

2017

Wittingham, LLC, a Utah Limited Liability Company; The Mu1r Second Family Limited Partnership; A Dissolved Utah Limited Partnership, and Dorothy Jeanne Muir, Respondents, v. Tnelimited Partnership, a Utah Limited Partnership~ Ga Vin Dickson; Bruce J. Malcolm, Individually and as Trustee of the Bruce J. Malcolm Trust, Maureen H. Malcolm, Trustee of the Maureen H. Malcolm Trust; Daniel J. Torkelson, Trustee; William Nicholas Muir; trillv.lp Security LLC, a Utah Limited Liability Company; Mario Ozuna; Dwight Egan; :Michael Snow; Brett Candiotti; Tod Debie, Ashton Gifford, Juliana Keller, Mario Naujoks, and Stephen Hawkes,

Utah Supreme Court

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UTAH SUPREME COURT

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OSMAN MOHAMMED NOOR,  
*Petitioner/Appellant,*

*v.*

STATE OF UTAH,  
*Respondent/Appellee.*

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Brief of Appellee

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On Certification from the Utah Court of Appeals

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
STATEMENT OF JURISDICTION .....	1
STATEMENT OF THE ISSUE .....	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES .....	2
STATEMENT OF THE CASE.....	3
A. Summary of facts. ....	3
B. Procedural history.....	5
SUMMARY OF ARGUMENT.....	15
ARGUMENT .....	15
I. THE DISTRICT COURT CORRECTLY RULED THAT NOOR’S AMENDED PETITION, WHOSE CORE PLEADED FACTS DIFFERED FROM AND AT TIMES CONTRADICTED THOSE IN HIS ORIGINAL PETITION, WAS TIME BARRED.....	15
A. To be timely, amended claims must relate back to a common core of operative facts raised in a timely petition.....	18
B. Utah’s relation back case law supports a narrow reading of “conduct, transaction, or occurrence” in post-conviction proceedings. ....	29
C. Barring late claims that share no common core of facts with those raised in a timely petition advances legislative policy.....	34
E. The district court’s allowance for an amendment of the petition neither gave Noor license to raise untimely claims nor prevented the State from raising procedural defenses.....	43
CONCLUSION.....	45

CERTIFICATE OF COMPLIANCE .....	46
---------------------------------	----

## ADDENDA

Addendum A — Constitutional Provisions, Statutes, and Rules

Addendum B — Post-Conviction Petition

Addendum C — Order Appointing Counsel

Addendum D — Minutes Status Conference

Addendum E — Amended Post-Conviction Petition and  
Memorandum of Authorities

Addendum F — Memorandum Decision

# TABLE OF AUTHORITIES

## FEDERAL CASES

<i>Board of Regents v. Tomanio</i> , 446 U.S. 478 (1980).....	35
<i>Dale K. Barker Co., P.C. v. Valley Plaza</i> , 541 F. App'x 810 (10th Cir. 2013) .....	23
<i>In re Fosamax Products Liability Litigation</i> , 707 F.3d 189 (2d Cir. 2013).....	42
<i>Mayle v. Felix</i> , 545 U.S. 644 (2005) .....	<i>passim</i>
<i>Turner v. United States</i> , 699 F.3d 578 (1st Cir. 2012) .....	26
<i>United States v. Edwards</i> , 588 F. App'x 823 (10th Cir. 2014) .....	26
<i>United States v. Espinoza-Saenz</i> , 235 F.3d 501 (10th Cir. 2000).....	26, 28
<i>United States v. Hicks</i> , 283 F.3d 380 (D.C. Cir. 2002).....	28
<i>United States v. Kubrick</i> , 444 U.S. 111 (1979) .....	35
<i>United States v. Pursley</i> , No. 03-CR-00415, 2009 WL 1505164 (D. Colo. May 28, 2009) .....	27

## STATE CASES

<i>Amjacs Interwest, Inc. v. Design Associates</i> , 635 P.2d 53 (Utah 1981).....	16
<i>Behrens v. Raleigh Hills Hosp., Inc.</i> , 675 P.2d 1179 (Utah 1983) .....	30, 38
<i>Benvenuto v. State</i> , 2007 UT 53, 165 P.3d 1195 .....	31
<i>Corcoran v. State</i> , 845 N.E.2d 1019 (Ind. 2006) .....	19
<i>Ex Parte Jenkins</i> , 972 So.2d 159 (Ala. 2005).....	28
<i>Gordon v. State</i> , 2016 UT 11, 369 P.3d 1255 .....	19
<i>Gordon v. State</i> , 2016 UT App 190, 382 P.3d 1063 .....	34

<i>Gregg v. State</i> , 2012 UT 32, 279 P.3d 396 .....	32
<i>Gressman v. State</i> , 2013 UT 63, 323 P.3d 998 .....	2
<i>Highlands at Jordanelle, LLC v. Washington Cty.</i> , 2015 UT App 173, 355 P.3d 1047 .....	29
<i>Johnson v. State</i> , No. CR 03-1023, 2005 WL 3320855 (Ark. Dec. 8, 2005) .....	28
<i>Jones &amp; Trevor Mktg., Inc. v. Lowry</i> , 2012 UT 39, 284 P.3d 630 .....	17
<i>Jones v. State</i> , No. 01-0184, 2002 WL 100566 (Iowa Ct. App. Jan. 28, 2002) ....	28
<i>Kell v. State</i> , 2012 UT 25, 285 P.3d 1133 .....	26
<i>Larson v. Wycoff Co.</i> , 624 P.2d 1151 (Utah 1981) .....	16
<i>Lucero v. Kennard</i> , 2005 UT 79, 125 P.3d 917 .....	31
<i>McNair v. State</i> , 2014 UT App 127, 328 P.3d 874 .....	25
<i>Menzies v. State</i> , 889 P.2d 393 (Utah 1994) .....	32, 33
<i>People v. Bell</i> , 16 N.E. 3d 910 (Ill. Ct. App. 2014) .....	27
<i>Pinder v. State</i> , 2015 UT 56, 367 P.3d 968 .....	33
<i>Ringwood v. Foreign Auto Works, Inc.</i> , 786 P.2d 1350 (Utah Ct. App. 1990) ....	30
<i>Roach v. Kentucky</i> , 384 S.W.3d 131 (Ky. 2012) .....	27
<i>State v. Noor</i> , 2012 UT App 187, 283 P.3d 543 .....	9, 41
<i>State v. Noor</i> , 288 P.3d 1045 (Utah 2012) .....	9
<i>State v. Winfield</i> , 2006 UT 4, 128 P.3d 1171 .....	1
<i>Surinach v. State</i> , 110 So.3d 95 (Fla. Dist. Ct. App. 2013) .....	27

<i>Thompson v. State</i> , No. A-8043, 2003 WL 22405385 (Alaska Ct. App. Oct. 22, 2003) .....	27
<i>Tucker v. State Farm Mut. Auto. Ins. Co.</i> , 2002 UT 54, 53 P.3d 947 .....	23
<i>Webster v. Sill</i> , 675 P.2d 1170 (Utah 1983) .....	42
<i>Yearsley v. Jensen</i> , 798 P.2d 1127 (Utah 1990).....	18, 19, 29, 30

## FEDERAL STATUTES

28 U.S.C. § 2242 .....	23
28 U.S.C. § 2254 .....	24

## STATE STATUTES

Utah Code Ann. § 78A-3-102.....	1
Utah Code Ann. § 78B-9-102 .....	19, 33
Utah Code Ann. § 78B-9-105 .....	17, 18
Utah Code Ann. § 78B-9-106 .....	2, 26, 32, 44
Utah Code Ann. § 78B-9-107 .....	1, 2, 17, 18, 36
Utah Code Ann. § 78B-9-109 .....	38

## FEDERAL RULES

Fed. R. Civ. P. 15 .....	23
--------------------------	----

## STATE RULES

Utah R. Civ. P. 8 .....	45
Utah R. Civ. P. 15 .....	2, 18, 23



Utah R. Civ. P. 56.....	16
Utah R. Civ. P. 65C.....	<i>passim</i>

#### OTHER AUTHORITIES

House Floor Debate, H.B. 214, 1996 Gen. Sess. (Feb. 22, 1996).....	24, 34
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Brief of Appellee

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STATEMENT OF JURISDICTION

Noor appeals from summary judgment against him and the denial of post-conviction relief. The Utah Court of Appeals certified Noor's case for this Court's review. The Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(b).

STATEMENT OF THE ISSUE

*Introduction*

The Postconviction Remedy Act's one-year statute of limitations requires that petitioners act diligently to present all of the facts that form the basis of their claims for relief in a timely petition. This legislative timing requirement fosters repose, stability, and public faith in the justice system by bringing finality to criminal convictions and state judgments.

Noor filed a timely pro se petition, but after the district court appointed him pro bono counsel, he filed an amended petition that omitted all claims he had raised in the original and substituted new claims that had nothing in common with the original ones other than the trial itself and his trial attorney's general effectiveness. Noor filed the amended petition over a year and a half after the statute of limitations elapsed on those claims.

**Issue:** Did the district court correctly determine that Noor's amended post-conviction petition, whose core pleaded facts either differed from or directly contradicted those in his original petition, was time barred under the Postconviction Remedy Act's statute of limitations?

*Standard of Review.* An appellate court reviews a district court's grant of summary judgment for correctness. *Gressman v. State*, 2013 UT 63, ¶ 6, 323 P.3d 998.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

Utah Code Ann. § 78B-9-106 (PCRA's procedural bars)  
Utah Code Ann. § 78B-9-107 (PCRA's statute of limitations)  
Utah R. Civ. P. 15 (Amended and supplemental pleadings)  
Utah R. Civ. P. 65C (Post-conviction relief)



## STATEMENT OF THE CASE

### A. Summary of facts.<sup>1</sup>

Some time after 10:00 p.m., Noor, a Somali immigrant who was then a resident of the Lorna Doone apartments, banged on a neighbor's door. CR137:71-72.<sup>2</sup> Loud music played through the open door of Noor's apartment. CR137:73. Because it was during the apartment's "quiet hours," the manager, J.E., who lived across the hall, told Noor to turn his music down and to stop banging on the door or she would call the police. CR137:67, 73-74. J.E. noticed "a glass jug of some type of alcohol" in Noor's apartment; she also smelled alcohol on Noor. CR137:74.

As J.E. turned to reenter her open apartment door, Noor went in before her and sat on her couch. CR137:75. J.E. repeatedly asked and gestured for Noor to leave, but Noor remained on her couch, professing his love for her. CR137:75-76. When J.E. did not respond, Noor stood and, walking a few feet to the living room closet, shed his clothes. *Id.* Noor pointed to his erect penis

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<sup>1</sup> The trial facts are recited "in a light most favorable" to the jury verdict. *State v. Winfield*, 2006 UT 4, ¶ 2, 128 P.3d 1171.

<sup>2</sup> The State cites to the underlying criminal record as "CR[page #]" and to the record for this post-conviction appeal as "PCR[page#]."

and said he was a man and loved her. CR137:77. J.E. told Noor to get dressed and leave or she would call the police. CR137:78.

J.E. then tried to enter her bedroom to get her cell phone. *Id.* As she passed Noor, he grabbed her and pulled her down on top of him on the couch. *Id.* While J.E. struggled to free herself from Noor's grasp, he tried to kiss her and to "get [her] to engage with him, with his face, and with . . . his body." CR137:79. J.E. momentarily freed herself and ran into her bedroom. CR137:80.

She returned to the living room with her cell phone and called the police. CR137:81. While she was on the telephone with the dispatcher, Noor, who had redressed, put his arms around her and tried to kiss her. *Id.* J.E. resisted his advances and asked for police assistance to get Noor out of her apartment. *Id.* Police dispatch assured her that officers were on the way. CR137:81-83.

After hanging up, J.E. again tried to evade Noor's advances, but he "went down on his knees" with "his arms around [her] bottom." CR137:83-84. Noor then pulled J.E. forward, holding her buttocks, and "stuck his face into [her] crotch, [simulating] . . . oral sex with his tongue." CR137:84-85. J.E. pulled away, but Noor pushed her up against a wall, held her arms, and "continued to try to kiss [her] and push his body against" hers. CR137:85-86.

As J.E. fought to free herself, Noor put his hand down her pants, touching her genitals, skin to skin. CR137:86-87. J.E. pushed Noor away, grabbed her keys, and tried to leave her apartment. CR137:87.

At about this time, a police officer entered the hall. *Id.* He saw Noor and J.E. standing in the doorway to J.E.'s apartment. CR137:118. Noor was "obstructing" J.E.'s "ability to leave." CR137:119. The officer saw that J.E. was already "tearing up" and that she "appeared scared." CR137:120. Her clothing "was all out of place," and had "been pulled and stretched, especially around the neck and the waist area." *Id.* The officer also noted that Noor's belt was unbuckled and his pants completely unzipped. CR137:123. Davis smelled a "strong odor" of alcohol on Noor. CR137:120. When other officers arrived, Noor went to his apartment. CR137:121. He "started yelling" profanities at them when they asked him to sit down. *Id.*

#### **B. Procedural history.**

The State charged Noor with one count of burglary, one count of forcible sexual abuse, and one count of lewdness. CR1-3.

At an early hearing where a no-contact order was made, Noor had the assistance of court-appointed Somali interpreter Abdullehi Kulmye. PCR415. At the preliminary hearing, Noor had the assistance of court-appointed Somali interpreter Ahmed M. Ali. PCR416-17. The victim, J.E., testified at



that hearing. *Id.* At a subsequent arraignment hearing, Noor had the assistance of yet another court-appointed Somali interpreter, Layla Ismail. PCR416.

Noor attended at least five more pretrial hearings where he had the assistance of an interpreter. *See generally* PCR418-27 (Noor assisted by interpreters Salah Awad, Ahmed M. Ali, Layla Ismail, and Ali Mohamed at various proceedings).

Noor was tried before a jury in January 2011. R92-93. He had two alternating Somali interpreters during trial. CR137:58-59; *see* PCR428 (listing Ali Omar Ali as the interpreter). Michael Sikora represented Noor. *Id.*

Before voir dire of the jury venire, Sikora informed the Court that Noor was with him at the defense table "with the interpreter." CR137:1. In his opening argument, Sikora informed the jury that Noor was "sitting next to a Somalia interpreter." CR137:58. Sikora said, "That is his native language, and you will see this interpreter trade places off and on with the interpreter who was here for the beginning." CR137:58-59. Sikora told this to the jury "in case" they were "wondering what's going on when" the interpreters "trade off as the trial goes along." CR137:59. Sikora went on to explain that Noor spent twelve years of his life in Somalia and then seventeen more in refugee camps in Kenya. CR137:59-60.

At trial, the State called two witnesses—J.E. and the arresting officer. *See generally* CR137. J.E. testified that she had been the resident manager at the Lorna Doone apartment complex in Salt Lake City when Noor entered her apartment uninvited, exposed his erect penis, and sexually assaulted her. CR137:61,71-87.

At one point during J.E.'s testimony, she identified Noor as "sitting right there *next to the interpreter* in blue and khaki." CR137:66 (emphasis added). J.E. testified that Noor had resided in the apartment across the hall from her. CR137:67. The State presented photographs showing the relative locations of Noor's and J.E.'s apartments with their door numbers. CR137:67-68; State's Exhibits (SE) 2,3,4.

J.E. had "many" interactions with Noor; some involved Noor paying rent, while others involved occasions in which she had to ask him to be quiet. CR137:69. J.E. usually conversed with Noor in English, but she used the assistance of Noor's brother as an interpreter on some occasions. CR137:69-70.

J.E. went on to describe the night when Noor forcibly entered her apartment, pointed to his erect penis and told her he loved her, and then continued through the series of confrontations in which she verbally and even physically resisted Noor's sexual assaults. CR137:71-87.

After J.E.'s testimony, the court dismissed the jury and asked Sikora if Noor was going to testify. CR137:112. Sikora said that he "had that discussion with [Noor] this morning" and told him that he had a right to testify. *Id.* Sikora continued, "It was my advice to him that he not testify and he told me that he will trust me on this decision and agreed not to testify today." *Id.*

The trial court then addressed Noor: "Is that correct, Mr. Noor? You are going to take your attorney's advice and not testify today?" *Id.* Noor responded, "Oh, okay. Yes." *Id.*

The arresting officer then testified that he saw Noor preventing a disheveled, scared, and tearful J.E. from leaving her apartment. CR137:118-19. Noor was drunk and verbally abusive towards officers until they arrested him. CR137:120-21.

After the jury retired, Sikora made a perfunctory motion for a directed verdict, and the court denied it. CR137:165. The jury returned with a guilty verdict on all counts only twenty-seven minutes after being excused. R93.

The trial court sentenced Noor to concurrent 1-to-15-year prison terms for burglary and forcible sexual abuse, and ordered credit for time served on his lewdness conviction. PCR435-36.



Noor appealed to the Utah Court of Appeals. On appeal, Noor was represented by Sikora and Brittany Enniss from LDA. *State v. Noor*, 2012 UT App 187, 283 P.3d 543. He argued that since “subjugation and domination of women is acceptable and even encouraged in the highly patriarchal Somali culture,” his conduct towards the victim “should be viewed only as a misguided attempt to express love and affection,” not as demonstrating an intent to commit forcible abuse or sodomy. *Id.* ¶ 6.

The court of appeals affirmed Noor’s convictions. *Id.* ¶ 8. It held that Noor had not preserved his cultural-misunderstanding claims, along with other sufficiency of the evidence claims, because his motion for directed verdict at trial lacked the requisite specificity. *Id.* ¶ 7.

On October 17, 2012, this Court denied Noor’s petition for certiorari review. *State v. Noor*, 288 P.3d 1045 (Utah 2012).

On November 5, 2013, Noor filed a timely pro se petition for post-conviction relief. He raised essentially two grounds for relief based on theories of ineffective assistance of his trial counsel. *See generally* PCR1-25 (Addendum B).

Noor claimed that Sikora ineffectively omitted certain arguments from his motion for directed verdict. PCR6-7. Namely, Noor complained that Sikora did not argue that Noor’s cultural background and intoxication

prevented him from forming the requisite intent, and did not argue that no “skin to skin contact with the victim’s genitals” occurred. PCR7. Noor also faulted Sikora for not objecting to a forcible sexual abuse jury instruction on grounds that it improperly listed the knowing, intentional, and reckless mental states. PCR8-9.

