The Post-Conviction Remedies Act

(or what do I do with this petition for post-conviction relief?)

August 2013

1. **Read the Statute**
   Post-Conviction Remedies Act [PCRA]
   Utah Code Ann. §§ 78B-9-101 through 78B-9-110

2. **Read the Rule**
   Utah Rule of Civil Procedure 65C - Post-Conviction Relief

3. Check to see if the Judge has performed the required **initial review**.

Under Rule 65C(i) the court must review the petition and determine whether all or part of it should be summarily dismissed. The court may dismiss the entire petition without ever requiring you to respond. If the petition is not entirely 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."

Remember, the Petitioner is not required to serve a copy on you. He is only required to file it with the court (see Rule 65C(c)). Just because he might give, mail, or serve you with a copy, you are not required to respond until after the court has performed its initial review and determined that all or part of it should not be summarily dismissed, and the court has served you with a copy of the petition.

4. Once the court has performed its initial review, designated the portions not dismissed, and served it on you, you must file an answer or other **response within 30 days**. Rule 65C(k). You may file a motion requesting an enlargement of time to respond under civil rule 6(b).

5. Check to make sure it is a petition that is **properly assigned** to you.

Under Rule 65C(i), 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. So you should only receive petitions where your office prosecuted the petitioner.

6. Check to make sure he has filed the petition as a **separate civil action**. He cannot file his petition in the criminal case. If he has erroneously filed it in the criminal case, file a motion to dismiss or ask the court to re-file it as a civil action.

"Proceedings under this chapter [PCRA] are civil and are governed by the rules of civil procedure." 78B-9-102(1)

7. Request and review the **criminal file.**

(or at least the court docket in justice court. Remember that entries in a justice court judge's docket are prima facie evidence of the facts stated. 78A-7-111 and are presumed correct without contrary evidence. *State v. Bailey*, 282 P.2d 339 (Utah 1955).

8. Has he filed a petition that meets the statute and rule requirements?

"The petition should be filed on forms provided by the court." Rule 65C(c) See Form 47 - found in the appendix at the back of the civil rules

(Rule 65C(h)(3) allows the court to return a copy of the petition with leave to amend within 20 days if the petition is deficient due to pleading error or failure to comply with the requirements of the rule. I have filed a motion asking the court to do this when the petition was so bad I couldn't tell what he was claiming).

9. In response to the petition, you may file an **answer, a motion to dismiss or a motion for summary judgment** Rule 65C(k). **(See attached sample, <u>Ashley Fielding v. State</u>).**

10. You can always call or e-mail the post-conviction section at the Attorney General's office to ask questions, to **ask for help**, to ask if we have sample motions related to your issue that we could send you copies of, etc. We are happy to help. You can call me directly or call the appellate section and ask to speak to anyone who handles post-conviction cases.

Erin Riley
Assistant Attorney General
Criminal Appeals
eriley@utah.gov
(801) 366-0110 - Erin's direct line
(801) 366-0180 - the main number

Burden of Proof - 78B-9-105

Remember that in a petition for post-conviction relief, the **Petitioner bears the 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." Utah Code Ann. §78B-9-105(1).

Unlike in the criminal case, the petitioner is not presumed innocent. He has already pled guilty or been found guilty. He is no longer a defendant. He is a civil petitioner.

He has filed a civil action where he bears the burden of convincing the court why he is entitled to relief.

The respondent has the burden of pleading any ground of preclusion - in other words, you have the burden to tell the court that the petition is untimely, or procedurally barred, etc., "but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence." Utah Code Ann. §78B-9-105.

For example, if you argue that the petition is untimely, then the petitioner has the burden to prove to the court that his petition is timely, or why he should be allowed to proceed with an untimely petition.

Is the petition TIMELY? - 78B-9-107

(was it filed within the one year statute of limitations?)

Utah Code Ann. §78B-9-107

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

If the petition is not filed within one year it is untimely and you should file a motion to dismiss based on untimeliness.

The Court should rule on the timeliness issue before addressing any of the merits "if a court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106." Utah R. Civ. P. 65C(b).

Check to see if all of the claims are timely. On rare occasions some of the claims might be timely while some are time-barred.

