

1966

## Jerry W. McGuffey 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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JERRY W. MCGUFFEY,  
Petitioner-Respondent,

- vs -

JOHN W. TURNER, Warden,  
Utah State Prison,  
Respondent-Appellant.

} Case No.  
10561

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## BRIEF OF APPELLANT

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Appeal from the Judgment of the Honorable  
Marcellus K. Snow, Judge, Granting the  
Petitioner a Conditional Release Upon  
Writ of Habeas Corpus

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*Filed*  
*May 2 1966*

IN THE SUPREME COURT OF THE STATE OF UTAH

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RY W. MCGUFFEY,

:

Petitioner-  
Respondent,

:

:

Case No. 10561

W. TURNER,  
den, Utah State  
son,

:

:

Respondent-  
Appellant.

:

:

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The Attorney General wishes to supplement the  
ef heretofore filed on behalf of the appellant  
the instant matter.

The Attorney General respectfully calls to the  
art's attention the decision of the Utah Supreme  
rt in State v. Seymour, No. 10596, wherein this  
rt ruled that in the absence of a showing of pre-  
lice, failure to provide counsel for a defendant  
the time of preliminary hearing was not a denial  
constitutional rights or otherwise prejudicial  
or.

Respectfully submitted,

PHIL L. HANSEN  
Attorney General

RONALD N. BOYCE  
Assistant Attorney General

Attorneys for Respondent

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# In The Supreme Court of the State of Utah

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JERRY W. McGUFFEY, Petitioner-Respondent,	}	Case No. 10561
- vs -		
JOHN W. TURNER, Warden, Utah State Prison, Respondent-Appellant.		

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## BRIEF OF APPELLANT

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### STATEMENT OF NATURE OF CASE

The appellant, John W. Turner, Warden of the Utah State Prison, appeals from a judgment of the District Court of the Third Judicial District, conditionally releasing the respondent, Jerry W. McGuffey, a prisoner at the Utah State Prison, and ordering that McGuffey be returned to the Sixth Judicial District, Kane County, to stand trial on the charge of robbery.

### DISPOSITION IN LOWER COURT

On September 13, 1965, Jerry W. McGuffey plead guilty to the crime of robbery in the District Court of the Sixth Judicial District, Kane County, State of Utah, before the Honorable Ferdinand Erickson, District Judge. On the 22nd day of September,

1965, he was sentenced to be committed to the Utah State Prison. Thereafter, on November 22, 1965, the respondent filed a petition for writ of habeas corpus in the District Court of the Third Judicial District, Salt Lake County, alleging in his petition that the plea of guilty entered before the District Court of the Sixth Judicial District had been coerced and that he had been denied his rights to counsel at the time of his preliminary hearing before the magistrate in the justice's court in Kane County. An answer to the petition for writ of habeas corpus was duly filed and hearing held thereon. Witnesses were called for both respondent and appellant. On the 7th day of February, 1966, the Honorable Marcellus K. Snow entered his decision, ordering that the petitioner be released from the Utah State Prison and returned to Kane County to stand trial on the charges of robbery. The court found that the petitioner was not properly advised of his rights to have counsel appointed prior to the preliminary hearing without legal advice from counsel and that his plea of guilty to the charge of robbery was entered without counsel and with the reasonable belief that such plea was necessary to obtain the release of his wife and prevent her prosecution for the crime of robbery.

On the 10th day of February, 1966, the district court entered an amended order providing for a stay of release of the petitioner pending appeal and ordering his return for reprosecution within fifteen



days of affirmance by this court or fifteen days after dismissal of any appeal.

On the 16th day of February, 1966, the appellant warden filed a notice of appeal to this court. The respondent filed a cross appeal on the 18th day of February, 1966, appealing the amended order of the court granting the stay of the release of Jerry W. McGuffey, pending this appeal. Subsequently, this court, upon motion of the respondent's new counsel, denied an application for release pending appeal and bail. Consequently, the issues raised by the cross-appeal are now moot.

The counsel for the respondent on appeal is not the same counsel who tried the case in the District Court of Salt Lake County on the respondent's application for a writ of habeas corpus.

## **STATEMENT OF FACTS**

The respondent, Jerry W. McGuffey, a prisoner in the Utah State Prison, filed a petition for a writ of habeas corpus in the District Court of Salt Lake County, State of Utah. The petition and amended petition alleged (1) the denial of counsel at preliminary hearing, (2) coercion inducing the petitioner to enter his plea of guilty in the District Court of Kane County, which plea resulted in his confinement in the Utah State Prison, and (3) that he was

not informed as to the consequences of his plea of guilty (R. 8).<sup>1</sup>

At the time of hearing on January 19, 1966, a transcript of the proceedings in the District Court for the Sixth Judicial District, in and for Kane County, were received into evidence (Exhibit 1). It appeared that at the time of the respondent's arraignment on the 13th day of September, 1965, he appeared without counsel, having theretofore waived preliminary hearing (T. 2). An amended information charging the respondent with the crime of robbery was filed with the court. The respondent waived his right to arraignment in Kane County and the matter was heard before the Honorable Ferdinand Erickson in Richfield, Sevier County. The court indicated with reference to the charges then pending against the wife of the respondent that the charges would be dismissed. The court then advised the respondent with reference to his right to counsel. The court stated:

"The law of our State also provides, Jerry, that before you are required to enter a plea to the Information charging you with the commission of a felony that you are entitled to an attorney, whom you may either employ on your own or in the event you are unable financially to provide the funds, the court may appoint one or is obliged to appoint one for you to represent you. So do you want to employ one or have the court appoint one for you?"

DEFENDANT: No. sir."

(1) The transcript of proceedings in the District Court for Kane County (Exhibit 1) will be referred to as "T." The proceedings in the District Court of Salt Lake County will be referred to as "R."

It further appeared that the respondent was advised that the crime of robbery was punishable by imprisonment in the Utah State Prison for a period of from ten years to life (T. 4).<sup>2</sup> Subsequent to the advice by the court as to the sentence that could be imposed upon a plea of guilty to the charge of robbery, the information was read, the respondent waived the time for entering his plea after advice, and entered a plea of guilty (T. 4). The court indicated that it needed additional information before passing sentence (T. 5).

