IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Petitioner/Appellee	:	Case No. 20030208-SC
v.	:	
TROY REES,	:	
Respondent/Appellant	:	

BRIEF OF PETITIONER STATE OF UTAH

ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This Court granted certiorari to review the Utah Court of Appeals' decision in *State v. Rees,* 2003 UT App 4, 63 P.3d 120 (addendum A), which reversed the district court's denial of Rees's petition for extraordinary relief. This Court has jurisdiction pursuant to Utah Code Annotated § 78-2-2(3)(a) (Supp. 2001) & UTAH CODE ANN. § 78-2a-4 (1986).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

Issue 1: Did the Court of Appeals err by resurrecting the ancient common law writ of error *coram nobis* when a clear statutory remedy is available to Rees under the Post-Conviction Remedies Act?

Standard of Review: On certiorari review, this Court reviews the decision of the court of appeals, not the trial court, for correctness and without deference to its conclusions of law. *State v. James*, 2000 UT 80, ¶ 8, 13 P.3d 576 (citations omitted). "The correctness of the court of appeals' decision turns on whether that court accurately reviewed the trial court's decision under the appropriate standard of review." *Id.*

Issue II: Did the Court of Appeals err in reversing the trial court's decision to dismiss the petition for extraordinary relief?

Standard of Review: Same as above.

Issue III. Did the Court of Appeals err by ruling that Rees may be entitled to a second direct appeal from the same final judgment?

Standard of Review: This is an issue of law which should be reviewed for correctness. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following relevant statutes and rules are set forth in full in addendum B:

The Post-Conviction Remedies Act, UTAH CODE ANN. § 78-35a-101 et seq. (1996);
Utah Rule of Civil Procedure 65C (1996);
Utah Rule of Civil Procedure 65B (1996);
Former Utah Rule of Civil Procedure 65B(b) (1977).

STATEMENT OF THE CASE

On February 4, 1999, Rees was charged with possession of marijuana with intent to distribute, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (1998 & Supp. 2000) (R. 1). Rees moved to suppress evidence seized pursuant to a warrantless

search of his trailer home (R. 26). The trial court denied Rees's motion and found Rees guilty as charged (R. 104:2-7). The court imposed a 0-5 year prison term, which was suspended in lieu of a 3-year probationary term (R. 86). Rees timely appealed (R. 95).

On appeal, Rees was represented by trial counsel. Counsel failed to include the preliminary hearing transcript, the suppression hearing transcript, and the affidavit in support of the search warrant in the record on appeal. Absent an adequate record, the court of appeals could not address the issues raised and presumed the correctness of the disposition made by the trial court. Rees's conviction was affirmed. *See State v. Rees*, 2001 UT App. 27 (unpublished memorandum decision) (Feb. 1, 2001) (addendum C).

On April 12, 2001, Rees, still represented by the same counsel, filed a motion for re-sentencing in the underlying criminal case (R. 112-114). Rees stated that the purpose of the motion was to allow him to re-file his appeal (R. 112). On May 9, 2001, one day before the scheduled hearing, Rees apparently realized that a motion to re-sentence was not the appropriate way to seek relief. He then filed a petition for extraordinary relief (R. 121-123). However, the petition was filed in the original criminal case, no. 991900480, instead of as a separate civil action (R. 121-123, addendum D). The petition did not raise any claim of ineffective assistance of appellate counsel. The petition stated:

> The reason for requesting extraordinary relief is that the Defendant's appeal was denied for the failure of certain transcripts having not been filed with the Court of Appeals. These transcripts had been timely ordered, paid for and were on file with the Clerk of the District Court but were not filed with the rest of the record. This was through no fault of the Defendant/

> Petitioner, but the Defendant/Petitioner is restrained by the 45 day jail sentence pending if he is not granted the relief requested herein.

(R. 121). The relief Rees requested was that he be re-sentenced and allowed to file a second appeal (R. 123).

On May 10, 2001, the trial court dismissed the petition. In its minute entry, the court said: "This is time [sic] set for motion hearing on the motion for extraordinary relief. Hearing not held. State[1] objects to the motion filed as the case has already been adjudicated in the Court of Appeals. Court dismisses the petition and finds that the case has been adjudicated in the Court of Appeals" (R. 128)(addendum E).

Rees appealed the trial court's dismissal of his petition. On appeal, Rees stated that "[t]he issue before this Court if [sic] the Trial Court committed err [sic] in not considering the defendant's lack of fault in a procedural defect in the appeal process." (addendum F). Again, Rees did not raise any claim of ineffective assistance of counsel.

On appeal, the State filed a motion for summary disposition requesting that the court of appeals reverse and remand to the district court, so that the matter could be properly filed as a civil petition for post-conviction relief, pursuant to The Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 et. seq. and Utah R. Civ. P. 65C, and the Attorney General

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[1] A prosecutor was present on May 10, but no one from the Attorney General's office was present. "If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General." Utah R. Civ. P. 65C(h). The Attorney General was not notified that a petition had been filed, was not asked to respond, was not present when the petition was dismissed, and was not notified that the petition had been dismissed.

could respond to the petition at the district court level. The court of appeals denied the State's motion for summary disposition. *State v. Rees*, No. 20010490-CA (Utah App. March 25, 2002).