<u>Accrual of the cause of action</u> - 78B-9-107(2)

The one year begins to run from the latest of the following dates:

a. the last day for filing an appeal if no appeal is filed
b. entry of an appellate decision
c. last day for filing a cert petition if none filed
d. entry of denial of a cert petition
e. "the date on which the petitioner knew of should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based"
f. the date on which a new rule - as described in section 78B-9-104(1)(f) is established

NO INTERESTS OF JUSTICE EXCEPTION

Older versions of the PCRA included language that

** "If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations." **warning - this language no longer exists!!!**

Petitioners often still attempt to argue that the one-year time limitation should be excused in the "interests of justice." But the "interests of justice" exception no longer exists.

The PCRA was amended in 2008. The "interests of justice" exception was deleted and a tolling provision was added instead. The statute now states that "[t]he limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity." Utah Code Ann. § 78B-9-107(3).

Tolling Provisions - 78B-9-107(3) & (4)

The PCRA 1-year statute of limitations is tolled:

- during the time period a petitioner was prevented from filing a petition due to state action in violation of the United States Constitution,
- was prevented from filing due to physical or mental incapacity,
- while a petition for DNA testing is pending under 78B-9-303, or
- while a petition for factual innocence is pending under 78B-9-401

Remember, it is still the Petitioner's burden to prove that the time limit should be tolled. He must establish that he was prevented from timely filing his petition due to one of the statutorily recognized reasons.

PROCEDURAL BARS - 78B-9-106

(Are some or all of the claims procedurally barred?)

A petitioner is not eligible for relief on any ground that:

a. may still be raised on appeal or by a post-trial motion
(in other words, if he could file a motion for new trial, or still appeal or has an appeal pending, he may not yet proceed with a post-conviction petition)

b. was raised or addressed at trial or appeal
(post-conviction is not a 2nd bite at the appeal. For example, if he already filed a motion to exclude certain evidence and lost, he may not raise that issue in a post-conviction petition. He could challenge the judge's decision on appeal, but he cannot just re-raise the same issue that was already raised or addressed at trial or on appeal).

c. could have been, but was not raised at trial or on appeal
(for example, if he filed a motion to exclude certain evidence and lost, but his appellate counsel did not challenge that decision on appeal, he could file a post-conviction petition alleging that he received ineffective assistance of appellate counsel because his counsel did not raise the issue on appeal. But he could not just re-raise the same issue already raised at trial)

d. was raised or addressed or could have been raised in any previous request for post-conviction relief
(in other words, if he already filed a petition, but did not raise a certain claim, he could not simply file a second petition and try to raise that claim, because it could have been raised in his first petition. Similarly, if he already raised it in his first petition, he cannot file a second petition and ask for a second opinion on an issue already raised).

e. is barred by the statute of limitations

You can raise any of the above procedural bars at any time, and a court may raise a procedural bar even if you don't raise it. 78B-9-106(2)

Exception:

A petitioner 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. 78B-9-106(3).

On post-conviction, he must raise his issue as a claim of ineffective assistance of counsel. In other words, he cannot go directly to the underlying issue. He has to prove ineffective assistance of counsel.

Padilla cases

Is the Petitioner alleging that he received ineffective assistance of counsel because his counsel failed to advise him of the immigration consequences of his plea, as required under ***Padilla v. Kentucky,*** 559 U.S. 356, 130 S.Ct. 1473?

1. First, check the **time** frame

Was the guilty plea entered before or after entry of the *Padilla* decision on March 31, 2010?

2. If the plea was entered **before** the *Padilla* decision, the petition is most likely time-barred because of the ruling in ***Chaidez v. United States***, 133 S.Ct. 1103, that the new *Padilla* rule does not apply retroactively.

Padilla announced a new rule that was not dictated by precedent. *Chaidez*, 133 S.Ct. at 1110-1111.

"[D]efendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding." *Chaidez,* 133 S.Ct. at 1113

(see attached **Sample**
Mohamed Barkatle v. State, memo in support of Motion to Dismiss)

3. If the plea was entered **after** the *Padilla* decision, it gets a little more complicated. There are a lot more factors to consider, such as:

- is the petitioner timely?
  Even if the plea was entered after *Padilla*, the petition still has to be filed within 1 year of accrual of the cause of action or else it is untimely.
- did counsel really not advise him? (Just because a defendant claims this doesn't necessarily make it true. Talk to counsel to find out what he says. Remember that Petitioner has waived his attorney/client privilege as to this issue by alleging ineffective assistance of counsel)
- even if counsel did not advise him, was he advised by the court or in the written plea agreement, etc? (Even if counsel was deficient for not advising him, petitioner cannot establish prejudice if you can show that he was advised)
- was he here legally? (If he is an illegal alien, he can never establish prejudice because he is already deportable, no matter whether he was convicted of this offense or not)
- does he have other convictions that make him deportable? (If he is already deportable based on another conviction, he cannot establish prejudice)

- did counsel have any reason to advise him?

