**

MAR 26 1993

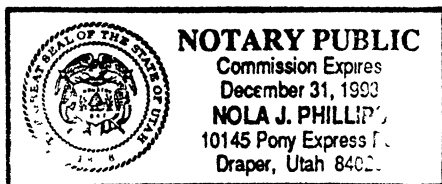
**COURT OF APPEALS**

**\*Certificate of Mailing\***

I do hereby certify that I caused to (1) be mailed a true and correct copy of the foregoing, Appeal Brief, via U.S. Mail, first class postage prepaid, on this 5<sup>th</sup> day of March, 1993 to the following:

*John H Schmidt*

Jan Graham  
Attorney General for  
the State of Utah  
236 State Capital Building  
Salt Lake City, Utah 84114



John H. Schmidt  
Petitioner/Appellant  
Utah State Prison

*Nola J. Phillip* *3-5-93*  
*Notary Public*

## TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| STATEMENT OF JURISDICTION . . . . .                      | 1           |
| NATURE OF PROCEEDINGS . . . . .                          | 1           |
| ISSUES PRESENTED FOR REVIEW . . . . .                    | 2           |
| STANDARD OF REVIEW . . . . .                             | 2           |
| CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES . . . . . | 2           |
| STATEMENT OF THE CASE . . . . .                          | 4           |
| STATEMENT OF THE FACTS . . . . .                         | 5           |
| SUMMARY OF THE ARGUMENTS . . . . .                       | 6           |
| ARGUMENT . . . . .                                       | 7           |

### POINT I

|  |   |
|--|---|
| THE TRIAL COURT COMMITTED PREJUDICIAL ERROR<br>IN FAILING TO ASSIGN TIMELY REPRESENTATION<br>BY COMPETENT LEGAL COUNSEL FOR THE APPELLANT<br>ON HIS FIRST APPEAL . . . . . | 7 |
|--|---|

### POINT II

|   |   |
|---|---|
| THE TRIAL COURT COMMITTED PREJUDICIAL ERROR<br>IN FAILING TO DECLARE JUDGMENT OUTLINING THE<br>RIGHTS, STATUS, AND OR OTHER LEGAL RELATIONS<br>OF APPELLANT . . . . . | 8 |
|---|---|

### POINT III

|  |   |
|--|---|
| ANY FAILURE OF THE ASSIGNED DEFENSE COUNSEL<br>TO FILE DEFENDANT'S OPENING APPEAL BRIEF OF<br>FIRST APPEAL NOT SUPPORTED BY GOOD CAUSE, DE-<br>NIED APPELLANT HIS RIGHT TO DUE PROCESS OF<br>LAW . . . . . | 9 |
|--|---|

POINT IV

|   |    |
|---|----|
| THE FAILURE OF DEFENSE COUNSEL TO FILE<br>DEFENDANT'S FIRST APPEAL VIOLATED APPELLANT'S<br>RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL . . . . . | 11 |
| CONCLUSION . . . . .  | 13 |
| CERTIFICATE OF SERVICE . . . . .  | 14 |
| ADDENDUM . . . . .  | 15 |

## TABLE OF AUTHORITIES

|   |             |
|---|-------------|
| <u>Codianna v. Morris</u> , 660 P.2d 1101 (Utah 1983) . . . . .                       | .11         |
| <u>Coe v. Thurman</u> , 922 F.2d 528 (9th Cir. 1990) . . . . .                        | 8, 9, 10    |
| <u>Evitts v. Lucey</u> , 469 U.S. 337, 105 S.Ct. 830, 38 L.Ed 2d 321 (1985) . . . . . | 8, 9        |
| <u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963) . . . . .                           | .11         |
| <u>State v. Peterson</u> , 310 P.2d 421 (Utah 1991) . . . . .                         |             |
| <u>State v. Tenplin</u> , 335 P.2d 162 (Utah 1990) . . . . .                          | 12          |
| <u>Strickland v. Washington</u> , 446 U.S. 688 (1980) . . . . .                       | .11, 12, 13 |
| <u>United States v. Robinson</u> , 336 F.2d 1270, 1965 (9th Cir. 1965) . . .          | 3           |
| <u>United States v. Williams</u> , 310 F.2d 1184, 1187-88 (9th Cir. 1963) . . .       | 12          |

## OTHER CITED

|  |        |
|--|--------|
| Rule 6 of the Utah Code of Criminal Procedure . . . . .                                | .7     |
| 377-32-1 of the Utah Code of Criminal Procedure . . . . .                              | .7     |
| 377-32-2 of the Utah Code of Criminal Procedure . . . . .                              | .11    |
| 377-32-3 of the Utah Code of Criminal Procedure . . . . .                              | .12    |
| Fifth, Sixth, and Fourteenth Amendments of the United States<br>Constitution . . . . . | 8, 9   |
| Article I, Section 7 of the Utah Constitution . . . . .                                | .10    |
| Article I, Section 12 of the Utah Constitution . . . . .                               | .9, 13 |

---

IN THE UTAH COURT OF APPEALS

---

|                             |   |                    |
|-----------------------------|---|--------------------|
| JOHN H. SCHMIDT,            | : |                    |
|                             | : | BRIEF OF APPELLANT |
| Petitioner/Appellant,       | : |                    |
| vs.                         | : | Case No. 920713-CA |
| STATE OF UTAH, and          | : |                    |
| O. LANE McCOTTER, Warden of | : |                    |
| the Utah State Prison,      | : | Priority No. 3     |

---

STATEMENT OF JURISDICTION

This is an appeal from a judgment denying extraordinary writ of habeas corpus relief. This court has jurisdiction of this appeal pursuant to Rule 65D (b)(10) of the Utah Rules of Civil Procedure, and pursuant to Rule 20 (a)(b) of the Utah Rules of Appellate Procedure.

NATURE OF PROCEEDINGS

This is an appeal from a final judgment entered against appellant in the Second Judicial District Court, in and for Weber County, the honorable Stanton M. Taylor, Judge, presiding. Appellant was denied extraordinary writ of habeas corpus relief. On June 19, 1992, appellant was convicted of possession of a controlled substance, a third degree felony, and possession of marijuana, a class A misdemeanor. Appellant was sentenced to a term of zero to five years imprisonment on June 19, 1991. Notice of Appeal was filed on June 26, 1991 in the lower court proceedings in case no. 91190082. This appeal subsequently ensued. Appellant is proceeding pro se.

### ISSUES PRESENTED FOR REVIEW

The following issues will be presented for review in this appeal:

1. Did the trial court commit prejudicial review in refusing to appoint legal counsel for the appellant on his first appeal?
2. Did the trial court commit prejudicial error in refusing to declare the rights, status, and legal relations of appellant?
3. Was appellant denied his due process rights by defense counsel's failure to file appellant's opening appeal brief of first appeal?
4. Was appellant denied his constitutional right to effective assistance of counsel by the defense counsel's failure to file appellant's first appeal?

### STANDARD OF REVIEW

There are differing standards of review for these issues. The appropriate standard will be described in the opening paragraph of each point in the argument.

### CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Rule 6 of the Utah Rules of Criminal Procedure:

#### Appointment of Counsel:

"A defendant charged with a public offense, other than an infraction, who is indigent and unable to obtain counsel has the right to court-appointed counsel if he faces a substantial probability of deprivation of liberty, or the to represent himself."



~ 77-32-1 of the Utah Code of Criminal Procedure:

Minimum standards provided by county for defense of indigent defendants.

"The following are minimum standards to be provided by each county, city, and town for the defense of indigent persons in criminal cases in the courts and various administrative bodies of the state:

- (1) Provide counsel for every indigent person who faces the substantial probability of the deprivation of his liberty;
- (2) Afford timely representation by competent legal counsel;
- (3) Provide the investigatory and other facilities necessary for a complete defense;
- (4) Assure undivided loyalty of defense counsel to the client; and
- (5) Include the taking of a first appeal of right and the prosecuting of other remedies before or after a conviction,..."

~ 77-32-2 of the Utah Code of Criminal Procedure:

Assignment of counsel on request of defendant or order of court.

"Counsel shall be assigned to represent each indigent person who is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison if:

- (1) The defendant requests it; or
- (2) The court on its own motion or otherwise so orders and the defendant does not affirmatively waive or reject of record the opportunity to be represented."

