Case No. 20220636-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellant,

v.

KOLBY RYAN BARNETT,
Defendant/Appellee.

Brief of Appellant

Interlocutory appeal from the denial of a pretrial detention motion in the Second Judicial District, Davis County, the Honorable Rita Cornish presiding.

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INTRODUCTION

In 2018, Kolby Barnett was convicted of a felony in the Third District and placed on probation. Since then, he has been charged repeatedly in over ten separate criminal cases and in three different districts with thirty-three new felonies. In this case alone, he has been charged with fourteen new felonies.

The State filed a motion for detention, invoking Article I, Subsection 8(1)(b) of the Utah Constitution. Under this Subsection, like under the capital offender exception directly above it, a criminal defendant is as a matter of law categorically nonbailable if "charged with a felony while on [felony] probation or parole, or while free on bail awaiting trial on a previous felony charge." Utah Const. art. I, § 8(1)(a)-(b). *Scott v. Ryan*, 548 P.2d 235, 236 (Utah 1976) (plurality opinion); *e.g.*, *Ex parte Springer*, 1 Utah 214, 214 (1875); *Roll v. Larson*, 516 P.2d 1392, 1392 (Utah 1973); *State v. Alvillar*, 748 P.2d 207, 210 (Utah Ct. App. 1988). The only precondition for Subsection 8(1)(a) or (b)'s preclusionary rules to apply is a judicial finding that "there is substantial evidence to support the new felony charge." Utah Const. art. I, § 8(1)(a)-(b). This second of the three "enumerated," *State v. M.L.C.*, 933 P.2d 380, 383 (Utah 1997), "exceptions to bailability," *id.* at 384 n.12, is known as the "double felony standard," *Scott*, 548 P.2d at 236.

Consistent with Subsection 8(1)(b), one Second District judge found Barnett to be nonbailable and issued a warrant for his arrest. At his initial appearance, another judge left the nonbailable hold in place. However, a third judge, despite finding that substantial evidence supported the new felony charges and that the double felony standard applied, advanced an insufficiently reasoned and repudiated method of constitutional construction.

The judge purported to read Subsection 8(1)'s plain language and, without further analysis, construed it to mean that Barnett was only not entitled to bail as a matter of right. He was still bailable as a matter of inferred judicial discretion. Even though the State had met its burden, the judge chose not to enforce the double felony provision, denied the State's motion, and granted Barnett monetary bail.

The district court erred. This Court has "'rejected'" this kind of present-day, plain-language-only "'rule of constitutional interpretation.'" *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 18-23, 450 P.3d 1092, 1098; *Patterson v. State*, 2021 UT 52, ¶ 91, 504 P.3d 92, 112, *reh'g den'd* (Jan. 18, 2022); *Randolph v. State*, 2022 UT 34, ¶¶ 57-69, 515 P.3d 444, 459-62; *see State v. Hernandez*, 2011 UT 70, ¶ 8, 268 P.3d 822, 825. Subsection 8(1)'s operative meaning can only be understood by reference to its "'precise'" text and actual history. *Kuchcinski v. Box Elder Cty.*, 2019 UT 21, ¶¶ 18-19, 450 P.3d 1056 (A correct interpretation of Subsection 8(1) "'turns in large part on an originalist inquiry."); *Maese*, 2019 UT 58, ¶ 18 ("[W]e start with the meaning of the text as understood when it was adopted.").

As discussed below, Subsection 8(1)'s core and operative text—"shall be bailable except . . . when"—is a term of art with an extensive history and established public meaning the district court ignored. From the time of its adoption, it has been understood to enumerate what crimes are "non-bailable offenses," Report to the Utah Judicial Council on Pretrial Release and Supervision Practices at 20 (Nov. 23, 2015), where bail should be "denied," *State v. Kastanis*, 848 P.2d 673, 675 (Utah 1993). Once the State has met its

burden of demonstrating that substantial evidence supports a new felony charge, a court must, as a matter of law, withhold bail from a double felony defendant.

Whether the district court used a "contemporary-context approach" or a "subjective approach" in reading Subsection 8(1), *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶¶ 73-74, 140 P.3d 1235, 1256 (Durrant, C.J., concurring) (outlining the "three possible approaches to constitutional interpretation"), the method it used creates several problems: it ignores history, the will of the People, and established canons of interpretation; it nullifies the Constitution's nonbailable exceptions; it creates inconsistent results and unequal treatment among similarly situated defendants; and it causes unpredictability and uncertainty in the law's enforcement. This case is but one example.

