

2001

Larry L. Hutchings, Defendant-Appellant, v. State of Utah, Appelle : Reply Brief

Utah Supreme Court

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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

LARRY L. HUTCHINGS,

Defendant-Appellant,

v.

STATE OF UTAH,

Appellee.

Case No. 20010419-SC

REPLY BRIEF OF APPELLANT

FILED
UTAH SUPREME COURT

NOV 27 2002

PAT BARTHOLOMEW
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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

<p>LARRY L. HUTCHINGS,</p> <p style="text-align: center;">Defendant-Appellant,</p> <p style="text-align: center;">v.</p> <p>STATE OF UTAH,</p> <p style="text-align: center;">Appellee.</p>	<p style="text-align: right;">Case No. 20010419-SC</p>
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REPLY BRIEF OF APPELLANT

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SUMMARY

Appellant Larry Hutchings' appeal brief noted numerous violations of state and federal law and procedure regarding the revocation of his probation and subsequent incarceration by Utah's Seventh Judicial District Court. These errors included extradition violations (including failure to obtain a governor's warrant and hold requisite pre-extradition hearings and failure to follow the Uniform Criminal Extradition Act); prosecuting Mr. Hutchings for violations of his alleged probation after he was already sentenced by a New York State court for the same conduct pursuant to the Interstate Compact relating to suspension of probation; failure to commence probation revocation hearings and issue orders within the time frame established by Utah law, and after Mr. Hutchings' probationary period expired; and the like.

The State raises only two responses to Mr. Hutchings' brief. First, that Mr. Hutchings filed two post-conviction petitions, and because this appeal relates to his "second" petition, his claims were either already heard and ruled upon once before—making this "second" petition superfluous— or, any arguments not included in the "first" petition (and hence not addressed) should have been included by Mr. Hutchings and weren't, and shouldn't be considered now. Second, the State claims that because Mr. Hutchings admitted to conduct allegedly constituting a violation of probation at the order to show cause hearing the trial court convened following Mr. Hutchings' extradition, the State argues it was appropriate for the trial court and Court of Appeals to dismiss Mr. Hutchings' post-conviction petition summarily and without a hearing.

As shown below, these arguments are entirely misplaced and non-responsive to the arguments raised in this appeal. Specifically, Mr. Hutchings' "second" petition is simply a refiling—at the State's request—of his "first" petition under Rule 65C rather than Rule 65B of the Utah Rules of Civil Procedure. Mr. Hutchings resisted the State's motion that he refile on grounds that the State would then argue it was a "second" petition. Ultimately this Court agreed with the State and ordered Mr. Hutchings to refile his petition under Rule 65C. The State represented "This Court should dismiss the [Rule 65B] petition. *Petitioner may then refile his petition in the district court under rule 65C.*" (emphasis added). [R. at 337]. That is precisely what occurred, though the State now complains about it. The State simply cannot have it both ways. It cannot get a ruling that Mr. Hutchings' "first" petition be dismissed under Rule 65B to allow a refiling under Rule 65C, and then claim his Rule 65C petition shouldn't be considered on the merits because it is a "second" petition.

Furthermore, it is true that, on advice of counsel that Mr. Hutchings now claims was deficient, Mr. Hutchings told the trial court at an order to show cause hearing that he had not completed sex-offending treatment. However, that statement (which Mr. Hutchings claims can be proven inaccurate) was made *prior* to the trial court's ruling that the procedural errors in his case warranted the appointment of counsel and a hearing on his post-conviction petition. More importantly, the hearing at which it was made was unlawfully convened since, *inter alia*, a New York state court had already dismissed Utah's charge of probation violation that the trial court's OSC was convened for; Mr. Hutchings wasn't properly extradited to be present for that hearing; the hearing was held

outside the time parameters for probation revocation hearings established by Utah Code; and etc. In other words, the statement Mr. Hutchings made is irrelevant because the court didn't have jurisdiction over Mr. Hutchings for purpose of conducting the hearing where his utterance occurred.

In short, the State has not responded at all to any of the procedural and legal errors set forth in Mr. Hutchings' opening brief. Mr. Hutchings should be released forthwith, or alternatively, be given a hearing on his petition for post-conviction relief with the assistance of counsel for the reasons set forth in his appeal brief.

ARGUMENT

I. THE STATE HAS NOT ADDRESSED ANY ISSUE RAISED ON APPEAL

Rather than addressing the merits of Mr. Hutchings' arguments – which have never been addressed by any court – the State takes a stance that contradicts the position it took when it moved this Court to dismiss Mr. Hutchings' Rule 65B Petition for Extraordinary Relief and sought a refiling by Mr. Hutchings under Rule 65C. In that motion, Appellee stated that this Court should dismiss Mr. Hutchings' petition filed under Rule 65B “so that petitioner can file his petition in the proper court” or “transfer the petition to the appropriate district court for post-conviction proceedings under rule 65C.” The State went on to say “ Petitioner *may then refile his petition* in the district court . . .” (emphasis added) [R. at 3337 (attached hereto as Addendum “A”)]. Opposing the motion, Mr. Hutchings sought to avoid the procedural box the State is trying to force him in now, and stated that “any such filing as the State claims in there [sic] motion could only result in a dismissal based on repetitive filings.” [R. at 400 (attached hereto as Addendum “B”)].