On September 22, 1966, the respondent appeared before the court again and the district attorney recited that he had additional information to the effect that the respondent had other charges against him and had committed other crimes in other parts of the United States. (T. 7-8). The court then asked the respondent whether the statements by the district attorney were true and respondent indicated that they were (T. 10). After the indication of the other involvement of the respondent, the judge indicated that the respondent had fooled him (T. 11). The respondent admitted that it was his purpose to take money from the victim of the robbery and that he would have taken whatever money she had (T. 12). The court then asked the respondent if he

<sup>(2)</sup> The crime of robbery is actually punished by imprisonment in the Utah State Prison for a period of five years to life. However, since the petitioner-respondent was advised that the penalty for the crime was more severe than it actually was under the Utah statutes, no prejudice could have resulted to him. Further, the trial court did not in any way indicate that its judgment ordering the release of the petitioner-respondent was predicated upon any erroneous advice as to the possible consequences of the plea of guilty.

desired to consult with counsel before sentencing and the respondent declined (T. 12). He was again advised as to the penalty and further advised as to his right to counsel, which he refused. The court then entered a sentence committing the respondent to the Utah State Prison.

At the time of the hearing on the respondent's petition for a writ of habeas corpus, he testified that he had been committed to the Utah State Prison on the 22nd day of September, 1965, for the crime of robbery following his arrest in Kane County on September 8, 1965. (R. 34). He indicated that both his wife and he were charged with the crime of robbery (R. 35). Subsequent to his arrest, he was taken before a justice of the peace (R. 35). He indicated that he waived preliminary hearing (R. 36). He stated that prior to preliminary hearing, he had a conversation with the Sheriff and that the Sheriff advised him that it would be better if he waived preliminary hearing. (R. 36). He indicated that he could recall no statement from Justice of the Peace Hepworth, who is the justice before whom he appeared, except the statement to the effect that he was being bound over for trial. (R. 37). On cross-examination, he indicated that he was never advised that he could have counsel if he could afford it, although there is some ambiguity in his answers in the record (R. 49). He further indicated that prior to the time of the preliminary hearing, he had indicated to the Sheriff that he was guilty. He did admit that he waived preliminary hearing (R. 49). He testified that subsequent to his

waiver of preliminary hearing, he was bound over to the district court and appeared there on the 13th of September, 1965, and entered a plea to the charge. He indicated that prior to appearing in open court, he had a conversation with the Judge, the District Attorney, and the Sheriff at which conversation his wife was also present. He stated that probation was discussed and it was indicated that if he entered a plea of guilty he would be considered for probation (R. 38). He indicated that prior to that time, he had had a discussion with the Sheriff of Kane County in the Kane County Jail at Kanab, Utah, and that, more or less, the same thing was said. He further indicated that it was stated that if he plead guilty, the charges against his wife would be dropped (R. 39). He further indicated that there some mention about possibly expunging the record and obtaining his return to military service (R. 40-42). He stated that the judge indicated that the case would no be referred to the Adult Probation and Parole Department, but that the Sheriff would make an examination and advise the court (R. 40). He further testified that prior to the entry of his plea of guilty, he had a conversation with the Sheriff as to the feasibility of obtaining counsel and that the Sheriff told him that that would slow things up and that counsel would have to come from Salt Lake (R. 41). He admitted that he was advised as to the consequences of his plea and did not impeach the record as to its recital that he was advised as to the right to have counsel (R. 42).

On cross-examination, it appeared that the respondent had been convicted upon trial before a special Court-martial in the United States Air Force of AWOL under the Uniform Code of Military Justice and spent three months in a military stockade (R. 47). The trial court took judicial notice of the legal proceedings in special court-martials (R. 48). He admitted that he was advised that he could have a preliminary hearing to determine whether there was probable cause to see if he was guilty. He further indicated that he wanted to waive the preliminary hearing, because he felt that he was guilty (R. 49-50). He stated that he was never promised probation but it was merely indicated that he would be considered for it and that he understood there was no guarantee (R. 51). He recognized that Judge Erickson had not promised him probation (R. 51). He admitted that he was advised as to the right to counsel and stated that he plead guilty because "I didn't think it would be necessary to plead not guilty and that I wanted to waive jury trial." (R. 53-54). He stated that he had no doubt in his mind as to the commission of the offense for which he was charged (R. 54). The question was asked: "All right. Now, you plead guilty, knowing that you had committed that offense, didn't you? Answer: Yes." (R. 55).

The respondent further testified that the charges against his wife were, in fact, dropped. He further said he realized that going back into the service depended on his being accepted.

Patricia May McGuffey testified that she was

the wife of the respondent and that prior to the time he entered his plea of guilty, Sheriff Johnson had indicated that if the respondent would plead guilty, he might be able to get probation (R. 64). She didn't recall whether there was any mention of charges against her and could not recall whether there was any questions asked at preliminary hearing about an attorney (R. 64-65). Thereafter, after very leading questions from the respondent's counsel, she indicated that she recalled a conversation concerning dropping charges and the possibility of the respondent obtaining probation (R. 66-67). She stated that there was no doubt in her husband's mind that if he plead guilty, she wouldn't be prosecuted (R. 69). She stated that there was a conversation prior to the time he entered a plea of guilty with Judge Erickson, the District Attorney, and the Sheriff being present, where it was indicated that if the respondent plead guilty, he would be considered for probation, and at which time Judge Erickson also indicated that the charges would be dropped against her if her husband plead guilty (R. 70). Mrs. McGuffey stated that she was still in love with her husband (R. 69).

Sheriff LeNard Johnson of Kane County testified that he was present at the time of the magistrate's hearing. He said that the complaint was read and that the respondent was advised of his right to an attorney and that he could have an attorney at all proceedings, if he wanted it, including preliminary hearing and that the district court would appoint one if he couldn't afford one. (R. 70). He

indicated that the respondent had told him prior to the time of preliminary hearing that he was guilty and wanted to waive a hearing and get it over with (R. 70). Sheriff Johnson said that he advised the respondent prior to the time of the preliminary hearing that he was entitled to counsel and that he also advised that if he couldn't afford it, that counsel would be appointed. (R. 73). At the time of preliminary hearing, the Sheriff indicated that the respondent was advised again of his right to counsel and that counsel would be appointed if he couldn't afford it (R. 70). Thereafter, the respondent waived preliminary hearing.

