

2001

# Larry L. Hutchings v. State of Utah : Brief of Appellee

Utah Supreme Court

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

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<b>LARRY L. HUTCHINGS,</b>	<b>:</b>	
<b>Petitioner/Appellant,</b>	<b>:</b>	<b>Case No. 20010419-SC</b>
<b>v.</b>	<b>:</b>	
<b>STATE OF UTAH,</b>	<b>:</b>	
<b>Respondent/Appellee.</b>	<b>:</b>	

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**BRIEF OF APPELLEE**

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ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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

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<b>STATE OF UTAH,</b>	:	
<b>Respondent/Appellee.</b>	:	

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**BRIEF OF APPELLEE**

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**JURISDICTION AND NATURE OF THE PROCEEDINGS**

Petitioner appealed the district court's summary dismissal of his second petition for post-conviction relief challenging revocation of probation for his convictions for two counts of Sexual Abuse of a Child, second degree felonies, in violation of Utah Code Annotated § 76-5-404.1(1) (Supp. 1990). This Court granted certiorari review following the Utah Court of Appeals' affirmance of the dismissal by the district court. The court of appeals had jurisdiction under § 78-2a-3(2)(f) (2001). This Court has jurisdiction under Utah Code Ann. §78-2-2(3)(1)(2001) and §78-2a-4 (1996).

**ISSUES ON APPEAL AND STANDARDS OF REVIEW**

**Issue I:** When a petition for post-conviction relief is summarily dismissed, without being served on the State or requesting an answer from the State, may this court determine



whether petitioner is entitled to post-conviction relief, or only whether the lower court erred in summarily dismissing the petition?

**Standard of Review:** This question was not specifically addressed below, therefore no standard of review applies.

**Issue II:** Did the Utah Court of Appeals correctly determine that the district court properly summarily dismissed the petition for post-conviction relief?

**Standard of Review:** On a writ of certiorari, this Court reviews the decision of the court of appeals, not the district court, and applies the same standard of review used by the court of appeals. *Clark v. Clark*, 2001 UT 44, ¶ 8, 27 P.3d 538, 540.

When reviewing an appeal from an order granting or denying post-conviction relief, the appellate court reviews the lower court's conclusions of law for correctness and its findings of fact for clear error. *Julian v. State*, 2002 UT 61, ¶ 8, 52 P.3d 1168, 1170. *See also Wickham v. Galetka*, 2002 WL 1728629, 2002 UT \_\_\_, ¶ 7, \_\_\_ P.3d \_\_\_; *Rudolph v. Galetka*, 2002 UT 7, ¶ 4, 43 P.3d 467, 468; *Matthews v. Galetka*, 958 P.2d 949, 950 (Utah App. 1998).

## **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

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

Addendum A - Utah Rule of Civil Procedure 65C

Addendum B - Post-Conviction Remedies Act, Utah Code Ann. §78-35a-101 through § 78-35a-110 (1996)

## STATEMENT OF THE CASE

On December 16, 1991, petitioner was charged with one count of Aggravated Sexual Abuse of a Child, in violation of Utah Code Ann. § 76-5-404.1(1)(Supp. 1990), a first-degree felony, and two counts of Sexual Abuse of a Child, in violation of § 76-5-404.1(1)(Supp. 1990), second degree felonies (R. 07-08).

On July 7, 1992, petitioner pled guilty to two counts of Sexual Abuse of a Child (R. 10-15, 18-31). Petitioner was sentenced to a term of imprisonment of not less than one nor more than fifteen years on both counts, to run concurrently (R. 16-17, 29, 34). The imposition of the prison terms was stayed and petitioner was placed on probation for a period of thirty-six months under certain conditions, including that he enter into and successfully complete sexual treatment therapy (R. 16-17, 29-30, 34).

Less than two years later, in April 1994, a motion for order to show cause why probation should not be revoked was filed (R. 37). The district court entered a show cause order, and the show cause hearing was scheduled for July 6, 1994 (R. 42). Petitioner was served with the order to show cause on June 1, 1994 (R. 44). Petitioner did *not* appear at the hearing on July 6<sup>th</sup>. However, petitioner was represented by counsel who advised the court that petitioner had contacted him from New York and indicated that he could not afford counsel (R. 46). The court appointed counsel to represent petitioner and rescheduled the hearing for September 7, 1994. *Id.*

At the hearing on September 7, petitioner was again not present in person. However, counsel for petitioner advised the court that he believed petitioner could provide proof that

he was back in therapy. He therefore requested a continuance (R. 48). The matter was continued to September 26<sup>th</sup>. *Id.* At the hearing on September 26, 1994, petitioner was again not present, but was represented by counsel (R. 51). The court found that petitioner had not completed counseling as required, and he was therefore in violation of his probation (R. 56). The court ordered that probation would be revoked unless petitioner was enrolled in an appropriate counseling program by October 11<sup>th</sup>, and provided evidence to his counsel that he was enrolled (R. 56). If petitioner was not enrolled in counseling by October 11, 1994, then he would have to come back to Utah and report to the Utah state prison (R. 54).<sup>1</sup>

In December of 1994, an affidavit in support of a motion for warrant of arrest was filed, alleging that petitioner had violated the terms and conditions of his probation (R. 65-66). An arrest warrant was signed on December 20 (R. 68). On February 8, 1995, a new arrest warrant was signed (R. 70). Petitioner was eventually arrested on the Utah warrant when he was arrested in New York for a DUI (R. 153, 163).

Petitioner appeared before the Utah district court on July 16, 1996 (R. 90). A public defender was appointed to represent petitioner and the show cause hearing was scheduled for August 20, 1996 (R. 90).

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<sup>1</sup> Petitioner asserts in his statement of facts that he “did enroll at the Share Program and mailed, at Mr. Harrison’s instruction, proof of that enrollment directly to the Seventh District Court Clerk. Unfortunately, the court apparently never received it or when it received the proof, did not know where to file or record the information.” (Brief of pet. at 7). Petitioner cites to no record support for this assertion. The state therefore asks that the Court strike this unsupported assertion.

At the hearing on August 20, 1996, petitioner admitted that he violated probation by failing to successfully complete sex offender therapy as required (R. 93). Petitioner also admitted that he violated probation by failing to report to his probation officer in the state of New York since September of 1994 (R. 95-96).<sup>2</sup> At the conclusion of the hearing, the judge found that petitioner had violated the terms of his probation and ordered that he be sent to the Utah State Prison to serve the original sentence (R. 165, 168, 170-171).

