Case No. 20180788-SC

IN THE

# UTAH SUPREME COURT

TROY MICHAEL KELL,
*Petitioner/Appellant,*

*v.*

STATE OF UTAH,
*Respondent/Appellee.*

## Supplemental Brief of Appellee


JON M. SANDS
Federal Public Defender
District of Arizona
Lindsey Layer (VA #79151)
Alexandra H. LeClair (AZ #026269)
Arizona Federal Defender's Office
850 West Adams Street, Ste, 201
Phoenix, AZ 85007
Telephone:
Email: Lindsey_Layer@fd.org

Jonathan T. Nish (14739)
B. Kent Morgan (3945)
Morgan, Nish & Assoc., P.C.
975 West 850 South
Woods Cross, UT 84087

Counsel for Appellant

ERIN RILEY (8375)
ANDREW F. PETERSON (10074)
TANNER R. HAFEN (18398)
Assistant Solicitors General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: andrewpeterson@agutah.gov
eriley@agutah.gov
trhafen@agutah.gov

Counsel for Appellee


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## INTRODUCTION

In 1994, 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.

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 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 over *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.

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 district court granted summary judgment because Kell's claim was untimely and procedurally barred. PCR906-918. The court also concluded 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." PCR916. Finally, the district court ruled that the statute of limitations "does not unconstitutionally suspend the writ." PCR917.

The Post-Conviction Remedies Act (PCRA) and Rule 65C fairly balance the availability of collateral remedies 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.

Kell cannot establish that barring his belated claim violated his constitutional rights. The rule 65C/PCRA procedural limitations are extremely flexible. They do not violate the Suspension Clause, the Due Process Clause, or the Open Courts Clause. The voters who ratified the 1984 constitutional amendments would have understood that there were limits on postconviction relief, such as laches and the doctrine of abuse of the writ. Kell's withholding of his claim constitutes an abuse of the writ, and such abuses have historically been barred.

The district court's judgment should be affirmed.

## ARGUMENT

### I.

**Kell has not established that barring his belated claim would violate his constitutional rights.**

The Court ordered the parties to brief the following question:

> 1. Has Mr. Kell adequately and properly presented and preserved the issue of whether application of the PCRA and rule 65C's time and procedural bars to his claim violates the Suspension Clause or any other provision of the Utah Constitution? If so, what are the arguments for and against such constitutional violations[?]

Supp. Br. Order, 31 January 2022 at 4.

The district court granted summary judgment because Kell's claim was (1) untimely and (2) procedurally barred. PCR906-918. The court also anticipated this Court's holding in *Patterson v. State*, 2021 UT 52, 504 P.3d 92, concluding 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." PCR916. Finally, the district court ruled that the statute of limitations "does not unconstitutionally suspend the writ." PCR917.

While Kell's appeal was pending, this Court issued *Patterson*, 2021 UT 52. *Patterson* holds that "the courts of this state have constitutional writ authority independent of the PCRA." *Id.* ¶33. But it also holds that "Utah Rule

of Civil Procedure 65C—which incorporates the PCRA—governs the exercise of that power. And [the courts] exercise that power in total harmony with the PCRA." *Id*. ¶174. Therefore, to convince the Court "to hear a petition that rule 65C and the PCRA bar," Kell "would need to demonstrate that failure to entertain his petition violates his constitutional rights." *Id.* ¶218. Kell cannot meet that requirement because he cannot establish that application of the rule 65C/PCRA procedural limitations violates the Suspension Clause, the Due Process Clause, or the Open Courts Clause.

### A. The rule 65C/PCRA procedural limitations do not violate the Suspension Clause.

Kell argues that strict application of the rule 65C/PCRA time and procedural bars violate his rights under the Suspension Clause of the Utah Constitution (Kell Supp. Br. 3, hereafter "KSB"). The Suspension Clause provides: "The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it." Utah Const., art. I, § 5. Kell cannot establish any violation of the Suspension Clause because he cannot show that the extremely flexible time and procedural bars suspended his ability to file a petition.

### 1. The statute of limitations and procedural bars do not "suspend" a petitioner's ability to file a petition.

The rule 65C/PCRA procedural limitations permit all reasonably diligent petitioners to have their meritorious claims heard. So long as a petitioner does not unreasonably delay as Kell did, waiting longer than the limitation period or not bringing the claim in the first petition where the claim could be raised, the rule 65C/PCRA statute of limitations and procedural bars provide a perfectly traversable avenue to seek relief. Whatever "suspended" means in the Suspension Clause, it does not include reasonable limitations that erect no barrier to relief for the reasonably diligent.[1]

In *Patterson,* the Court noted that "the Suspension Clause contemplates measures that 'stay,' 'cause to cease,' or 'interrupt' the ability of a prisoner to challenge her detention." 2021 UT 52, ¶209. The rule 65C/PCRA statute of limitations does not stay, cause to cease, or interrupt the *ability* of a prisoner to challenge detention. It merely provides reasonable procedural rules for when a petition may be filed, requiring a petitioner to bring his claims at the first opportunity to do so. As explained below, the time limit is extremely

[1] For an example of suspension of the writ, at the outset of the Civil War, President Abraham Lincoln suspended the writ of habeas corpus to protect Union troops moving to defend the Capital. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in Abraham Lincoln: Speeches and Writings 1859-1865* at 246, 254 (Don E. Fehrenbacher ed., 1989).

flexible because it does not begin until the option for appellate review has concluded, or until the date the petitioner knew or reasonably should have known of the evidentiary facts on which the petition is based, and it is tolled for any period during which the petitioner was prevented from filing due to unconstitutional State action, or due to physical or mental incapacity, or while a DNA or factual innocence petition is pending. And no statute of limitations applies to DNA or factual innocence petitions.

"[S]tatutes of limitations 'establish a prescribed time within which an action must be filed after it accrues. They do not abolish a substantive right to sue, but simply provide that if an action is not filed within the specified time, the *remedy* is deemed to have been waived.'" *Kiernan Fam. Draper, LLC v. Hidden Valley Health Ctrs, LC,* 2021 UT 54, ¶33, 497 P.3d 330 (citation omitted). "'The statute of limitations…does not destroy the right but withholds the remedy.'" *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725 (1988) (citation omitted). The rule 65C/PCRA statute of limitations is an appropriate procedural limit that does not suspend the writ of habeas corpus.

The rule 65C/PCRA procedural rules state that a petitioner is not eligible for relief upon 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). In addition to being untimely, Kell's claim was also procedurally

barred because it could have been raised in a prior petition. Kell did not dispute that his claim could have been raised in a prior petition. PCR909.

So long as a petitioner uses reasonable diligence, he will always be able to have a claim heard on the merits. The rule 65C/PCRA limitations never cut off claims before they could ever be heard; they only cut off claims that have already been heard or that a petitioner unreasonably delays discovering or presenting. The rule 65C/PCRA time and procedural bars do not violate the Suspension Clause because they do not abrogate the right to get relief for appropriate claims. They merely require reasonable diligence. Kell failed to get his claim heard on the merits because of his own delay in presenting it, not because rule 65C/PCRA limitations suspended the writ of habeas corpus.

**2. The statute of limitations and other procedural bars are permissible under the Suspension Clause because they are procedural, not substantive.**

Kell concedes that "courts may certainly place rules and limits on the procedures by which individuals may petition for the writ." (KSB 3). But then in a complete about-face, Kell argues that under the Suspension Clause the writ must "always" be an available tool to the courts to correct judgments. *Id*. Contrary to his concession, Kell argues that any time bar or procedural bar is always unconstitutional if a petitioner has a meritorious claim. Kell argues

that the Legislature cannot expand or diminish the substantive writ authority (KSB 5).

Kell argues as if the Legislature's enactments in the PCRA were the whole story. He ignores *Patterson*'s holding that the limitations at issue—time and procedural bars—apply to post-conviction petitions by virtue of the Court's rulemaking authority, not the legislative function. The Court promulgated rule 65C and adopted the procedural framework of the PCRA, meaning the Court, not the Legislature, has regulated its own exercise of its writ authority.

But even if the PCRA's limitations were fundamentally legislative impositions on the exercise of the writ, those limitations are procedural, not substantive, rules. And the Suspension Clause does not prevent a State from imposing procedural rules and limitations. "Statutes of limitations are essentially procedural in nature and establish a prescribed time within which an action must be filed after it accrues." *Lee v. Gaufin*, 867 P.2d 572, 575 (Utah 1993); *Arnold v. Grigsby*, 2012 UT 61, ¶13 n. 14, 289 P.3d 449 (same). "Utah follows the majority position that limitation periods are generally procedural in nature." *Fin. Bancorp, Inc., v. Pingree & Dahle, Inc.,* 880 P.2d 14, 16 (Utah Ct. App. 1994).

The PCRA's statute of limitations and procedural bars are procedural in nature, and the Court may certainly apply its own procedural rules to actions litigated in its courts. Kell has not shown that applying the statute of limitations and procedural bars violated his constitutional rights.

**3. The time limitation and procedural bars are flexible.**

Kell argues that "[r]emoving all flexibility and discretion would remove the Court's authority to correct constitutional violations, regardless of the injustice that would result, and thereby result in a suspension of the writ." (KSB 4). But the rule 65C/PCRA limitations do not remove all flexibility.[2] Quite the opposite. The current time limitations are extremely flexible. "A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code Ann. § 78B-9-107(1). Right out of the chute, all petitioners always have a full year to bring any claim that arises, whenever it arises.