The Sheriff indicated that subsequent to the waiver of preliminary hearing, the subject of probation was discussed with the respondent, but that he never advised him that he would get it and never advised him that he should plead guilty. The Sheriff indicated, in fact, that he advised him on several occasions that he should plead not guilty and let the court determine the issue (R. 74-75). He indicated that at no time did he promise or indicate to the respondent that he would get probation. The respondent at no time testified that he was promised probation.

The Sheriff stated that prior to the time of arraignment in the district court, both the respondent and his wife approached him and asked if there was a possibility that a dismissal could be obtained against the wife if the respondent plead guilty. He indicated that he didn't know, but that he would present the



matter to the District Attorney (R. 79). He indicated that he never advised the respondent that he should plead guilty. He further indicated that there was no agreement that if the respondent would plead guilty, the charges against his wife would be dropped. He stated that he felt the evidence simply did not support the charges against the wife and that the evidence seemed to indicate that she had been led into the crime by her husband (R. 83). He stated that he would have recommended dropping the charges against the wife, even if there had been no guilty plea entered.

The Sheriff further said that he never told McGuffey to waive counsel or that counsel would have to come from Salt Lake City.

The District Attorney, Ken Chamberlain, testified that he prosecuted Mr. McGuffey, that he first saw Mr. McGuffey at the time scheduled for his arraignment on September 13, 1965, and that prior to that time, he had had no discussions with the respondent (R. 87). He stated that there was a conversation in the chambers of Judge Erickson, at which time he, the sheriff, the judge, and Mr. and Mrs. McGuffey were present. He stated that prior to that time, the Sheriff had talked to him about possibility dismissing the charges against the respondent's wife. (R. 87). He stated that there was no arrangement or agreement made to dismiss the charges against the respondent's wife in exchange for a plea of guilty by the respondent but that the evidence simply did

not justify continuing to press the charges against the respondent's wife because it appeared that Mrs. McGuffey's involvement in the crime was because of the domination of her husband (R. 88). He further indicated that there were no promises of probation by himself, the Sheriff, or the Judge, at this time. Mr. Chamberlain further testified that it was not the practice to appoint counsel for indigents from Salt Lake City, but, rather, to obtain counsel for them in Richfield and that in his experience, he had never seen counsel appointed from Salt Lake City (R. 90). Mr. Chamberlain further testified that he had already decided to dismiss the charges against respondent's wife and that no condition that the respondent plead guilty was placed upon such a dismissal (R. 92). He stated that the respondent's plea was not a factor in the dismissal of the charges. He categorically stated that it was not reasonable to assume that Mr. McGuffey had been under the impression that it was necessary for him to plead guilty for the charges to be dismissed against his wife and that at no time had Judge Erickson made any promises in his presence to the respondent.

Based upon the above evidence, the trial court found that the respondent was entitled to a writ of habeas corpus based upon the failure to have counsel at the time of preliminary hearing and the claim that the respondent plead guilty in order to have the charges against his wife dropped.

## ARGUMENT

### POINT I.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE RESPONDENT WAS ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE OF HIS CONTENTION THAT HIS PLEA ENTERED AT THE TIME OF ARRAIGNMENT IN THE DISTRICT COURT OF KANE COUNTY WAS INVOLUNTARY.

The appellant submits that the trial court committed error in finding that there was any irregularity or impropriety at the time of the respondent's plea of guilty entered to the crime of robbery in the Sixth Judicial District Court for Kane County on September 13, 1965. The appellant submits that the court erred in two particulars: First, that the court erred in finding that there was sufficient evidence to sustain the respondent's burden of proof that he was entitled to habeas corpus. Second, that the court erred in that it misapplied the law in weighing whether the respondent's plea of guilty was voluntary.

It is well established that an individual seeking release from custody by petition for writ of habeas corpus has the burden of proof to demonstrate to the court that he is entitled to release. **Ex parte Riddle**, 57 Cal.2d 848, 22 Cal.Rep. 472, 372 P.2d 304 (1962); 39 C.J.S., Habeas Corpus, sec. 100; 25 Am. Jur., Habeas Corpus, sec. 150. Consequently, it was incumbent upon the respondent in the instant case

to carry the burden of proof to show that he was entitled to a writ of habeas corpus.

Recently, courts have recognized that there is an increasing use of the writ of habeas corpus to make inquiry into procedures occurring at the time of trial or at the time of arraignment and that inquiry under habeas corpus is broader in scope than it has been previously, and it is not limited to the very basic question of whether the individual having custody of the petitioner is entitled to have custody because he is a person in proper authority, or that the individual having custody has jurisdiction to exercise dominion over the person in custody. Because of the expanded use of writs of habeas corpus and the fact that they are often post-conviction retrials of the issues previously heard by a court, appellate courts have imposed a rather heavy burden of proof upon an individual seeking release from custody by habeas corpus.

In **Wilson v. Hand**, 181 Kan. 483, 311 P.2d 1009 (1957), the Kansas Supreme Court stated with reference to a habeas corpus proceeding:

"In this type of proceeding, the petitioner has the burden of proving the grounds upon which he relies for his release \*\*\* and he must establish his allegations by a clear and convincing preponderance of the evidence because a judgment of conviction bears a presumption of regularity and validity."

In **Montgomery v. Hand**, 183 Kan. 118, 325 P.2d 69 (1958), the Kansas Supreme Court again stated:

“However, the burden was upon the petitioner to prove by clear and convincing evidence the grounds upon which he relies for his release.”

In **Application of Gaskill**, 335 P.2d 1088 (Court of Crim. App. Okla. 1959), the court noted:

“Moreover, to vacate a judgment and sentence by habeas corpus for alleged denial of fundamental constitutional rights, where the judgment is regular on its face, the proof must be clear, convincing and without doubt.”

In **In Re O'Neill**, 359 P.2d 619 (Court of Crim. App. Okla. 1961), the court again indicated that in order to justify the release of a petitioner, by habeas corpus, the evidence showing a violation of constitutional rights must be clear and convincing. It is noteworthy that the O'Neill case involved a claim by a petitioner that his plea of guilty was coerced because of threats by a county attorney that he would be turned over to a mob unless he entered a plea of guilty.

In **Farmer v. Raines**, 276 P.2d 633 (Okl. Crim. 1962), the syllabus of the court indicated:

“Public policy demands that the charges of petitioner in habeas corpus proceedings should be clear and convincing and should be corroborated by clear and convincing proof.”

