

2003

## Heerman v. Utah : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THOMAS P. HEERMAN,	:	
Petitioner/Appellant,	:	Case No. 20030205-CA
v.	:	
STATE OF UTAH,	:	
Respondent/Appellee.	:	

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BRIEF OF APPELLEE

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APPEAL FROM AN ORDER DISMISSING A PETITION FOR POST-CONVICTION RELIEF IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR DUCHESNE COUNTY, UTAH, THE HONORABLE A. LYNN PAYNE, PRESIDING.

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FILED  
UTAH APPELLATE COURTS  
APR - 6 2004

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 STATE OF UTAH, :  
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 Respondent/Appellee. :

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**BRIEF OF APPELLEE**

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**JURISDICTION AND NATURE OF THE PROCEEDINGS**

Heerman appeals the district court's dismissal for failure to prosecute his petition for post-conviction relief (addendum A). The petition challenged his plea and conviction for one count of Attempted Sodomy of a Child, a first degree felony. This Court has jurisdiction under Utah Code Ann. §78-2a-3(2)(j) (2001).

**ISSUES ON APPEAL AND STANDARDS OF REVIEW**

**Issue I:** Did the district court properly dismiss the petition for post-conviction relief for failure to prosecute?

**Standard of Review:** The following standard of review applies:

In reviewing a trial court's decision to dismiss for failure to prosecute, we accord the trial court broad discretion and do not disturb its decision absent an abuse of discretion and a likelihood that an injustice has occurred.

*Hartford Leasing Corp. v. State*, 888 P.2d 694, 697 (Utah App. 1995).



## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

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

Addendum B - Utah Rule of Civil Procedure 65C.

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

Addendum D - Utah Rule of Civil Procedure 41(b).

## STATEMENT OF THE CASE<sup>1</sup>

Petitioner Heerman was charged with two counts of Sodomy of a child (R. 137-39). On April 6, 1998, he entered an Alford plea to one count of Attempted Sodomy of a Child, a first degree felony (R. 143-196). He was sentenced to three years to life at the Utah state prison (R. 197-202). Heerman never filed a motion to withdraw his plea or a direct appeal of his conviction or sentence.

On July 1, 1999, Heerman filed a petition for post-conviction relief (R. 1- 17). The district Court entered a ruling that summarily dismissed Heerman's first claim<sup>2</sup> and directed the State to respond to Heerman's second claim, alleging ineffective assistance of counsel (R. 18-20) (addendum E). The State filed its response on November 15, 1999 (R. 36-202). On June 5, 2000, the Court approved Heerman's request to take depositions from two attorneys (R. 254 and 277-81). However, Heerman never took any depositions (R. 610:8).

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<sup>1</sup> Additional relevant facts are included in the argument section of the brief.

<sup>2</sup> Heerman's first claim alleged that he believed that by entering an *Alford* plea, he would be afforded all benefits associated with having maintained his innocence (R. 4-5).

On February 14, 2002, the Court entered an order to show cause for dismissal. During a telephone conference call on April 22, 2002, counsel for Heerman told the court that there was “no problem with this case being dismissed as his client will be proceeding in another direction.” (R. 361A). Therefore the case was dismissed (R. 361A and 558-562).<sup>3</sup>

On July 11, 2002, new counsel, Mitchell Barker, entered a notice of appearance and filed a motion to vacate the order of dismissal (R. 393-404). An evidentiary hearing was held on October 31, 2002 (R. 518-520 and trans. R. 609). The Court granted the motion to set aside the dismissal to which Heerman’s prior counsel had agreed (R. 558-562, 609) (addendum F). However, the Court found that there still needed to be a decision as to whether the matter should be dismissed for failure to prosecute (R. 609:140).

A hearing on the issue of dismissal for failure to prosecute was held on January 13, 2003 (R. 580-81 and R. 610:1-135). On February 4, 2003, the Court entered a ruling which dismissed the petition for failure to prosecute (R. 584-93) (addendum A). On March 5, 2003 Heerman filed his notice of appeal.

Heerman is no longer in prison. He was paroled on April 8, 2003.

#### **FACTS FROM THE UNDERLYING CRIMINAL CASE**

Heerman entered an Alford plea. At the plea hearing, when the court asked for a factual basis, the prosecutor stated: “The evidence from the preliminary hearing and that the victim has told in various interviews is that the defendant would essentially come up to him

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<sup>3</sup> On May 15, 2002, Heerman filed a pro se notice of appeal (R. 364-65). Because the dismissal was later set aside, the appeal was dismissed as moot (R. 606).

and have him – would – yeah, he'd have the victim, who was at the time of the count he's pleading to, let's see his date of birth was '85, so – . . . definitely under the age of 14. But anyway, he had the victim drop his pants and he would drop his and he would insert his penis into the anus of the little boy. And the boy has said he felt wet afterwards on certain of those times. He said this happened many times. So we believe this happened many times over the entire period that he was in Fruitland and that it started in Bountiful before he came out to Fruitland, the same kind of conduct.

We have a colposcope which would show damaged anal – anal tear which is consistent with – with the testimony of the child. And also the child had a condition of encopresis, which is that he's unable to control his bowel movements properly and would poop in his pants, and that that we believe – we believe we would have evidence that's consistent with abuse.” (R. 169-170).

### **SUMMARY OF ARGUMENT**

The decision of the district court should be affirmed because the petition for post-conviction relief was properly dismissed. The district court did not abuse its discretion by dismissing the petition for failure to prosecute. A lengthy amount of time elapse in which Heerman did nothing to bring his case to conclusion. In fact, Heerman made a conscious decision to keep his case on hold while he concentrated on issues before the Board of Pardons. Even when told by the post-conviction court that he must proceed, Heerman still did nothing to bring his post-conviction case to conclusion.

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY DISMISSED THE PETITION FOR POST-CONVICTION RELIEF FOR FAILURE TO PROSECUTE.

The petition for post-conviction relief was dismissed for failure to prosecute.<sup>4</sup> “‘The burden is upon the plaintiff to prosecute a case in due course without unusual or unreasonable delay.’ Plaintiffs are required ‘to prosecute their claims with due diligence, or accept the penalty of dismissal.’” *Charlie Brown Const. Co. Inc. v. Leisure Sports Inc.*, 740 P.2d 1368, 1370 (Utah App. 1987)(citing *Lake Meredith Reservoir Co. v. Amity Mutual Irrigation Co.*, 698 P.2d 1340, 1344 (Colo. 1985) and *Dept. of Soc. Serv. v. Romero*, 609 P.2d 1323, 1324 (Utah 1980).

“Cases discussing whether the trial court abused its discretion in dismissing an action for failure to prosecute are fact sensitive.” *Meadow Fresh Farms Inc., v. Utah State Univ.*, 813 P.2d 1216, 1219 (Utah App. 1991). Therefore, it is important to closely examine the facts when determining whether the district court abused its discretion in dismissing this case. A review of the facts in this case establishes that petitioner Heerman not only failed to prosecute his case with due diligence, but he intentionally chose a course of delay.

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<sup>4</sup> The district court summarily dismissed one of Heerman’s claims (R. 18-20) (addendum E). Heerman has not alleged on appeal that the district court erred in summarily dismissing this claim. Heerman has not raised or addressed this issue anywhere in his appellate brief. Therefore, the issue of whether the district court properly summarily dismissed this claim is waived because it was not raised on appeal. See *Pasquin v. Pasquin*, 1999 UT App 245, ¶ 21, 988 P.2d 1 (issues not briefed by appellant are deemed waived and abandoned); *Pixton v. State Farm Mutal Auto. Insur. Co. of Bloomington, Ill.*, 809 P.2d 746, 751 (Utah App. 1991) (where appellant fails to brief an issue, the point is waived).

**The first order to show cause:** The petition was filed on July 1, 1999 (R. 1-17). The State filed its response on November 15, 1999 (R. 36-202). On March 3, 2000, the Court sent its first notice of order to show cause for dismissal. On April 21, 2000, Heerman filed a motion for discovery (R. 207-216). The show cause hearing on June 5, 2000 was changed to a hearing on the motion for discovery (R. 253-55). The Court approved Heerman's request to take depositions from two attorneys (R. 254 and 277-81). However, Heerman never took any depositions (R. 610:8).

**The Stipulation:** On September 11, 2000, Heerman filed a stipulation which stated: "Counsel for the Petitioner and counsel for the State of Utah have agreed to suspend future proceedings in this case until Mr. Heerman has had an opportunity to have his hearing before the Board of Pardons." (R. 258-59) (addendum G).<sup>5</sup> The stipulation also stated: "Counsel for the parties have no objection to the court passing any appropriate order which suspends all future proceedings until Mr. Heerman has had an opportunity to have his case reviewed by the Board of Pardons." (R. 248-59) (addendum G).

