

1993

# Lyle C. Hendricks v. State of Utah : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jan Graham; Utah Attorney General; Angela F. Micklos; Assistant Attorney General; Attorneys for Appellee.

Lyle C. Hendricks; Appellant Pro Se.

---

## Recommended Citation

Brief of Appellant, *Hendricks v. State of Utah*, No. 930532 (Utah Court of Appeals, 1993).

[https://digitalcommons.law.byu.edu/byu\\_ca1/5449](https://digitalcommons.law.byu.edu/byu_ca1/5449)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

BRIEF

Lyle C. Hendricks  
Attorney Pro Se  
P. O. Box 250  
Draper, Utah 84020

UTAH  
DOCUMENT  
K F U  
50  
.A10  
DOCKET NO.

930532

IN THE UTAH COURT OF APPEALS

Lyle C. Hendricks,  
Petitioner/Appellant

-vs-

State of Utah,  
Respondent/Appellee

:

:

:

:

:

Case No. ~~930055-CA~~

*930532-CA*

BRIEF OF APPELLANT

In the matter for Review of the Decision Rendered by the Second  
Judicial District Court on January 12th, 1993 on a Petition for  
Writ of Extraordinary Relief in County of Weber, State of Utah  
The Honorable Michael J. Glasmann, Judge

Jan Graham  
Utah State Attorney General  
236 State Capitol Bldg.  
Salt Lake City, Utah 84104

Angle F. Micklos  
Assistant Attorney General  
330 South 300 East  
Salt Lake City, Utah 84111

*Lyle C. Hendricks*

Lyle C. Hendricks  
Attorney Pro Se  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020

FILED

MAY 13 1993

CURT OF APPEALS

## **TABLE OF CONTENTS**

<b>Question Presented for Review</b> .....	<b>1</b>
<b>Report of Decision</b> .....	<b>1</b>
<b>Statement of Grounds For Jurisdiction</b> .....	<b>1</b>
<b>Determinative Provisions</b> .....	
<b>Statement of the Case</b> .....	<b>2</b>
<b>Statement of the Facts</b> .....	<b>2,3,4,5</b>
<b>Argument</b> .....	<b>5,6,7,8,9</b>
<b>Conclusion</b> .....	<b>17</b>
<b>Addendum</b> .....	

## TABLE OF AUTHORITIES

<u>Bivens v. Six Unknown Agents</u> , 403 U.S. 388,29 LEd 2d 619,91 SCt 1999 (1971).	6
<u>Bryant v. Turner</u> , 19 Utah 2d 284, 431 P.2d 121 (1967) . . . . .	7
<u>Codianna v. Morris</u> , 660 P.2d 1101 (Utah 1983) . . . . .	9
<u>Daniels v. Blackburn</u> , 763 F.2d 705 (5th Cir. 1985) . . . . .	8
<u>Dunn v. Cook</u> , 791 P.2d 873 (Utah 1990) . . . . .	13
<u>Fernandez v. Cook</u> , 783 P.2d 547 (Utah 1989) . . . . .	13
<u>Gallegos v. Turner</u> , 17 Utah 2d 273, 409 P.2d 386 (1965) . . . . .	7,8
<u>Hurst v. Cook</u> , 777 P.2d 1029 (Utah 1989) . . . . .	7
<u>Jensen v. Deland</u> , 795 P.2d 619 (Utah 1989) . . . . .	13
<u>Kuhlmann v. Wilson</u> , 477 U.S. 436 (1986) . . . . .	8
<u>Rammell v. Smith</u> , 560 P.2d 1108 (Utah 1977) . . . . .	8
<u>Sanders v. United States</u> , 373 U.S. 1 (1963) . . . . .	5,6,8
<u>State v. Booker</u> , 709 P.2d 342 (Utah 1985) . . . . .	14
<u>State v. Dumaine</u> , 783 P.2d 1184, 1191 (Arizona 1989) . . . . .	13
<u>State v. Frame</u> , 723 P.2d 401, 405 (Utah 1986) . . . . .	9,12,13
<u>State v. Geary</u> , 707 P.2d 645, 646 (Utah 1985) . . . . .	9
<u>State v. Martinez</u> , 709 P.2d 355 (Utah 1985) . . . . .	14
<u>State v. McCardell</u> , 652 P.2d 942. 945 (Utah 1982) . . . . .	14
<u>State v. Petree</u> , 659 P.2d 443, 445 (Utah 1983) . . . . .	14
<u>Strickland v. Washington</u> ,466 U.S. 668, <u>reh'g denied</u> .467 U.S.1267 (1984) 9,10,12,13	

<b><u>Webb v. Texas</u></b> , 409 U.S. 95, 34 LEd 2d 330, 93 SCt 351 (1972) .....	13
<b><u>White v. Ragen</u></b> , 324 U.S. 760, 89 LEd 1348, 65 SCt 978 (1953) .....	6

## **STATUTES AND RULES**

Constitution of the United States, Sixth Amendment .....	addendum
Constitution of Utah Article 1, Section 12 .....	addendum
Utah Code Annotated (1953), Section 76-2-307 (2) .....	12,13
76-3-402 .....	16
76-5-103 .....	16
76-6-302 .....	13

