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 SUPPLEMENTAL REPLY BRIEF

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I. REPLY ARGUMENT

Utah courts' power to administer postconviction relief derives from two provisions in the state constitution: the section that grants Utah courts extraordinary writ power and the section that grants the Supreme Court rule-making power. The former provides the substance of the remedy, and the latter provides the Supreme Court the power to regulate its use.

The State fights against this position. By the State's account, Utah courts have no constitutional authority to grant postconviction relief and no authority to regulate habeas, even under the rule power. But while the State has some imaginative arguments, they all suffer from the same fundamental flaw: there is no evidence to back them up. The State's understanding of the Utah Constitution is not grounded in law or history.

This Court should conclude that Utah courts have constitutional authority to grant postconviction relief outside of the PCRA.

A. Utahns would have understood habeas by the results it achieved, and not though abstract statements.

The State's opening salvo is leveled against the 1896 constitution. After sampling a smattering of U.S. Supreme Court opinions describing the limits of habeas review, the State declares that people of Utah would have understood "the habeas writ could only be employed to challenge subject matter jurisdiction or void convictions." *State's Supp.* at 8. Thus, by the State's account, the habeas power would not reach "the kinds of post-trial, post-appeal claims often brought today under the PCRA." *Id.*

The State's narrow focus on "subject matter jurisdiction" and "void convictions" is the thread that unravels the State's superficial analysis. These are the State's own terms, not that of any court, for describing on what "limited" grounds habeas relief was available. By contrast, case law of the time stated that habeas relief could only be granted in the postconviction setting upon a showing of "want of jurisdiction." *State's Supp.* at 9 (quoting *Ex parte Hays*, 47 P. 612, 614 (Utah 1897)). And as was previously emphasized, *see Original Reply Brief* at 3–12, the understanding of jurisdiction that prevailed in the late 19th century is much different than the understanding we have now.

Consistent with the understanding of jurisdiction that prevailed around the time of Utah's founding, habeas relief was warranted not only where a court was "without jurisdiction of the cause," but also where a court had "no constitutional authority or power to condemn the prisoner." *Ex parte Nielsen*, 131 U.S. 176, 184 (1889). If a judgment was the result of a constitutional violation, the judgment was void because the Constitution "bounds and limits all jurisdiction." *Id.* at 185. The rights guaranteed to criminal defendants in the constitutions "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).[1]

This Court's early decisions reflect this understanding. Under the habeas rubric, it regularly considered petitioners' claims that they had been convicted

[1] Available at: https://books.google.com/books?id=E5gEAAAAYAAJ.

and punished in violation of their constitutional rights. *See, e.g.*, *Opening Supp.* at 15–16; *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). The State ignores these cases.

So, while Utahns who ratified the constitution would have understood the habeas power to reach jurisdictional questions, they also would have understood that constitutional errors affected jurisdiction. The *Snow* and *Nielsen* cases confirmed this. And to the extent other Supreme Court decisions muddled the issue, the *Nielsen* case explained, "If we have seemed to hold the contrary in any case, it has been from inadvertence." 131 U.S. at 184.

The State's own authorities support this view. *Cf. State's Supp.* at 6–10. Although these cases conclude that run-of-the mill errors or irregularities are not cognizable under habeas, they also recognize that some errors so grave that they exceed a court's authority to act. For example, *Ex parte Lange*, 85 U.S. 163 (1873), remedied a claim of double jeopardy through habeas, an error that we would not now frame as a jurisdictional defect in the latter proceeding. While these frame these errors differently than we do today, they acknowledge a power to reach constitutional errors. *See, e.g., id.* at 166 (finding constitutional authority to determine "whether [a] court has exceeded its authority").

The State ignores this nuance, never scratching below the surface. By looking beyond labels and understanding the substance of what courts were actually doing, it becomes clear that habeas in 1896 reached what we would now call constitutional errors. This Court should acknowledge that complexity

and conclude that Utah's original writ of habeas corpus reached constitutional postconviction claims.

B. This Court did not create a common-law writ of habeas corpus.

The State does not dispute one whit that this Court (and lower Utah courts) granted habeas relief for decades based on grounds that would not be cognizable under its narrow definition of habeas corpus. It acknowledges that in the 1940s, this Court recognized a broader purpose for habeas than simply checking jurisdiction. But it dismisses this development, claiming that throughout this period, from 1944 through at least the passage of the PCRA in 1998, Utah courts were not exercising the constitutional writ of habeas corpus. Instead, the State claims that Utah courts were exercising a "common law" writ of habeas corpus that was "completely distinct from the core constitutional writ." *State's Supp.* at 11–14.

