

1961

# State of Utah v. David Wayne Banford : Brief of Appellant

Utah Supreme Court

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Richard G. Daly; Richard S. Shepherd; Attorneys for Defendant and Appellant;

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*Subrauf*

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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STATE OF UTAH

Respondent, )

vs. )

Case No.  
9395

DAVID WAYNE BANFORD,

Defendant and Appellant, )

**FILED**  
AUG 23 1961

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Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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Defendant and Appellant

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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STATE OF UTAH,	)	
	Respondent, :	
vs.	)	Case No.
	:	9395
DAVID WAYNE BANFORD,	)	
	:	
Defendant and Appellant,)		

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BRIEF OF APPELLANT

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STATEMENT OF FACTS

Appellant and four others were arrested on the 16th day of December, 1959, (R. 4, 5 ); a warrant for their arrest was issued pursuant to a complaint filed on the 18th of December (R. 2, 3, 5 ) and charging the second degree burglary of a service station. Defendants waived preliminary hearing on December 18 (R. 1, 2, 5 ) and were bound over to the District Court on December 21 or before on the charge of second degree burglary (R. 5 ).

Appellant David Banford and two others were arraigned on January 5, 1960 before the honorable Parley E. Norseth (R. 10, 24-29). L. Roland Anderson, District Attorney for

State (R. 24 ). He was the only lawyer appearing (R.24 ).

Because the arraignment was brief, and because it is the crux of this appeal, the arraignment is set forth, as it applied to appellant David Wayne Banford, in full.

"THE COURT: No. 664 Criminal. State of Utah versus William Thomas Gary, Edwin Oscar Fillen, Charles Edson Sherwood, David Wayne Banford and Dennis Austin. This is the time set for arraignment. All of you come up, please (R. 24).

"THE COURT: The record will show this is the time set for the arraignment of Edwin Oscar Fillen, David Wayne Banford and Dennis Austin. You may read the Information. Each of them have a copy, do they not, Mr. Anderson?

MR. ANDERSON: Yes.

THE COURT: The record will show each of them received a copy of the Information.

(Information read by Clerk of the Court.)" (R. 25 )

"(The Court) Mr. David Wayne Banford, if you are not designated in this Information by your true and correct name, you may declare your true name now,

or be prosecuted under the name of David Wayne Banford.

MR. BANFORD: That's my name.

THE COURT: The Court informs you that you are entitled to be represented by an attorney, and need take no affirmative steps until you have counsel. Is it your desire to have an attorney?

MR. BANFORD: No sir.

THE COURT: Do you waive services of an attorney in open court?

MR. BANFORD: Yes sir.

THE COURT: The Court advises you that you may have and take at least 48 hours before you are required to plead to the Information charging you with burglary in the second degree, or you may waive that time and enter your plea now.

MR. BANFORD: I waive it.

THE COURT: The record will so show.

To the Information charging you with burglary in the second degree, what is your plea? Guilty or not guilty?

MR. BANFORD: Guilty, sir.

THE COURT: The record will show the defendant enters a plea of guilty, and upon such plea the Court adjudicates him guilty of the offense charged." (R. 26-27)

THE COURT: I will refer it to the Adult Probation Department for investigation and report. And that means you three are to report to one of the probation officers in Ogden, Utah, today.

MR. ANDERSON: This one man is incarcerated, Your Honor.

THE COURT: Then they can contact the man that is in jail down here.

(Discussion off the record.)

THE COURT: Now I want to warn all of you that if you lie to Mr. Larsen, we'll know about it. If I find out that any one of you lied, you won't get any kind of probation consideration. I want to warn you now that I'm not granting you probation. I don't know whether I'll give you probation or not. You have acted like a bunch of blamed fools.

(Further statement by the Court)"(R. 28-29)

David Wayne Banford appeared before the honorable John F. Wahlquist for sentencing on January 19 (R. 12 ). He was not represented by counsel (R. 19), nor accompanied by counsel. (R. 7 ) stating that he was "accompanied by his attorney," was reformed on appellant's motion by the honorable John F. Wahlquist to read "without an attorney." (R.14-16 ) David Wayne Banford was sentenced to serve an indeterminate term in the Utah State Penitentiary for second degree burglary (R.7, 12, 19-22). The honorable John F. Wahlquist apparently felt that David Banford should serve the minimum one year sentence (R. 22 ).

While the record does not disclose David Banford's age, the record does show that David is a minor , since the honorable John F. Wahlquist considered the question of whether to commit David to the State Industrial School (R.21 ).

David Banford arrived at the Utah State Penitentiary on January 19, 1961 (R.6-A). He filed a notice

of appeal on February 19 (R. 8-9 ).