## IN THE UTAH COURT OF APPEALS

---

Lyle C. Hendricks,	:	<b>PETITIONER'S APPELLANT</b>
Petitioner/Appellant	:	<b>BRIEF</b>
-vs-	:	
State of Utah,	:	<b>Case No. <u>930055-CA</u></b>
Respondent/Appellee	:	

---

### QUESTIONS PRESENTED FOR REVIEW

Petition for Extraordinary Relief is not a successive or delayed petition, nor is it repetitious, when through Petitioner's own diligence new evidence is obtained showing perjured testimony regarding the formulation of "intent" which subsequently resulted in a conviction for an offense which was not committed. Ineffective assistance of counsel.

### REPORT OF DECISION

The [r]uling on writ of extraordinary relief by Judge Michael Glasmann of the Second Judicial District Court of January 12th, 1993. Docketing Statement of February 16th, 1993, and Utah Court of Appeals Order Case 930055-CA by Judge Regnal W. Garff, Judge dated March 23rd, 1993 is attached.

### STATEMENT OF GROUNDS FOR JURISDICTION

The decision previously referred to was filed on January 12th, 1993. No orders granting extension have been granted. The Utah Court of Appeals has

jurisdiction pursuant to Title 78, Chapter 2a, Section 3 (2) (g) of the Utah Code Annotated, 1953, as amended, and Rule 65 B (b) (13) of the Utah Rules of Civil Procedure.

### **DETERMINATIVE PROVISIONS**

See Addendum

### **STATEMENT OF THE CASE**

1. This is an appeal from a ruling in the Second Judicial District Court Pursuant to the dismissal of a Petition for Extraordinary Relief which was filed under Rule 65B of the Utah Rules of Civil Procedure based on newly discovered evidence regarding the veracity of one of the state's key witnesses.
2. The witnesses testimony was relied upon for the formulation of "intent" in the crime of aggravated robbery.
3. Appellant now has proof the this witnesses testimony was false.
4. Dismissal of the original petition by Judge Glasmann was on the grounds of being repetitious; frivolous.
5. Notice of Appeal was filed with the Utah Court of Appeals on January 29th, 1993.
6. Appellee's Motion to Dismiss before this court was denied on March 23, 1993, by Judge Garff.

### **STATEMENT OF THE FACTS**

In the afternoon of December 8, 1987, an individual later identified as the

Appellant, Lyle C. Hendricks, entered Murray's Pharmacy and walked to the back of the store where the pharmacy's owner, Mr. Murray and an employee, Mrs. Blackwell, were working. He had a gun in his hand and asked the owner, Mr. Murray, for all of his class II narcotics. Mr. Murray replied that he did not have any class II narcotics and when questioned opened a drawer to show Mr. Hendricks that it was empty. At that point, Mr. Hendricks turned around and walked out stating that he was "only joking anyway". Mr. Murray immediately telephoned the police as Mrs. Blackwell went to the front door. Mrs. Blackwell identified the Appellant's car leaving the parking lot of the pharmacy. Mr. Murray forwarded the information to the Ogden City Police Department which led to Appellant's later apprehension and the recovery of an unloaded nine millimeter handgun. The vehicle was seen by Ogden City police officers and after a chase, the vehicle stopped near 24th Street and Jefferson. Mrs. Blackwell was taken to the area where she identified the vehicle as the one leaving Murray's Pharmacy.

Mr. Hendricks was arrested as a suspect in the robbery and both witnesses were brought to the jail to be present at a line-up. both Mr. Murray and Mrs. Blackwell picked the Appellant out of the line-up as the individual who entered Murray's Pharmacy with a gun. While waiting for the line-up to occur, Mr. Hendricks kept indicating his innocence to Officer Zimmermann until finally Officer Zimmermann advised him of his Miranda rights. After being advised, Mr. Hendricks indicated he wanted to talk. During the course of the interrogation, the Appellant indicated a



series of facts regarding himself and his vehicle, but finally admitted he had gone into Murray's pharmacy, but not to commit an armed robbery. Mr. Hendricks claimed he entered the pharmacy at about 2:30 or 2:45 to get some cold medicine. At that point, Officer Zimmermann indicated that the Appellant wouldn't answer any more of his questions.

After the initial questioning was terminated the Appellant (Mr. Hendricks) did not talk to any of the officers until the next morning when an Officer Minor happened to be present in the jail during a video arraignment process. Mr. Hendricks had apparently been unable to come to terms with his private counsel, Paul Stockdale, and was requesting the assistance of a public defender. At this time, a Mr. G. Scott Jensen was appearing for the Public Defenders Association to handle video arraignments on the morning law and motion calendar. Throughout the arraignment process Mr. Jensen was present with the Appellant and Detective Minor. Detective Minor did not renew the Miranda warnings with Mr. Hendricks, and even so, proceeded to ask Mr. Hendricks questions regarding the robbery charge. During that discussion no statements adverse to the Appellant's position were given. Subsequently, Detective Minor formulated a report and testified at Appellant's trial that during this period Mr. Hendricks "confessed" to him the required intentional elements of the crime of aggravated robbery. Detective Minor stated that Mr. G. Scott Jensen was present during this confession.

