

2007

Juan Carlos Colin v. State of Utah : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Juan Carlos Colin; Petitioner/Appellee Pro Se.

Erin Riley; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Attorney for Respondent/Appellant.

Recommended Citation

Brief of Appellant, *Colin v. Utah*, No. 20070211 (Utah Court of Appeals, 2007).
https://digitalcommons.law.byu.edu/byu_ca3/137

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JUAN CARLOS COLIN, :
 :
 Petitioner/Appellee, :
 :
 v. : Case No. 20070211-CA
 :
 STATE OF UTAH, :
 :
 Respondent/Appellant. :

BRIEF OF APPELLANT

APPEAL FROM AN ORDER GRANTING A PETITION FOR POST-
CONVICTION RELIEF, IN THE THIRD JUDICIAL DISTRICT
COURT, SALT LAKE COUNTY, UTAH, THE HONORABLE JOHN
PAUL KENNEDY PRESIDING

ERIN RILEY (#8375)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Utah Attorney General
PO BOX 140854
Salt Lake City, Utah 84114-0854

JUAN CARLOS COLIN
4884 Westpoint Dr.
West Valley, Utah 84120

Attorney for Respondent/Appellant

Petitioner/Appellee pro se

ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS

AUG - 1 2007

IN THE UTAH COURT OF APPEALS

| | | |
|-----------------------|---|----------------------|
| JUAN CARLOS COLIN, | : | |
| Petitioner/Appellee, | : | |
| v. | : | Case No. 20070211-CA |
| STATE OF UTAH, | : | |
| Respondent/Appellant. | : | |

BRIEF OF APPELLANT

APPEAL FROM AN ORDER GRANTING A PETITION FOR POST-
CONVICTION RELIEF, IN THE THIRD JUDICIAL DISTRICT
COURT, SALT LAKE COUNTY, UTAH, THE HONORABLE JOHN
PAUL KENNEDY PRESIDING

ERIN RILEY (#8375)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Utah Attorney General
PO BOX 140854
Salt Lake City, Utah 84114-0854

JUAN CARLOS COLIN
4884 Westpoint Dr.
West Valley, Utah 84120

Attorney for Respondent/Appellant

Petitioner/Appellee pro se

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

| | Page |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| TABLE OF AUTHORITIES | iii |
| JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS | 2 |
| STATEMENT OF THE ISSUE AND STANDARD OF APPELLATE REVIEW | 2 |
| CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES | 3 |
| STATEMENT OF THE CASE | 3 |
| STATEMENT OF THE FACTS | 7 |
| FACTS FROM ORAL ARGUMENT ON THE MOTION TO DISMISS | 7 |
| SUMMARY OF THE ARGUMENT | 12 |
| ARGUMENT | |
| I THE COURT COMMITTED REVERSIBLE ERROR BY GRANTING THE PETITION FOR POST-CONVICTION RELIEF AT A HEARING ON A MOTION TO DISMISS | 12 |
| A The post-conviction court erred by granting the petition without giving the State the opportunity to respond on the merits. | 12 |
| B The post-conviction court erred by turning the hearing on the motion to dismiss into a motion for summary judgment, without giving the State notice or an opportunity to present evidence. | 13 |
| C The post-conviction court erred by making its decision based on a proffer, without ever allowing the State to present witnesses or evidence. | 15 |
| D The post-conviction court erred by failing to consider whether petitioner had met the prejudice prong of the <i>Strickland</i> standard. | 17 |
| E The post-conviction court erred by granting the petition without evaluating the credibility of witnesses. | 19 |
| CONCLUSION | 21 |

ADDENDA

Addendum A: Order Granting Petition For Post-Conviction Relief

Addendum B: Utah Code Ann. § 78-35a-101 through § 78-35a-110 (West 2004)

Addendum C: Utah Rule of Civil Procedure 65C

Addendum D: Docket, Case No. 971900070

Addendum E: Transcript of Hearing Held February 27, 2007

Addendum F: Declaration of Juan Carlos Colin

Addendum G: *Odak v. Odak*, 1998 WL 1758373 (Utah App. 1998)

TABLE OF AUTHORITIES

FEDERAL CASES

| | |
|-------------------------------------------------------------------------|------------|
| <i>Hill v. Lockhart</i> , 474 U.S. 52, 106 S. Ct. 366 (1985) | 17 |
| <i>Miller v. Champion</i> , 262 F.3d 1066 (10th Cir. 2001) | 17, 18, 21 |
| <i>Sallahdin v. Mullin</i> , 380 F.3d 1242 (10th Cir. 2004) | 16 |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984) | 16, 17, 18 |
| <i>United States v. Clingman</i> , 288 F.3d 1183 (10th Cir. 2002) | 18 |
| <i>Williams v. Head</i> , 185 F.3d 1223 (11th Cir. 1999) | 16 |

STATE CASES

| | |
|---------------------------------------------------------------------------------------------------|----|
| <i>Alvarez v. Galetka</i> , 933 P.2d 987 (Utah 1997) | 14 |
| <i>Behm's Estate v. Gee</i> , 213 P.2d 664 (Utah 1950) | 13 |
| <i>Bekins Bar V Ranch v. Utah Farm Prod. Credit Associate</i> , 587 P.2d 151 (Utah 1978) | 14 |
| <i>Colman v. Utah State Land Board</i> , 795 P.2d 622 (Utah 1990) | 14 |
| <i>Gillmor v. Cummings</i> , 806 P.2d 1205 (Utah App. 1991) | 3 |
| <i>Miller v. USAA Casualty Insur. Co.</i> , 2002 UT 6, 44 P.3d 663 | 21 |
| <i>Moench v. State</i> , 2004 UT App. 57, 88 P.3d 353 | 17 |
| <i>Moles v. Regents of University of Calif.</i> , 187 Cal. Rptr. 557 (Cal. 1982) | 22 |
| <i>Odak v. Odak</i> , 1998 WL 1758373 (Utah App.1998) | 15 |
| <i>Parsons v. Barnes</i> , 871 P.2d 516 (Utah 1994) | 17 |
| <i>Perez-Llamas v. Utah Court of Appeals</i> , 2005 UT 18, 110 P.3d 706 | 22 |
| <i>Peterson v. The Sunrider Corp.</i> , 2002 UT 43, 48 P.3d 918 | 3 |

| | |
|------------------------------------------------------------------------------------------------|----|
| <i>State v. Boyd</i> , 2001 UT 30, 25 P.3d 985 | 15 |
| <i>State v. Chapman</i> , 655 P.2d 1119 (Utah 1982) | 19 |
| <i>State v. Ellifritz</i> , 835 P.2d 170 (Utah App. 1992) | 3 |
| <i>State v. Martinez</i> , 2001 UT 12, 26 P.3d 203 | 19 |
| <i>State v. Stefaniak</i> , 900 P.2d 1094 (Utah App. 1995) | 19 |
| <i>State v. Workman</i> , 852 P.2d 981 (Utah 1993) | 19 |
| <i>Strand v. Associate Students of the University of Utah</i> , 561 P.2d 191 (Utah 1977) | 14 |
| <i>Wickham v. Galetka</i> , 2002 UT 72, 61 P.3d 978 | 2 |

STATE STATUTES

| | |
|---------------------------------------------------|----|
| Utah Code Ann. §76-3-402 (West 2004) | 4 |
| Utah Code Ann. § 76-5-404 (West 2004) | 3 |
| Utah Code Ann. § 78-2a-3 (West 2004) | 2 |
| Utah Code Ann. § 78-35a-101-110 (West 2004) | 3 |
| Utah R. App. P. 29 | 22 |
| Utah R. Civ. P. 65C | 3 |

IN THE UTAH COURT OF APPEALS

| | | |
|-----------------------|---|----------------------|
| JUAN CARLOS COLIN, | : | |
| | : | |
| Petitioner/Appellee, | : | |
| | : | |
| v. | : | Case No. 20070211-CA |
| | : | |
| STATE OF UTAH, | : | |
| | : | |
| Respondent/Appellant. | : | |

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

The State appeals the granting of a petition for post-conviction relief, which challenged petitioner Colin’s guilty plea to one count of attempted forcible sexual abuse.

This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(f) (West 2004).

STATEMENT OF THE ISSUE
AND STANDARD OF APPELLATE REVIEW

Issue: Did the post-conviction court err by granting a petition for post-conviction relief at a hearing on the State’s motion to dismiss, without giving the State the opportunity to respond to the merits of the petition?

Standard of Review: “Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness, giving no deference to the post-conviction court’s conclusion.” *Wickham v. Galetka*, 2002 UT 72, ¶7, 61 P.3d 978 (citation omitted). An appellate court “determine[s] as a matter of law

whether procedural error occurred.” *State v. Ellifritz*, 835 P.2d 170, 174 (Utah App. 1992). A trial court’s procedural error may constitute grounds for reversing its order. *Gillmor v. Cummings*, 806 P.2d 1205, 1208 (Utah App. 1991); and *Peterson v. The Sunrider Corp.*, 2002 UT 43, ¶30, 48 P.3d 918.

Preservation: In the post-conviction action below, the State objected to the court granting the petition following argument on the motion to dismiss, without giving the State the opportunity to answer or otherwise respond on the merits (R98:16). The State appeals from the the court’s order granting the petition for post-conviction relief (Addendum A).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules relate to this appeal:

- **Post-Conviction Remedies Act** - Utah Code Ann. § 78-35a-101 through § 78-35a-110 (West 2004). The text is contained in Addendum B.
- **Utah Rule of Civil Procedure 65C** - the text is contained in Addendum C.

STATEMENT OF THE CASE

Petitioner Colin was charged with one count of forcible sexual abuse, a second degree felony, in violation of Utah Code Ann. § 76-5-404 (Information).¹ Colin pled guilty to an amended count of attempted forcible sexual abuse, a third degree felony (Statement of Defendant). On April 11, 1997, Colin was sentenced to 0 to 5 years in the

¹ The trial court record has not been paginated because Colin did not file a direct appeal. Therefore, when referring to the trial court record in the underlying criminal case #971900070, the State will simply name the document.

Utah State prison (Judgment, Sentence). The prison sentence was suspended and Colin was granted probation for 36 months upon compliance with certain conditions (Conditions of probation).

Colin did not file a timely motion to withdraw his plea and did not file any direct appeal. On June 12, 2006, Colin filed a motion under Utah Code Ann. §76-3-402, for reduction in sentence. Following a hearing, the motion was denied (addendum D).²

On November 13, 2006, nine (9) years after Colin pled guilty and was sentenced, he filed an untimely memorandum in support of motion to vacate judgement and withdraw plea (R1-24).³ On December 18, 2006, Third District Court Judge Deno Himonas entered a ruling which stated that the motion was in substance a petition for post-conviction relief. Therefore, the motion was filed as a civil petition for post-conviction relief, as case no. 060920152.⁴

On December 18, 2006, the post-conviction court entered an order which directed the State to file a response on or before December 27, 2006 (R25-26). However, the court did not provide a copy of the petition as required by rule 65C(h), Utah Rule of Civil

² The section 76-3-402 motion and the court's ruling do not appear in the criminal file. However they are noted on the court docket. A copy of the docket in case # 971900070 is attached as Addendum D).

³ The record in the post-conviction case, which is the matter on appeal, will be referred to as (R page number).

⁴ This ruling also does not appear in the record of the criminal case or the post-conviction case. However, it appears in the court docket of the criminal case #971900070 (Addendum D).

procedure. *Id.* Without a copy of the petition, the State was unable to respond, or even determine what case petitioner Colin was challenging. And without knowing what case Colin was challenging, the State could not request a copy of the underlying criminal case. Therefore, on December 21, 2006, the State requested a copy of the petition and filed a motion for enlargement of time to respond to the petition within 30 days after receipt of the petition (R27-29).

The next day, the State received from the court a faxed copy of the petition and an order requiring respondent to file a response no later than December 31, 2006, thereby granting the State four (4) additional days to respond to the petition (R30).⁵

Upon receiving the court's new order and a copy of the petition, counsel for the State filed a motion requesting release of the record in the underlying criminal case (Motion for release of record and transcripts). However, the record was not released until after the State filed its motion to dismiss.

The State filed a motion to dismiss and a supporting memorandum (R33-46). Since the underlying criminal case had not yet been received, the motion to dismiss could not state the facts of the criminal case, and could not respond in full to the merits of the issues raised in the petition. The State argued that the petition should be denied and dismissed with prejudice because, having been filed nine years after the conviction

⁵ Counsel for the State was out of the office on vacation from December 22 - 26, 2006. Counsel therefore did not receive the Court's new order and a copy of the petition until return to the office on December 27, 2006.

became final, it was untimely (R33-46). Colin filed a reply to the State's motion to dismiss (R53-72).⁶

On February 27, 2007, the post-conviction court heard argument on the State's motion to dismiss (R98:1-18).⁷ The hearing was specifically docketed as argument on the motion to dismiss and the parties received notice stating that the hearing was on the motion to dismiss (R79-81). Petitioner Colin appeared pro se by telephone to argue against the State's motion to dismiss (R83 & 86).

At the conclusion of argument on the motion to dismiss, the post-conviction court ruled that the petition was timely and that even if it wasn't timely, it met the interest of justice exception (R98:13 & R103). It therefore denied the State's motion to dismiss (R103).⁸

The post-conviction court then granted the petition for post-conviction relief and vacated Colin's guilty plea (R98:14 & R104). The State objected to the Court's ruling on the petition, since all the State had the opportunity to do thus far was file the motion to dismiss (R98:16). The State had not filed any written response on the merits of the

⁶ Colin erroneously served his reply on the District Attorney instead of the Attorney General (R70).

⁷ A copy of the transcript of the hearing on the State's motion to dismiss is included as Addendum E.

⁸ The State is not appealing denial of the motion to dismiss as to the issue concerning immigration consequences. The post-conviction court entered no ruling as to whether Colin's claim concerning compliance with Rule 11 was timely (R98:16, R103). It remains the State's position that this claim is time barred.

claims. The State asked for an evidentiary hearing on the merits (R98:16). The State's request was denied (R98:16-17).

The post-conviction court's final order granting the petition was filed on April 2, 2007 (R105) (Addendum A). The State timely appealed (R90).