But there is also tremendous flexibility around when claims accrue and start the one-year clock ticking. There are numerous points at which a cause of action may accrue. Absent any later occurrence, a cause of action may accrue on the last day for filing an appeal if no appeal is taken, or upon entry of the decision of the appellate court, or on the last day for filing a petition

[2] And Kell has not shown that the constitution requires discretion.

for writ of certiorari in the Utah Supreme Court or the United States Supreme Court if no certiorari petition is filed, or upon entry of the denial of the petition for writ of certiorari or entry of the decision on the petition for certiorari review. Utah Code Ann. § 78B-9-107(2) (a-d).

The statute of limitations also provides a full year to bring claims after "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." *Id.* § 107(2)(e).

And the limitations statute provides for instances where the U.S. Supreme Court, this Court, or the Utah Court of Appeals announce a new rule that would apply to the petitioner. In those circumstances, the cause of action does not accrue until the date on which the new rule is established. *Id.* § 107(2)(f).

Kell argues that federal courts have found that federal procedural limitations did not offend the federal Suspension Clause only because they contained adequate safety valves in the form of tolling provisions (KSB 6).[3]

[3] Equitable tolling in federal habeas petitions is invoked sparingly and will not toll a statute of limitations because of "what is at best a garden variety claim of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way."

Even if that were true, Kell neglects to address the similar rule 65C/PCRA tolling provisions. In addition to flexible accrual dates, the limitations period may be 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 [or] due to physical or mental incapacity."[4] Utah Code Ann. § 78B-9-107(3)(a). It is also tolled for claims specified in the statute where the petitioner committed enumerated offenses "due to force, fraud, or coercion." *Id*. Finally, the statute of limitations is tolled during the pendency of a petition asserting exoneration through DNA testing or factual innocence. *Id.* § 107(4), which themselves have no procedural bars at all. Utah Code Ann. §§ 78B-9-301-304 & 78B-9-401-405.

The time limitations applicable to rule 65C/PCRA petitions are extremely flexible. Application of these generous and flexible limitation periods do not suspend the privilege of the writ of habeas corpus. Like Patterson, Kell has not established that "the flexible one-year statute of

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*Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

[4] Utah's tolling provisions mirror equitable tolling in federal habeas cases. For incapacity tolling, *compare Lawrence v. Florida*, 549 U.S. 327, 337 (2007) *and Hunter v. Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir. 2009) *with* Utah Code Ann. §78B-9-107(3)(a). For tolling for unconstitutional state action *compare Spottsville v. Terry,* 476 F.3d 1241, 1245-46 (11th Cir. 2007) *with* Utah Code Ann. § 78B-9-107(3)(a).

limitations to file a post-conviction writ amounts to a suspension of the writ of habeas corpus." *Patterson*, 2021 UT 52, ¶212.

The PCRA's other procedural bars are also flexible and do not violate the Suspension Clause. A petitioner is not eligible for post-conviction relief on a claim that "may still be raised on direct appeal or by a post-trial motion." Utah Code Ann. § 78B-9-106(a). This does not suspend a petitioner's right to seek relief since it *requires* that he first seek relief on direct appeal or by a post-trial motion if such a remedy is available. Similarly, a petitioner is not eligible for relief on claims that were already raised or addressed at trial, on appeal, or in a prior post-conviction petition. *Id.* §78B-9-106(b) & (d). Again, this does not suspend a petitioner's right to seek relief—he already sought relief. He is merely prevented from seeking the same relief twice. And as discussed below, this prohibition against relitigation of spent claims was always the law even under the pre-PCRA common law.

Finally, a petitioner is not eligible for relief on a claim that he could have raised, but did not raise, at trial, on appeal, or in a prior post-conviction petition. *Id.* § 78B-9-106(c)&(d). But again, this does not suspend a petitioner's right to seek relief. He had the right and the ability to raise the claim at trial, on appeal, or in a prior post-conviction petition. And if he could not have raised the claim earlier, then it is not barred. This provision prevents a

petitioner from not seeking relief as a strategic decision, or as a form of tactical delay, and then later attempting to seek relief in a post-conviction petition.

And like the time bar, these procedural bars are also flexible. Notwithstanding the fact that a claim could have been raised at trial or on appeal, it may still be raised in post-conviction if the "failure to raise that ground was due to ineffective assistance of counsel." *Id.* § 78B-9-106(3)(a). And although the claim could have been raised at trial, on appeal, or in a prior post-conviction petition, the claim may still be raised for enumerated offenses if the "failure to raise that ground was due to force, fraud, or coercion." *Id.* § 78B-9-106(3)(b).

Kell acknowledges that historically courts "would not consider petitions for habeas corpus containing claims that had been raised and addressed, or that could have been raised in a prior petition." (KSB 9). However, he argues that courts would nonetheless consider a petitioner's claims "where it would be 'unconscionable not to re-examine the conviction.'" *Id.* (quoting *Gallegos v. Turner*, 409 P.2d 386, 387 (Utah 1965)). But as this Court noted in its Supplemental Briefing Order, Kell cannot "obtain relief under the pre-PCRA exceptions, which we eliminated when we adopted rule 65C." Kell's argument about what claims could historically

receive review fails to establish a violation of the Suspension Clause. The fact that something was allowed in the past does not compel the conclusion that the current rule 65C/PCRA limitations violate the Suspension Clause. Kell simply says it is so, apparently assuming that the contours of the common law limitations necessarily define the reach of the Suspension Clause, without explaining why, thus failing to meet his burden of persuasion.

Habeas has never been a substitute for appeal. But historically, irrespective of whether an appeal was taken, a conviction could be challenged by collateral attack "where an obvious injustice or a substantial and prejudicial denial of a constitutional right ha[d] occurred." *Dunn v. Cook,* 791 P.2d 873, 876 (Utah 1990). This standard is similar to the one this Court applied in *Patterson*, holding that the court has authority "to hear a petition that rule 65C and the PCRA bar" if the petitioner can "demonstrate that failure to entertain his petition violates his constitutional rights." 2021 UT 52, ¶218.

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 only gave way if the petitioner could show "good cause" under one of several enumerated exceptions. *Id.* at 1037. But before a court could even examine a claim under one of the good cause

exceptions, a petitioner first 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). Kell cannot meet that requirement for all the reasons the State argued in its opening brief. 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 cannot meet his burden 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 prior post-conviction proceedings. "His opening brief made no mention of the threshold burden under *Hurst*—of establishing that the claims were not withheld for tactical reasons," nor did his supplemental brief. *Pinder v. State*, 2015 UT 56, ¶58, 367 P.3d 968 (internal quotation marks and citation omitted). "That alone is a fatal misstep…." *Id.* Kell failed to meet his burden to show he could get past the common law procedural bars even assuming the Court found the rule 65C/PCRA procedural bars unconstitutional. Kell's actions, not the rule 65C/PCRA limitations, removed his claims from the reach of the writ of habeas corpus.

Kell cites *Hurst,* 777 P.2d at 1034-35 and *Julian v. State,* 966 P.2d 249, 253 (Utah 1998) to argue that "[r]emoving all flexibility and discretion would remove the Court's authority to correct constitutional violations, regardless of the injustice that would result, and thereby result in a suspension of the writ." (KSB 4). But as addressed above, the current rules are extremely flexible. And *Hurst* and *Julian* did not consider either the current flexible limitation period and procedural rules or the Court's later rulemaking adoption of the PCRA. Most of the concerns raised in *Hurst* and *Julian* are now addressed in rule 65C/PCRA or other statutes and rules.

*Hurst* clearly held that "[f]rivolous claims, once-litigated claims with no showing of 'unusual circumstances' or 'good cause,' and claims that are withheld for tactical reasons should be summarily denied." *Hurst*, 777 P.2d at 1037.

When *Hurst* was decided, rule 65C's predecessor, rule 65B(i)(4), provided that claims "may not be raised in another subsequent proceeding except for good cause shown therein." *Hurst*, 777 P.2d at 1033. Thus, at the time, the good cause exception was specifically part of the rule. *Hurst* said that a "showing of good cause that justifies the filing of a successive claim may be established by showing" at least one of the following circumstances: (1) denial of a constitutional right pursuant to a new law that is, or might be,

retroactive, now addressed by Utah Code section 78B-9-104(1)(f); (2) new facts not previously known which would show the denial of a constitutional right or change the outcome of the trial, now addressed by Utah Code section 78B-9-104(1)(e); (3) fundamental unfairness in a conviction, now addressed, at least in part, in the PCRA's provisions for determination of factual innocence, Utah Code sections 78B-9-401 through 405; (4) illegality of a sentence, now addressed under Utah Rule of Criminal Procedure 22(e); and (5) a claim overlooked in good faith with no intent to delay or abuse the writ, now at least partially covered by the PCRA provisions addressing claims of ineffective assistance of counsel, Utah Code section 78B-9-106(3). *Hurst*, 777 P.2d at 1037.

As an example of unusual circumstances, *Hurst* mentioned a retroactive change in the law. 777 P.2d at 1036. That is now covered by Utah Code section 78B-9-104(1)(f). Another example was the subsequent discovery of suppressed evidence or newly discovered evidence. 777 P.2d at 1036. That is now covered by Utah Code section 78B-9-104(1)(e).

