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 REPLY BRIEF

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I. REPLY TO STATEMENT OF FACTS

The state recites the sordid testimony from Mr. Patterson's trial. But this discussion ignores the premise of his postconviction claims: he is actually innocent of the charges and was convicted only because attorney errors prevented the jury from getting a complete understanding of what happened.

However, due to the nature of these errors, Mr. Patterson was unaware of them until new counsel was appointed to represent him. Tragically, by that time his ability to challenge these errors was compromised by his appellate attorney's misadvice about how to proceed in postconviction. The State objects, repeatedly claiming that Mr. Patterson received correct advice. But it does so by ignoring how a lay petitioner would reasonably understand the unequivocal advice counsel gave in writing and in person: you've exhausted your claims, there's nothing to gain by filing a state petition, go straight to federal court, and do it within a year.

It is undisputed that Mr. Patterson filed a timely pro se petition in federal court, and he also filed a petition in state court within a year of having counsel appointed, who discovered new evidence that Mr. Patterson could not reasonably have obtained as an indigent, pro se inmate.

Had this evidence been obtained at trial, Mr. Patterson could have demonstrated his innocence. Records from DCFS refute his ex-wife's firm testimony that *she* was the one who requested a divorce (these records confirm that Mr. Patterson requested it), and expert testimony would have

demonstrated for the jury how E.H.'s highly inconsistent testimony was evidence of improper influence and post-hoc fabrication.

II. ARGUMENT

A. The True Breadth of the Great Writ.

The core principle animating Mr. Patterson's opening brief is simple: the Utah Constitution grants Utah courts the power to grant extraordinary writs, include the Great Writ of habeas corpus. This Court has been clear that the legislature cannot diminish its writ power. *Opening Brief* at 10. So, unless Mr. Patterson's claims can be heard under an exception to the PCRA's time bar, this Court must confront the conflict between its own assertion that its writ powers are inviolable and the PCRA's assertion that it is the sole source of postconviction relief.

The State resists that conclusion. As its brief tells it, there is no conflict—the Great Writ is misnamed and toothless in postconviction matters. Essentially, the State argues that this Court's past use of the Great Writ was *ultra vires*, and now the PCRA has restored the proper order, preventing courts from providing any relief without its permission.

The State is wrong about the history of the Great Writ. Since even before Utah's founding, the people of Utah have used habeas to correct injustice outside the narrow circumstances to which the State would confine it. That point colors this whole appeal.

1. Utah's original Writ of Habeas Corpus reached well beyond matters of jurisdiction.

The State's central argument against the Great Writ is that in postconviction matters, it was only a check on jurisdiction. According to the State, it was not until *Thompson*, some 40 years after ratification, that the Writ was "expanded . . . to incorporate post-appeal review of a conviction or sentence for constitutional error." *State's Brief* at 68-71.

But the State's briefing belies this conclusion. Its cases show this Court used habeas to correct issues beyond jurisdiction. For example, in its discussion of *In re McKee*, the State claims this Court examined "the entire judicial regime upon which the prosecutions proceeded to determine if 'the petitioner was tried and convicted' under 'legal proceedings.'" *State's Brief* at 70 (citing *In re McKee*, 57 P. 23, 27 (Utah 1899)). That exaggerates some. The issue raised in *McKee* was whether the petitioner "was tried and convicted without due process of law" because he had only eight people on his jury. *In re McKee*, 57 P. at 23. That is not something that affects a court's jurisdiction to hear a criminal case. Otherwise, defendants could never be tried before a judge or stipulate to a number of jurors less than what the law requires. *McKee* shows that habeas, as originally understood, was not limited to jurisdictional issues—at least as we understand them today.

The same holds true for *In re Maxwell*, another case the State cites. The *Maxwell* petitioner raised the same jury claims as the petitioner in *McKee*. *See In re Maxwell*, 57 P. 412, 413 (1899). He also argued that his conviction was illegal

because he was charged by information, not indictment. *Id.* Again, these are not claims that go to the jurisdiction of a court to hear a case.

The State doesn't even touch *Saville v. Corless*. In that case, two petitioners received habeas relief based on three separate arguments that the statute under which they were convicted was invalid. *See Opening Brief* at 36 (discussing *Saville*, 151 P. 51, 51-53 (Utah 1915)). That sort of claim does not question the "entire judicial regime" under which the pair were tried. Nor does the constitutionality of a statute have anything to do with a court's jurisdiction. *See State v. Norris*, 2007 UT 5, ¶¶8-9, 152 P.3d 305, *reversing* 2004 UT App 267, 97 P.3d 732.

The cases just cited only begin to scratch the historical record. True, there are few successes to report—just as there are few successes in modern postconviction. Still, there are more early cases in which petitioners challenged their convictions in habeas proceedings and had this Court hear those claims on the merits, all of them without a semblance of what we would understand as a jurisdictional challenge. *See, e.g.*, *In re Monk*, 50 P. 810, 811 (Utah 1897); *In re De Camp*, 49 P. 823, 823-24 (Utah 1897); *Roberts v. Howells*, 62 P. 892, 892-93 (Utah 1900); *Rasmussen v. Zundel*, 248 P. 135, 137 (Utah 1926). Beyond those, there are surely countless other cases that ended without an appeal, leaving almost no trace of their existence.

So, despite what cases like *Thompson* may have *said* about the reach of the Great Writ, in practice, just after the Utah Constitution was ratified, the Writ was frequently used to examine constitutional claims unrelated to jurisdiction.

But why would this Court have said habeas was originally limited to jurisdictional challenges if, in reality, it was not? This conflict can be attributed to an evolution in how jurisdiction was understood near the time of Utah's founding. And this evolution was on display in the Territory of Utah's prosecution of Lorenzo Snow, a prominent leader (and later President) of the Church of Jesus Christ of Latter-day Saints.

Some background is necessary to fully appreciate Mr. Snow's case. After it made Utah a territory, Congress made ever-increasing efforts to eradicate polygamy. The first push came with the Morrill Act, which made it an offense punishable by up to five years' imprisonment to "marry any other person, whether married or single, in a Territory of the United States." Morrill Act, ch. 126, 12 Stat. 501 (1862); Edwin Firmage and Richard Mangrum, *Zion in the Courts*, 131 (Univ. Ill. Press 2001) [hereinafter "*Zion in the Courts*"]. But the law was difficult to enforce. For one thing, the Utah territory, like the territories around it, did not keep marriage records. *Zion in the Courts*, 149. More significantly, "Mormon weddings were often performed in temples or the Endowment House, which were open only to faithful Mormons," so willing witnesses were hard to find. *Id.* Altogether these conditions made it difficult to prosecute polygamist marriages. *Id.* at 160.

In response to these troubles, Congress passed the Edmunds Act, which created the new offense of "unlawful cohabitation." *Id.* at 161; Edmunds Act, ch. 47, 22 Stat. 31, §3 (1882). This created a new misdemeanor, punishable by up to six months in prison, that prohibited "cohabit[ing] with more than one woman." *Id.* Under this new statute, proof that sexual intercourse had

occurred or even that some marriage ceremony had been performed was unnecessary. It was enough that a man had been "living and dwelling with more than one woman as if they were married." *United State v. Cannon*, 7 P. 369, 374-75 (Utah 1885).

While the new offense resulted in many successful prosecutions, it had one drawback: the maximum punishment was just six months. But that did not stop creative prosecutors. To increase a defendant's punishment, prosecutors would bring a separate charge of cohabitation for discrete time periods, e.g., charging a defendant separately for each year, month, or even each day in violation. *Zion in the Courts*, 178-79.

The first test case for this charging practice came in the prosecution of Lorenzo Snow. In December 1885, he was charged in three separate indictments with unlawful cohabitation with the same women—one charge for the year 1883, another for 1884, and one for 1885. He was first tried on the 1885 charge and convicted. At his second trial, for the charge covering 1884, he argued that his prior conviction barred further prosecution. The district court rejected his defense in that trial and again at his third trial for the charge covering 1883. *Zion in the Courts*, 179.

