PUBLIC
20200917-SC

IN THE UTAH SUPREME COURT

STATE OF UTAH,
Appellee/Plaintiff,
v.
STEPHEN RIPPEY,
Appellant/Defendant.

REPLY BRIEF OF APPELLANT

Appeal from Final Judgment Entered in the Third District Court,
In and For Salt Lake County, State of Utah,
the Honorable Douglas Hogan presiding, Case No. 081402174

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INTRODUCTION

Contrary to the State's "facts", Rippey's criminal prosecution was plagued by false and unreliable accusations, mental health concerns, ineffective assistance of trial counsel, and an invalid plea and sentence.[1] Although the State acknowledges there are constitutional safeguards built into the system meant to guard against these very issues, StateBr:14-15, this recognition does not speak to the critical problem Rippey raises – for 93% of Utah criminal defendants who enter pleas, *there is no appellate review* to swiftly remedy the errors and constitutional violations that occur when those safeguards fail.[2]

Through this appeal, Rippey demonstrates that the interaction between Utah's Plea Withdrawal Statute ("PWS") and the Post-Conviction Remedies Act ("PCRA") presents serious constitutional problems which strike at the very core of the criminal justice system. To counter Rippey's claims, the State relies on precedents that have rejected isolated constitutional challenges made in procedurally different contexts. The State, and to some extent this Court itself, justifies the PWS by declining to "see the forest for the trees", with each "tree" being a distinct constitutional challenge that was rejected due to procedural posture, or by applying a precedent issued when the PWS was substantively

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[1] *E.g.*, PR:8-13,43-51,55-59 (alleging numerous grounds of IAC); PR:9,51-64 (Rippey incapable of entering valid plea and waivers of rights due to diminished mental capacity); PR:12 (State's failure to disclose exculpatory evidence implicating victim's biological father); PR:12-13 (deprivation of right to appeal). Also, during Rippey's time in pretrial solitary confinement, which was concurrent with his plea and sentencing, an evaluation noted Rippey "endorsed considerable distress" and that this "sense of agitation likely is going to interfere with [his] ability to focus and concentrat[e]." PR:91; *also* PR45-46.

[2] RippeyBr:32 ("Flow Chart" depicting review of plea-based convictions), attached in Addendum A.

different. But the "forest" is a constitutionally untenable construct where 93% of criminal defendants are effectively denied their right to challenge their convictions. Rippey's case provides this Court the perfect opportunity to finally see the forest for what it is, and find the PWS unconstitutional for the host of interrelated reasons presented.

ARGUMENT

I.
UTAH'S SYSTEM OF PLEAS: THE REALITY

One of the State's primary arguments is that there is no impropriety in the disparate treatment between defendants who enter pleas but who do not seek to withdraw them (or raise all challenges to their pleas) before sentencing, and all other defendants. StateBr:40-42. The State claims all defendants "enjoy[] an equal opportunity to avoid whatever disadvantages might attend the PCRA." *Id*. Alluding to *Ostler's* after-sentencing deadline, the State also argues:

> Requiring a defendant to move to withdraw a plea before sentence . . . does not make the creation of the subclass any less voluntary. It does not make it so defendants "could do nothing to escape" becoming a member of the subclass . . . To escape the limited class, a defendant has but to say "I wish to withdraw my plea" any time before or even during the sentencing proceeding, provided the sentence has not yet been announced.

StateBr:41.

This position is, respectfully, both ignorant of and naive to systemic realities. No one voluntarily chooses to be deprived of constitutionally adequate assistance of counsel or any other fundamental right inherent in a criminal prosecution, but many are. The position is also deaf to the fact that minorities, the indigent, the uneducated, the mentally

ill, and the underserved, make up a substantial number of those persons the State now claims "voluntarily" place themselves in a class undeserving of the very constitutional rights meant to protect them. The reality of Utah's criminal justice system shows:

Many Defendants Are Detained Pretrial.

Approximately two-thirds of those held in United States' jails are awaiting trial.[3] Many are minorities, the mentally ill, and the poor.[4] Utah detention statistics follow the same trends.[5] Indeed, Rippey was arrested and remained *in solitary confinement* at the

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[3] Léon Digard & Elizabeth Swavola. *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,* 3 VERA INST. OF J. 1, 1-2 (2019).

[4] *E.g*., Clare Perez, *The Criminalization of Poverty in Pretrial Detention Hearings*, GEO. J. ON POVERTY L.& POL'Y (March 19, 2023), *available at* https://www.law.georgetown.edu/poverty-journal/blog/the-criminalization-of-poverty-in-pretrial-detention-hearings/ ("black and brown defendants are at least 10-25% more likely than white defendants to be detained pretrial"); Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y (October 9, 2019), *available at* https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ ("People of color and low-income people . . . more likely to be held pretrial than white defendants"); Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y (May 10, 2016), *available at* https://www.prisonpolicy.org/reports/incomejails.html ("most people who are unable to meet bail fall within the poorest third of society"); Lorna Collier, *Incarceration Nation*, 45 AM. PSYCHOL. ASS'N 56, 56 (2014) (blacks "more likely to be incarcerated before trial, [and] to fare worse in plea agreements"); OPEN SOCIETY JUSTICE INITIATIVE, *The Socioeconomic Impact of Pretrial Detention,* at 22 (Feb. 2011), *available at* https://www.justiceinitiative.org/publications/socioeconomic-impact-pretrial-detention ("those entering pretrial detention come from the poorest and most marginalized echelons of society").

[5] According to the Salt Lake County Sheriff's Jail Dashboard (updated daily), on June 20, 2023: 72.84% of the jail population were "non-sentenced"; 61.39% unemployed; 24.5% homeless; 11% black; and 32% Hispanic. As of this date, the average number of days in jail was 171 days. *Jail Dashboard*, SALT LAKE COUNTY SHERIFF'S OFFICE, https://slco.org/sheriff/corrections-bureau/metro--oxbow-jail/jail-dashboard/ (last visited 6/20/23).

Salt Lake County Jail until well after his plea and sentence. TR284-85.

The many perils of pretrial incarceration are well known.[6] Cut-off from communication with persons outside the facility, pretrial detainees are unable to contact and arrange meetings with witnesses who could testify in the defense, obtain or preserve evidence, or otherwise meaningfully assist in the investigation of their case.[7] It comes as no surprise, then, that "defendants detained pretrial feel more inclined to accept plea bargains,"[8] and regardless of actual guilt, "plead guilty twice as much as released defendants."[9]

Many Pleas Are Entered with an Informational Deficit.

Since there is no "right" to a plea bargain, plea offers may be contingent, time-

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[6] *E.g., Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

[7] Clara Kalhous, John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 801 (2012).

[8] Alexander Shalom, *Bail Reform As A Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921, 921 (2014) (citing authority).

[9] Lydette S. Assefa, *Assessing Dangerousness Amidst Racial Stereotypes: An Analysis of the Role of Racial Bias in Bond Decisions and Ideas for Reform*, 108 J. CRIM. L. & CRIMINOLOGY 653, 668 (2018). The pressure to plead was exacerbated during the Coronavirus pandemic. In one study, one-third of defense attorneys reported detained clients "plead guilty due to COVID-19 related conditions who might not have under normal circumstances." Daftary-Kapur, T., Henderson, K. S., & Zottoli, T. M. *COVID-19 Exacerbates Existing System Factors That Disadvantage Defendants: Findings from a National Survey of Defense Attorneys*, LAW AND HUMAN BEHAVIOR, 45(2), 81-96 (Apr. 2021), *available at* https://doi.org/10.1037/lhb0000442.

limited, or withdrawn at the prosecutor's whim.[10] Plea offers are often provided with an expiration attached, and due to time pressures, the accused may accept a plea they otherwise would not had they been able to wait until "their comprehension of the situation" improved."[11]

Defense attorneys are also "generally at an informational deficit compared to prosecutors, who at the early stages of proceedings typically have access to a full police report, interview statements, and evidence."[12] Evidence disclosure rules are not consistently upheld for purposes of plea bargaining.[13] Statutes and rules protecting the disclosure of information about alleged victims greatly impact the defense's ability to obtain necessary information to counter the accusations.[14] And "[d]efense attorneys might not have many opportunities to meet with their clients before a plea decision is made."[15]

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[10] *E.g., State v. Greuber*, 2007 UT 50, ¶13, 165 P.3d 1185, ultimate holding overruled by *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376 (2012).