Instead, the court of appeals, without oral argument, reversed on a ground that was never asserted or briefed on any level. The court of appeals found that "while Rees's petition for extraordinary relief fails to articulate a clear or concise claim, our reading of the petition suggests that the petition is predicated on a claim of ineffective assistance of appellate counsel." *State v. Rees*, 2003 UT App 4, ¶ 8, 63 P.3d 120. The court of appeals then resorted to an ancient common law writ, concluding that "Rees's petition for extraordinary relief is best described as rooted in the ancient writ of error coram nobis" *Id*. The court of appeals reversed and remanded to the district court, with the additional instruction that "should Rees prevail, the trial court's authority is limited to merely re-sentencing Rees nunc-pro-tunc." *Id*. at ¶ 16.

STATEMENT OF THE FACTS

The facts essential to this petition are included in the statement of the case. The facts of the underlying criminal conviction, taken from the State's brief in the direct appeal (case no. 991078-CA), are included for the information of the Court as addendum G. Those facts are stated in the light most favorable to the bench verdict. *See Johnson v. Higley*, 1999 UT App 278, ¶2, 989 P.2d 61, 61 (bench trial).

SUMMARY OF THE ARGUMENT

The court of appeals improperly reversed the district court decision without oral argument on a ground that was not briefed, and that was never raised by Rees. In reversing the district court's denial of the petition for extraordinary relief, the court of appeals erred by resorting to use of the common law writ of error coram nobis, thereby circumventing the appropriate statutory avenue for relief available under the Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 et seq., and Utah Rule of Civil Procedure 65C. The court of appeals' decision departs from the accepted and usual course of judicial proceedings and conflicts with decisions of this Court.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY RESORTING TO THE COMMON LAW WRIT OF ERROR CORAM NOBIS, WHEN A CLEAR STATUTORY REMEDY EXISTS UNDER THE POST-CONVICTION REMEDIES ACT.

On appeal, it is appellant's burden to ensure that a complete record has been provided. Utah R. App. P. 11. Absent an adequate record, "defendant's assignment of error stands as a unilateral allegation which the review court has no power to determine." *Rudolph v. Galetka*, 2002 UT 7, ¶ 8, 43 P.3d 467 (quoting *State v. Wulffenstein*, 657 P.2d 289, 293, *cert. denied*, 460 U.S. 1044, 103 S.Ct. 1443 (1982)). Where the record is inadequate, the appellate court will assume the regularity of the underlying proceeding. *State v. Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92.

Rees's appellate counsel performed deficiently by failing to ensure that necessary parts of the trial record were made part of the record on appeal.[2] Consequently, the court of appeals affirmed Rees's conviction. Rees had a clear-cut legal avenue to seek relief: a civil petition for post-conviction relief pursuant to the Post-Conviction Remedies Act and Utah Rule of Civil Procedure 65C. The Post-Conviction Remedies Act specifically provides that a petitioner may file a new, civil action seeking relief on the ground that "the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution." Utah Code Ann. § 78-35a-104(1)(d)(1996).

Rather than pursue this available remedy, counsel for Rees committed two missteps. First, he improperly filed a petition for extraordinary relief in the underlying criminal case, rather than as an independent civil action under the Post-Conviction Remedies Act. Second, he failed to assert a claim of ineffective assistance of appellate counsel. In view of these omissions, the district court properly dismissed the petition.

As a consequence of counsel's choices, Rees's appellate claims were not reviewed on the merits. In an apparent attempt to afford Rees the review his counsel had failed to obtain, the court of appeals ignored the only appropriate avenue of relief - the Post-Conviction Remedies Act - and instead resorted, not merely to a common law remedy, but

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[2] The State concedes that counsel on appeal performed deficiently but does not concede that Rees can meet the prejudice prong of the test in order to establish ineffective assistance of appellate counsel.

to an ancient writ the Post-Conviction Remedies Act was expressly designed to supersede. This was error.

A. The proper avenue for seeking relief is under the Post-Conviction Remedies Act.

The ancient writ of error coram nobis was a common-law device designed to allow a trial court to review an error of fact. *Huffman v. Alexander*, 197 Or. 283, 293, 253 P.2d 289, 340 (Oregon 1953). "While the writ is recognized as an existing common-law remedy in some jurisdictions, it is almost obsolete.[3] " *Huffman*, 253 P.2d at 340, citing 24 C.J.S., Criminal Law, § 1606, p. 144; *and see* 31 Am.Jur., Judgments, §§ 798-812. In some jurisdictions, including Utah, "post-conviction statutes have been passed which take the place of all proceedings in the nature of coram nobis and which eliminate much of the uncertainty as to the scope of that remedy." *Huffman*, 253 P.2d at 341.