Following the revocation hearing, petitioner filed a notice of appeal. (R. 101-102). On December 9, 1996, the appeal was dismissed for failure to file a docketing statement (R. 106). However, petitioner was advised that if the docketing statement was submitted within ten days the appeal would be reinstated. *Id.* Apparently no docketing statement was ever filed because the appeal was not reinstated. The Remittitur was issued on January 23, 1997 (case # 960726-CA) (R. 104).<sup>3</sup>

Petitioner filed his first state petition for post-conviction relief on January 22, 1997 (R. 123-132). On August 1, 1997, the district court entered an order which concluded that the petition was frivolous (R. 193). The petition was therefore denied and dismissed - case # 970700008 (R. 193) (addendum D).

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<sup>2</sup> Petitioner had failed to report to his probation officer since September of 1994. The first show cause hearing in Utah concerning probation violations was held on September 26, 1994.

<sup>3</sup> The notice of appeal appears to be untimely. The district court Order was filed on August 22, 1996 (R. 171 and addendum C). The notice of appeal is dated October 18, 1996, but was not filed in Seventh District Court until November 4, 1996, and in the Utah Court of Appeals on November 12, 1996 (R. 101).

Petitioner appealed the dismissal of his first petition for post-conviction relief (R. 196). On January 23, 1998, the Utah Court of Appeals entered a memorandum decision which affirmed the dismissal of the first post-conviction petition - case # 970479-CA (R. 226-227) (addendum E). A petition for rehearing was denied on March 23, 1998 (R. 250-251)(addendum F). Petitioner apparently did not file any petition for writ of certiorari.

On November 11, 1999, petitioner filed a petition for extraordinary relief directly in the Utah Supreme Court (R. 316). On December 1, 1999, pursuant to Rule 20(a) of the Utah Rules of Appellate Procedure, this Court ordered that the petition be “transferred to the Seventh Judicial District Court for post-conviction proceedings under Rule 65(c) [sic] of the Rules of Civil Procedure.” (R. 374) (addendum G).

Petitioner’s second state petition for post-conviction relief was therefore filed in Seventh District Court on December 7, 1999 - case #990700187 (R. 374). The state was not asked to file any answer or response to this second petition and was therefore not a party to this action. *See Utah R. Civ. P. 65C(g)(1) & (h)*. On October 20, 2000, the district court entered a memorandum decision and order which summarily dismissed the second petition (R. 433-435) (addendum H).

Petitioner timely filed a notice to appeal the district court’s dismissal of his second state petition for post-conviction relief. Since the State was not a party below, it was also not a party to this appeal, and did not file any brief or appear in the appellate case. On March 22, 2001, the court of appeals entered a memorandum decision which affirmed the dismissal

of the second petition - case # 20000994-CA (addendum I). On August 8, 2001, this Court granted a petition for writ of certiorari - case # 20010419 (addendum J).

Although the state was not a party below, and did not respond at the district court or appellate court level concerning dismissal of the second petition, in an order dated January 28, 2002, this Court requested that the State participate and file a brief in response (addendum K). In addition, this Court appointed counsel to represent petitioner. Id.

### **SUMMARY OF ARGUMENT**

The issue of whether petitioner is entitled to post-conviction relief is not before this Court. The only issue before this Court is whether the court of appeals correctly affirmed the district court's summary dismissal of petitioner's second petition for post-conviction relief.

The district court properly denied and summarily dismissed petitioner's second petition for post-conviction relief because the claims had already been raised or could have been raised in his previous petition. The petition was also properly summarily dismissed because it was frivolous on its face.

### **ARGUMENT**

#### **I. THE ONLY ISSUE BEFORE THIS COURT IS WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S SUMMARY DISMISSAL OF PETITIONER'S SECOND PETITION FOR POST-CONVICTION RELIEF.**

In his brief, petitioner argues the merits of his underlying claims, as if this Court should decide the merits of those issues. However, the merits of the underlying claims in the

second petition were not addressed by the district court because the petition was summarily dismissed. That dismissal was affirmed by the court of appeals. On a writ of certiorari, this Court reviews the decision of the court of appeals. *Clark v Clark*, 2001 UT 44, ¶8, 27 P.3d 538, 540. If this Court determines that the court of appeals decision was in error, it should remand the case to the district court for appropriate proceedings under the Post-Conviction Remedies Act and Rule 65C of the Utah Rules of Civil Procedure. *See: Moench v. State*, 2002 UT App 333 (trial court erred in finding petition frivolous - reversed and remanded, directing trial court to order the Attorney General to file a response); *Seel v. Van Der Veur*, 971 P.2d 924 (Utah 1998) (remanded for further proceedings consistent with rule 65B).

Rule 65C provides that a petition shall be assigned to the judge who sentenced the petitioner. *Utah R. Civ. P. 65C(f)*. The judge must review the petition. If it is apparent that the claim has already been adjudicated, or if the claim is frivolous, then the court “shall forthwith issue an order dismissing the claim” *Utah R. Civ. P. 65C(g)(1)*. In this case, the district court judge summarily dismissed the petition (R. 433-435)(addendum H).

If the court concludes that a petition should *not* be summarily dismissed, the district court must “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.” *Utah R. Civ. P. 65C(h)*. The respondent has thirty (30) days after service of the petition in which to file an answer or other response. *Utah R. Civ. P. 65C(i)*.

In this case, because the petition was summarily dismissed, the State was not served with the petition, and was not given an opportunity to answer or respond to the issue of whether petitioner was entitled to post-conviction relief in his second petition.

If the case were remanded, the district court would enter its ruling only after allowing the State to file an answer or other response, and after holding evidentiary hearings and/or oral arguments, if necessary. Once a ruling was entered, the petitioner would have an opportunity to appeal the district court decision. If the district court decided the issues on the merits, then the court of appeals would review the district court's rulings on the merits.

Since there was no ruling on the merits, and the State was not given the opportunity to respond at the district court or appellate court level, the issue of whether petitioner's claims would justify post-conviction relief is not before this Court.

If this Court determines that the court of appeals erroneously affirmed the summary dismissal of the second petition, the case should be remanded to the district court, and the State should be given the opportunity to respond to the petition at the district court level, as required by Rule 65C.

## **II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S SUMMARY DISMISSAL OF PETITIONER'S SECOND PETITION FOR POST-CONVICTION RELIEF.**

### **A. The district court properly summarily dismissed the second petition because the issues were previously raised and addressed, or could have been raised, in the first petition for post-conviction relief.**

The Post-Conviction Remedies Act (PCRA) governs this petition. This Court recently



held that “[t]he PCRA replaced prior post-conviction remedies with a statutory, ‘substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies.’ *Id.* § 78-35a-102.” *Julian v. State*, 2002 UT 61, ¶ 4, 52 P.3d 1168.

