

2017

**Osman Mohammed Noor, Petitioner/ Appellant, v. State of Utah,
Respondent/ Appellee.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

OSMAN MOHAMMED NOOR,

Petitioner/Appellant,

V.

STATE OF UTAH,

Respondent/Appellee.

BRIEF OF APPELLANT

Court of Appeals No. 20160797

District Court No. 130907566

Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court, Salt Lake County, State of Utah
Honorable Vernice S. Trease, Presiding

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UTAH APPELLATE COURTS

JAN 27 2017

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STATEMENT OF JURISDICTION

This appeal is from the district court's August 22, 2016 Memorandum Decision granting the State of Utah's Motion for Summary Judgment and dismissing Petitioner-Appellant Osman Mohammed Noor's petition under the Post-Conviction Remedies Act. (R. at 879-882.) The district court entered its final order on September 2, 2016. (R. at 890-891.) Mr. Noor filed his appeal on September 27, 2016. (R. at 894-895.) This Court has jurisdiction pursuant to Utah Code sections 78B-9-110 and 78A-4-103.

ISSUES PRESENTED FOR REVIEW

Issue: After the district court specifically allowed Mr. Noor's newly appointed pro bono counsel to file an amended petition under the Post-Conviction Remedies Act, did it err in holding the claims in his amended petition were time-barred because they did not relate-back to the claims raised in his original petition?

Standard of Review: "We review an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law." *McNair v. State*, 2014 UT App 127, ¶ 6, 328 P.3d 874 (quoting *Gardner v. Galetka*, 2004 UT 42, ¶ 7, 94 P.3d 263).

Preservation: This issue was preserved in multiple areas of the trial record including in the district court's Memorandum Decision (R. at 879-882), and Mr. Noor's Opposition to the State's Motion for Summary Judgment. (R. at 759-766.)

DETERMINATIVE LAW

Appellant believes the following statutes and rules are determinative of the appeal or are of central importance to the appeal:

- Utah's Post-Conviction Remedies Act (Utah Code §§ 78b-9-101 to -110)
- Rule 65C of the Utah Rules of Civil Procedure
- Rule 15 of the Utah Rules of Civil Procedure

The foregoing authorities are voluminous and are reproduced in Addendum A, B, and C, respectively pursuant to Utah R. App. P. 24(a)(6).

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

This is an appeal from the district court's dismissal of Mr. Noor's amended petition under the Post-Conviction Remedies Act ("PCRA"). (R. 879-882.) After Mr. Noor filed his amended PCRA petition, the State moved for summary judgment on various issues. (R. at 356-409.) The district court granted the State's motion and dismissed Mr. Noor's amended petition on the ground that it was barred by the PCRA's statute of limitations. (R. at 882; *see* Addendum D.) The district court did not reach the merits of Mr. Noor's claims.

B. Statement of the Facts.

Mr. Noor is a Somali refugee who has little grasp of the English language. (R. at 20-21, 197, 199, 253.) He cannot read or write in English, and he requires the assistance

of an interpreter in order to communicate effectively with English speakers. (R. at 197, 199-201, 253.)

On May 28, 2009, Mr. Noor was arrested based on allegations made by the manager of the apartment where he was living. (R. at 199.) On July 6, 2009, he was charged with one count of burglary, one count of forcible sexual abuse, and one count of lewdness. (R. at 199.) He was appointed counsel from the Legal Defender's Office. (R. at 197, 199.) Mr. Noor could only communicate with his counsel through a Somali interpreter. (R. at 571-72.) From the time Mr. Noor was charged and throughout trial, he struggled with obtaining adequate interpretation and struggled to understand the allegations against him. For instance, the police report against Mr. Noor was never interpreted for him, and he could not understand what it said on his own. (R. at 579.) Moreover, at one pre-trial meeting at his attorney's office, his attorney obtained the services of a Mr. Ali to interpret for Mr. Noor. (R. at 571.) Mr. Noor informed his attorney that he had a personal conflict with Mr. Ali and that Mr. Ali was not a capable interpreter. (R. at 571-72.) His attorney did not obtain another interpreter. (R. at 572.) This made it impossible for Mr. Noor to communicate with his attorney. (R. at 572.)

At trial, two interpreters were assigned to interpret for Mr. Noor. (R. at 656-657). One individual interpreted at a time, while the other took a break. (R. at 656-57.) Mr. Ali was one of these interpreters. (R. at 572.) Mr. Ali interpreted much of the trial, and Mr. Noor could not understand Mr. Ali's interpretation. (R. at 201, 572.) Mr. Noor did not

understand the testimony of his accuser and did not understand what was going on at trial. (R. at 198, 201, 572.) Although Mr. Noor told his attorney that he could not understand the proceedings against him, his attorney did nothing to fix the problem. (R. at 201.) The jury returned a guilty verdict. (R. at 199, 228-229.) Mr. Noor was sentenced to concurrent 1-to-15 year prison terms for burglary and forcible sexual abuse and ordered credit for time served on his lewdness conviction. (R. at 229-230.)

Mr. Noor appealed to the Utah Court of Appeals. (R. 234-237) His trial attorney was also one of his attorneys on appeal. (R. at 228, 234.) His sole argument was that the state presented insufficient evidence that he had the requisite intent for the crimes on which he was convicted. (R. at 234-36.) The Court of Appeals affirmed. (R. at 234.) Mr. Noor filed a petition for writ of certiorari with the Utah Supreme Court, which was denied on October 17, 2012. (R. at 231.)

On November 5, 2013, without the assistance of counsel, Mr. Noor filed his initial petition for relief under the PCRA. (R. at 1-12.) There is no dispute that this petition was timely under the PCRA's statute of limitations and was actually filed two months before the statutory deadline of January 15, 2014. (R. at 880); *see also* Utah Code § 78B-9-107(1). In this petition, Mr. Noor raised three claims for relief, including ineffective assistance of trial counsel. (R. at 6-8.) On the ineffective assistance of trial counsel claim, Mr. Noor argued that "trial counsel should have brought to the trial court's attention the fact that [his] cultural background prevented him from forming the requisite intent to

commit lewdness or forcible sexual abuse” and also that trial counsel should have raised his “lack of fluency in English.” (R. at 7.)

Mr. Noor filed a motion seeking the appointment of counsel on the same day he filed this initial PCRA petition. (R. at 1, 26.) The basis for this motion was that the petition was complex and English was not Mr. Noor’s first language. (R. at 26.) On December 30, 2013, the district court denied Mr. Noor’s motion on the basis that “the issues of law and/or facts are not of a complicated nature such that assistance of counsel would be required for proper adjudication.” (R. at 40.)

On March 15 and March 21, 2014, after the State filed its initial motion for summary judgment, Mr. Noor wrote to the court, with assistance from another inmate, explaining his “inability to read and write English,” and requesting that the court appoint counsel to assist with his case. (R. at 101, 104 (Mr. Noor’s letters); R. 68-91 (State’s initial Motion for Summary Judgment)). In response, on April 7, 2014, the court ordered that Mr. Noor be appointed pro bono counsel and requested the Utah State Bar’s assistance in making that appointment. (R. at 107-08). As part of this ruling, the court acknowledged “Mr. Noor’s representation that he cannot read or write” and concluded “that this will make it difficult for him to address the facts and issues in this case.” (R. at 108.) Based on the filings Mr. Noor had made up to that time, the Court concluded that “he must be receiving assistance from someone if he is unable to read or write.” (R. at 108.)

On October 7, 2014, Mr. Noor's first pro bono attorneys entered an appearance on his behalf. (R. at 113, 117.) Prior to filing any substantive documents, these attorneys sought leave to withdraw as Mr. Noor's counsel. (R. at 128-29.) The court granted their motion on December 8, 2014. (R. 143.)

On March 4, 2015, Sam Alba of Snow, Christensen & Martineau accepted the appointment as Mr. Noor's pro bono counsel. (R. at 153-54.) On April 27, 2015, the district court held a hearing with Mr. Alba and counsel for the State. (R. at 906-915; *see* Addendum E). At the beginning of the hearing, the court stated as follows:

Mr. Alba, Mr. Noor, as you know, filed a pro se petition challenging his convictions in this case and in a habeas fashion. And before we proceed with setting any dates, I wanted to inquire if you wanted time to file a supplemental or amended petition as counsel for Mr. Noor

(R. at 909.) Mr. Noor's counsel responded, "I have reviewed the original petition filed by Mr. Noor. I don't think it is adequate. I think we need an opportunity to try and put some substance to it. In order to do that, I need a little bit of time." (R. at 910.) The court responded, "I'm happy – and I don't think [counsel for the State] has an objection to giving you time to file an amended petition." (R. at 910.) The State did not object. (*See generally* R. at 906-915).

On August 28, 2015, Mr. Noor filed his amended PCRA petition ("Amended Petition") along with a memorandum of points and authority. (R. at 185-333.) Mr. Noor raised four claims for relief. (R. at 192). The first two claims asserted Mr. Noor's trial counsel was ineffective for failing to seek a competent interpreter for Mr. Noor at trial.

(R. at 190-91.) The third claim alleged trial counsel was ineffective for failing to allow Mr. Noor to aid in his own defense prior to trial. (R. at 191.) The fourth claim alleged trial counsel was ineffective for failing to advise Mr. Noor of the risk of deportation if he was found guilty. (R. at 192.)

On November 25, 2015, the State filed a motion and memorandum in support of summary judgment seeking to dismiss Mr. Noor's claims on various grounds. (R. at 356-409.) As relevant here, the State argued the claims in Mr. Noor's amended petition were untimely under the PCRA's statute of limitations, and were therefore barred because they did not relate back to the claims in his original petition. (R. at 380.)

On August 22, 2016, after briefing was completed and oral argument was held, the Court granted the State's motion for summary judgment on the ground that Mr. Noor's claims in his Amended Petition were barred under the PCRA's statute of limitations. (R. at 882.) Although the Court previously allowed Mr. Noor the opportunity to amend his petition with the assistance of his newly appointed counsel, the court explained as follows:

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 [by] 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.

(R. at 881). Additionally, relying on *Gardner v. State*, 2010 UT 46, ¶ 91, 234 P.3d 1115, the court reasoned that it lacked the authority “to extend the limitations period when it granted Mr. Noor’s leave to amend the Original Petition.” (R. at 881)

Based on this reasoning, the court analyzed whether the claims in Mr. Noor’s Amended Petition “related back” to the original petition. (R. at 881-82.) It concluded they did not. (R. at 882.) Accordingly, it granted the State’s motion for summary judgment, and dismissed Mr. Noor’s petition without reaching the merits of his claims. (R. at 882.)