STATEMENT OF THE FACTS⁹

"Murray police have spoken with Sofia Dissel, DOB 09/15/80, who states that on November 22, 1996 she was walking down State Street and 6400 South when a man approached her and asked her if she wanted a ride. She accepted. On the way to R.C. Willey at 800 East and 6400 South, the man touched Sofia's belly, thighs and vagina. Sofia pulled the man's hand out of her pants. The man then touched her stomach and breasts skin-to-skin. The man also took Sofia's hand and placed it in his crotch area outside his clothing. The man dropped Sofia off at Eat-A-Burger on 7200 South and 800 East. Sofia wrote down the man's license plate number and has positively identified defendant Juan Carlos Colin as the man who groped her."

FACTS FROM ORAL ARGUMENT ON THE MOTION TO DISMISS

Oral argument on the State's motion to dismiss was held on February 27, 2007 (R98). At the beginning of the hearing, counsel for the State said: "Well, essentially, your Honor, he [Colin] filed a petition and we haven't responded on the merits, we simply filed a motion to dismiss." (R98:2). The Court responded by saying "Right." *Id.*

⁹ Since Colin pled guilty, no trial was held. Therefore the statement of the facts is quoted from the probable cause statement attached to the Information in the court file of the underlying criminal case # 971900070. It is double spaced for ease in reading.

Petitioner Colin appeared pro se by telephone, representing himself to argue against the State's motion to dismiss (R83 & 85). Colin was not placed under oath.¹⁰ (*See* R98).

The court told petitioner Colin that its biggest concern was that it seemed that there was a conflicting statement. "[O]ne was that no one had said anything to you about the immigration consequences of your plea." (R98:3). To which Colin said: "Right." *Id.* The Court went on to say, "[a]nd then at one point in your petition, you actually asserted affirmatively that - - that - - that you were told, as I recall." (R98:3). The Court then asked counsel for the State to clarify.

Counsel for the State said that in his petition, Colin "said several different things. He said they failed to adequately advise him, that he was misled, that they neglected to adequately inform him and that he was misinformed as to the immigration consequences. So he's kind of, it seems to me, either making two statements or else not clarifying." (R98:3). Counsel also reminded the Court that in his written and signed declaration attached to the petition, Colin specifically stated that "his counsel never discussed with him the possible immigration consequences." (R98:3-4, Addendum F).

Counsel for the State said, "I think we need to clarify that, whether they never discussed it with him, which he's considering failing to adequately advise him, or if he's

¹⁰ The State did not request that Colin be placed under oath, because this was not an evidentiary hearing. This was oral argument on a motion to dismiss, and Colin was entitled to argue without being placed under oath, because he was acting pro se.

alleging that they actively misled him and if so, what he's claiming they said to him."

(R98:4).

The Court then said to Mr. Colin, "That's what I would like to hear from you."

(R98:4). Mr. Colin's response was confusing and practically unintelligible.

Okay. They - - they told me - - they - - they - - my counsel, he - - he told me I would not get deported, okay? The other thing he, when I (inaudible) the immigration consequences about, you know, because this, I knew it had to be innocent, meanwhile, he never told me that. He told me I no longer get deported, (inaudible) he handle it, he know - - he says he know - - I know - - immigrant (inaudible) he told me, you know, not going to have any problems, you know, I - - I don't want to get deported, because he never - - I wanted to make sure that (inaudible) the consequences about the future when I try to be a citizen, you know, or in case they take my - - my - - my papers away and I can deported for life, you know, he didn't tell me that.

When - - when he - - when I - - I say (inaudible) he told me, you know, there's not going to be any problem, okay, I go back - - go back to my normal life, you know, I don't want to get deported, okay, understand that, I - - I - - the issue about the immigration consequences about in - - in the future, (inaudible) to be a citizen, I (inaudible) know its going to affect me, you know, I'd just as soon go to trial, you know, because why you going to try and (inaudible) when I do not try to rape somebody, I try to have a - - a normal life, when in the future, you know, I'm going to become a (inaudible) citizen, you know, my home, my family are here, my kids and my wife, you know.

(R98:4-5).

The Court asked Colin when his counsel told him he wasn't going to be deported.

"Did he tell you that before you made your plea or after?" (R98:5). Again, Colin's response was difficult to understand. "When, you know, because at - - at one point, the agreement on it, you know, when he tried to tell me, he explained to me the trial proceedings, you know. He say, you know, if you go to trial, it's going to be hard and

maybe you're going to lose, he no tell me exactly what - - you know, what the trial is, you know." (R98:5).

The Court tried again, and the following exchange took place:

THE COURT: Mr. Colin, tell me when the lawyer told you you would not be deported. Did he tell you that before you - -

MR. COLIN: Before I say, you know, before - - before and after, you know, he say -

THE COURT: Both before and after?

MR. COLIN: Un huh.

THE COURT: Okay.

MR. COLIN: He say, before he say, take this, it is a good deal, it's not going to be affected with your nationality, it will not be affected (inaudible) and you know, you go back to - - it's a good deal, you know.

THE COURT: All right.

MR. COLIN: You do it, you do it, (inaudible) good thing I do not sign a paper, you're going to get deported, you know, why is - - you know, I - -

THE COURT: Okay, I think we got it.

(R98:6).

Counsel for the State argued that it is not a meritorious claim if counsel did not advise him of immigration consequences, because counsel is not required to give advice on collateral consequences (R98:8-9).

Counsel also argued that if the motion to dismiss were denied, then an evidentiary hearing would be necessary to hear testimony from Mr. Quinlan, petitioner's trial counsel (R98:9). Counsel then made the following proffer:

There's nothing from Mr. Quinlan in the file yet. All we have is statements from Mr. Colin (inaudible) but I could make a proffer for the Court that I have spoken to Mr. Quinlan and that he advised me that he does not remember this case specifically, since it's ten years ago, but that **it is not his normal practice and that in fact, he could never recall ever telling anyone charged with a felony that they would not be deportable.**

So, if the Court denies the motion to dismiss and allows the petition to proceed, I think we need an evidentiary hearing to put on testimony from his trial counsel, Mr. Quinlan, about that issue, as well as statements from Mr. (inaudible).

(R98:9) (addendum E) (emphasis added).

At the conclusion of argument on the motion to dismiss, the post-conviction court ruled that the petition was timely and that even if it wasn't timely, it met the interests of justice exception (R98:13 & R103). The post-conviction court then granted the petition for post-conviction relief and vacated Colin's guilty plea (R98:14 & R104).

The Court stated that giving the State's proffer "the maximum force that I think it could be given, I still don't think it would go to extent [sic] of contradicting what I hear over the phone, as Mr. Colin's specific recollection of - - of the event and his specific recollection of the event is that he was told he would not be deported and he based his plea on that advice and he would not have pled otherwise, if - - if he - - or he would not have pled guilty if he had been instructed that there might be immigration consequences, which could lead to his de - deport - - deportation." (R98:14).

The State objected to the Court ruling on the petition, since all the State had the opportunity to do thus far was file the motion to dismiss (R98:16). The State had not filed

any written response on the merits of the claims.¹¹ The State asked for an evidentiary hearing on the merits (R98:16). The State's request was denied (R98:16-17).

SUMMARY OF THE ARGUMENT

It was reversible error for the post-conviction court to grant a petition for post-conviction relief at a hearing on a motion to dismiss, without giving the State the opportunity to respond on the merits. Since only the petition and a motion to dismiss had been filed, the only appropriate order was a ruling on the motion to dismiss. A post-conviction court is not authorized to grant a post-conviction petition without giving the State the opportunity to respond on the merits or present relevant evidence on a disputed issue of fact.

ARGUMENT

I. THE COURT COMMITTED REVERSIBLE ERROR BY GRANTING THE PETITION FOR POST-CONVICTION RELIEF AT A HEARING ON A MOTION TO DISMISS

A. The post-conviction court erred by granting the petition without giving the State the opportunity to respond on the merits.

Oral argument was held on the State's motion to dismiss (R98). At the conclusion of argument on the motion to dismiss, the court granted the post-conviction petition on the merits (R98:14). The State had not yet filed any answer to the petition. It had only filed a motion to dismiss.

¹¹ The State also had not cross-examined Colin, because this was oral argument on the motion to dismiss, not an evidentiary hearing. The only question counsel for the State asked Colin, was whether he was alleging that co-counsel Mr. Johnson ever told him he wouldn't be deported, or if his allegations referred only to Mr. Quinlan (R98:11-12).

It is error for a court to grant a plaintiff relief on the merits at a hearing on a motion to dismiss. The Utah Supreme Court has said, “[w]e know of no way in which a trial court can shortcut orderly procedure and change a motion to dismiss into a hearing on the merits. . . . Unless appellant had in some way waived his right to a hearing or had refused to further plead after the motion had been disposed of, he would be entitled to file an answer and be heard on the merits.” *Behm’s Estate v. Gee*, 213 P.2d 664, 666 (Utah 1950). Here, the State did not waive its right to a hearing, but objected to the Court granting the petition without giving it the opportunity to respond on the merits (R98:16). The State was entitled to file an answer and be heard on the merits.

In *Behm*, the Utah Supreme Court said that since the matter was pending on a motion to dismiss, it viewed the judgment as having been prematurely made. “Under the existing state of the pleadings the only appropriate order that could have been entered was one denying the motion to dismiss and granting appellant a reasonable time to answer.” *Behm*, 213 P.2d at 666. The same is true in the case at issue. The only appropriate order was a ruling on the motion to dismiss. Since the motion to dismiss was denied, the post-conviction court should have granted the State a reasonable time to answer and be heard on the merits.

B. The post-conviction court erred by turning the hearing on the motion to dismiss into a motion for summary judgment, without giving the State notice or an opportunity to present evidence.

By considering the statements made by petitioner over the telephone as evidence, the court essentially turned the State’s motion to dismiss into a motion for summary judgment

by the petitioner. However, the State was not given proper notice or an opportunity to present its evidence. “[I]f a motion to dismiss is converted to a motion for summary judgment, it must only be done so as to not create procedural prejudice to one of the parties.” *Colman v. Utah State Land Board*, 795 P.2d 622, 625 (Utah 1990).

Numerous Utah courts have held that “[i]t is error to consider a motion to dismiss as a motion for summary judgment, without giving the adverse party an opportunity to present pertinent material.” *Strand v. Assoc. Students of the Univ. of Utah*, 561 P.2d 191, 193 (Utah 1977) (citation omitted); *see also Bekins Bar V Ranch v. Utah Farm Prod. Credit Assoc.*, 587 P.2d 151, 152 (Utah 1978) (the record must clearly demonstrate that when a motion to dismiss is made and matters outside the pleading are presented, all parties are given reasonable opportunity to present additional pertinent material if they wish); *Alvarez v. Galetka*, 933 P.2d 987, 990, n.6 (Utah 1997) (court did not treat the motion as one for summary judgment, but even if it had, Alvarez was not given notice or reasonable opportunity to respond).

If a court decides to consider materials outside the pleadings, “all parties must be given adequate notice and opportunity to submit supporting materials, particularly the party against whom summary judgment is entered.” *Strand*, 561 P.2d at 193 (citation omitted). “The action of the trial court in denying the plaintiff the reasonable opportunity to present controverting material violated the mandate of the rule.” *Id.*

C. The post-conviction court erred by making its decision based on a proffer, without allowing the State to present witnesses or evidence.

During the hearing on the motion to dismiss, counsel for the State made a proffer that petitioner's trial counsel told her that "he does not remember this case specifically, since it's ten years ago, but that it is not his normal practice and that in fact, he could never recall ever telling anyone charged with a felony that they would not be deportable." (R98:9).

This proffer demonstrated that a genuine issue of material fact existed. Thus, if the motion to dismiss were to be denied, an evidentiary hearing would be necessary. A proffer is simply "a mechanism by which a party may create an appellate record of what the evidence would have shown." *State v. Boyd*, 2001 UT 30, ¶36, 25 P.3d 985. However, the Court entered its ruling based on the proffer and statements made over the telephone by the petitioner. It refused to give the State the opportunity to respond on the merits and present its evidence.

It was error for the Court to proceed based on this proffer, without allowing the State to respond on the merits and present its evidence. Parties may consent to a court's reliance on proffers, and may submit an issue for ruling based on proffers. *Odak v. Odak*, 1998 WL 1758373 (Utah App.1998) (unpublished memo. decision) (copy attached as Addendum G). However, that did not occur here. In this case, counsel specifically objected to the court entering a ruling on the petition without giving the State an opportunity to present evidence and respond on the merits (R98:16). Counsel for the State said: "[i]f the Court's going to

rule on the actual petition, we would ask for an evidentiary hearing to bring Mr. Quinlan in to testify so that his testimony is on the record for appeal.” (R98:16).

The Court stated that it had given the State the maximum benefit of its proffer (R98:16). However, where the record is unclear about what counsel did because of inability to recall due to the passage of time, the presumption that counsel did what should have been done and exercised reasonable judgment prevails. *Sallahdin v. Mullin*, 380 F.3d 1242, 1249 (10th Cir. 2004); *Williams v. Head*, 185 F.3d 1223, 1227-28 (11th Cir. 1999).

In addition, the State had not presented any testimony or evidence (because this was not an evidentiary hearing, it was argument on the motion to dismiss). Counsel for the State also pointed out that petitioner’s trial counsel had not yet had a chance to go back and look at the file to see if there might be notes or additional information in the file, relevant to this issue (R98:16).

The file might not contain any helpful information. However, it could contain information concerning what, if anything, Colin told his counsel about his immigration status, and what, if anything, counsel said to Colin about possible immigration consequences. “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984). However, there has been no evidence presented as to what, if anything, petitioner told his trial counsel about his nationality, citizenship, residence, or immigrant status.

D. The post-conviction court erred by failing to consider whether petitioner had met the prejudice prong of the *Strickland* standard.

In a petition for post-conviction relief, “[t]he petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.” Utah Code Ann. § 78-35a-105. Petitioner alleged ineffective assistance of counsel. Under *Strickland*, when asserting a claim of ineffective assistance of counsel, the petitioner must establish not only that his counsel’s performance was deficient, but also that he was prejudiced. *Strickland*, 466 U.S. at 693. “[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366 (1985).

Assuming, solely for purposes of this argument, that counsel’s performance was deficient because he told Colin that his guilty plea would not cause him to be deportable, that does not establish prejudice. “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59; *see also Moench v. State*, 2004 UT App 57, ¶21; 88 P.3d 353; *Parsons v. Barnes*, 871 P.2d 516, 525 (Utah 1994); *and Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001) (quoting *Hill*, 474U.S. at 59). “[C]ourts applying this standard will often review the strength of the prosecutor’s case as the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial.” *Miller*, 262 F.3d at 1072.