*Hurst* pointed out cases that "called in question the fundamental justice of a conviction where the issue was not, or could not be, dealt with on direct appeal." 777 P.2d at 1036, n.6. Under the current rule and statute, a claim is not barred if it could not have been raised on appeal. Claims are only barred

if they were raised on appeal or in a prior petition, or could have been, but were not. Utah Code Ann. § 78B-9-106(1). And the circumstances in the cases mentioned in *Hurst* are now covered by the current rules and statute. *Hurst* mentioned cases that involved (1) ineffective assistance of counsel, which can now be raised on appeal under Utah R. App. P. 23B or, if a default resulted from trial or appellate counsel's ineffectiveness, in post-conviction under Utah Code section 78B-9-106(3); (2) discovery of new exculpatory evidence, including unconstitutionally suppressed evidence, which are now addressed by Utah Code section 78B-9-104(1)(e) and the DNA and factual innocence provisions, sections 78B-9-300 through 405; (3) fraud committed on the court by the knowing use of false evidence, now governed by the new evidence provisions of Utah Code sections 78B-9-104(1)(e) and 104(2)(b); (4) an illegal sentence, now covered by Utah R. Crim. P. 22(e); (5) denial of the right to appeal, now covered by Utah R. App. P. 4(f); and (6) challenges to guilty pleas, which petitioners may raise under Utah Code section 78B-9-104(1)(a) or, if timely filed, Utah Code section 77-13-6.

*Julian* also did not address the current, flexible, one-year limitations period. *Julian* held that the general civil four-year statute of limitations could not be constitutionally applied to bar a habeas corpus petition because it was "inflexible." *Julian,* 966 P.2d at 253. As noted, the current statute of limitations

is anything but inflexible. And the "sweeping language" of *Julian* has been "overtaken" — meaning overruled *sub silencio* — in any event by cases in which application of time bars to petitions for extraordinary relief have been upheld. *Patterson,* 2021 UT 52, ¶203.

In addition, the concerns raised in *Julian* are now addressed in the PCRA. *Julian* was concerned that if a statute of limitations alone could be applied to dismiss a petition, a person "who could show his innocence — e.g., by new DNA evidence or confessions of others — could never be exonerated and obtain freedom from wrongful incarceration." *Julian,* 966 P.2d at 254. These problems are now addressed by the PCRA's provisions allowing a petitioner to seek post-conviction DNA testing, Utah Code §§ 78B-9-300 through 304, and to seek a determination of factual innocence, Utah Code §§ 78B-9-401 through 405. Petitions under these provisions may be raised at any time. The *Julian* court's worst fear, that an innocent person could rot in prison without any legal recourse, has itself been overtaken by legislation expanding the traditional remedies for those unusual circumstances. Moreover, the filing of a DNA or innocence petition tolls the limitations period for all other claims, resulting in an even more generous time to bring routine claims. Utah Code § 78B-9-107(4). Far from suspending the writ, the rule 65C/PCRA provisions more than reasonably expands a petitioner's access to it.

Kell argues that historically, his claim could still have been reviewed where it would be unconscionable not to. But historically, petitioners were not entitled to a writ of habeas corpus if some other statutory remedy was available but never pursued. *See, e.g.*, *Lindeman v. Morris*, 641 P.2d 133, 134 (Utah 1982) (per curiam) (application for habeas corpus rejected as "an attempt to…substitute [it] for…timely appeal"). Historically, to obtain review, a petitioner had to show that "there was an obvious injustice or a substantial and prejudicial denial of a constitutional right." *Dunn,* 791 P.2d at 876. But Kell cannot show an obvious injustice or a substantial and prejudicial denial of a constitutional right. He cannot show a violation of the Suspension Clause, and there is no obvious injustice in requiring a petitioner to raise his claim at the first opportunity and not allowing him to proceed with a claim that he purposely delayed bringing for tactical reasons. And as noted, historically Kell's claim would have been summarily dismissed as tactically withheld for strategic purposes. History is no help to Kell. The habeas common law brooked no dilatory tactics like the ones Kell used here and he cannot complain of suspension of the writ where he would never have been entitled to it in the first place.

**4. Other state and federal courts have held that statutes of limitations do not violate the Suspension Clause.**

This Court said, "[w]hile the decisions of other courts do not dictate the interpretation of our constitution, they certainly cause us to stop before we would presume to declare that any statute of limitations violates the Suspension Clause." *Patterson*, 2021 UT 52, ¶211. Other states that have considered this issue have held "that statutes of limitations do not violate their respective Suspension Clauses." *Id.*[5] And like Utah's limitations, the federal statutory provision for federal habeas corpus relief includes a one-year limitation period. 28 U.S.C.A. § 2244(d). Federal courts have universally agreed that the one-year limitation is not a violation of the suspension clause.

Kell cherry-picks language from sister state and federal cases in an attempt to support his arguments. But he fails to evaluate and compare the post-conviction provisions addressed in those cases with Utah's current flexible time and procedural bars. For example, Kell argues that *Lott v. State*, 2006 MT 279, 334 Mont. 270, concluded that a post-conviction procedural bar

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[5] *See e.g., Com. v. Zuniga*, 772 A.2d 1028, 1032 (Pa. Super. Ct. 2001); *Carson v. Hargett*, 689 So.2d 753, 755 (Miss. 1996); *Kills on Top v. State*, 901 P.2d 1368, 1385-87 (Mont. 1995); *Com v. Marcum*, 873 S.W.2d 207 (Ky. 1994); *People v. Wiedemer,* 852 P.2d 424, 435 (Colo. 1993); *Bartz v. State*, 839 P.2d 217 (Or.1992); *White v. State*, 779 S.W.2d 571 (Mo. 1989), related ref, 838 S.W.2d 140 (Mo. Ct. App. 1992); *In re McCastle*, 514 N.E.2d 1307 (Mass. 1987); *Campbell v. State*, 500 P.2d 303 (Okla. Crim. App. 1972).

"effected an unconstitutional suspension of the writ." (KSB 20). But *Lott* addressed a challenge to a facially invalid sentence. *Lott*, 2006 MT 279, ¶22. In Utah, a challenge to an illegal sentence is raised by filing a motion under Utah R. Crim. P. 22(e), and depending on the type of illegality at issue, such a motion may be brought at any time.

Kell argues that two Colorado cases found that, absent protections for otherwise meritorious claims, statutes of limitations on the writ of habeas corpus violate Due Process and the Suspension Clause (KSB 21). But Kell fails to acknowledge that Colorado's courts later upheld statutory limitations on habeas relief after amendments to Colorado's provisions that mirror the flexibility found in Utah's rule 65C/PCRA.

Like Utah, Colorado's post-conviction provisions have changed over the years. Its holding in *People v. Germany,* 674 P.2d 345 (Colo. 1983) addressed a former time bar, before certain exceptions were included. *People v. Wiedemer*, 852 P.2d 424, 437 (Colo. 1993). But in 1993 the Colorado court held that its post-conviction provision "does not suspend the constitutional right to the writ of habeas corpus." *Id*. at 434. "It is well settled that states may attach reasonable time limits to the assertion of federal constitutional rights." *Id. Wiedemer* went on to say that the inclusion of certain exceptions to the time bar, such as loss of the right to challenge a conviction as a result of mental

disability or when failure to seek relief resulted from justifiable excuse or excusable neglect, "further contributes to our conclusion that the time limitations…do not render the mechanisms for postconviction relief insufficient to afford an accused a meaningful opportunity to attack the constitutionality of prior convictions." *Id*. at 435.

*In re Friend*, 489 P.3d 309 (Cal. 2021), discussed new restrictions on successive habeas petitions in death penalty cases. But both parties agreed that the new "successiveness standard does not apply to claims that could not have been raised in earlier petitions." *Id.* at 316. Similarly, under Utah's rule 65C/PCRA, a petitioner is not barred from raising a claim that could not have been previously raised, Utah Code Ann. § 78B-9-106(1)(b), (d), thus providing the same flexibility that resulted in the California court upholding limitations on habeas relief.

As this Court recognized, "[s]everal federal circuits have held that a one-year statute of limitations on habeas petitions does not violate the federal Suspension Clause." *Patterson*, 2021 UT 52, ¶210 (noting cases that found no suspension clause violation); *see also Hill v. Dailey*, 557 F.3d 437, 438 (6th Cir. 2009) ("Like every other court of appeals to address the issue, this court has held that AEDPA's one-year statute of limitations does not improperly suspend the writ of habeas corpus.").

Kell fails to point to a single sister state or federal appellate decision finding a suspension of the writ of habeas corpus where flexible limitations like Utah's accommodated the reasonably diligent petitioner. Doing so here would make Utah a singular outlier.

**5. Rule 65C does not remove an appellate court's original jurisdiction to review habeas petitions filed directly in that court.**

Kell argues that in *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996), the Supreme Court noted that the federal habeas statute did not withdraw from the Supreme Court the jurisdiction to review habeas petitions filed in the Court under its original jurisdiction (KSB 7). But in *Felker*, the Court ordered briefing on three separate questions: (1) whether the Act applied to an original petition for habeas corpus filed in the Supreme Court; (2) "whether application of the Act suspended the writ of habeas corpus;" and (3) whether the Act "constitute[d] an unconstitutional restriction on the jurisdiction of [the Supreme] Court." *Felker*, 518 U.S. at 658. The Court's conclusion that the Act did not repeal its "authority to entertain original habeas petitions," *id.* at 660, was entirely separate from its holding that the new restrictions the act placed on second habeas petitions did "not amount to a 'suspension' of the writ." *Id.* at 664.

And in any event, the PCRA similarly does not withdraw from the Utah appellate courts the jurisdiction to review writs filed directly in those courts.[6] Utah Rules of Appellate Procedure 19 and 20 provide for filing writs directly in the appellate courts. *See e.g., In re A.C.*, 2011 UT App 134, 256 P.3d 237; *Powell v. Stuart*, 2002 UT App 202, 2002 WL 1291999.[7] And with or without Rules 19 and 20, Article VIII gives this Court jurisdiction over all extraordinary writs. Utah Const. art. VIII, § 3. A procedural rule is not needed to enact that jurisdiction.

