Case No. 20200917-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellee,

v.

STEPHEN RIPPEY,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for aggravated sexual abuse of a child and object rape of a child, first-degree felonies, in the Third Judicial District, Salt Lake County, the Honorable Mark S. Kouris and L. Douglas Hogan presiding

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INTRODUCTION

Stephen Rippey seeks to challenge his guilty plea in this direct appeal. But under the Plea Withdrawal Statute he is barred from doing so because he did not move to withdraw his plea before his sentence was announced. Rippey argues that the statute is unconstitutional and that he should therefore be permitted to challenge his plea on direct appeal.

Rippey's primary argument is that the statute violates his constitutional right to appeal "with the commensurate right to effective assistance of counsel." But the Court already rejected this claim in *State v. Rettig*. Rippey has not asked the Court to overrule *Rettig*, much less identified a reason to.

Rippey also argues that the statute violates federal due process and his state constitutional rights to the uniform operation of laws and open courts. The Court rejected similar challenges in *State v. Merrill*. Though it did so under a prior version of the Plea Withdrawal Statute, any changes to the statute do not affect *Merrill*'s analysis. Its holding still controls.

Finally, Rippey argues that the Plea Withdrawal Statute's requirement that a motion to withdraw be made before sentence is announced violates separation-of-powers principles. He says the time limit is procedural and, because it was not adopted by court rule or legislative amendment to a court rule, it violates article VIII, section 4 of the Utah Constitution.

This claim fails for several reasons. First, the constitution gives the legislature authority to regulate jurisdiction, including authority to regulate jurisdiction over specific issues within a case—regardless whether the regulation is procedural or substantive. Second, the Court has already recognized, in the context of retroactivity, that the Plea Withdrawal Statute's time limits are substantive, and that conclusion accords with separation-of-powers principles. Third, even if the time limit is procedural, it is inextricably intertwined with the substantive provisions of the statute and is thus constitutional.

STATEMENT OF THE ISSUES

1. Does the Plea Withdrawal Statute violate Rippey's constitutional rights?

Standard of Review. A statute's constitutionality is reviewed for correctness. *Gailey v. State*, 2016 UT 35, ¶8, 379 P.3d 1278.

2. Does the statute violate separation-of-powers principles?

Standard of Review. Same.

STATEMENT OF THE CASE

When Rippey's ten-year-old stepdaughter told her mother that Rippey had sexually abused her as many as thirty times, her mother confronted Rippey. TR5.[1] Rippey "immediately admitted" touching his stepdaughter's vagina with his hand and rubbing her vagina with a spatula. *Rippey v. State*, 2014 UT App 240, ¶2, 337 P.3d 1071; TR5, 36, 107. He also admitted the abuse to his in-laws, law enforcement, and a doctor who performed a post-arrest psychosexual evaluation. *Rippey*, 2014 UT App 240, ¶2; TR107; PR125.

The State charged Rippey with three counts of aggravated sexual abuse of a child and two counts of object rape of a child, all first-degree felonies. TR1-4. The offenses were alleged to have occurred over a three-and-a-half-

[1] The State cites the record in Rippey's criminal case as "TR" and the record in his post-conviction case as "PR."

year period, from January 2005 to July 2008. TR1-4. The penalty for both offenses changed during that period. Most notably, before May 2008 object rape of a child carried a presumptive sentence of fifteen-to-life, which the court could reduce in the interests of justice to ten- or six-to-life. Utah Code §76-5-402.3(2), (3) (eff. 4/30/2007 to 5/5/2008). After May 2008, the sentence was twenty-five years to life with no downward deviation. *Id.* (eff. 5/5/2008 to 5/14/2013). But under each version, imprisonment was mandatory.

Guilty Plea

Rippey agreed to plead guilty to one count each of aggravated sexual abuse of a child and object rape of a child. TR33-34. In exchange, the State dismissed the remaining counts and amended the information to describe a single month for the offenses: December 2007. TR35, 39, 93-94. This took a twenty-five-year minimum sentence off the table for the object-rape-of-a-child charge.

Before accepting Rippey's plea, the district court engaged in a colloquy to ensure that the plea was knowing and voluntary. Rippey said he had attended almost a year of college and could read and understand English, had taken no drugs or alcohol in the previous forty-eight hours, and was not aware of any mental or physical issue that would make him unable to understand what he was doing. TR96. He said he understood that by

pleading guilty, he might spend the rest of his life in prison, but he was "still willing to go forward." TR96.

Rippey confirmed that no one was forcing him to plead guilty or made any promises beyond the State's enumerated concessions. TR98. When his counsel provided a factual basis for the plea, Rippey confirmed its accuracy and assured the court that he was pleading guilty because he was in fact guilty. TR97-98.

A statement in support of the plea was also prepared. Rippey confirmed that he reviewed the entire statement with his counsel and that he read and understood each of the rights it said he was waiving: the right to a jury trial, to confront witnesses, to compel witnesses to testify, to testify himself or choose not to, to be presumed innocent until the State proves his guilt beyond a reasonable doubt, to appeal his conviction, and to appeal at the State's expense if he could not afford it. TR37-38, 97. The statement also described the potential consequences of pleading guilty, including the maximum sentences Rippey could face. TR35, 38. And it reiterated that the court was not bound by any representation the parties made about what sentence the court might impose. TR39.

Rippey's counsel confirmed that she had reviewed the statement twice with Rippey, once at the jail that morning "under circumstances [that] didn't

require us to hurry," and once again at the courthouse. TR96-97. The court gave Rippey the chance to ask counsel or the court any questions about the rights he was waiving, and Rippey said he had no questions. TR97.

Rippey signed the statement in open court, certifying many of the facts he confirmed in court about the knowing and voluntary nature of the plea. TR39-40, 98. In addition, the certification stated that Rippey believed he was "of sound and discerning mind," was "mentally capable of understanding these proceedings and the consequences of [his] plea," and was "free of any mental disease, defect, or impairment that would prevent [him] from understanding" what he was doing or from doing it knowingly, intelligently, and voluntarily. TR39.

The final part of the certification explained requirements for withdrawing a guilty plea and the requirement that any untimely plea challenge would have to be brought in post-conviction review:

> I understand that if I want to withdraw my guilty … plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. … I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.

TR40.

The court found that Rippey was competent to enter a plea, that he understood the rights he was waiving, and that he entered the plea knowingly and voluntarily. TR99. After accepting the plea, the court reiterated the process to withdraw the plea: "if you want to withdraw this plea, you'll need to ask me in writing sometime prior to your sentencing date." TR99-100.[2]

Rippey never moved to withdraw his plea. At sentencing, he argued that a six-to-life sentence was in the interests of justice, and the prosecutor argued for consecutive sentences of fifteen-to-life. TR107-10. The court imposed concurrent sentences of fifteen-to-life and ordered Rippey to pay restitution for his stepdaughter's counseling expenses. TR118-19. The sentence was entered February 5, 2009. PR39-40.

Post-conviction Petition

Rippey did not file a notice of appeal within thirty days of his sentence. He did, however, file a timely pro se petition for post-conviction relief. PR2-16, 475. Rippey's petition identified seventeen claims. PR8-13. The district court summarily dismissed eight as frivolous on their face and ordered the

[2] The Plea Withdrawal Statute requires the motion to be made "before sentence is announced," Utah Code §77-13-6(2)(b), not before the "sentencing date," TR100. And it does not require a written motion. Rippey does not claim he was misled by these discrepancies.

State to respond to the rest. PR140-44. After several lengthy delays, the State moved to dismiss for failure to state a claim upon which relief could be granted. PR304-10, 342-65; *Rippey*, 2014 UT App 240, ¶11.

At a hearing on the State's motion, "the district court questioned Rippey extensively to discern the facts upon which Rippey based his claims." *Rippey*, 2014 UT App 240, ¶5; PR512-20. The court "ruled that Rippey's direct challenges to the validity of his plea were procedurally barred because they could have been raised at trial or on direct appeal." *Rippey*, 2014 UT App 240, ¶5; PR476-77, 522-24. And it ruled that the remaining claims—his ineffective-assistance claims—lacked merit. PR477-79, 524-25. The court granted the motion and dismissed Rippey's petition. PR480.

Several times throughout the post-conviction process, Rippey requested counsel but the court denied his requests. *E.g.*, PR413-15. But when Rippey appealed the dismissal of his petition, the court appointed counsel. PR498.

On appeal, Rippey argued that the Plea Withdrawal Statute allowed plea challenges to be raised in post-conviction regardless of the procedural bars applicable in post-conviction review. *Rippey*, 2014 UT App 240, ¶8. The court of appeals did not address this argument because it was unpreserved and Rippey argued no exception to preservation. *Id.* ¶¶8-9. Rippey also

challenged the district court's conclusion that his ineffective-assistance claims lacked merit. The court of appeals affirmed the district court. It noted that some of Rippey's allegations in his petition, "if taken as true, arguably state one or more claims that his counsel performed deficiently in some respects." *Id.* ¶13. But it held that Rippey's petition and the facts he proffered at the hearing could not make out a claim of prejudice. *Id.* ¶¶14-16. The court explained that even if the proffered facts were taken as true, they would not "establish a 'rational' basis for rejecting the State's plea offer and insisting on a trial" given Rippey's confessions and the benefit he received from pleading guilty. *Id.* This Court then denied certiorari review. PR556.

Motion to Reinstate Time to Appeal

Five years later, Rippey filed a pro se motion to reinstate the time to appeal in his criminal case. TR216; *see* Utah R. App. P. 4(f). He attached a letter he wrote to his trial counsel shortly after sentencing. "Appeal if possible," he wrote. TR219. The district court denied the motion, TR232-33, but the court of appeals summarily reversed because the district court had not appointed counsel to litigate the motion, as required by rule, TR249. On remand, the court appointed counsel, ordered briefing, and set a hearing. TR255, 275. After the hearing, the court granted the motion and Rippey timely appealed. TR312, 314.

As discussed below, the absence of a motion to withdraw his guilty plea statutorily prevents Rippey from challenging his conviction on appeal. At Rippey's suggestion, this Court ordered the parties to brief the threshold question of whether that statutory limit is constitutional before briefing the merits of any challenge to Rippey's conviction or sentence. Order (Aug. 1, 2022).

SUMMARY OF ARGUMENT

I. Right to Appeal with Counsel. Rippey argues that the Plea Withdrawal Statute violates his constitutional right to appeal with the assistance of counsel. He acknowledges that *Rettig* said it rejected this argument, but he claims it didn't actually do so because it never addressed why post-conviction review without counsel was an adequate substitute for direct appeal. Rippey is wrong; *Rettig* squarely rejected the argument he raises. *Rettig* held that limiting the issues that may be raised on appeal does not violate the right to appeal. It did not discuss whether post-conviction review without counsel is an adequate substitute for direct appeal, because it rejected the premise that there was any need for a substitute—the statute allows for a direct appeal in which a defendant may challenge a plea so long as a timely motion to withdraw is filed.

Other Constitutional Rights. Rippey also contends that the statute violates due process, the uniform operation of laws, and open courts guarantees. In *State v. Merrill* this Court upheld a prior version of the Plea Withdrawal Statute under each of these provisions. Rippey says *Merrill* should not apply because the statute has been amended, but he doesn't explain why the amendments alter *Merrill*'s analysis. They don't.

Due Process. Rippey argues that the statute violates due process because he did not receive notice of the rights he was waiving or the consequences of the waiver. But that goes to the merits of whether Rippey's plea is valid—something this Court lacks jurisdiction to consider. Rippey also argues that the Plea Withdrawal Statute and the Post-Conviction Remedies Act work together to foreclose any challenge to the validity of a plea because challenges that could have been raised in the criminal case cannot be raised in post-conviction. But at the very least, such claims can be raised through ineffective assistance. The Plea Withdrawal Statue does not violate due process because it gives defendants at least one opportunity to challenge the validity of their pleas.

Uniform Operation of Laws. Rippey argues that the statute violates the constitutional guarantee that laws have unform operation. He says the statute violates this guarantee in the way it treats defendants who do not timely

move to withdraw their pleas. But statutory deadlines that create a conditional class do not violate principles of operational uniformity when compliance with the deadline is voluntary.

Open Courts. Rippey argues that the statute violates the open courts guarantee because it abrogates a remedy—direct appeal with the assistance of counsel—and does not provide an adequate substitute. But the Court has repeatedly recognized that imposing time limits does not amount to abrogation of a remedy. Defendants can challenge the validity of their pleas on direct appeal, so long as they timely move to withdraw the plea.

II. Separation of Powers. Rippey argues that the Plea Withdrawal Statute violates separation-of-powers principles because it is a procedural statute that the legislature lacked authority to enact under article VIII, section 4. He says time limits are quintessentially procedural.

This claim fails for several independent reasons. First, the time limit restricts district courts' and appellate courts' jurisdiction, and the constitution gives the legislature the authority to regulate jurisdiction. That includes authority to regulate courts' jurisdiction over specific issues. The Court has already recognized that when a constitutional provision gives the legislature authority to act in a specific area, the Court need not engage in a separation-of-powers analysis under article VIII, section 4.

Second, the time limit is substantive because it is absolute. The Court recognized as much in the context of determining whether the statute should apply retroactively. And it relied on that conclusion as an appropriate example of a substantive statute in a separation-of-powers context. That conclusion also aligns with cases from this and other jurisdictions identifying absolute timing rules as substantive.

Third, the time limit is inextricably intertwined with the substantive provisions of the Plea Withdrawal Statute. The statute's provision of post-conviction review as the exclusive remedy for untimely claims goes hand-in-hand with the trigger for that exclusive remedy—the measure of when a claim is timely.

ARGUMENT

Properly administered plea bargains "benefit all concerned"—defendants, prosecutors, courts, victims, and the public. *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). The "advantages" of plea bargaining "can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality." *Id.* Allowing "indiscriminate" challenges to guilty pleas "would eliminate the chief virtues of the plea system—speed, economy, and finality." *See id.*

Guilty pleas deserve a great measure of finality because of the many safeguards that ensure their validity. Defendants are guaranteed the right to competent counsel to assist in plea bargaining and plea entry. *Missouri v. Frye*, 566 U.S. 134, 140-44 (2012). Prosecutors must ensure "that justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935), and make a record establishing that the waiver of constitutional rights inherent in a guilty plea is knowing and voluntary, *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). By rule, the court must also ensure that the plea is knowing and voluntary before accepting it. Utah R. Crim. P. 11(e). To facilitate that obligation, the rule specifies eight findings the court must make. *Id.* Finally, if there is reason to doubt a defendant's competency, the court is constitutionally obliged to

ensure that the defendant is competent to proceed before accepting a plea. *Godinez v. Moran*, 509 U.S. 389, 396-402 & n.13 (1993).

That said, "no procedural device for the taking of guilty pleas is so perfect in design and exercise as to warrant a *per se* rule rendering it 'uniformly invulnerable to subsequent challenge.'" *Allison*, 431 U.S. at 73; *see also Garza v. Idaho*, 139 S. Ct. 738, 745 (2019) (noting that despite factual waiver of rights in pleading guilty, "courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable"). Thus, defendants must have some mechanism for raising legitimate challenges to their guilty pleas. *See Allison*, 431 U.S. at 72-74.

The Plea Withdrawal Statute provides two such mechanisms: a motion to withdraw the plea "before sentence is announced," and a petition for post-conviction relief. Utah Code §77-13-6(2)(b), (c). In a long, unbroken line of opinions, this Court has recognized that the statute creates a jurisdictional limit: claims not raised in a timely motion to withdraw may not be raised in the district court or on direct appeal, even through plain error or ineffective assistance. *E.g.*, *State v. Badikyan*, 2020 UT 3, ¶¶17-34, 459 P.3d 967. Untimely challenges must be brought in a petition for post-conviction relief. *Id.*

Rippey contends that the statute's limit on claims that may be raised on appeal makes the statute unconstitutional. He argues that it violates his

rights to appeal, effective assistance of counsel, due process, uniform operation of laws, and open courts. He also argues that it violates separation-of-powers principles because the requirement that a motion to withdraw be raised before sentence is announced amounts to a procedural rule that the legislature lacks power to enact through statute.