By adopting Subsection 8(1)(b), using the Subsection's unique phraseology, the people of Utah understood that this constitutional provision would preclude bailabilty from double felony defendants like Barnett, just like capital defendants always have been. *E.g.*, Recording of Utah House Floor Debates, H.J.R. 5, 39th Utah Leg. Gen. Sess. at Track 1 (Feb. 12, 1971) (stating that the purpose of this provision was to "put these people in a position where they can't . . . they can't get out on bail at all" and to ensure "they're not going to have the opportunity of getting out on bail"); Clyde L. Miller, *Proposed Changes in Utah's Const.*, Deseret News, Nov. 2, 1972, at 14A (explaining to Utah voters that the text of the double felony amendment meant that such defendants "shall not be bailable"); *Scott*, 548 P.2d at 236 (stating that the double felony exception was intended "to create a classification of comparable gravity" to that of the "capital offense exception"). This is why the "historical approach" to interpreting Subsection 8(1) is the correct approach. *Am.*

Bush, 2006 UT 40, ¶¶ 73, 83-86 (Durrant, C.J., concurring). And it is the approach this Court recently and unanimously endorsed. *Randolph*, 2022 UT 34, ¶¶ 57-69. District courts should be instructed that, as a matter of constitutional mandate, they are without discretion to grant bail when it is shown that the offense charged falls within the double felony exception to bailability.

STATEMENT OF ISSUE

Issue. Did the district court err in inferring discretion not to enforce Article I, Subsection 8(1)(b)'s double felony exception to bailablity and grant a double felony criminal defendant bail even though it was shown that substantial evidence supported the new felony charge and even though the Utah Constitution declares that defendant to be nonbailable?

Preservation. The State's Motion for Pretrial Detention, Overlength Memorandum, and oral argument, reviewed and denied by the district court, preserved this issue for appeal. R.20-26; 43-101; 209.

Standard of Review. Utah appellate courts "review constitutional interpretation issues for correctness, granting no deference to the district court." *Richards v. Cox*, 2019 UT 57, ¶ 7, 450 P.3d 1074, 1077.

STATEMENT OF THE CASE

In 2018, Kolby Barnett was convicted of a felony in the Third District and placed on felony probation. Stip. Mot. to Reconst. at 3. Since that time, while on probation, he has been charged with "numerous, serious felony charges" in the Third District. Stip. Mot. to

Reconst. at 5; *e.g.*, R.23-24. In these new cases, he has been repeatedly released on "pretrial services" or "monetary bonds." Stip. Mot. to Reconst. at 3.

He was then charged in this case with fourteen felonies alleged to have been committed in March and April of 2022 in Davis County. R.1-16. The State moved for Barnett's detention and requested a warrant. R.20-28. One Second District judge granted these requests. R.29-31. At his initial appearance, another Second District judge left the no bail hold in place. R.33-38. On July 11, 2022, bail was again addressed before a third Second District judge. R.165-70; 208-13; Stip. Mot. to Reconst. at 1.

At this hearing, Barnett "conceded" that he "was on felony probation when the new felony charges allegedly occurred." *Id.* at 2. He also "did not contest the substantial evidence issue" supporting his new felony charges. *Id.* at 4. Instead, he argued that this particular judge had "ruled in another case . . . that the plain language of Art. I, § 8 does not prohibit courts from granting bail to felony-on-felony defendants as a matter of judicial discretion." *Id.* at 2. Asking the judge to exercise such discretion, Barnett argued that he "was participating in the Sheriff's Prisoner Labor Detail at the ADC and that he was eligible to advance to a higher level in that program" if the no bail hold was lifted. *Id.* at 3.

"The State opposed Barnett's request." *Id.* at 4. Barnett was "a felony-on-felony offender" and "nonbailable" as a matter of law. *Id.* His "criminal history was lengthy and ongoing" and the State "discussed the many new felony charges brought against Barnett in different jurisdictions since being placed on felony probation." *Id.* Moreover, his history was one of "failures to comply with probation and pretrial release requirements in Salt Lake." *Id.*

Having "reviewed the briefs submitted by the parties," *id.* at 2, where the State set forth the evidence supporting the new felony charges, *e.g.*, R.20-26, the "Court expressly found that there was substantial evidence to support the new felony charges in this case and that Barnett was therefore not entitled to bail as a matter of right under Art. I, § 8 because he was on felony probation when the new felonies were allegedly committed. However, the court again indicated that it could still grant bail as a matter of discretion." Stip. Mot. to Reconst. at 4-5. Finding the no bail hold "prevented Barnett from being granted additional privileges in" the "Sheriff's Prisoner Labor Detail program," the court denied the State's Motion and granted Barnett monetary bail. *Id.* at 5; R.165-70.