One last point causes counsel for the appellant some concern. On the one hand, this Court has established that it does not desire to hear recitations of fact not supported by the record. On the other hand, many appellate courts faced with pleas of guilty have felt that an important consideration was whether the defendant was guilty. Counsel for the appellant are not aware of whether they should inform the court of matters outside the record. However, may we submit to this court that the defendant's plea of guilty is not conclusive proof that he is guilty.

There is an unfortunate belief that if a man pleads guilty, he is guilty. This common presumption does not always meet the test of common sense. A defendant may feel that unless he hires the most expensive lawyer he is merely postponing the inevitable. He may feel it is better to plead guilty and accept a criminal record and hope for probation, or a few months in jail, rather than place himself and his

family in debt to a lawyer. He may share the common belief that courts are "easier" on the defendant who pleads guilty. He may have been persuaded by the traditionally strong statements of police officers about how strong the State's case is. He may be a minor and unable to view the massive and overwhelming machinery of justice with a clear, mature view -- he just hasn't finished growing up.

THE TRIAL COURT ERRED IN ACCEPTING APPELLANT'S PLEA OF GUILTY AND ENTERING JUDGMENT AND SENTENCE THEREON FOR THE REASON THAT THE TRIAL COURT LOST ITS JURISDICTION OVER THE PROCESS.

Counsel contends that David Banford did not receive that fundamental respect, that degree of fairness, which due process of law, both state and federal, require. Counsel offers five reasons for that conclusion.

Before discussing the five reasons, counsel desires to discuss certain underlying questions of

law: Those points which West Publishing Company traditionally headnotes under "Appeal and Error", those points which a court reviews in determining what question is before it and what ruling may reasonably be made. First, the defendant can only present errors which are jurisdictional. He pled guilty and therefore waived all other errors, although this court has the power to determine that some happening was prejudicial error, even though not jurisdictional error. Second, since the errors are jurisdictional, they need not be preserved for appeal. Rather it is the trial court's (or the State's) duty to preserve a record showing that the trial court retained jurisdiction. Third, the want of jurisdiction in a criminal case may be raised for the first time in the Supreme Court.

1. "The plea of guilty waives and defect not jurisdictional." 4 Wharton's Criminal Law and Procedure, <sup>s</sup> 1901 (p. 770) (1957 ed.); People v. Popescue, 345 Ill. 142, 177 N.E. 739, 77 A.L.R.



1199. Therefore, appellant is not concerned with whether the error of the trial court was prejudicial, nor with whether the trial judge abused his discretion. He has no right to raise such issues. On the other hand, if the trial court lost jurisdiction, the question does not arise whether the action was prejudicial. The trial court lost jurisdiction over the process, or, as some put it, the trial court exceeded its jurisdiction. The process is therefore void. (Putting it another way, if the trial court didn't have jurisdiction to put David Banford in the State Penitentiary, then putting him in the State Penitentiary was prejudicial.)

The cases cited in this brief are almost exclusively cases wherein the accused pled guilty. It follows that the cases are ones wherein the court was concerned with jurisdiction. In those cases wherein a new trial was granted, the appellate court necessarily found that the trial court lost jurisdiction over the process. One question before this court is whether errors which are jurisdictional in other states are jurisdictional in Utah.

2. Utah authority seems to support the proposition that if a trial judge fails to preserve sufficient record to show that he retained jurisdiction, then the Supreme Court will rule that he lost it. The trial judge faces no particular difficulty in preserving a record showing jurisdiction if, in fact, he had jurisdiction. On the other hand, placing upon a defendant not represented by a lawyer the duty to preserve a record showing that the trial judge did exceed his jurisdiction is placing upon a defendant an impossible burden.

At least one function of the writ of certiorari in the State of Utah appears to be to give the Supreme Court an opportunity to review the record to see if the trial court has jurisdiction. *Hillyard v. District Ct. of Cache County*, 68 Utah 220, 249 Pac. 806 (1926). In that case, in which the Supreme Court found that the trial court exceeded its jurisdiction, there is some discussion of presumption of verity of the record on the point of whether the trial judge was obligated to preserve a record showing that necessary waivers

were made. Apparently the Court held that the record is conclusively presumed to contain all jurisdictional facts that did occur. The same rule appears to apply in the State of Illinois, at least in criminal cases. In that state, the writ of error appears to have the same function as the writ of certiorari in the State of Utah. Two cases from Illinois, relevant here, concern the need to amend the trial record in order to show that the jurisdictional acts did or did not occur. Both cases are concerned with the need to admonish a criminal defendant of the consequences of his plea before the plea of guilty may be accepted. In both cases, the Supreme Court of Illinois held, as a preliminary ruling, that the record had to disclose that the defendant was admonished in order to show that the trial court retained jurisdiction over the process. The first, *People v. Petrie*, 294 Ill. 366, 128 N.E. 569, concerned a record which originally did not contain the statement that the defendant was duly admonished of the consequences of his plea. The trial

judge later amended the record. Held, reversed and remanded. The amendment was not duly made. Without the amendment, the record did not disclose the jurisdictional facts necessary for a finding that the court retained jurisdiction over the subject matter. In the second, *People v. Fulimon*, 308 Ill. 235, 139 N.E. 396, the defendant moved to expunge from the record the statement that the defendant was duly admonished. Apparently, the motion was summarily denied. On appeal reversed and remanded. Without the correction, the defendant would have no case for review under a writ of error.