The common law writ of error coram nobis is limited to an error of fact for which the Legislature has provided no remedy. *State v. Gee*, 30 Utah 2d 148, 150, 514 P.2d 809, 811 (Utah 1973). Utah's Post-Conviction Remedies Act provides a remedy. It is the appropriate avenue for seeking relief when a defendant claims that he "had ineffective assistance of

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[3] Common law writs such as the writ of error coram nobis fell into disuse in Utah, and most other states, as early as 1895. *See Elliott v. Bastian*, 40 P.713 (Terr. of Utah 1895) ("these writs have fallen into desuetude in most of the states); *Sullivan v. Turner*, 22 Utah 2d 85, 448 P.2d 907 (Utah 1968) (writ of error coram nobis is available in a proper case, but "its use is even more rare and restricted than that of habeas corpus").

counsel in violation of the United States Constitution or Utah Constitution." Utah Code Ann. § 78-35a-104(1)(d).

More than a hundred years ago, when the common law writ of error coram nobis was in general use, there was no remedy by appeal, or by motion for a new trial, [or by a petition for post-conviction relief]. *See State v. Gee*, 30 Utah 2d 148, 150, 514 P.2d 809, 810 (Utah 1973); and *Huffman v. Alexander*, 197 Or. 283, 293, 253 P.2d 289, 341 (1953). "Subsequently these remedies came into existence by statutory enactment and supplanted much of the former scope of the writ." *Gee*, 514 P.2d at 810. Use of a petition for writ of error coram nobis became very uncommon. "Coram nobis is a limited remedy of narrow scope and is available, where no other remedy exists . . ." *Lopez v. Shulsen*, 716 P.2d 787, 788, n. 1 (Utah 1986).

Previously in Utah, a petitioner seeking certain kinds of post-conviction relief could have filed a petition for writ of habeas corpus or a petition for writ of error coram nobis. *See Sullivan v. Turner*, 22 Utah 2d 85, 448 P.2d 907 (1968); *Ward v. Turner*, 12 Utah 2d 310, 366 P.2d 72 (1961); *Butt v. Graham*, 6 Utah 2, 133, 307 P.2d 892 (1957). However, in 1969,[4] former Utah Rule of Civil Procedure 65B(i) was enacted, which included provisions for "Postconviction Hearings." Former Rule 65B stated: "Special forms of pleadings and of writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition,

[4] "Rule 65B(i) was adopted by the Supreme Court effective August 20, 1969." Compiler's Notes, Utah R. Civ. P. 65(B)(i)(1977).

and other extraordinary writs, as heretofore known, are hereby abolished. Where no other plain, speedy and adequate remedy exists, relief may be obtained by appropriate action under these Rules." Utah R. Civ. P. 65B(a)(1977)(emphasis added). The Rule was amended numerous times over the following years.

In 1996, the Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 et seq. and Utah Rule of Civil Procedure 65C were enacted. The Post-Conviction Remedies Act and Rule 65C replaced the provisions of former Rule 65B which governed certain post-conviction proceedings. The Post-Conviction Remedies Act "establishes a substantive legal remedy for any person who challenges a conviction or sentence and who has exhausted all other legal remedies." Utah Code Ann. § 78-35a-102(1). Rule 65C contains the procedural provisions for the filing and commencement of a petition under the Post-Conviction Remedies Act.

Before enactment of the current Post-Conviction Remedies Act, this Court recognized the "availability of a writ of error coram nobis in a proper case" but noted that "its use is even more rare and restricted than that of habeas corpus." *Sullivan v. Turner*, 22 Utah 2d 85, 88, 448 P.2d 907, 909 (Utah 1968). The court of appeals found that "Rees's petition presents a rarely encountered situation" *Rees*, 2003 UT App. at ¶ 12. To the contrary, defendants frequently allege that counsel performed deficiently upon appeal. When seeking a remedy for this type of allegation, the appropriate avenue for relief is to file a civil petition for post-conviction relief under the Post-Conviction Remedies Act.

B. It is improper to resort to common law when a statutory remedy is available.

"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." *Gee*, 514 P.2d at 811. 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) (Statute held that wife was not a competent witness against her husband and therefore excluded resort to the common law); *Gibbs v. Gibbs*, 26 Utah 382, 73 P. 641 (Utah 1903) (question must be determined by reference to the statute and "in the absence of statutory regulation, resort must be had to the rules of common law").