[11] Miko Wilford and Annmarie Khairalla*, Innocence and Plea Bargaining, in* A SYSTEM OF PLEAS: SOCIAL SCIENCE'S CONTRIBUTION TO THE REAL LEGAL SYSTEM 132, 138 (Oxford University Press 2019).

[12] Kelsey S. Henderson, *Defense Attorneys and Plea Bargains*, *in* A SYSTEM OF PLEAS: SOCIAL SCIENCE'S CONTRIBUTION TO THE REAL LEGAL SYSTEM 37, 45 (Oxford University Press 2019) (citing study).

[13] *E.g., Medel v. State*, 2008 UT 32, ¶24, 184 P.3d 1226 (citing *United States v. Ruiz*, 536 U.S. 622, 633 (2002)).

[14] *E.g., State v. Chadwick*, 2023 UT 12, ___P.3d__ (June 8, 2023) (victim's and State's interests "weighed in favor of keeping victim's therapy records sealed" on appeal); Utah R.Crim.P. 14(b)(1) (requirements for obtaining victim's private and privileged records).

[15] Henderson, *supra* n.12. These issues were also exacerbated during the pandemic. *See* Daftary-Kapur, Henderson, & Zottoli, *supra* n.9.

Consequently, many pleas are entered before counsel has investigated the facts and the law of the case and without a defendant's full understanding and appreciation of the evidence against him (or lack thereof). Rippey's record is demonstrative. A request for discovery was filed by trial counsel upon appointment in September 2008, TR16-20; PR284, but the State did not reply until November 6, 2008. TR31. Rippey entered a plea only *six days* later, without having seen that critical information. TR33-34.

Finally, although the preliminary hearing is a fundamental procedural right guaranteed by the Utah Constitution, courts and prosecutors regularly (and improperly) condition plea offers upon its waiver.[16] As a result, many defendants enter pleas without this critical proceeding, which was the case here. TR:34,93. Even if a preliminary hearing is held, the standard for bindover is low, and Utah law has so limited a defendant's ability to obtain information about the nature of the State's case and its evidence,[17] that this "critical hearing", from the defense perspective, is little more than an exercise in futility.

The Entry of the Plea Itself Poses Problems.

For many, the plea forms may be discussed in the few moments before the entry of the plea, perhaps in a nearby holding cell with surrounding noise and a lack of privacy. The forms themselves are problematic, "frequently written at an eighth-grade level or higher" though on average "defendants read at or below the sixth-grade level."[18]

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[16] *E.g., State v. Hararah,* 2023 UT App 77, n.3, __ P.3d __ (July 20, 2023); *State v. Prisbrey*, 2020 UT App 172, ¶19, 479 P.3d 1126.

[17] *E.g.*, *State v. Lopez*, 2020 UT 61, ¶50, 474 P.3d 949.

[18] Wilford and Khairalla, *supra* n.11, at 140.

Language barriers, mental impairments, other mental health issues, and the prevalence of higher-order vocabulary and legalese make it difficult for many to fully understand the plea process itself.[19]

Court calendars are also packed and judges simply do not have the ability, in the few minutes spent engaging in the plea colloquy, to truly ascertain each defendant's understanding of the rights waived and the consequences of the plea. And although the standardized court forms do advise that "any challenge to [a] plea made after sentencing must be pursued under the Post-Conviction Remedies Act," TR40,99-100, neither Criminal Rule 11 nor Rule 22 require courts to explain what the PCRA is, what the post-conviction process entails, the time limits for filing, and critically, that there is no right to counsel in seeking post-conviction relief.

Here, the only advisement the court gave Rippey regarding plea withdrawal was "if you want to withdraw this plea, you'll need to ask me in writing sometime prior to your sentencing date." TR99-100. Rippey was also advised he had the right to be represented by an attorney, TR36-37, but it was not made clear that he would not be afforded a direct appeal, and he was certainly not advised that he would not be afforded the assistance of counsel in further challenging his conviction. Consequently, Rippey, like most other defendants, did not knowingly waive the right to appeal simply by entering a

[19] *Id.*

plea; nor knowingly waive the right to appeal or the aid of counsel for future challenges just by signing the court form. TR39.[20]

No Motion to Withdraw Is Filed in Most Circumstances.

At times, a defendant files correspondence with the court seeking to withdraw the plea, which is stricken, ignored, or withdrawn by counsel.[21] Defense counsel often does not advise (or does not know) of grounds to support withdrawal. There is also every incentive for counsel to discourage withdrawal to insure that the prosecutor and the presentence-report-author offer a positive sentencing recommendation, and so the judge will impose a more lenient sentence. As here, no motion to withdraw a plea is filed in the vast majority of Utah cases – less than roughly .25%.[22]

This Is the Reality of Utah's Current "Justice" System.

Where motions to withdraw pleas prior to sentencing were once liberally granted for "good cause", now, once a defendant *utters the word guilty* the case is all but closed unless the defendant can specifically show the plea was not knowingly and

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[20] "[A] defendant does not waive the right to appeal simply by entering a guilty plea." *Manning v. State*, 2005 UT 61, ¶36, 122 P.3d 628. The right is waived only "pursuant to a plea agreement that expressly waives the right to appeal and is entered in accordance with the procedural safeguards of rule 11 of the Utah Rules of Criminal Procedure." *Id.*; *also Garza v. Idaho*, 139 S.Ct. 738, 744-45 (2019) (even appeal waiver not absolute bar to appeal). Thus, the mere *signing of a plea form* must not be confused with waiving the right to appeal by *entering into a plea agreement*. To be sure, the waiver of appellate rights can be plea-bargained away and are regularly part of plea agreements in federal court. But unless the right is expressly, knowingly, and voluntarily waived, a defendant does not waive this crucial right by simply signing a court form.

[21] *E.g., State v. Rettig*, 2017 UT 83, ¶1, 416 P.3d 520.

[22] RippeyBr:Add.A.

voluntarily made. Requiring this showing to be made prior to sentencing is unreasonable, however, as the defendant remains in the very same rushed position, without full information, full investigation, and perhaps, without the ability to comprehend the nature of the charges, possible defenses, and other critical circumstances of the case.

This is the reality of Utah's criminal justice system. And this reality does not support the State's position that defendants "voluntarily" place themselves in a group undeserving of the fundamental rights meant to protect them.

II.
THE PWS/PCRA REGIME IS CONSTITUTIONALLY UNTENABLE

A. The PWS Violates a Number of State and Federal Constitutional Rights

1. This Court Has Not Already Rejected Rippey's Claims

a. *State v. Rettig* did not dispose of Rippey's Claims; *Rettig*'s reasoning is also flawed, and this Court should reconsider its holdings and application in subsequent cases

(1) *Rettig* did not dispose of Rippey's claims

The State argues that the *Rettig* majority already rejected Rippey's right to appeal and right to counsel claims. StateBr:17-29. Not so.