“It is not necessary for the defendant to show that he actually would have prevailed at trial, although the strength of the government’s case against the defendant should be considered in evaluating whether the defendant really would have gone to trial if he had received adequate advice from his counsel.” *Miller*, 262 F.3d at 1069.

Therefore, a petitioner’s assertion that he would not have pled guilty is not sufficient to establish prejudice. “[M]ere allegation that he would have insisted on trial but for his trial counsel’s errors, although necessary, is ultimately insufficient to entitle him to relief. Rather, we look to the factual circumstances surrounding the plea to determine whether [he] would have proceeded to trial.” *United States v. Clingman*, 288 F.3d 1183, 1186 (10th Cir. 2002) (citation omitted).

Actual prejudice is weighed against the totality of evidence before the trier of fact. *Strickland*, 466 U.S. at 695. The determination as to whether petitioner has met the prejudice prong must include consideration of all of the facts and circumstances of the case. This includes information such as whether the petitioner had confessed, or given a statement to the police, the strength of the State’s case, whether the plea offer was to a reduced charge, and the likelihood of conviction on the greater charge if petitioner had gone to trial. None of this information was considered in the post-conviction case.

Petitioner was originally charged with forcible sexual abuse, a second degree felony. He pled guilty to a reduced charge of attempted forcible sexual abuse, a third degree felony. Even if counsel had advised petitioner that he would be deportable if he pled guilty to the reduced charge, counsel might still have advised petitioner to plead guilty, because he

would also have been deportable if convicted of the more serious offense. *See e.g. State v. Martinez*, 2001 UT 12, ¶ 19, 26 P.3d 203 (“there’s no doubt ... that [defendant] got a better deal than he would have gotten . . . if he were tried. Had counsel known the first degree conviction could not be reduced, he would not have advised defendant any differently. He still would have advised defendant to plead guilty.”) (additional quotation omitted).

E. The post-conviction court erred by granting the petition without evaluating the credibility of witnesses.

When there are contradictory statements of fact, one of the duties of a district court Judge is to determine the credibility of the witnesses. “It is for the factfinder to determine witness credibility.” *State v. Stefaniak*, 900 P.2d 1094, 1096 (Utah App. 1995). “When the evidence presented is conflicting or disputed, the jury [or the factfinder] serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence.” *State v. Workman*, 852 P.2d 981, 984 (Utah 1993) (citations omitted). “The United States Supreme Court has clearly held that the right to confront witnesses at trial and to provide the factfinder an opportunity to assess their credibility cannot be lightly dismissed.” *State v. Chapman*, 655 P.2d 1119, 1122 (Utah 1982).

The post-conviction court was not able to assess the credibility of any State witnesses, because it refused to allow the State to present testimony from witnesses. The State made a proffer that trial counsel had stated that “he does not remember this case specifically, since it’s ten years ago, but that it is not his normal practice and that in fact, he

could never recall ever telling anyone charged with a felony that they would not be deportable.” (R98:9).

As addressed above, the court should not have proceeded based solely on a proffer and petitioner’s confusing, unsworn statement over the telephone. The court should have considered the credibility of witnesses. A court cannot determine a witness’s credibility based solely on a proffer made by someone else. It appears that the post-conviction court gave no thought to the issue of credibility. The court simply stated that giving the proffer the maximum force, “I still don’t think it would go to [the] extent of contradicting what I hear over the phone as Mr. Colin’s specific recollection.” (R98:14).

In other words, the court was apparently saying that Mr. Quinlan’s statement that “he could never recall ever telling anyone charged with a felony that they would not be deportable” was not sufficient to contradict Mr. Colin’s self-serving statement that his counsel had improperly advised him of immigration consequences.

But the Court also failed to evaluate the petitioner’s credibility. The court relied uncritically on the unsworn statement of the petitioner, which was made over the telephone, was difficult to decipher, was not subject to cross examination, and contradicted his previous signed declaration that his counsel had never discussed possible immigration consequences with him.

As addressed above, the court should also have considered relevant facts and circumstances surrounding the criminal case, in determining the credibility of petitioner’s claim that he would not have pled guilty if he had known he would be deportable. *See*

Miller, 262 F.3d at 1070 (defendant’s assertion that he would have pled not guilty but for his counsel’s ineffective assistance was not credible).

CONCLUSION

By granting the petition at the hearing on the motion to dismiss, the post-conviction court denied the State its day in court on the merits. The Utah Supreme Court has stated that “[w]hen ensuring litigants have received due process of law, our policy is to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy.” *Miller v. USAA Casualty Insur. Co.*, 2002 UT 6, ¶ 41, 44 P.3d 663 (additional quotations and citations omitted). “At a minimum, a day in court means that each party shall be afforded the opportunity to present claims and defenses, and have them properly adjudicated on the merits.” *Id.* at ¶ 42.

The post-conviction court in this case did not allow the State to have its day in court to address the merits of the claims and to present its witnesses, evidence and defenses.

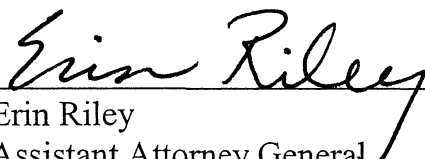
For the foregoing reasons, the State respectfully requests that this Court reverse the decision granting the petition for post-conviction relief, and remand the case back to the district court to allow the State to respond on the merits.

ORAL ARGUMENT REQUESTED

The State requests oral argument. “[O]ral argument is a tool for assisting the appellate court in its decision making process,” *Perez-Llamas v. Utah Court of Appeals*, 2005 UT 18, ¶ 10, 110 P.3d 706, and “the only opportunity for a dialogue between the litigant and the bench.” *Moles v. Regents of Univ. of Calif.*, 187 Cal.Rptr. 557, 560 (Cal. 1982). In the case at bar, the decisional process would “be significantly aided by oral argument.” Utah R. App. P. 29(a)(3).

RESPECTFULLY SUBMITTED this 15th day of August, 2007.

MARK L. SHURTLEFF
ATTORNEY GENERAL

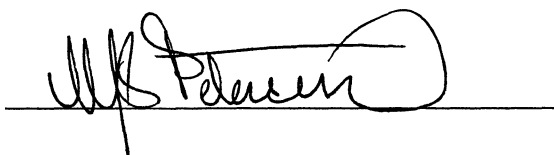

Erin Riley
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2007, I mailed, postage prepaid,
two accurate copies of the foregoing Respondent/Appellant's Brief to:

Juan Carlos Colin
4884 Westpoint Dr.
West Valley, UT 84120

(petitioner/appellee pro se)

A handwritten signature in black ink, appearing to read "Juan Carlos Colin", is written over a horizontal line.

Addenda

Addendum A

APR 02 2007

SALT LAKE COUNTY

By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JUAN CARLOS COLIN,
Petitioner,

vs.

STATE OF UTAH,
Respondent.

FINAL ORDER

Case No. 060920152

Judge John Paul Kennedy

ORDER

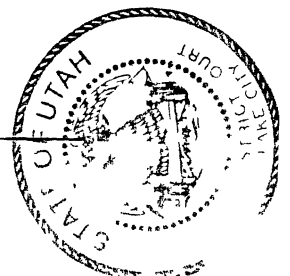
This Court hereby ORDERS:

- 1) That the petition for post-conviction relief filed by petitioner Juan Carlos Colin is Granted, for the reasons, facts, and conclusions set forth in the Order Granting the Petition.
- 2) Under the Post-Conviction Remedies Act, "[a]ny party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction." Utah Code Ann. § 78-35a-110.
- 3) The Court Orders that the State promptly take any necessary action to notify I.C.E. and cooperate in releasing the Petitioner.

DATED this 30 day of March, 2007.

BY THE COURT:

[Signature]
Judge John Paul Kennedy
Third Judicial District Court Judge



105

APR 03 2007

SALT LAKE COUNTY
By [Signature]
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JUAN CARLOS COLIN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

ORDER GRANTING PETITION FOR
POST-CONVICTION RELIEF

Case No. 060920152

Judge John Paul Kennedy

FINDINGS OF FACT

1. On November 27, 1996, an Information was filed against petitioner, charging him with one count of Forcible Sexual Abuse, a second degree felony, in violation of Utah Code § 76-5-404.
2. On February 28, 1997, petitioner pled guilty to one count of attempted forcible sexual abuse, a third degree felony.
3. On April 11, 1997, petitioner was sentenced to 0 to 5 years in the Utah State prison. The prison sentence was suspended and petitioner was granted probation for 36 months upon compliance with certain conditions.
4. Petitioner did not file a timely motion to withdraw plea and did not file any direct appeal.

19DL

5. On June 12, 2006, petitioner filed a 402 motion for reduction in sentence. Following a hearing, the motion was denied and the court's ruling was entered on August 7, 2006.

6. On November 13, 2006, more than nine (9) years after petitioner pled guilty and was sentenced, he filed an untimely memorandum in support of motion to vacate judgment and withdraw plea.

7. On December 18, 2006, Third District Court Judge Deno Himonas entered a ruling which stated that the motion was in substance a petition for post-conviction relief. Therefore, the motion was filed as a civil petition for post-conviction relief, as case no. 060920152.

8. In his petition, the petitioner alleged that he should be allowed to withdraw his guilty plea because 1) "there was not strict compliance with Rule 11(e), Utah Rules of Criminal Procedure . . . and 2) the assistance rendered him by defense counsel was ineffective and thus a violation of the U.S. Const. Amend. VI and Utah Const. Art. I, Section 12." (pet. at p. 1).

Petitioner alleged that counsel erroneously advised him "that a plea to this offense would not affect his immigration status in the United States." (pet. at p. 2).

9. Petitioner attached to his petition a document entitled "DECLARATION OF : JUAN CARLOS COLIN"

10. Petitioner's declaration stated:

3. During the entire time that Mr. Johnson and Mr. Quinlan represented me, they never discussed with me the possible immigration consequences that would attach to my guilty plea.
4. Mr. Johnson and Mr. Quinlan did speak with me about the time that the Court would suspend [sic] and the period of time that I would serve in probation, but they never said anything about possible consequences with immigration authorities if I accepted the plea.
5. Specifically, my attorneys never discussed with me any of the following:
 - a. That I should consult with an immigration attorney before entering my plea since I was not a U.S. citizen;
 - b. That my plea would have potential immigration immigration [sic] consequences as deportation, exclusion from admission to the United States, or denial of naturalization as a direct consequence of my plea and subsequent conviction;
 - c. That I should consider the protection of my legal status in the United States as a factor in the negotiations of a plea agreement;
 - d. That the guilty plea I was entering into would constitute a conviction for an aggravated felony under federal immigration laws and would make me ineligible for certain forms of immigration rights such as, Cancellation of Removal as well Asylum [sic] and even Voluntary Departure.
 - e. That my plea would make me PERMANENTLY EXCLUDABLE from the United States and I would risk criminal prosecution and imprisonment of up to 20 years if I entered the U.S. illegally after being deported as an aggravated felon.

11. The final paragraph of petitioner's declaration states: "I declare under penalty of perjury under the laws of the State of Utah that the foregoing is true and correct." It is then signed by Mr. Colin and dated November 1, 2006.

12. On December 29, 2006, the State filed a motion to dismiss the petition.

13. In its motion to dismiss, the State argued that the petition should be denied and dismissed with prejudice because it was untimely and petitioner had not met the interests of justice exception because he failed to assert any reason for the untimely filing of his petition and because his claims were not meritorious.

14. On February 27, 2007, oral argument was held on the State's motion to dismiss.

15. Petitioner appeared pro se by telephone.

16. Petitioner was not sworn and no objection was raised by the State.

17. Petitioner clarified his affidavit and stated that his attorneys had misinformed him about immigration consequences by telling him that he would not be deported. The State was given the opportunity to question Petitioner, who cooperated and answered the State's questions, further clarifying his affidavit.

18. Petitioner stated that for nine years he thought everything was OK. It was only when ICE came to his house on February 15th of 2006 that he knew there was an immigration problem

19. The State was represented by Assistant Attorney General Erin Riley.

20. The State argued that the petition should be dismissed for the same reasons raised in the memorandum in support of its motion to dismiss.

21. In addition, the State argued that if the Court denied its motion to dismiss, an evidentiary hearing would be necessary to hear testimony from petitioner's trial counsel.

22. The State made a proffer that it had spoken to petitioner's trial counsel, Mr. Paul Quinlan by telephone and that he said it was not his practice, in fact he could never remember ever telling a defendant charged with a felony that he would not be deportable.

23. The Court indicated that it would accept as true for the purposes of this proceeding the proffer made by the State.

CONCLUSIONS OF LAW

1. The Court denied the State's motion to dismiss.

2. The Court entered no ruling concerning petitioner's allegation that there was not strict compliance with Rule 11.

3. The Court found that the issue of ineffective assistance of counsel was timely because petitioner raised this claim within one year of discovering the immigration issue.

4. In addition, even if not timely, the Court found that this issue met the interests of justice exception.

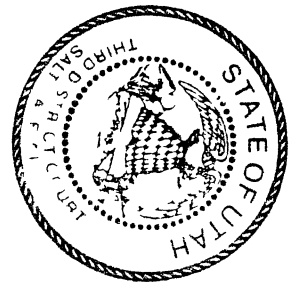
5. Accepting the State's proffer as to what Mr. Quinlan would say, Mr. Quinlan's general statement that it was not his practice, and that he could never remember ever telling

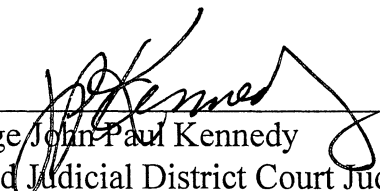
a defendant charged with a felony that he would not be deportable, doesn't overcome petitioner Colin's specific recollection that he was told that he would not be deported.

6. The Court therefore granted the petition and vacated the conviction, finding that based on the facts before the Court and accepting as true all facts proffered by the State, the Petitioner did not have effective assistance of counsel. The facts showed that Petitioner was affirmatively informed that his plea would not result in his deportation, when this was incorrect advice.

DATED this ²~~30th~~ day of ^{April}~~March~~, 2007.

BY THE COURT:





Judge John Paul Kennedy
Third Judicial District Court Judge

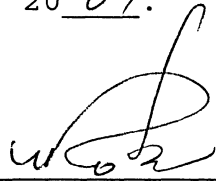
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060920152 by the method and on the date specified.