**6. Kell has failed to show entitlement to any extra-statutory excuse from the procedural bars.**

Kell does not dispute that his claim runs afoul of the plain terms of the current statute of limitations and the procedural bar against claims that could have been raised in a previous petition. Having opted out of the procedures

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[6] As a hypothetical example, consider a county sheriff who decides he has had enough of illegal immigration and rounds up undocumented immigrants, holding them at the county jail. With no criminal judgments against them, rule 65C/PCRA will never give them any relief. But they have a right to seek a writ of habeas corpus under the core constitutional power in any court, including this one.

[7] Although the repeal of Rule 20 has been proposed, the current proposal also includes an Advisory Committee Note to Rule 19 stating that even though Rule 20 was repealed, petitioners still have the ability to file directly to the Supreme Court under appropriate circumstances.

that gave him a remedy, he cannot establish that those procedures violate the Suspension Clause.

The Advisory Committee Notes to rule 65C state that the rule amendments "embrace Utah's Post-Conviction Remedies Act as the law governing post-conviction relief." They continue that "[i]t is the committee's view that the added restrictions which the Act places on post-conviction petitions do not amount to a suspension of the writ of habeas corpus." Advisory Committee Notes "merit great weight in any interpretation of [the] rules." *Burns v. Boyden*, 2006 UT 14, ¶18 n.6, 133 P.3d 370. Kell has not provided any reason to discount the Advisory Committee Notes.

Patterson failed to convince this Court "that the Suspension Clause of the Utah Constitution either forbids all statutes of limitations on [its] writ power nor that the application of the time bar to [his] petition violates the Suspension Clause." *Patterson*, 2021 UT 52, ¶205. Kell's arguments are also not convincing.

Rule 65C and the PCRA gave Kell a cause of action with reasonable limitations. Kell made a tactical decision not to raise his claim in a timely effort to obtain post-conviction relief, but instead reserved the claim for its optimal delay potential at the end of his federal habeas case. He got the delay he sought—over five years and counting since the federal court heard

argument on August 17, 2017 but did not rule on Kell's habeas petition. But that decision came with a trade-off: to get the maximum delay Kell had to opt out of procedural compliance with rule 65C and the PCRA. By choosing maximum delay rather than procedural compliance, Kell opted out of the remedy he once had available to him. His own decisions, not rule 65C and the PCRA, prevented Kell from obtaining merits review of his claim.

### B. The time and procedural bars do not violate Kell's constitutional right to Due Process.

Kell argues that strict application of the time and procedural bars in rule 65C and the PCRA would violate his rights under the Due Process Clause of the Utah Constitution (KSB 3). But Kell has not established that any of his Due Process rights were violated.

The Due Process clause of the Utah Constitution protects against a "depriv[ation] of life, liberty or property, without due process of law." Utah Const. art. I, § 7. In other words, it guarantees a person the right to fair processes to dispute government action that deprives or takes a protected interest in "life, liberty, or property." *Id.* But examining a petitioner's due process claims in federal habeas, the Supreme Court stated that postconviction relief "is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of the conviction. States have no obligation to provide this avenue of relief." *Pennsylvania v.*

*Finley*, 481 U.S. 551, 557 (1987). And the "Due Process Clause of the Fifth Amendment…does not establish any right to collaterally attack a final judgment of conviction." *United States v. MacCollom*, 426 U.S. 317, 323 (1976). "When a State chooses to offer help to those seeking relief from convictions, due process does not dictate the exact form such assistance must assume." *Dist. Attorney's Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (citing *Finley*, 481 U.S. at 559 (cleaned up)). "[I]n this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review. *Finley*, 481 U.S. at 559.

"[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). But "nothing … entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (cleaned up).

While these authorities on the relationship between due process and collateral post-conviction review speak explicitly to the federal clause, Kell has cited no authority to suggest that the Due Process Clause of the Utah

Constitution enshrines any different or more petitioner-friendly principles. He has failed to carry his burden of persuasion that the Utah Constitution offers him any more protection than the federal one. *See, e.g., Sandoval v. State*, 2019 UT 13, ¶16, 441 P.3d 748 (declining to reach post-conviction petitioner's State Due Process claim because he omitted "a thorough examination of Utah's constitutional history in an attempt to show that the original public meaning of the due process clause considered and encompassed" the petitioner's construction).

Kell argues generally that strict application of time or procedural bars "may" lead to petitioners being unable to vindicate their substantive rights (KSB 11). He raises hypothetical situations where he claims Due Process rights might be violated. *Id.* But Kell fails to specifically argue how the time and procedural bars violated his Due Process rights. Kell does not claim that he suffered a "'distinct and palpable injury that gives [him] a personal stake in the outcome of the legal dispute.'" *ACLU of Utah v. State*, 2020 UT 31, ¶3, 467 P.3d 832 (citation omitted). Part of the traditional test for standing requires a showing of a "particularized injury," which Kell has not shown. *Haik v. Jones*, 2018 UT 39, ¶18, 427 P.3d 1155. Kell has failed to establish that he has traditional standing to proceed with this claim.

Kell raises arguments about hypothetical issues that do not exist in his case. In Utah, this Court may "grant standing where matters of great public interest and societal impact are concerned." *Gregory v. Shurtleff*, 2013 UT 18, ¶¶12-13, 299 P.3d 1098. A party may "'gain standing if they can show that they are *an appropriate party* raising issues of significant public importance.'" *Id*. (citation omitted). It is Kell's burden. *Brand v. Paul*, 2017 UT App 196, ¶7, 407 P.3d 1012.

But Kell has failed to establish that he can meet the requirements for this Court to grant public interest standing. The "importance of the issue by itself is not enough to give parties public-interest standing. One must also be an appropriate party." *Gregory*, 2013 UT 18, ¶28 (internal quotations and citation omitted). To demonstrate that he is an appropriate party, Kell must show that the issue is unlikely to be raised if he is denied standing. *Id.* Kell has not made and cannot make that showing. A petitioner in a case where these issues actually arise could raise these Due Process arguments. Therefore Kell is not an appropriate party and cannot establish that public interest standing should be granted.

Kell argues that because application of procedural bars in state court generally precludes federal review, strict adherence to a time or procedural bar may result in petitioners not being able to have their claims addressed in

federal court (KSB 11). But the fact that a petitioner may not be able to raise claims in federal court does not establish a violation of Due Process. A State has no authority to tell the federal court what claims it must review, nor may the federal court dictate to the State court what it must review. And Due Process does not require that claims that could have been addressed in state court must also be reviewable in federal court.[8]

Next, although Kell recognizes that this is "not presently at issue in this case," he argues that strict adherence to time and procedural bars could violate the Due Process clauses of the Utah and Federal constitutions to the extent that they could bar claims not previously ripe for consideration. But, as Kell acknowledges, this is not an issue in his case. A hypothetical argument about possible future problems in other cases does not establish that Kell's constitutional right to Due Process was violated. Essentially, Kell is asking

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[8] In any event, it is not true that barring a claim in State court necessarily defaults it in federal court. Federal law bars federal review of claims defaulted in State court if the State bar is independent of federal law and adequate to fairly justify denying State merits review. *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000). But federal law also contains numerous exceptions to default rules that permit federal review where, for instance, State law provided no fair remedy in the first place, the petitioner can demonstrate his actual innocence, or some cause external to the defense prejudicially led to the default. *Spears v. Mullin*, 343 F.3d 1215, 1255 (10th Cir. 2003) (citing *Coleman v. Thompson,* 501 U.S. 722, 753 (1991)). Federal law is sufficiently independent of State default rules that both sovereigns may decide what limitations on habeas review properly balance the competing interests of finality and merits review.

for an advisory opinion on whether Due Process might be violated in cases unrelated to his own, in areas not at issue here. This Court has "unequivocally declared that courts are not a forum for hearing academic contentions or rendering advisory opinions." *Utah Transit Auth. v. Local 382 of Amalgamated Transit Union*, 2012 UT 75, ¶19, 289 P.3d 582 (quotations and citation omitted). It should decline Kell's request.

By admitting his own Due Process rights are not at issue on these grounds, Kell has invited the Court to treat his case the same as it treated Patterson's. "To convince us to hear a petition that rule 65C and the PCRA bar, Patterson would need to demonstrate that failure to entertain *his* petition violates *his* constitutional rights. Patterson has failed to make that showing." *Patterson*, 2021 UT 52, ¶218 (emphasis added). So too here.

As addressed above, the statute of limitations and procedural rules are reasonable procedural requirements. Rule 65C provides State post-conviction petitioners with the legal process they are due. The statute of limitations and procedural rules are reasonable, flexible, and appropriate. They are adequate to allow all reasonably diligent petitioners to vindicate their substantive rights. And a "State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan*, 455 U.S. at 437 (emphasis in original). Due Process is not unlimited

process, and petitioners like Kell who sandbag their claims for many years fairly risk defaulting them.

It is Kell's "burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief." *Osborne*, 557 U.S. at 71. Kell has failed to meet that burden.

### C. The rule 65C/PCRA procedural bars do not violate the Open Courts Clause.

Kell argues that strict application of the time and procedural bars would violate his rights under the Open Courts Clause of the Utah Constitution (KSB 3).[9] The Open Courts Clause guarantees access to courts to pursue available remedies by due course of law. It is a guarantee about a citizen's right to invoke the judicial process. Kell fails to establish a violation of the Open Court's Clause because he has not shown that he was denied access to the courts to pursue available remedies.

Kell argues that this Court has interpreted the Open Courts Clause to provide both procedural and substantive protections (KSB 13). Kell has not specifically asserted any substantive issue. But whether procedural or substantive, Kell has not established an Open Courts Clause violation. In

[9] Although Kell includes procedural bars in this initial statement, his argument only addresses the statute of limitations (KSB 12-19). Kell never argues how or why any of the other rule 65C/PCRA procedural bars violate the Open Courts Clause.

addition, this Court should overturn *Berry ex rel. Berry v. Beech Aircraft Corp*, 717 P.2d 670, 675 (Utah 1985) and its progeny, and hold that the Open Courts Clause in the Utah Constitution provides only a procedural guarantee of access by due course of law.