Noor used a standard form available to aid prisoners in filing their post-conviction petitions. In the section designated for naming and articulating grounds for relief, the form instructed: “**NOTICE TO THE PETITIONER:** You may be barred from presenting additional grounds in a future post-conviction petition if you fail to present any grounds that you could present here but do not.” PCR5 (bolding and capitalization in original). On the same page, the form instructed in boldface that Noor “**must allege facts**” in support of any ground raised. *Id.*

With his petition, Noor filed a motion for appointment of counsel, which the court denied. PCR26-27,40-41. The State filed a motion for summary judgment on Noor’s petition. PCR57-91. Meanwhile, Noor filed letters with the court stating that he could not read or write English and that another person was writing pleadings on his behalf. PCR101,104.

Accepting these representations, the district court ordered that counsel be appointed for Noor. PCR107-09 (Addendum C). Attorneys from Holland

& Hart entered their appearance in October 2014. PCR113-14,117-18. Due to a conflict, they soon withdrew. PCR128-30,143.

In March 2015, Noor's current counsel from Snow Christensen & Martineau accepted appointment. PCR153-54. At a status conference, counsel stated their intent to file an amended petition on Noor's behalf. PCR160 (Addendum D). The State did not object, and the district court gave Noor forty-five days to file an amended petition. *Id.*

At no point during Noor's preliminary hearing, arraignment, several pretrial conferences, trial, presentence investigation, appeal, original post-conviction petition, or in the various representations he made pro se or through counsel up to the filing of his amended petition had Noor suggested—let alone claimed—that he did not understand the victim's testimony or that his court-appointed trial interpreters were incompetent. Neither had Noor complained about any of Sikora's pretrial decisions.

Noor, through counsel, filed an amended petition and memorandum in support on August 27, 2015. PCR185-210 (Addendum E). It omitted all of the challenges Noor set forth in the original petition. For the first time in over four years of litigation, Noor claimed that he “had a difficult time understanding the translation” of his Somali interpreter during his jury trial. PCR203. Despite the record evidence showing that Noor had at least 5



different court-appointed Somali interpreters alternately assisting him during his preliminary hearing, arraignment, and subsequent pretrial hearings, as well as two interpreters during trial, Noor claimed that he “did not even understand the accuser’s testimony against him.” PCR201,203-04,205.

Noor brought his amended collateral challenge under new theories of structural error and ineffective assistance of counsel. First, he claimed that Sikora’s facilitation of court interpreters at trial amounted to structural error relieving Noor of his burden to prove prejudice. PCR203-04. He alleged that Sikora “did not do anything” when Noor said that he was having difficulty understanding the Somali interpreter’s translation. *Id.* Second, he claimed, in the alternative, that Sikora’s omission was ineffective under *Strickland v. Washington*, and that he suffered prejudice because he did not understand the victim’s testimony and thus could not suggest to Sikora an alternative defense theory that the victim was fabricating her testimony out of romantic jealousy. PCR205-06. Third, Noor argued that Sikora was ineffective because he did not allow him to “tell his version of what happened” when they met before trial. PCR206-07. Finally, Noor claimed that Sikora was ineffective for not advising him of deportation risks before they tried the case to a jury. PCR209-10.

The district court granted summary judgment for the State. PCR879-82 (Addendum F). It ruled that all of Noor's claims in the amended petition were time barred because he raised them outside the PCRA's one-year statute of limitations and they did not relate back to any claims raised in his original, timely petition. PCR880-82. The court determined that Noor had omitted all of his original claims for relief and raised new claims with different core facts in their stead. *Id.*

The district court rejected Noor's argument that it should deem his claims timely because it had already allowed him to amend his petition during an earlier status conference hearing. PCR881. The court concluded that it was not given the opportunity to address the statute of limitations on Noor's claims at that hearing. *Id.* Noor's counsel had said only that they wanted "to try and put some substance" to the original petition and needed time to "ascertain whether there [were] any other issues that needed to be raised." *Id.* The statute of limitations issues was thus "not before the court" when it granted the motion to amend. *Id.*

The court further concluded that it did not have authority to extend the limitations period at the time of the status conference, even if Noor had apprised the Court of the timeliness of his claims. *Id.* The court observed that the Legislature had "sharply restricted" district courts' discretion to consider

untimely post-conviction petitions. *Id.* (citing *Gardner v. State*, 2010 UT 46, ¶ 91, 234 P.3d 1115). The court concluded that its earlier decision to allow Noor's amended petition did not mean it had the authority to extend a limitations period established by statute. *Id.*

The court next rejected Noor's argument under rule 15(c), Utah Rules of Civil Procedure, that his amended petition's claims related back to those in his original pro se petition. PCR881-82. Following the United States Supreme Court's reasoning in *Mayle v. Felix*, the court determined that "even the most liberal reading" of Noor's original and amended petitions could not sustain an inference that their claims were related by a common core of facts. *Id.* (citing 545 U.S. 644, 664 (2005)). Noor's original petition made no mention of alleged problems with his trial interpreter, with his counsel during pretrial meetings, or with counsel's alleged failure to inform him of deportation consequences. *Id.* The only mention Noor's original petition made of his difficulty with the English language concerned his ability to understand the victim and thus form the requisite intent for his underlying crimes. *Id.* But that claim did not fault his trial interpreter, and was thus based on different operative facts than the interpreter-deficiency claims in his amended petition. *Id.* The district court thus concluded that all of the amended petition's claims were time barred. *Id.*

## SUMMARY OF ARGUMENT

The district court correctly granted summary judgment for the State. Noor brought his amended petition over a year and a half after the PCRA's statute of limitations elapsed on Noor's amended claims. And the amended petition completely abandoned the claims in his original petition, instead substituting claims that shared no common factual core with any claim in the original. Because the rule governing amendments in post-conviction proceedings is silent on the issue whether untimely amendments must relate back to claims in a timely petition, the district court properly looked to rule 15(c), Utah Rules of Civil Procedure, which governs pleading amendments, to fill the gap. That rule required that Noor's amendments arise from the same conduct, occurrence, or transaction in claims set forth in his original, timely petition. None of the claims in Noor's amended petition met rule 15(c)'s relation back requirement. They were thus time barred as a matter of law.

## ARGUMENT

### I.

The district court correctly ruled that Noor's amended petition, whose core pleaded facts differed from and at times contradicted those in his original petition, was time barred.

Noor argues that rules governing post-conviction amendments and this Court's precedent gave the district court "discretion" to review the merits

of claims raised in his amended petition, regardless of their timeliness. Br.Aplt. 10-19. He views the district court's application of the PCRA's time bar to those claims as an abuse of that discretion. *Id.* But the district court correctly determined that its general discretion to permit or deny amendments did not give it authority to extend the Legislature's one-year limitations period for post-conviction claims. Because Noor's new claims came well over a year after the statute expired and shared no common core of facts with those pleaded in his original timely petition, the district court properly granted summary judgment against Noor.

Rule 56, Utah Rules of Civil Procedure, requires a district court to grant summary judgment if "there is no genuine dispute as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(a). "Summary judgment is proper when the pleadings and other documents before the court establish that there is no basis for awarding the relief sought by a litigant." *Larson v. Wycoff Co.*, 624 P.2d 1151, 1153 (Utah 1981).

"The purpose of summary judgment is to eliminate the time, trouble, and expense of trial when it is clear as a matter of law that the party ruled against is not entitled to prevail." *Amjacs Interwest, Inc. v. Design Associates*, 635 P.2d 53, 54 (Utah 1981). Noor bore the burden to show that his claims



complied with the PCRA's statute of limitations. *See* Utah Code Ann. § 78B-9-105(2) (providing that once the State raises the procedural bar, "the petitioner has the burden to disprove its existence by a preponderance of the evidence").

To support summary judgment, the State had to show that Noor's proffer, even if believed, failed as a matter of law to entitle him to relief. *See Jones & Trevor Mktg., Inc. v. Lowry*, 2012 UT 39, ¶¶26-27, 284 P.3d 630 (agreeing with a determination that the plaintiff's allegations were insufficient as a matter of law to meet its burden on an element of its claim).

The district court properly granted summary judgment. All of Noor's claims were time barred because he raised them outside the PCRA's statute of limitations and they did not arise from the same conduct, occurrence, or transaction in claims set forth in his original timely petition.

Under the PCRA, a "petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code Ann. § 78B-9-107. The PCRA requires post-conviction courts to "clearly and expressly determine whether [a] claim is independently precluded" by the time bar, even "if the court comments on the merits of a post-conviction claim." Utah R. Civ. P. 65C(b). Noor's cause of action accrued on January 15, 2013, the last day for seeking certiorari review in the United States Supreme

Court. *Id.* § 78B-9-107(c)<sup>3</sup>; Supreme Court Rule 13 (Time for Petitioning). Thus, Noor had to file his claims on or before January 15, 2014.

Noor filed his first post-conviction petition on November 5, 2013—within the statute of limitations. But he did not file his current amended petition until August 27, 2015. Thus, the claims in Noor’s amended petition were untimely unless he could prove that they related back to claims in his original petition. *See* Utah Code Ann. § 78B-9-105(2) (placing burden on petitioner to “disprove” application of the time bar once raised by the State).

**A. To be timely, amended claims must relate back to a common core of operative facts raised in a timely petition.**

The relation back doctrine allows claims in amended pleadings to survive the applicable statute of limitations so long as they arise from the same “conduct, transaction, or occurrence set out...in the original pleading.” Utah R. Civ. P. 15(c)(2). If a claim in an amended pleading does not relate back to a claim raised in a timely pleading, then the timely pleading does not serve to bring it within the statutory period. *See Yearsley v. Jensen*, 798 P.2d 1127, 1128-29 (Utah 1990).

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<sup>3</sup> The statute lists other potential times a cause of action can accrue, such as discovery of new, material evidence, but Noor’s petition did not implicate any of them. *See* Utah Code Ann. § 78B-9-107. He does not argue otherwise.

“Proceedings” conducted under the PCRA are “civil and are governed by the rules of civil procedure.” Utah Code Ann. § 78B-9-102. Provisions “for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.” *Id.* Thus, when rule 65C does not specifically address a procedural issue, the remainder of the rules of civil procedure govern. *See, e.g., Gordon v. State*, 2016 UT 11, ¶ 39 & n.17, 369 P.3d 1255 (interpreting rule 65C as impliedly incorporating general pleading rules that are not expressly contrary to it).

Rule 65C expressly governs amended petitions brought under the PCRA. It states, “No...amendments will be permitted unless ordered by the court.” Utah R. Civ. P. 65C(k). Rule 65C is silent, however, on whether new claims are time barred when raised in an amended petition that falls outside the PCRA’s statute of limitations. Thus, by operation of the plain language of the PCRA, a post-conviction court must look to other Utah Rules of Civil Procedure to resolve this question. *See* Utah Code Ann. § 78B-9-102; *Gordon*, 2016 UT 11, ¶ 39 & n.17; *see also Corcoran v. State*, 845 N.E.2d 1019, 1021 (Ind. 2006) (applying rule of evidence equivalent to Utah rule 15(c) where Indiana rules governing post-conviction relief were otherwise silent on how to treat new claims brought in amended petition outside the statute of limitations).

The only relevant provision to resolve this question is rule 15(c). Noor thus misses the point when he reads the absence of a relation back requirement in rule 65C(h)(3) & (k) as meaning that there is no such requirement for untimely amendments in post-conviction proceedings. Br.Aplt. 10-11. As discussed, rule 15(c) fills this gap to permit amendments that arise out of the same “conduct, transaction, or occurrence set forth...in the original pleading.”

The relationship between rules 65C(k) and 15(c) is similar to the relationship between rules 15(a) and 15(c). Rule 15(a) governs how non-PCRA pleadings may be amended, such as by leave of the court. But it does not address how untimely claims in an amendment are to be treated. Rule 15(c) does that work.

Likewise, rule 65C governs how to amend a post-conviction petition—only by leave of the court. Utah R. Civ. P. 65C(k). Like rule 15(a), rule 65C(k) is silent on amendments that include otherwise untimely claims. Thus, the district court must look to rule 15(c), just as it would in other civil cases.

Utah courts have not yet addressed the relation back doctrine in the context of post-conviction relief. But the United States Supreme Court has applied the relation back doctrine under federal civil procedure rules in analogous federal habeas corpus proceedings. In *Mayle v. Felix*, the Court

held that relation back of a claim will not occur and the claim will be untimely unless the original and amended claims are “tied to a common core of operative facts.” 545 U.S. at 664 (providing survey of federal court rulings on relation back in the context of amended habeas corpus petitions).

The petitioner in *Mayle* filed a timely pro se federal habeas petition. *Id.* at 648. He claimed, among others, that the trial court’s admission of a witness’s videotaped interview violated his right to confrontation under the Sixth Amendment. *Id.* at 648. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year statute of limitations on federal habeas corpus petitioners. *Id.* Five months after the AEDPA’s one-year limitation period expired, and eight months after the federal court appointed him counsel, the petitioner filed an amended petition. *Id.* There, he added a new claim: that officers violated his Fifth Amendment right against self-incrimination by using coercive tactics to obtain damaging statements from him. *Id.*

The Court looked to the interaction between rule 15(c), Federal Rules of Civil Procedure, and the AEDPA’s one-year limitation period, to conclude that the petitioner’s Fifth Amendment claim was time barred. *Id.* at 656-57, 664. Only two circuits had previously held that “conduct, transaction, or occurrence” could encompass the entire trial, including conviction and



sentence. *Id.* The majority of circuits interpreted “conduct, transaction, or occurrence” more restrictively. *Id.* at 657.

The Supreme Court adopted the more restrictive reading because interpreting “conduct, transaction, or occurrence [broadly] to mean same trial, conviction, or sentence...leaves Rule 15(c)(2) meaningless in the habeas context.” *Id.* at 664 (citations and quotations omitted). The Court reasoned that “amendments...would almost invariably be allowed even after the statute of limitations had expired, because most habeas claims arise from a criminal defendant’s underlying conviction and sentence.” *Id.* at 662 (citations omitted). Thus, *Mayle* held that relation back is proper only when “the original and amended petitions state claims that are tied to a common core of operative facts.” *Id.* at 664. The petitioner’s claims did not meet that criterion. *Id.*

In the Court’s view, the heightened pleading burden in federal habeas corpus proceedings further militated towards a restrictive view of conduct, transaction, or occurrence. *Id.* at 655, 661. The Court observed that that burden is “more demanding” than the notice-pleading requirement imposed on run-of-the-mine civil complaints because it requires petitioners to “specify all [available] grounds for relief” in the federal petition and to

“state the facts supporting each ground.” *Id.* at 655, 661 (quoting Rule 2(c), Rules Governing Section 2254 and 2255 Cases).

*Mayle* concerns not only a federal statutory proceeding directly analogous to the PCRA, but also a federal rule of civil procedure upon which Utah modeled its relation back rule and a similarly demanding pleading requirement. “Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are substantially similar to the federal rules.” *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 7 n.2, 53 P.3d 947 (internal citations omitted). And the Tenth Circuit has opined that “Utah R. Civ. P. 15(c) and Fed. R. Civ. P. 15(c) are substantially similar”; “both rules ask the same questions and lead to the same result.” *Dale K. Barker Co., P.C. v. Valley Plaza*, 541 F. App’x 810, 813-14 (10th Cir. 2013) (unpublished). Thus, *Mayle*’s interpretation of federal rule 15(c) should guide interpretation of Utah rule 15(c).

*Mayle* supports a narrow application of the relation back doctrine to amended petitions brought under Utah’s PCRA for at least three reasons.

First, 28 U.S.C. § 2242 — like the PCRA — specifically applies the rules of civil procedure to habeas corpus proceedings, and therefore operates in precisely the same way in habeas proceedings that state rule 15(c) should in PCRA cases.

Second, federal and state interests in prompt resolution of criminal proceedings manifestly align in their respective post-conviction statutes. As *Mayle* recognized, the “conduct, transaction or occurrence” in the context of habeas corpus should be viewed narrowly because of the one-year statute of limitations established by the AEDPA. *Mayle*, 545 U.S. at 653, 664. The AEDPA was enacted “to advance the finality of criminal convictions,” by adopting the “tight time line” of a one year statute of limitations. *Id.* at 662. Similarly, Utah’s Legislature expressed an intent in enacting the PCRA and its statute of limitations to “significantly shorten[] the time and the number of the appeals,” available to criminal defendants. House Floor Debate, H.B. 214, 1996 Gen. Sess. (Feb. 22, 1996) (statement of Rep. John L. Valentine). Indeed, the legislature intended that the PCRA be a “mirror image” of the AEDPA. *Id.*, see also Utah R. Civ. P. 65C advisory committee note (procedure governing summary dismissal of frivolous claims in state post-conviction “is patterned after the federal practice pursuant to 28 U.S.C. § 2254”). The PCRA thus favors heightened scrutiny of amended petitions to eliminate the time and expense of litigating new claims with different core facts.

Third, the rules governing federal habeas petitions contain a “particularity-in pleading requirement” that substantively parallels the PCRA’s pleading requirements. The federal rule requires a “petitioner to

specify all the grounds for relief available to the petitioner and state the facts supporting each ground.” *Mayle*, 545 U.S. at 655 (internal citations and quotation marks omitted). Under this standard, each claim must be pleaded “discretely” and the petitioner must provide facts “supporting the grounds for relief” that “would delineate an occurrence” under rule 15(c). *Id.* at 661. Likewise, a Utah post-conviction petitioner must “set forth all claims” and include “all of the facts that form the basis of the petitioner’s claim to relief” by attaching “affidavits, copies of records and other evidence in support of the allegations.” Utah R. Civ. P. 65C; *see also McNair v. State*, 2014 UT App 127, ¶ 9, 328 P.3d 874 (stating PCRA provides “a somewhat higher standard than the general” notice “pleading standard found in rule 8(a)”).