"[W]here a statute creates a liability and provides a remedy by suit specially adapted to its enforcement, other less appropriate common-law remedies are impliedly excluded." *Shriver v. Woodbine Sav. Bank of Woodbine*, 285 U.S. 467, 478, 52 S.Ct. 430, 434 (1932). *See also Turner v. Hawaii Paroling Authority*, 93 Hawaii 298, 1 P.3d 768 (2000) ("any post-conviction remedy which is available under this rule will require a resort to this rule in place of habeas corpus, coram nobis or any other vehicle").[5]

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[5] *And see also In re Jacks*, 266 B.R. 728 (9th Cir. 2001) (by codifying statutory remedies the legislature has occupied the field and precluded resort to common law); *Scott County Fed. of Teachers v. Scott County School Dist. #2*, 496 N.E.2d 610 (Ind. 1986) (where statute provides for remedy it excludes any common law or equitable procedure); *People v. Ingles*, 97 Cal.App.2d 867, 218 P.2d 987 (1950)(statutory remedy displaces the common-law remedy); *People v. Lewis*, 64 Cal. App. 2d 564, 149 P.2d 27

This Court has recognized that "[t]he postconviction hearing procedure is a successor to the common-law writ of error coram nobis." *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981).[6] *Johnson* explains that the remedy formerly available under coram nobis was adopted by Utah and is available under the post-conviction procedures. Accordingly, courts in Utah have treated petitions filed as writs of error coram nobis as petitions for writ of habeas corpus or post-conviction relief. *See Lopez v. Shulsen*, 716 P.2d 787, 789 (Utah 1986); *Walker v. State*, 624 P.2d 687 (Utah 1981).

Here, the court of appeals found that "Rees's petition for extraordinary relief is best described as rooted in the ancient writ of error coram nobis, and therefore, the petition was properly filed with Rees's sentencing court." *Rees*, 2003 UT App. at ¶8. The court of appeals erred by viewing the petition as a writ of error coram nobis under the common law, since the Legislature has provided a clear statutory avenue for relief under the Post-Conviction Remedies Act. Rees had an appropriate statutory avenue for seeking relief. He was not "wholly without remedy." The Post-Conviction Remedies Act was specifically adopted to provide a remedy for just such an allegation as ineffective assistance of appellate

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(1944)(the existence of a statutory remedy precludes resort to the common law); *Wike v. Lightner*, 1829 WL 2573 (Pa) ("common law remedies shall be superseded in all cases where a remedy is provided by act of assembly).

[6] Similarly, the United States Supreme Court has stated that in the federal arena, "28 U.S.C. § 2255, which provides federal prisoners a statutory motion to vacate a federal sentence. . . 'restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis.'" *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 235, (1995) (quoting *United States v. Hayman*, 342 U.S. 205, 218 (1952).

counsel. Therefore, it was unnecessary and improper for the court of appeals to improvise a common law remedy.

With the promulgation of Utah's state post-conviction procedures, "the common law forms and procedures for extraordinary writs were abolished, in keeping with modern concepts of pleading and practice, but the remedies continue to be available." *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 682 (Utah 1995); *see also Indian Village Trading Post, Inc., v. Al Bench*, 929 P.2d 367, 369 (Utah App. 1996).

"The PCRA [Post-Conviction Remedies Act] replaced prior post-conviction remedies with a statutory, 'substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies.'" *Julian v. State*, 2002 UT ___, ¶ 4, 52 P.3d 1168, 451 Utah Adv. Rep. 6., *quoting Utah Code Ann.* § 78-35a-102.

Most claims which formerly could have been raised in a common law petition for writ of error coram nobis, can now be raised under the Post-Conviction Remedies Act. This does not necessarily mean that the common law writ of error coram nobis has been totally abolished. As the Kansas Supreme Court said: "We need not say here that under no circumstances is the writ [of error coram nobis] longer available under our procedure. But we are not now aware of a situation where adequate remedies are not provided by our comprehensive codes of civil and criminal procedure . . . and in addition the relief afforded

in habeas corpus proceedings." *State v. Miller*, 161 Kan. 210, 216, 166 P.2d 680, 684 (1946).

Similarly, our courts have not held that the common-law writ of error coram nobis is no longer available in Utah under any circumstance. However, in a case like this, where a specific statutory avenue for seeking relief exists under the Post-Conviction Remedies Act, the court of appeals erred by resorting to an ancient common law writ rather than acknowledging that Rees's proper avenue for relief was to file a civil petition for post-conviction relief under the Post-Conviction Remedies Act.[7]

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[7] Even if a statutory remedy were not available, the common law writ of error coram nobis is not the proper writ to attempt to correct the type of irregularity which occurred in this case. The error in this case arose during appeal. "Another limitation upon the scope of the remedy in the nature of coram nobis is found in the rule that the writ or equivalent motion is never granted to relieve from circumstances arising subsequent to the judgment. *Huffman v. Alexander*, 197 Or. 283, 294, 253 P.2d 289, 342-43 (1953), *citing Collins v. State*, 66 Kan. 201, 71 P.251, 60 L.R.A. 572; 31 Am.Jur., Judgments, § 3804.

"A writ of coram nobis seeks review of a judgment on the ground that judgment would not have been rendered but for mistakes of fact which were unknown to the trial court and the parties. *State v. Woodard*, 108 Utah 390, 391, 160 P.2d 432, 433 (1945). It "can properly be invoked only where there has been some mistake of fact which, if the truth had been known, would have prevented the conviction: and the failure to make known such fact must have been without fault or neglect on the part of the accused." *Valdez v. State*, 22 Utah 2d 306, 307, n.2, 452 P.2d 551 (Utah 1969), *quoting Sullivan v. Turner*, 22 Utah 2d 35, 448 P.2d 907, 909 (1968); *and see Sulaiman v. United* States, 2002 WL 519718 (E.D.N.Y.) (petition for writ of error coram nobis claimed ineffective assistance of counsel, but coram nobis could not afford requested relief. Court treated it as a petition for habeas corpus).