Under the Post-Conviction Remedies Act, a petitioner is not eligible for post-conviction relief if the claims asserted in a second petition were “raised or addressed in any previous request for post-conviction relief or could have been, but [were] not, raised in a previous request for post-conviction relief.” *Utah Code Ann. § 78-35a-106(1)(d)* (addendum B).<sup>4</sup>

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<sup>4</sup> Prior to the PCRA, court rules and case law governed post-conviction remedies. The pre-Act law permitted merits review of a claim first raised in a successive petition only if a petitioner could establish “good cause” for omitting it from prior petitions. This Court recognized that “raising issues in a subsequent habeas corpus petition that were not but could have been raised in a previous habeas petition constitutes an abuse of the writ and requires dismissal of the petition except where good cause is shown.” *Monson v. State*, 953 P.2d 73, 75 (Utah 1998). This Court also declared that all claims seeking post-conviction relief should be raised in a single petition. *See Andrews v. Shulsen*, 773 P.2d 832, 833-34 (Utah 1988) (raising issues in a petition that were not but could have been raised in a previous petition, except where good cause is shown, constitutes an abuse of the writ and requires dismissal of the petition). *Accord, Hurst v. Cook*, 777 P.2d 1029, 1037 (Utah 1989). *See also; Gardner v. Holden*, 888 P.2d 608, 613 (Utah 1994); *Wright v. Carver*, 886 P.2d 58, 60-61 (Utah 1994).

In *Hurst*, the court identified examples of the requisite “good cause:” 1) denial of a constitutional right under retroactive new law; 2) previously unknown facts that might change the trial’s outcome; 3) fundamental unfairness in the conviction; 4) imposition of an illegal sentence; and 5) “a claim overlooked in good faith with no intent to delay.” *Hurst*, 777 P.2d at 1037.

By its clear language, the PCRA necessarily incorporates the first *Hurst* exception: a claim based on new, retroactive law could not have been raised in a prior petition. The PCRA also contemplates the second exception to the extent that it allows relief for evidence that meets the statutory definition of “newly discovered evidence.” *Utah Code*

This was petitioner's *second* state petition for post-conviction relief. In his brief, petitioner ignores the fact that this was his second petition. But this fact is crucial as to why summary dismissal was appropriate. All of the issues petitioner attempted to raise in his second petition had previously been raised, (or could have been raised), in his prior petition for post-conviction relief. The district court found that the claims petitioner attempted to raise in his second petition had previously been "dealt with by the Appellate Court as well as the Trial Court" (R. 434) (addendum H). It therefore properly summarily dismissed the petition.

Upon review of the district court's dismissal of the second petition, the court of appeals held that:

The Post-Conviction Remedies Act, Utah Code Ann. §§ 78-35a-101 to -110 (1996), is dispositive. Section 78-35a-106(1) precludes relief on any ground that was "raised or addressed ... on appeal" or "could have been but was not raised on appeal" or "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."

*Hutchings v. State*, 2001 UT App 95 (unpublished) (addendum I).

The court of appeals then specifically held that the claims petitioner "raised in his second petition were either raised and addressed, or could have been raised, in either the direct appeal from the probation revocation, the first petition for post-conviction relief, or the

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*Ann. § 78-35a-104(e)*. However, the clear language of the PCRA prohibits excusing a procedural default on any of the remaining *Hurst* exceptions. (Of course, Utah law provides an alternative remedy for correcting an illegal sentence. *Utah R. Crim. P. 22(e)*).

appeal from dismissal of that petition.” *Id.* The court of appeals found that given the preclusive effect of section 78-35a-106, the petitioner “may not continue to obtain review of claims that were either raised or could have been raised on direct appeal or in previous post-conviction proceedings and the appeal therefrom.”<sup>5</sup> *Id.*

Under the statutory guidelines of the Post-Conviction Remedies Act, the district court properly summarily dismissed petitioner’s second petition for post-conviction relief. The court of appeals properly affirmed that dismissal. Therefore, this Court should affirm the decision by the court of appeals.

**B. The district court also properly dismissed the petition because it was frivolous.**

Summary dismissal of the second petition was appropriate because the issues raised had previously been raised, or could have been raised in the prior petition. This alone was a sufficient and proper basis for summary dismissal. However, in addition, the district court also found that the petition was frivolous.

Rule 65C of the Utah Rules of Civil Procedure provides that when a petition for post-conviction relief is filed, “[t]he assigned judge shall review the petition, and, if it is apparent

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<sup>5</sup> The court of appeals included the fact that the claims raised in the second petition could have been raised in the direct appeal from the probation revocation. The PCRA provides that a person is not eligible for post-conviction relief upon any ground that “was raised or addressed at trial or on appeal” or that “could have been but was not raised at trial or on appeal” *Utah Code Ann. § 78-35a-106(1)*. However, whether the issues could have been raised in a direct appeal is an irrelevant inquiry when a second petition is filed. The inquiry as to what could have been raised in a direct appeal is only relevant as to the first state petition for post-conviction relief.

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 of dismissal need not recite findings of fact or conclusions of law.” *Utah R. Civ. P. 65C(g)(1)* (addendum A).

The rule defines a frivolous petition as follows:

- (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

*Utah R. Civ. P. 65C(g)(2)* (addendum A).

In his second petition, the petitioner alleged numerous claims, many of which raised procedural issues concerning prior revocation hearings. However, the record establishes the clear fact that petitioner eventually appeared in person at a revocation hearing where he admitted on the record in open court that he had violated the terms of his probation (R. 93-96). The facts alleged by the petitioner in his second petition were either cured by subsequent events, were immaterial, or were not supported by the record. Pursuant to Rule 65C, the district court properly summarily dismissed petitioner’s second petition because it was frivolous.

In his second petition for post-conviction relief, petitioner alleged that:

1. the “trial court’s issuance of an order for the automatic revocation of the petitioners probation was in error as the petitioner had never waived his right to be present . . .

Nor did he through his Attorney admit any allegations” (R. 326);

2. “the order issued by the trial court for the Automatic Revocation of Probation is in standing effect as it has never been Vacated or Ordered set Aside” (R. 326);
3. “the city court for Ithaca New York . . Exonerated the Petitioner of the charge of Violation of Probation by Disposing of the Charges and convicting on the charge of unlicensed operation 3<sup>rd</sup> in Satisfaction of all Charges” (R. 327-28);
4. “The delay from the 15<sup>th</sup> day of May 1995 to the revocation hearing held on the 20<sup>th</sup> day of August 1996 . . . does prejudice the petitioner” (R. 330);
5. “the Emory County Attorney raised allegations not mentioned in the Order to Show Cause . . . Specifically the allegation that alleged the petitioner failed to report to his Probation Officer during the time of ‘Fictional Supervision’” (R. 331)(emphasis in original);
6. “counsel was and is ineffective because he was not the counsel appointed by the trial court at the hearing held the 6<sup>th</sup> day of July 1994” (R. 331);
7. “the court has inappropriately and illegally imposed a sentence of five (5) years to life and done so ‘**behind closed doors**’ by its order to show cause and to commit to the Utah state prison” (R. 332)(emphasis in original);
8. “The trial court erred in its order on the petitioners petition for post-conviction relief in that the court failed to appoint counsel and set the matter for an evidentiary hearing” (R. 334).