First, context is necessary. *Rettig*'s holding that the statute's jurisdictional bar did not infringe on the right to an appeal was based on the premise that the "only issue" limited was that the "plea of guilty was not knowingly and voluntarily made." 2017 UT 83, ¶10 (cleaned up). However, the Court's subsequent expansion barring from review "any challenges" when a plea has been entered (through *Flora* and *Badikyan*), no longer

simply narrows issues, but eliminates direct appellate review altogether of a plea-based *conviction*, which can "certainly be said to infringe the important right to appeal." *Id.*, ¶23.[23]

Second, Rippey raises issues not present in *Rettig*. For example, Rettig did not challenge the PWS on the ground that it eliminated "any meaningful avenue for appellate review" thereby infringing upon the important right to an appeal. *Id*., ¶¶23-24. Rippey does. RippeyBr:33,49-54.

Rettig also states that "[a]n unreasonably short deadline foreclosing meaningful access to the judicial system could also potentially be challenged under the Open Courts

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[23] Since the 2003 amendments to the PWS, this Court has issued a series of opinions both solidifying the PWS's strict penalty and expanding its reach. RippeyBr: 27-30. Until more recently, this Court applied the PWS's jurisdictional bar narrowly to the specific issue that a plea was not made knowingly and voluntarily. *See State v. Allgier*, 2017 UT 84, ¶13, 416 P.3d 546 (PWS's jurisdictional bar deprives Allgier of "right to direct appellate review *of the entry of his plea*" and IAC "*at the plea hearing*") (emphasis added); *Id*., ¶25 (PWS requires two steps to withdraw a plea: "request a plea withdrawal in a timely fashion" and "*present evidence to support a finding that he or she did not enter the plea knowingly or voluntarily*"; "If a defendant fails to take these steps to *preserve the issue*, he or she has 'waived the right to raise a specific issue (the validity of [his or] her guilty plea)'") (emphasis added); *Rettig*, 2017 UT 83, ¶10 (defendant must show plea "was not knowingly and voluntarily made" and defendant who fails to seek withdrawal "is left to raise *the issue* in a [PCRA] petition") (emphasis added); *Gailey v. State*, 2016 UT 35, ¶¶22-23, 34, 379 P.3d 1278 (Gailey "waived the right to raise *a specific issue (the validity of her guilty plea)*") (emphasis added).

The reach of the bar significantly expanded in 2020, in *State v. Flora*, 2020 UT 211, 459 P.3d 975 and *State v. Badikyan*, 2020 UT 312, 459 P.3d 967, wherein the Court held the PWS "bars review of unpreserved claims raised as part of an appeal from the denial of a timely plea-withdrawal motion." *Badikyan*, 2020 UT 3, ¶1, n.4 (emphasis added). In doing so, the Court effectively extended the bar to foreclose appellate review of any non-sentencing challenge *when a plea has been entered* and not the *narrow issue* that the plea was not knowingly and voluntarily made. *E.g., Id.*, ¶¶14-15. This expansion of the PWS's jurisdictional bar effectively leaves defendants who enter pleas devoid of the right to appeal their convictions.

Clause or Due Process Clause" but no such claim was asserted. 2017 UT 83, n.2 and ¶24. In response to the State's uniform operation and equal protection argument, Rippey does demonstrate that the PWS's timing requirement is unreasonable due to the many factors preventing defendants from being able to raise challenges prior to the imposition of sentence, including the fact that many defendants enter a plea and are sentenced the same day. *E.g*. Point I, *supra*.

Third, Rippey argues that although the *Rettig* majority stated it was reaching the question left unanswered in *Gailey*,[24] the Court did not analyze why the failure to afford counsel did not violate the right to counsel in this "alternative" to appeal. RippeyBr:28-29. The State concedes "*Rettig* did not directly explain how its holding disposed of the argument *Gailey* did not reach," but faults Rippey's assertion that *Rettig* never actually answered the question. StateBr:20. This is just semantics and seeks to require Rippey to deconstruct an analysis that was not made. Rippey does so now, however, and details *Rettig*'s deeply flawed reasoning.

(2) The Court should reconsider *Rettig*'s flawed analysis

The Court should reconsider *Rettig*'s faulty reasoning, as well as the expansion of the faulty principles in *Flora, Badikyan,* and other subsequent cases, because it has "proven to be unpersuasive and unworkable, create[s] more harm than good, and ha[s]n't

[24] Specifically, whether the PWS could be applied in a manner infringing the constitutional right to an appeal and the "core element" of the right to assistance of counsel on appeal. *Rettig*, 2017 UT 83, ¶17.

created reliance interests." *State v. Green*, 2023 UT 10, ¶56, __ P.3d. __; *also State v. Wilder*, 2018 UT 17, ¶19, 420 P.3d 1064.[25]

The Preservation/Waiver Analysis Is Unpersuasive

Rettig's reasoning is logically flawed. Purporting to answer whether requiring defendants to pursue "appellate review" through the PCRA violates the right to appeal *and* the attendant right to counsel, the majority did not actually answer the two-part question before it. The Court focused instead on principles of preservation and waiver to determine what issues may be raised for review and when, stating that "[r]ules requiring preservation of an issue at specific times and by required means have never been thought to impinge on the constitutional right to an appeal. Such rules simply establish the concept of waiver in litigation." 2017 UT 83, ¶18 (cleaned up). Thus, while ostensibly answering why an issue might be required to be raised in a post-conviction forum, the separate question concerning the denial of the right to counsel in raising that issue was forgotten.

Thereafter, when addressing principles of preservation, the *Rettig* majority focused only on the plain error exception to preservation. *E.g.*, *Id.* ¶¶46-49. But there is more than one exception to preservation in criminal proceedings. *See State v. Johnson*, 2017 UT 76, ¶19, 416 P.3d 443 (listing "plain error, ineffective assistance of counsel, and exceptional circumstances"). After discussing *only* plain error review, the majority jumped to the

[25] Appellant understands this Court does not overrule its precedents lightly. *E.g., Green*, 2023 UT 10, ¶56. Though Rippey asks the Court to reconsider its precedent, it is not necessary to do so to accept Rippey's constitutional claims.

conclusion that the PWS is a jurisdictional bar to the other exceptions as well, including IAC. *Rettig*, 2017 UT 83, ¶¶50-51. This logical leap fails to recognize that even though IAC is an exception to preservation, it is also "a stand-alone constitutional claim attacking the performance of a criminal defendant's counsel." *Johnson*, 2017 UT 76, ¶22. And of particular note, Utah employs a unique Rule 23B procedure whereby IAC claims may be raised on direct appeal. This ability to raise IAC claims on appeal in a criminal case undercuts *Rettig*'s reasoning that a "waiver sanction" completely forecloses appellate consideration of the merits of the issue. *Rettig*, 2017 UT 83, ¶33.

The failure to recognize the ability to raise IAC claims on appeal in Utah further underscores flaws in the majority's analysis of other points. For example, the majority spends much time explaining preservation/waiver principles in civil cases. *E.g.*, *Rettig*, 2017 UT 83, ¶¶30-33,40,43. But a "preservation exception" based on IAC does not exist in the general civil arena. The majority did the same in analogizing preservation/waiver principles in the federal arena. But, again, IAC claims generally cannot be raised in a federal direct appeal and virtually all will be dismissed. *E.g.,United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc).

Rettig's "waiver analysis" is also seriously flawed and seemingly conflates the "failure to preserve" with the concepts of "waiver" and "forfeiture" which bar appellate review altogether. 2017 UT 83, ¶19 ("Rules of preservation and waiver or forfeiture always foreclose the right to raise an issue on appeal"). Failures to "preserve" do not "bar" appellate review, however. An appellant is still afforded review, but must raise

unpreserved issues under exceptions to preservation, which exist in both criminal and civil cases, and in both state and federal court – the common exception being plain error.

