

1966

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

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# In The Service of the State

**JOSEPH TERRY KIRK**

**JOHN W. TURNER**  
Utah State Prison,

## BRIEF OF

Agreed Upon the 1st day of  
Utah State Prison,  
Hatchville, Utah

**W. H. FLETCHER**  
Attorney for Plaintiff - Appellant  
The Kansas Building  
Salt Lake City, Utah

## TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE .....	1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
ARGUMENT	
POINT I.	
There is no showing that appellant has been deprived of any federal or state constitutional rights ..	2
A. Appellant knowingly and intelligently waived his legal right to preliminary examination .....	2
B. There is no showing that appellant was denied his right to counsel .....	2
POINT II.	
The trial court did not err as a matter of law in excluding from the record all reference to extradition proceedings except as they might affect appellant's pleas of guilty .....	10
Conclusion .....	13

### Cases Cited

Carnley v. Cochran, 369 U.S. 506 (1962) .....	9, 10
Dear v. State of Ohio, 107 F.Supp. 937 (D.C.W.VA. 1952) .....	12
DeToro v. Peppersack, 332 F.2d 341 (4th Cir. 1964) ..	5, 6
Doughty v. Maxwell, 376 U.S. 202 (1964) .....	10
Doughty v. Sacks, 173 Ohio St. 407, 183 N.E.2d 368 (1937) .....	10
Gideon v. Wainwright, 372 U.S. 385 (1963) .....	8, 10
Hamilton v. Alabama, 368 U.S. 52 (1961) .....	4, 5, 6

# TABLE OF CONTENTS—(Continued)

Page

<b>In Re Satterfield</b> , 50 Cal. Rptr. 284, 412 P.2d 540 (1966) .....	13
<b>Harvey v. State of Mississippi</b> , 340 F.2d 263 (5th Cir. 1965) .....	9, 10
<b>Johnson v. Matthews</b> , 182 F.2d 677 (C.A.D.C. 1950) ..	12
<b>Latham v. Crouse</b> , 320 F.2d 120 (10th Cir. 1963) ....	6, 7, 8, 9
<b>Lovato v. Cox</b> , 344 F.2d 916 (10th Cir. 1965) .....	7
<b>McGuffey v. Turner</b> , 18 U.2d 354, 423 P.2d 116 (1967) ..	4, 9
<b>People v. Wilson</b> , 106 C.A. 2d 716, 236 P.2d 891 (1966) ..	11
<b>State v. Freeman</b> , 94 Utah 125, 71 P.2d 196 (1937) ....	4
<b>State v. Stewart</b> , 87 Idaho 210, 392 P.2d 180 (1964) ....	11
<b>State v. Wise</b> , 58 N.M. 164, 267 P.2d 992 (1954) .....	11
<b>Thompson v. State</b> , 197 Kan. 360, 419 P.2d 891 (1966) ..	11
<b>Utah v. Sullivan</b> , 227 F.2d 511 (10th Cir. 1952) .....	6
<b>White v. Maryland</b> , 373 U.S. 59 (1963) .....	4, 5, 6
<b>Wilson v. Hand</b> , 181 Kan. 483, 311 P.2d 1009 (1957) ..	9

## Statutes Cited

Utah Code Ann. § 77-16-2 (1953) .....	8
Utah Code Ann. § 77-56-25 (c) 1953) .....	12, 13
California Penal Code § 1555.2 .....	13

# In the Supreme Court of the State of Utah

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JOSEPH TERRY SIEBOLD,

Plaintiff - Appellant,

vs.

JOHN W. TURNER, Warden,  
Utah State Prison,

Defendant - Respondent.

} Case No.  
10551

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## BRIEF OF RESPONDENT

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### STATEMENT OF NATURE OF CASE

Appellant, Joseph Terry Siebold, appeals from a judgment of the Third District Court, Salt Lake County, State of Utah, Aldon J. Anderson, Judge, denying his petition for a writ of habeas corpus.

