

1966

# Joseph Terry Siebold v. John W. Turner, Warden, Utah State Prison : Brief of Appellant

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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|                              |   |          |
|------------------------------|---|----------|
| JOSEPH TERRY SIEBOLD,        | ) |          |
|                              | ) |          |
| Petitioner-Appellant,        | ) |          |
|                              | ) |          |
| vs.                          | ) | CASE NO. |
|                              | ) |          |
| JOHN W. TURNER, WARDEN, UTAH | ) | 10551    |
| STATE PRISON,                | ) |          |
|                              | ) |          |
| Respondent.                  | ) |          |
|                              | ) |          |

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BRIEF OF APPELLANT

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Appealed from the Judgment Dismissing  
Complaint for Writ of Habeas Corpus of  
the Third Judicial Court for Salt Lake  
County, the Honorable Aldon J. Anderson  
Presiding.

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

---

JOSEPH TERRY SIEBOLD, :

Petitioner- :  
Appellant, :

vs. :

CASE NO.

JOHN W. TURNER, :  
WARDEN, UTAH STATE :  
PRISON, :

10551

Respondent. :

:

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BRIEF OF APPELLANT

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### STATEMENT OF NATURE OF CASE

The petitioner - appellant, Joseph Terry Siebold, appeals from a judgment of the District Court of Salt Lake County, dismissing appellants complaint for a writ of habeas corpus against respondent.

### DISPOSITION IN LOWER COURT:

Petitioner - appellant filed a Complaint for Writ of Habeas Corpus in the District Court in and for Salt Lake County, on November 19, 1965. The respondent, John W. Turner, Warden of the Utah State Prison, answered the Complaint for Writ of Habeas Corpus on the 6th day of December, 1965 by and through Phil L. Hanson, Attorney General of Utah. A pre-trial was held on the 3rd day of December, 1965 and

a pre-trial order signed and entered by Judge Aldon J. Anderson on the 7th day of December, 1965. On the 6th day of January, 1966, a hearing was held on the matter and after making Findings of Fact and Conclusion of Law on the 11th day of January, 1966, Judge Aldon J. Anderson entered Judgment against petitioner-appellant, dismissing his Application and Complaint for Writ of Habeas Corpus and denying the same.

RELIEF SOUGHT ON APPEAL.

Appellant submits that the Judgment of the trial court should be reversed and his Application and Complaint for Writ of Habeas Corpus should be granted.

STATEMENT OF FACTS

On the 3rd day of August, 1964, appel-



lant and one Dennis J. Demarais were arrested in Uintah County, State of Utah, and charged with the crime of assault with intent to commit murder, pursuant to Section 76-30-14, Utah Code Annotated, 1953, and charged with robbery pursuant to Section 76-51-1, Utah Code Annotated, 1953, (Exhibits D-1 and D-2). On August 4, 1964 they were brought before Justice of the Peace, R. A. McConkie, where the complaints were read to them. (Exhibit D-1 and D-2). At that time, appellant was without funds with which to retain counsel. (R-42). Appellant testified that at the time they were brought before the Justice of the Peace no mention was ever made regarding their right to counsel. (R-42). County Attorney Hammond testified that the Justice of the

peace advised them that if they wanted to talk to an attorney they could have time to do that. (R-88). County Attorney Hammond also advised them they had a right to confer with an attorney but did not tell them that they could do so even though they didn't have any funds. (R-90).

Having waived Preliminary Hearing, Appellant was bound over to the Fourth Judicial District Court and arraignment was set for August 12, 1964. (Exhibits D-1 and D-2). On August 12, 1964, defendants were arraigned before the Hon. Joseph E. Nelson in the Fourth Judicial District Court in and for Uintah County, State of Utah. (Exhibits D-1 and D-2). The court appointed Ray E. Nash, Esq. to represent appellant and Demarais on both charges. (Exhibits D-1 and D-2).

At the arraignment, appellant pleaded guilty to the charge of robbery and was remanded to the custody of the Uintah County Sheriff to be delivered to the court on September 9, 1964 for pronouncement of judgment (Exhibit D-2). At the arraignment, appellant pleaded not guilty to the charge of assault with intent to commit murder and was remanded to the custody of Uintah County Sheriff to be delivered to the court on September 9, 1964, for trial. (Exhibit D-1).