While this is a imaginative argument, it has no support. Yes, this Court declared that it was extending the reach of writ of habeas to postconviction claims that it had not reached before. *See State's Supp.* at 11–13 (quoting *Thompson v. Harris*, 144 P.2d 761 (Utah 1943) and *Hurst v. Cook*, 777 P.2d 1029 (Utah 1989)).[2] But the State never shows any evidence that Utah courts were exercising something other than their constitutional authority to issue the writ. The State does not even show that this Court had any authority to create a

[2] As argued previously, these cases reflect a change in terminology, not a substantive expansion of the writ.

common-law writ of habeas corpus; the most it says is that the purported common law habeas writ was "not necessarily improper." *State's Supp.* at 16.

In truth, all the evidence points the other way: this Court repeatedly indicated that it was using the constitutional writ to grant postconviction relief. Thus, for example, on the eve of the amendment of the judicial article of the Utah Constitution, this Court noted that:

> [T]he office of the Great Writ was to test the legality of a restraint. . . . In recent years its office has been expanded. In *Ziegler v. Miliken,* Utah, 583 P.2d 1175, 1176 (1978), we stated that the writ may be used to challenge the legality of a restraint and "other alleged violations of basic rights," including violations of the prohibition against cruel and unusual punishment and "anything that would properly fit within that charge."

Homer v. Morris, 684 P.2d 64, 66 (Utah 1984). Because it was widely understood that the courts were using the constitutional power, most habeas cases do not stress the point. Yet, over the years, this Court repeatedly affirmed that it was using the constitutional writ of habeas corpus. *See, e.g.*, *Lindeman v. Morris*, 641 P.2d 133, 134 (Utah 1982) ("the ancient, extraordinary writ"); *Helmuth v. Morris*, 598 P.2d 333, 335 (Utah 1979) ("the ancient and honored writ"); *Brown v. Turner*, 440 P.2d 968, 969 (Utah 1968) ("extraordinary remedy").

Former Rule of Civil Procedure 65B further confirms that Utah courts were employing their constitutional habeas power to grant relief on postconviction claims. Since at least 1953, the former rule stated that it was regulating the same writs named in the constitution. URCP 65B (1953); *accord Palmer v. Broadbent*, 260 P.2d 581, 581 n.1 (Utah 1953). From then until 1969,

all habeas attacks on pre- and post-conviction detainers proceeded under one portion of that rule—part (f). In 1969, part (i) was added, delineating separate procedure for post-conviction attacks. URCP 65B (1969). Still, before 1984 and after, parts (f) and (i) were treated as different flavors of the same constitutional remedy. *See Hurst*, 777 P.2d at 1034 & n.3; *Spain v. Stewart*, 639 P.2d 166, 168 & n.2 (Utah 1981).

Looking at the whole picture, there is no reason to believe that the Twentieth Century courts were applying anything other than their constitutional authority to issue writs of habeas corpus.

C. The State does not dispute that the 1984 amendments ratified the existing understanding of the constitutional writ.

As a result, the people of Utah would never have understood the Utah courts to be exercising a common law habeas power. When the people of Utah updated the judicial article, they left the courts' writ powers alone—other than adopting this Court's terminology. *Compare* URCP 65B(a) (1984) *with* Utah Const. Art. VIII, § 3 (2019). Based on that, Mr. Patterson argued that the people of Utah ratified the Court's description of its powers under the writ. *Opening Supp.* at 17–19.

The State doesn't challenge this argument. It focuses elsewhere, arguing that Utah courts were *not* using the constitutional writ to grant postconviction relief in 1984 and before. But as shown above, the State's attack holds no water. And having failed to challenge the common-sense principle that people understand language and legal terms as they are used contemporarily, the State has implicitly conceded that the 1984 amendment incorporated the

extraordinary writs as Utahns understood them *in 1984*. *See State's Supp.* at 22 (acknowledging "there was no intent to alter the substance of the core constitutional habeas writ").