II. THE COURT OF APPEALS IMPROPERLY REVERSED THE TRIAL COURT DECISION TO DISMISS THE PETITION.

Rees filed a petition for extraordinary relief in the underlying criminal case. The trial court properly dismissed the petition because the case had already gone up on appeal. The court of appeals reversed the trial court and remanded with instructions that should Rees prevail, he be resentenced nunc pro tunc.

A. The petition was improperly filed in the criminal case, instead of as a separate civil action.

A petition following conclusion of a direct appeal is necessarily a post-conviction petition which must be filed as a separate civil action. Petitioner improperly filed his petition in the underlying criminal case, rather than as a separate civil action. Petitioner filed his petition as a petition for extraordinary relief under Utah Rule of Civil Procedure 65B(a)(b), rather than under the Post-Conviction Remedies Act and Rule 65C. However, under either rule 65B or rule 65C, the petition should have been filed as *civil* action separate from the criminal case. *See* Utah R. Civ. P. 65B(b)(2) and 65C(b); *See also Shunk v. Fuchs*, 2000 WL 33250566, Nos. 20000192-CA, 20000193-CA (Utah App. May 4, 2000) (unpublished memorandum decision) (addendum H).

Procedural provisions for filing a petition for post-conviction relief are governed by Rule 65C of the Utah Rules of Civil Procedure. Utah Code Ann. § 78-35a-102(1), and Utah R. Civ. P. 65C(b) & (f). A petition for post-conviction relief is a *civil* action which must be filed as a civil case separate from the underlying criminal case. *Shunk v. Fuchs*, 2000

WL 33250566, Nos. 20000192-CA, 20000193-CA (Utah App. May 4, 2000) (unpublished memorandum decision) (petition "was filed in the underlying criminal case rather than in a separate civil action, as required by Rule 65C.") (addendum H).[8]

B. The criminal trial court lacked jurisdiction and therefore properly dismissed the petition.

Rees improperly filed his petition in the criminal case, and did so after his conviction had been affirmed on appeal. On May 10, 2001, the trial court dismissed the petition. In its minute entry, the court said: "This is time [sic] set for motion hearing on the motion for extraordinary relief. Hearing not held. State objects to the motion filed as the case has already been adjudicated in the Court of Appeals. Court dismisses the petition and finds that

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[8] The State argues that coram nobis is not the appropriate remedy. But even if a writ of coram nobis was proper, it should have been filed as a separate civil action. The court of appeals cites federal cases for its conclusion that coram nobis is a step in the criminal case and not like habeas corpus where relief is sought in a separate civil proceeding. *Rees*, 2003 UT App. 4 at ¶ 6. However, courts have disagreed about this. Several Utah cases have asserted that coram nobis is a civil action. *See Sullivan v. Turner*, 22 Utah 2d 85, 89, 448 P.2d 907, 910 (1968) ("Petitions in habeas corpus and coram nobis are generally regarded as being analogous procedurally to civil proceedings."); *State v. Mitchell*, 569 P.2d 1117, 1118 (Utah 1977) (The writ of coram nobis, like habeas corpus, is civil in nature.)

The court of appeals also cites *Johnson* in support of its position by referring to the fact that *Johnson* says a petition for post conviction relief should be filed in the sentencing court. *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981). However, this does not mean that the petition should be filed in the underlying criminal case. It merely means that the petition should be reviewed by the Judge who sentenced the defendant. Current Civil Rule 65C states that a civil petition for post-conviction relief "shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered"and that "the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner." Utah R. Civ. P. 65C(b) and (f).

the case has been adjudicated in the Court of Appeals" (R. 128) (addendum E). Because the court of appeals had not remanded the case, the litigation was concluded.

On appeal of the dismissal of the petition, the court of appeals criticized the ruling of the trial court: "After reviewing the petition, the trial court, in a short minute entry, dismissed Rees's petition as focusing solely on issues that had been previously adjudicated by this court. The trial court's conclusion is incorrect." *Rees*, 2003 UT App 4, at ¶ 10.

The court of appeals reads meaning into the trial court's minute entry which is not part of its plain language. The minute entry does not state that the trial court was dismissing the petition because it focused on issues that had already been raised on appeal.[9] The trial court merely found that the case had been adjudicated in the court of appeals. The criminal case was complete and judgment was final. A valid sentence had been imposed, and the conviction and sentence were affirmed on appeal. Therefore the criminal case was closed and the trial court lacked jurisdiction.