The State timely petitioned for interlocutory review, which was granted. R.202-03.

SUMMARY OF THE ARGUMENT

As originally understood, the "exceptions to bailability" under Article I, Subsection 8(1) of the Utah Constitution render nonbailable certain enumerated classes of criminal defendants like double felony defendants when substantial evidence supports a new felony charge. Subsection 8(1)'s history, actual and precise text, structure, placement, and context demonstrate that this was Subsection 8(1)'s original public meaning.

Disregarding this, the district court advanced a present-day, plain-language-only construction of Subsection 8(1)(b), resulting in a myopic reading of the text to infer discretion not to enforce this constitutional rule. Whatever its motivations, the district court's interpretive method conflicts with the will and understanding of the People who amended what is now Subsection 8(1)(b), ignores this Court's instructions for constitutional interpretation, and creates several hermeneutical and practical problems.

Kolby Barnett is a double felony defendant. The double felony exception was enacted for criminal defendants like him. Substantial evidence supports his new felony charges. As a matter of law, he is categorically nonbailable. This Court should reverse and hold that district courts are without discretion to grant bail to double felony defendants.

ARGUMENT

When construing Utah's Constitution, "'a page of history is worth a volume of logic.'" *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 (Utah 1993) (citation omitted); *see Maese*, 2019 UT 58, ¶¶ 18-29. Constitutions are not the same as statutes. *E.g.*, *id.* at ¶ 76 (Durrant, C.J., concurring) (observing that "our state constitution is a document that rarely delves too deeply into particulars"); *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819) ("[W]e must never forget that it is a *constitution* we are expounding."). Indeed, the interpretation of Subsection 8(1) "requires 'careful analysis of the precise terms' in the provision and the framer's original meaning of those terms." *Kuchcinski*, 2019 UT 21, ¶¶ 18-19 (citation omitted); *see also In re Young*, 1999 UT 6, ¶ 15, 976 P.2d 581, 586–87 (explaining that courts interpret constitutional provisions "in light of their historical background and the then-contemporary understanding of what they were to accomplish"); *Randolph*, 2022 UT 34, ¶¶ 57-69 (same).

In doing this, a judge's "duty is not to judge the wisdom of the people of Utah in granting or withholding constitutional protections but, rather, is confined to accurately discerning their intent." *Am. Bush*, 2006 UT 40, ¶ 12 n.3. "The goal of [constitutional] analysis is to discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect. It is from this latter class of

individuals that the Utah Constitution derives its power and effect, and it is to them we must look for its proper interpretation." *Id.* at ¶ 12; *Randolph*, 2022 UT 34, ¶ 69 ("But when we interpret our constitution, we are not simply shopping for interpretations that we might like. We start our analysis by trying to understand what the language meant to those who voted on it, and we go from there.").

"All political power," after all, belongs to the People, and they "founded" Utah's government "for their equal protection and benefit," retaining the power to "alter" it "as the public welfare may require." Utah Const. art. I, § 2. It is sometimes forgotten that the "Constitution seeks to protect the innocent. The guilty, in general, receive procedural protection only as an incidental and unavoidable byproduct of protecting the innocent *because* of their innocence." Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 Am. Crim. L. Rev. 1123, 1133 (1996).

Crime infringes on innocent people's liberties. Experience has shown, because of the public safety risks certain individuals pose, that there are a few categories of criminal defendants for whom there can be "'no other sureties but the four walls of the prison.'" *Carlson v. Landon*, 342 U.S. 524, 545 n.45 (1952) (citation omitted). Because of this, exercising their prerogative to prioritize the rights of the innocent, the People have from the beginning, *see* Utah Const. art. I, § 8 (1896), using a term of art with a deep historical meaning, identified certain classes of criminal defendants from whom they have withheld any bailability by creating the "exceptions to bailablity," *M.L.C.*, 933 P.2d at 384 n.12. These exceptions outline when "[b]ail is not available," *id.* at 383 n.5, "precluded,"

Alvillar, 748 P.2d at 210, and "denied," *Kastanis*, 848 P.2d at 675. *E.g.*, *Roll*, 516 P.2d at 1392 (reversing a court that granted bail where the offense was nonbailable by Section 8).