  This is an issue that has not yet been resolved by the Utah courts or the U.S. Supreme Court. But our position is that:

Counsel are not deficient, even under *Padilla,* for failing to advise a client of immigration consequences of a plea, when they do not know and have no reason to suspect that their client is not a U.S. citizen. If counsel don't know that their client is not a U.S. citizen, they have no reason to know or suspect that there would be any immigration consequences from the guilty pleas.

Counsel in *Padilla* knew that his client was not a U.S. citizen. *Padilla*, 130 S.Ct. at 1478. "*Padilla* does not discuss the case of an attorney who does not know the client is an alien." *State v. Limarco*, 235 P.3d 1267U, 2010 WL 3211674 (Kan.App). "If the defendant's attorney had no reason to believe that the defendant was a non-citizen, then he had no obligation to address immigration consequences with him and his failure to do so cannot be considered objectively unreasonable." *People v. Wong*, 29 Misc.3d 1227(A), 920 N.Y.S.2d 24366, 2010 WL 4861044 (N.Y. City Crim. Ct.). "If an attorney did not know and had no reason to know his client was an alien, then a failure to advise the client about immigration consequences might not constitute ineffective assistance, even under *Padilla*." *Limarco*, 235 P.3d 1267U

"Because appellant did not tell plea counsel that he was not a citizen, and the record is void of any facts indicating that plea counsel knew or should have known otherwise, plea counsel had no obligation to advise appellant of possible immigration consequences to pleading guilty, and, therefore, any failure on behalf of plea counsel to provide such advice could not have fallen below an objective standard of reasonableness." *Phillips v. State*, 2011 WL 781197 (Minn. App.).

- Finally, even if counsel's performance was deficient, can the Petitioner establish prejudice?

A petitioner's assertion that he would not have pled guilty is not sufficient to establish prejudice. "[M]ere allegation that he would have insisted on trial but for his trial counsel's errors, although necessary, is ultimately insufficient to entitle him to relief. Rather, we look to the factual circumstances surrounding the plea to determine whether [he] would have proceeded to trial." *United States v. Clingman*, 288 F.3d 1183, 1186 (10th Cir. 2002) (citation omitted).

"[C]ourts applying this standard will often review the strength of the prosecutor's case as the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial." *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001). "It is not necessary for the defendant to show that he actually would have prevailed at trial, although the strength of the government's case against the defendant should be considered in

evaluating whether the defendant really would have gone to trial if he had received adequate advice from his counsel." *Miller*, 262 F.3d at 1069.

The determination as to whether a petitioner has met the prejudice prong must include consideration of all of the facts and circumstances of the case. This includes whether Petitioner confessed, the strength of the State's case, whether the plea offer was to a reduced charge, whether other charges were dismissed, and the likelihood of conviction on the greater charge or additional charges if petitioner had gone to trial, etc.

Miscellaneous *Padilla* issues:

The fact that they are about to be deported should not change how the case proceeds:

Petitioners often argue that their post-conviction petition must be dealt with immediately because they are about to be deported.

First, that is not our problem and we have no control over that. The Judge also has no control over that. A state judge can **not** order the federal government (ICE) not to deport a petitioner while the petition is pending.

Second, a petition does not automatically become moot merely because a Petitioner is deported. A Petitioner may choose to continue with his petition from his native country. It is going to be a lot harder for him, because he won't be here in person to testify, etc. But he can ask to appear by video conferencing, or ask to allow the court to consider his deposition, etc. You don't have to agree to any of that - but the Petitioner can ask for it, and the court could agree.

***Padilla* does not require counsel to advise of other collateral consequences:**

Petitioners often argue that they received ineffective assistance of counsel under *Padilla* because their counsel did not advise them of other immigration issues or other collateral consequences.

for example - that counsel did not advise them they could not become a citizen, or counsel did not advise them that limitations would be placed on their ability to travel outside of the country, or counsel did not advise them that they would have to register as a sex offender for life, not just for 10 years, etc. None of these things are required by *Padilla*.