~ 77-32-3 of the Utah Code of Criminal Procedure:

Duties of assigned counsel - Compensation.

"(1) When representing an indigent person the assigned counsel shall:

- (a) Counsel and defend him at every stage of the proceeding following assignment; and
- (b) Prosecute any first appeal of right or other remedies before or after conviction that he considers to be in the interests of justice except for other and subsequent discretionary appeals or discretionary writ proceedings..."

The appropriate Constitutional Provisions will be cited as needed throughout the briefs and as necessary.

### STATEMENT OF THE CASE

Appellant is incarcerated at the Young Adult Correctional Facility, at the Utah State Prison, and alleges he is being illegally deprived of his liberty and due process rights. On June 19, 1991, appellant was convicted of the offense of possession of a controlled substance, a felony of the third degree, and possession of marijuana, a class a misdemeanor. On June 26, 1991, Notice of Appeal was filed in the trial court.

On July 20, 1991, appellant executed an affidavit of Impecuniosity in the trial court for proceeding on appeal. The trial court appointed public defender, Martin V. Gravis to represent the appellant. On December 1, 1991, appellant's appeal was dismissed with prejudice for lack of prosecution. On or about August 10, 1992, appellant filed a petition for writ of habeas corpus in the trial court. On September 25, 1992, the trial court dismissed the appellant's petition for writ of habeas corpus. On October 16, 1992, appellant filed a Notice of Appeal in the trial court challenging the dismissal of his writ of habeas corpus. Because of these events and actions, appellant pursues this matter on appeal now before the court.

### STATEMENT OF THE FACTS

This appeal ensued as a result of actions and events stemming from the original conviction and or judgment Order committing appellant to be incarcerated at the Utah State Prison.

Appellant is an inmate incarcerated at the Utah State Prison. Appellant alleges he is illegally restrained from and wrongly deprived of his liberty, and denied his due process rights. Appellant filed a timely Notice of Appeal of the final judgment order and conviction of June 19, 1991, in the trial court, on June 26, 1991.

Appellant filed an affidavit of Impediment in the trial court and the Utah Court of Appeals, and as a consequence he was appointed a public defender for legal representation to pursue his first appeal. Appellant filed a Docketing Statement in the Utah Court of Appeals on September 6, 1991, in the original proceedings. i.e., (Case No. 910550-CR). On October 10, 1991, the record on appeal was filed in the Utah Court of Appeals. Appellant's opening brief in the original proceedings (supra), was due on November 25, 1991.

However, the public defender representing the defendant filed a motion requesting an enlargement of time for filing appellant's brief on first appeal. The appellate court granted the motion enlarging the time of filing "due date" of appellant's brief, to be December 31, 1991. On January 13, 1992, the Utah Court of Appeals "dismissed" appellant's appeal upon the failure and lack of prosecution of the appointed defense counsel to file an "appellant brief" as required by Rules 24, 26, and 27 of the Utah Rules of Appellate Procedure 3 (a).

Appellant was not made aware of these facts and had no knowledge of the facts dismissing his original first appeal until on June 9, 1992, appellant contacted the court clerk of the appellate court and was informed of the disposition of his appeal on file. On August 25, 1992, appellant (petitioner) filed in the trial court a petition for writ of habeas corpus pursuant to Rule 65D (b) of the Utah Rule of Civil Procedure (as amended September 1991). On September 25, 1992, the trial judge dismissed appellant's (petitioner's) writ for habeas relief. Appellant filed timely Notice of Appeal with the judge and after remanded by the trial court on the "trial" on October 20, 1992, and the case was filed in the Utah Court of Appeals on October 20, 1992. This appeal now seeks to challenge the facts and issues for review before the court.

#### SUMMARY OF THE ARGUMENTS

The trial court failed to appoint competent legal representation for the defendant, an "indigent" person, on his "first appeal." The court abused its discretion in not insuring the appellant competent and effective legal representation on his first appeal. The court is bound to insure the rights of an indigent person at a minimum. These errors require that a hearing be granted to make findings on the issues and determine if the court abused its discretion.

The trial court failed to declare the rights, status, and other legal relations of the appellant. The circumstances are so substantive and indicate clearly that appellant has been denied due process of law. Any failure of the court to make findings of fact pertaining to questions of law, and that is to be reviewed for correctness requires

at minimum an evidentiary hearing to determine if the court abused its discretion.

The appellant's assigned counsel failed to file and effectively prosecute appellant's first appeal of right. Any failure of the appointed counsel to competently and effectively represent an indigent person without good cause, denied appellant his right to due process of law. The failure of appointed counsel to effectively prosecute appellant's first appeal of right violated appellant's constitutional right to effective assistance of counsel.

#### CONCLUSION

#### POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO ASSIGN TIMELY REPRESENTATION BY COMPETENT LEGAL COUNSEL FOR THE APPELLANT ON HIS FIRST APPEAL.

The trial court then having original jurisdiction of this cause violated appellant's due process by having failed and refusing to re-appoint timely representation by competent legal counsel for appellant. The appellant established his right to be assigned counsel by having submitted and filing a sworn affidavit of indigency in both the trial court and the Utah Court of Appeals, and thereby having met the requirements of an indigent person.<sup>1</sup>

Rule 3 of the Utah Rules of Criminal Procedure, states:

"A defendant charged with a public offense, other than an infraction, who is indigent and unable to obtain counsel has the right to court-appointed counsel if he faces a substantial probability of deprivation of liberty, or the right to represent himself."

---

1. §77-32-1 of the Utah Code of Criminal Procedures. [Counsel for Indigent Defendants].

The trial court was advised of this matter by the appellant, yet refused to remedy the error causing undue prejudice to appellant's defense by subjecting him to excessive delay in the appellate process.<sup>2</sup> Where a state guarantees the right to a direct appeal, as Utah does, the state is required to make that appeal satisfy the Due Process Clause.<sup>3</sup> Evitts v. Lucey, 469 U.S. 337, 105 S.Ct. 330, 33 L.Ed.2d 321 (1985). Appellant's judgment and conviction should be vacated.

#### POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR  
IN FAILING TO REVERSE JUDGMENT VIOLATING THE  
RIGHTS, STATUS, AND OR OTHER LEGAL RELATIONS  
OF APPELLANT.

The denial of habeas corpus is reviewed de novo; however, district court findings of fact relevant to the denial are reviewed under a clearly erroneous standard.<sup>4</sup> Coe v. Thurman, supra, at 530. In the instant case, the district court dismissed appellant's petition for habeas corpus by merely stating, "the relief requested would not be justified by the facts alleged in petition." *Id.*, [addendum C]. However, the district court failed to explain its reason(s) for dismissing the petition by its findings of fact which were relevant to the dismissal of petition of habeas corpus and are reviewed under a clearly erroneous standard. The district court made no findings of fact in the matter and further failed to address any of appellant's rights, status, and or other legal relations of the appellant.

---

2. United States v. Ambrose, 903 F.2d 1379, 1382 (9th Cir. 1990).  
Coe v. Thurman, 922 F.2d 523 at 530 (9th Cir. 1990).

3. The Fifth and Fourteenth Amendments of the United States Const.

It has already been demonstrated that appellant has largely been without the assistance of legal counsel to represent him on his first appeal of right, and any reasonable person would conclude that such a person who is indigent and without knowledge of law, is greatly placed at an unfair disadvantage to provide, protect and exercise his guaranteed rights against the vast, various and major ambiguities of the law. Appellant's conviction and judgment should be reversed and at minimum, an evidentiary hearing should be held to determine the issues and findings of fact and conclusion of law addressing the appellant's rights.

### POINT III

ANY FAILURE OF THE ASSIGNED DEFENSE COUNSEL TO FILE APPELLANT'S OPENING APPEAL BRIEF OF FIRST APPEAL NOT SUPPORTED BY GOOD CAUSE, DENIED APPELLANT HIS RIGHT TO DUE PROCESS OF LAW.

The Fifth Amendment of the United States Constitution, as applied to the states guarantees that "no person shall be deprived of life, liberty, or property, without due process of law." Respectively, the Fourteenth Amendment of the United States Constitution, as applied to the states ...guarantees to any person within its jurisdiction the equal protection of the laws. In the instant case, appellant was denied his first appeal as of right.<sup>5</sup> The due process clause of the fourteenth amendment guarantees the right to effective assistance of counsel on a first appeal as of right. Evitts v. Lucey, supra.