At trial, during the testimony of Detective Minor the Appellant, Mr. Hendricks

objected. A conference was held in judges chambers and the Appellants trial counsel, Stephen Laker, was told to contact Mr. Jensen. At this point the court recognized if Detective Minor's testimony about the confession were untrue the jury would be tainted and a mistrial would be in order. Appellant's trial counsel, Stephen Laker did not attempt to contact Mr. Jensen as the court instructed. As a result of this indifference perjured testimony entered into the record and this testimony played a major part in the juries verdict. It is only now, several years later, through Mr. Hendricks own diligence that he has obtained a affidavit from Mr. Jensen. This affidavit proves Appellant's contention that there never was a "confession" to Detective Minor.

## **ARGUMENT**

### **Point I**

PETITION FOR EXTRAORDINARY RELIEF IN THIS CASE IS NOT A SUCCESSIVE OR REPETITIOUS PETITION WHEN PETITIONER'S DILIGENCE PROVIDES NEW EVIDENCE IN ADDITION TO DEMONSTRATION A COLORABLE SHOWING OF FACTUAL INNOCENCE.

In Sanders v. United States, 373 U.S. 1 (1963) the Supreme Court stated that successive petitions can be denied if three conditions are evident: first, the same ground presented in the subsequent petition was decided adversely to the petitioner on the prior petition; second, the prior determination was on the merits; and third, "ends of justice" would not be served by reconsideration of the claim.

While it is true that the Appellant has filed a previous petition and his post-

conviction appeal, his claim has never been borne out to the current level as he now has hard evidence showing that a highly prejudicial interrogation never took place between himself and a Detective Minor. In previously raising a ineffectiveness of counsel claim, Appellant has stated that he did object through his trial counsel, one Stephen Laker, about the false nature of Detective Minor's testimony. Then, the trial court immediately called for a conference in chambers where both counsels were instructed as to the fact that if the Detective's testimony were in fact false, a mistrial would result. Defense counsel was then instructed to contact the attorney present at the video arraignment, one G. Scott Jensen, for verification. This never occurred.

Appellant contends that the "ends of justice" require an intense reconsideration of this claim. Even if "abuse of the writ" is found, however, the court may not dismiss the petition if the "ends of justice" require consideration of the claim. Sanders, 373 U.S. at 18-19. A claim of constitutional magnitude is involved. In White v. Ragen, 324 U.S. 760, 89 LEd 1348, 65 SCt 978 (1953) the United States Supreme Court held that a conviction secured by the use of perjured testimony known to be such by the prosecuting attorney is lacking due process. In addition, the case of Bivens v. Six Unknown Agents, 403 U.S. 388, 29 LEd 2d 619, 91 SCt 1999 (1971), the Court held that government agents who act in an unconstitutional manner become liable for monetary damages.

Notwithstanding liability here, for it appears that the real damage has been done to Mr. Hendricks. The Appellant, Lyle Hendricks, has brought a showing of

good cause that justifies the filing of a successive habeas corpus claim as stated by the Utah court in Hurst v. Cook, 777 P.2d 1029 (Utah 1989) where the Court stipulated that such a showing of good cause may be established by showing: (1) the denial of a constitutional right pursuant to a new law that is, or might be, retroactive; (2) new facts not previously known that would show the denial of a constitutional right or might change the outcome of the trial; (3) the existence of fundamental unfairness in a conviction; (4) the illegality of a sentence; or (5) a claim overlooked in good faith with no intent to delay or abuse the writ.

Clearly, the affidavits of G. Scott Jensen constitute the requisite new facts consisting of a denial of due process claim. Mr. Jensen was present at the video arraignment, and in stating that the interrogation by Detective Minor never took place, the State now lacks the intent necessary to prove the crime of aggravated robbery. A condition that would have most definitely changed the outcome of the trial.

The existence of such a fundamental unfairness goes to the heart of the purpose of the writ. Habeas Corpus is not to be used to review a final judgment arrived at through regular proceedings and due process of law by a court having jurisdiction, but it is to be used to protect anyone who is restrained of his liberty where there exists no jurisdiction or authority, or where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term due process of law, or where some other circumstance exists which would make it wholly unconscionable not to re-examine the conviction.

Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967) ; Gallegos v. Turner, 17 Utah 2d 273, 490 P.2d 386 (1965). See also Rammell v. Smith, 560 P.2d 1108 (Utah 1977).

In Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality opinion) a plurality of the United States Supreme Court agreed that the "ends of justice" require that a petitioner filing a successive petition supplement his constitutional claim with a colorable showing of factual innocence. Although acceptance of the Kuhlmann plurality standard has varied among the circuits that have addressed the issue, Appellant contends that with only Detective Minor's testimony, and the prosecutions mention of it in closing statements, forming the only basis for the necessary "intent" to commit aggravated robbery, now, without this testimony as it is untrue and the requisite suppression of its mention in closing, the Appellant Mr. Hendricks is shown, inter alia, to be factually innocent of the crime of aggravated robbery.

