

1998

# Gilbert Loretto v. Henry Galetka : Brief of Appellee

Utah Court of Appeals

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Gilbert Loretto; Pro Se.

Thomas B. Brunker; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

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GILBERT LORETTO,	:	
Petitioner/Appellant,	:	Case No. 981831-CA
v.	:	
HENRY GALETKA, Warden,	:	Priority No. 3
Respondent/Appellee.	:	

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BRIEF OF APPELLEE

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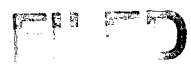
APPEAL FROM THE DISMISSAL OF A PETITION FOR POST-  
CONVICTION RELIEF IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE  
HONORABLE FRANK B. NOEL PRESIDING

THOMAS B. BRUNKER (4804)  
Assistant Attorney General  
JAN GRAHAM (1231)  
Utah Attorney General  
Heber Wells Building  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854  
Telephone: (801) 366-0180

Attorneys for Appellee

GILBERT LORETTO  
P.O. Box 250  
Draper, Utah 84020

Pro se

  
Utah Court of Appeals  
SEP 1 1998  
Julia D'Alesandro  
Clerk of the Court

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Heber Wells Building  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854  
Telephone: (801) 366-0180

Attorneys for Appellee

GILBERT LORETTO  
P.O. Box 250  
Draper, Utah 84020

Pro se

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF THE PROCEEDINGS

Petitioner appeals the dismissal of his petition for post-conviction relief filed pursuant to rule 65B, Utah Rules of Civil Procedure. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(j) (1996).

STATEMENT OF ISSUE AND STANDARD OF APPELLATE REVIEW

Did the post-conviction court correctly conclude that all of petitioner's claims were procedurally barred because he could and should have raised them on his direct appeal?

The Court reviews for correctness the legal conclusions underlying the dismissal of a petition for post-conviction relief. *Wright v. Carver*, 886 P.2d 58, 60 (Utah 1994).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Former rule 65B, Utah Rules of Civil Procedure, is attached

as addendum A.<sup>1</sup>

#### STATEMENT OF THE CASE

The state charged petitioner with being a party to an aggravated robbery (R. 396). A jury convicted petitioner as charged, and the trial court sentenced petitioner to the statutory five-years-to-life prison term (R. 398). This Court affirmed the conviction on direct appeal. *State v. Loretto*, slip. op. 960622-CA (attached as addendum B).

Petitioner challenged the conviction in a petition for post-conviction relief (R. 1-72). The trial court dismissed the petition without a hearing, finding all of petitioner's claims procedurally barred (R. 455-56) (attached as addendum C). Petitioner timely filed a notice of appeal (R. 458-59).

Pursuant to petitioner's request, this Court has accepted his Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Extraordinary Relief as petitioner's brief on appeal.<sup>2</sup>

#### STATEMENT OF FACTS

The State detailed the historical facts in its brief on direct appeal. Because they have little relevance to this

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<sup>1</sup>As a result of amendments subsequent to the filing of the petition in this case, rule 65C now provides for the relief petitioner sought.

<sup>2</sup>All references to "Appellant's Brief" refer to this memorandum.

appeal, respondent will not repeat them here.

In his direct appeal, petitioner raised five challenges to his conviction: 1) the trial court should have quashed the jury panel based on a prospective juror's voir dire comments about Mexican gang members; 2) the evidence was insufficient to support his conviction as an accomplice to an aggravated robbery; 3) the trial court erroneously gave repetitious aggravated robbery instructions; 4) the trial court gave an improper reasonable doubt instruction; and 5) the trial court erroneously denied petitioner's motion for a continuance. *State v. Loretto*, slip op. 960622-CA (Utah App. August 14, 1997. The Court rejected all five claims in an unpublished decision. *Id.*

In his petition and amended petition for post-conviction relief, petitioner attacked his aggravated robbery conviction on the following grounds: 1) the prosecutor allegedly withheld police reports of interviews with the co-defendant; 2) the prosecutor allegedly presented false or misleading testimony; 3) the State produced insufficient evidence to establish that petitioner acted as an accomplice; 4) the State subjected petitioner to selective prosecution; and 5) the State used an impermissibly suggestive photo identification procedure because he was the only person in the photo array with a spider tattoo on his neck (R. 17-70, 353-63). Petitioner offered no explanation why he did not include these claims in the direct appeal.