"Once a court imposes a valid sentence, it loses subject matter jurisdiction over the case." *State v. Montoya*, 825 P.2d 676, 679 (Utah App. 1991) (*citing State v. Babbel*, 813 P.2d 86, 88 (Utah 1991). As a general rule, a trial court loses jurisdiction once an appeal is perfected. *See Saunders v. Sharp*, 818 P.2d 574, 577 (Utah App. 1991); *Frost v. District*

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[9] Even if this were the reason the trial court dismissed the petition, the Court can affirm the trial court on any proper ground. *See Otteson v. Dept. of Human Services,* 945 P.2d 170,172 (Utah App. 1997); *Buehner Block Co. v. UWC Assoc*., 752 P.2d 892, 895 (Utah 1988).

Court, 83 P.2d 737 (Utah 1938). A judgment is final following affirmance on appeal, when nothing is remanded for the trial court to reconsider or decide. *See Schoney v. Memorial Estates, Inc*., 863 P.2d 59, 61 (Utah App. 1993).

On direct appeal, the court of appeals did not return Rees's case to the trial court, thus the criminal trial court no longer had jurisdiction to make additional rulings in the underlying criminal case. "When a matter is outside the court's jurisdiction, it retains only the authority to dismiss the action." *Varian-Eimac v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989). *See also Serrato v. Utah Transit Auth.,* 2000 UT App 299, ¶ 7, 13 P.3d 616; *State v. Palmer*, 777 P.2d 521, 522 (Utah App. 1989).

The trial court properly dismissed the petition because it lacked jurisdiction. Lack of jurisdiction was not specifically given as the reason for the dismissal. However, "a lack of jurisdiction can be raised by the court or either party at any time." *A.J. MacKay Co. v. Okland Const. Co*.,, 817 P.2d 323, 325 (Utah 1991). *See also Barton v. Barton*, 2001 UT App 199, 29 P.3d 13. The State's brief to the court of appeals asserted that the petition was properly dismissed for lack of jurisdiction.

The trial court properly dismissed the petition for extraordinary relief because the criminal trial court did not have jurisdiction to make additional rulings in the criminal case. The court of appeals erred in reversing the trial court decision.

C. The petition was improperly filed under Rule 65B instead of under the Post-Conviction Remedies Act and Rule 65C.

In addition to the fact that the petition was improperly filed in the criminal case instead of as a separate civil action, it was also improperly filed under Rule 65B instead of under the Post-Conviction Remedies Act and Rule 65C.

In his petition, Rees alleged that he was denied his right to appeal. The appropriate avenue for seeking relief on a claim of denial of the Constitutional right to appeal, (or a claim of ineffective assistance of appellate counsel), is under the Post-Conviction Remedies Act and Utah Rule of Civil Procedure 65C. Rule 65C contains the procedural provisions for the filing and commencement of a petition for post-conviction relief under the Post-Conviction Remedies Act. The Act provides a substantive legal remedy for those who wish to "challenge a conviction or sentence for a criminal offense." Utah Code Ann. § 78-35a-102(1).

Rule 65C "replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence . . . . Claims relating to the terms or conditions of confinement are governed by paragraph (b) of the Rule 65B." Utah R. Civ. P. 65C, Advisory Committee Note (1996).

The petition was filed "under the provisions of Rule 65B(a)(b)" (R. 121). However, Rule 65B is inapplicable because it governs the procedures for those who claim they have "been wrongfully restrained of personal liberty." Utah R. Civ. P. 65B(b) (1998); Utah R. Civ. P. 65B, Advisory Committee Note (1998). Rule 65B(a) states: "Where no other plain,

speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful restraint on personal liberty). . . . There shall be no special form of writ. Except for instances governed by Rule 65C, the procedures in this rule shall govern proceedings on all petitions for extraordinary relief." Because Rees had a remedy under the Act and rule 65C, current rule 65B, by its own terms, does not apply.

Rees's petition was improper because it was filed under Rule 65B when Rees was not challenging the terms or conditions of his confinement. Because of the nature of his petition and the relief it requested, it was more properly a petition for post-conviction relief under the Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 et seq, and Rule 65C. "In determining the character of a motion, the substance of the motion, not its caption, is controlling." *State v. Parker*, 872 P.2d 1041, 1044 (Utah App. 1994). Likewise, the character of a petition must be determined by its substance and the relief it seeks rather than by its caption.

Rees did not challenge the terms or conditions of his confinement but instead challenged his conviction and sentence, claiming that he was "denied his Constitutional right to appeal" (addendum E). Accordingly, the petition should have been filed under the Post-Conviction Remedies Act and Rule 65C. The trial court properly dismissed the petition because it was improperly filed. The court of appeals erred in reversing the trial court's dismissal of the petition.

D. The court of appeals erroneously reviewed the matter as if the petition raised a claim of ineffective assistance of counsel when Rees never alleged ineffective assistance of counsel.