"A statute has 'a strong presumption of constitutionality, with doubts resolved in favor of its constitutionality.'" *Peterson v. Coca-Cola USA*, 2002 UT 42, ¶23, 48 P.3d 941. Rippey has not overcome that presumption. The Court has already rejected Rippey's argument that the Plea Withdrawal Statute violates his right to appeal, and his attempt to distinguish that precedent fails. The Court has also rejected most of his other constitutional challenges under a prior but materially indistinguishable version of the statute. Finally, Rippey's separation-of-powers argument fails for several reasons, but mainly because the statute is a valid exercise of the legislature's constitutional authority to regulate the jurisdiction of the courts.

I.

The Court has repeatedly and correctly held that the Plea Withdrawal Statute does not violate defendants' constitutional rights.

Rippey argues that the Plea Withdrawal Statute violates his constitutional rights to appeal, effective assistance of counsel, due process, uniform operation of laws, and open courts. But the Court has rejected each of these challenges.

A. The Court correctly held in *Rettig* that the statute does not violate the rights to appeal or to counsel on appeal.

The Utah Constitution provides, "In criminal prosecutions the accused shall have … the right to appeal in all cases." Utah Const. art. I, §12. While the federal Constitution does not require states to provide an appeal in criminal cases, the United States Supreme Court has held as a matter of due process and equal protection that whenever a State provides a right to appeal, defendants are entitled to the effective assistance of counsel in a first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985); *Douglas v. California*, 372 U.S. 353, 354-58 (1963).

Rippey argues that the Plea Withdrawal Statute violates "a defendant's right to appeal with the commensurate right to effective assistance of counsel" guaranteed by the federal due process and equal protection clauses. Br.Aplt.30. He starts with the premise that "Utah law has deemed post-

conviction proceedings to be a substitute for appeal in certain cases," Br.Aplt. 37, and he argues that using post-conviction review as a substitute for appeal is unconstitutional for three reasons. First, he says the constitutional right to appeal "requires review by a court with appellate jurisdiction." Br.Aplt.30, 40-41. Second, the Post-Conviction Remedies Act (PCRA) has strict procedural bars that prevent defendants from raising every claim they may wish to raise. Br.Aplt.40-41. And third, defendants are not guaranteed counsel in post-conviction proceedings but would be on direct appeal. Br.Aplt.35, 38-39, 41.

The premise of Rippey's argument—that post-conviction is a substitute for appeal—is reflected in this Court's opinion in *State v. Gailey*, 2016 UT 35, 379 P.3d 1278. Gailey argued that the Plea Withdrawal Statute violated her constitutional right to appeal because it required her claim to be raised in post-conviction where she was not guaranteed counsel. *Id.* ¶22. The Court held that the statute did not on its face violate the right to appeal because it provided an alternative "mechanism for review" of guilty pleas—a post-conviction proceeding, with an appeal from that proceeding. *Id.* ¶¶11, 23-25.

Gailey did not address the issue Rippey now raises—whether the denial of counsel in a post-conviction proceeding renders the Plea Withdrawal Statute unconstitutional as applied. *Id.* ¶¶28-30. In essence, Gailey argued (as

does Rippey) that post-conviction review is an inadequate substitute for an appeal because counsel is not guaranteed. But the Court did not reach that argument in *Gailey* because it was not ripe: Gailey had not sought post-conviction review and thus could have potentially obtained pro bono counsel. *Id.* The claim is ripe here because Rippey sought post-conviction relief and requested but was not given counsel.

Although *Gailey* did not reach this issue, the Court reached—and rejected—the argument in *State v. Rettig*, 2017 UT 83, 416 P.3d 520. The Court started by confirming "*Gailey's* holding and threshold premise." *Id.* ¶15. It then said, "We now reach the question left unanswered in *Gailey*." *Id.* ¶17. The Court held that statutes do not infringe the constitutional right to appeal when they do not "foreclose an appeal but only narrow[] the issues that may be raised on appeal." *Id.* ¶22. It acknowledged that a statute that "eliminates *any* meaningful avenue for appellate review … could certainly be said to infringe the important right to an appeal." *Id.* ¶23 (emphasis added). But it held that the Plea Withdrawal Statute's jurisdictional bar did not do so because it "only sets the terms and conditions for preservation and waiver." *Id.* ¶24. The Court explained that the statute "prescribe[s] a rule of preservation and establish[es] a waiver sanction that stands as a jurisdictional bar on appellate consideration of matters not properly preserved." *Id.* ¶27.

And doing so does not violate the right to appeal because it does not foreclose an appeal. *Id.* ¶¶22, 26-27.

Rippey tries to escape the holding of *Rettig* by arguing that the Court "did not actually" reach the issue he now raises, because the Court "engaged in no reasoned analysis" of the issue. Br.Aplt.28-29. Thus, he argues, the Court has "never explicitly answered the fundamental question deemed unripe in *Gailey* six years ago: Does requiring criminal defendants to pursue 'appellate review' through the post-conviction process violate a defendant's right to appeal with the commensurate right to effective assistance of counsel?" Br.Aplt.30.

True, *Rettig* did not directly explain how its holding disposed of the argument *Gailey* did not reach. But saying *Rettig* did not actually decide the issue is incorrect. *Rettig* expressly said it was rejecting the argument Rippey raises. The Court recognized that the "unanswered" question it was resolving was whether the denial of counsel in a post-conviction proceeding would amount to applying the Plea Withdrawal Statute "in a manner infringing the constitutional right to an appeal." *Rettig*, 2017 UT 83, ¶¶16-17. Because Rippey has not asked the Court to overrule *Rettig*, he is bound by it, and his claim fails.

In any event, *Rettig* did not need to discuss the adequacy of the post-conviction process as a substitute for a direct appeal because it upheld the statute for an antecedent and wholly independent reason. It held that applying strict rules of forfeiture or waiver to limit the issues that may be raised on direct appeal does not infringe the right to appeal. *Id.* ¶19.

In other words, there is no need for a substitute for direct appeal because the statute does not foreclose an appeal. Even if the Court were to conclude that the PCRA is an inadequate substitute—something the Court need not consider to resolve this case—the holding and reasoning of *Rettig* would remain unaffected and would still defeat Rippey's claim that the statute violates his "right to appeal with the commensurate right to effective assistance of counsel." Br.Aplt.30. Rippey has the right to direct appeal. He has the right to the effective assistance of counsel in that direct appeal. Whatever his right may be to review in a court with "appellate jurisdiction," *see* Br.Aplt.30, 40-41, he's got that. Rippey even had the right to challenge his plea on direct appeal, had he complied with the requirements of the Plea Withdrawal Statute. But those requirements do not violate Rippey's right to appeal when his failure to follow them limits the issues he can raise in his direct appeal. *Rettig*, 2017 UT 83, ¶22. Rippey barely acknowledges *Rettig*'s

holding, and he does not engage with its reasoning. That reasoning is fatal to Rippey's claim.

But even if *Rettig* did not dispose of Rippey's claim, Rippey has not met his heavy burden of showing that limiting issues that may be raised on appeal and denying counsel in post-conviction proceedings makes the Plea Withdrawal Statute unconstitutional. Rippey has engaged in no textual or historical analysis of the meaning of the constitutional right to appeal. *See South Salt Lake City v. Maese*, 2019 UT 58, ¶18, 450 P.3d 1092 ("When we interpret constitutional language, we start with the meaning of the text as understood when it was adopted."). He has not shown that the original public meaning of the right to appeal secured an unlimited right to raise all issues on direct appeal with the assistance of counsel.

The text itself suggests that the right to appeal is analyzed on a case-specific rather than issue-specific basis. The constitution guarantees "the accused" in "criminal prosecutions" "the right to appeal *in all cases*." Utah Const. art. I, §12 (emphasis added). It does not say the right to appeal *every issue*. The debates during the constitutional convention illustrate the point. In addition to guaranteeing criminal defendants the right to appeal, the original constitution extended that right to all litigants: "From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court."

Utah Const. art. VIII, §9 (1896). That provision further stated, "The appeal shall be upon the record made in the court below, and *under such regulations as may be provided by law*. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone." *Id.* (emphasis added).

In discussing this section, the drafters debated the extent of the Court's authority to reexamine facts in equity cases. 2 *Official Report of the Proceedings and Debates of the Convention* 1506-13 (1898).[3] Samuel Thurman, who proposed the language, *id.* at 1506-07, explained that even though "the right of appeal is absolute in all cases," the scope of appellate review would be regulated by the legislature, *id.* at 1512-13. He explained that the phrase "under such regulations as may be provided by law" "means more than simply fixing a bond and all that, but that it gives to the Legislature the right to regulate the appeal *and the extent of it*." *Id.* at 1513 (emphasis added).[4]

[3] Attached as Addendum B.

[4] Although the language about regulating appeals is no longer in the constitution, the substance of that provision remains in the provisions authorizing the legislature to limit, provide, and direct the exercise of jurisdiction, as discussed in Point II.A below. And that language will always bear on the original public meaning of related provisions in the original constitution.

The scope of the right of appeal has long been understood to be subject to regulation. Some regulations cut off the appellate court's ability to hear the case altogether. *Allen v. Garner*, 143 P. 228, 229 (Utah 1914) (concluding Court lacked jurisdiction to hear appeal where necessary party did not appeal within statutory deadline); *see also Weaver v. Kimball*, 202 P. 9, 10 (Utah 1921) (noting that despite the "unqualified" right to appeal, "the appeal must be taken within such limitations and restrictions as to time and orderly procedure as the Legislature may prescribe").

Others limit only the issues that may be raised on appeal. Among the first statutes adopted after ratification of the Utah Constitution was a provision that in civil cases, only "orders and decisions … to which proper exceptions have been taken in the court below … are before the supreme court for review." Utah Rev. Stat. §3304 (1898). The criminal code identified specific issues that could be appealed if a challenge was properly preserved, and several specific issues that could be preserved without taking an exception. *Id.* §§4943-45. But if an exception was not made and the "matter" was not "deemed excepted," it could not be challenged on appeal. *See id.; People v. Hopt*, 9 P. 407, 408 (Utah Terr. 1886), *aff'd*, 120 U.S. 430 (1887).

Such limits were not seen as infringing the right to appeal. For example, the Court recognized that it lacked power to hear an appeal from

an untimely motion for new trial, despite the defendant's "right to appeal" and despite the late discovery of the constitutional violation making a motion for new trial "the only way in which he could seek redress for the wrong." *State v. Morgan*, 64 P. 356, 361-62 (Utah 1901); *accord State v. Cano*, 231 P. 121, 122 (Utah 1924).

Not only are such limitations common today, but some defects in a criminal case are simply beyond appellate review because of when they are discovered. For example, when a defendant does not discover a *Brady* violation before the fourteen-day deadline for filing a motion for new trial, she can seek relief only under the PCRA.[5] *See generally Brady v. Maryland*, 373 U.S. 83 (1963). So too for a defendant who discovers new evidence of actual innocence after the new trial deadline. And when a prosecutor breaches a plea agreement after sentencing, relief from the plea may be obtained only under the PCRA. *State v. Thurman*, 2022 UT 16, ¶¶6-10, 23-25, 508 P.3d 128.

Likewise, when a defendant's appointed appellate counsel fails to recognize and argue constitutional error that occurred at trial, the defendant's only remedy is under the PCRA. *See Davila v. Davis*, 137 S. Ct. 2058, 2068 (2017) (recognizing that claims of ineffective assistance of appellate counsel

[5] A court may extend the fourteen-day deadline, but only if the request is made before the original deadline expires. *See* Utah R. Crim. P. 24(c).

"*necessarily* must be heard in collateral proceedings, where counsel is not constitutionally guaranteed"); *accord State v. Rees*, 2005 UT 69, ¶¶18-19, 125 P.3d 874 (reversing court of appeals' attempt to provide defendant "an additional direct appeal" to raise claim of ineffective assistance of appellate counsel).

All these constitutional claims must be raised in post-conviction, where there is no right to counsel or the effective assistance of counsel. Potential plea challenges of which a defendant is unaware before sentencing are no different.

Despite this authority, Rippey argues that the assistance of counsel is a "'core element'" of an appeal, Br.Aplt.28 (quoting *Rettig*'s characterization of a defendant's argument), and any system that requires claims to be raised in a forum that does not guarantee the assistance of counsel thus violates the right to appeal, Br.Aplt.38-39, 41, 49-54. He also asserts that the United States Supreme Court has held that "the right to assistance of counsel attaches to the 'first review' of an issue where that review is the equivalent of a direct appeal." Br.Aplt.35. In support, Rippey cites *Halbert v. Michigan*, 545 U.S. 605 (2005), and *Martinez v. Ryan*, 566 U.S. 1 (2012).

Rippey misreads *Halbert* and *Martinez*. *Halbert* dealt with a direct appeal, not a collateral proceeding. *Halbert* reiterated the Court's prior

holdings that "a State is required to appoint counsel for an indigent defendant's first-tier appeal as of right." 545 U.S. at 611. And it applied that principle to require counsel for an intermediate appellate court's direct review of plea-based convictions that was nominally discretionary but functionally a merits-based review. *Id.* at 608, 616-24. Part of the Court's reasoning emphasized the practical advantages that counsel provided and the recognition that the intermediate appellate court would provide "the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Id.* at 619-24. But again, it emphasized those points in the context of a direct appeal. Because *Halbert* involved a direct appeal and not some equivalent, it could not have held that counsel is required for "the 'first review' of an issue where that review is the equivalent of a direct appeal." Br.Aplt.35.

Although *Martinez* involved collateral review, it undermines rather than supports Rippey's claim. *Martinez* addressed a state system that prohibited any claims of ineffective assistance of trial counsel to be raised on direct appeal, instead requiring them to be raised for the first time in state post-conviction review. 566 U.S. at 6. Martinez pursued state post-conviction relief and then federal habeas relief. *Id.* at 6-8. In federal court his claims of trial counsel ineffectiveness were procedurally barred because Martinez's

state post-conviction counsel did not raise them. *Id.* Martinez asked the Supreme Court to excuse his procedural default by recognizing a constitutional right to the effective assistance of counsel "in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id.* at 5, 8. But the Court refused to recognize a constitutional right to counsel in "initial-review collateral proceedings." *Id.* at 5, 9, 16. And it did so even though it recognized that when "the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 11. Rather than recognizing a constitutional right, the Court held that Martinez's default could be excused as a matter of equity so the federal habeas court could hear his challenge to trial counsel's representation. *Id.* at 16-17.

If *Martinez* hadn't been clear enough, the Supreme Court has since reiterated that a criminal defendant "does not have a constitutional right to counsel in state postconviction proceedings." *Davila*, 137 S. Ct. at 2062, 2065, 2068. And in full recognition of the absence of a constitutional right to counsel in such proceedings, the Court has taken pains to emphasize that states are free to reserve claims of trial counsel's ineffectiveness for post-conviction

review. *Trevino v. Thaler*, 569 U.S. 413, 429 (2013) ("[W]e do not … seek to encourage States to tailor direct appeals so that they provide a fuller opportunity to raise ineffective-assistance-of-trial-counsel claims. That is a matter for the States to decide."); *Martinez*, 566 U.S. at 13 ("This is not to imply the State acted with any impropriety by reserving the claim of ineffective assistance for a collateral proceeding."). In fact, the Court has recognized many "sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage," including the extended time to investigate the claim and ability to develop the factual basis for the claim. *Martinez*, 566 U.S. at 13; *accord Trevino*, 569 U.S. at 429; *Massaro v. United States*, 538 U.S. 500, 504 (2003) (reasoning that even when ineffective-assistance claims may be brought on direct appeal in a federal case, raising such claims on collateral review "in the first instance" is the "better-reasoned approach").