On the basis of the foregoing authorities and reasoning, appellant submits that the presumption of verity of the trial record requires a finding that the trial record contains all jurisdictional facts which did in fact occur. The need for the rule seems apparent: a lawyer has to be able to rely upon a rule that says the record discloses what happened.

### 3. The question of want of jurisdiction in the

trial court, in a criminal case, may be raised for the first time in the Supreme Court. State v. Morrey, 23 Utah 273, 64 Pac. 764. Therefore, David Banford was not obligated to point out to the trial court at what stage of the proceedings the trial court failed to inform David Banford of his rights.

1. THE COURT COULD NOT ACCEPT DAVID BANFORD'S PLEA OF GUILTY BEFORE ADMONISHING HIM OF THE CONSEQUENCES OF HIS PLEA BECAUSE HE WAS NOT REPRESENTED BY COUNSEL.

"Where the defendant is not represented by counsel, the court shall not accept a plea of guilty until it shall have explained to the defendant the consequences of such plea." <sup>s</sup> 77-24-6 U.C.A. (1953).

Appellant submits that the history of this statute emphasizes that a court commits jurisdictional, and therefore reversible, error if it fails to admonish the defendant of the consequences of his plea providing the defendant is not accompanied by counsel.

## A. Summary

In passing such a statute, the legislature exercised its prerogative to establish a policy binding upon the people and the courts. When a man appears without a lawyer before the bar of criminal justice, there is the danger that he has been misinformed by overzealous police officers or prosecutors as to what shall be the probable consequences of his plea. Perhaps he was informed, or believes though he was not informed, that a plea of guilty will automatically give him probation if he has not been convicted before. He may believe that the sentence is lower for those who plead guilty. He may not realize that the offense is punishable by imprisonment in the State Penitentiary. Perhaps, if he can prove that the plea of guilty arose from a promise of leniency, he can have the conviction and sentence set aside. However, the legislature has established that he bears no such burden of proof. The danger that his plea of guilty will arise from an ignorance of the potential dangers he faces is

sufficiently great as compared with the ease with which that danger may be avoided, that the legislature has made a mandatory requirement: Before the Court may accept the plea of guilty, it must inform the defendant who appears without a lawyer of the consequences of his plea. "Consequences" appears to mean the number of years which he can be forced to serve in the State Penitentiary for committing the offense. See any of the Illinois, Texas or Arizona decisions cited infra.

Nor should it be the defendant's duty to establish the prejudicial effect of the judge's action in failing to admonish the defendant of the consequences of his plea. That would place upon the defendant the burden of proof. If he cannot prove the fact of prejudice, then he loses regardless of whether he was in fact prejudiced or not. Compare, Frank, Courts on Trial, wherein the honorable Jerome Frank discusses the difficulties of actually ascertaining what has happened. Therefore, the presumption must be one of prejudice. In order to put teeth in a law which is so easily followed and whose

violation may have such a profound effect on a defendant's subsequent life, that presumption must be irrebuttable. Since the presumption is irrebuttable, the error should be regarded as jurisdictional. Therefore, the judgment of guilty and the sentence entered thereon do not constitute due process within the meaning of the law.

#### B. Legislative History

The provision became part of the Utah law in 1935. 1935 Laws of Utah ch. 122, § 1. It was proposed by the Utah State Bar Association, V Utah Bar Bulletin 22-23, as part of a general change in Utah criminal procedure. See also IV Utah Bar Bulletin. It was based upon the A.L.I. Code of Criminal Procedure (1930). (The A.L.I. Code of Criminal Procedure (1930) is available at the University of Utah Law Library.) The relevant section of the A.L.I. Code is § 224. As found in the A.L.I. Code, and as proposed to the legislature, the statute would have contained the proviso that the "failure of the Court to explain the consequences of the plea shall not affect the validity of any proceeding in the action."