Mr. Snow appealed all three convictions. *See United States v. Snow*, 9 P. 501 (Utah 1886); 9 P. 686 (Utah 1886); 9 P. 697 (Utah 1886). Only the second appeal discusses his prior-conviction defense. This Court's territorial predecessor recognized the issue as "probably the most important in the case" but believed there was not "an abundance of authority either for or against" Mr. Snow's contention that he was improperly charged. *Snow*, 9 P. at 693.

Ultimately, though, it was persuaded that the separate charges were permissible and upheld the convictions. *Id.* at 696.

Mr. Snow sought review from the U.S. Supreme Court, but his petition was rebuffed. Under the statutes then in effect, Congress had not granted the Supreme Court jurisdiction to review criminal proceedings by appeal or writ of error. And for that reason, Mr. Snow's writs of error were dismissed. *Snow v. United States*, 118 U.S. 346, 347-54 (1886). But in the course of the decision, the Supreme Court twice mentioned statutes that would allow it to review writs of *habeas corpus*. *Id.* at 348-49.

Whether or not that was a suggestion, Mr. Snow's next move was to seek a writ of habeas corpus. On October 22, 1886, Mr. Snow's attorney, Franklin S. Richards, filed his petition in the territorial court. It alleged that Mr. Snow was "being punished twice for one and same offense," and sought a discharge from custody on that ground. "Petition of Habeas Corpus," *Deseret Evening News* (October 22, 1886).[1] When the petition was heard, the territorial prosecutor claimed the court had no jurisdiction to grant the writ, especially since Mr. Snow had been convicted in a different district. "Writ Denied," *Deseret News* (October 27, 1886).[2] The district court denied the writ. *Id.*

Mr. Snow then appealed to the U.S. Supreme Court. *Ex parte Snow*, 120 U.S. 274, 280 (1887). On appeal, the government argued that Mr. Snow was

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[1] https://newspapers.lib.utah.edu/ark:/87278/s6vf0zjh/23181922.

[2] https://newspapers.lib.utah.edu/ark:/87278/s6931nq0/2667786.

not entitled to relief in habeas proceedings. It argued that the district court had jurisdiction over the charges, including jurisdiction to hear his challenges to the successive prosecutions, so the Supreme Court could review those issues only by writ of error, and not via habeas. *Id.* at 281.

The Supreme Court rejected the government's argument. Jumping to the heart of the matter, it determined the territorial supreme court had incorrectly interpreted the cohabitation statute: it defined a continuing offense, not one that could be divided up arbitrarily. *Id.* at 281-85. Based on this interpretation of the statute, the Supreme Court concluded the district court in the criminal proceeding had "*no jurisdiction* to inflict a punishment" for duplicitous charges. *Id.* at 285 (emphasis added). The conviction and sentence were "illegal," and it was proper to give Mr. Snow relief through the Great Writ. *Id.* at 285-87.

To say the court lacked jurisdiction to impose that punishment is, of course, quite different from how we view the issue now. Under present law, the error in Mr. Snow's case would be viewed as a double jeopardy violation. Though serious, it would have nothing to do with jurisdiction.[3] But this is not how jurisdiction was understood then. As the Supreme Court put it just two years later, "the court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a

[3] Under present law, double jeopardy claims are waivable. *See United States v. Broce*, 488 U.S. 563, 569-74 (1989). And if they are waivable, by necessity, a double jeopardy violation does not limit a court's jurisdiction, since jurisdiction cannot be waived. *Chen v. Stewart*, 2004 UT 82, ¶¶34-35, 100 P.3d 1177.

constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right." *Ex parte Nielsen*, 131 U.S. 176, 184 (1889).

In other words, at this period of time, when courts spoke about jurisdiction, they did not have in mind only subject-matter jurisdiction as we understand it today. While the lack of subject-matter jurisdiction was a sufficient basis to grant habeas relief, it was not the only one. Instead, the contemporary view of jurisdiction included not only the power to hear a case, but also the power act in a case. And because the Constitution denied courts power to perform certain acts, it was understood to be a check on their jurisdiction. Thus, if a court acted contrary to the Constitution, it was without jurisdiction, and the resulting judgment could be challenged by habeas.

This view was confirmed in another Utah habeas case that followed close on the heels of *Ex parte Snow.* That case, *Ex parte Nielson*, again involved the propriety of multiple charges. Coming after *Ex parte Snow*, prosecutors could charge cohabitation only once, so instead they charged the defendant Hans Nielson with cohabitation and adultery. *Ex parte Nielson*, 131 U.S. at 176-77. He was tried on the cohabitation charge first, and pleaded guilty. When he was arraigned on the adultery charge, he entered a plea of former conviction, arguing that the cohabitation and adultery charges were "one and the same offense and not divisible." *Id.* at 177-78. The prosecutor demurred to the plea, and the district court sustained the demurrer. Mr. Nielson was subsequently convicted and sentenced to additional imprisonment. *Id.* at 178. He did not appeal to the territorial supreme court. Instead, within days of sentencing, he

filed a habeas petition arguing that "he was being punished twice for one and the same offense," so "the court had no jurisdiction to pass judgment against him upon more than one of the indictments." *Id.* When the district court denied his petition, he appealed to the Supreme Court. *Id.*

On this appeal, the Supreme Court leaped straight into the jurisdiction question. While the Court acknowledged that generally it was not permissible to collaterally attack a judgment of conviction, there were exceptions to the rule. By then, the Court said, it was already the law that the constitutionality of a statute could be challenged on collateral review because if a statute was unconstitutional, it would deprive a court of jurisdiction to hear a charge under the statute. *Id.* at 182–83 (citing *Ex parte Coy*, 127 U. S. 731 (1888)). From this, the Supreme Court reasoned:

> It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has *no authority* to take cognizance of the case; but in the other it has *no authority* to render judgment against the defendant.

Id. at 183-84 (emphasis added). In light of its later conclusion that the two crimes were one and the same offense, the Supreme Court held that Mr. Nielson's sentence on the adultery conviction "was beyond the jurisdiction of the court, because it was against an express provision of the constitution which bounds and limits all jurisdiction." *Id.* at 185.

Read with a modern understanding of jurisdiction, the Supreme Court's pronouncement does not make sense. Under modern jurisprudence, constitutional errors in the course of a criminal proceeding do not deprive a court of subject matter jurisdiction. But at the time of *Ex parte Snow* and *Ex parte Nielson*, jurisdiction was synonymous with 'power' or 'authority.' And with that contemporary understanding in mind, the conflict between what this Court said and what it did disappears. A habeas petition, though nominally attacking jurisdiction, in reality reached errors that deprived courts of the authority or power to enter a judgment. Consistent with that understanding, a respected treatise on jurisdiction from this period declared:

> [I]f the defendant being placed on trial was denied the right of counsel guarantied him by the constitution there is no rightful conviction for he has had no trial and the conviction only follows a trial. So if a defendant was refused a subpoena for witnesses in his favor or refused the right of having the indictment read to him or any constitutional immunity the sentence is void. Such immunities are part of the mode of trial and their refusal *goes to the power of the court* as much as if sentenced without being indicted at all.

BROWN ON JURISDICTION, §103 ("When judgment is void and when voidable") (pp. 280-81) (1891) (emphasis added).[4]

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[4] https://books.google.com/books?id=E5gEAAAAYAAJ. The second edition of this treatise was issued in 1901. It gives the same view on habeas and jurisdiction. *See* BROWN ON JURISDICTION, §103 (pp. 378-79) (1901), *available at* https://books.google.com/books?id=nKYzAQAAMAAJ. This Court frequently relied on this treatise. *See, e.g.*, *State v. Morgan*, 140 P. 218, 220 (Utah 1914); *Snyder v. Pike*, 83 P. 692, 694 (Utah 1905).

Thus, despite the frequent declaration from this Court and others that the Great Writ was only a check on jurisdiction, in reality it was commonly used to correct what we now understand to be constitutional errors in criminal convictions. Under this view, any problem with Mr. Patterson proceeding under habeas is readily cured by adding the word "jurisdiction" to all of his claims. Put otherwise, his claims are proper because the district court lacked jurisdiction to punish Mr. Patterson in violation of the Constitution.

2. At Utah's founding, the public understood the Great Writ to have broad reach.

Because of the issue and the people involved, the proceedings in *Ex parte Snow* and *Ex parte Nielson* were well known to the people of Utah at the time of Utah's founding. Newspapers of the time confirm it.