**1. Kell has not established that rule 65C/PCRA procedural bars violate the Open Courts Clause.**

Kell has not established that the rule 65C/PCRA procedural bars violate Utah's Open Courts Clause, regardless of whether it provides only procedural protection, or both procedural and substantive protections. Kell argues that neither the legislature nor the courts may implement limitations on a petitioner's ability to obtain review of his claims that are so inflexible as to effectively close the courthouse doors to a petitioner (KSB 13). But, as addressed above, the time and procedural bars are extremely flexible and did not unfairly close the courthouse doors to Kell before he could get through them. Kell simply waited and waited until they closed before knocking.

The Open Courts Clause is "satisfied if the law provides an injured person an effective and reasonable alternative remedy 'by due course of law' for vindication of his constitutional interest." *Craftsman Builder's Supply v. Butler Mfg Co.,* 974 P.2d 1194, 1198 (Utah 1999) (citation omitted). A statute violates "the open courts provision only if it 'is unreasonable and arbitrary and will not further the statutory objectives.'" *Day v. State*, 1999 UT 46, ¶37,

980 P.2d 1171 (Utah 1999) (quoting *Berry*, 717 P.2d at 681).

A statute violates the Open Courts Clause only if it has "*abrogated* a cause of action." *Patterson*, 2021 UT 52, ¶¶201, 202 (citing *Petersen v. Utah Lab. Comm'n*, 2017 UT 87, ¶20, 416 P.3d 583) (emphasis added). But statutes of limitation "do not create the total abrogation of all remedies." *Currier v. Holden,* 862 P.2d 1357, 1365 (Utah Ct. App. 1993). As *Patterson* notes, this Court has previously suggested that "a challenge to a statute of limitation does not pass even the first step of the Open Courts Clause analysis—the legislature has not 'abrogated' a cause of action by specifying a reasonable period of time after accrual during which the cause of action must be asserted." *Patterson*, 2021 UT 52, ¶202 (internal citation omitted). The Legislature has "the discretion to enact statutes of limitations, and these statutes are presumptively constitutional. A statute of limitations is constitutionally sound if it should allow a reasonable, not unlimited, time in which to bring suit." *Avis v. Board of Review*, 837 P.2d 584, 587 (Utah App. 1992) (citations omitted). A statute of limitations does not per se offend the Open Courts Clause because the "Legislature clearly has a valid interest in limiting the time within which a legal action may be commenced once it arises." *Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1091 (Utah 1989). Even fundamental constitutional claims may appropriately be time-barred.

*Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 2012 UT 66, ¶52, 289 P.3d 502. How much more constitutional is a rule, promulgated by the Court itself, adopting reasonable limitations periods within which to ask the Court for redress?

Kell points out that previous limitation periods were found to violate the Open Courts Clause. A pre-PCRA limitations period violated the Open Courts Clause because it imposed an "inflexible three-month" period that ran from a date certain under all circumstances. *Currier*, 862 P.2d at 1371. And a general four-year statute of limitations also violated the Open Courts Clause because it was "equally inflexible." *Julian*, 966 P.2d at 253. But as addressed above, the current one-year limitation provides flexible dates of accrual of the cause of action, tolling provisions, and allows DNA petitions and factual innocence petitions with no statute of limitations. Kell fails to address this current flexibility, meaning his analysis does not actually address the law he is challenging.

Kell also points out that when the Court upheld a one-year limitation period in *Manning*, it noted that the "interests of justice" escape valve in that version of the statute alleviated the concern expressed in *Currier*. *Manning v. State*, 2004 UT App 87, ¶16 n.4, 89 P.3d 196. But Kell fails to include that the concern expressed in *Currier* was that the three-month time limit was

"unreasonably short and lack[ed] any provision which could excuse delayed filing because of circumstances beyond the petitioner's control." *Currier*, 862 P.2d at 1368. As addressed above, that is not the situation under the current limits. The current procedural bars account for claims that could not have been raised previously and permit a generous one-year period to file a petition after the claim arises.

Kell argues that Utah courts have repeatedly held that to comply with the Open Courts Clause, any statute of limitations must include an "escape valve." (KSB 19). But that is not what the courts have said. The courts have held that "inflexible" statutes of limitations violated the Open Courts Clause. Kell fails to address the flexibility of the current limitations period and has failed to establish any violation of the Open Courts Clause.

**2. *Berry* should be overruled because the better view is that the Open Courts Clause provides only a procedural guarantee of access "by due course of law."**

Citing *Laney v. Fairview City,* 2002 UT 79, ¶33, 57 P.3d 1007, and *Berry*, 717 P.2d at 675, Kell points out that this Court has interpreted Utah's Open Court's Clause to provide both procedural and substantive protections (KSB 13). As addressed above, Kell does not specifically raise a substantive claim. But even if reviewed as providing substantive protections, Kell has failed to

establish that the rule 65C/PCRA procedural bars violate the Open Courts Clause. In addition, *Berry* is wrong and should be overruled.[10]

**a. The Open Courts Clause guarantees only procedural safeguards.**

Properly read and understood, the Open Court's Clause guarantees only procedural safeguards, including an injured person's right to pursue in court any then recognized "remedy by due course of law." Utah Const., art. I, § 11. Nothing about the Open Court's Clause compels the conclusion that injured individuals have a substantive right to a remedy previously recognized in the State's (or Territory's) past.

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[10] In recent years, several Justices have expressed the opinion that *Berry* should be overruled. "*Berry* has outlived its usefulness. The time has come to overrule it…. I think we should overrule it and replace it with a standard that is more workable and more faithful to the terms of the Open Courts Clause." *Waite v. Utah Labor Comm.*, 2017 UT 86, ¶¶36, 41, 416 P.3d 635 (Lee, J., concurring). "I find no basis in the nineteenth-century cases to conclude that the Open Courts Clause limits the legislature's general power to abrogate an existing remedy. At most, the nineteenth-century open courts cases recognized a limit on the abrogation of a *vested* claim." *Id.* ¶64 (emphasis in original). If "we conclude we have the ability to strike down legislation for reasons the Utah Constitution never contemplated, we may find ourselves impermissibly treading upon territory that the people of Utah gave to the Legislature." *Id*. ¶91 (Pearce, J., concurring). The "decision in *Laney* to adhere to the *Berry* interpretation and test was erroneous." *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶9 n.1, 67 P.3d 436 (Wilkins, J., and Durrant, J., writing separately on this point only). "I would overturn *Berry* in favor of the more procedural interpretation of the Open Courts Clause...." *Laney*, 2002 UT 79 at ¶85 (Wilkins, J., concurring in part and dissenting in part).

### i. The text and original meaning of the Open Courts Clause do not guarantee a substantive right to apply past law or remedies.

The Open Courts Clause guarantees court access and process. It does not guarantee a substantive right to apply past law or remedies. Utah's Open Courts Clause states:

> *All courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay*; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const., art. I, § 11 (emphasis added).

The emphasized text guarantees injured persons only the procedural rights to access and appear in court to seek any currently available remedies as regularly administered by law, without denial or delay. The text neither explicitly nor implicitly guarantees what those remedies will be; it does not promise that past legal remedies will forever exists, nor bar the Legislature from prospectively changing the law regarding injury or available remedies.

Focusing on the Clause's operative text—injury, remedy, and due course of law—supports this procedural understanding. At the time the Clause was enacted, "injury" meant "[a]ny wrong or damage done to another, either in his person, rights, reputation, or property"; "remedy" meant "the means by which the violation of a right is prevented, redressed,

or compensated"; and "due course of law' was "synonymous with due process of law" and meant "law in its regular course of administration through courts of justice." BLACK'S LAW DICTIONARY (1st ed. 1891). Accordingly, the Clause's guarantee that a person "shall have remedy by due course of law" for any wrong done to him simply means that an injured person is entitled to invoke the judicial process and pursue any available remedy through the normal, existing, and regular administration of the law.

This reading best accords with the context in which the operative provisions appear. First, the Clause's non-remedy provisions deal with process: access to courts, administered without denial or delay, with the ability to personally appear. That suggests the "remedy by due course of law" provision also speaks to procedural rights. *Heathman v. Giles*, 374 P.2d 839, 840 (Utah 1962) (meaning of words and phrases should be "determined in the light of and take their character from associated words or phrases").

Second, the framers knew how to compose provisions limiting legislative power or prohibiting the abrogation of rights of action and remedies. *See, e.g., Laney*, 2002 UT 79 at ¶34 (plurality) citing Utah Const. art. VI, §§ 22, 26, 28); Utah Const. art. XVI, § 5. That they did not expressly do so in the Open Courts Clause strongly suggests that no such substantive component was intended.

The fact that the framers did not adopt the language from some other states' more limited open courts provisions proves little. *Laney*, 2002 UT 79, ¶36 (plurality); *Craftsman,* 1999 UT 18 at ¶49 (Stewart, J. concurring), because it's equally true that the framers did not adopt the language from more robust remedy provisions in other states. Instead, the more salient point remains that the framers knew how to restrict legislative power and prohibit the abrogation of rights and remedies. But they chose not to use that language in the Open Courts Clause they drafted.