This particularity requirement necessitates a narrow view of conduct, transaction, or occurrence because each claim must stand alone. Viewing the conduct, transaction, or occurrence as the entire pretrial, trial, and post-trial case would “permit the relation back doctrine to swallow” the PRCA’s statute of limitations and the purposes behind rules 15(c) and 65C. *Mayle*, 545 U.S. at 662. A petitioner could conceivably file a post-conviction petition with only one claim and then file endless amendments on the theory that they all generally relate back to “pretrial, trial, or post-trial” error that provided a “basis for challenging the conviction.” *Id.* at 661. Such a strategy violates the

PCRA's express purpose to prohibit interminable successive petitions. Utah Code Ann. §§ 78B-9-106, -107; *Kell v. State*, 2012 UT 25, ¶¶ 25, 31, 285 P.3d 1133 (interpreting PCRA as consistent with the AEDPA in creating a "prohibition against subsequent postconviction petitions"). The Legislature could not have intended, in creating the one-year statute of limitations and a bar against successive petitions, to allow for interminable amendments that skirt the procedural bars and whose only limitation is the district court's discretion over pleading amendments.

In applying the *Mayle* standard, federal courts routinely bar amended ineffective assistance of counsel claims that share no core of operative facts with previous ineffectiveness claims. See *United States v. Espinoza-Saenz*, 235 F.3d 501, 504-05 (10th Cir. 2000) (petitioner's ineffectiveness claims raised in an amended petition did not relate back to the ineffectiveness claims in the original petition because they were "totally separate and distinct, in both time and type") (internal citations omitted); *United States v. Edwards*, 588 F. App'x 823, 827 (10th Cir. 2014) (unpublished) (amendment with claim that attorney failed to call petitioner as a witness did not relate back to original petition that attorney failed to call material witnesses); *Turner v. United States*, 699 F.3d 578, 583, 585 (1st Cir. 2012) (petitioner's ineffectiveness claim did not relate back to original petition which had at least five other ineffectiveness claims);



*United States v. Pursley*, No. 03-CR-00415, 2009 WL 1505164, at \*2 (D. Colo. May 28, 2009) (“Because Defendant’s proposed new claims involve distinct areas of alleged ineffective assistance...[they] do not relate back for purposes of amendment”).

The majority of other state courts addressing the timeliness of amended post-conviction claims require that the claims relate back to timely ones in a narrower sense than simply relating to trial. *See Roach v. Kentucky*, 384 S.W.3d 131, 136 (Ky. 2012) (because of gap in state criminal rule governing post-conviction, court looked to state civil rule governing amendment—consistent with the *Mayle* approach—and held that untimely amended claims must arise “out of the conduct, transaction, or occurrence set forth...in the original pleading”); *Thompson v. State*, No. A-8043, 2003 WL 22405385, at \*10 (Alaska Ct. App. Oct. 22, 2003) (unpublished) (applying Alaska’s civil rule 15(c)’s relation back doctrine to affirm the time bar on new amended post-conviction claims); *People v. Bell*, 16 N.E. 3d 910, 914 (Ill. Ct. App. 2014) (declining to review untimely amended claims that did not relate back to original pro se petition, because allowing the new claims would create “an end run” around the district court’s frivolousness review); *Surinach v. State*, 110 So.3d 95, 95 (Fla. Dist. Ct. App. 2013) (requiring relation back of untimely amended claims, but allowing untimely claims that “merely enlarge

an issue or issues raised in the original motion"); *Johnson v. State*, No. CR 03-1023, 2005 WL 3320855, at \*4 (Ark. Dec. 8, 2005) (unpublished) (requiring that all grounds for relief be raised in original post-conviction petition); *Jones v. State*, No. 01-0184, 2002 WL 100566, at \*1 (Iowa Ct. App. Jan. 28, 2002) (per curiam) (rejecting petitioner's argument that new ineffective assistance claim related back to original pro se insufficiency of the evidence claim and affirming time bar of the new claim). Respondent is aware of only one jurisdiction that has rejected application of the relation back doctrine to bar amended post-conviction claims raised outside the statute of limitations. See *Ex parte Jenkins*, 972 So.2d 159, 162 (Ala. 2005).

In short, relation back of a claim will not occur and the claim will be untimely unless the original and amended claims are "tied to a common core of operative facts." *Mayle*, 545 U.S. at 664. A claim introducing additional facts only relates back if it "clarifies or amplifies a claim or theory in the original motion." *United States v. Espinoza-Saenz*, 235 F.3d 501, 504-05 (10th Cir. 2000). An amendment does not relate back if it "seek[s] to add a new claim or to insert a new theory into the case." *Id.*; see also *United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002).

B. Utah's relation back case law supports a narrow reading of "conduct, transaction, or occurrence" in post-conviction proceedings.

Utah courts have applied rule 15(c) narrowly to amended claims in other civil contexts. For instance, in *Yearsley v. Jensen*, this Court determined that new claims of false arrest and malicious prosecution varied "profoundly" from claims of police assault and battery in the original complaint. 798 P.2d 1127, 1129 (Utah 1990). The original complaint alleged only that officers "physically beat" the plaintiff and made not "even an obscure reference" to other misconduct. *Id.* at 1128-29. Denial of the amendment was thus proper. *Id.* at 1129.

And in *Highlands at Jordanelle, LLC v. Washington Cty.*, the Utah Court of Appeals barred an amended complaint brought by a company that had purchased the right to sue from two landowners, one the successor in interest to the other. 2015 UT App 173, ¶¶ 47, 51-52, 355 P.3d 1047. The court held that Washington County's fees charged against the successor landowner amounted to separate conduct than the fees charged against the predecessor, even though both fees were assessed in a singular effort to build a fire station by new housing developments along the Jordanelle Reservoir. *Id.* Thus, the amended complaint did not relate back to the original and ran afoul of the statute of limitations. *Id.* ¶¶ 51-52.

Only when an amendment consists of new “legal characterization of the same conduct” or clarifies an existing claim can relation back allow the amendment to come under the statute. *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1183 (Utah 1983) (determining relation back of a widow plaintiff’s amendment that consisted solely of requesting punitive damages against a hospital for misconduct that had already been specifically pleaded in the original complaint); *see also Ringwood v. Foreign Auto Works, Inc.*, 786 P.2d 1350, 1353, 1359-60 (Utah Ct. App. 1990) (determining that an amended complaint related back to the original complaint because it merely clarified that the breach of contract claim was targeted at a later agreement that concerned the sale of the same automobile sales and service company).

The upshot of these cases is that Utah courts examine “conduct, transaction, or occurrence” scrupulously in civil cases and bar untimely amendments that allege “new or different acts of misconduct.” *Yearsley*, 798 P.2d at 1129. The rule applies *a fortiori* in post-conviction cases, which are governed by the rules of civil procedure and, unlike other civil cases, are collateral attacks on presumptively valid convictions. Petitioners here have already seen an underlying case to completion and that case has been documented by a trial record and oftentimes an appellate record. Discovery in post-conviction is often unnecessary because the record has already been

sufficiently developed through the trial and appellate processes. What was not developed through trial and appeal is often within the petitioner's own exclusive and privileged possession, such as conversations with trial counsel. These factors give rise to a presumption of regularity that simply does not obtain in normal civil proceedings. See *Lucero v. Kennard*, 2005 UT 79, ¶ 24, 125 P.3d 917. Both the court and the State are entitled to repose where the record is already sufficient to justify the conviction and sentence.

Noor nevertheless argues that this Court's post-conviction precedent "strongly suggests" that relation back of claims should not be required for amended post-conviction petitions. Br.Aplt. 15-19. But none of Noor's authorities address a situation like his, where appointed counsel files an amended petition with new facts unrelated to those pleaded in the original pro se petition.

*Benvenuto v. State*, only undermines his argument. 2007 UT 53, 165 P.3d 1195. Benvenuto failed to file a timely pro se petition and argued that he lacked resources in prison to adequately research his claims and could not afford counsel in time to file a petition that met the limitations period. *Id.* ¶ 33. This Court rejected both justifications for the late filing and endorsed the district court's ruling that Benvenuto failed to show that he could not have filed a timely pro se petition or that his counsel could not have subsequently

amended it “pursuant to rule 15.” *Id.* ¶ 34 (quoting the district court). *Benvenuto* thus supports that amendments to post-conviction petitions must comply with rule 15, including its relation back requirement.

*Gregg v. State* did not address the PCRA’s statute of limitations and the relation back requirement because neither party raised them. 2012 UT 32, 279 P.3d 396. Rather, the State argued that Gregg’s petition was successive because Davis County lacked authority to stipulate to Gregg amending a petition that the district court had already dismissed. *Id.* ¶¶ 14, 16; *see* Utah Code Ann. § 78B-9-106(1)(d) (barring claims that were raised, or could have been but were not raised, in a previous post-conviction petition).

To the extent *Gregg* can be read as endorsing the filing of untimely amendments that share no common core of facts with an original, timely petition, it should be overruled. Its rejection of the State’s argument that Gregg’s petition was successive did not create “weighty” precedent and had “little analysis” and no “reference to authority.” *Menzies v. State*, 889 P.2d 393, 399 (Utah 1994). The Court cited no authority when it accepted Gregg’s petition despite Davis County’s lack of authority to stipulate to its amendment. Indeed, the decision contradicted the rules governing post-conviction relief. “Procedural provisions for filing and commencement of a [post-conviction] petition are found in Rule 65C, Utah Rules of Civil



Procedure.” Utah Code Ann. § 78B-9-102(1); *accord* Utah R. Civ. Proc. 65C(a). Under rule 65C(i), when a post-conviction petition challenges “a felony conviction or sentence, the respondent is the state of Utah represented *by the Attorney General*.” (Emphasis added). Gregg bypassed the lawful representatives of the State and obtained an ex parte stipulation from a prosecutor who lacked any authority to agree to the amendment.

Moreover, to the extent Gregg permitted an untimely petition whose claims did not relate back, it proposes an unworkable rule. *Menzies*, 889 P.2d at 400. As discussed, such a rule contravenes the Legislature’s intent in requiring post-conviction petitioners to bring all of their claims within one year of the accrual date. Removing this restriction would allow petitioners to file endless untimely amendments on the theory that they all generally relate back to “pretrial, trial, or post-trial error” that provided “a basis for challenging the conviction.” *Mayle*, 545 U.S at 661.

Noor’s other cases supply only dicta supporting the undisputed principle that post-conviction courts have discretion to allow petitioners to amend with new legal theories after the statute of limitations has expired. None of them comes close to saying that the petitioner can amend with new core facts outside the limitations period. See *Pinder v. State*, 2015 UT 56, ¶ 61, 367 P.3d 968 (noting merely that in post-conviction, a “denial of a motion to

amend usually requires explanation”); *Gordon v. State*, 2016 UT App 190, ¶ 37, 382 P.3d 1063 (defaulting Gordon’s ineffective assistance of appellate counsel claim and noting his failure to amend his original petition with that claim based on the same underlying facts as an already-pleaded ineffective assistance of trial counsel claim).

**C. Barring late claims that share no common core of facts with those raised in a timely petition advances legislative policy.**

Applying the statute of limitations to bar new claims with different core facts advances the Legislature’s prerogative in enacting the PCRA. The PCRA’s one-year statute of limitations encourages diligence in the filing of state post-conviction petitions and fosters repose, stability, and public faith in the justice system by bringing finality to criminal convictions and state judgments. *See* House Floor Debate, H.B. 214, 1996 Gen. Sess. (Feb. 22, 1996) (statement of Rep. John L. Valentine).

Delayed claims come with deterioration or loss of evidence. This disserves both the parties and the reviewing court because it weakens the fact-finding process. The United States Supreme Court has stated that discovery and trial are “obviously more reliable if the witness or testimony in question is relatively fresh. Thus, in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process

or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.” *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980); *see also United States v. Kubrick*, 444 U.S. 111, 117 (1979) (asserting that statutes of limitation “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise”).

Courts aim to minimize error in adjudication of claims. Enforcing the statute of limitations ensures that the majority of post-conviction cases and claims will be considered with fresh evidence and thus with greater accuracy. This is true regardless of whether issues of timeliness arise at the filing of the original petition or an amended petition. Late claims threaten the integrity of the judicial process.

Noor nevertheless argues that applying the relation back doctrine to amended petitions filed by appointed counsel who take the case after the statute of limitations has already expired will render counsel’s appointment “futile” and ultimately have a chilling effect on pro bono representation in post-conviction cases. Br.Aplt. 13-14. Noor reasons that limiting appointed counsel to the core of facts raised in a pro se litigant’s original, timely petition will work manifest injustice. *Id.* Citing Justice Souter’s dissent in *Mayle*, Noor

continues that the Utah Legislature, in enacting the PCRA, could not have intended to so limit pro bono counsel's assistance. *Id.* at 13.

But Noor identifies no non-speculative disadvantage to petitioners who file timely pro se petitions then get the benefit of counsel to help prosecute those petitions. Rule 65C(d)(3) and the PCRA require that a petitioner exercise reasonable diligence and plead "all of the facts that form the basis of the petitioner's claim to relief." Petitioners like Noor have one year from the conclusion of their criminal case to gather trial documents, review them, identify points of grievance, and plead all facts related to those grievances. In Noor's case, he would have been aware of any trial-interpreter problems and other pretrial matters with Sikora as early as the trial itself. Noor enlisted an English-writing individual's help in prison to file a timely petition for post-conviction relief with claims already challenging Sikora's effectiveness. That fact alone defeats his complaint that a language barrier prevented him from identifying more pressing grievances. If they were indeed more pressing, he should have exercised greater diligence in presenting them within the limitations period.

And the PCRA provides flexibility for those litigants who, despite reasonable diligence, cannot not timely bring their claims. Again, it gives petitioners a full year to file from the accrual date. Utah Code Ann. § 78B-9-

107(1). While some of its accrual dates look to fixed events, others postpone accrual to account for later occurring events, such as new evidence or new legal rules. *Id.* The statute also tolls the year for any time the petitioner is unable to bring suit because of mental or physical disability, or because unconstitutional state action prevents a petitioner from filing. *Id.* It also tolls the year while a DNA or factual innocence petition is pending. *Id.* This flexibility affords petitioners all the opportunity to present a claim that fairness reasonably requires.

Applying the relation back doctrine in post-conviction does nothing to erode these safe harbors. Noor's case simply does not fit them. He has never argued otherwise. PCR881 n.2 (district court noting that Noor had not argued a different limitations period applies or that the limitations period was tolled for any reason).

Requiring that appointed counsel honor the PCRA's limitations period when considering what claims to bring in an amended petition is consistent with legislative intent and with the relation back rule. Noor merely speculates that this requirement would prevent petitioners from bringing claims "most worthy of the PCRA court's consideration." Br.Aplt. 14. As discussed, the PCRA already provides a flexible framework that allows pro se litigants to plead all of the facts that form the basis of their grievances.

Applying the relation back doctrine merely requires that appointed counsel stick to those core facts. It does not prevent them from arguing those facts under different legal theories. *Behrens*, 675 P.2d 1179 at 1182-83.

And Noor's rule, seeking to protect the ability of appointed pro bono counsel to bring new claims, finds no support in the PCRA itself. Utah code section 78B-9-109(2) provides that a post-conviction court may appoint pro bono counsel to assist an indigent inmate, but only if "the petition" "contains factual allegations that will require an evidentiary hearing" or it "involves complicated issues of law or fact that require the assistance of counsel for proper adjudication." This provision presupposes that the petition has already pleaded facts or claims sufficient to require attorney assistance, and that the attorney will litigate that petition. It does not contemplate the petitioner's alleged need to drum up new claims with counsel's help. Of course, section -109 does not *prohibit* counsel amending the petition, but that is beside the point. Section -109's express preconditions for the appointment of pro bono counsel do not support Noor's argument that the pleading rules should accommodate counsel's late appointment.

Applying the relation back requirement to amended post-conviction petitions thus does not work a "grave miscarriage of justice," as Noor sees it. Br.Aplt. 14. It is a necessary extension of the Legislature's intent and

consistent with this Court's rules of civil procedure. It puts post-conviction petitioners under the same burdens as other civil litigants.

**D. Noor's amended claims did not relate back to any timely claims.**

Noor's amended petition raised new claims that shared no common core of operative facts with the claims raised in his original petition. Noor's original petition challenged only three of Sikora's strategic trial decisions. Noor faulted Sikora for not stressing during his directed verdict motion (1) the effect of Noor's intoxication on his mental state and (2) the lack of skin-to-skin between Noor's fingers and the victim's vagina. PCR7. And Noor faulted Sikora for (3) not objecting to the forcible sexual abuse elements instruction. PCR8-9.

Nowhere in his original petition did Noor allege that his Somali interpreters provided inadequate assistance, much less that Sikora was ineffective for not ensuring that Noor had a more robust translation during trial. Similarly, Noor at no point claimed that Sikora did not let him "tell his version of what happened" when they met before trial. Indeed, none of Noor's original claims involved Sikora's pretrial performance. Finally, Noor never alleged that Sikora did not inform him of deportation risks before they tried the case to a jury, much less that Sikora was ineffective in this regard. Because his new claims did not arise from the same "conduct, transaction, or



occurrence” underlying claims raised in his original petition, they did not relate back and are time barred.

Noor concedes that the claims in his amended petition “differ from those in his original petition.” Br.Aplt. 23. He nevertheless argues that his pro se petition should be construed liberally as raising core facts common to those pleaded in his amended petition. Br.Aplt. 20-24. He says that his original petition, at its core, concerned Sikora’s inattention to Noor’s “cultural background and language ability” and Sikora’s lack of communication. *Id.* at 22-23.

But the liberal pleading standard afforded to pro se litigants does not allow their later-appointed counsel to bypass civil rules and statutory timing requirements. And even a liberal reading of Noor’s petition does not yield the similarities he purports to find between the original and the amendment. Indeed, Noor’s original and amended petitions are factually opposite. Noor’s original complaint was that Sikora should have argued that Noor’s language barrier “impaired his ability to understand the victim’s demands that he stop his advances and *leave her apartment.*” PCR7 (emphasis added). Noor’s amended petition stated that he was *never in J.E.’s apartment.* PCR198,201; PCR572. The new claim involved an entirely different “conduct, transaction, or occurrence” than the old. Indeed, it contradicted the original petition. In

one core of facts, Noor was in the apartment; in the other, he was not. No liberal reading of those pleaded versions can alchemize them into a single common core of alleged facts.