Already cited above are two articles that described the portion of the writ proceedings in Mr. Snow's case that occurred in Utah. As the case made its way to the U.S. Supreme Court, more news articles followed. The Deseret News criticized the district court for failing to issue the writ at all, even if just to deny it. It was believed that this might frustrate review by the Supreme Court. "Another Judicial Straw," *Deseret News* (Nov. 3, 1886).[5] Another editorial advised readers to exercise "a little more patience" as they waited for the Supreme Court to hear the appeal. "The Snow Habeas Corpus Case," *Deseret Evening News* (Nov. 26, 1886). When Mr. Snow's attorney, Franklin S.

[5] https://newspapers.lib.utah.edu/ark:/87278/s65b0x14/2667860.

Richards, left Utah to argue the case, it made the news. "A Very Important Case," *Deseret Evening News*, (Dec. 27, 1886).[6] And after the case was argued, the Deseret Evening News provided a lengthy discussion of the argument itself. "Law and Logic: Arguments in the Case of Lorenzo Snow," *Deseret Evening News* (January 29, 1887).[7]

Once the case was decided, news of the decision made it into every newspaper. A short discussion of the result was announced on the day it was issued. "Reversed!," *Deseret Evening News* (Feb. 7, 1887);[8] "The Decision," *Ogden Herald*, (Feb. 7, 1887).[9] The next day just about every paper discussed it. *See* "The Great Topic," *Ogden Herald* (Feb. 8, 1887);[10] "A Paralyzer," *Salt Lake Herald-Republican* (Feb. 8, 1887);[11] "The Snow Case," *Salt Lake Democrat* (Feb. 8, 1887);[12] "The Snow Decision," *Salt Lake Tribune* (Feb. 8, 1887).[13] Further discussion of the decision and its consequences followed in the weeks after. *See, e.g.*, "The Last Assault on Mr. Dickson," *Salt Lake Tribune* (Feb. 12,

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[6] https://newspapers.lib.utah.edu/ark:/87278/s6w41wc1/23182213.

[7] https://newspapers.lib.utah.edu/ark:/87278/s62k0c10/23184027.

[8] https://newspapers.lib.utah.edu/ark:/87278/s65b42nc/23184067.

[9] https://newspapers.lib.utah.edu/ark:/87278/s6qz3brt/7403223.

[10] https://newspapers.lib.utah.edu/ark:/87278/s6m62m28/7403242.

[11] https://newspapers.lib.utah.edu/ark:/87278/s6bk2jxz/10726968.

[12] https://newspapers.lib.utah.edu/ark:/87278/s6543stv/9891461.

[13] https://newspapers.lib.utah.edu/ark:/87278/s6r5110v/13158248.

1887);[14] "In the Snow Case," *Salt Lake Herald-Republican* (Feb. 13, 1887);[15] "Despoiling the Mormons," *Deseret News* (Feb. 16, 1887);[16] "The Scope of the Decision," *Deseret News* (Feb. 16, 1887).[17] And eventually papers printed the Supreme Court's decision in full. *See, e.g.*, "The Snow Case," *Salt Lake Herald-Republican* (Feb. 18, 1887).[18]

But while press coverage of the Snow decision saturated the Utah territory, none of it focused on the habeas aspect of the case. Even the Salt Lake Tribune, then a stridently anti-Mormon publication, was quiet on that front. Sure, it threw other barbs. For example, one of its articles on the *Snow* decision was titled "Releasing the Cohabs." That same article described one person who benefited from the *Snow* decision as a "child beater" with a "decidedly tough appearance." *See* "Releasing the Cohabs," *Salt Lake Tribune* (Feb. 10, 1887).[19] But while the Tribute criticized Mormons, it never suggested the *Snow* decision was an improper or even unusual exercise of habeas authority.

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[14] https://newspapers.lib.utah.edu/ark:/87278/s6766qjw/13158436.

[15] https://newspapers.lib.utah.edu/ark:/87278/s6hm6g1w/10739075.

[16] https://newspapers.lib.utah.edu/ark:/87278/s61n8vrm/2733321.

[17] https://newspapers.lib.utah.edu/ark:/87278/s61n8vrm/2733358.

[18] https://newspapers.lib.utah.edu/ark:/87278/s6xd27cm/10813468.

[19] https://newspapers.lib.utah.edu/ark:/87278/s6gq8701/13158346.

The subsequent habeas proceedings for Mr. Nielson made smaller waves in the press, but they were still well-covered. Like Mr. Snow, Mr. Nielson was represented by Franklin S. Richards. His departure to D.C. to argue the case was announced. "Gone to Washington," *Utah Enquirer* (Mar. 29, 1889).[20] The briefing was described for the public. *See, e.g.*, "The Nielson Case: Before the U.S. Supreme Court," *Utah Enquirer* (Apr. 30, 1889).[21] The argument was described. "The Neilsen [sic] Case," *Deseret Weekly* (May 18, 1889).[22] And once the Supreme Court decision was announced, it was widely discussed. *See* "Only One Punishment," Ogden Semi-Weekly Standard (May 14, 1889);[23] "The Nielsen Case," *Utah Enquirer* (May 17, 1889);[24] "An Erroneous Impression," *Utah Enquirer* (May 20, 1889).[25] Again, though, throughout this coverage, there is no comment about this being a novel or improper use of the Great Writ.

Looking back more than one hundred and twenty years, it is impossible to exactly define the original public meaning of the Utah Constitution's grant of habeas authority to courts. Yet, after Mr. Snow's and Mr. Nielson's cases,

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[20] https://newspapers.lib.utah.edu/ark:/87278/s6pr900q/1399401.

[21] https://newspapers.lib.utah.edu/ark:/87278/s6db94z9/1399897.

[22] https://newspapers.lib.utah.edu/ark:/87278/s6nz936d/2675887.

[23] https://newspapers.lib.utah.edu/ark:/87278/s6766gq7/6239698.

[24] https://newspapers.lib.utah.edu/ark:/87278/s6mw3m6b/1400235.

[25] https://newspapers.lib.utah.edu/ark:/87278/s6h42vjt/1400264.

the courts and people of Utah were well familiar with the essence of the Great Writ, and understood it could reach constitutional issues that today we would not call jurisdictional. This history demonstrates that cases like *In re McKee*, *In re Maxwell*, and *Saville v. Corless* were neither an aberration nor an innovation. The results there are consistent with what the public understood and intended when it granted habeas authority to the judiciary in Utah's Constitution.

3. The State's historical argument focuses on the wrong part of the Utah Constitution while ignoring territorial history.

The State's only historical analysis focuses on the Constitutional Convention's debate on how to phrase Utah's Suspension Clause. Because it mirrors the federal Suspension Clause, the State concludes the intent was to adopt a not-so-great writ—one that was practically toothless for postconviction claims. There are several flaws with this analysis.

The biggest problem is that it fails to recognize a key structural difference between the state and federal constitutions. The federal Constitution mentions habeas corpus only in its Suspension Clause. This has led to disagreement over whether that clause implicitly guarantees a right to the Great Writ, whether there is some other source to that right, or whether the writ could be eliminated altogether because inferior courts were optional and did not have general jurisdiction. *See, e.g.*, *I.N.S. v. St. Cyr*, 533 U.S. 289, 337-40 & n.5 (2001) (Scalia, J., dissenting). No such confusion is possible with the Utah Constitution. Its drafters included an explicit grant of habeas power to this Court and to district courts, gave both original jurisdiction to grant such writs, and required the creation of district courts. Utah Constitution, Art. VIII, sec. 4, 5, & 7 (1896).

And while the judicial article of the Utah Constitution has changed over the years, those core attributes remain. *See Opening Brief* at 10 n.1. Because of this structural difference between the two constitutions, the State's comparison is based on a false premise.

But even if that fact were ignored, the State portrays the debate that occurred as if it were specifically focused on the breadth of the writ. That is not true. The exclusive focus on the debate was over who may suspend the Great Writ and on what conditions. There were some who wanted the state legislature to be in control and to set the conditions. Others wanted the executive branch to have the power, reasoning that "it could not escape the notice of anybody, or any person in the city or State when there was rebellion, or when the State was being invaded by foreign enemies." 1 Official Report of Proceedings and Debates of the Convention 253-54 (1898). But while the delegates frequently lauded the Great Writ, there was no discussion whatsoever of what breadth they expected it to have. There was certainly no hint that they wanted its reach diminished.