The proviso presumably meant that the error could not be raised on certiorari or habeas corpus, since these remedies are limited to jurisdictional error. *Ex Parte Hays*, 15 Utah 77, 47 Pac. 612; *Hillyard v. District Court of Cache County*, 68 Utah 220, 249 Pac. 806. Apparently, then, a defendant would be able to raise the issue only on appeal and then would be required to show that the error was prejudicial. *State v. Hines*, 6 Utah 2d 126, 307 P. 2d 887. That proviso was stricken before the law was adopted. See Utah Senate Bill #38 (1935), in the office of the Secretary of State, State of Utah, where the provision is stricken in red. This left the bill almost identical to the language found in the Illinois Rev. Stat., 1929, ch. 38, § 756, now Ill. Rev. Stat. (1959) Ch. 38 § 732, except that Illinois requires the admonishment even when the accused is accompanied by counsel.

"In cases where the party pleads 'guilty' such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering

such plea; . . . " The statute is also almost identical, on this point, to the language of the Texas statute. See Vernon's Ann. C.C.P. Art. 501:

"If the defendant plead guilty, he shall be admonished by the court of the consequences, and no such plea shall be received unless it plainly appear that he is sane, and is uninfluenced by any consideration of fear, by any persuasion or delusive hope of pardon prompting him to confess his guilt." (Amended in 1959 to add plea of nolo contendere.)

These two laws are among the five on which the American Law Institute relied in writing the proposed provision. A.L.I. Code of Criminal Procedure (1930) Commentary on section 224. They are also the two laws that appear to be most litigated and the two laws most similar in language. Accordingly, the court may desire to consider the interpretations of those statutes by courts of last resort.

### C. The Case Law.

#### 1. The Supreme Court of Illinois has clearly

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stated its analysis in a 1957 case and has shown that the violation of the statute is reversible error in cases handed down before the Utah legislature adopted its act.

In *People v. Baxton*, 10 Ill. 2d 295, 139 N.E. 2d 754 (1957) (Daily, J.), cert. denied, 77 S. Ct. 1062, 353 U.S. 976, 1 L.ED. 2d 1138, judgment of guilty and sentence of 99 years to a plea of guilty to a charge of murder was affirmed. (Defendant had beat a man to death with a whiskey bottle.)

"The next assignments of error center around the assertion in defendant's brief that the 'Court exceeded its jurisdiction by accepting Plea of Guilty from (illiterate) defendant who attempted to defend self.' Such a theory overlooks, of course, that the court set aside the proceedings at which defendant attempted to defend himself and ultimately accepted the plea of guilty entered while he was attended by counsel. In so doing we do not find either that the court exceeded its jurisdiction or that it committed an abuse of

discretion. A strict requirement of our law is that, in each conviction of a crime upon a plea of guilty, the record must show that before the entry of the plea the court fully explained its consequences to the defendant and that the explanation was understandingly received.' Ill. Rev. Stat. 1951, ch. 38, par. 732; People v. Washington, 5 Ill. 2d 58, 124 N.E. 2d 890. The object of the rule is to give the defendant the right to withdraw the plea of guilty, if, after hearing the consequences of such plea, he desires to be tried by a jury. People v. Wilke, 390 Ill. 598, 62 N.E. 2d 468. In the record before us the explanation and admonition of the court, given upon two occasions, is a model of thoroughness, and the defendant's replies on both occasions demonstrate that his plea was knowingly and understandingly made and persisted in. We find no basis to now say that his plea should not have been accepted." P. 756.

In People v. Fulimon, 308 Ill. 235, 139 N.E. 396 (1923) (Cartwright, J.), the defendant pled guilty to

the charge of contributing to the delinquency of a minor. In *People v. Petrie*, 294 Ill. 366, 128 N.E. 569 (1920) (Dunn, J.), the defendant pled guilty to an indictment charging abduction. Both of these cases were reversed and remanded because the Supreme Court of Illinois was not satisfied that the defendant was duly admonished. (The particular points of error in each of these cases are technical: on what notes may the trial judge rely when he makes a minute entry saying that the defendant was duly admonished. At least one of the opinions has a dissent which, however, goes to the technical nature of the error: whether the Supreme Court of Illinois should rule that the record discloses that the defendant was admonished. All opinions are agreed on the point that if the record does not show that defendant was admonished, then he was entitled to a new trial.)

In *People v. Rusk*, 348 Ill. 218, 180 N.E. 863 (1932) (Dunn, J.), the defendant was charged with

robbery while armed with a pistol. The State dropped the pistol count and the defendant pled guilty to robbery. After being duly admonished, he persisted in pleading guilty to robbery. Later in the same term, he was allowed to withdraw his plea to robbery. The State dropped the robbery charge and defendant pled guilty to a lesser included offense of grand larceny. He was sentenced to the state reformatory for an indeterminate sentence of one to ten years. On suit for writ of error, Held, reversed and remanded. The record failed to disclose that he was admonished of the consequences of a plea of guilty to grand larceny.