The writ power preserved in 1984 can only have been the power that everyone understood existed at that time. Had the people of Utah wanted to alter its substance in favor of a more limited or antiquated one, they could have done so. Absent an express intent to do something else, this Court must conclude that the people of Utah chose to maintain the power as it was then.

D. The Suspension Clause does not provide the Legislature authority to regulate habeas corpus.

Under *Brown v. Cox*, 2017 UT 3, 387 P.3d 1040, the authority to regulate the habeas part of the extraordinary writ power must be the same that regulates the rest of the extraordinary writ power: the rulemaking provision of Article VII, section 4. *Opening Supp.* at 23–25. The State resists this reality, offering instead another creative response. It ignores the rulemaking provision and instead asserts that the Suspension Clause implies a legislative authority to regulate habeas. *State's Supp.* at 14–16.[3] This suggestion has several problems.

First, the Suspension Clause itself provides no textual support for the State's position. It speaks only to when the right to habeas can be suspended

[3] The State also argues that the PCRA reasonably regulates habeas under the Suspension Clause. *State's Supp. Brief* at 17–20. But because the State is incorrect both as to the breadth of habeas power and the source of the power to regulate it, this argument is irrelevant.

and says nothing about regulation. It doesn't even say who has the authority to suspend habeas. (This point will be emphasized again below.)

Structurally, too, the State's argument presents a significant anomaly. It would leave the regulation of all but one portion of the extraordinary writ power to the rulemaking provision, but cut out one portion for regulation by the Suspension Clause. Again, though, there is no evidence that such a mess was ever intended. And messy it would be, as the line between the habeas power and the other writ powers is not always clear cut. *See, e.g.*, *Boggess v. Morris*, 635 P.2d 39, 42–43 (Utah 1981) ("[W]here this Court has appellate jurisdiction over the habeas corpus proceeding and original jurisdiction to issue the writ of certiorari for the record in the criminal conviction, the effect of the two writs can unite to open the door for direct review of a criminal conviction in this Court."); *McNair v. Hayward*, 666 P.2d 321, 324 n.4 (Utah 1983).

Nor does the State present any evidence whatsoever that anyone, anywhere has ever understood a suspension clause in any constitution to provide authority to regulate habeas. Instead, it relies on the fact that habeas had a long history of regulation under statute. *State's Supp.* at 15–16. But that only confuses the method of regulation with the source of the power to regulate. Significant structural differences between the federal and state constitutions explain the divergent results.

For one thing, it's not entirely clear whether the federal constitution provides any right to postconviction relief. *See Swain v. Pressley*, 430 U.S. 372, 384–85 (1977) (Burger, C.J., concurring). But even if there is a federal right to postconviction relief, Congress has other routes for regulation. Except for the

Supreme Court, all federal courts are courts of limited jurisdiction, and their jurisdiction is defined according to the whim or wisdom of Congress. *Sheldon v. Sill*, 49 U.S. 441, 449 (1850). Thus, Congress could frustrate the right to postconviction relief by stripping federal courts of the jurisdiction to hear postconviction claims. *See INS v. St. Cyr*, 533 U.S. 289, 298–314 (2001). Alternatively, without an affirmative grant of writ power, Congress could deny federal courts the power to grant postconviction relief even when they have jurisdiction. *Felker v. Turpin*, 518 U.S. 651, 664 (1997). Finally, Congress can dictate how the writ power is used through rules. It has long been understood that "Congress has the power to make procedural rules for the lower federal courts." 1 Moore's Federal Practice and Procedure § 1.20 (3rd ed. 2019).[4]

The relationship between the Utah Legislature and the state courts is markedly different. As has already been established, the Utah Constitution does provide the right to postconviction relief. And the Utah Constitution also guarantees there will be a court with jurisdiction to hear a postconviction claim. The Utah Constitution has always required the creation of "a trial court of general jurisdiction known as the district court." Utah Const. Art. VIII, §§1 & 5 (2019); Utah Const. Art. VIII, §§1 & 7 (1896). And while the Legislature may limit the jurisdiction of district courts, *see* Utah Const. Art. VIII, § 5 (2019), the Legislature cannot eliminate postconviction relief through jurisdiction stripping without violating the uncontested protections of the Open Courts Clause. *See*

[4] Congress has afforded the U.S. Supreme Court rulemaking power under Congress's supervision. 28 U.S.C. §§2072 & 2074.

