

2017

**Gaspar Avila, Petitioner and Appellant, vs. Taylorsville City,  
Respondent and Appellee**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS  
STATE OF UTAH

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<p>GASPAR AVILA, Petitioner and Appellant, vs. TAYLORSVILLE CITY, Respondent and Appellee.</p>	<p>PUBLIC Appellate Court Docket No.: 2016-0612-CA</p>
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APPEAL FROM THE THIRD DISTRICT COURT – SALT LAKE DEPT.,  
SALT LAKE COUNTY, HONORABLE SU CHON

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**REPLY BRIEF OF THE APPELLANT**

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Petitioner and Appellant is not incarcerated. This is not an Anders Brief.  
Petitioner and Appellant request oral arguments on this matter.

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UTAH APPELLATE COURTS

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**ARGUMENT**<sup>1</sup>

**POINT ONE:     Petitioner’s PCRA Petition Was Timely Filed Pursuant To  
UCA § 78B-9-107**

An ‘evidentiary fact’ is, “a fact that is necessary for or leads to the determination of an ultimate fact.”<sup>2</sup> An ‘ultimate fact’ is, “a fact essential to the claim.”<sup>3</sup>

Here, GASPAR AVILA (“Petitioner”), discovered for the first time, on November 13, 2015, via current counsel’s efforts, the following evidentiary facts: (1) The Taylorsville Justice Court (the “Plea Court”), failed to abide by any aspect of the Utah Rules of Criminal Procedure, Rule 11(e) requirements, if the Appellate Court appropriately determines that the Plea Court failed to incorporate into the

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<sup>1</sup>Petitioner herein fully incorporates the Brief of the Appellant.

<sup>2</sup> Black's Law Dictionary 611 (7th ed. 1999).

<sup>3</sup> Black's Law Dictionary 612 (7th ed. 1999).

record, the documents associated with this case;<sup>4</sup> or (2) in the event that the Appellate Court inappropriately determines that the documents associated with this case were properly incorporated into the record, then the Plea Court still fatally failed to comply with Rule 11(e) because it: (a) failed to advise Petitioner of the likely consequences of his plea; (b) failed to explain the criminal elements of his plea; and (c) failed to advise Petitioner of the factual basis of his plea.<sup>5</sup>

Said evidentiary facts form the basis of Petitioner's ultimate fact, i.e., Petitioner's constitutional right to due process was violated because his plea is unknowing and involuntary.

Accordingly, the legal consequence of said evidentiary and ultimate facts make Petitioner's plea invalid, pursuant to Nicholls and Alexander, which hold,

"A guilty plea is not valid under the Due Process Clause of the United States Constitution unless it is knowing and voluntary," (citations and quotations omitted). Nicholls v. State, 2009 UT 12, ¶ 20, 203 P.3d 976; *see also* State v. Alexander, 2012 UT 27, ¶ 16, 279 P.3d 371 ("A guilty plea involves the waiver of several constitutional rights and is therefore valid under the Due Process Clause of the U.S. Constitution only if it is made voluntarily, knowingly, and intelligently," (citations and quotations omitted)).

It is unrealistic, at best, and truly inequitable, at worst, for the Appellate Court to determine that Petitioner, in his pro se status, was familiar with Rule

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<sup>4</sup> As more thoroughly argued in the Brief of the Appellant.

<sup>5</sup> As more thoroughly argued in the Brief of the Appellant.

11(e), and all of the case law cited in the Brief of the Appellant and this Reply at the time of his plea. As such, it is appropriate for the Appellate Court to determine that Petitioner was not aware of the evidentiary facts, ultimate fact, and legal consequences from said facts that form the basis of his Post Conviction Remedies Act (“PCRA”), Petition at the time of his plea.

Accordingly, Utah’s high Courts created case law to protect individuals such as Petitioner. Said case law provides Petitioner with the opportunity to have his day in court, in order to address the violations of his constitutional rights. In relation to the PCRA timeliness issues the Pinder court held,

“Our cases establish that a defendant could have raised a claim when he or his counsel is aware of the essential factual basis for asserting it,” (quotations omitted). Pinder v. State, 2015 UT 56, ¶ 44, 367 P.3d 968.

The Pinder ruling was appropriately applied in the following case law. In Gardner,

“Fourteen (14) years after his conviction, an evidentiary hearing took place in 1999, which concluded that Mr. Gardner’s trial counsel did not spend enough time preparing and explaining mitigating factor’s regarding Mr. Gardner’s mental health, thereby creating a new due process claim for Mr. Gardner.”<sup>6</sup>

“The district court concluded that the PCRA required Mr. Gardner to have brought this claim by September 2000, one year after having discovered the evidence.”<sup>7</sup>

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<sup>6</sup> Gardner v. State, 2010 UT 46, ¶ 67, 234 P.3d 1115.