Respondent moved to dismiss the petition, contending that the claims were procedurally barred because petitioner could have raised them on direct appeal and had neither alleged nor established unusual circumstances for his failure to do so (R. 394). Petitioner did not respond to the motion, and the post-conviction court granted it (R. 455-56).

Petitioner appeals the dismissal of his petition. In this appeal, petitioner claims: 1) a prospective juror's statements about Mexican gang members tainted the entire panel; 2) the State produced insufficient evidence to support his conviction for participating in the aggravated robbery; 3) the trial court erroneously gave an *Allen* instruction; 4) the trial court refused a jury instruction that presented his theory of the case; 5) the trial court erroneously denied his counsel's requested continuance; and 6) the trial court and jury were biased. Appellant's Brief at 5-13. In addition, petitioner alleges for the first time that his trial and appellate counsel performed deficiently in handling his sufficiency and biased court and jury claims. Appellant's Brief at 1-5, 9.

#### SUMMARY OF THE ARGUMENT

The trial court correctly concluded that all of petitioner's claims were procedurally barred. Petitioner offered no justification for failing to raise them on direct appeal. Consequently, he failed to meet his burden to show that unusual

circumstances justified hearing his post-conviction claims, and the trial court correctly applied the procedural bar.

On appeal, petitioner has established no error in this ruling. To the contrary, petitioner relies on claims he never presented to the post-conviction court. Raising claims on appeal that he did not raise in the post-conviction court does not establish that the lower court erroneously found the claims before it procedurally barred.

#### ARGUMENT

THE POST-CONVICTION COURT CORRECTLY DETERMINED THAT PETITIONER'S CLAIMS WERE PROCEDURALLY BARRED, AND PETITIONER'S RELIANCE ON CLAIMS HE NEVER RAISED IN THE POST-CONVICTION COURT AND ON CLAIMS ALREADY REJECTED ON THE DIRECT APPEAL DOES NOT ESTABLISH THE CONTRARY

The trial court correctly concluded that petitioner's claims were procedurally barred. Utah law clearly precludes using a petition for post-conviction relief to raise claims that could and should have been raised on direct appeal. *See, e.g., Webb v. Van Der Veur*, 853 P.2d 898, 899 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993). A petitioner may avoid this procedural bar by establishing that unusual circumstances excuse his failure to raise the otherwise barred claim in the direct appeal. *Id.*

The petition included no excuse for petitioner's failure to raise his post-conviction claims on direct appeal (R. 1-71). When respondent moved to dismiss the petition because petitioner's claims were procedurally barred, petitioner again

failed to come forward with any justification for failing to raise the claims on direct appeal (R. 453 (October 21, 1998 minute entry indicating that petitioner filed no response to respondent's motion to dismiss)). On this record, the post-conviction court correctly concluded that all of the claims were procedurally barred and correctly dismissed the petition.

On appeal, petitioner identifies no error in this ruling. Instead, petitioner belatedly alleges that his counsel performed deficiently on his direct appeal (Appellant's Brief at 1-5, 9) and abandons all but one of the claims he raised in his post-conviction petition in favor of claims that he already litigated in his direct appeal (Appellant's Brief at 5-13).<sup>3</sup>

Petitioner alleges for the first time on appeal that his counsel performed ineffectively. Admittedly, prior counsel's constitutionally deficient performance may avoid the procedural bar. See, e.g., *Gardner v. Holden*, 888 P.2d 608, 615 (Utah), cert. denied, 516 U.S. 828 (1995). However, petitioner cannot wait until his post-conviction appeal to argue ineffective assistance of counsel in order to avoid the procedural bar enforced by the court below. Cf., e.g., *Edgell v. Canning*, 976 P.2d 1193, 1196 (Utah 1999) (refusing to address an issue raised for the first time on appeal).

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<sup>3</sup>The only claim included in both the petition and appeal is petitioner's challenge to the sufficiency of the evidence.

In any event, petitioner's ineffective assistance of counsel claims are facially meritless. In order to establish that counsel performed deficiently, petitioner must identify specific acts and omissions by counsel that fell below an objective standard of reasonableness and overcome a strong presumption that counsel performed reasonably. *See, e.g., Parsons v. Barnes*, 871 P.2d 516, 521-22 (Utah), *cert. denied*, 513 U.S. 966 (1994). Petitioner's arguments do not satisfy this burden.