In the late 1960's and early 1970's, because of "the steady and alarming increase in crimes, particularly by career criminals," *Scott*, 548 P.2d at 237 (Crockett, J., concurring and dissenting in part), Utahns made a policy decision to expand the classes of criminal defendants from whom they wished to withhold bailability to include not just "the capital offender" but also "the repeated offender." Gov. Calvin L. Rampton, Utah Senate Journal, 39th Utah Leg. Gen. Sess., 71 (Jan. 12, 1971); *Randolph*, 2022 UT 34, ¶ 58 (briefly discussing the historical amendments that "expanded that exception").

Like the people of the United States, Utahns have a "legitimate and compelling" "interest" in "preventing crime by arrestees." *United States v. Salerno*, 481 U.S. 739, 749 (1987). Thus, they amended what is now Article I, Subsection 8(1) to include those criminal defendants who fall within the "double felony standard." *Scott*, 548 P.2d at 236. Their intent was "to create a classification of comparable gravity" to that of the "capital offense exception." *Id.* These defendants were to be treated like capital defendants always have been. To accomplish this, the People used the same term of art they had always used to withhold bailabilty from capital defendants.

Despite the district court's finding Barnett to be a double felony defendant, it chose to nonetheless grant him bail. To do this, it advanced a method of constitutional construction squarely "'rejected,'" *Maese*, 2019 UT 58, ¶ 22, one that reads only the plain language of a part of a single provision as it might be understood by some modern readers and without reference to its history, actual text, guiding interpretive canons, structure,

surrounding provisions, or other sources. This way, the district court could read the phrase "[a]ll persons charged with a crime shall be bailable except . . . when" to mean that a qualifying defendant was not entitled to bail as a matter of right only but may still be granted bail as a matter of judicial discretion.

Article I, Subsection 8(1)'s actual text, however, has never spoken in such terms. It does not say, for instance, "except as determined by a court." Thus, the district court's reading of the plain language of Subsection 8(1)'s actual text was myopic, focusing on only part of the entire rule without considering its entire meaning. It further conflicts with this Court's and the court of appeals' prior decisions, disregards the canons of interpretation, contravenes the interpretive "mandatory and prohibitory" requirements of Article I, Section 26, and ignores the history and original understanding of the text. It amounts to little more than judicial legislation.

Utah courts are to construe a constitutional provision by looking to its (I) history, original meaning, and intent; (II) its actual and precise text as it was originally understood; and (III) its structure, placement, context, and operation in relation to other provisions. A complete constitutional analysis of this provision, discussed below, demonstrates the interpretive error the district court advanced in this case, which has led to a reoccurring problem of some nonbailable offenders like Barnett being granted bail and has created (IV) a number of other unresolved hermeneutical and practical problems.

Subsection 8(1)(b)'s exception is self-executing.[1] In applying it, a court's discretion is limited to its substantial evidence determination. If the State meets its burden of proof, a court is required to withhold bail from the defendant because the Constitution renders such a person nonbailable. A court does not have discretion to choose not to enforce this rule. It was democratically designed for defendants like Barnett.

I. THE DISTRICT COURT'S CONSTRUCTION OF SUBSECTION 8(1) IS UNSUPPORTED BY SUBSECTION 8(1)'S HISTORY, INTENT, AND ORIGINAL UNDERSTANDING.

While the district court disregarded Subsection 8(1)'s history in this case, its text can only be reasonably understood in light of its history. When the people of Utah first adopted their Constitution, they declared their rights under Article I. *See generally* Utah Const. art. I (1896). Article I was uniquely framed to protect both the "[r]ights of accused persons," *id.* § 12, and the "lives and liberties" of those who are not accused, *see id.* §§ 1, 2. When it came to "accused persons," the people chose to confer an inferred protection of bailability upon most of them by creating the "Offenses bailable" Clause. *Id.* § 8 ("All prisoners shall be bailable by sufficient sureties . . . ."); *Kastanis*, 848 P.2d at 675 (stating

[1] "'[A] constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers' or, in other words, 'if no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.'" *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 59, 250 P.3d 465, 481 (citation omitted). As discussed below, the double felony exception requires no implementing legislation and has long been enforced without it. It is self-executing for the same reasons Article I, Sections 1 and 7 are self-executing. *E.g.*, *id.* at ¶ 61. In fact, it is far more specific than the Due Process Clause. And Subsection 8(1), unlike any other Article I sections, has a dual operation, both granting and withholding a right.

that "Section 8 . . . by inference guaranteed bail to all [save a few] as a matter of right."); *accord Randolph*, 2022 UT 34, ¶ 15.