Noor's argument, both on direct appeal and in his original petition, centered on a theme of cultural and linguistic misunderstanding between Noor and the *victim*, not Noor and *counsel*. On appeal, Noor argued that "subjugation and domination of women is acceptable and even encouraged in the highly patriarchal Somali culture," and that his conduct towards J.E. "should be viewed only as a misguided attempt to express love and affection." *Noor*, 2012 UT App 187, ¶ 6. In his pro se post-conviction petition, Noor faulted counsel for not better arguing that language and cultural barriers prevented Noor "from forming the requisite intent to commit lewdness or forcible abuse," and from "understanding the *victim's* demands that he stop his advances and leave her apartment."<sup>4</sup> PCR7 (emphasis added). The original claim related to Sikora's trial strategy in addressing the

---

<sup>4</sup> Noor also argued in his original petition that Sikora should have stressed during his directed verdict motion (1) the alleged effect of Noor's intoxication on his mental state and (2) alleged the lack of skin-to-skin contact between Noor's fingers and the victim's vagina. PCR7. And Noor faulted Sikora for not objecting to the forcible sexual abuse elements instruction. PCR8-9. None of these claims implicated Noor's language barrier, let alone Sikora's facilitation of court-appointed Somali interpreters. They share no common core of operative facts with his new claims.

elements of the offense. The amended claim abandoned any complaint about Sikora's strategic decisions at trial and instead focused on the relationship between attorney and client and the language barriers between them.

Noor not only abandoned his core factual allegation that he was with J.E. in her apartment; he contradicted himself by claiming he was never there. He could not gin up a fact dispute by disagreeing with himself. *Cf. Webster v. Sill*, 675 P.2d 1170, 1173 (Utah 1983) (holding that that a "moving party may not rely upon his own affidavit which contradicts his deposition...."); *see also In re Fosamax Products Liability Litigation*, 707 F.3d 189, 193 (2d Cir. 2013) (explaining that the "sham issue of fact" doctrine prohibits a party from defeating summary judgment "simply by submitting an affidavit that contradicts the party's previous sworn testimony").

And nowhere in his pro se petition did Noor allege that his cultural and language barriers prevented him from communicating with and understanding Sikora, or from understanding what went on at trial. Yet that was the sole focus of his amended petition. He never once mentioned the Somali interpreters, much less alleged that they provided inadequate interpretation at trial. Yet his amended petition claimed that he had no idea what the victim was saying at trial. PCR572. The two petitions shared no common "transaction" or "occurrence" other than the trial itself and Sikora's

representation. Noor's argument under the relation back doctrine "views 'occurrence' at too high a level of generality." *Mayle*, 545 U.S. at 661. But, more fatally, it shows Noor abandoning a version of facts that no longer suited him in effort to manufacture a fact dispute on entirely different facts concerning Sikora's performance.

**E. The district court's allowance for an amendment of the petition neither gave Noor license to raise untimely claims nor prevented the State from raising procedural defenses.**

Noor argues that the district court's application of the time bar to the claims in his amended petition "backtracked" on its earlier order allowing him leave to amend before he had presented his amendments to the court. Br.Aplt. 10. He says that the district court had "discretion" to allow his amended petition to move past summary judgment, even if it raised "new claims and even after the statute of limitations ha[d] expired." *Id.* at 11. Noor's argument wrongly presupposes that the district court's discretion to allow an amended petition bound the court to overlook the timeliness of his claims once he presented them.

Under Noor's logic, a post-conviction petitioner could raise defaulted or litigated-and-lost claims in an amended petition with impunity. Noor's rule would allow a petitioner to withhold the nature of the amended claim until being granted leave to amend, thus depriving the court of any

opportunity to consider the new claim's timeliness. If it were true that a post-conviction court's silence on statutory limitations hypothetically applicable to amended claims operated as a waiver of those limitations, Noor could relitigate claims he raised at trial and on appeal, or litigate claims that he could have, but did not raise on appeal. The PCRA's procedural bars plainly foreclose Noor's line of reasoning. *See* Utah Code Ann. § 78B-9-106(1)(b) (barring claims that were raised at trial or on appeal); *id.* § 78B-9-106(1)(c) (barring claims that could have been, but were not, raised at trial or on appeal). The same must be true for new claims raised outside the statute of limitations. *Id.* §§ 78B-9-106(1)(e), -107.

Noor has previously argued that the State waived its statute of limitations defense by not objecting to post-conviction counsel's request for leave to amend at the April 2015 status conference hearing. PCR531-32. To the extent he maintains that position here, the argument is misguided. The PCRA allows both the State and the reviewing court to raise the time bar "at any time"—including on appeal from an order granting post-conviction relief—unless the court determines that it should have been raised earlier. Utah Code Ann. § 78B-9-106(2)(a). The statute makes no distinction between claims in an original petition and claims in an amendment. And the rule governing post-conviction procedure required that the district court, before

commenting on the merits of a post-conviction claim, “first clearly and expressly determine whether that claim [was] independently precluded” under the PCRA’s procedural and time bars. Utah R. Civ. P. 65C(b).

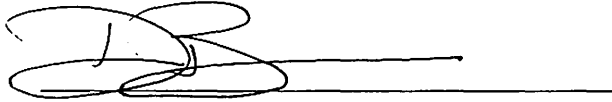
The State asserted the time bar at the earliest possible opportunity: after Noor raised untimely claims in his amended petition. Neither the court nor the State could determine at the April 2015 hearing whether procedural bars applied to Noor’s amended claims because he had not yet pleaded them. This speaks to a basic principle of civil pleading: affirmative defenses, including statute of limitations, can only be raised after a plaintiff makes a claim for relief. Utah R. Civ. P. 8 (c) (“In pleading *to a preceding pleading*, a party shall set forth affirmatively...statute of limitations” as an affirmative defense.) (emphasis added). Parties do not anticipatorily plead defenses to unpleaded claims.

## CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on May 30, 2017.

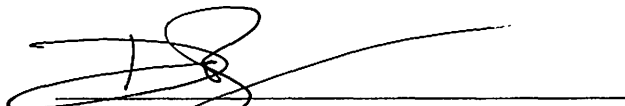
SEAN D. REYES  
Utah Attorney General

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

DANIEL W. BOYER  
Assistant Solicitor General  
Counsel for Appellee

### CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 9,831 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

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

DANIEL W. BOYER  
Assistant Solicitor General



## CERTIFICATE OF SERVICE

I certify that on May 30, 2017, two copies of the Brief of Appellee were

☒ mailed ☐ hand-delivered to:

Samuel Alba  
Robert T. Denny  
Snow Christensen & Martineau  
10 Exchange Place, Eleventh Floor  
PO Box 45000  
Salt Lake City, Utah 84145-5000

Also, in accordance with Utah Supreme Court Standing Order No. 8, a  
courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Melissa Fryer

# Addenda

## Addendum A

## Utah Code Annotated § 78B-9-106 (2017) 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 78B-9-107.
- (2)
  - (a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.
  - (b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.
- (3) 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.
- (4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).



**Utah Code Annotated § 78B-9-107 (2017) Statute of limitations for postconviction 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;
- (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; or
- (f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

- (a) exoneration through DNA testing under Section 78B-9-303; or
- (b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

## Utah R. Civ. P. 15 Amended and Supplemental Pleadings

### (a) Amendments before trial.

- (1) A party may amend its pleading once as a matter of course within:
  - (A) 21 days after serving it; or
  - (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
- (2) In all other cases, a party may amend its pleading only with the court's permission or the opposing party's written consent. The party must attach its proposed amended pleading to the motion to permit an amended pleading. The court should freely give permission when justice requires.
- (3) Any required response to an amended pleading must be filed within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

### (b) Amendments during and after trial.

- (1) When an issue not raised in the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment-- to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.
- (2) If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

### (c) Relation back of amendments. An amendment to a pleading relates back to the date of the original pleading when:

- (1) the law that provides the applicable statute of limitations allows relation back;
- (2) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
- (3) the amendment adds a party, substitutes a party, or changes the name of the party against whom a claim is asserted, if paragraph (c)(2) is satisfied and if, within the period provided by Rule 4(b) for serving the summons and complaint, the party to be brought in by amendment:

(A) received such notice of the action that it will not be prejudiced in defending on the merits; and  
(B) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

**(d) Supplemental pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to file a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party respond to the supplemental pleading within a specified time.



## **Utah R. Civ. P. 65C Post-conviction relief.**

(a) **Scope.** This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) **Procedural defenses and merits review.** Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) **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.

(d) **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. 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.

(e) **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.

(f) **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.

(g) **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.

(h) (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 claim 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 claim has no arguable basis in fact; or
- (C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a claim 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.

(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) **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.

(j) **Appointment of pro bono counsel.** 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 to represent the petitioner in the post conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(k) **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.

(l) **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.

(m) **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.

(n) **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.

(o) **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.

(p) **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, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by

which the trial court shall determine the amount, if any, to charge for fees and costs.

(q) **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.



## Addendum B

Osman Mohammed Noor  
P.O. Box 550  
Gunnison, Utah 84634  
Attorney Pro Se

FILED DISTRICT COURT  
Third Judicial District

NOV 05 2013

SALT LAKE COUNTY

By [Signature]  
Deputy Clerk

IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH

Osman Mohammed Noor  
Petitioner,

*waiver* vs.

The State of Utah  
Respondent.

\* PETITION FOR RELIEF UNDER  
\* THE POST-CONVICTION REMEDIES  
\* ACT  
\* UCA 78B-9-101 - 405 et seq.  
\*  
\* URCP Rule 65C  
\*  
\* Case No.: 170910754  
\*  
\* JUDGE \_\_\_\_\_  
\*

I. NAME OF RESPONDENT:

X Conviction of Felony: State of Utah  
\_\_\_\_ Conviction of Misdemeanor: County of  
\_\_\_\_ Conviction of Misdemeanor: Municipality of:

II. IDENTIFICATION OF CURRENT AND RELATED CASES

- 1 (a) Name of court that entered the judgment being challenged: THIRD District Court  
(b) Location of Court: 450 South State Street, Salt Lake City, Utah 84111  
(c) Case Number: 091905211 FS
2. Date of Judgment being challenged: January 4, 2011
3. Sentence: Two one to fifteen year sentences, to be served concurrently.
4. Nature of offense involved (all counts) Burglary, 2<sup>nd</sup> Degree Felony; Forcible Sexual Abuse, 2<sup>nd</sup> Degree Felony; Lewdness-first or second offense, Class B Misdemeanor.



5. What was your plea?

☒ Not Guilty  
☐ Guilty  
☐ No Contest  
☐ Guilty and Mentally ill  
☐ Not Guilty by reason of insanity

6. If you entered a plea of guilty to some counts, and a not guilty plea to other counts, give your plea to each count: \_\_\_\_\_  
\_\_\_\_\_

7. If you pled not guilty or not guilty by reason of insanity, was the trial before?

☒ Jury ☐ Judge ☐ Not Applicable

8. Did you testify at the trial?

☐ Yes ☒ No ☐ Not Applicable

9. Did you appeal from the conviction or Sentence?

☒ Yes ☐ No ☐ Not Applicable

10. If your answer is "Yes" provide the following information:

A. Name of Appellate Court: Utah Court of Appeals  
Case Number: 20110198-CA  
Result: Conviction Affirmed  
Date of result or citation of opinion: July 12, 2012  
Grounds raised: State's failure to present sufficient evidence that Defendant had the requisite intent to commit lewdness or forcible sexual abuse, or burglary premised on either of those offenses.

Did you seek further review of this appeal? \_\_\_\_\_

PETITION FOR WRIT OF POST-CONVICTION RELIEF

☒ Yes      ☐ No      ☐ Not Applicable

If your answer is "Yes" provide the following information:

- (1) Name of Reviewing Court: Utah Supreme Court
- (2) Case Number: 20120676-SC
- (3) Result: Petition for Writ of Certiorari denied.
- (4) Date of result or citation of opinion: October 17, 2012.
- (5) Grounds raised: Utah Court of Appeals erred when it concluded that defense counsel had not preserved a claim that the state presented insufficient evidence as to intent even though defense counsel made a motion for directed verdict during trial.

11. If you did not appeal from your conviction or sentenced, why not?

Petitioner's attorney failed to inform the petitioner that the next step in the appeal process was to file a Writ of Certiorari with the Utah Supreme Court.

12. (a) Other than your direct appeal from your conviction or Sentence, have you filed any petitions, applications, or motions with respect to this conviction or sentence in any court, state or federal?

☐ Yes      ☒ No      ☐ Not Applicable

- (b). If your answer is "Yes", provide the following information:

- (1) Name of court: \_\_\_\_\_
- (2) Case Number: \_\_\_\_\_
- (3) Result: \_\_\_\_\_
- (4) Date of result citation of opinion: \_\_\_\_\_
- (5) Grounds Raised: \_\_\_\_\_

- c). Did you receive an evidentiary hearing on your petition, application, or motion?

PETITION FOR WRIT OF POST-CONVICTION RELIEF

☒ Yes                      ☐ No                      ☐ Not Applicable

(d) Did you appeal the decision on your petition, application or motion?

☒ Yes                      ☐ No                      ☐ Not Applicable

(e) If your answer is "Yes", provide the following information:

- (1) Name of court: \_\_\_\_\_
- (2) Case Number: \_\_\_\_\_
- (3) Result: \_\_\_\_\_
- (4) Date of result citation of opinion: \_\_\_\_\_
- (5) Grounds Raised: \_\_\_\_\_

13. (a) Other than the case described in question 12, have you filed any further petitions, applications, or motions with respect to this conviction or sentence in any court, state of federal?

☐ Yes                      ☒ No                      ☐ Not Applicable

(b) If your answer is "Yes", provide the following information:

- (1) Name of court: \_\_\_\_\_
- (2) Case Number: \_\_\_\_\_
- (3) Result: \_\_\_\_\_
- (4) Date of result citation of opinion: \_\_\_\_\_
- (5) Grounds Raised: \_\_\_\_\_

Did you receive an evidentiary hearing on your petition, application, or motion?

☒ Yes                      ☐ No                      ☐ Not Applicable

(d) Did you appeal the decision on your petition, application or motion?

☒ Yes                      ☐ No                      ☐ Not Applicable

(e) If your answer is "Yes", provide the following information:

- (1) Name of court: \_\_\_\_\_
- (2) Case Number: \_\_\_\_\_

PETITION FOR WRIT OF POST-CONVICTION RELIEF

- (3) Result: \_\_\_\_\_  
(4) Date of result citation of opinion: \_\_\_\_\_  
(5) Grounds: \_\_\_\_\_

14. (a) Do you have any petition, appeal, or motion now pending in any court, state or federal, relating to the judgment being challenged:

  X   Yes                             No                             Not Applicable

(b) If your answer is "Yes", provide the following information:

- (1) Name of court: United States District Court, District of Utah Central Division  
(2) Case Number: 2:13-cv-00738  
(3) Nature of Proceeding: § 2254 Petition for Habeas Corpus for issues exhausted at the Utah State court level.

III. GROUND FOR RELIEF

**NOTICE TO THE PETITIONER:** You may be barred from presenting additional grounds in a future post-conviction petition if you fail to present any grounds that you could present here but do not.

The following is a list of the most frequently raised grounds for relief in Post-Conviction proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You should raise in this petition any of these grounds that apply and **any other grounds not listed** that you may have available.

**DO NOT MERELY CHECK THE GROUNDS LISTED.** If you believe any of these grounds apply to you. **You must allege facts.** The petition will be returned to you if you merely check a ground and fail to list necessary facts or attach supporting documentation.

- (a) Conviction obtained by plea of guilty that was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

PETITION FOR WRIT OF POST-CONVICTION RELIEF

- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury that was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Conviction under an unconstitutional statute of constitutionally protected conduct.
- (k) Denial of right to appeal.

State concisely every ground on which you claim you are entitled to post-conviction relief. Summarize briefly the facts supporting each ground. If necessary, you may attach additional pages stating additional grounds and facts supporting same.

GROUND ONE: Denial of effective assistance of trial counsel.

Supporting Facts for Ground One (state briefly without citing law or making argument):

- (a) Petitioner's trial attorney was ineffective when he moved for a directed verdict based on insufficiency of the evidence, but failed to provide any reasons or specific issues regarding the insufficiency of the evidence to the trial court.

PETITION FOR WRIT OF POST-CONVICTION RELIEF

- (b) This resulted in an adverse ruling from the Utah Court of Appeals, which ruled that the insufficiency of the evidence argument was not specifically presented to the trial court and thus not preserved for appeal.
- (c) Petitioner's trial counsel should have brought to the trial court's attention the fact that Petitioner's cultural background prevented him from forming the requisite intent to commit lewdness or forcible sexual abuse.
- (d) Petitioner's trial counsel should have brought to the trial court's attention that Petitioner's lack of fluency in English and his intoxication impaired his ability to understand the victim's demands that he stop his advances and leave her apartment.
- (e) Petitioner's trial counsel should have brought it to the trial court's attention that there is insufficient evidence that any skin to skin contact with the victim's genitals occurred. The Petitioner's PSI indicates that the Petitioner pushed his hand down the front of the victim's pants, but that he did not touch her vagina.
- (f) The statute for Forcible Sexual Abuse requires that the offender touch the anus, buttocks, or any part of the genitals of another. Utah Code Ann. § 76-5-407(3) does not list violations of Forcible Sexual Abuse as offenses where touching through clothing is sufficient to constitute the relevant element of the offense.
- (g) Petitioner's trial counsel should have objected to the erroneous mens rea contained in Jury instruction 17 for the offense of Forcible Sexual Abuse. The jury instruction

PETITION FOR WRIT OF POST-CONVICTION RELIEF

lists as the fifth element for forcible sexual abuse "That said touching was done knowingly, intentionally, or recklessly." The statute for Forcible Sexual Abuse defines the mental state required for the offense within the statute: "...with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person..."

- (h) There is a reasonable probability that but for trial counsel's unprofessional errors and ineffectiveness, the results of the Petitioner's trial would have been different.

(b) GROUND TWO: Petitioner was prejudiced by an erroneous jury instructions that incorrectly informed the jury that the touching in a crime of Forcible Sexual Abuse could be committed knowingly, intentionally, or recklessly, even though Utah Code Ann. § 76-5-404 (2010) specifies a different mental state, and that did not inform the jury that Forcible Sexual Abuse requires skin to skin contact.

Supporting Facts for Ground Two (state briefly without citing law or making argument):

- (a) Utah Code Ann. § 76-5-404 (2010) defines the mental state required for the offense within the statute: "...with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person..."
- (b) Jury instruction number seventeen (attached), provided to the jury in Petitioner's trial, lists as the fifth element that must be satisfied in order to convict the Petitioner of forcible sexual abuse as "5. That said touching was done knowingly, intentionally, or recklessly."