And, despite the preference for finality in litigation, re judicata does not apply to habeas proceedings. Sanders, 373 U.S. at 7. The rationale for not applying res judicata goes again to the heart of the writ: habeas proceedings are designed to hold the government accountable to the judiciary for a person's imprisonment. Therefore, "access to the courts on habeas must not be thus impeded". Id. at 8. See also Daniels v. Blackburn, 763 F.2d 705 (5th Cir. 1985) (Res judicata principles do not apply in habeas corpus proceedings).

## **POINT II**

## APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The sixth amendment of the United States Constitution and Article I Section 12 of the Utah State Constitution guarantees the right to effective assistance of counsel in criminal prosecutions. In Strickland v. Washington, 466 U.S. 668 (1984) the Supreme Court established a two-prong standard to govern ineffective assistance claims. To obtain reversal of a conviction the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

The Utah Supreme Court has adopted this approach and stated the following in State v. Geary 707 P.2d 645, 646 (Utah 1985):

In challenging a conviction on the ground of ineffective assistance of counsel, it is the defendant's burden to show: (1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error. Codianna v. Morris 660 P.2d 1101 (Utah 1983)

Failure to meet either of these requirements will defeat a claim based on ineffectiveness of counsel. Additionally the claims must be "sufficient to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment". State v. Frame 723 P.2d 401, 405 (Utah 1986).

To satisfy the requisite "prongs" of the Strickland and overcome the strong

presumption of Frame, the court may conclude that a single error rendered counsel's assistance ineffective, but it must consider the totality of the circumstances in making its determination. Strickland 466 U.S. at 690. It is exactly such a "totality of circumstances" that the Appellant prays this Court consider. For it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was reasonable, thereby voiding a claim of ineffectiveness.

Initially, the Appellant developed a somewhat strained relationship with his trial counsel, Mr. Stephen Laker, which hampered communication between the two. In the course of the trial proceedings, Mr. Laker met with the Appellant one time. Surely facing a serious first-degree felony charge requires more due diligence when a conviction could result in a sentence that would expire with the Appellant's own natural life.

Specifically, the Appellant points to his attorney's failure to make any attempt to suppress the supposed statement Appellant made to Detective Minor. Supposed statement Appellant now has proof never occurred. (Affidavit of G. Scott Jensen no. 5 and no. 6). The likelihood of the Appellant prevailing on the suppression of these inculpatory statements and confession is evidenced by the discussion in chambers on-the-record, between Judge Roth and Mr. Laker;

The Court: "you were aware that testimony would be at least attempted to be introduced today at trial?"

Mr. Laker: "yes"

The Court: ". . . it would have been logical to have a suppression hearing prior to trial . . ."

The Court: ". . . if I do that now, we have a mistrial".

(Transcript Pages 115, line 11 through line 15)

Despite counsel's forewarning from the trial court, and despite counsel's client urging him to investigate and make claim, counsel failed to investigate or make the claim.

In addition, Appellant points to his counsel's failure to cross-examine many of the State's witnesses (Transcript, page 44, page 58, page 87, page 90). Counsel's failure to make an opening statement to the jury (Transcript, page 13). Counsel's failure to call witnesses on behalf of the defense and in presenting no defense whatsoever (Transcript, page 129).

During the course of the trial an argument ensued between counsel and his client, over Mr. Hendricks requesting that he be called to testify on his own behalf. In the course of this verbal exchange, counsel voir dired his own client, on the record, that if he took the stand on his own behalf that the State would introduce evidence of a prior conviction (Transcript, page 124). It should be noted that this issue was never addressed by the trial court.

It is also possible that counsel committed perjury before the trial court in response to the Court's Order that counsel interview Attorney G. Scott Jensen and



produce him before the Court (Transcript, page 122 and Affidavit of G. Scott Jensen).

Appellant contends the outcome of his trial would have been different. To prevail, the Appellant must:

show that but for the alleged deficiencies of counsel there exists any reasonable probability that the jury's verdict would have been different. He [must show] that the adversarial process of the trial was so undermined that the jury could not have produced a just result.

Frame at 405.

Section 76-2-307 of the Utah Code Ann. (1991) "Voluntary termination of efforts prior to offense" states as follows:

It is an affirmative defense to a prosecution in which an actor's criminal responsibility arises from his own conduct or from being party to the commission of the offense, the actor voluntarily terminated his effort to promote or facilitate its commission and either:

- (1) Gave timely warning to the proper law enforcement authorities or the intended victim; or
- (2) Wholly deprives his prior efforts of effectiveness in the commission.

Appellant states and the record clearly shows that he took no Class II narcotics when he left Murray's Pharmacy on December 8, 1987 (Transcript, page 37, line 8) through line 15) while there were large amounts of other scheduled controlled substances and cash present. the Appellant, armed with an unloaded non-functional weapon, simply stated, "I was only kidding anyway" and left the store (Transcript, page 33, line 15 and page 37, line 14).