Acting on cue, the State now asks this Court to affirm the Court of Appeals' affirmance of the district court's summary dismissal of Mr. Hutchings' Second Petition for Post-Conviction Relief. Appellee argues that because the issues in the second petition were, or could have been, raised in the first petition, summary dismissal was proper. But, it was the State that demanded Mr. Hutchings *refile* his petition under Rule 65C. The State simply cannot have it both ways.

Furthermore, the State fails to recognize that Mr. Hutchings was never represented by counsel in conjunction with the first petition and the issues in that petition were never considered by the trial court – despite the fact that the trial court expressly stated that Mr. Hutchings needed counsel and deserved a hearing on the issues raised therein.

Briefly stated, the State has not addressed a single procedural or legal error raised by Mr. Hutchings in his petition or in this appeal. His assertions, arguments and authorities that he was not extradited properly, that his alleged probation violations were dismissed by a New York Court prior to his extradition, and the like, all stand unrefuted before this Court. The unrefuted arguments before the court at this point include the following:

- i. There is no record of any Governor's warrant having been issued or any pre-extradition hearing having occurred prior to the extradition of Mr. Hutchings from New York. Both are prerequisites for an extradition to vest the seventh district court with jurisdiction over Mr. Hutchings.¹

¹ This court should note that the State sought, and was granted, an enlargement of time prior to filing its opposition brief so that it could obtain the complete record in the matter. It is noteworthy that in light of Mr. Hutchings' challenge that these items did not exist in the record, followed by the State's enlargement of time for leave to search the record for those items, that the State's opposition brief still is silent as to those issues.

- ii. Mr. Hutchings' extradition also violated the Uniform Criminal Extradition Act due to the fact that the state of Utah failed to extradite Mr. Hutchings from his detention in New York within thirty days of the date he was detained by New York and New York notified Utah of his detention. *See* Utah Code Ann. § 77-30-15.
- iii. No probation revocation hearing has been properly noticed and convened in the state of Utah and Mr. Hutchings' original probation period has expired. Therefore his probation was not legally revoked prior to the expiration of his probation, divesting the trial court of any jurisdiction or authority to revoke his probation at this point. *See e.g. Morrissey v. Brewer* 408 U.S. 471, 487 (1972); Utah Code Ann. § 78-18-1; *Smith v. Cook* 803 P.2d 788 (Utah 1990).
- iv. The eighteen-month-plus delay from the issuance of the final warrant on February 8, 1995 for an alleged probation violation to the date the trial court claimed to have revoked his probation constituted an unreasonable delay of prosecuting Mr. Hutchings for an alleged probation violation, as the term "reasonable time" has been defined by United States courts. *See e.g. Morrissey* 408 U.S. at 488; *Wells v. Wise* 390 F. Supp. 299; *United States v. Lindsey*, 395 F. Supp. 404 (E.D. Pa. 1975) (nine month delay between conviction and holding of revocation hearing is unreasonable delay).
- v. After being incarcerated for an alleged probation violation, the state of Utah violated Mr. Hutchings' constitutional rights by denying him the original parole hearing required by Utah Code Ann. § 77-27-7.
- vi. The state of Utah unconstitutionally subjected Mr. Hutchings to double-jeopardy when it tried and sentenced him for an alleged probation violation that a New York court had already heard and passed sentence upon.
- vii. The state of Utah violated the full faith and credit clause of the constitution when it convened a hearing and sentenced Mr. Hutchings for an alleged probation violation after a New York state court had already convened a hearing and delivered a sentence on the same charge.

- viii. The state of Utah failed to comply with the Interstate Compact for the Supervision of Parolees and Probationers Act when the seventh district court found Mr. Hutchings to have violated his probation without addressing the New York court's ruling dismissing the same alleged probation violation.
- ix. Mr. Hutchings was denied the effective assistance of counsel at his probation revocation hearing and his appeal of the order following that hearing.
- x. It was an obvious abusive discretion and reversible error for the district court to dismiss Mr. Hutchings' petition as frivolous on its face when it stated so many viable legal and procedural errors relating to his incarceration and substantive grounds for a lack of jurisdiction by the district court.
- xi. It was an abusive discretion and reversible error for the trial court to dismiss as patently frivolous on its face Mr. Hutchings' petition without stating any rational or reasoning when the same district court had previously found on the record that the same petition warranted a hearing and appointment of counsel.
- xii. The Court of Appeals alleged its discretion and erred as a matter of law when it upheld the trial court's summary dismissal of Mr. Hutchings' petition in light of these legal and procedural errors.