Thus, the courts are recognizing that in the absence of an obvious defect in the record of any proceedings, an individual seeking his release from

custody by habeas corpus should demonstrate by clear and convincing evidence that his detention is unlawful. Certainly, there must be a presumption of judicial regularity and a recognition that where an individual enters a plea of guilty he does so under circumstances which are not inherently coercive. A defendant is before the court and can make a statement in his own behalf and if it appears, as it does in this case, that the respondent was clearly advised of his rights to counsel, it would seem to be a matter of sound public policy to require the person in custody to demonstrate by clear and convincing evidence that he is unjustifiably held.

It is submitted that in the instant case, the respondent in no way met the required burden of proof. In respect to the determination of the court that the respondent's plea of guilty was improvidently entered, it is submitted that such a finding is not supported by clear and convincing evidence and is contrary to the weight of testimony presented at the time of trial.

First, the transcript of proceedings of the respondent's arraignment clearly indicates that at the time he entered his plea of guilty, he was well aware that the charges against his wife had been dropped. The district attorney amended the information, and the court in questioning the respondent obtained the response of the respondent and he was aware of the fact the charges had been dropped. The court thereafter very carefully advised the respon-

ent of his rights to appear in Kane County and the respondent intelligently waived his appearance in Kane County and entered his plea in Sevier County. The court then went on to advise respondent that before he was required to enter a plea to the information, that he was entitled to an attorney, and the court stated: "Whom you may either employ on your own, or in the event you are unable financially to provide the funds, the court may appoint one or is obliged to appoint one for you to represent you." The court then asked the respondent if he desired counsel and he stated: "No, sir." (T. 3). Thereafter, the respondent was advised as to the penalty that could be imposed by the court in the event the court saw fit to do so. The information was read and the respondent was advised that he was entitled to time to consider the matter before he entered a plea of guilty. The respondent replied that he was ready to enter his plea at that time. The court then asked the respondent how he plead to the information and he replied: "Guilty, sir." (T. 4). Thereafter, the respondent's sentencing was delayed pending a determination as to his background and whether there were any other charges pending against him. At the time respondent appeared for sentencing, he was again advised as to his right to counsel and again he waived counsel. He was further advised, again, as to the consequences of his plea and the possibility that he could be incarcerated in the Utah State Prison for a period of five years to life and after such advice, the respondent still indicated that he did not desire counsel.

The District Attorney informed the court as to prior difficulties the respondent had been involved in, and the respondent admitted that the District Attorney's statement was correct. At no time, does it appear from the transcript, that the respondent, in any way, desired to have his plea set aside, nor did he at any time indicate that he was under coercion or misapprehension. There is nothing in the transcripts of proceedings at the time of the respondent's arraignment or his sentencing that demonstrates any illegality.

At the time of the hearing, the respondent testified that when he entered his plea of guilty, he recognized that there was no promise of probation and that he would only be considered for probation. Further, the trial court on habeas corpus made no finding to the effect that the respondent was under any misapprehension as to the likelihood of his receiving probation if he entered a plea of guilty. The respondent stated that he had discussed the question of entering a plea of guilty with the District Attorney, the Sheriff, and the Judge, immediately prior to his arraignment (R. 38). The respondent further testified that at this conference with the Judge, he was told that he was entitled to counsel but that counsel would have to come from Salt Lake City and that since he was being considered for probation anyway, he didn't see where it was necessary. This was rebutted by the District Attorney. Further, the respondent indicated that he pleaded guilty knowing he had committed the offense and might go to prison (R. 55). The respondent's wife



testified that she was present at a pre-arraignment meeting in chambers where the District Attorney, the Sheriff, and the Judge and her husband were also present. She indicated, at the outset, (R. 64), that she didn't recall if there was anything mentioned regarding any charges against her. She further indicated that she couldn't recall what Judge Erickson had said specifically (R. 70). However, in other instances, she says that she recalled the conversation concerning dropping the charges.

On the opposite side, the District Attorney testified that there was a conversation, but that at no time was there any indication to the respondent that counsel would have to be brought from Salt Lake City, nor was there any promise made to him. The District Attorney indicated that the reason the charges were dropped against the respondent's wife was because the case against her was weak. This was corroborated by the Sheriff, who stated that the original request to drop the charges against the respondent's wife if he plead guilty, came from the respondent himself. The Sheriff indicated that at no time did he advise the respondent to plead guilty, but to the contrary, had advised him several times to plead not guilty and to get the matter heard by the court. He further stated that the respondent had indicated that he was guilty and would like to get it over with. The testimony of the Sheriff and the District Attorney, both men with unimpeachable backgrounds, was exactly to the opposite of that of the respondent. There is nothing in the record to

support the respondent's contentions of duress or coercion and, in addition, it should be remembered that the respondent had previously been convicted of a military offense and spent time in a military confinement facility. Further, he had committed several other violations of law throughout the United States which were committed at the time of the sentencing, which would tend to cast substantial doubt on his veracity.

With the posture of the evidence being such as indicated above, it cannot be said that the respondent carried his burden to prove by clear and convincing evidence that he was entitled to release.

It is well established that where an individual is fully advised of his rights and waives his right to counsel, there is no constitutional violation of the right to counsel. **State v. Spiers**, 12 U.2d 14, 361 P.2d 509 (1961). In the Spiers case, this court noted first that the burden of proof was upon the defendant to show that he had been denied his constitutional rights and stated:

"There was no evidence of fear or coercion, or any other reason why he was induced to waive his rights, other than he thought the course he took was for his best good. There was nothing to indicate that at any stage of the proceedings he did not understand what was going on, the questions asked or the effect of the waiver of counsel. In view of this situation, we conclude that the trial court's finding that he intelligently waived his right to counsel must be sustained."

In the instant case, there is no evidence of any fear or threats or coercion of any kind. The only evidence before the trial court was that the respondent felt that the best course to follow would be to plead guilty. Consequently, there was clearly an intelligent waiver of the right to counsel and a voluntary plea of guilty.

In **Busby v. Holman**, 356 F.2d 75 (5th Cir. 1966), two state prisoners serving life sentence in the Alabama State Penitentiary sought federal writs of habeas corpus. Each had been charged with a capital crime. One was charged with forceable rape, and one had been charged with murder in the first degree. Each had plead guilty to the charges in reliance upon the prosecutor's promise that he would not seek the death penalty. The prosecutor did not seek the death penalty. The court indicated that there was no basis for habeas corpus. The court stated:

"The important thing is not that there shall be no 'deal' or 'bargain' but that the plea shall be genuine, by a defendant who is guilty; one who understands his situation, his rights and the consequences of his plea and is neither deceived nor coerced."

