Case No. 20180788-SC

IN THE

UTAH SUPREME COURT

TROY MICHAEL KELL,
Petitioner/Appellant,

v.

STATE OF UTAH,
Respondent/Appellee.

Brief of Appellee

Appeal from the denial of a petition for post-conviction relief, in the Sixth Judicial District, Sanpete County, the Honorable Wallace Lee presiding

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INTRODUCTION

"Both the state and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). But "not all petitioners have an incentive to obtain…relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). Indeed, "capital defendants, facing impending execution, seek to avoid being executed. Their incentive, therefore, is to utilize every means possible to delay the carrying out of their sentence." *Lindh v. Murhpy*, 521 U.S. 320, 340 (1997) (Rehnquist, C.J., dissenting); *see also Ford v. Wainwright*, 477 U.S. 399,

429 (1984) (opinion of O'Connor, J.) (noting "the potential for false claims and deliberate delay in [capital] context is obviously enormous"). For a petitioner sentenced to death, delay is its own reward.

This appeal—Troy Kell's fourth pass through this Court—perfectly illustrates that well-recognized truism. One would strain to imagine more suitable circumstances for the imposition of a death sentence without misgivings for the possibility of a false conviction or about just desert: Kell, a white supremacist already serving life in prison without possibility of parole for murder, murdered fellow inmate Lonnie Blackmon merely because he was African-American. The murder was caught on videotape. Those facts have never been in dispute, and a jury sentenced him to death.

But twenty-six years later, Kell's case limps along, apparently no closer to conclusion than it was the last time this Court considered it in 2012. Just when the federal court seemed ready to finally dispose of Kell's habeas petition, his legal team decided it was suddenly the right time to present claims in state court based on juror declarations obtained fully five years earlier. Irrespective of the contents of those declarations, Kell obviously withheld and then strategically deployed them. This was not a good faith effort to obtain post-conviction relief on a meritorious claim. If that had been Kell's goal, he would have pursued this claim with all haste.

But he didn't. He withheld the claim and the supporting evidence—for *five years*—springing them only when they would most effectively stall the final disposition of his federal habeas petition and execution of his presumptively valid death sentence.

The Utah Legislature, in enacting the Post-Conviction Remedies Act (PCRA), has fairly balanced the availability of collateral remedies available to reasonably diligent petitioners against the perverse incentive capital petitioners have to delay presentation of claims for purely dilatory purposes. A petitioner who discovers new evidence and timely files the claim based on it will always have one full and fair opportunity to press the claim and obtain relief where appropriate. But a petitioner like Kell—who withholds claims for half a decade beyond his first opportunity to present them—will be cut off. This is fair because if the petitioner really thought he had something that would get him off death row, he surely would have presented it when he first had the chance. The act of withholding claims speaks to Kell's view of the claims' merits and his motives in pressing them now.

Kell obtained his juror declarations in 2012. They purport to show that Kell's sentencing judge spoke ex parte with the jury during sentencing deliberations, though only one of the jurors purports to clearly remember what the judge allegedly told the jury about how to strike the balance

between life and death. Kell then waited until 2018 to present the declarations in state court. The plain terms of the PCRA doubly barred this claim because it came (1) many years past expiration of the statute of limitations, and (2) successive to multiple opportunities Kell passed up to discover and present it.

The district court below recognized how plainly the PCRA bars this claim and correctly denied post-conviction relief on summary judgment.

Kell makes no argument that the PCRA does not, as written, bar his claim. Instead, he argues multiple extra-statutory reasons why he should be exempted from the procedural bars. But even if such exemptions were legally possible, Kell manifestly deserves no consideration of them here since he intentionally opted out of compliance with the PCRA at least as early as 2013, the most generous possible deadline to file his claim. Having chosen to forgo that statutory remedy, Kell cannot claim unfairness in judicial refusal to create special remedies *ex nihilo* just for him. And Kell has failed to show that the exemptions he requests are legally available or would benefit him even if they were.

And to the extent Kell purports to stand on equity, he deserves none. Those who seek equity must come with clean hands. *Rosenthyne v. Matthews-*

McCulloch Co., 51 Utah 381, 68 P. 957, 960 (1917) (noting "the maxim that 'he who seeks equity must do equity'"). Equity does not reward tactical delay.

The district court's judgment should be affirmed.

STATEMENT OF THE ISSUE

Did the post-conviction court correctly grant summary judgment and deny Kell's petition because it was both time and procedurally barred?

Standard of Review. This Court reviews a district court's grant of summary judgment for correctness. *Kell v. State*, 2008 UT 62,¶8, 194 P.3d 913 (citing *Taylor v. State,* 2007 UT 12,¶13, 156 P.3d 739) (other citation omitted).

STATEMENT OF THE CASE

A. Summary of relevant facts.

This crime's facts are not disputed: A prison videotape captured avowed white supremacist Troy Kell stabbing African-American and fellow inmate Lonnie Blackmon sixty-seven times in the eyes, face, neck, and back, until he bled to death. Kell was already serving a life-without-parole sentence for murder when he killed Blackmon. *See generally State v. Kell*, 2002 UT 106, 61 P.3d 1019 (*Kell I*).

B. Summary of proceedings and disposition of the court.

A jury convicted Kell of aggravated murder and sentenced him to death. *Id*. This Court affirmed Kell's conviction and sentence on direct appeal.

Id. Kell filed a petition in his first-round post-conviction relief case (PCI) in May 2003, followed by an amended petition in August 2005. *See generally* docket, case no. 030600171. This Court affirmed denial of that petition. *Kell v. State*, 2008 UT 62, 194 P.3d 913 (*Kell II*).

In 2007, while *Kell II* was still pending, the federal district court appointed Jon Sands, the Arizona Federal Defender and Kell's current counsel, to represent Kell in his anticipated federal habeas action. R726,907.

Kell then filed a rule 60(b) motion in the state case, the denial of which this Court affirmed. *Kell v. State*, 2012 UT 25, 285 P.3d 1133 (*Kell III*). This Court recognized the rule 60(b) motion for what it was—an attempt to avoid the limits on filing successive petitions. *Id.*

While the rule 60(b) proceedings unfolded, counsel sought and received a first stay of the federal case under *Rhines v. Weber*, 544 U.S. 269 (2005). R726,907.

In January 2013, seven months after this Court affirmed denial of Kell's rule 60(b) motion, Kell filed an amended federal habeas petition. R907. Kell's amended petition claimed, among other things, that the trial judge provided a supplemental instruction during the jury's penalty-phase deliberations, without notice to the parties, which Kell argued unconstitutionally shifted the burden of proof to the defense. R907-08. Kell attached declarations from

jurors that were signed in May 2012, mere days after this Court affirmed the denial of Kell's rule 60(b) motion in *Kell III.* R908.

Despite presenting this claim in his January 2013 habeas petition, Kell took no immediate action, either in state or federal court, to get relief on that claim.[1] *See generally* docket, federal case no. 02:07-cv-00359-CW. Kell waited another 5 years, until after the federal court heard final argument on whether to grant or deny the habeas petition, before asking the federal court for a second stay of the federal action to press the claim in state court. *See id.* doc. nos. 243,245.

The federal court granted Kell's motion to stay in November 2017. R38-49. The Tenth Circuit recently determined it did not have jurisdiction to review that order on appeal. *See generally Kell v. Benzon*, 925 F.3d 448 (10th Cir. 2019).

Kell filed a second state petition (PCII) on 16 January 2018. R1. The post-conviction court granted the State's summary judgment motion, ruling that Kell's supplemental instruction claim was both time and procedurally barred. R906-18. The State did not move for, and the district court did not

[1] As explained below, presentation of this claim in Kell's federal petition did not permit the federal court to consider it, and Kell did not accompany that claim with a request to pursue it in state court.

consider, summary judgment on an alternative merits basis. R750 (State's motion to stay briefing on merits response pending summary judgment on procedural defenses); R789 (order granting motion to stay merits response).

Kell timely appealed. R919.

SUMMARY OF ARGUMENT

Kell argues that the trial judge unconstitutionally shifted the burden of proof at sentencing from the State to the defense during an ex parte meeting with the jury. He supports this argument with declarations from jurors that his current counsel obtained in 2012.

But the merits of Kell's claim are not before this Court. The lower court granted summary judgment on purely procedural grounds. Kell waited many years—a minimum of five—after the statute of limitations expired before bringing the claim to state court. And Kell could have but did not bring the claim in his PCI proceedings. The district court correctly ruled that those procedural grounds barred Kell's claim.

Kell does not argue that the PCRA as written does not bar his claim. Instead, he floats a number of reasons why he thinks the current PCRA should not apply to his claim. But this Court need not consider any of Kell's proffered alternatives. Kell effectively opted out of the statutory cause of action the PCRA provided him. He tactically withheld his claim for many

years, bringing it out not when it would most likely get merits review, but when it would most effectively delay his federal habeas proceedings. With juror declarations in hand in 2012, Kell neglected this claim for more than five years. Kell got the delay in the federal court that he wanted, but that decision came with the consequence of forfeiting merits review of the claim in state court. He now asks this Court to craft an exception to the PCRA's "limitations bar," *Gardner v. State*, 2010 UT 46,¶60, 234 P.3d 1115, to excuse his calculated delay in filing his state post-conviction petition. This Court should not reward Kell's dilatory tactics with a merits review despite his lack of compliance with the PCRA's filing requirements. *See Winward v. State*, 2012 UT 85, ¶ 17, 293 P.3d 259 (articulating, but not applying, "a framework for considering a petitioner's claim that he qualifies for an exception to the PCRA's procedural bars").

Despite his decision to forgo the cause of action the PCRA gave him no later than 2013, Kell claims entitlement to the benefit of the right to counsel the pre-2008 version of the PCRA gave him. Relying on this Court's opinion in *Menzies v. Galetka*, Kell argues that the PCRA cannot bar his claim because, according to him, his PCI counsel ineffectively defaulted the claim. This argument (1) misconstrues the remedy available under *Menzies*, which is to set aside a total default of post-conviction proceedings under rule 60(b); (2)

ignores that this Court has already ruled that Kell's PCI counsel did not fall to the level of the *Menzies* total default rule; and (3) ignores that it was current counsel, not PCI counsel, who discovered, delayed, and defaulted the claim many years after PCI counsel's representation concluded. Simply put, the Arizona Federal Defender tactically withheld the claim; PCI counsel had nothing to do with it.

Kell suggests that the Court can apply an "egregious injustice" exception to excuse the procedural bars, but he fails to meet the criteria this Court has established for consideration of such a claim. First, he cannot establish a "reasonable justification" for his tactical delay—intentionally withholding the claim is the very definition of unreasonable delay. And he failed to brief the particulars of an "egregious injustice" exception or tie his proposed rule to any constitutional authority the Court has for creating one. Kell has failed to show entitlement to consideration of an "egregious injustice" exception.

Finally, Kell argues that the PCRA is unconstitutional and the Court should revert to its common law framework for reviewing collateral challenges to criminal judgments. Kell's anemic constitutional briefing merits no consideration at all. But even if it did, and even if Kell could show the PCRA runs afoul of the judiciary's inherent constitutional powers—which

the State does not concede—reverting to the common law would not help him. Under this Court's pre-PCRA case law, Kell would have the burden to show that he did not tactically withhold the claim he now wants the Court to review. He has not even attempted to shoulder that burden in his opening brief, and "that alone is a fatal misstep." *Pinder v. State*, 2015 UT 56,¶58, 367 P.3d 968. Nor could he ever shoulder it. Kell plainly withheld the claim for tactical reasons. Because any constitutional ruling in Kell's favor could never support relief, such a ruling would be merely advisory and principles of constitutional avoidance counsel against addressing the argument.