The United States Court of Appeals, Ninth Circuit, held that:

"(1) since excessive delay in obtaining appeal might constitute due process violation, prisoner

---

4. Norris v. Risley, 878 F.2d 1176 (9th Cir. 1989). Id., Coe v. Thurman, supra.

5. Article I, Sec. 10 of the United States Constitution.

did not have to fully exhaust state remedies before seeking habeas relief if root of his complaint was his inability to do so, and (2) state appellate court's delay of nearly four years in reviewing petitioner's conviction violated due process and warranted habeas relief, under analysis of relevant factors."

Cox v. Threlton, 372 F.2d 520 (9th Cir. 1968). Again, in the case at bar, the root of appellant's complaint seeking habeas relief is indistinguishable from that in the case of Cox. The factors relied upon in that case were a) Length of delay; b) Reason for delay; c) Defendant's knowledge of his right; and d) Prejudice to the defendant.<sup>6</sup> The court in Cox found that the government had acted unreasonably in failing to move for summary judgment and the judge's ruling was based on:

- (1) significant factual issues raised;
- (2) delay and expense of the hearing; and
- (3) the possibility that the defense will be prejudiced.

The court noted that the issue is still being litigated by the government.

500, pp. 3-4. (1968).

There is in Case, to be considered appellate delay, that, although, altered, that of the Call is: 1) oppressive incarceration pending appeal; 2) anxiety and concern of the convicted party awaiting the outcome of the appeal; and 3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of a retrial.

As well, the appellant in this case met the requirements which entitled him to be represented by assigned counsel and to proceed in this cause on first appeal, having all costs born by the State of Utah.<sup>7</sup>

5. Barker Kline, Jr., Barker Kline, Jr., 407 U.S. 514, 92 S.Ct. 2132, 33 L.Ed.2d. 101 (1972).

7. Article I, Sec. 7 of the Utah Const. [Due Process of Law].



In fact, appellant submitted and filed an affidavit of Impecuniosity in both the trial court and the appellate court. The Utah Code of Criminal Procedure §77-32-2 states the following:

"Counsel shall be assigned to represent each indigent person who is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison if:

- (1) The defendant requests it; or
- (2) The court on its own motion or otherwise so orders and the defendant does not affirmatively waive or reject of record the opportunity to be represented."

Utah Code Ann. (1953 as amended). Appellant has been denied his right to counsel on his first appeal of right and on his other post conviction proceedings as remedies of law. Appellant's judgment and conviction should as a matter of law be reversed and his sentence set aside or vacated.

#### POINT IV

THE FAILURE OF DEFENSE COUNSEL TO FILE  
DEFENDANT'S FIRST APPEAL VIOLATED APPELLANT'S  
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution, as applied to the states guarantees a criminal defendant the right to counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). In Strickland v. Washington, 446 U.S. 533 (1984), the Court held that the Sixth Amendment also entitles criminal defendants to effective assistance of counsel. In reviewing claims of ineffective assistance of counsel, the Utah Supreme Court has stated, "the burden of establishing inadequate representation is on the defendant 'and proof of such must be demonstrable reality and not a speculative matter.'" Codianna v. Morris, 560 P.2d 1101 at 1109 (Utah 1983).

Strickland v. Washington, supra, established a two pronged test to be applied to determine if a defendant has been denied his right to effective assistance of counsel. The court stated,

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

440 U.S. at 687. In Strickland v. Washington, 440 U.S. 568 (Utah 1999), the Supreme Court held that a defendant has the burden of proving both parts of this test. In Strickland the court noted that under the first part of the test the defendant must identify specific acts or omissions by counsel which fall below an objective standard of reasonableness. The court further noted that the conduct would not fall within decisions attributable to "sound trial strategy."

In the instant case, the assigned counsel deliberately failed to prosecute appellant's first appeal of right. To further support this argument, appellant relates the question of law back to the court in view of the "duties" of assigned counsel representing an indigent person.

377-32-3.(1)(a)(b) of the Utah Code of Criminal Procedure:

- (1) When representing an indigent person the assigned counsel shall:
  - (a) Counsel and defend him at every stage of the proceeding following assignment; and
  - (b) Prosecute any first appeal of right or other remedies before or after conviction that he considers to be in the interests of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

Appellant has a constitutional right to a first appeal as a guarantee and he has not at any time waived his right to appeal his original conviction.<sup>8</sup> The failure of the assigned counsel (Gravis) to prepare and prosecute appellant's first appeal of right also establishes the prejudice prong of the Strickland analysis. Williams v. Lockhart, 849 F.2d 1134, 1137-38 (8th Cir. 1993). Appellant's judgment and conviction should be reviewed as a matter of law in the interest of justice, and the legality of appellant's ongoing incarceration requires at minimum an evidentiary hearing be held to determine the constitutionality of the appellant being further wrongly deprived of his liberty.

#### CONCLUSION

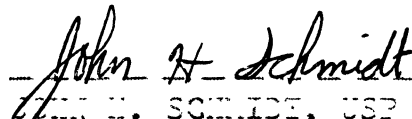
The error of the trial court failing to assign timely representation by competent legal counsel for the appellant on his first appeal of right denied appellant his due process and equal protection of the law, and requires that appellant's judgment and conviction be reversed and sentence vacated. Likewise, the error of the trial court failing to declare judgment outlining the rights, status, and other legal relations of appellant requires that appellant's sentence be set aside or vacated. The failure of the assigned counsel to prosecute appellant's first appeal of right denied appellant his right to effective assistance of counsel and his right to due process of law. These errors require that appellant's conviction and judgment be reversed and his sentence vacated, or in the alternative, the case should be remanded back to the district court for a hearing on

---

8. Constitution of Utah, Article I, Sec. 12. [Rights of Accused Persons.]

these issues with an order that the district court judge make findings of fact and conclusions of law on the issues.

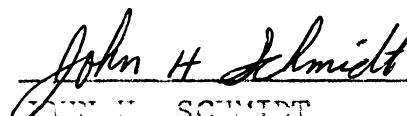
DATED this 5<sup>th</sup> day of March, 1993.

  
JOHN H. SCHMIDT, USP #200003  
Appellant/Petitioner  
Attorney, Pro. Co.

CERTIFICATE OF SERVICE

I do hereby certify that I mailed/delivered a true and correct copy of the foregoing, APPEAL BRIEF OF APPELLANT, via First-class, U.S. Mail, postage prepaid, this 5<sup>th</sup> day of March, 1993, to the following:

JAN GRAHAM  
Attorney General  
236 State Capitol Building  
Salt Lake City, UT 84114

  
JOHN H. SCHMIDT  
Appellant/Petitioner

### ADDENDUM

Copies of the following documents are enclosed as the Addendum:

1. Notice of Appeal, Case No. 920900426
2. Docketing Statement, Case No. 920713-CA
3. Affidavit of John H. Schmidt, Case No. 920900426 (attached court correspondence)
4. Notice of Appeal, Civil No. 91190082
5. Docketing Statement, District Court Case No. 91190082
6. Court letter of briefing schedule of appeal, Case No. 910050-CA
7. Court letter notifying brief is delinquent, Case No. 910050-CA
8. Order of Dismissal, Case No. 910050-CA
9. Memorandum Decision - District Court Case No. 920900426
10. Complaint - Utah State Bar letter Counsel, John H. Schmidt v. Martin v. Gravis
11. Utah State Bar letter of October 30, 1992 (Schmidt)
12. Utah State Bar letter of October 30, 1992 (Gravis)
13. Utah State Bar letter of Response (Gravis)
14. Utah State Bar Notification of Disciplinary Hearing (Schmidt v. Gravis)

JOHN H. SCHMIDT  
Petitioner/Appellant, Pro Se  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020

No. 1

IN THE SECOND DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

---

|                             |   |                          |
|-----------------------------|---|--------------------------|
| JOHN H. SCHMIDT,            | : |                          |
|                             | : |                          |
| Petitioner/Appellant,       | : |                          |
|                             | : | NOTICE OF APPEAL         |
| vs.                         | : |                          |
|                             | : |                          |
| STATE OF UTAH, and          | : | Case No. 920900426       |
| O. LANE McCOTTER, Warden of | : | Judge: Stanton M. Taylor |
| the Utah State Prison,      | : |                          |
|                             | : |                          |
| Respondents/Appellee(s).    | : |                          |

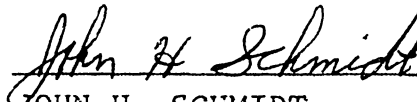
---

COMES NOW, Appellant, JOHN H. SCHMIDT, appearing Pro Se and In Forma Pauperis, and submits this Notice of Appeal.