Petitioner argues that counsel was ineffective for not raising a sufficiency claim in the direct appeal. Appellant's Brief at 5. The argument misstates the record. Appellate counsel raised a sufficiency claim in the direct appeal, and this Court rejected it. *State v. Loretto*, slip op. 960622 at 2 (Utah App. August 14, 1999).

Petitioner's other two ineffectiveness claims appear to allege that he was denied his right to conflict-free counsel. In order to succeed on this claim, petitioner must establish both that his appellate counsel had an actual conflict of interest, and that the conflict affected her performance. *See, e.g., State v. Lovell*, 368 Utah Adv. Rep. 3, 4 (Utah 1999). Petitioner has established neither part of this test.

In order to establish that an actual conflict existed, petitioner must establish that counsel had to make choices that would advance her interests over petitioner's. *Id.* Petitioner

first faults his counsel for not raising his claim that he was tried before a biased judge and jury (Point VI). Appellant's Brief at 5. In support, petitioner alleges only that his trial and appellate attorneys' role as officers of the court would make them reluctant to raise the claim. Id.

Petitioner's allegation is frivolous. If petitioner's allegation established a conflict of interest for Sixth Amendment purposes, all defense counsel would have a conflict of interest because all counsel serve the dual function of advocate and officer of the court.

As to his sufficiency claim, petitioner contends "it is quite possible that the ineffective representation of Mr. Loretto was caused by the fact that the Salt Lake Legal Defenders association is curtailed by the State government from fully and zealously representing defendant because of loyalties owed to the Third (3d) Parties (e.g. the Prosecution Council and the Utah Department of Corrections)." Appellant's Brief at 9 (emphasis added). This allegation merely speculates about possible divided loyalties. It does nothing to establish that counsel in any way advanced her interests to the detriment of petitioner's

Petitioner also has not shown that any conflict affected his counsel's performance. Admittedly, counsel did not raise on direct appeal a that petitioner was tried before a biased judge and jury. However, petitioner offers nothing other than his mere

conclusion that the omission resulted from an actual conflict of interest.<sup>4</sup>

Petitioner similarly fails to establish that any conflict affected how counsel presented the sufficiency claim. To the contrary, petitioner merely repeats the same sufficiency argument in this appeal that his counsel made on the direct appeal. Appellant's Brief at 7-9.

Petitioner also grounds his appeal on five claims that he never presented to the post conviction court.<sup>5</sup> Raising new claims on appeal does not establish that the post-conviction court erroneously found that the claims presented to it were procedurally barred.

Moreover, all the claims petitioner raises in this appeal are clearly procedurally barred; the substance of each was fully and fairly litigated on the direct appeal. A petitioner may not re-litigate in a post-conviction petition issues that the Court has already disposed of on direct appeal. See, e.g., *Wright v.*

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<sup>4</sup>To support this claim, petitioner refers back to the other five claims he raised on this appeal. Appellant's Brief at 9. As detailed below, counsel raised the substance of all five of those claim on the direct appeal.

<sup>5</sup>The petition did not include petitioner's appellate claims that: 1) a prospective juror's comments about Mexican gang members tainted the panel (Point I); 2) the trial court gave an *Allen* instruction (Point III); 3) the trial court refused an instruction on petitioner's theory of the case (Point IV; 4) the trial court should have granted petitioner's requested continuance (Point V); and 5) the trial court and jury were biased (Point VI).

*Carter*, 886 P.2d 58, 60 (Utah 1994); *Webb v. Van Der Veur*, 853 P.2d at 899. This Court already rejected petitioner's claims that prospective juror Bingham's comments about the dress of Mexican gang members tainted the jury panel, that the State produced insufficient evidence to support his conviction, and that the trial court erroneously denied a requested continuance. *State v. Loretto*, slip op. 960622-CA (Utah App. August 14, 1997).

