No. 20180108-SC

THE SUPREME COURT OF UTAH

SCOTT PATTERSON,

Petitioner–Appellant

v.

STATE OF UTAH,

Respondent–Appellee.

A direct appeal from the dismissal of postconviction claims entered in the Second District Court, Case No. 160701113 (Farmington), the Honorable Thomas L. Kay presiding.

APPELLANT'S OPENING BRIEF

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Other Parties to the Proceeding in the District Court

None

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APPELLANT'S OPENING BRIEF

I. INTRODUCTION

Scott Patterson is a petitioner who is appealing the dismissal of his postconviction claims. Despite his convictions, Mr. Patterson maintains his innocence and asserts that he was convicted only because of errors that occurred at his trial. However, because of his attorneys' ineffective assistance, he has never had the opportunity to present a defense. When he challenged his convictions under the Post-Conviction Remedies Act (PCRA) and the district court's habeas authority, the district court dismissed his constitutional claims as untimely. He asks this court to reinstate his petition.

Upon the denial of Mr. Patterson's direct criminal appeal, his attorney told him that he should take his case to federal court. Mr. Patterson followed that advice, and filed a timely petition for habeas relief in federal court. But that was a mistake. Under principles of comity, the federal district court could not hear Mr. Patterson's claims that had not yet been exhausted in the state. But until he was provided counsel, he was unaware that he needed to first file in state court; had he known he needed to file first in state court, he would have done so.

Within a year of having counsel appointed, Mr. Patterson filed a petition for postconviction relief in state district court. Mr. Patterson offered the district court a number of reasons why, despite the delay in filing, it could still grant

relief. But the district court rejected them and granted summary judgment in favor of the State.

This appeal asks whether the PCRA or the courts' inherent writ power allow Mr. Patterson's claims to be heard. Despite the district court's conclusion, his diligent reliance on bad advice from counsel justifies his late filing in state court. The district court's decision to dismiss his claims should be reversed.

II. ISSUES

A. Mr. Patterson's appellate attorney wrongly advised him to seek post-conviction relief in federal court without first filing in state court. Following this advice, Mr. Patterson filed a timely federal petition that included unexhausted but facially meritorious constitutional claims. Within a year of having post-conviction counsel appointed, he filed a state PCRA claim. Was this petition timely?

Preservation: This argument was raised in briefing below. (R:543-50, 805-43.)

Standard of review: Legal questions of timeliness and statutory construction are reviewed de novo. *See, e.g., Perez v. South Jordan City*, 2013 UT 1, ¶ 9, 296 P.3d 715.

B. Some of Mr. Patterson's claims were based on new evidence that was discovered within a year prior to filing the petition. Were these claims timely under Utah Code § 78B-9-107(2)(e)?

Preservation: This argument was raised in briefing below. (R:547, 843-45.)

Standard of review: Questions of timeliness and statutory interpretation are reviewed de novo. *Perez*, 2013 UT 1, ¶ 9.

III. STATEMENT OF THE CASE

A. The Criminal Trial

In 2010, Scott Patterson was convicted of sexually abusing his step-daughter, and he was sentenced to two consecutive terms of 15 years to life in prison. Mr. Patterson maintains his innocence and argues that his wrongful conviction was the consequence of numerous constitutional errors at trial and on appeal. (R:472-551.) In short, he argues that the allegations against him in his step-daughter's testimony were not true. Instead, the seeds of those allegations were planted by Mr. Patterson's ex-wife, in retaliation for Mr. Patterson seeking a divorce. Then those seeds were allowed to bloom into ugly weeds after various interviewers improperly influenced her testimony with unskilled questions.

The results of this calamity were on display at trial. The step-daughter's testimony was filled with inconsistencies, and the ex-wife claimed that *she* was the one who had sought a divorce, but only after learning of her daughter's allegations against Mr. Patterson. Even though the State's case against Mr. Patterson hinged on the step-daughter's allegations, trial counsel did not seek an expert who would have shown the numerous ways in which her testimony was unreliable and showed signs that it had been influenced by others. (*See* R:132-45.) Nor did they offer any evidence to rebut the ex-wife's testimony, despite the availability of evidence that would have shown she engaged in

retaliatory conduct and had previously told social workers that *Mr. Patterson* was the one who had sought the divorce. (*See, e.g.,* R:96.)

If nothing else, Mr. Patterson might have swayed the jury if he took the stand and explained what was really going on. But although he wanted to testify, Mr. Patterson's trial counsel advised him not to do so because the prosecutor had threatened during the trial to call Mr. Patterson's LDS bishop as a witness to impeach him. However, the prosecutor had already spoken to the bishop and knew that he would not testify without first getting clearance from church attorneys, which the prosecutor did not do, and he did not have him under subpoena to testify, so he knew his threat was false. (*See* R:658-59, 664-65.) But trial counsel made no effort to assess whether the bishop would actually testify, what the nature of his testimony would be, or whether they could keep him off the stand under the priest-penitent privilege. Instead, they advised Mr. Patterson not to testify. (*See, e.g.,* R:590-94.) As a result of this prosecutorial misconduct and ineffective assistance of counsel, Mr. Patterson did not testify, and his attorneys put on no evidence to rebut the testimony of the girl and her mother. Unable to tell his side of the story, Mr. Patterson was convicted and sentenced to two consecutive terms of 15 years to life in prison.

B. Appellate Counsel's Misadvice and the Federal Writ of Habeas Corpus

Mr. Patterson appealed his conviction and sentence. His appellate attorney identified many problems with how trial counsel had handled the case. So, after his convictions were affirmed by the Court of Appeals and this Court denied certiorari, Mr. Patterson wanted to continue fighting his case.

In a letter sent after certiorari was denied, Mr. Patterson's appellate attorney explained how Mr. Patterson might seek postconviction relief, but it was wrong in significant respects. (R:201-7.) Despite claiming to address both federal and state post-conviction proceedings, the letter came down clearly on one side: "I recommend you pursue federal habeas relief in your case." (R:202.) In support of this recommendation, the letter explained that while a petitioner seeking federal relief must first exhaust state remedies, in the same breath the letter told Mr. Patterson: "You have now exhausted your state court remedies." (R:202.) Although the letter left the decision of where to file up to Mr. Patterson, it identified no reason for Mr. Patterson to file in state court and led him to believe that the next step was to seek a writ of habeas corpus in federal court.

The letter wrongly told Mr. Patterson that he would have only a year to file a federal petition and failed to inform Mr. Patterson that the time to file a federal petition would be tolled while a state petition was pending. *Cf.* 28 U.S.C. § 2244(d)(2). It also artificially limited the scope of issues that could be raised by suggesting that Mr. Patterson had no other viable claims. It ignored the possibility that appellate counsel's own representation could have been the source of constitutional error and that those claims would have to be presented first to the state before Mr. Patterson could seek relief in federal court. To the extent the letter was intended to say that those claims raised by appellate counsel had been exhausted, it was wrong even in this, for counsel had failed to exhaust all the claims he had raised by including them in his petition for certiorari. In short, appellate counsel could not ethically give advice about

what claims Mr. Patterson could or could not pursue in post-conviction, and he certainly could not have continued to represent Mr. Patterson in a post-conviction proceeding, despite his offer to do so.

The letter was also wrong to say that Mr. Patterson had "no right to counsel." (R:201.) As discussed further below, the Supreme Court has made clear that the right of habeas corpus is so important that states like Utah that do not provide access to legal materials must at least provide "adequate assistance from persons trained in the law" to assist habeas petitioners "to make a meaningful initial presentation to a trial court." *Bounds v. Smith*, 430 U.S. 827, 827-28 (1977). Appellate counsel should have told Mr. Patterson that he did not know what claims could be made, but that the state was obligated to provide assistance to him to submit a meaningful post-conviction petition, and that some of these claims might not have been raised at all, let alone fully exhausted. But this is not what he said. In an in-person visit, Mr. Patterson's appellate attorney was clear: the state case was over, and the next step was to seek a writ of habeas corpus in federal court. (R:856.)

Relying on appellate counsel's advice, Mr. Patterson filed a timely petition in federal court. But Mr. Patterson filed *pro se*, and his repeated requests for the appointment of counsel to help him were denied. No real movement was made in the case until a pro bono attorney appeared for the limited task of getting qualified postconviction counsel appointed. Only then did the federal court appoint present counsel to represent Mr. Patterson.

Upon digging into his case, counsel discovered significant constitutional claims that had not previously been raised in state court. Contrary to his

appellate attorney's advice, Mr. Patterson had not exhausted his state remedies, and the correct advice should have been to seek post-conviction relief in the state to ensure that all claims were fully exhausted.

C. The State PCRA Petition

The discovery of those claims led to the PCRA petition that is the basis of this appeal. But by the time Mr. Patterson's state petition was filed, several years had passed. Mr. Patterson offered a host of theories for why the claims should still be considered. The state district court rejected them all. It also refused to consider claims that were based on evidence that was not discovered until Mr. Patterson's present counsel investigated his case. It granted summary judgment in favor of the State and dismissed all of Mr. Patterson's claims without a hearing. This appeal followed.

IV. SUMMARY OF ARGUMENT

Mr. Patterson tried diligently to seek post-conviction relief, but he did not have access to legal counsel to assist him with that filing, and because of his attorney's incorrect advice, he filed his first pro se petition in federal court instead of state court. His claim raises numerous significant and complex claims of constitutional error, and he advances several legal theories that would allow the district court to reach the merits of his claims.

First, he argues that the statute of limitations should be tolled because (a) his attorney's constitutionally defective advice should be imputed to the State, and (b) the State's failure to provide adequate contract legal counsel

prevented him from filing a timely petition in this court. These two sets of facts provide a basis for statutory tolling.

Second, if he does not qualify for statutory tolling, his diligence in seeking relief coupled with his attorney's erroneous advice is grounds for equitable tolling.

Third, if the Court concludes that equitable tolling is not available under the PCRA, then he should be excused under the "egregious injustice" exception that this Court has recognized previously but not yet defined. Mr. Patterson meets the threshold criteria and proposes two possible frameworks for analyzing claims under this exception. Either framework would excuse his late filing.

Fourth, if the Court concludes that the PCRA's filing deadlines are so absolute as to prevent consideration of the merits, then they are unconstitutional, and Mr. Patterson asks the Court to allow his petition to move forward under its constitutional authority to grant a writ of habeas corpus, which is not subject to such strict time limits.

Finally, even if none of these legal theories carry the day, some of Mr. Patterson's claims should be allowed to go forward because they are based on newly discovered evidence.

V. ARGUMENT

A. The district court erred by dismissing Mr. Patterson's claims as untimely.

The only issue given any real consideration below was not the merits of Mr. Patterson's claims, but whether the merits should be considered at all. The State argued that the delay between when Mr. Patterson's criminal case became final and when he filed his petition was too long for any of his claims to be heard. The district court agreed, and dismissed Mr. Patterson's petition. In so doing, the district court erred.