The Fourth Judicial Court, in and for Uintah County, State of Utah, the Hon. Maurice Harding presiding, pronounced judgment on September 9, 1964 on the charge of robbery, to which appellant had previously pleaded

guilty and sentenced him to be confined in the Utah State Prison for an indeterminate period of not less than five years. (Exhibit D-2). On September 9, 1964, appellant changed his plea on the charge of assault with intent to commit murder from not guilty to guilty. (Exhibit D-3). Appellant then waived the time for pronouncement of judgment and the court entered Judgment on September 9, 1964, that appellant be confined in the Utah State Prison for an indeterminate period of not less than five years on the charge of assault with intent to commit murder. (Exhibit D-4). Appellant was then delivered by the Sheriff of Uintah County to the Warden of the Utah State Prison for execution of the Judgments on both charges. (R-26).

Sometime after his arrest on August 3, 1964, and prior to the pronouncement of Judgment on September 9, 1964, appellant waived extradition proceedings to the State of California and was returned to California for investigation of murder. California authorities did not press the investigation for murder and returned appellant to the State of Utah where he was arraigned and judgment pronounced. There is no evidence or record on these facts as the pre-trial order made and entered by the Hon. Aldon J. Anderson precluded the introduction of evidence as to extradition proceedings. (R-9)

POINT I. THE TRIAL COURT ERRED  
IN FINDING THAT APPELLANT HAS NOT  
BEEN DEPRIVED OF A STATE OR FEDERAL  
CONSTITUTIONAL RIGHT.

Appellants Complaint for Writ of  
Habeas Corpus came on for hearing before the  
Honorable Aldon J. Anderson one of the Judges  
of the Third Judicial District Court in and  
for Salt Lake County. After hearing the testi-  
mony of witnesses, receiving exhibits and hear-  
ing the arguments of counsel, the Honorable  
Judge made his Findings of Fact and Conclusions  
of Law. No finding was made as to when appellant  
was appointed counsel although the record shows  
counsel was appointed by the Uintah County  
District Court at the arraignment on August  
12, 1964 (Exhibit D-4), nine days after appellants  
arrest on August 3, 1964 (Exhibits D-1 and  
D-2). The Honorable Judge found in his

Conclusions of Law that, " . . . they have been deprived of no state or federal constitutional right." (R-16) Based on this conclusion of law, which appellant submits was in error, Judgment was entered in his Complaint for Writ of Habeas Corpus, dismissing the same.

It is clear from the record that at the time of his arrest and at the time he was taken before Justice of the Peace McConkie, he was without funds with which to retain counsel. (R-42) Although it may appear that Justice of the Peace McConkie advised appellant of his right to counsel, it is clear that he was not advised that counsel would be appointed for him if he were without funds. (R-90).

Appellant submits that he was deprived of his right to counsel at critical

stages of the proceedings against him.

Without the aid of counsel he was required to determine whether or not to waive a preliminary hearing (R-89); whether or not to waive extradition proceedings to the State of California and whether or not to waive extradition proceedings back to the State of Utah (the record is devoid of evidence in this regard due to the pre-trial order made by Judge Anderson). (R-8,9). These examples are only the legal matters which appellant was confronted with and do not include other matters which may have necessitated the advice of counsel.

The Sixth Amendment to the United States Constitution and the Constitution of Utah, Article I, Section 12, provides:



"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

In Gideon v. Wainwright, 83 Sup.

<sup>372 U.S. 335, 92, 100, 261 799</sup>  
Ct. 792 (1963), the United States Supreme

Court ruled that the right to counsel is one of the fundamental rights of an accused and is obligatory on the states under the 14th Amendment to the United States Constitution. In the Gideon case, the court quoted Justice Southerland in Powell v. Alabama, 287 U.S. 45, 68, 53 Sup. Ct. 55, 64, 77 Law Ed. 158 (1932) as follows:

"The right to be heard would be in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself

"whether the indictment is good or bad. He is unfamiliar with the rule of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (Emphasis Added).