Waite v. Utah Labor Commission, 2017 UT 86, ¶65 n. 90, 416 P.3d 635 (Lee, J., concurring); *id.* at ¶94 (Pearce, J, concurring).

Nor is the Utah Legislature free to frustrate postconviction relief through rules of procedure. The 1984 revision to the Utah constitution explicitly delineated the rulemaking power, giving primary authority to this Court. To the extent the Legislature shares the rulemaking power, this Court has stated that the power must be explicitly exercised by promulgating rules, not statutes. *Brown*, 2017 UT 3, ¶¶15–24.

The bottom line is that Congress can shape how federal postconviction relief is dispensed in a way that the Utah Legislature cannot.[5] In light of these structural differences between the Utah and federal governments, the State's focus on the Suspension Clause is a red herring.

A look back at the origins of Utah's suspension clause further demonstrates its irrelevance as a source of legislative authority to regulate the writ. At Utah's Constitutional Convention, postconviction relief itself was not mentioned, and habeas corpus was discussed in any length only in connection with the Suspension Clause. And this discussion centered on one question: who has the power to suspend habeas?

Utah's Suspension Clause has always provided that "[t]he 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. I, §5 (2019). However,

[5] As it was explained previously, *Opening Supp.* at 26–27, this puts Utah in the same position as Florida, Arizona, as well as New Mexico and possible other states. *See, e.g.*, *In re Forest*, 113 P.2d 582, 584 (N.M. 1941).

at the convention, one delegate proposed adding this phrase: "in such manner as shall be prescribed by law." The amendment's purpose was to let the Legislature spell out under what circumstances the writ could be suspended and what procedures must be followed to do so. But other delegates thought it was a bad idea. Some suggested that it was none of the legislature's business because the executive branch holds the authority to suspend habeas. In the end, the amendment was rejected with the understanding that the power to suspend habeas should "be exercised in accordance with the general precedent and history of its exercise in this county." 1 Official Report of Proceedings and Debates of the Convention 252–57.

This undermines the State's arguments in several respects. First, the drafters outright rejected an explicit grant of authority to the Legislature in the Suspension Clause. That makes it hard to believe that the clause is hiding some authority to regulate habeas. Beyond that, even the delegates didn't agree which branch of government could exercise the power to suspend. So it is even more difficult to believe that the Suspension Clause harbors some reservoir of regulating authority for the Legislature when it is not clear that the Legislature was even granted the authority to suspend. *Cf.*, *e.g.*, *In re Boyle*, 57 P. 706, 706–07 (Idaho 1899) (recognizing the governor to have suspension authority because under statute he was charged with putting down insurrection); *see also* Utah Const. Art. VII, § 4 (1896) (giving same charge to Utah's governor).

Nothing corroborates the State's contention that the Suspension Clause allows the Legislature to regulate habeas. The only power the Legislature has ever had to regulate habeas was its former, purported rulemaking power.

E. The PCRA impermissibly restricts Utah Courts' flexibility to grant postconviction relief.

While the focus in this briefing has been on the postconviction part of habeas—the power to grant relief from a criminal judgment—habeas is used for many other things, too. As has been noted elsewhere, it has been used to address child custody issues, prison conditions, and any detention that occurs outside of the criminal process. *See Opening Supp.* at 20–21; *State's Supp.* at 23–25. But unlike these other uses, the PCRA is the only statute that attempts to dictate to the courts when they can use their writ power. Other instances of what the State calls "regulation" are just statutes declaring relief can be obtained via habeas. *See* Utah Code § 62A-15-642 ("Any individual detained pursuant to this part is entitled to the writ of habeas corpus upon proper petition by himself or a friend, to the district court in the county in which he is detained."); *accord* § 62A-15-709; § 77-30-10; *cf. State's Supp.* at 25.

But even if the Legislature did attempt to regulate other aspects of habeas practice, or other writ powers, that regulation would be improper. Because the extraordinary writ power belongs to the courts, the Legislature's only ability to weigh in comes through the "check" it is granted under the rulemaking provision. And that holds true even if the State believes the Legislature has good reason to try to regulate the postconviction procedure. Good intentions don't obviate a violation of the separation of powers.