SUMMARY OF ARGUMENT

The district court erred in ruling that Mr. Noor’s Amended Petition under the PCRA was barred by the one-year statute of limitations. Although the court previously ruled that Mr. Noor could file a “supplemental or amended petition” to “put some substance to it,” it later backtracked on this decision. It reasoned that it lacked the authority to allow amended petitions that raised new claims after the original statute of limitations expired. It then concluded Mr. Noor’s claims in his Amended Petition were barred because they did not “relate back” to the claims in his initial petition. The Court’s decision conflicts with the letter and spirit of the PCRA, Rule 65C and Rule 15 of the Utah Rules of Civil Procedure, and Utah appellate decisions addressing amended PCRA Petitions.

The text of the PCRA grants district court's discretion to allow amended PCRA petitions, even if they raise new claims and even if the amendments are made after the original statute of limitations has expired. This is particularly appropriate after the district court has appointed pro bono counsel to assist the petitioner. If counsel cannot assist in amending a petition that was initially filed pro se by their client, counsel's ability to provide meaningful assistance could be severely limited. This is contrary to the intent of the PCRA, which suggests pro bono counsel should be permitted to assist their client at all stages of the PCRA process. Although no Utah court has directly addressed whether PCRA petitions may be amended to add new claims after the original statute of limitations has expired, several decisions strongly suggest that such amendments are commonplace and expected.

Even if district courts do not have authority to allow amended PCRA petitions with new claims after the statute of limitations has expired, Mr. Noor's amended claims relate back to the claims raised in his initial petition. Mr. Noor's initial petition claimed that his trial counsel was ineffective, in part, for failing to consider his cultural background and failing to raise his lack of fluency in English. Similarly, the core of Mr. Noor's amended claims is that Mr. Noor's trial counsel failed to consider his cultural background and failed to address his difficulty communicating in English. Although Mr. Noor's amended claims are not exactly the same as his original claims, Utah courts require that his original claims be liberally construed and considered in light of the fact

that he filed them pro se. Viewed through this lens, his amended claims plainly relate back to his initial claims, and the district court erred in holding otherwise.

Mr. Noor requests that the district court's decision be reversed and remanded so that the district court can consider the merits of his PCRA claims.

ARGUMENT

I. THE DISTRICT COURT HAD DISCRETION TO ALLOW MR. NOOR TO AMEND HIS PCRA PETITION, AND IT ERRED IN HOLDING THE CLAIMS IN HIS AMENDED PETITION WERE BARRED BECAUSE THEY DID NOT RELATE BACK TO THE ORIGINAL PETITION.

A. The Text of the PCRA and Rule 65C of the Utah Rules of Civil Procedure Allow Amended PCRA Petitions After the Statute of Limitations Has Expired, Especially After Pro Bono Counsel Is Appointed.

The letter and spirit of Utah's Post-Conviction Remedies Act ("PCRA") and Rule 65C of the Utah Rules of Civil Procedure specifically contemplate that a petitioner may amend his petition for post-conviction relief with leave of the court so long as the original petition was timely filed. *See* Utah R. Civ. P. 65C(k). Although the district court initially allowed Mr. Noor to amend his petition after he was appointed counsel, it later backtracked, explaining that it lacked the authority "to extend the limitations period when it granted Mr. Noor leave to amend." (R. at 881.) The court's ruling, however, ignores the broad discretion the PCRA affords trial courts in allowing amended petitions.

The text of Rule 65C discusses amendments to PCRA petitions in two separate provisions. First, Rule 65C(h)(3) provides that the trial court may allow an amended petition when the petition "is not frivolous on its face but is deficient due to a pleading

error or failure to comply with the requirements of this rule.” Utah R. Civ. P. 65(C)(h)(3). Such amendments must be filed within 21 days, unless the trial court in its discretion allows “one additional 21-day period to amend for good cause shown.” Utah R. Civ. P. 65C(h)(3). This provision places no restriction on the claims that may be raised in the amended petition, and does not suggest that such claims must be the same or relate back to the original petition. Moreover, by not mentioning the PCRA’s statute of limitations, amended petitions filed after the original statutory deadline will be, and almost certainly are, fully considered by PCRA courts. *See* Utah R. Civ. P. 65(C)(h)(3).

Second, Rule 65C(k) provides that after the answer or further response is filed, “further pleadings or amendments” may be permitted if “ordered by the court.” *Id.* 65C(k). This provision leaves it within the trial court’s discretion as to whether to allow amended PCRA petitions. This is consistent with Utah law providing that “[t]he granting or denial of leave to amend a pleading is within the broad discretion of the trial court, and [appellate courts] will not disturb such a ruling absent a showing of an abuse of that discretion.” *Shah v. Intermountain Healthcare, Inc.*, 2013 UT App 261, ¶ 6, 314 P.3d 1079 (internal quotation marks omitted).

Both Rule 65C(h)(3) and 65C(k) contemplate that the trial court will have discretion in determining whether to allow a petitioner to file an amended petition, even if it raises new claims and even after the statute of limitations has expired. When reading these provisions in conjunction with the appointment of pro bono counsel provisions, it is

apparent that the legislature understood that certain litigants should be provided assistance throughout the entire PCRA process. *See* Utah R. Civ. P. 65C(j).

For instance, prior to appointing counsel, the trial court must undertake a preliminary analysis to determine whether based on the unique facts of the case pro bono counsel should be appointed. This analysis requires courts to “review the petition, and . . . if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim.” *Id.* 65C(h)(1), (j). It is only after the court has undertaken this preliminary analysis that the Rule authorizes the court to assess whether pro bono counsel should be appointed. *Id.* 65C(j); *see also* Utah Code § 78B-9-109. Specifically, “[i]n 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.” *Id.*

In this case, the court presumably undertook this analysis, determined Mr. Noor’s claims were not frivolous, and used its discretion to appoint Mr. Noor pro bono counsel. It explained that because Mr. Noor “cannot read or write . . . this will make it difficult for him to address the facts and issues in this case.” (R. at 108.) It also acknowledged that based on Mr. Noor’s prior filings he “must be receiving assistance from someone.” (R. at 108.) Given Mr. Noor’s limitations, while his initial claims may not have been frivolous,

this does not mean they were the claims Mr. Noor intended to raise or the worthiest of the court's consideration.

Because Mr. Noor cannot read or write English, and needed assistance in filing his original PCRA petition, it follows that he likely had little understanding of the issues identified in his original petition. Individuals like Mr. Noor need assistance at all stages of the PCRA process, from filing of the petition, through trial and the appeals process. Because the initial petition is critical to ultimate success in a PCRA case, to only allow counsel to assist after the initial pleading stage would make the appointment of counsel futile in many cases where meritorious claims exist. Moreover, it would provide petitioners who can afford counsel from the outset of their case a decisive advantage in the PCRA process. Certainly, this could not have been the intent of the legislature. *See Mayle v. Felix*, 545 U.S. 644, 675–76 (2005) (Souter, J., dissenting) (“[B]y hobbling counsel this way, the Court limits the capacity of appointed counsel to provide the professional service that a paid lawyer, hired at the outset, can give a client”).¹

¹ The potential effect of the district court's ruling on the ability to locate pro bono counsel should also be considered. While lawyers have a public duty to provide pro bono assistance, and while it is an honor and a privilege to serve those in need, it took nearly a year and a half to locate conflict free counsel for Mr. Noor. One of the primary motivations for counsel performing pro bono work is the possibility of making a difference in their client's lives. *See* April Faith-Slaker, *What We Know and Need to Know About Pro Bono Service Delivery*, 67 S.C. L. Rev. 267, 269-70 (2016). If pro bono lawyers are not permitted to amend their client's PCRA petition, the ability of counsel to make a difference in their client's case may be severely limited. Moreover, the lawyer's ability to use his or her own unique knowledge and creative talents will be greatly diminished. These limitations have the potential to further narrow the pool of lawyers

Rather, both the text of the PCRA and Rule 65C contemplate that pro bono counsel will be able to assist their clients at all stages of their case. This includes ensuring that the initial PCRA petition sets forth the issues most worthy of the PCRA court's consideration. If instead, pro bono counsel is forced to make their client's case based on the issues raised in their client's original pro se petition, it is unlikely counsel can do anything to resuscitate a petition that was dead from the start.

Here, upon appointment, Mr. Noor's counsel explained that the initial petition was inadequate. (R. at 910.) Accordingly, with the blessing of the district court, counsel diligently identified claims with a better chance of prevailing. To deny Mr. Noor the benefit of this assistance, where he had otherwise diligently complied with the deadlines imposed by the PCRA, would be a grave miscarriage of justice.

Fortunately, the PCRA and Rule 65C provide trial courts the discretion to allow amended petitions when appropriate. In a case such as this, where Mr. Noor filed his original PCRA petition months before the statutory deadline, but pro bono counsel was not appointed for nearly a year and a half later, this is precisely the type of case where an amended PCRA petition should be allowed, even if it raises new claims that do not relate back to the original petition.

with the time, willingness, and ability to assist in PCRA cases. *See id.* at 284 (explaining that a pro bono attorney's "motivations, resource constraints, and professional life inform[] the answer to the question of whether this particular person will provide pro bono service, and for how many hours").

B. Utah Supreme Court Precedent Suggests Trial Courts Have the Discretion to Allow Amended PCRA Petitions After the Statute of Limitations Has Expired.

The State admits that “Utah courts have not yet addressed the relation-back doctrine in the context of post-conviction relief,” but the weight of Utah appellate decisions strongly suggests that relation-back is not a requirement for amendments under the PCRA. (R. at 382.) For example, in *Gregg v. State*, 2012 UT 32, 279 P.3d 396, the Utah Supreme Court approved amendments to a post-conviction relief petition when both the petitioner and the prosecutor stipulated to such an amendment. *Id.* ¶¶ 16-17. There, Mr. Gregg’s initial PCRA petition was dismissed by the district court for reasons not stated in the opinion. *Id.* ¶ 14. Nonetheless, “the Davis County Attorney’s office stipulated that Mr. Gregg could amend his original petition.” *Id.* ¶ 14. In his amended petition, Mr. Gregg raised eleven claims of ineffective assistance of trial and appellate counsel. *Id.* Although not reflected in the Supreme Court’s Opinion, briefing in that case reflects that the amended petition raised new claims well after the statute of limitations period had expired.² After the amended petition was filed, Davis County moved for

² Mr. Gregg admitted in his appellate briefing that his amended petition, filed on August 23, 2007, “raised new claims.” Brief of Appellant, *David Vincent Gregg v. State of Utah*, No. 20090567 (Utah Court of Appeals, 2009), at 4, relevant portion attached as Addendum F.