In this case, there was no showing that the plea of guilty entered by the respondent wasn't with full understanding as to the nature and consequences of the plea. Even assuming the position taken by the respondent that he plead guilty in order to obtain the dismissal of charges against his wife, it does not appear that that plea was improvident. Indeed,

at the time of the sentencing, the respondent virtually admitted his guilt to the crime and did so again at the time of the habeas corpus hearing. Consequently, there appears to be a plea by an individual who was guilty and who fully understood the reasons and circumstances surrounding the charges against him. The fact that there may have been some deal or bargain would not vituate the plea, if there was no deceit or coercion. Since the charges were, in fact, dismissed against the respondent's wife, it cannot be claimed that there is any basis for habeas corpus.

In **People v. Defulmer**, 209 N.E.2d 93 (N.Y. 1965), the court indicated that there was no violation of due process for a court to receive a plea of guilty to second degree murder and sentence a defendant who is only fourteen years of age where the desire was to avoid the consequences of a possible first degree murder conviction and mandatory death sentence. In this case, the respondent was twenty-three years of age, was married, had had military experience, had previously been before some form of a judicial tribunal<sup>3</sup> and, apparently, was fully advised by the court at the time the plea was entered as to the nature and consequences of the plea.

Most recently, in **Tipton v. State**, 194 Kan. 705, 402 P.2d 310 (1965), the Kansas Supreme Court indi-

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(3) The Uniform Code of Military Justice provides for an arraignment proceeding very comparable to that in the federal courts in trials before general, special, and summary courtmartials. Manual for Courtmartial 1951 p. 107; 10 U.S.C., secs. 836-854.

cated that the record did not substantiate the defendant's claim that his plea was coerced or that the prosecution failed to carry out promises to attempt to obtain leniency.

In **People v. Schiskie**, 263 N.Y.S.2d 885 (N.Y. 1965), the court indicated that absent any official deception and trickery, even though the defense attorney did advise the defendant to plead guilty and that probation would be granted, it did not warrant withdrawal of the plea of guilty.

In **People v. Noonan**, 46 Cal.Rep. 680 (1965), the court upheld the decision of the trial court by refusing to allow the withdrawal of a plea of guilty, based upon an agreement with the district attorney to dismiss another charge. In doing so, the court noted:

“This case is one of an increasing number involving a trial by the defendant of our judges, district attorneys, and defense counsel.”

It is submitted that much of the contentions of the respondent at the time of trial were merely accusations against the court, the district attorney, and the sheriff, which, but for his testimony, were not supported by the evidence.

In **Hulett v. Sigler**, 242 F.Supp. 705 (Neb. 1965), the court indicated that even though a guilty plea was effected through negotiation with the district attorney in order that an habitual criminal charge

would be dropped, the circumstances were not that they overcame the defendant's ability to make a voluntary decision and application for habeas corpus, on the basis of a coerced plea, would not be sustained.

In **In Re Garceau's Petition**, 212 A.2d 633 (Vt. 1965), the defendant plead guilty and received the sentence which the state's attorney recommended. The court noted that he had a free choice to reject the offer, and, apparently, plead guilty knowing the consequences of his plea. Under these circumstances, the court said that the contention that the plea was coerced could not be sustained.

In **Queor v. State**, 174 So.2d 687 (Ala. 1965), the court indicated that an agreement worked out in accordance with an understanding between the defendant and the prosecution that he would receive a sentence of life imprisonment, if he changed his plea, does not amount to coercion. Plea bargaining does not necessarily render a plea of guilty improvident or coerced. Quite to the contrary, plea bargaining is very often the only means that a defense counsel has to assist his client. Steinberg and Paulson, *A Conversation with Defense Counsel, The Problem of a Criminal Defense*, ABA, pages 47-49 (1961).

In the case of **State v. Plum**, 14 U.2d 174, 378 P.2d 671 (1963), this court had before it a contention made by a 23-year old defendant that the trial court had

erred in refusing to allow him to change his plea of guilty after a deal had been made with the prosecutor that if he agreed to plead guilty, the prosecutor would recommend probation. This court noted that the mere fact that a bargain is reached between the prosecutor and the defendant does not mean that the plea was improvidently entered where the prosecutor otherwise carried out his end of the bargain. This case is precedent for reversal in the instant case.

In Cipes, Moore's Federal Practice (Rules of Criminal Procedure ); para. 11.05 [4], it is stated:

"Prosecutor promises to make some concession other than a sentencing recommendation, such as dismissal of a related indictment, or dismissal of certain counts in the indictment to which the plea is made. Unlike sentence, these are not matters within the exclusive province of the court and the prosecutor will usually be able to obtain the court's consent to dismissal. The only question then is whether the prosecutor keeps his promise."

Thus, if the charges are actually dismissed, it does not appear that the courts will find that there has been an improvident plea, if it was understandably made. See also **Kent v. United States**, 272 F.2d 795 (6th Cir. 1959).

In **Holt v. United States**, 329 F.2d 368 (7th Cir. 1964), cert. denied 379 U.S. 992, the court ruled that a plea was not coerced where there was a consent to dismissal of one indictment in exchange for a plea to another.

In **Martin v. United States**, 256 F.2d 345 (5th Cir. 1958), the defendant plead guilty on certain charges in exchange for a concession from the United States attorney to dismiss a kidnapping count. The court refused to find that the plea of guilty had been coerced or was otherwise improvidently entered. The court noted that the United States Supreme Court had indicated in one case that "perhaps, a plea of guilty induced in part by promises may nevertheless be trustworthy." The court went on to say:

"So far as we know, no court has held that any such concession made by the prosecution necessitates the finding that a plea was involuntary. The crucial issue appears to be whether, with all the facts before him, including the advice of competent counsel, the plea was truly voluntary. The Supreme Court lays down no other test."

The court relied upon the decision of **Traver v. United States**, 203 F.2d 948 (4th Cir. 1953), where the court had found that entering a plea on two counts in an indictment in consideration of the remaining count being dismissed did not render the plea involuntary. Many other cases so holding are collected in 35 Notre Dame L. Rev. 1.