If a state does not violate a defendant's right to the assistance of counsel on appeal by choosing to require *all* defendants to raise *all* ineffective-assistance claims in post-conviction review—where the right to counsel does not attach—then a fortiori a state does violate that right by requiring a subset of such claims—untimely challenges to guilty pleas—to be raised in post-conviction review.

B. The Court's reasoning in *Merrill* upholding the constitutionality of a prior version of the statute applies with equal force to the current statute.

Rippey argues that the Plea Withdrawal Statute violates due process, the uniform operation of laws, and the open courts guarantee. In *State v. Merrill* this Court rejected similar challenges to the 1989 version of the statute. 2005 UT 34, 114 P.3d 585. That version allowed withdrawal "upon good cause shown" and imposed a jurisdictional bar on appellate review of plea challenges that were not raised within thirty days after judgment was entered. Utah Code §77-13-6(2) (eff. 4/24/89 through 5/5/2003); *State v. Reyes*, 2002 UT 13, ¶¶3-4, 40 P.3d 630; *State v. Ostler*, 2001 UT 68, ¶13, 31 P.3d 528. The current statute, adopted in 2003, allows withdrawal "only upon leave of the court and a showing that it was not knowingly and voluntarily made," and it requires such challenges be "made by motion before sentence is announced" to avoid the jurisdictional bar. Utah Code §77-13-6(2).

Rippey mentions both statutory changes in his general discussion of the history of the Plea Withdrawal Statute and claims that the changes distinguish his constitutional challenges from those rejected in *Merrill*. Br.Aplt.25-26 nn.12-13. But he never explains why these changes alter the outcome of *Merrill*. In fact, the changes do not undermine *Merrill*'s holding

that the Plea Withdrawal Statute comports with due process, the uniform operation of laws, and the open courts guarantee.

1. *Merrill* correctly held that the statute does not violate due process because—just like the current statute—it provides defendants an opportunity to challenge their pleas.

Rippey argues that the statute violates both procedural and substantive due process under the United States Constitution. Br.Aplt.41-45. He presents two arguments in support.[6]

First, Rippey claims that he was never advised of the consequences of not moving to withdraw his plea—including that he would not have an attorney to assist him in any future challenges to his plea, and that the post-conviction process involved "time frames and 'higher' burdens." Br.Aplt.43.

This Court has no jurisdiction to address Rippey's notice claim because it concerns the validity of his conviction, not the constitutionality of the jurisdictional bar. Rippey argues that lack of notice led him to enter (and not withdraw) his plea without understanding the rights he was giving up—the right to appeal his conviction with the assistance of counsel. In other words, Rippey argues that lack of notice rendered his plea unknowing. But that is precisely what the Plea Withdrawal Statute prevents this Court from

[6] Rippey also cites the Utah Constitution, but he does not "advance a unique state constitutional analysis." *See State v. Worwood*, 2007 UT 47, ¶19, 164 P.3d 397. The State thus limits its response to the federal provision.

considering. *See Gailey*, 2016 UT 35, ¶¶22-23 (not reaching argument that statute violated due process as applied, because it amounted to claim that plea was unknowing and court lacked jurisdiction to address plea challenge). What's more, the statute does not foreclose defendants from receiving the notice Rippey says they must receive. *See* Utah Code §77-13-6. Any defect in the notice Rippey received here is not a defect in the statute.

Second, Rippey argues that the statute's designation of the PCRA as a "substitute for appeal" is an "illusory" substitute because the Plea Withdrawal Statute and the PCRA "fatally conflict" and prevent any review of defendants' claims. Br.Aplt.43-45. He explains that the Plea Withdrawal Statute requires any untimely challenge to a guilty plea to be pursued under the PCRA, Utah Code §77-13-6(2)(c), but the PCRA contains a procedural bar that precludes relief for "any ground" that "could have been but was not raised in the trial court," *id.* §78B-9-106(1)(c). Rippey says courts "regularly" accept the State's argument in post-conviction that any plea challenges are procedurally barred under this provision because a defendant could have but did not timely move to withdraw the plea. Br.Aplt.44-45.

Even if Rippey's characterization of the interplay between the Plea Withdrawal Statute and the PCRA were correct, he still has not carried his heavy burden to show that the Plea Withdrawal Statute violates due process.

Rippey must show that the statute extinguishes a fundamental right or "forecloses any meaningful opportunity" for defendants to protect their rights. *In re Adoption of J.S.*, 2014 UT 51, ¶22, 358 P.3d 1009. The Court has already held it does not.

Merrill held that the Plea Withdrawal Statute "does not create an absolute bar," nor does it "unconstitutionally impede [a defendant's] opportunity to bring his claim that his plea was not knowing and voluntary before a court." 2005 UT 34, ¶30. Rather, the statute "provides two opportunities to challenge the validity of a guilty plea."[7] *Id.* Rippey ignores that the statute allowed him to challenge his plea in the district court and on direct appeal. A "constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944) (rejecting due-process challenge to statute that prevented defendants from raising issue in criminal case in absence of timely administrative proceeding). Because he did not take that opportunity, he cannot argue that the statute now provides an inadequate opportunity to challenge a plea

[7] In fact, defendants potentially have four opportunities: a motion to withdraw, appeal from the denial of a motion to withdraw, post-conviction, and appeal from the denial of post-conviction relief. Not to mention federal habeas.

unless he can show that the requirements for bringing a challenge in district court are "incapable of affording due process." *Id.* at 435. He has not done so.

Merrill upheld the statute against a due-process challenge, and the 2003 amendments do not meaningfully alter the analysis. One change simply moved the timeframe for bringing a motion to withdraw a guilty plea. 2003 Utah Laws 1321, 1321. That does not extinguish the opportunity to challenge a plea in district court, and Rippey makes no argument that it deprived him of "any meaningful opportunity" to challenge his plea. *See In re Adoption of J.S.*, 2014 UT 51, ¶22. Rather, Rippey's due-process challenge focuses on the requirement that challenges not brought in district court must be brought under the PCRA. *See* Br.Aplt.43-45. But that was true under the version *Merrill* upheld.

The other statutory change adjusted the standard for granting withdrawal in the district court, from good cause to unknowing and involuntary. 2003 Utah Laws 1321, 1321. That tempers *Merrill*'s conclusion that the statute provides *two* avenues to challenge a guilty plea. For any challenge that is not based on the unknowing or involuntary nature of a plea, the statute makes post-conviction review the sole avenue to challenge a plea-based conviction. *See Thurman*, 2022 UT 16, ¶24. But due process does not require multiple avenues to raise a claim—it requires only a meaningful

opportunity to raise the claim. *See Yakus*, 321 U.S. at 433, 444-46; *In re Adoption of J.S.*, 2014 UT 51, ¶22. And due process does not require that the opportunity to raise the challenge be in the criminal case. *See Yakus*, 321 U.S. at 433, 444.

After *Merrill*, the Court has repeatedly emphasized—though not in the context of a due-process challenge—that the PCRA provides a remedy for plea challenges that appellate courts lack jurisdiction to hear on direct appeal. *See Thurman*, 2022 UT 16, ¶31 n.29 (adopting interpretation of PCRA that allowed plea challenge that could not be brought in motion to withdraw, based on presumption "that the Legislature did not intend to leave individuals with no remedy for a due process violation"); *State v. Allgier*, 2017 UT 84, ¶27, 416 P.3d 546 ("In fact, the PCRA has long been the remedy for these types of claims."); *Gailey*, 2016 UT 35, ¶ 31 ("[D]efendants are not left without a remedy to challenge invalid pleas … ."); *Grimmett v. State*, 2007 UT 11, ¶26, 152 P.3d 306 (noting that by holding Court lacked jurisdiction to address untimely plea challenge, court did "not leave Grimmett without a remedy").

In any event, Rippey's characterization of the interplay between the Plea Withdrawal Statute and the PCRA is incorrect—or at least incomplete in a way that is fatal to his due-process argument. While it is true that some—perhaps even many—plea challenges will be procedurally barred because

they could have been but were not brought in a timely motion to withdraw a plea, Utah Code §78B-9-106(1)(c), that is not true of all claims. This Court has recognized that the PCRA provides broader grounds for relief than may be asserted in a motion to withdraw a guilty plea in the criminal case. *Thurman*, 2022 UT 16, ¶¶26-31. While the Plea Withdrawal Statute allows for withdrawal of a guilty plea only on a timely showing that the plea was unknowing or involuntary, Utah Code §77-13-6(2)(a), the PCRA allows for a conviction to be vacated when it "was obtained … in violation of the United States Constitution or Utah Constitution," *id.* §78B-9-104(1)(a). A constitutional challenge to a conviction that is not based on the plea being unknowing or involuntary may not be brought in the criminal case, so the procedural bar would not apply. In that way, the PCRA provides broader process than what a defendant may obtain in the criminal case.

A claim that a plea was unknowing or involuntary may also be brought under the PCRA so long as it is not a claim that could have been brought in the criminal case—for example, when a defendant had no way of knowing the basis of the claim until months or even years later. Once again, the PCRA provides more process than what was ever available in criminal cases.

But even if many challenges to the knowing or voluntary nature of a plea would otherwise be procedurally barred, the PCRA provides an

exception to the procedural bar: "a petitioner may be eligible for relief on a basis that the ground could have been but was not raised in the trial court, at trial, or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel." Utah Code §78B-9-106(3)(a). That exception is the real core of the interplay between the two statutes. As the Court has recognized, nearly any claim can be reformulated in terms of ineffective assistance. *State v. Rhinehart*, 2007 UT 61, ¶13, 167 P.3d 1046 ("As a practical matter, there is no alleged flaw in a guilty plea of a defendant represented by counsel that could not be attributed in some way to deficient representation."); *see also State v. Flora*, 2020 UT 2, ¶¶24-25 & n.30, 459 P.3d 975 (rejecting claim that Court's interpretation of Plea Withdrawal Statute prevented competency challenge from ever being raised in some forum, in part because of ineffective-assistance exception to procedural bar). In almost all cases, a plea that was constitutionally invalid at its inception can be collaterally attacked as the result of constitutionally inadequate assistance.

Because the Plea Withdrawal Statute provides at least one meaningful opportunity to challenge a plea-based conviction, Rippey's due-process argument fails.

2. *Merrill* correctly held that the statute does not subject similarly situated defendants to disparate treatment because—just like the current statute—creation of the class occurs through voluntary noncompliance with a deadline.

The Utah Constitution provides, "All laws of a general nature shall have uniform operation." Utah Const. art. I, §24. "Operational uniformity, in turn, requires that persons similarly situated be treated similarly." *Merrill*, 2005 UT 34, ¶33. Rippey argues that the Plea Withdrawal Statute violates this guarantee. He says the statute creates two similarly situated classes—those who do not move to withdraw a plea before sentence is announced, and all other criminal defendants.[8] Br.Aplt.46-47. He argues that the statute treats those classes differently by allowing only the latter class to raise "*any issue*" on direct appeal with the assistance of counsel. Br.Aplt.47. And he argues that the disparate treatment is arbitrary. Br.Aplt.48.[9]

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[8] Rippey also includes in the classification those who file a timely motion but do not "raise all possible challenges" in the motion. Br.Aplt.46-47; *see Flora*, 2020 UT 2, ¶1 (holding that Plea Withdrawal Statute's jurisdictional bar applies when defendant timely moves to withdraw guilty plea but raises claims on appeal not raised in timely motion). Rippey did not timely move to withdraw his plea so he has no standing to argue that this aspect of the statute violates the uniform operation of laws. *See State v. Roberts*, 2015 UT 24, ¶¶45-47, 345 P.3d 1226. The State therefore focuses on whether the statute has uniform operation as to defendants who make no timely motion to withdraw. However, the analysis applies with equal force to both groups of defendants.

[9] Rippey also argues that the statute violates the federal Equal Protection Clause, but he provides no separate analysis of that provision. Br.Aplt.45-48. The State thus responds only to the state claim.

Merrill disposed of this claim, and Rippey does not ask the Court to overrule it. *Merrill*'s operational-uniformity analysis addressed an amalgam of the former and current statutes. The Court applied the former statute's thirty-day post-judgment deadline, 2005 UT 34, ¶¶32, 36, 39-42, 44, 46, but it also applied the current statute's limitation requiring withdrawal to be based on an unknowing or involuntary plea, *id.* ¶32 n.3. Thus, the only difference that could possibly distinguish *Merrill* is the change in when a motion to withdraw must be made.

Again, Rippey offers no analysis of why that change matters to operational uniformity. *See* Br.Aplt.25-26 nn.12-13, 45-48. And *Merrill*'s discussion of how "the test of operational uniformity [applies] to statutorily imposed deadlines" shows that the change is immaterial to this analysis—the current statute is just as constitutional as the former. *See Merrill*, 2005 UT 34, ¶37.

The test of operational uniformity requires the Court to consider two threshold questions: first, what classifications are created by the statute, and second, whether those classifications result in similarly situated classes being treated disparately. *State v. Drej*, 2010 UT 35, ¶34, 233 P.3d 476; *Merrill*, 2005 UT 34, ¶31. If there is no disparate treatment of similarly situated classes, the inquiry ends and the statute is upheld. *Drej*, 2010 UT 35, ¶34. Otherwise, the

Court considers "whether the disparate treatment serves a reasonable government objective." *Merrill*, 2005 UT 34, ¶31.

Merrill recognized that the Plea Withdrawal Statute creates a class of defendants who plead guilty and excludes those who are not criminal defendants or who do not plead guilty. *Id.* ¶35. "Within the class of defendants who enter guilty pleas, section 77–13–6(2) has uniform application: all defendants are made subject to the same time limit to attempt to withdraw their pleas by motion." *Id.* ¶36.

The Court recognized a subclassification within the class of defendants who plead guilty: those who seek to withdraw their pleas outside the statutory window. *Id. Merrill* held, however, that this subclass was not subject to disparate treatment when compared to those who timely move to withdraw, so the statute is constitutional. *Id.* ¶¶37, 40.

The Court explained that the statute "treats alike every defendant who enters a guilty plea." *Id.* ¶39. The statute provides all such defendants "the opportunity to obtain relief from the consequences of his plea" by timely moving to withdraw the plea. *Id.* "[E]ach enjoys an equal opportunity to avoid whatever disadvantages might attend the PCRA by moving to withdraw his guilty plea within the … statutory period." *Id.* The Court thus described the subclassification as "conditional and contingent," and it

emphasized that "membership in the class is voluntary." *Id.* "It 'applies equally' to all defendants who plead guilty, including those whose guilty pleas were unlawfully obtained or who, for some other reason, may be entitled to withdraw their pleas.'" *Id.*

Unlike a statutory deadline that creates a class entirely through the voluntary actions of the class members, the Court noted that a deadline is discriminatory when class members "could do nothing to escape their fate" and "did not join their statutory classification by choice." *Id.* ¶38.

Moving the deadline to withdraw a plea does not shift the statute into the category of discriminatory deadlines identified by *Merrill*. Requiring a defendant to move to withdraw a plea before sentence is announced—rather than thirty days after judgment is entered—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 of defendants who do not timely move to withdraw their pleas. *See id.* 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.

Rippey may argue that some defendants do not realize they have a basis to withdraw their pleas within the statutory timeframe. But the same

can be said of defendants who were required to move to withdraw within thirty days of judgment under the former statute. And the same can be said of every deadline. Whether a defendant recognizes he has a basis to make a motion is not the relevant consideration under an operational-uniformity analysis. *See id.* ¶¶37-40. The Plea Withdrawal Statue itself creates no distinction between those who realize they have a basis to move to withdraw and those who do not. It creates only a statutory deadline, and the subclass created by that deadline is conditional and voluntary.

In short, the subclass created by the Plea Withdrawal Statute "owes its existence to the uniform operation and equal application of the statute." *Id.* ¶40. It is therefore constitutional.