TO THE CLERK OF THE COURT AND THE ATTORNEY GENERAL:

NOTICE IS HEREBY GIVEN that JOHN H. SCHMIDT, Petitioner/Appellant, hereby appeals from the judgment rendered in this action, wherein the Petitioner/Appellant's Extraordinary Writ of Habeas Corpus was dismissed on September 25, 1992.

DATED this 16 day of October, 1992.

  
\_\_\_\_\_  
JOHN H. SCHMIDT  
Petitioner/Appellant  
Utah State Prison

\*\*\*CERTIFICATE OF MAILING\*\*\*

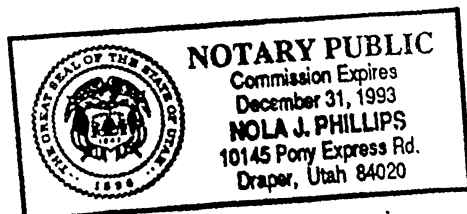
I DO HEREBY CERTIFY, that I caused to be mailed a true and correct copy of the foregoing, NOTICE OF APPEAL, via U.S. Mail, First-Class, postage prepaid, this 16 day of October, 1992, to the following:

Second District Court  
Court Reporter  
2549 Wasahington Blvd.  
Ogden, UT 84401

R. Paul Van Dam  
Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114

*John H. Schmidt*

JOHN H. SCHMIDT  
Petitioner/Appellant  
Utah State Prison



*Nola J. Phillips,*  
*Notary Public*  
*Commission Expires: 12-31-93*

JOHN H. SCHMIDT  
Petitioner/Appellant, Pro Se  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020

No. 2

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

---

|                             |   |                         |
|-----------------------------|---|-------------------------|
| JOHN H. SCHMIDT,            | : |                         |
|                             | : | DOCKETING STATEMENT     |
| Petitioner/Appellant,       | : |                         |
|                             | : |                         |
| vs.                         | : |                         |
|                             | : | Lower Docket: 920900426 |
| STATE OF UTAH, and          | : | Case No: 920713-CA      |
| O. LANE McCOTTER, Warden of | : |                         |
| the Utah State Prison,      | : |                         |
|                             | : |                         |
| Respondents/Appellees.      | : |                         |

---

1. DATE OF ENTRY OF JUDGMENT, SENTENCE AND CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, AND POSSESSION OF MARIJUANA, A CLASS "A" MISDEMEANOR ON: June 19, 1991. (original conviction Dist. court).

2. NATURE OF POSTJUDGMENT MOTION(S) AND DATE(S) FILED: Writ of Habeas Corpus, pursuant to Rule 65 B (b) U.R.C.P., filed August 25, 1992 and assigned to the Second Judicial District Court, Weber County, State of Utah, Honorable Judge Stanton M. Taylor presiding.

3. DATE AND EFFECT OF ORDER(S) DISPOSING OF POST-JUDGMENT MOTION(S) AND ORDER OF DETERMINATION OF FINAL JUDGMENT UNDER U.R.C.P. 65 B (b): September 25, 1992., [Dismissed].

4. DATE OF FILING NOTICE OF APPEAL: June 26, 1991 (original conviction Dist. court)., October 23, 1992, (writ of habeas Dist. court)., October 30, 1992, (Court of Appeal)



5. JURISDICTION: The Utah Court of Appeals has jurisdiction in this matter pursuant to Rule 65B (b)(13) U.R.C.P. (1991 as amended), whereby any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

6. NAME OF TRIAL COURT OR AGENCY: The Honorable Stanton M. Taylor, Judge, Second Judicial District Court in and for Weber County, State of Utah.

7. STATEMENT OF FACTS:

This cause of action stems from the original conviction judgment and order committing Petitioner to be incarcerated at the Utah State Prison. Petitioner at the time of said judgment and order filed a timely Notice of Appeal in the trial court as required by law.

Petitioner is an inmate incarcerated in the Young Adult Correctional Facility, at the Utah State Prison. Petitioner is illegally incarcerated at the Utah State Prison and is illegally restrained from his liberty by the Respondents to this cause of action. Petitioner appealed the final judgment and order and conviction of June 19 1991, by filing a Notice of Appeal in the Second Judicial District Court in and for Weber County, State of Utah, Honorable Stanton M. Taylor, Judge, on the 26th day of June 1991.

Petitioner filed an Affidavit of Impecuniosity in the trial court and the Utah Court of Appeals and as a consequence was appointed "the public defender" for the purpose of appeal. Petitioner filed a Docketing Statement in the Utah Court of Appeals September 6 1991, by and through his counsel of record, the public defender. Petitioner's Notice of Appeal was received and filed in the Utah Court of Appeals on September 30 1991, by and through the public defender. (Case No. 910550-CA.)

On October 10 1991, the record on appeal was filed in the Utah Court of Appeals. Petitioner's opening brief in this case (supra) was due November 25 1991. However, the public defender filed a motion requesting an enlargement of time for filing petitioner's opening brief. The court granted the same and enlarged the time of filing (due date) of brief to be December 31 1991.

On January 13 1992, the Utah Court of Appeals "dismissed" Petitioner's (appellant's) appeal upon the failure of the public defender to file an "appellant brief" as required by Rules 24, 26, and 27 Utah R. App. P., and the same so ORDERED, pursuant to Utah R. App. P. 3(a).

Petitioner has not received a copy of appeal brief and after a reasonable time of delay, petitioner on June 9 1992, contacted the Court Clerk of the Utah Court of Appeals and was informed by the court clerk that his appeal was dismissed with prejudice and the file on appeal was closed on December 31 1991, due the public defender's failure to submit and file appeal brief with the court.

Petitioner on August 25 1992, submitted and filed in the trial court a petition for writ of habeas corpus, pursuant to Rule 65B (b) U.R.C.P. (1991 as amended). The trial court dismissed petitioner's writ of habeas corpus on September 25 1992.

Petitioner filed notice of appeal on judgment and order rendered by the trial court on the "writ", the 23rd day of October, 1992 (trial court) and the same was filed in the Utah Court of Appeals on October 30, 1992.

8. ISSUE(S) FOR REVIEW AND STANDARD(S) OF APPEAL

REVIEW:

[A]. Was the failure of the public defender to file opening appeal brief supported by good cause?

Standard of Review: Duties of assigned counsel --- Compensation. When representing an indigent person the assigned counsel shall: "Counsel and defend him at every stage of the proceeding following assignment; and Prosecute any first appeal of right or other remedies before or after conviction that he considers to be in the interest of justice..." Utah Code Ann. § 77-32-3.(1), of the Utah Code of Criminal Procedure.

[B]. Does the failure of the public defender to file first appeal violate an indigent person's (defendant's) rights of due process?

Standard of Review: MINIMUM STANDARDS PROVIDED BY COUNTY FOR DEFENSE OF INDIGENT DEFENDANTS. "The following are minimum standards to be provided by each county, city and town for the defense of indigent persons in criminal cases in the courts and various administrative bodies of the state: Provide counsel for every indigent person who faces the substantial probability of the deprivation of his liberty; Afford timely representation by competent legal counsel; Provide the investigatory and other facilities necessary for a complete defense; Assure undivided loyalty of defense counsel to the client; and Include the taking of a first appeal of right and the prosecuting of other remedies before or after a conviction,..." Utah Code Ann. § 77-32-1 Utah Code of Criminal Procedure. (emphasis added)

In the DECLARATION OF RIGHTS, Constitution of Utah, Art.I, § 7 [Due Process of Law.] "No person shall be deprived of life, liberty or property, without due process of law."

[C]. Did the court err by failing to appoint timely representation by competent legal counsel for the [defendant] appellant, who is an indigent person in this action?

Standard of Review: MINIMUM STANDARDS PROVIDED BY COUNTY FOR DEFENSE OF INDIGENT DEFENDANTS. "Afford timely representation by competent legal counsel," (U.Cr.P. § 77-32-1, supra). The rules of practice for the Court of Appeals and circuit courts made by the Judicial Council and approved by the Supreme Court relating to appeals from circuit courts govern criminal as well as civil appeals. Rule 26.(11) Utah Rules of Criminal Procedure.