Rees's petition for extraordinary relief did not allege any claim of ineffective assistance of counsel. Rather, he argued that he had been denied his right to appeal. Likewise, when appealing the dismissal of his petition, Rees also did not argue any claim of ineffective assistance of counsel. Instead, he argued that the issue on appeal was whether "the Trial Court committed err [sic] in not considering the defendant's lack of fault in a procedural defect in the appeal process." (Brief at 1). Despite the fact that Rees had never argued or even mentioned the Sixth Amendment, his right to counsel, or ineffective assistance of counsel, the court of appeals created for him an ineffective assistance of counsel claim out of whole cloth. It wrote that "while Rees's petition for extraordinary relief fails to articulate a clear or concise claim, our reading of the petition suggests that the petition is predicated on a claim of ineffective assistance of appellate counsel." *State v. Rees*, 2003 UT App 4, at ¶ 8.

By what authority the court believed it could reverse on this ground is unclear. Utah courts will not reverse based on claims of error argued for the first time on appeal. *State v. Cram*, 2002 UT 37, ¶9, 46 P.3d 230 ("as a general rule, claims not raised before the trial court may not be raised on appeal"); *and see State v. Julian*, 966 P.2d 249, 258 (1998) ("we will not consider issues raised for the first time on appeal"). A fortiori, they may not reverse on a ground never briefed or argued, even on appeal.

This Court has frequently refused to "engage in constructing arguments out of whole cloth on behalf of defendants," even in capital cases. *State v. Arguelles*, 2003 UT 1, ¶ 125, 63 P.2d 731 (quoting *State v . Lafferty*, 749 P.2d 1239, 1247 n. 5 (Utah 1988), *habeas corpus granted on unrelated grounds in Lafferty v. Cook*, 949 F.2d 1546 (10th Cir. 1991) *cert. denied* 504 U.S. 911, 112 S.Ct. 1942 (1992). Yet the court of appeals has done precisely that in this possession-of-marijuana case, despite the fact that, as demonstrated above, Rees has a clear legal remedy if he will only avail himself of it.

III. REES IS NOT ENTITLED TO A SECOND DIRECT APPEAL FROM THE SAME FINAL JUDGMENT.

The court of appeals reversed the trial court's decision dismissing Rees's petition, and remanded for further consideration. The court also ruled that if Rees is able to satisfy the requirements for a writ of error coram nobis, the trial court "must then grant Rees's petition and reenter his sentence nunc-pro-tunc." *Rees*, 2003 UT App. 4 at ¶¶ 11, 15. Presumably, after a re-sentencing nunc pro tunc, Rees would be allowed to proceed with a second appeal. This relief is not appropriate or available. The court of appeals ruling would provide Rees with two direct appeals from the same final judgment.

In his petition, Rees alleged that he was denied his right to appeal. However, Rees had an appeal. *State v. Rees*, 2001 UT App 27 (unpublished memorandum decision) (addendum C). The petition asks for inappropriate relief, by asking that Rees be re-sentenced and allowed to file a second direct appeal.

The petition states:

> 12. . . . the defendant has been denied his right to appeal through no fault of his own.
> 13. The only remedy for this type of Problem is threw [sic] a Petition for Extraordinary Relief under Rule 65B of the Utah Rules of Civil Procedure. State v. Johnson, 635 P.2d 36 (1981).

(R. 123) (addendum D).

By alleging that Rees was denied his right to appeal, the petition asserts a claim which is simply not true. Rees did receive an appeal. The court of appeals entered its decision on February 1, 2001. *State v. Rees*, 2001 UT App 27 (unpublished decision). Thus, Rees was never denied his right to appeal because he had an appeal. The claim which should have been raised was that Rees received ineffective assistance of appellate counsel. However, Rees has never asserted a claim of ineffective assistance of appellate counsel.

If a defendant has been denied his constitutional right to appeal, then nunc pro tunc re-sentencing, such as was provided in *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981), may be appropriate, in order to provide a defendant with a first appeal as of right. But a *Johnson* re-sentencing is only available when a defendant has been completely denied his right to appeal, not when a defendant has already had an appeal but alleges ineffective assistance of appellate counsel on appeal. *See State v. Jiminez*, 938 P.2d 264 (Utah 1997); *State v. Hallett,* 856 P.2d 1060 (Utah 1993); *State v. Johnson*, 635 P.2d 36 (Utah 1981). This is because denial of counsel altogether on appeal warrants a presumption of prejudice, but an

allegation of mere ineffective assistance of counsel on appeal does not. *Smith v. Robbins*, 528 U.S. 259, 286, 120 S.Ct. 746, 764 (2000).

"The standard for judging ineffective assistance of appellate counsel is the same as the standard for judging ineffective assistance of trial counsel." *Bruner v. Carver*, 920 P.2d 1153, 1157 (Utah 1996). To prove ineffective assistance of appellate counsel, Rees would have to show that his attorney's performance was deficient, and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

To meet the prejudice requirement, Rees would have to demonstrate that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. In other words, that the outcome of his appeal would have been different - that his conviction or sentence would have been reversed on appeal. *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746) (2000) (must show a reasonable probability that he would have prevailed on his appeal); *and see Carter v. Galetka*, 2001 UT 96, ¶ 47-48, 44 P.3d 626.