A better indication of what they intended is found in the historical use of the Great Writ in the Territory of Utah. As discussed above, just a few short years before the Utah Constitution was drafted, the Great Writ was used to overturn the cumulative convictions of Mr. Snow and Mr. Nielsen based on constitutional issues, not jurisdictional defects. Besides the fact that these proceedings were relatively fresh in the public mind, they bore special relevance to the convention. Those two petitioners were both represented by Franklin S. Richards in the territorial district court and on appeal to the U.S.

Supreme Court. The same man served as delegate to the Utah Convention. 2 Official Report 1883. With his background, it is unlikely Mr. Richards would stand silent if the new state's writ of habeas corpus was going to be narrower than the writ his clients just took advantage of.

4. Before statehood, the public understood the Great Writ to reach postconviction issues. That is what they got after statehood.

It is easy to find early cases from this Court that say habeas concerns itself only with jurisdiction. And it is easy to find later cases, like *Thompson*, that suggest the reach of the writ was expanded. But history shows that neither proposition is true, at least not as we now understand jurisdictional and constitutional claims.

"The life of the law has not been logic; it has been experience." Oliver Wendell Holmes, Jr., COMMON LAW 1 (1881). For Utahans, their experience has been that the Great Writ can correct constitutional errors in postconviction. Utahans saw that with Mr. Snow and Mr. Nielson. When they voted to ratify the constitution, they would have understood the Writ to have that same reach. And in the years immediately after ratification, this Court considered constitutional postconviction claims under its Writ power, even granting relief in some cases.

It is that experience that governs, not incorrect statements about the reach of the Writ caused by confusion about what jurisdiction meant historically. Since Utah's founding, the Great Writ has reached postconviction claims.

5. Utah enshrined a modern understanding of this Court's habeas authority in the 1984 constitutional amendment.

Whatever this Court concludes about its habeas authority in 1896, the 1984 amendment constitutionalized its writ authority as that authority was understood at the time of the amendment. And the State acknowledges that by the time of this amendment, it was firmly settled that habeas reached the type of constitutional challenges Mr. Patterson raises here. Because this Court had explicitly held that its writ power included the authority to hear constitutional challenges to a criminal conviction, that understanding was codified, even constitutionalized, in the 1984 amendment.

A legislative act that uses a legal term this Court has authoritatively interpreted carries the meaning the Court previously gave it. *See, e.g., MacDonald v. MacDonald*, 430 P.3d 612, 617 (Utah 2018); *Christensen v. Indus. Commn.*, 642 P.2d 755, 756 (Utah 1982). Under the "prior construction canon," "where a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent." *Christensen*, 642 P.2d at 756. Put otherwise, where a legal term in a statute "has been authoritatively interpreted by the highest court in a jurisdiction," "a 'later version' of a statute 'perpetuating the wording is presumed to carry forward' the established judicial interpretation." *MacDonald*, 430 P.3d at 617 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)).

Although this is a canon of *statutory* construction, its logic applies here with equal force. Whatever habeas authority this Court had in 1896, by 1984 this court had authoritatively held that its habeas authority extended to constitutional challenges. When the legislature enshrined this Court's authority to issue "all extraordinary writs," including the writ of habeas corpus, it did so in light of what that authority entailed at the time of the amendment. Had the legislature been dissatisfied with the scope of this authority, it could have narrowed or restricted that authority through the amendment process. But it did not do that. Instead, the 1984 amendment constitutionalized the understanding of this Court's habeas authority that existed at that time, which undeniably included the authority to vacate unconstitutional criminal convictions.

The better view is that this authority has existed since the founding, but whatever the scope of the historical authority, the 1984 amendment ensured that this Court would have the power to issue a writ of habeas corpus as that authority was understood at the time of the amendment.

B. The PCRA is not valid regulation of the Great Writ

Hedging its bets, the State argues that even if Utah's habeas clause originally reached postconviction claims, then the PCRA is reasonable regulation of the habeas process. Its legal support for this proposition is a string cite to federal and state cases where various time bars have been upheld in a variety of postconviction regimes. *State's Brief* at 75-76. The State asserts that the PCRA is comparable to these undescribed regimes. It further asserts

that the PCRA validly regulates the Writ because, as the State opines, the Act's "flexible accrual dates and tolling provisions . . . affords petitioners all the opportunity to present a claim that fairness reasonably requires." *State's Brief* at 79.

The State's has failed to adequately brief this argument. While it is undoubtedly true that the various jurisdictions have upheld an assortment of time limits, the State fails to explain how the logic of those opinions applies to Utah's constitution. Do those other jurisdictions have the same history with the Great Writ as Utah does? What limits are put on suspension of habeas in those jurisdictions? Are the courts in those jurisdictions granted habeas authority by their constitutions, or by statute? And if by the constitution, is the habeas writ in those jurisdictions as broad as Utah's has been historically? And what exceptions exist within those jurisdiction to their postconviction bars? Without addressing these questions, the State cannot show how the decisions it cites are relevant to Utah's writ.

For example, take the cited federal decisions upholding the regulation of federal habeas. While the Supreme Court has upheld the constitutionality of time and procedural bars, it has also ruled that relief can be granted despite those bars. *Holland v. Florida*, 560 U.S. 631 (2010) (equitable tolling); *Murray v. Carrier*, 477 U.S. 478 (1986) (cause and prejudice to overcome procedural bar); *Schlup v. Delo*, 513 U.S. 298 (1995) (actual innocence). So, it is confusing, if not illogical, for the State to rely on the validity of the federal bars to justify the validity of the PCRA's bar, while at the same time arguing that the PCRA should not be subject to the same exceptions to the bars.

The State's most glaring failure is its silence regarding the affirmative grant of writ power in Utah's constitution. As explained elsewhere, this Court and the district courts were granted habeas power in the original constitution. Though the Great Writ is no longer explicitly named, habeas is one of the extraordinary writs to which this and the district courts are entitled. Over and over again, this Court has been strident in its protection of those writ powers. Just two years ago, this Court quoted a decision from 1908 to reaffirm an important principle: "[I]t was not within the province of the Legislature to so modify and enlarge the office of the writ. . . . [W]hatever power was conferred upon the courts by the Constitution cannot be enlarged or abridged by the Legislature." *Brown v. Cox*, 2017 UT 3, ¶14, 387 P.3d 1040 (quoting *State ex rel. Robinson v. Durand*, 104 P. 760, 762-63 (1908)). It then went on to quote *Petersen v. Utah Bd. of Pardons*, a habeas case, to say that writ power cannot be diminished. *See id.* (quoting *Petersen*, 907 P.2d 1148, 1152 (Utah 1995)).

The State presents *no* argument for how the significant restrictions the PCRA places on postconviction relief do anything but modify, abridge, and diminish the Court's habeas writ power. Even *Brown* is mentioned only in a footnote in the State's brief. That footnote suggests that this Court should overrule *Brown*—an election case—along with a variety of habeas cases. *See State's Brief* at 72 n.16. It goes without saying that the State has not made its case that *Brown* and the cases it cites should be overturned. *See Eldridge v. Johndrow*, 2015 UT 21, ¶¶21-22, 345 P.3d 553.

But, assuming for the moment that some regulation is permissible, the State has failed to show that the PCRA permissibly regulates the Great Writ.

The State acknowledges that *Julian* requires flexibility in habeas matters, but it then uses that word as if it is talismanic, claiming that "flexible accrual dates and tolling provisions" automatically satisfy *Julian*'s demands. *State's Brief* at 78-79. That ignores a plain reading of *Julian*.

In *Julian*, the petitioner was seeking relief on a set of claims more than six years after this Court had affirmed his convictions on direct appeal. *See Julian v. State*, 966 P.2d 249, 250 (Utah 1998) (citing *State v. Julian*, 771 P.2d 1061 (Utah 1989)). The petitioner's claims did not hinge on new evidence but were focused on an evidentiary question central to his trial. This issue could have been addressed on direct appeal. Indeed, one of his habeas claims faulted his appellate counsel for failing to raise it. *See id.* Nowhere is it suggested that the petitioner had any obstacle that prevented him from bringing the claims sooner.