II. THE COURT SHOULD REVERSE THE COURT OF APPEALS AND IMMEDIATELY FREE MR. HUTCHINGS FROM INCARCERATION, OR, AT A MINIMUM, GIVE HIM AN EVIDENTIARY HEARING WITH ASSISTANCE OF COURT APPOINTED COUNSEL

Mr. Hutchings agrees with the State that the decision before this Court is whether to reverse or affirm the Court of Appeals' affirmance of the trial court's summary dismissal of the Second Petition for Post-Conviction Relief. Mr. Hutchings also agrees

that, normally, if this Court reverses the Court of Appeals, the remedy would be to remand the case to the trial court. Nevertheless, as this Court has also stated, “a remand is not necessary if the evidence in the record is undisputed and the appellate court can fairly and properly resolve the case on the record before it.” *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618, 622 (Utah 1989).

The record is undisputedly clear, and Mr. Hutchings’ arguments unrefuted, that the trial court abused its discretion in summarily dismissing the “second” petition. As discussed in Mr. Hutchings’ opening brief, the record reflects that the State of Utah (1) violated Mr. Hutchings’ rights under the Uniform Criminal Extradition Act by incarcerating him for over thirty days and failing to hold a pretrial hearing; (2) deprived Mr. Hutchings of his statutory and due process rights by failing to provide him with timely and complete notice of the charges against him and his due process rights at the probation revocation hearings; (3) unreasonably delayed in extraditing Mr. Hutchings by failing to hold a revocation hearing until eighteen months after the alleged probation violation took place; (4) violated (a) the Full Faith and Credit Clause and (b) Mr. Hutchings’ constitutional right to protection from double jeopardy when it subjected Mr. Hutchings to a hearing and passed sentence on him for allegedly violating the terms of his probation after a New York State court had already dismissed the same alleged probation violation charges; and (5) failed to comply with its statutory obligations under the Interstate Compact for Supervision of Parolees or Probationers by extraditing Mr. Hutchings and revoking his probation based on the same charges that the New York state court had dismissed. Mr. Hutchings’ petition also established that he was denied the

effective assistance of counsel at his probation revocation hearing and in perfecting his appeal. It cannot be lost on this court that none of these legal and procedural defects are challenged or even addressed by the State in its brief.

Because the issues raised in Mr. Hutchings' first brief establish, as a matter of law, that the trial court lacked jurisdiction to convene a probation revocation hearing, this Court would be fully justified in immediately releasing Mr. Hutchings from incarceration based on the aforementioned and unrefuted errors. Nowhere is it mandated that this Court remand the case to the trial court for a hearing when this Court can decide the legal issues based on the undisputed record.² *Flying Diamond Oil*, 776 P.2d at 622.

Nevertheless, the Court should at least remand the case to allow Mr. Hutchings the hearing he never received on these important issues, with proper appointed counsel.

III. THE DISTRICT COURT ERRED WHEN IT SUMMARILY DISMISSED MR. HUTCHINGS' SECOND PETITION AND THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE DISTRICT COURT'S DECISION.

The crux of Appellees' argument is that because the issues in the second petition were previously raised and addressed, or could have been raised, in the first petition, the district court properly summarily dismissed the second petition. Indeed, Appellee's brief paints a picture showing that Mr. Hutchings' "first" petition was properly heard, decided,

² There is no dispute, nor can there be, that the record contains no Governor's warrant for extradition; no record of a pre-extradition hearing; contains a transcript of the New York court dismissing Utah's claim of probation violation upon payment of a small fine; and the like. In other words, not only are the legal effects of these facts unrefuted by the State, but the procedural record is also unrefuted and unrefutable.

and dismissed. The picture, however, has a crucial flaw: the issues raised in the first petition were never heard or decided and therefore the dismissal was improper.

Before a hearing on Mr. Hutchings' "first" petition, the Prosecutor's office sent Mr. Hutchings a letter asking him to prepare a draft of his petition for the hearing. [Exhibit II-E to Mr. Hutchings' writ]. Mr. Hutchings prepared a hand-written draft of his petition and submitted it to the Court and to the prosecutor at the January 22, 1997 hearing. After a brief review of the petition, the trial court stated that it could not establish the factual matters at issue and that an evidentiary hearing would be necessary. The court also stated that Mr. Hutchings was entitled to appointed counsel. The discussion then turned to who would pay for the appointed counsel and the hearing concluded with the court requiring the State to advise it on that issue.

By July, 1997, after an additional six months in jail, Mr. Hutchings moved for an order to show cause why counsel had not been appointed. Unexpectedly, the trial court denied the first petition as frivolous – failing to address the specific points raised in that petition.³ The Court of Appeals affirmed. After Mr. Hutchings petitioned for rehearing and was denied, he petitioned this Court for a writ of extraordinary relief.

In moving to dismiss the petition for extraordinary relief, the state of Utah argued that it should be governed by Utah R. of Civ. 65C (Post-Conviction Relief) – stating that “the Court should dismiss the petition so that petitioner can file his petition in the proper

³ It is important to note that Mr. Hutchings' handwritten Petition for Post Conviction Relief would have been clarified and better drafted if he would have received the assistance of counsel that the court already noted he deserved.

court.” Mr. Hutchings opposed that motion and argued that if the petition were remanded to the trial court, it would be summarily dismissed for repetitive filings. The State now makes that very argument – asserting that the petition should be dismissed because it is repetitive.