---

1 The Section 76-2-307 U.C. Ann. (Utah Code Annotated) Affirmative defense of voluntary termination arises here not as a point of appeal, but only as a demonstration of a defense strategy left unused by counsel. It is utilized here for a showing satisfaction of both prongs of Stickland in that Appellant's actions constituted

its definition yet defense counsel failed to recognize, raise, or employ it.

These facts show an uncanny parroting of Section 76-2-307 (2) of the Utah Code Ann. wherein the Appellant, "[W]holly deprives his prior efforts of effectiveness in the commission", of an aggravated robbery. Appellant contends that defense counsel's failure to recognize such an elemental affirmative defense, let alone raise or utilize it, constitutes both a showing of prejudice and a deficiency in performance as required by Strickland and Frame.

The Appellant, Mr. Hendricks, situation meets the criteria in totality of circumstances that the Court's find most frequently results in reversal. Mr. Hendricks was completely deprived of any defense or allowed to testify on his own behalf, because of an untold conclusion[s] by defense counsel. See State v. Dumaine, 783 P.2d 1184, 1191 (Arizona 1989); and Webb v. Texas, 409 U.S. 95, 34 Led 2d 330, 93 SCt 351 (1972).

Finally, accord defense counsel Mr. Laker's failure to file a timely Docketing Statement in the correct court or to perfect appeal. Dunn v. Cook, 791 P.2d 873 (Utah 1990); Fernandez v. Cook, 783 P.2d 547 (Utah 1989) as cited in Jensen v. Deland, 795 P.2d 619 (Utah 1989).

### **POINT III**

WITH NEW EVIDENCE AND RECOGNITION OF APPELLANT'S VOLUNTARY TERMINATION OF CRIMINAL EFFORTS, FACTS DO NOT SUPPORT A FINDING OF GUILT ON THE CHARGE OF AGGRAVATED ROBBERY.

The Utah Code Annotated, Section 76-6-302, requires the State to prove

beyond a reasonable doubt that Appellant, in the course of committing the robbery, (a) used a firearm or a facsimile of a firearm, knife or a facsimile of a knife, or a deadly weapon; (b) cause serious bodily injury upon another. Part (III) of Section 76-6-302 provides that "For the purposes of this part an act shall be deemed to be:

In the course of committing a robbery if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery. In order to satisfy its burden it is incumbent upon the State to prove beyond a reasonable doubt the Defendant unlawfully and intentionally at least attempted to take personal property in the possession of another from his person, or from his immediate presence against his will accomplished by means of force or fear and that in doing so he used a firearm".

The Utah Supreme Court has expressed a rather strict standard of review when the Court is asked to review the evidence to determine the sufficiency of the evidence to support a conviction. State v. Booker, 709 P.2d 342 (Utah 1985), where the Court stated:

[W]e review the evidence and all inferences which may be reasonably drawn from it in a light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence so viewed is so sufficiently inclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that Defendant committed the crime of which he was convicted.

State v. Petree, Utah, 659 P.2d 443, 444 (1983); accord State v. McCardell, Utah, 652 P.2d 942, 945 (1982); State v. Martinez, Utah, 709 P.2d 355 (1985).

The Appellant contends that even with this standard of review the facts

demonstrated in the present case are now clearly controverted. Appellant argues that with newly discovered evidence (Affidavit of G. Scott Jensen) showing that the statements to Detective Minor, in fact, never occurred, the State cannot show the requisite "intent" necessary for a showing that the crime he committed was an aggravated robbery.

From the Affidavit of G. Scott Jensen:

"5. At no time was I or Mr. Hendricks in an interview room with Detective Minor on the morning of December 9th, 1987, where I left on any occasion, where Mr. Hendricks was with Detective Minor alone.

6. Mr. Hendricks did stop Detective Minor in the hallway by the video arraignment room and asked why he was being charged with a 1st degree felony, where Detective Minor stated, "cause a gun was involved" whereupon Mr. Hendricks went into the video arraignment and waived preliminary hearing and asked to be sentenced.

7. I do remember a phone call from Stephen Laker on January 20th, 1988 asking about Mr. Hendricks, but at the time I could not recollect who Mr. Hendricks was, I was not asked about the facts concerning me or Mr. Hendricks being in the interview room with Detective Minor or I would have testified to the facts which would have been inconsistent with Detective Minor's testimony concerning Mr. Hendricks alleged confession".

Appellant points to the State's own witnesses who admitted that when the Appellant asked for any Schedule II drugs, he was told that the object of his desire did not exist in the premises. The witnesses all clearly relate that the Appellant immediately turned around and walked out of the store the same way that he had

entered, making the comment, "I was only kidding anyway" (Transcript, page 37, line 13 through 15).

The State's witnesses made it clear that there were other narcotics available as well as substantial amount of money which was required to be in the cash register of the business. There is no argument whatsoever that the Appellant made any attempt to take any of those items from the possession of the store owner or employee.

These facts clearly indicate that the Appellant voluntarily terminated his criminal efforts prior to the commission of an aggravated robbery. Section 76-2-307 (2) of the Utah Code Ann. concerns exactly such a scenario, "Voluntary termination of efforts prior to offense". Therein arises an affirmative defense to exactly such conduct as was attempted by the Appellant, Mr. Hendricks.