The Court should affirm the district court's grant of summary judgment.

ARGUMENT

Kell's claim is both time and procedurally barred because he withheld it for many years before presenting it to the district court.

Kell's dilatory tactics are unmistakable. Kell relies on declarations to support his claim that his capital sentencing trial was tainted. He obtained those declarations in 2012. Under the plain terms of the PCRA, he could have presented those declarations in a post-conviction petition within one year of when reasonable diligence would have led him to them. Had he done so, he would have received merits review.

But he didn't. He allowed the statute of limitations to lapse many times over, filing the claim in state court nearly 6 years after he actually had the declarations he relies on to support it. Rather than timely attempt to get relief by presenting the declarations in state court under a statute that expressly gave him a cause of action—*see* Utah Code Ann. § 78B-9-104(1)(c) (permitting cause of action where "the sentence was imposed…in violation of the controlling statutory provisions") *and id.* § 78B-9-107(2)(e) (delaying accrual of cause of action and start of statute of limitations until "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based")—Kell instead merely noted the declarations in a habeas petition to a court that, under federal law, could not even consider them. *See* 28 U.S.C. 2254(b)(1)(A) (prohibiting federal habeas relief unless petitioner first exhausts claim in State court); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("We now hold that [habeas] review…is limited to the record that was before the state court that adjudicated the claim on the merits."). Only when the federal court was poised to end Kell's habeas action—five years after he obtained the declarations and nearly four years after he noted them in his amended federal petition—did he finally decide the time was right to seek relief in state court.

The plain terms of the PCRA bar this claim, both because Kell waited more than a year after discovering the evidence on which it was based and because he failed to show that he could not with reasonable diligence have discovered and presented the claim during his first-round post-conviction review. And while Kell faults prior counsel for defaulting the claim, his brief conspicuously omits discussion of either his current counsel's five-year neglect of the claim after obtaining the declarations or the five years before that when current counsel could have investigated the claim but didn't. Kell's transparent tactical default undermines any argument he could make about prior counsel's omissions and, therefore, any excuse he seeks from the PCRA procedural bars. In any event, this Court has already recognized the abolition of extra-statutory excuses in general and the unavailability to Kell specifically of now-defunct extra-statutory excuses.

A. The lower court correctly granted summary judgment because Kell's claim is statutorily barred.

A court must grant summary judgment "if the pleadings" and other evidence show "that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). Summary judgment serves a "salutary purpose in our procedure because it eliminates the time, trouble and expense of" an evidentiary hearing

"when upon the best showing the plaintiff can make, he would not be entitled to a judgment." *Brandt v. Springville Banking Co.*, 353 P.2d 460, 462 (Utah 1960).

Once the State raises the time and procedural bars, a petitioner must disprove their application by a preponderance of the evidence. Utah Code Ann. § 78B-9-105(2). And a petitioner must also proffer admissible evidence on each element he must prove to get relief. *Archuleta v. Galetka*, 2011 UT 73,¶43, 267 P.3d 232.

For the reasons argued below, Kell's pleaded facts and proffered evidence—presumptively his "best showing"—were insufficient as a matter of law to demonstrate that he is entitled to post-conviction relief. Kell's claim is time barred because he waited more than a year after the latest possible date that his cause of action accrued. And it is procedurally barred because he could have raised it in his first post-conviction proceeding but did not. Kell failed to proffer facts that, if proved and believed, would entitle him to

relief. The district court was therefore required to grant summary judgment against him.[2]

1. Kell's claim is time barred because he filed his current petition more than one year after he knew the evidentiary facts on which it is based.

The PCRA provides that a person "is not eligible" for post-conviction relief on "any ground that…is barred by the limitation period." Utah Code Ann. § 78B-9-106(1)(e). It bars relief for claims filed more than one year after a cause of action accrues. *Id*. § 78B-9-107(1).

The PCRA provides a flexible framework for determining when a post-conviction "cause of action accrues," which happens "on the latest of" several possible dates. *Id*. § 78B-9-107(2). Those dates include, most generously, "the date on which petitioner knew or should have known, in the exercise of

[2] Kell's Point I argues that he is entitled to post-conviction relief because the trial judge violated Kell's constitutional rights by allegedly giving the sentencing jury ex parte supplemental instructions. Br.Aplt. 12-17. But that claim is not before this Court. The district court stayed consideration of the merits of Kell's claim, denied the petition on purely procedural grounds, and never reached the merits even as an alternative basis for summary judgment. R789,906-18. Indeed, the State never *asked* the district court to rule that there was no genuine fact dispute on the merits of Kell's claim and, were this Court to reverse summary judgment, might not do so on remand. In other words, if this Court reverses summary judgment on the procedural bars, it is in no position to review whether a fact dispute exists on the merits of Kell's claim.

reasonable diligence, of evidentiary facts on which the petition is based." *Id.* § 78B-9-107(2)(e). The statute allows no exceptions to the time bar.

Kell filed his amended federal habeas petition in January 2013. He identified the current supplemental jury instruction claim and supported it with the same evidence he relies on here. *Compare* R51-57 *with* R738-49 (federal case no. 2:07-cv-00359-CW, doc. no. 94 Exhs. 1-5) (Addendum C). That evidence consisted entirely of declarations signed in May 2012. He therefore unquestionably "knew…of evidentiary facts on which the petition is based" nearly six years before filing his state petition. Utah Code Ann. § 78B-9-107(2)(e). Under the most generous application of the statute, Kell had until May 2013—one year after obtaining the juror declarations—to file his petition. He chose instead to wait until January 2018, at least four and a half years too late.

Kell argues at length that his PCI counsel performed deficiently by not asserting the supplemental-instruction claim in his first post-conviction petition. Br.Aplt. 19–23. But PCI counsel's involvement is entirely beside the point since their involvement in the case ended many years earlier. Current counsel discovered the claim at least as early as 2012. Armed as Kell therefore was with the knowledge of this potential PCI ineffective-assistance claim in 2012, he waited and allowed that claim to sit idle. Because Kell

unquestionably knew of his supplemental-instruction claim no later than when he obtained the juror declarations and did not file his petition within one year of that date, the PCRA statute of limitations bars consideration of its merits or granting relief. The signing of the declarations stands as a firm boundary to measure accrual of his causes of action; it also allows the most generous possible view of the limitation period despite Kell's neglect of his reasonable diligence burden. That is, even disregarding whether Kell should have known the facts earlier, the signing of the declarations concretely demonstrates Kell's neglect of his actual knowledge of the evidence. Faulting PCI counsel does not excuse current counsel's neglect of the claim.

Rather than confront this basis for the district court's decision, Kell simply speculates that had he "filed a petition including this claim in 2013, the court almost certainly would have found that it had already been defaulted" in 2005 when the PCI judgment was entered. Br.Aplt. 25. In other words, he asserts an earlier and less generous 2005 accrual date—arguing as if accrual dates had something to do with the procedural bar—asserts a statutory right to post-conviction counsel at that time, supposes that he had filed a post-conviction petition in 2013 when he had juror declarations in hand, presumes an unfavorable court default ruling based on a presumed earlier accrual date, and argues that PCI counsel was ineffective for not

raising the supplemental-instruction claim in the 2005 collateral challenge. Br.Aplt. 24–26. Accordingly, he asks this Court for relief while turning a blind eye to his own decision to withhold the claim from presentation and adjudication once he unquestionably discovered it.

The lower court correctly granted summary judgment denying Kell's claim as time barred.

2. The PCRA bars Kell's claim because he could have raised it in his previous post-conviction petition but did not.

The PCRA bars relief for "any ground…that could have been, but was not, raised in a previous request for post-conviction relief." Utah Code Ann. § 78B-9-106(1)(d). This procedural bar has no exceptions. This section independently bars Kell's claim because, although he had not yet obtained the juror declarations during PCI review, he proffered no evidence that, if proved and believed, would have adequately explained why he could not have done so in time to discover and raise this claim the first time around.

Certainly, the PCRA does not bar a claim that a petitioner could not have presented earlier because, for example, the State withheld the evidence in violation of the constitution or the information was unobtainable. Utah Code Ann. § 78B-9-106(1)(d) (barring only those claims that "could have been" raised in a prior petition). To meet his burden to show by a

preponderance of the evidence that his claim is not barred, *see id*. § 78B-9-105(2), Kell therefore had to show how and when he discovered the juror information and demonstrate that he could not with reasonable diligence have discovered and presented it in his first state petition. Kell proffered no evidence to shoulder this burden.

Nor could he. The jurors' descriptions of their alleged interactions with the trial judge would presumably have been the same—if not clearer and more complete—immediately after trial and during the many years Kell waited until asking jurors for declarations. Kell has not said that the jurors refused until 2012 to discuss the case or that they only lately remembered the information. The most reasonable inference is to the contrary—the jurors freely gave the information and signed affidavits in 2012. With reasonable diligence Kell could have discovered and brought this claim in a motion for new trial, during PCI proceedings, or during the rule 60(b) proceedings. Kell concedes that the claim could and should have been presented earlier by faulting previous counsel for not doing so.[3]

The PCRA bars Kell's claim and the lower court correctly granted summary judgment.

[3] The State addresses Kell's arguments about prior counsel in the next subpoint.

B. Kell claims entitlement to extra-statutory excuses from the procedural bars but fails to justify examining them since they would not benefit him in any event.

Kell's argument does not make any argument that the statute as written does not bar his claim. Thus, he does not dispute that his claim falls afoul of the plain terms of the current PCRA's statute of limitations and the procedural bar against claims that could have been raised in a previous petition. Instead, he argues various reasons why he thinks he is entitled to now-defunct statutory and common law provisions. But Kell opted out of the statute that gave him a remedy. He elected to forgo the proper tool at the proper time to raise his juror-interference claim. He cannot now be heard to complain about the operation of the PCRA and certainly cannot meaningfully argue for the benefit of something outside it when it offered an avenue for relief that he forfeited by his own dilatoriness. Further, none of the extra-statutory remedies Kell argues for apply here or would benefit Kell if they did.

1. Kell cannot invoke extra-statutory remedies since he strategically opted out of the statutory remedy the PCRA provided.

As an initial matter, Kell cannot complain about operation of the statutory bars or ask this Court to craft judicial exemptions from them because the PCRA gave Kell a cause of action with reasonable limitations.

And had he complied with those reasonable limitations, his claim would not have been procedurally barred. It was his choice that inflicted on him the very injury he asks this Court to relieve him from.

Had Kell filed his petition in 2012 when he first obtained the juror declarations, or rather within a year of when he reasonably could have obtained them, the PCRA permitted a cause of action unrestricted by procedural limitations. *See* Utah Code Ann. § 78B-9-104(1)(c) (permitting cause of action where "the sentence was imposed…in violation of the controlling statutory provisions); *id*. § 78B-9-107(2)(e) (delaying accrual of cause of action and start of statute of limitations until "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based"). Had Kell exercised reasonable diligence, he could have gotten a ruling on the merits of his claim.

Kell made a tactical decision not to use the claim in a timely effort to obtain post-conviction relief. Instead, he bided his time and reserved the claim until filing it provided optimal potential to stall final judgment in his federal habeas case. He got the delay he sought—a nearly two year and counting intermission since the federal court heard argument but did not rule on Kell's habeas petition pending the outcome of this litigation. But Kell's

tactical decision came with a trade-off: to get the maximum delay Kell had to opt out of procedural compliance with the PCRA. Filing a timely petition in 2012 or 2013 would not have stalled final judgment on his federal petition—state court litigation could have been fully resolved before the 2017 argument in federal court.