The Court rejected the substance of petitioner's *Allen* instruction claim on the direct appeal. In Point III, petitioner contends that the trial court erroneously gave "verdict urging 'Allen' instructions." Appellant's Brief at 9. "When a jury informs the trial court that they are having difficulty agreeing, the court may underscore the case's importance, urge the jury to reach an agreement, and send them back for further deliberations." *State v. Clements* 967 P.2d 957, 959 (Utah App. 1998) (citing *Allen v. United States*, 164 U.S. 492 (1896)). However, such instructions are appropriate only if, in context, they are not coercive. *Id.*

*Clements* clarifies that the analysis is triggered only when the jury announces that it is deadlocked, or, at least, having difficulty reaching a verdict. *Id.* Petitioner does not argue that the jury in his criminal trial made such an announcement. Instead, petitioner merely repeats the argument the Court already rejected that the trial court erroneously gave more than one

aggravated robbery instruction. Appellant's Brief at 9-11.

Similarly, the Court rejected the substance of petitioner's claim that the trial court refused to instruct on his theory of the case. In Point IV, petitioner asserts that the trial court erroneously declined a "reasonable alternative" instruction. Appellant's Brief at 11-12. Petitioner presented this same argument on direct appeal as part of his contention that the trial court gave an erroneous reasonable doubt instruction. Specifically, petitioner argued that his proffered "reasonable alternative hypothesis" instruction better defined reasonable doubt (R. 434-37). The Court rejected petitioner's challenge to the reasonable doubt instructions. *State v. Loretto*, slip op. 960622-CA at 2. Re-badging already litigated and rejected claims does not revive them for purposes of post-conviction relief. *Gardner v. Holden*, 888 P.2d at 616 ("the attempt to avoid a prior ruling by a hair-splitting distinction in the statement of the issue does not invoke Rule 65B or habeas jurisdiction").

Finally, petitioner's claim that he was tried before a biased judge and jury also fails. To support that claim, petitioner merely refers to other claims in his current appellate brief. Appellant's Brief at 13. Those claims are procedurally barred because they were fully and fairly litigated on direct appeal. Petitioner cannot obtain merits review of a claim that is merely derivative of procedurally barred claims.

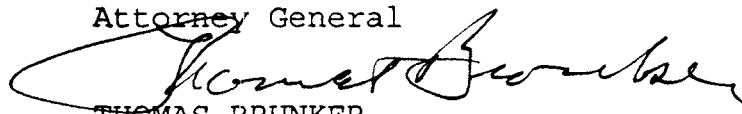


### CONCLUSION

Because petitioner offered no justification to the post-conviction court for omitting his post-conviction claims from the direct appeal, the post-conviction court correctly applied the procedural bar and correctly dismissed the petition. On appeal, petitioner has established no error in applying the procedural bar. Therefore, the Court should affirm the dismissal of the petition.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of Sept  
1999.

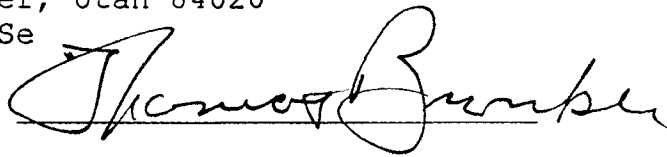
JAN GRAHAM  
Attorney General

  
THOMAS BRUNKER  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed by first-class mail, postage pre-paid, to the following on this 29<sup>th</sup> day of Sept. 1999:

Gilbert Loretto  
P.O. Box 250  
Draper, Utah 84020  
Pro Se

A handwritten signature in cursive script, appearing to read "Thomas Brunker", written over a horizontal line.

## ADDENDA

## ADDENDUM A

granted. *Birch Creek Irrigation v. Prothero*, 858 P.2d 990 (Utah 1993).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 42 Am. Jur. 2d Injunctions §§ 10, 14, 48 to 52, 69 et seq., 265, 296 to 303, 310 to 316.

**C.J.S.** — 43 C.J.S. Injunctions §§ 8, 16, 22 to 24, 36 et seq.; 43A C.J.S. Injunctions §§ 165, 166, 180, 206, 208.

**A.L.R.** — Infant's employment contract, enforceability of covenant not to compete in, 17 A.L.R.3d 603.

Appealability of contempt adjudication or conviction, 33 A.L.R.3d 448.

Review other than by appeal or writ of error, contempt adjudication or conviction as subject to, 33 A.L.R.3d 589.

Propriety of permanently enjoining one guilty of unauthorized use of trade secret from engaging in sale or manufacture of device in question, 38 A.L.R.3d 572.