A review of the appellate and trial court dockets reveals that these claims were untimely under the logic used by the trial court in this case. The Utah Court of Appeals decided Mr. Gregg’s initial appeal on June 3, 2005, and the Utah Supreme Court denied his petition for certiorari on October 4, 2005. *See State v. Gregg*, 2005 UT App 258; *State v. Gregg*, 125 P.3d 102 (Table) (Utah 2005). The PCRA trial court’s docket reflects that

summary judgment, and the trial court dismissed all of Mr. Gregg's claims as procedurally barred. *Id.*

On appeal, the State sought dismissal of Mr. Gregg's petition because "it was procedurally improper for the Davis County Attorney to stipulate to Mr. Gregg's amended petition because the State Attorney General's office is the only party who can permit an extension under rule 65C(i) of the Utah Rules of Civil Procedure." *Id.* ¶ 16. Rule 65C(i) governs the service of PCRA petitions. It provides that in petitions challenging felony convictions, the State of Utah is the proper party to be served, and in all other cases, it is the governmental entity that prosecuted the petitioner. *See id.* In Gregg's case, the clerk of the trial court, inadvertently served Davis County, rather than the State. 2012 UT 32, ¶ 17. Davis County did not forward the petition to the State, and instead stipulated that Mr. Gregg could file an amended petition. *Id.* The State argued this

Mr. Gregg filed his original petition for post-conviction relief on October 2, 2006, his first amended petition for post-conviction relief on February 20, 2007, and his second amended petition for post-conviction relief, which was the petition at issue in the Supreme Court's opinion, on August 23, 2007. *See Gregg v. State*, 2012 UT 32, 279 P.3d 396 attached as Addendum G.

Thus, under the PCRA's statute of limitations provision (Utah Code § 78B-9-107(2)(c)), the deadline for Mr. Gregg to file his PCRA petition was in mid-January 2007 at the latest. *See* U.S. Sup. Ct. R. 13 (providing that the deadline to file a petition for writ of certiorari with the United States Supreme Court is 90-days after entry of the state court's judgment). Nonetheless, the Supreme Court did dismiss the case on the grounds that it was barred by the statute of limitations, and rejected the procedural claims raised by the State.

stipulation was improper because Davis County was without authority to enter into such a stipulation. *Id.* ¶ 16.

The Supreme Court rejected this argument. *Id.* ¶ 17. Because it was not Mr. Gregg's fault that the wrong party was served, the Court held that "it was reasonable for Mr. Gregg to believe that the Davis County Attorney had authority to stipulate to the filing of his amended petition." *Id.* ¶ 17. The Court therefore proceeded to address the merits of Mr. Gregg's claims, and ultimately vacated his conviction and remanded for a new trial. *Id.* ¶ 49.

By accepting the validity of Mr. Gregg's amended petition, the Utah Supreme Court implicitly acknowledged that amendments to PCRA petitions are allowed when the prosecutor agrees to such amendment, regardless of when such amendments are filed. *See id.* ¶ 16. Similarly, it follows that trial courts should have the same discretion to allow amended petitions even if the amended claims do not relate back to the claims raised in the original petition.

Various other Utah cases have suggested that whether an amendment is allowed is up to the discretion of the trial court. For instance, in *Benvenuto v. State*, 2007 UT 53, 165 P.3d 1195, the Utah Supreme Court acknowledged that "[e]ven if it is true that [petitioner] lacked the resources to adequately research his . . . claim, and therefore needed the assistance of an attorney, this state-of-affairs did not prevent him from filing an initial petition for post-conviction relief . . . and subsequently amending it, if

necessary, pursuant to Rule 15.” *Id.* ¶ 34. In short, the Utah Supreme Court recognized that petitioners may file a pro se petition for post-conviction relief to satisfy the statute of limitations and then amend that petition with the assistance of counsel. This is precisely what Mr. Noor attempted to do in this case.

Moreover, other Utah cases indicate that PCRA petitions are commonly amended after the statute of limitations has expired, which suggests that the district court’s ruling in this case is an anomaly that needs to be corrected. *See, e.g., Gordon v. State*, 2016 UT App 190, ¶ 37, 382 P.3d 1063 (suggesting that a PCRA petitioner could have amended his petition to add an additional claim); *Pinder v. State*, 2015 UT 56, ¶ 61, 367 P.3d 968, 980, reh’g denied (Dec. 18, 2015) (noting that in a PCRA case, “[a] denial of a motion to amend usually requires explanation”).

The district court justified its ruling on the basis that it lacked the discretion to allow Mr. Noor’s amended claims to proceed based on the Utah Supreme Court’s decision in *Gardner v. State*, 2010 UT 46, ¶ 58, 234 P.3d 1115. (R. at 881.) But *Gardner* did not address the situation here where an original petition was timely filed and where the trial court specifically authorized and directed the petitioner to amend his petition. *See Gardner*, 2010 UT 46, ¶ 1. Rather, *Gardner* addressed the petitioner’s third-petition for post-conviction relief, which he filed nearly twenty-five years after his initial conviction. *Id.* ¶¶ 1, 46. The Utah Supreme Court ruled that “[a]ll of the claims Mr. Gardner raises in his most recent petition for post-conviction relief are claims that he could have raised

more than a decade ago.” *Id.* ¶ 98. Unlike this case, *Gardner* is a case where the petitioner filed multiple separate and independent PCRA petitions over several decades seeking any avenue possible to avoid the death penalty. It is a case where Mr. Gardner and his counsel tested the limits of the PCRA, and where the Utah Supreme Court explained the PCRA is an exhaustible resource. Notwithstanding the Court’s denial of Mr. Gardner’s petition, the court explained, “Throughout the lengthy course of this case, multiple courts, including this one, have endeavored to scrupulously ensure that Mr. Gardner’s rights are protected. We are firmly convinced that he has been treated justly and fairly.” *Id.* ¶ 99.

Unlike Mr. Gardner, Mr. Noor is not testing the limits of the PCRA. He is simply seeking his one opportunity to present his claims before the PCRA court. In doing so, he filed his PCRA petition two months early, and immediately asked that pro bono counsel be appointed to assist him. Through no fault of his own, it took nearly a year-and-a-half to locate pro bono counsel. To deny him the opportunity to pursue the claims in his Amended Petition, after the district court expressly allowed amendment, is unjust and unfair. *Compare Gardner*, 2010 UT 46, ¶ 99. Mr. Noor respectfully requests that the ruling of the district court be reversed and remanded so that the merits of his claims can be addressed.

II. **ALTERNATIVELY, THE CLAIMS IN MR. NOOR’S AMENDED PETITION RELATE BACK TO THE CLAIMS IN THE ORIGINAL PETITION.**

If Mr. Noor’s claims in his Amended Petition are required to relate back to the claims in the original petition, that requirement is satisfied. All of Mr. Noor’s current claims relate to his trial counsel’s ineffective assistance, which was raised in the original petition. Although the basis for the claims of ineffective assistance are not identical, the original and amended claims all relate to the same conduct, transaction, or occurrence.

Pursuant to Rule 15(c) of the Utah Rules of Civil Procedure, “[w]henver the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or *attempted to be set forth in the original pleading*, the amendment relates back to the date of the original pleading.” Utah R. Civ. P. 15(c) (emphasis added). “The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide.” *2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC*, 2016 UT App 89, ¶ 14, 372 P.3d 683, *cert. granted* 379 P.3d 1182 (Utah 2016) (citations and internal quotation marks omitted). “The same general standard of notice applies regardless of whether a litigant seeks to add defendants, plaintiffs, or claims.” *Id.*

Additionally, the scope of Mr. Noor’s original pro se petition for post-conviction relief must be “liberally construed.” *McNair v. State*, 2014 UT App 127, ¶ 12, 328 P.3d 874. Regardless of how “inartfully pleaded, [it] must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed . . . if it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* (alterations in original) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Moreover, pro se litigants are “accorded every consideration that may reasonably be indulged.” *State v. Winfield*, 2006 UT 4, ¶ 19, 128 P.3d 1171 (citation and internal quotation marks omitted).

Applying these standards, Utah courts have liberally construed PCRA petitions, even when they have been filed beyond the statute of limitations. For example, in *McNair v. State*, 2014 UT App 127, 328 P.3d 874, the petitioner filed a pro se PCRA petition one month after the statute of limitations expired. *Id.* ¶ 3. In the petition, McNair explained that he was mentally challenged, but did not specifically request that the statute of limitations be tolled for that reason. *Id.* ¶ 4. The State moved to dismiss the petition on the ground that it was time-barred. *Id.* ¶ 5. The trial court granted this motion, and McNair appealed. *Id.*

The Utah Court of Appeals reversed. *Id.* ¶ 1. In doing so, it cited the provisions above requiring that pro se petitions be liberally construed. *Id.* ¶¶ 12-16. It held that although McNair’s petition was “inartfully squared with the provisions of the PCRA and that the petition failed to explicitly ask the trial court to toll the statute of limitations due to McNair’s mental incapacity,” it was sufficient “to survive the State’s motion to dismiss.” *Id.* ¶ 13. Although *McNair* did not deal with the issue of relation back, its

liberal construction of the petitioner's petition is instructive as to how the district court should have interpreted the claims in Mr. Noor's original pro se petition.

Here, when Mr. Noor filed his initial petition pro se, the State was placed on notice that Mr. Noor was arguing that his trial counsel was ineffective. (R. at 6-10); *2010-1 RADC/CADC Venture*, 2016 UT App 89, ¶ 14. Specifically, his initial ineffective assistance claim highlighted that trial counsel failed to consider Mr. Noor's "cultural background," his "lack of fluency in English," and suggested an overall lack of effective communication between trial counsel and Mr. Noor. (R. at 6-10.) For instance, Mr. Noor argued that trial counsel was ineffective for failing to bring "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." (R. at 6-7.) He also claimed that trial counsel should have raised his "lack of fluency in English." (R. at 7.)

When this claim is liberally construed, it involves the same conduct, transaction, or occurrence as the claims in Mr. Noor's Amended Petition. For instance, his first and second claims in his Amended Petition are based on the fact that his trial counsel failed to obtain a competent interpreter. (R. at 190-91.) As in the original petition, these claims relate directly to trial counsel's failure to consider Mr. Noor's cultural background and his inability to understand the English language. (R. at 7.) Similarly, Mr. Noor's third-claim regarding trial counsel's failure to allow Mr. Noor to assist in his own defense at

trial also implicates counsel's failure to consider Mr. Noor's cultural background and language ability in developing Mr. Noor's defense. (R. at 7; 191-92.)

Mr. Noor's fourth claim deals with trial counsel's ineffective assistance in failing to advise him of the risk of deportation to Somalia if a jury found him guilty. (R. at 192.) In Somalia, Mr. Noor would be at risk of death, torture, and other cruel, inhuman or degrading treatment. (R. at 192.) Again, this relates back to trial counsel's failure to consider Mr. Noor's cultural background in presenting his defense. (R. at 7.)

