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IN THE JUDICIAL DISTRICT COURT
..... COUNTY, STATE OF UTAH

<p>,</p> <p>Petitioner,</p> <p>vs.</p> <p>STATE OF UTAH,</p> <p>Respondent.</p>	<p>STATE’S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION FOR POST-CONVICTION RELIEF</p> <p>Case No.</p> <p>Judge</p>
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The State submits the following memorandum in support of its motion to dismiss the petition for post-conviction relief.

PROCEDURAL HISTORY

On petitioner was charged with one count of, a third degree felony, he entered into a Plea in Abeyance. Under that plea, Petitioner was required to fulfill certain conditions, including that he successfully complete Drug Court, and violate no laws. *Id.*

Sometime after that, Petitioner was apparently picked up and is currently being held by U.S. Immigration and Customs Enforcement (ICE).

On, petitioner filed his petition for post-conviction relief.

FACTS

(This case has some privilege issues and some of the documents were filed under seal, so I have deleted any information that would identify a defendant, but included the relevant argument).

ARGUMENT

Petitioner states that he is petitioning the court pursuant to Rule 65B(b) and/or 65C. Petitioner is not entitled to relief under either rule because he is not currently in State custody, and no conviction or sentence has yet been entered.

I. Petitioner is not entitled to relief under Rule 65B(b) because he is not currently in State custody.

Rule 65B states that “[e]xcept for instances governed by Rule 65C, [rule 65B(b)] shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty.” Utah R. Civ. P. 65B(b). However, as far as respondent can tell, Petitioner is not in State custody and is not claiming that the State has wrongfully restrained his personal liberty. It appears that he is in ICE federal custody. Therefore, his personal liberty is being restrained by federal, not state, authority.

Petitioner is not entitled to relief under Utah Rule of Civil Procedure 65B(b), because it is a state rule governing state petitions claiming that a person has been wrongfully restrained of personal liberty by the State. But the State is not restraining Petitioner's liberty, since he is not in State custody. His liberty is being restrained by the federal government because he is in the custody of ICE. Petitioner does not appear to be alleging that the State has wrongfully restrained his personal liberty.¹ Because Petitioner is not being held in State custody, and is not alleging that the State has wrongfully restrained his personal liberty, he cannot proceed with a petition under rule 65B(b).

¹ Petitioner also does not appear to be challenging his federal custody, and a claim challenging his federal custody would have to be raised and addressed in federal court. The validity of his federal custody could not be challenged by a state extraordinary writ petition under Utah Rule of Civil Procedure 65B. *See Resendiz v. Kovensky, Acting Director*, 416 F.3d 952, 957-78 (9th Cir. 2005) (Custody under the Immigration and Naturalization Service is not custody pursuant to the judgment of a state court to permit a challenge to a state judgment to avoid deportation).

II. Petitioner is not entitled to relief under the PCRA because no conviction or sentence has been entered.²

Rule 65C “governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9.” Utah R. Civ. P. 65C(a). The Post-Conviction Remedies Act (PCRA) is found at Utah Code Ann. §§ 78B-9-101 through 110. The PCRA “establishes the sole remedy for any person who challenges a conviction or sentence for a criminal offense.” Utah Code Ann. § 78B-9-102. The PCRA “does not apply to: (a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense.” Utah Code Ann. § 78B-9-102(2)(a).

Petitioner is not entitled to relief under the PCRA because he is not challenging a conviction or sentence. Petitioner entered pleas in abeyance. Therefore, no conviction or sentence has yet been entered, so there is not yet any conviction or sentence to challenge.