Padilla merely requires that "when the deportation consequences is truly clear," counsel must give correct advice that the plea may subject him to deportation.

"When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla*, 130 S.Ct. at 1483.

Knowing and Voluntary plea

Petitioners often allege that their plea was not knowing and voluntary because they were not advised of the immigration consequences of their plea.

First, *Padilla* only applies to claims of ineffective assistance of counsel. *Padilla* only addresses defense counsel's obligations under the Sixth Amendment. It says nothing at all about a court's obligation or the State's obligations under due process.

In *State v. McFadden*, 884 P.2d 1303, 1304-05 (Utah App. 1994) *cert. denied*, 892 P.2d 13 (Utah 1995), the Utah Court of Appeals noted that due process only requires that "an accused must be 'fully aware of the direct consequences of a guilty plea.'" *Id.* at 1304 (quoting *Brady v. United States*, 397 U.S. 742, 755 (1970)). The court further held that if a particular "consequence flowing from the plea is 'collateral,' then the defendant need not be informed of it before entering the plea." *Id.* (citation omitted). After noting that federal courts had "uniformly" concluded that deportation is a collateral consequence for purposes of due process, the court held that "the voluntariness of a plea is unaffected by collateral consequences such as possible deportation." *Id.*

The rule set forth by the United States Supreme Court in *Brady* and adopted by the Utah Court of Appeals in *McFadden*, was reaffirmed by the court of appeals in *State v. Marshall*, 2003 UT App 381, ¶ 21 n.9, 81 P.3d 775.

"For a plea to be knowing and voluntary, an accused must be fully aware of the *direct* consequences of a guilty plea. . . . However, [i]f the consequence flowing from the plea is 'collateral,' then the defendant need not be informed of it before entering the plea." *Id. Padilla* did not change this. *Padilla* only discusses ineffective assistance of counsel as to immigration consequences.

Other courts have recognized this in the post-*Padilla* context. In *United States v. Delgado-Ramos*, 635 F.3d 1237, 1237 (9th Cir. 2011), the Ninth Circuit reiterated that "a court conducting a plea colloquy must advise the defendant of the direct consequences of his plea, but need not advise him of all the possible collateral consequences of the plea." The Ninth Circuit specifically noted that while *Padilla* governs in the ineffective assistance context, the decision "sheds no light on the obligations a district court may have under . . . due process." *Id.* Thus, even with *Padilla*, the Ninth Circuit continued to apply its earlier case law stating that a failure to inform a person of the immigration consequences of their plea was not a violation of due process. *See id*.

In *Smith v. State*, 697 S.E.2d 177, 184 (2010), the Georgia Supreme Court reached the same conclusion, rejecting the idea that *Padilla*'s language regarding ineffective assistance of counsel claims also extends to due process:

> In short, despite its discussion of the importance of deportation risks to some defendants, in the end the Supreme Court did *not* extend the direct consequences doctrine to that issue, or reject the basic distinction between direct and collateral consequences in determining whether a defendant's guilty plea was knowingly and voluntarily entered. In the absence of such a binding directive to do so, we decline to do so either.

Id. at 184.

Thus, while deportation is "intimately related to the criminal process," the possibility of deportation is still collateral for purposes of due process because it "remains a consequence beyond the authority of the sentencing court, and . . . does not lengthen or alter the sentence that the state court imposes." *Id.*

In short, controlling law from the United States Supreme Court and Utah's appellate courts hold that due process is not violated when a defendant is not informed of immigration consequences prior to a plea.

ICE contact information

ICE has a "duty attorney" who is always available. You may call the Salt Lake City ICE office to find out information about your petitioner. If you have specific enough information about him, you can find out

- when an immigration detainer was filed against him (this is relevant to the time-bar issue)
- what documents and notification he received
- if he has previously been deported
- when he entered the country,
- whether he entered illegally,
- where he is currently being held, or
- whether he has already been deported, etc.