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<sup>5</sup> The stipulation does not contain any date for Heerman's Board of Pardons hearing. At the court hearing on January 13, 2002, counsel for the State told the Court that in August of 2000, Mr. Pavlinic, Heerman's out-of-state counsel, called her about possibly entering a stipulation. He told her that Mr. Heerman had a showing at the Board of Pardons but it was not until April (R. 610:27). Counsel for the State assumed he was referring to April of 2001 (R. 610:32-33). Counsel for the State believed she was agreeing to stipulate to a continuance of the matter until April of 2001 (R.610:28). The Board of Pardons advised counsel that Heerman had a special attention review hearing on April 17, 2001 (R. 610:26).

However, Heerman concedes that “the *Stipulation* was never presented to Judge Payne for approval.” (pet.’s brief, p. 27, n. 16). In its ruling, the Court found that “[t]he Stipulation was never approved by the Court.” (R. 585).

**Withdrawal of counsel:** On August 29, 2000, Kristine Rogers filed a motion to withdraw as local counsel (R. 274-276). Pro hac vice counsel, Thomas Pavlinic, was sent notice that a hearing on this motion was scheduled for October 10, 2000 (R. 288-290). At Mr. Pavlinic’s request, the hearing on the motion to withdraw was continued from October 10, 2000 to November 6, 2000, and then to December 4, 2000 (R. 292-93, 298, 300, 302-03, 308-09). At the hearing on December 4, 2000, no local counsel appeared and Mr. Pavlinic did not appear. Permission for Mr. Pavlinic to act pro hac vice was withdrawn (R. 308-10 and 313-316).

On December 19, 2000 counsel for the state filed a NOTICE TO RETAIN COUNSEL OR APPEAR IN PERSON (R. 310-312). In a letter dated December 29, 2000, Heerman advised the court that he was seeking local counsel (R. 317-18).

**The second order to show cause:** On May 10, 2001, the court sent notice of a hearing for order to show cause for dismissal for lack of prosecution (R. 391-20). A hearing on the order to show cause was held on June 18, 2001 (R. 331-32). Heerman appeared in person without counsel. Heerman understood that the hearing was to talk about why the case shouldn’t be dismissed for failure to prosecute (R. 610:98). Heerman explained to the court that he understood the State had agreed to put this matter on hold until his hearing before the Board of Pardons. He told the court that his hearing would be in April of 2002 (R. 331).

Heerman testified that he told the court “that there was this agreement between the prosecution and my previous counsel to wait until afterwards. And at that time, he [the Judge] told me that – that he wasn’t going to wait that long.” (R. 610:96). The Court told Heerman that he needed to get an attorney involved in his case or proceed on his own. The court also told Heerman that his case would be dismissed if something had not been filed by August 12, 2001 (R. 331-32). Heerman requested a continuance because he told the court he was still looking for new counsel (R. 335-341). On September 24, 2001, attorney Greg Skordas filed a notice of appearance of counsel (R. 344-45). However, new counsel took no action in the post-conviction case except to agree to its dismissal (*see* letters from counsel, R. 523-25). At the evidentiary hearing, the Court asked Heerman some questions about this.

The following exchange occurred:

Q. So what was it that you expected Mr. Skordas to do that he wasn’t doing while this matter was pending?

A. That was – I contacted Mr. Skordas after you had said you weren’t going to wait that long when I appeared before here. And I told you that there was a – my understanding, that it was going to be postponed until after the board hearing. And I believe your words were basically, “I’m not going to wait that long.” And so I said, “Yes, sir.” That was when I started getting to work on it, finding another attorney again. And that’s when I found Mr. Skordas.

Q. So you – from that point on, were you relying upon the stipulation?

A. No.

(R. 610:111).

**The third order to show cause:** Even after being told by the Court that he could not rely on the stipulation, Heerman still did nothing. On February 14, 2002, the Court again sent notice of an order to show cause for dismissal. A hearing was scheduled for March 11, 2002 (R. 349-50). During a telephone conference call on March 11, Heerman's counsel, Mr. Skordas, noted that "Mr. Heerman has a parole hearing the 2<sup>nd</sup> week of April. If the parole hearing goes the way they wish he will dismiss the petition in this case. If not, they don't want to have this dismissed." (R. 359). The order to show cause hearing was continued until April 22, 2002 (R. 356-57, 359-60).

**Agreed dismissal:** During the telephone conference call on April 22, 2002, counsel for Heerman<sup>6</sup> advised the court that there was "no problem with this case being dismissed as his client will be proceeding in another direction." (R. 361A). Therefore, almost three (3) years after the petition was filed, the case was dismissed (R. 361A and 558-562).<sup>7</sup>

**Motion to Vacate:** On July 11, 2002, new counsel, Mitchell Barker, entered a notice of appearance (R. 393-94). Heerman's new counsel filed a motion to vacate the order of dismissal (R. 395-404). An evidentiary hearing was held on October 31, 2002 (R. 518-520 and R. 609:1-150). Following the hearing, the Court granted Heerman's motion to set aside the dismissal. (R. 558-562 and 609). In ruling on this issue, the Court stated: "I think he made a decision not to oppose the order to show cause. . . . But I cannot say in good

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<sup>6</sup> An associate acting for Mr. Skordas.

<sup>7</sup> On May 15, 2002, Heerman filed a pro se notice of appeal (R. 364-65). Because the dismissal was later set aside, the appeal was dismissed as moot (R. 606).



conscience that he understood the effect of his decision.” (R. 609:139-140). The Court said: “I’m also convinced, based upon the testimony, that Mr. Skordas never communicated to him the effect of a dismissal on the order to show cause.” (R. 609:138). Mr. Heerman “believed he could refile.” (R. 609:139).

The Court then said: “However, that doesn’t answer all the questions. I need to take this thing back to where we were on April the 22<sup>nd</sup> and there needs to be someone come before the Court, in this case Mr. Heerman, to show cause why the matter should not be dismissed based upon failure to prosecute. And if he cannot do that then the matter will be dismissed based upon the merits concerning the issue of failure to prosecute.” (R. 609:140).

**Dismissal for failure to prosecute:** A hearing on the issue of dismissal for failure to prosecute was held on January 13, 2003 (R. 580-81 and R. 610:1-135). Following the hearing, the Court took the matter under advisement. On February 4, 2003, the Court entered a ruling which dismissed the petition for failure to prosecute (R. 584-93) (addendum A).

**A. Review of the *Westinghouse*<sup>8</sup> factors and the totality of the circumstances establishes that the district court did not abuse its discretion in dismissing the case for failure to prosecute.**

In considering dismissal for failure to prosecute, a court should “seek to balance the need to expedite litigation and efficiently utilize judicial resources with the need to allow parties to have their day in court.” *Meadow Fresh Farms, Inc. v. Utah State Univ. Dept. of*

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<sup>8</sup> *Westinghouse Electric Supply Co. v. Larsen Contractor, Inc.*, 544 P.2d 876, 879 (Utah 1975)

*Ag.*, 813 P.2d 1216, 1219 (Utah App. 1991). When considering whether dismissal for failure to prosecute is appropriate, the district court should consider:

1. time elapsed since the suit was filed,
2. the conduct of both parties,
3. the opportunity each party has had to move the case forward,
4. what each of the parties has done to move the case forward,
5. what difficulty or prejudice may have been caused to the other side,
6. most important, whether injustice may result from the dismissal.

*Country Meadows Convalescent Center v. Utah Dept. of Health*, 851 P.2d 1212, 1215 (Utah App. 1993); *Meadow Fresh Farms, Inc. v. Utah State Univ. Dept. of Ag.*, 813 P.2d 1216, 1219 (Utah App. 1991); *Maxfield v. Ruston*, 779 P.2d 237, 239 (Utah App. 1989); *Westinghouse Electric Supply Co. v. Larsen Contractor, Inc.*, 544 P.2d 876, 879 (Utah 1975).

When applying the *Westinghouse* factors, the Utah Supreme Court has required that the totality of the circumstances be considered. “A plaintiff cannot isolate and argue facts relevant to only one or two of the *Westinghouse* factors to avoid its burden to prosecute a case in due course without unusual or unreasonable delay.” *Country Meadows*, 851 P.2d at 1215 (cites omitted). “In fact, even where a trial court finds facts indicating that ‘injustice could result from the dismissal of[a] case,’ it can dismiss when a plaintiff has ‘had more than ample opportunity to prove his asserted interest and simply failed to do so.’” *Id.* at 1216.

The district court properly considered and analyzed each of the *Westinghouse* factors and all of the relevant facts and circumstances of this case (R. 584-593) (addendum A).

**Time elapsed since the suit was filed:** The petition for post-conviction relief was filed on July 1, 1999. The petition was dismissed for failure to prosecute on February 4,

2003, over three and a half (3 ½) years later. In its order of dismissal, the district court noted that: “Other than requesting that certain people be deposed (which Motion was filed on April 21, 2000), there is absolutely no record that anything has been done to bring this case to a conclusion. Although depositions were authorized, none were taken. Other than the request to depose certain witnesses, no discovery has been requested, no motions relevant to the claims in the petition have been filed, no request for hearing on any issues has been made, nor has a trial been requested. Nothing has been done to bring this case to a conclusion.” (R. 588-89) (addendum A).