This Court surely did not remand Mr. Hutchings’ petition simply to watch the trial court summarily dismiss without providing Mr. Hutchings court-appointed counsel or an opportunity to be heard. If that were the intended result, this Court would have simply denied the petition as frivolous on its face as a matter of law without need of remanding the petition to the district court. Mr. Hutchings agrees that nearly all of the issues contained in the first petition are found in the second. Those issues have *never* been addressed and Mr. Hutchings has never received a hearing on them, even though the trial court found that one was necessary. Indeed, the “first” and “second” petitions should be considered one and the same for purposes of this appeal. This Court should decide the legal issues presented in them or at least ensure that Mr. Hutchings is afforded the counsel and hearing on them that he deserves, but has never had.

As discussed above, this Court is not required to send this matter down to the trial court for a hearing. The record reflects, as a matter of law, that Mr. Hutchings is entitled to immediate release. It remains unrefuted in the record that the state of New York previously sentenced Mr. Hutchings on Utah’s alleged probation violations before the Utah court re-heard the same claim. Mr. Hutchings’ other arguments of how the court had no jurisdiction or authority over him at the OSC hearing also remain unrefuted by the State. If not immediately released, the Court should, at a minimum, require the trial court

to hear and decide Mr. Hutchings' arguments on their merits and not summarily dismiss as them as frivolous without giving them any consideration.⁴

**MR. HUTCHINGS' IN-COURT STATEMENT CANNOT BE THE BASIS FOR
PROBATION REVOCATION**

The only other argument that the State makes to justify the Court of Appeals is that Mr. Hutchings admitted that he failed to complete sex-offender treatment or to timely contact his probation officer at the order to show cause hearing. Thus, the State concludes no hearing on Mr. Hutchings' post-conviction petition was needed.⁵

Unfortunately, that argument is too simplistic. Because Mr. Hutchings was not extradited properly, he shouldn't have been before the court to make those statements. Since the New York court, which had jurisdiction over Mr. Hutchings and his probation review pursuant to the Interstate Compact for Supervision of Probationers, dismissed the Utah warrant for allegedly violating the terms of his probation, then the Utah court held Mr.

⁴ For instance, where the record includes a transcript from the New York court passing sentence on the alleged probation violation that Utah later prosecuted Mr. Hutchings for, his argument that he was in double-jeopardy surely was not patently frivolous. This also holds for claims of improper extradition, and the like. Importantly, the State has not even attempted to explain how the trial court – or the Court of Appeals – could have reasonably concluded the petition was frivolous on its face in light of such gross procedural errors and missing procedural records. It is patently *not* frivolous to point to a record of the New York court and claim the charge had already been prosecuted. It was patently not frivolous to demonstrate that he had been held longer than allowed by law without a revocation hearing before Utah even attempted (improperly at that) to extradite him. No analysis to the contrary is even offered by the State in its opposition brief

⁵ The Court should note that Mr. Hutchings contends that he has completed sex-offenders treatment and complied with all probation registration requirements.

Hutchings in double-jeopardy when it prosecuted him on the same charge the New York court already passed sentence upon. Because the Utah trial court did not act to revoke probation until after the probationary period expired, the hearing at which these statements were made was wrongfully held, and hence they cannot be the proper basis for Mr. Hutchings' current incarceration.

These, and the other issues raised on Mr. Hutchings' appeal, have *never* been addressed by *any* court. The trial court simply dismissed the petition which raised these arguments (albeit inartfully) as frivolous. After playing bait-and-switch, getting Mr. Hutchings' first petition dismissed to make way for a refiling under Rule 65C, the State would now have this Court also dodge the serious issues of federally mandated proceedings and protection that Mr. Hutchings has never received, but demanded from the beginning of his incarceration, yet never had addressed by any court.

Mr. Hutchings need not restate the numerous cases set forth in his opening brief, which were not even addressed by the State, which hold that when a state fails to comply with procedural requirements to convene a probation revocation hearing, or to extradite a prisoner, it has no jurisdiction over him, and hence, any subsequent rulings are null and void *ab initio*. *E.g. State v. Rawlings*, 893 P.2d 1063, 1071 (Utah Ct. App. 1995). (A trial court retains jurisdiction over a probationer after the original probation period expires on its face only if revocation procedures are "properly initiated *before* the probation period expires.") *Id.* (emphasis added). *Accord Cuyler v. Adams*, 449 U.S. 443, 443 (1981) (court obtains jurisdiction over prisoner extradited from foreign jurisdiction after, *inter alia*, pre-extradition hearing is held.)