"This judgment must be reversed, nevertheless, because the record does not show that the court explained to the plaintiff in error the consequences of his plea of guilty to the charge of grand larceny. The record shows that, when the plea of guilty to the charge of robbery was entered, the court explained the consequences of that plea, and afterwards accepted the plea and sentenced the plaintiff in error. Subsequently

the sentence was vacated, the plea withdrawn, and the state's attorney waived the robbery charge. The defendant's relation to the case was then the same as if he had never entered a plea. The sentence followed without explanation of the consequences of the plea. The record, containing no reference to any explanation to the defendant of the consequences of his plea of guilty, was insufficient to sustain the judgment. *People v. Petrie*, 294 Ill. 366, 128 N.E. 569; *Krolage v. People*, 224 Ill. 456, 79 N.E. 570, 8 Ann. Cas. 235." P. 864.

Other Illinois cases are to the same effect. See i.e. *People v. Meyers*, 397 Ill. 286, 73 N.E. 2d 288 (1947) (Wilson, J.) (The defendant was sentenced to from one to fourteen years. He was charged with two offenses, one carrying a maximum term of ten years, the other, of life. Though the record said that the defendant was duly admonished, the Supreme Court found error. The Court was unwilling to say that the defendant was duly admonished since the trial court did not appear to know what the consequences were. In

view of the fact that the original conviction had occurred sixteen years in the past, the Court ordered that the case be dismissed. There would be no useful purpose in ordering a new trial.) *People v. Washington*, 5 Ill. 2d 58, 124 N.E. 2d 890 (1955) (Klingbiel, J.) (Though the common-law record reported that the defendant was admonished, the transcript showed that the admonishment was unsatisfactory. Therefore, the case was reversed. Note, however, that the admonishment in that case was more complete than the one given David Banford.) *People v. Cooper*, 366 Ill. 113, 7 N.E. 2d 882 (1937) (Wilson, J.) (Reversal of conviction on plea of guilty to misdemeanor of disorderly conduct at a primary election.)

2. The Court of Criminal Appeals is the court of last resort in criminal cases in Texas. Vernon's Ann. Tex. Const. Art. 5 <sup>ss</sup> 3 and 5, and interpretative commentary following each section. In Texas, the prosecution must prove a *prima facie* case on certain crimes even if the defendant pleads guilty. *Braggs v.*



State, Cr. App., 334 S.W. 2d 793. Further, the accused can't plead guilty to certain crimes unless he's accompanied by counsel. Ex parte Kelley, 161 Cr.R. 330, 277 S.W. 2d 111 (1955) (Davidson, J.)

Even so, the requirement that the court must admonish the defendant of the consequences of his plea before it may accept a plea of guilty is mandatory. For two examples, see Alexander v. State, 163 Cr.R. 53, 288 S.W. 2d 779 (1956) (Belcher, Cmsr.) (plea of guilty to felony of driving while intoxicated) and Coleman v. State, 35 Cr. R. 404, 33 S.W. 1083 (1896) (Davidson, J.) sentence of death on plea of guilty to first degree murder, reversed, even though defendant was already serving life imprisonment on a plea of guilty to another first degree murder.) See, also, May v. State, 151 Cr. R. 534, 209 S.W. 2d 606 (1948) (reversed on another point) (" . . . It is to be hoped that the trial judges will keep in mind the requirements of the statute in accepting pleas of guilty in felony cases . . ." p.607) Many other cases are found in the annotation

to Vernon's Texas C.C.P. Art. 501.

### 3. OTHER STATES

Other states having similar statutes have interpreted them as being mandatory if the statutes have been interpreted at all.

New York has the law that a man loses his driver's license if he has three moving violations in eighteen months, but that a magistrate need inform a defendant of this consequence if he desires to plead guilty to a violation which will count as one of the three. In *Hubbell v. MacDuff*, 2 N.Y. 2d 563, 141 N.E. 2d 897 (1957) Fuld, J.), the New York court of last resort held that if the driver was not duly admonished, then the Commissioner of Motor Vehicles must return his license.

The Arizona Rule of Criminal Procedure #182 is substantially identical to section 224 of the A.L.I. Code of Criminal Procedure (1930). It therefore contains the proviso that the failure to admonish is not jurisdictional. While *State v. Smith* 66 Ariz. 376

189 P.2d 205 (La Prade, J.) was reversed on other grounds, the court noted that the requirement to admonish was in the code for a purpose.