Propriety of injunctive relief against diver-

sion of water by municipal corporation or public utility, 42 A.L.R.3d 426.

Preliminary mandatory injunction to prevent, correct, or reduce effects of polluting practices, 49 A.L.R.3d 1239.

What constitutes fraud or forgery justifying refusal to honor, or injunction against honoring, letter of credit under UCC § 5-114(1), (2), 25 A.L.R.4th 239.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond, 30 A.L.R.4th 273.

Right of employee to injunction preventing employer from exposing employee to tobacco smoke in workplace, 37 A.L.R.4th 480.

Propriety of federal court injunction against suit in foreign country, 78 A.L.R. Fed. 831.

**Key Numbers.** — Injunction ¶ 9 et seq., 143, 148, 150, 189, 190, 204, 213.

### 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 imprisonment), paragraph (c) (involving other types of wrongful restraint on personal liberty), paragraph (d) (involving the wrongful use of public or corporate authority) or paragraph (e) (involving the wrongful use of judicial authority and the failure to exercise such authority). There shall be no special form of writ. 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 imprisonment.

(1) **Scope.** Any person committed by a court to imprisonment in a state prison, other correctional facility or county jail who asserts that the commitment resulted from a substantial denial of rights may petition the court for relief under this paragraph. This paragraph (b) shall govern proceedings based on claims relating to original commitments and commitments for violation of probation or parole. This paragraph (b) shall not govern proceedings based on claims relating to the terms or conditions of confinement.

(2) **Commencement.** Except for challenges to parole violation proceedings, the proceeding shall be commenced by filing a petition, together with a copy thereof, with the clerk of the district court in the county in which the commitment leading to confinement was issued. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses. Petitions challenging parole violation proceedings shall be commenced by filing a petition together with a copy thereof, with the clerk of the district court in the county in which the petitioner is located.

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

(A) the place where the petitioner is restrained;

(B) the name of the court by 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;

(C) in plain and concise terms, all of the facts on the basis of which the petitioner claims a substantial violation of rights as the result of the commitment;

(D) whether or not the judgment of conviction or the commitment for violation of probation or parole has been reviewed on appeal, and, if so, the number and caption or title of the appellate proceeding and the results of the review;

(E) whether the legality of the commitment has already been adjudicated in any prior post-conviction or other civil proceeding, and if so the reasons for the denial of relief in the prior proceeding.

(4) **Attachments to the petition.** The petitioner shall attach to the petition affidavits, copies of records or other evidence available to the petitioner in support of the allegations. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the commitment, and a copy of all orders and memoranda of the court. If copies of pertinent pleadings, orders, and memoranda are not attached, the petition shall state why they are not attached.

(5) **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.

(6) **Assignment by the presiding judge.** On the filing of the petition, the clerk shall promptly deliver it to the assigned judge of the court in which it is filed. Except for challenges to parole violation proceedings, the presiding judge shall if possible assign the proceeding to the judge who issued the commitment.

(7) **Dismissal of frivolous claims.** On review of the petition, if it is apparent to the court that the issues presented in the petition have 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. 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.

(8) **Service of petitions.** If, on review of the petition, the court concludes that all or part of the petition is not frivolous on its face, the court shall designate the portions of the petition that are not frivolous and direct the clerk to serve a copy of the petition and a copy of any memorandum by mail upon the attorney general and the county attorney.

(9) **Responsive pleading.** Within twenty days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the attorney general and county attorney, or within such other period of time as the court may allow, the attorney general or county attorney 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 twenty 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.

(10) **Hearings.** After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. Upon motion

for good cause, the court may grant leave to either party to take discovery or to extend the date for the hearing. Prior to the hearing, the court may order either the petitioner or the state or county to obtain any relevant transcript or court records. 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. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding.

(11) **Orders.** If the court rules in favor of the petitioner, it shall enter an appropriate order with respect to the validity of the challenged commitment and with respect to rearraignment, retrial, resentencing, custody, bail or discharge. The court shall enter findings of fact and conclusions of law, as appropriate, following any evidentiary hearing or any hearing on a dispositive motion. Upon application of the attorney general or the county attorney, or upon its own motion, the court may stay release of the petitioner pending appeal of its order.

(12) **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 unable to pay the costs of the proceeding, the petitioner may proceed upon an affidavit of impecuniosity, in which event the court may direct that the costs be paid by the county in which the complainant was originally charged.