Merrill went on to explain why any possible disparate treatment had "a reasonable tendency to further the objective of the statute" to "protect the State from difficulties associated with prosecuting stale claims" and to preserve interests in "the finality of judgments." *Id.* ¶¶41-47. Indeed, the current statute serves its objectives even more reasonably by preserving the finality of judgments against defendants experiencing buyer's remorse after hearing and being disappointed by their sentences. But the Court need not engage in that analysis because the statute does not treat similarly situated classes disparately, *see Drej*, 2010 UT 35, ¶34, and because Rippey offers only

conclusory assertions that the statute is arbitrary and does not engage with *Merrill* on this point, *see* Br.Aplt.48.

3. *Merrill* correctly held that the statute does not violate open courts guarantees because—just like the current statute—it does not abrogate a remedy but merely imposes a time limit.

The Open Courts Clause of the Utah Constitution guarantees a remedy for injuries: "All courts shall be open, and every person, for an injury done to the person in his or her person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay … ." Utah Const. art. I, §11.

This provision guarantees that "no law unreasonably 'diminish[es] or eliminate[s] a previously existing right to recover for an injury.'" *Merrill*, 2005 UT 34, ¶23. The analysis involves two sequential steps. First, the Court considers "whether the legislature has abrogated a cause of action, or modified a cause of action by abrogating a remedy." *Petersen v. Utah Lab. Comm'n*, 2017 UT 87, ¶20, 416 P.3d 583. If it has, the Court then considers whether the legislature has provided "an effective and reasonable alternative remedy" or whether "there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or

unreasonable means for achieving the objective." *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985).[10]

Rippey argues under the first step that the Plea Withdrawal Statute has "removed" a remedy—review on direct appeal with the assistance of counsel. Br.Aplt.49. And he argues under the second that the PCRA is an inadequate substitute. Br.Aplt.49-54.

Rippey's claim fails both steps. First, he makes only a bald assertion—in a single sentence—that the statute abrogates a remedy. Br.Aplt.49. He cannot carry his burden to overcome the presumption of constitutionality without some argument on this essential step.

Merrill implicitly held that the time limits of the plea withdrawal statute do not abrogate a remedy. 2005 UT 34, ¶¶23-25. And no matter which version of the statute applies, that conclusion aligns with the Court's treatment of other statutory time limits under its open courts jurisprudence. Reasonable time limits on raising claims generally do not leave individuals without a remedy. *Amundsen v. Univ. of Utah*, 2019 UT 49, ¶44, 448 P.3d 1224; *Petersen*, 2017 UT 87, ¶9 & n.7; *Payne ex rel. Payne v. Myers*, 743 P.2d 186, 190

[10] The State is challenging the validity of *Berry* in *State v. Kell*, 20180788-SC. The Court need not reach that issue here because *Merrill* has resolved the question for this case.

(Utah 1987). The Plea Withdrawal Statute allows defendants to challenge their pleas on direct appeal with the assistance of counsel. They simply have to move to withdraw their pleas before sentence is announced. Because the statute allows defendants who plead guilty "an opportunity to seek redress in the courts" even on direct appeal, the statute does not violate open courts guarantees. *Payne*, 743 P.2d at 190.

Second, even if the statute did abrogate a remedy, Rippey's argument is foreclosed by *Merrill*, which he has not asked to overrule. *Merrill* squarely held that the Plea Withdrawal Statute does not violate the Open Courts Clause because it "preserves the right of a defendant to pursue challenges to the lawfulness of his guilty plea under both the Post-Conviction Relief Act ('PCRA') and Utah Rule of Civil Procedure 65C, provisions that embody the elements of the traditional writ of habeas corpus." 2005 UT 34, ¶25. In so holding, the Court applied the current version of the statute. Thus, Rippey's attempt to distinguish *Merrill* fails and he is bound by its holding.

II.

The Plea Withdrawal Statute does not violate separation-of-powers principles.

Rippey contends that the Plea Withdrawal Statute violates separation-of-powers principles because the time limit is a procedural statute that the legislature lacked authority to enact.

As amended in 1985, the Utah Constitution explicitly addresses the Court's and legislature's authority over "rules of procedure and evidence":

> The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

Utah Const. art. VIII, §4.

Rippey argues that the time limit for withdrawing a guilty plea is purely procedural, and because the legislature enacted it as a statute rather than as an amendment to a court rule, he argues that the statute is unconstitutional. Br.Aplt.56-60.

The Court should reject Rippey's challenge for three independent reasons. First, whether or not the statute is procedural, it is a valid exercise of the legislature's authority to regulate the courts' exercise of jurisdiction. Second, even if filing deadlines are generally procedural and the legislature lacks power to enact procedural statutes, the time limit in the Plea

Withdrawal Statute is substantive because it creates an absolute deadline. And third, even if the time limit is procedural, it is inextricably intertwined with the substantive elements of the statute and is thus constitutional.

A. The statute's time limit is constitutional because it is a valid exercise of the legislature's authority to regulate the courts' exercise of jurisdiction.

Regardless of whether the time limit in the Plea Withdrawal Statute is procedural or substantive, it is jurisdictional and thus within the legislature's purview.

This Court recognized in *State v. Larsen* that when a constitutional provision gives the legislature authority to regulate a specific matter, the legislature may do so without amending the Court's rules by the process outlined in article VIII, section 4. *See* 850 P.2d 1264 (Utah 1993). In *Larsen*, a conflicting statute and rule addressed the standard for staying a sentence pending appeal. *Id.* at 1265-66. The district court applied the rule of procedure, "apparently [being] of the opinion that the subject matter of the release of a convicted person on bail pending appeal was a question of procedure and therefore within the exclusive province of the rule-making authority of this court as conferred by article VIII, section 4 of the constitution." *Id.* at 1266. This Court reversed, holding that the statute applied because a separate constitutional provision stated, "'Persons convicted of a

crime are bailable pending appeal only as prescribed by law.'" *Id.* at 1265-67 (quoting Utah Const. art. I, §8). Looking to the history of that constitutional provision, the Court concluded that the phrase "as prescribed by law" authorized the legislature to regulate bail pending appeal. *Id.* at 1265-66. Because that constitutional provision gave the legislature authority to regulate this specific matter, the Court concluded that it "need not reach" the question of whether the statute was a permissible exercise of legislative authority under article VIII, section 4. *Id.* at 1266.

The same result holds for the Plea Withdrawal Statute because it regulates the courts' jurisdiction and the Utah Constitution explicitly empowers the legislature to regulate all courts' jurisdiction. First, this Court's appellate jurisdiction: "The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute … ." Utah Const. art. VIII, §3. Next, the district court's jurisdiction: "The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute … ." *Id.* art. VIII, §5. And finally, the court of appeals' jurisdiction: "The jurisdiction of all other courts, both original and appellate, shall be provided by statute." *Id.*

This Court has unequivocally and repeatedly held that failing to timely move to withdraw a guilty plea deprives both trial and appellate courts of

jurisdiction to consider the validity of the plea in the criminal proceeding. *See State v. Brown*, 2021 UT 11, ¶¶22, 26, 489 P.3d 152; *Allgier*, 2017 UT 84, ¶¶17-21; *Rettig*, 2017 UT 83, ¶27; *Gailey*, 2016 UT 35, ¶¶13-20; *State v. Ott*, 2010 UT 1, ¶18, 247 P.3d 344; *Rhinehart*, 2007 UT 61, ¶¶10-14; *Grimmett*, 2007 UT 11, ¶¶8, 25; *State v. Nicholls*, 2006 UT 76, ¶¶6-7, 148 P.3d 990; *State v. Mullins*, 2005 UT 43, ¶11 n.2, 116 P.3d 374; *Merrill*, 2005 UT 34, ¶¶13-20; *Reyes*, 2002 UT 13, ¶3.

True, "jurisdiction" is a "'slippery'" term "'that means different things in different circumstances.'" *Rettig*, 2017 UT 83, ¶36. The Court acknowledged in *Rettig* that the legislature has constitutional authority to regulate subject-matter jurisdiction. *Id.* ¶37. The Court clarified that the Plea Withdrawal Statute's jurisdictional nature involves a "narrow notion of jurisdiction [that] is not a 'subset' of subject-matter jurisdiction." *Id.* ¶39 n.7. After all, subject-matter jurisdiction involves a court's authority to hear a class of cases, not specific issues within a case over which it has jurisdiction. *Id.* ¶36. *Rettig* noted that court rules "generally" regulate a court's jurisdiction in the narrower sense of limiting a court's "authority to decide certain issues," while statutes "generally" regulate a court's subject-matter jurisdiction. *Id.* ¶40. And the Court expressed skepticism that the constitution gave the legislature authority to regulate jurisdiction in the narrower sense. *Id.* ¶58

n.12. But it held that it had "no need to consider this question" because the defendant had not challenged the constitutionality of the statute's time limit. *Id.*

The constitution gives the legislature authority to regulate not only subject-matter jurisdiction, but issue-specific jurisdiction—the courts' power to hear specific issues in a case over which it has subject-matter jurisdiction. *See* Utah Const. art. VIII, §5 (authorizing statutory limits on district court's original jurisdiction over "all matters"); *Western Water, LLC v. Olds*, 2008 UT 18, ¶42, 184 P.3d 578 (using "matters" to refer to specific issues a court decides within a case). This is the "narrow" view of jurisdiction that *Rettig* doubted the legislature could regulate, but that doubt overlooked precedent that had already decided the question in favor of the legislature's power.

The Court has recognized the legislature's power to regulate "narrow" jurisdiction in the context of de novo appeals from justice court. By statute, a person convicted in justice court may appeal to district court and obtain a trial de novo. Utah Code §78A-7-118(1). The district court's ruling "is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance." *Id.* §78A-7-118(8). The Court upheld the statutory scheme against a challenge that the defendants' right to appeal was violated by limiting review in the court of appeals to the

constitutionality of the ordinance. *City of Monticello v. Christensen*, 788 P.2d 513, 516-19 (Utah 1990). It did so in part because the jurisdictional restriction on the issues that may be raised reflected an exercise of the legislature's constitutional authority to regulate appellate jurisdiction. *Id.* at 517-18 (citing Utah Const. art. VIII, §5). By upholding the limit on appealable issues, the Court "simply recognize[d] the well-settled principle that it is within the legislature's prerogative to define a court's appellate jurisdiction over decisions from any lower court so long as such jurisdiction is not expressly prohibited by the state constitution." *Id.* at 518.

The statutory limit on issues that may be raised on appeal from a de novo appeal in district court was originally in the Utah Constitution. *See* Utah Const. art. VIII, §9 (1896); *City of Eureka v. Wilson*, 48 P. 41, 42-43 (Utah 1897) (holding that Court had jurisdiction only to consider constitutionality of ordinance and not other issues raised in district court), *aff'd*, *Wilson v. Eureka City*, 173 U.S. 32 (1899). The removal of the jurisdictional limit from the constitution reflected the view that determining jurisdictional limits on issues that may be raised "properly lies with the legislature." *Christensen*, 788 P.2d at 518. And that change occurred at the same time article VIII, section 4 was adopted.

This understanding of legislative authority to regulate issue-specific jurisdiction is reinforced by looking to the federal system. Congress has constitutional authority to "ordain and establish" inferior courts. U.S. Const. art. III, §§1-2. The Supreme Court has interpreted that power to include "power to define the jurisdiction of inferior federal courts." *Yakus*, 321 U.S. at 433, 443. And it has interpreted the power to define jurisdiction as the power to limit a court's authority to decide a specific issue in a case. *Id.* at 443-44. In *Yakus*, for example, the Court upheld a statute that prohibited the federal district court from considering a challenge to the validity of a price control in a criminal prosecution for violating that price control. *Id.* at 418-19, 429-31, 433, 444-46. As long as the statute retained some opportunity for the defendant to raise the issue—in *Yakus* it was a timely administrative proceeding—the jurisdictional limit was valid. *Id.* at 433, 444.

Rettig acknowledged that some time limits cut off "appellate jurisdiction." 2017 UT 83, ¶39 n.7. The necessary corollary to that principle is that the legislature has authority to enact such time limits, because the constitution explicitly gives the legislature authority to regulate "appellate jurisdiction." Utah Const. art. VIII, §§3, 5. The Court seemed concerned about extending that principle to statutes that also cut off the district court's jurisdiction. *See* 2017 UT 83, ¶58 n.12. But constitutional language authorizes

the legislature to do just that. Utah Const. art. VIII, §3. *Rettig*'s skepticism about the constitutional foundations for the legislature's regulation of issue-specific jurisdiction was therefore unfounded.

Rettig also expressed concern that recognizing this authority would "swallow the prohibition in article VIII, section 4 on the legislature promulgating rules of 'procedure.'" *Id.* ¶58 n.12. But *Larsen* already addressed that concern. As discussed, an explicit grant of constitutional authority to legislate in a specific area trumps article VIII, section 4. *Larsen*, 850 P.2d at 1265-66. The legislature's authority to regulate jurisdiction is indeed broad, but that's the system our constitution established.

That's not to say that the legislature can avoid whatever restrictions article VIII, section 4 imposes simply by calling a statute jurisdictional. The courts will no doubt look to the "statute's actual function" when determining whether it is jurisdictional. *See Drej*, 2010 UT 35, ¶20. And jurisdictional bars may not violate a litigant's constitutional rights. *See Yakus*, 321 U.S. at 433, 444. But when the legislature enacts a statute that has the effect of cutting off a court's authority to reach an issue, that is a valid exercise of the legislature's authority to regulate jurisdiction no matter if the statute may be considered procedural.

B. The statute's time limit is constitutional because its absolute nature makes it substantive.

In any event, the statute's time limit is substantive and thus constitutional under article VIII, section 4.

The Court effectively resolved this issue when it held in *State v. Abeyta* that the former Plea Withdrawal Statute's time limit is substantive and thus not retroactive. 852 P.2d 993, 995 (Utah 1993). It explained that once the deadline to withdraw a plea passes, "the right is extinguished." *Id.* By definition, the time limit was thus a substantive statute. *See id.* Although *Abeyta* addressed the substance–procedure distinction in terms of whether to apply a statutory amendment retroactively, in *Drej* the Court cited its holding as an appropriate example of a substantive statute for purposes of *Drej*'s separation-of-powers analysis. *Drej*, 2010 UT 35, ¶27.

Rippey does not acknowledge *Abeyta* or address *Drej*'s application of its holding in the separation-of-powers context. Instead, he relies on dicta from *Rettig* stating that filing deadlines like the one in the Plea Withdrawal Statute seem to be "quintessentially procedural"—"perhaps the most rudimentary form of procedure"—and may provide "a potent basis for questioning the constitutionality of this statute." *Rettig*, 2017 UT 83, ¶¶58 & n.12, 59 n.14. Despite these broadsides, the Court reiterated that it was not

resolving whether the time limit violated separation-of-powers principles because Rettig had not made that challenge. *Id.* ¶¶59-60.

Rettig did not acknowledge *Abeyta*. But it critiqued the premise—again, in dicta—that a case discussing the substance–procedure distinction in the retroactivity context could "tell us anything meaningful" for a separation-of-powers analysis. *Id.* ¶56 n.11.

Rettig's critique ignores the Court's own reliance on retroactivity precedent in interpreting article VIII, section 4. In *Drej* the Court looked to retroactivity cases to define substance and procedure precisely for separation-of-powers purposes. 2010 UT 35, ¶¶26-27. Even *Rettig* relied on such precedent in holding that, for purposes of article VIII, section 4, the Plea Withdrawal Statute's designation of the PCRA as the exclusive remedy for untimely claims is substantive. 2017 UT 83, ¶53 (citing *Petty v. Clark*, 192 P.2d 589, 593 (Utah 1948)).

While *Rettig* may have a valid point that one "legal construct" may call for a different line between substance and procedure than another legal construct, *id.* ¶56 n.11, Rippey has not done the work to show that this is such an instance. He has given the Court no reason to depart from the conclusions of *Abeyta* and *Drej* that the Plea Withdrawal Statute's time limits are substantive. He has thus not overcome the presumption of constitutionality.