So far as counsel's research discloses, only two other states have similar provisions. Alaska's Rule of Criminal Procedure #11 has not been judicially interpreted. Colorado Rev. Stat. (1953) § 39 -7-8 was ruled complied with the Glass v. People, 127 Colo. 210, 255 P. 2d 738 (1953: en banc) (Moore, J.). The defendant was duly informed of the consequence of his plea when the trial judge informed him that he may be sentenced to life, even though the statute required that he must be sentenced to life.)

2. THE DEFENDANT COULD NOT VALIDLY WAIVE HIS RIGHT TO COUNSEL FOR THE REASON THAT HE WAS A MINOR AND THEREFORE NOT SUI JURIS.

A. The law of Utah and certain other states supports the conclusion that there is a minimal age below which a person is not competent to defend himself in a

criminal case.

There should be a minimal age below which the court should not allow a youngster to waive his right to counsel--an age below which a man's ability to fend for himself is sufficiently in doubt so that a court will require that the boy have a lawyer. That age is the age at which he becomes sui juris.

Utah law seems to assume that such an age exists. In the case of State v. Penderville, 2 Utah 2d 281, 272 P. 2d 195, the defendant appealed from the Honorable A. H. Ellett's dramatic ruling that nobody was competent to defend himself when charged with murder, and that, therefore, the court would appoint a lawyer to represent him whether he like it or not. In light of Article 1, section 12 of the Utah Constitution, which guarantees the right to defend in person or by counsel, this court ruled that the trial court's conclusive presumption, however valid it was in fact, was not valid in law. A man may defend himself, or, at least, may try, if he is "sui juris and not mentally competent." State

v. Penderville, 272 P. 2d 195, 199.

Other courts have emphasized the same point. In State v. Thomlinson, (South Dakota: 1960) 100 N.W. 2d 121, the court used the phrase, "If he is sui juris and mentally competent . . ." In Dietz v. State, 149 Wis. 462, 136 N.W. 166, Ann. Cas. 1913 C, 732 (1912), the court noted the need for the defendant to be sui juris. In both of these cases, the defendant was sui juris; in both cases the defendant was over twenty-one.

B. The determining age is twenty-one.

The rule requiring counsel for minors appears to be an old one. In Regina v. Tanner et alios, 2 Lord Raymond 1284 (6 Queen Anne) (92 Eng. Reprints 342), the defendant pleaded not guilty to an information charging the misdemeanor of riot. Verdict for the Queen. A motion was made to set aside the verdict, first, because the defendant gave no authority to the attorney to appear for him; second, because he was an infant under 18 and ought to have appeared by a guardian. In denying the motion, the court noted that in cases

charging infants with riot, the custom of the Queen's office was to have the defendant appear by an attorney. Counsel submits that there is something significant in that custom, occurring as it does in a period when English courts denied the right to counsel to persons charged with felonies.

In Kansas, where the point has been litigated, it is jurisdictional error to fail to require counsel when a minor is accused of a felony if the minor does not have his own lawyer. Quoting from *State v. Oberst*, 127 Kansas 412, 419, 273 Pac. 490, 494, " . . . In the case before us the defendant was a seventeen-year-old boy . . . The one thing this youngster needed more than anything else before pleading guilty to such a horrifying accusation was consultation with and the advice of a good lawyer . . . " Continuing, 127 Kansas at 421, 273 Pac. at 494-5, " . . . it is suggested that there are many prisoners incarcerated in our penal institutions on pleas of guilty without advice of counsel. We doubt that, and would be sorry, indeed, if it were

true, particularly if they are seventeen-year-old lads ,  
who, without legal advice pleaded guilty to a murder in  
the first degree. Certainly, we are not anxious to  
share the responsibility for such a lamentable situation.  
We are well assured that the common practice in  
the district courts of this state is not to accept a plea  
of guilty in any felony case, except on the well-considered  
advice of counsel for the prisoner, and some careful  
judges take other precautions to avoid miscarriage of  
justice which need not now be discussed." In Willey v.  
Hudspeth, 162 Kansas 516, 178 P. 2d 246 (1947)  
(Bartch, J.) the question was whether the trial court  
erred in accepting a seventeen-year-old boy's plea of  
guilty to burglary in the second degree and to grand  
larceny. Held, the trial court erred, even though the  
trial judge duly notified the defendant of his Constitu-  
tional rights and that the court would appoint a lawyer  
for him if he had none. The trial court also explained  
the nature of the charge and explained the penalty to  
the defendant--a procedure not followed when David