1. Mr. Patterson's claims must be heard, either under the PCRA or under the Utah court's power to issue the Great Writ.

The writ of habeas corpus—the Great Writ—"is one of the most important of all judicial tools for the protection of individual liberty." *Hurst v. Cook*, 777 P.2d 1029, 1034 (Utah 1989). The Writ belongs to the judicial branch and is an essential power that ensures courts' power to act as a separate branch of government, open to hear to the complaints of those whose liberty is restrained. *Id.* at 1033–34. The Writ is a cornerstone "of Anglo-American jurisprudence and an essential constitutional tool we give every citizen so that they can raise challenges to the lawfulness of their confinements." *Julian v. State*, 966 P.2d 249, 259 (Utah 1998) (Zimmerman, J., concurring).

Mindful of the Writ power, Mr. Patterson sought postconviction relief in the district court under the auspices of the PCRA as well as that court's "authority under the Utah Constitution." R:472; *cf. Winward v. State*, 2012 UT 85, ¶ 57 n.10, 293 P.3d 259 (Lee, J, concurring in judgment). That was a

deliberate reference to the district court's authority to issue writs of habeas corpus.

And it is the Utah Constitution that provides courts this power. The Utah Constitution gives this Court and district courts the authority "to issue all extraordinary writs." Utah Const. Art. VIII, sec. 3 & 5. Among those extraordinary writs is the writ of the habeas corpus. *See Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1152 (Utah 1995).[1] Because the courts' writ power is granted directly by the constitution, the legislature has no authority to diminish or restrict that power. *See Brown v. Cox*, 2017 UT 3, ¶ 14, 387 P.3d 1040 (citing *Petersen*, 907 P.2d at 1152).

Contrary to this clear grant of the Writ power to the courts, the legislature has ostensibly sought to limit the courts' habeas power. As written, the PCRA purports to replace "all prior remedies for review, including extraordinary or common law writs." Utah Code §78B-9-102(1)(a). Yet even the legislature has recognized that it cannot oust the court's writ powers by statute. In 2009, it sought—but failed—to amend the constitution so that a "person may challenge the legality of the conviction or sentence only in the manner and to the extent provided by statute." *Senate Joint Resolution 14* (Utah

[1] The Judicial Article of the Utah Constitution was completely overhauled in an amendment passed in 1984. While that revision accomplished many large changes, like establishing the Judicial Council, in other places it simply updated language. Naming the specific extraordinary writs was one such change. *See* 1984 Report of the Utah Constitutional Revision Commission, pp. 25–26, 28; *see also Peterson*, 907 P.2d at 1152.

2009).[2] As it stands, then, Utah courts still have plenary Writ power *despite* the PCRA's statements to the contrary. The Great Writ remains in force without legislative restrictions.

Nevertheless, the PCRA puts hard limits on when relief can be granted in postconviction. Among the restrictions the legislature has claimed to place on postconviction relief is a severe and unforgiving statute of limitations. *See* Utah Code § 78B-9-107(a). Yet such a limitation cannot be squared with the purpose of the Writ. Because of the significance of what the Writ protects, "the mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights." *Julian*, 966 P.2d at 254. "*No* statute of limitations may be constitutionally applied to bar a habeas petition." *Id.*

Despite this Court's unambiguous statements about the writ power generally and the Great Writ specifically, the district court refused to hear Mr. Patterson's claims because it concluded they were untimely under the PCRA and that no exceptions to the PCRA applied. The question, then, is whether the PCRA can be interpreted in some way that avoids a conflict with the constitution, which does not impose such a strict time limit, or whether it must be declared unconstitutional. *See, e.g., Nevares v. MLS*, 2015 UT 34, ¶ 38, 345 P.3d 719 (declaring "under the canon of constitutional avoidance," interpretations should be avoided that raise constitutional conflicts). In briefing

[2] Available at https://le.utah.gov/~2009/bills/static/SJR014.html; *see also* Mark L. Shurtleff, "Help crime victims by limiting appeals," *Deseret News* Feb. 13, 2009, available at https://perma.cc/3AZB-RGX5.

below, Mr. Patterson offered three possible interpretations that would avoid a conflict between the PCRA and the courts' Great Writ power. If any of those arguments prevail, then, at least as it concerns Mr. Patterson, the PCRA is constitutional. Otherwise this Court must confront the constitutional question and consider whether the PCRA infringes on the courts' power to issue the Great Writ.

2. Mr. Patterson is entitled to statutory tolling.

The first, most conventional way in which Mr. Patterson's claims could be considered under the PCRA is through statutory tolling. To understand his claim to statutory tolling, it is first necessary to examine the PCRA's statutes.

Under the PCRA, a petition for relief generally must be filed within a year of when the petitioner's case becomes final. *See* Utah Code §78B-9-107(2)(a)–(d). But the time to file is tolled in a few limited circumstances. One circumstance is for "any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution." Utah Code §78B-9-107(3). The State prevented Mr. Patterson from filing a timely petition in two ways. First, his attorney's misadvice was an error that should be imputed to the State. Second, the State failed to provide adequate legal counsel to facilitate his filing of a timely petition.

a. Ineffective assistance of Mr. Patterson's appellate counsel justifies statutory tolling.

The first way in which unconstitutional state action prevented Mr. Patterson from filing at timely petition was the erroneous advice of appellate

counsel, which should be imputed to the State. A significant error by a defendant's attorney can be imputed to the State when it amounts to unconstitutional ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478 (1986).

In *Murray v. Carrier*, the U.S. Supreme Court considered whether a petitioner should be allowed to seek federal review of claims that were dismissed by the state court on procedural grounds. With respect to the failure to follow state procedural rules, the Supreme Court explained: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Id.* at 488. However, "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default to be imputed to the state." *Id.* Put otherwise, if the Constitution required the State to provide effective assistance of counsel, then the failure to do so made the State responsible for the procedural error. If the Constitution did not require effective assistance of counsel, then attorney error cannot be imputed to the State. Thus, failure to comply with procedural rules (like the statute of limitations in this case) must be excused if the failure was the result of ineffective assistance of counsel.

In Mr. Patterson's case, it was his appellate counsel who provided ineffective assistance. *See Evitts v. Lucey,* 469 U.S. 387 (1985) (appellant counsel must provide effective assistance). Part of his duty as appellate counsel was to advise Mr. Patterson of what remedies he had after his direct appeal had been

completed. For example, in the American Bar Association's *Criminal Justice Standards, Defense Function*, it states that "[a]fter a conviction is affirmed on appeal, appellate counsel should determine whether there is any ground for relief under other post-conviction remedies. If there is a reasonable prospect of a favorable result, counsel should explain to the defendant the advantages and disadvantages of taking such action." American Bar Association, *Criminal Justice Standards, Defense Function*, Standard 4-8.5 (Third Ed. 1993); *accord* American Bar Association, *Criminal Justice Standards, Defense Function*, Standard 4-9.5 (Fourth Ed. 2015). This duty naturally follows, too, from Rules of Professional Conduct. Those rules require attorneys to communicate diligently with their clients, give accurate advice, and "[u]pon termination of representation" take reasonable steps "to protect a client's interests." Utah R. Prof'l Conduct 1.1, 1.3, 1.4, & 1.16; *accord* Ellen M. Meagher, "Bar overseer: It's not over till it's over," *Lawyers Journal*, Mass. Bar Assoc. (May 2003), available at https://perma.cc/J6E8-2559.

It does not matter that appellate counsel gave his advice on postconviction after Mr. Patterson's appeal of right had been completed. He was obligated to give correct advice in a timely manner as direct appeal counsel. The fact that he filed a cert petition on Mr. Patterson's behalf meant only that he could provide this advice in a timely matter on a later date. But once the time to provide that advice arrived—i.e., when certiorari was denied—he was obligated to provide correct advice.

Just like the right to appeal, Mr. Patterson has a right to postconviction relief. *See, e.g.*, *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (holding that the

Fourteenth Amendment requires state courts to provide a forum for postconviction claims). Appellate counsel was as much to blame for the improper about how to seek postconviction relief as a trial attorney would be if he gave improper advice on the right to appeal. His failure to properly and accurately advise Mr. Patterson was ineffective assistance of counsel.

Even if appellate counsel did not have an affirmative duty to advise Mr. Patterson about his postconviction rights, having offered advice, he had the duty to ensure his advice was correct. This is especially so where the advice related to Mr. Patterson's constitutional right to seek postconviction relief.

This Court recognized as much in *State v. Rojas-Martinez*, 2005 UT 86, 125 P.3d 930. Before the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that defense attorneys have an affirmative obligation to advise their clients about deportation consequences, this Court had held in *Rojas-Martinez* that there was no such affirmative duty. However, if an attorney *did* offer such advice, offering an "affirmative misrepresentation" would constitute unconstitutional ineffective assistance of counsel. *See Rojas-Martinez*, 2005 UT 86, ¶ 20, 125 P.3d 930.

Although *Rojas-Martinez* arose in the context of a guilty plea, the "affirmative misrepresentation" rule should control here as well. Under this precedent, even if counsel was not affirmatively obligated to advise Mr. Patterson of his postconviction rights, by offering advice that affected his ability to seek postconviction relief under the state and federal Constitutions, he was constitutionally obligated to give correct advice. The failure to do so

was unconstitutional ineffective assistance of counsel that should be imputed to the State for purpose of the PCRA's statute of limitations.

The district court rejected this argument on the theory that *Carrier* does not apply here because it "addressed a 'cause and prejudice' standard applicable only in federal habeas proceedings, and it was not a statute of limitations case." (R:998.) However, the central issue was the same as in this context: who is responsible for a procedural error caused by an attorney's bad advice? If the attorney's error was unconstitutional, then the error would be imputed to the State; if it was not unconstitutional, then the error would be imputed to the petitioner. Because appellate counsel's misadvice was given in violation of the Sixth Amendment, it is imputed to the State, and Mr. Patterson's petition is timely.

With respect to the district court's reliance on federal caselaw, the cited cases do not address *Murray v. Carrier*, so they are inapposite here. (R:999 (citing cases). Furthermore, their facts are highly distinguishable. In *Irons v. Estep*, 2006 WL 991106 (10th Cir. 2006), the petitioner tried to argue that the delay in filing was a result of his being unaware of a change in the law, a legal theory that had nothing to do with his counsel's representation, so he could not "demonstrate how the actions of his attorney prevented him from filing his [federal] petition in a timely manner." *Id.* at *1. In *Finch v. Miller*, 491 F.3d 424 (8th Cir. 2007), the petitioner's claim was directed at the failure to appeal from the denial of his first post-conviction application. Because there is no constitutional right to counsel at this stage, *Murray v. Carrier* would not change the outcome had it been discussed. And in *Dunker v. Bissonnette*, 154 F. Supp.