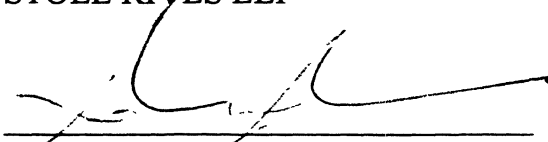
CONCLUSION

Based on the foregoing, Appellant asks this Court to reverse the Court of Appeals' affirmance of the district court's summary dismissal of Appellant's Second Petition for Post-Conviction Relief. The issues in Mr. Hutchings' petitions were never addressed and the record before this Court clearly establishes that the State of Utah failed to initiate probation revocation proceedings in a timely fashion; failed to comply with the Interstate Compact regarding New York's decision to release Mr. Hutchings after two hearings at which no evidence was adduced to show he had violated the terms of his probation; failed to afford Mr. Hutchings his statutory and constitutional due process rights at the probation revocation hearings; and failed to comply with prerequisites necessary to extradite Mr. Hutchings to this state. Accordingly, the trial court was without jurisdiction to revoke Mr. Hutchings' probation. That order should be reversed and Mr. Hutchings should be immediately freed from incarceration. At a minimum, the Court of Appeals should be reversed, the matter remanded, and Mr. Hutchings allowed to present evidence of his contentions at an evidentiary hearing with the assistance of court-appointed counsel.

DATED: November 21, 2002.

Respectfully submitted,

STOEL RIVES LLP

A handwritten signature in black ink, appearing to read 'D. Moscon', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of November, 2002, I served the foregoing

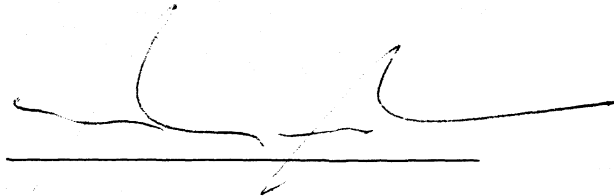
Reply Brief of Appellant on the following named persons on the date indicated below

by:

- ☒ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery

to said persons a true copy thereof, contained in a sealed envelope, addressed to said persons at their address as indicated below.

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Tab 1

**IN THE SUPREME COURT OF THE
STATE OF UTAH**

<p>LARRY L. HUTCHINGS,</p> <p style="text-align: center;">Defendant-Appellant,</p> <p style="text-align: center;">v.</p> <p>STATE OF UTAH,</p> <p style="text-align: center;">Appellee.</p>	<p style="text-align: center;">Case No. 20010419-SC</p>
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ADDENDUM

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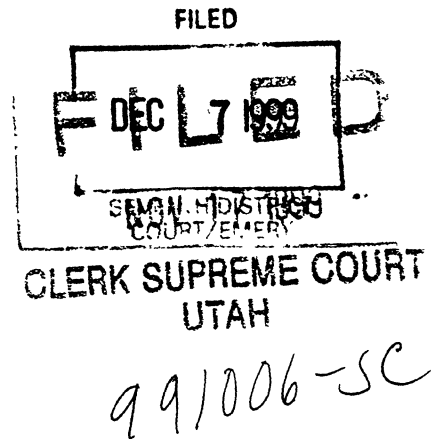
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Tab A

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IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY L. HUTCHINGS,	:	STATE'S MOTION AND SUPPORTING
	:	MEMORANDUM TO DISMISS
Petitioner/plaintiff,	:	PETITION FOR EXTRAORDINARY
	:	WRIT OR TRANSFER TO THE
v.	:	DISTRICT COURT
STATE OF UTAH,	:	Case No. 99xxxx-SC
	:	
Respondent/defendant.	:	

Respondent, through counsel, Assistant Attorney General Laura B. Dupaix, moves to dismiss the petition for extraordinary relief or, in the alternative, to transfer the petition to the appropriate district court to be treated as a post-conviction petition under rule 65C, Utah Rules of Civil Procedure. The basis for this motion is detailed below.

MEMORANDUM

THE COURT SHOULD DISMISS THE PETITION BECAUSE
IT IS FOR POST-CONVICTION RELIEF WHICH IS
GOVERNED BY RULE 65C, UTAH RULES OF CIVIL
PROCEDURE; UNDER THAT RULE, THE PETITION MUST
BE FILED IN THE DISTRICT COURT

Petitioner files an original petition for extraordinary relief in this Court. His petition, however, appears to attack the validity of his 1992 guilty pleas to aggravated sexual abuse of a child, a first degree felony, and sexual abuse of a child, a second degree felony. The petition also appears to contest the district court's order revoking his probation. Thus, although petitioner styles his petition as one for extraordinary relief under rule 65B, Utah Rules of Civil Procedure, in substance his petition is really for post-conviction relief under rule 65C, Utah Rules of Civil Procedure.

Rule 65B permits a petitioner to seek extraordinary relief “[w]here no other plain, speedy and adequate remedy is available.” Here, petitioner has a plain, speedy and adequate remedy under rule 65C. Rule 65C governs proceedings “in all petitions for post-conviction relief filed under Utah Code Ann. § 78-35a-101 et. seq. Post-Conviction Remedies Act.” Utah R. Civ. Pro. 65C(a). Utah Code Ann. § 78-35a-104 (1995) permits a person convicted and sentenced for a criminal offense to “file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence.” Rule

65C places venue for actions filed under the Post-Conviction Remedies Act in the district court in the county in which the judgment of conviction was entered. Utah R. Civ. Pro. 65C(b). Copies of Rules 65B and 65C and the Post-Conviction Remedies Act are attached.