Banford appeared before the trial court in this case. Quoting from page 248, ". . . in none of the cited cases and in none which our research has disclosed, has this court approved the practice of permitting a 17-year-old boy to enter a plea of guilty to a felony without consulting with counsel . . . " Further in the opinion, the court says, "When the petitioner, as a boy of only 17 years of age, stood before the court, under the laws of this state he could not have entered into a valid contract obligating himself; he could not have voted; he could not have married without the consent of a parent; he could not alone, without a guardian ad litem, or next friend, have been heard to say anything in the court room in a civil action which would have been binding. Should we say, in such circumstances, that about the only thing he could have done alone, with legal significance, was to have pleaded guilty to a felony in a court of law?" See also *Dunfee v. Hudspeth*, 162 Kan. 524, 178 P. 2d 1009 (1947)

Harvey, C. J.) (defendant was twenty when he pled



guilty; he was granted a new trial) and *McCarty v. Hudspeth*, 166 Kan. 476, 201, P. 2d 658 (1949) (Thiele, J.). See, also, *Application of Gillette*, (Okl. Cr.) 349 P. 2d 769 (Brett, J.) (fifteen-year-old defendant could not waive counsel.)

C. Therefore, David Banford should receive a new trial.

David Banford is a minor, as is shown by the fact that the court considered sentencing him to reform school. Under the above authorities, he could not waive his right to counsel. Therefore, he should have a new trial at which he will have counsel.

3. THE DEFENDANT COULD NOT VALIDLY WAIVE HIS RIGHT TO COUNSEL FOR THE REASON THAT THE TRIAL COURT FAILED TO EXPLAIN TO DEFENDANT THAT HE WAS ENTITLED TO COUNSEL EVEN THOUGH HE BE A PAUPER.

The legislature, in its wisdom, has determined that a man accused of a felony may well be at a disadvantage because he is not acquainted with judicial

procedure sufficiently well to be able to defend himself or to evaluate his chances of showing the jury that there is a reasonable doubt. While it may be well and good to convict the guilty, it is equally important that the innocent have an expert to defend their rights. Accordingly, the laws of the State of Utah include § 77-22-12 U.C.A. (1953):

"If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked whether he desires the aid of counsel. If he desires, but is unable to employ, counsel, the court must assign counsel to defend him." See, also, 77-15-1, ibid.

If a man is sui juris and otherwise competent, he may waive that right to counsel. State v. Penderville, supra. However, the presumption is against a competent waiver. Velky v. United States, 279 F. 2d 679; Smith v. United States, 238 F. 2d 925 (1956) (5th Cir.: Hutcheson, J.) See also People v. Kemp, 11 Cal.

Rptr. 361, 359 P. 2d 913 (S. Ct.: en banc) (Peters, J.: 1961) (Trial judge properly denied the defendant's request to discharge counsel after ascertaining that, though the defendant understood the elements of the offense, he did not understand judicial procedure sufficiently well to be competent to handle his own defense.)

Before the waiver is competent, the defendant must be aware of the right he waives. Griffith V. Wray, 282 F. 2d 711 (applying the fourteenth amendment of the Constitution of the United States).

Therefore, the following cases inter alia have found error in a trial court's accepting a waiver of counsel because the trial court failed to make the defendant aware that he was entitled to counsel forma pauperis. Ex Parte Cannon, (Okl. Cr.: 1960) 351 P. 2d 756 (Brett, J.) ("A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial." Court Syllabus

#2.) State v. Jameson (S.D.: 1958) 91 N.W. 2d 743

(plea of guilty to two counts of molesting a minor child.

New trial ordered following petition of habeas corpus.

The trial court had said to the defendant, "You are in addition advised that you are entitled to be represented by an attorney at all stages of the case if you so desire\*\*\*do you understand these rights?" The defendant answered, "I believe I do so, Your Honor.")

(Note that the language in that case is almost identical to the language David Banford heard in the court below.)

Winn v. State, 232 Ind. 70, 111 N.E. 2d 653 (1953)

(Charge: Inflicting injury with a dangerous weapon while in the commission of a robbery) (Court: "do you have an attorney?" Defendant: "No, Sir." Court: "Do you want one?" Defendant: "No, Sir.") (The court found an unintelligent waiver because the trial court didn't say that the lawyer would be a public expense

Under the above authorities, David Banford's waiver was incompetent because the trial judge failed to tell him that if he could not afford a lawyer the court would

appoint one. Therefore, David Banford is entitled to a new trial.

4. THE TRIAL COURT FAILED TO ASCERTAIN WHETHER DEFENDANT WAS IN FACT COMPETENT TO WAIVE COUNSEL.

As noted in *State v. Penderville*, supra, the criminally accused may waive counsel if he is sui juris and otherwise competent. It follows that the trial court must not only ascertain whether the accused is sui juris but also whether he is mentally competent, before the court may allow the defendant to waive his right to counsel.