Based upon the above authorities and assuming that the court would believe the testimony of the respondent over that of the Sheriff and District Attorney, it would still appear that the plea which was entered by the respondent under circumstances where he heard and understood



what was occurring was voluntary. **In Re Johnson**, 42 Cal.Rep. 228, 62 Cal.2d 325, 398 P.2d 420 (1965) Under these circumstances, it appearing further that there was substantial evidence of guilt which would tend to support the very conclusion that the respondent's plea was entered because of an acknowledgment of guilt as distinct from some other reason, there is no legal basis for habeas corpus.

## POINT II.

**THE TRIAL COURT ERRED IN CONCLUDING THAT THE PETITIONER WAS ENTITLED TO RELEASE UPON HABEAS CORPUS BECAUSE OF ANY FAILURE OF PROPER ADVICE AT THE TIME OF PRELIMINARY HEARING.**

The trial court apparently found that there was some irregularity at the time the respondent appeared before the justice's court for preliminary hearing, which irregularity was such as to warrant his release by habeas corpus. It is submitted that the decision of the trial court cannot be sustained on two grounds. First, it is submitted that the evidence does not support the contention that the respondent was not properly advised as to his rights to counsel at preliminary hearing and that he did not properly waive preliminary hearing. Secondly, it is submitted that a preliminary hearing is not a "critical stage" at which the appointment of counsel is necessary; and, consequently, under the facts and circumstances of this case, there was no violation of

the respondent's constitutional rights, even if he were not afforded an opportunity to obtain counsel at the time of preliminary hearing.

At the time of the hearing for collateral relief in the trial court, the respondent testified that he appeared before a Justice of the Peace for preliminary hearing. He indicated that he didn't recall any evidence being given and that he did not have an attorney. He testified that he did enter a waiver of preliminary hearing (R. 36). He stated that he did have a conversation with the Sheriff prior to preliminary hearing and the Sheriff told him that he would be better off without a preliminary hearing. The Sheriff testified to the contrary, that he never advised the respondent to waive preliminary hearing, but that the respondent indicated that he was guilty and he wanted to get it over with. Respondent indicated on direct examination that he did not recall any other statement made by the justice of the peace, except that he was being bound over to stand trial (R. 37).

On cross-examination, the respondent indicated that the Justice of the Peace advised him that he could have a preliminary hearing to determine whether there was probable cause to see if he was guilty (R. 49). He stated that he had indicated he wanted to waive preliminary hearing and get it over because he was guilty. That statement was made prior to the time he waived preliminary hearing. Further, prior to the time he waived preliminary

hearing, he had told the sheriff that he was guilty (R. 50).

Sheriff Johnson who was present at the time of the preliminary hearing indicated that the respondent was advised of his rights to have a preliminary hearing, of his rights to have counsel, and to have counsel even if he was impecunious. The Sheriff further testified that the Justice of the Peace advised the respondent that the district court would appoint counsel for him at all stages of the proceedings, including the preliminary hearing, and further, that he also advised the respondent that he could have counsel.

Mrs. McGuffey, who was also present at the time of the preliminary hearing, did not, at the hearing on the habeas corpus petition, offer any testimony as to the lack of any advice as to the right to counsel at the time of preliminary hearing.

Further, the District Attorney testified that counsel had been previously appointed in preliminary hearings on criminal charges in Kane County in the past (R. 95).

Thus, it appears that the only evidence going to the question of whether the respondent was advised of his rights to counsel at the time of preliminary hearing was offered by the respondent himself and was not, in any manner, corroborated.

As noted from the authorities cited in Point I of this brief, *infra*, page 15, the burden of proof to demonstrate a violation of constitutional right entitling a petitioner to release by habeas corpus is upon the petitioner and the burden must be met by clear and convincing evidence.

In **Wilson v. Hudspeth**, 165 Kan. 666, 198 P.2d 165 (1948), the court indicated that the unsupported and uncorroborated statements of the petitioner given at a habeas corpus proceeding would not carry the burden of proving his entitlement to release for violation of his constitutional rights.

In **Flowers v. State**, 90 Okl. Crim. 390, 214 P.2d 728 (1950), the Oklahoma court stated that in a habeas corpus proceeding by an inmate of the prison to obtain his release, that testimony from the inmate alone, or even when supported by the testimony of another inmate, is not entitled to much weight.

In **Exparte Langley**, 325 P.2d 1094 (Okl. Crim. 1958), the court indicated that the uncorroborated and unsupported statements of the petitioner would not meet the requirements of the standard of burden of proof to entitle the petitioner to release on habeas corpus.

In **Exparte Mathews**, 85 Okl. Crim. 173, 186 P.2d 840 (1947), the Oklahoma court indicated that public policy did not permit a petitioner on habeas corpus to supply missing links by his testimony standing

alone in a record, but relief must be based upon something more substantial and the petitioner's testimony must be corroborated by clear and convincing proof.

Most recently, in **Hicks v. Hand**, 189 Kan. 415, 369 P.2d 250 (1962), the Kansas Supreme Court indicated that the standard of proof necessary to justify the issuance of a writ of habeas corpus is not met by the uncorroborated and unsupported statements of the petitioner.

Consequently, it is submitted that in the instant case, the facts relating to the advice given the respondent as to counsel at the time of preliminary hearing is not sufficient to support the respondent's contention that he was not properly advised. Especially is this so where the Sheriff who was present testified to the contrary, the respondent's wife offered no evidence to rebut the Sheriff's testimony on this issue, and where the District Attorney indicated that counsel had, in fact, been appointed at preliminary hearings in Kane County in the past. It is submitted that the respondent did not sustain his burden of proof on the issue of failure to be properly advised as to counsel at the time of preliminary hearing.

Further, it is submitted that even were this court to accept the uncorroborated testimony of the respondent, to the effect that he was not advised of his right to counsel at the time of preliminary hearing

or otherwise afforded an opportunity to have counsel at preliminary hearing, that this would not justify his release on habeas corpus. It should be remembered that prior to the time the respondent appeared at preliminary hearing, he confessed his guilt by his own admission to the Sheriff of Kane County. His appearance at preliminary hearing before the Justice of the Peace resulted in a waiver of the preliminary hearing only. No plea was entered nor other action taken which could have prejudiced the respondent in any fashion. Under these circumstances, it is clear that there is no violation of any constitutional rights.