2d 95, 106 (D. Mass 2001), "there [was] no indication that petitioner contacted [his attorney] to ask him about any filing deadline," so he could not have shown that his attorney caused the late filing in any case. These cases do not change the rule in *Murray v. Carrier* that an attorney's advice should be imputed to the State when it violates the Constitution.

On the facts, the district court is right in identifying "seemingly contradictory statements" in Mr. Patterson's arguments (R:999), but the source of this contradiction was appellate counsel who failed to provide accurate advice. It surely is "contradictory" to conclude "that Petitioner could 'challenge the convictions in state court' when he 'had exhausted [his] state court remedies.'" (*Id.*) Yet this contradiction is at the heart of the misadvice that compelled Mr. Patterson to file in federal court. Although his attorney had touched on the availability of state postconviction proceedings as a theoretical legal option, it was only in the context of saying that Mr. Patterson had exhausted his state remedies and had no reason to further litigate his case in state court. The bottom line was that the next step was to proceed directly to federal court, which Mr. Patterson did to his detriment.

Appellate counsel was constitutionally required to give correct advice about how to proceed on postconviction. His failure to do so was unconstitutional and, therefore, is imputed to the State. As such, Mr. Patterson's claims should be equitably tolled until present counsel was appointed to correct that error.

b. The State's failure to provide access to the courts justifies statutory tolling.

Alternatively, if appellate counsel's bad advice is insufficient to justify statutory tolling, then the State's failure to provide access to its courts is. Prisoners, like everyone else, have a constitutional right of access to courts. *See Bounds v. Smith*, 430 U.S. 817 (1977); Utah Const. Art. I, sec. 11. But because of their incarceration, mere access is an empty right unless prisoners are provided with adequate legal resources so they can prepare "meaningful legal papers." *Bounds*, 430 U.S. at 1498. The State has previously recognized that "if the State failed to provide [a petitioner] with sufficient legal resources to allow him to access the courts, then the PCRA's statute of limitations would be tolled." Aplee. Br., *Winward v. State*, Case No. 20101005 at 23 (Utah Dec. 7, 2011).

The Utah Department of Corrections purports to provide prisoners such legal resources through contract counsel who advise prisoners and provide them legal materials. *See* Utah Administrative Rule R251-707-3(4) & (6); *accord Bounds*, 430 U.S. at 1498. In reality, though, the contract counsel generally fail to provide legally sufficient advice. And in this case, the contract counsel failed to provide legally sufficient advice to Mr. Patterson.

To begin with, Mr. Patterson was unaware of the existence of the attorneys when he was first imprisoned.[3] When he found out about their existence and sought out their help, their responses were always dilatory, and

[3] And, from his perspective, there was not a need to seek them out. With this appellate attorney's advice, Mr. Patterson had an idea of what he was supposed to do, even if it was an incorrect one.

the assistance they provided was deficient. Rather than help Mr. Patterson identify claims and prepare filings, the contract counsel instead simply provided him forms and directed him to file *pro se*.

In postconviction, absent unusual circumstances, the only claims a petitioner may have will be claims of ineffective assistance of counsel. *See, e.g.*, Utah Code § 78B-9-106(1) & (3)(a). Such claims will turn on whether counsel acted reasonably, i.e. whether their conduct was consistent with "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Yet it is regularly recognized that except for the most obvious errors, it is beyond the ken of lay people what an attorney should or should not do in a case. *See, e.g.*, *Kirkham v. McConkie*, 2018 UT App 100, ¶ 9. For that reason, it is constitutionally inadequate for contract attorneys to merely provide forms or copies of legal opinions. They must *consult* with prisoners about their claims. The failure to do so with Mr. Patterson effectively imposed a barrier to his access to state courts.

The district court rejected this argument by making factual inferences that were not Mr. Patterson's favor, so it should be reversed for further discovery and factfinding. *See, e.g., Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993) (stating that facts and all reasonable inferences must be drawn "in the light most favorable to the nonmoving party"). For example, the district court reasoned that "[i]f other inmates were aware of the contract attorneys, it seems to follow that Petitioner should have known of them as well if he was diligently attempting to file another challenge to his conviction." (R:994.) However, this assumption is inconsistent with Mr. Patterson's assertion as a

matter of fact that he was not aware of the contract attorneys until very late in the case. On remand, the State may offer evidence to support the court's conclusion that Mr. Patterson *should have been aware* of these attorneys,[4] but that evidence is not yet in the record, and the district court improperly drew that evidence against Mr. Patterson on summary judgment.

The court also faults Mr. Patterson for relying on a 2003 contract that was available in public court records to draw inferences about what the contract required attorneys to do in 2014. Mr. Patterson has no reason to believe that the 2014 contract was materially different from the 2003 contract, but without the chance to do discovery, he is unable to make his case. Though styled as a motion for summary judgment, the State's motion was actually its first response to Mr. Patterson's petition, and it was filed without the opportunity to conduct discovery. At this early juncture, the court should have construed the 2003 contract as evidence of what a standard, state-issued contract would have covered in 2014, and it should have allowed the parties to conduct discovery so that Mr. Patterson could discovery what obligations the contract attorneys actually had. It is entirely possible that the 2014 contract was even more lax than the 2003 contract, which would further support Mr. Patterson's claim.

The State has previously acknowledged that failure to provide sufficient contract legal services could justify statutory tolling. Aplee. Br., *Winward v. State*, Case No. 20101005 at 23 (Utah Dec. 7, 2011). And Mr. Patterson has

[4] Mr. Patterson doubts the State will have such evidence to present.

alleged such a failure in his case. The court improperly drew factual inferences against him, so it should be reversed for further discovery and factual findings.

In short, whether or not he had an affirmative duty to do provide advice about postconviction litigation, appellate counsel's incorrect advice is ineffective assistance, and thus is imputed to the State. And the failure to provide legal resources to prisoners prevented Mr. Patterson from realizing that he had received bad advice and to file a legally sufficient petition for postconviction relief. Under Utah Code §78B-9-107(3), these facts toll the time to file.

3. Mr. Patterson is entitled to equitable tolling.

Another source of relief from the PCRA's short statute of limitations is equitable tolling. In general, statutes of limitations can be tolled for "exceptional circumstances where the application of the general rule would be 'irrational' or 'unjust.'" *Estes v. Tibbs*, 1999 UT 52, ¶ 5, 979 P.2d 823 (quoting *Sevy v. Security Title Co.*, 902 P.2d 629, 636 (Utah 1995)). And as the U.S. Supreme Court has recognized, "equitable principles have traditionally governed the substantive law of habeas corpus." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (cleaned up). "We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Id.* at 645-46. In light of that history, the U.S. Supreme Court has allowed for equitable tolling in habeas cases where a petitioner "has been pursuing his rights diligently," yet failed to file because "some extraordinary circumstance stood in his way." *Id.* at 649

(quoting *Pace v. DiGuglielmo,* 544 U.S. 408, 418 (2005)). *Holland* also clarified that "[t]he diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Id.* at 653 (internal citations and quotation marks omitted). This Court, too, has expressed a similar view, declaring that "the law should not be so blind and unreasoning that where an injustice has resulted the [defendant] should be without remedy." *Hurst v. Cook*, 777 P.2d 1029, 1035 (Utah 1989).

Another Supreme Court decision shows how equitable principles can be used to excuse a procedural defect in a first habeas petition. In *Martinez v. Ryan*, the Supreme Court held that an attorney's error in an "initial-review collateral proceeding" was cause to excuse a procedural default. 132 S.Ct. 1309 (2012). The Court acknowledged that a habeas petitioner is not entitled to appointment of counsel and, thus, normally cannot challenge habeas proceedings under the Sixth Amendment. However, because of the unique importance of an "initial-review collateral proceeding," the Court concluded that such errors were equitable grounds to excuse a filing that would be procedurally barred. "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Id.* at 1314.

In *Martinez*, the petitioner was originally represented by counsel in his state collateral proceeding. Although post-conviction counsel began the process of seeking relief, she did not raise ineffective assistance of counsel claims "and later filed a statement asserting she could find no colorable claims at all." *Id.* As such, Mr. Martinez's petition was dismissed. He subsequently filed a

second post-conviction petition, but this was dismissed on procedural grounds, and he filed a habeas petition in federal court. Normally such a claim would be deemed to be procedurally defaulted, but he argued that the default should be excused because it deprived him of the chance to ever challenge the effectiveness of his original trial.

The Supreme Court agreed.

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.

Id. at 1318.

Like the attorney in *Martinez* who wrongly concluded the petitioner had "no colorable claims" for a state habeas petition, appellate counsel wrongly advised Mr. Patterson that he had no reason to file in state court and should proceed directly to federal court. Mr. Patterson relied on this advice. Thus, even if the advice was not constitutionally protected such that it should be imputed to the State, Mr. Patterson's reliance on this advice to forego an initial review petition at least constitutes equitable grounds to toll the statute of limitations.

Additionally, Mr. Patterson's case presents another basis for equitable tolling: the filing of a timely federal habeas petition. Federal law requires petitioners coming from state court to "exhaust" state court remedies by

presenting all federal constitutional claims first to the state court. 28 U.S.C. § 2254(b)(1)(A). Because the time needed to litigate a state post-conviction claim would likely take longer than the year provided by the federal statute of limitations, federal law provides for statutory tolling when a state petition is filed. 28 U.S.C. § 2244(d)(2). The exhaustion doctrine is a consequence of comity, and the tolling provision provides a balance between the State's interest in hearing the claim first and the petitioner's interest in filing a timely federal petition.

The State is the beneficiary of this requirement because it allows state courts to have the first opportunity to review claims of constitutional error. Accordingly, the State should reciprocate this comity by allowing petitioners who file timely federal petitions to return to state court to exhaust their claims.

It is true that Utah does not provide statutory tolling based on the filing of a federal petition, but this court has equitable authority to toll the statute of limitations on this basis. The State should not penalize pro se petitioners who diligently pursue their constitutional rights by filing a timely federal petition, only to find out that the federal petition is ineffectual based on doctrines of comity. Because the federal government has decided to respect state jurisdiction by requiring exhaustion, state courts should excuse untimely filers who raise meritorious claims in federal court but then, on principles of comity, bring those claims to the State. The State should reciprocate the comity by equitably tolling the statute of limitations when a federal petition is timely filed.

Mr. Patterson has been diligently pursuing post-conviction relief and would have filed a timely petition in state court but for the erroneous advice of counsel and the lack of meaningful guidance from the contract attorneys. The bad advice deprived Mr. Patterson of his right to an initial-review collateral proceeding, which is a basis for equitable tolling. So is the fact that he filed first in federal court when he should have filed in state court.