Despite these facts, this Court still held that it could not be barred by a statute of limitations. While this Court focused on flexibility, it was not with an eye to accommodate petitioners struggling with procedural barriers. Instead, this Court focused on its own flexibility to grant relief in appropriate cases. This Court disapproved of the four-year statute of limitations because it "remove[d] flexibility and discretion from state judicial procedure, thereby diminishing the *court's* ability to guarantee fairness and equity in particular cases." *Julian*, 966 P.2d at 253 (quoting *Currier v. Holden*, 862 P.2d 1357, 1368 n.18 (Utah App. 1993)) (emphasis added). And it approved of a one-year statute of limitations only because it included an interests-of-justice exception, as "proper consideration of meritorious claims raised in a habeas corpus

petition will *always* be in the interests of justice." *Id.* at 254. It was in this context that this Court concluded "that *no* statute of limitations may be constitutionally applied to bar a habeas petition." *Id.* "[I]f the proper showing is made, the mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights." *Id.*

Contrary to the State's assertions, the PCRA does not provide courts the flexibility that the Great Writ requires. Under the PCRA, the mere passage of time *can* justify continued imprisonment of one who has been deprived of fundamental rights. Under the PCRA, the merits of a claim are irrelevant; all that matters are the deadlines—which usually cut off relief after one year. Even if a dead-bang winner claim is filed one day late, the PCRA consigns it to the trash-heap. In this way, the PCRA impermissibly restricts power that has been constitutionally granted to the judicial branch. *See Julian*, 966 P.2d at 253. For these reasons, the PCRA is not a "reasonable" regulation of the Great Writ.

For the same reasons, it is irrelevant that Rule 65C—this Court's own rule—"embraces" the PCRA as the law governing postconviction. *See State's Brief* at 50-51. This Court has declared that "the Writ belongs to the judicial branch of government" and that the separation of powers provision of the Utah Constitution requires it to have a potent habeas writ. *Hurst v. Cook*, 777 P.2d 1029, 1033-34 (1989). It follows that the Court itself would violate the separation of powers if it ceded to any other branch of government control over how it can employ the Great Writ. *Cf. State v. Gallion*, 572 P.2d 683, 687 (Utah 1977) ("The Legislature is not permitted to abdicate or transfer to others the essential legislative function with which it is thus vested."). Exercise of the

Great Writ is one of the core powers of the courts, reserved to it in the text of the constitution, so it is nondelegable. *See Salt Lake City v. Ohms*, 881 P. 2d 844, 848 (Utah 1994).

Because this Court's writ authority is granted to it by the Utah Constitution, this Court—not the Legislature—must decide how that power can be used. Under this Court's previous case law, Mr. Patterson's diligent effort should allow his claims to be heard. If review is otherwise unavailable, his claims should be considered under the courts' writ power.

C. Mr. Patterson was improperly advised to go directly to federal court.

Against this constitutional backdrop, one factual dispute animates this appeal. It concerns the advice that Mr. Patterson received as his direct appeal was concluding. Because appellate counsel Ed Wall's advice included some correct information about state postconviction, the State argues that Mr. Patterson was correctly advised and his failure to file on time should not be excused under any legal theory.

In reality, the advice was incorrect on its face because Mr. Patterson had not exhausted even the claims Mr. Wall identified because he had not included them in his appeal to this court.

More importantly, the State fails to acknowledge that Mr. Wall specifically advised Mr. Patterson *twice* to go directly to federal court. PCR88-89, 207. And one of these times was in an in-person meeting that the State completely ignores in its briefing. By omitting that point, the State undermines its whole argument. *Cf. State v. Nielsen*, 2014 UT 10, ¶¶40-44, 326 P.3d 645

(recognizing that factual arguments are undermined by failure to address key evidence).

From the point-of-view of a layperson like Mr. Patterson, Mr. Wall's specific advice to go directly to federal court puts everything else into perspective. While it is true Mr. Patterson was informed about the possibility of state postconviction, to him it was always presented as an irrelevant option. He had no reason to dwell on it when Mr. Wall, the person who informed him of its existence, told him to ignore it.

Besides the explicit advice, two other points further signaled to Mr. Patterson that state postconviction was irrelevant to him. The first is Mr. Wall's statement that he could not think of any potential claims that he would raise in state postconviction. PCR201. To Mr. Patterson, this statement would further persuade him that he should disregard state postconviction. Why worry about it as an option when your attorney, with his experience, tells you he cannot think of any claims you could pursue there?

Similarly dissuasive were Mr. Wall's statements that Mr. Patterson's state remedies were exhausted. PCR88-89, 202. To a layperson unfamiliar with federal habeas law, the statement that remedies were "exhausted" would be interpreted according to its everyday meaning: a layperson would understand that state remedies have been "completely used up." *See* "exhaust", p. 499, Concise Oxford English Dictionary, 12th ed. (Oxford University Press 2011). Mr. Patterson had no reason to think that "exhausted" was a specialized term that meant something technical about one of his claims in his direct appeal. *Cf. State Brief* at 26-27.

Sure, had Mr. Patterson consulted another attorney, he might have been set straight on why state postconviction was important to him. But that misses the point. We don't expect laypeople to question their attorney's advice—or any professional's advice—when circumstances give them no reason to. It should be beyond debate that a reasonable person is not blameworthy for following the advice of lawyer, doctor, or accountant, especially when there is no indication the advice is suspect. And that's precisely what Mr. Patterson did: he followed Mr. Wall's advice and gave no thought to state postconviction. Although that was a mistake, it should not be counted against him.

Mr. Wall's advice also undercuts the notion that Mr. Patterson was not diligent in pursuing relief. He was told he had a year to file, and he filed within a year. He just followed his attorney's advice. And, having watched his criminal case take four years to get from charge to the end of direct appeal, Mr. Patterson had no reason to believe filing sooner would somehow speed up the process. More significantly, Mr. Patterson had no reason to believe he would be prejudiced if he filed later in the year-long period. In light of how he was advised, there is no basis to hold Mr. Patterson at fault for filing when he did.

In sum, Mr. Patterson was reasonably following his attorney's advice when he skipped state postconviction and instead filed a *timely* federal petition near the end of filing period. The postconviction court's determination to the contrary were unreasonable, and under the facts of this case, improper on motion for summary judgment. At this stage in the proceedings, the Court must accept Mr. Patterson's claim that Mr. Wall told him to proceed directly to federal court. The only real question is whether, under these circumstances, a

remedy short of declaring the PCRA unconstitutional will allow his claims to be heard.

D. Mr. Patterson's claims were statutorily tolled.

There are two statutory bases for tolling. The first focuses on a state impediment to filing, whether by Mr. Wall's affirmative misadvice or the unavailability of contract counsel to assist with filing. The second focuses on new evidence that supports the tolling for only a few claims. Each is addressed in turn.

1. For purposes of the tolling provision, Mr. Wall's misadvice must be imputed to the state.

Mr. Patterson is entitled to statutory tolling under Utah Code §78B-9-106(3) because Mr. Wall, as direct appeal counsel, he had an obligation to correctly advise on postconviction matters that would follow the end of direct review. The State seeks to avoid that conclusion for several reasons. The first argument is that Mr. Patterson was correctly advised. That contention is rebutted above. In short, a correct description of the state postconviction process is meaningless when it is accompanied by specific advice to ignore that state process.

Beyond this point, the State argues that any misadvice should not be imputed to the state because the advice was not constitutionally defective. This argument has several aspects. For one thing, the State focuses on when the advice was offered. Pointing out that Mr. Wall did not advise Mr. Patterson until after this Court denied review on direct appeal, the State relies on the fact

that by that time, Mr. Patterson had no right to counsel, let alone effective counsel. *State's Brief* at 28-34. But that misses the point.

While Mr. Patterson had no right to counsel for discretionary review to this Court or for postconviction, he did have the right to effective counsel in his first appeal of right. And the State offers no counterargument to Mr. Patterson's contention that such appellate counsel must adequately and accurately advise clients on what corrective processes are available to them once the direct appeal has concluded. The authorities are consistent in that view. *See Opening Brief* at 13-14.