Because petitioner's claims clearly fall within the provisions of the Post-Conviction Remedies Act and rule 65C, this Court should dismiss the petition. Petitioner may then refile his petition in the district court under rule 65C. Alternatively, this Court should transfer the petition to the appropriate district court for proceedings consistent with the provisions of rule 65C.¹

CONCLUSION


Because the petition is in substance a rule 65C petition for post-conviction relief, it must be filed in the district court. This Court should therefore dismiss the petition so that petitioner can file his petition in the proper court. Alternatively, the Court should transfer

¹Petitioner claims that it would be inappropriate for him to file his petition in the district court because it and the court of appeals are prejudiced against him as evidenced by prior adverse rulings. The fact that petitioner may have received prior adverse rulings from the district court and court of appeals, however, is not a basis for showing that the lower courts are unfairly prejudiced against him. Under the circumstances, the appropriate procedure is for petitioner to file his petition in the district court and to appeal any adverse ruling.

the petition to the appropriate district court for post-conviction proceedings under rule 65C,
Utah Rules of Civil Procedure.

DATED this 17th day of November, 1999.

JAN GRAHAM
ATTORNEY GENERAL


LAURA B. DUPAIX
Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that on the 7th day of November, 1999, a true and correct copy of the foregoing Motion and Supporting Memorandum to Dismiss or Transfer Petition was mailed postage prepaid to the following:

Larry L. Hutchings, #25435
Petitioner Pro Se
Utah State Prison
P.O. Box 250
Draper, Utah 84020

A handwritten signature in black ink, appearing to read "R. L. Hutchings", written over a horizontal line.

Rule 65B. Extraordinary relief.

(a) *Availability of remedy.* Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful restraint on personal liberty), paragraph (c) (involving the wrongful use of public or corporate authority) or paragraph (d) (involving the wrongful use of judicial authority, the failure to exercise such authority, and actions by the Board of Pardons and Parole). There shall be no special form of writ. Except for instances governed by Rule 65C, the procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

(b) *Wrongful restraints on personal liberty.*

(1) *Scope.* Except for instances governed by Rule 65C, this paragraph shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty, and the court may grant relief appropriate under this paragraph.

(2) *Commencement.* The proceeding shall be commenced by filing a petition with the clerk of the court in the district in which the petitioner is restrained or the respondent resides or in which the alleged restraint is occurring.

(3) *Contents of the petition and attachments.* The petition shall contain a short, plain statement of the facts on the basis of which the petitioner seeks relief. It shall identify the respondent and the place where the person is restrained. It shall state the cause or pretense of the restraint, if known by the petitioner. It shall state whether the legality of the restraint has already been adjudicated in a prior proceeding and, if so, the reasons for the denial of relief in the prior proceeding. The petitioner shall attach to the petition any legal process available to the petitioner that resulted in restraint. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior proceeding that adjudicated the legality of the restraint.

(4) *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.

(5) *Dismissal of frivolous claims.* On review of the petition, if it is apparent to the court that the legality of the restraint has already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face and the reasons for this conclusion. The order need not state findings of fact or conclusions of law. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.

(6) *Responsive pleadings.* If the petition is not dismissed as being frivolous on its face, the court shall direct the clerk of the court to serve a copy of the petition and a copy of any memorandum upon the respondent by mail. At the same time, the court may issue an order directing the respondent to answer or otherwise respond to the petition, specifying a time within which the respondent must comply. If the circumstances require, the court may also issue an order directing the respondent to appear before the court for a hearing on the legality of the restraint. An answer to a petition shall state plainly whether the respondent has restrained the person alleged to have been restrained, whether the person so restrained has been transferred to any other person, and if so, the identity of the transferee, the date of the transfer, and the reason or authority for the transfer. Nothing in this paragraph shall be construed to prohibit the court from ruling upon the petition based upon a dispositive motion.

(7) *Temporary relief.* If it appears that the person alleged to be restrained will be removed from the court's jurisdiction or will suffer irreparable injury before compliance with the hearing order can be enforced, the court shall issue a warrant directing the sheriff to bring the respondent before the court to be dealt with according to law. Pending a determination of the petition, the court may place the person alleged to have been restrained in the custody of such other persons as may be appropriate.

(8) *Alternative service of the hearing order.* If the respondent cannot be found, or if it appears that a person other than the respondent has custody of the person alleged to be restrained, the hearing order and any other process issued by the court may be served on the person having custody in the manner and with the same effect as if that person had been named as respondent in the action.

(9) *Avoidance of service by respondent.* If anyone having custody of the person alleged to be restrained avoids service of the hearing order or attempts wrongfully to remove the person from the court's jurisdiction, the sheriff shall immediately arrest the responsible person. The sheriff shall forthwith bring the person arrested before the court to be dealt with according to law.