Under the circumstances in his case, it would be unjust to blindly apply the statute of limitations without reason. Mr. Patterson diligently sought further review of his case. He filed a timely petition in federal court because he had been told that his state remedies had been exhausted and he should proceed next to federal court. Then, once he had filed, he asked for help, only to be rebuffed time and again. Only after the normal time to file had expired did Mr. Patterson have counsel appointed to help him. It was only then that he was informed that appellate counsel's advice about how to seek postconviction relief was wrong. Had he known he needed to file first in state court, he would have done so. He was acting diligently to protect his constitutional rights and filed his PCRA petition within a year of having counsel appointed. Given the complex nature of his claims and his diligent efforts to pursue them, the statute of limitations should be equitably tolled until counsel was appointed to represent him.

The district court did not address whether it had equitable authority to toll the statute of limitations. (R:997-999 (discussing only whether ineffective assistance of counsel could be imputed to the State to qualify for statutory tolling)) Although the factual basis for equitable tolling is the same for this

legal theory as for statutory tolling, the legal standards are different. Under equitable tolling, the court does not need to find that appellate counsel's advice was unconstitutional. Equitable tolling focuses on the petitioner's efforts, and even if his counsel's bad advice was not constitutional, it certainly created an unusual circumstance that is ground for equitable tolling. Put otherwise, Mr. Patterson exercised reasonable diligence, so he should not be barred from presenting his serious and complex constitutional claims where his missteps were based on counsels' bad advice.

Equitable tolling, like statutory tolling above, is an appropriate way to avoid addressing the constitutionality of the PCRA because it allows Mr. Patterson's claims to be heard without invalidating the postconviction framework the legislature created in the PCRA. Either Mr. Patterson's claims are heard based on an explicit tolling provision or an implicit one. Either way, the PCRA remains intact.

4. Mr. Patterson's petition should be reinstated because dismissing it would be an egregious injustice.

The last way in which Mr. Patterson's claims may be heard without confronting the looming constitutional question is to allow his claims to be heard under this Court's proposed "egregious injustice" exception.

In *Gardner v. State* and *Winward v. State*, this Court confronted the constitutional question discussed above, asking "whether the PCRA and Rule 65C now wholly accommodate the full measure of our constitutional authority or whether the Utah Constitution requires that we be able to consider, in some cases, the merits of claims otherwise barred by the PCRA." *Gardner v. State*,

2010 UT 46, ¶ 93, 234 P.3d 1115; *accord Winward v. State*, 2012 UT 85, ¶ 14, 293 P. 3d 259. This Court reasoned that it could still grant relief, despite the PCRA, if doing so would avoid an egregious injustice. *Gardner*, 2010 UT 46, ¶ 93; *Winward*, 2012 UT 85, ¶ 15.

In *Winward*, this Court provided a rough sketch of how claims could be presented under the "egregious injustice" exception. The threshold step requires a petitioner to show that "he has a reasonable justification for missing the deadline combined with a meritorious defense." *Winward*, 2012 UT 85, ¶ 18. Then the petitioner must articulate the contours of his proposed exception and how the petitioner's circumstances qualify for the articulated exception. *Id.*

Mr. Patterson can make the threshold showing. He does have a reasonable justification for his delay. His delay was not intended to abuse the writ, to hold claims in reserve to spring later, or any other inappropriate reason. To the contrary, he wanted relief as soon as possible. Despite his diligent effort to seek postconviction relief, he failed to file in state court within a year only because he was directed to federal court on the bad advice of his direct appeal counsel. Thus, even if appellate counsel's advice was not *constitutionally* defective advice that could be imputed to the State, it is a "reasonable justification" required for the threshold issue under *Winward*. Relying on this misadvice, Mr. Patterson filed in federal court on time, and he filed here within a year of having counsel appointed. This court should find that Mr. Patterson's justification is reasonable.

With respect to whether the petition has merit, this Court suggested that this standard was "flexible," *see id.* ¶ 20 ("flexible test") and recognized that a

petitioner does not need to prove at this stage that he will prevail. Instead, a petitioner needs to show only that the claims are not frivolous. *See id.* (citing URCP 65C(h)(2)).[5] But the same frivolousness review was part of the district court's initial review of the petition. *See* URCP 65C(h)(1). And here, the State did not move to dismiss for failure to state a claim or even argue that the lack of merit was a reason to fail *Winward's* threshold test. Mr. Patterson has presented numerous valid claims of error throughout the entire process from investigation, to plea negotiations, to trial, to sentencing, to appeal. The only real dispute is whether Mr. Patterson "has a reasonable justification" for his untimely filing, which he does. The district court wrongly concluded that he had not met the threshold test. (R:995.)

Having made the threshold showing, Mr. Patterson must "fully brief the particulars of this exception" and "demonstrate why the particular facts of his case qualify under the parameters of the proposed exception." *Winward*, 2012 UT 85, ¶ 18. Mr. Patterson proposes two frameworks for this exception, either of which would allow his case to go forward.

First, this Court should hold that the egregious injustice exception is satisfied any time a petitioner satisfies the threshold test. That is, a petitioner who states a meritorious claim should be allowed to proceed if he satisfies the court that "he has a reasonable justification for missing the deadline." Indeed, this was essentially the law in Utah before the PCRA was amended in 2008.

[5] Relevant to the discussion here, URCP 65C(h)(2) states that a claim is frivolous when "the facts alleged do not support a claim for relief as a matter of law" or when "the claim has no arguable basis in fact."

See Laws of Utah 2008, ch. 288, § 6. Prior to 2008, the "interests of justice" exception gave courts the flexibility and discretion that the Utah Constitution requires they have. This doctrine requires courts to look at the merits of the claims to be presented and the reasons for why they are filed late *See, e.g., Adams v. State*, 2005 UT 62, ¶¶ 10–26, 123 P.3d 400. In other words, it asks basically the same questions as Mr. Patterson had to meet under *Winward*'s threshold. A narrower standard would be unconstitutional under *Julian v. State*, 966 P.2d 249, 253 (1998).

Adopting this same standard here has two advantages. First, it has the benefit of years of caselaw applying the "interests of justice" exception. Second, it avoids the complex analytical framework that *Winward* calls for, with its as-yet-undefined considerations. Once a petitioner has shown a good reason for his tardiness, there is often not much more to say. If the constitutional claims have merit, they should be allowed to proceed, for denying relief for a constitutional violation would itself be an egregious injustice. As under doctrines of equitable tolling, a reasonable justification for the delay should be sufficient to grant relief by itself.

Mr. Patterson has already demonstrated how he satisfies this standard based on his diligent efforts to seek postconviction relief, the affirmative misadvice from counsel, and the fact that he filed a timely federal writ of habeas corpus with numerous claims of possible merit. Mr. Patterson's strong showing on both fronts makes resolution of that question unnecessary. His reason for delay is eminently reasonable. Indeed, his "delay" was diligently pursuing relief in the wrong court based on bad advice.

As for the strength of his claims, the State did not argue that his claims were not potentially meritorious. To the contrary, Mr. Patterson has alleged numerous claims that, if true, would undermine the validity of his conviction. The claims speak for themselves.

For example, Grounds 1-3 (R:490-502) deal with the prosecutor's threat to impeach Mr. Patterson with his so-called confession to his LDS bishop. However, post-trial testimony established that the prosecutor knew that the bishop was unwilling to testify at trial. (R:664-665.) It also revealed that the bishop had not actually disclosed a confidential "confession" or any other admission of criminal conduct. (R:573-75.) However, trial counsel made no effort to question the prosecutor about the likelihood that the bishop would testify (he would not have testified), or what he would say (he had nothing damaging to say), or whether his testimony would have been admissible at all (the PCRA claims identify multiple theories that could have been used to exclude the testimony). Instead, trial counsel parroted the prosecutor's threat to Mr. Patterson, telling him that if he testified, the prosecutor would call his bishop to testify that he had confessed to the crime. Trial counsel was clearly ineffective in the manner that they handled this issue, and the advice that Mr. Patterson not testify was fatal to his defense. Moreover, the prosecutor's threat to call the bishop as an impeachment witness when he knew he would not testify was a violation of due process.

Ground 4 (R:503-515) challenges trial counsels' failure to consult with and retain an expert who could have demonstrated how suggestive interviews were a likely cause of the step-daughter's damaging trial testimony. Her trial

testimony was full of inconsistencies, and an expert would have shown how these inconsistencies were evidence of suggestive questioning, not a sexual assault. Rather than follow clinical protocols that ensure that the child's statement was not tainted or distorted, each person who interviewed the complainant improvised as they went. This tainted the her statement, filling it with answers that were either coached or offered to satisfy the interviewer's question, regardless of what the truth was.

Ground 5 (R:515-27) challenges counsels' failure to investigate and present readily available impeachment evidence that would have discredited the ex-wife's testimony that she had asked for a divorce only after discovering what Mr. Patterson had done to her child. Mr. Patterson argues that she was retaliating against him for seeking a divorce, and this ground identifies numerous readily available sources that could have been used to establish this theory. The most damaging omission was counsels' failure to obtain a DCFS report that the ex-wife told DCFS workers that *her husband* had asked for the divorce. This evidence directly contradicts her trial testimony. Counsel's failure to obtain this evidence and put on a defense case was unconstitutionally ineffective.

This analysis could continue for all of Mr. Patterson's claims, but returning to the bigger picture, it makes sense to focus on why a claim was not presented consistent with the PCRA's rules (cause) and its consequence to the petitioner (prejudice). The upshot of all of Mr. Patterson's claims is that he was unconstitutionally prevented from presenting a viable defense to the charges against him. He stands wrongly convicted and sentenced to an effective life

sentence. The impact for him from the loss of these claims is enormous, and he has diligently tried to seek relief, but he was misdirected by his own attorney's bad advice. It is hard to imagine anything else that would be relevant to the equitable question of whether a petitioner's claims should be heard despite the PCRA's bars. Or, put another way, the combination of cause and prejudice conceivably cover everything relevant to the consideration of whether a claim should be heard for equitable reasons when a procedural bar stands in the way.

However, if the court concludes that the egregious injustice exception requires something more than *Winward*'s threshold analysis or *Adams*'s interests of justice analysis are not sufficiently rigorous, then it must provide guidance for lower courts about what specific considerations must be made to warrant relief. To that end, Mr. Patterson identified several factors below that could serve as guideposts for whether the injustice of a dismissal would be so egregious as to warrant relief from the statute of limitations. (R:830-31.)

Gardner and *Winward* suggest several factors the court could consider: (1) the length of the delay; (2) the petitioner's explanation for the delay; (3) the petitioner's diligence in seeking relief; (4) the nature of petitioner's claims; and (5) whether the petition is a first or successive petition. Additionally, while the cases do not discuss it, another consideration bears on the justice or injustice of a dismissal: the length of the petitioner's sentence. While the State presumably seeks to enforce a statute of limitations under principles of "finality," the burden of finality is bore by the person unconstitutionally punished, and this burden increases with each passing day. The permanence afforded to a

constitutional error by a long sentence weighs in favor of finding an egregious injustice.

