

1992

John H. Schmidt v. State of Utah : Brief of Appellee

Utah Court of Appeals

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Jan Graham; Attorney General; Nancy L. Kemp; Assistant Attorney General; Attorney for Appellees.
John H. Schmidt; Pro Se.

Recommended Citation

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UTAH
DOCUMENT
FILE

IN THE UTAH COURT OF APPEALS

10
DOCKET NO. 920713CA

JOHN H. SCHMIDT,	:	
Petitioner-Appellant,	:	Case No. 920713-CA
v.	:	
STATE OF UTAH, et al.,	:	Priority No. 3
Respondents-Appellees.	:	

BRIEF OF APPELLEES

- - - - -

APPEAL FROM DISMISSAL OF PETITION FOR WRIT OF
HABEAS CORPUS IN THE SECOND JUDICIAL DISTRICT
COURT IN AND FOR WEBER COUNTY, STATE OF UTAH,
THE HONORABLE STANTON M. TAYLOR, PRESIDING

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NANCY L. KEMP (5498)
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Attorneys for Appellees

JOHN H. SCHMIDT
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Pleasant View, Utah 84414

Pro Se

FILED

MAY 17 1993

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JOHN H. SCHMIDT,	:	
Petitioner-Appellant,	:	Case No. 920713-CA
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION AND NATURE OF PROCEEDINGS	1
ISSUE PRESENTED UPON APPEAL AND STANDARD OF APPELLATE REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
POINT I THE DISTRICT COURT ERRONEOUSLY DISMISSED AS FRIVOLOUS PETITIONER'S CLAIM THAT HIS CONSTITUTIONAL RIGHT TO APPEAL HIS CONVICTION WAS DENIED	4
POINT II THE DISTRICT COURT'S ERRONEOUS DISMISSAL OF THE PETITION MAY BE REMEDIED BY REINSTATEMENT OF PETITIONER'S APPEAL	5
CONCLUSION	6

TABLE OF AUTHORITIES

	Page
<u>CASES CITED</u>	
<u>Boggess v. Morris</u> 635 P.2d 39 (Utah 1981)	4-7
<u>Fernandez v. Cook</u> 783 P.2d 547 (Utah 1989)	1
<u>Gerrish v. Barnes</u> 202 Utah Adv. Rep. 7 (Utah Dec. 16, 1992)	1
<u>State v. Johnson</u> 635 P.2d 36 (Utah 1981)	4-5

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Const. art. I, § 12	4
Utah Code Ann. § 58-37-8 (Supp. 1991)	2
Utah Code Ann. § 78-2a-3 (Supp. 1992)	1, 3
Utah R. Civ. P. 65B	1, 3, 5

IN THE UTAH COURT OF APPEALS

JOHN H. SCHMIDT,	:	
Petitioner-Appellant,	:	Case No. 920713-CA
v.	:	
STATE OF UTAH, et al.,	:	Priority No. 3
Respondents-Appellees.	:	

BRIEF OF APPELLEES

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the district court's dismissal of a petition for writ of habeas corpus brought under Rule 65B(b), Utah Rules of Civil Procedure. This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(g) (Supp. 1992).

ISSUE PRESENTED UPON APPEAL AND STANDARD OF APPELLATE REVIEW

Did the district court err in dismissing the petition as frivolous on its face?

In reviewing a dismissal of a petition for writ of habeas corpus, the reviewing court accords the trial court's conclusions of law no deference, but reviews them for correctness. Gerrish v. Barnes, 202 Utah. Adv. Rep. 7, 9 (Utah Dec. 16, 1992); Fernandez v. Cook, 783 P.2d 547, 549 (Utah 1989).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, or

rules pertinent to the resolution of the issue before the Court is contained in the body of this brief.

STATEMENT OF THE CASE

This case arises from petitioner's June, 1991 conviction of two counts of possession of a controlled substance, one a third degree felony and the other a class A misdemeanor, in violation of Utah Code Ann. § 58-37-8 (Supp. 1991). On June 26, 1991, attorney Martin Gravis filed a notice of appeal from these convictions on petitioner's behalf in the district court (Addendum A; R. 6). Following the filing of a docketing statement in this Court on September 6, 1991 (Addendum B; R. 8-9), a briefing schedule was set, and Gravis was advised by letter dated October 11, 1991 (Addendum C; R. 11) that his opening brief was due on or before November 25, 1991.

On December 20, 1991, this Court again wrote Gravis, advising him that his brief was in default and extending his briefing deadline to December 31, 1991 (Addendum D; R. 13). On January 13, 1992, the Court entered an order of dismissal based on petitioner's failure to file an opening brief.