In its memorandum decision dismissing the second petition, the district court noted that it had reviewed the petition, the entry of the plea, and the admissions of probation violations (addendum H). The Court found that the petitioner was present in person at the revocation hearing. The petitioner was represented by counsel David Allred, who was a legal defender for Emery County, and who was appointed to represent the petitioner in the Show Cause proceedings. The court also specifically noted that the probation violation hearing was held in open court (R. 433) (addendum H).

At the hearing, the petitioner admitted violating the terms of his probation. The district court specifically found that “[t]here is no question that the petitioner had, in fact, violated the terms of his probation, had failed to report, and had not successfully completed the sexual abuse counseling” (R. 433). Therefore, petitioner’s probation was revoked and he was sentenced to the Utah State Prison under the terms of the original judgment (R. 433-34) (addendum H).

Based on the district court findings, it is clear that the issues raised by petitioner were frivolous. For example, petitioner alleged that he never waived his right to be present at the revocation hearing and did not, through his attorney, admit any allegations. Although petitioner was not present for earlier proceedings, the district court specifically found that the petitioner was present in person at the revocation hearing, where he admitted violating probation. Another example is that petitioner alleged that the hearing occurred “behind closed doors.” The district court specifically found that the hearing was held in open court.

Based on its knowledge of the case, and its review of the petition, entry of the plea, and the probation revocation hearing, the district court properly summarily dismissed the second petition because it was frivolous. The facts alleged in the petition either did not support a claim for post-conviction relief as a matter of law, or the claims had no arguable basis in fact.

**C. The district court properly dismissed the second petition without holding a hearing or appointing counsel.**

Petitioner alleges that the district court erred in dismissing the petition without a hearing and without appointing counsel. In his brief, petitioner asserts that “the trial court found on the record that Mr. Hutchings’ post-conviction petition merited both the appointment of counsel and an evidentiary hearing.” (Brief of pet. at 14). However, petitioner is apparently referring to statements made by the court at a hearing concerning the first petition for post-conviction relief (case # 970700008), held on January 22, 1997. (R. 143-144). The district court did *not* hold that petitioner’s second petition for post-conviction relief (case # 990700187) merited appointment of counsel or an evidentiary hearing.<sup>6</sup>

The post-conviction rules clearly provide for summary dismissal of a petition. *Utah R. Civ. P. 65C(g)* (addendum A). Obviously no hearing is required when a petition is summarily dismissed. Even if a petition is not summarily dismissed, a hearing is not always

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<sup>6</sup> Even if a court originally thought a petitioner was entitled to a hearing and to appointment of counsel, after a review of the law and the facts of a particular case, a court could appropriately simply change its mind and rule that a hearing and appointment of counsel were not necessary.

required. The rule provides that: “[a]fter pleadings are closed, the court shall promptly set the proceeding for a hearing *or otherwise dispose of the case.*” *Utah R. Civ. P. 65C(j)* (emphasis added) (addendum A). In appropriate cases, a district court may properly dispose of a post-conviction petition without ever holding any hearing. The district court in this case did not err by summarily dismissing the petition without holding any hearing, because no hearing was required.

Petitioner was also not entitled to appointment of counsel. A petitioner has no constitutional right to counsel in a civil petition for post-conviction relief. *See e.g. Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990 (1987); *Anderson v. Cowan*, 227 F.3d 893, 901 (7<sup>th</sup> Cir. 2000). However, if a petition is not summarily dismissed, the district court *may* decide to appoint *pro bono* counsel in certain cases. Since the petition was summarily dismissed in this case, the district court properly did not appoint counsel.

Even if the petition had not been summarily dismissed, the district court would not have been required to appoint *pro bono* counsel. The Post-Conviction Remedies Act provides that:

- (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.

\* \* \*

- (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.

*Utah Code Ann. § 78-35a-109* (emphasis added) (addendum B). The district court did not err in not appointing pro bono counsel, because the petition was properly summarily dismissed.


### CONCLUSION

The district court properly summarily dismissed petitioner's second petition for post-conviction relief because the issues raised were previously raised, or could have been raised, in the first petition for post-conviction relief. The petition was also properly dismissed because it was frivolous. The court of appeals properly affirmed the summary dismissal of the second petition. This Court should affirm the court of appeals decision.

If this Court should find that the court of appeals decision was in error, and that summary dismissal of the second petition was improper, the remedy is to remand the matter back to the district court for appropriate proceedings under the Post-Conviction Remedies Act and Rule 65C, including providing the State with the opportunity to answer or respond to the petition at the district court level.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of October, 2002.

MARK L. SHURTLEFF  
ATTORNEY GENERAL


  
ERIN RILEY  
Assistant Attorney General

## MAILING CERTIFICATE

I hereby certify that on this 10<sup>th</sup> day of October, 2002, I mailed, postage prepaid, two accurate copies of the foregoing Respondent/Appellee's Brief to:

D MATTHEW MOSCON  
MARC T. RASICH  
JUSTIN B. PALMER  
Stoel Rives LLP  
2001 South Main Street, Suite 1100  
Salt Lake City, Utah 84111

Counsel for Petitioner/Appellant

A handwritten signature in cursive script, reading "Erin Riley", is written over a horizontal line.

## Addenda

## Addendum A

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus—modern cases, 26 A.L.R.4th 455.

Allowance of attorneys' fees in mandamus proceedings, 34 A.L.R.4th 457.

### **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 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.

(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, 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.)

**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 sentence other than commitment. Claims relating to the terms or conditions of confinement are governed by paragraph (b) of the Rule 65B. This rule, as a general matter, simplifies the pleading requirements and contains two significant changes from procedure under the former rule. First, the paragraph requires the clerk of court to assign post-conviction relief to the judge who sentenced the petitioner if that judge is available. Second, the rule allows the court to dis-

miss frivolous claims before any answer or other response is required. This provision is patterned after the federal practice pursuant to 28 U.S.C. § 2254. The advisory committee adopted the summary procedures set forth as a means of balancing the requirements of fairness and due process on the one hand against the public's interest in the efficient adjudication of the enormous volume of post-conviction relief cases.

