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# Richard B. Dolan v. State of Utah, Weber County Sheriff, Utah State Parole Department : Brief of Appellant

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IN THE

CHARD B. DOLAN,

Petioner and
Appellant,

vs.

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TY SHERIFF, UTAH
E BOARD OF PAR
STATE PAROLE
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Respondent.

BRIE

Appeal from
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IN THE SUPREME COURT
OF THE
STATE OF UTAH

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| ICHARD B. DOLAN,<br><br>Petioner and<br>Appellant,<br><br>vs.<br><br>TATE OF UTAH, WEBER<br>OUNTY SHERIFF, UTAH<br>TATE BOARD OF PARDONS,<br>TAH STATE PAROLE DE-<br>RTMENT,<br><br>Respondent. | ) | Case No. 12914 |

BRIEF OF APPELLANT

Appeal from a decision denying petioner's
plication for writ of habeas corpus entered
ainst him in the Second Judicial District Court
Weber County, State of Utah, the Honorable Judge
hn F. Wahlquist, presiding.

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RNON B. ROMNEY
torney General
ate Capitol
lt Lake City, Utah
torney for Plaintiff-
Respondent

WILLIAM D. MARSH
Attorney for Plaintiff-
Appellant
1018 First Security Bank
Building

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# BRIEF OF APPELLANT

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## STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a decision of the Honorable John F. Wahlquist denying petioner's petition for a writ of habeas corpus challenging continued incarceration pursuant to a plea

of guilty to a charge of forgery entered January 3, 1963.

DISPOSITION IN LOWER COURT

Petitioner-appellant filed, without the assistance of legal counsel, a petition for a writ of habeas corpus with the District Court of Weber County, State of Utah, challenging the legality of his incarceration in the Weber County Jail (R. 1-3). District Judge Calvin Gould received the petition and set the matter for hearing on February 14, 1972, and appointed counsel to represent petitioner. On the date set for hearing, petitioner appeared and was represented by counsel. The defendants appeared and were represented by counsel. Due to a mixup in scheduling, no judge was available to hear the matter and the case was rescheduled for March 19, 1972,

by the Court Administrator.

A hearing on the petition was held on the latter date before the Honorable John F. Wahlquist, Judge of District Court, sitting without jury. Testimony was introduced by both plaintiff and defendants and the matter was continued until March 15, 1972, to allow the State to produce appropriate transcript records of the proceedings when petitioner entered his plea in 1963. (TR 130)

On March 15, 1972, the hearing was continued after a report that the records were not available. All issues were argued, briefs were submitted and the Court took the matter under advisement. The following day the Court issued a four-page memorandum decision denying the petition. (R 73-76)

## RELIEF SOUGHT ON APPEAL

Petitioner-appellant respectfully requests this Court to find that his plea of guilty to the charge of forgery was made without a meaningful or effective waiver of the rights necessarily waived by such plea and that it is, therefore, void; and to reverse the District Court's decision denying his petition for writ of habeas corpus.

## STATEMENT OF FACTS

Richard B. Dolan, the petitioner herein, entered a plea of guilty to an information charging him with the crime of forgery. His plea was entered before the Honorable Parley E. Norseth, Judge of the District Court of Weber County, State of Utah, on January 3, 1963. (TR 3-4) Petitioner was represented by counsel, L.G.

Bingham, Esquire. (R 56, 62)

The petitioner was sentenced and committed to the Utah State Prison for one to twenty years on February 14, 1963 (R 34). Petitioner served approximately thirty-seven months in prison, was paroled in March of 1966 and then recommitted to prison in October of 1966 wherein he served an additional thirty months until a second parole in May of 1969.

On February 2, 1968, petitioner filed a petition for writ of habeas corpus in the District Court of Salt Lake County. (R 31) This initial petition challenged the Court's judgment and sentence on the plea by asserting the plea had been coerced by promises made by petitioner's counsel and by officers

of the State. (R 38) The State produced no record to rebut these claims but the petition was dismissed without opinion on June 4, 1968, (R 45) and was not appealed.

Petitioner was paroled and while on parole was charged with another offense. A "parole hold" was placed on him and he was held without bail for more than seven (7) months awaiting disposition of charges. (HT 3) He appeared before the Hon. Calvin Gould, Judge of the District Court of Weber County, in chambers, on January 24, 1972. There he filed a petition for writ of habeas corpus. (R 6) A hearing was held before the Hon. John F. Wahlquist, Judge of the District Court of Weber County on March 10, 1972, (HT 1) and his petition was denied. It is from this denial of this petition that the instant appeal is taken.