### DISPOSITION IN LOWER COURT

Appellant filed a petition for writ of habeas corpus in the Third District Court on November 19, 1965. Pretrial was held December 3, 1965, and a hearing was held January 6, 1966, before the Honorable Aldon J. Anderson. Judgment was entered January 11, 1966, denying the petition based on the court's findings of fact and conclusions of law.

## RELIEF SOUGHT ON APPEAL

Respondent submits that the judgment of the trial court should be affirmed.

## STATEMENT OF FACTS

Respondent accepts the statement of facts as presented in appellant's brief.

## ARGUMENT

### POINT I

**THERE IS NO SHOWING THAT APPELLANT HAS BEEN DEPRIVED OF ANY FEDERAL OR STATE CONSTITUTIONAL RIGHTS.**

**A. APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS LEGAL RIGHT TO PRELIMINARY EXAMINATION.**

**B. THERE IS NO SHOWING THAT APPELLANT WAS DENIED HIS RIGHT TO COUNSEL.**

The record shows that appellant and his co-defendant had discussed the matter of a preliminary examination prior to appearing before the committing magistrate and that they had decided against it. (R. 64) It is clear from the record that the committing magistrate, R. A. McConkie, justice of the peace in Uintah County, advised the defendants of their right to a preliminary examination and the nature of preliminary examinations. Appellant was also advised that he had a right to counsel. (R. 88-89) Appellant thereupon waived preliminary hearing.

(R. 89) It is not denied that neither defendant was represented by counsel at this time.

At the time set for arraignment in the Fourth Judicial District, Judge Joseph E. Nelson requested of the defendants whether they wished to be represented by counsel. They answered in the affirmative and a continuance of thirty minutes was granted for a conference with Ray E. Nash, court appointed counsel.

During that conference, Mr. Nash told both appellant and Mr. Desmarais that they had waived preliminary examination and that if they wanted one it would be granted by the court. Counsel then explained what a preliminary examination consisted of saying, "We will just merely parade their witnesses and get all the story from all the witnesses they have." (R. 94)

The defendants decided to plead guilty to the robbery charge because, as they said, "they got us dead-to-rights so there's no need to go into that." (.94) The defendants also decided not to have a preliminary hearing on the charge of assault with intent to commit murder. (R. 95).

Thereafter, appellant was given an additional opportunity to discuss at length with Mr. Nash the merits of the State's case against him; however, appellant again decided against having a preliminary hearing.

Although appellant was not represented by counsel at the time he first waived preliminary ex-

amination, his failure to request a preliminary examination following appointment of counsel, who advised him that he could recall preliminary examination, negates his claim that he was denied his legal rights to a preliminary hearing.

In **McGuffey v. Turner**, 18 U.2d 354 at 356, 423 P.2d 166 at 167 (1967), this court, in reversing a District Court ruling granting a writ of habeas corpus, stated:

It is the practice in the trial courts of this state to remand a criminal case for preliminary hearing when the defendant requests it at arraignment when the preliminary hearing has been theretofor waived. It is rather difficult to see how a guilty defendant is prejudiced by waiving a preliminary hearing when all that is entailed at the hearing is that sufficient evidence be given to the committing magistrate to cause him to believe the defendant guilty thereof.

This court has held in **State v. Freeman**, 94 Utah 125, 71 P.2d 196 (1937), that before a defendant can be bound over to District Court he is entitled to a preliminary examination unless, with consent of the state, he waives such hearing. If such hearing is waived, defendant thereby implies that the evidence the State would have produced would have been sufficient to justify the magistrate holding him for arraignment. The defendant thereby consents that he be held for trial, and no witnesses need be produced.

Appellant cites **Hamilton v. Alabama**, 368 U.S. 52 (1961) and **White v. Maryland**, 373 U.S. 59 (1963) for the proposition that failure to appoint counsel

prior to appellant's waiving preliminary examination requires reversal of the conviction even though no prejudice has been shown.