In any event, the reasoning of *Abeyta* and *Drej* are correct. "Procedural law … 'prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective.'" *Drej*, 2010 UT 35, ¶26 (quoting *Petty*, 192 P.2d at 593-94). "Substantive law 'creates, defines and regulates the rights and duties of the parties ... which may give rise to a cause for action.'" *Id.* (quoting *Petty*, 192 P.2d at 593). These concepts often overlap. To be sure, some of this Court's precedent could be read to suggest that the time limit in the Plea Withdrawal Statute is procedural. *See Petty*, 192 P.2d at 593 (stating in retroactivity context that statute is procedural when, rather than "cutting off all review," it has the effect of "substituting one method of review for another"); *see also Pilcher v. Utah Dep't of Soc. Servs.*, 663 P.2d 450, 455 (Utah 1983) (recognizing that statute is procedural and thus retroactive when it provides "a different mode or form of procedure for enforcing substantive rights").

But the weight of authority from this and other jurisdictions shows that an absolute timing deadline falls on the substantive side of the line. A change in a court's "jurisdictional limits" is substantive. *State v. Augustine*, 416 P.2d 281, 283-84 (Kan. 1966) (retroactivity). And a statute that has the effect of cutting off rights is substantive. *Brown & Root Indus. Serv. v. Industrial Comm'n*, 947 P.2d 671, 676 (Utah 1997) (retroactivity).

That applies even to time limits. For example, a statute that addresses the time within which a loan default may be cured is substantive. *Washington Nat. Ins. Co. v. Sherwood Assocs.*, 795 P.2d 665, 666-70 (Utah Ct. App. 1990) (retroactivity). On the other hand, a filing deadline that may be extended or excused is procedural—it does not necessarily cut off rights. *Jacobs v. Shelly & Sands, Inc.*, 365 N.E.2d 1259, 1262 (Ohio Ct. App. 1976) (separation of powers). Finally, "[i]f the rule can determine in and of itself the outcome of the proceeding, it is generally substantive." *Suchit v. Baxt*, 423 A.2d 670, 680 (N.J. Super. Law. Div. 1980) (separation of powers).

Each of these principles points to the substantive nature of the Plea Withdrawal Statute's time limits. As the Court has repeatedly recognized, the statute creates an absolute bar that admits no exceptions. *E.g.*, *Flora*, 2020 UT 2, ¶¶1, 15. The limit is jurisdictional, and failure to timely move to withdraw a plea is outcome determinative of any plea challenge on direct appeal. As *Abeyta* recognized, because noncompliance with the statute's time limit extinguishes the right to challenge a plea on direct appeal, the time limit is substantive. 852 P.2d at 995.

Rettig's dicta expressed concern that if a time limit was substantive simply because it was absolute, that would "erase[]" the "limitation" of article VIII, section 4. *See* 2017 UT 83, ¶56 n.11. But *Abeyta*'s rule does not

sweep so broadly as *Rettig* assumed. Many time limits that may seem absolute are not. *Rettig* pointed to the time limits in rule 12 of the Utah Rules of Criminal Procedure as an example of a similarly absolute time limit, because it imposes a waiver sanction for untimely motions and does not allow for plain-error review. *Id.* ¶20. But a defendant on appeal may still argue that her attorney was ineffective in missing the deadline. *See Mills v. State*, 2020 WY 14, ¶¶18, 14, 21, 34, 458 P.3d 1 (holding that rule foreclosed plain-error review of issues not raised in timely motion to suppress, but reviewing for ineffective assistance). Recognizing truly absolute time limits as substantive does not create an exception that swallows the rule. Whatever may be said for other time limits, at the very least the Court should uphold the time limit in the Plea Withdrawal Statute as substantive law.

C. The statute's time limit is constitutional because it is inextricably intertwined with the substantive provisions of the statute.

Even if the time limit is purely procedural, it is inextricably intertwined with the substance of the Plea Withdrawal Statute and is therefore constitutional. This Court held in *Drej* that a procedural provision in a statute does not violate separation-of-powers principles when it is "so intertwined" with the substantive provisions of the statute "that the court must view it as substantive." 2010 UT 35, ¶¶30-31.

Rippey acknowledges this principle, Br.Aplt.55, but he offers no analysis of why it does not apply here. Rippey cannot overcome the presumption of constitutionality without engaging with precedent identifying at least one circumstance in which procedural statutes may be constitutional.

Again, *Rettig* expressed "doubts" in dicta about the applicability of "the 'inextricably intertwined' analysis" to the Plea Withdrawal Statute's time limits. 2017 UT 83, ¶¶59-60. But *Rettig*'s doubts are easily resolved. The Court suggested that the inextricably-intertwined analysis was proper only when "[f]aced with a difficult problem of categorizing" the procedural or substantive nature of the statute at issue. *Id.* ¶60 n.15.

That difficulty applies equally to absolute time limits. While a filing deadline may very well be "quintessentially procedural" in general, *id.* ¶58, precedent from this and other courts firmly establish the substantive nature of provisions that completely cut off rights or that are outcome determinative, *supra* Point II.C. The inextricably-intertwined test is therefore appropriate even if the Court were to accept *Rettig*'s dicta about when it applies.

The time limit here is inextricably intertwined with the statute's substantive elements. The Court has already held that subsection (2)(c) of the statute is substantive because it "establish[es] a new remedy" in directing

untimely plea challenges to the PCRA. *Rettig*, 2017 UT 83, ¶53. But the exclusive nature of that remedy comes into play only in conjunction with the time limits of subsection (2)(b): "Any challenge to a guilty plea not made *within the time period specified in Subsection (2)(b)* shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure." Utah Code §77-13-6(2)(c) (emphasis added). The Plea Withdrawal Statute did not create the PCRA. The PCRA provision in the Plea Withdrawal Statute is superfluous unless read along with the time limits of subsection (2)(b). And it is the two provisions working in tandem that effect the policy of the Plea Withdrawal Statute: "protect[ing] the State from difficulties associated with prosecuting stale claims" and preserving "the finality of judgments." *Merrill*, 2005 UT 34, ¶44.

The intertwined nature of any substantive and procedural aspects of the Plea Withdrawal Statute is reinforced by the legislative history of that statute, particularly around the time of the adoption of article VIII, section 4. The Plea Withdrawal Statute has been part of the Utah Code of Criminal Procedure since the beginning, and it has contained a timing provision since the beginning as well. Utah Rev. Stat. §4790 (1898) ("The court may at any time *before judgment* upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted." (emphasis added)).

In 1980 the legislature separated out formal rules of procedure from the Code of Criminal Procedure. It adopted the Rules of Criminal Procedure as Chapter 35 of Title 77, and it renumbered and reenacted the remaining provisions of Title 77 as the Code of Criminal Procedure. 1980 Utah Laws 86; 1980 Utah Laws 110. As part of the Rules of Criminal Procedure, the legislature adopted rule 11, which governed pleas. 1980 Utah Laws 86, 93-94. But the legislature did not put the time limit for withdrawing pleas in rule 11. Rather, it left the Plea Withdrawal Statute in the Code of Criminal Procedure. 1980 Utah Laws 110, 133; Utah Code §77-13-6 (eff. 7/1/1980 to 4/24/1989) (imposing good-cause requirement for withdrawal and timing requirement that any withdrawal to occur "prior to conviction").

In January 1989, four years after the constitution was amended to clarify the Court's rulemaking authority, the Court formally adopted the Rules of Criminal Procedure as enacted in the Utah Code. *Christensen*, 788 P.2d at 519 (Durham, J., dissenting) (quoting order from Court adopting rules). The legislature then repealed the statutory Rules of Criminal Procedure. 1989 Utah Laws 479, 486. However, the Court did not adopt and the legislature did not repeal the rest of the Code of Criminal Procedure in Title 77. Whatever the substance–procedure distinction means in the context of article VIII, section 4, both branches of government apparently viewed

some procedural matters to be within the legislature's power to govern by statute.

In the same session that the legislature repealed the Rules of Criminal Procedure, it amended the Plea Withdrawal Statute to include a thirty-day deadline. 1989 Utah Laws 163, 163. In that same bill, it amended rule 11 to give courts authority to excuse default under the thirty-day deadline. The legislature was attuned to the requirements of article VIII, section 4. Had the legislature believed the Plea Withdrawal Statute and accompanying time limit to be purely procedural, it likely would have repealed that statute and moved all of it into rule 11.

The legislature likely viewed the Plea Withdrawal Statute as predominantly substantive and thus within its purview, regardless of any procedural components. This can be seen in how the legislature treated another provision that it moved from the rules into statute. When the legislature repealed the Rules of Criminal Procedure, it created a committee to review the rules and recommend "which provisions should be reenacted as codified substantive law under Article VIII, Utah Constitution." 1989 Utah Laws 479, 486. The committee recommended reenacting as a statute the rule governing guilty-and-mentally-ill pleas and not-guilty-by-reason-of-insanity pleas. Even though the rule covered many procedural matters such as jury

instructions and the timing of motions and hearings, the committee believed the rule was "predominantly substantive." *Special Report and Recommendations to the Interim Judiciary Committee and the Utah Supreme Court*, at 8 (Oct. 1989) (addressing rule 21.5).[11] The legislature followed the recommendation and enacted a predominantly substantive statute with several timing provisions. 1990 Utah Laws 14, 14-16.

In short, the history of the Plea Withdrawal Statute and the Court's and legislature's treatment of the Code of Criminal Procedure support the conclusion that any procedural component of the Plea Withdrawal Statute is inextricably intertwined with its substantive components and is thus within the legislature's authority to enact.

[11] Attached as Addendum C.

CONCLUSION

For the foregoing reasons, the Court should reject Rippey's challenge to the constitutionality of the Plea Withdrawal Statute and allow him to proceed with any challenge to his sentence he may wish to raise.[12]

Dated April 14, 2023.

SEAN D. REYES
Utah Attorney General

/s/ William M. Hains
WILLIAM M. HAINS
Assistant Solicitor General
Counsel for Appellee

[12] Rippey argues that if the Court strikes down the statute, it should "fashion a procedural mechanism" that will allow Rippey and others like him to challenge their pleas on direct appeal. Br.Aplt.61-64. But if the Court strikes down the statute, there is no longer any jurisdictional bar keeping the Court from hearing Rippey's challenge to his plea in the present appeal. Rippey would not need a new rule allowing him to challenge his plea. Nor would any other defendant who has yet to take a direct appeal. To the extent Rippey wants a rule governing other defendants in future cases, the Court should address that question through its regular rulemaking process in the event the Court strikes down the statute.

CERTIFICATE OF COMPLIANCE

Page/Word Certification. I certify that in compliance with rule 24, Utah R. App. P., this brief contains 13,873 words, excluding tables, addenda, and certificates of counsel.

Public/Protected Records Certification. I also certify that in compliance with rule 21, Utah R. App. P., this brief, including any addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

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/s/ *William M. Hains*
WILLIAM M. HAINS
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on April 14, 2023, the Brief of Appellee, including any addenda, was filed with the Court by email in a searchable PDF attachment and served upon appellant Stephen Rippey's counsel of record at:

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* No more than 7 days after filing by email, the State will file with this Court the required number of paper copies of the brief and any addenda (six to Court of Appeals or 8 to Supreme Court). Upon request, the State will serve two paper copies thereof to the appellant's counsel of record. *See* Utah R. App. P. 26(b).

Addenda

Addendum A

Effective 1/1/2021

Article I, Section 12 [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation, to have a copy thereof, to testify in the accused's own behalf, to be confronted by the witnesses against the accused, to have compulsory process to compel the attendance of witnesses in the accused's own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself or herself; a person shall not be compelled to testify against the person's spouse, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Article VIII
Judicial Department

Article VIII, Section 1 [Judicial powers -- Courts.]

The judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

Article VIII, Section 2 [Supreme court -- Chief justice -- Declaring law unconstitutional -- Justice unable to participate.]

The Supreme Court shall be the highest court and shall consist of at least five justices. The number of justices may be changed by statute, but no change shall have the effect of removing a justice from office. A chief justice shall be selected from among the justices of the Supreme Court as provided by statute. The chief justice may resign as chief justice without resigning from the Supreme Court. The Supreme Court by rule may sit and render final judgment either en banc or in divisions. The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of the Supreme Court. If a justice of the Supreme Court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause.

Article VIII, Section 3 [Jurisdiction of Supreme Court.]

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.

Article VIII, Section 4 [Rulemaking power of Supreme Court -- Judges pro tempore -- Regulation of practice of law.]

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

Article VIII, Section 5 [Jurisdiction of district court and other courts -- Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

Article VIII, Section 6 [Number of judges of district court and other courts -- Divisions.]

The number of judges of the district court and of other courts of record established by the Legislature shall be provided by statute. No change in the number of judges shall have the effect of removing a judge from office during a judge's term of office. Geographic divisions for all courts of record except the Supreme Court may be provided by statute. No change in divisions shall have the effect of removing a judge from office during a judge's term of office.

Article VIII, Section 7 [Qualifications of justices and judges.]

Supreme court justices shall be at least 30 years old, United States citizens, Utah residents for five years preceding selection, and admitted to practice law in Utah. Judges of other courts of record shall be at least 25 years old, United States citizens, Utah residents for three years preceding selection, and admitted to practice law in Utah. If geographic divisions are provided for any court, judges of that court shall reside in the geographic division for which they are selected.

Article VIII, Section 8 [Vacancies -- Nominating commissions -- Senate approval.]

(1) When a vacancy occurs in a court of record, the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the Judicial Nominating Commission having authority over the vacancy. The governor shall fill the vacancy within 30 days after receiving the list of nominees. If the governor fails to fill the vacancy within the time prescribed, the chief justice of the Supreme Court shall within 20 days make the appointment from the list of nominees.
(2) The Legislature by statute shall provide for the nominating commissions' composition and procedures. No member of the Legislature may serve as a member of, nor may the Legislature appoint members to, any Judicial Nominating Commission.
(3) The Senate shall consider and render a decision on each judicial appointment within 60 days of the date of appointment. If necessary, the Senate shall convene itself in extraordinary session for the purpose of considering judicial appointments. The appointment shall be effective upon approval of a majority of all members of the Senate. If the Senate fails to approve the appointment, the office shall be considered vacant and a new nominating process shall commence.
(4) Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political consideration.

Article VIII, Section 9 [Judicial retention elections.]

Each appointee to a court of record shall be subject to an unopposed retention election at the first general election held more than three years after appointment. Following initial voter approval, each Supreme Court justice every tenth year, and each judge of other courts of record every sixth

year, shall be subject to an unopposed retention election at the corresponding general election. Judicial retention elections shall be held on a nonpartisan ballot in a manner provided by statute. If geographic divisions are provided for any court of record, the judges of those courts shall stand for retention election only in the geographic division to which they are selected.

Article VIII, Section 10 [Restrictions on justices and judges.]

Supreme court justices, district court judges, and judges of all other courts of record while holding office may not practice law, hold any elective nonjudicial public office, or hold office in a political party.

Article VIII, Section 11 [Judges of courts not of record.]

Judges of courts not of record shall be selected in a manner, for a term, and with qualifications provided by statute. However, no qualification may be imposed which requires judges of courts not of record to be admitted to practice law. The number of judges of courts not of record shall be provided by statute.

Article VIII, Section 12 [Judicial Council -- Chief justice as administrative officer -- Legal counsel.]

(1) There is created a Judicial Council which shall adopt rules for the administration of the courts of the state.
(2) The Judicial Council shall consist of the chief justice of the Supreme Court, as presiding officer, and other justices, judges, and other persons as provided by statute. There shall be at least one representative on the Judicial Council from each court established by the Constitution or by statute.
(3) The chief justice of the Supreme Court shall be the chief administrative officer for the courts and shall implement the rules adopted by the Judicial Council.
(4) The Judicial Council may appoint legal counsel which shall provide all legal services for the Judicial Department unless otherwise provided by statute.

Article VIII, Section 13 [Judicial Conduct Commission.]