PETITION FOR WRIT OF POST-CONVICTION RELIEF

- (c) The crime of Forcible Sexual Abuse specifies a specific mental state required and the jury should not have been provided the instruction that the Petitioner could commit the offense of Forcible Sexual Abuse knowingly, intentionally, or recklessly.

c) GROUND THREE: Denial of effective assistance of appellate counsel.

Supporting Facts for Ground Three (state briefly without citing law or making argument):

- (a) The Petitioner had the same counsel of record listed for his trial and appeal.
- (b) Appellate counsel should have brought up his own ineffectiveness at trial in Petitioner's appeal, which may have resulted in the Utah Court of Appeals ruling on the merits of Petitioner's claims rather than ruling that the issues were not preserved for appeal.
- (c) Appellate counsel was also ineffective for failing to bring up the additional grounds listed in this petition, namely the prejudicial jury instruction and the fact that the Petitioner never made skin to skin contact with the victim's genitals, breasts, or buttocks.
- (d) There is a reasonable probability that but for appellate counsel's unprofessional errors and ineffectiveness, the results of the Petitioner's appeal would have been different.

16. If any of the grounds listed above were not previously presented in any other court,  
[9]

state or federal, state briefly which grounds were not presented and your reasons for not presenting them:

17. Give the name and address, if known, of each attorney who presented you in the following stages of the judgment being challenged:

- 18(a) Do you have any future sentence to serve after you complete the sentence imposed by the judgment being challenged?

(b) If your answer is "Yes", give the following information:

- ### **I.V. REQUIRED ATTACHMENTS**

19. Attach a copy of the following documents to this petition or provide an explanation why you cannot provide the copies.

PETITION FOR WRIT OF POST-CONVICTION RELIEF

- (a) The judgment and commitment being challenged.  
Attached
- (b) Any decision issued by an appellate court from the direct appeal.  
Attached
- (c) Any previously-filed petition for post-conviction relief, and any decision issued as a result.  
N/A
- (d) Affidavits, records, or other documentary evidence that support your claim.  
Attached
- (e) An affidavit of Impecuniosity and certificate from the Inmate Accounting Office, if you are requesting waiver of the filing fee.  
Attached

PETITION FOR WRIT OF POST-CONVICTION RELIEF

V. PETITIONER'S VERIFICATION UNDER OATH

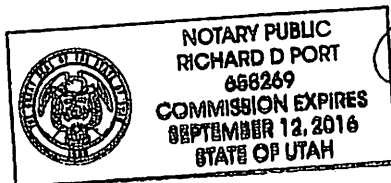
STATE OF UTAH                    )  
  ).SS  
COUNTY OF                    )

I the undersigned petitioner, declare under penalty of perjury that the information I have provided in this petition is true and correct.

Osman Moor

Attorney Pro Se

SUBSCRIBED AND SWORN to before me on this 24 day of Oct, 2013.



Richard Port  
Notary Public  
My Commission Expires: 9/12/16

VI. CERTIFICATION OF ATTORNEY (If petitioner is represented by attorney).

I certify I am the attorney for petitioner, and that this petition copies with Rule 11 (Utah Rules of Civil Procedure).

Signature of Attorney

Name of Petitioner:

Petitioner Address:

\_\_\_\_\_

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INSTRUCTION NO. 17

Before you can convict, the defendant, OSMAN MOHAMMED NOOR, of the offense of Forcible Sexual Abuse as charged in Count 2 of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense which is alleged to have occurred on or about May 28, 2009 in Salt Lake County, State of Utah:

1. That the defendant, OSMAN MOHAMMED NOOR
  - (a) touched the breasts, buttocks, or any part of the genitals of J■■■■ E■■■■
  - or
  - (b) took indecent liberties with J■■■■ E■■■■; and
2. That at the time of said touching, J■■■■ E■■■■ was 14 years of age or older; and
3. That said touching was done without the consent of J■■■■ E■■■■; and
4. That said touching was done with the intent to arouse or gratify the sexual desire of any person; and
5. That said touching was done knowingly, intentionally, or recklessly.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Forcible Sexual Abuse as charged Count 2 in the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of Count 2.

**76-5-404. Forcible sexual abuse.**

(1) A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

(2) Forcible sexual abuse is:

(a) except as provided in Subsection (2)(b), a felony of the second degree, punishable by a term of imprisonment of not less than one year nor more than 15 years; or

(b) except as provided in Subsection (3), a felony of the first degree, punishable by a term of imprisonment for 15 years and which may be for life, if the trier of fact finds that during the course of the commission of the forcible sexual abuse the defendant caused serious bodily injury to another.

(3) If, when imposing a sentence under Subsection (2)(b), a court finds that a lesser term than the term described in Subsection (2)(b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) 10 years and which may be for life; or

(b) six years and which may be for life.

(4) Imprisonment under Subsection (2)(b) or (3) is mandatory in accordance with Section 76-3-406.

Amended by Chapter 218, 2010 General Session

**76-5-407. Applicability of part -- "Penetration" or "touching" sufficient to constitute offense.**

(1) The provisions of this part do not apply to consensual conduct between persons married to each other.

(2) In any prosecution for:

(a) the following offenses, any sexual penetration, however slight, is sufficient to constitute the relevant element of the offense:

(i) unlawful sexual activity with a minor, a violation of Section 76-5-401, involving sexual intercourse;

(ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Subsection 76-5-401.2, involving sexual intercourse; or

(iii) rape, a violation of Section 76-5-402; or

(b) the following offenses, any touching, however slight, is sufficient to constitute the relevant element of the offense:

(i) unlawful sexual activity with a minor, a violation of Section 76-5-401, involving acts of sodomy;

(ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Section 76-5-401.2, involving acts of sodomy;

(iii) sodomy, a violation of Subsection 76-5-403(1);

(iv) forcible sodomy, a violation of Subsection 76-5-403(2);

(v) rape of a child, a violation of Section 76-5-402.1; or

(vi) object rape of a child, a violation of Section 76-5-402.3.

(3) In any prosecution for the following offenses, any touching, even if accomplished through clothing, is sufficient to constitute the relevant element of the offense:

(a) sodomy on a child, a violation of Section 76-5-403.1; or

(b) sexual abuse of a child or aggravated sexual abuse of a child, a violation of Section 76-5-404.1.

Amended by Chapter 128, 2000 General Session



**76-2-101. Requirements of criminal conduct and criminal responsibility.**

- (1) (a) A person is not guilty of an offense unless the person's conduct is prohibited by law; and
- (b) (i) the person acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or
- (ii) the person's acts constitute an offense involving strict liability.
- (2) These standards of criminal responsibility do not apply to the violations set forth in Title 41, Chapter 6a, Traffic Code, unless specifically provided by law.

Amended by Chapter 2, 2005 General Session

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
vs. :  
OSMAN MOHAMMAD NOOR, : Case No: 091905211 FS  
Defendant. : Judge: JUDITH S. ATHERTON  
: Date: February 25, 2011

---

PRESENT

Clerk: shantec  
Prosecutor: MAY, THADDEUS J  
Defendant  
Defendant's Attorney(s): SIKORA, MICHAEL R  
Interpreter: Ahmed M. Ali (Somali)

DEFENDANT INFORMATION

Language: Somali  
Date of birth: [REDACTED]  
Audio  
Tape Number: S45-2.22 Tape Count: 2.45

CHARGES

1. BURGLARY - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 01/04/2011 Guilty
2. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 01/04/2011 Guilty
3. LEWDNESS - FIRST OR SECOND OFFENSE - Class B Misdemeanor  
Plea: Not Guilty - Disposition: 01/04/2011 Guilty

SENTENCE PRISON

Based on the defendant's conviction of BURGLARY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of FORCIBLE SEXUAL ABUSE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

To run concurrent.

SENTENCE RECOMMENDATION NOTE

Court recommends credit for time served. Further restitution is reserved.

SENTENCE JAIL

Based on the defendant's conviction of LEWDNESS - FIRST OR SECOND OFFENSE a Class B Misdemeanor, the defendant is sentenced to a term of 84 day(s)

Credit is granted for time served.

Credit is granted for 84 day(s) previously served.

SENTENCE JAIL SERVICE NOTE

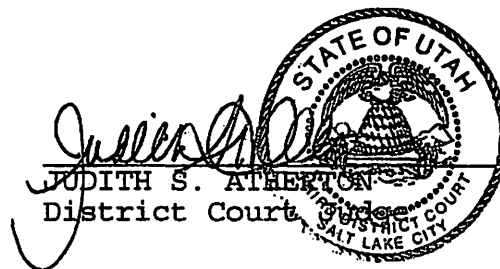
Count 3 is ordered credit time served.

Attorney Fees Amount: \$250.00 Plus Interest.  
Pay in behalf of: SALT LAKE COUNTY PROBATION

Restitution Amount: \$1550.00  
Pay in behalf of: VICTIM

Defendant transported.

Date: 2/25/11



IN THE UTAH COURT OF APPEALS

—ooOoo—

State of Utah,

)

MEMORANDUM DECISION

)

Plaintiff and Appellee,

)

Case No. 20110198-CA

)

v.

)

FILED

)

(July 12, 2012)

Osman Mohammad Noor,

)

2012 UT App 187

)

Defendant and Appellant.

)

Third District, Salt Lake Department, 091905211  
The Honorable Judith S. Atherton

Attorneys: Brittany D. Enniss and Michael R. Sikora, Salt Lake City, for Appellant  
Mark L. Shurtleff and Michelle I. Young, Salt Lake City, for Appellee

Before Judges McHugh, Orme, and Thorne.

THORNE, Judge:

¶1 Osman Mohammed Noor appeals his convictions for burglary, *see* Utah Code Ann. § 76-6-202 (Supp. 2011), forcible sexual abuse, *see id.* § 76-5-404, and lewdness, *see id.* § 76-9-702. Noor argues that the State failed to present sufficient evidence that he had the requisite intent to commit lewdness or forcible sexual abuse, or burglary premised on either of those offenses. We affirm.

¶2 Noor and the victim in this case, J.E., lived across the hall from each other in an apartment building in Salt Lake City. J.E. was the apartment manager for the building.

On May 28, 2009, shortly after the building's "quiet hours" began at 10:00 p.m., she confronted Noor in the hallway about his loud music and other noisy behavior. As J.E. was about to reenter her own apartment, Noor walked past her and entered her apartment through its open door, without her invitation. Noor refused to leave and began disrobing, at which point J.E. called the police. Noor continued to remove his clothing and make sexually explicit advances toward J.E., claiming that "he was a man and that he loved [her]." Noor ignored J.E.'s physical and verbal objections, pulled J.E. on top of him, attempted to kiss her, simulated oral sex over her clothing, and reached his hand down the front of her pants and underwear. J.E. managed to push Noor away and run from her apartment as a police officer arrived in response to her call.

¶3 Noor was arrested and charged with one count each of burglary, forcible sexual abuse, and lewdness. At Noor's jury trial, the State called two witnesses, J.E. and the responding officer. On cross-examination, Noor's counsel elicited testimony from both witnesses about Noor's intoxication at the time of the incident and his limited English. No witnesses testified for the defense, and the defense strategy appeared to focus on discrediting J.E. At the close of trial, Noor's counsel made a motion for a directed verdict based on insufficiency of the evidence. The district court denied the motion, and the jury found Noor guilty of all charges.

¶4 On appeal, Noor argues that the State failed to present sufficient evidence to prove that he had the requisite intent to commit lewdness or forcible sexual abuse. He also argues that there was insufficient evidence that he entered or unlawfully remained in J.E.'s apartment with the intent to commit lewdness or forcible sexual abuse. When a defendant challenges a jury verdict for insufficiency of the evidence, "we review the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict." *See State v. Hirschi*, 2007 UT App 255, ¶ 15, 167 P.3d 503 (internal quotation marks omitted). We will reverse the jury's verdict "only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *See id.* (internal quotation marks omitted).

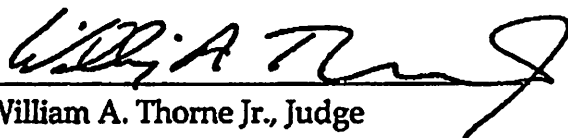
¶5 However, we will not consider issues on appeal that were not preserved below. *See generally 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801 (discussing

preservation requirements). "In order to preserve an issue for appeal, it must be . . . specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court . . . [so as to give] the trial court an opportunity to address the claimed error, and if appropriate, correct it." *State v. Santonio*, 2011 UT App 385, ¶ 29, 265 P.3d 822 (omissions and alteration in original) (internal quotation marks omitted), cert. denied, 275 P.3d 1019 (Utah 2012). "The mere mention of an issue without introducing supporting evidence or relevant legal authority does not preserve that issue for appeal." *State v. Brown*, 856 P.2d 358, 361 (Utah Ct. App. 1993) (internal quotation marks omitted).

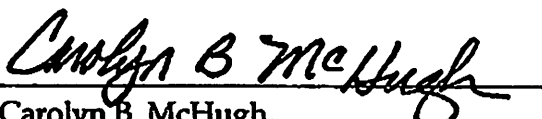
¶6 Noor's insufficiency of the evidence argument on appeal rests largely on factual allegations—some of which he apparently raises for the first time on appeal—regarding his cultural background. Noor was born in Somalia and fled to refugee camps in Kenya at the age of twelve. He lived there for the next seventeen years before coming to the United States. Noor argues on appeal that, as abhorrent as it seems within our own culture, subjugation and domination of women is acceptable and even encouraged in the highly patriarchal Somali culture. Additionally, Noor presents authority stating that rape and violence against women are prevalent in Kenyan refugee camps. Noor argues that, in light of the violence he had witnessed for nearly his entire life, his actions should be viewed only as a misguided attempt to express love and affection and that he had no intent to commit forcible sexual abuse or lewdness. Noor also argues that his lack of fluency in the English language and his intoxication impaired his ability to understand J.E.'s demands that he stop his advances and leave her apartment.

¶7 Noor's motion for a directed verdict did not bring these specific issues to the district court's attention. His directed verdict motion stated, in its entirety, "I would just move to—move for a directed verdict of acquittal based on insufficiency of the evidence." The State offered no comment on the motion, and the district court immediately denied it. This exchange did not apprise the district court that Noor was asserting that his cultural background, intoxication, and difficulties understanding English rendered him unable to form the requisite intent as to the crimes charged against him. Thus, his argument on appeal "was not presented to the trial court in such a way that it could have understood and ruled on it." See *Santonio*, 2011 UT App 385, ¶ 29.

¶8 Noor's insufficiency of the evidence argument on appeal was not specifically presented to the district court and is thus not preserved for appeal. Accordingly, we decline to address the merits of Noor's argument, and we affirm his convictions.

  
William A. Thorne Jr., Judge

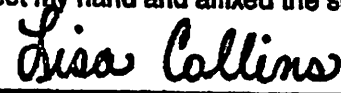

¶9 WE CONCUR:

  
Carolyn B. McHugh,  
Presiding Judge

  
Gregory K. Orme, Judge

I, the undersigned, Clerk of the Utah Court of Appeals, do hereby certify that the foregoing is a full, true and correct copy of an original document on file in the Utah Court of Appeals. In testimony whereof, I have set my hand and affixed the seal of the Court.



  
Lisa Collins  
Clerk of the Court  
By   
Deputy Clerk  
Date 10/26/12



IN THE UTAH SUPREME COURT

FILED  
UTAH APPELLATE COURTS

---ooOoo---

OCT 17 2012

State of Utah,

Plaintiff and Respondent,

v.

Case No. 20120676-SC

Osman Mohommad Noor,

Defendant and Petitioner.

ORDER

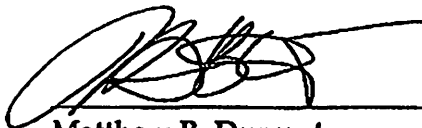
This matter is before the court upon a Petition for Writ of Certiorari, filed on August 9, 2012.

IT IS HEREBY ORDERED pursuant to Rule 51(a) of the Utah Rules of Appellate Procedure the Petition for Writ of Certiorari is denied.

For The Court:

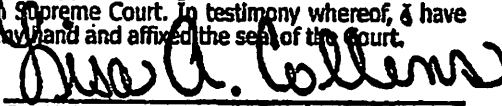
Dated

10-17-12

  
Matthew B. Durrant  
Chief Justice



I, the undersigned clerk of the Utah Supreme Court, do hereby certify that the foregoing is a true and correct copy of an original document on file in the Utah Supreme Court. In testimony whereof, I have set my hand and affixed the seal of the court.

  
Pat H. Bartholomew Lisa A. Collins  
Clerk of the Court

By   
Deputy Clerk

Date

10/19/12

**FILED DISTRICT COURT**  
Third Judicial District

NOV 05 2013  
SALT LAKE COUNTY  
By \_\_\_\_\_  
Deputy Clerk

Osman Mohammed Noor  
Petitioner,

## AFFIDAVIT OF IMPECUNIOSITY

Case No.: 150 TO 1544  
Judge: Trease

I, Osman Mohammed Noor, do solemnly swear that owing to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence (or the appeal which I am about to take), and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings or appeal.

(b) My amount of income, including government financial support, alimony, child support is \$ \_\_\_\_\_ per month.

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09/2011

PETITION FOR WRIT OF POST-CONVICTION RELIEF

\_\_\_\_\_.

(d) Business interests: \_\_\_\_\_

\_\_\_\_\_

(e) accounts receivable: \_\_\_\_\_

\_\_\_\_\_.

(f) securities, checking and savings account balances: \_\_\_\_\_

\_\_\_\_\_.


(g) debts: \_\_\_\_\_

\_\_\_\_\_

(h) monthly expenses: \_\_\_\_\_

\_\_\_\_\_.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

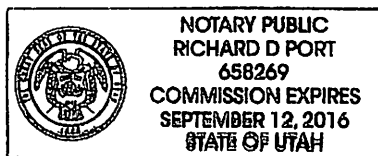
 Osman Noor

Attorney Pro Se

SUBSCRIBED AND SWORN TO before me this 21 day of Oct, 2013.