METHOD NAME

| | |
|------|----------------------------------------------------------------------------------------------------|
| Mail | COLLEEN K COEBERGH Attorney PET 29 S STATE ST STE 7 SALT LAKE CITY, UT 84111 |
| Mail | ERIN RILEY Attorney RES APPELLATE DIVISION 160 E 300 S 6TH FLR SALT LAKE CITY UT 84111 |

Dated this 3 day of April, 20 07.



Deputy Court Clerk

APR 03 2007

SALT LAKE COUNTY

By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JUAN CARLOS COLIN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

FINAL ORDER

Case No. 060920152

Judge John Paul Kennedy

ORDER

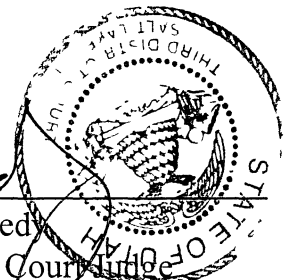
This Court hereby ORDERS:

- 1) That the petition for post-conviction relief filed by petitioner Juan Carlos Colin is Granted, for the reasons, facts, and conclusions set forth in the Order Granting the Petition.
- 2) Under the Post-Conviction Remedies Act, “[a]ny party may appeal from the trial court’s final judgment on a petition for post-conviction relief to the appellate court having jurisdiction.” Utah Code Ann. § 78-35a-110.
- 3) The Court Orders that the State promptly take any necessary action to notify I.C.E. and cooperate in releasing the Petitioner.

DATED this 2 day of ^{April}~~March~~, 2007.

BY THE COURT:

[Signature]
Judge John Paul Kennedy
Third Judicial District Court Judge



113


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060920152 by the method and on the date specified.

METHOD NAME

| | |
|------|----------------------------------------------------------------------------------------------------|
| Mail | COLLEEN K COEBERGH Attorney PET 29 S STATE ST STE 7 SALT LAKE CITY, UT 84111 |
| Mail | ERIN RILEY Attorney RES APPELLATE DIVISION 160 E 300 S 6TH FLR SALT LAKE CITY UT 84111 |

Dated this 3 day of April, 20 07.



Deputy Court Clerk

Addendum B

U.C.A. 1953 § 78-35a-101

C

West's Utah Code Annotated Currentness

Title 78. Judicial Code

Part IV. Particular Proceedings

▣ Chapter 35A. **Post-Conviction Remedies Act** (Refs & Annos)

▣ Part 1. General Provisions

→§ 78-35a-101. Short title

This act shall be known as the "Post-Conviction Remedies Act."

Laws 1996, c. 235, § 1, eff. April 29, 1996.

U.C.A. 1953 § 78-35a-101, UT ST § 78-35a-101

Current through 2007 General Legislative Session.

Copr © 2007 Thomson/West

END OF DOCUMENT

U.C.A. 1953 § 78-35a-102

C

West's Utah Code Annotated Currentness

Title 78. Judicial Code

Part IV. Particular Proceedings

▣ Chapter 35A. Post-Conviction Remedies Act (Refs & Annos)

▣ Part 1. General Provisions

→ § 78-35a-102. Replacement of prior remedies

(1) This chapter establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole.

Laws 1996, c. 235, § 2, eff. April 29, 1996.

U.C.A. 1953 § 78-35a-102, UT ST § 78-35a-102

Current through 2007 General Legislative Session.

Copr © 2007 Thomson/West

END OF DOCUMENT

U.C.A. 1953 § 78-35a-103

C

West's Utah Code Annotated Currentness

Title 78. Judicial Code

Part IV. Particular Proceedings

▣ Chapter 35A. Post-Conviction Remedies Act (Refs & Annos)

▣ Part 1. General Provisions

→§ 78-35a-103. Applicability--Effect on petitions

Except for the limitation period established in Section 78-35a-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996.

Laws 1996, c. 235, § 3, eff. April 29, 1996.

U.C.A. 1953 § 78-35a-103, UT ST § 78-35a-103

Current through 2007 General Legislative Session.

Copr © 2007 Thomson/West

END OF DOCUMENT

U.C.A. 1953 § 78-35a-104

C

West's Utah Code Annotated Currentness

Title 78. Judicial Code

Part IV. Particular Proceedings

▣ Chapter 35A. Post-Conviction Remedies Act (Refs & Annos)

▣ Part 1. General Provisions

→§ 78-35a-104. Grounds for relief--Retroactivity of rule

(1) Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; or

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received.

(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of

U.C.A. 1953 § 78-35a-104

Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity.

Laws 1996, c. 235, § 4, eff. April 29, 1996.

U.C.A. 1953 § 78-35a-104, UT ST § 78-35a-104

Current through 2007 General Legislative Session

Copr © 2007 Thomson/West

END OF DOCUMENT

U.C.A. 1953 § 78-35a-105

C

West's Utah Code Annotated Currentness

Title 78. Judicial Code

Part IV. Particular Proceedings

▣ Chapter 35A. Post-Conviction Remedies Act (Refs & Annos)

▣ Part 1. General Provisions

→§ 78-35a-105. Burden of proof

The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The respondent has the burden of pleading any ground of preclusion under Section 78-35a-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

Laws 1996, c. 235, § 5, eff. April 29, 1996.

U.C.A. 1953 § 78-35a-105, UT ST § 78-35a-105

Current through 2007 General Legislative Session.

Copr © 2007 Thomson/West

END OF DOCUMENT

U C A 1953 § 78-35a-106



West's Utah Code Annotated Currentness

Title 78 Judicial Code

Part IV Particular Proceedings

▣ Chapter 35A Post-Conviction Remedies Act (Refs & Annos)

▣ Part 1 General Provisions

→ § 78-35a-106. Preclusion of relief--Exception

(1) A person is not eligible for relief under this chapter upon any ground that

(a) may still be raised on direct appeal or by a post-trial motion,

(b) was raised or addressed at trial or on appeal,

(c) could have been but was not raised at trial or on appeal,

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief, or

(e) is barred by the limitation period established in Section 78-35a-107

(2) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel

Laws 1996, c 235, § 6, eff April 29, 1996

U C A 1953 § 78-35a-106, UT ST § 78-35a-106

Current through 2007 General Legislative Session

Copr © 2007 Thomson/West

END OF DOCUMENT

U C A. 1953 § 78-35a-107



West's Utah Code Annotated Currentness

Title 78. Judicial Code

Part IV. Particular Proceedings

Chapter 35A Post-Conviction Remedies Act (Refs & Annos)

Part 1. General Provisions

→§ 78-35a-107. Statute of limitations for postconviction relief

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed, or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

(3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations

(4) Sections 77-19-8, 78-12-35, and 78-12-40 do not extend the limitations period established in this section.

Laws 1995, c. 82, § 1, eff. May 1, 1995, Laws 1996, c. 235, § 7, eff. April 29, 1996, Laws 2004, c. 139, § 2, eff. May 3, 2004.

Codifications C. 1953, § 78-12-31 1.

HISTORICAL AND STATUTORY NOTES

Laws 2004, c. 139, in subsec. (4) added "77-19-8"

U.C.A. 1953 § 78-35a-107

Prior Laws:

Laws 1979, c. 133.

U.C.A. 1953 § 78-35a-107, UT ST § 78-35a-107

Current through 2007 General Legislative Session.

Copr © 2007 Thomson/West

END OF DOCUMENT

U.C.A. 1953 § 78-35a-108

C

West's Utah Code Annotated Currentness

Title 78. Judicial Code

Part IV. Particular Proceedings

▣ Chapter 35A. Post-Conviction Remedies Act (Refs & Annos)

▣ Part 1. General Provisions

→§ 78-35a-108. Effect of granting relief--Notice

(1) If the court grants the petitioner's request for relief, it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2)(a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

Laws 1996, c. 235, § 8, eff. April 29, 1996.

U.C.A. 1953 § 78-35a-108, UT ST § 78-35a-108

Current through 2007 General Legislative Session.

Copr © 2007 Thomson/West

END OF DOCUMENT

U.C.A. 1953 § 78-35a-109

C

West's Utah Code Annotated Currentness

Title 78. Judicial Code

Part IV. Particular Proceedings

▣ Chapter 35A. Post-Conviction Remedies Act (Refs & Annos)

▣ Part 1. General Provisions

→ § 78-35a-109. Appointment of counsel

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

Laws 1996, c. 235, § 9, eff. April 29, 1996.

U.C.A. 1953 § 78-35a-109, UT ST § 78-35a-109

Current through 2007 General Legislative Session.

Copr © 2007 Thomson/West

END OF DOCUMENT

U.C.A. 1953 § 78-35a-110

C

West's Utah Code Annotated Currentness

Title 78. Judicial Code

Part IV. Particular Proceedings

▣ Chapter 35A. Post-Conviction Remedies Act (Refs & Annos)

▣ Part 1. General Provisions

→§ 78-35a-110. Appeal--Jurisdiction

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78-2-2 or 78-2a-3.

Laws 1996, c. 235, § 10, eff. April 29, 1996.

U.C.A. 1953 § 78-35a-110, UT ST § 78-35a-110

Current through 2007 General Legislative Session.

Copr © 2007 Thomson/West

END OF DOCUMENT

Addendum C

Utah Rules of Civil Procedure, Rule 65C

C

West's Utah Code Annotated Currentness

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

Part VIII. Provisional and Final Remedies and Special Proceedings

→RULE 65C. POST-CONVICTION RELIEF

(a) Scope. This rule shall govern proceedings in all petitions for post-conviction relief filed under Utah Code Ann. § 78-35a-101 et seq., Post-Conviction Remedies Act.

(b) Commencement and Venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(c) Contents of the Petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. Additional claims relating to the legality of the conviction or sentence may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

- (1) whether the petitioner is incarcerated and, if so, the place of incarceration;
- (2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;
- (3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;
- (4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;
- (5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and
- (6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(d) Attachments to the Petition. If available to the petitioner, the petitioner shall attach to the petition:

- (1) affidavits, copies of records and other evidence in support of the allegations;
- (2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's

Utah Rules of Civil Procedure, Rule 65C

case;

(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence, and

(4) a copy of all relevant orders and memoranda of the court

(e) Memorandum of Authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(f) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course

(g)(1) Summary Dismissal of Claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law

(2) A petition is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that

(A) the facts alleged do not support a claim for relief as a matter of law;

(B) the claims have no arguable basis in fact, or

(C) the petition challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a petition is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown

(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death

(h) Service of Petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner

(i) Answer or Other Response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court

Utah Rules of Civil Procedure, Rule 65C

(j) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may

- (1) consider the formation and simplification of issues,
- (2) require the parties to identify witnesses and documents, and
- (3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing

(k) Presence of the Petitioner at Hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(l) Discovery; Records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(m) Orders; Stay.

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(n) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Sections 64-13-23 and Sections 78-7-36 through 78-7-43 govern the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(o) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

[Adopted effective July 1, 1996]

ADVISORY COMMITTEE NOTE

This rule replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence, regardless whether the claim relates to an original commitment, a commitment for violation of probation, or a

Addendum D

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH vs. JUAN CARLOS COLIN

CASE NUMBER 971900070 State Felony

CHARGES

Charge 1 - 76-5-404 - ATTEMPTED FORCIBLE SEX ABUSE 2nd Degree
Felony (amended) to 3rd Degree Felony
Plea: February 28, 1997 Not Guilty
Disposition: February 28, 1997 {Guilty Plea}

CURRENT ASSIGNED JUDGE
DENO HIMONAS

PARTIES

Defendant - JUAN CARLOS COLIN

Plaintiff - STATE OF UTAH
Represented by: BLAKE A NAKAMURA

Other Party - SHELLY A MOSER

DEFENDANT INFORMATION

Defendant Name: JUAN CARLOS COLIN
Offense tracking number: 7881766
Date of Birth: May 19, 1963
Law Enforcement Agency: MURRAY CITY POLICE
LEA Case Number: 96-15671
Prosecuting Agency: SALT LAKE COUNTY
Violation Date: November 22, 1996

ACCOUNT SUMMARY

| | | |
|---------------|--------------------|----------|
| TOTAL REVENUE | Amount Due: | 1,016.50 |
| | Amount Paid: | 1,016.50 |
| | Credit: | 0.00 |
| | Balance: | 0.00 |
| TRUST TOTALS | Trust Due: | 150.00 |
| | Amount Paid: | 150.00 |
| | Credit: | 0.00 |
| | Trust Balance Due: | 0.00 |
| | Balance Payable: | 0.00 |

REVENUE DETAIL - TYPE: FINE

CASE NUMBER 971900070 State Felony

| | |
|----------------|----------|
| Amount Due: | 1,000.00 |
| Amount Paid: | 1,000.00 |
| Amount Credit: | 0.00 |
| Balance: | 0.00 |

REVENUE DETAIL - TYPE: COPY FEE

| | |
|----------------|------|
| Amount Due: | 1.50 |
| Amount Paid: | 1.50 |
| Amount Credit: | 0.00 |
| Balance: | 0.00 |

REVENUE DETAIL - TYPE: COPY FEE

| | |
|----------------|------|
| Amount Due: | 2.25 |
| Amount Paid: | 2.25 |
| Amount Credit: | 0.00 |
| Balance: | 0.00 |

REVENUE DETAIL - TYPE: COPY FEE

| | |
|----------------|------|
| Amount Due: | 0.25 |
| Amount Paid: | 0.25 |
| Amount Credit: | 0.00 |
| Balance: | 0.00 |

REVENUE DETAIL - TYPE: COPY FEE

| | |
|----------------|-------|
| Amount Due: | 12.50 |
| Amount Paid: | 12.50 |
| Amount Credit: | 0.00 |
| Balance: | 0.00 |

TRUST DETAIL

| | |
|--------------------|-----------------|
| Trust Description: | Attorney Fees |
| Recipient: | LEGAL DEFENDERS |
| Amount Due: | 150.00 |
| Paid In: | 150.00 |
| Paid Out: | 150.00 |

CASE NOTE

BEEHIVE BOND **SPANISH INTERPRETER NEEDED**

PROCEEDINGS

01-21-97 Judge BRIAN assigned.
01-21-97 Arraignment scheduled on January 24, 1997 at 10:30 AM in Fourth
Floor - S42 with Judge BRIAN.
01-21-97 Note: Case filed from Circuit Court bindover.
01-21-97 Note: ARR scheduled for 1/24/97 at 10:30 A in room G
with PBB
01-21-97 Information filed
01-24-97 Arraignment scheduled on February 07, 1997 at 10:30 AM in