By choosing maximum delay rather than procedural compliance, Kell opted out of the statutory remedy he may have had available to him. His own decisions, not the PCRA, prevented Kell from obtaining merits review of his claim. Indeed, nothing outside of Kell's control prevented him from initiating a state post-conviction petition in 2012. He had the reasonable opportunity then to have his juror-interference claim heard and determined. Kell has never argued that he could not file a procedurally compliant petition. Had he applied for post-conviction relief at his first opportunity to do so, he would have received merits review of his claim. He simply chose not to, and his choice should not be rewarded here with a judicial exemption from the consequences of that decision.

2. Ineffective assistance by PCI counsel does not excuse either the time bar or the procedural bar on Kell's claim.

Kell argues that a right to effective post-conviction counsel—read into the PCRA by a 2006 opinion from this Court, *Menzies v. Galetka*—applies to

him and its violation by PCI counsel excuses both procedural failures. Br.Aplt. 17-18 (citing 2006 UT 81, 150 P.3d 480).[4]

In *Menzies*, this Court read a statutory right to funded counsel in death-penalty post-conviction cases to include a right to the effective assistance of counsel. 2006 UT 81,¶¶79-84. In response, the Legislature amended the statute to provide, "Nothing in this chapter shall be construed as creating the right to the effective assistance of post-conviction counsel, and relief may not

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[4] In arguing that PCI counsel was ineffective, Kell relies on his own conclusion that his juror-interference claim "was defaulted in 2005, not in 2013, as the district court found." Br.Aplt. 25. This assertion is born out of speculation. *Id.* ("Had Mr. Kell filed a petition including this claim in 2013, the court almost certainly would have found that it had already been defaulted."). In any event, his assertion of trial court error runs against his own interests: both the post-conviction court and the State were willing to entertain a later and more generous date triggering the PCRA's statute of limitations. Kell's selection of the earlier and less-generous default date is important only because during that earlier PCI window he argues that he was entitled to effective assistance of post-conviction counsel. *Id.* Kell's argument thus attempts to shift blame for the default from his current counsel, who is solely responsible for the litigation decisions that allowed the statute of limitations to run, to prior counsel, who never knew about the claim. But this framework, if followed by the Court, could only logically excuse the procedural bar resulting from PCI counsel's default. It could not excuse the time bar resulting from current counsel's delay in presenting the claim. Kell has offered no argument that could simultaneously avoid both bars.

be granted on any claim that post-conviction counsel was ineffective." Utah Code Ann. § 78B-9-202(4) (West 2008).[5]

To qualify for *Menzies* relief even if this were a procedurally appropriate invocation of it, Kell would have to show that post-conviction "counsel effectively 'defaulted'" his "'entire post-conviction proceeding, resulting in the dismissal'" of Kell's post-conviction case. *Archuleta v. Galetka*, 2011 UT 73,¶167, 267 P.3d 232 (quoting *Menzies,* 2006 UT 81,¶24). And *Menzies* held that, under the previous version of the PCRA, a post-conviction judgment could be set aside under rule 60(b). *See id.* ¶¶158-69 (explaining application rule of 60(b) to allow post-judgment relief from judgment in "'unusual and exceptional circumstances'") (quoting *Menzies*, 2006 UT 81,¶71).

Menzies did not excuse a time or procedural default on a mere *Strickland* showing. Rather, this Court granted *Menzies* relief because his "counsel effectively 'defaulted'" his "'entire post-conviction proceeding, resulting in the dismissal.'" *Archuleta v. Galetka*, 2011 UT 73,¶167, 267 P.3d

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[5] Kell says it "was undisputed in the court below that Mr. Kell's post-conviction counsel provided ineffective assistance." Br.Aplt. 19. This is true enough as far as it goes since the State did not formally dispute the effectiveness of PCI counsel. But that was because PCI counsel's effectiveness is legally irrelevant to the default inquiry. The State did not concede nor did the court find that PCI counsel were ineffective.

232 (quoting *Menzies,* 2006 UT 81,¶24). *Archuleta* made plain that that is the very limited universe of *Menzies* relief—it is available only when counsel's representation "amount[ed] to willful and deliberate inaction, complete forfeiture of the entire post conviction proceeding, or gross negligence." *Archuleta*, 2011 UT 73,¶166 n14 (cleaned up). As limited, a mere *Strickland* showing is not enough for relief under *Menzies*. Kell would have to show that PCI counsel completely defaulted his case. And he would have to make that showing in a rule 60(b) motion filed in the original post-conviction case. *See id.* ¶¶158-69 (explaining application rule of 60(b) to allow post-judgment relief from judgment in "'unusual and exceptional circumstances'") (quoting *Menzies*, 2006 UT 81,¶71).[6]

But Kell has already pressed—and lost—a rule 60(b) challenge to post-conviction counsel's representation. *See generally Kell III*, 2012 UT 25. This Court rejected Kell's claim that his PCI counsel's representation justified *Menzies* relief because Kell's post-conviction "judgment…had been heard, ruled on, and appealed." *Id.* ¶20. Thus, Kell's post-conviction case had not

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[6] It is no surprise that Kell wants this Court to decide his case under *Strickland* standards, Br.Aplt. 20, since tying the procedural bar to federal law might undo the state procedural bar in federal court and undermine the finality of this Court's default findings there. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

been defaulted, and the "generous language of *Menzies* directed at default judgments" did not apply. *Id.* Whatever Kell might say about the continued applicability of *Menzies* to his PCI petition, this Court already ruled that his PCI counsel did not default his post-conviction proceedings, and that determination is res judicata. Kell is thus mistaken when he says not giving him relief now will leave him "without any avenue to enforce [his] right" to counsel under the prior PCRA. Br.Aplt. 24. He had a right to be sure, but that right was not violated as this Court already concluded, and he never had a right to *repeated* attempts to set aside the PCI judgment on an ineffective-assistance claim he previously lost.

Apparently recognizing that this Court's determination in *Kell III* would bar relief under rule 60(b), Kell instead argues that *Menzies* did not limit the relief available in that case to rule 60(b) motions or total default. Br.Aplt. 23-24. Kell argues that *Menzies* relief could come from some other procedural invocation of it, but he neither offers authority in support nor identifies what procedural lever other than rule 60(b) could properly invoke *Menzies* relief from the PCI judgment.

In fact, this Court has "essentially limited *Menzies* to its facts" and now allows relief from a post-conviction judgment only in case "of a complete default" by counsel. *Honie v. State*, 2014 UT 19,¶91-92, 342 P.3d 182 (citing

Archuleta and *Kell III*). This remedy sounds in rule 60(b) and no other procedural mechanism. Thus, rule 60(b)'s applicability in unusual circumstances to relieve a post-conviction petitioner's complete default of the proceedings comprises the limit of *Menzies*'s remedy.

And this Court held in *Kell III* that rule 60(b), including an invocation of *Menzies*, may not be used as an end-run around the PCRA's bar against successive petitions. *Kell III*, 2012 UT 25,¶28 (holding "when a 60(b) motion acts as a substitute for a prohibited postconviction petition, we cannot allow its use"); *id.* ¶31 (holding "Mr. Kell's entire 60(b) motion is barred by the PCRA's prohibition against subsequent postconviction petitions, we conclude that it may not be brought under rule 60(b)"). If Mr. Kell could not successfully evade the PCRA's procedural bars by invoking rule 60(b), he certainly cannot evade the PCRA's procedural bars by filing a successive petition under the PCRA itself as he did here. The PCRA provides no grounds to set aside a PCI judgment, since its grounds for relief speak only to unconstitutionally-obtained convictions and sentences. Utah Code Ann. § 78B-9-104. The PCRA does not provide collateral relief from judgments on collateral challenges.

Since Kell has identified no procedural mechanism for invoking *Menzies other than* the PCRA or his already litigated-and-lost rule 60(b)

motion, he has not justified his reliance on the statutory right to counsel identified in *Menzies*.

And even if *Menzies* could excuse the time bar—which the State does not concede, since *Menzies* was about defaults—Kell has not shown that it would excuse it forever. *Menzies* could only conceivably excuse PCI counsel's defaults, not Kell's and current counsel's later delay in filing the petition that allowed the statute of limitations to expire from a later accrual date. Any impediment to filing the supplemental-instruction claim that PCI counsel's representation may have posed ended in 2008 when the Court affirmed the denial of Kell's first post-conviction petition and PCI counsel's representation ended. That was 4 ½ years before Kell raised his supplemental-instruction claim for the first time in federal court and 9 ½ years before he filed it in the post-conviction court below. Kell's brief does not even attempt to explain this delay. Federal counsel could have exercised the reasonable diligence they claim their immediate predecessor lacked by discovering and raising the

supplemental-instruction claim in state court at any time after their 2009 appointment.[7]

As shown, they did not. And many jurists have found that his current counsel, the Arizona Federal Defender, intentionally delayed presentation of claims in capital cases, just as he they here. *See, e.g., Cook v. Ryan,* 688 F.3d 598 (9th Cir. 2012) (noting capital habeas petitioner, represented by Arizona federal defender, "has delayed for 25 years disclosing much of the information on which he now premises his pretrial IAC claim"); *Beaty v. Schriro*, 554 F.3d 780 (9th Cir. 2009) (Arizona federal defender delaying presentation of *Atkins* claim until eve of execution, thus "engaging in needless piecemeal litigation, or collateral proceedings whose only purpose is to vex, harass, or delay") (cleaned up); *Menzies v. Benzon*, 2:03-cv-00902 (D. Utah), doc. no. 148 at 7 (finding Arizona federal defenders withheld claim for years and denying *Rhines* motion as "dilatory"); *Lafferty v. Crowther*, 2015 WL 6875393, *6 (D. Utah, October 30, 2015) (denying capital habeas petitioner a *Rhines* stay of federal proceedings, noting Arizona federal defender's

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[7] Kell argued below reasons why his current counsel could not file the state petition sooner, including federal regulations requiring federal court approval before federal counsel may be paid to pursue state remedies. *See, e.g.,* R821. Kell's brief noted but did not repeat this argument, Br.Aplt. 25 n2, and the State therefore does not address it. Kell may not raise the argument in his reply brief. *State v. Kruger*, 2000 UT 60,¶¶20-21, 6 P.3d 1116.

"intentional decision to delay the case"); *Garcia v. Jones*, 2018 WL 6266918 at *2 (S.D. Tex. 30 November 2018) (finding capital petitioner, represented by Arizona federal defender, was "dilatory" in seeking stay so as to delay execution); *West v. Brewer*, 2011 WL 2836754 at *8 (D. Ariz. 18 July 2011) (finding capital petitioner, represented by Arizona federal defender, "unnecessarily delayed filing suit until…just three days before his scheduled execution" and denying stay); *Murray v. Schriro*, 2008 WL 1701404 at *56 n25 (D. Ariz. 10 April 2008) (finding "[i]t was not reasonable" for capital habeas petitioner, represented by Arizona federal defender, "to delay his attempt to develop the factual bases of these claims in state court until two years after filing his federal habeas petition").[8]

Kell argues that *Menzies* gave him a "substantive right" to effective post-conviction counsel that later amendments could not retroactively extinguish. Br.Aplt. 10. His argument is incorrect. The present version of the PCRA governs Kell's present petition, not the version in effect at the time of prior counsel's representation. *See, e.g., Pinder v. State*, 2015 UT 56,¶¶56-57, 367 P.3d 968 (applying version of PCRA in effect on the day petition was

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[8] Kell's counsel deployed identical dilatory tactics in another Utah capital case, *Archuleta v. State*, 20160419-SC, which is currently pending before this Court.

filed). The current statute prohibits using "any claim that postconviction counsel was ineffective" to either "creat[e] the right to the effective assistance of postconviction counsel" or grant relief. Utah Code Ann. § 78B-9-202(4).

