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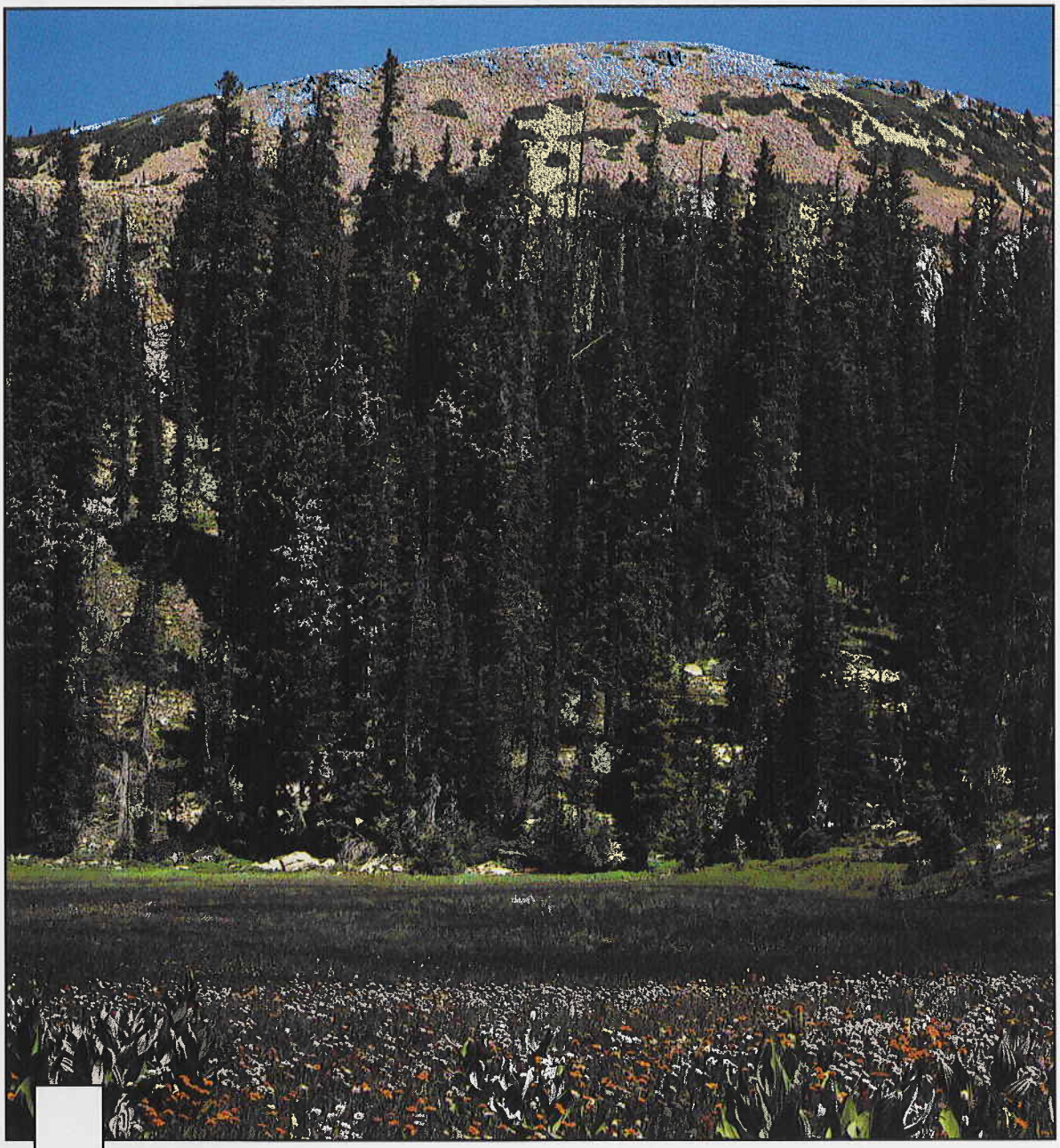

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COVER: High Uintas, Summit County, Utah, taken by Harry Caston, shareholder in McKay, Burton & Thurman.

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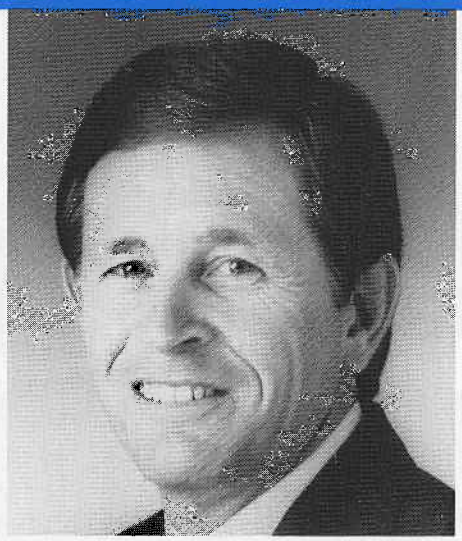

Habeas Corpus Practice in Utah — A Franz Kafka Mind Boggler?