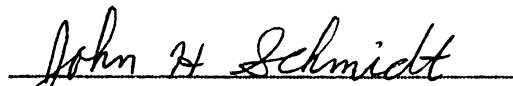
[D]. Did the court err by failing to grant petitioner Declaratory Judgment outlining the rights, status and/or other legal relations of petitioner?

Standard of Review: The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree. Judicial Code § 78-33-1. (1953 as amended).

9. RELATED APPEALS: There are no related appeals other than this postjudgment writ of habeas corpus. ie., (¶2 supra)

10. ATTACHMENTS: Notice of Appeal, Memorandum Decision, Order of Dismissal. Petitioner/Appellant has filed with the Court, but is without a copy of affidavit of impecuniosity.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of November, 1992.

  
JOHN H. SCHMIDT, Pro Se  
Petitioner/Appellant  
Utah State Prison

JHS:ado

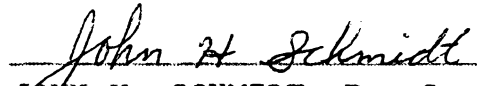
\*\*\*CERTIFICATE OF MAILING\*\*\*

I do hereby certify that I mailed a true and correct copy of the foregoing, DOCKETING STATEMENT, via first-class, U.S. Mail, postage pre-paid, this 9<sup>th</sup> day of November, 1992, to the following:

UTAH ATTORNEY GENERAL  
236 State Capitol  
Salt Lake City, UT 84114

SECOND DISTRICT COURT  
Clerk of the Court  
2549 Washington Blvd.  
Ogden, UT 84401

REED RICHARDS  
County Attorneys Office  
7th Floor Municipal Bldg.  
Ogden, UT 84401

  
JOHN H. SCHMIDT, Pro Se  
Petitioner/Appellant  
Utah State Prison

JHS:adc

JOHN H. SCHMIDT, #20283  
Petitioner, Pro Se  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020

No. 3

IN THE SECOND DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

---

|                             |   |                              |
|-----------------------------|---|------------------------------|
| JOHN H. SCHMIDT,            | : |                              |
|                             | : |                              |
| Petitioner,                 | : | AFFIDAVIT OF JOHN H. SCHMIDT |
|                             | : |                              |
| vs.                         | : |                              |
|                             | : |                              |
| STATE OF UTAH, and          | : | Case No. <u>920900426</u>    |
| O. LANE McCOTTER, Warden of | : | Judge <u>Taylor</u>          |
| the Utah State Prison,      | : |                              |
|                             | : |                              |
| Respondent(s).              | : |                              |

---

STATE OF UTAH        ]  
                          §  
COUNTY OF SALT LAKE]

COMES NOW, JOHN H. SCHMIDT, the affiant herein, who having been duly sworn under oath by an authorized Notary Public In And For Salt Lake County, State of Utah, and who states as follows:

1. I am an inmate who is incarcerated at the Young Adult Correctional Facility, at the Utah State Prison, and I am currently and at the present time, illegally restrained from my liberty.

2. I was convicted on June 19, 1991, in the Second Judicial District Court in and for Weber County, State of Utah, Honorable Stanton M Taylor presiding, for the crime of Possession of a Controlled Substance, a Felony of the Third Degree, and Possession of Marijuana, a Class "A" Misdemeanor. (Case No. 911900082).

3. On or about the 19th day of June, 1991, I was committed to serve a sentence of not less than (0) zero years and which may be for no more than (5) five years. [0-5 years].

4. On the 26th day of June, 1991, I submitted in the Second Judicial District Court, Weber County, State of Utah, a Notice of Appeal, by and through my attorney of record, Martin V. Gravis.

5. On or about the 15th of July, 1991, Attorney Martin V. Gravis sent to me by U.S. Mail, postage prepaid, an Affidavit of Impecuniosity to sign and have notarized by a Notary Public. On or about the 20th of July, 1991, I did execute the Affidavit of Impecuniosity before a registered Notary Public, and did so mail the same to Attorney Martin V. Gravis, by U.S. Mail, First-class, postage prepaid on July, 20, 1991.

6. On or about the 2nd day of September, 1991, I wrote my first letter to Attorney Gravis requesting informations of my appeal, and I inquired as to the disposition of my appeal. On or about the 6th day of September, 1991, Attorney Gravis responded back to me by letter, stating 'he was working on my appeal and that he was near completion of appeal for filing in the Appeals Court.

7. On or about the 23rd of November, 1991, I again contacted Attorney Gravis (by telephone) to again inquire as regards to my appeal. Attorney Gravis stated 'he needed additional time for preparing and filing of my appeal, and that he had requested the Utah Court of Appeals for an Enlargement of Time for Filing Appellant's Brief, and that the Court therein granted the same for a period of time not to exceed (30) thirty days.

8. On or about the 6th day of January, 1992, I again contacted Attorney Gravis by telephone to inquire as to the disposition of my appeal and the filing of appeal brief. Attorney Gravis stated to me on the telephone that he had filed my appeal brief and that it should be decided upon by the Court of Appeals in the months of April or May of 1992.

9. I wrote a letter to Attorney Gravis, on or about the 16th day of January, 1992, requesting he send or deliver to me, a copy of my appeal brief, and I also requested for him to deliver or send to me a copy of my transcripts. I received "no" answer. I again called Attorney Gravis, on or about the 22nd day of January 1992, and requested the same as noted supra ¶ 9., and wherein, Attorney Gravis agreed to send me a copy of my appeal brief, but stated that he could "not" send me a copy of my court transcripts, because it was against the law. He also stated that if I wanted a copy, I had to write the court and get written permission from the Judge, and further pay all costs.

10. Because I still had "not" yet received the copy of appeal brief I requested from Attorney Gravis, I again contacted him by telephone, and explained to him that I had not yet received the appeal brief he said he would send to me. He stated he would send another copy to me. (this occurred on/or about February 21, 1992.)

11. On or about the 16th day of March, 1992, I again contacted Attorney Gravis, because I still had "not" received a copy of my appeal brief, and I told him that I was becoming upset and uncomfortable with the situation and so I gave him my home address and asked that he send the copy to my wife. My wife nor



I, have yet to receive the copy of appeal brief that Attorney Gravis is adamant in stating and claiming that he did send.

12. On or about the 3rd of April, 1992, I became very displeased with Attorney Gravis and I was very disappointed that I had still not yet, received a copy of appeal brief as agreed to and promised to me, by Attorney Gravis, so I contacted him again by telephone and requested from him my District Court Case Number and Court of Appeals Case Number, if any. Attorney Gravis stated to me that he did not have my file right there and was unable to provide me with either, but assured me that he would immediately send to me "another" copy of my completed appeal brief.

13. On or about June 1, 1992, I again contacted Attorney Gravis due to the fact that I still had "not" received a copy of appeal brief. Attorney Gravis during the interim of our conversation, stated to me, and insisted that my appeal was in the Utah Court of Appeals, and that he had sent to me another copy of my appeal brief.

14. On June 9, 1992, I talked to another fellow-inmate, Aaron D. Olsen, who apprised me of the matter, that he too, had the same problems with Attorney Gravis, and advised me to personally contact the Utah Court of Appeals and request disposition of my appeal on Court's docket file. I did as Mr. Olsen advised me to do and contacted the Clerk of the Utah Court of Appeals. The Clerk informed me that my appeal was dismissed with prejudice and my file closed on December 31, 1991, and that Attorney Gravis did "not" complete or prepare appeal brief, nor submit an appeal brief, although he was granted an "enlargement of time."

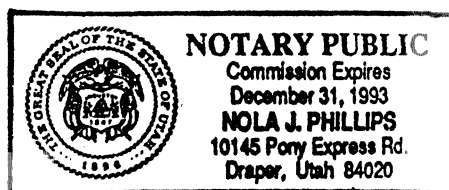
15. On June 9, 1992, after I contacted the Utah Court of Appeals and talked with the Court Clerk, I contacted Attorney Gravis by telephone and asked him if he sent me the copy of my appeal brief last week as he had promised to do, and he said, 'yes.' I then stated to him (Gravis) that I just got off the telephone from speaking with the Court Clerk of the Utah Court of Appeals, and that the Court Clerk stated to me, that my appeal brief had never been submitted nor filed in the Utah Court of Appeals, and that my appeal had been dismissed with prejudice and my file closed!!! Attorney Gravis then stated he would have to check on it.