Although Mr. Noor's claims in his Amended Petition differ from those in his original petition, at their core, they relate to trial counsel's ineffectiveness, and more specifically, relate to counsel's failure to consider his cultural and linguistic background in presenting his defense. While acting pro se, Mr. Noor knew his trial counsel was ineffective and attempted to raise claims asserting that ineffectiveness. *See* Utah R. Civ. P. 15(c) (allowing claims to relate back if they were "set forth or *attempted to be set forth in the original pleading*"). Simply because Mr. Noor is not legally trained and has a limited grasp of the English language, should not prevent his PCRA counsel from bolstering the ineffective assistance of counsel claims Mr. Noor raised in his original petition.

As Utah case law makes clear, the key criteria in analyzing whether a claim relates back to the initial pleading is notice. *2010-1 RADC/CADC Venture*, 2016 UT App 89, ¶ 14. Mr. Noor's pro se petition satisfies the notice requirement because it put the State on

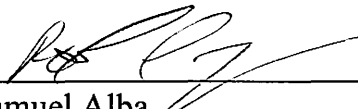
notice that he was raising ineffective assistance of counsel claims against his trial attorney. Where Mr. Noor filed his original petition pro se, this Court should liberally construe his original claims and hold that the ineffective assistance of counsel claims made in his Amended Petition relate back to the date of his original pleading.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the district court, and remand with instructions to consider the merits of Mr. Noor's claims.

DATED this 27th day of January, 2017.

SNOW CHRISTENSEN & MARTINEAU

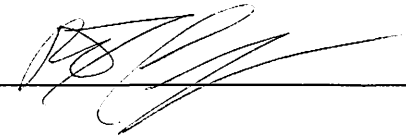


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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLANT** were served by U.S. Mail on January 27, 2017 as follows:

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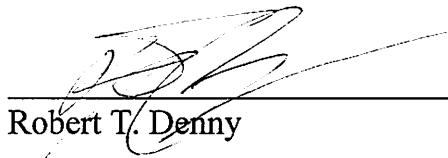
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Robert T. Denny

ADDENDUM

- A. Utah's Post-Conviction Remedies Act - (Utah Code §§ 78b-9-101 to -110)
- B. Rule 65C of the Utah Rules of Civil Procedure
- C. Rule 15 of the Utah Rules of Civil Procedure
- D. Memorandum Decision – August 22, 2016
- E. Transcript of Telephonic Conference – April 27, 2015
- F. Excerpt of Brief of Appellant, David Vincent Gregg v. State of Utah, No. 20090567 (Utah Court of Appeals, 2009)
- G. Docket, *David Vincent Gregg v. State of Utah*, No. 060700501 (2nd Dist. Ct., Utah)

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ADDENDUM A

West's Utah Code Annotated
Title 78b. Judicial Code
Chapter 9. Postconviction Remedies Act (Refs & Annos)
Part 1. General Provisions

U.C.A. 1953 § 78B-9-101
Formerly cited as UT ST § 78-35a-101

§ 78B-9-101. Title

Currentness

This chapter is known as the “Post-Conviction Remedies Act.”

Credits

Laws 2008, c. 3, § 1165, eff. Feb. 7, 2008; Laws 2008, c. 288, § 1, eff. May 5, 2008.

Notes of Decisions (10)

U.C.A. 1953 § 78B-9-101, UT ST § 78B-9-101
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U.C.A. 1953 § 78B-9-102
Formerly cited as UT ST § 78-35a-102

§ 78B-9-102. Replacement of prior remedies

Currentness

(1) This chapter establishes the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). This chapter replaces all prior remedies for review, including extraordinary or common law writs. Proceedings under this chapter are civil and are governed by the rules of civil procedure. Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

- (a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;
- (b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or
- (c) actions taken by the Board of Pardons and Parole.

Credits

Laws 2008, c. 3, § 1166, eff. Feb. 7, 2008; Laws 2008, c. 288, § 2, eff. May 5, 2008.

Notes of Decisions (29)

U.C.A. 1953 § 78B-9-102, UT ST § 78B-9-102
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U.C.A. 1953 § 78B-9-103
Formerly cited as UT ST § 78-35a-103

§ 78B-9-103. Applicability--Effect on petitions

Currentness

Except for the limitation period established in Section 78B-9-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996.

Credits

Laws 2008, c. 3, § 1167, eff. Feb. 7, 2008.

Notes of Decisions (1)

U.C.A. 1953 § 78B-9-103, UT ST § 78B-9-103
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U.C.A. 1953 § 78B-9-104
Formerly cited as UT ST §78-35a-104

§ 78B-9-104. Grounds for relief--Retroactivity of rule

Currentness

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or

(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or

(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted.

(2) The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence. Claims under Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence of this chapter may not be filed as part of a petition under this part, but shall be filed separately and in conformity with the provisions of Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence.

Credits

Laws 2008, c. 3, § 1168, eff. Feb. 7, 2008; Laws 2008, c. 288, § 3, eff. May 5, 2008; Laws 2010, c. 153, § 1, eff. March 25, 2010.

Notes of Decisions (96)

U.C.A. 1953 § 78B-9-104, UT ST § 78B-9-104

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U.C.A. 1953 § 78B-9-105
Formerly cited as UT ST §78-35a-105

§ 78B-9-105. Burden of proof

Currentness

(1) The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The court may not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record from the criminal case under review.

(2) The respondent has the burden of pleading any ground of preclusion under Section 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

Credits

Laws 2008, c. 3, § 1169, eff. Feb. 7, 2008; Laws 2008, c. 288, § 4, eff. May 5, 2008.

Notes of Decisions (6)

U.C.A. 1953 § 78B-9-105, UT ST § 78B-9-105
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U.C.A. 1953 § 78B-9-106
Formerly cited as UT ST § 78-35a-106

§ 78B-9-106. Preclusion of relief--Exception

Currentness

(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).

Credits

Laws 2008, c. 3, § 1170, eff. Feb. 7, 2008; Laws 2008, c. 288, § 5, eff. May 5, 2008; Laws 2010, c. 48, § 1, eff. May 11, 2010.

Notes of Decisions (97)

U.C.A. 1953 § 78B-9-106, UT ST § 78B-9-106
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U.C.A. 1953 § 78B-9-107
Formerly cited as UT ST § 78-35a-107

§ 78B-9-107. Statute of limitations for postconviction relief

Currentness

- (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.

Credits

Laws 2008, c. 3, § 1171, eff. Feb. 7, 2008; Laws 2008, c. 288, § 6, eff. May 5, 2008; Laws 2008, c. 358, § 1, eff. May 5, 2008.

Notes of Decisions (77)

U.C.A. 1953 § 78B-9-107, UT ST § 78B-9-107

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U.C.A. 1953 § 78B-9-108
Formerly cited as UT ST § 78-35a-108

§ 78B-9-108. Effect of granting relief--Notice

Currentness

(1) If the court grants the petitioner's request for relief, it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2)(a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice of intent to appeal the court's decision, the stay provided for by Subsection (2)(a) shall remain in effect until the appeal concludes, including any petitions for rehearing or for discretionary review by a higher court. The court may lift the stay if the petitioner can make the showing required for a certificate of probable cause under Section 77-20-10 and URCP 27.

(d) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

Credits

Laws 2008, c. 3, § 1172, eff. Feb. 7, 2008; Laws 2008, c. 288, § 7, eff. May 5, 2008.

Notes of Decisions (1)

U.C.A. 1953 § 78B-9-108, UT ST § 78B-9-108
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Part 1. General Provisions

U.C.A. 1953 § 78B-9-109
Formerly cited as UT ST § 78-35a-109

§ 78B-9-109. Appointment of pro bono counsel

Currentness

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition or the appeal contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

Credits

Laws 2008, c. 3, § 1173, eff. Feb. 7, 2008; Laws 2008, c. 288, § 8, eff. May 5, 2008.

Notes of Decisions (10)

U.C.A. 1953 § 78B-9-109, UT ST § 78B-9-109
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U.C.A. 1953 § 78B-9-110
Formerly cited as UT ST § 78-35a-110

§ 78B-9-110. Appeal--Jurisdiction

Currentness

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78A-3-102 or 78A-4-103.

Credits

Laws 2008, c. 3, § 1174, eff. Feb. 7, 2008.

Notes of Decisions (3)

U.C.A. 1953 § 78B-9-110, UT ST § 78B-9-110
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ADDENDUM B

West's Utah Code Annotated

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

Part VIII. Provisional and Final Remedies and Special Proceedings

Utah Rules of Civil Procedure, Rule 65C

RULE 65C. POST-CONVICTION RELIEF

Currentness

(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:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(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;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(d)(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;

(d)(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

(d)(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:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(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

(e)(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.

(h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(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 21 days. The court may grant one additional 21-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 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:

(l)(1) consider the formation and simplification of issues;

(l)(2) require the parties to identify witnesses and documents; and

(l)(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.

(o)(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 7 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.

(o)(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.

(o)(3) If the respondent gives notice that the petitioner will be retried or resented, 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.

Credits

[Adopted effective July 1, 1996; amended effective November 1, 2008; January 4, 2010; April 1, 2012; May 1, 2014.]

Editors' Notes

ADVISORY COMMITTEE NOTES

This rule replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence, regardless whether the claim relates to an original commitment, a commitment for violation of probation, or a sentence other than commitment. Claims relating to the terms or conditions of confinement are governed by paragraph (b) of the Rule 65B. This rule, as a general matter, simplifies the pleading requirements and contains two significant changes from procedure under the former rule. First, the paragraph requires the clerk of court to assign post-conviction relief to the judge who sentenced the petitioner if that judge is available. Second, the rule allows the court to dismiss frivolous claims before any answer or other response is required. This provision is patterned after the federal practice pursuant to 28 U.S.C. § 2254. The advisory committee adopted the summary procedures set forth as a means of balancing the

requirements of fairness and due process on the one hand against the public's interest in the efficient adjudication of the enormous volume of post-conviction relief cases.

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

This rule replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence, regardless whether the claim relates to an original commitment, a commitment for violation of probation, or a sentence other than commitment. Claims relating to the terms or conditions of confinement are governed by paragraph (b) of the Rule 65B. This rule, as a general matter, simplifies the pleading requirements and contains two significant changes from procedure under the former rule. First, the paragraph requires the clerk of court to assign post-conviction relief to the judge who sentenced the petitioner if that judge is available. Second, the rule allows the court to dismiss frivolous claims before any answer or other response is required. This provision is patterned after the federal practice pursuant to 28 U.S.C. § 2254. The advisory committee adopted the summary procedures set forth as a means of balancing the requirements of fairness and due process on the one hand against the public's interest in the efficient adjudication of the enormous volume of post-conviction relief cases.