Under controlling retroactivity law, amended section 202(4) governs Kell's successive petition filed in 2018. The courts "apply the law as it exists at the time of the event regulated by the law in question." *State v. Clark*, 2011 UT 23,¶13, 251 P.3d 829. So, for example, when a tort or breach of contract are at issue, the law regulating torts or breaches of contract in effect at the time of the tort or breach apply. If a law regulates matters such as filing a motion or an appeal, the law in effect at the time the motion or appeal is filed governs. *Id*. "When it comes to the parties' *procedural* rights and responsibilities…the relevant occurrence for such purposes is the underlying procedural act (e.g., filing a motion or seeking an appeal)." *Id*. ¶14 (italics in original). In that case, the governing law is "the law in effect at the time of the procedural act, not the law in place at the time of the occurrence giving rise to the parties' substantive claims." *Id*.

In *Clark*, the amended statute at issue did not permit the appellant to appeal, even though the unamended statute did. But because no right to appeal existed outside of the statutory right, the amended statute in effect when appellants filed their appeal applied. And because it did not permit an

appeal, the appeal they filed could not proceed. This was true even though the unamended statute, which permitted an appeal, was in effect at the time the conduct at issue in the appeal occurred. *Id*. ¶¶10-11,15.

Under *Clark*, the 2008 PCRA amendment repudiating *Menzies* applies to this 2018 case, and Kell cannot rely on PCI counsel's alleged ineffective assistance to escape time and procedural bars. *Menzies* did not create a right to substantive relief for PCI counsel's ineffective assistance. The right *Menzies* read into the statute could only permit bypassing a procedural impediment to considering the merits of a separate claim that may justify post-conviction relief. It could not get Menzies substantive relief from his conviction. As such, the right was procedural rather than substantive, contrary to Kell's interpretation.

Kell relies on *Menzies* only to excuse procedural defects in his 2018 action. The event the *Menzies* rule would address is the State's procedural defenses to Kell's 2018 post-conviction case. Until the State raised those procedural defenses in its summary judgment motion in 2018, the event that gave rise to Kell's post-conviction ineffective-assistance response to the procedural defenses had yet to arise. Therefore, as in *Clark*, the 2008 law in effect when that event occurred in 2018, including the amendments doing away with *Menzies*, governs this case.

In any event, this Court has never held, in *Menzies* or anywhere else, that a showing of mere ineffective assistance of PCI counsel would justify bringing otherwise defaulted claims in later petitions.

Under controlling law, Kell is thus precluded from overcoming the time and procedural bars by alleging ineffective assistance of his PCI team.

3. Kell cannot rely on judicial exceptions that the PCRA abolished and that would not qualify him for relief in any event.

Kell argues alternatively that he is entitled to merits review "under the judicial exceptions to the PCRA." Br.Aplt. 26. Relying on this Court's pre-2008 pronouncements, Kell argues that the Court's traditional common law habeas doctrines "retain their independent constitutional significance." *Id.* 27 (citing *Tillman v. State*, 2005 UT 56,¶22; *Gardner v. Galetka*, 2004 UT 42,¶14, 94 P.3d 263; *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989)) (quotation marks omitted). And he asserts that he is entitled to by-pass his defaults under an "egregious injustice" exception.

The PCRA and rule 65C abolished the common law exceptions. And by virtue of his tactical delay, Kell would not qualify for relief under them or under an egregious injustice exception.

a. Kell does not qualify for consideration of an "egregious injustice" exception because his tactical default has no "reasonable justification."

First, Kell argues that his claim qualifies for merits review outside the PCRA's limitations by virtue of an "egregious injustice" framework suggested in *Winward v. State*, 2012 UT 85, 293 P.3d 259. Br.Aplt. 27-32. In *Winward*, this Court discussed in dicta what analysis it would consider sufficient to establish the existence of an egregious injustice exception to the PCRA's procedural bars. But no opinion from this Court has ever confirmed the existence of an egregious injustice exception.[9]

And Kell cannot even pass over the threshold to get consideration of whether there is an "egregious injustice exception"—that he had "a reasonable justification for missing the deadline." *Winward,* 2012 UT 85,¶18.

As shown, the record irrefutably shows that he actually knew the facts supporting his supplemental-instruction claim as early as 2012, yet he did not seek state post-conviction review of the claim until 2018. And as shown, that

[9] In fact, the State has asked this Court to disavow its dicta in *Winward* in two currently-pending cases. *See* Br.Aple., *Archuleta v. State,* 20160419-SC; Br.Aple., *Patterson v. State*, 20180108-SC. Both parties' briefs in both of those cases provided the Court more substantive briefing and more appropriate occasions to address *Winward.* To the extent the Court might have interest in examining the *Winward* question in this case, the State invites the Court instead to address the issue only after deciding *Archuleta* and/or *Patterson* given the paucity of briefing on *Winward* in Kell's brief.

delay was tactical—Kell timed initiating this action to maximize delay in his federal habeas action.

Kell entirely ignores this lengthy delay and instead merely faults PCI counsel's omission of the claim. But these 5 ½ years had just as much or more relevance to *Winward*'s "reasonable justification" consideration as the period during which PCI counsel represented Kell. Even under his own argument, Kell would have to establish that *both* PCI counsel *and* the Arizona Federal Defender provided ineffective assistance by defaulting the claim during rule 60(b) proceedings and for allowing the statute of limitations to expire after obtaining the juror declarations. Kell makes no such argument, and any "reasonable justification" Kell could squeeze out of PCI counsel's performance evaporated once current counsel took over and continued to withhold the claim. As shown, the only "justification" was tactical delay. That is not reasonable.[10]

[10] Kell also omits discussion of the period between his conviction and sentence in 1996 and the conclusion of his direct appeal in 2002. Kell does not dispute that he could, with reasonable diligence, have discovered the evidence supporting his supplemental-instruction claim as soon as the jury sentenced him, and raised it at any time during this period. *Winward*'s framework would require yet more "reasonable justification" covering the pre-PCI delay that Kell leaves unaddressed.

Because Kell has offered no justification, reasonable or otherwise, for current counsel's tactical default of the claim, the Court need not address the claim's alleged merit under the second part of the *Winward* threshold. *See Adams v. State*, 2005 UT 62,¶16, 123 P.3d 400 (acknowledging that a total failure on one prong obviates need to address the other). Were the Court to wade into merits review, even under the *Winward* framework, that analysis would necessarily build in substantial delay in this almost 30-year-old case and undermine the finality of this Court's judgment. Entangling default questions with federal law permits the federal court to disregard this Court's default decision in habeas review. *See Long*, 463 U.S. at 1040-41. If the Court nevertheless comments on the merits of the claim under federal law, it should make clear whether Kell's lack of justification for his tactical default adequately supports the default independently of the claim's potential merit or lack thereof. *See id.* at 1038 n4 ("[W]e have long recognized that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.") (internal quotation marks and citation omitted).

b. Kell also has not "briefed the particulars" of the Court's constitutional authority to apply an "egregious injustice" exception.

After a petitioner successfully gets past *Winward*'s threshold, step two of that inquiry obliges the petitioner to "fully brief the particulars of this exception," including "an articulation of the exception itself, its parameters, and the basis for this court's constitutional authority for recognizing such an exception." *Winward*, 2012 UT 85,¶18. Kell has done none of that. He has merely suggested that the Court "could define an exception that mirrors the cause and prejudice exception to procedural default as articulated by the Supreme Court in *Coleman v. Thompson*, 501 U.S. 722 (1991), and *Martinez v. Ryan*, 566 U.S. 1 (2012)." Br.Aplt. 11. But he has neither briefed the particulars of that exception—which is much more complicated than his brief acknowledges and, as explained below, has no application to Utah procedure in any event—nor tied the *Martinez* exception to any recognized constitutional authority this Court possesses.

In *Martinez*, the Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. This rule applies only when state law compels a federal habeas petitioner to postpone his trial ineffective assistance claims until his

"initial-review collateral proceeding." *Id*. at 13. And the rule stemmed from a well-recognized equitable power federal courts have to "excuse the prisoner from the usual sanction of default" where they could show cause for and prejudice from the default. *Id*.

Even if this Court had discretion to exercise extra-statutory powers—which the State does not concede—Kell has not justified using that discretion to create a *Martinez*-like exception because (1) it applies only to claims of trial counsel ineffectiveness, not claims of trial court error like the one Kell raises here, and (2) *Martinez* is unique to the demands of federal habeas procedure and can do no work in Utah.

First, even if *Martinez* could apply in Utah state courts, it could not apply to Kell's claim. The Supreme Court has recently clarified that the *Martinez* exception is limited to excusing the default of only trial ineffective-assistance claims. *Davila v. Davis*, 137 S.Ct. 2058, 2068 (2017) (holding that *Martinez* responded "to an equitable consideration that is unique to claims of ineffective assistance of trial counsel and accordingly inapplicable to claims of ineffective assistance of appellate counsel" and other non-trial-ineffective-assistance claims). Kell's supplemental-instruction claim is not a trial ineffective-assistance claim. It is a claim of trial-court error. Thus, even if *Martinez*'s limited exception could apply in Utah state courts, it could not

apply to Kell's non-trial-ineffective-assistance claim. The rule Kell wants—excuse from defaults of non-trial-ineffectiveness claims on a showing of PCI counsel ineffectiveness—is not the *Martinez* rule at all. It is *Martinez* metastasized.

Second, *Martinez*'s narrow exception to the procedural default in federal habeas has no application in Utah's state post-conviction regime. Creating an equitable rule like *Martinez*'s under Utah post-conviction law would not have any operative effect because Utah post-conviction proceedings are not "initial review collateral proceedings" as *Martinez* defined that term: "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 8. Utah law permits convicted persons to raise trial ineffective assistance claims on appeal. *See, e.g., State v. Litherland*, 2000 UT 76, 12 P.3d 92 (Utah 2000); Utah R. App. P. 23B (effective October 1, 1992) (adopting a procedure for a remand to develop additional facts on an appellate challenge to trial counsel's representation). The prohibition from raising trial counsel's ineffectiveness on direct appeal that *Martinez* requires for its new "cause" exception to apply does not exist under Utah law. *Banks v. Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012) (*Martinez* did not apply to excuse defaulted claims "because Oklahoma law permitted Mr. Banks to assert his claim of ineffective

assistance of trial counsel on direct appeal"). In fact, challenging trial counsel's effectiveness on direct appeal has become ubiquitous in Utah.

Thus, the *Martinez* exception does not apply in Utah even under federal law because defendants may challenge their trial attorney's effectiveness on appeal. Indeed, on direct appeal of a criminal case in which a defendant is entitled to the assistance of counsel, Utah law authorizes "the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel." Utah R. App. P. 23B(a). Kell has offered no reason to import into Utah law an inapplicable federal habeas doctrine that does no work here because the procedural defects it remedies do not exist in Utah in the first place.

As an alternative exception, Kell suggests the Court could limit *Winward*'s availability to capital cases, since "death is different." Br.Aplt. 30 (citation omitted). He says the Court could add another threshold inquiry for capital cases, whether "a clear constitutional violation" will go unaddressed by any court "absent application of the egregious injustice exception." *Id.*

Kell is right, of course. Death cases are different: in all the universe of civil litigation, death-sentenced inmates are the only plaintiffs with a baked-in incentive to *prolong* litigation and avert final judgment. *Rhines*, 544 U.S.

277–78. Non-death-sentenced petitioners do not typically need a broad rule exempting them from procedural bars because the incentives in those cases naturally push petitioners to seek relief as soon as possible. Kell's argument here at least has the virtue of transparently acknowledging the true nature of what he is asking for: immunity for condemned prisoners to bring claims whenever they want without regard to their diligence or timeliness, so long as merits review can delay conclusion of their cases. A simple solution to be sure, but not a fair one.