<sup>7</sup> Id. ¶ 51.



In Brown, Mr. Brown was sentenced on March 31, 2011.<sup>8</sup> However, Mr. Brown, “concedes that he ‘may have known of these basic facts at the time of sentencing.’”<sup>9</sup> As such, Mr. Brown’s tolling period for PCRA purposes began on March 31, 2011, i.e., the time when he became “aware of the evidence.”<sup>10</sup> Therefore, Mr. Brown had until March 31, 2012 to timely file his PCRA petition.

In Glasscock, the petitioner,

“asserted that he was unaware of the requirement to register as a sex offender, which is the basis of his claims, until April 19, 2010. Thus, even assuming for the sake of argument that this is the day that Glasscock knew or should have known about the registration requirement, he was required to file his petition within one year of that date.” Glasscock v. State, 2017 UT App 39, ¶ 4, 20150242-CA.

In said cases, Utah’s high Courts consistently hold that the tolling period starts once the petitioner becomes aware of the facts that form the basis of the PCRA petition, which is equitable and makes commons sense, because a PCRA petition cannot be filed if the prospective petitioner is unaware of the facts that will form the basis of the PCRA petition.

Similarly here, Petitioner became aware of the facts that form the basis of his PCRA petition on November 13, 2015, wherein he subsequently, and diligently filed his PCRA petition within one year of said date. Accordingly, Petitioner’s

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<sup>8</sup> Brown v. State, 2015 UT App 254, ¶ 2, 361 P.3d 124.

<sup>9</sup> Brown v. State, 2015 UT App 254, ¶ 11, 361 P.3d 124.

<sup>10</sup> Gardner v. State, 2010 UT 76, ¶ 51, 234 P.3d 1115.

PCRA petition is timely filed. Tellingly, Taylorsville City (the “City”), failed to address any aspect of Pinder in its Brief.

**POINT TWO: Summary Judgment Was Inappropriate**

The City cites Heglar which holds,

“Summary judgment is appropriate if the pleadings and all other submissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The foregoing rule does not preclude summary judgment simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted.” Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390, 1391 (1980).

The Heglar court defines ‘submissions’ as, “Including depositions, answers to interrogatories, admissions, affidavits, etc.” Id. Footnote 1.

A ‘material fact’ is, “a fact that is significant or essential to the issue or matter at hand.”<sup>11</sup> The material facts in this matter that are genuinely controverted between the parties include, but are not limited to: (1) Whether or not Petitioner’s constitutional right to due process violated; (2) At what point Petitioner became aware that his constitutional right to due process was violated; and (3) Whether or not Petitioner’s PCAR Petition was timely filed.

The Lucky Seven court held,

“One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment,” (citations and

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<sup>11</sup> Black’s Law Dictionary 611 (7th ed. 1999).

quotations). Lucky Seven Rodeo Corp. v. Clark, 755 P.2d 750, 752 (Utah App. 1988).

It is appropriate for the Appellate Court to remand with instructions to the Court to reverse its summary judgment ruling because Petitioner provided a sworn statement, via his Affidavit<sup>12</sup> which states said material facts in his favor, thereby creating issue of fact, and thereby precludes the Court's entry of summary judgment pursuant to Lucky Seven.

### **CONCLUSION**

**WHEREFORE**, Petitioner prays the Appellate Court to: (1) remand with instructions to the Court that Petitioner timely filed his PCRA Petition; (2) remand with instructions to the Court to deny the City's motion for summary judgment; and (3) provide Petitioner with any and all other relief that the Appellate Court deems appropriate, equitable, and proper.

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<sup>12</sup> Please refer to pages 30-31 of the record.

**ADDENDUM**

No addendum is necessary under the Utah Rules of Appellate Procedure,  
Rule 24(a)(11).

DATED this 21<sup>st</sup> day of April, 2017.

**NEWTON & HELFER, PLLC**



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**CERTIFICATE OF SERVICE**


I hereby certify that on this 21<sup>st</sup> day of April, 2017, a copy of the Reply Brief of the Appellant was served via E-Mail, and two (2) copies of said Reply Brief were served via personal, hand-delivery to the following:

Taylorville Prosecutor's Office  
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DATED this 21<sup>st</sup> day of April, 2017.

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 1,518 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using 2010 Word, in font size number 14, in Times New Roman style.

DATED this 21<sup>st</sup> day of April, 2017.

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