"Section 8, however," had a dual function: it also "denied the right to bail in capital cases and certain other categories of offenses . . . ." *Kastanis*, 848 P.2d at 675; *Randolph*, 2022 UT 34, ¶ 15 ("But section 8 also imposes limitations on that right."). Initially, there was one category of accused persons from whom the people wanted to protect themselves: those charged with "capital offenses when the proof [was] evident or the presumption strong." Utah Const. art. I, § 8 (1896); *Kastanis*, 848 P.2d at 675. The "gravity of the nature of th[at] offense" was simply too great to confer the right to bail on such persons. *Scott*, 548 P.2d at 236. In order to withhold any bailability from capital offenders, the People adopted the following language: "All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong." Utah Const. art. I, § 8 (1896).

The operative words from Article I, Section 8's original Offenses Bailable Clause were "shall be bailable . . . except . . . when." This phraseology was not unique to Utah and did not originate in Utah's Constitutional Convention. Rather, it is a term of art with a well-understood and established meaning when it was adopted.[2] The principle behind it, moreover, has deep historical roots firmly grounded in the English Common Law. William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 77, 83, 101 (1977);

[2] *Maxfield v. Gary Herbert*, 2012 UT 44, ¶ 31, 284 P.3d 647, 655 (explaining that a term of art is "a word or phrase . . . 'transplanted from another legal source, whether the common law or other legislation, [that] brings the old soil with it'").

Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L.J. 1139, 1154-55 (1972) ("Soon, custom seems to have established two distinct categories of offenses, one bailable under common law, the other one not bailable.").

Historically, "[t]he common law did not provide for an absolute right to bail." Duker, *supra*, at 101. Instead, such questions were largely left to the discretion of those entrusted with bail decisions. This, however, led to repeated abuses, causing the law to develop so as to curb those abuses by, as early as 1166, beginning to distinguish criminal offenses through the dichotomy of bailability. *Id.* at 43-45; Meyer, *supra*, at 1155. When an act by the Crown or Parliament classified an offense as nonbailable, a common law judge lost all discretion to grant the charged person bail. *See* 4 William Blackstone, *Commentaries on the Laws of England*, 296-97 (1772).

This same model was imported into and adopted by the American Colonies. Duker, *supra*, at 81 ("When the colonies asserted their independence in 1776, they continued the system of bail as it had been known."); Meyer, *supra*, at 1178 ("The American colonies were greatly influenced by English law, some of them to the point of continuing the English bail statutes until their independence."); *e.g.*, Mass. Body of Liberties ¶ 18 (1641) ("No mans person shall be restrained or imprisoned by any authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behaviour in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of [the legislative body] doth allow it.").

After the formation of the United States, the new federal government adhered to this model, leaving bailability determinations to Congress.[3] Some of the States did the same.[4] For example, in 1785 the "Virginia legislature enacted a statute" that made it clear that there was no "judicial discretion in determining whether bail should be granted or denied." Duker, *supra*, at 81. This provision provided that "'if a crime be punishable by life or limb, or if it be manslaughter and there be good cause to believe the party guilty thereof, he shall not be admitted to bail.'" *Id.* at 81, *quoting* 12 Va. Stat. 185-86 (W. Hening ed. 1823); Meyer, *supra*, at 1193, *citing* Va. Comp. Laws, c. XIV, 1 Rev. Code of 1803, at 25 (2d ed. 1814).

The mindset of the founding generation was one of limiting discretion. In fact, the majority of the other States took it a step further. Rather than delegating bailability determinations to a legislature, they constitutionalized the principle that certain crimes should be designated as nonbailable while others should not, thus limiting legislative and judicial discretion. *E.g.*, Penn. Const. art. IX, § XIV (1790) (providing "[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great");[5] *Com. ex rel. Condello v. Ingham*, 54 Pa. D. & C. 253, 255 (Com.

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[3] *Compare* Judiciary Act of 1789, § 33, 1 Stat. 73, 91 (1789), *with* 18 U.S.C.A. § 3142 (West 2022). It continues to be so to this day, there being no federal constitutional right to bailability. *Carlson*, 342 U.S. at 545-46; *United States v. Edwards*, 430 A.2d 1321, 1327-28, 1330 (D.C. 1981); *Salerno*, 481 U.S. at 754–55.

[4] *E.g.*, Virginia Decl. of Rights § 9 (1776); Const. of Mass. Art. XXVI (1780); New York Bill of Rights 8th (1787).

[5] Capital offenses included several crimes. *E.g.*, Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112, 112-19 (1790) (outlining treason, willful murder, murder, robbery, piracy, forgery and counterfeiting, and rescuing a person convicted of a capital offense); *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976)