Under the decision of the court in Gideon v. Wainwright, the states are required to appoint counsel for indigent persons in all criminal prosecutions. The question of when an indigent person has the right to have counsel appointed for him has been considered by this court in State v. Brassch,

19 Utah 450, 229 P.2d 289 (1951). There the defendants claimed that they were deprived of their right to counsel at the preliminary hearing. The record showed that they requested counsel be appointed both at the arraignment and at the preliminary hearing. They were informed that they were entitled to counsel but that until the case went to the District Court they would have to procure such services at their own expense and without the aid of the state.

In the Brassch case, this court

stated at Page 460:

"Thus, at the preliminary hearing the State ought to provide counsel for any defendant desiring but unable to procure counsel for himself. This should have been made clear to the defendants before they de-

"cided whether they were  
ready for the hearing."  
(Emphasis Added).

The court ultimately held that the failure to advise of the right to have counsel for the preliminary hearing, although error, was not prejudicial error. Since the Brassch decision, the Federal Courts have more particularly set forth the extent of an indigent's right to counsel in the early stages of the proceedings against him.

In Harvey v. State of Mississippi, 340 Fed. 2d 263 (5th Cir., 1965) the petitioner sought a Writ of Habeas Corpus on the ground that he was denied due process. The petitioner, Harvey, was convicted on the basis of a guilty plea entered without the assistance of counsel and without being advised of his right to the assistance of

counsel. The court noted that "waiver of such right to counsel" cannot be presumed from the mere fact that the accused appeared without counsel or failed to request counsel.

Connally v. Cochran, 1962, 369 U.S. 506, 82 Sup. Ct. 884, 8 Law Ed.2d 70; Daugherty v. Maxwell, 1964, 376 U.S. 202, 84 Sup. Ct. 702, 11 Law Ed. 650.

The court noted at page 269:

"One accused of crime has the right to the assistance of counsel before entering a plea because of the disadvantageous position of an unassisted layman in a court of law and because of the serious consequences which may attend a guilty plea. Such disadvantages and consequences may weigh as heavily on an accused misdemeanor as on an accused felon. The record reveals that the guilty plea entered in the case at bar had grievous consequences indeed."

In Hamilton v. State of Alabama, 368

U.S. 52, 82 Sup. Ct. 157 (1961) the United States Supreme Court held that the arraignment in the State of Alabama is so critical a stage in the Alabama criminal procedure that denial of counsel at arraignment required reversal of the conviction even though no prejudice was shown. The court noted that at the time of arraignment in Alabama the defense of insanity must be pleaded or it is lost unless it is accepted at the trial judge's discretion. The exercise of this discretion is not appealable. Also, at the time of arraignment pleas in abatement and motions to quash must be raised. The court stated at Page 158:

"Whatever may be the function and importance of arraignment in other jurisdictions, we have said enough to show that in

"Alabama it is a critical stage in a criminal proceeding. What happens there may affect the whole trial. Available defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes."

The court, quoting from prior Supreme Court cases stated:

"An accused in a capital case requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. The guiding hand of counsel is needed at the trial lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the state exacts for the offense which they in fact in law committed. But the same pitfalls, or like

"ones, face an accused in Alabama who was arraigned without counsel at his side. When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. (citing cases) In this case, as in those, the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently."

Upon the foregoing, the United States Supreme Court reversed the ruling of the Alabama Supreme Court.

In White v. The State of Maryland, 373 U.S. 59, 83 Sup. Ct. 1050, 10 L.Ed. 2d 193 (1963), the United States Supreme Court held that under Maryland law the denial of the defendant's right to counsel at the preliminary hearing necessitated the reversal of his conviction for murder. In that case



the petitioner was arrested and brought before a Magistrate for a preliminary hearing at which time he plead guilty to the charge of murder. Thereafter, at what Maryland calls the arraignment, the petitioner had counsel appointed for him and entered a plea of not guilty and not guilty by reason of insanity. However, at his trial, the plea of guilty made at his preliminary hearing was introduced in evidence against him. It was contended that under Maryland Law there was no requirement of any practicable possibility under the present criminal procedure to appoint counsel for the petitioner at the preliminary hearing, and it was necessary for the petitioner to enter a plea at that time.