The only wrinkle is that Mr. Wall gave this required advice after discretionary review had been completed. But the timing of the advice does not change the duty to offer it. The exact timing of the advice is irrelevant, as long as it comes early enough to be useful. The duty to provide is what matters.

The State correctly observes that attorney misadvice is not typically imputed to the state in some contexts, like civil rights litigation, even when the attorney is a court-appointed public defender. But in postconviction matters, error is imputed to the state when the attorney provides ineffective assistance of counsel, even when counsel is retained. *See Cuyler v. Sullivan*, 446 U.S. 335, 342-45 (1980).

It is irrelevant that *Murray v. Carrier*, 477 U.S. 478 (1986), dealt with the federal "cause and prejudice" standard. The point is that when a petitioner's claim is procedurally barred as a result of constitutionally defective representation, that procedural bar should not keep the petitioner out of court because *the state* was supposed to have provided effective assistance at that

stage of the proceeding. Through this argument, Mr. Patterson does not assert he was entitled to counsel throughout his postconviction litigation. His claim is only that Mr. Wall, at the conclusion of his first appeal of right, was obligated to adequately advise him about what he could do next.

Even if correct advice was not constitutionally required at the conclusion of a direct appeal, Mr. Wall's decision to volunteer the information obligated him to provide correct advice. The State tries to avoid this conclusion by suggesting that *State v. Rojas-Martinez*, 2005 UT 86, was abrogated by *Padilla v. Kentucky*, 559 U.S. 356 (2010). *State's Brief* at 34 n.7. However, *Padilla* abrogated only this Court's holding that the Sixth Amendment does not require an attorney to correctly advise a defendant about deportation consequences of a plea. *Rojas-Martinez* remains good law about what rules apply when an attorney volunteers advice he is not constitutionally required to provide. By choosing to dispense such advice, counsel was obligated to dispense correct advice under *Rojas-Martinez*.

Because counsel has both a legal and ethical duty to correctly advise a client of other corrective processes available to the client, Mr. Wall's incorrect advice to Mr. Patterson was ineffective assistance that can be imputed to the state, thus triggering the tolling provision in Utah Code §78B-9-107(3).

2. The State's failure to provide adequate contract counsel prevented Mr. Patterson from filing a timely PCRA petition.

The State does not quarrel with Mr. Patterson's claim that failure to provide adequate contract attorneys could violate his right of access and, therefore, establish a state impediment to filing a PCRA petition. Instead it

argues that the contract attorneys were adequate, absent a showing of actual prejudice.

However, the prejudice is manifest in the dismissal of *all* of Mr. Patterson's claims. It was and is his desire to seek relief under any legal theory available to him. He filed a timely pro se petition in federal court, and he would have filed one in state court had Mr. Wall not advised him otherwise. Had contract counsel been available when he was preparing his federal petition, they surely would have advised him to consider claims beyond what Mr. Wall identified and would have made clear that he could pursue those claims in federal court only after presenting them in state court.

The fact that the Department of Correction's system has been found adequate in other circumstances does not guarantee that it would still survive scrutiny. Discovery is needed to fully develop this claim, but at this stage, the court should accept Mr. Patterson's statements that he was unable to access the contract counsel prior to filing his petition.

The State argues that Mr. Patterson's failure to seek out their help is like a "healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary." *State's Brief* at 39. This metaphor fails for two reasons. First, Mr. Patterson stands in this metaphor as a sick individual. He needed help and wanted help; he just didn't know where to get it. Second, it is inconceivable that the U.S. Supreme Court would approve of a prison that had an infirmary but did not publicize to inmates how to get help there. The flip side of the state's analogy is a prison that has the best infirmary in the country but does not inform inmates how to see a doctor. In this case, the State's failure

to tell inmates how to obtain those services undermines their effectiveness and made them effectively unavailable to Mr. Patterson, violating his right of access to the courts, and tolling the statute of limitations under §78B-9-107(3).

In the end, this claim turns on a factual dispute that was unreasonably resolved against Mr. Patterson. The Court should remand to allow further discovery and factfinding on this claim.

3. Tolling of individual claims.

In addition to these tolling arguments that apply to all of Mr. Patterson's claims, at least two claims are timely because they rely on new evidence that he could not collect as an indigent prisoner. *Opening Brief* at 39-41. The State objects, claiming that Mr. Patterson has not shown that his indigency and incarceration prevented him from getting that evidence earlier. *State's Brief* at 41. But the State's arguments do not make sense under the circumstances.

The statute at issue requires "reasonable diligence," *see* Utah Code §78B-9-107(2)(e), not "'extreme diligence' or 'exceptional diligence.'" *See Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003). With that in mind, Mr. Patterson's conduct is perfectly appropriate.

During his direct appeal, Mr. Patterson had no reason to be gathering evidence. He was relying on counsel, and counsel's failure to gather it then was itself ineffective assistance. By the time his direct appeal had concluded, Mr. Patterson had already been incarcerated for more than three years. R:113-14, 806. In prison, he had no money and could gather evidence only by sending

requests through the mail. His diligence must be judged in light of these conditions. *See Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000).

As an indigent prisoner, there was no feasible way for Mr. Patterson to get the expert opinion that is the foundation of one of his claims. Reasonable diligence can't require a petitioner to beg for free expert services from an expert he does not even know about.

The DCFS report was practically out of reach as well. In theory, Mr. Patterson could have eventually received it. But that conclusion requires the consideration of many other factors that the district court did not address. As a prisoner, did Mr. Patterson have the ability to learn of the report's existence? Did he have the ability to learn how to request it under GRAMA, including what requirements he had to fulfill to even have access to a restricted juvenile record? Did DCFS provides records without cost to prisoners? Did DCFS provide juvenile records to prisoners at all? Even assuming the answer to all of these questions is yes, how quickly could he have accomplished everything necessary to get the report?

In light of the hurdles he would have to overcome to get it himself, it was reasonable that he only received once he had the aid of counsel. Because the consequences of a late filing are so severe, this court should construe this provision liberally to allow inmates who lack the means to conduct independent factual research to benefit from information that is discovered much later by others who take an interest in the case. However, without factual findings, it would be improper for this Court to conclude that he could have

obtained it sooner. And for that reason, if this Court doesn't allow that claim to proceed, it should remand for the district court to resolve the matter.

E. Mr. Patterson's claims are entitled to equitable tolling.

Besides statutory tolling, Mr. Patterson should also benefit from equitable tolling does despite the State's various arguments against it.

One argument that State presents is that Mr. Patterson was correctly advised. The fault with this argument is addressed above.

At another point, the State focuses on this Court's rejection of common law exceptions to the PCRA's procedural bars. *State's Brief* at 42-44. From that, the State claims that this Court has already rejected equitable tolling. But that conclusion only follows if you conflate the various procedural bars with the statute of limitations. None of the common law exceptions to the procedural bars addressed when it was proper to hear an untimely claim, *see Hurst*, 777 P.2d at 1037, so this Court's rejection of those exceptions is irrelevant.

The State also argues against equitable tolling by asserting that the PCRA enacted comprehensive set of limitations statutes and thus "occupied the field," while Congress did not. Based on that distinction, the State claims that Congress "has not abolished [federal courts'] equitable powers" as the PCRA has for state courts. *State's Brief* at 44. But a comparison of statutes shows that the premise of the State's argument is wrong: the federal statutes are just as comprehensive as the PCRA.

Like the PCRA, the federal statute of limitations begins to run from the latest of several different events. 28 U.S.C. §2244(d)(1) (state habeas); §2255(f)

(federal postconviction); Utah Code §78B-9-107(2). One of those events is when a conviction becomes final. 28 U.S.C. §2244(d)(1)(A); §2255(f)(1). The PCRA has a similar limitation, except that the PCRA is much more verbose in spelling out when a conviction is final. *See* Utah Code §78B-9-107(2)(a)-(d). Another event recognized in federal statutes is the recognition of a new right by the U.S. Supreme Court. 28 U.S.C. §2244(d)(1)(C); §2255(f)(3). The PCRA is the same. Utah Code §78B-9-107(2)(f). The federal statutes also recognize the discovery of new evidence as a possible event. 28 U.S.C. §2244(d)(1)(D); §2255(f)(4). The PCRA is the same. Utah Code §78B-9-107(2)(E).