And nothing in the common law and constitutional traditions leading up to *Winward* suggests any principled reason to exempt non-capital cases from the reach of whatever inherent constitutional habeas powers the Court retains. And Kell cannot seriously complain that no Court can reach the merits of his claim since it was his own tactical decisions, not some unfair procedural trap, that removed the claim from any court's power to address it.

c. Kell has inadequately briefed his constitutional challenge to the PCRA, and a ruling on that basis would be merely advisory because it would not entitle Kell to relief in any event.

Kell next argues, in a scant three pages of briefing, that if the PCRA procedural bars prevent merits review of his claim then the PCRA is

unconstitutional and the Court should revert to its "traditional common law authority over collateral proceedings." Br.Aplt. 33.

Kell's constitutional argument is inadequately briefed and thus fails his "burden of persuasion on appeal." *Salt Lake City v. Kidd*, 2019 UT 4,¶20, 435 P.3d 248. "[A]ll statutes are presumed to be constitutional and the party challenging a statute bears the burden of proving its invalidity." *State v. Angilau*, 2011 UT 3,¶7, 245 P.3d 745 (citation omitted). An "issue is inadequately briefed if the argument merely contains bald citations to authority without development of that authority and reasoned analysis based on that authority." *Bank of America v. Adamson*, 2017 UT 2,¶11, 391 P.3d 196 (cleaned up).

It is doubtful that in three short pages an appellant could adequately demonstrate the following sweeping propositions: (1) that the writ of habeas corpus, which the Utah Constitution entrusts to the judiciary, embraces collateral challenges to criminal judgments entered by courts of competent jurisdiction; (2) that the Legislature therefore either has no power to regulate the availability of the writ or, having some power to do so, exceeded that reasonable-regulation authority by enacting a flexible one-year statute of limitations and a procedural bar; and (3) the Legislature's overreach obliges this Court to revert to the common law framework (4) despite this Court's

rulemaking declaration that it would exercise whatever constitutional authority it has through the PCRA. *See* Utah R. Civ. P. 65C. Kell's brief makes gestures toward some of these ideas, but no more than a suggestion of an argument.

As an example of Kell's inadequate briefing, he says that this Court has "previously *held* that such restrictions on the Great Writ are impermissible." Br.Aplt. 34 (emphasis added). In support, he relies on dicta from *Julian v. State*, a twenty-year-old post-conviction case, to argue that the current version of the PCRA is constitutionally infirm. 966 P.2d 249 (Utah 1998)). But *Julian*'s dicta has since been repudiated, and this Court has never *held* that application of the PCRA's procedural bars or its current one-year statute of limitations is unconstitutional. In *Julian*, this Court ruled that an "inflexible" four-year statute of limitations applicable to civil claims not otherwise provided for by law could not be constitutionally applied to bar a post-conviction petition. 966 P.2d at 252-53. But the Court did not hold that the PCRA's one-year limitations period was unconstitutional. Indeed, Julian had not put the statute's constitutionality directly at issue. *See id.* at 254. Nevertheless, this Court stated that "if the proper showing is made, the mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights." *Id.* at 254. The Court added, "[i]t

necessarily follows that *no* statute of limitations may be constitutionally applied to bar a habeas petition." *Id.*

That additional language did not control the outcome of Julian's case because he had not directly challenged the constitutionality of the PCRA's one-year limitations period; instead, he had argued only that a then-available "interests of justice" exception excused his untimely filing. *Id.*; *see Swart v. State*, 1999 UT App 96, ¶¶3-4, 976 P.2d 100 (per curiam) (acknowledging that *Julian*'s statements about the constitutionality of statutes of limitations to restrict habeas petitions were "dicta" and that "no court ha[d] yet actually declared the [PCRA's] statute of limitations…unconstitutional").

Kell's reliance on outdated and repudiated dicta does not amount to the kind of thoroughgoing briefing this Court requires to support novel constitutional propositions. *See, e.g.*, *Zimmerman v. University of Utah*, 2018 UT 1,¶19, 417 P.3d 78 (lamenting the parties' "superficial" briefing, where the constitutional question "calls out for careful analysis of the precise terms of the Utah Constitution and its original meaning to aid in our determination of whether the 'framers intended the provision to have'" a particular effect); *Am. Bush v. City of South Salt Lake*, 2006 UT 40,¶¶10-12, 140 P.3d 1235 (describing extensive sources a party should draw from in construing the Utah Constitution, such as "a review of the constitutional text," "historical

evidence of the framers' [and the citizens'] intent," "our state's particular traditions," and "court decisions made contemporaneously to the framing of Utah's constitution in sister states") (ellipses omitted).

But more ruinously to his argument, Kell has failed to demonstrate he would be entitled to relief under the common law were it even available to him. Under this Court's pre-PCRA precedents, successive post-conviction petitions were procedurally barred. *Hurst v. Cook*, 777 P.2d 1029, 1036-37 (Utah 1989). That common law bar gave way if the petitioner could show "good cause" under one of several enumerated exceptions. *Id.* at 1037. But before a court could examine a claim under one of the good cause exceptions, a petitioner had the burden of proving that a claim was not "withheld for tactical reasons." *Id.*; *see also Gerrish v. Barnes*, 844 P.2d 315, 320 (Utah 1992). Likewise, claims of error that "should have been known" to the petitioner during previous phases of review could not support habeas relief under the common law. *Lopez v. Shulsen*, 716 P.2d 787, 788 (Utah 1986).

Kell has never attempted to meet his burdens under the common law to show that he did not withhold his claim for tactical reasons or that reasonable diligence would not have led him to raise the claim in his PCI proceedings. "His opening brief made no mention of the threshold burden under *Hurst*—of establishing that the claims were not withheld for tactical

reasons." *Pinder*, 2015 UT 56,¶58 (internal quotation marks and citation omitted). "That alone is a fatal misstep…." *Id.* And even if that were not fatal, his tactical withholding of the claim surely would be.

Kell failed to meet his burden to show he could get past the common law procedural bar even assuming the Court found the PCRA unconstitutional. Any ruling on the PCRA's constitutionality would therefore be advisory, and under principles of constitutional avoidance this Court should refrain from ruling on it. *See, e.g., State v. Anh Tuam Pham*, 416 P.3d 1122 (Utah 2018) (order dismissing certiorari) (denying certiorari in part on "principles of constitutional avoidance" since even assuming a "Confrontation Clause violation, any error…would have been harmless beyond a reasonable doubt").

CONCLUSION

For the foregoing reasons, the State asks the Court to affirm the lower court's summary judgment.

Respectfully submitted on June 28, 2019.

SEAN D. REYES
Utah Attorney General

/s/ Andrew F. Peterson
ANDREW F. PETERSON
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 10,147, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the 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).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Andrew F. Peterson
ANDREW F. PETERSON
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on June 28, 2019, the Brief of Appellee was served upon counsel of record for appellant by ☑ mail ☐ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melissa Walkingstick Fryer

Addenda

Addendum A

Utah Code Annotated § 78B-9-101. Title

This chapter is known as the "Post-Conviction Remedies Act."

Utah Code Annotated § 78B-9-102. Replacement of prior remedies

(1) (a) This chapter establishes the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). This chapter replaces all prior remedies for review, including extraordinary or common law writs. Proceedings under this chapter are civil and are governed by the rules of civil procedure. Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.
(b) A court may not enter an order to withdraw, modify, vacate or otherwise set aside a plea unless it is in conformity with this chapter or Section 77-13-6.

(2) This chapter does not apply to:
(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;
(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or
(c) actions taken by the Board of Pardons and Parole.

Utah Code Annotated § 78B-9-103. Applicability--Effect on petitions

Except for the limitation period established in Section 78B-9-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996.

Utah Code Annotated § 78B-9-104. Grounds for relief--Retroactivity of rule

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or

(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or

(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted; or

(g) the petitioner committed any of the following offenses while subject to force, fraud, or coercion, as defined in Section 76-5-308:

(i) Section 58-37-8, possession of a controlled substance;

(ii) Section 76-10-1304, aiding prostitution;

(iii) Section 76-6-206, criminal trespass;
(iv) Section 76-6-413, theft;
(v) Section 76-6-502, possession of forged writing or device for writing;
(vi) Sections 76-6-602 through 76-6-608, retail theft;
(vii) Subsection 76-6-1105(2)(a)(i)(A), unlawful possession of another's identification document;
(viii) Section 76-9-702, lewdness;
(ix) Section 76-10-1302, prostitution; or
(x) Section 76-10-1313, sexual solicitation.

(2) The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence.Claims under Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence of this chapter may not be filed as part of a petition under this part, but shall be filed separately and in conformity with the provisions of Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence.

Utah Code Annotated § 78B-9-105. Burden of proof

(1) (a) Except for claims raised under Subsection 78B-9-104(1)(g), the petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.
(b) For claims raised under Subsection 78B-9-104(1)(g), the petitioner has the burden of pleading and proving by clear and convincing evidence the facts necessary to entitle the petitioner to relief.
(c) The court may not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record from the criminal case under review.

(2) The respondent has the burden of pleading any ground of preclusion under Section 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

Utah Code Annotated § 78B-9-106. Preclusion of relief--Exception

(1) A person is not eligible for relief under this chapter upon any ground that:
(a) may still be raised on direct appeal or by a post-trial motion;
(b) was raised or addressed at trial or on appeal;
(c) could have been but was not raised at trial or on appeal;
(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
(e) is barred by the limitation period established in Section 78B-9-107.

(2) (a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.
(b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) (a) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel; or
(b) Notwithstanding Subsections (1)(c) and (1)(d), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial, on appeal, or in a previous request for post-conviction relief, if the failure to raise that ground was due to force, fraud, or coercion as defined in Section 76-5-308.

(4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).

Utah Code Annotated § 78B-9-107. Statute of limitations for postconviction relief

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, due to physical or mental incapacity, or for claims arising under Subsection 78B-9-104(1)(g), due to force, fraud, or coercion as defined in Section 76-5-308. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

§ 78B-9-108. Effect of granting relief--Notice

(1) If the court grants the petitioner's request for relief, except requests for relief under Subsection 78B-9-104(1)(g), it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2) If the court grants the petitioner's request for relief under Subsection 78B-9-104(1)(g), the court shall:

(a) vacate the original conviction and sentence; and

(b) order the petitioner's records expunged pursuant to Section 77-40-108.5.

(3) (a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice of intent to appeal the court's decision, the stay provided for by Subsection (3)(a) shall remain in effect until the appeal concludes, including any petitions for rehearing or for discretionary review by a higher court. The court may lift the stay if the petitioner can make the showing required for a certificate of probable cause under Section 77-20-10 and URCP 27.

(d) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

Utah Code Annotated § 78B-9-109. Appointment of pro bono counsel

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition or the appeal contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

Utah Code Annotated § 78B-9-110. Appeal--Jurisdiction

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78A-3-102 or 78A-4-103.

Utah Code Annotated § 78B-9-201. Post-conviction remedies--30 days

A post-conviction remedy may not be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds for application are based on facts or circumstances which developed or first became known within that period of time.

Utah Code Annotated § 78B-9-202. Appointment and payment of counsel in death penalty cases

(1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent petitioners.

(2) (a) If a petitioner requests the court to appoint counsel, the court shall determine whether the petitioner is indigent and make findings on the record regarding the petitioner's indigency. If the court finds that the petitioner is indigent, it shall, subject to the provisions of Subsection (5), promptly appoint counsel who is qualified to represent petitioners in postconviction death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.
(b) A petitioner who wishes to reject the offer of counsel shall be advised on the record by the court of the consequences of the rejection before the court may accept the rejection.