The *Rettig* majority's attempt to give examples where "waiver" prohibits appellate review are also unavailing. In the criminal realm, the majority cites to Utah Rule of Criminal Procedure 29 which provides that certain motions be made "not later than 14 days" after the party learns of the grounds; to criminal Rule 12(c) which requires other enumerated motions "be raised at least 7 days prior to the trial"; to criminal Rule 19(e) which requires a party to raise objections to written jury instructions "before the instructions are given to the jury"; and to criminal Rule 24(c) which mandates that a motion for new trial be made "not later than 14 days after entry of the sentence, or within such further time as the court may fix." 2017 UT 83, ¶29. None of these examples support the majority's point, however, since the failure to raise any of these motions in the delineated time frame does not "bar" further review.

Specifically, a Rule 24 motion for new trial is completely discretionary and issues that could be raised there are not barred from appeal.[26] A court may review unpreserved jury instruction errors "to avoid a manifest injustice," which is generally synonymous with plain error. *See* Utah R.Crim.P. 19(e); *State v. Alinas*, 2007 UT 83, ¶10, 171 P.3d 1046. Indeed, the very purpose of the doctrine is to assure a defendant is not convicted even though technical requirements are not complied with in raising an error. *See State v.*

[26] In fact, this Court has held that a defendant may not "preserve" issues through a Rule 24 motion. *E.g., State v. Fullerton*, 2018 UT 49, ¶ 49, 428 P.3d 1052 (citing *State v. Larrabee*, 2013 UT 70, 321 P.3d 1136)). In any event, no issue is "barred" from appeal, but viewed through the lens of plain error, exceptional circumstances and/or IAC.

Bullock, 791 P.2d 155, 164 (Utah 1989) (Stewart, J., dissenting). And our rules specifically provide that a "court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." Utah R.Evid. 103(e).

Finally, although *United States v. Weathers* holds that plain error can be waived in the federal system under federal rule 12, the case also acknowledged that IAC claims were still reviewable. 186 F.3d 948, 957-58 (D.C. Cir. 1999) (cited by *Rettig*, n.3). And Utah case law is rife with examples of appellate courts both considering and granting IAC claims on appeal for counsel's failures to file pretrial motions or timely object, which the *Rettig* majority claims are "waived" and not subject to appellate review. *E.g., State v. Larrabee*, 2013 UT 70, ¶26, 321 P.3d 1136 (IAC for counsels' failure to object to prosecutorial misconduct; by failing to object, counsel failed to preserve issue for appeal); *State v. Ferry*, 2007 UT App 128, 186 F.3d 948 (IAC claim for failure to file suppression motion); *State v. Cummins*, 839 P.2d 848, 851 (Utah Ct. App 1992) (IAC claim for failing to timely file pretrial notice of voluntary intoxication defense). In at least one Utah case, the appellate court reviewed and granted an IAC claim precisely because the attorney's failure subjected his client to the "waiver" of a pretrial suppression issue. *See State v. Snyder*, 860 P.2d 351, 353 (Utah App. 1993).

The Authority has Created More Harm Than Good

The fallout from *Rettig*'s faulty analysis has created many of the constitutional problems raised in this appeal, and the application of *Rettig* in *Flora* and *Badikyan* to foreclose appellate review of any unpreserved challenge when a plea has been entered

goes much too far, effectively denying 93% of Utah defendants their right *to appeal their convictions*. *See* n.23, *supra*.

Further, the Court of Appeals has applied this precedent to hold that when a defendant does not move to withdraw his plea, the court "lack[s] jurisdiction to consider any challenge not directed at the sentence [.]" *State v. Alvarez*, 2020 UT App 126, ¶19, 473 P.3d 655. The Court of Appeals has also barred remedy when a prosecutor breached a plea agreement at sentencing when the requested remedy for that breach was withdrawal of the plea. *See State v. Featherston*, 2020 UT App 106, ¶11, 470 P.3d 473.

How Firmly the Precedent Has Become Established

In determining how firmly a precedent has established itself in Utah law, the Court first looks "to the age of the precedent, since newer precedents are likely to be less firmly established." *Eldridge v. Johndrow*, 2015 UT 21, ¶34, 345 P.3d 553. In comparison to the 32-year-old doctrine this Court overruled in *Eldridge*, *Rettig*'s precedence is in its relative infancy (as are *Flora* and *Badykian*).

The Court considers two additional factors: "how well it has worked in practice" and "whether the precedent has become inconsistent with other principles of law." *Eldridge*, 2015 UT 21, ¶40. As noted extensively, the precedent does not play-well with other fundamental principles of law. And of course, the question of "working well" must be qualified with "for whom"? The current precedent does work well for the Attorney General's Office, which can continue to insist that the vast majority of criminal defendants pursue their conviction challenges unrepresented, where they are rarely

addressed on the merits, and where they are never successful. RippeyBr:52-54 (citing PCRA data). But it does not work well for the district courts where these cases often languish in a procedurally complex and inefficient mire (of which Rippey's case is "Exhibit 1"); nor for the pro se petitioners who are desperately trying to litigate their claims without assistance; nor for the victims, witnesses, or other interested parties, who must wait through years of uncertainty.

b. *State v. Merrill* Did Not Dispose of Rippey's Claims

The State contends that *State v. Merrill* rejected the balance of Rippey's constitutional claims. StateBr:2. The State is wrong.

As context, the 1999 version of the PWS at issue in *Merrill* required a motion to withdraw a plea be filed for "good cause" and within 30-days after sentencing, thus running parallel to the filing of a notice of appeal where the right to counsel still attached. *See State v. Merrill*, 2005 UT 34, ¶¶13,46, 114 P.3d 585.

Also, though Rippey and Merrill both raise challenges under the same constitutional provisions, their claims are just different. Rippey also raises an additional "right to effective assistance of trial counsel" violation not addressed before; one which the State does not address now. RippeyBr:38-39. Broadly viewed, Merrill attacked the constitutionality of the thirty-day limitation on the basis that the imposition of any finite period to bring a motion to withdraw a guilty plea violated five constitutional guarantees. *Merrill*, 2005 UT 34, ¶21.

(1) Open Courts

With regard to his "open courts" challenge, Merrill asserted that the right to petition to withdraw a guilty plea is equivalent to a habeas corpus petition, and argued that the legislature had no more authority to limit the time to file a motion seeking to withdraw a guilty plea than to impose filing deadlines on habeas petitions. *Id.,* ¶¶21-22.

Rippey's Open Courts challenge, however, is based on the guarantee that every person shall have a remedy for an injury by due course of law, and the clause's proscription against laws that unreasonably "diminish or eliminate a previously existing right to recover for an injury." RippeyBr:48-49. Rippey has shown that for 93% of criminal defendants, the PWS has removed the right to direct review of plea-based convictions by a court with appellate jurisdiction and with the right to assistance of counsel fully intact. In doing so, the PWS further fails to provide a reasonable alternative remedy of substantially equal value to the guaranteed right to appeal and all that right entails. This Court's rejection of Merrill's different argument, then, is not a rejection of Rippey's.

(2) Separation of Powers

Merrill's "separation of powers" claim again aligned a petition for habeas corpus with a motion to withdraw a guilty plea, and he again argued that the legislature had no authority to limit the time to file a motion to withdraw a plea. *Merrill*, 2005 UT 34, ¶27.

Rippey's separation of powers argument is substantively different, as set forth below in Point II.B. Of note at this point, Merrill's separation of powers argument also

differed because it was based on Article V, §1 of the Utah Constitution, whereas Rippey's is based on Article VIII, §4.