The Clause's history and apparent original understanding in Utah further support this procedural interpretation. It's widely accepted that current open courts provisions were derived from Magna Carta as reinterpreted by Edward Coke, then taken up by American colonists and incorporated into some of their constitutions. From there, the provisions spread to dozens of other state constitutions over the years. *See generally Craftsman*, 1999 Ut 18, ¶¶ 41-45 (Steward, J., concurring); Jonathan M. Hoffman, *By the Courts of the Law: The Origins of the Open Courts Clause of State Constitutions,* 74 Or. L. Rev. 1279, 1284-1311 (1995); David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1199-1200 (1992); Daniel W. Halston, *The Meaning of the Massachusetts 'Open Courts' Clause and its Relevance to the Current Court Crisis*, 88 Mass. L. Rev. 122, 123-26 (2004). To some, the details

behind the provision's history "strongly suggest[s] that the language of the open courts clause was intended to promote and protect an independent judiciary, not to guarantee a remedy for every right." Hoffman, *By the Course of the Law*, 74 Or. L. Rev. at 1311. But others read that history differently. *See, e.g., Craftsman*, 1999 UT 18, ¶ 46 (Stewart, J., concurring).

Regardless of who is right about open courts provisions' initial purpose and meaning, the more important question is how Utah's voters understood the provisions when they ratified them. That record is admittedly sparse, but what exists supports the view that Utah's Open Courts Clause protects procedural rights, rather than the never-ending preservation of common law remedies.

Indeed, as Justice Zimmerman correctly pointed out, Utah's early settlers were "hostile to the common law, lawyers, and courts." *Craftsman*, 1999 UT 18, ¶132 (Zimmerman, J., concurring in the result); *see also* Michael W. Homer, *The Judiciary and the Common Law in Utah: A Centennial Celebration*, Utah B.J. 13 (Aug./Sep. 1996); Comment, *Mormonism, Originalism, and Utah's Open Courts Clause*, 2015 BYU L. Rev. 811, 829-35 (2016). One of the earliest enactments of Utah's Territorial Legislature was a statute expressly rejecting the common law. *Craftsman,* 1999 UT 18, ¶ 132 (Zimmerman, J., concurring in the result) (citing Laws, Territory of Utah,

ch. LXIV, 260 § 1 (1855)). To the extent the common law was applied in Utah during territorial times, it appears to have been federally imposed. *See generally Hatch v. Hatch*, 148 P. 1096, 1098 (Utah 1915) (stating common law was not adopted in Utah territory until 1898); Homer, *The Judiciary and the Common Law in Utah*, Utah B.J. at 13-16.

Utah's reticence towards the common law carried through to statehood. Unlike other states, Utah's framers did not constitutionalize the common law.[11] *E.g.,* Md. Const. art. 5; Mich. Const. art. 3, § 7; N.Y. Const. art. I, § 14; Wisc. Const. art. 14, § 13. And even after Utah became a state, the Legislature waited two years before adopting the common law. Utah Code § 68-3-1 (unchanged since its enactment in 1898). Even then, the common law applied only "so far as it was not repugnant to, or in conflict with, the . . . laws of this state . . . ." *Id.* Further, Utah law expressly disavows the "rule of the common law that a statute in derogation of the common law is to be strictly construed." Utah Code § 68-3-2(1).

[11] This choice to not constitutionalize the common law is also important in light of *Hatch*. If the Open Courts Clause had been meant to adopt and protect common law rights and remedies from abrogation by the legislative branch, surely the *Hatch* decision would have presented this fact as a positive enactment of the common law by the people of Utah.

With that background, it's highly unlikely Utah's voters who ratified the constitution intended the Open Courts Clause to protect common law remedies (which the Legislature had not yet even adopted). Nonetheless, some have argued that the Clause was adopted during a time when legislatures and special interests were generally distrusted and that the framers therefore could have plausibly meant the remedy language to substantively check legislative power. *Laney*, 2002 UT 79, ¶¶ 33-36 (plurality); *Craftsman*, 1999 UT 18, ¶¶ 50-51 (Stewart, J., concurring). But this argument discounts Utah's antagonism towards the common law leading up to statehood. It also ignores the view that the late 1800s was a "populist era during which distrust of elitist courts ran high." Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. at 1201.[12]

But regardless of which branch—legislative or judicial—Utah's voters distrusted more, it's abundantly clear that they knew how to draft, and did adopt, provisions expressly limiting legislative power and placing particular rights or remedies beyond legislative reach. *See, e.g.,* Utah Const. art. XVI, § 5; *Laney*, 2002 UT 79, ¶ 34 (plurality) (identifying constitutional

[12] Indeed, some courts have held that their states' open courts provisions applied only to the judiciary. *See, e.g., Scott v. Nashville Bridge Co.*, 223 S.W. 844, 852 (Tenn. 1920); *Adams v. Iten Biscuit Co.*, 162 P. 938, 942 (Ok. 1917).

provisions that expressly limit legislative authority). Had they really wanted the Open Courts Clause to substantively limit the Legislature's ability to modify remedies, they easily could have done so using text similar to what appears in those other provisions.

The history of how Utah enacted its Open Courts Clause also suggests that the framers viewed the remedy language of the Clause as procedural, not substantive. As originally proposed, this section read: "All courts shall be open and every person, for an injury done to him in his person, property, or reputation shall have remedy by due course of law, *and right of justice* shall be administered without sale, denial or delay." 2 Official Report of the Proceedings and Debates of the Convention . . . to Adopt a Constitution for the State of Utah 304 (1898) (emphasis added). But it was amended to remove the emphasized words and replace them with the word "which." *Id.* at 304-05. The amendment's proponent explained that: "[i]t is to be presumed that the law is right and just, and if it be not it must be administered anyhow, as long as it is in force and I think that it is surplusage—the word 'which' would be sufficient without the other." *Id.*

As amended, and when considering the reasons for the amendment, this single provision was meant as a procedural guarantee that the law in

force—whether just or not—would be properly administered, not as a substantive prohibition against legislative enactments modifying the common or statutory law regarding remedies.

Early cases interpreting the Open Courts Clause bear this point out. *Craftsman*, 1999 UT 18, ¶¶ 133-134 (Zimmerman, J., concurring in the result); *Laney*, 2002 UT 79, ¶¶ 115-117 (Wilkins, J., concurring and dissenting). In 1914, the Court explained that the Clause prevented the Legislature from "curtailing" the right that "courts must always be open to all alike." *Union Sav. & Inv. Co. v. Dist. Court of Salt Lake Cty.*, 140 P. 221, 225 (Utah 1914).

The next year, the Court emphasized the Clause's procedural nature as allowing redress for existing rights and remedies. Open courts provisions don't create "new rights" or "new remedies, where none otherwise are given"; rather, they place "a limitation upon the Legislature to prevent [it] from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy. Where no right of action is given, however, or no remedy exists, under either the common law or some statute, those constitutional provisions create none." *Brown v. Wightman*, 151 P. 366, 366-67 (Utah 1915). Importantly, the Court went on to reiterate that "[t]he right and power, as well as the duty, of creating rights and to provide remedies, lies with the Legislature, and not with the courts. Courts

can only protect and enforce existing rights, and they may do that only in accordance with established and known remedies." *Id.* at 367.

Again, in 1918, the Court stated that the Open Courts Clause "applies only to judicial questions. It is not meant thereby that this court may reach out and usurp powers which belong to another independent and co-ordinate branch of state government." *Salt Lake City v. Utah Light & Traction Co.*, 173 P. 556, 563 (Utah 1918).

That understanding still prevailed thirty years later. During the course of its open courts discussion, *Masich v. United States Smelting, Refining & Mining Co. et. al.* recognized that "both statutory rights and common law rights can be taken away, otherwise there can be no question that acts which abolish actions for seduction, breach of promise, criminal conversation, and alienation of affections, would be unconstitutional." 191 P.2d 612, 624 (Utah 1948). And in his concurring opinion, Justice Wolfe stated that the Clause did not "prohibit the modification or even the entire removal or destruction of a common law right by legislative enactment" and he saw no reason "why the common law which recognized rights, duties and liabilities to meet the conditions of a certain period may not later recede from those or modify them if the needs of the people require that." *Id.* at 626.

In sum, the text, history, and original public meaning of article I, section 11 confirm that the Open Courts Clause provides only procedural rights.

**b. No other factors support reading a substantive component into the Open Courts Clause.**

No other factors support reading a substantive component into article I, section 11's Open Courts Clause. Over the years, *Berry's* proponents have offered various rationales for a substantive Open Courts Clause. None of them justifies rejecting the procedural interpretation required by the Clause's text, history, and original understanding.

Some have argued that the Open Courts Clause must have a substantive component, otherwise it does nothing more than Utah's due process provision. *Laney*, 2002 UT 79, ¶ 37 (plurality); *Craftsman*, 1999 UT 18, ¶¶ 47-48 (Stewart, J., concurring); cf. *Berry*, 717 P.2d at 675. The two provisions—both guaranteeing procedural rights—overlap to some degree. But they are not necessarily identical. Article I, section 7 protects against a "depriv[ation] of life, liberty or property, without due process of law." Utah Const. art. I, § 7. In other words, it guarantees a person the right to fair processes to dispute government action that deprives or takes a protected interest ("life, liberty, or property"). It is a right that operates *against the government* with respect to the individual; it limits the government's power

to act arbitrarily against him. In contrast the Open Courts Clause guarantees persons (whether injured by private or governmental conduct) access to courts to pursue available remedies by due course of law (the regular administration of applicable law). It is a guarantee about a citizen's right to invoke the judicial process for his own benefit against others. From the citizen's point of view, the Open Courts Clause preserves swords—the ability to go on offense in response to wrongs—while the Due Process Clause preserves a shield—the ability to ensure that the State follows all proper and necessary procedures before depriving him of life, liberty, property interests.