In **Hamilton**, the court held that arraignment could be a "critical stage" when, as in Alabama, the defendant, if he is to raise the defense of insanity at all, must raise it then. In **White**, the accused, unrepresented by counsel at a preliminary hearing, entered a plea of guilty to a capitol offense. Thereafter, he entered a plea of not guilty at the time of his arraignment. The plea of guilty was offered in evidence at the trial. The United State Supreme Court said that in view of the fact that a plea could be entered at the time of a preliminary hearing, and was in fact entered, a preliminary hearing in this situation was a "critical stage."

In **DeToro v. Peppersack**, 332 F.2d 341 (4th Cir. 1964), the court ruled that under Maryland law, as modified since the **White** decision, a preliminary hearing was not a critical stage of the judicial process as defenses not raised were not irretrievably lost. Therefore, failure to appoint counsel prior to preliminary examination did not violate the accused's constitutional rights. At 332 F.2d 343 the court said:

In our view, **Hamilton** and **White** teach that an accused is denied rights afforded him under the sixth amendment when he is subjected to an arraignment or to a preliminary hearing without the assistance of counsel, where events transpire that are likely to prejudice his ensuing trial . . . .  
 . . . the thrust of **Powell's [Powell v. Alabama, 287**

U.S. 45 (1932)] admonition that an accused has a right to counsel 'at every step in the proceedings against him,' as borne out by subsequent decisions, including *Hamilton* and *White*, seems to be that if the effectiveness of legal assistance ultimately furnished an accused is likely to be prejudiced by its prior denial, the earlier period may be deemed a critical stage in the judicial process and a conviction obtained in such circumstances is rendered invalid. We find nothing in the Supreme Court decisions, however, that would permit us to extend the duty of the State to appoint counsel in proceedings where even the likelihood of later prejudice arising from the failure to appoint is absent.

It should be noted that the United States Court of Appeals for the Tenth Circuit in **Latham v. Crouse**, 320 F.2d 120 (1963), handed down subsequent to both **White** and **Hamilton**, ruled that an accused has no constitutional right to be furnished counsel at a preliminary hearing in a state court capital case. In that case, two individuals by the names of Latham and York were responsible for a series of killings throughout the United States, and were tried and convicted of murder in Kansas after being apprehended in Utah. The Tenth Circuit Court of Appeals relied on its previous decision in **Utah v. Sullivan**, 227 F.2d 511 (10th Cir. 1952), stating:

The first contention is that petitioners were entitled to have counsel appointed for them prior to the preliminary examination. Heavy reliance is placed on the decision of the United States Supreme Court in **Gideon v. Wainwright, Corrections Director**, 372 U.S. 385, 83 S.Ct. 792, 9 L.Ed.2d 799. That case concerned the right of an accused to counsel at trial — not at a preliminary hearing. In **State v. Sullivan**, in **State of Utah v. Sullivan**, 10 Cir., 227 F.2d 511, 513, certiorari denied, sub nom. **Braasch v. Utah**, 350 U.S. 973 S.Ct. 449, 100 L.Ed 844, we

held that in circumstances where an accused did not enter a plea of guilty at a preliminary hearing, did not make a confession, did not testify and did not say anything of an incriminating nature, the failure to furnish counsel at such hearing did not abridge that accused's fundamental constitutional rights. That decision is controlling here. No claim is made of any incriminating statements or acts of the petitioner at the preliminary examination. All they did was waive the right to a preliminary hearing. Prejudice is asserted on the ground that counsel would have forced the prosecution to disclose at least some of its evidence. The point is not well taken as more than a month in advance of trial copies of the confessions and list of the prosecution witnesses were given defense counsel. Our conclusions in **State of Utah v. Sullivan** are supported by the decisions of other circuits. We find nothing in **Gideon v. Wainwright** which requires a review of the decision in **State of Utah v. Sullivan**.

This holding was reiterated recently in **Lovato v. Cox**, 344 F.2d 916 (10th Cir. 1965) a per curium opinion. The court noted that the preliminary proceedings were entirely independent of the prisoner's formal arraignment and sentencing, and at the time of preliminary hearing, the prisoner had already signed a statement. He appeared before a justice of the peace without counsel and thereafter at the time of arraignment entered a plea of guilty. The court concluded the prisoner was in no way deprived of any constitutional right.