Petitioner claims to have contacted Gravis repeatedly by letter and telephone during the period from September, 1991 to June, 1992, requesting information about his appeal (Addendum E; R. 21-23). He represents that Gravis consistently assured him that the briefing process was moving forward and that a decision on his appeal would be forthcoming (Addendum E; R. 21-23). Petitioner

states that after talking with another inmate on June 9, 1992, he became suspicious of Gravis' assurances and telephoned this Court to verify the actions taken pursuant to his appeal (Addendum E; R. 23). Petitioner claims to have learned of the dismissal of his appeal in the course of that call (Addendum E; R. 23).

On August 14, 1992, petitioner filed his petition for writ of habeas corpus in the Second District Court, alleging denial of constitutional and statutory rights based on the facts recited above and requesting procedural, declaratory, and injunctive relief (Addendum F; R. 1-4). The court entered a memorandum decision on September 25, 1992, dismissing the petition without hearing under Rule 65B(b)(7), Utah Rules of Civil Procedure (Addendum G; R. 28-29). Petitioner now appeals the dismissal to this Court.

STATEMENT OF FACTS

No statement of facts beyond those set forth above is necessary to resolve the issue presented on appeal.

SUMMARY OF ARGUMENT

Respondents stipulate to the fact that petitioner has been deprived of his right to appeal his criminal convictions in this case by the failure of his appellate counsel to file an opening brief. Respondents further stipulate that reinstatement of his appeal in this Court would appropriately remedy this deprivation.

Under Utah Code Ann. § 78-2a-3(1)(b) (Supp. 1992), "The Court of Appeals has jurisdiction to issue all extraordinary writs and to

issue all writs necessary: . . . (b) in aid of its jurisdiction." This Court can invoke the discretionary writ of common-law certiorari in aid of its supervisory jurisdiction over the actions of inferior courts to obtain the record in petitioner's criminal action and reinstate his appeal, an approach that was undertaken by the Utah Supreme Court in Boggess v. Morris, 635 P.2d 39 (Utah 1981). Because the facts justifying petitioner's right to an appeal have been established by stipulation, a remand to determine the validity of the petition is unnecessary. Therefore, respondents further concede that the district court's dismissal must be reversed to permit reinstatement of petitioner's appeal pursuant to Boggess.

ARGUMENT

POINT I

THE DISTRICT COURT ERRONEOUSLY DISMISSED AS FRIVOLOUS PETITIONER'S CLAIM THAT HIS CONSTITUTIONAL RIGHT TO APPEAL HIS CONVICTION WAS DENIED.

The right of criminal defendants to appeal their convictions is well established in both the constitution and case law. Article I, section 12 of the Utah Constitution states, "In criminal prosecutions the accused shall have . . . the right to appeal in all cases." See also State v. Johnson, 635 P.2d 36, 37 (Utah 1981) ("In all criminal prosecutions, an accused has a constitutional right to a timely appeal from his conviction.") Because the right to appeal is of constitutional stature, the court has not hesitated to provide remedial measures where deprivations of this right are

established.

Respondents stipulate to the fact that the briefing default of petitioner's attorney on appeal unconstitutionally deprived petitioner of his first appeal of right, and concede that on this ground, the district court erred in dismissing the petition as frivolous pursuant to Rule 65B(b)(7) of the Utah Rules of Civil Procedure. This legal error must therefore be corrected by reversing the dismissal below.

POINT II

THE DISTRICT COURT'S ERRONEOUS DISMISSAL OF
THE PETITION MAY BE REMEDIED BY REINSTATEMENT
OF PETITIONER'S APPEAL.

In State v. Johnson, counsel failed to file a notice of appeal pursuant to the defendant's request. The court, ruling on defendant's motion for an extension of time to file an appeal, held that the defendant was entitled to a hearing before the district court to establish his reasonable reliance on counsel's agreement to take a timely appeal. Johnson, 635 P.2d at 38. The court further held that if the defendant made the requisite showing, he would be entitled to resentencing on the prior finding of guilt, triggering a new appeal period. Id.

In Boggess v. Morris, 635 P.2d 39 (Utah 1981), a companion case to Johnson, the defendant had been denied an opportunity to appeal his conviction due to counsel's failure to file a timely notice of appeal. He then filed a petition for writ of habeas corpus. The district court, finding he had been denied his right to appeal, granted the petition and ordered that the defendant be

permitted to file a belated appeal on the merits or have his conviction vacated. After the ensuing appeal was dismissed on the ground that the untimeliness was jurisdictional, the lower court ordered the defendant released from custody. On appeal from the underlying writ, the supreme court found that the petition had, in fact, established the denial of defendant's right to appeal. The court then invoked common-law certiorari in aid of its supervisory jurisdiction over the actions of the lower court to grant direct review of the alleged errors in the criminal action. The court stated that "where the facts have already been established by findings in a habeas corpus proceeding, it would be needlessly circular to require that defendant return to the district court to re-establish the facts by a post-conviction hearing and then to be resentenced to qualify for a direct appeal." Boggess at 42.