But even if the two clauses were completely redundant, it wouldn't support a substantive interpretation of the Open Courts Clause. The *Berry* test, after all, plows the same ground as substantive due process. *See, e.g., Craftsman,* 1999 UT 18, ¶ 77 (Stewart, J., concurring); *Laney*, 2002 UT 79, ¶ 129 (Wilkins, J., concurring and dissenting). If both the procedural and substantive views mirror procedural and substantive due process, respectively, the redundancy argument does not favor either view. Regardless, alleged redundancy does not provide a license to adopt an otherwise unsupported substantive interpretation that violates the constitutionally required separation of powers. *Laney*, 2002 UT 79, ¶ 129 (Wilkins, J., concurring and dissenting).

At bottom, *Berry* rests on a single false premise: the Open Courts Clause must substantively limit the Legislature's power over remedies, or the Clause is meaningless. *See, e.g., Berry,* 717 P.2d at 676, 678-79. But that's a false choice. The mere fact that the Open Courts Clause limits the legislature doesn't logically require that the limit must be substantive. Nothing justifies an all-or-nothing, substantive-limits-or-bust framework for interpreting the Clause.

The procedural interpretation also imposes meaningful legislative limits in keeping with the Clause's text and history. As Justice Wilkins explained, the procedural view limits legislative authority "to reduce or inhibit the ability of the judiciary to resolve the disputes of the people, awarding remedies to those injured under the law"; to "tak[e] action that would hinder or preclude the judiciary from conducting the business of resolving cases and controversies, deciding cases by applying the law, as promulgated by the Legislature, to factual circumstances on a case by case basis"; or to "deny a party access to a judicial officer for a determination of whether a particular set of facts and circumstances constitute a legal injury for which a remedy exists under the law." *Laney*, 2002 Ut 79, ¶¶ 112, 135 (Wilkins, J., concurring and dissenting).

Importantly, while limiting the Legislature's authority, the procedural

understanding of the Open Courts Clause still recognizes and respects the difference between retroactive and prospective laws. The law remains that the Legislature cannot retroactively deprive an individual's vested rights in an accrued cause of action. *Berry*, 717 P.2d at 676. But it remains equally true that the Legislature can prospectively change rights and remedies because "no one has a right to any rule of law." *Id*. at 675 (internal quotation marks omitted). The substantive interpretation of the provision would make the law a one-way ratchet, binding all future generations to the rules of law of past generations without democratic recourse. That outcome is antithetical to the entire project of republican democracy.

Finally, the Court has asserted that its substantive interpretation is not unique or unusual among the states. *Laney*, 2002 Ut 79, ¶ 44 (plurality). While the *Berry* test may not be totally unique, it still puts Utah in the distinct minority of states. Forty states have some form of an Open Courts Clause, or right to remedy clause, in their state constitutions.[13] (Addendum C).

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[13] A widely cited count of open courts or remedy provisions identifies only 39 states with such provisions, including New Mexico (which has implied the right to a remedy in its constitution). Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. at 1201 & n.25. But that count did not include Washington, which has an open courts provision that does not mention "remedy." *1519-1525 Lakeview Boulevard Condominium Association v. Apartment Sales Corp.*, 6 P.3d 74, 80-82 (Wa. Ct. App. 2000); *see also* National Center for State Courts, Judicial Administration State Links, http//www.ncsc.org/Topics/Judicial-Officers/Judicial-

Although their precise interpretations differ, thirty states place no significant burdens upon their legislature's ability to alter or abrogate common law rights and remedies. *Id*. Only ten states, including Utah, read their provisions as significantly restricting the ability of their Legislatures to alter the common law. *Id*.[14]

In sum, no persuasive reasons justify keeping a substantive component in article I, section 11.

**c. Stare decisis considerations offer no reason to continue following *Berry* and its progeny.**

If the court decides that the better view is that the Open Courts Clause provides only a procedural guarantee of access "by due course of law," it should not uphold its past precedent to the contrary under the *stare decisis* standards discussed in *Eldridge v Johndrow*, 2015 UT 21, ¶¶ 20-41, 345 P.3d 553. The precedent is not based on persuasive authority or reasoning, nor has

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Administration/State-Links.aspx (quoting open courts provisions from 39 states, not including New Mexico).

[14] Some in the minority prohibit their legislatures from abolishing common law rights of action. Others permit their legislatures to modify the common law only if a reasonable alternative remedy is provided. Still others permit the legislature to alter the common law, not just provide substitute remedies, but only upon the legislature meeting a very high standard of proof for demonstrating the need for the change. Since 1985, two states (Utah and Oregon) have adopted the minority position. At the same time, five states (Montana, South Dakota, Wyoming, Arkansas, and Ohio) have adopted the majority position (Addendum C).

it become firmly established in the law given its age (and shifting justifications and iterations), its complexity, its inconsistency with other legal principles, and the lack of any practical reliance upon its principles. *Id*. at ¶ 22.

First, as noted, the "authority and reasoning on which [*Berry*] was originally based" is not persuasive. *Eldridge*, 2015 UT 21, ¶ 22. *Berry* performed a perfunctory analysis of the Open Courts Clause's text and history. *See Craftsman*, 1999 UT 18, ¶¶ 113-117 (Zimmerman, J., concurring in the result). At bottom, *Berry* rests on the assumption that the Clause's "basic purpose" was "to impose some [substantive] limitation" on legislative power to benefit injured persons "since they are generally isolated in society, belong to no identifiable group, and rarely are able to rally the political process to their aid." *Berry*, 717 P.2d at 676.[15] Neither the provision's text nor its history supports that reasoning. And the generalization about the plight of injured people is not persuasive, *Laney*, 2002 UT 79, ¶ 98 (Wilkins, J., concurring and dissenting)); at the very least, the plaintiffs' bar gives injured persons a

[15] To be sure, "*Berry's* analytical model . . . was established only after" reviewing Utah case law and case law from other states with similar provisions. *Laney*, 2002 UT 79, ¶ 46. But the fact that the *Berry* test was announced after such a review doesn't mean the review necessarily justified the Court's conclusion that the Open Courts Clause includes a substantive component.

powerful voice at the Legislature. The lone authority *Berry* offers for its sweeping contrary generalization is no more persuasive and doesn't directly support the assertion in any meaningful way. *Id*. (citing with a "cf." *Rosin v. Lidgerwood Mfg. Co.,* 89 App. Div. 245, 86 N.Y.S. 49 (1903)). Illustrating *Berry's* relative lack of persuasiveness, its proponents have tried to bolster the decision over the ensuing years with additional justification. *See, e.g., Craftsman,* 1999 UT 18, ¶¶ 27i-48 (plurality). None of those additional rationales warrants infusing the Open Courts Clause with a substantive guarantee.

Second, *Berry* and its progeny lack other hallmarks of firmly established precedent. *Eldridge*, 2015 UT 21, ¶ 22. Although *Berry* was decided 36 years ago, that overstates its true age for stare decisis purposes. As Justice Zimmerman explained in 2000, "[t]he two step test [*Berry*] advances is without solid definition. In an effort to make sense of it, we have repeatedly shifted course over the fifteen years since *Berry* was decided." *Lyon v. Burton*, 2000 UT 19, ¶ 89, 5 P.3d 616 (Zimmerman, J., dissenting). Then in 2004 the Court further adjusted the *Berry* test in recognition of an obligation of deference to legislative judgments." *Judd v. Drezga*, 2004 UT 91, ¶ 11, 103 P.3d 135. Given the shifting justifications, the fact that *Berry* interprets a constitutional provision gives the decision no special weight. *Cf. Agostini v.*

*Felton*, 521 U.S. 203, 235 (1997) (stare decisis at its weakest when United States Supreme Court interprets the Constitution). Nor can *Berry* unequivocally claim to date back to "judicial understanding[s]" of the Clause "that ha[ve] provided substantive protection" since statehood. *Compare Laney* 2002 UT 79, ¶ 46 (plurality), *with id.* ¶¶ 115-121 (Wilkins, J., concurring and dissenting).

In addition, the *Berry* test has not worked well in practice. Several members of the Court have described *Berry* as "unworkable." *Laney,* 2002 UT 79, ¶ 94 (Wilkins, J., concurring and dissenting) (joined by Durrant, A.C.J.) ("Compelling to me is that *Berry* has proven to be unworkable over a period of 17 years, has not been adhered to unanimously, has been questioned and chastised by members of this court, including one who agreed with the *Berry* interpretation initially, has been criticized by legal scholars, and presents separation of powers problems."); *Lyon*, 2000 UT 19, ¶ 89 (Zimmerman, J., dissenting) ("*Berry* has proven unworkable and should be abandoned.").

In a similar vein, the Court recognized that applying the Open Courts Clause to governmental immunity "is somewhat complex." *Scott v. Universal Sales, Inc.*, 2015 UT 64, ¶ 53, 356 P.3d 1172. Consequently, the Court had to spend time explaining why "determin[ing] whether the Governmental Immunity Act violates the open courts clause in a particular case, [requires] look[ing] to see whether the plaintiff could have brought his or her cause of

action prior to 1987." *Id*. ¶ 54.

However one thinks *Berry* has worked in practice, it's undisputed that the Court has had to adjust the *Berry* test several times over the years. At a minimum, the repeated revisions suggest *Berry* has not been a model of analytical clarity nor a straightforward framework with which to work.

*Berry*'s inconsistency with other legal principles further undermines any contention that it is firmly established precedent. Most notably, *Berry* violates the constitutionally mandated separation of powers. Utah Const. art. V, § 1. It is "squarely within the legislature's power" to determine what the substantive law of Utah should be. *Ryan v. Gold Cross Serv., Inc.*, 903 P.2d 423, 425 (Utah 1995) ("The legislature may regulate, as a matter of public policy and substantive law, the scope of legal definitions of negligence."). The Court has also recognized that the "legislative branch has the authority, and in many cases is better suited, to establish appropriate remedies for individual injuries. By requiring courts to defer to relevant legislative determinations of appropriate remedies, we respect the legislature's important role in our constitutional system of government." *Spackman v. Bd. of Ed. of the Box Elder County Sch. Dist.*, 2000 UT 87, ¶24, 16 P.3d. 533.