SUBSCRIBED AND SWORN TO  
BEFORE ME ON THIS 21 DAY  
OF Oct BY Osman Noor

  
NOTARY PUBLIC



Rev.  
09/2011

## Addendum C

APR 01 2014  
IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

OSMAN M. NOOR,  
Inmate# 200844

Petitioner,

vs

STATE OF UTAH,

Respondent.

**ORDER REGARDING PETITIONER'S  
MOTION FOR APPOINTMENT  
OF COUNSEL**

Case No. 130907566

Judge Vernice S. Trease

This matter is before the Court on Mr. Noor's recent letters requesting appointment of counsel.

The Court had previously denied Mr. Noor's request to appoint counsel on the basis that although an evidentiary hearing might be needed in this case, the issues of fact and law identified in the Petition were not of a complicated nature such that assistance of counsel is required for proper adjudication. The Court also took into consideration the content of Mr. Noor's Petition and the other documents that he filed and determined that although English may not be Mr. Noor's first language, it appeared from a review of the documents filed that he had a good command of the English language such that appointment of counsel was not appropriate under the statute. UCA 78B-9-109, does not require appointment of counsel based on the fact that a Petitioner speaks another language.

Subsequent to this denial of Petitioner's request for appointed counsel, Mr. Noor has sent letters and has indicated that he cannot read or write. In his letter dated March 15, 2014,


Mr. Noor states, "This letter to you has been written by another person on my behalf due to my inability to read and write English".

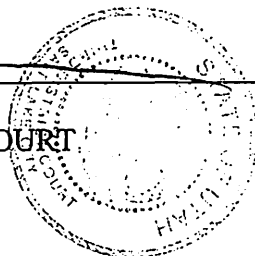
Accepting Mr. Noor's representation that he cannot read or write, the Court finds that this will make it difficult for him to address the facts and issues in this case. The State has filed a Motion to Dismiss and has raised issues that may be difficult for Mr. Noor to respond to if he is unable to read the documents and write a response. The Court notes that Mr. Noor has filed a Petition, documents, and letters that are articulate and so he must be receiving assistance from someone if he is unable to read or write.

Accordingly, pursuant to UCA 78B-9-109, the Court appoints pro bono counsel to represent Mr. Noor in this matter. The court clerk will notify the appropriate person at the Utah State Bar of this order. Once pro bono counsel is secured, the Court will schedule further briefing schedule and hearing. The Court will not require Mr. Noor to respond to the State's Motion to Dismiss or set a hearing until pro bono counsel has been identified unless he wants to proceed otherwise. The court clerk will pull the case for a status review in approximately thirty days (30) to see if pro bono counsel has been secured.

This shall be the Order of the Court; no further order is necessary.

DATED this 7th day of April, 2014.

  
Vernice S. Trease  
THIRD DISTRICT COURT



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130907566 by the method and on the date specified.

MAIL: OSMAN MOHAMMED NOOR UTAH STATE PRISON P.O. BOX 250 DRAPER,  
UT 84020

MAIL: RYAN D TENNEY 160 E 300 S P O BOX 140854 SALT LAKE CITY UT  
84114-0854

Date: 04/08/2014 \_\_\_\_\_

/s/ JENNIFER WILLIAMS \_\_\_\_\_

Deputy Court Clerk



## Addendum D

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

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OSMAN MOHAMMED NOOR,	:	MINUTES
Petitioner,	:	LAW AND MOTION
	:	
vs.	:	Case No: 130907566 RN
STATE OF UTAH,	:	Judge: VERNICE TREASE
Respondent.	:	Date: April 27, 2015

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Clerk: amyb

PRESENT

Petitioner's Attorney: SAMUEL ALBA

Attorney for the Respondent: DANIEL W BOYER

Audio

Tape Number: CR W45 Tape Count: 9:00-12

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HEARING

Counsel for Mr. Noor is present by telephone. The Court has scheduled this matter for a status conference and the defendant has been excused. Counsel for the defendant makes a record of the receipt of the case prior to this hearing. Counsel indicates they need more information regarding the defendant's Petition. The State may have a copy of the transcript from the trial in question for case number 091905211. The Court indicates there is a transcript on the docket which the Court will provide to counsel. Counsel moves the Court for 45 days to file an amended petition. Counsel is to file the amended petition on or before 6/26/15 and responses are to be filed on or before 8/14/15. Once that is filed the Rule 7 time will begin. Clerk to set hearing if needed.

## Addendum E

SAM ALBA (0031)  
ROBERT W. LIN (15190)  
**SNOW, CHRISTENSEN & MARTINEAU**  
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*Attorneys for Petitioner Osman Mohammed Noor*

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**IN THE THIRD JUDICIAL DISTRICT COURT**

**SALT LAKE COUNTY, STATE OF UTAH**

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OSMAN MOHAMMED NOOR,  Petitioner,  vs.  THE STATE OF UTAH,  Respondent.	Amended Petition for Relief Under the Post-Conviction Remedies Act  Utah Code Section 78B-9-101, et seq. Utah Rules of Civil Procedure 65C  Civil No. 130907566  Judge: Vernice Trease
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**REQUEST FOR RELIEF**

Petitioner Osman Mohammed Noor is currently incarcerated in the Utah State Prison located in 14425 Bitterbrush Lane, Draper, Utah. Pursuant to Utah Code Ann. 78B-9-101, et seq., and Rule 65C of the Utah Rules of Civil Procedure, Mr. Noor respectfully requests post-conviction relief.

Mr. Noor understands that this petition raises important factual issues regarding the actions of his counsel Mr. Sikora and the ability of the Court provided Somali translators. Mr. Noor respectfully requests that the Court allow him to conduct discovery on the factual issues surrounding



this petition.

**NOTICE TO THE PETITIONER:** BEFORE COMPLETING THIS FORM, PLEASE READ IT CAREFULLY. IF YOU HAVE ANY QUESTIONS, CONTACT AN ATTORNEY. COURT CLERKS ARE NOT ALLOWED TO GIVE LEGAL ADVICE. ATTACH ADDITIONAL SHEETS OF PAPER AS NECESSARY TO COMPLETE YOUR ANSWERS. SHOW THE QUESTION NUMBER FROM THIS FORM ON THE ADDITIONAL SHEET OF PAPER.

**I. NAME OF RESPONDENT (Check One)**

- ☒ Conviction of Felony: State Of Utah  
☐ Conviction of Misdemeanor or Ordinance: County of Salt Lake  
☐ Conviction of Misdemeanor or Ordinance: Municipality of Salt Lake City

**II. IDENTIFICATION OF CURRENT AND RELATED CASES**

1. (a) Name of court that entered the judgment being challenged: Third Judicial Court, State of Utah.  
(b) Location of Court: 450 South State Street, Salt Lake City, Utah 84111.  
(c) Case Number: 091905211.
2. Date of Judgment being challenged: January 4, 2011.
3. Sentence: Two one to fifteen year sentences served concurrently for Burglary and Forcible Sexual Assault; 84 days for Lewdness - First or Second Offense.
4. Nature of offense involved (all counts): Charge 1: Burglary, 2nd Degree Felony; Charge 2: Forcible Sexual Assault, 2nd Degree Felony; Charge 3: Lewdness - First or Second Offense, Class B Misdemeanor.
5. What was your plea? (Check One)  
☒ Not guilty  
☐ Guilty  
☐ No Contest  
☐ Guilty and Mentally ill  
☐ Not guilty by reason of insanity
6. If you entered a plea of guilty to some counts, and a not guilty plea to other counts, give your plea to each count: Not Applicable.
7. If you pled not guilty or not guilty by reason of insanity, was the trial before a  
☒ Jury ☐ Judge

8. Did you testify at the trial?  
☐ Yes ☒ No
9. Did you appeal from the conviction or sentence?  
☒ Yes ☐ No
10. If your answer is "yes," provide the following information:
- (a) Name of Appellate Court: Utah Court of Appeals.
  - (b) Case Number: 20110198-CA.
  - (c) Result: The Court of Appeals declined to address the merits of Mr. Noor's argument, and affirmed his conviction.
  - (d) Date of result or citation of opinion: July 19, 2012.
  - (e) Grounds Raised: The State of Utah failed to present sufficient evidence that he had the requisite intent to commit lewdness or forcible sexual abuse, or burglary premised on either of those offenses.
  - (f) Did you seek further review of this appeal?  
☒ Yes ☐ No
  - (g) If your answer is "yes," provide the following information:
    - (1) Name of Reviewing Court: Utah Supreme Court.
    - (2) Case Number: 20120676-SC.
    - (3) Result: The Petition for Writ of Certiorari was denied.
    - (4) Date of result or citation of opinion: October 17, 2012.
    - (5) Grounds Raised: The Court of Appeals erred when it concluded that Defense Counsel had not preserved a claim that the State presented insufficient evidence as to intent even though defense counsel made a motion for directed verdict below.
11. If you did not appeal from your conviction or sentence, why not? Not Applicable as the conviction was appeal.
12. (a) Other than your direct appeal from your conviction or sentence, have you filed any petitions, applications, or motions with respect to this conviction or sentence in any court, state or federal?  
☒ Yes ☐ No
- (b) If your answer is "yes," provide the following information:

- (1) Name of court: The United States District Court, District of Utah.
- (2) Case Number: 2:13-cv-00738-TS.
- (3) Result: The Court dismissed the petition without prejudice.
- (4) Date of result or citation of opinion: March 16, 2015.
- (5) Grounds Raised: The Utah Court of Appeals erred when it affirmed Mr. Noor's conviction based on a lack of preservation, and refused to address the merits of Mr. Noor's claims.

(c) Did you receive an evidentiary hearing on your petition, application, or motion?

☐ Yes ☒ No

(d) Did you appeal the decision on your petition, application, or motion?

☐ Yes ☒ No

(e) If your answer is "yes," provide the following information:

- (1) Name of court:
- (2) Case Number:
- (3) Result:
- (4) Date of result or citation of opinion:
- (5) Grounds Raised:

13. (a) Other than the case described in question 12, have you filed any further petitions, applications, or motions with respect to this conviction or sentence in any court, state or federal?

☐ Yes ☒ No

(b) If your answer is "yes," provide the following information:

- (1) Name of court:
- (2) Case Number:
- (3) Result:
- (4) Date of result or citation of opinion:
- (5) Grounds Raised:

(c) Did you receive an evidentiary hearing on your petition, application, or motion?

☐ Yes ☐ No

(d) Did you appeal the decision on your petition, application, or motion?

☐ Yes ☐ No



(e) If your answer is "yes," provide the following information:

- (1) Name of court:
- (2) Case Number:
- (3) Result:
- (4) Date of result or citation of opinion:
- (5) Grounds Raised:

14. (a) Do you have any petition, appeal, or motion now pending in any court, state or federal, relating to the judgment being challenged:

☐ Yes ☒ No

(b) If your answer is "yes," provide the following information:

- (1) Name of court:
- (2) Case number:
- (3) Nature of proceeding:

### III. GROUNDS FOR RELIEF

**NOTICE TO THE PETITIONER:** YOU MAY BE BARRED FROM PRESENTING ADDITIONAL GROUNDS IN A FUTURE POST-CONVICTION PETITION IF YOU FAIL TO PRESENT ANY GROUNDS THAT YOU COULD PRESENT HERE BUT DO NOT.

THE FOLLOWING IS A LIST OF THE MOST FREQUENTLY RAISED GROUNDS FOR RELIEF IN POST-CONVICTION PROCEEDINGS. EACH STATEMENT PRECEDED BY A LETTER CONSTITUTES A SEPARATE GROUND FOR POSSIBLE RELIEF. YOU SHOULD RAISE IN THIS PETITION ANY OF THESE GROUNDS THAT APPLY AND ANY OTHER GROUNDS NOT LISTED THAT YOU MAY HAVE AVAILABLE.

**DO NOT MERELY CHECK THE GROUNDS LISTED.** IF YOU BELIEVE ANY OF THESE GROUNDS APPLY TO YOU, YOU MUST ALLEGE FACTS. THE PETITION WILL BE RETURNED TO YOU IF YOU MERELY CHECK A GROUND AND FAIL TO LIST NECESSARY FACTS OR ATTACH SUPPORTING DOCUMENTATION.

- (a) Conviction obtained by plea of guilty that was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury that was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Conviction under an unconstitutional statute or constitutionally protected conduct.
- (k) Denial of right to appeal.

15. State concisely every ground on which you claim you are entitled to post-conviction relief. Summarize briefly the facts supporting each ground. If necessary, you may attach additional pages stating additional grounds and facts supporting same.

(a) GROUND ONE: Mr. Noor's counsel was per se ineffective for failing to seek a competent interpreter for Mr. Noor at trial.

SUPPORTING FACTS FOR GROUND ONE (*state briefly without citing law or making argument*):

Mr. Noor had a difficult time understanding the translation at trial. Due to the lack of adequate translation, he did not know what was going on. Mr. Noor told Mr. Sikora that he was having a difficult time understanding, but Mr. Sikora did not do anything. As a result, Mr. Noor did not even understand his accuser's testimony against him. Under these circumstances, Mr. Noor was deprived of his right to communicate with his attorney during trial as guaranteed by the Sixth Amendment and there is a presumption that Mr. Noor was prejudiced. In short, this situation is so likely to prejudice Mr. Noor that the Court should find that Mr. Sikora was per se ineffective for failing to ensure that Mr. Noor understood what was happening at trial, especially since Mr. Noor complained about it to Mr. Sikora.

(b) GROUND TWO: Even if the Court applied the *Strickland* standard, Mr. Noor's counsel was still ineffective for failing to seek a competent interpreter for Mr. Noor at trial.

SUPPORTING FACTS FOR GROUND TWO (*state briefly without citing law or making argument*):

Mr. Sikora should have understood his obligation to make sure that Mr. Noor understood what was happening at trial. Mr. Sikora should have understood the importance of allowing Mr. Noor to participate in his own defense. Yet, at trial, Mr. Noor told Mr. Sikora that he was having a

difficult time understanding the translation at trial, but Mr. Sikora did not do anything. Mr. Sikora failure to object or otherwise takes steps to obtain another interpreter at trial was deficient as to fall below an objective standard for reasonableness.

Mr. Noor was prejudiced by not understanding the trial proceedings for two reasons as follows:

First, there was only one witness to the alleged crime at trial—the alleged victim J.E. She testified that Mr. Noor harassed her in her apartment. If Mr. Noor had understood J.E.'s testimony, he could have told Mr. Sikora that J.E. was romantically interested in him, and she was jealous of his relationship with another person. So there was a motive for J.E. to lie. On cross-examination, Mr. Sikora did not ask about these issues. In closing, the State of Utah bolstered the testimony of J.E. by arguing that she had no motive to lie. Specifically, the State argued "Why did [J.E.] come here a year ago to a preliminary hearing, and testify, and tell people these ugly, ugly things about what happened to her? Why is she here today? Why did she immediately call the police?" (Trial Transcript at 163:13-17, attached as Exhibit H.) If Mr. Sikora had challenged J.E.'s credibility and provided the jury a reason as to why J.E. would lie, there is reasonable probability that the jury would not have convicted Mr. Noor.

Second, J.E. accused Mr. Noor of going into her apartment and harassing her. Mr. Noor, however, contends that he was never in J.E.'s apartment. If Mr. Noor had understood the trial proceedings, he would have been able to ask Mr. Sikora to cross-examine the State's witnesses as to whether the State had any fingerprint, DNA, or other physical evidence that Mr. Noor was in J.E.'s apartment—there was none. If Mr. Sikora had done so, this would have undermined the State's case against Mr. Noor. If the jury knew there was no fingerprint, DNA, or other physical evidence placing Mr. Noor inside J.E.'s apartment, there is a reasonable probability that the jury would not have convicted Mr. Noor.

(c) GROUND THREE: Mr. Sikora was ineffective because he would not let Mr. Noor aid in his own defense prior to trial.

SUPPORTING FACTS FOR GROUND THREE (*state briefly without citing law or making argument*):

Mr. Sikora should have known that it was important to hear Mr. Noor's version of what happened on May 28, 2009. Also, Mr. Sikora should have known that Mr. Noor was a valuable and important resource in aiding in his own defense. It was unreasonable for Mr. Sikora to refuse to let Mr. Noor tell his side of the story. It is unreasonable for Mr. Sikora fail to make sure that that Mr. Noor understood the police report so that Mr. Noor could aid in his own defense.

Mr. Noor was prejudiced for two reasons as follows:

First, as stated above, there was only one witness to the alleged crime—the alleged victim J.E. J.E. testified that Mr. Noor went into her apartment to harass her. If Mr. Sikora would have allowed Mr. Noor to participate in his own defense, Mr. Sikora would have known that Mr. Noor believed that J.E. lied because she was jealous of Mr. Noor and the person he was dating. Mr.

Sikora would have been able to investigate this issue. Mr. Sikora would have been able to talk to Mr. Noor's brother, the person Mr. Noor was dating, and other people in the apartment to support this theory. If Mr. Sikora had done so, there was a reasonable probability that Mr. Noor's account of what happened would have been bolstered, and J.E. credibility would have been damaged such that there is a reasonable probability that the jury would have acquitted Mr. Noor.

Second, if Mr. Sikora had allowed Mr. Noor to participate in his own defense, Mr. Sikora would have known that Mr. Noor was never in J.E.'s apartment. Mr. Sikora would have been able to investigate the lack of fingerprint, DNA, and physical evidence to show that Mr. Noor was in J.E.'s apartment. If Mr. Sikora had done so, there was a reasonable probability that the jury would have acquitted Mr. Noor for lack of physical evidence.

(d) GROUND FOUR: Mr. Sikora was ineffective for failing to advise Mr. Noor of the risk of deportation if a jury found him guilty.

SUPPORTING FACTS FOR GROUND FOUR (*state briefly without citing law or making argument*):

Mr. Sikora did not tell Mr. Noor how the charges would or could affect his immigration status. Nor did Mr. Sikora tell Mr. Noor that he could be deported if he went to trial and was convicted of the charges against him. In view of the Supreme Court's recognition of the prevailing professional norm that counsel must so advise, Mr. Sikora was unreasonable not to do so.

Mr. Sikora failed to tell Mr. Noor that he would be deported if found guilty of the charges against him. If Mr. Sikora and Mr. Noor understood that Mr. Noor, if he was found guilty, could be deported back to Somalia—a place where Mr. Noor is at risk of death, torture, and other cruel, inhuman, or degrading treatment—they could have pursued a plea bargain to a lesser crime that would not result in his deportation. (Somalia 2014 Human Rights Report, attached as Exhibit J.)