As in Boggess, petitioner has filed a habeas action to establish that his right of appeal was denied. Respondents stipulate to the fact that he was unconstitutionally deprived of his first appeal of right. Because the fact of the deprivation is thereby established, a remand to the district court would impose the needless circularity that Boggess sought to avoid. Therefore, respondents would not oppose the reinstatement of petitioner's appeal in this Court for adjudication of appellate claims that were properly articulated in the appeal as initially filed.

CONCLUSION

Respondents stipulate to the validity of petitioner's claim

that he was deprived of his first appeal of right by counsel's failure to file an opening brief. Because his right to appeal is thereby established, respondents concede that reversal of the lower court's dismissal and reinstatement of his appeal in this Court pursuant to Bogges would appropriately remedy his deprivation.

Respectfully submitted this 17th day of May, 1993.

A handwritten signature in dark ink, appearing to read 'Nancy L. Kemp', is written over a horizontal line.

NANCY L. KEMP
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on the 15 day of May, 1993, a true and accurate copy of the foregoing BRIEF OF APPELLEE was mailed, postage prepaid, to the following:

John H. Schmidt
1700 West 2700 North #204
Pleasant View, Utah 84414



ADDENDUM A

Jun 23 4 43 PM '91
FILED

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

SEP 30 1991
910550-CA
COURT OF APPEALS

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 1991

TO THE CLERK OF THE COURT AND THE ATTORNEY GENERAL:

NOTICE IS HEREBY GIVEN that John Schmidt, Defendant/Appellant 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 } ss:

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 COURTS

BY [Signature] DEPUTY

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

ADDENDUM B

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.

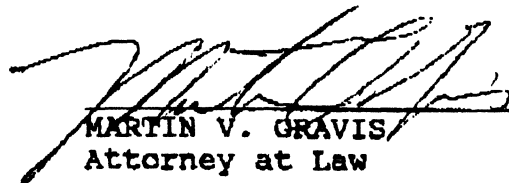
3. Appellant was convicted on June 19, 1991, in the Second Judicial District Court in and for Weber County, State of Utah, for the crime of Possession of a Controlled Substance, a felony of the Third Degree, and Possession of Marijuana a Class "A" Misdemeanor.

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

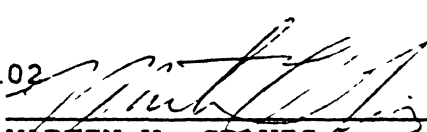
STATE OF UTAH vs.
Docketing Statement
Appeals Court No.

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 7 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


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 4 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

ADDENDUM C

Russell W. Bench
residing judge

Judith M. Billings
Associate & residing judge

Reginal W. Gurr
clerk

Pamela T. Greenwood
clerk

Norman H. Jackson
clerk

Gregory K. Orme
clerk

Leonard H. Russon
clerk

Utah Court of Appeals

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



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

ADDENDUM D

Russell W. Benson
Presiding Judge

Judith M. Billings
Associate Presiding Judge

Reginald W. Garm
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



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:

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

Case No. 910550-CA

FILE COPY

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

ADDENDUM E

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IN THE SECOND DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

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Case No. 920900426
Judge _____

AUG 20 1992

020

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."

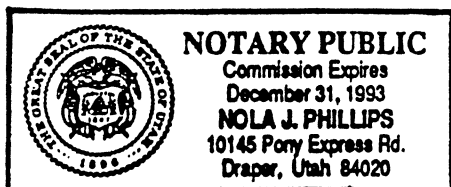
15. On June 9, 1992, after I contacted the Utah Court of Appeals and talked with the Court Clerk, I contacted Attorney Gravis by telephone and asked him if he sent me the copy of my appeal brief last week as he had promised to do, and he said, 'yes.' I then stated to him (Gravis) that I just got off 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} ~~June~~ 1992.

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



ADDENDUM F

3. Petitioner was convicted on June 19, 1991, in the Second Judicial District Court in and for Weber County, State of Utah, Honorable Stanton M. Taylor, Judge, for the crime of Possession

of a Controlled Substance, a Felony of the Third Degree, and Possession of Marijuana, a Class "A" Misdemeanor. (District Court Case No. 911900082 FS).

4. Petitioner Appealed the final judgment order and/or his conviction of JUNE 19, 1991, by filing 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. see (Appendix I)

5. Petitioner filed an Affidavit of Impecuniosity in both the trial and appeals court, and further was appointed an attorney by the the trial court for purpose of appeal. (Attorney Martin V. Gravis, of the Public Defender Association, Inc., of Weber County, State of Utah, is counsel of record.)