If a condition of the pleas in abeyance is violated, and convictions and sentences are entered, then Petitioner may proceed under the PCRA with a post-conviction petition

² Even if petitioner could proceed with a post-conviction claim at this time, he has failed to state a claim upon which relief could be granted. Petitioner alleges that his counsel failed to advise him of the immigration consequences of his plea. However, he fails to assert what, if any, immigration consequences resulted from his pleas in abeyance. It is not clear that Petitioner’s current custody by ICE is a consequence of or even related to his pleas in abeyance. Under *Padilla*, it may be deficient performance if counsel fails to advise a defendant of immigration consequences when “the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences.” *Padilla v. Kentucky*, 130 S.Ct. 1473, 1483, 176 L.Ed.2d 284 (2010). Petitioner has failed to allege, let alone establish, that any immigration consequences of his pleas in abeyance meet this standard.

challenging his convictions and/or sentences.³ However, until there is an actual conviction or sentence to challenge, there is no remedy under the PCRA.⁴

The State recognizes that this situation leaves petitioner without a means to challenge his pleas in abeyance. But that may be the cost for the benefit of entering a plea in abeyance. That is, a plea in abeyance gives a defendant the opportunity to avoid a criminal conviction altogether. The price for that opportunity is that there is no conviction to challenge. If and when the conditions of the pleas in abeyance are violated, and a conviction is actually entered, then Petitioner may proceed with a petition for post-conviction relief.

³ Even if petitioner is deported, deportation alone would not necessarily make a petition for post-conviction relief moot. For purposes of federal habeas relief, custody requirements are jurisdictional and an individual who has been deported is no longer in custody. *Miranda v. Reno*, 238 F.3d 1156, 1158-59 (9th Cir. 2001). However, unlike federal habeas law, Utah's PCRA does not require that a petitioner actually be in custody. It merely requires that there be a conviction or sentence and that all other legal remedies be exhausted. Utah Code Ann. § 78B-9-102(1).

⁴ The State notes that trial counsel filed the current post-conviction petition. However, if Petitioner proceeds with a post-conviction petition after a conviction is entered, being represented by trial counsel could present a conflict of interest, since the allegation is ineffective assistance of trial counsel. If a post-conviction case proceeds, and an evidentiary hearing were held, trial counsel could be called to testify. To avoid this type of conflict, the PCRA specifically states that “[c]ounsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.” Utah Code Ann. § 78B-9-109(1).

III. An allegation that he was denied his right to appeal must be pursued by filing a Manning motion in the underlying criminal cases.

In his petition, Petitioner also alleges that his right to appeal was violated by counsel's failure to file a timely notice of appeal and failure to advise him of the immigration consequences of his pleas. However, an allegation that a right to appeal was violated must be pursued by filing a motion in the underlying criminal case. *Manning v. State*, 2005 UT 61, ¶ 31, 122 P.3d 628.

Even if Petitioner could proceed with this claim in a post-conviction petition, he has failed to establish that his right to appeal was violated. Petitioner was properly advised of his appellate rights in the written plea agreements he signed (addenda G & H). If the plea in abeyance is violated and a conviction and sentence are entered, petitioner waived his right to appeal his conviction by entering into the plea agreement. *Id.* However, he could still appeal the sentence imposed if he filed a notice of appeal within 30 days after the sentence is entered. *Id.*

In addition, the *Padilla* case is related to claims of ineffective assistance of counsel. *Padilla* does not anywhere state that a defendant is denied his right to appeal if his counsel does not advise him of immigration consequences. A violation of the requirements as set out

in *Padilla* may establish ineffective assistance of counsel,⁵ but it does not establish that the right to appeal was violated.

CONCLUSION

Based on the facts and argument presented above, respondent respectfully asks this court to grant the State's motion to dismiss the petition for post-conviction relief.

Dated this ____ day of July, 2013.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

Erin Riley
Assistant Attorney General
Attorneys for Respondent

⁵ However, as addressed in footnote 2 above, petitioner has not established that he meets the requirements of *Padilla* to establish ineffective assistance of counsel.

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of July, 2013, I served a copy of the foregoing STATE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION FOR POST-CONVICTION RELIEF by causing the same to be mailed, via first class mail, postage prepaid, to the following:

(Counsel for petitioner)