Immigration and Customs Enforcement (ICE)

801-236-4200

You can also find out information about your petitioner by going to ICE's online detainee locator system:

https://locator.ice.gov/

The *Teague* issue related to *Padilla* cases

This is a new argument we have started to see. Petitioners allege that Utah does not have to follow *Chaidez* because *Teague* is a federal case and Utah does not have to follow *Teague.*

Petitioner acknowledges that the United States Supreme Court held in *Chaidez* that the new rule announced in *Padilla* does not apply retroactively to cases already final on direct appeal. However, the petitioner nevertheless argues that state courts are free to apply *Padilla* retroactively because state courts don't have to follow the rule in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

But the *Teague* rule is irrelevant in these cases. What is relevant is the PCRA's statutory provisions concerning retroactive application of new rules.

The PCRA includes specific statutory provisions concerning retroactive application of new rules. The PCRA states that a cause of action may accrue on the date on which a new rule is announced if the petitioner can prove that "the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final." Utah Code Ann. §§78B-9-107(2)(f) and 78B-9-104(1)(f)(i). In *Chaidez*, the United States Supreme Court held that *Padilla* announced a new rule not dictated by precedent.

The new *Padilla* rule therefore does not meet the PCRA standard for accrual of a cause of action because the new rule was <u>not</u> dictated by existing precedent at the time the conviction or sentence became final.

States are bound to follow their own statutory law, therefore the Utah courts are bound to follow Utah's PCRA, including its provisions governing the one year statute of limitations and accrual of a cause of action.

A petition is untimely because the Supreme Court held that *Padilla* announced a new rule that was not dictated by existing precedent, and under the PCRA, a cause of action accrues on the date of decision of a new rule only if the new rule was dictated by existing precedent. Since the *Padilla* rule was <u>not</u> dictated by existing precedent, the cause of action did not accrue on the date *Padilla* was decided. Therefore the petition is untimely. *Teague* is not controlling. The PCRA is controlling.

(*see sample argument attached - <u>Collins</u>* Reply*)*

Newly Discovered Evidence

The PCRA states that a petitioner may file a petition for post-conviction relief based upon a claim of newly discovered evidence because

i. neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing
ii. and the evidence is not merely cumulative of evidence that was known,
iii. is not merely impeachment evidence; and
iv. when "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.

Utah Code Ann. § 78B-9-104(1)(e).

Manning motions

(*Manning v. State*, 2005 UT 61)

There are two problems that we frequently see:

1. A petitioner files a petition for post-conviction relief where he raises several issues, including a claim that he was denied his right to appeal.

If he is actually claiming that he was denied his right to appeal, he cannot raise that in a post-conviction petition. He must instead file a *Manning* motion in the criminal case. Therefore, the entire petition should be dismissed while he proceeds with his *Manning* motion.

(see sample motion attached - Cracroft, memo to dismiss)

2. A petitioner may attempt to get around the PCRA's one year statute of limitations by filing a *Manning* motion instead of a petition for post-conviction relief.

But the only issue a defendant can raise in a *Manning* motion is that he was denied his right to appeal. If he attempts to raise or address issues other than whether he was denied his right to appeal, the court should dismiss the motion.

Under *Manning,* a criminal defendant claiming denial of the right to appeal must file a motion in the trial court for reinstatement of a denied right to appeal.

And remember, even if he properly filed a *Manning* motion, and the court determines that he was denied his right to appeal, the remedy is merely to reinstate the right to appeal. **The remedy is NOT to vacate a plea, conviction, or sentence.**

Other writs - and ancient common law writs

Sometimes Petitioner's will attempt to get around the requirements of the PCRA by trying to file ancient common law writs such as a **writ of error coram nobis** or **writ of habeas corpus**

These types of writs are not appropriate for raising any issue that could be raised in a petition for post-conviction relief. When a statute exists which properly governs a matter or provides an avenue for relief, it is improper to resort to the common law. *See Smith v. Sheffield*, 58 Utah 77, 197 P. 605, 607 (1921)

The PCRA specifically states that "**This chapter replaces all prior remedies for review, including extraordinary or common law writs**." 78B-9-102(1)

Post-Conviction is the **SOLE REMEDY - 78B-9-102**

The PCRA "establishes the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal" 78B-9-102(1)

"The functions of the writ of coram nobis are strictly limited to an error of fact for which the legislature has provided no remedy, for it is only when the defendant is wholly without remedy that the common law provides one." *State v. Gee*, 514 P.2d 809, 811 (Utah 1973).

See State v. Rees, 2005 UT 69 - write of error coram nobis was not available to provide remedy because PCRA provided adequate remedy.

