

2007

# Juan Carlos Colin v. State of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JUAN CARLOS COLIN, :

Petitioner/Appellee, : Case No. 20070211-CA

v. :

STATE OF UTAH, :

Respondent/Appellant. :

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REPLY BRIEF OF APPELLANT

---

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

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**REPLY BRIEF OF APPELLANT**

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**I. THE STATE IS NOT APPEALING DENIAL OF THE MOTION TO DISMISS**

**(Reply to Point A)**

Petitioner Colin spends the majority of his brief arguing that his post-conviction petition was timely (Br. of appellee at 3-9). The post-conviction court denied the State's motion to dismiss as to the timeliness of the issue concerning immigration consequences. The post-conviction court did not rule on whether the Rule 11 claim was timely. However, as pointed out in the State's opening brief on page 6, footnote 8, the State is not appealing the post-conviction court's denial of the motion to dismiss. The State's appellate brief asserts that the district court erroneously granted the petition for post-conviction relief. It does not challenge denial of the motion to dismiss.

## **II. THE DISTRICT COURT ERRONEOUSLY GRANTED THE PETITION FOR POST-CONVICTION RELIEF**

### **(Reply to Point B)**

Petitioner asserts that his “counsel was aware that Petitioner was not a U.S. citizen, had lawful status in the United States and was concerned about the potentially adverse immigration consequences he might face because of the criminal case. . . . defense counsel failed to investigate the immigration consequences of his proposed plea and misadvised his client about those consequences.” (Br. of appellee at 12). Although petitioner makes these assertions in his brief, he does not cite to the record, perhaps because the record contains no facts that would support these allegations.

Nothing in the record indicates whether counsel was aware that petitioner was not a U.S. citizen, or whether he knew if petitioner was lawfully in the United States. Similarly, nothing in the record indicates whether counsel was aware of petitioner’s concern about potentially adverse immigration consequences. The record is silent on these questions because the court did not allow the State to respond on the merits to the petitioner’s allegations, either in the form of a responsive pleading or the presentation of evidence.

Instead the post-conviction court granted the petition based on petitioner’s unsworn and unopposed allegations. Specifically, the court relied on a brief proffer based on counsel for the State’s telephone conversation with one of petitioner’s trial counsel. That telephone conversation occurred before counsel had reviewed the file, before the State had completed

its discovery, before the State was able to speak to trial co-counsel, and before the State responded on the merits to the petition (R98:2, 9, 11, 16).


The State was denied its day in court. The district court erred in granting the post-conviction petition at a hearing on a motion to dismiss. The petition should not have been granted without allowing the State to respond on the merits, to cross-examine the petitioner, and to present its own evidence and testimony. The trial court also erred because it failed to evaluate or consider the credibility of the witnesses (since it refused to allow the State to present any witnesses). In addition, the district court erred in ruling that trial counsel was ineffective without finding prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984).

### CONCLUSION

This Court should reverse the district court's ruling granting the petition for post-conviction relief.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of October, 2007.

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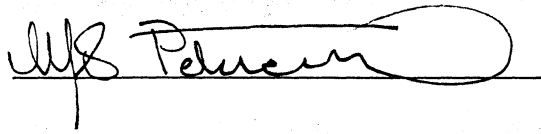


**MAILING CERTIFICATE**

I hereby certify that on this 31 day of October, 2007, I mailed, postage prepaid, two accurate copies of the foregoing Appellant's Reply Brief to:

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(Petitioner/appellee pro se)

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