These considerations all support applying the exception here. Mr. Patterson worked hard to file a pro se post-conviction petition on time. He did so without knowing contract attorneys could be available to assist him, and when he sought their help, they had no substantive help to offer. Mr. Patterson relied on the misadvice of appellate counsel to his detriment about what he must do to protect his rights. He filed a timely petition in federal court, and once counsel was appointed, he filed a state petition within a year. This petition raises serious claims of ineffective assistance of counsel that infect the entire process from investigation, to plea negotiations, to trial, to sentencing, to appeal. It also raises a claim of prosecutorial misconduct, and it would be unjust to allow the State to breach its ethical duties and then hide behind a statute of limitations.

As the court weighs these factors, it should also keep in mind the lasting impact these errors will have on Mr. Patterson. Because he is subject to consecutive terms of 15 years to life in prison, the effect of these errors may well be permanent, and he will suffer the impact of these errors every day for the rest of his life. It is just that some flexibility be afforded to allow him to challenge these errors. Because this is Mr. Patterson's first petition, it has unique importance and should be allowed to go forward on the merits. *See, e.g., Martinez v.* Ryan, 132 S.Ct. 1309, 1316 (2012) (explaining unique importance of initial-review collateral petition). On balance, the court should find that

enforcing the statute of limitations against him would be an egregious injustice.

Mr. Patterson missed the time to file a PCRA petition, but for good reason. He has important claims that go to the heart of his convictions. So, if statutory or equitable tolling are not available, this Court should allow his claims to be heard under the egregious injustice exception.

5. If no tolling or exception is available, then the PCRA is unconstitutional.

If Mr. Patterson's claims cannot be heard under the PCRA, then they must be heard pursuant to the courts' Writ power, which has no statute of limitations. *Julian v. State*, 966 P.2d 249 (1998). The problem, though, is the PCRA's claim that it is the "sole remedy" and that it "replaces all prior remedies for review, including extraordinary or common law writs." Utah Code § 78B-9-102(1)(a). To consider Mr. Patterson's claim under the Writ power, the Court must first decide whether the PCRA can validly restrict the courts' writ power. The answer, of course, is that it cannot.

This decision is dictated by the reasoning in *Peterson v. Utah Board of Pardons*. In that case, at issue was a statute stating that decisions of the Board of Pardons and Parole were unreviewable in Utah courts. *Peterson*, 907 P.2d at 1151 (citing Utah Code § 77-27-5(3)). This Court concluded that this statute restricted its appellate jurisdiction, but not its power to issue writs: "Although the Legislature can refuse to provide a statutory appeal from orders of a governmental agency, the Legislature cannot curtail the constitutional powers of this Court to issue extraordinary writs in appropriate circumstances." *Id.* at

1152. Because the legislature was without power to restrict its writ power, this Court went on to consider the substance of the petitioner's claims. Ultimately the petitioner lost, not because this Court could not hear his claims but because his claims failed on their merits. *Id.* at 1153–55.

The restrictions imposed by the PCRA are similarly flawed. The legislature cannot diminish or restrict the courts' power to issue the Great Writ any more than it can restrict the other writs. The only exception is the one set out in the constitution: "The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it." Utah Const. Art. 1 sec. 5. No such suspension has occurred, so the statute of limitations imposed by the PCRA are unconstitutional.

Because the PCRA's restrictions on the Great Writ are unconstitutional, Mr. Patterson's must be heard under the courts' writ power, even if they would otherwise be barred under the PCRA. And the Writ power has long been used to examine the propriety of criminal proceedings and to ensure that prisoners received their appropriate constitutional protections before judgment. In the case of *McKee*, the petitioner in a habeas proceedings challenged an "innovative" feature of state's nascent criminal justice system, e.g. eight-person juries in non-capital felony cases. The petitioner claimed this denied him due process. *In re McKee*, 57 P. 23, 23–24 (Utah 1899). This Court denied his writ, not because the writ could reach such claims, but because it concluded that the due process clause in the Fourteenth Amendment of the Constitution allowed such changes. *Id.* at 24–28. Similarly, in *Bruce v. Sharp*, an appeal from the denial of a habeas petition, the petitioner argued that his conviction was

invalid because the statute under which he was prosecuted was invalid. 127 P. 343, 344 (Utah 1912). The petitioner lost his appeal, but again on the merits, not because his use of the writ was improper. *Id.* In *Saville v. Corless*, the petitioners argued in this Court that the statute under which they were convicted was invalid because "the subject of the act is not clearly expressed in the title, and that the act contravenes the fourteenth amendment to the Constitution of the United States, and the state Constitution, forbidding special legislation where a general law can be made applicable." 151 P. 51, 51 (Utah 1915). This Court granted a writ of habeas corpus, ruling in favor of the petitioners on all three of their arguments. *Id.* at 51–53.

Since the founding, the Great Writ has been available to correct "jurisdictional errors and to [correct] errors so gross as to in effect deprive the defendant of his constitutional substantive or procedural rights." *Thompson v. Harris*, 152 P.2d 91, 92 (Utah 1944). And since the founding of the state, that power has unambiguously been vested in the judicial branch without limitation, short of a complete suspension when the public safety requires it.

In this way, the Great Writ allows the judiciary to check the powers of the other branches of government. Should they ever overstep their bounds, the judiciary always can always respond through its writ power and assert itself as a separate but equal branch. *See Hurst*, 777 P.2d at 1033–34. The PCRA claims to withdraw this power from the judiciary and eliminate its ability to correct error in criminal cases except on the legislature's terms. According to the PCRA, no matter how meritorious the claim or egregious the injustice, if the claim is barred under the PCRA restrictions, no court can correct the error.

This Court has already held that such restrictions on the Great Writ are impermissible. *Julian*, 966 P.2d at 254. In *Julian v. State*, the State sought to assert two different statute of limitations against a petitioner seeking postconviction relief. The first was the general civil statute of limitations that required claims to be filed within four years without any exceptions. *Id.* at 250-52. The second was the one-year statute of limitations in the newly enacted PCRA. That one-year limit included the "interests of justice" exception. *Id.* at 253-54 (citing Utah Code § 78-35a-107(1) & (3) (1996)).

Considering the four-year statute of limitations, this Court held that an absolute limit without exception was unconstitutional because it "removed flexibility and discretion from state judicial procedure" so that the courts' "ability to guarantee fairness and equity in particular cases" was diminished. *Id.* at 253. Moreover, such inflexible limits on the writ of habeas corpus are inconsistent with the Open Court Provision and Separation of Powers Provision. *See id.* As for the one-year limit in the PCRA, it was valid only if the "interests of justice" exception was broadly construed. Otherwise, it, too, would "unconstitutionally limit[] habeas corpus actions." *Id.* at 254. "Under our reasoning in this case, proper consideration of meritorious claims raised in a habeas corpus petition will *always* be in the interests of justice. It necessarily follows that *no* statute of limitations may be constitutionally applied to bar a habeas petition." *Id.*

In short, in *Julian* this Court recognized that meritorious claims should always be heard. Indeed, this Court would later rely on *Julian* to hold that 'a petitioner's failure to comply with a statute of limitations *may never be a proper*

ground upon which to dismiss a habeas corpus petition." *Frausto v. State*, 966 P.2d 849, 851 (Utah 1998).

If Mr. Patterson's claims cannot be considered under the current PCRA, then they can and must be addressed under the Utah courts' Writ power. Enforcing the statute of limitations here would violate the suspension clause of the Utah Constitution because Mr. Patterson has raised serious claims of constitutional error. It is his first petition, and he has been diligently pursuing his rights by filing in federal court. He failed to file here based on inaccurate advice from counsel and the lack of ability to cure that bad advice with legal information available to inmates.

The district court rejected this claim because it was "not persuaded that Petitioner has been denied due process and does not see anything in the Opposition that convincingly suggests 'that it would be unconscionable not to re-examine the conviction.'" (R:996.) However, this cursory dismissal of the merits of Mr. Patterson's claims ignores the serious allegations he has raised and fails to construe the facts in his favor, as the law requires at this stage of litigation. *See, e.g., Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993) (stating that facts and all reasonable inferences must be drawn "in the light most favorable to the nonmoving party").

For example, if Mr. Patterson's claims are true, he was convicted because his wife retaliated against him when he asked for a divorce, and his step-daughter's inconsistent trial testimony was the result of untrained, suggestive questions. His attorneys put on no evidence to rebut the case against him, despite the availability of witnesses who could establish the problems in the

State's case. And when Mr. Patterson at least wanted to tell his side of the story, the prosecutor knowingly lied about an impeachment witness it could call to testify against him (Mr. Patterson's LDS bishop). Counsel have admitted that they did not question the State's claim, they did not really know what the bishop would say, and they did not consider whether his testimony would be admissible at all. (*See, e.g.,* R:590-94.) As a result of these and other serious errors, Mr. Patterson is condemned to spend the rest of his life in prison. Only by resolving factual inferences against him could the district court conclude that Mr. Patterson had not made constitutional claims that would be "unconscionable not to re-examine." Given the serious nature of Mr. Patterson's constitutional claims, this Court should conclude that he has acted diligently and deny the State's summary judgment motion.

B. Some of Mr. Patterson's claims rely on facts that were previously unavailable and are timely under the PCRA.

Finally, if the court concludes that Mr. Patterson's petition is time-barred, some of his claims are timely because they are based on newly discovered evidence. A petition is timely if it is filed within one year of when the petitioner knew of the evidentiary facts on which the claims are based. *Id.* at (2)(e). Some of Mr. Patterson's claims are timely under this provision. This was explained to the district court below (R:843-45), but the district granted the State's summary judgment motion anyway. *Cf. State v. Mullins*, 2005 UT 43, ¶8, 116 P.3d 374 ("When a final disposition of a case is entered by a district court, any unresolved motions inconsistent with that disposition are deemed resolved by implication.").

Ground 4 in Mr. Patterson's petition is one of the claims that it timely because of later discovered evidentiary facts. In that claim, Mr. Patterson faults his prior counsel for failing to get an expert who could examine the several interviews of the complainant and explain how those interviews failed to meet forensic standards and likely corrupted her testimony while also failing to examine for coaching. An expert retained by present counsel reviewed the complainant's statements and concluded that there is strong evidence of fabrication, too. (*See* R:503-15.)

The point that prior counsel failed to get an expert is critical to the timeliness of the claims in Ground 4. Once Mr. Patterson was imprisoned, he had neither the ability nor the means to hire an expert on his own. After his direct appeal had been paid for, he was destitute. So getting an expert to provide the evidentiary facts necessary to Ground 4 was impossible.