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

The 2009 amendments embrace Utah's Post-Conviction Remedies Act as the law governing post-conviction relief. It provides an independent and adequate procedural basis for dismissal without the necessity of a merits review. See *Gardner v. Galetka*, 568 F.3d 862, 884-85 (10th Cir. 2009). It is the committee's view that the added restrictions which the Act places on post-conviction petitions do not amount to a suspension of the writ of habeas corpus. See *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (relying on *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)).

Section 78B-9-202 governs the payment of counsel in death penalty cases.

Notes of Decisions (152)

Rules Civ. Proc., Rule 65C, UT R RCP Rule 65C

Current with amendments received through September 15, 2016.

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ADDENDUM C



KeyCite Red Flag - Severe Negative Treatment

Enacted Legislation Amended by 2016 UTAH COURT ORDER 0030 (C.O. 0030),

West's Utah Code Annotated

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

Part III. Pleadings, Motions, and Orders

Utah Rules of Civil Procedure, Rule 15

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

Currentness

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 21 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 14 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to conform to the evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Credits

[Amended effective May 1, 2014.]

Notes of Decisions (524)

Rules Civ. Proc., Rule 15, UT R RCP Rule 15

Current with amendments received through September 15, 2016.

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ADDENDUM D

In the Third Judicial District Court, Salt Lake County, State of Utah	
OSMAN MOHAMMED NOOR, Petitioner, vs. STATE OF UTAH, Respondent.	MEMORANDUM DECISION 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 BACKGROUND¹

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.

¹ 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.²

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.³

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).⁴ To relate back, the

² 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.

³ 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.

⁴ 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).

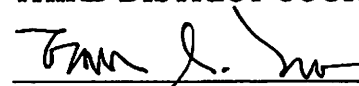
Here, it is clear that even the most liberal reading of the allegations in the Original and Amended Petitions cannot sustain a reasonable inference that the claims in the Amended Petition arise from the same factual allegations as the claims in the Original Petition. Indeed, the Original Petition contains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

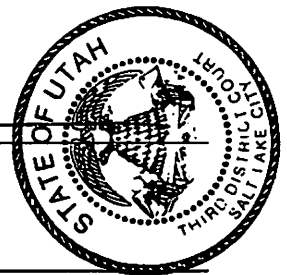
As discussed above, the claims in the Amended Petition are based on alleged problems with Mr. Noor’s interpreter during the trial, meetings with trial counsel and other legal proceedings, and on defense counsel’s alleged failure to inform Mr. Noor of the immigration consequences of a conviction. The 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.⁵ 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.

⁵ 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.

ADDENDUM E

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

OSMAN MOHAMMED NOOR,

: Case No. 130907566

Petitioner,

:

: Appellate Court Case No. 20160797

vs.

:

:

:

STATE OF UTAH,

:

:

:

Respondent.

: With Keyword Index

TELEPHONIC CONFERENCE APRIL 27, 2015

BEFORE

JUDGE VERNICE TREASE

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way

Sandy, Utah 84092

801-523-1186

APPEARANCES

For the Petitioner:

SAMUEL ALBA
Attorney at Law

For the Respondent:

DANIEL W. BOYER
Assistant Attorney General

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SALT LAKE CITY, UTAH - APRIL 27, 2015

JUDGE VERNICE TREASE

(Transcriber's note: Identification of speakers
may not be accurate with audio recordings.)

PROCEEDINGS TELEPHONICALLY

THE COURT: How are you, Mr. Boyer?

MR. BOYER: Doing well. Thank you, Judge.

COURT CLERK: Mr. Alba, are you there?

MR. ALBA: I am.

THE COURT: Okay. Good morning, Mr. Alba.

MR. ALBA: Good morning, Judge.

THE COURT: Mr. Boyer, why don't you move up and
maybe stand here next to the clerk's -

MR. BOYER: Sure.

THE COURT: - stand, and we'll call the case.

Okay. We're on the record in case 130907566, Osman
M. Noor vs. State of Utah. I'm going to ask counsel to state
their appearances on the record, and then we will talk about
what we need to do next on the case.

Mr. Alba, why don't you go first. And for the
record, counsel for Mr. Noor - pro bono counsel for Mr. Noor
appointed by the court is on the phone, and counsel for the
State, the respondent, is here in court. Go ahead, Mr. Alba.

MR. ALBA: Thank you. Sam Alba, Your Honor, of
Snow, Christensen, and Martineau appearing on behalf of Mr.

1 Noor, and I was called by the clerk to accept the pro bono
2 appointment. And after conducting a conflicts check with him
3 and the firm, I accepted that appointment.

4 THE COURT: Okay, thank you.

5 Mr. Boyer?

6 MR. BOYER: Daniel Boyer for the state of Utah.

7 THE COURT: Okay. I set today for a telephone
8 conference to sort of discuss the status of this case. Mr.
9 Noor is not present. I didn't feel that his presence was
10 needed for the things we were going to discuss today, which
11 are primarily scheduling.

12 Mr. Alba, Mr. Noor, as you know, filed a pro se
13 petition challenging his conviction in this case and in a
14 habeas fashion. And before we proceed with setting any
15 dates, I wanted to inquire if you wanted time to file a
16 supplemental or amended petition as counsel for Mr. Noor and
17 then set any further scheduling matters that we need to.

18 MR. ALBA: Thank you, Your Honor. Let me just
19 address the matter.

20 I have received a docket that your clerk was kind
21 enough to send to us, and I have reviewed it. I've noticed a
22 couple of things in it.

23 Number one. Prior counsel was appointed from
24 Holland & Hart, and I don't know the reasons why, but they
25 actually moved to withdraw after being on for a couple of

1 months last year, and they were allowed to withdraw.

2 I have reviewed the original petition filed by Mr.
3 Noor. I don't think it is adequate. I think we need an
4 opportunity to try and put some substance to it. In order to
5 do that, I need a little bit of time.

6 I have an assistant in my office, Jan Howell, who
7 has been trying desperately to get a copy of the transcript
8 from the trials. We have not received that. We have not
9 been able to get that, but we need that in order to ascertain
10 whether there are any other issues that need to be raised on
11 Mr. - on the petitioner's behalf, and I was going back to one
12 of these [inaudible] that I have for the court today.

13 THE COURT: Okay. So I'm looking at the court
14 docket, and I don't believe that, first, counsel for Mr. Noor
15 filed an amended petition. So I think the only thing we have
16 is the original pro se petition filed by Mr. Noor. I'm happy
17 - and I don't think Mr. Boyer has an objection to giving you
18 time to file an amended petition.

19 Secondly, in terms of the transcript for the trial,
20 I don't know if one was filed in the original case. I can
21 take a look on the docket. I guess, the other option is to
22 obtain one from the Legal Defenders office, if they, in fact,
23 filed the appeal for Mr. Noor.

24 MR. ALBA: Your Honor, let me just interrupt for a
25 moment.

1 In looking at the material that I have received, I
2 noticed as well that the State had filed a petition - or
3 pardon me - a motion - a memorandum in support of the State's
4 motion for summary judgment. This was done way, way back
5 last year.

6 They make a reference to the transcript and to
7 portions of the transcript. So I don't know whether they
8 still have a copy of it or whether they obtained one or not-

9 THE COURT: Okay.

10 MR. ALBA: - but I'm just relying on what I saw on
11 the docket itself.

12 THE COURT: Sure. Mr. Boyer, do you know - do you
13 have access to a transcript of the trial?

14 MR. BOYER: Your Honor, I do not know. I will check
15 my file and see if I have a transcript. In which case, I'd
16 be happy to forward that to either the court or opposing
17 counsel.

18 THE COURT: Okay. So the docket on the underlying
19 case - the underlying case is number 091905211. It does show
20 that there was an appeal to the Court of Appeals, a decision
21 affirming the conviction was issued by the Court of Appeals,
22 and then cert was denied when there was - a cert was taken to
23 the Utah Supreme Court, and that was denied.

24 Normally, the attorney general's Office -
25 (The connection with Mr. Alba was lost)

1 THE COURT: Hello? Okay, we need to call him back.

2 (Mr. Alba answered phone)

3 MR. ALBA: This is Sam Alba. I don't know what
4 happened. We got disconnected. I apologize.

5 THE COURT: That's okay. So there is a transcript
6 somewhere, and I'm sure we can get you a copy, Mr. Alba.

7 In fact, now that I pull - I've been clicking on -
8 I've been clicking on some things filed in the underlying
9 case, and it does appear that there is a transcript of the
10 trial that was filed in the underlying case. The trial was
11 January 4th, 2011, it looks like.

12 I just want to make sure that all the pages are
13 here. There's - it looks like there's a 170 pages. It must
14 have been a short trial.

15 So what I can do - and it is a - it's a certified
16 transcript, it looks like. Yep. If you would like to, Mr.
17 Alba, we can print - my clerk can print it off, and put it in
18 an envelope, and send it to you today?

19 MR. ALBA: I would appreciate that very much, Your
20 Honor. If we could do that, then I would like, in light of
21 that, I would like 45 days to be able to file an amended
22 petition on behalf of the petitioner.

23 THE COURT: Sure.

24 MR. ALBA: If I could?

25 THE COURT: Sure. Okay. So let's see should we -

1 if I give you until mid or end of June, is that sufficient
2 time, Mr. Alba?

3 MR. ALBA: That'll be sufficient, Your Honor. If
4 you could possibly - let me think for a moment. I'm looking
5 at my calendar. I'm going to be out the week of the 15th.
6 If you could give me until the 26th of June, I would
7 appreciate that very much.

8 THE COURT: Sure. Okay. So amended petition to be
9 filed by June 26th, 2015. And then I'm assuming once the
10 amended petition is filed, Mr. Boyer, you wish to file maybe
11 an amended motion for summary judgment or some responsive
12 motion?

13 MR. BOYER: Correct, Your Honor.

14 THE COURT: How much time did you need?

15 MR. BOYER: We would ask for 45 days.

16 THE COURT: Forty-five days? Okay. So that takes
17 us to about the middle of August. So deadline for filing a
18 responsive pleading by the State August 14th.

19 And then Mr. Alba, how much time after that would
20 you want to get to file your - well, let's do this. So once
21 the responsive pleading is filed, either your motion to
22 dismiss or motion for summary judgment, then the Rule 7 time
23 will kick in. The Rule 7 time will kick in for the def - the
24 plaintiff or petitioner to file something and so forth.

25 And then once a notice to submit is filed, I will -

1 my clerk will contact you and set a hearing for oral argument
2 on any motion that was filed.

3 If no motion - if no motion - if the State just
4 simply files an answer and does not file a motion for summary
5 judgment or a motion to dismiss, then we will - my clerk will
6 also contact you and schedule the matter for an evidentiary
7 hearing or whatever we need to do after that. Does that
8 sound good?