16. On June 12, 1992, I sent a letter to the Utah Court of Appeals, wherein I requested a copy of the disposition of appeal in regards this case of reference, and any or all motions, documents and informations filed by counsels for both the State of Utah and the Defendant's counsel of record. see (Exhibit A).

17. I further state and depose that the foregoing statements, informations and facts herein, are true and correct to the best of my knowledge and belief under penalty of perjury.

RESPECTFULLY SUBMITTED this 6 day of August 1992.

John H. Schmidt  
JOHN H. SCHMIDT, #20803  
Affiant



*N. J. Phillips* *Notary*

Exhibit A

FILED

JUN 16 1992

JOHN H. SCHMIDT, #20803  
Defendant/Appellant  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020

UTAH COURT OF APPEALS  
Office of the Clerk  
230 South 500 East  
Salt Lake City, UT 84111

RE: John H. Schmidt (file)  
Lower Docket: 911900082

June 12, 1992

Clerk of the Court:

Please forward a copy of the disposition of appeal in regards the above case of reference, and any or all motions, documents and informations filed by counsels for the defendant/appellant and the State of Utah. (copies only).

This request is duly made by me for the purpose of preparing and executing of a forthcoming Extraordinary Writ of Habeas Corpus, and is necessary for the preparation of an adequate and effective presentation of litigation.

I greatly appreciate your assistance and cooperation in regards this matter.  
Thank you for your time and prompt attention.

Very truly yours,

*John H Schmidt*

John H. Schmidt, #20803  
Defendant/Appellant  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020

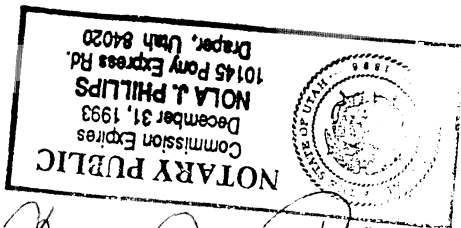
cc:ado

\*\*\*CERTIFICATE OF MAILING\*\*\*

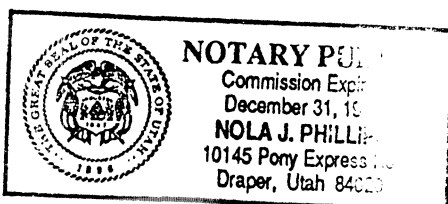
I DO HEREBY CERTIFY, that I caused to be mailed a true and correct copy of the foregoing, WRIT OF HABEAS CORPUS, MEMORANDUM OF POINTS AND AUTHORITIES and AFFIDAVIT OF JOHN H. SCHMIDT, via U.S. Mail, First-class, postage prepaid, this 22 day of July, 1992, to the following:

R. PAUL VAN DAM  
Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

John H. Schmidt  
JOHN H. SCHMIDT, #20283  
Petitioner, Pro Se  
Utah State Prison



*Nola J. Phillips, Notary  
sworn & signed before me  
on 22nd of July, 1992*



No. 4

FILED

SEP 30 1991

910550-CA  
COURT OF APPEALS

PUBLIC DEFENDER ASSOCIATION,  
INC., OF WEBER COUNTY  
2568 Washington Blvd. Suite 203  
Ogden, Utah 84401  
Telephone: (801) 392-8247

IN THE SECOND DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

|               |   |                       |
|---------------|---|-----------------------|
| STATE OF UTAH | : |                       |
| Plaintiff,    | : | NOTICE OF APPEAL      |
| Vs.           | : |                       |
| JOHN SCHMIDT, | : | Civil No. 911900082   |
| Defendant.    | : | Judge: Stanton Taylor |

JUN 28 19

TO THE CLERK OF THE COURT AND THE ATTORNEY GENERAL:

NOTICE IS HEREBY GIVEN that John Schmidt, Defendant/Appellan hereby appeals from the judgment rendered in this action, where the Defendant/Appellant was convicted of Possession of a Controll Substance a Third Degree Felony and Possession of Marijuana a Cla "A" Misdemeanor on June 19, 1991 and Defendant/Appellant's Moti for a new trial was denied on June 19, 1991.

DATED this 26 day of June, 1991.

STATE OF UTAH  
COUNTY OF WEBER

I Hereby Certify That This is a True Copy  
Of The Original On File in My Office

DATED THIS 29 DAY OF SEP 1991

PAULA GARR  
CLERK OF THE COURT

BY [Signature] DEPUTY

[Signature]  
MARTIN V. GRAVIS  
MANAGER OF  
PUBLIC DEFENDER ASSOCIATIO  
INC., OF WEBER COUNTY  
Attorney for  
DEFENDANT/APPELLANT

No.5

FILED

SEP 06 1991

COURT OF APPEALS

MARTIN V. GRAVIS (#1237)  
Attorney for Defendant  
2568 Washington Blvd., Suite 203  
Ogden, UT 84401  
Telephone: (801) 392-8247

IN THE UTAH COURT OF APPEALS

---

|                       |   |                              |
|-----------------------|---|------------------------------|
| STATE OF UTAH,        | : |                              |
|                       | : | DOCKETING STATEMENT          |
| Plaintiff/Respondent, | : |                              |
| vs.                   | : |                              |
|                       | : | Dist. Court No. 911900082 FS |
| JOHN SCHMIDT,         | : | Appeals Court No.            |
|                       | : |                              |
| Defendant/Appellant.  | : |                              |

---

COMES NOW, Defendant John Schmidt, by and through his attorney, Martin V. Gravis, and hereby submits the following Docketing Statement:

1. Authority in this appeal is taken pursuant to Utah Code Annotated 78-2-2(3)(h).

2. Appeal from judgment and conviction in the above-entitled matter on June 19, 1991, in the Second Judicial District Court in and for Weber County, State of Utah, for the crime of Possession of a Controlled Substance, a felony of the Third degree and Possession of Marijuana a Class "A" Misdemeanor.

3. Appellant was convicted on June 19, 1991, in the Second Judicial District Court in and for Weber County, State of Utah, for the crime of Possession of a Controlled Substance, a felony of the Third Degree, and Possession of Marijuana a Class "A" Misdemeanor.

STATE OF UTAH vs.  
Docketing Statement  
Appeals Court No.

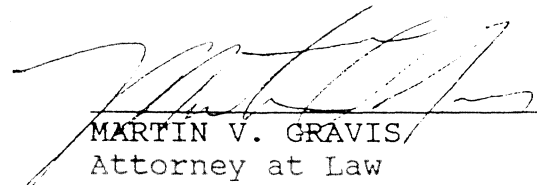
3. Appellant was convicted on June 19, 1991, in the Second Judicial District Court in and for Weber County, State of Utah, for the crime of Possession of a Controlled Substance, a felony of the Third Degree, and Possession of Marijuana a Class "A" Misdemeanor.

4. That the Court errored in denying Defendant's suppression motion in that there was insufficent factsto justify a nighttime warrent.

5. Notice of Appeal was filed June 26, 1991.

7. There have been no previous appeals in this matter.

DATED this 4 day of September, 1991.

  
MARTIN V. GRAVIS  
Attorney at Law



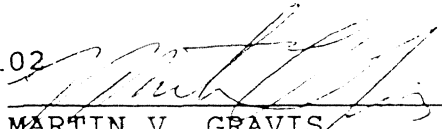
STATE OF UTAH vs.  
Docketing Statement  
Appeals Court No.

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing DOCKETING STATEMENT, via First-Class U.S. Mail, postage prepaid this 9 day of , 1991, to:

R. Paul Van Dam  
Attorney General  
236 State Capitol Building  
Salt Lake City, UT 84114

Clerk of the Court  
UTAH COURT OF APPEALS  
400 MIDTOWN PLAZA  
230 S 500 E  
SALT LAKE CITY UTAH 84102

  
\_\_\_\_\_  
MARTIN V. GRAVIS  
Attorney at Law

Russell W. Bench  
Residing Judge

Judith M. Billings  
Associate Presiding Judge

Reginald W. Gantt  
Judge

Pamela T. Greenwood  
Judge

Norman H. Jackson  
Judge

Gregory K. Orme  
Judge

Leonard H. Russon  
Judge

# Utah Court of Appeals

400 Midtown Plaza  
230 South 500 East  
Salt Lake City, Utah 84102  
801-533-6800

No. 6



Mary T. Noonan  
Clerk of the Court

October 11, 1991

Martin V. Gravis  
Public Defenders Association  
of Weber County, Inc.  
2568 Washington Boulevard, Suite #203  
Ogden, UT 84401

In Re:

FILE COPY

State of Utah,  
Plaintiff and Appellee,  
v.  
John Schmidt,  
Defendant and Appellant.