A Judicial Conduct Commission is established which shall investigate and conduct confidential hearings regarding complaints against any justice or judge. Following its investigations and hearings, the Judicial Conduct Commission may order the reprimand, censure, suspension, removal, or involuntary retirement of any justice or judge for the following:
(1) action which constitutes willful misconduct in office;
(2) final conviction of a crime punishable as a felony under state or federal law;
(3) willful and persistent failure to perform judicial duties;
(4) disability that seriously interferes with the performance of judicial duties; or
(5) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.

Prior to the implementation of any commission order, the Supreme Court shall review the commission's proceedings as to both law and fact. The court may also permit the introduction of additional evidence. After its review, the Supreme Court shall, as it finds just and proper, issue its order implementing, rejecting, or modifying the commission's order. The

Legislature by statute shall provide for the composition and procedures of the Judicial Conduct Commission.

Article VIII, Section 14 [Compensation of justices and judges.]

The Legislature shall provide for the compensation of all justices and judges. The salaries of justices and judges shall not be diminished during their terms of office.

Article VIII, Section 15 [Mandatory retirement.]

The Legislature may provide standards for the mandatory retirement of justices and judges from office.

Article VIII, Section 16 [Public prosecutors.]

The Legislature shall provide for a system of public prosecutors who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute. Public prosecutors shall be elected in a manner provided by statute, and shall be admitted to practice law in Utah. If a public prosecutor fails or refuses to prosecute, the Supreme Court shall have power to appoint a prosecutor pro tempore.

Utah Constitution (1896)
Article VIII

Section 9. [Appeals from district court: record, etc. From justices' courts.]

From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below, and under such regulations as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the Court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the District Courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute.

PLEA WITHDRAWAL STATUTE

2003

§ 77-13-5. Failure to plead—Not guilty entered

When a defendant does not enter a plea, the court shall enter a plea of not guilty for him.

Laws 1980, c. 15, § 2.

Library References

Criminal Law ⇐300.
Westlaw Topic No. 110.

C.J.S. Criminal Procedure and Rights of the Accused §§ 215 to 216.

Notes of Decisions

In general 1

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1. In general

Where defendant voluntarily went to trial, contested every step, and claimed and was granted every right known to law during the progress of the trial, he will he held to have waived the right to enter a formal plea, and his conduct will be held tantamount to the entry of a plea in view of Const. art. 1, § 13. State v. Estes, 1918, 52 Utah 572, 176 P. 271. Criminal Law ⇐ 262

That defendant was not afforded an opportunity to plead to information, and was tried without having entered a plea, could not under statute be raised by motion in arrest of judgment, but by motion for new trial. State v. Estes, 1918, 52 Utah 572, 176 P. 271. Criminal Law ⇐ 918(7); Criminal Law ⇐ 968(7)

§ 77-13-6. Withdrawal of plea

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2)(a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.

(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.

(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

Laws 1980, c. 15, § 2; Laws 1989, c. 65, § 1; Laws 1994, c. 16, § 1; Laws 2003, c. 290, § 1, eff. May 5, 2003; Laws 2004, c. 90, § 91, eff. May 3, 2004; Laws 2008, c. 3, § 251, eff. Feb. 7, 2008.

Historical and Statutory Notes

Laws 2003, c. 290, § 1, rewrote this section that formerly provided:

"(1) A plea of not guilty may be withdrawn at any time prior to conviction.

"(2)(a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

"(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.

"(3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure."

Laws 2004, c. 90, § 91, in subsec. (2)(c), changed "(2)(c)" to "(2)(b)".

Laws 2008, c. 3, § 251, in par. (2)(c), substituted "Title 78B, Chapter 9" for "Title 78, Chapter 35a".

Cross References

Appeal as of right, see Rules App. Proc., Rule 4.

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NOTES TO DECISIONS

Cited in State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988).

77-13-4. Felonies — Entry in open court.

All pleas in felony cases shall be entered by the defendant in open court and the proceedings recorded.

History: C. 1953, 77-13-4, enacted by L. 1980, ch. 15, § 2.

77-13-5. Failure to plead — Not guilty entered.

When a defendant does not enter a plea, the court shall enter a plea of not guilty for him.

History: C. 1953, 77-13-5, enacted by L. 1980, ch. 15, § 2.

NOTES TO DECISIONS

Waiver.

One accused of crime could waive mere formality of entering plea of not guilty before going to trial. State v. Estes, 52 Utah 572, 176 P. 271 (1918).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d 730, Criminal Law, § 447.
Key Numbers. — Criminal Law ⇐ 266.

77-13-6. Withdrawal of plea.

(1) A plea of not guilty may be withdrawn at any time prior to conviction.
(2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.
(b) A request to withdraw a plea of guilty or no contest is made by motion, and shall be made within 30 days after the entry of the plea.
(3) This section does not restrict the rights of an imprisoned person under Rule 65B(i), Utah Rules of Civil Procedure.

History: C. 1953, 77-13-6, enacted by L. 1980, ch. 15, § 2; 1989, ch. 65, § 1.
Amendment Notes. — The 1989 amendment, effective April 24, 1989, designated the first sentence as Subsection (1) and the second sentence as Subsection (2)(a), inserted "the" in Subsection (2)(a), and added Subsections (2)(b) and (3).

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only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

History: C. 1953, 77-13-3, enacted by L. 1980, ch. 15, § 2.

77-13-4. Felonies — Entry in open court. All pleas in felony cases shall be entered by the defendant in open court and the proceedings recorded.

History: C. 1953, 77-13-4, enacted by L. 1980, ch. 15, § 2.

77-13-5. Failure to plead — Not guilty entered. When a defendant does not enter a plea, the court shall enter a plea of not guilty for him.

History: C. 1953, 77-13-5, enacted by L. 1980, ch. 15, § 2.

Collateral References.
Criminal Law ⇦ 266.
22 CJS Criminal Law § 413.
21A AmJur 2d 730, Criminal Law, § 447.

DECISIONS UNDER FORMER LAW

Waiver.
One accused of crime could waive mere formality of entering plea of not guilty before going to trial. State v. Estes (1918) 52 U 572, 176 P 271, overruling People v. Heller (18—) 2 U 133.

77-13-6. Withdrawal of plea. A plea of not guilty may be withdrawn at any time prior to conviction. A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of court.

History: C. 1953, 77-13-6, enacted by L. 1980, ch. 15, § 2.

Collateral References.
Criminal Law ⇦ 274.
22 CJS Criminal Law, § 421.
21 AmJur 2d 829-847, Criminal Law, §§ 500-505.

CHAPTER 14

AFFIRMATIVE DEFENSES

Section
77-14-1. Time and place of alleged offense — Specification.
77-14-2. Alibi — Notice requirements — Witness lists.
77-14-3. Mental illness defense notice requirement.
77-14-4. Mental condition of defendant examined by alienists — Appointment by court — Compensation — Other testimony admissible.
77-14-5. Hearing on mental condition of defendant found not guilty by reason of mental illness — Commitment to state hospital — Subsequent hearings.
77-14-6. Entrapment — Notice of claim required.

77-14-1. Time and place of alleged offense — Specification. The prosecuting attorney, on timely written demand of the defendant, shall

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over the subject of the information or indictment, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment. [C. L. § 4980*.

Cal. Pen. C. § 1012.
Objections except the two specified, not taken by demurrer, are waived, U. S. v. West, 7 U. 437; 27 P. 84.

CHAPTER 26.

PLEA.

4788. Pleas, of four kinds. There are four kinds of pleas to an information or indictment. A plea of:

1. Guilty.
2. Not guilty.
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty.
4. Once in jeopardy, which may be pleaded with or without the plea of not guilty. [C. L. § 4981*.

Cal. Pen. C. § 1016[2].
"Not guilty" entered when defendant refuses to plead, § 4796.
There is no issue in a criminal cause until a plea has been interposed by defendant, and a verdict rendered in the absence of any such plea cannot stand. People v. Heller, 2 U. 133.
There can be no waiver of right to plead in a criminal cause. The record must show that the defendant pleaded, and in cases of felony the pleadings cannot be waived. Id.
Plea of former conviction not made is waived. In re Maughan, 6 U. 107; 21 P. 1088. In re Barton, 6 U. 264; 21 P. 998.
A defendant pleaded not guilty and once in jeopardy. The jury was discharged after trial with the consent of the defendant, when he was placed on trial again; *held*, that the defendant could not plead a failure of the jury to find upon the issues of once in jeopardy, he having consented to the discharge of the jury. People v. Kerm, 8 U. 268; 30 P. 988.

4789. Plea must be oral. Form of entry. Every plea must be oral, and entered upon the minutes of the court substantially in the following form:

1. If the defendant pleads guilty: "The defendant pleads that he is guilty of the offense charged."
2. If he pleads not guilty: "The defendant pleads that he is not guilty of the offense charged."
3. If he pleads a former conviction or acquittal: "The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the judgment of the court of (naming it), rendered at (naming the place), on the ——— day of ———."
4. If he pleads once in jeopardy: "The defendant pleads that he has been once in jeopardy for the offense charged (specifying the time, place, and court). [C. L. § 4982.

Cal. Pen. C. § 1017.

4790. Plea of guilty put in only by defendant. Withdrawal. A plea of guilty can be put in only by the defendant himself, in open court, unless upon information or indictment against a corporation, in which case it may be put in by counsel. The court may at any time before judgment upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted. [C. L. § 4983.

Cal. Pen. C. § 1018.

4791. Issue on plea of not guilty. The plea of not guilty puts in issue every material allegation of the information or indictment. [C. L. § 4984*.

Cal. Pen. C. § 1019.

4792. Evidence under plea of not guilty. All matters of fact tending to establish a defense other than those specified in the third and fourth

Addendum B

OFFICIAL REPORT

OF THE

PROCEEDINGS AND DEBATES

OF THE

CONVENTION

ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A

CONSTITUTION

FOR THE

STATE OF UTAH.

VOLUME II.

SALT LAKE CITY.
STAR PRINTING COMPANY.

1898.

in line 4, the word "jurisdiction," and strike out all the remaining portion of the section after the word "compensasation," in line 5.

Mr. THURMAN. Mr. President, I object to that, because we want to limit the power of the Legislature to extend the jurisdiction of justices of the peace. We do not want them ever to have the power to give justices any more jurisdiction than they have now. They may restrict it but not enlarge it.

The amendment of Mr. Boyer was withdrawn.

Mr. Evans, of Weber, offered the following substitute for the section:

The Legislature may provide for the election of justices of the peace in each county, city, and incorporated town in the State, and fix by law their powers and compensation. The jurisdiction of justices of the peace shall be as now provided by law, but the Legislature may restrict the same.

Mr. THORESON. Do you think it would be proper for the Legislature to fix the compensation of justices of the peace in cities?

Mr. EVANS (Weber). Why, it has the power to do that, only it can fix fees if it wants to, just as it does now. We are here creating courts. That is the only purpose of mentioning justices of the peace at all. We are creating that class of courts in pursuance of section 1 of this article.

Mr. THORESON. I understood your substitute for this section fixes the compensation or authorizes the Legislature to fix the compensation.

Mr. EVANS (Weber). It will do that, but of course the Legislature will have power over the cities. The city is only a creature of the State and it might delegate the power to the cities to do that.

The substitute of Mr. Evans, of Weber, was rejected.

Mr. RICHARDS. Mr. President, before passing section 8, I move that the word "but" be stricken out at the end of line 6, and the word "unless" inserted in lieu thereof, and the word "may" stricken out in line 7, and the word "shall" inserted.

Mr. GOODWIN. Would you not change your word unless to "until?"

Mr. RICHARDS. I have no objection. It seems to me the way it stands now it is rather contradictory in terms.

Mr. THURMAN. Mr. President, I do not believe in splitting hairs. It seems to me that is what we are doing, but the word until implies that the Legislature will do it probably as soon as they get an opportunity. Now, that is not the meaning of it. It means that the jurisdiction shall remain as it now is. But if the Legislature ever chooses to do so, it may restrict it. Now, why is not "but" the proper word?

The amendment of Mr. Richards was rejected.

Section 9 was read.

Mr. RICHARDS. Mr. President, I move to insert after the word "court," in the third line, the following words: "Upon such conditions and under such regulations as may be prescribed by law." It seems to me that as the section now stands it might give an unqualified right of appeal without complying with the regulations in the way of filing bond, etc., as the Legislature might prescribe, and I think that it is proper that the Legislature should have power to prescribe certain conditions and regulations.

Mr. GOODWIN. I would ask Mr. Richards if his idea is that under this amendment a man could take an appeal without paying costs? If that is the case, I think the amendment good.

Mr. THURMAN. Mr. President, I have an amendment to cover the same ground and including something else with it. My motion is to strike out all of lines 2 and 3 down to the word alone, in line 3, and insert the following:

From all final judgments of the district court, there shall be a right of appeal to the supreme court, under such regulations as may be provided by law. In equity, the appeal may be on ques-

tions of law and fact. In cases at law, the appeal shall be on questions of law alone.

In the article as reported by the committee we provided that an appeal should be upon questions of law alone in all cases. The gentleman from Salt Lake, Mr. Varian, moved to strike out the same words that I now move to strike out.

Mr. VARIAN. They are stricken out.

Mr. THURMAN. He moved to strike out the words "on questions of law alone;" that prevailed. That left it that an appeal could lie upon both questions of law and fact in all cases from the district court. Now, I think he agrees with me that in equity cases that is right, but in law cases where the facts have been found by a jury, the supreme court ought not to have a right to review those facts except it be for purposes of determining the legal question involved.

Mr. EVANS (Weber). I want to ask Mr. Thurman a question, and also Mr. Varian. I am convinced that the way that reads, that in the supreme court you could take your witnesses and have a retrial before the supreme court. I do not believe that either of the gentlemen intend that. It says upon both questions of law and fact, just as an appeal is taken from a justice's court to the district court, on both questions of law and fact, and there is no question but what a man could go into the supreme court with his witnesses and have another trial, and I do not believe that was ever intended by the mover.

Mr. VARIAN. I call the gentleman's attention to the fact that the all-important provision there is "under such regulations as may be provided by law." Now, of course, the statute as we have it now, if it is continued over, will regulate that. We must assume that the Legislature will regulate it.

Mr. EVANS (Weber). I think the words, "an appeal on questions of both law and fact," are well understood and well defined by the courts. It means a retrial of the issue. Now, if they would say, "upon the record," or something of that kind, so that the supreme court may review the fact in equity cases, it would be all satisfactory, but we certainly do not want to get the idea here that a jury can be called in the supreme court and witnesses can be introduced there and have a trial of the entire issue, and I believe this is broad enough to cover that state of facts.

Mr. VARIAN. Let me call your attention to the fact that in another section the jurisdiction of the supreme court is limited to appellate jurisdiction. It does not mean original jurisdiction.

Mr. THURMAN. It does not mean a trial.

Mr. VARIAN. The general rule in regard to equity causes is that the evidence is taken by what we call depositions; that is, it is taken down in writing; witnesses are never called in equity cases, except in accordance with the code statute, and this means appellate jurisdiction. Whatever may be in the record of the court below would be taken to the court above.

Mr. EVANS (Weber). I would like to call the attention of the Convention again to this matter. I am satisfied it is a mistake. I do not believe that there is any gentleman but what would agree with me that an appeal from the justice's court to the district court would be a trial anew before a jury, and the recalling of the witnesses and a re-examination of all the facts. Now, the clause in that section relating to appeals from justices' courts to the district court reads as follows:

> And also appeals shall lie from the final judgments of justices of the peace in civil and criminal cases, to the district court, upon both questions of law and fact.

Mr. VARIAN. What interpretation does the gentleman give the word appeal in this amendment? "The appeal

shall be," on certain questions. That is, the appeal shall be from questions of law and fact. It does not mean the original jurisdiction.