9 MR. ALBA: That'll - that'll be fine, Judge.

10 THE COURT: Okay.

11 MR. BOYER: Works for me.

12 THE COURT: Okay. It works for Mr. Boyer as well.

13 Amy, did you get the dates?

14 COURT CLERK: I did. June 26th and August 14th on
15 [inaudible].

16 THE COURT: Okay. And then Amy will send a print
17 off and send - you don't need - do you want a copy, or do you
18 think you have one, Mr. Boyer?

19 MR. BOYER: We probably do electronically.

20 THE COURT: Okay.

21 MR. BOYER: That'll be something that -

22 THE COURT: Okay. If - anything else either of you
23 want, contact my clerk, and we can print it off, but she will
24 print off today for Mr. Alba the trial transcript that - it
25 was scanned for the trial on January 4th, 2011 in the

1 underlying case of 091905211, and I think that will be it.

2 MR. ALBA: Thank you very much, Your Honor.

3 THE COURT: Oh, -

4 MR. ALBA: I appreciate it.

5 THE COURT: Mr. Alba, my clerk just tells me also
6 that if it's preferable to you, she can email you the
7 transcript rather than send you a hard copy. Do you have a
8 preference?

9 MR. ALBA: The electronic version would work just
10 fine.

11 THE COURT: Okay. So after we get off the record
12 here, I - if you'll stay on, Mr. Alba, and Amy will get your
13 email and send that to you today.

14 MR. ALBA: That'll be fine.

15 THE COURT: Okay, thank you. We'll be in recess.

16 MR. BOYER: Thank you.

17 MR. ALBA: Thank you, Your Honor.

18 (Whereupon the hearing was concluded)

19

20

21

22

23

24

25 (Transcript completed on October 7, 2016)


<p>0</p> <p>091905211 [2] 4:19 8:1</p> <p>1</p> <p>130907566 [1] 1:16</p> <p>14th [2] 6:18 7:14</p> <p>15th [1] 6:5</p> <p>170 [1] 5:13</p> <p>2</p> <p>2011 [2] 5:11 7:25</p> <p>2015 [2] 1:1 6:9</p> <p>2016 [1] 8:19</p> <p>26th [3] 6:6,9 7:14</p> <p>27 [1] 1:1</p> <p>4</p> <p>45 [2] 5:21 6:15</p> <p>4th [2] 5:11 7:25</p> <p>A</p> <p>accept [1] 2:1</p> <p>accepted [1] 2:3</p> <p>access [1] 4:13</p> <p>accurate [1] 1:4</p> <p>address [1] 2:19</p> <p>adequate [1] 3:3</p> <p>affirming [1] 4:21</p> <p>ahead [1] 1:23</p> <p>alba [32] 1:8,9,10,11,20,23, 24,24 2:12,18 3:24 4:10,25 5:2,3,3,6,17,19,24 6:2,3,19 7:9,24 8:2,4,5,9,12,14,17</p> <p>allowed [1] 3:1</p> <p>amended [7] 2:16 3:15,18 5:21 6:8,10,11</p> <p>amy [3] 7:13,16 8:12</p> <p>answer [1] 7:4</p> <p>answered [1] 5:2</p> <p>apologize [1] 5:4</p> <p>appeal [2] 3:23 4:20</p> <p>appeals [2] 4:20,21</p> <p>appear [1] 5:9</p> <p>appearances [1] 1:18</p> <p>appearing [1] 1:25</p> <p>appointed [2] 1:22 2:23</p> <p>appointment [2] 2:2,3</p> <p>appreciate [3] 5:19 6:7 8:4</p>	<p>april [1] 1:1</p> <p>argument [1] 7:1</p> <p>ascertain [1] 3:9</p> <p>assistant [1] 3:6</p> <p>assuming [1] 6:9</p> <p>attorney [1] 4:24</p> <p>audio [1] 1:4</p> <p>august [3] 6:17,18 7:14</p> <p>B</p> <p>back [3] 3:11 4:4 5:1</p> <p>behalf [3] 1:25 3:11 5:22</p> <p>believe [1] 3:14</p> <p>bit [1] 3:5</p> <p>bono [2] 1:21 2:1</p> <p>boyer [19] 1:6,7,12,14 2:5, 6,6 3:17 4:12,14 6:10,13,15 7:11,12,18,19,21 8:16</p> <p>C</p> <p>calendar [1] 6:5</p> <p>call [2] 1:15 5:1</p> <p>called [1] 2:1</p> <p>case [12] 1:15,16,19 2:8,13 3:20 4:15,19,19 5:9,10 8:1</p> <p>cert [2] 4:22,22</p> <p>certified [1] 5:15</p> <p>challenging [1] 2:13</p> <p>check [2] 2:2 4:14</p> <p>christensen [1] 1:25</p> <p>city [1] 1:1</p> <p>clerk [9] 1:8 2:1,20 5:17 7:1,5,14,23 8:5</p> <p>clerk's [1] 1:13</p> <p>clicking [2] 5:7,8</p> <p>completed [1] 8:19</p> <p>concluded [1] 8:18</p> <p>conducting [1] 2:2</p> <p>conference [1] 2:8</p> <p>conflicts [1] 2:2</p> <p>connection [1] 4:25</p> <p>contact [3] 7:1,6,23</p> <p>conviction [2] 2:13 4:21</p> <p>copy [5] 3:7 4:8 5:6 7:17 8:7</p> <p>counsel [8] 1:17,21,21,22 2:16,23 3:14 4:17</p> <p>couple [2] 2:22,25</p>	<p>D</p> <p>daniel [1] 2:6</p> <p>dates [2] 2:15 7:13</p> <p>days [3] 5:21 6:15,16</p> <p>deadline [1] 6:17</p> <p>decision [1] 4:20</p> <p>def [1] 6:23</p> <p>defenders [1] 3:22</p> <p>denied [2] 4:22,23</p> <p>desperately [1] 3:7</p> <p>disconnected [1] 5:4</p> <p>discuss [2] 2:8,10</p> <p>dismiss [2] 6:22 7:5</p> <p>docket [5] 2:20 3:14,21 4:11,18</p> <p>E</p> <p>electronic [1] 8:9</p> <p>electronically [1] 7:19</p> <p>email [2] 8:6,13</p> <p>end [1] 6:1</p> <p>enough [1] 2:21</p> <p>envelope [1] 5:18</p> <p>evidentiary [1] 7:6</p> <p>F</p> <p>fact [2] 3:22 5:7</p> <p>fashion [1] 2:14</p> <p>feel [1] 2:9</p> <p>file [8] 2:15 3:18 4:15 5:21 6:10,20,24 7:4</p> <p>filed [14] 2:12 3:2,15,16,20, 23 4:2 5:8,10 6:9,10,21,25 7:2</p> <p>files [1] 7:4</p> <p>filing [1] 6:17</p> <p>fine [3] 7:9 8:10,14</p> <p>firm [1] 2:3</p> <p>forth [1] 6:24</p> <p>forty-five [1] 6:16</p> <p>forward [1] 4:16</p> <p>further [1] 2:17</p> <p>G</p> <p>general's [1] 4:24</p> <p>giving [1] 3:17</p> <p>guess [1] 3:21</p> <p>H</p>	<p>habeas [1] 2:14</p> <p>happened [1] 5:4</p> <p>happy [2] 3:16 4:16</p> <p>hard [1] 8:7</p> <p>hart [1] 2:24</p> <p>hearing [3] 7:1,7 8:18</p> <p>hello [1] 5:1</p> <p>holland [1] 2:24</p> <p>howell [1] 3:6</p> <p>I</p> <p>identification [1] 1:3</p> <p>inquire [1] 2:15</p> <p>interrupt [1] 3:24</p> <p>issued [1] 4:21</p> <p>issues [1] 3:10</p> <p>itself [1] 4:11</p> <p>J</p> <p>jan [1] 3:6</p> <p>january [2] 5:11 7:25</p> <p>judgment [4] 4:4 6:11,22 7:5</p> <p>june [4] 6:1,6,9 7:14</p> <p>K</p> <p>kick [2] 6:23,23</p> <p>kind [1] 2:20</p> <p>L</p> <p>lake [1] 1:1</p> <p>last [2] 3:1 4:5</p> <p>legal [1] 3:22</p> <p>light [1] 5:20</p> <p>little [1] 3:5</p> <p>look [1] 3:21</p> <p>looking [3] 3:13 4:1 6:4</p> <p>looks [3] 5:11,13,16</p> <p>lost [1] 4:25</p> <p>M</p> <p>martineau [1] 1:25</p> <p>material [1] 4:1</p> <p>matter [2] 2:19 7:6</p> <p>matters [1] 2:17</p> <p>memorandum [1] 4:3</p> <p>mid [1] 6:1</p> <p>middle [1] 6:17</p> <p>moment [2] 3:25 6:4</p> <p>months [1] 3:1</p>
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<p>morning [2] 1:10,11 motion [11] 4:3,4 6:11,12, 21,22 7:2,3,3,4,5 move [1] 1:12 moved [1] 2:25 must [1] 5:13</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>need [10] 1:19 2:17 3:3,5,9, 10 5:1 6:14 7:7,17 needed [1] 2:10 next [2] 1:13,19 noor [11] 1:17,21,21 2:1,9, 12,16 3:3,14,16,23 normally [1] 4:24 note [1] 1:3 notice [1] 6:25 noticed [2] 2:21 4:2 number [2] 2:23 4:19</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objection [1] 3:17 obtain [1] 3:22 obtained [1] 4:8 october [1] 8:19 office [3] 3:6,22 4:24 once [3] 6:9,20,25 one [6] 2:23 3:11,20,22 4:8 7:18 only [1] 3:15 opportunity [1] 3:4 opposing [1] 4:16 option [1] 3:21 oral [1] 7:1 order [2] 3:4,9 original [3] 3:2,16,20 osman [1] 1:16 out [1] 6:5</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>pages [2] 5:12,13 pardon [1] 4:3 petition [10] 2:13,16 3:2, 15,16,18 4:2 5:22 6:8,10 petitioner [2] 5:22 6:24 petitioner's [1] 3:11 phone [2] 1:22 5:2 plaintiff [1] 6:24 pleading [2] 6:18,21</p>	<p>portions [1] 4:7 possibly [1] 6:4 preferable [1] 8:6 preference [1] 8:8 presence [1] 2:9 present [1] 2:9 primarily [1] 2:11 print [5] 5:17,17 7:16,23,24 prior [1] 2:23 pro [4] 1:21 2:1,12 3:16 probably [1] 7:19 proceed [1] 2:14 proceedings [1] 1:5 pull [1] 5:7</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raised [1] 3:10 rather [1] 8:7 reasons [1] 2:24 received [3] 2:20 3:8 4:1 record [4] 1:16,18,21 8:11 recordings [1] 1:4 reference [1] 4:6 relying [1] 4:10 respondent [1] 1:23 responsive [3] 6:11,18,21 reviewed [2] 2:21 3:2 rule [2] 6:22,23</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>salt [1] 1:1 sam [2] 1:24 5:3 saw [1] 4:10 scanned [1] 7:25 schedule [1] 7:6 scheduling [2] 2:11,17 se [2] 2:12 3:16 secondly [1] 3:19 send [6] 2:21 5:18 7:16,17 8:7,13 set [3] 2:7,17 7:1 setting [1] 2:14 short [1] 5:14 show [1] 4:19 simply [1] 7:4 snow [1] 1:25 somewhere [1] 5:6 sort [1] 2:8 sound [1] 7:8</p>	<p>speakers [1] 1:3 stand [2] 1:13,15 state [7] 1:17,17,23 2:6 4:2 6:18 7:3 state's [1] 4:3 status [1] 2:8 stay [1] 8:12 still [1] 4:8 submit [1] 6:25 substance [1] 3:4 sufficient [2] 6:1,3 summary [4] 4:4 6:11,22 7:4 supplemental [1] 2:16 support [1] 4:3 supreme [1] 4:23</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>telephone [1] 2:7 telephonically [1] 1:5 tells [1] 8:5 terms [1] 3:19 transcript [12] 3:7,19 4:6, 7,13,15 5:5,9,16 7:24 8:7, 19 trease [1] 1:2 trial [7] 3:19 4:13 5:10,10, 14 7:24,25 trials [1] 3:8 try [1] 3:4 trying [1] 3:7</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>underlying [5] 4:18,19 5: 8,10 8:1 until [2] 6:1,6 utah [4] 1:1,17 2:6 4:23</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vernice [1] 1:2 version [1] 8:9</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wanted [2] 2:15,15 week [1] 6:5 whatever [1] 7:7 wish [1] 6:10 withdraw [2] 2:25 3:1 work [1] 8:9</p>	<p>works [2] 7:11,12</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year [2] 3:1 4:5 yep [1] 5:16</p>
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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceeding was transcribed by me from an audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