The requirement in paragraph (l) for a determination that discovery is necessary to discover relevant evidence that is likely to be admissible at an evidentiary hearing is a higher standard than is normally used in determining motions for discovery.

## Addendum B



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. 1963, 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. 1963, 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. 1963, 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. 1963, 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. 1963, 78-35a-106, 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. 1963, 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. 1963, 78-12-31.1, enacted by L. 1996, 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, 1996.

**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.

### **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. 1963, 78-35a-108, enacted by L. 1996, ch. 235, § 8. became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.  
Effective Dates. — Laws 1996, ch. 235

### **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.

### **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. 1963, 78-35a-110, enacted by L. 1996, ch. 235, § 10. became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.  
Effective Dates. — Laws 1996, ch. 235

## Addendum C

7th DIST. COURT - CASTLE DALE  
EMERY COUNTY, STATE OF UTAH

STATE OF UTAH vs. LARRY LEWIS HUTCHINGS

CASE NUMBER 911701048 State Felony

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CHARGES

Charge 1 - 76-5-404.1 - SEX ABUSE CHILD

2nd Degree Felony Plea: July 07, 1992 Guilty

Disposition: July 07, 1992 {Guilty Plea}

Charge 2 - 76-5-404.1(2) - AGGRAVATED SEX ABUSE OF A CHILD

1st Degree Felony Plea: July 07, 1992 Guilty

Disposition: July 07, 1992 {Guilty Plea}

CURRENT ASSIGNED JUDGE

BRUCE K. HALLIDAY

PARTIES

Defendant - LARRY LEWIS HUTCHINGS  
READING, PA 19604

Plaintiff - STATE OF UTAH  
Represented by: DAVID A BLACKWELL  
Represented by: MARY L. MANLEY

DEFENDANT INFORMATION

Defendant Name: LARRY LEWIS HUTCHINGS  
Offense tracking number: 578911  
Date of Birth: February 16, 1965  
Law Enforcement Agency: Emery Co Sheriff  
Prosecuting Agency: EMERY COUNTY  
Violation Date: March 01, 1990 EMERY COUNTY

ACCOUNT SUMMARY

PROCEEDINGS

10-29-91 Information filed  
10-29-91 Filed: AMENDED INFORMATION  
10-29-91 Filed: BIND OVER ORDER

julieqw  
julieqw

12-16-91 Filed: THIRD AMENDED INFORMATION julieqw  
08-28-92 Filed judgment: JUDGMENT - SIGNED BY JUDGE BOYD BUNNELL julieqw  
Judge bhallida  
Signed July 07, 1992  
08-22-96 Filed order: ORDER ON ORDER TO SHOW CAUSE AND COMMITMENT TO  
UTAH STATE PRISON julieqw  
Judge bhallida

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CASE NUMBER 911701048 State Felony

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Signed August 21, 1996  
11-04-96 Filed: NOTICE OF APPEAL julieqw  
11-04-96 Filed: AFFIDAVIT OF IMPECUNIOSITY julieqw  
11-21-96 Filed: COPY OF LETTER FROM COURT OF APPEALS julieqw  
11-26-96 Filed: MOTION FOR APPOINTMENT OF COUNSEL julieqw  
12-04-96 Filed: COPY OF MOTION WITH JUDGE'S NOTE AT BOTTOM julieqw  
12-04-96 Filed: NOTICE OF HEARING julieqw  
12-12-96 Filed: REQUEST FOR COPIES julieqw  
12-12-96 Filed order: ORDER TO PRODUCE julieqw  
Judge bhallida  
Signed December 04, 1996  
12-12-96 Filed: ORDER OF DISMISSAL FROM COURT OF APPEALS julieqw  
01-22-97 Minute Entry - Motion julieqw  
Judge: BRUCE K. HALLIDAY  
PRESENT  
Clerk: JULIE WINN  
Defendant

Tape Number: 0334 Tape Count: 3301

HEARING

TAPE: 0334 COUNT: 3301

Motion for Court Appointed Counsel. The Court informed the defendant that because of the allegations in the Petition, it prevented the Court from appointed the public defender, David Allred. The State addressed the Court regarding the responsibility of the County to pay for counsel for the defendant on post conviction motions. The Court will allow the State 15 days to respond to the petition of the defendant and time for setting an evidentiary hearing.

01-22-97 Minute Entry - Motion

julieqw

Judge: BRUCE K. HALLIDAY

PRESENT

Clerk: JULIE WINN

Prosecutor: MARY L. MANLEY

Defendant

Tape Number: 0334 Tape Count: 3301

## HEARING

TIME: 9:05 a Counsel for the State addressed the Court in regards to the County's responsibility to provide the defendant with counsel for post-conviction matters.

TIME: 9:10 a The Court will allow that State 15 days to respond to the Petition regarding counsel and time for setting an

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CASE NUMBER 911701048 State Felony

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evidentiary hearing.

TIME: 9:00 a The defendant presented the Court with a Petition for Post Conviction Relief. The Court accepted and reviewed said petition.

01-22-97 Minute Entry - Motion

julieqw

Judge: BRUCE K. HALLIDAY

PRESENT

Clerk: JULIE WINN

Prosecutor: MARY L. MANLEY

Defendant

Audio

Tape Number: 0334 Tape Count: 3301

## HEARING

The defendant presented the Court with a Petition for Post Conviction Relief. The Court accepted the Petition and reviewed the same.

Because of the allegations in the Petition, the Court is unable to appointed the public defender. The State addressed the Court in regards to the County's responsible to provide counsel on post-conviction motions.

The Court will allow the State 15 days to respond to the Petition



regarding counsel and time for setting an evidentiary hearing.  
 01-24-97 Filed: remittitur from court of appeals - order of dismissal julieqw  
 02-21-97 Filed: Motion to Set for Hearing on Petition for  
     Post-Conviction Relief wendid  
 01-26-98 Filed: Memorandum Decision - Utah Court of Appeals wendid  
 08-07-98 Filed: Remittur julieqw  
 10-27-98 Filed: Motion of Discovery wendid  
 05-19-99 Filed: Transcript of Hearing 7-7-92 wendid  
 05-19-99 Filed: Transcript of Hearing 9-26-94 wendid  
 05-19-99 Filed: Transcript of Hearing 8-20-96 wendid  
 05-19-99 Filed: Transcript of Hearing 1-22-97 wendid  
 05-09-01 Filed order: Amended Judgment julieqw  
     Judge bhallida  
     Signed May 07, 2001  
 05-09-01 Filed order: Order on Order to Show Cause julieqw  
     Judge bhallida  
     Signed May 07, 2001  
 05-16-01 Filed: Letter from Supreme Court julieqw

## Addendum D

IN THE SEVENTH JUDICIAL DISTRICT COURT  
EMERY COUNTY, STATE OF UTAH

---

LARRY L. HUTCHINGS,	:	ORDER ON PLAINTIFF'S
	:	PETITION FOR POST-
Plaintiff,	:	CONVICTION RELIEF
	:	
vs.	:	
	:	
	:	
THE STATE OF UTAH,	:	
	:	
Defendant.	:	Civil No. 970700008

---

The Court, having reviewed Petitioner Larry L. H  
Petition for Post-Conviction Relief in the above-entitle  
and having reviewed the proceedings wherein the Plaintiff w  
in violation of his probation, now concludes as follows.