The court stated at Page 1051:

"Whatever may be the normal function of the preliminary hearing under Maryland law, it was in this case as critical a stage as arraignment under Alabama law. For petitioner entered a plea before the Magistrate and that plea was taken at the time when he had no counsel.

"We repeat what we said in Hamilton v. Alabama, supra, at 55, 82 Sup. Ct. at 159, that we do not stop to determine whether prejudice resulted:

'only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently!

"We therefore hold that Hamilton v. Alabama governs and the judgment below must be and is reversed."

Appellant respectfully submits that

under the holdings of Hamilton v. Alabama, supra, and White v. State of Maryland, appellant's

arraignment before the Justice of the Peace was such a "critical stage" in the criminal proceedings against him as to require the appointment of counsel. As stated in a paper by Ronald I. Meshbesher:

"The initial appearance or arraignment before a Magistrate may, in addition to pleading, involve a decision whether to waive preliminary examination and the setting of bail. In some situations it might be beneficial to waive the preliminary examination, but in most cases it is an excellent device for discovery. In any event, the strategy to be employed can most effectively be determined by counsel. The lawyer may also aid his client in seeing that the bail set is not excessive or perhaps even have the defendant released without bail. Thus, for purposes of strategy or possible early release, the initial appearance or arraignment is a 'critical stage' and under the rational of Hamilton and White an offer of appointed

"counsel and advising of the right to retain counsel is constitutionally required."

The Hennepin, Vol. 35/No.6, p.

88.

As Professor Kamisar has stated, there exists a

". . . (G)atehouse of American criminal procedure--through which most defendants journey and beyond which many never get-- (where) the enemy of the state is a depersonalized 'subject' to be 'sized up' and subjected to 'interrogation tactics and techniques most appropriate for the occasion'; he is 'game' to be stalked and cornered. Here ideals are checked at the door, 'realities' faced, and the prestige of law enforcement vindicated. Once he leaves the 'gatehouse' and enters the 'mansion'--if he ever gets there--the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual

"freedom from law enforcement celebrated."

Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Kamisar, Inbau & Sowle, Criminal Justice in Our Time, 20 (1965) (Magna Carta Essays).

Utah does not come expressly within the holding of the White case inasmuch as Utah does not permit the entering of a plea at the preliminary hearing. At that hearing the defendant may make a statement, not under oath, after being informed of his right to remain silent without risking later comment on his silence and after being informed of the admissibility of a statement against him at trial. (Utah Code Annotated, Sec. 77-15-35) However, at the preliminary hearing and at the request of the prosecutor, the Magistrate must order the transcription

of testimony which may be admitted at trial, thus possibly depriving the defendant of his opportunity for cross examination at a trial by jury. As Professor Mazor so ably put it in the Utah Law Review, Vol. 9, p. 68:

"Even if it be thought that characterization of the preliminary examination as critical can be avoided where no such testimony is taken or obviated through deletion of this provision, there are broader aspects of the use of the preliminary hearing which suggest the necessity of providing counsel. Whereas some states have provided for discovery in criminal cases, apart from the preliminary examination Utah has not. Thus, the occasion which it affords for the pre-trial examination of witnesses upon compulsory process is a unique and irretrievable opportunity for the defense. Nor would it seem that a rule of prejudicial error can be applied in this context, for

"it is forever unknowable what information counsel might have gleaned from the preliminary examination."

It is clear from the Hamilton decisions and other decisions in the same line of cases that the court does not look to whether or not the accused was prejudiced by his lack of counsel. The mere fact that his constitutional rights were denied is sufficient reason to overrule the judgment of the trial court.

### CONCLUSION

Appellant showed by creditable evidence in the Court below that he was deprived of his constitutional right to the advice of counsel at the critical stages of the criminal proceedings against him. Counsel was not appointed for him until the proceedings had reached the District Court level. By that time, matters which may have materially aided his defense had already been lost to him and it must be presumed that he was prejudiced thereby.

Appellant respectfully submits that the trial court erred in concluding that he had been deprived of no constitutional rights



and dismissing his Complaint for Writ of Habeas Corpus. The trial court should be reversed and appellant's Writ of Habeas Corpus granted.

Respectfully submitted,

HANSON & BALDWIN

A handwritten signature in cursive script, appearing to read "F. Alan Fletcher", written over a horizontal line.

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