(3) Attorney fees and litigation expenses incurred in providing the representation provided for in this section and that the court has determined are reasonable shall be paid from state funds by the Division of Finance according to rules established pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.
(a) In determining whether the requested funds are reasonable, the court should consider:

(i) the extent to which the petitioner requests funds to investigate and develop evidence and legal arguments that duplicate the evidence presented and arguments raised in the criminal proceeding; and
(ii) whether the petitioner has established that the requested funds are necessary to develop evidence and legal arguments that are reasonably likely to support postconviction relief.
(b) The court may authorize payment of attorney fees at a rate of $125 per hour up to a maximum of $60,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).
(c) The court may authorize litigation expenses up to a maximum of $20,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).
(d) The court may authorize the petitioner to apply ex parte for the funds permitted in Subsections (3)(b) and (c) upon a motion to proceed ex parte and if the petitioner establishes the need for confidentiality. The motion to proceed ex parte must be served on counsel representing the state, and the court may not grant the motion without giving the state an opportunity to respond.
(e) In determining whether good cause exists to exceed the maximum sums established in Subsections (3)(b) and (c), the court shall consider:
(i) the extent to which the work done to date and the further work identified by the petitioner duplicates work and investigation performed during the criminal case under review; and
(ii) whether the petitioner has established that the work done to date and the further work identified is reasonably likely to develop evidence or legal arguments that will support postconviction relief.
(f) The court may permit payment in excess of the maximum amounts established in Subsections (3)(b) and (c) only on the petitioner's motion, provided that:
(i) if the court has granted a motion to file ex parte applications under Subsection (3)(d), the petitioner shall serve the motion to exceed the maximum amounts on an assistant attorney general employed in a division other than the one in which the attorney is employed who represents the state in the postconviction case; if the court has not granted a motion to file ex parte applications, then the petitioner must serve the attorney representing the state in the postconviction matter with the motion to exceed the maximum funds;
(ii) if the motion proceeds under Subsection (3)(f)(i), the designated assistant attorney general may not disclose to the attorney representing the state in the postconviction matter any material the petitioner provides in support of the motion except upon a determination by the court that the material is not

protected by or that the petitioner has waived the attorney client privilege or work product doctrine; and
(iii) the court gives the state an opportunity to respond to the request for funds in excess of the maximum amounts provided in Subsections (3)(b) and (c).
(4) Nothing in this chapter shall be construed as creating the right to the effective assistance of postconviction counsel, and relief may not be granted on any claim that postconviction counsel was ineffective.
(5) If within 60 days of the request for counsel the court cannot find counsel willing to accept the appointment, the court shall notify the petitioner and the state's counsel in writing. In that event, the petitioner may elect to proceed pro se by serving written notice of that election on the court and state's counsel within 30 days of the court's notice that no counsel could be found. If within 30 days of its notice to the petitioner the court receives no notice that the petitioner elects to proceed pro se, the court shall dismiss any pending postconviction actions and vacate any execution stays, and the state may initiate proceedings under Section 77-19-9 to issue an execution warrant.
(6) Subject to Subsection (2)(a) the court shall appoint counsel to represent the petitioner for the first petition filed after the direct appeal. For all other petitions, counsel may not be appointed at public expense for a petitioner, except to raise claims:
(a) based on newly discovered evidence as defined in Subsection 78B-9-104(1)(e)(i); or
(b) based on Subsection 78B-9-104(1)(f) that could not have been raised in any previously filed post trial motion or postconviction proceeding.

Utah R. Civ. P. 65C. Post-Conviction Relief

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(e)(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h) (1) *Summary dismissal of claims.* The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.
(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of pro bono counsel. If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(k) Answer or other response. Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:
(l)(1) consider the formation and simplification of issues;

(l)(2) require the parties to identify witnesses and documents; and
(l)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(m) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) Discovery; records.
(n)(1) Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.
(n)(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.
(n)(3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(o) Orders; stay.
(o)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.
(o)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.
(o)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Addendum B

IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR SANPETE COUNTY, STATE OF UTAH

TROY MICHAEL KELL, Petitioner, vs. LARRY BENZON, Respondent.	**RULING AND ORDER ON STATE'S MOTION FOR SUMMARY JUDGMENT and STATE'S OBJECTIONS TO EVIDENTIARY PROFFERS** Case No. 180600004 Judge Wallace A. Lee

The State moves for summary judgment on Petitioner Troy Michael Kell's Petition for Post-conviction Relief because it is procedurally barred by the Post-conviction Remedies Act, section 78B-9-106 (hereinafter "PCRA"). The State also objects to several of the evidentiary proffers Mr. Kell attached to his Petition. Neither party requested oral argument. After considering the arguments presented by the parties, the court GRANTS the State's Motion for Summary Judgment and dismisses the Petition. Because the case has been dismissed, the State's objections to the evidentiary proffers are MOOT.

Discussion

The Utah Rules of Civil Procedure dictate that summary judgment is appropriate when there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(a). While the court need only consider materials cited in the motion, it may also consider other materials in the record. *See* Rule 56(c)(3). The Court views the evidence and all reasonable inferences in the light most favorable to the non-moving party. *See Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 36.

The State sets forth 12 undisputed material facts in support of its motion. In his opposing

memorandum, Mr. Kell did not include "a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record" as required by rule 56(a)(2). Thus, for purposes of the motion for summary judgment, the State's undisputed material facts are deemed admitted.[1] In summary, the undisputed material facts show the following:

The Utah Supreme Court upheld Mr. Kell's conviction and sentence of death on November 1, 2002. *See State v. Kell*, 2002 UT 106. Mr. Kell filed his first petition for post-conviction relief in May 2003, followed by an amended petition in August 2005. *See* case number 030600171. The district court denied the petition, and Mr. Kell appealed. While the petition was pending, the federal district court appointed federal defenders to represent Mr. Kell in federal court.

The district court denied the petition for post-conviction relief in 2007, and the Utah Supreme Court affirmed the denial in 2008. *Kell v. State*, 2008 UT 62. In 2009, acting *pro se*, Mr. Kell filed a motion under rule 60(b), alleging that he had received ineffective assistance of counsel. That same year, Mr. Kell's federal defenders filed a Petition for Writ of Habeas Corpus in federal court and sought a stay while Mr. Kell's rule 60(b) motion was pending. The stay was granted. The state district court denied the motion under rule 60(b), and the Utah Supreme Court upheld the district court in 2012. *Kell v. State*, 2012 UT 25.

On January 14, 2013, Mr. Kell, through his federal defenders, filed an amended federal habeas petition in federal court, claiming that the judge in Mr. Kell's criminal trial improperly

[1] In footnote 1 on page 4 of Mr. Kell's response memorandum, Mr. Kell alleges that the State did not dispute the facts Mr. Kell alleged in his memorandum in support of his petition. Rule 56 requires Mr. Kell to assert his facts in numbered paragraphs in his opposing memorandum to a Motion for Summary Judgment, which Mr. Kell did not do. In addition, the "facts" Mr. Kell alleges in his memorandum in support of his petition are not presented in individual numbered paragraphs with supporting citations as required by Rule 56, making it difficult for the State to respond.

instructed the jury during its deliberations without notice to either party. According to the claim, this instruction unconstitutionally shifted the burden of determining a death sentence from the prosecution to the defense. In support of his federal petition, Mr. Kell attached declarations from jurors that served on his case, which were signed and dated in May 2012. Mr. Kell filed his current Petition for Post-conviction relief in the state district court on the January 16, 2018, alleging the same claim that was originally presented in his January 2013 federal petition for habeas corpus.

The State argues that summary judgment is appropriate because undisputed material facts show that Mr. Kell's Petition is barred for two reasons: 1) the claim could have been raised in his first Petition for Post-conviction relief but was not; and 2) it is untimely. Once a respondent pleads a ground of preclusion under section 78B-9-106 of the Utah Code, "the petitioner has the burden to disprove its existence by a preponderance of evidence." Utah Code § 78B-9-105(2). The court will address the two procedural bars raised by the State below.

A. The claim could have been, but was not, raised in Mr. Kell's first Petition for Post-conviction Relief

Section 78B-9-106(1)(d) precludes relief for any claim that "could have been, but was not, raised in a previous request for post-conviction relief." The only current statutory exceptions to this bar to relief are if the failure to raise a claim was "due to force, fraud, or coercion as defined in Section 76-5-308." Utah Code § 78B-9-106(3)(b).

Mr. Kell, through state-appointed counsel, filed an initial petition for post-conviction relief in 2003 and an amended petition in 2005. He has not shown by a preponderance of the evidence that he or his counsel *could not* have raised this claim in that initial petition. All of the facts necessary to support the claim are contained in juror declarations. Mr. Kell has not alleged that he was unable interview the jurors in time to include the claim in the initial petition or that

the jurors were uncooperative. Accordingly, the court concludes that the claim could have been raised in the initial petition.

Mr. Kell does not dispute that the claim could have been raised in the initial petition; however, Mr. Kell argues that the claim was omitted due to the ineffective assistance of his post-conviction relief counsel.

In *Menzies v. Galetka*, the Utah Supreme Court found that under the pre-2008 version of the PCRA, petitioners in capital cases had the right to the effective assistance of post-conviction relief counsel. In 2008, the legislature amended the PCRA to explicitly remove the right to the effective assistance of counsel in subsequent petitions. Nothing in the amendments to the PCRA indicates that the removal of the right to the effective assistance of counsel should apply retroactively.

The court agrees with Mr. Kell that prior to 2008, when he filed his initial petition for post-conviction relief, he had the statutory right to the effective assistance of post-conviction relief counsel. The State argues that the remedy for the violation of any such right is to file a rule 60(b) motion to set aside the denial of an initial petition, as was the remedy in *Menzies v. Galetka*. Mr. Kell, on the other hand, argues that the Supreme Court's holding in *Menzies* allows a petitioner to file a subsequent petition for post-conviction relief and raise claims that could have been raised in a prior petition but were not due to the ineffective assistance of counsel.

Nothing in *Menzies* indicates that filing a subsequent petition is the appropriate procedure for the denial of the statutory right to the effective assistance of counsel. The court, therefore, concludes that although Mr. Kell had the right to the effective assistance of counsel in his initial petition, the proper procedure is to raise his argument in a rule 60(b) motion in his initial case and not in a subsequent petition.

The claim is, therefore, barred under section 78B-9-106(1)(d).

B. The claim is untimely under the statute of limitations

Pursuant to the PCRA statute of limitations, a "petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code § 78B-9-107(1). In relevant part, a cause of action accrues on the latest of several dates, including "(c) the last day for filing a petition for writ of certiorari in . . . the United States Supreme Court, if no petition for writ of certiorari is filed; [and] (e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based[.]" Utah Code § 78B-9-107(2)(c), (e).

No petition for writ of certiorari was filed in the United States Supreme Court after the Utah Supreme Court affirmed Mr. Kell's conviction and sentence on appeal. *See* Petitioner's Memo. in Support of Petition, at 5. Therefore, under the (2)(c) accrual date, Mr. Kell had until November 2, 2004, to file his claim. Mr. Kell has not shown by a preponderance of the evidence that he or his counsel, in the exercise of reasonable diligence, could not have interviewed the jurors as soon as the trial concluded or within a year after his conviction was affirmed on appeal. In fact, Mr. Kell concedes that his prior post-conviction counsel *should* have interviewed the jurors earlier and raised the claim in his initial petition for post-conviction relief. *See, e.g.*, Memo. in Support of Petition, 15-16. Therefore, pursuant to 78B-9-107(2)(c), the court concludes that the claim is barred by the statute of limitations.

Even if Mr. Kell could not have known of the evidentiary facts by diligently interviewing the jurors, both parties agree that Mr. Kell *did* know of the evidentiary facts by May of 2012 when he was able to obtain declarations from the jurors who served on his case. Therefore, under the most generous analysis of the claim's accrual date, Mr. Kell had until May of 2013 to file his

petition in state court. Because the petition was not filed until January 16, 2018, the claim is barred.