Mr. EVANS (Weber). "And appeals also shall lie from the justice's court to the district court upon both questions of law and fact." It is an appeal from the justice's court to the district court, just as it is an appeal from the district court to the supreme court, and if it is construed that a trial will be had anew in the district court, from the justice of the peace, then it would certainly be so in an equity case, because the language is identical. I would like to have that amended in some way so that it would be upon the record made in the district court.

Mr. THURMAN. Mr. President, I will accept an amendment proposed by the gentleman, an appeal on the record if there can be any sort of doubt about it. There is not any in my mind.

Mr. EVANS (Weber). Mr. President, I will offer an amendment to that after the word fact:

In equity cases the appeal may be on both questions of law and fact as made upon the record in the court below.

Mr. MALONEY. Does Mr. Thurman mean to cut off an appeal from orders after final judgment?

Mr. THURMAN. I think it is provided for lower down in the section.

Mr. MALONEY. I did not know whether I understood your amendment. I am in favor of leaving it to the Legislature. This may not work well and they may want to change it.

Mr. EICHNOR. Mr. President, I do not know how many amendments are before the house, but I am opposed to all amendments. The way it was amended the other day I think it is right.

Mr. EVANS (Weber). Mr. President, I desire to withdraw the amendment which I suggested. I am just like Mr. Eichnor. There is great danger in this section.

Mr. SQUIRES. Mr. President, I am waiting patiently for the lawyers to agree so I shall know how to vote on this proposition. I wish they would put their heads together and fix this thing up.

Mr. EVANS (Weber). Mr. President, I can get this matter before this Convention very readily. I move as an amendment that the words, "on questions of law alone," be inserted after the word court, in line 3.

Mr. CREER. The words that were stricken out the other day?

Mr. EVANS (Weber). The words that were stricken out the other day, on Mr. Varian's motion, that they may be reinstated.

Mr. VARIAN. Mr. President, I suggest as point of order, that amendment is not pertinent now. It is not an amendment to the amendment, and the amendment to the section covers those three lines. Mr. Thurman offers an amendment to those three lines as a substitute. Now, Mr. Evans comes in with an amendment to the three lines of the section. It is not an amendment to Mr. Thurman's amendment. Mr. Evans must wait, unless he chooses to amend Mr. Thurman's amendment, until we get through with that.

The PRESIDENT. The point of order is well taken.

Mr. EVANS (Weber). Then, Mr. President, as a part of my remarks, I want to state my reasons for voting down the amendments offered. I want to state right here in the beginning that this section was drawn—and I think that I will not be guilty of any breach of courtesy if I name the gentleman—by Judge Sutherland and other wise lawyers who assisted the committee in this matter of the jurisdiction of courts. It is a well established principle that appeals to the supreme court ought to be on questions of law alone. These words which were stricken out will work a great hardship on those people who are least able to stand it.

You let a supreme court have power to review the facts that a district court has had the right to review, and the chances are that the man who is least able to stand the reversals will have to bear the burden. Take it, gentlemen, in cases of railroad corporations, where an individual is injured by a company, and suppose a supreme court has the right to review the facts in that case; suppose a consideration of the facts were not conclusive by the trial court, where it sits and sees the witnesses and their conduct, their manner, and their deportment upon the witness stand, and is capable then and there of judging as to whether the witness is telling the truth or not—take all that away, take the cold record into the supreme court, and permit a review upon the facts, and injury will result to that very class of people who are least able to afford it. It is a well recognized and understood principle of law, that a trial court is the best judge of the facts, and if he tries the case correctly, sees the witnesses, and their conduct and deportment, and determines what the truth is, the facts ought to remain there, and the supreme court ought to have nothing to do except to review any mistakes or errors which might have occurred by reason of some question of law. Some gentlemen might say that the supreme court would not even have the right to examine into the evidence for the purpose of ascertaining whether the facts alone justified the verdict; but that is not true. If all the facts taken together do not as a matter of law justify the verdict, the supreme court will reverse the case. But this principle of permitting a supreme court that is far removed from the people, and from the witnesses, to determine upon a question of fact which it is the peculiar province of the trial court to determine, is wrong in principle, and ought not to be permitted in a constitution. And I affirm here now that even if the substitute offered by Mr. Thurman be adopted, that there will be a retrial upon questions of fact in the supreme court. Every decision will so hold. Every court will so hold when it comes to construing it. As this is now drawn, it is in conformity with the constitutions that are usually written, it is in conformity with the statutes where the jurisdiction of the courts is defined, and this question here of a departure such as that which is now proposed, is dangerous in the extreme. We might as well abolish our territorial courts altogether, and just have a supreme court, who can review the facts—with judges that are far removed from the people, that are not so closely in touch with them as these trial judges who sit, and see and examine the evidence carefully, scrutinize the witnesses, know the impulses and environments, and all that—to take that away from those courts would be an outrage, a shame, and unprecedented. So that I say, that the words which were stricken out the other day ought to be reinserted and the section left just as it was reported by the committee.

Mr. VARIAN. Mr. President, it seems to me the gentleman is not using his usual discrimination. This is not a question of appeal to prejudice. It is not a question of railroad corporations, nor one of the trial of causes against them. I quite agree with him, and I think my friend Mr. Thurman quite agrees with him, that in law cases—that means all cases that under any circumstances can be tried by a jury—the determination of the question of fact ought to end with the trial court; but we have in our system a system of equity law which never has been and probably never will be subjected to the trial by jury. It is entirely distinct in every way. Until within a few years, in the states of the western coast and in New York, the evidence in that class of cases was never taken before the court in person, by the witnesses appearing in person. It was taken by deposition or in writ-

ing and it was passed upon by the trial court and the appellate court, questions of law arising in such cases being so necessarily connected and involved with the questions of fact, which, ever shifting and changing as they do, present new phases and questions of equity law. So that in the main you may say that an equity cause is always a question of law. Now, we quite agree with my friend, Mr. Evans, upon this question, and when these words were stricken out the other day, it was with the avowed purpose and the distinct understanding, as I remember it, that some substitute would be arranged for, to cover the ground, to be presented at this time. Mr. Thurman has presented that substitute for those words, making the distinction clearly between law cases and cases of equity. It is the distinction that is preserved in the Constitution of the United States, in the seventh amendment, which provides that in all cases of a trial by jury, the question shall not be reviewed in any other way except as at the common law. That is, by the trial courts. There the matter ends, just as my friend suggests, but that does not interfere with the equity system which prevails in the federal courts. It prevails, here for that matter. Now, all that is asked by this substitute is that it shall be made perfectly clear that the supreme court shall not be restricted of the jurisdiction that prevails everywhere, in every state in the Union and in the federal court, of reviewing questions of fact in equity causes, because they cannot review the questions of law without they review and decide the question of fact appearing upon the record. Nor, do I think that the fear and apprehension expressed by my friend that this language may or will be construed so as to give the supreme court original jurisdiction in those causes is well founded. It means just what it says. First, in a preceding section the court shall have appellate jurisdiction; second, in the exercise of that appellate jurisdiction, it may not in questions of law review questions of fact; it may in equity causes review questions of fact as they are now reviewed and have been ever since the system of equity came into existence four or five hundred years ago. That is all, as I understand it, but if I am mistaken in the construction of my friend's amendment, he may correct me——

Mr. EVANS (Weber). Permit me to ask a question. If an appeal be allowed in an equity case, even upon questions of fact, would not the supreme court have the right to determine where the truth lies, where there is a conflict in the evidence?

Mr. VARIAN. Of course.

Mr. EVANS (Weber). That is to say, if one set of witnesses swear to one state of facts and another set of witnesses swear to another state of facts, you would not let the trial court determine which told the truth?

Mr. VARIAN. Precisely.

Mr. EVANS (Weber). You would permit the supreme court to review that conflict?

Mr. VARIAN. Certainly.

Mr. EVANS (Weber). Is there any authority for that anywhere under our American jurisprudence?

Mr. VARIAN. Mr. President, I am astounded at the question coming from the source that it does. I am actually astounded. The authority is everywhere. It began with the chancellors from the first in England. It is exercised to-day by the supreme court of the United States, and it is right that it should be. The system is complex. It is very different from the system at law. It is necessary that certain rules which are the fundamental landmarks in the administration of equity jurisprudence should be maintained, and in order to maintain them it is necessary in every case that the facts should be considered. It would be a monstrous proposition if you would confine that system as

you do the legal system, to the determination of the facts in each case, to the trial by jury, to that of the trial judge. You would have a different system in the administration of equity law in every district in the State. Now, that is not analagous at all to the trial by jury. In a case at law, when the facts are to be tried by a jury, they are clean cut; they only relate to questions of fact and are not connected in that sense with questions of law, and the jury find the facts—that is, the man did so or he did not do so; that is, the note was given or it was not given; that is, the fatal blow was stricken or it was not stricken; there was malice or there was not malice; and upon that finding as it shall be expressed, the judgment of the law is pronounced by the court. On all those questions I quite agree with the gentleman that there ought to be no review. It invades the right of trial by jury. But this is entirely a different question. We are discussing now a question of a different system, or at least a different part of the same system of jurisprudence. Equity and law go hand in hand, it is true, side by side; they are determined by different principles, determined in different ways and by different judges, and they ought to be.

Mr. EVANS (Weber). Mr. President, it may be contrary to the rules—I know this Convention has indulged me many times, probably more than it should, but I would like to make a few remarks respecting this question. No one else seems to want to speak. If any one does, I will yield at once. As I understand Mr. Varian now, he would permit the supreme court in an equity case to review a conflict in the evidence. I regret sincerely that he and I should differ so much with respect to the decisions of the supreme court of the United States upon that question, because I never heard it questioned before that the supreme court would not deal with a direct conflict in the evidence, and the reason for it is this, gentlemen: As I stated before, but did not elaborate upon it, the trial court, in a case of equity, has as many conflicts in the evidence as it does in a case at law. He sees the witnesses, examines them carefully. Why, you know, sometimes a man may swear that black is white or white is black, but that does not make it so. The record may show the strongest kind of a case in favor of a client, when you read it coldly as written out, and yet a judge sitting upon the bench might read right in the face of that witness a lie in every word and sentence that he utters; and you would permit the supreme court, would you, to pass on that question, when it is without the necessary and essential means of determining the truth or falsity of the testimony? And another thing, if this principle be adopted, that an equity case can be reviewed upon a conflict in the evidence, then take for illustration one of those classes of cases which are familiar to you all. Take a water case among the farmers. One set of witnesses will swear that a certain quantity of water was appropriated at a certain time by a certain person. Another set of witnesses will swear that the appropriation was made prior to that time by the other party. There will be a direct conflict in the evidence. The trial judge in many cases goes out and examines the water ditches; he looks at the quantity of water flowing; he examines the premises. This is frequently the case in equity cases, not only in water cases, but also in mining cases. He goes down into the shaft, through drifts and stopes and levels, and examines everything to ascertain whether or no the witnesses have told the truth. Now, gentlemen, if this cold fact can be reviewed by the supreme court, the supreme court would not be likely to do these things. It would not examine the witnesses, it would not see their

deportment, probably would not examine the premises, or go into the mines and make an examination to ascertain what the fact is, but would take a conflict of evidence before it, and have the right to determine which set of witnesses told the truth and which swore falsely. I do affirm, that no such system of jurisprudence was ever inaugurated in any civilized government, English or American.

The rule is this, that the chancellor hears all the evidence; from that evidence he makes a finding of fact, which finding of fact may be reviewed by the supreme court, or all the evidence might be taken up with the finding of fact for the purpose of ascertaining whether the chancellor came to the correct conclusion or found the proper facts. And if the evidence shows that he did not find the proper facts, or if the facts do not justify the conclusion, then the supreme court, as a matter of law, reverses the chancellor and his case is retried, but not tried by the supreme court. It is returned to the chancellor again for a retrial where the witnesses can again be summoned and brought into court and examined as they were originally. But this system would simply overturn every foundation principle of American jurisprudence, to permit a supreme court, sitting away from the people and away from the witnesses, to determine what their motives and their promptings were at the time they gave their evidence. This section is right as it stands. It is in the interest of every honest litigant. It is in the interest of the people and in the interest of a good system of jurisprudence. Any other system would overturn that system, which has long since been established.

Mr. THURMAN. Mr. President, when the motion was made the other day to strike out these words, I was the only one who voted against it. I thought it very singular that it was so nearly unanimous, but my voice was so lonesome when I voted that it almost frightened me. Now, I objected, and I went over it with the gentleman from Salt Lake, Mr. Varian, and told him I was dissatisfied with that action, that I did not want the supreme court to have the right to try questions of fact, particularly where they had been passed upon by a jury, and that the verdict of the jury should be final as to facts. He agreed with me that that was the case, but wanted it made applicable to equity, so you had a substitute which provides as it has been read, that the right of appeal is absolute in all cases, under such regulations as may be provided by law. In equity cases, it may be upon both questions of the law and fact. In cases at law it shall be upon questions of law alone. Now, there is an appeal allowed to-day for insufficiency of the evidence, whereby the supreme court can even review the facts passed upon by a jury, and in some cases say that the jury found wrongly. There they passed upon the facts, and I take it that that is what this means, that we do not want to permit the supreme court to pass upon even the sufficiency of the evidence. Because for the trial judge to say to a jury that they shall be the sole judges of the facts and the sufficiency of the evidence and the weight of it, and after they have decided it under those instructions, to have some other man or set of men review that and say that the jury decided wrong, is not to leave the facts with the jury, and for that reason we want it understood here that in cases at law where a jury passes upon the facts, there should be no review of the facts by the supreme court; but in cases of equity that it might continue just as it is to-day under existing law. Now, I will be frank, it may be my ignorance—if that means anything more than it does to-day, that the court may review the facts for the purpose of determining the sufficiency of the evidence, then I agree with the gentleman and

am not in favor of it, but I take it that that is all it means.

Mr. EVANS (Weber). I thank you for your kindly expressions on this matter. Mr. Varian thinks the supreme court would have the right to determine the fact where the evidence is conflicting, and I want to call your attention further to the fact that the section as you propose gives the supreme court the right to review the facts. If they have the right to review the facts, have not they the right to review a conflict in the evidence?

Mr. THURMAN. Now, they have a right to review the facts under such regulations as may be provided by law. That is a part of my amendment, and I say that it means more than simply fixing a bond and all that, but that it gives to the Legislature the right to regulate the appeal and the extent of it, and I think that it means exactly what our system is to-day. And in relation to these railroad companies and railroad cases, permit me to say this, that where a case is tried by the court alone (and equity cases are always tried by the court alone) it might be very convenient for the poor man to have some other court have a right to review the facts to some extent.

The question being taken on the amendment of Mr. Thurman, the Convention divided, and by a vote of 36 ayes to 29 noes, the amendment was agreed to.

Mr. EVANS (Weber). Mr. President, I change my vote to the affirmative for the purpose of moving a reconsideration.

Mr. VARIAN. I object. The gentleman cannot change his vote after the decision is announced.

Mr. EVANS (Weber). I cannot vote for this judicial article with that amendment in it, and will not.

Mr. VARIAN. Mr. President, I will say this, if after the section is passed the gentleman requests it, I will give notice of reconsideration myself.

The PRESIDENT. Will that be satisfactory?

Mr. EVANS (Weber). That will be very satisfactory indeed.

Mr. EICHNOR. Mr. President, I move to strike out section 9.

The motion was rejected.

Mr. RICHARDS. Mr. President, I move to strike out the word "an," at the end of line 3, section 9, and the word "appeal," in the beginning of line 4, be made to read "appeals."

The amendment was agreed to.

Sections 10, 11, 12, 13, 14, 15, 16, 17 and 18 were read.

Mr. EICHNOR. I would ask the chairman of the committee a question with regard to section 18. Many constitutions provide that all criminal prosecutions should be as against the peace and dignity of the state.

Mr. GOODWIN. That was put in and stricken out; I do not remember how. I believe it was on the ground that it did not amount to anything. That is something I am not at all particular about.

Sections 19 and 20 were read.