Nor could Mr. Patterson have filed the claim and hypothesized about what an expert might have said about the interviews of the complainant. Over and over again, Utah courts have denied claims of ineffective assistance in which the person making the claim has failed to provide evidence of what an expert would say, not what one might say. Without evidence of what an expert would say, claims of prejudice are speculative. *See, e.g.*, *State v. Chacon*, 962 P.2d 48, 51 (Utah 1998); *Taylor v. Warden*, 905 P.2d 277, 284 (Utah 1995); *State v. Burnside*, 2016 UT App 224, ¶38, 387 P.3d 570; *State v. Bingham*, 2015 UT App 103, ¶¶34–35, 348 P.3d 730; *In re N.A.D.*, 2014 UT App 249, ¶8, 338 P.3d 226.

Ground 4 is timely because it was filed within one year of when Mr. Patterson's present counsel retained the expert and received his report. It should not have been dismissed as untimely.

Ground 5 does not involve an expert, but parts of it, too, relies on newly discovered evidence. Specifically, Parts 1 and 6 rely on a DCFS report that prior counsel failed to obtain. (*See* R:515-16, 521-24.) The critical piece of this report is the statement by Mr. Patterson's ex-wife to DCFS that the Mr. Patterson was the one who had requested a divorce. (R:96.) This statement directly contradicted the ex-wife's trial testimony and would have corroborated Mr. Patterson's theory of the case. However, the report was not obtained until present counsel got involved with the case and could seek discovery. Therefore, those parts of Ground 5 based on this evidence are also timely under the PCRA.

VI.
CONCLUSION

Mr. Patterson has raised numerous serious and complex constitutional challenges to his conviction. He was diligently seeking relief and failed to file a timely petition only because he was misadvised by his appellate attorney. On these facts, this Court should reverse the district court and allow him to proceed to the merits of his claims. He has offered several legal theories that support the reinstatement of his petition:

1. He is entitled to statutory tolling because (a) his attorney's erroneous advice is imputed to the State and (b) the State did not provide adequate legal resources to allow him to file a timely petition;

2. He is entitled to equitable tolling;

3. Enforcing the statute of limitations would be an egregious injustice; and

4. The PCRA unconstitutionally diminishes the courts' inherent authority to grant a writ of habeas corpus, and the petition should be allowed to proceed under that authority.

And even if the petition is not reinstated in its entirety, those claims based on newly discovered evidence should be reinstated. For these reasons, the Court should REVERSE and REMAND.

DATED: July 16, 2018.

/s/ Benjamin C. McMurray
BENJAMIN C. MCMURRAY
Assistant Federal Public Defender

VII. ADDENDUM

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IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

SCOTT KIRBY PATTERSON, Petitioner, v. STATE OF UTAH, Respondent.	**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT** Civil No. 160701113 Judge Thomas L. Kay

This matter is before the Court on Respondent's Motion for Summary Judgment ("Motion") filed August 28, 2017. The Court has considered the Motion, Petitioner's Opposition to the Motion ("Opposition") filed September 6, 2017, and Petitioner's Reply in support of the Motion ("Reply") filed October 6, 2017. The Court now grants Respondent's motion for summary judgment because Petitioner's petition is barred for being untimely under §78B-9-107 of the Utah Code.

"A district court should grant summary judgment only when, viewing all facts and reasonable inferences therefrom in the light most favourable to the non-moving party, there is no genuine issue of material fact and . . . the moving party is entitled to a judgment as a matter of law." *Morra v. Grand County*, 2010 UT 21, ¶ 15 (citation and internal quotation marks omitted). The Utah Rules of Civil Procedure require a party opposing summary judgment to "include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record." Utah R. Civ. P.

56(a)(2). Petitioner has not done so. Opposition, pg. 2-3. As such, all material facts provided in Respondent's Motion are "deemed admitted for the purposes of the motion." Utah R. Civ. P. 56(a)(4). The only thing left for the Court to determine is whether "the moving party is entitled to a judgment as a matter of law." *Morra v. Grand County*, 2010 UT 21, ¶ 15.

Respondent notes that a petitioner "is entitled to relief only if the petition is filed within one year after the cause of action has accrued." §78B-9-107. A cause of action accrues on the last of the following dates: "(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken; (b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken; (c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed; (d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; (e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or (f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established." §78B-9-107(2). Respondent argues that Petitioner's petition was untimely because his cause of action accrued on August 14, 2013, the last day for seeking certiorari review in the United States Supreme Court. Reply, pg. 6. Respondent further argues that Petitioner had one year from the time that his cause of action accrued to file a state petition. Reply, pg. 6. Because he failed to do so, Respondent asserts that Petitioner's claims should be barred for being untimely. *Id.*

Petitioner claims that his petition was timely under doctrines of (1) statutory tolling, (2) the egregious injustice exception, (3) constitutional limits on the state's authority to restrict the writ, and (4) equitable tolling. The Court will address each of these below.

STATUTORY TOLLING

Petitioner's argument in support of his request for statutory tolling is ineffective assistance of counsel following the denial of his petition for a writ of certiorari to the Utah Supreme Court. Opposition, pg. 3. However, "relief may not be granted on any claim that postconviction counsel was ineffective." §78B-9-202(4). Petitioner's argument may have been valid prior to 2008, but the Utah Supreme Court has noted that "the legislature responded to our *Menzies III* decision by amending the PCRA. We have previously recognized that the 2008 amendments were a response to our holding in *Menzies III* that the PCRA granted a right to effective assistance of post-conviction counsel. Under the amended version, the PCRA expressly states it does not confer a right to effective assistance of counsel in post-conviction proceedings." *Menzies v. State*, 2014 UT 40, ¶ 22. The Utah Court of Appeals also recently decided *Zaragoza v. State*, which reiterates this point by noting that "there is no constitutional right to counsel on discretionary appeals." *Zaragoza v. State*, 2017 UT App 215, ¶41.

Petitioner also argues in favor of statutory tolling because "the state deprived him of his right to access the courts." Opposition, pg. 14. Petitioner claims he did not have access to the courts because he was not "made aware" of the contract attorneys available to help him prepare post-conviction petitions. Opposition, pg. 17. However, Petitioner has cited nothing to suggest that the state has an affirmative duty to make prisoners aware of the contract attorneys and Petitioner even admits in his affidavit that "it came to my attention from other inmates that the prison had contract attorneys." Opposition, Addendum 1, pg. 3. If other inmates were aware of the contract attorneys, it seems to follow that Petitioner should have known of them as well if he was diligently attempting to file another challenge to his conviction. Petitioner then attempts to impose a list of duties on these contract attorneys based on a 2003 contract filed in an unrelated

federal case. Opposition, pg. 19. Petitioner even admits that he is assuming this contract was still in place in 2014 even though nothing in the record supports that claim. *Id.* There is nothing in the record to suggest that this contract is still in place or was ever in place with respect to the contract attorneys that currently work with those in situations like Petitioner. Accordingly, this Court does not see anything to support the idea that "the state deprived [Petitioner] of his right to access the courts."

THE EGREGIOUS INJUSTICE EXCEPTION

Petitioner next argues that the Court should grant relief under the "egregious injustice" exception that the Utah Supreme Court recognized in *Gardner v. State* and *Winward v. State*. Opposition, pg. 20. The Supreme Court in *Winward* said that the Petitioner "must demonstrate that he has a reasonable justification for missing the deadline combined with a meritorious defense" as a threshold matter. *Winward v. State*, 2012 UT 85, ¶ 18.

This Court declines to speculate as to the reach of the egregious injustice exception. It is the Utah Supreme Court that "retains constitutional authority, even when a petition is procedurally barred, to determine whether denying relief would result in an egregious injustice." *Gardner v. State*, 2010 UT 46, ¶ 93. Petitioner argues that the Utah Court of Appeals has addressed the egregious injustice doctrine, but fails to recognize that the Court of Appeals, even in the cases cited by Petitioner, has never made it beyond the threshold considerations noted in *Winward*. Even if this were not the case, the Petitioner has failed to convince the Court that he "has a reasonable justification for missing the deadline combined with a meritorious defense." *Winward v. State*, 2012 UT 85, ¶ 18. Therefore, Petitioner's egregious injustice claim fails as a threshold matter.

CONSTITUTIONAL LIMITS ON THE STATE'S AUTHORITY TO RESTRICT THE WRIT

Petitioner next argues that enforcing the statute of limitations in this case would violate the suspension clause of the Utah and United States Constitutions as it pertains to the writ of habeas corpus. After correctly noting that the Legislature "can neither increase nor decrease this court's constitutionally derived powers" (see *Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1152 (Utah 1995)), Petitioner argues that any statute of limitations imposed on post-conviction petitions is unconstitutional. Opposition, pg. 31. Petitioner cites *Julian v. State* in support of this idea. However, *Julian* does not stand for the idea that all statutes of limitation are unconstitutional in a post-conviction setting. Petitioner is correct that the Supreme Court in *Julian* said that "the mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights, regardless of how difficult it may be for the State to reprosecute that individual." *Julian v. State*, 966 P.2d 249, 254 (Utah 1998). Petitioner ignores the text immediately preceding that citation. "We emphasize, however, that when a court grants relief pursuant to a habeas corpus petition, it does so on the ground that the petitioner has been wrongfully incarcerated. *See* Utah R. Civ. P. 65B & 65C. That is to say, a court should grant relief if the petitioner establishes that he or she has been deprived of due process of law or that it would be unconscionable not to re-examine the conviction." *Id.* This Court is not persuaded that Petitioner has been denied due process and does not see anything in the Opposition that convincingly suggests "that it would be unconscionable not to re-examine the conviction." *Id.*

Petitioner argues that he has raised "serious claims of constitutional error." Opposition, pg. 32. These "serious claims" seem to be Petitioner's claims of ineffective assistance of counsel and lack of access to the courts. Opposition, pgs. 32-33. As this Court has already noted, neither

of these claims is meritorious.

Petitioner next attempts to equate the writ of habeas corpus to a §1983 action, which enjoys a four year statute of limitations. Opposition, pgs. 33-34. Petitioner fails to cite any case law in support of the idea that different statutes of limitation can be compared and equated to create a Fourteenth Amendment violation. Additionally, these laws do not "unreasonably and unconstitutionally distinguish between similarly situated individuals" as Petitioner suggests. Opposition, pg. 33. The most obvious difference is the fact that habeas petitioners have multiple additional and alternative routes in both state and federal court to seek the same relief (beyond filing a habeas petition). This process can often go on for much longer than four years. Anyone seeking civil damages for a constitutional violation under §1983 has limited remedies and a limited number of actions that can be brought depending on the factual situation. Even if Petitioner's theory was correct, Petitioner has failed to provide a meritorious argument that his constitutional rights have been violated.