Mr. Kell argues that his late filing should be excused because i) the delay was due to his prior counsel's ineffective assistance of counsel and his current counsel could not file the petition sooner than January 2018; ii) the common law exceptions to the PCRA apply; iii) his claim meets a constitutional exception under the framework established in *Winward v. State*, 2012 UT 85; and iv) the 2008 amendments to the PCRA are unconstitutional.

i. Prior counsel's alleged ineffectiveness does not excuse the late filing

The court has already concluded the proper avenue for relief for the ineffective assistance of post-conviction counsel on a petition filed prior to 2008 is to file a rule 60(b) motion to set aside a judgment. And, even if the Utah Supreme Court's ruling in *Menzies* allows a petitioner to raise his claim in a subsequent petition, Mr. Kell still waited over four and a half years to file a petition after he undisputedly knew of the evidentiary facts in support of his claim.[2]

Mr. Kell's attorneys argue that the court should toll the statute of limitations as a matter of equity because their federal contract does not allow the federal defenders to represent a petitioner in state court proceedings without permission from the federal court. And, according to Mr. Kell's federal defenders, the attorneys were unable to receive a stay in federal court until January of 2018.

As an initial matter, the Memorandum provided by the federal defenders explaining their inability to file in state court merely discusses when *funding* is available to federal defenders to

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[2] Mr. Kell has not alleged that his current counsel was ineffective for failing to file the state claim sooner than January 2018, even though he had been represented by the federal defender's office since 2007.

It is unclear whether the statute would have allowed Mr. Kell to allege that his current counsel was ineffective, as the PCRA was amended in 2008 to eliminate the statutory right to the effective assistance of counsel. And ineffective assistance of counsel is not listed as a reason to toll the statute of limitations under section 78B-9-107(3).

litigate in a state forum. It does not prevent the attorneys from filing a petition in state court absent permission. It is not unreasonable or necessarily uncommon for an attorney to represent a petitioner in state court post-conviction relief proceedings pro bono. *See, e.g., Perea v. State,* district court case number 160903792; *Ross v. State*, district court case number 080700641.

Regardless, even if the federal defenders were prevented by legal, ethical, or financial reasons to file a petition in state court on behalf of Mr. Kell, Mr. Kell has not shown by a preponderance of the evidence that *he* was unable to file his state petition by May of 2013. *See Pinder v. State*, 2015 UT 56, ¶ 44 (explaining that "a claim could have been raised when [a petitioner] *or* his counsel became aware of the 'essential factual basis for asserting it'" (emphasis added)).

His attorneys argue that inmates "'are generally ill equipped to represent themselves' and 'cannot rely on a court opinion or the prior work of an attorney addressing that claim,' which they do not have." Pet.'s Opposition, at 7-8 (quoting *Halbert v. Michigan*, 545 U.S. 605, 617 (2005)). While Mr. Kell's attorneys' arguments are well-taken, his attorneys have not shown that Mr. Kell was ill-equipped to represent himself in a state post-conviction relief case. The investigation had been done for him by his federal defenders. The arguments had been made in the federal habeas petition. Mr. Kell could have adopted the same or a similar petition his federal defenders filed in federal court and filed it pro se in state court. And he could have done so prior to when the May 2013 statute of limitations expired. Indeed, Mr. Kell has shown his ability to file pro se motions and appeals, as evidenced by the pro se rule 60(b) motion and appeal he filed in his initial post-conviction relief case.

Once a petition is filed pro se, Utah's PCRA allows a petitioner to file a motion for the court to appoint an attorney pro bono to represent a petitioner on complex or potentially

meritorious claims. Mr. Kell had full access to the court to file his petition and request an attorney. He has not suggested that he was mentally incapacitated or prevented from filing a petition by illegal state action. *See* Utah Code § 78B-9-107(3) (delineating the specific circumstances when the statute of limitations is tolled). Therefore, even if the court had the authority to toll the statute of limitations due to his federal defenders' inability to represent Mr. Kell sooner in state court, Mr. Kell has not shown that there is sufficient reason to do so.

ii. The common law "unusual circumstances" exception to the PCRA does not apply

Mr. Kell next argues the court should consider the merits of his petition because the judicial exceptions to the PCRA still apply. Specifically, Mr. Kell relies on the "unusual circumstances" exception, which the Utah Supreme Court in *State v. Griffin*, 2016 UT 33, ¶ 21, suggests may have survived the 2008 amendments to the PCRA. *See* Pet.'s Opposing Memo., at 11.[3] While the court recognizes that the *Griffin* case is our most recent word from the Utah Supreme Court on this matter, the Supreme Court just one year earlier explicitly indicated the common law exceptions to the PCRA "are available only for claims filed before May 5, 2008." *Pinder v. State*, 2015 UT 56, ¶ 56 (explaining that the common law exceptions "were repudiated by the legislature in 2008"); *see also Taylor v. State*, 2012 UT 5, ¶ 11 n.3. Because Mr. Kell is asking this court to apply the unusual circumstances to his current petition, which was filed after 2008, the court concludes that the common law exceptions do not provide him relief.

Even if the common law exceptions do still apply to the PCRA, as suggested but not held by *Griffin*, under the "unusual circumstances" test, claims that are procedurally barred may only

[3] The Utah Supreme Court in *Griffin* cites to several cases, one of which specifically states that the common law exceptions no longer apply, *see Carter v. State*, 2012 UT 69, ¶ 31, and others that state that the question is still undecided, *see, e.g., Winward v. State*, 2012 UT 85; *State v. Taufui*, 2015 UT App 118, ¶ 14.

The *Griffin* court did not cite to its most recent precedent, *Pinder v. State*, 2015 UT 56, ¶ 56, which explicitly states that the common law exceptions only apply to petitions filed before 2008. It is unclear to this court whether to rely on the direct language in *Pinder* or the language in *Griffin*.

be addressed if "there was an obvious injustice or a substantial and prejudicial denial of a constitutional right." *Taylor v. State*, 2007 UT 12, ¶ 122 (citing *Carter III*, 2001 UT 96, ¶ 15). The court concludes there is no obvious injustice or denial of a constitutional right in applying the statute of limitations here: As explained above, Mr. Kell had every opportunity prior to May of 2013 to file a petition in state court but he failed to do so. Instead he waited over four and a half years to assert his claim in January of 2018.

iii. Mr. Kell has not shown that he meets an egregious injustice exception under *Winward*

Regardless of whether the common law exceptions still apply following the 2008 amendments, in *Gardner v. State*, 2010 UT 46, the Supreme Court acknowledged that it *may* have the authority under the Utah Constitution to address the merits of an otherwise-barred post-conviction relief petition when not addressing it may result in an "egregious injustice." *Id.* ¶ 93.

The State argues the power to recognize such an exception belongs to the Utah Supreme Court and not the district court. The State's argument is well-taken. This court is bound by rule 65C of the Utah Rules of Civil Procedure, which specifically requires that all petitions for post-conviction relief are governed by the PCRA. The PCRA, as amended in 2008, "replaces all prior remedies for review, including extraordinary or common law writs" and is now "the *sole* remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies" § 78B-9-102(1) (emphasis added). In order to recognize a remedy beyond the PCRA, this court would have to ignore rule 65C's mandate to follow the parameters of the Act.

Regardless, in the interest of thoroughness and to ensure this court is addressing all of Mr. Kell's arguments, this court will address whether he has shown that he is entitled to an "egregious injustice" exception under the Utah Constitution.

In *Winward v. State*, 2012 UT 85, the Utah Supreme Court articulated a framework for considering whether a petitioner's claim would be subject to such an exception: First a petitioner has a "heavy burden" to show that he has "a reasonable justification for missing the deadline combined with a meritorious defense." *Id.* ¶ 18. "Only after meeting this threshold requirement will [the court] even consider the existence of an exception to the PCRA." *Id.*

Second, the petitioner must then "fully brief the particulars of this exception," including an "articulation of the exception itself, its parameters, and the basis for [the] court's constitutional authority for recognizing such an exception." *Id.* Finally, a petitioner must explain "why the particular facts of his case qualify under the parameters of the proposed exception." *Id.*

Mr. Kell argues that he has met the *Winward* framework due to the ineffective assistance of his counsel on his initial petition for post-conviction relief, which was filed in 2005. But Mr. Kell misunderstands his burden. He must show that he has a reasonable justification for missing the deadline to file his *current* petition, for which the cause of action accrued in May 2013. As explained above, the court concludes that Mr. Kell did not have a reasonable justification for missing that deadline by four and a half years because he could have filed a petition by May 2013. Accordingly, the court concludes that Mr. Kell has not shown that he meets an "egregious injustice" exception to the bars in the PCRA.

In addition, Mr. Kell did not adequately brief the second and third requirements for the court to recognize an egregious injustice exception to the statute of limitations. He did not include a discussion of the parameters of the exception he is requesting or the court's constitutional authority[4] to recognize such an exception.

[4] Mr. Kell did address the court's constitutional authority to grant relief when challenging the constitutionality of the PCRA in general on pages 21 through 24 of his opposing memorandum.

Accordingly, Mr. Kell has not met his burden to show that an "egregious injustice" exception to the procedural bars in the PCRA applies to his claim.

iv. The 2008 amendments to the PCRA are not unconstitutional

Mr. Kell argues that if no exceptions to the time bars in the PCRA apply, then the PCRA is unconstitutional. The Utah Constitution provides "The privilege of the writ of habeas corpus shall not be suspended" and the court has the power "to issue all extraordinary writs." Utah Const., art. I, § 5; art. VIII, §§ 3, 5. According to Mr. Kell, "[b]ecause the courts' writ power is granted directly by the constitution, the legislature has no authority to diminish or restrict that power." Pet.'s Opposing Memo., at 22 (citing *Brown v. Cox*, 2017 UT 3, ¶ 14).

Even if post-conviction review is coextensive with the writ of habeas corpus, the court concludes that the legislature has not encroached on the court's authority to address post-conviction claims. The Utah Supreme Court has exercised its constitutional power by codifying rules that set forth the parameters and procedure governing writs. In 2009, the Utah Supreme Court amended rule 65C, the court rule governing petitions for post-conviction relief. The amended rule provides that the PCRA "sets forth the manner and extent to which a person may challenge the validity of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal." Utah R. Civ. P. 65C(a) (2010). The rule also eliminated a petitioner's power to file successive petitions for post-conviction relief and raise additional claims if a petitioner could show "good cause." *Compare* Utah R. Civ. P 65C (2008) *with* Utah R. Civ. P. 65C(d) (2010).

Thus, contrary to Mr. Kell's assertion that the PCRA has limited the court's authority to address a writ, the court has explicitly embraced the PCRA through its codification of rule 65C. The court still retains the authority to amend rule 65C, or, as outlined in *Winward*, to recognize a

constitutional exception to the PCRA's parameters. The Advisory Committee Note to the changes to rule 65C specifically indicates that the restrictions placed on post-conviction relief petitions "do not amount to the suspension of the writ of habeas corpus." Utah R. Civ. P 65C advisory committee note.

Furthermore, as argued by the State, the PCRA gives petitioners a meaningful opportunity to contest their conviction or their sentence. The statute provides a year for petitioners to develop their claims after a cause of action has accrued and includes tolling provisions for petitioners who do not have the mental capacity or ability to file claims sooner. The only restriction the PCRA places on a petitioner is the petitioner must be reasonably diligent in pursuing his or her claims. The court concludes this restriction does not unconstitutionally suspend the writ.

Accordingly, the court concludes that the PCRA is not unconstitutional.

ORDER

For the foregoing reasons, the State's Motion for Summary Judgment is hereby GRANTED. Because there are no outstanding claims, the court orders that Mr. Kell's Petition for Post-conviction Relief is DISMISSED with prejudice.