ADDENDUM F

IN THE UTAH SUPREME COURT

DAVID VINCENT GREGG,

Petitioner/Appellant,

vs.

STATE OF UTAH,

Respondent/Appellee

Case No. 20090567-SC

Appellant is incarcerated

BRIEF OF APPELLANT

JURISDICTION

Appellant, DAVID VINCENT GREGG, appeals the district court's denial of his petition for post-conviction relief. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-3-102.

ISSUES, STANDARDS OF REVIEW, AND PRESERVATION

Several errors occurred during the trial and beyond in this case that are encompassed within the following questions for review:

1. **Did the district court err in summarily dismissing Mr. Gregg's First Amended Petition wherein he demonstrated several errors that tainted the fundamental fairness of his trial, including false evidence and ineffective assistance of counsel?**

Standard of Review and Preservation: This issue was preserved in Mr. Gregg's Amended Petition (RP37) and in his Second Amended Petition (RP128). An appeal from an order denying a petition for post-conviction relief is reviewed for correctness with no deference to the lower court's legal conclusions. *Nicholls v. State*, 2009 UT 12.

2. May the procedural bars of the Post-conviction Remedies Act override Mr. Gregg's right to due process of law and his right to counsel?

Standard of Review and Preservation: An appeal from an order denying a petition for post-conviction relief is reviewed for correctness with no deference to the lower court's legal conclusions. *Nicholls v. State*, 2009 UT 12. The multiple errors that deprived Mr. Gregg of due process including his right to a fair trial and his right to counsel were raised and preserved in his Amended Petition for Post-Conviction Relief (RP37), his Second Amended Petition for Post-conviction Relief (R 128), and in his Memorandum of Law in Support of Second Amended Petition for Post-conviction Relief (RP189). His claims relative to the Post-conviction Remedies Act (PCRA) were raised and preserved in his Opposition to State's Motion for Summary Judgment (RP367), his Response to State's Reply Memorandum (RP488), Petitioner's Motion for Relief From Judgment or Order Pursuant to Rule 60(b) (RP549), and Petitioner's Reply Memorandum to State's Opposition to Motion for Relief from Judgment or Order Pursuant to Rule 60(b) (RP574).

3. Does the Utah Constitution allow the legislature to eliminate judicial discretion to consider the merits of post-conviction claims involving substantive rights?

Standard of Review and Preservation: An appeal from an order denying a petition for post-conviction relief is reviewed for correctness with no deference to the lower court's legal conclusions. *Nicholls v. State*, 2009 UT 12. Constitutional questions, including whether a statute is constitutional, are questions of law that are reviewed for correctness. *State v. Alinas*, 171 P.3d 1046, 1048 (Utah 2007). Statutes are presumed constitutional with any reasonable doubts resolved in favor of constitutionality. *Id.* This issue was preserved in the pleadings in Issue 2.

4. Did the district court err in concluding Mr. Gregg's claim that the reckless *mens rea* shifts the burden of proof to the defendant and requires him to prove consent in violation of the defendant's right to due process of law, was not correctly framed as a challenge to the controlling statute's constitutionality as applied in the context of rape?

Standard of Review and Preservation: An appeal from an order denying a petition for post-conviction relief is reviewed for correctness with no deference to the lower court's legal conclusions. *Nicholls v. State*, 2009

UT 12. Constitutional questions are questions of law that are reviewed for correctness. *Id.* This issue was preserved in the pleadings noted in Issue 2.

5. **Where appellate counsel's failure to marshal the evidence on direct appeal is a matter of record, and where appellate counsel failed to raise trial counsel's errors and prosecutorial misconduct, did the district court err in concluding appellate counsel did not render deficient performance that prejudiced Mr. Gregg on his direct appeal?**

Standard of Review and Preservation: An appeal from an order denying a petition for post-conviction relief is reviewed for correctness with no deference to the lower court's legal conclusions. *Nicholls v. State*, 2009 UT 12. Claims of ineffective assistance of appellate counsel present mixed questions of fact and law. *Kell v. State*, 2008 UT 62, ¶16. This issue was preserved in the pleadings referenced in Issue 2.

STATEMENT OF THE CASE

Mr. Gregg was convicted by jury on one count of Rape on July 18, 2003, Case No. 031700275, and was sentenced to serve five years to life in prison. RT361, 365.¹

On direct appeal, Mr. Gregg's counsel argued the district court erred in denying his motion to arrest judgment, which was treated by the appellate court as a challenge to the sufficiency of the evidence. *State v. Gregg*, 2005 UT App 258 (Unpublished Opinion), Addendum A. The court declined to consider the issue because Mr. Gregg's appellate counsel failed to marshal the evidence and simply reargued the weight of the evidence supporting his trial defense, which the court noted was "a futile tactic on appeal." *Id.* The court stated, "[E]ven if we disregard Defendant's failure to marshal the evidence, our review of the record in the light most favorable to the verdict reveals that there was sufficient evidence presented at trial [] to support the jury's verdict." *Id.*

¹The record for the underlying criminal matter is referenced as "RT." The record for the post-conviction matter is referenced as "RP."

This Court denied Mr. Gregg's petition for writ of certiorari. *State v. Gregg*, 125 P.3d 102 (Case No. 20050663-SC).

Mr. Gregg filed a Petition for Post-conviction Relief on October 2, 2006. RP1. He filed an Amended Petition on February 20, 2007. RP37. Mr. Gregg's then post-conviction counsel had represented him at trial yet raised claims of ineffective assistance of trial counsel in the petition. Mr. Gregg retained current counsel in April 2007. RP117.

The district court denied Mr. Gregg's Amended Petition in its Ruling on Respondent's [sic] Petition for Post-conviction Relief dated June 28, 2007. RP122 (Addendum B). However, the court issued an order allowing current counsel to file a Second Amended Petition for Post-conviction Relief on August 23, 2007. RP124, 128. This Second Amended Petition raised new claims and also incorporated the claims raised in the prior Amended Petition for the purpose of preserving them. RP128.

Finding the claims raised in Mr. Gregg's Second Amended Petition were meritorious, the district court issued an Order Requiring Respondent's Pleading. RP235. In April 2008 the State filed a motion for summary judgment and dismissal, arguing Mr. Gregg's claims were procedurally barred under the Post-conviction Remedies Act (PCRA) and his counsel on direct appeal did not render ineffective assistance. RP249.

The parties filed a number of other related pleadings and the court granted the State's motion for summary judgment in its Ruling dated December 17, 2008. RP516 (Addendum C). The district court entered its Findings of Fact, Conclusions of Law, and Order Dismissing Petition for Post-conviction Relief on January 29, 2009. RP535

(Addendum D). Mr. Gregg filed a Motion for Relief from Judgment or Order Pursuant to Rule 60(b) on February 26, 2009, primarily to request the district court to address claims it appeared to have overlooked in its initial ruling denying his petition, and thus preserve all of his claims for this appeal. RP549. He also timely filed a notice of appeal from the district court's dismissal of his petition on February 27, 2009. RP554.

The district court also denied Mr. Gregg's 60(b) motion and he timely filed a notice of appeal on that issue. This Court granted Mr. Gregg's motion to consolidate both matters for this appeal. Because the purpose of preservation was accomplished by the filing of Mr. Gregg's motion as well as the State's responsive pleadings and the district court's ruling on the same, any challenges to the district court's ruling on that motion are fairly encompassed within Mr. Gregg's first action.

STATEMENT OF FACTS

1. Mr. Gregg arrived at the home of Suzanne Stacey at 2:20 a.m. on February 15, 2003, about 20 minutes after they had arranged to meet. RT417:29-30. They had not met in person before but had communicated via three or four instant-messages on LDS Singles Online (LDSSO), an internet dating service. RT417:29, 30, 34.

2. At trial Ms. Stacey portrayed herself as a devout Mormon. She testified she used LDSSO because she "wanted to meet someone with the same interests and values [she] had [and] ... find somebody maybe that would ... have those same interests and values to help [her] raise [her four] children and instill those values in [her] children as well." RT417:24. She "thought [] everybody [using LDSSO] had the same values and

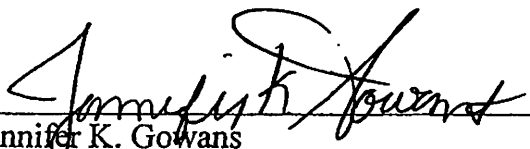
strategy to not subpoena a crucial witness. All of this evidence was crucial to Mr. Gregg's defense. Trial counsel was ineffective for failing to present it and appellate counsel was ineffective for not addressing these errors on Mr. Gregg's direct appeal.

CONCLUSION

The procedural bars imposed by the PCRA have made this appeal more complicated than it needs to be. The real issue is simple: Mr. Gregg was wrongfully convicted when he was deprived of his right to a fair trial and to effective assistance of counsel. Mr. Gregg respectfully requests that his conviction be vacated. In the alternative, he requests that this matter be remanded for a new trial.

