

1997

The State of Utah v. John Peter Kiriluk : Response to Petition for Rehearing

Utah Court of Appeals

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Jan Graham; Attorney General; Attorney for Appellee.

Linda M. Jones; Salt Lake Legal Defender Association; Attorney for Appellant.

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FILED

Utah Court of Appeals

JAN 27 1999

Julia D'Alesandro
Clerk of the Court

LINDA M. JONES (5497)
Attorney for Defendant/Respondent
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 E. 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE UTAH COURT OF APPEALS

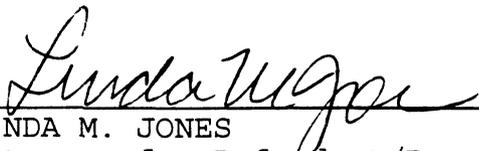
THE STATE OF UTAH,	:	
	:	
Plaintiff/Petitioner,	:	
	:	
v.	:	
	:	
JOHN PETER KIRILUK,	:	Case No. 970200-CA
	:	Priority No. 2
Defendant/Respondent.	:	

ANSWER TO PETITION FOR REHEARING

The state is seeking rehearing in connection with this Court's ruling in State v. Kiriluk, 358 Utah Adv. Rep. 10 (Utah App. 1998), "to delete dicta in the fourth sentence in the second full paragraph on page 5" of the slip opinion. See Petition for Rehearing, dated January 6, 1999, at p. 1. Respondent John Peter Kiriluk objects to the Petition for Rehearing for the reasons set forth in Respondent's "Memorandum in Opposition to State's 'Motion to Grant Petition for Rehearing Filed Out of Time,'" a copy of which is attached hereto.

SUBMITTED this 27th day of January, 1999.

APPEALS



 LINDA M. JONES
 Attorney for Defendant/Respondent

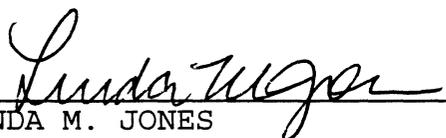
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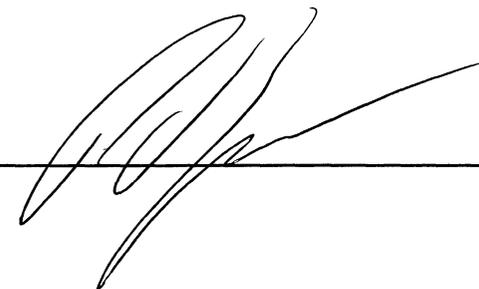
DOCKET NO. 970200-CA

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand-delivered an original and six copies of the foregoing to the Utah Court of Appeals, 450 S. State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 E. 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 27th day of January, 1999.


LINDA M. JONES

DELIVERED copies to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 27th day of January, 1999.



Linda M. Jones (#5497)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444
Attorneys for John P. Kiriluk

FILED
Utah Court of Appeals
JAN 15 1999
Julia D'Alessandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	MEMORANDUM IN OPPOSITION
Plaintiff/Appellee,	:	TO STATE'S "MOTION TO GRANT
	:	PETITION FOR REHEARING FILED
v.	:	OUT OF TIME"
	:	
JOHN PETER KIRILUK,	:	Case No. 970200-CA
Defendant/Appellant.	:	Priority No. 2
	:	

Defendant/Appellant John Peter Kiriluk ("Kiriluk"), by and through his counsel, hereby submits this memorandum in opposition to the state's "Motion to Grant Petition for Rehearing Filed out of Time" ("Motion").¹

THE STATE'S PETITION FOR REHEARING SHOULD BE REJECTED BY THIS COURT AS UNTIMELY.

As set forth in the Motion, this Court issued its decision in the above-entitled matter on December 10, 1998. See State v. Kiriluk, 358 Utah Adv. Rep. 10 (Utah App. 1998). On January 6, 1999, the state filed a Petition for Rehearing. The Petition is untimely and should be rejected for the following reasons.

¹ Although the title of the Motion suggests that the state is asking the Court "to grant" the petition for rehearing filed on January 6, 1999, the state is not entitled to have the Court "grant" the petition unless and until this Court has given Kiriluk the opportunity to respond to the merits of the petition. Utah R. App. P. 35(a) ("A petition for rehearing will not be granted in the absence of a request for an answer"). The title of the Motion is confusing. It appears from the text of the Motion that the state is actually seeking leave to file the untimely Petition.

1. ACCORDING TO RULE 35(d), THIS COURT WILL NOT RECEIVE THE UNTIMELY PETITION.

Pursuant to Rule 35(a), Utah Rules of Appellate Procedure, "[a] petition for rehearing may be filed with the clerk within 14 days after the entry of the decision of the court, unless the time is shortened or enlarged by order." The rule also provides that "Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk." Utah R. App. P. 35(d) (1998) (emphasis added).

In order to be timely, the state was required to file the Petition for Rehearing on or before December 24, 1998. Utah R. App. P. 35(a). The state filed the petition 13 days after the time for filing had lapsed. (See Petition for Rehearing, dated January 6, 1999.) According to the plain language of Rule 35(d) this Court will not receive the untimely filing. The Petition should be rejected on that basis.

2. THE RULES SUPPORT THE DETERMINATION THAT THE PETITION FOR REHEARING MUST BE TIMELY FILED IN ORDER FOR THIS COURT TO RETAIN JURISDICTION OVER THE SUBSTANTIVE MATTERS.

Rule 35(d) supports the determination that this Court will retain jurisdiction over the substantive matters of the case for the purpose of rehearing, so long as the party requesting the rehearing has filed a petition within the time prescribed by the rules. See Utah R. App. P. 35(a), (d) and 22(b)(3) (1998). That is, where a party fails to properly seek an extension of time for filing a petition for rehearing or fails to file the petition

within the 14-day period, this Court will not accept the filing concerning the substantive issues. This Court's jurisdiction over the substantive matters reasonably terminates at that point.