(3) Due Process

Merrill's due process claims, though more relevant here, are still not dispositive of Rippey's claims. Merrill argued he did not enter a knowing and voluntary plea because he was suffering from religious delusions. *Merrill*, 2005 UT 34, ¶6. He then argued that a jurisdictional bar on untimely motions to withdraw pleas denied him and similarly situated defendants "a means by which they can reappear before the [district] court and have these due process rights enforced." *Id.,* ¶29. In evaluating Merrill's claims, this Court did recognize that an unknowing or involuntary guilty plea likely constitutes a denial of due process, and that "an absolute prohibition against providing a forum to a defendant in which he may assert defects in his guilty plea would certainly violate constitutional due process guarantees." *Id.* But, the Court found that the applicable version of the PWS did not create an absolute bar and therefore, the statutory scheme satisfied due process. *Id.,* ¶30.

Rippey's due process claims are not the same.

First, Rippey's claims are not limited to the propriety of the PWS's jurisdictional bar itself, but also to the requirement that issues be brought without the aid of counsel and defense resources in a forum that does not adequately substitute for direct appeal. These problems were not at issue in *Merrill* because the 30-day window to withdraw a

plea ran contemporaneously with the 30-day window to file a notice of appeal, wherein the right to counsel still attached.

Second, like Merrill, Rippey asserts he did not enter a knowing and voluntary plea. But Rippey's arguments differ in both substance and degree. Rippey argues that he has been denied procedural due process by being forced unknowingly into the post-conviction process itself and by not being advised that he was waiving his right to an attorney to aid in raising his challenges. RippeyBr:43.[27] Thus, just as the *Manning*-reinstatement-remedy was fashioned for those defendants denied "their right to appeal" because of a lack of notice and proper advisement, it follows that due process is also violated when a defendant is denied their right to appeal due to lack of notice as to the substitute appeal process. *See id.*

Third, Rippey argues due process is violated because the post-conviction process is not an adequate substitute for appeal. RippeyBr:43-45. The promise that the PCRA provides an avenue to challenge plea-based convictions is illusory due to conflicting provisions between the PWS and the PCRA. Here, when Rippey did what he was required and filed his challenges under the PCRA, his claims were dismissed, due in large part to the PCRA's procedural bar to any claim that "could have been but was not raised at trial." Utah Code §78B-9-106(c); PR509-510. Thus, the Catch-22 reared its ugly head – the PWS requires that any untimely challenge be raised under the PCRA, which is then

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[27] *Also Halbert v. Michigan*, 545 U.S. 605, 624 (2005) (rejecting argument that defendant waived right to counsel by entering a plea where "the trial court did not tell Halbert, simply and directly, that in his case, there would be no access to appointed counsel").

promptly dismissed and "procedurally barred" under the PCRA because the challenge "could have been but was not" raised in a timely motion to withdraw a plea. These conflicting provisions render the PCRA as an "alternative to appeal" illusory.

And fourth, the right to the assistance of counsel and defense resources for the indigent on appeal, implicate due process, attach to the first appellate review of right, and if denied, amount to structural error. RippeyBr:33-34,41.

(4) Equal Protection/Uniform Operation

The Court recognized Merrill's claims under the Equal Protection Clause and Utah's Uniform Operation provision as being substantially parallel. 2005 UT 34, ¶31. Under each, the Court determines "what classifications are created by the statute, whether they are treated disparately, and whether the disparate treatment serves a reasonable government objective." *Id.* When a fundamental right is at issue, under the Uniform Operation clause which always meets or exceeds the federal standard, "a discriminatory classification . . . must be reasonably necessary to further, and in fact must actually and substantially further, a legitimate legislative purpose." *Gallivan v. Walker*, 2002 UT 89, ¶42, 54 P.3d 1069.[28]

[28] Under the federal equal protection analysis, "courts exercise strict scrutiny of legislative classifications when fundamental constitutional rights are affected." *Flowell Elec. Ass'n, Inc. v. Rhodes Pump, LLC*, 2015 UT 87, ¶23, 361 P.3d 91(citing *Malan v. Lewis*, 693 P.2d 661, 674, n.17 (Utah 1984)). In such instances, discrimination can be justified only if narrowly tailored to achieve a compelling state interest. *E.g., Ashaheed v. Currington*, 7 F.4th 1236, 1251 (10th Cir. 2021).

Under Utah's Uniform Operation provision, when the law affects fundamental and critical constitutional rights, the Court reviews with "heightened scrutiny" and the law is constitutional only if it: "(1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid

According to Merrill, the PWS unconstitutionally imposed disparate treatment in two ways: (1) those who meet the deadline "can obtain immediate relief," while those who do not must remain incarcerated while they "exhaust appellate remedies" before seeking post-conviction relief; and (2) defendants seeking post-conviction relief are not guaranteed the benefit of appointed counsel. 2005 UT 34, ¶32.

Merrill's second contention is most similar to Rippey's.[29] The *Merrill* Court found – as the State argues here – that the PWS treats every defendant alike who entered a guilty plea by extending to each the opportunity to obtain relief from the consequences of his plea by filing a motion within thirty days of entry of the final judgment. Thus, the PWS "applied equally" to all defendants who plead guilty, including those whose pleas were unlawfully obtained or who might otherwise be entitled to withdraw their pleas. *Id.,* ¶39. The Court reasoned, "*where a defendant chooses to subject himself to the requirements of the PCRA* by failing to file a [timely] motion . . . *the consequences of that choice*, to the extent it results in consigning a defendant to a class, is not unconstitutionally arbitrary or unreasonable." *Id.* ¶41 (emphasis added).

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legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal." *Gallivan,* 2002 UT 89, ¶42 (citing authority).

[29] Rippey argues the PWS has created two classes of convicted criminal defendants: 1) those convicted upon a plea who did not raise all challenges prior to the announcement of sentence; and 2) all other convicted defendants, whether convicted by plea or trial. The PWS denies the first class a "first review" of their convictions to an appellate court with the attendant rights to counsel and defense resources. RippeyBr:47. Even more broadly, defendants convicted upon a guilty plea are treated disparately from *all other litigants in the court system*, whether criminal or civil, who are all afforded *some opportunity* for a relief from judgment *after* it has been entered. RippeyBr:47-48.

Merrill's holdings do not control here.

First, there were no fundamental rights at issue in *Merrill*, because the time frame as it existed allowed appellate counsel to assist in determining if a motion to withdraw should be filed. For this same reason, it cannot be said that today's defendants voluntarily "choose" to subject themselves to the requirements of the PCRA, because today's statute allows withdrawal for only limited reasons and prior to sentencing, a time period where a defendant does not have access to appellate counsel, is under immense pressure to plead, is operating under an informational deficit, and cannot know of every legal challenge available for withdrawal. *See* Point I, *supra*.

Second, the Court rejected Merrill's arguments regarding the absence of counsel in PCRA proceedings because he failed to demonstrate that PCRA petitioners were ever required to pursue their claims unaided. 2005 UT 34, ¶47. Under the current scheme, however, it is undisputed that most petitioners must raise their challenges in post-conviction proceedings, at least initially, unaided by counsel.[30] And the record here is clear – Rippey requested counsel *10 times* and was denied each time. RippeyBr:19.

Third, unlike Merrill, Rippey demonstrates that the classifications created by the PWS discriminate against persons' protected fundamental rights, including the rights to appeal to an appellate court, to the assistance of counsel, and to defense resources. Due to the impairment of fundamental rights, heightened scrutiny applies and this Court should find the PWS unconstitutional (using the Uniform Operation standard) because the

[30] RippeyBr:Add.B (205 of 318 PCRA petitions filed pro se).

classifications are not reasonable, do not actually further a valid legislative purpose, and are not reasonably necessary to further a legitimate legislative goal.