While the PCRA tolls the statute of limitations when state action prevents a filing, Utah Code §78B-9-107(3), the federal statutes just list that as another event from which the statute of limitations begins to run. 28 U.S.C. §2244(d)(1)(B); §2255(f)(2). In the end, the only generally applicable provision that isn't shared is PCRA's tolling for physical or mental incapacity. Utah Code §78B-9-107(3). But such incapacity would generally form the basis for equitable tolling under federal law. *See, e.g.*, *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003). In short, the PCRA's statute of limitations differ only slightly from those in federal law. If the State's theory were correct, the complex federal statutes of limitations would "occupy the field" and preclude equitable tolling. But federal courts allow equitable tolling. For the same reasons it is available there, it should be available here.

A decision from this Court also implies the existence of numerous tolling provisions is irrelevant to the determination of whether equitable tolling should be applied. In *Garza v. Burnett*, the Court was asked to determine

whether an unforeseen change in the law could provide a basis for equitable tolling. 2013 UT 66, ¶1, 321 P.3d 1104. Under federal law, the statute of limitations for a civil rights claim is the same as that for a state personal injury claim. *Id.* at ¶5 & n.7. This Court concluded that a change in the law could provide a basis for equitable tolling. *Id.* at ¶14. This decision is notable because Utah has numerous statutory grounds for tolling a personal injury claim. *See* Utah Code §§78B-2-104 through -114. However, there was no suggestion that these various statutory grounds "occupied the field." Clearly, equitable tolling is available despite the availability of specified, statutory grounds.

The State's last focus is *Martinez v. Ryan*. Mr. Patterson discussed that case to show "how equitable principles can be used to excuse a procedural defect in a first habeas petition." *Opening Brief* at 22. After comparing the facts in *Martinez* to those in this case, Mr. Patterson suggested that the similarity justified equitable tolling. *Id.* at 23.

The State's response misses the mark. The brunt of its argument centers on the State's assertion that *Martinez* is not applicable to state prisoners seeking review of their Utah convictions in federal court. *State's Brief* at 46-48. The validity of that argument is questionable. *See, e.g. Lafferty v. Crowther*, 2:07-CV-322, 2016 WL 5848000, at *1 (D. Utah Oct. 5, 2016) ("The equitable rule announced in *Martinez* is applicable in Utah pursuant to *Trevino v. Thaler.*"). Regardless, Mr. Patterson was not asking this Court to implement *Martinez*, but just to recognize that its reasoning justifies the application of equitable tolling in this case, *i.e.* incorrect advice of counsel caused the petitioner to forfeit a chance at state court review.

Because equitable tolling is not statutorily prohibited, it should be considered as an alternative to Mr. Patterson's constitutional arguments. Like the federal courts, this Court should hold that the PCRA's statute of limitations may be equitably tolled.

F. Enforcing the statute of limitations would be an egregious injustice.

If equitable tolling is not available, Mr. Patterson's claims should proceed under the egregious injustice exception. Yet, the State's brief shows its discontent with *Winward* and *Gardner*. It wants those case overruled, claiming this Court was wrong to suggest there was some space between what relief the PCRA permits and what relief courts can grant with their habeas power. Nevertheless, while it wants those cases overruled, the State still criticizes Mr. Patterson for failing to meet their strictures in his attempt to take advantage of the egregious injustice exception.

The State's first argument is that Mr. Patterson was properly advised and thus has no reasonable excuse for delay. That has been addressed before, and so the argument need no repetition.

The State's next complaint is that Mr. Patterson's suggested factors are "cobbled together" from factors suggested by *Winward* and not independently divined from some unspecified constitutional principle. *State's Brief* at 55. It is true that Mr. Patterson relied on factors that have been used previously. But that is due to the nature of the egregious injustice exception. Prior to the PCRA, this Court focused on the factors Mr. Patterson has suggested, like the reason and length of the delay, and a petitioner's diligence, to determine

whether to excuse untimely filings. Beyond these pre-PCRA cases, there are no relevant authorities to consult. There is certainly no case that says, "Here are the factors that *really* matter if the Legislature ever takes over postconviction." Significantly, the State does not suggest that some essential factor has been overlooked. It merely faults only the provenance of the factors cited. But what mattered before still matters now, so if delay and diligence and other factors Mr. Patterson cited were what this Court weighed in a pre-PCRA framework, they are what this Court should consider again.

If Mr. Patterson's proposed frameworks are inadequate, the State's brief suggests another one under which Mr. Patterson still would qualify. The State writes that it would be an "egregious injustice" if "a convicted person [were allowed] to go free because of technical noncompliance with the timeframes set out for sentencing." *State's Brief* at 62. But this standard yields a corollary more fitting in this context: it would be an egregious injustice for an innocent petitioner to have his claims dismissed because of inadvertant noncompliance with the timeframes set out for filing.

Mr. Patterson claims he is innocent, and a cascade of errors in his original trial bury his innocence beneath a defective and unconstitutional conviction. He has alleged numerous ways in which his attorneys failed to expose defects in the case against him or present his defense. He was dissuaded from taking the stand only because his attorneys bungled their response to a

prosecutor's improper and heavy-handed threat.[26] Mr. Patterson has now obtained evidence that squarely contradicts a central point of his ex-wife's testimony by showing that *he* was the one who requested a divorce. And he has now obtained expert evidence that would demonstrate why his step-daughter's highly-inconsistent testimony was most likely the result of undue influence and post-hoc fabrication. And while he wanted to keep fighting his case, and did everything he thought he needed to do, he was misled by his attorney. Enforcing the statute of limitations would result in an egregious injustice.

G. If there remains any doubt, *Winward* must yield to the Constitution.

The State's argument against the egregious injustice exception gets at the internal contradiction in *Winward*. That case, like *Gardner*, recognized the possibility that the PCRA infringed upon this Court's habeas power. However, it suggested that infringement was problematic only if a petitioner met some yet-unspecified, but heightened, standard. Put another way, *Winward* suggests that although the PCRA is unconstitutional, a petitioner can still gain relief if

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[26] The State criticizes Mr. Patterson's suggestion that the prosecutor misled trial counsel by threatening to use the Bishop to impeach him when he knew he could not be called as a witness. State's Brief 13-14 n.4. However, the prosecutor admitted he talked to the Bishop just once, on the Saturday before trial. The Bishop refused to talk without first consulting Church attorneys, and the prosecutor made no effort to contact them. Then, on Monday, around the time he rested his case, the prosecutor made his threat. R:656-59, 664-65. It is highly improbable that he could have subpoenaed the Bishop to testify the next day. Whether this threat was prosecutorial misconduct is a merits question the district court should be allowed to reach.

the petitioner is willing to meet the violation halfway by showing that, at least in his case, the unconstitutionality will cause some egregious injustice to occur.

This contradiction is not tenable. To the extent the PCRA violates the constitution, it is void. *See, e.g.*, *Egbert v. Nissan Motor Co., Ltd.*, 2010 UT 8, ¶12, 228 P.3d 737 (Utah 2010). The PCRA can be saved, of course, if it can be interpreted in a way that avoid the unconstitutionality, *Utah Dep't of Transp. v. Carlson*, 2014 UT 24, ¶23, 332 P.3d 900, or if its unconstitutional features can be severed from the remainder of the Act, *State v. Briggs*, 2008 UT 83, ¶47, 199 P.3d 935.

The problem lies in two different parts of the PCRA. The first is in §78B-9-102(1)(a), which proclaims that the PCRA is the "sole remedy" that "replaces all prior remedies for review, including extraordinary or common law writs." The second is the bar in §78B-9-106(1)(e), which prohibits relief under the PCRA for any claim that it deems untimely. Neither provision is ambiguous, so the avoidance canon is irrelevant. *See Carlson*, 2014 UT 24, ¶24. That means one of the two provisions must be severed. Looking at the PCRA as a whole and its history, it seems most likely that the legislative preference would be to sever the "sole remedy" provision—and return the statute to its pre-2008 form—rather than remove the effect of the statute of limitations completely. *Cf. State v. Lopes*, 1999 UT 24, ¶¶18-20, 980 P.2d 191 (Utah 1999).