By Randy L. Dryer

Do you know how many petitions for writs of habeas corpus are filed each year in Utah's state courts? Do you know how many petitions are filed by pro se litigants? Do you know how many petitioners are represented by appointed counsel and how many of these appointed counsel are paid for their services?

As a civil litigator my entire professional life, these questions had never crossed my mind for even a nanosecond — until Ron Yengich cornered me one day to bend my ear on the subject. What I learned from Ron and my subsequent investigation into the matter is the operation of the state habeas system leaves much to be desired. I found a system which is inflexible, inefficient, expensive, wasteful, dominated by the *pro se* petitioner and pleases virtually no one involved.

PRO SE OR PRO BONO

According to the State Court Administrator's Office, there were over 250 petitions for writs of habeas corpus filed last year with the state's trial and appellate courts. Approximately 60% of these petitions were *pro se* filings. Of the petitioners who were represented by counsel, the overwhelming majority were court appointed. Utah's statutory indigent defense scheme, unlike the federal counterpart, does not compensate appointed counsel in "discretionary writ proceedings," such as habeas corpus petitions. The "chosen few" who are blessed with a call to serve from a judge are not only "asked" to donate their time, but are asked to absorb any out-of-pocket costs associated with the representation. And while *pro bono* service is laudatory, it hardly offers a reliable system for representing the incarcerated indigent, particularly one on death row. Of the 10 persons presently on death row in Utah, none has appointed compensated counsel. I fully realize that most habeas petitions are without merit and are nothing more than a rehash of the original claims which have been rejected at the trial and appellate levels. Still, meritorious petitions do exist and our system of justice is tilted in favor of innocence. Unfortunately, our system not only fails to expeditiously ferret out the unmeritorious habeas claim, but it presents the real possibility that worthy claims will be trapped in a procedural quagmire and will never be considered on the merits. The problem stems from the fact that most habeas petitions are initially filed by uncounseled litigants. Consequently, petitions are inartfully drawn, procedurally defective, filed in the wrong forum and often fail to raise all the appropriate legal and factual issues.

RAISE IT OR WAIVE IT

The first step taken by the pro se habeas petitioner is too often a misstep, which misstep nevertheless sets in motion a series of subsequent proceedings which are time consuming, expensive and often doomed to failure because of the lack of legal counsel at the outset. The importance of doing it right in the state system cannot be overemphasized, since the United States Supreme Court has held that once a writ has been heard in state court (which it must as a predicate to federal review) any claims not raised in the state proceedings are waived and the petitioner is barred from having them heard in federal court. *See, Herrera v. Collins*, 113 S.Ct. 853 (1993). Thus, the revered Writ of Habeas Corpus recognized in Article I, Section 9 of the United States Constitution will not prevent an innocent person from being put to death unless the claims of innocence

were raised in the original habeas petition filed in state court.

The current state habeas petition practice should be of concern to more than just the civil libertarian or the court appointed, uncompensated counsel. The system should be of concern to Utah taxpayers, as well. The system fosters successive and redundant petitions which chew up thousands of hours of judicial and prosecutorial resources in responding. The recent case of *Gerrish v. Barnes*, 202 Utah Adv. Rep. 7 (1992) offers a prime example.

GERRISH V. BARNES

In 1985, Oliver Gerrish was charged with three counts of aggravated sexual abuse of a child, a first degree felony carrying a minimum mandatory term of 3, 6 or 9 years to life. As part of a plea bargain, where the state purportedly agreed to support a 3 year prison term, Gerrish pleaded guilty to one of the counts and the other charges were dismissed. Gerrish was sentenced to the middle term — 6 years to life. Gerrish was represented by a neighbor/friend who was an attorney with little or no criminal law experience and practiced corporate and estate planning law.

Gerrish appealed his sentence, claiming the minimum mandatory statutory scheme was unconstitutional. In 1987, the Supreme Court upheld his conviction. *State v. Gerrish*, 746 P.2d 762 (Utah 1987).

Habeas No. 1

Following the Supreme Court's decision, Gerrish filed a *pro se* habeas corpus petition in the Third Judicial District Court. The grounds for that petition included, among other things, a claim of ineffective assistance of counsel and an involuntary guilty plea. Judge Homer F. Wilkinson dismissed the petition on the ground that Mr. Gerrish had not previously moved to withdraw his guilty plea.

Habeas No. 2

Shortly after Judge Wilkinson had dismissed that habeas corpus petition, Mr. Gerrish filed a *pro se* motion, in the Utah State Supreme Court seeking reversal of his conviction and sentence on the same grounds. The Supreme Court dismissed that motion, referring to it as a habeas corpus petition.

Mr. Gerrish then attempted to appeal from Judge Wilkinson's decision by filing a *pro se* notice of appeal and a *pro se* petition for interlocutory appeal. The Supreme Court denied the petition for interlocutory appeal and dismissed the appeal as untimely.