The State's primary "purposes" in criminal cases are "speed, economy, and finality." StateBr:14. To the State, the PWS preserves judgments "against defendants experiencing buyer's remorse after hearing and being disappointed by their sentence[,]" *Id*:42, and the PWS and the PCRA work "in tandem" to effectuate the policy of "protect[ing] the State from difficulties associated with prosecuting stale claims." *Id*:68. In one sense, speed and finality are achieved under the current regime because either no post-conviction case is filed at all (as the pro se petitioner is unaware of the procedure and requirements), or if filed, the vast majority are summarily dismissed without merits review. The achievement of speed and finality, however, at the expense of fundamental fairness and justice cannot be tolerated. And as a practical matter, forcing these claims into PCRA proceedings is precisely what leads to staleness, additional time, and stress on victims. Because a defendant actually has an additional year from the close of his appellate window or the termination of his appellate case to file a PCRA petition, *see* Utah Code §78B-9-107(1)-(2), the reality is that it could be several years after the criminal proceedings for the post-conviction process to even begin. If, however, plea challenges could be made and handled shortly after sentencing or even on appeal (as Rippey suggests), evidence and witnesses would still be readily available, and neither has become "stale." Proceedings closer in time to the criminal proceedings themselves would also facilitate finality for victims.

Rippey's process evidenced these very problems, where his attempt to get any court to review the merits of his claims was met by delay after delay, all while he repeatedly requested the aid of counsel. RippeyBr:6-22. Rather than simply reviewing the merits of Rippey's contentions in 2009 (when he first asked his attorney to appeal), Rippey is still seeking review 14-years later.

2. The "Right to Appeal" Includes, at Least, the Right to Appeal the Constitutional Soundness of the Process That Led to the Conviction Itself, When Those Issues Are Known at the Time of Appeal

Alternatively, the State claims that even if *Rettig* did not dispose of Rippey's claims, under the Utah constitution, "the right to appeal is analyzed on a case specific rather than issue-specific basis," and that the "scope of the right of appeal has long been understood to be subject to regulation" some of which cuts-off "the appellate court's ability to hear the case altogether." StateBr:22-24. The problem with the arguments is that the application of the PWS has gone well-beyond simply limiting "issues" to deny wholesale appellate review of "convictions".

Article 1,§12 of the Utah Constitution grants litigants the "right to appeal in all cases," and Article 8, §5 provides "there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the case." The drafters of the 1895 Utah Constitution said little about the "scope" of the right to appeal, recognizing broadly that section 12 gave criminal defendants, among other things, "the right of a speedy and public trial" and "the right of appeal." 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON

THE FOURTH DAY OF MARCH 308 (1895) (statement of Mr. Evans). But the debates give insight into the belief that a conviction was not final until after the appeal. As one delegate stated, if a defendant wishes to appeal, the conviction "is not then a final judgment." *Id*. at 311(statement of Mr. Maloney). Though our contemporary definition of a criminal "final judgment" for purposes of appeal is the sentence,[31] it can at least be said that the drafters contemplated the ability to meaningfully appeal "the conviction" because that was the one thing identified as not yet "final" while the appeal was pending.

The State further argues the right of appeal has long been understood to be subject to regulation, concluding that the legislature therefore has the right to regulate potential plea challenges. StateBr:24,26. Rejecting a similar argument made in *Gailey*, this Court held that whatever authority the legislature has to regulate appeals, the legislature does not have the authority to "eviscerate" a constitutional right, "including the right to appeal found in Article I, section 12." *Gailey*, 2016 UT 35, n.3. And it must also be remembered that in "regulating the constitutional right to appeal", *the legislature has given defendants the right to appeal convictions from pleas*. Utah Code § 77-18a-1(1)(a) states, "A defendant may, as a matter of right, appeal from . . . a final judgment of conviction, *whether by verdict or plea*."(emphasis added).

Finally, the State argues that "some defects in a criminal case are simply beyond appellate review because of when they are discovered," and "[p]otential plea challenges of which a defendant is unaware before sentencing are no different." StateBr:25-26.

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[31] *State v. Harris*, 2004 UT 103, ¶20, 104 P.3d 1250.

Yes, there are certain claims that cannot be raised on direct appeal with the help of counsel due to when they are discovered. But, pleas *are* the criminal justice system for most people. If one is barred from challenging on direct appeal the constitutional validity of the very decision to give up the presumption of innocence and all trial rights, then there is no meaningful appeal. This Court must draw the line somewhere, but wherever it is, it should be somewhere on the right side of letting the criminally accused challenge the acts (and advice of counsel) upon which the entire conviction is based.

3. *Halbert v. Michigan* and *Martinez v. Ryan* support Rippey's Arguments

The State argues Rippey misapplies *Halbert* and *Martinez*, and points out that *Martinez* and another case, *Davilla*, have not found a constitutional right to counsel in state post-conviction proceedings. StateBr:27-28. The argument misses Rippey's point. Because post-conviction proceedings are the *only avenue for review of the conviction* when a Utah defendant enters a plea but does not move to withdraw it (or raise all challenges to it) before sentence is announced, counsel is required.

In *Halbert*, the Supreme Court recognized that the "Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review." 545 U.S. at 617. "Whether formally categorized as . . . an appeal or [some other disposal] . . . the intermediate appellate court's ruling on a plea convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Id*. at 607. Thus, when a defendant *is required to raise challenges to a conviction* for the first time in

PCRA rather than on direct appeal – as this Court has determined is required by the PWS's directives – then *Halbert* speaks to the scenario and guides that no matter the formal categorization of the review, when it amounts to the first, and likely only, direct review of a plea-based conviction, and when the court also sits as an "error correction" body, the absence of counsel violates the defendant's Fourteenth Amendment rights. *Id*. at 607,617,619-20.

B. The PWS Violates Utah's Separation of Powers; Subsection (2)(B) Is An Unconstitutional Assumption Of The Court's Exclusive Power To Adopt Procedural Rules

1. The Relevant "Jurisdictional" Question Is Whether The PWS's Filing Deadline Is a Type of Strict Preservation Rule That the Court Has Control Over

a. The State's Authority Does Not Address the Relevant Question

The State argues the procedural/substantive distinction is irrelevant because subsection 2(b) of the PWS is jurisdictional. StateBr:47-53.

However, this Court also uses the term "jurisdictional bar" to describe what is, in essence, a strict rule of preservation and waiver, as this Court has interpreted the PWS to be. *E.g., Rettig*, 2017 UT 83, ¶34. And this Court has long-acted with the understanding that this latter type of "jurisdiction" is still subject to this Court's procedural control. *See id.* ¶35 ("[T]his kind of 'jurisdictional bar' [in the PWS] is a proper subject for our rules of procedure."); *id*. at n.6 ("[O]ur power to amend a rule does not mean that it is not jurisdictional.").

The State acknowledges this Court's previous treatment of the jurisdiction issue in *Rettig*, but suggests that it was wrong, StateBr:49-53, and argues that the distinction between "strict-preservation-rule jurisdiction" and "authority-to-hear-subject-matter jurisdiction" is irrelevant because the legislature has plenary authority over both types.