Case No. 910550-CA

Dear Mr. Gravis:

On October 10, 1991, the record on this appeal was filed in this court and may be withdrawn by the attorney or by a representative upon the written request of the attorney of record. The purpose of this letter, therefore, is to set the briefing schedule.

Pursuant to Rules 13 and 26, Utah Rules of Appellate Procedure, the appellant's brief must be served and filed on or before November 25, 1991. This due date takes into consideration the three days mailing provision of Rule 22(d). Briefs filed by use of first class mail must be postmarked on or before November 25th, pursuant to Rule 21(a).

Please refer to the attached checklist and Rules 24, 26 and 27 for content and format requirements. These requirements are strictly enforced. Before making duplicate copies of your original brief, you may bring your original to the clerk's office at the Court of Appeals for examination. This will ensure that the brief is correct, and may save you time and expense.

Sincerely,

*Sheri Knighton*  
Sheri Knighton  
Deputy Clerk

cc: R. Paul Van Dam

Russell W. Benen  
Presiding Judge

Judith M. Billings  
Associate Presiding Judge

Reginal W. Garr  
Judge

Pamela T. Greenwood  
Judge

Norman H. Jackson  
Judge

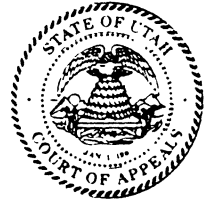
Gregory K. Orme  
Judge

Leonard H. Russon  
Judge

## Utah Court of Appeals

400 Midtown Plaza  
230 South 500 East  
Salt Lake City, Utah 84102  
801-533-6800

No. 7



Mary T. Noonan  
Clerk of the Court

December 20, 1991

Martin V. Gravis  
Public Defenders Association  
of Weber County, Inc.  
2568 Washington Boulevard, Suite #203  
Ogden, UT 84401

In Re:

FILE COPY

State of Utah,  
Plaintiff and Appellee,  
v.  
John Schmidt,  
Defendant and Appellant.

Case No. 910550-CA

Dear Mr. Gravis:

Our records indicate that the appellant's brief in this case was due November 25, 1991. To date, the brief has not been filed and is therefore in default. Your brief and seven copies must be received in this Court by December 31, 1991.

If the brief is not filed by December 31, 1991, the case may be dismissed pursuant to R. 3(a), Utah R. App. P.

Sincerely,

*Sheri Knighton*

Sheri Knighton  
Deputy Clerk

cc: R. Paul Van Dam

No. 8

FILED

JAN 13 1992

UTAH COURT OF APPEALS

-----oo0oo-----

*Mary Stroman*  
JAN 13 1992  
CLERK OF COURT  
SALT LAKE CITY

ORDER OF DISMISSAL

|                          |   |                    |
|--------------------------|---|--------------------|
| State of Utah,           | ) |                    |
|                          | ) |                    |
| Plaintiff and Appellee,  | ) |                    |
|                          | ) |                    |
| v.                       | ) | Case No. 910550-CA |
|                          | ) |                    |
| John Schmidt,            | ) |                    |
|                          | ) |                    |
| Defendant and Appellant. | ) |                    |

-----

Before Judges Bench, Greenwood, and Orme (Law and Motion).

Upon the failure of the appellant to file an  
appellant's brief, as required by Rules 24, 26 and 27  
of the Utah Rules of Appellate Procedure,

IT IS ORDERED that the appeal be, and the same is,  
hereby dismissed, pursuant to Utah R. App. P. 3(a).

Dated this 13th day of January, 1992.

FOR THE LAW AND MOTION PANEL:

*Pamela T. Greenwood*  
Pamela T. Greenwood, Judge

No. 9

---

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

---

JOHN H. SCHMIDT,

}

MEMORANDUM DECISION

Petitioner,

vs.

}

STATE OF UTAH, et al.,

Case No. 920900426

Respondents.

}

SEP 25 1992

---


The petitioner has filed this petition for relief under the Rules of Civil Procedure 65B (b), Wrongful Imprisonment.

The factual basis for the request for a Writ of Habeas Corpus is simply a failure on the part of the public defender to perfect an appeal on his behalf.

The petitioner's requests for relief may be summarized in three classifications: a request for procedural relief under 65B (b) (hearings, etc.), a request for dismissal of the charges against the petitioner and his discharge from custody, and finally a declaratory judgment.

Since the relief he has requested would not be justified by the facts he has alleged, the Court dismisses the petition under the provisions of Rule 65B (b) (7).

DATED this 25 day of September, 1992.

  
STANTON M. TAYLOR, Judge

Memorandum Decision  
Case No. 920900426  
Page 2

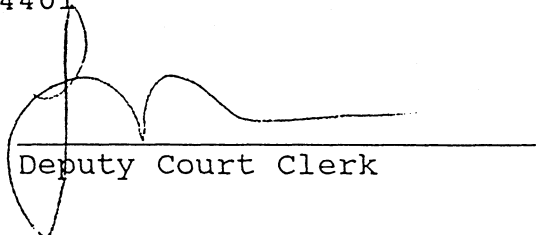
CERTIFICATE OF MAILING

I hereby certify that on the 25 day of September,  
1992, I sent a true and correct copy of the foregoing Memorandum  
Decision to counsel as follows:

John H. Schmidt  
P.O Box 250  
Draper, Utah 84020

R. Paul Van Dam  
236 State Capitol  
Salt Lake City, Utah 84114

Reed Richards  
7th Floor Municipal Bldg  
Ogden, Utah 84401



Deputy Court Clerk

UTAH STATE BAR COUNSEL  
NAYER H. HONARVAR  
Assistant Bar Counsel  
645 South 200 East, Suite 205  
Salt Lake City, Utah 84111-3834

JOHN H. SCHMIDT, #20803  
Complainant  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020

September 08, 1992

No. 19

RECEIVED  
SEP 11 1992  
OFFICE OF BAR COUNSEL

RE: COMPLAINT AGAINST ATTORNEY MARTIN V. GRAVIS

Dear Ms. Honarvar:

This letter is to serve as "Formal Notice" of complaint against Attorney Martin V. Gravis, Weber County, State of Utah. I duly request that an investigation regarding ethical conduct of legal practice by Attorney Gravis be executed hereupon, forthwith and inclusive of the general interests of justice.

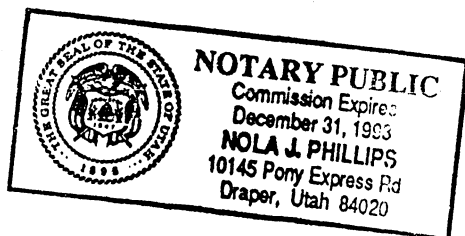
I alledge that Attorney Martin V. Gravis is in violation of both "DILIGENCE" and "COMMUNICATION" practices of the Utah State Bar Counsel's Code of Ethics. In support of these allegations, the attached documents marked as ADDENDUM 1, 2 and 3 are herein submitted to you, and thereby made a complete part of this complaint.

I appreciate your cooperation and prompt assistance regarding this matter. Thank you for your time...

Very truly yours,

*John H. Schmidt* 9-8-92

JOHN H. SCHMIDT, #20803  
Utah State Prison



cc:ado

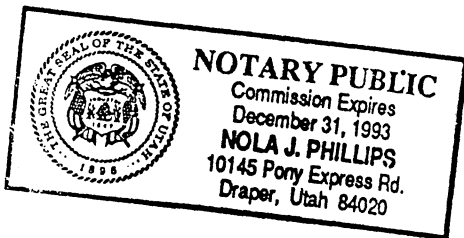
*Can you please return me  
a complete copy Thank you  
John H Schmidt 9-21-92*

CERTIFICATE OF NOTARY PUBLIC

STATE OF UTAH ]

COUNTY OF SALT LAKE ]

Before Me, A Duly Authorized Notary Public, In And For  
Salt Lake County, personally appeared the plaintiff,  
John H. Schmidt who executed the above in my presence  
at the Young Adult Correctional Facility located at the Utah  
State Prison on the 21 day of Sept 1992



Nola J. Phillips

Notary Public

My commission expires on the 31 day of  
Dec, 1993. I reside in Salt Lake County  
County, State of Utah.