6. Petitioner filed a Docketing Statement in the Utah Court of Appeals, September 06, 1991, by and through his attorney, Martin V. Gravis. see (Appendix II)

7. Petitioner's Notice of Appeal, received and filed in the Utah Court of Appeals, September 30, 1991, (Case No. 910550-CA).
see (Appendix I)

8. On October 10, 1991, the record on this appeal was filed in the Utah Court of Appeals. see (Appendix III)

9. Petitioner's (appellant's) Opening Brief in this case was due November 25, 1991. Attorney, Martin V. Gravis requested of the Appeals Court, an extension of time for filing petitioner's (appellant's) opening brief. The Court granted the same and extended the due date of brief to be December 31, 1991.

10. On the 13th day of January, 1992, the Utah Court of Appeals "DISMISSED" Petitioner's (appellant's) appeal, upon the failure of appellant (Petitioner) to file an appellant's brief, see (Appendix IV)

as required by Rules 24, 26 and 27 of the Utah R. App. P., and the same so ORDERED, pursuant to Utah R. App. P. 3(a).

see (Appendix V)

11. Petitioner has been "denied" his statutory and constitutional rights of state, local and federal laws, wherein Petitioner has been denied due process of law.

*****RELIEF SOUGHT*****

Petitioner prays the following relief be granted forthwith:

a) THAT THE COURT ISSUE AN ORDER REQUIRING THE RESPONDENT TO SHOW CAUSE WHY PETITIONER HAS AND IS BEING RESTRAINED AND DEPRIVED OF HIS LIBERTY;

b) THAT THE COURT ORDER AND SERVE UPON THE RESPONDENT A COPY OF THE PETITION REQUIRING THE RESPONDENT TO ANSWER THERETO, PURSUANT TO RULE 65 B(b) of the UTAH RULES OF CIVIL PROCEDURE;

c) THAT THE COURT ORDER ALL CHARGES AGAINST THE PETITIONER TO BE DISMISSED WITH PREJUDICE, AND FURTHER DIRECTING THE RESPONDENTS TO RELEASE PETITIONER FROM CUSTODY;

d) THAT PURSUANT TO RULE 65 B(b) of the UTAH RULES OF CIVIL PROCEDURE, THE COURT ISSUE, FORTHWITH, AN ORDER DIRECTING THE RESPONDENTS TO APPEAR BEFORE THE COURT FOR A HEARING ON THE LEGALITY OF THE RESTRAINT IMPOSED UPON PETITIONER, AND FURTHER DIRECTING THE RESPONDENTS TO IMMEDIATELY BRING FORTH PETITIONER TO BE PRESENT AT ANY AND/OR ALL HEARING(S) HELD ON THE PETITION;

e) THAT THE COURT PURSUANT TO § 78-33-1 of the UTAH JUDICIAL CODE, GRANT PETITIONER DECLARATORY JUDGMENT, THEREBY DECLARING THE RIGHTS, STATUS AND/OR OTHER LEGAL RELATIONS OF PETITIONER;

f) THAT THE COURT APPOINT PETITIONER QUALIFIED LEGAL COUNSEL TO FULLY REPRESENT PETITIONER IN THIS CAUSE OF ACTION AND TO PERFECT ANY APPEAL IF NECESSARY;

g) ANY OTHER RELIEF DEEMED JUST AND PROPER BY THE HONORABLE COURT AFTER FURTHER REVIEW.

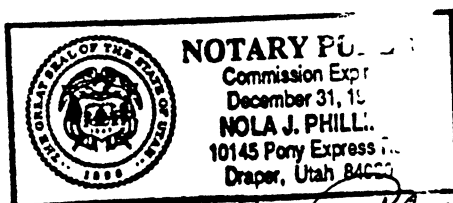
Petitioner further supports this Petition for Writ of Habeas Corpus on and by the following Memorandum of Points and Authorities, hereto attached.

RESPECTFULLY SUBMITTED this 22 day of July, 1992.

John H. Schmidt
JOHN H. SCHMIDT, #20803
Petitioner, Pro Se
Utah State Prison

I HEREBY CERTIFY that the foregoing facts and informations are true and correct to the best of my knowledge and belief under penalty of perjury.

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



jhs/ado

Nola J. Phillips Notary
Sworn & Sealed before me
the 22 of July, 1992.

ADDENDUM G

DISTRICT COURT
CITY
02 OCT 25 PM 2 26

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

JOHN H. SCHMIDT,

Petitioner,

vs.

STATE OF UTAH, et al.,

Respondents.

}

}

}

MEMORANDUM DECISION

Case No. 920900426

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

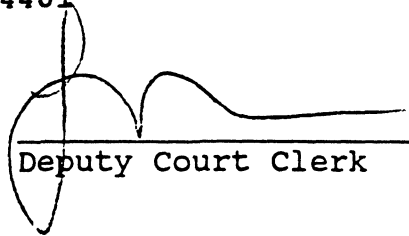
CERTIFICATE OF MAILING

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