Under the presumption against waiver of a constitutional right to counsel, see e.g. *People v. Whitsitt*, 359 Mich. 656, 103 N.W. 2d 424 (1960) (Black, J.) and the Supreme Court decisions cited therein, a defendant can be found to have competently waived counsel only if the trial court makes a finding that the defendant is mentally competent to exercise the waiver. As implied in *State v. Penderville*, supra, and as held

in *People v. Kemp*, supra, if the defendant is found to be incompetent to handle his own case, then the court must appoint a lawyer to defend him. (In this regard, see also the annotation to Vernon's Texas C.C.P. Art. 501.)

Admittedly, the above cases do not specifically state that the presumption against waiver necessitates a finding of fact that the defendant is competent to waive counsel before the trial court allows the waiver. Counsel submit for the consideration of this court that, since there is a presumption against competent waiver, it necessarily follows that this presumption is stronger than a presumption of proper exercise of judicial discretion if both presumptions are forced to rely upon a silent record. If the presumption that the trial court exercised its discretion is applied, then the presumption against a competent waiver becomes non-existent. This is because the proof of a competent waiver will then necessarily be forced to rely upon some actual testimony or evidence. Since there is a

presumption against competent waiver, the appellant David Banford must necessarily be granted the benefit of that presumption. It therefore becomes necessary for the trial record to show some testimony or some questioning to rebut that presumption. Since the record fails to show any such testimony or questioning, it follows that the presumption is not rebutted. Therefore, the trial court erred in accepting the purported waiver.

##### 5. THE TRIAL COURT FAILED TO REQUIRE THAT DAVID BANFORD DISCUSS THE CASE WITH A LAWYER BEFORE HE WAIVED HIS RIGHT TO COUNSEL

Because a defendant does not know law, he needs the advice of someone who does. Only then can he understand exactly what his situation is. A judge cannot fulfill that role--anything the defendant says in open court can be held against him. The defendant can trust only a person who is bound to keep the communication secret. Only a lawyer has the needed education plus the needed privilege.

Once a defendant talks to a lawyer, he is aware

of what his problems and chances are. Only then can he make waivers with an appreciation of what he is waiving.

Appreciating this, some courts have noted the advisability of requiring that a defendant discuss his case with a lawyer. See i.e. State v. Thomlinson (S.D.) 100 N.W. 2d 121.

Some district judges in Utah require than an accused see a lawyer before he may plead or waive rights. Counsel understand that both the Honorable A. H. Ellett and the Honorable Stewart M. Hanson have such a rule. Counsel has heard that the rule is applied in almost all felony cases before the Third Judicial District. The rule is also the standard procedure in the trial courts of Kansas. Dunfee v. Hudspeth, supra, esp. the quotation from that case, supra. Such a plan appears to be successful.

Because the rule is successful, and because the rule is reasonable in light of the established laws of due process, this court should rule that, in the absence



of a legislative enactment to the contrary, it appears that no defendant may waive his rights or plead guilty to a felony until the court has required that he see a lawyer.

Such a rule fulfills the traditional concept of the development of common law--that for each evil, there must be a remedy. While a legislature chooses the problems it desires to face, and resolves the questions which it desires to resolve, a court faces only the questions brought before it and it must resolve these questions. This difference in function as perennially required that courts develop law on a case-by-case basis. The judges determine that which appears reasonable. In the absence of a legislative determination to the contrary, that judicial opinion becomes the law. Thereby, the people gain a remedy for each evil.

A judge, in establishing a rule, looks to the nature of people and the nature of the world in which we live. An excellent application of this type of

reasoning is found in Justice Tom Clark's opinion in *Mapp v. Ohio*, -- U.S.--, 81 S. Ct. 1684. The Court was concerned with the question of whether illegally obtained evidence may support a conviction in a state court. Justice Clark analyzed the considerations on both sides and viewed the question of whether the federal exclusion rule had worked satisfactorily. Concluding that the value of the rule was great, and that it worked no undue hardship on federal enforcement agencies, he ruled for the Court that the exclusion rule was the law under the Fourteenth Amendment.

The same style of reasoning applies here. A number of trial courts in Utah require that a defendant talk to a lawyer before the defendant may waive counsel or plead. Apparently, many other trial judges throughout the land apply the same rule. The rule has worked no undue hardships. The value of the rule is that the young, the unintelligent, and the hang-dog defendants gain counselling from

trained advocates on their side. Since many people are not as mature, knowing, and sophisticated as one would wish, the rule has been a great aid to many people. Counsel submits that it should be a great aid to all.

### CONCLUSION

David Banford was not granted those rights which are guaranteed by the Fourteenth Amendment to the United States Constitution and guaranteed by the Constitution and laws of the State of Utah. Therefore, the trial court lost jurisdiction over the process. It follows that David Banford is entitled to a new trial.

Respectfully submitted,

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