At that hearing the petitioner testified that at the time of his plea of guilty he knew what he was charged with but that he had not been advised, by either his attorney or the Court, as to the possible punishment, possible defenses or the existence of lesser included offenses. (H.T. 5) He testified further that he similarly had not been advised of any of the rights necessarily waived by a plea of guilty; nor that such a plea constituted an admission of every material fact alleged in the information. (H.T. 6) On cross-examination it appeared that the petitioner, despite the lack of advice, did know that he was charged with a felony and that he understood a felony to be something more serious than a misdemeanor. (H.T. 13) When asked on cross-examination if

he had ever been charged with a felony before, he replied, "yes, bastardy" (a non-criminal action) and carnal knowledge, a charge which was dismissed. (H.T. 14)

It appeared that he knew something of his right to trial by jury and his right to confront witnesses (H.T. 17-19) but that he did not know he had the right to remain silent (H.T. 19-21) Mr. Dolan also testified that at the time of his earlier application for writ of habeas corpus he was not aware of the legal significance of his right to be advised as to the rights he waived by a plea of guilty and the consequences of such a plea. (H.T. 23)

The defendant called as a witness L.G. Bingham, Esquire, who had represented Mr. Dolan at the plea and sentencing. Mr. Bingham testified

in general as to his usual practice. He had no specific recollection of the case. (H.T. 25 et seq) Mr. Bingham stated that it would be his usual practice to discuss each case with his clients and explain their rights but that the extent of such advice would depend on the individual and that he could not recall what, if anything, he had told Mr. Dolan in that regard. (H.T. 28)

The Court reporter testified that he was not able to locate his notes of the hearing at which the guilty plea was entered and therefore could not prepare a transcript of the proceedings (H.T. 38).

Mr. Dolan's petition was denied in an opinion by Judge Wahlquist dated March 16, 1972. Judge Wahlquist based his opinion on

principles of res judicata and upon a finding that the ". . . defendant's rights, etc., were not prejudiced in any way by the failure of Judge Norseth to discuss these matters with him in open Court." (R. 76)

## ARGUMENT

### POINT I

THE PRINCIPLE OF RES JUDICATA DOES NOT APPLY WHERE THE PETITIONER WAS NOT AWARE OF THE EXISTENCE OF OTHER ISSUES AT THE TIME OF THE FIRST PETITION FOR WRIT OF HABEAS CORPUS.

Res judicata in habeas corpus matters is not governed by the same concepts that apply to cases involving private litigants. Rather the traditional nature of this ancient proceeding requires that each contention of a petitioner be considered, even if successively, unless the petitioner is deliberately withholding grounds

for relief and thus abusing the procedure. Sanders v. U.S., 375 U.S. 1, 83 S. Ct. 1068 (1963).

The Courts of this state have generally considered that where a petitioner could have raised an issue in an earlier application for writ of habeas corpus he is precluded from raising it in a later one. Wood v. Turner, 19 Utah 2d. 133, 427 P. 2d. 397 (1967), Maxwell v. Turner, 23 Utah 2d. 12, 455 P. 2d. 912 (1969). The difficult language in this line of cases is the word "could". In considering the applicable standard the United States Supreme Court decided in Price v. Johnston, 334 U.S. 266, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948), that a petitioner who was justifiably ignorant of the newly-alleged facts

or unaware of their legal significance could not reasonably be held to be responsible for failing to include them in any earlier application.

In the instant case we have two successive petitions based on different grounds and a petitioner who was totally unaware of the legal significance of the facts upon which the second application was based. To hold that the petitioner shall have included in his first application matters which he did not know were of legal consequence would be inconsistent with the nature of the writ of habeas corpus. Sanders, supra.

POINT II

THE PETITIONER'S PLEA OF GUILTY TO THE CHARGE OF FORGERY WAS MADE WITHOUT A KNOWING AND INFORMED WAIVER OF HIS RIGHTS

UNDER THE CONSTITUTION OF THE UNITED STATES AND IS, THEREFORE, VOID.

A plea of guilty by its very nature constitutes a surrender of three rights guaranteed by the Constitution of the United States Amendments V, VI, and XIV. These are the right to trial by jury, the right to confront one's accusers, and the right of a defendant to avoid compulsory self-incrimination. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d. 491 (1968); Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d. 923 (1965); Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 653 (1964). It is axiomatic then that a plea of guilty will be void unless these rights are effectively waived. Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed.