1. Petitioner's claim that his probation revoca  
in an unlawful manner is not justified by the proceedings  
The claims appear to be specious and frivolous upon thei  
Any claim of inappropriateness of timeliness of the filing  
service of same need be made at the time of appearance a  
subsequently at this late date.

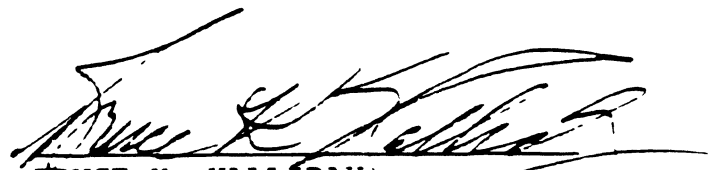
2. The claim of Petitioner of ineffectivene  
counsel is not substantiated by any factual allegations but

the Petitioner's conclusions that the Petitioner was unable to communicate with his attorney and a claimed error on the part of the attorney in not reviewing the case history, again, a conclusion not substantiated by any factual allegations made by the Petitioner herein.

Based thereon, the Court concludes that the Petition is specious and frivolous and hereby denies same.

Due to the foregoing decision, the Court concludes that Plaintiff's Motion to Grant Relief filed herein on May 27th as well as his Motion for Order to Show Cause filed herein on July 2nd are frivolous and are hereby denied.

DATED this 31<sup>st</sup> day of July, 1997.

  
BRUCE K. HALLIDAY  
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 1<sup>st</sup> day of August, 1997, a true and correct copy of the foregoing ORDER ON PLAINTIFF'S PETITION FOR POST-CONVICTION RELIEF was mailed, postage prepaid, to the following:

Larry L. Hutchings  
c/o Utah State Prison  
P.O. Box 250  
Draper, Utah 84020

Mary L. Manley  
Deputy Emery County Attorney  
P.O. Box 249  
Castle Dale, Utah 84513

Angela Micklos  
Assistant Attorney General  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114

                    JLH

## Addendum E

FILED

JAN 23 1998

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

-----ooOoc-----

Larry L. Hutchings,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner and Appellant,	)	
	)	
v.	)	Case No. 970479-CA
	)	
State of Utah,	)	
	)	F I L E D
Respondent and Appellee.	)	(January 23, 1998)

-----

Seventh District, Castle Dale Department  
The Honorable Bruce K. Halliday

Attorneys: Larry L. Hutchings, Draper, Appellant Pro Se

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Before Judges Greenwood, Jackson, and Orme.

PER CURIAM:

Hutchings appeals the trial court's dismissal of his petition for post-conviction relief. We affirm.

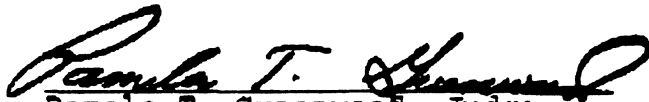
In an earlier appeal, Case No. 960726-CA, Hutchings contested the trial court's order revoking his probation and claimed that his counsel was ineffective. That appeal was dismissed after Hutchings failed to file a docketing statement. In the subject petition, Hutchings attempts to contest the same issues--the probation revocation and the effectiveness of his counsel.

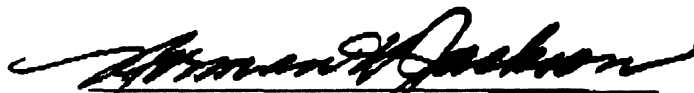
Even if we pass over the procedural difficulty presented by the dismissal of the prior appeal and reach the merits of Hutchings's arguments, they would fail. It is undisputed that on June 2, 1994, the State filed a motion for order to show cause and an affidavit in support alleging probation violations by Hutchings and that on December 16, 1994, the State filed a motion for warrant of arrest and an affidavit in support. Hutchings and/or his attorney were/was given copies of these documents and of the court's resulting orders and thereby received written notice of the nature of the allegations against Hutchings and of the pendency of enforcement actions in the trial court requiring him to respond. Hutchings and/or his attorney appeared at all of the hearings concerning his probation violations, further

evidence that they/he received proper notice. At the September 1994 hearing, Hutchings's attorney conceded that Hutchings had violated his probation when he requested additional time for Hutchings to enroll in counseling, a condition of his probation, and at the August 1995 hearing, Hutchings admitted to two probation violations which led to the second order revoking his probation. Moreover, the filing of the affidavits by the State alleging probation violations, the trial court's issuance of orders to show cause and a warrant tolled Hutchings's probation period and, thus, it did not expire on July 7, 1995, as Hutchings argues. See Utah Code Ann. § 77-18-1(9)(b) (1992).

We agree with the trial court that Hutchings's claim of ineffective assistance of counsel is not supported by any evidence. Hutchings makes broad assertions about his counsel's actions, but fails to offer specific factual support for his claim or to meet the requirements of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984).

Accordingly, the trial court's order dismissing Hutchings's petition for post-conviction relief is affirmed.

  
Pamela T. Greenwood, Judge

  
Norman H. Jackson, Judge

  
Gregory K. Orme, Judge



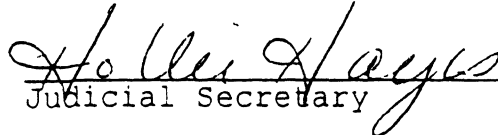
CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of January, 1998, a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to:

Larry L. Hutchings  
#25435  
PO Box 250  
Draper UT 84020

and a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to the judge listed below:

Honorable Bruce K. Halliday  
Seventh District Court  
PO Box 907  
Castle Dale UT 84513

  
Judicial Secretary

TRIAL COURT: Seventh District, Castle Dale Dept., #970700008  
APPEALS CASE NO.: 970479-CA

## Addendum F

**FILED**  
Utah Court of Appeals

**MAR 23 1998**

**Julia D'Alessandro**  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Larry L. Hutchings,	)	
	)	
Plaintiff and Appellant	)	ORDER DENYING PETITION
	)	FOR REHEARING
v.	)	
	)	
State of Utah,	)	Case No. 970479-CA
	)	
Defendant and Appellee.	)	

-----

Before Judges Greenwood, Jackson, and Orme.