# Utah State Bar

Office of Bar Counsel

645 South 200 East, Suite 205 • Salt Lake City, Utah 84111-3834

Telephone: (801) 531-9110 • FAX: (801) 531-0660 • WATS 1-800-698-9077

No. 11

Stephen A. Trost  
Bar Counsel

Gary Ferrero  
Assistant Bar Counsel

Wayne H. Honarvar  
Assistant Bar Counsel

Wendell K. Smith  
Assistant Bar Counsel

Amela Blevins  
Legal

David Bryan  
Legal

October 30, 1992

John H. Schmidt, #20803  
P.O. Box 250  
Draper, UT 84020

Re: Complaint against Martin V. Gravis

Dear Mr. Schmidt:

We have received your letter of complaint and thank you for the same. We wish to advise you that your letter will be reviewed by the Office of Bar Counsel and forwarded to the attorney for a response. You will be notified by our office when that response is received. We appreciate your patience with this preliminary review and investigation which generally takes four to six weeks.

If upon conclusion of our investigation, it is determined that your complaint involves only a fee dispute, please be advised that the Bar offers an arbitration program to assist attorneys and clients in resolving the same and we will provide further details of this procedure at the appropriate time.

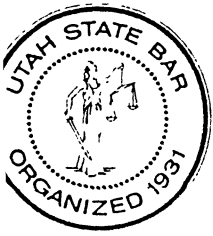
Please be advised that disciplinary proceedings may be held in abeyance by the Disciplinary Committee prior to the filing of a Formal Committee Complaint or by the Board at any stage of the proceedings where the allegations or the Formal Committee Complaint contains matters of substantial similarity to the material allegations of pending criminal or civil litigation in which the attorney in question is involved.

Sincerely,

*Diana Barwald*

Diana Barwald  
Secretary to Bar Counsel

Enclosure



# Utah State Bar

Office of Bar Counsel  
645 South 200 East, Suite 205 • Salt Lake City, Utah 84111-3834  
Telephone: (801) 531-9110 • FAX: (801) 531-0660 • WATS: 1-800-698-9077

No. 12

Stephen A. Trost  
Bar Counsel

Paul Gary Ferrero  
Assistant Bar Counsel

Wayne H. Honarvar  
Assistant Bar Counsel

Vendell K. Smith  
Assistant Bar Counsel

Pamela Blevins  
Investigator

David Bryan  
Legal

October 30, 1992

Martin V. Gravis  
2568 Washington Blvd., #203  
Ogden, UT 84401

Re: Complaint by John H. Schmidt

Dear Mr. Gravis:

Enclosed please find a copy of a letter of complaint this office received from the above-referenced. Upon my initial review, it appears that if the allegations are true the conduct could lead to the Office of Bar Counsel filing a Notice of Complaint for violation of the following Rules of Professional Conduct: Rule 1.2 Scope of Representation, Rule 1.3 Diligence, Rule 1.4(a) Communication, and Rule 8.4(c&d) Misconduct, and the matter would be heard by a Screening Panel for disposition.

Before taking this step this office makes every effort to resolve the dispute informally. Accordingly, please provide this office with a brief explanation of any defenses or mitigating/extenuating circumstances relevant to the allegations. If you can provide this office with evidence clearly establishing a defense and rendering the complaint unmeritorious this office will summarily dismiss the complaint as per Rule V(b)(ii) of the Procedures of Discipline.

Please be advised that your defense and supporting documentation will be reviewed by this office and forwarded to the Complainant for his response. Further investigation pertaining to the allegations and defenses will be undertaken by Pamela Blevins, an investigator in the investigative unit of this office. If you have any questions regarding the status of the investigation or would like to suggest an area to be investigated or documents which should be secured, please contact Pamela Blevins directly.

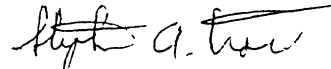
If you have any questions regarding an interpretation of a rule, application of a rule to certain conduct or any other inquiry or statement which requires a legal analysis, review or opinion please feel free to call me directly.

Martin V. Gravis  
Page Two

Once all the facts have been ascertained your case will be presented at a Charging Conference where the entire professional staff including the Bar Counsel will determine whether a Notice of Complaint should be filed or the matter disposed of in some other way.

We realize that being accused of unprofessional conduct is most unpleasant and that you desire an expeditious resolution as does the complainant. Therefore, please respond to these allegations within the next ten (10) days.

Sincerely,

A handwritten signature in cursive script, appearing to read "Stephen A. Trost".

Stephen A. Trost  
Bar Counsel

SAT:db  
cc: John H. Schmidt  
Enc.

MARTIN V. GRAVIS  
ATTORNEY AT LAW  
2568 WASHINGTON BOULEVARD  
SUITE 203  
OGDEN, UTAH 84401  
PHONE 392-8231



RECEIVED  
DEC 2 1992  
OFFICE OF BAR COUNSEL

November 30, 1992

Wendell Smith  
Assistant Bar Counsel  
645 S. 200 E.  
Suite 205  
Salt Lake City, Utah 84111-3834

Re: Bar Complaint of John Schmidt

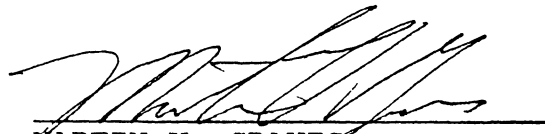
Dear Mr. Smith:

I am writing regarding the bar complaint of John Schmidt. It is true that I failed to timely file the brief in the case in this matter.

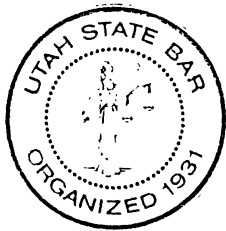
The issue on appeal is whether the search warrant was valid in the search where Mr. Schmidt arrested. The motion to suppress was based upon the case of State vs. Rowe which stated that night time searches were not appropriate if it was simple check the box on the affidavit for search warrant. In this case the officers did put down a general conclusionary statements that drug dealers normally have guns and it would be safer to institute the search at night time. Said decision was based upon the case of State vs. Rowe a court of appeals decision which was reversed by the Supreme Court which held that even merely checking the box and not adding the extra wording was sufficient to constitute a valid search.

At the time the brief was due I was involved in trying to prepare a petition for Writ of Certiorari with the United States Supreme Court on the case of State of Utah vs. John Albert Taylor a Capitol Homicide case where Mr. Taylor was given the death penalty and simple got so involved with that matter that I failed to get the brief filed.

Very truly yours;

  
MARTIN V. GRAVIS  
Attorney at Law

MVG/mlw



# Utah State Bar

Office of Bar Counsel

645 South 200 East, Suite 205 • Salt Lake City, Utah 84111-3834  
Telephone: (801) 531-9110 • FAX: (801) 531-0660 • WATS: 1-800-698-9077

No. 14

Stephen A. Trost  
Bar Counsel

P. Gary Ferrero  
Assistant Bar Counsel

Nayer H. Honarvar  
Assistant Bar Counsel

Wendell K. Smith  
Assistant Bar Counsel

Pamela Blevins  
Paralegal

Boyd Bryan  
Paralegal

January 25, 1993

John H. Schmidt, #20803  
P.O. Box 250  
Draper, UT 84020

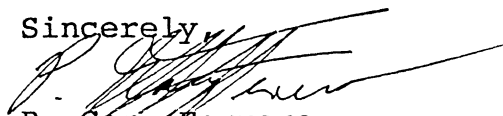
Re: Complaint against Martin V. Gravis

Dear Mr. Schmidt:

The Office of Bar Counsel has investigated your complaint and determined that it should be presented to a Screening Panel of the Ethics and Discipline Committee of the Utah State Bar. You will receive notice of the Panel meeting and will be given the opportunity to appear, give testimony, present additional evidence, and call witnesses, if you so desire.

You will also be notified of the actions of the Screening Panel.

Sincerely,

  
P. Gary Ferrero  
Assistant Bar Counsel

PGF:db