(13) **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.

**(c) Other wrongful restraints on personal liberty.**

(1) **Scope.** Except for instances governed by paragraph (b) of this rule, this paragraph (c) 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 paragraph (c) 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.

(d) **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 (d). 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 (d) may petition the court under this paragraph (d) 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.

(e) **Wrongful use of judicial authority or failure to comply with duty.**

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

(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.)

**Advisory Committee Note.** — This rule represents a complete reorganization of the former rule. This rule also revises parts of the former rule dealing with habeas corpus and post-conviction remedies. The rule applies generally to proceedings that are necessitated by the absence of another plain, speedy and adequate remedy in the court. After the rule's introductory paragraph, each subsequent paragraph is intended to deal with a separate type of proceeding. Thus, subparagraph (b) deals with proceedings involving wrongful imprisonment; subparagraph (c) deals with proceedings involving other types of wrongful restraint on personal liberty; paragraph (d) deals with proceedings involving the wrongful use of public

or corporate authority; and paragraph (e) deals with proceedings involving the wrongful use of judicial authority or the failure to exercise such authority. To the extent that the special procedures set forth in these paragraphs do not cover specific procedural issues that arise during a proceeding, the normal rules of civil procedure will apply.

This rule effectively eliminates the concept of the "writ" from extraordinary relief procedure. In the view of the advisory committee, the concept was used inconsistently and confusingly in the former rule, and there was disagreement among judges and lawyers as to what it meant in actual practice. The concept has been replaced with terms such as "hearing

## ADDENDUM B

FILED

AUG 14 1997

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	
v.	)	Case No. 960622-CA
	)	
Gilbert Loretto,	)	
	)	F I L E D
Defendant and Appellant.	)	(August 14, 1997)

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Third District, Salt Lake Department, Division I  
The Honorable Frank G. Noel

Attorneys: Lisa J. Remal and Rebecca Hyde, Salt Lake City, for  
Appellant  
Jan Graham and Thomas B. Bruncker, Salt Lake City, for  
Appellee

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Before Judges Wilkins, Billings, and Orme.

WILKINS, Associate Presiding Judge:

This court has determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3).

#### TRIAL COURT'S REFUSAL TO QUASH JURY PANEL

In some cases, there exists a rebuttable presumption of prejudice, which requires the prosecution to prove the defendant was not prejudiced. See, e.g., State v. Swain, 835 P.2d 1009, 1011 (Utah Ct. App. 1992). However, in this case, Loretto bears the burden of showing that prejudice resulted from the rather confusing statements made by Ms. Bingham during voir dire. Although defendant has offered an interpretation of Ms. Bingham's statements in conjunction with a theory of how they could have prejudiced him, we conclude that defendant has not shown that Ms. Bingham's comments prejudiced him, especially in light of the jurors' response to the trial court's subsequent voir dire. We therefore reject Loretto's challenge to the trial court's denial of his motion to quash the entire jury panel.

### SUFFICIENCY OF EVIDENCE

Loretto and the third man flanked the armed man in the group. Each man stood only a foot away from Flores in the dark parking lot. In this formation, the three men stood close enough to Flores to grab her if she tried to escape. The position of each of the men suggests a planned confrontation, or at least a concerted effort by all three men to rob Flores. As such, we conclude that the evidence, when viewed in the light most favorable to the jury's verdict, is not "sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt" that Loretto, with the necessary mental state, encouraged or intentionally aided the armed man in the commission of the robbery. See Utah Code Ann. § 76-2-202 (1995); State v. Dunn, 850 P.2d 1201, 1212 (Utah 1993).

### AGGRAVATED ROBBERY INSTRUCTION

Instruction 13 requires the State to prove that the conduct with which Loretto was charged was prohibited, and thus explains why the next two instructions define what constitutes prohibited conduct. Instruction 16 gives the statutory definition of accomplice liability. Instruction 17 and 18 then clarify that the jury must only consider Loretto's role in the robbery and that Loretto's mere presence was not enough to convict him of accomplice liability. Thus, when the instructions are read together, they do not overemphasize the elements of robbery or detract from the issue of whether Loretto was an accomplice. Instead, the instructions accurately state the law and emphasize to the jury what it must find for Loretto to be guilty on a theory of accomplice liability.