Habeas No. 3

In 1988, Mr. Gerrish filed a petition for a writ of habeas corpus in the United States District Court for the District of Utah. The grounds for that petition also included a claim of ineffective assistance of counsel and an involuntary guilty plea. In May of 1989, the federal court dismissed the petition on the ground that Mr. Gerrish had not exhausted his state court remedies because the only issue ever resolved by the State courts was the constitutionality of the minimum mandatory sentencing scheme.

Habeas No. 4

Following the dismissal of his federal petition, Mr. Gerrish filed another *pro se* habeas corpus petition in the Third Judicial District Court again raising a claim of ineffective assistance of counsel. Judge John A. Rokich dismissed the petition as successive without good cause and thus procedurally barred under U.R.C.P. 65B(i)(4). Although Mr. Gerrish filed a *pro se* appeal of Judge Rokich's decision, the Supreme Court ultimately dismissed the appeal for lack of prosecution.

Mr. Gerrish sent a letter of complaint against his trial counsel to the Utah State Bar which ultimately disciplined counsel for violating the ethical rule that prohibits lawyers from handling matters that they know they are not competent to handle.

After learning the outcome of the Bar proceedings, Mr. Gerrish filed a *pro se* motion to set aside his guilty plea. After appointing counsel for Mr. Gerrish and holding an evidentiary hearing, Judge Timothy R. Hanson denied the motion. The Court of Appeals upheld Judge Hanson's ruling.

Habeas No. 5

Gerrish later filed yet a fifth state habeas petition which also was denied on the grounds it was successive without good cause. Gerrish did appeal this denial and the Supreme Court poured over the matter to the Court of Appeals. The Court of Appeals summarily affirmed the dismissal of the petition as successive and for some inexplicable reason, the Supreme Court granted certiorari. For the first time in the habeas process, Mr. Gerrish was provided with appointed counsel — a former law clerk of the Supreme Court. Appointed counsel spent over 365 hours on the case over a 24 month period — all without compensation. Moreover, appointed counsel was required to absorb almost $500.00 in out-of-pocket costs, including long distance collect telephone charges from the client at the Utah State Prison. On the other side of the ledger, the Attorney General's Office spent hundreds of hours responding to the prior state habeas petitions and in preparing its responsive briefs and for oral argument before the Supreme Court, all at taxpayers' expense.

In the end, all the time, effort and resources were for naught (at least as far as Gerrish was concerned) because the Supreme Court ruled that his petition was procedurally barred and therefore declined to consider the substantive merits of his claims. The Court held that Gerrish's claims of ineffective assistance of counsel were not raised in either his direct appeals or in his earlier habeas petitions and could not be raised for the first time in the Supreme Court. Although appointed counsel was not monetarily compensated, the service counsel rendered was acknowledged by the Court in the last sentence of its opinion as follows:

> "This Court expresses its appreciation for appointed counsel's fine work in this matter."

Justice Zimmerman, in his concurring opinion, lamented the sorry state of affairs existing in state habeas proceedings:

> All in all the present case is a fine example of how claims of arguable merit can fall between the cracks created by the combination of insufficiently flexible procedures and insufficiently counseled litigants that is endemic to habeas corpus proceedings. In the long run, both the courts and the parties would save time and money and be better served if we provided criminal defendants with counsel, with one thorough plenary examination and hearing of all post conviction questions, and with a counseled appeal from that determination. Instead, we squander vast time and resources trying to avoid reaching the merits of successive habeas petitions in which uncounseled defendants haltingly attempt to

raise what they think are valid claims. The present system serves only to baffle and anger the public with its costs and delay, while occasionally denying justice.

Thus, almost 6 years after Mr. Gerrish entered his plea and 5 habeas petitions later, the highest Court of this state told Mr. Gerrish, in essence, he should have gotten a lawyer in the first place.

No doubt Mr. Gerrish has finally exhausted his state remedies and may now move to the federal forum. I hope someone tells him about *Herrera v. Collins* before countless more hours at taxpayers expense are expended.

GERRISH — REPRESENTATIVE OR ATYPICAL?

Is the *Gerrish* case simply an aberration, or does it represent the state of affairs in our habeas system? Based on my admittedly cursory look, reality seems closer to the latter, rather than the former. What can be done to address this problem, if indeed, it is as serious as it appears? I certainly have no ready answer, but I do know something needs to be done. As a first step, I have requested the Criminal Law Section to review the state habeas system and make specific recommendations for reform to the Bar Commission.

Whether you are an incarcerated indigent who still proclaims innocence, a civil libertarian who cringes at the thought of an incarcerated defendant being procedurally barred from proving his innocence, a taxpayer who is disgruntled and frustrated by the delay and huge public expense attendant to the criminal system, or a court appointed lawyer forced to provide pro bono service, it is clear the state habeas process needs a close inspection and the organized bar should be in the forefront of that examination.

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