This was the same issue which was before the court in **State v. Braasch**, 119 Utah 450, 229 P.2d 289 (1951). In that case, this court noted that:

“The preliminary hearing is an inquiry, not a trial—it is held in the place of the common law grand jury where the accused is only present if called as a witness and is never represented by counsel.”

The court noted that at the preliminary hearing in the Braasch case, there was no prejudice to the defendants from the failure to have counsel and that they had previously confessed to police officials. Thus, the court determined that there could be no prejudice to the defendants.

The facts of that case bear a resemblance to the evidence in this case when taken in a light overwhelmingly favorable to respondent and even exceed the circumstances favorable to respondent in the instant case.

Since the decision of the Braasch case, the United States Supreme Court has handed down opinions in two cases which it may be argued have some effect upon the Braasch decision. The first is **Hamilton v. Alabama**, 368 U.S. 52 (1961). In that case, 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 or make a plea of abatement or other motions of procedural concern. The court in the Hamilton case said that, therefore, arraignment is a "critical stage," requiring the advice as to counsel or the appointment of counsel. The Hamilton case is entirely distinguishable from the situation in the present case, since the defendant here was not obligated to make any plea of any kind at the time of preliminary hearing, and motions were not lost by the failure to be raised at the time of preliminary hearing. Further, since the petitioner subsequently plead guilty, if that guilty plea was voluntarily and intelligently entered after waiving counsel, there could be no prejudice.

In **White v. Maryland**, 373 U.S. 59 (1963), the accused, unrepresented by counsel at preliminary hearing, entered a plea of guilty to a capital offense. Thereafter, he entered a plea of not guilty at the time of his arraignment. The plea of guilty that he entered at the time of preliminary hearing was offered in evidence against him at the time of trial. The United States Supreme Court said that in view of the fact that a plea could be entered at the time

of preliminary hearing and was, in fact, entered, preliminary hearing in the Maryland situation was a critical stage. Once again, however, that case is clearly no precedent for the instant fact situation.

The courts have generally recognized that a preliminary hearing is not a critical stage within the meaning of Hamilton and White.

In **DeToro v. Peppersack**, 332 F.2d 341 (4th Cir. 1964), a state prisoner sought a petition of writ of habeas corpus from a federal court. The matter came before the Fourth Circuit Court of Appeals. The court ruled that under Maryland law, as modified since the White decision, that a preliminary hearing was not a critical stage of judicial process and that defenses not raised were not irretrievably lost. Therefore, the failure to appoint counsel for the accused charged with murder did not violate his constitutional right to counsel. The court stated:

“Despite the very able arguments advanced by counsel for DeToro, we are unable to accept either of these contentions. We take as our starting point, as do the parties, *Powell v. Alabama*, supra, which states the broad proposition that an accused has the right to counsel ‘at every step in the proceedings against him.’ 287 U.S. at 69, 53 S.Ct. at 64. In *Powell*, this was taken to mean that the accused has the right to have counsel appointed sufficiently in advance of trial to make adequate preparation. Later decisions of the Court have reaffirmed the importance of pre-trial preparation. In *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940). Mr. Justice Black warned that:



‘[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel. The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.’

While *Hamilton v. Alabama*, *supra*, and *White v. Maryland*, *supra*, have further extended the right to counsel prior to trial, we are unable to read them as extending that right to the extent and in the manner urged by DeToro. In *Hamilton*, the defendant, indicated for burglary, and without counsel, entered a plea of not guilty at arraignment. The Supreme Court reversed his later conviction, holding that the defendant had been entitled to counsel since, under Alabama law, arraignment is ‘a critical stage in a criminal proceeding.’ 368 U.S. at 53, 82 S.Ct. at 158. It was a critical stage, according to the Court, because certain defenses, specifically a plea of insanity, a plea in abatement, and a motion to quash based on an improperly drawn grand jury, not raised at arraignment, were considered waived.

In *White*, the accused was without counsel at a preliminary hearing. Unlike arraignment under Alabama law, a preliminary hearing under Maryland law is not, in and of itself, a critical stage in the judicial process. Defenses not raised at a preliminary hearing are not irretrievably lost and may be raised later. In the context of the particular facts of *White*, however, the Court was persuaded that *White*’s preliminary hearing had been a critical stage. This was so because *White*’s plea of guilty, taken at the preliminary hearing and subsequently withdrawn, was introduced into evidence against him during trial. On this ground, the Court reversed the conviction.

DeToro calls our attention to what he considers to be the key sentence of the case:

'For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel.' 373 U.S. at 60, 83 S.Ct. 1051.

The district court, we think, effectively brought the above sentence into the proper prospective:

'This sentence cannot be read out of context. It must relate to the case before the Court, namely that the "plea" was "guilty", and it was offered in evidence at the trial.' 222 F.Supp. at 624.

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 court, in each case, refused to speculate as to whether in fact prejudice actually accrued.

Thus, the thrust of Powell's 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. Crause**, 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). It stated:

"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 of Utah v. Sullivan*, 10 Cir., 227 F.2d 511, 513, certiorari denied, sub nom. *Braasch v. Utah*, 350 U.S. 973, 76 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 the accused's fundamental constitutional rights. That decision is controlling here. No claim is made of any incriminating statements or acts of nation. All they did was to 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 lists of the prosecu-

tion 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*."

Further, most recently, ***Loato v. Cox***, 344 F.2d 916 (10th Cir. 1965), the Tenth Circuit Court of Appeals in a percuriam opinion adhered to its position. 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. This case seems to be rather directly in point for authority in the instant case that if McGuffey was adequately appraised of counsel at the time of arraignment and intelligently waived the same, he could not complain of any defect at the time of preliminary hearing.

A similar case is ***United States v. Rundle***, 349 F.2d 952 (3rd Cir. 1965).

In Vol. II, No. 4, of the Defender News Letter, July 6, 1965, there is an excellent discussion of the right to counsel at preliminary hearing. It is noted:

"Some courts have understood the *White* case to mean that the absence of counsel at the preliminary

hearing is not a violation of the defendant's constitutional rights, if the absence of counsel is not, in the eyes of the court, prejudicial."