An order allowing Heerman to take depositions was entered on June 5, 2000. However, from June 5, 2000 until the case was dismissed, no depositions were ever taken.

Heerman argues that the stipulation signed by the parties should have stayed the case and prevented dismissal for failure to prosecute. As addressed below, the stipulation was never approved by the court. In addition, at the hearing on June 18, 2001, Heerman was told that the court was not going to follow the stipulation. Heerman knew that he could not wait until after his parole hearing to proceed with his post-conviction case. Yet from June 18, 2001 until the case was dismissed, Heerman still did nothing to bring his post-conviction case to conclusion.

**The conduct of both parties:** Although the *Westinghouse* decision requires the district court to consider the conduct of both parties, “the duty to prosecute is a duty of due diligence imposed on a plaintiff, not on a defendant.” *Country Meadows*, 851 P.2d at 1216, citing *Meadow Fresh Farms*, 813 P.2d at 1218. The State timely filed a response to the

petition (R. 36-202). It therefore timely fulfilled the only duty imposed upon it under the controlling rule. *See* Utah R. Civ. P. 65C. The burden was on Heerman to prosecute his claims with due diligence. *Charlie Brown*, 740 P.2d at 1370.

In its order of dismissal, the district court noted that “[e]arly on in this case Mr. Herrman<sup>9</sup> [sic] made a conscious decision to keep this case on hold while he concentrated on issues before the Board of Pardons.” (R. 589) (addendum A).

The district court specifically found that “[t]he Stipulation to suspend was initiated by the Petitioner. It was the Petitioner who proposed that the matter be suspended and this was obviously in furtherance of his tactic to delay this case while he addressed issues before the Board of Pardons.” (R. 589).

The State agreed to the stipulation.<sup>10</sup> However, Heerman acknowledges that “the *Stipulation* was never presented to Judge Payne for approval.” (pet.’s brief, p. 27, n. 16). In addition, Heerman testified under oath that at the hearing on June 18, 2001, when he mentioned the stipulation, the Judge told him that he would not wait that long. (R. 610:96). As the court told counsel during the hearing: “You can’t argue that you relied upon it [the stipulation] after June 18<sup>th</sup> [2001]. . . . it turned out that he was notified on June 18<sup>th</sup>, that that wasn’t going to happen, it wasn’t going to be a stipulation.” (R. 610:119). As the district court concluded in its ruling: “The Court never approved the Stipulation” (R. 591).

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<sup>9</sup> The Court’s ruling prints petitioner’s name as “Herrman” instead of “Heerman.”

<sup>10</sup> Although the State believed it was only agreeing to a stipulation to stay the case until April of 2001. *See* footnote 4 above.

**The opportunity each party has had to move the case forward:** Heerman had several years to move this case forward. As the plaintiff, he had the duty to prosecute his case with due diligence. *Charlie Brown*, 740 P.2d at 1370. Heerman was aware that several orders to show cause for dismissal for failure to prosecute were issued before the case was actually dismissed, yet he still did nothing to bring his post-conviction case to conclusion.

The State had fulfilled its obligations by filing a response to the petition, and by responding to Heerman's discovery request. The State had no duty or responsibility to move petitioner's action to judgment. *Hartford Leasing Corp. v. State*, 888 P.2d 694, 698, n. 2 (Utah App. 1995). And, since the court had already issued several orders to show cause for failure to prosecute, there was not really anything further the State could have done to move the case forward.

**What each of the parties has done to move the case forward:** Heerman filed the petition. The State timely filed its response, and filed a response to Heerman's discovery request (R. 219-229). After his discovery request, Heerman did nothing to move his case forward. As the district court noted in its ruling: "Petitioner's own counsel, Ms. Rogers, was concerned that the case was not progressing. Indeed in her motion to withdraw, which is dated August 25, 2000, she states: 'Since 1999 nothing of substance has happened in this case.'" (R. 590).

The district court found that "[t]he State has also not taken any significant action to bring the matter to a conclusion." (R. 590). However, "[t]he State's responsibility, as a defendant which has not asserted a claim for affirmative relief, is limited." *Hartford Leasing*

*Corp. v. State*, 888 P.2d 694, 699 (Utah app. 1995). As this Court said:

We pause to note the obvious: What each party has done to move the case forward can only be evaluated in light of each party's responsibility concerning the case. Of course, the plaintiff, as the party initiating the lawsuit, has the primary responsibility to move the case forward. The defendant's responsibility is limited to responding timely to the action, expeditiously attending to discovery, and moving any counterclaim along. The defendant has no general responsibility to move *plaintiff's* action to judgment.

*Hartford Leasing Corp. v. State*, 888 P.2d 694, 698, n. 2 (Utah App. 1995).

When Heerman's local counsel withdrew, and pro hac vice status of his out-of-state counsel was withdrawn, the state timely informed Heerman that he must retain new counsel or proceed on his own (R. 310-312). When Heerman still did nothing to move his case forward, the State could have sought orders to show cause for dismissal for failure to prosecute, but that was not necessary, since the court itself issued three orders to show cause.

**What difficulty or prejudice may have been caused to the other side:** In its ruling, the district court found that there was "no direct evidence before the Court as to prejudice which has resulted by the delay of this case." (R. 590). However, lengthy delay in any post-conviction case can seriously prejudice the State. As the district court noted in its ruling: "If the State is required to again criminally prosecute the Petitioner they would be required to proceed through a child witness who would be required to testify about events which are far removed." (R. 591).

The crime occurred in 1997 (R. 61). Heerman entered his plea in 1998. The petition for post-conviction relief was dismissed on February 4, 2003. Delay in the post-conviction case could prejudice the State in two ways. First, if the district court determined that an

evidentiary hearing was necessary in the post-conviction case, it would involve testimony about events that occurred many years ago. Second, if the petition for post-conviction relief had been granted, the State would have the option to re-try Heerman. *See* Utah Code Ann. § 78-35a-108. Attempting to take a case to trial many years after the crime was committed may cause difficulties due to the fact that memories fade, people move and become difficult or impossible to locate, or even die.

In addition, society has a strong interest in finality. “Justice demands that a convicted defendant have an opportunity to appeal in timely fashion, but once the appellate process has concluded, society’s interest in the effectiveness and integrity of the criminal justice system requires a finality of judgment . . . .” *Gerrish v. Barnes*, 844 P.2d 315, 320-21 (Utah 1992) (*quoting Bundy v. DeLand*, 763 P.2d 803, 805 (Utah 1988)). Allowing a post-conviction case to languish indefinitely with no resolution of the case undermines society’s interest in finality.

**Whether injustice may result:** Petitioner has failed to establish that any injustice would result from the dismissal of his post-conviction petition for failure to prosecute.<sup>11</sup> The

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<sup>11</sup> In response to the petition for post-conviction relief, the State argued that Heerman was procedurally barred from proceeding with the allegations because all of the issues raised in his post-conviction petition could have been raised on appeal (R. 39-42). In addition, the State argued that Heerman was not entitled to post-conviction relief because his voluntary guilty plea constituted a waiver of all pre-plea non-jurisdictional defects (R. 42- 45). Finally, the State argued that even if his claims were not procedurally barred, he had failed to meet his burden of proof to establish ineffective assistance of counsel (R. 45-58). Heerman has failed to refute any of these arguments to establish that an injustice would occur if the dismissal for failure to prosecute is affirmed.

district court specifically found that Heerman made a conscious decision to keep his post-conviction case on hold while he concentrated on issues before the Board of Pardons. “Instead of responding to the three Order to Show Cause hearings by proceeding on this case, he has successfully delayed this case. He has been successful in delaying this case until after the Board considered his parole.<sup>12</sup> After all of this time he now expects to avoid the consequences of his decisions.” (R. 592).

In considering this issue, the district court recognized the importance of the writ of habeas corpus. However, the court also noted that it could “not ignore the fact that society has a legitimate interest in having such matters timely concluded.” (R. 590). The district court found that:

In the second Order to Show Cause hearing on June 18, 2001, the Court specifically directed the Petitioner to go forward with this case. In spite of this direction, nothing was done to further the case. When the matter was considered at the third Order to Show Cause hearing (April 22, 2002), nothing had been done. By the time the third Order to Show Cause hearing was held, the matter had been pending for almost three years. Other than difficulties experienced in obtaining counsel, the Petitioner has offered no explanation or excuse as to why he did not prosecute his case.

(R. 591).