Mr. EVANS (Weber). Mr. President, I want to call attention to section 19, to show the consistency of the vote taken a while ago. There shall be but one form of civil action, and law and equity may be administered in the same action. You have a case of law and equity mixed. How would that be? Would the case be divisible for purposes of appeal.

Mr. VARIAN. Yes, it is, and has been so.

Mr. EVANS (Utah). Mr. President, I move to amend section 20 by striking out the words, "and mileage."

Mr. CREER. Mr. President, I have a substitute as follows:

Until otherwise provided by law, salaries of the supreme judges shall be three thousand dollars a year, paid quarterly, and that of the district judges twenty-five hundred dollars a year, paid quarterly, and their mileage.

Addendum C

SPECIAL REPORT AND RECOMMENDATIONS TO THE INTERIM JUDICIARY COMMITTEE AND THE UTAH SUPREME COURT

OCTOBER, 1989

SPECIAL REPORT TO
THE INTERIM JUDICIARY COMMITTEE
AND THE UTAH SUPREME COURT

I. INTRODUCTION

During the 1989 legislative session, the legislature enacted House Bill 5 which repealed Title 77, Chapter 35, known as the Rules of Criminal Procedure. The legislation was enacted to transfer the Rules of Criminal Procedure from the legislature to the Utah Supreme Court consistent with the Court's rulemaking authority under Article VIII. The act also established a seven member committee to review Title 77, Chapter 35 of the Utah Code, to determine which provisions, if any, should be reenacted as substantive law by the legislature and to submit its recommendations to the Interim Judiciary Committee and the Supreme Court.

The following report was prepared by the 7 member committee pursuant to House Bill 5 and contains a chronology of events, a description of the committee's procedures, a discussion of the distinction between substantive and procedural rules and the recommendations of the committee.

II. CHRONOLOGY OF EVENTS

In 1985, Article VIII Section 4 of the Utah Constitution was revised to vest authority with the Supreme Court for the adoption of rules of procedure and evidence for the courts of the state. (A copy of Article VIII is attached as Exhibit 1)

On January 13, 1989, the Utah Supreme Court, pursuant to its constitutional rulemaking authority, adopted, with two exceptions, Title 77, Chapter 35, as the Supreme Court's Rules of Criminal Procedure. These exceptions were Sections 77-35-12(g) and 77-35-21.5(4)(c) and (d) which had previously been ruled unconstitutional by the Court. (A copy of the Supreme Court's Minute Entry is attached as Exhibit 2.)

During the 1989 legislative session, the legislature enacted House Bill 5 which repealed Title 77, Chapter 35 consistent with the Utah Supreme Court's authority under Article VIII. The bill also established a seven member committee to review the Rules of Criminal Procedure contained in Title 77, Chapter 35 and determine which provisions should be reenacted as substantive law by the legislature. The bill provided that the members of the committee were to be appointed by the president of the Senate, the speaker of the House and the State Court

Administrator and that the Office of the Court Administrator would provide administrative and research assistance. (A copy of H.B. 5 is attached as Exhibit 3.)

Those sections of the bill which provided for the repeal of Title 77, Chapter 35 do not take effect until July 1, 1990. That section of the bill which established the committee took effect on April 24, 1989 to provide the committee with adequate time to review Title 77, Chapter 35 prior to the effective date of its repeal.

In May, 1989, the president of the Senate and the speaker of the House each appointed two of the following members of the State Legislature to serve as members of the House Bill 5 Committee: Senator Lyle W. Hillyard, Senator Craig Petersen, Representative Byron L. Harward, and Representative Stanley M. Smedley. In June, 1989, the Court Administrator's Office appointed Edward Kimball, Professor at the J. Reuben Clark College of Law, Brigham Young University; John Hill, Executive Director of the Salt Lake Legal Defenders' Association; and Rodney Snow, partner in the law firm of Clyde and Pratt to serve as members. Carlie Christensen, General Counsel for the Court Administrator's Office, was assigned to provide administrative and research assistance to the committee.

III. COMMITTEE PROCEDURE

In accordance with the directive of House Bill 5, the committee scheduled a series of meetings during the months of June through October, 1989. During these meetings, the committee members reviewed the scope of the Supreme Court's rulemaking authority, researched the case discussing the definitions of and distinction between substantive and procedural rules, reviewed the federal rules of criminal procedure and the classifications adopted by the United States Supreme Court and Congress, and reviewed legal memoranda prepared by the Office of Legislative Research and General Counsel and General Counsel for the Court Administrator's Office. (A copy of the memorandum prepared by General Counsel reviewing the case law, the comparative table of the state and federal rules, and the memorandum prepared by the Office of Legislative Research and General Counsel are attached as Exhibit 4.)

After studying these authorities, the committee undertook a review and analysis of each rule contained in Title 77 Chapter 35 and made recommendations as to whether a rule was procedural and should be repealed from Title 77, Chapter 35 or whether the rule was substantive. If the rule was substantive, the committee considered whether the substantive provision existed independent of the rule, i.e. in the state or federal constitution, case law or

state statute, and therefore, could be repealed without affecting its substance or whether the provision was the exclusive basis for the substantive provision and should be reenacted as legislation.

IV. SUBSTANTIVE AND PROCEDURAL LAW

The decisions of both state and federal jurisdictions are similar regarding the difference between substantive and procedural rules. Most jurisdictions recognize substantive law as the law which creates the duties, rights and obligations which establish a cause of action; and procedural law as the method of enforcing those rights or obtaining redress for their invasion. Carlucci v. Utah State Industrial Commission, 725 P.2d 1335 (Utah 1986).

In the area of criminal law, substantive law defines those acts which are crimes and prescribes the punishment for those crimes. Procedural law provides or regulates the steps by which those individuals who violate a statute are punished. State v. Augustine, 416 P.2d 281 (1966).

A practical application of this standard is as follows: substantive law determines, in and of itself the outcome of the proceeding, while procedural law is just one step towards the final determination. For example, where state law provides that a defendant may have 6 peremptory challenges to a jury panel, a reduction in the number of peremptory challenges available to the defendant would not affect the outcome of the criminal proceeding, change the substantive elements of the offense or affect the defendant's constitutional rights. Accordingly such a provision is procedural rather than substantive. Simpson v. Wyrick, 527 F. Supp. 1144 (W.D. Mo. 1981).

V. RECOMMENDATIONS

Based upon the foregoing definitions and standards, the committee analyzed, debated and voted upon each rule contained in Title 77, Chapter 35. The following tables contain a list of each rule number and its title, the committee's recommendation, and an explanation of the recommendation.

In making these recommendations, the committee is mindful of the fact that there is likely to be more than one viewpoint regarding the distinction between substance and procedure and where that line is drawn may vary depending upon the context within which the decision is made. In general, however, it was the committee's view that the distinction should emphasize the difference between the rights of the parties and the methods for enforcing those rights.

RULE	TITLE	RECOMMENDED CLASSIFICATION AND DISPOSITION	EXPLANATION
1	Application and Effective Date of Rules	The rule is procedural and should be repealed.	
2	Calculation of Time	The rule is procedural and should be repealed.	
3	Service and Filing	The rule is procedural and should be repealed	
4	Prosecution of Public Offenses — Contents of Indictment and Information	The rule is procedural and should be repealed	
5	Filing of Information and Indictment	The rule is procedural and should be repealed	
6	Warrants and Summons	The rule is procedural and should be repealed	
7*	Proceedings before Magistrate	The rule contains both substantive and procedural provisions, but should be repealed.	Subsection (B)(c) provides that the dismissal or discharge of a prosecution at the preliminary examination does not bar a subsequent prosecution and is substantive. This provision should be repealed because it is contained in the constitution's prohibition against double jeopardy and in Title 77, Chapter 1, Section 6 which specifically enumerates the rights of a criminal defendant. Subsections (8),(9) and (11) all govern the management and admissibility of evidence and are substantive. These provisions, however,

RULE	TITLE	RECOMMENDED CLASSIFICATION AND DISPOSITION	EXPLANATION
7*	Proceedings Before Magistrate (Continued)		should be repealed because they are rules of evidence and within the Supreme Court's rulemaking authority.
8	Appointment of Counsel	The rule is substantive but can be repealed.	The right to appointed counsel is substantive, however, the rule can be repealed because the right to counsel is constitutionally mandated and provided for in Utah Code Ann. Section 77-32-1.
9	Joinder of Offenses and Defendants	The rule is procedural except for subsection (d) which is substantive. The rule, however, can be repealed.	Subsection (d) gives the defendant the right to sever a trial of multiple offenses or defendants under specific circumstances and is substantive. The rule, however, can be repealed because the right to sever is part of the defendant's right to a fair trial and exists in case law independent of this provision.
9.5	Charged Multiple Offenses	The rule is procedural and should be repealed	
10	Arraignment	The rule is procedural and should be repealed	
11	Pleas	The rule is procedural except subsection (1) which is substantive. The rule, however, can be repealed.	Subsection (1) gives the defendant a right to counsel at arraignment and is substantive. The rule, however, can be repealed because the right to counsel is constitutionally mandated, provided for by statute, and exists independent of this rule.

RULE	TITLE	RECOMMENDED CLASSIFICATION AND DISPOSITION	EXPLANATION
12	Motions	The rule is procedural and should be repealed.	
13	Pretrial Conference	The rule is procedural except subsection (a) which is substantive. The rule however, can be repealed.	Subsection (a) gives defendant the right to appear at the pretrial conference. The rule, however, can be repealed because the right to counsel is constitutionally mandated, provided for by state statute and exists independent of this provision.
14	Subpoena	The rule is procedural except subsections (a), (e) and (g) which are substantive. The rule, however, can be repealed.	Subsections (a) and (e) establish the subpoena power of the court; and subsection (g) establishes that failure to comply with a subpoena constitutes contempt. The rule, however, be repealed because the subpoena power of the court and the acts which constitute contempt are established in Title 78, Chapter 7 of the Code.
15**	Expert Witnesses and Interpreters (	The rule is procedural except subsection (a) which is substantive. The committee, however, recommends that the rule be repealed and that the language specifying the responsibility for payment of expert witnesses be enacted as part of Utah Code Ann. Section 77-32-5.	Subsection (a) places responsibility for the payment of expert witnesses on local government.

RULE	TITLE	RECOMMENDED CLASSIFICATION AND DISPOSITION	EXPLANATION
15.5*	Visual Recording of Testimony in Child Abuse	The rule is procedural except subsection (1) which is a rule of evidence. The rule, however, should be repealed.	Subsection (1) provides that a videotaped statement is admissible as evidence. The rule, however. should be repealed because subsection (1) is a rule of evidence and within the Supreme Court's rulemaking authority.
16	Discovery	This rule is procedural except subsection (a)(4) which is substantive. The rule however, can be repealed and subsection (a)(4) referred to the Supreme Court's Advisory Committee on Criminal Procedure to determine whether the duty established by rule is consistent with the case law.	Subsection (a)(4) establishes the duty of the prosecutor to disclose exculpatory evidence and is substantive. The rule however, can be repealed because the prosecutor's duty is constitutionally mandated, established by the decisions of the United States Supreme Court and exists independent of this rule.
17	The Trial	The rule is procedural except subsections (a) and (c) which are substantive. The rule, however, can be repealed.	Subsection (a) gives the defendant the right to appear and defend in person and by counsel; and subsection (c) requires that all felony cases be tried by a jury unless waived by the defendant. The rule, however, can be repealed because the right to appear in person and the right to a jury trial are constitutionally mandated and exist independent of this rule.
18	Selection of Jury	The rule is procedural and should be repealed.	
19	Instructions	The rule is procedural and should be repealed.	

RULE	TITLE	RECOMMENDED CLASSIFICATION AND DISPOSITION	EXPLANATION
20	Exceptions	The rule is procedural and should be repealed.	
21	Verdict	The rule is procedural except subsection (b) which is substantive. The rule, however can be repealed.	Subsection (b) provides that a jury verdict must be unanimous and is substantive. The rule, however, can be repealed because the right to a unanimous jury verdict is constitutionally mandated and exists independent of this provision.
21.5**	Guilty and Mentally Ill	The rule contains both substantive and procedural provisions, but should be repealed and reenacted as substantive legislation except for subsections (4)(c) and (d) which have previously been held unconstitutional by the Utah Supreme Court.	Rule 21.5 contains the following substantive provisions: the standards for a verdict of guilty and mentally ill, the sentence for a defendant who is found guilty and the sentencing alternatives for the court. The rule also provides for the maximum length of commitment and specifies who is authorized to provide care and treatment. The rule contains procedural provisions setting forth the steps for a criminal commitment. Because the rule is predominantly substantive, and because other legislative provisions exist which govern criminal commitments, the rule should be reenacted as substantive legislation.
22	Sentence, Judgment and Commitment	The rule is procedural and should be repealed.	
23	Arrest of Judgment	The rule is procedural and should be repealed.	

RULE	TITLE	RECOMMENDED CLASSIFICATION AND DISPOSITION	EXPLANATION
24	Motion for New Trial	The rule is procedural and should be repealed.	
25**	Dismissal without Trial	The rule is procedural and should be repealed except subsections (d) and (e) which are substantive and should be reenacted as legislation.	Subsection (d) provides that a dismissal of charges is not a bar to further prosecution except under specified circumstances such as unconstitutional delay or statute of limitations. Subsection (e) prohibits dismissal of a misdemeanor by compromise of the misdemeanor is committed by or upon a peace office and is substantive. These limitations on further prosecutions do not exist independent of this rule.
26	Appeals	The rule is procedural except subsections (2), (3) and (9) which are substantive. The rule, however, should be repealed.	Subsections (2) and (3) govern the scope of the prosecution's and defendant's appellate rights and are substantive. Subsection (9) limits the number of appeals and is substantive. The rule, however, should be repealed because these provisions are within the Supreme Court's authority to govern the appellate process.
27	Stays Pending Appeal	The rule is procedural and should be repealed.	
28	Disposition on Appeal	The rule is procedural and should be repealed	
29	Disability and Disqualification of Judge/Change of Venue	The rule is procedural and should be repealed.	

RULE	TITLE	RECOMMENDED CLASSIFICATION AND DISPOSITION	EXPLANATION
30	Errors and Defects	The rule is procedural and should be repealed.	
31	Rules of Court	The rule is substantive, but should be repealed and referred to the Judicial Council and Supreme Court for study.	This rule confers rulemaking authority on the local courts and is substantive. The rule, however, should be repealed because the Constitution provides that Supreme Court and the Judicial Council have the rulemaking authority for the judiciary.
32	Minute Entry	The rule is procedural and should be repealed.	
33	Regulation of Conduct in the Courtroom	The rule is procedural and should be repealed.	

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*These provisions are rules of evidence which are categorized as substantive law in most jurisdictions. New York Life Ins. Co. v. Rogers, 126 F.2d 784 (9th Cir.); State v. Pavelich, 279 P.1102 (Wash.); and Zell v. American Seating Co., 138 F.2d 641 (2nd Cir.). But see Buhler v. Madison, 176 P.2d 118 (Utah 1947) where the Utah Supreme Court concluded that rules of evidence are matters of procedure. For purposes of the Committee's responsibility, however, the distinction may not be critical inasmuch as the Utah Supreme Court has the authority to adopt rules of procedure and evidence for the courts of this state. See Utah Con. Art. VIII Section 4.

**These provisions are substantive, do not exist independent of the rule, and should be reenacted as legislation.

VI. CONCLUSION

The committee's conclusions are that House Bill 5 should take effect on July 1, 1990 as originally enacted and that the Office of Legislative Research and General Counsel should prepare legislation which reenacts the substantive provisions contained in Sections 15, 21.5 and 25 of Title 77, Chapter 35. The committee also recommends that the statutory cross-references contained in those sections which will be repealed, be referred to the Supreme Court's Advisory Committee on Criminal Procedure for correction, that Rule 16 be referred to the Supreme Court Committee for further study and that Rule 31 be referred to the Supreme Court and Judicial Council for study.

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