1461 (1938 is the case most frequently cited as setting the standard for determining the valid waiver of a federal right. That case defined waiver as an intentional relinquishment of a known right. Ibid at page 1466. Moreover, the Court therein stated that Courts should indulge every reasonable presumption against a waiver of any fundamental constitutional right rather than presume more acquiescence in the loss. Ibid at page 1466. Even in a State Court proceeding, the effective waiver of a federal right is governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d. 934 (1965) cited in Boykin v. Alabama 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d. 274 (1969). Since a waiver must be intentional and understanding in order to be effective, an accused cannot make such

an effective waiver unless he possesses an understanding of the law in relation to the facts in the particular case. It was upon this premise that the United States Supreme Court ruled in McCarthy v. U.S., 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d. 418 (1969)that it was the responsibility of the trial judge to answer that the accused had such a full understanding of the meaning of a plea of guilty and of its consequences. McCarthy arose as a question concerning construction of Rule 11 of the Federal Rules of Criminal Procedure but the Court spoke in constitutional terms and its holding was quoted with approval in Boykin, supra, which dealt with a state case. The concept that a trial judge bears this responsibility is not original with McCarthy as numer-

ous cases have so held. Woods v. Rhay, 414 P. 2d. 601 (Wash. 1966); Hughes v. U.S., 304 F. 2d. 91 (5th Cir. 1962), Copenhaver v. State, 431 P. 2d. 669 (Okla. App. 1967).

Boykin, supra, is the summation of the current law in this area and stands for two propositions.

(1) The same standards which the Court has previously held to apply to waiver of other federal rights, such as the right to counsel, apply also to the waiver of rights by a plea of guilty.

(2) Such a waiver will not be presumed by a silent record.

There is some controversy over whether or not Boykin is to be applied retroactively. In these cases which have come before the United States Supreme Court for a determination of a pre-

Boykin plea, the Court has found effective waiver without reaching the retroactivity issue. In Brady v. U.S., 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d. 747 (1970), the Court found that the record of the pre-Boykin plea of guilty satisfied the requirements of that case and noted in a footnote that they had not yet made a determination of retroactivity. A survey of the cases indicates that the portion of Boykin setting out the standard for determining waiver is being applied retroactively. Belgarde v. Turner, 307 F. Supp. 936 (Utah 1969). In North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d. 162 (1970), the Court found the plea to conform with what it called the substantive standards of that case and that there was in fact a show-

ing of affirmative waiver in the record. Ibid, footnote at page 166. In the body of the opinion the Court stated in reference to the 1963 plea that Boykin set out the standard for determining the effectiveness of a waiver of rights by a guilty plea and applied that standard.

To consider the substantive portion of Boykin to be retroactive but not the requirement of a record would comport with the principles of determining when to apply a decision retroactively as set out in Adams v. Illinois, -U.S.-, 92 S. Ct.—, 31 L. Ed. 2d. 202 (1972). In its discussion of this issue the Court stated these critera: (1) the purpose of the new standards; (2) the extent of reliance and (3) the effect of retroactivity on the administration of justice.

The Court pointed out that the importance

of the first may outweigh the latter two and that the right to counsel was held fully retroactive in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d. 799 (1963). In Adams, however, the Court held that the rig to counsel at preliminary hearing would not be applied retroactively. The requirement of Boykin regarding the record of the proceedings would seem not to be of such great import that it should be applied retroactively. Although some states have themselves had such a require ment, many have not. McBain v. Maxwell, 466 P 2d. 177 (Wash. App. 1970). In contrast the standards for determining waiver are at least as old as Johnson v. Zerbst, and have been qui broadly, if not uniformly, applied. Moreover, as the Court indicated in Brady, supra, this i

the substantial portion of the holding. It should also be noted that in reiterating these standards the Boykin Court specifically analogized to the standards applicable to the waiver of the right to counsel; these standards are retroactive. Gideon, supra.

In the instant case the petitioner was not advised in fact of the rights waived by a plea of guilty nor by the nature and consequences of such a plea. He did have some personal knowledge of the right to trial by jury and of the right to confront his accusers; he lacked actual knowledge of his right not to incriminate himself. He did not know the penalty which could be imposed upon his plea. Without such knowledge he could not have effectively waived his rights to trial by jury, confrontation of accusers, or

against self-incrimination. One cannot waive a right he does not know he possesses.

## CONCLUSION

The petitioner did not by his plea of guilty effectively waive his rights under the Constitution of the United States for the reason that he was never advised as to the nature and consequences of his plea and was not in fact aware of such. His petition for writ of habeas corpus on this ground cannot be barred by res judicata because he had no knowledge of the significance of the facts and issues presented here at the time of his earlier petition.

Respectfully submitted,

WILLIAM D. MARSH
Attorney for Petitioner
1018 First Security Bank Bldg.
Ogden, Utah 84401