The courts have defined a reasonable probability as "a probability sufficient to undermine confidence in the reliability of the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "The error must be such that we lose confidence in the result on appeal." *Butterfield v. Cook*, 817 P.2d 333, 336 (Utah App), *cert. denied* 826 P.2d 651 (Utah 1991).

Rees already had a direct appeal. He is not entitled to a second appeal from the same final judgment. If a claim of ineffective assistance of appellate counsel is properly raised in a civil petition for post-conviction relief, and the reviewing court finds that appellate counsel's performance was deficient and that Rees was prejudiced, (that there is a reasonable probability that Rees would have prevailed on appeal), the remedy would be to vacate the conviction or sentence, not to allow Rees a second direct appeal on the same final judgment because his counsel was ineffective the first time around. *See Utah Code Ann.* § 78-35a-108(1).

The court of appeals erred by reversing the trial court, and remanding with instructions that if Rees prevails, he would be entitled to a second direct appeal from the same final judgment.

CONCLUSION

The court of appeals erred by resorting to use of the ancient common law writ of error coram nobis when the legislature has provided a clear avenue for seeking relief under the Post-Conviction Remedies Act. By its holding, "the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Supreme Court's power of supervision." *Utah R. App. P.* 46(a)(3). In addition, the court of appeals decision conflicts with decisions of this Court. *Utah R. App. P.* 46(a)(2).

The court of appeals should have affirmed the trial court's dismissal of the petition. It could also have pointed out that the appropriate avenue for seeking relief was a civil petition for post-conviction relief, filed under the Post-Conviction Remedies Act and Utah Rule of Civil Procedure 65C.

Based on the facts and arguments set forth above, the State respectfully requests that this Court Reverse the Court of Appeals decision.

RESPECTFULLY submitted this ____ day of November 2003.

MARK SHURTLEFF
Attorney General

_____
ERIN RILEY
Assistant Attorney General
Counsel for State of Utah

CERTIFICATE OF SERVICE

I hereby certify that on ____ November 2003, I mailed, postage prepaid, two accurate copies of the foregoing BRIEF OF PETITIONER ON WRIT OF CERTIORARI to:

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

ARIE ALBERTUS BOS, III, Petitioner, vs. STATE OF UTAH, Respondent.	STATE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION FOR POST-CONVICTION RELIEF Case No. 100921238 Judge Deno Himonas

The State submits the following memorandum in support of its motion to dismiss the petition for post-conviction relief.

PROCEDURAL HISTORY

On January 7, 2010, in case number 101900156, petitioner Bos was charged with one count of Possession or Use of a Controlled Substance, a third degree felony (addendum A). On April 22, 2010 he entered into a Plea in Abeyance (addendum B). Under that plea,

Petitioner was required to fulfill certain conditions, including that he successfully complete Drug Court, and violate no laws. *Id*.

On January 5, 2010, in case number 101900058, Petitioner was charged with one count of Burglary, a third degree felony; one count of Manufacturing or Possessing Burglary Tools, a class B misdemeanor; and one count of Criminal Mischief, a class B misdemeanor (addendum C). On May 27, 2010, Petitioner entered into a plea in abeyance as to the Burglary charge (addendum D). Under that plea, Petitioner was required to fulfill certain conditions, including that he serve 180 days in jail and successfully complete the CATS program, successfully complete Drug Court, and violate no laws. *Id*.

On July 15, 2010, the trial Court ordered that Petitioner be released from jail to the supervision of Salt Lake County Drug Court with certain conditions (addendum E). Petitioner later failed to appear for a review hearing and was subsequently arrested on a bench warrant. On August 26, 2010, the Court again ordered that Petitioner be released (addendum F).

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

On November 1, 2010, petitioner filed his petition for post-conviction relief.

FACTS

On or about December 18, 2009, a West Valley City Police Officer initiated a traffic stop of a vehicle with three occupants, for an improper left-hand turn. A records check

showed that the driver had a suspended license. A K-9 officer was summoned to the scene and his police dog indicated positive for the presence of narcotics in the vehicle. One of the passengers, Petitioner Arie Bos, notified officers that he was in possession of drugs. During a search incident to arrest, officers located and field-tested-positive methamphetamine on Bos's person (addendum A).

On December 30, 2009, Daniel Chidester, an employee with the Murray City Power Substation, observed, via video surveillance cameras, four males break into the power station located at 859 West Bullion Street in Salt Lake County. Murray City Police Officers contacted Arie Bos and the other three individuals inside the property. Officers found that the chain link fence had been cut to gain entrance into the yard. The individuals were each in possession of burglary tools. Damage to the fence was approximately $200.00. Two of the individuals told officers that their intention, upon entering the property, was to take copper wiring and scrap metal (addendum C).

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 Bos 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.[10] 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).

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[10] 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.[11]

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 Bos 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 Bos may proceed under the PCRA with a post-conviction petition

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[11] 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.[12] However, until there is an actual conviction or sentence to challenge, there is no remedy under the PCRA.[13]

The State recognizes that this situation leaves Bos 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.

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[12] Even if petitioner Bos 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).

[13] 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 Bos 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,[14] 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

[14] 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:

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_____