Rule 48(c), Utah Rules of Appellate Procedure, further supports that in the context of this case this Court may retain jurisdiction over the substantive issues so long as the petitioner has filed a timely petition for rehearing and/or request for extension of time. Rule 48(c) provides that "[i]f a petition for rehearing is timely filed by any party, the time for filing the petition for a writ of certiorari for all parties runs from the date of the denial of rehearing or of the entry of a subsequent decision entered upon the rehearing." Utah R. App. P. 48(c) (1998) (emphasis added).

Rule 48 may not be suspended. See Utah R. App. P. 2 (1998). Thus, in the context of this case an untimely filing under Rule 35 must preclude either rehearing in this Court, or review on certiorari under Rule 48 in the supreme court. Any other interpretation of the rules would allow this Court and the supreme court in a specific case to review simultaneously the orders of this Court (via petition for rehearing in this Court, and via petition for certiorari review in the supreme court).

The state apparently is aware of the jurisdictional quagmire presented by its untimely filing of the Petition for Rehearing. At the same time that the state filed the untimely Petition, it filed with the Utah Supreme Court a request for an extension of time for filing a petition for writ of certiorari under Rule 48.

The state in this case is required to file its petition for writ of certiorari in the supreme court on or before February 8, 1999. That deadline expires in 3 weeks. In the event this Court requests that Kiriluk answer the state's petition for rehearing, Rule 35(a) provides him with 14 days to respond. Thus, the state has created a situation where this Court may be considering the merits of the petition for rehearing in this matter, while the supreme court simultaneously is considering the merits of a petition for writ of certiorari under Rule 48.

In effect, the state has sought to place the courts in the position of sharing jurisdiction over review/rehearing of the matter. Under these circumstances, Rules 48(c) and 35(d) considered together compel the determination that this Court may not retain jurisdiction over the substantive issues since the state has filed an untimely petition for rehearing. See Utah R. App. P. 35(d). Any other result creates jurisdictional problems.

3. THE STATE HAS FAILED TO IDENTIFY "EXTRAORDINARY CAUSE" FOR SUSPENDING THE APPELLATE RULES IN THIS MATTER.

Pursuant to Rule 2, Utah Rules of Appellate Procedure, this Court may suspend the provisions of the appellate rules for "extraordinary cause." The state in this matter has asked this Court to "suspend the timeliness requirements of Rule 35(a), Utah Rules of Appellate Procedure, and consider the State's Petition for Rehearing in this case." (See "Motion to Grant Petition for Rehearing Filed out of Time," dated January 9, 1999.) The state relies only on the "body of [its] petition" as a basis for

suspending the rules. That is insufficient.

Pursuant to Rule 22, Utah Rules of Appellate Procedure, a motion for an enlargement of time must be "filed prior to the expiration of the time for which the enlargement is sought." Utah R. App. P. 22(b)(3) (1998) (motion for enlargement of time "shall be filed" prior to the expiration of the time for which enlargement is sought). In this case, the state was required to file its motion for enlargement of time for the Petition prior to December 24, 1998; the state did not file the Motion until after it had filed the untimely Petition for Rehearing with this Court. (See Petition for Rehearing, dated January 6, 1999; and "Motion to Grant Petition for Rehearing Filed out of Time," dated January 9, 1999.)² The state has failed to identify why it did not comply with Rules 22(b)(3) and 35(d) by timely requesting an enlargement of time for filing the Petition.

Since the state's Petition for Rehearing may not be received by this Court unless and until the state overcomes the timeliness issue, see Utah R. App. P. 35(d) and 22(b)(3), the state's refusal to identify why it did not timely seek additional time for filing the petition is problematic.

In addition, the state has effectively acknowledged in its Petition that granting the Petition for Rehearing will not have an impact, let alone an "extraordinary" impact, on this case.

²Court records reflect that although the Motion was dated January 9, 1999, the state filed it on January 8, 1999. Kiriluk's counsel, Salt Lake Legal Defender Association, received service of the document on January 12, 1999.

Indeed, the state's Petition seeks a "change" that "will not affect the reasoning or result in this case." (Petition for Rehearing, 5.) Since the issue raised in the Petition does not rise to the level of "extraordinary," the basis for suspending the rules does not rise to the level of "extraordinary cause."

Finally, the state has failed to address how a suspension of Rule 35(a) may be reconciled with the provisions of Rule 48. That is, if this Court were to suspend Rule 35(a) and allow the untimely filing, it is unclear what would become of the petition for writ of certiorari that the state intends to file with the supreme court. See Utah R. App. P. 2 (1998) (court may not suspend requirements of Rule 48). The state apparently anticipates proceeding in that court with a petition while pursuing the Petition for Rehearing here.

The state acknowledges that its recourse in this matter is to seek certiorari review since the Petition for Rehearing was untimely. (See "Motion to Grant Petition for Rehearing Filed out of Time," dated January 9, 1999 ("the state's only recourse is to seek certiorari review in the supreme court").) That is how the state should be required to proceed.

CONCLUSION

For the reasons set forth herein, Kiriluk respectfully

requests that this Court deny the state's Motion and reject the untimely Petition.

DATED: 15th day of January, 1999.


LINDA M. JONES
SALT LAKE LEGAL DEFENDER ASSOCIATION
Attorneys for John P. Kiriluk

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand-delivered an original and 4 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and 1 copy to Marian Decker at the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 15th day of January, 1999.


LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals Court as indicated above this ____ day of January, 1999.

DEPARTMENT OF
JAN 15 1999
V. JONES