In addition, as stated above, there was only one witness to the alleged crime, J.E. If Mr. Sikora would have told the State of J.E.'s motive to lie and if Mr. Sikora would have pressed the State's lack of physical evidence, there is a reasonable probability that the State would have offered Mr. Noor a plea deal. In addition, there is a reasonable probability that Mr. Sikora could have and should have convinced Mr. Noor to accept that deal in view of the serious risk of deportation back to Somalia.

16. If any of the grounds listed above were not previously presented in any other court, state or federal, state briefly which grounds were not presented and your reasons for not presenting them:

The grounds listed above were not previously presented. The Utah Supreme Court has held that "trial counsel cannot reasonably be expected to raise the issue of his or her own incompetence [at trial and] on appeal." *Archeuleta v. Galetaka*, 2011 UT 73, ¶ 35, 267 P.3d 232. Here, Mr. Noor's trial counsel, Mr. Sikora, could not be expected to raise the issue of his own ineffectiveness at trial. In addition, Mr. Sikora represented Mr. Noor on appeal. Mr. Sikora also cannot reasonably be expected to raise the issue of his own ineffectiveness at trial on appeal.

17. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment being challenged.

- (a) Preliminary hearing: Michael R. Sikora, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111.
- (b) Arraignment and plea: Michael R. Sikora, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111.
- (c) Trial: Michael R. Sikora, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111.
- (d) Sentencing: Michael R. Sikora, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111.
- (e) Appeal: Michael R. Sikora and Brittany D. Enniss, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111.
- (f) Post-Conviction proceeding: Previously withdrawn attorneys Blaine J. Benard and M. Benjamin Machlis, Holland & Hart, 222 S. Main Street, Suite 2200, Salt Lake City, Utah 84101. Current attorneys Sam Alba and Robert Lin, Snow, Christensen & Martineau, 10 Exchange Place, 11th Floor, Salt Lake City, Utah 84111.
- (g) Appeal from post-conviction proceeding: Not Applicable.

18 (a) Do you have any future sentence to serve after you complete the sentence imposed by the judgment being challenged?

☐ Yes ☒ No

(b) If your answer is "yes" give the following information:

- (1) Name of court:
- (2) Location:
- (3) Case number:

#### IV. REQUIRED ATTACHMENTS

**NOTICE TO THE PETITIONER:** IF YOU DO NOT ATTACH THE REQUIRED COPIES OR PROVIDE AN EXPLANATION WHY YOU CANNOT PROVIDE THEM, THIS PETITION WILL NOT BE FILED AND WILL BE RETURNED TO YOU. YOU MAY THEN LOSE YOUR RIGHT TO FILE A PETITION IF THE STATUTE OF LIMITATIONS EXPIRES BEFORE YOU FILE ANOTHER PETITION.

19. Attach a copy of the following documents to this petition or provide an explanation why you cannot provide the copies.

- (a) The judgment and commitment being challenged.  
(See Docket at 18-19, attached as Exhibit B.)
- (b) Any decision issued by an appellate court from the direct appeal.  
(See *State v. Noor*, 2012 UT App 187, attached as Exhibit C.)
- (c) Any previously-filed petition for post-conviction relief, and any decision issued as a result.  
(See Habeas Petition, attached as Exhibit D.)  
(See Memorandum Decision and Order Granting Motion to Dismiss Habeas Petition, attached as Exhibit E.)
- (d) Affidavits, records, or other documentary evidence that support your claim.  
(See Affidavit of Osman Mohammed Noor, attached as Exhibit F.)  
(See Appellant's Brief, attached as Exhibit G.)  
(See Portions of Trial Transcript, attached as Exhibit H.)  
(See Portions of Pre-Sentence Report, attached as Exhibit I.)  
(See State Department Somalia 2014 Human Rights Report, attached as Exhibit J.)
- (e) An affidavit of impecuniosity and certificate from the Inmate Accounting Office, if you are requesting a waiver of the filing fee.  
(Not Applicable.)
- (f) Memorandum of Points and Authorities.  
(See Memorandum of Points and Authority in Support of Osman Mohammad Noor's Amended Petition for Relief under the Post-Convictions Remedies Act, attached as Exhibit A.)



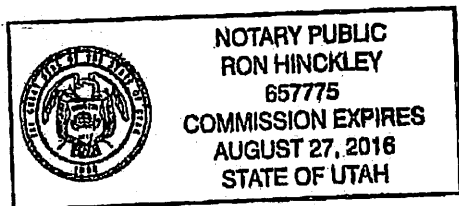
V. PETITIONER'S VERIFICATION UNDER OATH

STATE OF UTAH )  
SS.  
COUNTY OF SALT LAKE )

I, the undersigned petitioner, declare under penalty of perjury that the information I have provided in this petition is true and correct.

Osman Mohammad Noor  
SIGNATURE OF PETITIONER

Subscribed and sworn to before me on: 20 AUGUST 2015



[Signature]  
NOTARY PUBLIC  
Residing in: SALT LAKE COUNTY  
My Commission Expires: 8/27/2016

VI. CERTIFICATION OF ATTORNEY (If petitioner is represented by attorney)

I certify I am the attorney for petitioner, and that this petition complies with Rule 11, Utah Rules of Civil Procedure.

[Signature]  
SIGNATURE OF ATTORNEY

Name of Petitioner: Osman Mohammad Noor  
Address: C/O Sam Alba, Snow, Christensen & Martineau, 10 Exchange Place, 11th Floor, Salt Lake City Utah, 84111.



# Exhibit A

SAM ALBA (0031)  
ROBERT W. LYN (15190)  
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*Attorneys for Petitioner Osman Mohammed Noor*

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**IN THE THIRD JUDICIAL DISTRICT COURT**

**SALT LAKE COUNTY, STATE OF UTAH**

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OSMAN MOHAMMED NOOR,

Petitioner,

vs.

THE STATE OF UTAH,

Respondent.

**MEMORANDUM OF POINTS AND  
AUTHORITY IN SUPPORT OF OSMAN  
MOHAMMAD NOOR'S AMENDED  
PETITION FOR RELIEF UNDER THE  
POST-CONVICTION REMEDIES ACT**

Civil No. 130907566

Judge: Vernice Trease

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**INTRODUCTION**

Mr. Noor is a refugee from Somalia. He does not understand, speak, or read English well. On May 28, 2009, Mr. Noor was arrested based on accusations from the manager of his apartment building, J.E., that he went into her apartment to harass her. On July 6, 2009, Mr. Noor was charged with one count of burglary, one count of forcible sexual abuse, and one count of lewdness. Because he was found indigent, he was assigned an attorney from the Legal Defender's Office, Mike Sikora.

Mr. Noor met with Mr. Sikora prior to trial, but Mr. Sikora would not let Mr. Noor tell his version of what happened on May 28, 2009. Also, Mr. Sikora did not make sure that Mr. Noor understood the police report against him. In addition, Mr. Sikora did not tell Mr. Noor that the charges against him would affect his immigration status. If Mr. Noor would have been allowed to tell Mr. Sikora his version of the event, he would have told Mr. Sikora that J.E. had a motive to lie. In addition, Mr. Noor would have told Mr. Sikora that he had never been in J.E.'s apartment.

At trial, Mr. Noor had a difficult time understanding the translation. He did not know what was going on. He did not understand his accuser's testimony against him. Mr. Noor told Mr. Sikora that he was having a hard time understanding, but Mr. Sikora did not do anything. The jury found Mr. Noor guilty.

### REQUEST FOR RELIEF

Pursuant to Utah Code Ann. 78B-9-101, et seq., and Rule 65C of the Utah Rules of Civil Procedure, Mr. Noor respectfully requests post-conviction relief because (1) Mr. Sikora was per se ineffective for failing to seek a competent interpreter for Mr. Noor at trial; (2) even if the Court were to apply the *Strickland* standard, Mr. Sikora was still ineffective for failing to seek a competent interpreter for Mr. Noor at trial; (3) Mr. Sikora was ineffective because he failed let Mr. Noor aid in his own defense prior to trial; and (4) Mr. Sikora was ineffective for failure to advise Mr. Noor of the risk of deportation if a jury found him guilty.

Mr. Noor understands that this petition raises important factual issues regarding the actions of Mr. Sikora and the ability of the court provided Somali translators. Mr. Noor

respectfully requests that the Court allow Mr. Noor to conduct discovery on the factual issues surrounding this petition.

## STATEMENT OF FACTS

### I. Procedural History of Mr. Noor's Criminal Case

1. Mr. Noor is a refugee from Somalia. He speaks, read, and understands very little English. (Noor Affidavit, attached as Exhibit F.)
2. On May 28, 2009, Mr. Noor was arrested based on accusations from the manager of his apartment building, J.E. ((See Docket Case No. 091905211 at 1, attached herein as Exhibit B.)
3. On July 6, 2009, Mr. Noor was charged with one count of burglary, one count of forcible sexual abuse, and one count of lewdness – first or second offense. (*Id.* at 2.)
4. Mr. Noor was represented by Michael Sikora. (*Id.* at 1.)
5. On October 23, 2009, Mr. Noor pleaded not guilty to the charges. (*Id.* at 1.)
6. On January 4, 2011, a jury trial was held for Mr. Noor. (*Id.* at 16-17.)
7. There were two witnesses at trial, the alleged victim J.E., and the Officer responding at the scene Daniel Davis. (*Id.* at 17.)
8. J.E., the alleged victim, was the only witness to the alleged crime, Office Davis responded to the scene after the alleged crime took place.
9. Mr. Noor did not testify. (*Id.* at 17.)
10. The jury found Mr. Noor guilty on all three counts. (*Id.* at 16.)
11. Mr. Noor was sentenced to two one to fifteen year sentences to be served concurrently for Burglary and forcible Sexual Assault and 84 days for Lewdness. (*Id.* at 18-19.)

12. Mr. Sikora appealed the case arguing that the State failed to present sufficient evidence that Mr. Noor had the requisite intent to commit lewdness or forcible sexual abuse, or burglary. *State v. Noor*, 2012 UT App 187, ¶ 1, 283 P.3d 543.

13. The Court of Appeals declined to address the appeal on the merits finding that Mr. Noor's insufficiency of evidence argument on appeal was not specifically presented to the district court and is thus not preserved for appeal. *Id.* at ¶ 8.

14. Mr. Sikora filed a petition for writ of certiorari to the Utah Supreme Court. The Utah Supreme Court denied that petition. *State v. Noor*, 288 P.3d 1045 (Utah 2012).

## **II. Mr. Noor's Pre-Trial Interactions with Mr. Sikora**

15. Mr. Noor met with Mr. Sikora prior to trial. (Noor Affidavit, attached as Exhibit F.)

16. Mr. Sikora would not let Mr. Noor tell his version of what happened on May 28, 2009. (*Id.*)

17. No one translated the police report to Mr. Noor such that he understood what was in the report. (*Id.*)

18. Mr. Sikora did not tell Mr. Noor how the charges would affect his immigration status. (*Id.*)

19. Mr. Sikora did not tell Mr. Noor that he could be deported if he went to trial and was convicted of the charges against him. (*Id.*)

### III. Mr. Noor's Version of the Events of May 28, 2009.

20. If Mr. Noor had been allowed to tell Mr. Sikora his version of the events. He would have told Mr. Sikora that he and J.E. would often talk, and he believed that J.E. was romantically interested in him.

21. He would have told Mr. Sikora that he believed that J.E. was jealous when he began a relationship with another person.

22. He would have told Mr. Sikora that he did not enter J.E.'s apartment on May 28, 2009.

23. He would also have told Mr. Sikora that he had never entered J.E.'s apartment.

### IV. Mr. Sikora's Representation of Mr. Noor.

24. Mr. Noor had a difficult time understanding the translation at trial. (Noor Affidavit, attached as Exhibit F.)

25. Due to the lack of adequate translation, he did not know what was going on. (*Id.*)

26. Mr. Noor did not understand his accuser J.E.'s testimony against him. (*Id.*)

27. Mr. Noor told Mr. Sikora that he was having a difficult time understanding, but Mr. Sikora did not do anything. (*Id.*)

28. At trial the State of Utah argued "[J.E.] has no motive to lie. Why did [J.E.] come here a year ago to a preliminary hearing, and testify, and tell people these ugly, ugly things about what happened to her? Why is she here today? Why did she immediately call the police?" (Trial Transcript 163:13-17, attached as Exhibit H.)

29. At trial, Mr. Sikora did not ask J.E. if she was romantically interest in Mr. Noor, and if J.E. was jealous of Mr. Noor's relationship with another person.

30. At trial, Mr. Sikora did not call any witnesses on behalf of Mr. Noor.

31. At trial, Mr. Sikora did not ask about the lack of fingerprint, DNA, or any other physical evidence showing that Mr. Noor was in J.E.'s apartment.

32. After Mr. Noor was found guilty, Mr. Sikora appealed that conviction. In that appeal, Mr. Sikora argued "Mr. Noor maintains that the evidence shows that he did not understand his conduct in [J.E.'s] apartment to be lewd, as his background gave him no reason to expect his actions to cause affront or alarm to [J.E.]." Mr. Sikora also argued that "Mr. Noor's intention to express his 'love' for [J.E.] resulted in conduct that, by our standards, seems clearly criminal, but conduct is not criminal if it lacks a culpable mental state. But relative to the violence against women that he experienced for nearly his entire life, his intention in remaining in [J.E.'s] apartment and his subsequent conduct appear to be severely misguided attempts at expressing love and affection. He repeatedly told her that he loved her, and he seemed to think his actions were expressive of that." (Appellant's Brief, attached as Exhibit G.)

33. But according to Mr. Noor, this is not what happened.

34. In addition, Mr. Noor's pre-sentencing report states that "[a]ccording to Immigration and Custom Enforcement (ICE) Agent Ryan Overton, the defendant entered the United States on July 14, 2004, through New York City as a refugee. He then adjusted his status on April 12, 2008 and became a legal permanent resident, so he is legal but is not a US Citizen. However due to having been convicted of the present charges, an ICE detainer has been place on the defendant at the Salt Lake County Jail. Agent Overton stated the defendant will have to see an Immigration Judge "but will most likely be ordered deported." (Presentencing Report, attached as Exhibit I.)



35. According to Mr. Noor, this information regarding his immigration status is incorrect.

## ARGUMENT

### I. Mr. Sikora Was Per Se Ineffective for Failing To Seek a Competent Interpreter for Mr. Noor at Trial.

Generally, the Supreme Court presumes that an attorney is competent to provide counsel, so the burden rests on the accused to demonstrate a constitutional violation. But the Supreme Court held that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronie*, 466 U.S. 648, 658-59 (1984). In short, the Supreme Court, in *Cronie*, held that there are situations where counsel's actions are presumed to have prejudiced a defendant. Specifically, when a defendant is "deprived of his right to communicate with his attorney [and] [w]here he and his attorney could not communicate in a shared language [there] is no way in which the two could have a meaningful attorney-client relationship during trial guaranteed by the Sixth Amendment. Thus, the *Cronie* presumption of prejudice applies." *Gonzalez v. Phillips*, 1095 F. Supp. 2d 893, 902 (E.D. Mich. 2001).

Here, Mr. Noor had a difficult time understanding the translation at trial. Due to the lack of adequate translation, he did not know what was going on. Mr. Noor told Mr. Sikora that he was having a difficult time understanding, but Mr. Sikora did not do anything. As a result, Mr.

Noor did not even understand his accuser's testimony against him. Under these circumstances, Mr. Noor was deprived of his right to communicate with his attorney during trial as guaranteed by the Sixth Amendment and there is a presumption that Mr. Noor was prejudiced. In short, this situation is so likely to prejudice Mr. Noor that the Court should find that Mr. Sikora was per se ineffective for failing to ensure that Mr. Noor understood what was happening at trial, especially since Mr. Noor complained about it to Mr. Sikora.

**II. Even if the Court Were To Apply the *Strickland* Standard, Mr. Noor's Counsel Was Still Ineffective for Failing To Seek a Competent Interpreter for Mr. Noor at Trial.**

Even if the Court, under these circumstances, were to apply the *Strickland* standard to Mr. Noor's ineffective of counsel claim, Mr. Noor would still succeed. Utah Courts "evaluate whether a defendant has received ineffective assistance of counsel under the two-part test established by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense." *Gregg v. State*, 2012 UT 32, ¶ 19, 279 P.3d 396. As to the first part, "the defendant must demonstrate that counsel's performance was so deficient as to fall below an objective standard for reasonableness." *Id.* at ¶ 20. As to the second part, "the defendant must show that counsel's deficient performance prejudiced the defense." *Id.* at ¶ 21.

**A. Mr. Sikora's Representation Was Unreasonable.**

As to the first part of the *Strickland* analysis—reasonableness, numerous courts have recognized a counsel's obligation to make sure that his client understands and participates in his own defense. See e.g., *Chaco v. Wood*, 36 F.3d 1459, 1465 (9th Cir. 1994) (overturned on other grounds) ("An accurate and complete translation of all attorney-client communications was

necessary to ensure that [defendant] received effective assistance of counsel. In the absence of such translation, [defendant] could not receive such assistance.”); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (“Clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be severely hampered.”).

Here, Mr. Sikora should have understood his obligation to make sure that Mr. Noor understood what was happening at trial. Mr. Sikora should have understood the importance of allowing Mr. Noor to participate in his own defense. Yet, at trial, Mr. Noor told Mr. Sikora that he was having a difficult time understanding the translation at trial, but Mr. Sikora did not do anything. Mr. Sikora failure to object or otherwise takes steps to obtain another interpreter at trial was deficient as to fall below an objective standard for reasonableness.

**B. Mr. Sikora’s Representation Prejudiced Mr. Noor.**

As to the second part of the *Strickland* analysis—prejudice, the Utah Supreme Court explains that “[p]rejudice is shown where there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at ¶ 21.