First, the State cites *Western Water, LLC v. Olds* because this Court used the term "matters" from Article VIII, §5 of the Utah Constitution to include specific issues the court has authority to decide. StateBr:50 (*citing Western Water, LLC v. Olds*, 2008 UT 18, ¶42, 184 P.3d 578). But looking at *Western Water* in more detail supports Rippey's position, not the State's. There, this Court was asked to determine whether the district court had subject matter jurisdiction to award costs in a case where it lacked the subject matter jurisdiction over the merits. *Id.,* ¶¶41-42. In concluding that it did, this Court noted that the constitution gives district courts general jurisdiction that can be limited by statute, but that general jurisdiction included inherent jurisdiction over its own processes. *Id*., ¶42. In other words, *Western Water* did not decide whether the legislature has plenary authority over not just a court's authority to hear certain subject matter but also the court's authority to define strict preservation and waiver rules. If anything, *Western Water* reinforces the Court's inherent power to "make, modify, and enforce rules for the regulation of the business before it."

Second, the State compares the filing deadline in the PWS to the legislature's regulation of the subject matter of appeals that originated in the justice court. StateBr:50-51 (*citing* Utah Code § 78A-7-118). This argument has the same problem – it does not answer the relevant question.

Utah Code § 78A-7-118 limits the appellate courts' subject-matter jurisdiction to the constitutionality of a statue or ordinance in the context of justice court cases that have been appealed to district courts for a trial de novo. This same restriction survived a constitutional challenge in *City of Monticello v. Christensen*, as the State points out. StateBr:51 (citing *City of Monticello v. Christensen*, 788 P.2d 513, 516-19 (Utah 1990)). But in *Monticello*, this Court was not addressing the *statutory* authority to regulate the specific issues that can be addressed in an appeal; it was addressing this Court's *rule-based* authority to do so. 788 P.2d at 516.[32] Ultimately, *Monticello* does not even address, much less decide, whether the restriction on the types of justice court appeal claims is a restriction on "authority-to-hear/subject-matter" jurisdiction restriction, or a "strict-preservation-rule" jurisdiction restriction. *Monticello* simply confirmed that strict application of the rule did not violate the constitutional right to appeal in that context. *See id*. at 518-19.

Third, the State turns to the federal system, citing *Yakus v. United States* for the proposition that Congress may also regulate the federal courts' authority to decide a specific issue in a case. StateBr:52 (*citing Yakus v. United States*, 321 U.S. 414, 433, 443 (1944)). But like *Monticello* and *Western Water*, *Yakus* does not shed much light on the present issue. The federal comparison is particularly not useful because, in the federal system, the Supreme Court's power to promulgate its own rules of procedure is statutory rather than constitutional. *See* 28 U.S.C. §2071 (Rules Enabling Act). *Yakus* simply

[32] The relevance of the case is further complicated by the fact that it uses the term "legislative enactments" when talking about the rule. *See id.* at 516.

confirms the U.S. Congress's prerogative to define the types of claims that can be heard in inferior federal courts, and, in that case, to create a special "Emergency Court of Appeals" to hear price regulation claims. *See* 321 U.S. at 443. It does not address a situation, like the one here, where the legislature has created a strict preservation rule with a filing deadline.

In sum, these cases miss the mark because they only reinforce the legislature's authority under the constitution to define the general types of cases and claims that may be heard. The argument does not address Rippey's argument – well-supported by the language from *Rettig* – that a strict rule of preservation based on a filing deadline is a matter of procedure within this Court's control, even when it has "jurisdictional" consequences, as it does in the case of subsection 2(b) of the PWS.

b. The "Jurisdictional" Filing Deadline for a Notice of Appeal Is a Useful Analogy

The State points to the time limit for filing a notice of appeal as a useful example of the legislature's authority in the separation-of-powers context. Rippey agrees that it is, just not for the purpose the State intends.

The State cites *Rettig* for its acknowledgment that some time limits clearly do cut-off appellate jurisdiction, such as the deadline to file a notice of appeal. StateBr:52. The State argues this reinforces the legislature's authority to regulate jurisdiction through filing deadlines. *See id*. But the history and current interpretation of the jurisdictional filing deadline for a notice of appeal instead demonstrates the Court's authority to regulate the procedure of that jurisdictional bar.

This Court's Rules Committee imported the statutory thirty-day window for filing a notice of appeal into the Rules of Appellate Procedure when they were adopted following the 1984 constitutional amendment. *See* Utah R.App.P. 4(a) (1985). This time window for filing the notice of appeal is considered (and was at the time) "jurisdictional." *E.g., Nelson v. Stoker*, 669 P.2d 390 (Utah 1983); *Yost v. State*, 640 P.2d 1044 (Utah 1981). Correspondingly, the original Rule 22(b)'s language prohibited the Court from enlarging the time for filing a notice of appeal "except as provided by law." Utah R.App. P. 22(b) (1985). Rule 22 has since been amended, however, to state that a court cannot enlarge time frames that are jurisdictional under the *rules*. *See* Utah R.App.P. 22(b)(2) (current) ("This rule does not authorize the court to extend the jurisdictional deadlines specified by any of the *rules* listed in Rule 2" further referencing Rules of Appellate Procedure 4(a), 4(b), and 4(e)) (emphasis added). Notably removed is a reference to the statute. The revised language implicitly recognizes that the notice of appeal deadline is a matter of Court rule, which an individual court cannot disregard in a certain case pending before it, but that this Court may amend in committee.

Even looking back to 1985, other portions of the then-newly-adopted rules indicate that this Court did claim its authority to modify or enlarge the appeal filing deadline. In the Advisory Committee Note to Rule 4, the Committee explained it was revising a previous rule of procedure specifying a "one month" time limit for certain notices of appeal to a less confusing "30-day" limit, stating "it is intended that the 30-day time limit

. . . shall be applicable in all cases, *notwithstanding a statute or other rule to the contrary*." Utah R.App.P. 4 (1985), Adv.Com.Note (emphasis added).

Moreover, some of Rule 4's provisions *do* modify and effectively extend the time for filing a notice of appeal. *See, e.g*., Utah R.App.P. 4(b) (extending deadline when certain substantive motions are filed); *Id.* 4(e) (allowing Court to grant extensions of time); *Id.* 4(f) (allowing Court to reinstate time period for filing a notice of appeal). Many rules that extend the thirty-day deadline were modified well after the Rules were originally "imported" from statute.[33] This Court has similar power over the PWS filing deadline, even though it is similarly described as "jurisdictional."

2. The Filing Deadlines in the PWS Are Procedural, as *Rettig* Said They Were, and the State Points to No Authority that Compels a Different Result

The State alternatively argues that even if subsection 2(b) of the PWS is not jurisdictional such that it can only be under the legislature's purview, it is nonetheless substantive rather than procedural, and therefore under the legislature's exclusive purview for that reason.

The State leans heavily on *State v. Drej* (and its purported application of *State v. Abeyta*) to undercut *Rettig*'s language suggesting that a filing deadline is "quintessentially procedural." StateBr:54. The State points out that *Abeyta* found the filing deadline in the PWS was substantive in the sense that it could not be applied retroactively. *Id*. (*citing State v. Abeyta,* 852 P.2d 993, 995 (Utah 1993)). The State then claims *Drej* "cited

[33] *See* http://www.utcourts.gov/utc/rules-approved/category/urap004/ (listing four changes to Appellate Rule 4 in last 15 years).

[*Abeyta*'s] holding as an appropriate example of a substantive statute for . . . separation-of-powers analysis" *Id*. (*citing State v. Drej*, 2010 UT 35, ¶27, 233 P.3d 476).