Fourth Floor - S42 with Judge BRIAN.
01-24-97 Note: Continuance JUDGE: PAT B BRIAN
01-24-97 Note: Deft Present
01-24-97 Note: Deft advised of rights
01-24-97 Note: ATD: SHAPIRO, DAVID ATP: GOODMAN, KATIE
BERNARDS
01-24-97 Note: ARR scheduled for 02/07/97 at 1030 A in room G
with PBB
01-24-97 Note: CUSTODY: Bail Continued
01-24-97 Note: FILED: MINUTE ENTRY: HRG CONTINUED
02-07-97 DISPOSITION HEARING scheduled on February 28, 1997 at 10:30 AM
in Fourth Floor - S42 with Judge BRIAN.
02-07-97 Note: Fel Arraignment JUDGE: PAT B BRIAN
02-07-97 Note: ATD: STAM, KAREN ATP: STOTT, ROBERT
02-07-97 Note: Deft is present
02-07-97 Note: DSP scheduled for 02/28/97 at 1030 A in room G
with PBB
02-07-97 Note: CUSTODY: Pre-Trial Services
02-07-97 Note: Chrg: 76-5-404 Plea: Not Guilty
02-07-97 Note: INTERPRETER WAS PRESENT AND SWORN AT HRNG ON
2/7/97-DSP HRNG
02-07-97 Note: SET FOR 2/28/97 @ 10:30 AM
02-28-97 Note: Change of Plea JUDGE: PAT B BRIAN
02-28-97 Note: ATD: QUINLAN, PAUL C. ATP: NAKAMURA, BLAKE
02-28-97 Note: Deft is present
02-28-97 Note: Deft advised of rights
02-28-97 Note: PSI Ordered from ADULT PROBATION & PAROLE
02-28-97 Note: SNT scheduled for 04/11/97 at 1030 A in room G
with PBB
02-28-97 Note: Chrg: 76-5-404 Finding: Guilty Plea
02-28-97 Note: Charge 76-5-404 Sev F2 was amended to 76-5-404 Sev F3
02-28-97 Note: FILED: MINUTE ENTRY: DEF PLEADS G TO CNT I (AMENDED)-DEF
SIGNS
02-28-97 Note: PLEA AGMT-PSI ORDERED-SNT SET FOR 4/11/97 @ 10:30
AM
02-28-97 Note: FILED: FILED: STMT OF DEF, CERT OF COUNSEL & ORDER
02-28-97 Note: FILED: PRE-SENTENCE/PROBATION REFERRAL FORM
03-04-97 Sentencing scheduled on April 11, 1997 at 10:30 AM in Fourth
Floor - S42 with Judge BRIAN.
04-09-97 Note: FILED: AP&P PRE-SENT INVESTIGATION REPORT (CONFIDENTIAL)
04-11-97 Note: JUDGMENT - FORCIBLE SEX ABUSE
04-11-97 Note: 2214641
04-11-97 Note: DATE: 4-16-97
04-11-97 Note: TIME: 8:12 AM
04-11-97 Note: NOTE: SEE FILE
04-11-97 Note: Sentence: Judge PAT B BRIAN
04-11-97 Note: REPORTER: BRAD YOUNG
04-11-97 Note: Deft present with Counsel, Prosecutor present
04-11-97 Note: Chrg: ATT FORC SEX ABUSE Plea: Not Guilty Find:

Guilty Plea
04-11-97 Note: FINE AMOUNT: 5000.00 SUSPENDED:
4000.00
04-11-97 Note: 005 YEARS SUSPENDED: 5 YEARS
04-11-97 Note: DEF GRANTED PROB FOR 36 MOS-DEF TO COMPLY WITH ALL TERMS
OF
04-11-97 Note: PROBATION AS PER ORDER OF THE COURT-DEF TO PAY FINE OF
\$1,000
04-11-97 Note: (INCLUDING SURCHARGE)
04-11-97 Note: Fines and assessments entered: FS
1000.00
04-11-97 Note: SB
850.00
04-11-97 Note: Total fines and assessments...:
1850.00
04-11-97 Note: FILED: JUDGMENT, SENTENCE (COMMITMENT)
04-14-97 Fine Account created Total Due: 1000.00
04-16-97 Trust Account created Total Due: 150.00
12-23-97 Fine Payment Received: 1,000.00
12-23-97 Attorney Fees Payment Received: 150.00
12-23-97 Filed: Satisfaction of Judgment Re: Criminal Fine Surcharge
Recoupment Fee and/or Restitution (2214641) (97-864)
02-12-98 Note: Check #3663 payee changed to from
02-12-98 Attorney Fees Check # 3663 Trust Payout: 150.00
06-01-99 Filed: AP&P Progress/Violation Report
08-06-04 Fee Account created Total Due: 1.50
08-06-04 COPY FEE Payment Received: 1.50
Note: 2.00 cash tendered.
06-12-06 Filed: Motion for Reduction
06-14-06 Judge HIMONAS assigned.
06-23-06 Filed: State's Opposition to Defendant's Motion for a 402
Reduction
06-27-06 Filed: Letters from friends and family in reference to
reduction of sentence
07-06-06 Minute Entry - Minutes for Law and Motion
Judge: DENO HIMONAS
PRESENT
Clerk: patj
Defendant not present

HEARING

The court received a letter from Shelly Moser today.
A copy of the letter is enclosed
07-18-06 Filed: Letter from Jeffrey Noland
07-19-06 Notice - NOTICE for Case 971900070 ID 6684924
HEARING-402 REDUCTION is scheduled.

Date: 07/28/2006
Time: 09:00 a.m.
Location: Fourth Floor - S44
Third District Court
450 South State
SLC, UT 84114-1860

Before Judge: DENO HIMONAS

07-19-06 HEARING-402 REDUCTION scheduled on July 28, 2006 at 09:00 AM in
Fourth Floor - S44 with Judge HIMONAS.

07-19-06 HEARING-402 REDUCTION scheduled on July 28, 2006 at 09:00 AM in
Fourth Floor - S44 with Judge HIMONAS.

07-19-06 Notice - NOTICE for Case 971900070 ID 6684935
HEARING-402 REDUCTION.

Date: 7/28/2006

Time: 09:00 a.m.

Location: Fourth Floor - S44
Third District Court
450 South State
SLC, UT 84114-1860

Before Judge: DENO HIMONAS

The reason for the change is Notice needs to be mailed to parties.

07-19-06 HEARING-402 REDUCTION Cancelled.

07-28-06 Minute Entry - Minutes for Hearing

Judge: DENO HIMONAS

PRESENT

Clerk: patj

Prosecutor: SHUMAN, JON D

Defendant not present

Defendant's Attorney(s): VELEZ, A JASON

Video

Tape Count: 10.02

HEARING

COUNT: 10.02

This case is before the court for a hearing on a motion for 402
reduction.

The motion is argued to the court by respective counsel and
submitted.

The court takes its ruling under advisement.

08-04-06 Filed: State's Opposition to Defendant's Motion for a 402
Reduction

08-07-06 Filed: Court's ruling: the court denies the motion for a 402
reduction

08-30-06 Fee Account created Total Due: 2.25

08-30-06 COPY FEE Payment Received: 2.25

09-22-06 Fee Account created Total Due: 0.25

Fourth Floor - S44 with Judge HIMONAS.
12-15-06 Minute Entry - Minutes for Law and Motion
Judge: DENO HIMONAS
PRESENT
Clerk: wendypg
Prosecutor: NELSON, STEPHEN L
Defendant not present

Video
Tape Count: 11-21

HEARING

Defendant not present - housed Arizona Prison. State has not received a copy of the Motion to Vacate Judgment. Case continued without date.

12-18-06 Minute Entry - RULING - POST CONVICTION RELIEF
Judge: DENO HIMONAS
Having reviewed the Defendant's pro se Motion, the Court is of the opinion that it is in substance, even if not in name, a petition for post-conviction relief. (see complete Ruling in file) copy of ruling sent to all parties.

12-28-06 Filed: Motion for Release of Record and Transcripts
01-02-07 Filed order: Order Releasing Record and Transcripts
Judge dhimonas
Signed December 29, 2006

01-02-07 Filed: State's Memorandum in Opposition to Defendant's Motion to Vacate Judgment and Withdraw Plea

01-18-07 Filed: Petitioner's Reply to Respondent's Memorandum in Support of State's Motion to Dismiss Petition (060920152)

02-16-07 Fee Account created Total Due: 12.50
02-16-07 COPY FEE Payment Received: 12.50
Note: 20.00 cash tendered. 7.50 change given.

Addendum E

1 IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY
2 SALT LAKE COUNTY, STATE OF UTAH
3

4 -o0o-

5 JUAN CARLOS COLIN,

6 Petitioner,

7 vs.

8 STATE OF UTAH,

9 Respondent.

Case No. 06092152

STATE'S MOTION TO DISMISS

10 -o0o-

11 BE IT REMEMBERED that on the 27th day of
12 February, 2007, commencing at the hour of 1:39 p.m., the
13 above-entitled matter came on for hearing before the
14 HONORABLE JOHN PAUL KENNEDY, sitting as Judge in the
15 above-named Court for the purpose of this cause, and that
16 the following proceedings were had.
17

18 -o0o-

19 A P P E A R A N C E S

20 For the Petitioner: Appearing Telephonically
Pro Se

21 For the Respondent: ERIN RILEY
22 Assistant Attorney General
23 160 East 300 South, 6th Floor
Salt Lake City, Utah 84111
UTAH APPELLATE COURTS

24 MAY 18 2007
25

20070211-CA

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

1 MS. RILEY: So, I think that's what has to be dealt
2 with first and I think the issue had to do with some of the
3 allegations that he had made in his declaration and in his
4 petition.

5 THE COURT: It seemed to me that the biggest concern
6 I have, Mr. Colin, is that at one point in your petition, you
7 made a statement to the effect that it had been repre--that--
8 let me just try to recollect exactly what it was. It seemed
9 to me that there was a conflicting statement; one was that no
10 one had said anything to you about the immigration
11 consequences of your plea.

12 MR. COLIN: Correct.

13 THE COURT: And then at one point in your petition,
14 you actually asserted affirmatively that--that--that you were
15 told, as I recall.

16 Can you refresh my recollection on that, Ms. Riley,
17 if you would?

18 MS. RILEY: Your Honor, in the petition, he said
19 several different things. He said they failed to adequately
20 advise him, that he was misled, that they neglected to
21 adequately inform him and that he was misinformed as to the
22 immigration consequences. So, he's kind of, it seems to me,
23 either making two statements or else not clarifying.

24 And then in his declaration attached to the
25 petition, and I have a copy of that for the Court, if you'd

1 like, starting down in Paragraphs 3 and 4, he says that his
2 counsel never discussed with him the possible immigration
3 consequences. So, I think we need to clarify that, whether
4 they never discussed it with him, which he's considering
5 failing to adequately advise him, or if he's alleging that
6 they actively misled him and if so, what he's claiming they
7 said to him.

8 MR. COLIN: (Inaudible) your Honor?

9 THE COURT: Yeah. That's what I would like to hear
10 from you.

11 MR. COLIN: Okay. They--they told me--they--they--
12 my counsel, he--he told me I would not get deported, okay?
13 The other thing he, when I (inaudible) the immigration
14 consequences about, you know, because this, I knew it had to
15 be innocent, meanwhile, he never told me that. He told me I
16 no longer get deported, (inaudible) he handle it, he know--he
17 says he know--I know--immigrant (inaudible) he told me, you
18 know, not going to have any problems, you know, I--I don't
19 want to get deported, because he never--I wanted to make sure
20 that (inaudible) the consequence about the future when I try
21 to be a citizen, you know, or in case they take my--my--my
22 papers away and I can deported for life, you know, he didn't
23 tell me that.

24 When--when he--when I--I say (inaudible) he told me,
25 you know, there's not going to be any problem, okay, I go

1 back--go back to my normal life, you know, I don't want to get
2 deported, okay, understand that, I--I--the issue about the
3 immigration consequences about in--in the future, (inaudible)
4 to be a citizen, I (inaudible) know it's going to affect me,
5 you know, I'd just as soon go to trial, you know, because why
6 you going to try and (inaudible) when I do not try to rape
7 somebody, I try to have a--a normal life, when in the future,
8 you know, I'm going to become a (inaudible) citizen, you know,
9 my home, my family are here, my kids and my wife, you know.

10 THE COURT: Okay. Thank you.

11 When--when did he tell you that you weren't going to
12 be deported? Did he tell you that before you made your plea
13 or after?

14 MR. COLIN: When, you know, because at--at one
15 point, the agreement on it, you know, when he tried to tell
16 me, he explained to me the trial proceedings, you know. He
17 say, you know, if you go to trial, it's going to be hard and
18 maybe you're going to lose, he no tell me exactly what--you
19 know, what the trial is, you know.

20 THE COURT: When--when did he tell--

21 MR. COLIN: (Inaudible) you got a good deal--

22 THE COURT: Mr.--

23 MR. COLIN: --you're going to--you're going to be
24 free, (inaudible) is, you know, you need--you on probation and
25 do probation and the one thing the Court asks you to do and

1 you'll go back to your life, you know.

2 THE COURT: Okay. All right.

3 MR. COLIN: And (inaudible) any kind of problems,
4 you know, you can handle.

5 THE COURT: Mr. Colin, tell me when the lawyer told
6 you you would not be deported. Did he tell you that before
7 you--

8 MR. COLIN: Before I say, you know, before--before
9 and after, you know, he say--

10 THE COURT: Both before and after?

11 MR. COLIN: Uh huh.

12 THE COURT: Okay.

13 MR. COLIN: He say, before he say, take this, it is
14 a good deal, it's not going to be affected with your
15 nationality, it will not be affected (inaudible) and you know,
16 you go back to--it's a good deal, you know.