(10) *Hearing or other proceedings.* In the event that the court orders a hearing, the court shall hear the matter in a summary fashion and shall render

judgment accordingly. The respondent or other person having custody shall appear with the person alleged to be restrained or shall state the reasons for failing to do so. The court may nevertheless direct the respondent to bring before it the person alleged to be restrained. If the petitioner waives the right to be present at the hearing, the court shall modify the hearing order accordingly. The hearing order shall not be disobeyed for any defect of form or any misdescription in the order or the petition, if enough is stated to impart the meaning and intent of the proceeding to the respondent.

(c) *Wrongful use of or failure to exercise public authority.*

(1) *Who may petition the court; security.* The attorney general may, and when directed to do so by the governor shall, petition the court for relief on the grounds enumerated in this paragraph. Any person who is not required to be represented by the attorney general and who is aggrieved or threatened by one of the acts enumerated in subparagraph (2) of this paragraph may petition the court under this paragraph if (A) the person claims to be entitled to an office unlawfully held by another or (B) if the attorney general fails to file a petition under this paragraph after receiving notice of the person's claim. A petition filed by a person other than the attorney general under this paragraph shall be brought in the name of the petitioner, and the petition shall be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding. The sureties shall be in the form for bonds on appeal provided for in Rule 73.

(2) *Grounds for relief.* Appropriate relief may be granted: (A) where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military, a franchise, or an office in a corporation created by the authority of the state of Utah; (B) where a public officer does or permits any act that results in a forfeiture of the office; (C) where persons act as a corporation in the state of Utah without being legally incorporated; (D) where any corporation has violated the laws of the state of Utah relating to the creation, alteration or renewal of corporations; or (E) where any corporation has forfeited or misused its corporate rights, privileges or franchises.

(3) *Proceedings on the petition.* On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(d) *Wrongful use of judicial authority or failure to comply with duty; actions by board of pardons and parole.*

(1) *Who may petition.* A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph may petition the court for relief.

(2) *Grounds for relief.* Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled; or (D) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

(3) *Proceedings on the petition.* On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(4) *Scope of review.* Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

(Amended effective September 1, 1991; May 1, 1993; July 1, 1996.)

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 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 whether 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.

(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.

UTAH RULES OF CIVIL PROCEDURE

(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, Section 64-13-23 and sections 21-7-3 through 21-7-4.7 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.

(Added effective July 1, 1996.)

Section		Section	
78-35a-106.	Preclusion of relief — Exception.	78-35a-108.	Effect of granting relief — Notice.
78-35a-107.	Statute of limitations for post-conviction relief.	78-35a-109.	Appointment of counsel.
		78-35a-110.	Appeal — Jurisdiction.

PART 1

GENERAL PROVISIONS

78-35a-101. Short title.

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

History: C. 1953, 78-35a-101, enacted by L. 1996, ch. 235, § 1.
 Compiler's Notes. — As enacted, this chapter did not contain a Part 2.

Effective Dates. — Laws 1996, ch. 235 became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

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.

History: C. 1953, 78-35a-102, enacted by L. 1996, ch. 235, § 2.
 Effective Dates. — Laws 1996, ch. 235

became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

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.

History: C. 1953, 78-35a-103, enacted by L. 1996, ch. 235, § 3.
 Effective Dates. — Laws 1996, ch. 235

became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

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

History: C. 1953, 78-35a-104, enacted by L. 1996, ch. 235, § 4. became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.
 Effective Dates. — Laws 1996, ch. 235

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.

History: C. 1953, 78-35a-105, enacted by L. 1996, ch. 235, § 5. became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.
 Effective Dates. — Laws 1996, ch. 235

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.

History: C. 1953, 78-35a-106, enacted by L. 1996, ch. 235, § 6. became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.
Effective Dates. — Laws 1996, ch. 235

78-35a-107. Statute of limitations for post-conviction 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 78-12-35 and 78-12-40 do not extend the limitations period established in this section.

History: C. 1953, 78-12-31.1, enacted by L. 1995, ch. 82, § 1; renumbered by L. 1996, ch. 235, § 7.

Repeals and Reenactments. — Laws 1995, ch. 82, § 1 repeals former § 78-12-31.1, as enacted by Laws 1979, ch. 133, § 1, setting a three-month time limit on the right to petition for a habeas corpus writ, and enacts the present section, effective May 1, 1995.

Amendment Notes. — The 1996 amendment, effective April 29, 1996, renumbered this section, which formerly appeared as § 78-12-

31.1; added Subsection (4), redesignating former Subsection (4) as (3); deleted former Subsections (3) and (5) concerning applicability to time limitations and motions to correct a sentence; in Subsections (1) and (2) deleted "pursuant to Rule 65B(b), Utah Rules of Civil Procedure" after "entitled to relief"; and in Subsection (2) deleted "in a petition for post-conviction relief" after "cause of action."

Cross-References. — Extraordinary relief. Rule 65B, U.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Applicability.
Constitutionality of former section.

Applicability.

Petitions for writs of certiorari and mandamus were not subject to the statute of limitations that was intended to govern petitions for writs of habeas corpus. *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677 (Utah 1995) (decided under former section).

Constitutionality of former section.