It is submitted that under Utah law a preliminary hearing is not a "critical stage" and that appellant was in no way denied his constitutional rights when without counsel he first waived preliminary hearing.

**Gideon v. Wainwright**, 372 U.S. 385 (1963), is not in point. "That case concerned the right of an accused to counsel at trial—not a preliminary hearing." **Latham v. Crouse**, 320 F.2d 120 (1963).

In **State v. Braasch**, 119 Utah 450, 224 P.2d 289 (1951), the court held, as appellant acknowledges, that the failure to have counsel for preliminary hearing was not prejudicial.

Utah Code Ann. § 77-16-2 (1953) provides:

No defect or irregularity in or want or absence of any proceeding or statutory requirement, prior to the filing of an information or indictment, **including the preliminary hearing**, shall constitute prejudicial error and the defendant shall be conclusively presumed to have waived any such defect, irregularity, want or absence of proceeding or statutory requirement, unless he shall before pleading to the information or indictment specifically and expressly object to the information or indictment on such ground . . . (Emphasis added.)

Appellant asserts that he was prejudiced on the ground that preliminary examination would have forced the State to disclose some of its evidence. It is submitted that the point is not well taken as appellant pleaded guilty to the charge of robbery because he knew he was guilty and that the State could prove it.

Appellant entered his plea of guilty to the charge of assault with intent to commit murder after three weeks during which time appellant's attorney interviewed witnesses and looked into the State's case. It was on the advice of appellant's attorney to the effect that the State had a strong case against

him that appellant changed his plea from not guilty to guilty. See **Latham v. Crouse**, pages 7 and 8. Appellant has not demonstrated that he was in any way prejudiced by the proceedings in this case.

Respondent submits that defendant's unsupported testimony is not sufficient proof to establish appellant's contention that he did not intelligently and voluntarily waive preliminary hearing.

This court in **McGuffey v. Turner**, 18 U.2 354 at 359, 423 P.2d 166 at 169 (1967), cites favorably the Kansas case of **Wilson v. Hand**, 181 Kan. 483, 311 P.2d 1009 (1957), which said:

The rule is well established that the standard of proof necessary to justify the issuance of a writ of habeas corpus is not met by uncorroborated and unsupported statements of the petitioner.

It is submitted that where the petitioner relies on his testimony and that of his co-defendant to establish that he did not intelligently and voluntarily waive preliminary hearing, the burden of proof is not met where there is reliable testimony to the contrary indicating that they did intelligently and voluntarily waive preliminary hearing. In the instant case, the testimony of Ray E. Nash demonstrates that appellant did intelligently and voluntarily waive preliminary hearing.

In support of his contention that he was prejudiced by waiving preliminary hearing without the advise of counsel, appellant cites **Harvey v. State of Mississippi**, 340 F.2d 263 (5th Cir.) (1965); **Carnley v.**

**Cochran**, 369 U.S. 506 (1962); and **Doughty v. Maxwell**, 376 U.S. 202 (1964).

Respondent submits that the decision in **Harvey** is not in point as Harvey, a Negro, did not obtain counsel until after he had entered a plea of guilty to the charge of illegal possession of whisky, which plea, when accepted, became final.

**Carnley** is not in point as the case deals with the right to counsel at trial and the decision holds that a waiver of right to counsel cannot be presumed from a silent record.

Nor is **Doughty v. Maxwell**, *supra*, in point. See **Doughty v. Sacks**, 173 Ohio St. 407, 183 N.E.2d. 368 (1962). Doughty was indicted by a grand jury for rape and, after psychiatric examination, pleaded guilty without the aid of counsel. The United States Supreme Court relies on **Carnley v. Cochran**, *supra*, and **Gideon v. Wainwright**, *supra*, for its decision in this case.

## POINT II

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN EXCLUDING FROM THE RECORD ALL REFERENCE TO EXTRADITION PROCEEDINGS EXCEPT AS THEY MIGHT EFFECT APPELLANT'S PLEAS OF GUILTY.