17 THE COURT: All right.

18 MR. COLIN: You do it, you do it, (inaudible) good
19 thing I do not sign a paper, you're going to get deported, you
20 know, why is--you know, I--

21 THE COURT: Okay. I think we got it. Hold on a
22 second now.

23 MR. COLIN: Okay.

24 THE COURT: Ms. Riley, do you have any questions you
25 would like to ask him?

1 MS. RILEY: No, I did--well, I did have a few
2 additional things to advise the Court about, though.

3 THE COURT: Okay. All right. Thank you. We're--
4 what else would you like to advise the Court, Ms. Riley?

5 MS. RILEY: I think mainly, your Honor, just to
6 clarify the State's position, our motion to dismiss is because
7 the petition is untimely. And he raised basically two issues
8 in that petition, the first dealt with his claim that the plea
9 was not in strict compliance with Rule 11. And our position
10 is that there is no reason at all to proceed on that claim,
11 because there's no reason for why it wasn't raised earlier and
12 it's also not meritorious.

13 And I have looked at the file and it appears that--

14 MR. COLIN: Your Honor, (inaudible) do that--

15 THE COURT: Wait just a minute, Mr. Colin.

16 MS. RILEY: It appears to me, first of all, that
17 Rule 11 was followed, but in fact, in a post-conviction case,
18 even if strict compliance with Rule 11 was not followed,
19 that's not sufficient for post-conviction. He must still
20 establish that there was some kind of Constitutional violation
21 with the plea, which his petition does not do.

22 And second, we are also arguing that the claim about
23 ineffective assistance of counsel dealing with this
24 immigration consequences plea is also untimely. And there's
25 no question that it is untimely. He pled ten years ago, so

1 the question is, does he meet the interests of justice
2 exception? In other words, can he explain why he waited so
3 long to file and in addition, is the claim meritorious?

4 MR. COLIN: Just--

5 MS. RILEY: Now, he's attempted in some ways to say
6 why he waited so long to file, which is he claims that he
7 didn't know there were immigration consequences until
8 immigration came to pick him up. Now, we still need to check
9 the dates on that to make sure that he still filed the same
10 year of that happening. If he did, then we need to look at
11 the meritoriousness of the claim.

12 Claiming that his counsel didn't tell him anything
13 about immigration is not sufficient and he would lose, that is
14 not a meritorious claim, because counsel's not required to
15 give advice on collateral consequences. And--

16 MR. COLIN: The Fifth Amendment say that--

17 MS. RILEY: It--it--

18 THE COURT: Wait just a second, Mr. Colin. You'll
19 have a chance to respond. Okay?

20 MR. COLIN: I'm sorry, your Honor.

21 THE COURT: Go ahead, Ms. Riley.

22 MS. RILEY: The Federal Courts and the Utah Supreme
23 Court have clearly said that immigration consequences are
24 collateral consequences of a plea; so if they told him nothing
25 about immigration consequences, then there's no bias or no

1 problem.

2 Now, he also was claiming, though, that they did
3 give him--that they misadvised him or told him he would not be
4 deported. In that case, if the Court is inclined to deny the
5 motion to dismiss as untimely, asserting that that may meet
6 the meritoriousness claim, to meet the interests of justice
7 exception, then I believe we would need an evidentiary hearing
8 to call Mr. Quinlan.

9 There's nothing from Mr. Quinlan in the file yet.
10 All we have is statements from Mr. Colin (inaudible) but I
11 could make a proffer for the Court that I have spoken to Mr.
12 Quinlan and that he advised me that he does not remember this
13 case specifically, since it's ten years ago, but that it is
14 not his normal practice and that in fact, he could never
15 recall ever telling anyone charged with a felony that they
16 would not be deportable.

17 So, if the Court denies the motion to dismiss and
18 allows the petition to proceed, I think we need an evidentiary
19 hearing to put on testimony from his trial counsel, Mr.
20 Quinlan, about that issue, as well as statements from Mr.
21 (inaudible)

22 THE COURT: All right. Mr. Colin, it's your turn.

23 MR. COLIN: Okay. Your Honor, then just I want to
24 tell something, you know, it's like I would ask you like that
25 and approach it, you know, because I don't have a law degree,

1 I don't know a lot about law, you know. It's only, you know,
2 what she say, the time has already passed, yeah, because you
3 know, for nine years, I thought everything is--is okay in my
4 life, it's only, you know, in February 15 is--is when I--I
5 realized I made a bad deal, you know, to say that my plea
6 guilt--plead guilty, you know, my plea bargain is when I can--
7 to my--to my house, with no reason just because I have a
8 felony and you know, and--and on May 24 is when the judge
9 order the deportation; yet, you know, I have a--my son is here
10 and in--in the United States, you know, is why I'm trying to
11 take a little step this year, you know, because I don't think
12 it's fair to--to--(inaudible) the petitioner say you have to
13 have the right to buy from you confidence--

14 THE COURT: Do you want to--

15 MR. COLIN: --my confidence is on the (inaudible)
16 when I go to court and I didn't want to take this deal, what
17 is the point, you know, then I get deported; I'd just as soon
18 go to trial and see (inaudible)

19 THE COURT: Okay.

20 MR. COLIN: And I take the deal.

21 THE COURT: All right. And you say that you first
22 learned about this in May of last year?

23 MR. COLIN: You know, they (inaudible) okay, it was
24 as--as--came to my house to pick me up.

25 THE COURT: What year? This year or last year?

1 MR. COLIN: Last year.

2 THE COURT: Okay.

3 MR. COLIN: Last year. And on May 24, I was--I--and
4 I--and my (inaudible) and in Exhibit 1, Petition Exhibit 1 it
5 is I am ordered to remove from United States on May 24th
6 because I'm a--because of this felony.

7 THE COURT: Okay.

8 MR. COLIN: I don't know if you have this
9 attachment.

10 THE COURT: All right. Anything further--

11 MR. COLIN: And that is why I filed this petition
12 that I--I (inaudible) through--in February, when I came to my
13 house and pick me up, you know, I complete (inaudible) from
14 the court for me to do and (inaudible) this year, I--I--I
15 learned about the consequences of this.

16 THE COURT: Okay. All right. Thank you.

17 Anything further from the State?

18 MS. RILEY: Yes, your Honor, I realized I do have
19 one more question for Mr. Colin we need to ask and that is,
20 that in his petition, he said that his counsel, Mr. Johnson
21 and Mr. Quinlan never discussed possible immigration
22 consequences with him. And I need to know if he's alleging
23 that Mr. Johnson ever told him he wouldn't be deported,
24 because Mr. Johnson, his bar status is inactive in Utah, he's
25 apparently moved to Nevada to work. So, I need to know if--if

1 he's also making a claim against Mr. Johnson, whether we also
2 need to contact him or of it's just Mr. Quinlan he's claiming
3 made these statements.

4 THE COURT: Do you understand that question?

5 MR. COLIN: Uh huh. You know--you know, Mr. Quinlan
6 is the one I always talked to, okay. He's the one who
7 represented me. He's supposed to be my counselor.

8 MS. RILEY: It does appear that he was there the
9 majority of the time on the docket. There were other--

10 THE COURT: You don't remember getting an advice
11 from Mr. Johnson, do you?

12 MR. COLIN: As I say, both--both of--what--what I
13 remember is no, (inaudible) told me you will not get deported.
14 And as a consequence--as a consequence, I--you know, I
15 (inaudible) I know when I have a chance because of the felony,
16 okay? That is consequence. See, if--if you are here when--
17 when he told me I will not get deported, so is what I'm trying
18 to do in the interests of justice here, because you know, is
19 why I take the plea bargain because he prom--well, I mean, he
20 not promise, all he--he told me I would not get deported.

21 THE COURT: All right. Thank you, Mr. Colin.

22 MR. COLIN: And your Honor, I'm sorry, you know, I--
23 I tell you before, you know, I'm not--I'm not (inaudible) and
24 the reason that I want to go for this is because my
25 (inaudible) in English, you know, I am kind of nervous, you

1 know.

2 THE COURT: All right. I've got it. Thank you very
3 much.

4 MR. COLIN: I (inaudible) you know, I--I (inaudible)
5 memorize this and everything is in there.

6 THE COURT: All right. Well, what I have in front
7 of me here, it seems to me, is a--first of all, a question
8 with respect to the timeliness of the--of the motion. It
9 seems to me that the motion--or the petition is timely in that
10 he's brought it within one year of the time that he discovered
11 the problem; namely, this issue with respect to the advice he
12 received or didn't receive with respect to deportation. So, I
13 think it's a timely--it's a timely petition in that sense.

14 Secondly, even if it weren't, under Adams, the court
15 was supposed to consider the interests of justice and--and try
16 to determine whether there's merit to the petition. It--it
17 seems to me that the argument that he's making is ineffective
18 assistance of counsel, which really does, in essence, raise a
19 Constitutional issue; so, the question then comes down to
20 whether the cases support the contention that he was denied
21 effective assistance.

22 And as I understand those cases, they turn on the
23 question of whether he was mis-advised or just not advised.
24 If he is told nothing about deportation, then he cannot claim
25 that he was given ineffective assistance. On the other hand,

1 if he was given mis-advice and told, don't worry, you won't be
2 deported, then that would fall into the mis-advice category
3 and would constitute ineffective assistance.

4 In this case, the State has made a proffer that Mr.
5 Quinlan, if called to testify, would testify that he does not
6 remember the specific facts of this case, but that his
7 practice would be normally to adhere to the requirements of--
8 of good--good counsel.

9 Accepting that proffer and giving it the maximum
10 force that I think it could be given, I still don't think it
11 would go to extent of contradicting what I hear over the
12 phone, as Mr. Colin's specific recollection of--of the event
13 and his specific recollection of the event is that he was told
14 he would not be deported and he based his plea on that advice
15 and he would not have pled otherwise, if--if he--or he would
16 not have pled guilty if he had been instructed that there
17 might be immigration consequences, which could lead to his de-
18 -deport--deportation.

19 So, given all of that, I find that the petition has
20 merit and as a result, I'm--I'm going to--I'm going to grant
21 his petition and I'm going to vacate his plea of guilty and
22 leave it to the State as to whether or not they wish to re-
23 file the Information against him and bring the charges anew.

24 So, at this point, Mr. Colin, I am vacating your
25 conviction and allowing you to withdraw your plea and vacating

1 your conviction. Do you understand?

2 MR. COLIN: Your Honor--

3 THE COURT: Do you understand that?

4 MR. COLIN: Thank you, your Honor, you know what--
5 thank you, you know, (inaudible) all my family, all my
6 (inaudible) are here and I--

7 THE COURT: I--I--

8 MR. COLIN: --and I--

9 THE COURT: I understand. I understand what you're
10 saying and appreciate that, but I'm--what I'm going to do in
11 addition is, I'm going to allow the State to prepare the
12 appropriate order and submit that to us. Okay?

13 I don't know how--I don't know how long it'll take
14 to get all of this done, but anyway, that's what we've done
15 here so far. Okay?

16 MR. COLIN: (Inaudible) my case again, huh?

17 THE COURT: Say again?

18 MR. COLIN: So, my case is (Inaudible)

19 THE COURT: It is vacated as of now, but there's
20 going to be a written order and the State will prepare that
21 and it'll probably take some time for the red tape to be
22 processed. Do you understand?

23 MR. COLIN: Okay, your Honor.

24 THE COURT: Okay.

25 MS. RILEY: And your Honor, I do have two additional

1 matters. Is the Court making a ruling on whether the claim
2 concerning the compliance with Rule 11 was timely or not?

3 THE COURT: I don't think I need to rule on that
4 issue at this time, given the ruling that I've made.

5 MS. RILEY: And the second thing, your Honor, is
6 that we would object to the Court ruling on the actual
7 petition today, since we--all we've done--all the State has
8 had the opportunity to do so far is file the motion to
9 dismiss, because it's untimely. If the Court's going to rule
10 on the actual petition, we would ask for an evidentiary
11 hearing to bring Mr. Quinlan in to testify so that his
12 testimony is on the record for appeal.

13 THE COURT: Well, I've given you the maximum benefit
14 of--of your proffer, so I don't know that his testimony would
15 add anything. If you--we can bring him into court and he
16 could testify, but if he's only going to say what you've said,
17 I've already given you credit for that.

18 MS. RILEY: Well, at this point, your Honor, he
19 hasn't had the chance to go back and look at the file to see
20 if there might be notes in there or additional information. I
21 just think it's difficult to appeal simply based on a
22 proffer--

23 (Dial tone in the background)

24 THE COURT: We've lost our guy.

25 MS. RILEY: --without any actual testimony.

1 THE CLERK: Do you want me to get him back again?
2 THE COURT: Yeah. Try and get him back on.
3 THE CLERK: I'm still getting a busy signal.
4 (Inaudible) on that end.
5 Still busy.
6 (Inaudible)
7 THE COURT: Well--
8 (Inaudible)
9 THE COURT: It's a prison.
10 I guess (inaudible)
11 Well, I don't think we need him on the line. I'm
12 just--I'm going to stand by my ruling and with respect to the
13 evidentiary aspect of it, as I say, I've given you credit for
14 what your proffer was and even in the face of that--
15 MS. RILEY: That was pretty short, your Honor.
16 Would the Court consider allowing an affidavit from Mr.
17 Quinlan to be submitted on this matter?
18 THE COURT: File a Rule 60(b) here, or Rule--you
19 know, whatever you want to do; but prepare the order.
20 MS. RILEY: And may we just advise the Court, I
21 don't know if we can reach Mr. Quinlan within five days,
22 (inaudible) the letter will get to the prison, but I don't
23 know if it will get to him within five days, but we will
24 either appeal or re-file the charges, so--just so that that's
25 on the record. Okay?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Okay.

MS. RILEY: Thank you.

THE COURT: Thank you.

(Whereupon, this hearing was concluded.)

* * *

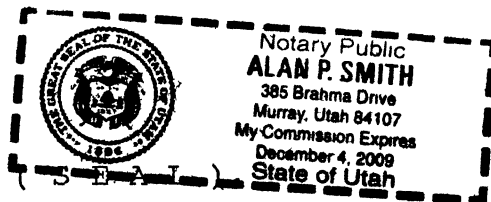
REPORTER'S CERTIFICATE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, Alan P. Smith, Certified Shorthand Reporter, Notary Public and a Certified Court Transcriber of Tape Recorded Court Proceedings within and for the State of Utah, do certify that I received an electronically recorded tape of the within matter and caused the same to be transcribed into typewriting, and that the foregoing pages, numbered from 1 to 18, inclusive, to the best of my knowledge, constitute a full, true and correct transcription, except where it is indicated the Tape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 27th day of March, 2007.