Due to the dismissal of the case, the State's evidentiary objections are MOOT.

This is the final order of the court.

Dated this 31st day of August, 2018.

BY THE COURT:

Judge Wallace A. Lee
Sixth District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 180600004 by the method and on the date specified.

EMAIL: DANIEL W BOYER dboyer@agutah.gov
EMAIL: B KENT MORGAN morgan@mnalaw.net
EMAIL: JONATHAN T NISH nish@mnalaw.net
EMAIL: ANDREW F PETERSON andrewpeterson@agutah.gov
EMAIL: ERIN RILEY eriley@agutah.gov

Date: 09/05/2018 /s/ LORI KOGIANES

Deputy Court Clerk

Addendum C

EXHIBIT 1

EXHIBIT 1

DECLARATION OF DEANN DRAPER

I declare under penalty of perjury the following to be true and accurate to the best of my information and belief:

1. I was a juror in the capital trial of Troy Kell.

2. I had a very hard time voting to sentence him to death but I voted that way because I didn't think there was anything else we could have done. He was already in prison for life, he'd already committed murder. There wasn't anything else to do but to say he's guilty and sentence him to death.

3. I recall no details of any mitigation evidence that generated any sympathy in my mind for Kell.

4. Going into the prison for the trial was traumatic. It really was. Knowing I was having to go into the prison system, the whole seriousness of it. I knew that having the trial in the prison was a point of controversy. It was mentioned. The judge said he didn't think the trial should be held at a public courthouse. It was something we had to do for our safety and for the safety of the community at large.

5. I was not aware that the family of the victim, Lonnie Blackmon, had won a settlement from the state over his death. The fact that the Utah Attorney General Office was defending the state against that claim while prosecuting Kell was a conflict. That's real obvious.

6. I recall Judge Mower coming in to speak to the jury after we'd started deliberating. I don't remember what the issue was but I do remember him coming in and clarifying something for us.

I declare under penalty of perjury the foregoing to be true and accurate to the best of my information and belief. Signed this 7 day of May, 2012, at Moroni, Utah.

Deann Draper

EXHIBIT 2

EXHIBIT 2

DECLARATION OF EVVA BEESLEY

I declare under penalty of perjury the following to be true and accurate to the best of my information and belief:

1. I was a juror at Troy Kell's capital trial.

2. I was one of two holdouts who were the last jurors to vote for death. The other holdout was Jeromy Hyatt. I recall that Hyatt held out because he believed Kell was a product of his environment, that going into prison as a young man, Kell did the only thing he could do to survive – he became a bad-ass.

3. I ultimately went along with the sentence because I became convinced that because Kell was already under a life without parole sentence, unless death was imposed, he would go unpunished for killing Lonnie Blackmon. I don't see that we had a choice. As hard as it was, I don't see I had an option. It was a decision I made because what else could I have done?

4. I believe there were about six secret ballots taken before the vote for death became unanimous.

5. I remember that the setting for the trial, inside the Central Utah Correctional Facility, was intimidating. The whole experience changed you. It made me more cynical. We had to go through security every day and get searched, go through a metal detector. It was a hard thing to go through. You felt like you left your rights at the door. It was an intimidating place to be.

6. I believe the trial was held inside the prison because they were afraid to take Kell out of the prison to a courthouse.

7. I was not aware that that some pretrial hearings were held at the Manti courthouse with Kell and his co-defendants present.

8. We watched the video three or four times during the trial, and watched a portion of it during deliberations.

9. I did not know that Kell had tattoos until we saw them on the video. We jurors surmised that Kell was shackled to the floor throughout the trial because he was

always seated at the defense table when we were ushered into the courtroom.

10. I was not aware that the Blackmon family had won a settlement from the state in the wake of Lonnie Blackmon's death. I was not aware that the Utah Attorney General's Office was defending the state against the Blackmon family's claim at the same time it was prosecuting Troy Kell. That arrangement strikes me as a conflict of interest.

I declare under penalty of perjury the foregoing to be true and accurate to the best of my information and belief. Signed this 7 day of May, 2012, at Mt. Pleasant, Utah.

Evva Beesley

EXHIBIT 3

EXHIBIT 3

DECLARATION OF GRANT HANSEN

I declare under penalty of perjury the following to be true and accurate to the best of my information and belief:

1. I was the foreman of the jury during Troy Kell's capital trial.

2. The question of guilt was straightforward. Videos played during the trial showed the horrific nature of the crime.

3. The penalty phase where the sentence was determined was a more difficult choice. It was one of the more stressful and emotional things I've been through. To say that another person has to die -- that was a really hard decision.

4. The prison setting of the trial didn't bother me. They had the trial inside the prison because they might have felt more secure. I know they talked about security concerns.

5. When we arrived at the prison each day for trial, we checked in at the admittance gate with an officer. We might have had passes. Then we gathered in the front hallway and walked down the hall to the courtroom together. I have been into the prison since the trial for educational and church matters, so I may be blending the experiences. I don't remember for sure if we passed a control room to get through additional doors. I know there's a control room there now. We may have gone past it at the time of trial; I can't recall with certainty. I remember the courtroom was on the right.

6. When we got to the penalty phase, the disclosure of Kell's prior conviction in Nevada came as a surprise.

7. Once deliberations began, the jurors voted by show of hands whether to have a secret ballot, and it was decided to proceed with secret ballots. Four or five jurors initially indicated that they believed Kell should be executed. The majority wasn't sure at the start. We talked for some time.

8. They jury asked the judge for a clarification. I believe it had to do with the range of sentences we could impose. I don't remember how the answer came back

ARH

to us, whether it was a written reply or spoken reply from the judge.

9. After penalty phase deliberations began in late afternoon, we broke for a meal and talked into the early evening. We went home for the night and came back the next day and made the decision after a couple of hours. I came back the next day thinking that a vote for death was the vote I needed to cast. As final a vote as that can be – to take his life – it was the law. It seemed to me like the attorneys had proved that it was appropriate.

10. A couple of jurors had a hard time voting for death. They held out. We talked about it. We talked about the implications.

GRH

~~11. I think we jurors felt we needed something to convince us not to vote for death, and we didn't have that reason.~~

12. At the time, I didn't think about the role the Attorney General's Office played in Kell's prosecution. However, I heard after the trial that the Sanpete County Attorney was unhappy about the role the AG's office played.

13. I thought the defense attorneys and prosecutors were pretty good on both sides, though I recall that defense attorney Doug Neeley talked of driving past the jurors' homes, and that bothered me.

14. I worried some and wondered whether Kell's friends or family might come back against me due to my role in this case.

15. I thought at the time that the death sentence was appropriate, and I still feel that way.

I declare under penalty of perjury the foregoing to be true and accurate to the best of my information and belief. Signed this 17th day of May, 2012, at Gunnison, Utah.

Grant Hansen

GRH

EXHIBIT 4

EXHIBIT 4

DECLARATION OF DEBORAH DYRENG

I declare under penalty of perjury the following to be true and accurate to the best of my information and belief:

1. I was a juror in the capital trial of Troy Kell.

2. I recall that the setting for the trial, the Central Utah Correctional Facility, was intimidating. Going into the prison every day for trial, going through security, was difficult.

3. I recall being fearful as the trial concluded. Deputies escorted us to our vehicles because they were afraid somebody might retaliate against us. I guess they thought we might be sniped or something.

4. Looking back, though I believe Kell was guilty, I also believe that having the trial inside the prison was unfair to Kell. I think it would have been fairer if the trial had been held in a courthouse.

5. I recall being told that the victim, Lonnie Blackmon, was a good kid gone bad and that he had created problems in the prison. But I wasn't convinced that Blackmon was a threat to Kell.

I declare under penalty of perjury the foregoing to be true and accurate to the best of my information and belief. Signed this 7 day of May, 2012, at Ephraim, Utah.

Deborah Dyreng

EXHIBIT 5

EXHIBIT 5

DECLARATION OF JO ANN JEPPSON

I declare under penalty of perjury the following to be true and accurate to the best of my information and belief:

1. I was a juror in the capital trial of Troy Kell.

2. I had a difficult time voting for the death penalty but I agreed to do so after Judge Mower came and spoke to the jurors as we deliberated. He told us that Kell's attorneys had to show us that Kell's life should be spared.. The jury had bogged down over a definition but the judge's statement helped because we wanted to be sure that we were doing the right thing. I remember that the judge was asked a question while he was speaking to us, and he kidded around and said he couldn't address that question, and said that it was up to us. After the judge came and spoke to us, I felt more comfortable voting for death.

3. There was no defense attorney present when the judge spoke to us during deliberations, though there was somebody with him – the bailiff, perhaps.

4. I had doubts about voting for the death penalty until the judge came in and said the defense needed to make you have that question, "Is there any doubt?"

5. During deliberations, we jurors tried to go back and think about all the testimonies. That was what kind of kept us in there as long as we were in there. Several of us said, "Wait a minute," and said we wanted to talk about it and not rush our decision Some jurors seemed irritated by the delay.

6. The horrible content of the trial, the video of the crime, game me nightmares during the trial. I discussed these nightmares with fellow juror Beth Ann Erickson, with whom I car-pooled to the trial each day from Ephraim, where we both worked at Snow College. Erickson indicated that she had had nightmares, too. She mentioned it to me several times.

7. I don't think the defense had a prayer of prevailing during the guilt phase of the trial. The crime was on tape.

8. My first impression of Kell was surprisingly good. He was very nice looking, and innocent looking. It was difficult for me to watch his actions on that

videotape.

9. Prior to sentencing, I was hoping to have more of an explanation of Kell's background. His attorneys did a poor job of explaining who he was. His attorneys were passive and seemed like they were kind of phoning it in. We didn't know Kell at all.

10. I think it's possible that Kell might have gotten a life sentence without parole if comprehensive mitigation had been presented. But no such presentation was made.

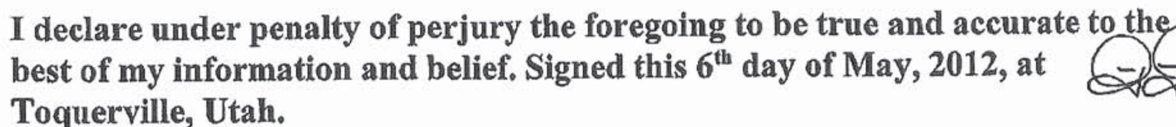
11. The defense claimed that the victim, Lonnie Blackmon, had provoked the attack by wearing a bandana, but this was never established with certainty. We couldn't figure it out. We asked if we could see that part of the video again, just that part. The only leg the defense had to stand on was that Blackmon was showing colors, and we couldn't see that. It was not clear.

12. I think that Kell was a member of a gang and that the crime had racial overtones. I think Blackmon was in a racial gang as well.

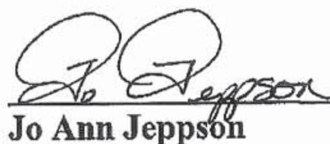
13. The videotape was shown too much. We didn't have to see the whole thing three times. I remember that one of the airings lasted longer than intended, and the jury saw the aftermath of the killing, when SWAT went in secured the unit. Afterwards, they told us we weren't supposed to see the latter stages of the video.

14. I think the prison staff was derelict in its response to the attack. They didn't react. It was awful. I think the prison guards panicked a little bit, and this precluded any opportunity to stop the attack.

15. Though people at the prison, where the trial was held, were very nice to us, the whole atmosphere of the murder trial was kind of scary for those of us on the jury.



I declare under penalty of perjury the foregoing to be true and accurate to the best of my information and belief. Signed this 6th day of May, 2012, at Toquerville, Utah.



Jo Ann Jeppson