With no requisite intent to commit the crime of aggravated robbery and a voluntary termination of his efforts prior to the commission of an aggravated robbery, Appellant is not suggesting that a crime did not take place, rather the Appellant argues that the uncontroverted facts suggest that Appellant is guilty of an aggravated assault rather than an aggravated robbery.

Section 76-5-103 of the Utah Code Ann. Aggravated Assault reads as follows:

- (1) A person commits aggravated assault if he commits assault as defined in Sec. 76-5-102 and he;
  - (a) Intentionally causes serious bodily injury to another; or
  - (b) Uses a dangerous weapon as defined in Sec. 76-1-601 or other means or force likely to produce death or serious bodily injury.
- (2) Aggravated assault is a third-degree felony.

Finally, Appellant contends that the court failed to consider Section 76-3-402 et al. of the Utah Code Ann. Conviction of lower degree of offense.

### **CONCLUSION**

Appellant Lyle C. Hendricks petition for extraordinary relief was improperly dismissed in Second Judicial District Court. Due to unusual circumstances; newly discovered evidence of an affidavit by an officer of the court which casts doubt as to formulation of the requisite intent to commit the crime for which he was convicted.

And a fundamental unfairness in that he was denied effective assistance of counsel, wherein his defense counsel failed to attempt suppression of prejudicial testimony, failed to cross-examine witnesses, failed to call witnesses for the defense, failed to address the jury, deliberately prejudiced his client by subjecting him to a voir dire in the presence of the jury, and failed to utilize an essential affirmative defense which, should have resulted in the Appellant's conviction on a lesser degree of offense.

Wherefore, the Appellant appeals to this Honorable Court to reverse the decision of the Second Judicial District Court overruling Judge Glasmann's dismissal, remand the case for an evidentiary hearing, and any other relief this Court deems necessary.

Dated 6<sup>th</sup> day of May 1993.

Respectfully Submitted,

Lyle C. Hendricks  
Lyle C. Hendricks  
Attorney Pro Se  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020

**CERTIFICATE OF MAILING**

I hereby certify that I have mailed four (4) true and correct copies of the above  
Appellant Brief to : Angela F. Micklos  
Assistant Attorney General  
330 South 300 East  
Salt Lake City, Utah 84111

postage pre-paid, this 6<sup>th</sup> day of May, 1993.

Lyle C. Hendricks  
Lyle C. Hendricks

## ADDENDUM



---

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

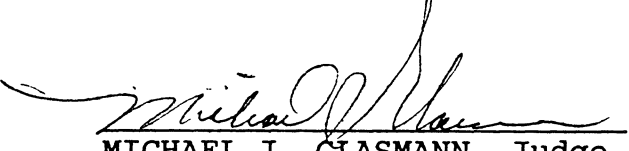
---

LYLE C. HENDRICKS,	}	
Plaintiff,	}	RULING ON WRIT OF EXTRAORDINARY RELIEF
vs.	}	
STATE OF UTAH,	}	Case No. 920900575
Defendant.	}	

---

Having examined the file in the above entitled case, I find that defendant's petition is repetitious of motions previously made and denied and I therefore am dismissing the petition on the ground that is frivolous.

DATED this 12 day of January, 1993.

  
MICHAEL J. GLASMANN, Judge

Ruling  
Case No. 920900575  
Page Two

CERTIFICATE OF MAILING

I hereby certify that on the 12<sup>th</sup> day of January,  
1993, I sent a true and correct copy of the foregoing Ruling to  
counsel as follows:

Lyle C. Hendricks  
P.O. Box 250  
Draper, UT 84020

Reed M. Richards  
7th Floor Municipal Bldg.  
Ogden, UT 84401

  
Deputy Court Clerk

## IN THE UTAH COURT OF APPEALS

---

LYLE C. HENDRICKS,  
APPELLANT,

### DOCKETING STATEMENT

-v-

STATE OF UTAH,  
APPELLEE,

Case No: 930055-CA

---

### Jurisdiction

This is an appeal from a final judgement entered in the Second District Court, for Weber County. This judgement denied appellant relief under Rule 65 U.R.C.P. from his illegal confinement. Appellant timely filed a notice of appeal.

### Statement of the case

Appellant filed with the district court under 65 (b) U.R.C.P. based on newly discovered evidence. In appellant's trial a detective testified appellant confessed to him about the "reason" for the robbery. This detective testified that appellant's attorney was present during this confession. The prosecution used this so called confession to establish intent before the jury. Appellant now has affidavits to prove this attorney was never present and the confession never took place.

### **Statement of Facts**

Appellant was not properly represented at trial. There was never a confession. This evidence was used to establish intent. The jury found appellant guilty of first degree robbery. The new evidence viewed in light most favorable to the government should be allowed. This evidence proves perjury of one of the state's key witnesses.