Thus, in *People v. Daniels*, 199 N.E.2d 33 (Ill. App. 1964), an Illinois appellate court saw no deprivation of the accused's right to counsel, since:

'there is neither a claim or any showing that the absence of counsel at the preliminary hearing or a failure of an earlier appointment of counsel in any manner prejudiced the defendant or in any way adversely affected or contaminated the subsequent proceedings in the case.'"

The same newsletter notes:

"Other courts have found there to be no constitutional injury in the failure to appoint counsel where no plea offered at the preliminary hearing could be offered in evidence at the trial \*\*\*."

In **United States ex rel. Cooper v. Reincke**, 333 F.2d 608 (2nd Cir. 1964), the United States Court of Appeals reasoned that the preliminary hearing in Connecticut could not be deemed a critical stage. The court stated:

"The Connecticut hearing in probable cause has been accurately characterized as a mere 'inquest' made to determine the existence of probable cause, and to discharge the accused if none exist \*\*\*. The finding of probable cause is not final and it cannot be used against the accused on trial before the superior court. \*\*\*."

The Connecticut hearing in probable cause cannot, therefore, be characterized as critical as in the arraign-

ment in Alabama. Indeed, it can hardly be termed a proceeding against the accused. To the contrary, it appears to operate entirely for the accused's benefit. And the mere fact that an accused is required to plead does not, in itself, demand the contrary conclusion where the plea entered is a self-serving denial of guilt. At trial, appellant had every opportunity to present any events that was available initially."

Further, in **Freeman v. State**, 392 P.2d 542 (Ida. 1964), the Supreme Court of Idaho stated:

"While it is recognized that an accused has a right to counsel at every stage of the proceedings, we do not understand this to mean that he must be so represented in the preliminary processes which take place primarily for the purpose of ascertaining whether a crime has been committed and whether there are reasonable grounds to believe that the accused has committed it, and particularly, where no prejudice has befallen him."

Numerous decisions from other courts from other states support the proposition urged in this brief.

Thus, in **Montgomery v. State**, 176 So.2d 331 (Fla. 1965), the court ruled that a preliminary hearing was not a critical stage in Florida. Defendant had not been informed of his right to counsel at arraignment before the magistrate on preliminary hearing.

In **State v. Cox**, 193 Kan. 571, 396 P.2d 326 (1964), the Kansas Supreme Court ruled that the lack of representation by counsel at the time of preliminary

hearing did not violate the constitutional rights of the defendant who did not request appointment and made no claim that there was any particular prejudice at the time of his trial from the failure to have counsel at the time of preliminary hearing. The Supreme Court of Kansas cited the Tenth Circuit Court case in **Latham v. Crause**, supra, and indicated that the purpose of a preliminary hearing in Kansas was comparable to Utah in that it was an inquiry to determine probable cause and nothing more.

A similar result was reached by the New Mexico Supreme Court in **French v. Cox**, 74 N.M. 593, 396 P.2d 423 (1964).

In **State v. Jackson**, 400 P.2d 774 (Wash. 1964), the Washington Supreme Court indicated that the right to counsel extends only to critical stages in the judicial process and that the critical point is to be determined both from the nature of the proceedings and from what actually occurs. The court there found that the preliminary hearing was not a trial in the sense that one could be found guilty, but was a mere inquest made to determine the existence of probable cause; and that since nothing that occurred at the preliminary hearing could be used against the defendant, it was not a critical stage which would warrant the appointment of counsel. The court carefully distinguished the Hamilton and White cases on the same basis that other cases heretofore cited and discussed have distinguished their application.

A similar result was reached again by the

Kansas Supreme Court in the case of **State v. Blacksmith**, 194 Kan. 643, 400 P.2d 743 (1965). In that case, the court further held [—referring to a previous Kansas case—]:

“That any so-called alleged ‘irregularity’ pertaining to a preliminary examination is deemed to be waived where a defendant enters a voluntary plea of guilty in the district court.”

This case is again precedent for the conclusion that the trial court in the case now before the court committed error in finding that the preliminary hearing circumstances justified the release of the respondent on habeas corpus.

The Arizona Supreme Court in **State v. Schumacher**, 97 Ariz. 354, 400 P.2d 584 (1965), also reached the same conclusion as the New Mexico and Kansas courts. Further, the Arizona court relied upon the decision of the Nevada Supreme Court in **Application of Hoff**, 393 P.2d 619 (Nev. 1964). Thus, almost every state surrounding Utah has adopted the position that this court recognized in the case of **State v. Braasch**, *supra*.

In **Poris v. State**, 195 Kan. 313, 403 P.2d 959 (1965), the Kansas Supreme Court ruled again that an indigent defendant has no constitutional right to be furnished court-appointed counsel at his preliminary hearing.

A similar result was reached in the decision of **State v. Atkins**, 195 Kan. 182, 403 P.2d 962 (1965).



In **Butler v. Rundle**, 206 A.2d 283 (Pa. 1965), the Pennsylvania Supreme Court concluded that a preliminary hearing was not a critical stage requiring the appointment of counsel for an indigent defendant. Pennsylvania also reached the same result in **James v. Russell**, 207 A.2d 792 (Pa. 1965).

The Ohio Court in **Bussey v. Maxwell**, 202 N.E.2d 698 (Ohio 1964), ruled that a preliminary hearing was not a critical stage where its only purpose was in determining whether the defendant should be held for arraignment in the court of general jurisdiction.

It would substantially burden the brief of the appellant to point out the other numerous cases which have reached similar conclusions. Many of the cases are collected in the Defender's Newsletter referred to above. It is submitted, however, from all these authorities, it should be overwhelmingly apparent that the trial court in this case erroneously determined that the respondent was entitled to release on a petition for a writ of habeas corpus, if there was a failure to advise him of his rights to counsel at the time of preliminary hearing.

## CONCLUSION

It is apparent from an analysis of the record in this case that there was no factual basis sufficient to support the trial court's findings and determinations. Further, the trial court made seriously er-

roneous errors of law in deciding whether the respondent was entitled to release by habeas corpus.

The facts of this case clearly demonstrate that the respondent voluntarily entered his plea of guilty. Further, the facts when taken against the burden of proof which the respondent must have maintained at the trial court in order to justify his release, conclusively demonstrates that there was no factual basis for habeas corpus.

It is therefore submitted that this court should reverse the decision of the trial court and order the respondent's application for habeas corpus vacated and that he be remanded to the custody of the appellant to serve the remaining portion of his sentence.

Respectfully submitted,  
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Attorney for Appellant