“[W]here a trial court finds facts indicating that ‘injustice could result from the dismissal of [a] case,’ it can dismiss when a plaintiff has ‘had more than ample opportunity to prove his asserted interest and simply failed to do so.’” *Id.* at 1216. Heerman had more

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<sup>12</sup> Heerman’s hearing before the Board of Pardons was on May 14, 2002. His petition for post-conviction relief was dismissed for failure to prosecute on February 4, 2003.



than ample opportunity to proceed with his post-conviction case, but failed to do so. In addition, Heerman cannot establish that any injustice would occur if dismissal of his case is upheld. The only consequence Heerman would suffer is that he would not be allowed to proceed with his post-conviction claims. However, this consequence is not unjust, since it occurred due to Heerman's own decision to delay and to not proceed with his post-conviction case until after his Board of Pardons hearing, even though the post-conviction court had specifically told him that it would not wait that long.

The district court considered the facts and circumstances of this case and each of the *Westinghouse* factors and properly dismissed the petition for failure to prosecute.

**B. The district court properly excluded several of Heerman's proposed exhibits.**

Heerman attempted to admit numerous letters as exhibits at the hearing on January 13, 2003. Heerman argues that several of his proposed exhibits were rejected in error. Hearsay objections were made to proposed exhibits 2, 3, 5 - 14, and 16.<sup>13</sup> (R. 610:47, 50-51, 55, 62-63, 65, 67-69, 76-77). Exhibits 2, 3 and 5 were admitted for limited purposes (R. 610:49, 51, 61). Exhibits 6 - 14 and 16 were not admitted. Under the Utah Rules of Evidence:

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Utah R. Evid. 801(c)(2003).

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<sup>13</sup> Some of the exhibits were also objected to on the basis of lack of foundation or relevance (R. 610:63, 65, 67, 69, 76-77).

Heerman argues that the excluded exhibits were not hearsay since they were “not assertions, and not offered to prove the truth” (pet.’s brief, p. 39.) However, Heerman goes on to state that the exhibits were “offered to show the efforts Mr. Heerman and his representative made to keep the case moving, and to keep the court informed of those efforts” (pet.’s brief, p. 39). Therefore, the exhibits were clearly out-of-court statements offered to prove the truth of the matter asserted.

Heerman argues that “[w]hen an out of court statement is offered simply to prove that it was made, without regard to whether it is true, such testimony is not proscribed by the hearsay rules.” (pet.’s brief, p. 39). The State agrees that “[w]hen an out-of-court statement is offered only to prove that the statement was made, without regard to its truth or falsity, it is not proscribed by the hearsay rule.” *State v. Hutchison*, 655 P.2d 635, 636 (Utah 1982).

However, Heerman’s proposed exhibits were offered to prove what had been done in the post-conviction case. The exhibits were worthless without a determination as to whether the statements in the exhibits were true. The people who made the statements were not present at the evidentiary hearing to testify and be cross examined. Without being able to cross-examine the person who made the statements, the State had no way to establish whether the statements were true - whether the things discussed in the exhibits were actually done. They were hearsay because they were out-of-court statements offered to prove the truth of the matter asserted: that something had been done to move the post-conviction case toward conclusion. They were properly excluded as hearsay.

Heerman argues that some of the proposed exhibits were letters written to the court and found in the court's own file, therefore they should have been admitted. However, the fact that a letter was written to the court does not establish the truthfulness of the statements in the letter. As the court advised counsel during the hearing:

Well, you don't get evidence in by writing something to the court. I mean, that doesn't just bypass all the rules.

\* \* \*

I really don't think that you just get around all these hearsay objections by saying, "Gee, Judge, it's right in your court file so, therefore, it must be true that Mr. Heerman did this and Mr. — his sister did that, and that the attorney contacted Mr. Bradshaw and that Mr. Bradshaw contacted Mrs. Rogers, and all those things happened. That is rank hearsay. And I just don't think that you can get around all those things.

\* \* \*

I'm telling you that the Rules of Evidence apply to this. And you just don't get by the Rules of Evidence by saying, "But, Your Honor, it's in the Court's file." Because all it is is a letter from the attorney. And if you're presenting this to show that the attorney did certain things, that isn't enough to get around a hearsay objection.

(R. 610:56, 59, 61).

In his brief, Heerman states: "If they were hearsay, then there would be an applicable exception." (pet.'s brief, p. 40). However, Heerman fails to present any argument or authority as to why or how these proposed exhibits would fall under a hearsay exception.

**C. The Court properly considered the entire record before making its decision to dismiss for failure to prosecute.**

Heerman argues that the trial court improperly considered statements made at the

hearing on June 18, 2001. However, he presents no argument or authority as to why the court should not have considered statements made at this hearing before dismissing the case for failure to prosecute. Heerman's only argument seems to be that because the court refused to admit some of his proposed exhibits, it should not have considered statements made at the earlier hearing. This argument has no merit. In fact, Heerman acknowledges that he "is not complaining that this was necessarily an error; but it is quite inconsistent and unfair" (pet.'s brief, p. 41). If the district court's action was not error, then there is no basis for this court to consider the matter.

**D. The lack of a complete transcript does not establish any basis for reversal.**

Heerman argues that the lack of a complete transcript is a reason for reversal and remand. The transcript of the January 13, 2003 hearing ends at 7:10 p.m. in the middle of a statement from Mr. Barker (R. 610:134). However, a review of the transcript makes it obvious that the transcript ends very near the conclusion of the hearing. As Heerman acknowledges in his brief, "the bulk of the hearing was preserved" (pet.'s brief, p. 43).

The State does not know why the transcript appears to end prematurely. However, it is Heerman's duty to provide a transcript of all evidence regarding challenged findings or conclusions. "Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript." Utah R. App. P. 11(e)(2).

The rule gives appellant guidance on what to do if a transcript is unavailable. If a transcript of the end of the hearing is not available;

the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or propose amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted in the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.


Utah R. App. P. 11(g). Heerman did not follow this rule. He should be prohibited from arguing that he is entitled to relief on appeal because the transcript is incomplete when he did not fulfil his obligation to assure a complete record on appeal.

### CONCLUSION

The trial court did not abuse its discretion in dismissing the petition for failure to prosecute. This Court should affirm the district court's ruling dismissing the petition for post-conviction relief.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of April, 2004.

MARK L. SHURTLEFF  
ATTORNEY GENERAL

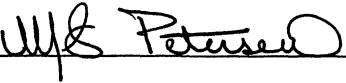
  
ERIN RILEY  
Assistant Attorney General

## MAILING CERTIFICATE

I hereby certify that on this 6th day of April, 2004, I mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to:

Mitchell R. Barker,  
2404 South Morning Sun Court  
Nampa, Idaho 83686

Attorney for Appellant Heerman

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# Addenda

# Addendum A




**IN THE EIGHTH JUDICIAL DISTRICT COURT  
IN AND FOR DUCHESNE COUNTY, DUCHESNE DEPARTMENT**

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THOMAS P. HERRMAN,	:	<b>RULING AND ORDER</b>	
Petitioner,	:		
vs.	:		
STATE OF UTAH,	:	Case No.: 990800051	
Respondent.	:		

FILED  
DISTRICT COURT  
DU<sup>1</sup> ESNE COUNTY, UTAH

**FEB 4 2003**

JOANNE McKEE, CLERK  
 DEPUTY

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Based upon a review of the Court's file, the December 31, 2002 hearing, and the January 13, 2003 hearing, the Court finds as follows:

1. On July 1, 1999 Petitioner filed his "Petition for Relief Under the Post-Conviction Remedies Act". Kristine Rogers filed the foregoing pleading as counsel for Petitioner.
2. On July 22, 1999 Kristine Rogers filed a Motion to Admit Thomas A. Pavlinic as co-counsel, Pro Hac Vice.
3. On August 2, 1999 the Court entered an Order admitting Mr. Pavlinic as co-counsel, Pro Hac Vice.
4. On November 15, 1999 Respondent filed its "Response to Petition for Post-Conviction Relief".
5. Based upon the lack of activity in the file, the Court set this matter for an Order to Show Cause as to why the Petition should not be dismissed and a hearing was scheduled for the Order to Show Cause on March 3, 2000 and rescheduled for June 5, 2000.
6. On April 21, 2000 Petitioner filed a "Rule 65 C(1) Motion and Memorandum for Discovery in Support of Request for Leave to Conduct Discovery". This Motion specifically requested leave to depose the two trial attorneys and seven fact witnesses. (The fact witnesses purportedly possessed evidence as to the Petitioner's guilt or innocence.)
7. At the June 5, 2000 hearing Mr. Pavlinic indicated that Petitioner wished to depose nine people. The State objected and the Court approved deposition of the two attorneys who represented the Petitioner in the criminal matter. The Court indicated that after the initial depositions had been completed the Petitioner could bring the issue of additional depositions back to the Court. The Court also directed that the parties file a Discovery Plan under the

recent amendment to the Rules of Civil Procedure. No Discovery Plan has been submitted or approved by the Court. The Court did not grant the Order to Show Cause and the case continued. Petitioner was present at this hearing.

8. On August 29, 2000 the Court received a Motion to Withdraw as Counsel from Ms. Kristine Rogers. This Motion indicated that it was based upon Mr. Pavlinic's failure to communicate with Ms. Rogers and his failure to take any action in the case. A copy of the Motion was sent to Mr. Herrman.