Alan P. Smith
Notary Public

| | | | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>---</p> <p>-deport [1] 14 18</p> <p>-ooo [3] 1 4,14,21</p> <hr/> <p>-0-</p> <p>06092152 [1] 1 7</p> <hr/> <p>-1-</p> <p>1 [3] 11 4,4 19 10</p> <p>11 [4] 7 9,17,18 16 2</p> <p>15 [1] 10 4</p> <p>160 [1] 1 27</p> <p>18 [1] 19 11</p> <p>1:39 [1] 1 16</p> <hr/> <p>-2-</p> <p>2007 [2] 1 16 19 19</p> <p>24 [2] 10 8 11 3</p> <p>24th [1] 11 5</p> <p>27th [1] 1 15</p> <hr/> <p>-3-</p> <p>3 [1] 4 1</p> <p>300 [1] 1 27</p> <hr/> <p>-4-</p> <p>4 [1] 4 1</p> <hr/> <p>-6-</p> <p>60 [1] 17 18</p> <p>6th [1] 1 27</p> <hr/> <p>-8-</p> <p>84111 [1] 1 28</p> <hr/> <p>-A-</p> <p>above-entitled [1] 1 17</p> <p>above-named [1] 1 19</p> <p>Accepting [1] 14 9</p> <p>actively [1] 4 6</p> <p>actual [3] 16 6,10,25</p> <p>Adams [1] 13 14</p> <p>add [1] 16 15</p> <p>addition [2] 8 3 15 11</p> <p>additional [3] 7 2 15 25 16 20</p> <p>adequately [3] 3 19,21 4 5</p> <p>adhere [1] 14 7</p> <p>advice [4] 8 15 12 10 13 11 14 14</p> <p>advise [5] 3 20 4 5 7 2,4 17 20</p> <p>advised [2] 9 12 13 23</p> <p>affect [1] 5 4</p> <p>affected [2] 6 14,15</p> <p>affidavit [1] 17 16</p> | <p>affirmatively [1] 3 14</p> <p>again [3] 15 16,17 17 1</p> <p>against [2] 12 1 14 23</p> <p>ago [2] 7 25 9 13</p> <p>agreement [1] 5 15</p> <p>ahead [1] 8 21</p> <p>Alan [1] 19 5</p> <p>allegations [2] 2 20 3 3</p> <p>alleging [2] 4 5 11 22</p> <p>allow [1] 15 11</p> <p>allowing [2] 14 25 17 16</p> <p>allows [1] 9 18</p> <p>always [1] 12 6</p> <p>Amendment [1] 8 16</p> <p>anew [1] 14 23</p> <p>anyway [1] 15 14</p> <p>appeal [3] 16 12,21 17 24</p> <p>appear [1] 12 8</p> <p>Appearing [1] 1 23</p> <p>appreciate [1] 15 10</p> <p>approach [1] 9 25</p> <p>appropriate [1] 15 12</p> <p>arguing [1] 7 22</p> <p>argument [1] 13 17</p> <p>asks [1] 5 25</p> <p>aspect [1] 17 13</p> <p>asserted [1] 3 14</p> <p>asserting [1] 9 5</p> <p>assistance [5] 7 23 13 18 13 21,25 14 3</p> <p>Assistant [1] 1 26</p> <p>attached [1] 3 24</p> <p>attachment [1] 11 9</p> <p>attempted [1] 8 5</p> <p>attorney [4] 1 26 2 9 19 14,16</p> <p>available [1] 2 18</p> <p>away [1] 4 22</p> <hr/> <p>-B-</p> <p>b [1] 17 18</p> <p>background [1] 16 23</p> <p>bad [1] 10 5</p> <p>bar [1] 11 24</p> <p>bargain [2] 10 6 12 19</p> <p>based [2] 14 14 16 21</p> <p>become [1] 5 8</p> <p>benefit [1] 16 13</p> <p>best [1] 19 11</p> <p>bias [1] 8 25</p> <p>biggest [1] 3 5</p> <p>bring [3] 14 23 16 11,15</p> <p>brought [2] 2 16 13 10</p> <p>busy [2] 17 3,5</p> <p>buy [1] 10 13</p> <hr/> <p>-C-</p> <p>C [2] 1 22 2 1</p> <p>cannot [1] 13 24</p> | <p>CARLOS [1] 1 5</p> <p>case [9] 1 7 4 21 7 17 9 4 9 13 14 4,6 15 16,18</p> <p>cases [2] 13 20,22</p> <p>category [1] 14 2</p> <p>caused [1] 19 9</p> <p>certain [1] 2 20</p> <p>CERTIFICATE [1] 19 1</p> <p>Certified [2] 19 5,6</p> <p>certify [2] 19 8,14</p> <p>chance [3] 8 19 12 15 16 19</p> <p>charged [1] 9 15</p> <p>charges [2] 14 23 17 24</p> <p>check [1] 8 8</p> <p>citizen [3] 4 21 5 4,8</p> <p>City [3] 1 2,28 19 18</p> <p>claim [10] 7 8,10,22 8 3 8 11,14 9 6 12 1 13 24 16 1</p> <p>claiming [4] 4 6 8 12 9 2 12 2</p> <p>claims [1] 8 6</p> <p>clarify [2] 4 3 7 6</p> <p>clarifying [1] 3 23</p> <p>clearly [1] 8 23</p> <p>clerk [3] 17 1,3 19 15</p> <p>closer [1] 2 12</p> <p>Colin [46] 1 5 2 4,6 3 6 3 12 4 8,11 5 14,21,23 6 3,5,8,11,13,18,23 7 14 7 15 8 4,16,18,20 9 10 9 22,23 10 15,20,23 11 1 11 3,8,11,19 12 5,12,21 12 22 13 4 14 24 15 2,4 15 8,16,18,23</p> <p>Colin's [1] 14 12</p> <p>collateral [2] 8 15,24</p> <p>commencing [1] 1 16</p> <p>complete [1] 11 13</p> <p>compliance [3] 7 9,18 16 2</p> <p>concern [1] 3 5</p> <p>concerning [1] 16 2</p> <p>concluded [1] 18 4</p> <p>confidence [2] 10 13,15</p> <p>conflicting [1] 3 9</p> <p>consequence [4] 4 20 12 14,14,16</p> <p>consequences [14] 3 11 3 22 4 3,14 5 3 7 24 8 7 8 15,23,24,25 11 15,22 14 17</p> <p>consider [3] 2 14 13 15 17 16</p> <p>considering [1] 4 4</p> <p>constitute [2] 14 3 19 11</p> <p>Constitutional [2] 7 20 13 19</p> <p>contact [1] 12 2</p> <p>contention [1] 13 20</p> <p>contradicting [1] 14 11</p> | <p>conviction [2] 14 25 15 1</p> <p>copy [1] 3 25</p> <p>correct [2] 3 12 19 12</p> <p>correctly [1] 2 21</p> <p>counsel [9] 4 2,12 7 23 8 12 9 19 11 20 13 18 14 8 19 14</p> <p>counsel's [1] 8 14</p> <p>counselor [1] 12 7</p> <p>COUNTY [2] 1 3 19 4</p> <p>court [72] 1 2,19 2 3,7 2 11,14,25 3 5,13,25 4 9 5 10,20,22,25 6 2,5,10 6 12,17,21,24 7 2,3,4,15 8 18,21,23 9 4,11,17,22 10 14,16,19,21,25 11 2 11 7,10,14,16 12 4,10 12 21 13 2,6,14 15 3,7,9 15 17,19,24 16 1,3,6,13 16 15,24 17 2,7,9,16,18 17 20 18 1,3 19 6,7,13</p> <p>Court's [1] 16 9</p> <p>courtroom [1] 2 7</p> <p>Courts [1] 8 22</p> <p>credit [2] 16 17 17 13</p> <hr/> <p>-D-</p> <p>D [1] 2 1</p> <p>Dated [1] 19 18</p> <p>dates [1] 8 9</p> <p>days [2] 17 21,23</p> <p>de [1] 14 17</p> <p>deal [6] 5 21 6 14,16 10 5 10 16,20</p> <p>dealing [1] 7 23</p> <p>dealt [2] 3 1 7 8</p> <p>declaration [2] 3 3,24</p> <p>degree [1] 9 25</p> <p>denied [1] 13 20</p> <p>denies [1] 9 17</p> <p>deny [1] 9 4</p> <p>deportable [1] 9 16</p> <p>deportation [4] 10 9 13 12,24 14 18</p> <p>deported [16] 4 12,16 4 19,22 5 2,12 6 6,19 9 4 10 17 11 23 12 13,17,20 14 2,14</p> <p>determine [1] 13 16</p> <p>Dial [1] 16 23</p> <p>different [1] 3 19</p> <p>difficult [1] 16 21</p> <p>discovered [1] 13 10</p> <p>discussed [3] 4 2,4 11 21</p> <p>dismiss [6] 1 9 2 24 7 6 9 5,17 16 9</p> <p>DISTRICT [1] 1 2</p> <p>docket [1] 12 9</p> <p>done [3] 15 14,14 16 7</p> <p>down [2] 4 1 13 19</p> <hr/> <p>-E-</p> | <p>E [5] 1 22,22 2 1,1 19 22</p> <p>East [1] 1 27</p> <p>effect [1] 3 7</p> <p>effective [1] 13 21</p> <p>either [5] 3 23 17 24 19 15,16,16</p> <p>electronically [1] 19 8</p> <p>end [1] 17 4</p> <p>English [1] 12 25</p> <p>Erin [2] 1 25 2 9</p> <p>essence [1] 13 18</p> <p>essentially [1] 2 22</p> <p>establish [1] 7 20</p> <p>event [3] 14 12,13 19 17</p> <p>evidentiary [4] 9 7,18 16 10 17 13</p> <p>exactly [2] 3 8 5 18</p> <p>except [1] 19 12</p> <p>exception [2] 8 2 9 7</p> <p>Exhibit [2] 11 4,4</p> <p>explain [1] 8 2</p> <p>explained [1] 5 16</p> <p>extent [1] 14 11</p> <hr/> <p>-F-</p> <p>face [1] 17 14</p> <p>fact [2] 7 17 9 14</p> <p>facts [1] 14 6</p> <p>failed [1] 3 19</p> <p>failing [1] 4 5</p> <p>fair [1] 10 12</p> <p>fall [1] 14 2</p> <p>family [2] 5 9 15 5</p> <p>far [2] 15 15 16 8</p> <p>February [3] 1 16 10 4 11 12</p> <p>Federal [1] 8 22</p> <p>felony [4] 9 15 10 8 11 6 12 15</p> <p>few [1] 7 1</p> <p>Fifth [1] 8 16</p> <p>file [8] 7 13 8 3,6 9 9 14 23 16 8,19 17 18</p> <p>filed [5] 2 15,22,24 8 9 11 11</p> <p>first [5] 3 2 7 8,16 10 21 13 7</p> <p>five [2] 17 21,23</p> <p>Floor [1] 1 27</p> <p>followed [2] 7 17,18</p> <p>following [1] 1 20</p> <p>force [1] 14 10</p> <p>foregoing [1] 19 10</p> <p>free [1] 5 24</p> <p>front [1] 13 6</p> <p>full [1] 19 11</p> <p>future [3] 4 20 5 3,7</p> <hr/> <p>-G-</p> <p>G [1] 2 1</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | | | | | | | | | | | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| General [1] 1 26 General's [1] 2 9 given [8] 13 25 14 1,10 14 19 16 4,13,17 17 13 giving [1] 14 9 good [6] 5 21 6 14,16,18 14 8,8 grant [1] 14 20 guess [1] 17 10 guilt [1] 10 6 guilty [3] 10 6 14 16,21 guy [1] 16 24 | <hr/> -J- <hr/> JOHN [1] 1 18 Johnson [5] 11 20,23,24 12 1,11 Juan [2] 1 5 2 4 judge [2] 1 18 10 8 JUDICIAL [1] 1 2 justice [4] 8 1 9 6 12 18 13 15 | <hr/> -K- <hr/> KENNEDY [1] 1 18 kids [1] 5 9 kind [4] 3 22 6 3 7 20 12 25 knew [1] 4 14 knowledge [1] 19 11 | <hr/> -L- <hr/> L [1] 19 22 Lake [5] 1 2,3,28 19 4 19 18 last [5] 2 17 10 22,25 11 1,3 law [2] 9 25 10 1 lawyer [1] 6 5 lead [1] 14 17 learned [2] 10 22 11 15 leave [1] 14 22 letter [1] 17 22 life [5] 4 22 5 1,7 6 1 10 4 line [1] 17 11 longer [1] 4 16 look [2] 8 10 16 19 looked [1] 7 13 lose [2] 5 18 8 13 lost [1] 16 24 | <hr/> -M- <hr/> majority [1] 12 9 March [1] 19 19 matter [5] 1 17 2 3,14 17 17 19 9 matters [2] 2 16 16 1 maximum [2] 14 9 16 13 may [6] 9 5 10 8,22 11 3 11 5 17 20 mean [1] 12 19 meanwhile [1] 4 15 meet [3] 8 1 9 5,6 memorize [1] 13 5 merit [2] 13 16 14 20 meritorious [3] 7 12 8 3 8 14 meritoriousness [2] 8 11 9 6 merits [1] 2 23 might [2] 14 17 16 20 | <hr/> -N- <hr/> N [2] 1 22 2 1 namely [1] 13 11 nationality [1] 6 15 need [13] 2 16 4 3 5 24 8 8,10 9 7,18 11 19,22 11 25 12 2 16 3 17 11 neglected [1] 3 20 nervous [1] 12 25 Nevada [1] 11 25 never [6] 4 2,4,15,19 9 14 11 21 nine [1] 10 3 normal [3] 5 1,7 9 14 normally [1] 14 7 Notary [2] 19 6,21 notes [1] 16 20 nothing [3] 8 24 9 9 13 24 now [5] 6 22 8 5,8 9 2 15 19 numbered [1] 19 10 | <hr/> -O- <hr/> O [1] 2 1 object [1] 16 6 Office [1] 2 10 officially [1] 2 19 one [10] 3 6,9,10,13 5 14 5 25 11 19 12 6,6 13 10 opportunity [1] 16 8 order [4] 10 9 15 12,20 17 19 ordered [1] 11 5 otherwise [2] 14 15 19 16 | <hr/> -P- <hr/> P [4] 1 22,22 2 1 19 5 p.m [1] 1 16 pages [1] 19 10 paper [1] 6 19 papers [1] 4 22 Paragraphs [1] 4 1 party [3] 19 15,16,16 | passed [1] 10 2 PAUL [1] 1 18 petition [23] 2 4,15,20 2 23 3 4,6,13,18,25 7 7 7 8,21 9 18 11 4,11,20 13 9,13,16 14 19,21 16 7 16 10 petitioner [4] 1 7,23 2 18 10 12 phone [3] 2 5,12 14 12 pick [3] 8 8 10 24 11 13 plea [12] 3 11 5 12 7 8 7 21,24 8 24 10 5,6 12 19 14 14,21,25 plead [1] 10 6 pled [3] 7 25 14 15,16 point [6] 3 6,13 5 15 10 17 14 24 16 18 position [2] 7 6,9 possible [2] 4 2 11 21 post-conviction [2] 7 17,19 practice [2] 9 14 14 7 prepare [3] 15 11,20 17 19 pretty [1] 17 15 prison [2] 17 9,22 Pro [1] 1 24 probation [2] 5 24,25 problem [3] 4 25 9 1 13 11 problems [2] 4 18 6 3 proceed [2] 7 10 9 18 proceedings [4] 1 20 5 16 19 7,13 processed [1] 15 22 proffer [6] 9 11 14 4,9 16 14,22 17 14 prom [1] 12 19 promise [1] 12 20 Public [2] 19 6,21 purpose [1] 1 19 put [1] 9 19 | <hr/> -Q- <hr/> questions [1] 6 24 Quinlan [11] 9 8,9,12 9 20 11 21 12 2,5 14 5 16 11 17 17,21 | <hr/> -R- <hr/> R [2] 1 22 2 1 raise [1] 13 18 raised [2] 7 7,11 rape [1] 5 6 re [1] 14 22 re-file [1] 17 24 reach [1] 17 21 realized [2] 10 5 11 18 really [1] 13 18 reason [4] 7 10,11 10 7 12 24 | received [1] 13 12 receive [2] 13 12 19 8 recollect [1] 3 8 recollection [3] 3 16 14 12,13 record [2] 16 12 17 25 recorded [3] 19 7,8,13 red [1] 15 21 refresh [1] 3 16 relating [1] 2 15 relative [1] 19 15 remember [5] 2 21 9 12 12 10,13 14 6 REMEMBERED [1] 1 15 remove [1] 11 5 Reporter [1] 19 5 REPORTER'S [1] 19 1 repre [1] 3 7 represented [2] 2 18 12 7 representing [1] 2 8 required [1] 8 14 requirements [1] 14 7 respect [5] 2 19 13 8,11 13 12 17 12 respond [1] 8 19 responded [1] 2 23 Respondent [2] 1 13,25 result [1] 14 20 right [13] 2 3,25 6 2,17 7 3 9 22 10 13,21 11 10 11 16 12 21 13 2,6 Riley [28] 1 25 2 9,9,11 2 13,21,22 3 1,16,18 6 24 7 1,4,5,16 8 5,17 8 21,22 11 18 12 8 15 25 16 5,18,25 17 15,20 18 2 rule [8] 7 9,17,18 16 2,3 16 9 17 18,18 ruling [4] 16 1,4,6 17 12 | <hr/> -S- <hr/> S [3] 1 22 2 1 19 22 Salt [5] 1 2,3,28 19 4,18 says [2] 4 1,17 Se [1] 1 24 second [4] 6 22 7 22 8 18 16 5 Secondly [1] 13 14 see [3] 10 18 12 16 16 19 sense [1] 13 13 set [1] 2 14 several [1] 3 19 short [1] 17 15 Shorthand [1] 19 5 sign [1] 6 19 signal [1] 17 3 simply [2] 2 23 16 21 sitting [1] 1 18 Smith [1] 19 5 son [1] 10 9 |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | | | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|--|
| <p>soon [2] 5:5 10:17 sorry [2] 8:20 12:22 South [1] 1:27 specific [3] 14:6,12,13 specifically [1] 9:13 spoken [1] 9:11 ss [1] 19:3 stand [1] 17:12 starting [1] 4:1 State [11] 1:3,11 2:8 11:17 14:4,22 15:11,20 16:7 19:2,7 State's [2] 1:9 7:6 statement [2] 3:7,9 statements [4] 3:23 9:10 9:20 12:3 States [2] 10:10 11:5 status [1] 11:24 stenographer [1] 19:15 step [1] 10:11 still [6] 7:19 8:8,9 14:10 17:3,5 strict [2] 7:9,18 submit [1] 15:12 submitted [1] 17:17 sufficient [2] 7:19 8:13 suit [1] 19:17 support [1] 13:20 supposed [2] 12:7 13:15 Supreme [1] 8:22</p> <hr/> <p>-T-</p> <hr/> <p>tape [4] 15:21 19:6,8,13 Telephonically [1] 1:23 telling [1] 9:15 ten [2] 7:25 9:13 testify [4] 14:5,5 16:11 16:16 testimony [4] 9:19 16:12 16:14,25 thank [10] 2:13 5:10 7:3 11:16 12:21 13:2 15:4,5 18:2,3 THIRD [1] 1:2 thought [1] 10:3 through [1] 11:12 timeliness [1] 13:8 timely [4] 13:9,13,13 16:2 today [2] 2:14 16:7 tone [1] 16:23 transcribed [1] 19:9 Transcriber [1] 19:6 transcription [1] 19:12 trial [6] 5:5,16,17,19 9:19 10:18 tried [1] 5:15 true [1] 19:12 try [7] 3:8 4:20 5:6,6,7 13:15 17:2 trying [2] 10:10 12:17</p> | <p>turn [2] 9:22 13:22 two [3] 3:23 7:7 15:25 typewriting [1] 19:10</p> <hr/> <p>-U-</p> <hr/> <p>under [1] 13:14 understand [8] 5:2 12:4 13:22 15:1,3,9,9,22 United [2] 10:10 11:5 untimely [5] 7:7,24,25 9:5 16:9 up [6] 2:12,16,19 8:8 10:24 11:13 Utah [8] 1:3,11,28 8:22 11:24 19:2,7,18</p> <hr/> <p>-V-</p> <hr/> <p>vacate [1] 14:21 vacated [1] 15:19 vacating [2] 14:24,25 violation [1] 7:20 vs [1] 1:9</p> <hr/> <p>-W-</p> <hr/> <p>Wait [2] 7:15 8:18 waited [2] 8:2,6 ways [1] 8:5 welcome [1] 2:12 wife [1] 5:9 wish [1] 14:22 withdraw [1] 14:25 within [5] 13:10 17:21 17:23 19:7,9 without [1] 16:25 words [1] 8:2 worry [1] 14:1 written [1] 15:20</p> <hr/> <p>-Y-</p> <hr/> <p>year [10] 8:10 10:11,22 10:25,25,25 11:1,3,14 13.10 years [3] 7:25 9:13 10:3 yet [2] 9:9 10:9</p> <hr/> <p>-`-</p> <hr/> <p>[1] 1:1</p> | | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|--|