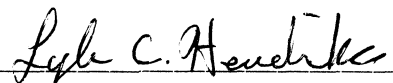
### **Issue on Appeal**

1. Newly discovered evidence.
2. Ineffective assistance of counsel.
3. Lesser included offence.
4. Intent to commit robbery.

### **Related Appeal**

This case was heard by this court on direct appeal a decision was entered on February 5, 1990. The evidence not available at the time.

Respectfully Submitted,

  
\_\_\_\_\_  
Lyle C. Hendricks

### **Certificate Of Service**

I certify that I mailed a true and correct copy of the Docketing Statement to the following. This was done by placing it in the U.S. mail on the undersigned date.

Jan Graham  
236 State Capitol Building  
Salt Lake City, Utah 84104

*Lyle C. Herlihy*

IN THE UTAH COURT OF APPEALS

MAR 22 1993

-----oo0oo-----

Lyle C. Hendricks,  
Petitioner and Appellant,  
v.  
State of Utah,  
Respondent and Appellee.

ORDER

Case No. 930055-CA

  
Mary T. Noonan  
Clerk of the Court

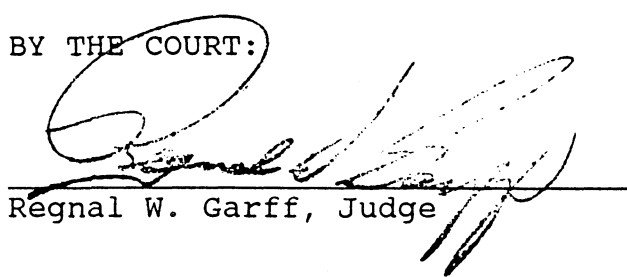
-----  
This matter is before the court upon appellee's motion to dismiss appeal, filed February 19, 1993. Appellant's objection to the motion was filed March 12, 1993.

Appellee seeks dismissal of the appeal pursuant to Rule 26(c) of the Utah Rules of Appellate Procedure due to appellant's failure to timely file a docketing statement. On February 18, 1993, appellant filed his docketing statement.

Now therefore, IT IS HEREBY ORDERED that appellee's motion to dismiss is denied.

Dated this 23rd day of March, 1993.

BY THE COURT:

  
Regnal W. Garff, Judge


AFFIDAVIT of G. Scott Jensen

I, G. Scott Jensen, Being first Duly Sworn upon oath, depose and say as follows:

1. That I am an Attorney Licensed to practice law in the State of Utah.
2. THAT on Dec 9, 1987 I worked on a part time Basis with the Weber County Public Defender Association.
3. It is possible on Dec 9, 1987 I stood with MR. Lyle C. Hendricks for an arraignment.
4. After discussing the Matter with Martin Gravis, the history of the Case sounded vaguely familiar And I might have been the one who stood up with Lyle during his Arraignment.
5. At no time was I or MR. Hendricks in a interview Room with "Detective Minor" on the Morning of Dec. 9, 1987, where I left on Any occasion, where MR. Hendricks was with "Detective Minor" alone.
6. MR. Hendricks did stop "Detective Minor" in the hall-way by the Video arraignment room and asked why he was being charged with a 1st degree felony, where "Det. Minor" stated "Cause a Gun was involved" where upon MR. Hendricks went into the Video arraignment and waived his preliminary hearing and asked to be sentenced.
7. I do remember a phone call from Stephen L. Baker on Jan 20, 1988 asking about MR. Hendricks, but at the time I could not recollect who MR. Hendricks was, I was not asked about the facts concerning me or MR. Hendricks being in an interview room with "Det. Minor" or I would have testified to the facts which would have been inconsistent with "Det. Minor" testimony concerning MR. Hendricks' alleged confession.


I Hereby certify this is true and correct to the best  
of my knowledge and belief

Dated this 12 day of November, 1990

  
G. Scott Jensen  
Attorney at Law

Subscribed And Sworn to me before this 12 day of  
November, 1990

My Commission Expires  
3/12/92

  
Jacquelyn M. Beretti  
Notary Public  
Residing at: Opendale





1 to December 8th of last year, were you working that afternoon?

2 A Yes.

3 Q And was Mr. Murray working that afternoon?

4 A Yes.

5 Q Mrs. Blackwell, did--would you please explain to  
6 the Jury what, if anything, happened at Murray's Pharmacy  
7 about 3:30 that afternoon?

8 A Murray and I were in the pharmacy working. And a  
9 fellow came in with a gun and walked between us, and said  
10 he wanted all the class 2 narcotics. Murray told him we  
11 didn't have any, and to go see. And he said you show me.  
12 So Murray went over and opened the drawers and showed him  
13 we didn't have. And he turned and went out of the pharmacy  
14 and said I was just fooling anyway, or kidding, I don't  
15 remember for sure. And left the store.

16 Q Mrs. Blackwell, when you said you and Murray  
17 were in the pharmacy, let me direct your attention over to  
18 this diagram, Proposed State's Exhibit number 4. Do you  
19 recognize this as a layout of the store, this being the  
20 Harrison entrance that's kitty-cornered, the shelves, some  
21 tables back here and a gate over here; a fair pharmacy section?