9. On September 7, 2000 the Court received a "Joint Stipulation Suspending Future Proceedings". The parties agreed to ". . . suspend future proceedings in this case until Mr. Herrman has had an opportunity to have his hearing before the Board of Pardons." The Stipulation indicated that the parties had no objection to the Court issuing an Order based upon the Stipulation; however, no such Order was requested or signed. The Stipulation was never approved by the Court.

10. In response to Miss Rogers Motion to Withdraw, on September 6, 2000 the Court instructed the clerk to notify Mr. Pavlinic that he would have to associate with local counsel.

11. On September 8, 2000 the clerk sent Mr. Pavlinic notice to associate with local counsel or be present in Court on October 10, 2000.

12. On September 29, 2000 the Court received a letter via fax from Mr. Provlinic which indicated that he was in the process of obtaining local counsel and requesting 30 days to do so.

13. In response to Mr. Pavlinic's request, the October 10, 2000 hearing was continued to November 6, 2000.

14. On November 2, 2000 the Court received a faxed letter from Mr. Pavlinic which indicated that he had an attorney "lined up" and requested a continuance of the November 6, 2000 hearing.

15. In response to Mr. Pavlinic's letter, the Court continued the November 6, 2000 hearing to December 4, 2000.

16. As of December 4, 2000 local counsel had not made an appearance, and Mr. Pavlinic did not appear at the December 4, 2000 hearing. The Court ruled that the Order allowing Mr. Pavlinic to appear as counsel should be revoked.

17. On December 19, 2000 the State filed its Notice to Retain Counsel or Appear in Person. A copy of the pleading was served upon Mr. Herrman.

18. On January 16, 2001 the Court entered its Order granting Miss Rogers' Motion to Withdraw as Counsel and revoking Mr. Pavlinic's admission Pro Hac Vice.

19. On January 29, 2001 the Court received a letter from Mr. Herrman dated December 29, 2000 indicating that he was seeking "local counsel" and that he would represent himself until local counsel was obtained. In this letter, Mr. Herrman indicated that he understood that the case had been "postponed" until after he saw the Parole Board. Therefore, Mr. Herrman was proceeding Pro se from that point until Mr. Skordas entered his appearance.

20. Based upon the lack of activity in the file, the Court set this matter for a second Order to Show Cause as to why the Petition should not be dismissed for lack of prosecution and a hearing was scheduled for the Order to Show Cause on June 4, 2001. Mr. Herrman, who was then acting as his own counsel, was notified of this hearing.

21. On June 1, 2001 the Court entered a minute entry which indicated that the June 4, 2001 Order to Show Cause hearing would be continued until June 18, 2001 because Mr. Herrman was housed in San Juan County and could not be transported to Duchesne County for the June 4, 2001 hearing.

22. On June 18, 2001 Mr. Herrman appeared before the Court on the Order to Show Cause hearing. The Court has reviewed the tape of this hearing. At the hearing the Court informed Mr. Herrman that the issue before the Court was whether the case should be dismissed for failure to prosecute. The Court informed Mr. Herrman that under normal circumstances where there was no activity in a case for this period of time, the matter would be dismissed. Mr. Herrman indicated that it was his understanding that the case had been placed on hold until he appeared before the Board of Pardons. He indicated that it was very expensive to pursue both this case and the issues before the Board of Pardons and that he was pursuing the matter before the Board at that time. Mr. Herrman indicated that if it did not work before the Board, he would get another attorney to work on this case. The Court indicated the matter would be dismissed if something was not filed by August 13, 2001. A review of the recording convinces the Court Mr. Herrman was on notice that the Court would not allow the case to remain dormant until he appeared before the Board of Pardons. He was also on notice that the Court expected him to move forward with the process of bringing the case to a conclusion. Mr. Herrman was also aware of his obligation to proceed on the matter before August 13, 2001.

23. On July 27, 2001 the Court received a letter from Mr. Herrman dated July 18, 2001 asking for "an additional continuance of 30 days." Mr. Herrman indicated "Information has come to my attention that may make it advisable for me to ask for a voluntary dismissal of my case." He indicated that he may request that he be allowed to amend his Petition. Mr. Herrman indicated that he had been transferred to the Gunnison facility and was having problems with his mail and obtaining access to a telephone.

24. On August 13, 2001 the Court received a letter from Mr. Herrman dated August 8, 2001 detailing problems he was having locating counsel and problems that he was having receiving mail and making telephone calls. He requested that he receive a 30 day continuance from the time that he received copies of the pleadings. He indicated that if he did not receive

the continuance he wished to voluntarily dismiss the Petition without prejudice.

25. On August 15, 2001 the Court received a letter from Mr. Herrman dated August 10, 2001. Mr. Herrman again indicated that he was having problems locating an attorney.

26. On August 30, 2001 the Court entered a minute entry granting Mr. Herrman a continuance for 60 days from that date to obtain new counsel. The Court clerk also wrote a note in the minute entry indicating that a copy of the docket was enclosed so that Mr. Herrman could determine which documents he needed. Mr. Herrman was also informed that there was a cost of 25 cents a page to copy material in the file.

27. On September 11, 2001 the Court received a letter from Mr. Herrman dated September 10, 2001 which designated certain pleadings and hearings and asked for the cost to obtain copies of those documents.

28. On September 25, 2001 Mr. Skordas entered his appearance as counsel for Mr. Herrman.

29. On October 21, 2002 the Court received a letter from Mr. Herrman dated October 9, 2001 in which he requested certain court records. Mr. Herrman sent \$44 to cover the costs of copying.

30. On February 4, 2002, based upon the lack of activity in the file, the Court set this matter for a third Order to Show Cause as to why the Petition should not be dismissed and a hearing was scheduled for the Order to Show Cause on March 11, 2002. The notice indicated that there had been no activity on this case since the attorney for Petitioner filed his Appearance on September 25, 2001. The court had previously ordered Mr. Herrman to file some pleading by August 13, 2001. Other than the Notice of Appearance from Mr. Skordas; nothing had been filed since Mr. Herrman had been instructed to go forward with the case at the June 18, 2001 Order to Show Cause hearing. Notice of the March 11, 2002 hearing was sent to Mr. Herrman and Mr. Skordas.

31. On March 8, 2002 the Court received a letter from Mr. Herrman dated March 2, 2002 which requested a copy of the docket.

32. At the request of the parties, the Court conducted the March 11, 2002 Order to Show Cause via telephone. The minute entry indicated that Mr. Skordas informed the Court that Mr. Herrman had a parole hearing in the second week of April. If the parole hearing went his way, Mr. Herrman would dismiss his Petition. If the hearing did not go his way, Mr. Herrman wished to proceed. The Court continued the matter to April 22, 2002 and set the matter for a conference call. The Court indicated that the matter would be dismissed if Mr. Skordas did not contact the Court on April 22, 2002. Because the hearing was conducted via telephonic conference, Mr. Herrman did not attend the hearing. The record does not indicate whether Mr. Herrman had waived his appearance. A copy of the minute entry for the March 11, 2002 hearing was sent to Mr. Herrman.

33. On April 22, 2002 the Court conducted a telephonic hearing of the Order to Show Cause. An associate of Mr. Skordas informed the Court that Mr. Herman had no problem with a dismissal of the Petition and that Mr. Herrman intended to proceed in another direction. The Court ordered the matter dismissed for lack of prosecution. Mr. Herrman had informed Mr. Skordas that he did not wish to be transported to the Court for the hearing on April 22, 2002. A copy of the minute entry was sent to Mr. Herrman.

34. On May 13, 2002 the Court received a letter from Mr. Herrman which was dated May 8, 2002 and was addressed to Mr. Skordas. Mr. Herrman indicated that he understood that a case dismissed for failure to prosecute could not be raised again and instructed Mr. Skordas to file a Notice of Appeal.

35. On May 15, 2002 the Court received a pro se Notice of Appeal from Mr. Herrman.

36. On July 11, 2002 the Court received the following pleadings from Mr. Barker:

- A. Appearance of Counsel
- B. Motion to Vacate Order of Dismissal
- C. Memorandum in Support of Motion to Vacate Order of Dismissal

37. On July 17, 2002 the State filed its Response to the Motion to Vacate Order of Dismissal.

38. On August 8, 2002 the Court scheduled an evidentiary hearing on the Motion to Vacate for October 31, 2002.

39. On October 31, 2002 the Court conducted an evidentiary hearing on the Motion to Vacate. The Court granted the Motion to Vacate and rescheduled the Order to Show Cause which had been set on April 22, 2002. The hearing on the Order to Show Cause was set for January 13, 2003.

40. On December 19, 2002 the Court entered its Findings of Fact, Conclusions of Law, and Order Vacating Dismissal.

41. On January 13, 2003 the Court conducted an evidentiary hearing on the Order to Show Cause as to why this case should not be dismissed for failure to prosecute. At that hearing the parties stipulated that the Court consider the evidence presented at the October 31, 2002 hearing.