(*see sample argument attached - Rees,* brief on cert)

Factual Innocence

Utah Code Ann. §78B-9-401 through 405

and

Post-Conviction DNA testing

Utah Code Ann. §78B-9-301

"The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or Part 4, Post-Conviction Determination of Factual Innocence.

Appointment of Counsel

A civil petitioner for post-conviction relief has no right to counsel (except in a death penalty case).

He may appear pro se, or

He may hire his own counsel, or

He may request appointment of pro bono counsel

(but remember that counsel who represented the petitioner at trial or on appeal may not be appointed to represent him in post-conviction). §78B-9-109

If the Petitioner files a motion for appointment of counsel, section 78B-9-109 provides that "the court may, upon the request of an indigent petitioner, appoint counsel *on a pro bono* basis."

This section of the Act also sets out guidelines for the court in determining whether to appoint counsel. It states that the court shall consider the following factors:

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

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

Utah Code Ann. § 78B-9-109(2).

Respondent neither agrees to nor objects to appointment of counsel, but simply leaves the decision as to whether or not to appoint **pro bono** counsel up to the court, pursuant to the guidelines provided in section 78B-9-109.

Also, remember that an allegation that appointed post-conviction counsel was ineffective cannot be a basis for any subsequent post-conviction relief. 78B-9-109(3)

Waiver of Attorney/Client privilege

When a petitioner claims ineffective assistance of counsel, he waives any attorney-client privilege as to all communications relevant to those claims. *See: Bullock v. Carver*, 910 F. Supp. 551, 557 (D. Utah 1995); *Tasby v. United States,* 504 F.2d 332, 336 (8th Cir. 1974), *cert. denied*, 419 U.S. 1125 (1975); *Laughner v. United States,* 373 F.2d 326, 327 (5th Cir. 1967); *and see c.f. State v. Stilling*, 856 P.2d 666, 675, n.10 (Utah App. 1993);

> See also the general rules of privilege:
> d) Exceptions: No privilege exists under this rule:
> * * *
> (3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer

Rule 504(d)(3) Utah Rules of Evidence, and the rules of professional conduct:

> (b) A lawyer may reveal such information to the extent the lawyer believes necessary:
> * * *
> (3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved

Rule 1.6(b)(3) Utah Rules of Professional Conduct

Plea in Abeyance

(Can he file a petition for post-conviction relief when he entered a plea in abeyance?)

Our position is that you cannot file a petition for post-conviction relief while a plea in abeyance is pending.

(*see sample, Abeyance* memorandum in support of motion to dismiss)

When a plea in abeyance has been entered, a Petitioner is not entitled to relief under the PCRA because no conviction or sentence has been entered.

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 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).

While a plea in abeyance is pending, no conviction or sentence has yet been entered, so there is not yet any conviction or sentence to challenge.

If a condition of the plea in abeyance is violated, and conviction and sentence are entered, then Petitioner may proceed under the PCRA with a post-conviction petition challenging his convictions and/or sentences. However, until there is an actual conviction or sentence to challenge, there is no remedy under the PCRA.

The State recognizes that this situation may leave a petitioner without a means to challenge his plea 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 plea in abeyance are violated, and a conviction is actually entered, then Petitioner may proceed with a petition for post-conviction relief.

****warning** - **we lost this argument in the district court.** But we won the case on other grounds, so we did not appeal & the petitioner has not yet appealed. We therefore continue to make this argument because the issue of whether you can proceed with post-conviction when a plea of abeyance is pending has not yet been decided by an appellate court in Utah.

No Default

Mere failure to respond does not entitle Petitioner to a default judgment on a post-conviction petition. Under Utah Code Ann. § 78B-9-105, "[t]he court may not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record from the criminal case under review."

In other words, even if you never respond, the court should not simply grant the petition based on default. The court must still determine whether the petitioner is entitled to relief under the PCRA.

(However, if you fail to respond, the court could still sanction you, etc).