EQUITABLE TOLLING

Petitioner finally turns to the doctrine of equitable tolling to excuse his late filing. Petitioner cites various federal cases in which statutes of limitation were equitably tolled. Opposition, pgs. 36-39. In Utah, equitable tolling under the PCRA is available under the following circumstances: 1) During the pendency of the outcome of a petition asserting exoneration through DNA testing under section 78B-9-303 or factual innocence under section 78B-9-401; 2) A petitioner shows by a preponderance of the evidence that the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution; 3) A petitioner shows by a preponderance of the evidence that the petitioner was prevented from filing a petition due to physical or mental incapacity; or 4) If a claim is raised under section 78B-

9-104(g), a petitioner shows by a preponderance of evidence that the petitioner did not raise the claim due to force, fraud, or coercion. §78B-9-107(3)-(4). Of these four, Petitioner only argues that he was prevented from filing due to state action in violation of the United States Constitution. Opposition, pg. 3.

Respondent notes that this argument ultimately fails for three reasons: "(1) Patterson's retained counsel was not a state actor, (2) Patterson had no right to counsel after the supreme court denied him certiorari review, and (3) in any event, counsel's advice was correct on the relevant issue—whether Patterson had satisfied the exhaustion requirement for federal habeas purposes by presenting to the state supreme court his claim that trial counsel was ineffective with respect to the clergy-penitent privilege." Reply, pgs. 7-8.

Petitioner acknowledges that his claim of ineffective assistance of counsel "is insufficient for statutory tolling unless it can be imputed to the state." Opposition, pg. 8. Petitioner argues that the advice from his privately retained appellate attorney, Edwin Wall, should be imputed to the state. Opposition, pg. 8. Petitioner, again relying on a federal habeas case, *Murray v. Carrier*, argues that ineffective assistance of counsel is imputed to the state and can therefore satisfy the "state action" provision of section 78B-9-107(3). *Carrier* is inapposite. It addressed a "cause and prejudice" standard applicable only in federal habeas proceedings, and it was not a statute of limitations case. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). It analyzed whether counsel's failure *to raise a claim* could amount to "cause and prejudice" and thus excuse a federal petitioner's failure to exhaust the claim in state court. *Id.* The Court stated that the ineffective assistance claim must generally be presented to the state courts "as an independent claim" before it can be used to establish cause in federal habeas. *Id.*

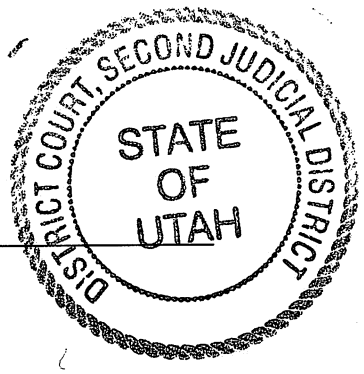
Here, Petitioner does not fault Mr. Wall for omitting a claim. Petitioner does not raise Mr. Wall's alleged misinformation about which post-conviction course to take as an independent claim for relief. In fact, it is difficult to know exactly what Petitioner alleges concerning Mr. Wall. Petitioner makes seemingly contradictory statements. In Petitioner's petition ("Petition") filed October 28, 2016, he states that "Mr. Wall told me I could challenge the convictions in state court or federal court. He told me that whichever court I chose, I had to file a petition with one or the other by May 16, 2013." Petition, Addendum 2, pg. 7. He then claims that "Mr. Wall told me that I had exhausted my state court remedies." *Id.* It seems contradictory that Petitioner could "challenge the convictions in state court" when he "had exhausted [his] state court remedies." *Id.*

Additionally, Respondent is correct in noting that "[f]ederal courts uniformly recognize that "ineffective assistance of counsel cannot constitute a state-created impediment" under the statute of limitations governing federal habeas petitions." *Irons v. Estep,* No. 05-1412, 2006 WL 991106, at *4-*5 (10th Cir. Apr. 17, 2006); *Finch v. Miller,* 491 F.3d 424, 427 (8th Cir. 2007) (same); *Crawford v. Jordan,* No. 04:04-CV-346-TCK-PJC, 2006 U.S. Dist. LEXIS 78204, at *12 (N.D. Okla. Oct. 24, 2006) (same); *Dunker v. Bissonnette*, 154 F. Supp. 2d 95, 106 (D. Mass. 2001) (same). While not binding, this case law governing a parallel statute of limitations in federal law is persuasive to this Court.

This Court has already addressed the fact that "relief may not be granted on any claim that postconviction counsel was ineffective." §78B-9-202(4). Since Petitioner was not entitled to effective assistance of counsel and his privately retained counsel, Edwin Wall, was not a state actor, Petitioner is not entitled to equitable tolling.

Based upon the foregoing, IT IS HEREBY ORDERED that the Respondent's Motion for summary judgment is GRANTED.

Dated this 20th day of December, 2017.



Thomas L. Kay
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160701113 by the method and on the date specified.

MANUAL EMAIL: DANIEL W BOYER dboyer@agutah.gov
MANUAL EMAIL: BENJAMIN C MCMURRAY Benji_McMurray@fd.org
MANUAL EMAIL: ERIN RILEY eriley@agutah.gov

Date: 12/20/2017

/s/ SARIAH MEADOWS

Deputy Court Clerk

Edwin Stanton Wall
Utah & Wyoming

Kelly Ann Fowler
Utah

Edwin S. Wall, P.C.

A PROFESSIONAL LAW CORPORATION

650 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111

May 22, 2013

Scott Patterson
Inmate Number 195465 **Legal Mail**
Utah State Prison
P.O. Box 205
Draper, Utah 84020

Regarding - Petition for Writ of Certiorari, Case Number 20130220 SC

Dear Scott:

This is not the letter I wanted to be sending you. The Utah Supreme Court has denied your petition for a writ of certiorari. Enclosed is the court's order denying the petition.

At this point, to challenge the state criminal conviction, you may file a federal petition for writ of habeas corpus under 28 U.S.C. § 2254 or you may pursue post-conviction relief through Rule 65 C of the Utah Rules of Civil Procedure, or both.

Because these are post-conviction proceedings you will have to retain counsel and pay filing fees. My fee for pursuing federal habeas relief in your case would be $10,000.00. As state post conviction relief would be more complicated and have to be based on matters that have not already been litigated I do not know what claims could be made so I have not determined what my fee might be. If you cannot afford counsel you may obtain some relief from the fee requirements if you file affidavits establishing your indigence and the inability to pay with the respective courts. If you are found indigent they may waive all or part of your filing fees. In some cases the courts will also appoint counsel, although there is no right to counsel.

In order to give you an idea as to what might be done and help you decide how to proceed, I have taken this opportunity to lay out some basic information. In this letter I will discuss both of the proceedings for federal habeas and those for state post-conviction relief so that you may consider how you wish to proceed.

Federal Habeas

If you pursue a federal petition of habeas corpus, the petition may challenge the validity of either the conviction or sentence. In your case, the issue would pertain to the validity of the conviction due to the deprivation of your right to testify in your own defense. I recommend you pursue federal habeas relief in your case.

28 U.S.C. § 2244(d)(1) provides for a one-year statute of limitation for federal habeas corpus petitions. The Court entered its order on May 16, 2013. This means you must file your petition with the federal district court within one year of May 16, 2013, or it will be barred.

The petition must allege that the conviction or sentence was in violation of the United States Constitution, a United States Supreme Court case law, or a federal law. The federal court does not have jurisdiction to consider claims which are based solely on state law or on the state constitution. This means the Utah State Appellate Court's interpretation of state law with respect to the clergy-penitent privilege will not be subject to reversal in a habeas procedure. Rather, the focus would be on the violation of your federal constitutional right to testify.

The federal court cannot grant relief on habeas corpus claims unless the the Utah Supreme Court has first had an opportunity to rule on the same federal claims. This is called *exhaustion of state court remedies*. 28 U.S.C. § 2254(b)(1)(A). The Supreme Court explained the exhaustion requirement in *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 1732 (1999). You have now exhausted your state court remedies.

After your federal habeas corpus petition is filed, a federal district or magistrate judge reviews the petition to determine whether it is subject to summary dismissal. See 28 U.S.C. § 2243. Summary dismissal is appropriate where "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Rule 4 of the Rules Governing § 2254 Cases. Summary dismissal is also appropriate where the allegations in the petition are vague, conclusory, palpably incredible, patently frivolous, or false. Summary dismissal is also appropriate where it is evident from the petition that the claims have been procedurally defaulted.

The Court's initial review order will determine whether you can proceed. Your case cannot proceed until this order is issued. Some habeas cases are not allowed to proceed after the initial review order; your case may be dismissed if it is clear that amendment could not cure the deficiencies.

Even if the initial review order grants the opportunity to proceed in the case, the state can still file a motion for summary dismissal. The Court usually does not have access to the full state court record when it performs its initial review, and the full record may reveal grounds for summary dismissal. At the same time, if the state seeks summary dismissal the full record may bolster the grounds for the petition. In your case we are fortunate to have transcripts of the events that arose due to the Rule 23B hearing.. The initial review process may take several months due to the federal court's heavy caseload and current budget limitations.

It is important to know that the habeas corpus claims are determined by a federal court's review of the written state court record. The federal habeas corpus action is not an opportunity to re-litigate the criminal case. See 28 U.S.C. § 2241, *et seq.* As the petitioner, you bear the burden of proof to show that your conviction or sentence violates the federal Constitution, United States Supreme Court case law, or federal law. If your case is unsuccessful, then you may wish to appeal it to the Tenth Circuit Court of Appeals. There is not an automatic right to appeal a habeas corpus case in the federal court system. You may begin the process to seek the right to appeal only after *judgment* has been entered in your case in the federal district court.

The appellate process in habeas proceedings is different from the typical appellate process in a criminal case. It requires obtaining a certificate of appealability rather than merely filing a notice of appeal after entry of the federal district court's order. If the appellate process is not properly followed, you will lose your opportunity to seek appeal. The *certificate of appealability* is a request for authorization to file an appeal. This process is unique to federal habeas corpus proceedings. This is filed in the federal district court, not in the Tenth Circuit Court of Appeals.

When a denial or dismissal of a habeas corpus petition was based upon the merits of the claims in the petition, it is necessary to show that the appeal presents a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c). To satisfy the "substantial showing" standard, it is necessary to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000). In your case, the violation of your right to testify in your own defense goes to such a constitutional claim.

When the denial or dismissal of a habeas corpus petition is based upon a procedural ground, it is necessary to show (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 120 S.Ct. at 1604. In your case, there is a procedural issue with regard to your defense counsel's failure to timely object to the prosecutor's assertion that they would impeach you if you took the stand.

If you elect to do the petition on your own, *pro se*, you should also be aware that prisoners are usually entitled to the benefit of the "mailbox rule," which provides that a legal document is deemed filed on the date a petitioner delivers it to the prison authorities for filing by mail, rather than the date it is actually filed with the clerk of court. *See Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379 (1988).

You should be aware that if you do not bring all federal claims related to a particular judgment in a single federal habeas corpus action, you will not be able to bring a second action without first obtaining court permission.

◆

State Post-Conviction Relief

Rule 65C of the Utah Rules of Civil Procedure provides for civil proceedings under Utah law to pursue post-conviction remedies. The rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act 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 under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

Utah Code Section 78B-9-107(1) requires a petition for post-conviction relief be filed "within one year after the cause of action has accrued." The Court entered its order on May 16, 2013. This means Scott must file your petition within one year of May 16, 2013, or it will be barred.