Respectfully submitted this 10th day of May, 2010.

JENNIFER K. GOWANS, P.C.


Jennifer K. Gowans
Attorney for Petitioner/Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of May, 2010, I ^{mailed} ~~hand delivered~~ 2 true and correct copies of the foregoing Brief of Appellant to the following:

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ADDENDUM G

2nd District- Farmington
DAVIS, STATE OF UTAH
GREGG, DAVID VINCENT vs. STATE OF UTAH

CASE NUMBER 060700501 - Post Conv Rel NonCap

CURRENT ASSIGNED JUDGE: DAVID CONNORS

Parties

Relationship	Party	Represented By
Petitioner	DAVID VINCENT GREGG	GRANT W P MORRISON JENNIFER K GOWANS
Respondent	STATE OF UTAH	KENNETH A BRONSTON THOMAS B BRUNKER

Events

Date	Event
October 02, 2006	Complaint filed
October 02, 2006	Filed: Petition for Post-Conviction Relief (URCP 65B, C); Petition for Writ of Habeas Corpus
October 02, 2006	Fee Account created
October 02, 2006	Fee Payment
October 02, 2006	Fee Account created
October 02, 2006	Fee Payment
February 20, 2007	Filed: Amended Petition for Post-Conviction Relief (URCP 65 B, C) Amended Petition for Writ of Habeas Corpus
February 26, 2007	Fee Account created
February 26, 2007	Fee Payment
February 28, 2007	Filed: Substitution of Document
April 20, 2007	Filed: Request for Ruling Pursuant to URCP 65C (g)-(h)
April 20, 2007	Filed: Notice of Errata
April 26, 2007	Filed: Notice of Appearance of Counsel - Jennifer Gowans for David Vincent Gregg
May 29, 2007	Filed: Motion For Withdrawal of Counsel
June 06, 2007	Filed: Order for Withdrawal of Counsel
June 28, 2007	Filed: Ruling on Respondent's Petition for Post-Conviction Relief
August 01, 2007	Filed: Stipulated Motion for Order Allowing Petitioner 30 days to File a Second Amended Petition
August 02, 2007	Filed: Proposed Order Granting Stipulated Motion for Order Allowing Petitioner 30 days to File a Second Amended Petition
August 23, 2007	Filed: Second Amended Petition for Post Conviction Relief and for Writ of Habeas Corpus
August 23, 2007	Filed: Memorandum of Law in Support of Second Amended Petition for Post Conviction Relief
October 10, 2007	Filed: Notice to Submit for Decision/Request for Ruling
October 10, 2007	Filed: Memorandum of Law in Support of Second Amended Petition for Post-Conviction Relief (Corrected)
November 15, 2007	Fee Account created
November 15, 2007	Fee Payment
December 14, 2007	Filed: Order Requiring Respondent's Pleading
January 31, 2008	Filed: Motion for Enlargement of Time to Respond to Petition and Proposed Order
March 24, 2008	Filed: Response to State's Motion for Enlargement of Time to File Response to Petition for Post-Conviction Relief
March 28, 2008	Filed: Order Granting Enlargement of Time to Respond to Petition
April 02, 2008	Fee Account created
April 02, 2008	Fee Payment

April 03, 2008	Fee Account created
April 03, 2008	Fee Account created
April 03, 2008	Fee Payment
April 18, 2008	Filed: State's Motion for Summary Judgment Dismissing Petition for Post-Conviction Relief and Supporting Memorandum
May 20, 2008	Filed: Order for Enlargement of Time to File Response to State's Motion for Summary Judgment Dismissing Petition for Post-Conviction Relief
July 08, 2008	Filed: Second Motion for Enlargement of Time to File Opposition to States Motion for Summary Judgment
July 16, 2008	Filed: Opposition to State's Motion for Summary Judgment
August 07, 2008	Filed: Notice to Submit for Decision/Invitation to Schedule Oral Argument
August 07, 2008	Filed: Opposition to State's Motion for Summary Judgment (Corrected)
August 25, 2008	Filed: State's Request for Permission to File a Reply Memorandum in Support of Motion for Summary Judgment and Opposition to Petitioner's Request to Submit for Decision and Order
September 30, 2008	Filed: State's reply memorandum in support of motion for summary judgment
October 08, 2008	Filed: Motion for Enlargement of Time to File Reply Memorandum and Proposed Order (not signed)
October 16, 2008	Filed: Renewed Request to Submit for Decision/Invitation to Schedule Oral Argument
October 16, 2008	Filed: Motion to Allow Petitioner to File a Response to the States Reply Memorandum and Supporting Memorandum
October 16, 2008	Filed: Response to States Reply Memorandum
October 23, 2008	Filed: Motion to Strike and Notice to Submit
October 30, 2008	Filed: Opposition to State's Motion to Strike Petitioner's Response Filed October 16, 2008
November 10, 2008	Filed: UNSIGNED Proposed Order Granting Petitioner's Motion to Allow Petitioner to File a Response to the State's Reply Memorandum and Supporting Memorandum
December 17, 2008	Filed: Ruling on State's Motion for Summary Judgment
December 22, 2008	Fee Account created
December 22, 2008	Fee Payment
January 06, 2009	Filed: Letter from Respondent to Petitioner Re: Findings of Fact, Conclusions of Law and Order Dismissing Petition for Post-Conviction Relief
January 29, 2009	Filed: Findings of Fact, Conclusions of Law and Order Dismissing Petition for Post-Conviction Relief
January 29, 2009	Case Disposition is Dismissed
February 26, 2009	Filed: Petitioner's Motion for Relief From Judgment or Order Pursuant to Rule 60b
February 27, 2009	Filed: Notice of Appeal
February 27, 2009	Fee Account created
February 27, 2009	Fee Payment
March 18, 2009	Filed: States response to petitioners motion to amend or alter judgment
March 25, 2009	Filed: Certificate of Mailing
April 03, 2009	Filed: Order from the Supreme Court
April 03, 2009	Filed: Letter from the Supreme Court
April 07, 2009	Filed: Petitioner's Reply Memorandum to State's Opposition to Motion for Relief from Judgment or Order Pursuant to Rule 60(b)
April 15, 2009	Filed: Notice to Submit for Decision on Petitioner's Motion for Relief From Judgment or Order Pursuant to Rule 60b
April 21, 2009	Filed: Motion to Strike State's Notice to Submit Petitioner's Motion to Amend or Alter Judgment
April 21, 2009	Filed: Order from the Utah Supreme Court
April 23, 2009	Filed: Notice to Submit Petitioner's Motion to Amend or Alter Judgment
June 02, 2009	Filed: Index
June 02, 2009	Filed: Certificate of Mailing
June 02, 2009	Filed: Email Request from Court of Appeals

June 04, 2009	Filed: Ruling on Petitioner's Motion for Relief from Judgment or Order Pursuant to Rule 60(b)
June 25, 2009	Filed: Notice of Appeal
July 02, 2009	Filed: Certificate of Mailing
July 17, 2009	Filed: Letter from Supreme Court of Utah
July 17, 2009	Filed: Order from Supreme Court
August 17, 2009	Filed: Order (from Utah Supreme Court)
January 19, 2010	Filed: Motion to Supplement the Record
February 25, 2010	Filed: Order from the Utah Court of Appeals
March 15, 2010	Filed: Second Judgment Roll and Index
March 15, 2010	Filed: Certificate of Mailing
September 03, 2010	Filed: Third Judgment Roll & Index
September 03, 2010	Filed: Certificate of Mailing
September 03, 2010	Filed: Email Request from Utah Supreme Court for Transcript and Supplemental Index
June 05, 2012	Filed: Opinion from Utah Supreme Court
June 25, 2012	Filed: Remittitur from Utah Supreme Court
April 08, 2013	Case Disposition is Dismsd w/o prejudice
April 15, 2013	Filed: Motion and Order of Dismissal without Prejudice

Account Summary

Account	Details
REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S	Amount Due: \$ 155.00 Amount Paid: \$ 155.00 Amount Credit: \$ 0.00 Balance: * \$ 0.00
REVENUE DETAIL - TYPE: COPY FEE	Amount Due: \$ 0.25 Amount Paid: \$ 0.25 Amount Credit: \$ 0.00 Balance: * \$ 0.00
REVENUE DETAIL - TYPE: COPY FEE	Amount Due: \$ 17.25 Amount Paid: \$ 17.25 Amount Credit: \$ 0.00 Balance: * \$ 0.00
REVENUE DETAIL - TYPE: COPY FEE	Amount Due: \$ 6.00 Amount Paid: \$ 6.00 Amount Credit: \$ 0.00 Balance: * \$ 0.00
REVENUE DETAIL - TYPE: TELEPHONE CHARGES	Amount Due: \$ 17.50 Amount Paid: \$ 17.50 Amount Credit: \$ 0.00 Balance: * \$ 0.00
REVENUE DETAIL - TYPE: TELEPHONE/FAX/EMAIL	Amount Due: \$ 17.50 Amount Paid: \$ 17.50 Amount Credit: \$ 0.00 Balance: * \$ 0.00
REVENUE DETAIL - TYPE: TELEPHONE CHARGES	Amount Due: \$ 5.00 Amount Paid: \$ 5.00 Amount Credit: \$ 0.00 Balance: * \$ 0.00

REVENUE DETAIL - TYPE: TELEPHONE/FAX/EMAIL	Amount Due:	\$	5.00
	Amount Paid:	\$	5.00
	Amount Credit:	\$	0.00
	Balance:		* \$ 0.00
REVENUE DETAIL - TYPE: COPY FEE	Amount Due:	\$	2.00
	Amount Paid:	\$	2.00
	Amount Credit:	\$	0.00
	Balance:		* \$ 0.00
REVENUE DETAIL - TYPE: COPY FEE	Amount Due:	\$	4.50
	Amount Paid:	\$	4.50
	Amount Credit:	\$	0.00
	Balance:		* \$ 0.00
REVENUE DETAIL - TYPE: APPEAL	Amount Due:	\$	205.00
	Amount Paid:	\$	205.00
	Amount Credit:	\$	0.00
	Balance:		* \$ 0.00

Errata

Mr. Noor notifies the court of a typographical error contained in his brief. On page 16, footnote 2, the last sentence should read as follows, with the alteration indicated in bold and underlined type: “Nonetheless, the Supreme Court did **not** dismiss the case on the grounds that it was barred by the statute of limitations, and rejected the procedural claims raised by the State.”

DATED this 27th day of April, 2017.

SNOW CHRISTENSEN & MARTINEAU

/s/ Robert T. Denny

Samuel Alba

Robert T. Denny

Attorneys for Appellant