22 A Yes.

23 Q Is that what you were talking about when you said  
24 you and Murray were in the pharmacy area?

25 A Yes.

1 courtroom today?

2 A Yes.

3 Q Would you please point him out?

4 A Right there.

5 Q The person in the striped shirt?

6 A Yes, striped shirt.

7 MS. KNOWLTON: May the record reflect the Defendant  
8 is wearing a striped shirt?

9 THE COURT: Yes.

10 MS. KNOWLTON: Thank you.

11 Q Mrs. Blackwell, is there any doubt in your mind  
12 this is the young man?

13 A No.

14 MS. KNOWLTON: I have no further questions.

15 THE COURT: Mr. Laker?

16 MR. LAKER: No questions.

17 THE COURT: You may step down, thank you. May this  
18 witness be excused?

19 MS. KNOWLTON: I have no objection.

20 THE COURT: Mr. Laker?

21 MR. LAKER: No objection.

22 THE COURT: You are excused, thank you.

23 MS. KNOWLTON: The State would call John Stallings.

24 JOHN STALLINGS

25 called as a witness, and having been first duly sworn, was

1 but I just wanted some cold medicine. I wasn't setting  
2 it up for a robbery either. I just went in there. That  
3 was at 2:30 or 2:45. And then that's basically all he  
4 would say. He kind of got upset and wouldn't really talk  
5 to me, wouldn't really answer my questions.

6 Q Okay.

7 MS. KNOWLTON: I have no further questions.

8 THE COURT: Mr. Laker?

9 MR. LAKER: No questions of this witness.

10 THE COURT: You may step down, thank you. May  
11 this witness be excused?

12 MS. KNOWLTON: Yes, your Honor, no objection.

13 MR. LAKER: No objection.

14 THE COURT: You are excused.

15 MS. KNOWLTON: The State would call Joe Chesser.

16 JOSEPH L. CHESSER

17 called as a witness, and having been first duly sworn,  
18 was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MS. KNOWLTON:

21 Q Would you please state your name and occupation?

22 A Joseph L. Chesser. I am a police officer for  
23 Ogden City.

24 Q And to what division are you specifically assigned?

25 A To the Detective Division.

Q Was there more conversation?

THE COURT: I am not sure it is clear to me precisely who was in the room at the time this was taking place. Let's go over that again.

Q Okay, when you got back to the room, one of the little interview rooms in the jail, who was there?

A ~~At first, myself, the Public Defender, and Mr. Hendricks.~~ Right after the conversation started, the Public Defender went back up to where the video arraignments take place. ~~And then he would walk back into the room for a minute and stand there for a couple of minutes.~~ Then he walked back up to the--to where the video arraignments take place. ~~And then he finally came back and said that it was time for Lyle's turn in the arraignment.~~

THE COURT: Was there any discussion as to whether or not this attorney was representing Mr. Hendricks or not?

A ~~That was the indication I got by Mr. Hendricks.~~ He told me Mr. Stockdale had resigned the case, ~~and that he had some other conversation. And it was this attorney coming in with him during the arraignment, or the video arraignment.~~

Q You don't know the attorney's name?

A ~~I think it was Jensen.~~ I asked Ms. Knowlton.

THE COURT: What did he look like?

A Glasses, tall, kind of reddish blond short hair.

THE COURT: Go ahead.

Q Detective Miner, what was next--who spoke next, if you recall?

A He stated that he didn't point the gun at anybody.

Q This is Mr. Hendricks talking?

A Yes.

Q Okay. What next, or who next spoke?

A Me.

Q What did you say?

A I asked him why he went in the pharmacy.

Q Did he have a response?

A Yes.

Q What did he say?

A He told me that--I think at first he told me,  
at he wanted some drugs. And I said why. And he went  
on to tell me that he had been taking coke that day, and  
s coming down. And that he had had a confrontation  
with an individual, and that he planned on killing the  
individual. He was coming down off the coke, and he wanted  
to stay high. He didn't want to back out of it, wanted  
to go through with killing him.

Q What did you say?

A I can't remember my response. I asked him more

1                   X5. JUDGMENT, Yes.

2                   THE COURT: Were those made available to the  
3 defense?

4                   MR. LAKER: Yes.

5                   THE COURT: You had those reports?

6                   MR. LAKER: Yes.

7                   THE COURT: You were aware that that testimony  
8 would be at least attempted to be introduced today at  
9 trial?

10                  MR. LAKER: Yes.

11                  THE COURT: The only reason for asking the question  
12 is it seems likely it would have been logical to have  
13 a suppression hearing prior to trial if you were concerned  
14 about the admissibility, rather than right while it was  
15 going before the Jury.

16                  MR. LAKER: Well, I was--the police report is--  
17 the whole issue of whether there was counsel or not was  
18 very unclear. That part is not in there.

19                  THE COURT: The record indicates that Scott  
20 Jensen was counsel on the morning of the 9th, that he  
21 represented the Defendant at the arraignment. That they  
22 waived Preliminary Hearing, and it was bound over to  
23 District Court.

24                  MR. LAKER: Well, the problem I have with that,  
25 your Honor, is that it is--I am not sure it was clear