This matter is before the court on Hutchings's petition for rehearing by which he argues that in our January 23, 1998, memorandum decision we improperly relied upon the dismissal of his earlier appeal and improperly concluded that his probation did not automatically expire on July 7, 1995. We reject these arguments.

Although we mentioned the fact that Hutchings's earlier appeal, Case No. 960726-CA, was dismissed for failure to file a docketing statement and not on the merits, we did not rely upon this dismissal as dispositive of his claims in the subject appeal.

Hutchings's appeal involved the interpretation of the 1992 version of Utah Code Ann. § 77-18-1(9)(b). According to the 1992 version of the statute, the filing of affidavits by the State alleging probation violations, the trial court's issuance of orders to show cause and a warrant before July 7, 1995, tolled his probation period. The cases upon which Hutchings's relies for his argument that his probation automatically expired on July 7, 1995, interpret earlier and different versions of that statute and are therefore not controlling in his case. State v. Moya, 815 P.2d 1312 (Utah Ct. App. 1991) and State v. Green, 757 P.2d 462, 464 (Utah 1988) interpret the 1984 version of the statute which did not contain the subject tolling provision. In both Moya and Green, the State did not file its first affidavit in support of order to show cause until after the original probation period had expired. Smith v. Cook, 803 P. 2d 788 (Utah 1990) interprets the 1981 version of the statute which did not contain the subject tolling provision. In Cook, the Utah Supreme Court concluded that "because Cook was not given notice of the revocation proceedings prior to the expiration of his probation," the trial court lacked the authority to revoke his probation

after it automatically expired pursuant to the subject statute. 803 P.2d at 793. In the subject case, the affidavit, order to show cause, and warrant were filed before Hutchings's original probation period expired. We also considered and rejected Hutchings's claim concerning notice. At the first order to show cause hearing in July 1994, Hutchings's counsel stated that he was appearing at Hutchings's request. Counsel and/or Hutchings appeared at all subsequent hearings, evidence that the State gave appropriate notice.

Accordingly, IT IS HEREBY ORDERED that the petition is denied as Hutchings has failed to present any points of law or fact which were overlooked or misapprehended in our January 23, 1998, memorandum decision.

Dated this 23rd day of March, 1998.

FOR THE COURT:

  
\_\_\_\_\_  
Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on March 23, 1998, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Larry L. Hutchings  
#25435  
PO Box 250  
Draper UT 84020

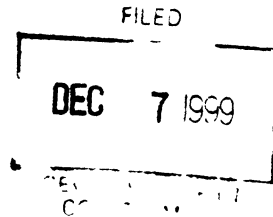
Dated this March 23, 1998.

By Paula Stagg  
Deputy Clerk

Case No. 970479-CA

## Addendum G

IN THE UTAH SUPREME COURT



--ooOoo--

Larry L. Hutchings,

Plaintiff and Petitioner,

v.

Case No. 991006-SC

State of Utah,

Defendant and Respondent.

990700187

**Order**

This matter is before the court upon a petition for extraordinary writ filed on November 10, 1999. A response to the petition was filed by the State of Utah on November 17, 1999.

IT IS HEREBY ORDERED pursuant to Rule 20(a) of the Utah Rules of Appellate Procedure the petition and supporting motions are transferred to the Seventh Judicial District Court for post-conviction proceedings under Rule 65(c) of Rules of Civil Procedure.

For The Court:

December 13, 1999  
Dated

  
Pat H. Bartholomew  
Clerk of the Court

**CERTIFICATE OF MAILING**

**I hereby certify that on December 2, 1999, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the party(ies) listed below:**

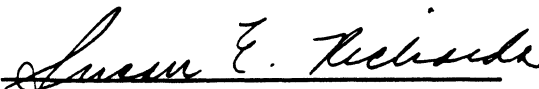
**LARRY L. HUTCHINGS  
#25435  
PO BOX 250  
DRAPER UT 84020**

**and a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the following office to be delivered to the party(ies) listed below:**

**LAURA B. DUPAIX  
ASSISTANT ATTORNEY GENERAL  
JAN GRAHAM  
ATTORNEY GENERAL  
160 E 300 S 6TH FL  
PO BOX 140854  
SALT LAKE CITY UT 84114-0854**

**and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:**

**SEVENTH DISTRICT, CASTLE DALE  
ATTN: APPEALS CLERK  
85 E MAIN ST  
PO BOX 635  
CASTLE DALE UT 84513**

By   
Deputy Clerk

**Case No. 991006-SC  
SEVENTH DISTRICT, CASTLE DALE , 911701048**



## Addendum H

**SEVENTH DISTRICT COURT  
FOR EMERY COUNTY, STATE OF UTAH**

FILED

OCT 20 2000

SEVENTH DISTRICT  
COUNTY OF EMERY

<b>LARRY L. HUTCHINGS</b> Petitioner,  <b>vs.</b>  <b>STATE OF UTAH</b> Respondent,	<b>MEMORANDUM DECISION AND ORDER in re EXTRAORDINARY WRIT</b>  <b>Case No.: 990700187</b>  <b>Judge: Bruce K. Halliday</b>
---	--

Petitioner filed a an Extraordinary Writ directly with the Supreme Court for the State of Utah on November 10, 1999. The petition contains extraordinarily long claims and has attached thereto appendices numbering in excess of 306 pages, (if petitioner's index is to be believed). He has filed a Request for Appointment of Attorney, and the Court has attempted to review the foregoing. In addition, the Court reviewed the entry of plea in the underlying matter before Judge Boyd Bunnell, as well as the admissions of violations alleged in an Order to Show Cause, which brought the respondent before the Court and resulted in his sentence to incarceration in the Utah State Prison. From the Court's review, I conclude that the Petition For Extraordinary Writ is frivolous and time expended by the county attorney in reviewing the documents, the attorney general in reviewing the documents when filed at the Supreme Court level, as well as this Court has been unnecessary.