Here, Mr. Noor was prejudiced by not understanding the trial proceedings for two reasons as follows:

First, there was only one witness to the alleged crime at trial—the alleged victim J.E. She testified that Mr. Noor harassed her in her apartment. If Mr. Noor had understood J.E.’s testimony, he could have told Mr. Sikora that J.E. was romantically interested in him, and she was jealous of his relationship with another person. So there was a motive for J.E. to lie. On

cross-examination, Mr. Sikora did not ask about these issues. In closing, the State of Utah bolstered the testimony of J.E. by arguing that she had no motive to lie. Specifically, the State argued “Why did [J.E.] come here a year ago to a preliminary hearing, and testify, and tell people these ugly, ugly things about what happened to her? Why is she here today? Why did she immediately call the police?” (Trial Transcript at 163:13-17, attached as Exhibit H.) If Mr. Sikora had challenged J.E.’s credibility and provided the jury a reason as to why J.E. would lie, there is reasonable probability that the jury would not have convicted Mr. Noor.

Second, J.E. accused Mr. Noor of going into her apartment and harassing her. Mr. Noor, however, contends that he was never in J.E.’s apartment. If Mr. Noor had understood the trial proceedings, he would have been able to ask Mr. Sikora to cross-examine the State’s witnesses as to whether the State had any fingerprint, DNA, or other physical evidence that Mr. Noor was in J.E.’s apartment—there was none. If Mr. Sikora had done so, this would have undermined the State’s case against Mr. Noor. If the jury knew there was no fingerprint, DNA, or other physical evidence placing Mr. Noor inside J.E.’s apartment, there is a reasonable probability that the jury would not have convicted Mr. Noor.

### **III. Mr. Sikora Was Ineffective Because He Would Not Let Mr. Noor Aid in His Own Defense Prior to Trial**

Pursuant to the *Strickland* two-part test as set forth above, Mr. Sikora was also ineffective because Mr. Sikora would not let Mr. Noor tell his version of what happened on May 28, 2009.

#### **A. Mr. Sikora’s Representation Was Unreasonable.**

As to the first part of the *Strickland* analysis—reasonableness, “[d]efense counsel loses a valuable resource if his or her client cannot understand the charge and supporting facts. Significance of detailed factual representations may escape the lawyer, but not the client who is

familiar with the circumstances surrounding his case. Ultimate success in court may depend on careful pre-trial investigation based on hints from the client. Inadequate input from the client who failed to understand the evidence to be relied upon by the government cannot be cured by the presence of an official court interpreter at a hearing or at trial.” *United States v. Mosquera*, 816 F.Supp. 168, 175 (E.D.N.Y. 1993).

Here, Mr. Sikora should have known that it was important to hear Mr. Noor’s version of what happened on May 28, 2009. Also, Mr. Sikora should have known that Mr. Noor was a valuable and important resource in aiding in his own defense. It was unreasonable for Mr. Sikora to refuse to let Mr. Noor tell his side of the story. It is unreasonable for Mr. Sikora fail to make sure that that Mr. Noor understood the police report so that Mr. Noor could aid in his own defense.

**B. Mr. Sikora’s Representation Prejudiced Mr. Noor.**

As to the second part of the *Strickland* analysis—prejudice, Mr. Noor was prejudiced for two reasons as follows:

First, as stated above, there was only one witness to the alleged crime—the alleged victim J.E. J.E. testified that Mr. Noor went into her apartment to harass her. If Mr. Sikora would have allowed Mr. Noor to participate in his own defense, Mr. Sikora would have known that Mr. Noor believed that J.E. lied because she was jealous of Mr. Noor and the person he was dating. Mr. Sikora would have been able to investigate this issue. Mr. Sikora would have been able to talk to Mr. Noor’s brother, the person Mr. Noor was dating, and other people in the apartment to support this theory. If Mr. Sikora had done so, there was a reasonable probability that Mr. Noor’s account of what happened would have been bolstered, and J.E. credibility would have

been damaged such that there is a reasonable probability that the jury would have acquitted Mr. Noor.

Second, if Mr. Sikora had allowed Mr. Noor to participate in his own defense, Mr. Sikora would have known that Mr. Noor was never in J.E.'s apartment. Mr. Sikora would have been able to investigate the lack of fingerprint, DNA, and physical evidence to show that Mr. Noor was in J.E.'s apartment. If Mr. Sikora had done so, there was a reasonable probability that the jury would have acquitted Mr. Noor for lack of physical evidence.

#### **IV. Mr. Sikora Was Ineffective for Failing To Advise Mr. Noor of the Risk of Deportation if a Jury Found Him Guilty.**

Pursuant to the *Strickland* two-part test as set forth above, Mr. Sikora was also ineffective because Mr. Sikora failed to advise Mr. Noor of the risk of deportation if a jury found him guilty.

##### **A. Mr. Sikora's Representation Was Unreasonable.**

As to the first part of the *Strickland* analysis—reasonableness, the Supreme Court has held that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of preserving the right to remain in the United States and preserving the possibility of discretionary relief from deportation.” *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010) (holding that it was unreasonable for counsel to fail to advise a client regarding the risk of deportation in the context of a guilty plea).

Here, Mr. Sikora did not tell Mr. Noor how the charges would or could affect his immigration status. Nor did Mr. Sikora tell Mr. Noor that he could be deported if he went to trial and was convicted of the charges against him. In view of the Supreme Court's recognition of the

prevailing professional norm that counsel must so advise, Mr. Sikora was unreasonable not to do so.

**B. Mr. Noor Was Prejudiced.**

As to the second part of the *Strickland* analysis—prejudice, Defendant must show that absent counsel's unreasonable acts "there is a reasonable probability of a more favorable outcome." *State v. Person*, 2006 UT App 288, ¶ 13, 140 P.3d 584.

Here Mr. Sikora failed to tell Mr. Noor that he would be deported if found guilty of the charges against him. If Mr. Sikora and Mr. Noor understood that Mr. Noor, if he was found guilty, could be deported back to Somalia—a place where Mr. Noor is at risk of death, torture, and other cruel, inhuman, or degrading treatment—they could have pursued a plea bargain to a lesser crime that would not result in his deportation. (Somalia 2014 Human Rights Report, attached as Exhibit J.) In addition, as stated above, there was only one witness to the alleged crime, J.E. If Mr. Sikora would have told the State of J.E.'s motive to lie and if Mr. Sikora would have pressed the State's lack of physical evidence, there is a reasonable probability that the State would have offered Mr. Noor a plea deal. In addition, there is a reasonable probability that Mr. Sikora could have and should have convinced Mr. Noor to accept that deal in view of the serious risk of deportation back to Somalia.

**CONCLUSION**

For the reasons stated, Mr. Noor's petition for post-conviction relief should be granted. In addition, Mr. Noor respectfully request that the Court allow Mr. Noor to conduct discovery on the factual issues surrounding this petition.



DATED this 28th day of August, 2015.

SNOW, CHRISTENSEN & MARTINEAU

By: 

Sam Alba

Robert W. Lin

*Attorneys for Petitioner Asman Mohammed Noor*

## Addendum F

In the Third Judicial District Court, Salt Lake County, State of Utah	
<b>OSMAN MOHAMMED NOOR,</b>  <b>Petitioner,</b>  <b>vs.</b>  <b>STATE OF UTAH,</b>  <b>Respondent.</b>	<b>MEMORANDUM DECISION</b>  Case No. 130907566  Judge Vernice S. Trease

In this action, Petitioner Osman Mohammed Noor seeks relief under the Postconviction Remedies Act (PCRA), *see* Utah Code Ann. §§ 78B-9-101, *et seq.*, from his conviction and sentence for burglary, forcible sexual abuse, and lewdness. Currently before the Court is Respondent the State of Utah's (the State) Motion for Summary Judgment. After reviewing the materials submitted by the parties in their briefs and at oral argument, I agree with the State that Mr. Noor's claims are time-barred, and therefore, I GRANT the State's motion.

#### PROCEDURAL BACKGROUND<sup>1</sup>

Mr. Noor was charged with burglary, forcible sexual abuse, and lewdness on July 6, 2009. Because Mr. Noor has difficulty speaking and understanding English, he required the assistance of interpreters throughout the proceedings, including in his meetings with counsel, at the preliminary hearing, and at trial. His case was tried to a jury and on January 4, 2011, a jury convicted him of all three charges.

On February 25, 2011, Mr. Noor was sentenced to serve two concurrent prison terms of one to fifteen years. Following his conviction and sentence, Mr. Noor filed a timely appeal. The Utah Court of Appeals affirmed his conviction in a ruling dated July 12, 2012, *see State v. Noor*, 2012 UT App 187, 283 P.3d 543, and the Utah Supreme Court denied his certiorari petition on October 17, 2012, *see State v. Noor*, 288 P.3d 1045 (Utah 2012). Mr. Noor did not pursue an additional appeal to the United States Supreme Court.

Mr. Noor initiated the instant action when he filed his original petition for postconviction relief (the Original Petition) on November 5, 2013. The Original Petition stated three claims for postconviction relief: (1) Ineffective assistance of trial counsel based on trial counsel's failure to adequately set forth grounds supporting a motion for directed verdict, (2) the trial court used a jury instruction that incorrectly stated the elements of the forcible sexual abuse statute, and (3) ineffective assistance of appellate counsel because on appeal, counsel failed to raise trial counsel's ineffectiveness or the erroneous jury instruction.

<sup>1</sup> Inasmuch as this matter is before the Court on a motion for summary judgment I view the allegations and the inferences stemming from those allegations in the light most favorable to Mr. Noor, who is the nonmoving party. *See Ross v. State*, 2012 UT 93, ¶ 18, 293 P.3d 345.

Along with the Original Petition, Mr. Noor filed a motion seeking the appointment of counsel. The Court granted the motion and eventually, current counsel was appointed to represent Mr. Noor in these proceedings. After counsel was appointed, the Court held a status conference on April 27, 2015. At the status conference, the Court asked Mr. Noor's counsel if he intended to file an amended or supplemental petition. Counsel responded that the Original Petition was inadequate and that he intended to file an amended petition "to try and put some substance to it." In the absence of any objection from the State, the Court granted Mr. Noor leave to amend the Original Petition. Mr. Noor filed his amended petition (the Amended Petition) with this Court on August 27, 2015.

The Amended Petition omitted all of the claims for relief that had been set forth in the Original Petition. In their place, Mr. Noor asserted four new claims for relief. These included two claims alleging that Mr. Noor's trial counsel provided ineffective assistance because he failed to secure an interpreter to adequately help Mr. Noor understand the proceedings at trial; an ineffective assistance of counsel claim based on allegations that problems with the interpreter and a lack of communication between Mr. Noor and counsel prevented Mr. Noor from assisting in his own defense, and a claim that trial counsel provided ineffective assistance of counsel by failing to inform Mr. Noor of the immigration consequences stemming from a conviction for the crimes he was charged with.

#### ANALYSIS

The State now seeks summary judgment in its favor on all of Mr. Noor's claims. Summary judgment is only appropriate where "the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Ross v. State*, 2012 UT 93, ¶ 18, 293 P.3d 345 (internal quotation marks omitted). In this case, the State asserts that it is entitled to summary judgment in its favor on several grounds. I need only address one of those grounds, however, because the undisputed facts demonstrate that Mr. Noor's claims in the Amended Petition are time-barred under the PCRA.

Under the PCRA, a petitioner seeking postconviction relief must file their petition "within one year after the cause of action has accrued." Utah Code Ann. § 78B-9-107(1). A cause of action accrues on the latest of several dates, only one of which has been raised here: "the last day for filing a petition for writ of certiorari in the . . . United States Supreme Court, if no petition for writ of certiorari is filed." *Id.* § 78B-9-107(2)(c). The Utah Supreme Court denied Mr. Noor's certiorari petition on October 17, 2012, which gave Mr. Noor until January 15, 2013 to file a certiorari petition with the United States Supreme Court. *See* Sup. Ct. R. 13 (stating that a petition for certiorari must be filed "within 90 days after entry of the order denying discretionary review"). Consequently, under the PCRA, Mr. Noor had to file his claims for relief in this Court by January 15, 2014.

There is no question that the Original Petition was timely filed before the limitations period expired. However, the claims raised in the Original Petition are no longer before the Court because the Amended Petition—which superseded the Original Petition—omitted all of Mr. Noor's original claims for relief. Thus, the only claims that are currently before the Court are the new claims for relief that have been asserted in the Amended Petition.



Here, the State argues that all of the claims in the Amended Petition are time-barred because Mr. Noor brought all of those claims on August 27, 2015—more than a year and a half after the statute of limitations expired. In response, Mr. Noor does not dispute that the claims in the Amended Petition were brought after the limitations period expired. Instead, Mr. Noor argues that the claims should be deemed timely because the Court granted him leave to amend the Original Petition and, in any event, the new claims in the Amended Petition relate back to the claims in the Original Petition. I disagree with both of Mr. Noor's arguments.<sup>2</sup>

Turning to the first argument, Mr. Noor argues that the Court should deem his claims in the Amended Petition timely because the Court granted Mr. Noor leave to amend the Original Petition at the status conference held on April 27, 2015. However, at that status conference, the limitations period was not raised by the parties or addressed the Court. To the contrary, counsel for Mr. Noor only stated that he was requesting leave to amend the Original Petition "to try and put some substance to it," and that he needed some time to "ascertain whether there are any other issues that need to be raised" in the amended pleading. At no point did counsel make any mention of the limitations period and its impact on the new claims. Therefore, the statute of limitations issue was not before the Court, nor did the Court address that issue when the Court granted Mr. Noor leave to amend his petition.

Furthermore, even if the statute of limitations issue would have been raised, it is doubtful that the Court had any authority to extend the limitations period at the time of the status conference. Indeed, to extend the limitations period at that time would have required the Court to ignore the fact that the limitations period had expired more than one year before the conference. Mr. Noor points to no authority that would have allowed the Court to reinstate and extend the limitations period at that point. In the absence of any authority to indicate otherwise, and in light of the fact that the legislature has sharply restricted a district court's ability to consider an untimely petition for postconviction relief, *see Gardner v. State*, 2010 UT 46, ¶ 91, 234 P.3d 1115, it does not appear that the Court had any authority to extend the limitations period when it granted Mr. Noor's leave to amend the Original Petition.<sup>3</sup>

Turning to the second argument, Mr. Noor asserts that the claims in the Amended Petition relate back to the claims in the Original Petition, and therefore, are timely. I disagree.

Under Rule 15(c) of the Utah Rules of Civil Procedure, an amended pleading that would otherwise run afoul of the statute of limitations may be considered timely where the amended pleading "relates back" to the original pleading. *See* Utah R. Civ. P. 15(c).<sup>4</sup> To relate back, the

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<sup>2</sup> In his current briefs, Mr. Noor does not argue that a different limitations period applies under the PCRA, nor does Mr. Noor argue that the limitations period was tolled for any other reason. Therefore, the Court only addresses the arguments raised by Mr. Noor in his memorandum opposing the motion at bar.

<sup>3</sup> As the State notes, the Utah Supreme Court has recognized that Utah courts may reach the merits of an untimely petition where application of the limitations period would result in an "egregious injustice." *See Gardner v. State*, 2010 UT 46, ¶ 93, 234 P.3d 1115. However, Mr. Noor has not raised that exception in this case, and therefore, the Court does not address the applicability of that exception to Mr. Noor's petition.

<sup>4</sup> Under the PCRA, petitions for postconviction relief are governed by Rule 65C of the Utah Rules of Civil Procedure. *See* Utah Code Ann. § 78B-9-102(1). If Rule 65C does not address a procedural matter, the Utah Rules

new claim must “ar[i]se out of the conduct, transaction, or occurrence set forth . . . in the original pleading.” *Id.* In other words, both the original and new claims must be “tied to a commoncore of operative facts.” *Mayle v. Felix*, 545 U.S. 644, 664 (2005).

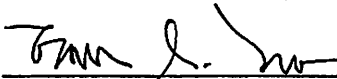
Here, it is clear that even the most liberal reading of the allegations in the Original and Amended Petitions cannot sustain a reasonable inference that the claims in the Amended Petition arise from the same factual allegations as the claims in the Original Petition. Indeed, the Original Petition contains no allegations that relate to the claims asserted in the Amended Petition.

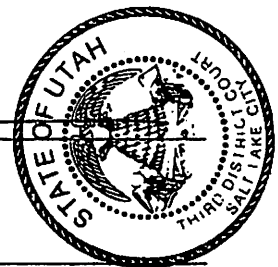
As discussed above, the claims in the Amended Petition are based on alleged problems with Mr. Noor’s interpreter during the trial, meetings with trial counsel and other legal proceedings, and on defense counsel’s alleged failure to inform Mr. Noor of the immigration consequences of a conviction. The Original Petition makes no mention of any of those allegations. While the Original Petition does mention Mr. Noor’s difficulty speaking and understanding English, the Original Petition does not discuss any problems with the interpreters at trial or in Mr. Noor’s communication with counsel. Instead, the Original Petition only alludes to Mr. Noor’s difficulty with the English language in connection with the claim that Mr. Noor could not have formed the intent necessary to have committed the underlying crimes. Consequently, it cannot reasonably be inferred that the allegations and claims in the Amended Petition are based on the same operative facts and claims as the Original Petition. In light of that conclusion, I agree with the State that the claims in the Amended Petition do not relate back to the claims in the Original Petition. Therefore, the claims in the Amended Petition are time-barred.

Based on the foregoing, I agree with the State that the undisputed facts demonstrate that Mr. Noor’s claims in his petition are time-barred under the PCRA. Accordingly, I GRANT the State’s motion for summary judgment.<sup>5</sup> Counsel for the State is designated to prepare an appropriate order consistent with this Ruling.

DATED this 22nd day of August, 2016.

THIRD DISTRICT COURT

  
Vernice S. Trease  
Third District Court Judge



of Civil Procedure Apply. *See id.* Here, Rule 65C does not address the amendment of a petition to add new claims. Consequently, any such amendments are governed by Rule 15 of the Utah Rules of Civil Procedure.

<sup>5</sup> In some instances, an amended petition that does not relate back to the original petition should be considered a new petition and be filed in a separate proceeding. *See, e.g., Carter v. State*, 2015 UT 38, ¶¶ 21-22, 345 P.3d 737 (concluding that a petition filed as an amended petition should have been filed as a new petition in a separate proceeding where the new claims did not relate back to the original petition and were based on new evidence). In the case at bar, the Amended Petition may represent such a petition. However, that issue has not been briefed by the parties, who have focused on the timeliness and merits of the claims in the Amended Petition. Therefore, in the absence of anything to suggest that the Amended Petition should have been filed as a separate postconviction proceeding, I assume that the Amended Petition is properly before the Court in the case at bar.