But the State's assertion that *Drej* "cited" *Abeyta*'s holding is not correct, or at least, the connection is much more tenuous than the State implies. In fact, *Drej* never cites to *Abeyta* at all, and the paragraph in which the State claims *Drej* "cites to" *Abeyta* actually cites only to a footnote in *Salt Lake Child & Family Therapy, Inc. v. Frederick*. StateBr:54 (*citing Drej*, 2010 UT 35, ¶27; *citing, in turn, Salt Lake Child & Family Therapy, Inc. v. Frederick*, 890 P.2d 1017, 1020 n.3 (Utah 1995)). *Salt Lake Child* was also, like *Abeyta*, an analysis of the procedural/substantive distinction in the retroactivity context, not the separation of powers context. *See Salt Lake Child*, 890 P.2d at 1020.[34]

Thus, the State relies on a substantive/procedural distinction made about a prior version of the PWS filing deadline in a different context with different standards,[35] passed through another case analyzing a completely different factual issue also in a different context with different standards,[36] which is then, in turn, cited in a case analyzing a completely different factual issue in the relevant separation-of-powers context.[37] Such a

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[34] *Salt Lake Child*'s footnoted reference to *Abeyta* notes that the Court errs on the side of "narrowly drawing the boundaries of what constitutes a procedural statute that may be applied retroactively." 890 P.2d at 1020 n.3.

[35] *Abeyta*, analyzing the 1980 version of the PWS (which had no filing deadline) in the retroactivity context. 852 P.2d at 995.

[36] *Salt Lake Child*, 890 P.2d at 1019-20 (analyzing mental health practitioner's privilege statute in retroactivity context).

[37] *Drej*, 2010 UT 35, ¶28 (analyzing right to special mitigation defense and burden of proof).

line of tenuous connections is not conclusive. At most, *Drej*'s passing reference to the footnote of *Salt Lake Child* is nonbinding dicta, just like the language the State criticizes so strenuously in *Rettig*. But at least the language in *Rettig* is extensive and directly on-point. RippeyBr:60-61 (*citing Rettig*).

Though the State cites to several cases (mostly from other jurisdictions and/or addressing the question in the different retroactivity context[38]) suggesting that an "absolute" filing deadline is substantive, the comparison to the appellate jurisdictional scheme is apt too. The legislature defines the jurisdiction of the appellate court, depending, *inter alia*., on the originating court and the charges of conviction,[39] but the filing deadline for invoking that jurisdiction is a procedural matter under the Court's control, even though the failure to meet that deadline is similarly "absolute." *E.g., Ahmad v. Graco Fishing & Rental Tools Inc.*, 2022 UT App 55, ¶13, 511 P.3d 1183 (thirty-day window to file notice of appeal is jurisdictional; appellate court "simply has no power to hear the case if a notice of appeal is untimely").

3. Subsection 2(b)'s Filing Deadline Is Not "Inextricably Intertwined" with the Substantive Aspects of the PWS

Again citing *Drej*, the State alternatively argues that Subsection 2(b)'s filing deadline is inextricably intertwined with the statute's substantive purpose. StateBr:58. In *Drej*, this Court concluded that an arguably procedural component of a statute – a burden

[38] StateBr:56-57 (citing Kansas, Ohio, New Jersey, and two Utah cases in retroactivity context).

[39] *E.g.*, Utah Code §78A-4-103 (jurisdiction of Court of Appeals dependant upon court or agency decision under review, and level of charge/conviction in criminal court).

of proof allocation – could not be separated from the underlying substance of the statute "without leaving the right or duty created meaningless." 2010 UT 35, ¶31. But the history of the PWS counsels that the filing deadline is not such a provision.

As noted in Rippey's opening brief, the PWS was enacted without a filing deadline. RippeyBr:55; *also Gailey*, 2016 UT 35, ¶12. Thus, the substantive "right or duty" created by the PWS, as originally envisioned, did not depend on a certain deadline. And the fact that the PWS has been twice amended since – first to a thirty-day deadline, then to the current pre-sentencing deadline – does not mean that a filing deadline is "critical" to the statute's purpose any more than it means the original PWS lacked purpose.

The State's argument further implies that because the legislature made these amendments, they must be substantive. StateBr:60. But that argument simply begs the question. If those amendments were (as they appear to be) procedural adjustments to the manner and process of invoking a statutory right, they are within this Court's constitutional wheelhouse, not the legislature's, despite the legislature's demonstrated interest in tinkering with it.

In short, Utah's Separation of Powers provision recognizes that *this Court* is in the best position to set and evaluate the efficiency and effectiveness of its procedural rules. Declaring subsection 2(b) unconstitutional would not eviscerate the PWS as a whole. Rather, such a procedural revision would still preserve the substantive rights and duties created by the legislature – the right for defendants to move to withdraw their pleas, the

duty to file a motion and prove that the plea was not knowing and voluntary, the obligation to pursue plea-based claims through the PCRA if a motion is not filed – while making *the process* of plea withdrawal and subsequent challenges happen quickly, efficiently, and constitutionally.

CONCLUSION

The Court should first find the PWS unconstitutional for any one (or all) of the reasons Rippey has set forth.

Thereafter, the Court should use its rule-making authority and afford defendants the opportunity to withdraw their pleas in a time period after sentencing, or, make the filing of a motion to withdraw the plea discretionary thereby allowing defendants to raise plea issues on appeal like any other issue – both remedies affording defendants their right to counsel.

Finally, to address cases like Rippey's where the PWS has already resulted in the deprivation of his constitutional rights, the Court should fashion a procedural mechanism that will afford Rippey his thus-far-denied appellate rights, as the Court did in *Manning*.

SUBMITTED THIS 28th day of July, 2023.

/s/ *Ann Marie Taliaferro*
ANN MARIE TALIAFERRO

/s/ *Dain Smoland*
DAIN SMOLAND

Attorneys for Appellant Rippey

CERTIFICATE OF COMPLIANCE

Pursuant to the Court's Order granting an enlargement of the word limitation, this Reply Brief of Appellant contains **10,497** excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery.

In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using WordPerfect X6 in Times New Roman 13 point.

I also certify that the Public version of this brief contains no non-public information in compliance with Utah R. App. P. 21(g).

/s/ *Ann Marie Taliaferro*
ANN MARIE TALIAFERRO
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CERTIFICATE OF DELIVERY

I hereby certify that on the 28th day of July, 2023, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT (PUBLIC) was mailed, postage prepaid, emailed, or hand-delivered to:

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Addendum A

CRIMINAL CASE IN UTAH STATE DISTRICT COURT

APPROX. **7%** TRIAL

POTENTIAL ISSUES ARISE IN ALL CASES

Competency • Pretrial Motions
Interpretation Law • Bail/Custody • IAC
Prosecutorial Misconduct • Judicial Error
Probable Cause Determination • Other

APPROX. **93%** PLEA

<1%*

DIRECT APPEAL

To Court with Appellate Jurisdiction:
Multiple-judge review; fresh eyes; experienced with appeals

Can Raise:
IAC (Utah R. App P. 23B)
All Issues Appearing in Trial Court (preserved or three exceptions to preservation)

Guarantee
Assistance of Counsel

State Funds
for Expert/Investigation if Indigent

Advised of Right to Appeal/Right to Counsel/Time for Filing

No Filing Fee/Entitled to Appeal

*PLEA WITH PRE-SENTENCING MOTION TO WITHDRAW PLEA

PCRA

To Trial/Sentencing Court:
Single district court judge; usually already sat on case; inexperienced with PCRA and process

Can Raise:
IAC Only
All Other Claims Procedurally Barred

No Guarantee
Assistance of Counsel

No State Funds
for Expert/Investigation if Indigent

Not Advised of PCRA Process or Requirements

Filing Fee!
+
Most Incarcerated:
Lack access to transcripts and necessary documents
Lack of legal resources/law library
Have incarceration issues (e.g., mail issues; lock downs; confiscation of legal documents; no access to tools/materials to draft petition)