One option not open to this Court, however, is that of rewriting the PCRA to have it say something it does not. *See State v. Garcia,* 2017 UT 53, ¶29, 424 P.3d 171. So *Winward*'s strictures cannot come from that. And the Court's

pre-PCRA case law regarding practice under the habeas clause is still intact. None of it required what *Winward* requires.

In short, if none of Mr. Patterson's proposed frameworks meets *Winward*'s requirements, it is *Winward* that should yield. It may well be that *Winward* presents a sui generis burden that has no basis in the law.

H. The State misapplies the bar on previously litigated claims.

The last part of the State's brief urges that several claims are also procedurally barred under Utah Code §78B-9-106(1)(b). That provision precludes relief on claims that were raised in prior proceedings. Relying on that section, the State argues that several claims were properly dismissed regardless of the time bar. *State's Brief* at 80-88. Though the Court *may* reach these arguments, it is not obligated to do so, and it may appropriately remand without ruling on this issue.

The State is correct that the PCRA does not permit a petitioner to relitigate claims that were presented before. The PCRA essentially implements the principles of issue preclusion and collateral estoppel, legal principles that were applied in postconviction proceedings even before the PCRA was adopted. *See Hurst v. Cook*, 777 P.2d at 1036; U.R.C.P. 65B(i)(2) (1988).

Nevertheless, the State's argument overreaches. It labels claims as identical even though they rest on logically distinct grounds. And while the State cites several cases to support its position, those cases do not illustrate the contours of the bar.

It appears only one appellate decision demonstrates how close claims can be reached without triggering the bar: *Lynch v. State*, 2017 UT App 86, 400 P.3d 1047. *Lynch* involved a defendant convicted of using a truck to murder his wife. *Id.* at ¶¶2-9. In a post-trial motion, Lynch unsuccessfully argued that his trial attorneys were ineffective for failing to determine whether his truck was drivable. *Id.* at ¶26. In his subsequent PCRA petition, Lynch again alleged faulted his trial attorneys for failing to determine whether his truck was drivable, and also for failing to determine whether his truck had certain features the truck involved in his wife's death had (a damaged grille, a "tow hook," and other features). *Id.* at ¶¶25-29. When the district court denied his PCRA petition in its entirety, Lynch appealed. *Id.* at ¶16-17.

On appeal, the State argued that all Lynch's claims regarding the truck, including those claims about specific features of the truck, were precluded. The State argued the bar applied because Lynch "thoroughly covered this in his new trial motion in the criminal case where he argued that his trial counsel were ineffective for fail[ing] to have important evidence examined and/or challenged." *Id.* at ¶25 (internal quotation marks omitted).

The Court of Appeals disagreed. "To the extent that Lynch's failure-to-investigate claim was based on the mechanical or operational capabilities of his truck," his claims were precluded under section §78B-9-106(1)(b). *Id.* at ¶29. However, the claims regarding the existence of specific features of the truck were not barred. Instead, the Court of Appeals examined those claims on their merits. *Id. at* ¶¶29, 47-52.

Lynch is instructive because it shows that two claims can be related yet distinct, such that the previous presentation of one does not necessarily bar the other under the PCRA. At a minimum, as long as the later claim does not depend on a factual or legal theory that was presented and rejected, a claim is not identical for purposes of Utah Code §78B-9-106(1)(b).

This is consistent with another relevant area of law that this bar is based on: that of issue preclusion. Under the doctrine of issue preclusion, "the issue decided in the prior adjudication" must be "identical to the one presented in the instant action" for there to be a preclusive effect. *Moss v. Parr Waddoups Brown Gee & Loveless*, 2012 UT 42, ¶23, 285 P.3d 1157. Issue preclusion will still apply even if a claim is framed differently, as long as the underlying issue is identical. And "issues are identical for res judicata purposes when a party attempts to relitigate the factual question of why something occurred and the newly alleged cause for the occurrence was rejected as a defense in a prior action." *Fowler v. Teynor*, 2014 UT App 66, ¶21, 323 P. 3d 594 (citing *Harline v. Barker,* 912 P.2d 433 (Utah 1996)).

With this law in mind, the State's arguments against Mr. Patterson's claims under §78B-9-106(1) (b) must fail. In Ground 1, Part 1 of his petition, Mr. Patterson alleges that his trial counsel were ineffective because of how Mr. Bushell, one his trial attorneys, handled his psychosexual evaluation. PCR492. Specifically, it argues that Mr. Bushell should not have let Mr. Patterson's bishop talk with the doctor performing the psychosexual evaluation, and that to the extent the bishop provided privileged material to the doctor, Mr. Bushell was ineffective for allowing that material to be passed to the prosecutor.

PCR492-93. Ground 2, Part 1 argues that appellate counsel was ineffective for failing to raise this same issue on appeal. PCR498. In contrast, on Mr. Patterson's direct appeal, appellate counsel simply argued that trial counsel were ineffective *at trial* for failing to raise the clergy-penitent privilege, and that the privilege had not actually been waived. PCR681-98 Appellate counsel did not address these pre-trial errors. These are distinct claims.

In Ground 1, Part 3 of his petition, Mr. Patterson alleges that his trial counsel were ineffective for failing to verify that his bishop would actually testify at the prosecution's request. PCR495. In Ground 2, Part 3 of his petition, he alleges that appellate counsel was ineffective for failing to raise this same issue on appeal. PCR499. In contrast, in the course of arguing that trial counsel were ineffective for failing to raise the clergy-penitent privilege at trial, appellate counsel asserted that the prosecutor's legal conclusion that the privilege had been waived was false. PCR690. To the extent this can even be considered as "raising" the issue, appellate counsel was focused on a different factual predicate: whether the privilege was legally waived, not whether the bishop would testify. These are distinct claims.

In Ground 2, Part 4 of his petition, Mr. Patterson alleges appellate counsel was ineffective for failing to challenge the district court's findings in the 23B proceedings that Mr. Patterson waived the clergy-penitent privilege. PCR499. In Mr. Patterson's reply brief, appellate counsel simply asserted that the district court was wrong in the 23B proceedings to conclude that "Mr. Patterson waived the clergy-penitent privilege by consenting to the having the psychologist communicate with the Bishop." PCR730. In other words,

appellate counsel challenged the legal conclusion, not the factual finding that led to the legal conclusion. Moreover, appellate counsel could not "raise" the issue in the reply brief. To challenge the factual finding, appellate counsel had to raise the issue in the opening brief. *State v. Weaver*, 2005 UT 49, ¶19, 122 P.3d 566; *see also* U.R.A.P. 24(c) ("Reply briefs shall be limited to answering any new matter set forth in the opposing brief."). Again, these are distinct claims.

With respect to Ground 3, the State's briefing mischaracterizes Mr. Patterson's claim. The claim is not that the prosecutor committed misconduct by threatening to call Mr. Patterson's bishop "without knowing what Patterson had actually said to the bishop." *State's Brief* at 87. Instead, the claim in Mr. Patterson's petition is that it was prosecutorial misconduct to make the threat while knowing the bishop "would not speak to [the prosecutor] or testify unless [the prosecutor] first contacted the Church's attorneys." PCR502. Again, it is a distinct claim.

On Ground 3, the State also argues that it should be barred because it could have been raised on Mr. Patterson's direct appeal. But that ignores how the issue came up. It was not until 23B proceedings on direct appeal that the factual predicate for the claim was even established in the record. When Mr. Patterson's direct appeal counsel tried to raise the different prosecutorial misconduct claim, the Utah Court of Appeals rejected it, stating that "rule 23B hearings are not the proper forum to preserve such claims." *State v. Patterson*, 2013 UT App 11, ¶10 n.4, 294 P.3d 662 (2013). However, the claim can now be

raised because the bar does not apply when "the failure to raise that ground was due to ineffective assistance of counsel." Utah Code §78B-9-106(3) (a).

III. CONCLUSION

Despite the State's arguments, Mr. Patterson has shown that his claims should be heard based on several different theories. This Court should therefore rule in his favor and remand this case to the district court so that his claims can be considered on the merits.

DATED: February 8, 2019.

/s/ Benjamin C. McMurray
Counsel for Scott Patterson

CERTIFICATE OF COMPLIANCE

I certify that in compliance with URAP 24(g)(1) and this Court's order, this brief contains 11,850 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: February 8, 2019.

/s/ Benjamin C. McMurray