Default judgments are generally not available in habeas corpus cases.
Gordon v. Duran, 895 F.2d 610, 612 (9th Cir. 1990) ("The failure to respond to claims raised in a petition for habeas corpus does not entitle the petitioner to a default judgment.");

Lemons v. O'Sullivan, 54 F.3d 357, 364 (7th Cir. 1995), *rhrg denied*, (1995), *cert. denied,* 516 U.S. 993, 116 S.Ct. 528 (1995) (releasing a properly convicted prisoner is a disproportionate sanction for the wrong of failing to file a timely motion for an extension of time);

Bleitner v. Welborn, 15 F.3d 652, 653-54 (7th Cir. 1994) (the district court, rather than entering a default judgment, ordinarily should proceed to the merits of the petition);

Stines v. Martin, 849 F.2d 1323, 1324-25 (10th cir. 1988) (default judgment, without full inquiry into the merits, is especially rare in a habeas corpus case);

Sparrow v. United States, 174 F.R.D. 491, 492-93 (D. Utah 1997) ("Some courts have concluded that default is inappropriate for habeas corpus proceedings.").

APPEAL

If you lose a civil post-conviction case, **you can appeal**. If the petitioner loses, he may also appeal.

"Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78A-3-102 or 78A-4-103." Utah Code Ann. §78B-9-110

see also Utah R. Civ. P. 65C(q).

Lucero v. Kennard and *Peterson v. Kennard*

2005 UT 79, 125 P.3d 917 **2008 UT 90, 201 P.3d 956**

Lucero

held that the PCRA applies to justice court defendants

but - petitioner must pursue any regular and prescribed method for attacking a conviction or sentence that would provide a plain, speedy, and adequate remedy.
For example, he can't just skip appeal and go straight to post-conviction.

Peterson

Peterson pled guilty to misdemeanor drug offenses in justice court.

He did not file any motion to withdraw his plea.

He did not appeal

Approx 25 months later (after probation was revoked) he filed a petition for post-conviction relief, claiming that he did not waive his right to counsel.

1. I think this petition could and should have been denied and dismiss because it was untimely, but apparently no one raised that issue.

2. The Court of Appeals held that his "challenge to his justice court conviction was barred by his failure to seek trial de novo in the district court." *Peterson v. Kennard*, 2007 UT App 26, ¶17, 156 P.3d 834.

This was a correct decision. His petition was procedurally barred because he could have raised his issues on appeal, but did not. *See* Utah Code Ann. § 78B-9-106(c).

3. On certiorari review, the Utah Supreme Court said that the PCRA "bars, without exception, relief for defendants who have not sought direct appeal." *Peterson v. Kennard*, 2008 UT 90, ¶17.

I think this overstates the correct rule.

Under the PCRA, a petitioner is not eligible for relief on any ground that "could have been but was not raised at trial or on appeal" 78B-9-106(c). Therefore, if a justice court defendant could have raised his issue on appeal, but he never appealed, his petition should be denied and dismissed because his claim is procedurally barred.

But - it is not merely the fact that he did not appeal that bars his petition, it is the fact that he **could have raised his issue on appeal** but did not, that bars his petition.

There may be circumstances where he could not have raised the issue on appeal. For example, in the case of newly discovered evidence.

Assume a petitioner is convicted in justice court and does not appeal. Then, after the time period has run out for filing an appeal, he discovers that the prosecutor has wrongfully withheld exculpatory evidence. He may file a petition based on that newly discovered evidence. He could not have raised this issue on appeal because he was not aware of the evidence in time to raise it on appeal. Therefore, he may raise the issue in a post-conviction petition.

Unusual circumstances exception no longer exists

The "unusual circumstances" exception is no longer available.

The unusual circumstances procedural bar exception is no longer available. The "unusual circumstances" analysis was encompassed by the "good cause" procedural bar exception formerly included in rule 65C. *Tillman*, 2005 UT 56, ¶ 20 (citing prior Utah R. Civ. P. 65C(c)).

However, effective in January 2010, the Utah Supreme Court amended rule 65C. The amendment eliminated the "good cause' language that encompassed the "unusual circumstances" procedural bar exception.

Further, the amendment provides that the PCRA "sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal." Utah R. Civ. P. 65C(a) (2010). The advisory committee note states that the amendment "embraces" the PCRA "as the law governing post-conviction relief." *See Burns v. Boyden*, 2006 UT 14, ¶ 16 n.6, 133 P.3d 370 (advisory committee notes "merit great weight in any interpretation of [the] rules"). Thus, the "unusual circumstances" exception no longer exists. The language on which it was based was written out of rule 65C. And section 78B-9-106, which the supreme court now "embraces" as the law governing post-conviction relief, does not encompass the exception.

(*see sample attached - McNair memorandum)*

What else is different about justice court cases?

Right to counsel