Appellant argues that the trial court erred in excluding all reference to appellant's waiver of extradition to California and his subsequent waiver of extradition back to Utah between the time of his arrest

on August 3, 1964, and pronouncement of judgment on September 9, 1964.

In **State v. Stewart**, 87 Idaho 210, 392 P.2d 180 (1964), the court held that the forum state may try the accused regardless of the manner in which he is returned to the state.

In **Thompson v. State**, 197 Kan. 360, 419 P.2d 891 (1966), the court held that the jurisdiction of the Kansas district court to the person on a charge of having committed a public offense does not depend on how he came into the state.

In **People v. Wilson**, 106 C.A.2d 716, 236 P.2d 9 (1951), **cert. den.** 342 U.S. 915 (1962), the California Court of Appeals said that jurisdiction over the person of an accused is not affected by the way it is acquired, or the manner by which the accused is brought into the court.

In **State v. Wise**, 58 N.M. 164, 267 P.2d 992 (1954), the New Mexico Supreme Court said that where a person accused of a crime is found within a territorial jurisdiction where he is charged, the jurisdiction of the court where the charge is pending is not impaired by the fact that the defendant is brought from another jurisdiction by illegal means.

Respondent submits that it is the purpose of extradition proceedings to prevent the successful escape of any person who has been accused of a crime; and, since this is the purpose of extradition proceedings, it is submitted that none of the appellant's constitutional and legal rights were violated.

**Johnson v. Matthews**, 182 F.2d 657, **cert. den.** 340 U.S. 828 (1950).

A person who has been extradited from one state to another and then subsequently extradited and brought back to the first state cannot, after he is once again held by the first state, inquire into the legality of his extradition back to that state, or into the right of the first state to his custody after his committment to a penal institution therein. **Dear v. State of Ohio**. 107 F.Supp. 937 (D.C.W.VA. 1952). See also 35 C.J.S. Extradition § 21(b).

Respondent submits that appellant, as a matter of record, was within the jurisdiction and the presence of the court which arraigned and pronounced sentence on him. There was no way, as a matter of law, for appellant to challenge the court's jurisdiction over him. It is submitted, therefore, that the trial court did not err in refusing to allow the issue of jurisdiction to be brought before the court except as it might affect appellant's pleas of guilty to the crimes charged. Respondent submits that the trial court's order should be affirmed.

Even had appellant raised the issue of jurisdiction in the trial court, he could not have successfully argued that Utah, by allowing California authorities to extradite him, had waived jurisdiction. Utah Code Ann. § 77-56-25 (c) (1953) provides:

**Nothing in this act contained shall be deemed to constitute a waiver by the state of its right, power**

or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed in this state, or shall any proceedings had under this act which result in extradition be deemed a waiver by this state of any of it's rights, privileges or jurisdiction in any way whatsoever.

This statute is a part of the Uniform Criminal Extradition Act and has also been adopted by California. See California Penal Code § 1555.2. The California Supreme Court in **In Re Satterfield**, 50 Cal. Rptr. 284, 412 P.2d 540 (1966), said that a waiver of jurisdiction is not to be automatically implied in all cases where the state transfers a prisoner to the custody of another sovereign. The state shall not be deemed to have waived jurisdiction unless evidence demonstrates an intentional waiver.

It appears that under Utah law the state did not waive jurisdiction over the appellant when it allowed extradition to California.

## CONCLUSION

Respondent submits that appellant voluntarily and intelligently waived his right to preliminary hearing. Further, a preliminary hearing is not a "critical stage" of the proceeding and appellant has failed to demonstrate that he was prejudiced by his waiver thereof. The trial court did not err by refusing

to allow into evidence any of the extradition proceedings. Respondent submits that the trial court's denial of appellant's petition for writ of habeas corpus should be affirmed.

Respectfully submitted,

PHIL L. HANSEN

Attorney General

GERALD G. GUNDRY

Assistant Attorney General

Attorneys for Respondent