### REASONABLE DOUBT INSTRUCTION

This court and the Utah Supreme Court have specifically held that the reasonable doubt instruction given in this case is "an appropriate statement of Utah law." State v. Robertson, 932 P.2d 1219, 1232 (Utah 1997); State v. Pedersen, 802 P.2d 1328, 1332 (Utah Ct. App. 1990). In addition, in Robertson, the supreme court specifically rejected the argument that the trial court instead should have presented the jury with an instruction that included a generalized reference to a reasonable alternative hypothesis. See 932 P.2d at 1233. Therefore, based on stare decisis, we reject Loretto's argument. See State v. Menzies, 889 P.2d 393, 399 n.2 (Utah 1994), cert. denied, 513 U.S. 1115, 115 S. Ct. 910 (1995).

DENIAL OF MOTION FOR CONTINUANCE

Loretto has never met his burden of establishing on the record that the sought-after witness could be produced or that the witness's testimony was relevant. See State v. Linden, 761 P.2d 1386, 1387 (Utah 1988). Furthermore, Loretto has never even established that the potential witness's testimony would be helpful to Loretto. As a result, Loretto has not shown that he "was materially prejudiced by the [trial] court's denial of the continuance or that the trial result would have been different had the continuance been granted." State v. Oliver, 820 P.2d 474, 476 (Utah Ct. App. 1991). Consequently, we conclude that the trial court did not abuse its discretion by denying Loretto's motion for a continuance. See State v. Cabututan, 861 P.2d 408, 413 (Utah 1993) (stating appellate court will not reverse trial court's denial of motion for continuance absent clear abuse of discretion).

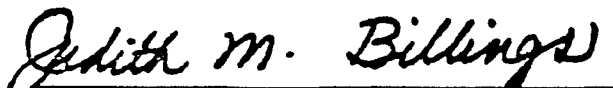
Affirmed.



Michael J. Wilkins,  
Associate Presiding Judge

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WE CONCUR:

  
Judith M. Billings, Judge

  
Gregory K. Orme, Judge

## ADDENDUM C

ANGELA F. MICKLOS (6229)  
Assistant Attorney General  
JAN GRAHAM (1231)  
Utah Attorney General  
Attorneys for Respondent  
P.O. Box 140854  
160 E. 300 S., 6th Floor  
Salt Lake City, Utah 84114-0854  
Telephone: (801) 366-0180

FILED DISTRICT COURT  
THIRD JUDICIAL DISTRICT

NOV 12 1998

SALT LAKE COUNTY  
BY DEPUTY CLERK *[Signature]*

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

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GILBERT LORETTO,	:	ORDER DISMISSING PETITION
	:	FOR POST-CONVICTION RELIEF
Petitioner,	:	
v.	:	
	:	Case No. 970910469
STATE OF UTAH,	:	
	:	Judge Frank G. Noel
Respondent.	:	

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The above-captioned matter came before the Court on respondent's September 18, 1998 motion to dismiss the petition for post-conviction relief. Petitioner did not respond to the motion to dismiss. After reviewing the file, the Court concludes as follows:

1. A petition for post-conviction relief is not a substitute for direct appeal and cannot be used to circumvent regular appellate review. A petitioner waives issues that could have been raised on direct appeal from a conviction unless the petitioner establishes unusual circumstances that justify the failure to previously raise them.


2. Petitioner could and should have raised all of his current issues on direct appeal, and has failed to allege or demonstrate unusual circumstances which justify his failure to do so. Accordingly, petitioner's post-conviction claims are procedurally barred.

**ORDER AND JUDGMENT**

1. Respondent's motion to dismiss is granted.
2. The petition is dismissed with prejudice.

DATED this 12 day of November, 1998.

BY THE COURT:

  
\_\_\_\_\_  
HONORABLE FRANK G. NOEL  
Third District Court



**CERTIFICATE OF MAILING**

I certify that I mailed a true and correct copy of the foregoing unsigned  
**ORDER DISMISSING PETITION FOR POST-CONVICTION RELIEF** postage prepaid,  
this 30<sup>th</sup> day of October, 1998, to:

Gilbert Loretto #25347  
Utah State Prison  
Post Office Box 250  
Draper, Utah 84020

Greg F. Nickles