42. Other than requesting that certain people be deposed (which Motion was filed on April 21, 2000), there is absolutely no record that anything has been done to bring this case to a conclusion. Although depositions were authorized, none were taken. Other than the request to depose certain witnesses, no discovery has been requested, no motions relevant to the

claims in the Petition have been filed, no request for hearing on any issues has been made, nor has a trial been requested. Nothing has been done to bring this case to a conclusion.

43. As the Court indicated in its findings from the bench at the conclusion of the October 31, 2002 hearing, the testimony of Mr. Herrman was not credible. His testimony at the January 13, 2003 hearing was also not credible. Therefore, the Court will find:

A. Prior to the April 22, 2002 hearing, Mr. Skordas and Mr. Herrman specifically discussed the issue of whether to object to a dismissal for failure to prosecute.

B. Mr. Herrman specifically authorized that Mr. Skordas consent to dismissal.

C. Mr. Herrman's motive in not objecting to the April 22, 2002 dismissal was that he believed that the existence of this case would have an adverse effect at his hearing before the Board of Pardons; and he expressed this concern to his attorney, (Mr. Skordas).

D. Mr. Skordas was hired for the limited purpose of keeping the case from being dismissed at the Order to Show Cause hearings. He was never given the responsibility to bring the case to a conclusion through litigation of the issues which had been raised in the Petition.

E. Prior to April 22, 2002, Mr. Herrman had specific knowledge about the process of voluntary dismissal as is evident in his letters of July 27, 2001 and August 13, 2001.

F. Even after Mr. Pavlinic's ability to represent Mr. Herrman in the case was withdrawn, Mr. Pavlinic continued to communicate with Mr. Herrman concerning this case.

G. Early on in this case Mr. Herrman made a conscious decision to keep this case on hold while he concentrated on issues before the Board of Pardons. This intent is evident in the fact that:

1. No discovery or other attempts to bring the case to a conclusion were attempted from the time that the matter was filed on July 1, 2000 until the stipulation to suspend was filed on September 7, 2000, a period of more than 14 months.

2. The Stipulation to suspend was initiated by the Petitioner. It was the Petitioner who proposed that the matter be suspended and this was obviously in furtherance of his tactic to delay this case while he addressed issues before the Board of Pardons.

3. On June 18, 2001, Mr. Herrman specifically informed the Court that he had decided to concentrate on the matters before the Board and wished to have this case put on hold until the Board entered its decision.

4. On June 18, 2001, Mr. Herrman was specifically instructed that the Court would not allow the case to await the Board's hearing in April, 2002. The court instructed Mr. Herrman to proceed with this case. In spite of this, nothing has been done to bring this case to a conclusion.

44. Mr. Herrman appeared before the Board of Pardons for his parole hearing on May 14, 2002.

45. Mr. Herrman's incarceration interfered with his ability to obtain substitute counsel during the period from June 18, 2001 to September 25, 2001 when Mr. Skordas made his appearance. Although his incarceration placed certain limitations on his ability to consult with counsel at other times, there was never any limitation on his ability to communicate in writing. Neither was there any significant impairment on his ability to speak with counsel. Mr. Herrman spoke with Mr. Pavlinic about every week. He spoke with Ms. Rogers two to three times a month. He spoke to Mr. Skordas at least five times. He spoke with his sister, who was assisting him in these matters, weekly. (His sister sometimes communicated with counsel on Mr. Herrman's behalf). Other than the time from June 18, 2001 through September 25, 2001, his incarceration did not interfere in any significant manner with his ability to communicate with counsel.

46. Petitioner's own counsel, Ms. Rogers, was concerned that the case was not progressing. Indeed in her Motion to Withdraw, which is dated August 25, 2000, she states: "Since 1999 nothing of substance has happened in this case."

47. The State has also not taken any significant action to bring the matter to a conclusion.

48. There is no direct evidence before the Court as to prejudice which has resulted by the delay of this case.

### CONCLUSION

Based upon the foregoing, the Court concludes:

1. The critical issue in this matters is whether an injustice will result if the matter is dismissed for failure to prosecute. In considering this issues the Court will consider the totality of circumstances. The Court is mindful of the importance of the Writ under which this case was brought. The Writ of Habeas Corpus is often a defendant's only available tool to set aside an unjust or incorrect verdict or judgment. Nevertheless, the Court can not ignore the fact that society has a legitimate interest in having such matters timely concluded. The facts in this case adequately demonstrate the interest which society has in requiring such cases to be concluded within a reasonable amount of time. Mr. Herrman was convicted by his plea of the offense of Attempted Sodomy of a Child. The Affidavit which is attached to the Petition

indicates that the crime occurred in the Spring of 1997. (See State v. Herrman 971800043). The victim was 11 years old when the offense occurred. If the State is required to again criminally prosecute the Petitioner they would be required to proceed through a child witness who would be required to testify about events which are far removed. Therefore, society as well as the Petitioner each have import interests which the Court should consider.

2. The Court is concerned that it has been the conscious decision of the Petitioner to delay this case. Prior to the September 5, 2000 Stipulation, there was no possible excuse for the Petitioner's failure to prosecute the matter. Even after the Court's first Order to Show Cause as to why the case should not be dismissed for failure to prosecute, which was held on March 5, 2000, the Petitioner made no effort to engage in the business of bringing the case to a conclusion.

3. The Petitioner argues that the Court should not consider the time from September 5, 2001, when the Stipulation to suspend the proceeding was filed, until June 18, 2001, when Mr. Herrman was informed that the Court would not await the Board hearing. Upon reflection, the Court has determined that this period of time should be considered but that the Court should also consider that the State agreed to a suspension of the proceedings during that period of time. The Court's reason for considering this time period are two: (1) The Court never approved the Stipulation; and more importantly (2) The Stipulation was initiated by the Petitioner as part of his tactic to delay this case. Undue delay is the very basis for the Order to Show Cause. It is the Court's judgment that in considering whether the matter should be allowed to go forward the Court should consider the fact that the case has been delayed as the result of the Petitioner's conscious decision to delay the case as is evident through the fact that he initiated the stay. Again, the Court must also consider the fact that the State agreed to the continuance.

4. In the second Order to Show Cause hearing on June 18, 2001, the Court specifically directed the Petitioner to go forward with this case. In spite of this direction, nothing was done to further the case. When the matter was considered at the third Order to Show Cause hearing (April 22, 2002), nothing had been done. By the time the third Order to Show Cause hearing was held, the matter had been pending for almost three years. Other than difficulties experienced in obtaining counsel, the Petitioner has offered no explanation or excuse as to why he did not prosecute his case.

5. With respect to counsel, although it is true between June 18, 2001 (when Petitioner began his search for new counsel) and September 25, 2001 (when Mr. Skordas entered his appearance), the Petitioner did have difficulty obtaining counsel. This, however, ignores the fact that from July 1, 1999 (when the case was filed) to January 15, 2001 (when Ms. Rogers withdrew) the Petitioner had counsel. He also had counsel from September 25, 2001 (when Mr. Skordas entered his appearance) until April 22, 2002 (when the third Order to Show Cause was scheduled). Mr. Herrman also specifically indicated in his December 29, 2000 letter that he was representing himself until he obtained counsel. Mr. Herrman was aware that



Ms. Rogers was seeking to withdraw as counsel and that the Court had held a hearing on December 4, 2000 where the Court had ruled that Mr. Pavlinic would not continue as counsel. Mr. Herrman decided to represent himself. There is no evidence that Mr. Herrman made any effort to obtain counsel prior to the June 18, 2001 hearing. The prosecution of this case was not significantly affected by reason of Mr. Herrman's difficulties in obtaining counsel during the June 18, 2001 to September 25, 2001 time period. Furthermore, based upon the Court's findings it is apparent that whether or not he had counsel, he had developed a tactic to delay the case. This tactic was developed very early in the case and was consistently followed. It is, therefore, apparent that, even if he had counsel at all times, he did not intend to prosecute his claims.

6, Mr. Herrman is articulate and intelligent as is evident in his appearances before the Court and his written communication with the Court (see exhibit 4 to the October 31, 2002 hearing as an example). Instead of responding to the three Order to Show Cause hearings by proceeding on this case, he has successfully delayed this case. He has been successful in delaying this case until after the Board considered his parole. After all of this time he now expects to avoid the consequences of his decisions. It is the Court's view, based upon all of the evidence, that the facts support the conclusion that this case be dismissed for failure to prosecute and it is so ordered. Based upon the record, no injustice will result if this matter is dismissed. The three Order to Show Cause hearings put Mr. Herrman on notice that the Court expected that this case would proceed. Mr. Herrman had an adequate opportunity to prosecute this matter. After having received specific direction by the Court on June 18, 2001 Mr. Herrman has taken no action to prosecute this case. His only action was to retain Mr. Skordas as his attorney. However, in spite of the Court's Order to proceed, he limited Mr. Skordas' involvement in the case to keeping the case from being dismissed and never allowed Mr. Skordas to prosecute the issues raised in the Writ.