The three-month limitation period formerly contained in this section was an unreasonable limitation on the constitutional right to petition for a habeas corpus writ; it violated petitioners' rights under Utah Const., Art. I, Sec. 11 to seek a civil remedy in state courts. *Currier v. Holden*, 862 P.2d 1357 (Utah Ct. App. 1993), cert. denied, 870 P.2d 957 (Utah 1994) (decided under former section).

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.

History: C. 1953, 78-35a-108, enacted by L. 1996, ch. 235, § 8.
Effective Dates. – Laws 1996, ch. 235

became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

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.

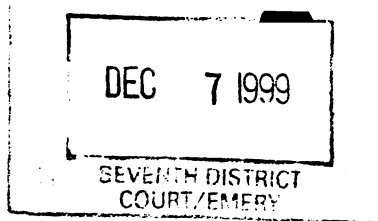
History: C. 1953, 78-35a-109, enacted by became effective on April 29, 1996, pursuant to
L 1996, ch. 235, § 9. Utah Const., Art. VI, Sec. 25.
Effective Dates. — Laws 1996, ch. 235

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.

History: C. 1953, 78-35a-110, enacted by became effective on April 29, 1996, pursuant to
L 1996, ch. 235, § 10. Utah Const., Art. VI, Sec. 25.
Effective Dates. — Laws 1996, ch. 235

Tab B



FILED
UTAH SUPREME COURT

NOV 24 1999

PAT BARTHOLOMEW
CLERK OF THE COURT

991006-SC

Larry L Hutchings #25435
In Propria Persona
Utah State Prison
P.O.Box 250
Draper Ut. 84020

In the Supreme court of the State of Utah

Larry L. Hutchings	:	Petitioner's motion on response
Petitioner/Plaintiff	:	to State's motion and supporting
	:	Memorandum to Dismiss Petition
V.	:	for Extraordinary / Habeas corpus
	:	Writ or transfer to the District
State of Utah	:	Court.
Respondent/Defendant	:	
	:	Case #99xxxx-SC

Now comes the petitioner Larry L. Hutchings in response to the State's motion to dismiss, or transfer to the district court, The bases for this motion is detailed below.

Memorandum

The Defendant in the State of Utah Argues that Petitioners Petition is for Post-Conviction Relief and to be governed by rule 65C, Utah rules of civil procedure the Petitioner would call the

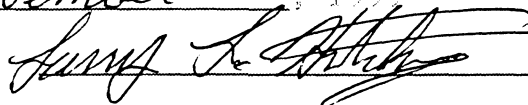
Courts attention to the following Appendix's to the petition for Extraordinary Writ II-E, II-F, II-G and II-H in Appendix Volume I Pages 134 through 151 and subsequently Appendix's II-I, II-J, II-K, II-L, II-M, II-N, and II-O these appendix's refer to a Petition for Post-Conviction Relief to the District court in the matters now before this court. Further the petitioner calls the Courts attention to Appendix's II-P, II-Q, II-R, II-S, II-T, II-U, II-V, II-X, II-Y, II-Z, III-A and III-B is further the subsequent appeal of the final Order of the District Court on petition for Post-Conviction Relief to the Utah Court of Appeals the Petitioner would remind the court that as set forth in section 78-35a-106 (1) (d) titled "Preclusion of Relief - Exception" "was addressed in any previous request for Post-Conviction Relief. And further in Section 78-35a-107 (2) (b) set forth a statute of limitations for Post-Conviction Relief " a petitioner is entitled to relief only if the petition is filed within one year of the entry of the decision of the Appellant court which has jurisdiction over the case if appeal is taken as in this case has taken place refer to the aforementioned Appendix's to petition for Extraordinary writ to subsequent this Claim by the Petitioner.

Further any such filing as the State Claims in there motion could only result in a dismissal based on repetitive filings. Thus the bases for the petitioners claim of prejudice is actual and supported by the aforementioned statutes of law under the Utah code Ann.

In Conclusion

As Post-Conviction Relief has been Sought on the Issues to the district court and the subsequent orders having been appealed to the Utah court of Appeals it is by aforementioned Statutes of law it would be further denial of the petitioner's Constitutional Rights under the fifth, sixth and the fourteenth amendments to the constitution of these United States for this court not to review and rule on the petitioners petition for Extraordinary Writ.

Dated this 22nd Day of November, 1992

A handwritten signature in black ink, appearing to read "Larry L. Hutchings", written over a horizontal line.

Larry L. Hutchings

Pro Se

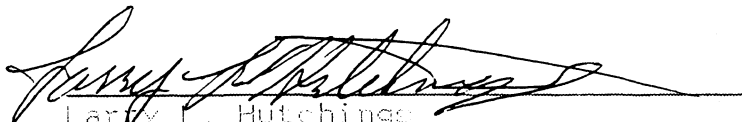
Larry L. Hutchings #25435
In Propria Persona
Utah State Prison
P.O. Box 250
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Certificate of Mailing

I hereby certify that on the 22nd day of November 1999,
A true and correct copy of the foregoing motion in response to
states motion to dismiss was placed in the United States Mail
postage pre-paid to the parties listed below.

Jan Graham
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