Addendum F

060920152

JUDICIAL DISTRICT

FEB 27 2007

SALT LAKE COUNTY

By
Deputy Clerk

DECLARATION OF: JUAN CARLOS COLIN

I, Juan Carlos Colin declare as follows:

1. I am the sole Defendant in: State of Utah v. Juan Carlos Colin, No. 971900070. I have personal knowledge of the facts set forth therein for which I entered a guilty plea.
2. On February 28, 1997, upon the advice of appointed public defenders, Kevin L. Johnson and Paul C. Quinlan, I agreed to enter a plea of guilty to a violation of Utah Code Ann. § 76-5-404, Attempted Forcible Sex Abuse, in exchange of suspension of sentence with 36 months under supervision [probation].
3. During the entire time that Mr. Johnson and Mr. Quinlan represented me, they never discussed with me the possible immigration consequences that would attach to my guilty plea.
4. Mr. Johnson and Mr. Quinlan did speak with me about the time that the Court would suspended and the period of time that I would serve in probation, but they never said nothing about possible consequences with immigration authorities if I accepted the plea.
5. Specifically, my attorneys never discussed with me any of the following:
 - a. That I should consult with an immigration attorney before entering my plea since I was not a U.S. citizen;
 - b. That my plea would have potential immigration immigration consequences as deportation, exclusion from admission to the United States, or denial of naturalization as a direct consequence of my plea and subsequent conviction;
 - c. That I should consider the protection of my legal status in the United States as a factor in the negotiations of a plea agreement;
 - d. That the guilty plea I was entering into would constitute a conviction for an aggravated felony under federal immigration laws and would make me ineligible for certain forms of immigration rights such as, Cancellation of Removal as well Asylum and even Voluntary Departure;
 - e. That my plea would make me PERMANENTLY EXCLUDABLE from the United States and I would risk criminal prosecution and imprisonment of up to 20 years if I entered the U.S. illegally after being deported as an aggravated felon.

47

6. As a result of the my guilty plea, I am now permanently ineligible to naturalize, I have lost my status as a lawful permanent resident status and I am subject to being removed-deported from the United States without the possibility of re-entering legally in the future.

7. I did not know of the abovementioned immigration consequences until the Department of Homeland Security commenced deportation proceedings against me based in the present action which is the ground for my deportation.


8. If I had known about the immigration consequences of my guilty plea, I would have never agreed to enter it since they are so much more serious consequences than the actual penal consequences. I would have been willing to accept a plea agreement subjecting me to additional time in custody if it meant protecting my legal status and the privilege to remain in the United States with my family or I would have taken my case to trial since I feel and the record corroborate that I had an extremely triable case from the beginning.

Given the devastation this conviction has visited upon my family and myself, I entreaty the Court to vacate the judgment of the present case because such conviction is a direct result of my plea entered in ignorance of the terrible immigration consequences that I currently condemn.

I declare under penalty of perjury under the laws of the State of Utah that the foregoing is true and correct.

Respectfully Submitted,

Dated: November 1, 2006.



Juan Carlos Colin
A90 711 402/Delta 317
Eloy Detention Center
1705 East Hanna Road
Eloy, Arizona 85231

Petitioner/Defendant pro se,
In ICE Custody.



CERTIFICATE OF SERVICE

I, Juan Carlos Colin, A#90 711 402, hereby certify that the original and two (2) copies of the Defendant's Memorandum in Support of Motion to Vacate Judgment and Withdraw Plea in the case of State of Utah v. Juan Carlos Colin, No. 971900070, was served upon the Third Judicial District Court, Utah County, State of Utah via U.S. Mail on this 1th day of November, 2006.

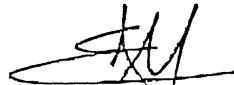
Additionally, one (1) true and correct copy of the attached was served upon the District Attorney's Office in separated sealed envelope with proper amount of postage thereon via U.S. Mail on this 1th day of November, 2006 as follows:

THIRD JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH
CLERK'S OFFICE
450 S STATE STREET
SALT LAKE CITY, UT 84111

DISTRICT ATTORNEY'S OFFICE
UTAH COUNTY, STATE OF UTAH
111 E BROADWAY, SUITE 400
SALT LAKE CITY, UT 84111

Respectfully Submitted,

Dated: November 1, 2006.



Juan Carlos Colin
A90-711 402/Delta 317
Eloy Detention Center
1705 East Hanna Road
Eloy, AZ 85231

Petitioner/Defendant pro se,
In ICE Custody.

49

Addendum G

Not Reported in P.2d, 1998 WL 1758373 (Utah App.)
(Cite as: Not Reported in P.2d)

Odak v. Odak
Utah App., 1998.
Only the Westlaw citation is currently available.
UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Utah.
Peggy B. ODAK, Plaintiff and Appellee,
v.
Perry D. ODAK, Defendant and Appellant.
No. 981133-CA.

Nov. 13, 1998.

Stephen B. Mitchell and Richard D. Burbidge, Salt
Lake City, for appellant.
Ann L. Wassermann, Salt Lake City, for appellee.

Before DAVIS, BENCH, and GREENWOOD, JJ.

MEMORANDUM DECISION

PER CURIAM.

*1 Appellant appeals from a final order of the district court denying his motion for a contempt order against appellee. We affirm.

Appellant and appellee were divorced by entry of a decree of divorce in 1992. The decree ordered "that the parties not in any way denigrate each other publicly or privately so as to negatively affect each other's personal, professional or business relations, harm each other's professional reputations, or reduce each other's earning power." Appellant filed a motion for a contempt order against appellee for violating this provision, which motion was denied.

On appeal, appellant argues that the district court erred by implicitly requiring appellant to prove defamation rather than denigration, and by proceeding by way of proffer rather than hearing evidence. When the evidence consists only of proffers to the district court, the appellate court is in as good a position to review the proffer as was the

district court, because no assessment of witness credibility occurred, and affords no deference to the district court. *Hamby v. Jacobson*, 769 P.2d 273, 278 (Utah Ct.App.1989). A careful review of the proffers recorded in the transcript reveals that the district court did not err in denying appellant's motion.

Appellant points out that the district court denied appellant's motion based upon appellant's failure to prove defamation. The divorce decree prohibits denigration, not defamation. However, the decree only prohibits denigrating conduct that negatively affects the other's personal, professional or business relations, harms the other's professional reputation, or reduces the other's earning power. Appellant failed to proffer any evidence that the statements made by appellee negatively affected his personal, professional or business relations, harmed his professional reputation, or reduced his earning power.

It is well-settled that an appellate court may affirm a judgment of a lower court on a ground other than that relied on by that court. *Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988) (citations omitted). Accordingly, this court affirms the district court's denial of appellant's motion on the basis that appellant failed to proffer sufficient evidence to demonstrate that appellee denigrated appellant to appellant's harm in violation of the decree.

With respect to appellant's contention that the district court erroneously relied upon proffers in making its ruling, it is clear from the record that appellant failed to object to, and, indeed, consented to, the court's reliance on proffers. Both parties expressly submitted the issue for ruling after the proffers were made. Appellant has therefore waived this issue. See *Montano v. Third Dist. Court, Salt Lake Cty.*, 934 P.2d 1156, 1157 (Utah Ct.App.1997) (failure to request evidentiary hearing results in waiver of issue of whether the procedure employed violated due process rights).

Not Reported in P.2d

Page 2

Not Reported in P.2d, 1998 WL 1758373 (Utah App.)
(Cite as: Not Reported in P.2d)

We affirm the district court. Appellee's request for attorney fees on appeal is denied.

Utah App., 1998.

Odak v. Odak

Not Reported in P.2d, 1998 WL 1758373 (Utah App.)

END OF DOCUMENT