7. In coming to its conclusion as expressed above, the Court has considered the following: (1) The conduct of the parties; (2) The opportunity each party has had to move the case forward; (3) What each party has done to move the case forward; (4) what difficulty or prejudice may have been caused to the other side; and (5) Whether injustice may result from dismissal. (Westinghouse Electric Supply Company v. Lanser, Inc., 544 P2d 876/Utah 1975). I believe the findings and conclusions adequately address these issues.

The Court is satisfied with the above as a final Judgment in this matter. Therefore, this Order shall be final upon entry in the Court's records.

DATED this 3 day of February, 2003.

BY THE COURT.

  
\_\_\_\_\_  
A. LYNN PAYNE, DISTRICT COURT JUDGE

**MAILING CERTIFICATE**

I hereby certify that on the 3<sup>rd</sup> day of February, 2003, true and correct copies of the Ruling and Order were mailed, postage prepaid, to: Mr. Mitchell R. Barker, Attorney for Petitioner, at 7931 Tommy Lane, Nampa, ID 83685 and to Erin Riley, Assistant Attorney General, at 160 E. 300 S., 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, UT 84114-0854.

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

# Addendum B



UT R RCP Rule 65C  
Utah Rules of Civil Procedure, Rule 65C

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C

**WEST'S UTAH RULES OF COURT  
UTAH RULES OF CIVIL PROCEDURE  
PART VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS**

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Current with amendments received through 10-01-03

**RULE 65C. POST CONVICTION RELIEF**

**(a) Scope.** This rule shall govern proceedings in all petitions for post- conviction relief filed under **Utah** Code Ann. 78-35a-101 et seq., Post- Conviction Remedies Act.

**(b) Commencement and Venue.** The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

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

- (1) whether the petitioner is incarcerated and, if so, the place of incarceration;
- (2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;
- (3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;
- (4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;
- (5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and
- (6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

**(d) Attachments to the Petition.** If available to the petitioner, the petitioner shall attach to the petition:

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- (1) affidavits, copies of records and other evidence in support of the allegations;
- (2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;
- (3) a copy of the pleadings filed by the petitioner in any prior post- conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and
- (4) a copy of all relevant orders and memoranda of the court.

**(e) Memorandum of Authorities.** The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

**(f) Assignment.** On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

**(g)(1) Summary Dismissal of Claims.** The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

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

- (A) the facts alleged do not support a claim for relief as a matter of law;
- (B) the claims have no arguable basis in fact; or
- (C) the petition challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a petition is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

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

**(h) Service of Petitions.** If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of **Utah** represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

**(i) Answer or Other Response.** Within 30 days (plus time allowed under these **rules** for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered

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by the court.

**(j) Hearings.** After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

- (1) consider the formation and simplification of issues;
- (2) require the parties to identify witnesses and documents; and
- (3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

**(k) Presence of the Petitioner at Hearings.** The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

**(l) Discovery; Records.** Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

**(m) Orders; Stay.**

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

**(n) Costs.** The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Section 64-13-23 and Sections 21-7-3 through 21-7-4.7 govern the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

**(o) Appeal.** Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of **Utah** in accord with the statutes governing appeals to those courts.

[Adopted effective July 1, 1996.]

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Committee Note

This **rule** replaces former paragraph (b) of **Rule 65B**. It governs proceedings challenging a conviction or sentence, regardless whether the claim relates to an original commitment, a commitment for violation of probation, or a sentence other than commitment. Claims relating to the terms or conditions of confinement are governed by paragraph (b) of the **Rule 65B**. This rule, as a general matter, simplifies the pleading requirements and contains two significant changes from procedure under the former rule. First, the paragraph requires the clerk of court to assign post-conviction relief to the judge who sentenced the petitioner if that judge is available. Second, the rule allows the court to 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 determining motions for discovery.

**Rules Civ. Proc., Rule 65C**

**UT R RCP Rule 65C**

END OF DOCUMENT

# Addendum C



**Section**

- 78-35a-107. Statute of limitations for post-conviction relief.  
 78-35a-108. Effect of granting relief — Notice.  
 78-35a-109. Appointment of counsel.  
 78-35a-110. Appeal — Jurisdiction.

**Part 2****Capital Sentence Cases**

- 78-35a-201. Post-conviction remedies — 30 days.  
 78-35a-202. Appointment and payment of counsel in death penalty cases.

**Part 3****Postconviction Testing of DNA**

- 78-35a-301. Postconviction testing of DNA — Petition — Sufficient allegations — Notification of victim.  
 78-35a-302. Effect of petition for postconviction DNA testing — Requests for appointment of counsel — Appeals — Subsequent postconviction petitions.  
 78-35a-303. Consequences of postconviction DNA testing when result is favorable to person — Procedures.  
 78-35a-304. Consequences of postconviction DNA testing when result is unfavorable to person — Procedures.

**PART 1****GENERAL PROVISIONS****78-35a-101. Short title.**

This act shall be known as the "Post-Conviction Remedies Act." 1996

**78-35a-102. Replacement of prior remedies.**

(1) This chapter establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

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

1996

**78-35a-103. Applicability — Effect on petitions.**

Except for the limitation period established in Section 78-35a-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996. 1996

**78-35a-104. Grounds for relief — Retroactivity of rule.**

(1) Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

- (a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;
- (b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah

**CHAPTER 35a****POST-CONVICTION REMEDIES ACT****Part 1****General Provisions****Section**

- 78-35a-101. Short title.  
 78-35a-102. Replacement of prior remedies.  
 78-35a-103. Applicability — Effect on petitions.  
 78-35a-104. Grounds for relief — Retroactivity of rule.  
 78-35a-105. Burden of proof.  
 78-35a-106. Preclusion of relief — Exception.

Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;

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

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

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

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

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

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

(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity. 1996

#### **78-35a-105. Burden of proof.**

The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The respondent has the burden of pleading any ground of preclusion under Section 78-35a-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence. 1996

#### **78-35a-106. Preclusion of relief — Exception.**

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion;

(b) was raised or addressed at trial or on appeal;

(c) could have been but was not raised at trial or on appeal;

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or

(e) is barred by the limitation period established in Section 78-35a-107.

(2) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel. 1996

#### **78-35a-107. Statute of limitations for post-conviction relief.**

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court.

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

(3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(4) Sections 78-12-35 and 78-12-40 do not extend the limitations period established in this section. 1996

#### **78-35a-108. Effect of granting relief — Notice.**

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

(a) modify the original conviction or sentence; or

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

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

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

(c) If the respondent gives notice that it intends to retry or resent 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. 1996

#### **78-35a-109. Appointment of counsel.**

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

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

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

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

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition. 1996

#### **78-35a-110. Appeal — Jurisdiction.**

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78-2-2 or 78-2a-3. 1996

## **PART 2**

### **CAPITAL SENTENCE CASES**

#### **78-35a-201. Post-conviction remedies — 30 days.**

A post-conviction remedy may not be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds for application are based on facts or circumstances which developed or first became known within that period of time. 1997

#### **78-35a-202. Appointment and payment of counsel in death penalty cases.**

(1) A person who has been sentenced to death and whose

# Addendum D

C

WEST'S UTAH RULES OF COURT  
UTAH RULES OF CIVIL PROCEDURE  
PART VI. TRIALS

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## RULE 41. DISMISSAL OF ACTIONS

**(a) Voluntary Dismissal; Effect Thereof.**

(1) *By Plaintiff.* Subject to the provisions of **Rule 23(e)**, of **Rule 66(i)**, and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(i) a stipulation of all of the parties who have appeared in the action; or

(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

**(b) Involuntary Dismissal; Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in **Rule 52(a)**. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

**(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if

there is none, before the introduction of evidence at the trial or hearing.

**(d) Costs of Previously-Dismissed Action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

**(e) Bond or Undertaking to Be Delivered to Adverse Party.** Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

[Amended effective November 1, 1997.]

**Rules Civ. Proc., Rule 41**

**UT R RCP Rule 41**

END OF DOCUMENT

# Addendum E

**In The Eighth District Court Of Duchesne County  
Duchesne Department, State of Utah**

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**THOMAS P. HEERMAN,**

Plaintiff,

vs.

**RULING**

CASE NO. 990800051

**STATE OF UTAH,**

Defendant.

Judge A. Lynn Payne

:

---

The Court has received and reviewed the Petitioners Petition for Relief Under the Post-Conviction Remedies Act. The Petition alleges two ground for relief.

"Ground One" indicates that Petitioner believed that when he entered his plea of guilty he would be "afforded all benefits which were associated with maintaining my innocence". He then indicates that after beginning his sentence at the prison, prison officials have treated his "Alford" Plea the same as a guilty plea. After review of the allegations, the court finds that this allegation is frivolous and does not support a claim for relief as a matter of law.