Procedurally, if the court comments on the merits of a post-conviction claim, it must first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106. The petition for post conviction relief must be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

The petition must set forth all of your claims in relation to the legality of the conviction or sentence. On the filing of the petition, the clerk of court is required to promptly assign and deliver it to the judge who sentenced you. That would be Judge Kay. Understandably, it would be prudent to seek the case be transferred to another judge. However, such transfers are not automatic and I anticipate it would have to be litigated.

The first consideration of the Post Conviction petition by the judge is whether to summarily dismiss the claims. The assigned judge reviews the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court summarily dismisses the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order of dismissal need not recite findings of fact or conclusions of law. Because of these limitations, those issues that have been addressed in the appeals we have taken would likely be summarily dismissed.

If, on review of the petition, the state court concludes that all or part of the petition should not be summarily dismissed, the court designates the portions of the petition that are not dismissed and directs the clerk to serve a copy of the petition, attachments and memorandum by mail upon the state, which is the respondent.

Any final judgment or order entered upon the state post-conviction petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

◆

You will need to decide how you wish to proceed. I urge you to do so, and to do so promptly. It is very disappointing and disconcerting that the Utah Supreme Court did not grant certiorari in your case. The Utah Supreme Court should have granted certiorari, and its failure to do so will result in severe consequences to those who confide in their clergy believing that they,

alone, hold the privilege. I have no doubt in time the Court will correct this error. Regardless of how you decide to take your next step, I adamantly urge you to seek relief at the very least through a federal habeas petition.

What has happened in your case and to you is an injustice. I appreciate the confidence and you have had in me in taking your cause forward. It is tragic your initial trial counsel did not understand and appreciate the significance of your clergy-penitent privilege. What is even more tragic is that you did not get to tell the jury at trial what really happened - your side of the case was completely gutted and never heard. I know you have always told the truth and testified with honor and integrity. You must fight on!

Edwin S. Wall
Attorney at Law

Enclosure: *Order*

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IN THE SECOND JUDICIAL DISTRICT COURT
FOR DAVIS COUNTY, STATE OF UTAH

SCOTT KIRBY PATTERSON, Petitioner, v. STATE OF UTAH, Respondent.	**DECLARATION OF SCOTT KIRBY PATTERSON** Case No. _____

I, Scott Kirby Patterson, am the petitioner in the above entitled matter, an do declare the following to be true to the best of my knowledge:

GENERAL FACTUAL MATTERS

1. I married Sandalyn Rosdahl ("Sandy") in a civil proceeding in October 2003.
2. We were never sealed as a couple in an LDS temple.
3. Early in our marriage, we lived in Cache Valley, and Sandy's daughter D.H. attended Skyview High School.
4. While there, D.H. was the victim of sexual battery committed by Robert Bedont.

5. Sometime prior to September of 2008, Sandy's mother had purchased a Ford F-150 pickup truck from Sandy's brother.

6. Sandy's mother then offered to sell the truck to me for over $6,000 because I needed a vehicle.

7. On September 23, 2008, I wrote a check to Sandy for $5,200 in exchange for the truck.

8. I gave this amount to Sandy because her mother wanted to receive cash for the purchase, and Sandy agreed to take the check to the bank and then give cash to her mother.

9. I paid the remaining portion of the purchase price from a tax return payment I had received.

10. Although Sandy's mother transferred title to the truck in Sandy's name, the truck belonged to me, and I used it as my own

11. Just after Christmas Day 2008, I informed Sandy that I would be seeking a divorce from her.

12. Upon hearing this news, Sandy immediately prepared legal papers to terminate the marriage.

13. Because I was the person who wanted the divorce, Sandy listed me as the petitioner.

14. Within a few days of hearing this news, Sandy falsely accused me of sexually assaulting her 11-year old daughter E.H.

15. As part of the divorce, Sandy and I agreed to sell the marital home and to divide the marital property as evenly as possible.

16. We agreed that I would keep the furniture in the great room of the house, while Sandy would take the remainder of the furniture including the contents of the children's bedrooms, the living room.

17. In addition, Sandy took all of the bathroom furnishings (towels), the ~~entire~~ most of contents of the kitchen (silverware, dishes, pots, pans, etc.), and some of our camping equipment, food storage, and yard equipment.

18. To ensure that I received the pickup truck as part of the divorce settlement, I asked Sandy to sign over title to the truck to me because the title listed her name as the owner.

19. Sandy agreed to sign over the truck title when she came to the marital home to move her belongings.

20. She left the title in a desk drawer in the great room but did not sign it over to me.

21. My son, Shane Patterson, was a witness to Sandy's move out of the home and has personal knowledge of her agreement to transfer the truck title to me.

22. As part of the divorce, Sandy and I placed the marital home for sale.

23. When we received an offer that was below the asking price, Sandy wanted to accept the offer.

24. I preferred to wait for a higher offer but Sandy insisted that we proceed with the sale.

25. To compromise, I agreed to accept the lower offer in exchange for Sandy's promise to give a portion of the proceeds as though we had sold the home at the higher price.

26. She also agreed to give me any money remaining in the escrow account with the mortgage company that was used to pay homeowner's insurance and property taxes because I had lived there and paid taxes for that year.

27. The real estate agent who handled the sale of the home knew of this agreement and facilitated the sale of the home based on this understanding between Sandy and myself.

28. Once the sale of the home was completed, I received a check from the escrow account for approximately $1,700.

29. However, because title to the home was listed in both Sandy's and my name, I could not cash the check without her signature.

30. Further complicating this matter, Sandy had obtained a protective order that prevented me from contacting her.

31. As a result, I was never able to cash the check for the remaining escrow funds.

32. I believe that Sandy has obtained these funds and taken them for herself, contrary to our agreement.

33. After Sandy raised the allegations against me, she sent letters and emails to several people to inform them of the charges filed against me.

34. Specifically, she emailed my employer and informed him that I had been charged with sexually assaulting a child.

35. As a direct result of this communication, I was let go from my job.

36. In addition, Sandy sent letters to my son Shane's parents in law in an effort to disparage me and harm my reputation.

37. Sandy sent similar letters to other friends and family members including Rodney and Valerie Neville.

38. I believe Sandy may have abused her connections with law enforcement to wrongfully to seize the pickup truck from me.

39. Specifically, Officer Potts of the Clearfield City Police Department came to my home and demanded that I turn over the truck to him.

40. He stated that because the title to the truck was in Sandy's name, she was the rightful owner.

41. I responded that the matter was civil in nature and did not concern the police.

42. Officer Potts disagreed, seized the truck, and gave it to Sandy.

43. To the best of my knowledge, Officer Potts did not act pursuant to a court order or valid warrant of any kind.

44. I believe Sandy knew Officer Potts through her employment at the Layton City Prosecutor's Office.

45. After the divorce, Sandy told me on multiple occasions that she would see me in prison.

46. For my birthday on September 21, 2008, E.H. and D.H. gave me a poster that listed several dozen things they liked about me, such as "We love you Dad,"

"You're a good Dad," "You're a good cook," "Best advice in the world," "Nice," "Funny," "Good worker," and "Good joke teller."

47. I gave the poster to Mr. Stone and Mr. Law to use in my defense.

48. I never saw the poster again after I gave it to them.

MATTERS RELATED TO TRIAL AND PREPARATION

49. I was represented at trial by Mr. Stone and Mr. Law.

50. Mr. Stone informed me that if I was convicted of the two felonies I was charged with, I would spend a substantial time in prison.

51. In preparing for trial, the plan always was that I would testify.

52. Beyond my own testimony, Mr. Stone and Mr. Law assured me that they would do a thorough investigation and be prepared to challenge the State's case.

53. In reality, it seems no real investigation was done, and no other witnesses were prepared to be called on my behalf.

54. Just before the final pretrial conference, Mr. Stone explained to me that the State had offered to allow me to plead to the sexual abuse charges as second degree felonies.

55. But his explanation did not convey to me the fact that the State also offered to recommend that I receive probation as part of the plea.

56. When I asked him about my chances of winning at trial, Mr. Stone estimated that my chances were great and that there was a 90% or 95% change that the jury would acquit me.

57. He did not explain or consider what my chances would be if I didn't testify at trial.

58. Had I understood that the state was willing to recommend that I receive only probation, and had I known that Mr. Stone would actually advise me not to testify, I would have taken the plea deal offered before the pretrial hearing.

MATTERS RELATED TO POSTCONVICTION

59. Edwin Wall was my attorney on direct appeal.

60. When my petition for certiorari to the Utah Supreme Court was denied, Mr. Wall in letter and in conversation told me I had two options left for challenging my convictions.

61. Mr. Wall told me I could challenge the convictions either in state court or in federal court.

62. He told me that whichever court I chose, I had to file a petition with one or the other by May 16, 2013.

63. Mr. Wall did not ever mention that my time to file a federal petition would be extended if I filed a state petition.

64. He did not suggest what claims I could raise in state court.

65. He did not recommend that I should file a petition in state court.

66. In contrast, Mr. Wall urged me to seek relief through a petition in federal court.

67. Mr. Wall told me that the federal court could not grant me relief unless I "exhausted" my state court remedies.

68. Mr. Wall told me that I had exhausted my state court remedies.

69. Mr. Wall offered to represent me whatever choice I made, but after paying the costs of my trial and my direct appeal, I had no money left to hire him.

70. After talking with Mr. Wall, I understood that my only real option was to file a federal petition.

71. Based on Mr. Wall's advice, I obtained a federal habeas petition form, and with the help of a fellow inmate, completed it.

72. With the help of a typist, I submitted it to the federal court.

73. Some time after I submitted the petition, the federal court ordered me to amend it within thirty days.

74. Because of time constraints and problems with the prison mail system, I only had seven days to comply with the federal court's order and was forced to submit the first amended petition on my own.

75. Again some time later, the federal court required another amendment. Consistent with the court's order, I sought the help of the prison's contract attorneys to make the required amendments.

76. My requests to meet with the contract attorneys was fruitless. Their first response was to send me a blank federal habeas form and a pro se guide. I only met in person with one of the contract attorneys just days before my seconded amended petition was due.

77. With help from Ross Anderson, I was able to submit a timely second amended petition.

78. Also with his help, the federal court granted my request to have an attorney appointed to help me.

I declare under criminal penalty of the State of Utah and under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28th day of October, 2016.

Scott Kirby Patterson

CERTIFICATE OF COMPLIANCE

I certify that in compliance with URAP 24(g)(1), this brief contains 11,182 words, excluding the table of contents, table of authorities, and the addenda. I further certify that this brief complies with URAP 21(g)'s restrictions on non-public records.

DATED: July 16, 2018.

/s/ Benjamin C. McMurray