The hearing at which the defendant admitted, by and through his attorney Mr. David Allred, to the violation of the terms of his probation, was held in open Court. The defendant was present. The defendant's attorney, Mr. David Allred, is a legal defender for Emery County, and was appointed to represent the petitioner in the Order To Show Cause proceedings. There is no question that the petitioner had, in fact, violated the terms of his probation, had failed to report, and had not successfully completed the sexual abuse counseling judgement issued by Judge Bunnell. Based upon all of the foregoing his probation was revoked and he was sentenced to the Utah State Prison under the original judgement. The review of the petitioner's pleadings, which the Court has made herein, seems to indicate that the Order on Order To Show Cause sent the defendant to the Utah State Prison for incarceration pursuant to the original judgement. The Court has reviewed the original judgement and the original judgement did not accurately reflect the judge's actions since the pleas taken were

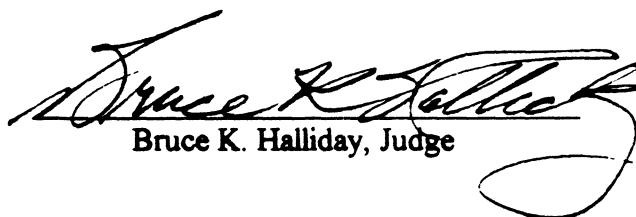
to two 2<sup>nd</sup> degree felonies, not a second degree and a 1<sup>st</sup> degree felony as reflected in the written judgement. The sentence, however, was accurately reflected in the judgement, to wit, not less than one (1) year nor more than fifteen (15) years for each count to run concurrently. Based upon the above, and the Court's assumption that the original judgement was attached to the Order To Show Cause Judgement, I conclude that there have been no improprieties in the sentencing of the defendant under the original judgment of the Court and the Order to Show Cause Judgement.

This Court is struck by the volume of pleadings which the petitioner has filed. In reviewing same, I note that the Court of Appeals in responding to this same petitioner's prayer for relief to that Court, also found no justification in the petitioner's petition. The petitioner continues to abuse the legal system relative to requests for relief and has most recently been referred to the Trial Court for a determination as to whether counsel should be appointed to represent the respondent. The Court having reviewed, as far as is reasonably possibly, the pleadings concludes that the claims made by the defendant are frivolous, and have also been dealt with by the Appellate Court as well as the Trial Court in the disposition which has been made of this matter.

Based thereon, I decline to appoint counsel to represent the defendant and find the Petition frivolous and order the same dismissed.

Dated this 12<sup>th</sup> day of October, 2000.

**BY THE COURT:**

  
Bruce K. Halliday, Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM  
DECISION AND ORDER IN RE EXTRAORDINARY WRIT by depositing same in the United  
States Mail, postage prepaid or hand delivering to the following:

Larry L. Hutchings  
#25435, Utah State Prison  
PO Box 250  
Draper, UT 84020

State Of Utah  
c/o Brent Langston  
Deputy County Attorney  
Emery County Courthouse  
Castle Dale, UT 84513

DATED this 20<sup>th</sup> day of October, 2000.

  
\_\_\_\_\_  
Deputy Court Clerk

## Addendum I

**H**  
UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Court of Appeals of Utah.

Larry L. HUTCHINGS, Petitioner and Appellant,  
v.  
STATE of Utah, Respondent and Appellee.

No. 20000994-CA.

March 22, 2001.

Larry L. Hutchings, Draper, pro se.

Before BENCH, BILLINGS, and ORME, JJ.

#### MEMORANDUM DECISION

PER CURIAM.

\*1 Hutchings was convicted in 1992 following guilty pleas to two second degree felony counts of Sexual Abuse of a Child. His probation was revoked in 1996. Based upon Hutchings' failure to file a docketing statement, this court dismissed a direct appeal from the probation revocation (Case No. 960726-CA) on December 9, 1996. Hutchings then filed his first petition for post-conviction relief in January of 1997, challenging the probation revocation on the merits and on procedural grounds. This court affirmed the district court's dismissal of that petition. See *Hutchings v. State*, No. 970479-CA, slip op. (Utah Ct.App. Jan. 23, 1998). Although noting that the trial court's dismissal of the direct appeal raising essentially the same issues was appropriate, this court concluded that the claims in the petition for extraordinary relief also failed on the merits. In November of 1999, Hutchings filed a second petition for extraordinary writ directly in the Utah Supreme Court, stating that he had been unable to obtain relief from either the district court or this court. After the supreme court's transferred the petition to district court, the petition was dismissed and this appeal followed.

The Post-Conviction Remedies Act, Utah Code

Ann. §§ 78-35a-101 to -110 (1996), is dispositive. Section 78-35a-106(1) precludes relief on any ground that was "raised or addressed ... on appeal" or "could have been but was not raised on appeal" or "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."

The claims Hutchings raised in his second petition were either raised and addressed, or could have been raised, in either the direct appeal from the probation revocation, the first petition for post-conviction relief, or the appeal from dismissal of that petition. The second petition repeats claims raised and addressed in prior proceedings including a claim that his probation terminated in July of 1995, and claims of procedural irregularities in the revocation proceedings. The remaining claims could have been raised in the prior proceedings. Given the preclusive effect of section 78-35a-106, Hutchings may not continue to obtain review of claims that were either raised or could have been raised on direct appeal or in previous post-conviction proceedings and the appeal therefrom.

The district court considered and rejected a claim that the sentence imposed was illegal. See Utah R.Crim.P. 22(e). The district court concluded that the judgment incorrectly recited that Hutchings entered a guilty plea to one first degree felony and one second degree felony, rather than guilty pleas to two second degree felonies. The sentence, however, correctly reflected the conviction for two second degree felonies, as did subsequent proceedings on probation revocation. The trial court did not err in concluding the sentence was not illegal.

Hutchings contends this court cannot act until the Utah Supreme Court transfers the appeal to this court. The appeal, however, is within the original jurisdiction of this court under Utah Code Ann. § 78-2a-3(2)(f)(1996), and no transfer from the supreme court is necessary to vest this court with jurisdiction.

\*2 We affirm the dismissal.

2001 WL 327741 (Utah App.), 2001 UT App 95

END OF DOCUMENT

## Addendum J

**H**

(The Court's decision is referenced in a "Supreme Court of Utah Dispositions of Petitions for Certiorari" table in the Pacific Reporter. See UT R J ADMIN Rule 4-508 and UT R J ADMIN Rule 4-605.)

Supreme Court of Utah

**Hutchings**  
v.  
State

**NO. 20010419**

August 08, 2001

Lower Court Citation or Number: 20000994

Disposition: Granted.

32 P.3d 249 (Table)

END OF DOCUMENT



## Addendum K

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo0oo-----

Larry L. Hutchings,  
Petitioner,

v.

State of Utah,  
Respondent.

No. 20010419-SC  
20000994-CA  
990700187

**ORDER**

The court grants Mr. Hutchings' motion to appoint counsel to represent him on appeal. The court has appointed Mr. D. Matthew Mascon and requested that he file a brief on behalf of Mr. Hutchings. The court also, by this order, requests that the State participate in this appeal and file a brief in response.

FOR THE COURT:

Jan. 28, 2002  
Date

Richard C. Howe  
Richard C. Howe,  
Chief Justice