Petitioners subjective belief as to how the plea would be viewed by third parties (i.e. the Board of Pardons) in the future does not provide a basis to set aside the plea. With respect to this issue, there is no allegation that he was not adequately advised by the court or counsel. Utah Code Annotated 77-13-1 designates all authorized pleas to an information as : (1) Not Guilty; (2) Guilty; (3) No Contest; (4) Not Guilty by Reason of Insanity; and (5) Guilty and Mentally Ill. It therefore appears that an "Alford" Plea is a plea of Guilty, and the Board may treat it as

such. Further, the Petitioner has not presented an arguable factual basis as to how a person who plead guilty could reasonably expect to be treated as a person who has maintained his innocence.

"Ground Two" alleges ineffective assistance of counsel. The allegations of ground two are not frivolous on their face. Therefore, the clerk is directed to serve a copy of the petition and attachments by mail upon the Utah Attorney Generals Office as required by Rules of Civil Procedure 65C(h).

Dated this 13<sup>th</sup> day of July, 1999.

BY ORDER OF THE COURT:



A. Lynn Payne  
8<sup>th</sup> District Court Judge

By Pat Mullins

Stamped at judge's direction



CERTIFICATE OF MAILING

Thomas P. Heerman

vs.

State of Utah

Case No. 990800051

(Reference Criminal No. 971800043)

I hereby certify that I mailed a true and correct copy of the foregoing *Ruling* and *Petition for Relief Under the Post-Conviction Remedies Act*, by depositing the same in the United States Post Office at Duchesne, postage prepaid, to the following parties, as directed by the Court:

Office of the Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Kristine M. Rogers  
10 West 100 South, Suite 605  
Salt Lake City, Utah 84101

Herbert Wm. Gillespie  
by Hand

Dated this 13<sup>th</sup> day of July, 1999.

Pat Mullins  
Pat Mullins, Deputy Court Clerk

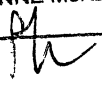
Page # 2 was missing from original mailing  
Delivered by fax to Katherine Marshall, AG's office at 366-0167 on 8-3-99  
Delivered by hand to Duchesne Co. Attorney on 8-3-99  
Delivered by fax to Kristine Rogers on 7-14-99

# Addendum F

Mitchell R. Barker, #4530  
Attorney for Petitioner  
7931 Tommy Lane  
Nampa, Idaho 83686  
Telephone: (208) 375-9392

FILED  
DISTRICT COURT  
DUCHESNE COUNTY, UTAH

DEC 19 2002

JOANNE McKEE, CLERK  
BY  DEPUTY

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**IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE  
COUNTY - STATE OF UTAH**

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THOMAS HEERMAN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

---

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
& ORDER VACATING DISMISSAL**

Case No. 990800051 RN

**Honorable A. Lynn Payne**

The above matter came before the Court on Petitioner's *Motion to Vacate Order of Dismissal* on October 31, 2002, with the Honorable A. Lynn Payne, Eighth District Court, presiding. Mitchell R. Barker appeared and presented evidence and argument on behalf of Petitioner Thomas Heerman. Mr. Heerman also appeared. Erin Riley appeared and presented evidence and argument on behalf of Respondent The State of Utah.

The Court heard testimony and received and considered various documentary exhibits. Having considered the filings of the parties, the evidence received and the arguments of

respective counsel, and having made oral findings and conclusions from the Bench, and good cause appearing, the Court now enters its

### **FINDINGS OF FACT**

1. There was a telephonic hearing held on April 22, 2002. Petitioner was and is in the Utah State Prison system, and was not transported for the hearing. Erin Riley appeared by telephone for the State of Utah, and an associate of Mr. Skordas appeared by telephone as well. At that hearing, the associate told the Court that Mr. Skordas did not object to dismissal, as he understood that petitioner wished to proceed in some other way.

2. The Court finds that the more credible testimony is to the effect that petitioner discussed dismissal with his attorney, Gregory Skordas.

3. It is reasonable to assume that petitioner knew or believed that disposition or pendency of this habeas corpus case might affect the result obtained from the Board of Pardons.

4. The Court believes that petitioner consented to or requested that Mr. Skordas allow this case to be dismissed.

5. However, based on the information available to him, petitioner thought that if dismissal was permitted, he could re-file the case within one year.

6. The Court finds, that Mr. Skordas did not explain to petitioner the effect which dismissal of this case on an Order to Show Cause would have on him. For example, petitioner was not warned of the authority to the effect that dismissal on an Order to Show Cause does not qualify for a re-filing, even if accomplished within one year of dismissal.

prosecute up until the dismissal date of April 22, 2002.


### ORDER

The Court having entered the foregoing Findings of Fact and Conclusions of Law, and good cause appearing, it is HEREBY ORDERED as follows:

1. The April 22, 2002 dismissal is vacated and set aside.
2. Petitioner is ordered to appear before this Court on January 13, 2002, to show cause why this habeas corpus action should not be dismissed for any failures to prosecute prior to April 22, 2002.
3. Petitioner Heerman shall be transported to the Court on that date, no later than 1:30 p.m. The hearing date and time are subject to change by the Court.

SO FOUND, CONCLUDED AND ORDERED ON this 16 day of Dec, 2002.

BY THE COURT:

  
\_\_\_\_\_  
Honorable A. Lynne Payne  
District Judge

## **CONCLUSIONS OF LAW**

1. Failures to prosecute (or lack of them) before the telephonic conference of April 11, 2002 are not relevant to this *Motion to Vacate*, since vacation was ostensibly by consent of petitioner's attorney, Mr. Skordas.

2. When proper notice is given of a show cause hearing on failure to prosecute, and the party against whom dismissal is proposed fails to appear, the result is usually that the Court will dismiss the case.

3. If the party ordered to show cause does appear, it is his burden to show and explain good cause why dismissal should not occur.

4. The Court concludes that petitioner's attorney did not explain to him that dismissal could be permanent.

5. The Court concludes that petitioner's belief that he could re-file was a material misunderstanding of the effect of dismissal.

6. The Court concludes that Petitioner did not knowingly allow the case to be dismissed.

7. A writ of habeas corpus is an important right, giving a prisoner the opportunity to test the legality of his incarceration. Petitioner's right to a determination on the merits should not be denied under the circumstances, purely based on his attorney consenting to dismissal, since this was not an informed waiver of a known right on the part of petitioner.

8. While the Court will set aside the dismissal, the Petitioner should be required to appear and show cause why the matter should not in fact be dismissed for any failure(s) to

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of November, 2002, I caused a true and correct copy of the foregoing to be mailed, postage prepaid, to the following individual at the indicated address:

Erin Riley, Esq.  
Assistant Attorney General  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

A handwritten signature in black ink, reading "Mitch R. Barker", written over a horizontal line.

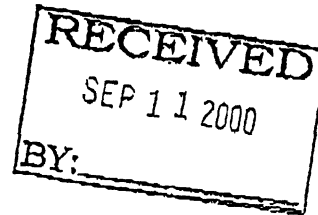
Mitchell R. Barker

# Addendum G



**COPY**

Kristine M. Rogers #6978  
 Thomas A. Pavlinic, *Pro Hac Vice*  
 Attorneys for Petitioner  
 Judge Building  
 8 East Broadway, Suite 712  
 Salt Lake City, UT 84111  
 (801) 994-6000



**IN THE EIGHTH JUDICIAL COURT OF THE STATE OF UTAH  
 IN AND FOR DUCHESNE COUNTY**

THOMAS P. HEERMAN	*	Joint Stipulation Suspending Future
	*	Proceedings
Petitioner	*	
	*	Civil Number: 99-0800051
STATE OF UTAH	*	
	*	
Respondent	*	Judge: A. Lynn Payne

**JOINT STIPULATION SUSPENDING FUTURE PROCEEDINGS**

Thomas P. Heerman, Petitioner, by and through Kristine M. Rogers and Thomas A. Pavlinic, his attorneys, and the State of Utah, by and through Assistant Attorney General Erin Riley, hereby stipulate as follows:

1. Counsel for the Petitioner and counsel for the State of Utah have agreed to suspend future proceedings in this case until Mr. Heerman has had an opportunity to have his hearing before the Board of Pardons.
2. Both counsel for Mr. Heerman have discussed this decision with him and have obtained his consent.
3. Mr. Heerman will be happy to provide, as a separate exhibit, his written

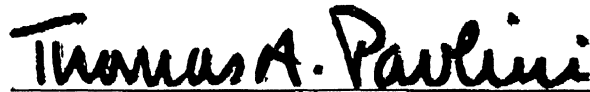
consent to suspend future proceedings in this case until after he has had an opportunity of having his case reviewed by the Board of Pardons.

4. Counsel for the parties have no objection to the court passing any appropriate order which suspends all future proceedings until Mr. Heerman has had an opportunity to have his case reviewed by the Board of Pardons.

DATED this 5th day of September, 2000.



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