More troubling, though, is the State's implication that this Court is not competent to regulate postconviction. It claims that the Legislature created the PCRA to address "vexatious and repetitive" litigation and to address "other

important societal interest" like the finality of convictions, the rights of victims, and the efficient use of judicial resources. *State's Supp.* at 26. Yet it's hard to believe that the courts can't be trusted to make efficient use of resources. And court rules make plain that this Court is quite capable of addressing the interests the State proclaims as important. *See, e.g.*, URCP 83 (2019) (addressing vexatious litigants); URCrP 35 (2019) (addressing victim's rights). Indeed, for more than 40 years, this Court did manage postconviction under its statutory and later constitutional rulemaking power. By granting this Court a constitutional rulemaking power, the people of Utah recognized that this Court was not only competent to address these issues, but also that it was the most appropriate body to address them.

Regardless, the State has presented nothing but its *ipse dixit* that these were really the Legislature's concerns. Listening to the legislative hearings, one might think instead that the Legislature was not happy with how Utah courts, particularly this Court, was exercising the habeas power. Again, though, that doesn't justify a breach of the separation of powers.

Because this Court is competent to dictate on what terms postconviction relief can be granted, the State's assertions that a year is plenty of time to file a postconviction claim and that claims should not be heard if there was a previous chance to hear them should be rejected as a difference of opinion. This Court has rejected both positions. *See, e.g.*, *Frausto v. State*, 966 P.2d 849, 851 (Utah 1998); *Hurst*, 777 P.2d at 1036–37. Indeed, for a pro se, indigent inmate with no access to legal materials, a one-year limitations period may be the death knell for a significant, meritorious constitutional claim.

The bottom line is that the overarching aim of the PCRA is to restrict avenues, not broaden them. The PCRA is "elegant" only in the way that an abattoir is elegant—the PCRA efficiently and ruthlessly kills claims for relief. *Cf. State's Supp.* at 27. Otherwise, there is very little to applaud. By severely narrowing the circumstances under which relief can be granted, the PCRA's primary "success" seems to be creating litigation over procedural matters instead of substance of clims. And even those provisions that purportedly "expand" the availability of relief to those demonstrating factual innocence or DNA exoneration may ultimately be just statutory alternatives to the habeas power. *See Montoya v. Ulibarri*, 163 P.3d 476, 484 (N.M. 2007) (recognizing "that a habeas petitioner must be permitted to assert a claim of actual innocence in his habeas petition" under New Mexico Constitution); *cf. Brown*, 440 P.2d at 98 (postconviction relief warranted "where some such fact is shown that it would be unconscionable not to re-examine the conviction").

Rather than being some boon to those who have been wrongfully convicted,[6] the PCRA should instead be recognized as the bland, generic alternative to name-brand habeas relief. Because of the particular provisions of the state constitution, the people of Utah have the right to "accept no substitutes." The PCRA's claim to be the exclusive remedy is invalid.

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[6] Indeed, despite asserting his innocence, an actual innocence claim under the PCRA is not really available to Mr. Patterson because the newly discovered evidence (Sandy's statement to DCFS workers that Mr. Patterson wanted a divorce, and the expert's critique of the victim's inconsistent testimony) does not satisfy Utah Code § 78B-9-402(2)(a)(iv).

II. CONCLUSION

Under Utah's original constitution, the habeas power allowed courts to grant postconviction relief. The 1984 amendments cemented that power. And the rulemaking provision gives this Court—not the legislature—primary authority to regulate the power to grant postconviction relief. So, consistent with his earlier prayers, this Court should either rule that Mr. Patterson's claims can be heard under the PCRA[7] or recognize that his claims can be heard under the courts' habeas power.

DATED: December 20, 2019.

/s/ Benjamin C. McMurray
Counsel for Scott Patterson

[7] In light of the Court's briefing order, Mr. Patterson has not repeated arguments here that he is entitled to relief under the PCRA. One of the ways that the court could grant relief under the PCRA is through the exception delineated in *Winward v. State*, 2015 UT 61, 355 P.3d 1022. Although Mr. Patterson has shown he is entitled to relief under *Winward*, he agrees with the State that the *Winward* analysis may be needlessly confusing, especially for pro se litigants. The better view is to hold, in light of the arguments presented here, that the court has authority to grant relief from constitutional errors independent of the PCRA and constrained only by pre-PCRA caselaw.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with the Court's supplemental briefing order, this brief is 15 pages long, 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: December 20, 2019.

/s/ Benjamin C. McMurray