Yet *Berry* forces the Court to act as a super-legislature, reweighing and reconsidering legislative policy decisions about an alternative remedy's

adequacy or the significance of social ills that prompted legislative action. *Laney*, 2002 UT 79, ¶¶89-91 (Wilkins, J., concurring and dissenting). Nothing in Utah's constitutional history and traditions, other than *Berry* and its progeny, places that responsibility on the Judiciary.

*Berry* contravenes this Court's prior, proper understanding of its role vis-à-vis this Legislature in applying the Open Courts Clause.

> This court cannot ignore or strike down an act because it is either wise or unwise. The wisdom or lack of wisdom is for the legislature to determine. If the act is unjust, amendments to correct the inequities should be made by the legislature and not by judicial interpretation. . . . If after considering the reasons for and against a bill, the legislature enacts it into law, arguments for correction of any claimed inequities should be addressed to the legislature where they can be considered and if found to exist, be corrected.

*Masich*, 191 P.2d at 625.

It in no way minimizes the separation of powers problem to argue that relatively few statutes have been invalidated under *Berry*. *Cf. Craftsman*, 1999 UT 18, ¶ 76 (Steward, J., concurring). That assertion largely misses the point. In Utah, separation of powers is an express constitutional mandate, and constitutional violations should not be excused merely because they happen infrequently. One violation, let alone several, is more than enough. Moreover, given the *Berry* test's requirements, applying it necessarily "places this court in the position of sitting as a second legislature, re-weighing the

[Legislature's] social or economic policy." *Laney*, 2002 UT 79, ¶ 107 (Wilkins, J., concurring and dissenting). Even if that review doesn't technically violate the separation of powers provision, its intrusiveness demeans a coordinate branch of government tasked with setting social and economic policy.

Lastly, *Berry* doesn't benefit from any public reliance. No one has relied on *Berry* and its progeny to make personal decisions or other plans that could be unjustly undermined if *Berry* were overturned. Nor could anyone have relied on *Berry* to such ends, given its rational creep during its first two decades. *Berry* should not be maintained on stare decisis grounds.

The better view is that the Open Courts Clause provides only a procedural guarantee of access "by due course of law." As this Court considers application of the Open Court's Clause in Kell's case, it should reject the test adopted in *Berry* and return the Clause to its constitutional roots—as a safeguard against irrational or arbitrary legislative action depriving individuals of procedural access to otherwise existing remedies.

**D. Kell's unpreserved claims should not be reviewed.**

Kell argues that his issues are adequately preserved because he previously argued that "application of the time and procedural bars violated his rights under the Utah Constitution, particularly when considered in light of the uncertainty in the law at the time his initial brief was filed." (KSB 23).

In support of that assertion, he cites his appellate brief and reply brief. Of course, an issue is not preserved by raising it on appeal. To be preserved, the issue must be raised in the district court below. *Ahhmigo, LLC v. Synergy Co. of Utah, LLC,* 2022 UT 4, ¶16, 506 P.3d 535. Kell also cites his opposition to the State's motion for summary judgment as preserving his claims. PCR824-27. In its decision, the district court specifically ruled that the statute of limitations "does not unconstitutionally suspend the writ," PCR 917, thus preserving Kell's Suspension Clause arguments. But Kell never argued below that the rule 65C/PCRA procedural limitations violated his Due Process rights or violated the Open Courts Clause. And the district court did not mention Due Process or the Open Courts Clause in its decision. PCR906-918.

An appellate court will review unpreserved claims only where an appellant argues some justification for review. *State v. Pinder*, 2005 UT 15, ¶45, 114 P.3d 551; *State v. Winfield*, 2006 UT 4, ¶14, 128 P.3d 1171 (appellate court does not review unpreserved claim unless party "articulate[s] an appropriate justification"). Kell has not done so. This Court should decline to review these unpreserved issues.

## II.

## THIS COURT HAS HISTORICALLY BARRED DELAYED CLAIMS LIKE KELL'S, BROUGHT FIVE-AND-A-HALF YEARS AFTER LEARNING THE FACTS HIS PETITION IS BASED ON.

The Court ordered the parties to brief the question: "Does the fact that Mr. Kell filed his current petition approximately five-and-a-half years after discovering the facts upon which it is based adversely affect his ability to obtain relief under this court's constitutional writ power?" Supp. Br. Order, 31 January 2022 at 4.

It does. Whether reviewed under the rule 65C/PCRA rubric or any version of the pre-PCRA common law, the district court properly denied Kell's petition because claims that could have been raised but weren't—especially those that were withheld tactically—would historically have been dismissed under Utah law. And the Court has repeatedly suggested that it *could* apply laches to such claims, and laches *has* been applied by the federal courts and sister states to delayed petitions.

The Court's holding in *Patterson* depended fundamentally on the notion that voters are presumed to understand the case law as it exists when they ratify a constitutional amendment. *Patterson*, 2021 UT 52 at ¶132 ("Our cases in the years leading up to 1984 and closely following it confirm that it was generally understood that extraordinary writs could be used to collaterally challenge a conviction based on factors other than lack of

jurisdiction."). And just as voters in 1984 understood and incorporated the Court's habeas common law into the Article VIII amendment—including the scope the Court had unilaterally given to the writ through case decision-making—they would also have been familiar with its common law limitations on habeas relief for precisely the same reasons. Voters in 1895 may have understood there to be limits on the writ of habeas corpus outside the postconviction context, but such limits would have been rare in a time when habeas relief was more limited in its application.

### A. The "abuse of the writ" doctrine historically barred claims like Kell's; and though the case law is limited, laches would also have appropriately barred this delayed petition.

The Court ordered briefing on whether there are "any historical limitations rooted in a petitioner's delay." Supp. Br. Order, 31 January 2022 at 4. The court specifically asked whether claims withheld for tactical reasons, claims that could have been raised but were not, and claims that were previously raised would have been barred. *Id*. And the Court asked whether laches would have applied to claims brought after a substantial delay. *Id*. These questions are appropriately asked together. The question of claims that could have been raised previously but were not, including claims withheld for tactical reasons, fits under the umbrella of a larger question: "Would a petitioner have been barred from obtaining habeas relief if he *abused the writ*?"

The doctrine of "abuse of the writ," stands for the principle that claims which should have been raised previously but were not cannot be entertained in a petition for habeas corpus. *Abuse-of-the-Writ Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). This doctrine is well settled in Utah law and would have served to bar a claim like Kell's. *See Codianna v. Morris*, 660 P.2d 1101, 1004-05 (Utah 1983). Laches, though not applied in past Utah cases, has historically done similar work as the doctrine of abuse of the writ. *Advisory Committee Notes for Rule 9,* RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (1994). And Utah courts have recognized the appropriateness of employing laches to dismiss untimely claims like Kell's. *Currier*, 862 P.2d at 1372.

**1. Withholding a claim—tactically or otherwise—that could have been but was not raised previously constitutes an abuse of the writ and would traditionally have been barred.**

A perennial problem in criminal law is striking the correct balance between ensuring the finality of criminal judgments and allowing the wrongfully or unconscionably convicted to collaterally attack their convictions. *See, e.g.*, *Brown v. Turner*, 21 Utah 2d 96, 440 P.2d 968, 970 (Utah 1968); *Andrews v. Morris*, 607 P.2d 816, 821 (Utah 1980). One mechanism early courts used to help strike this balance was the extraordinary writ. *See Renn v. Utah State Board of Pardons*, 904 P.2d 677, 682 (Utah 1995) (explaining the

functions of several extraordinary writs). A writ is simply a written order issued by a court "commanding the addressee to do or refrain from doing some specified act." *Writ*, BLACK'S LAW DICTIONARY (11th ed. 2019). Extraordinary writs are extraordinary in that they involve a court "exercising unusual or discretionary power." *Id*.

The most well-known of the extraordinary writs is the writ of habeas corpus. Habeas corpus is often (and incorrectly) equated with the other extraordinary writs and modern postconviction relief generally. The Court acknowledged as much in *Renn* when it observed that many petitions for extraordinary relief "have been referred to…as petitions for writs of 'habeas corpus,'" when they more closely resembled other writs. 904 P.2d at 683.

In the more distant past, there was no limit on how often a person could petition for habeas relief. *Salinger v. Loisel*, 265 U.S. 224, 230-231 (1924). This made sense in a time when denial of habeas petitions "was not open to appellate review." *Id*. at 230. "But when a right to an appellate review was given, the reason for that practice ceased, and the practice came to be materially changed." *Id.* at 231. Likewise, "when a right to a comprehensive review in criminal cases was given, the scope of inquiry deemed admissible on habeas corpus came to be relatively narrowed." *Id.* at 231.

As the right to appellate review expanded, courts began to acknowledge that unrestricted use of habeas would lead to "no conviction…ever becom[ing] final." *Thompson v. Harris*, 107 Utah 99, 152 P.2d 91, 92 (Utah 1944). So more and more courts, including this one, began to assert the principle that habeas corpus could not serve as a substitute for appeal. *See, e.g.*, *Ex parte Hays*, 15 Utah 77, 47 P. 612, 614 (Utah 1897).

Abuse of the writ emerged from this principle: [16] If habeas corpus could not serve as a substitute for appeal, then it would necessarily be improper for petitioners to raise claims that they could have raised on appeal but did not.[17]

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[16] It seems that the principle that habeas corpus could not serve as a substitute for appeal evolved from the historical fact that "[u]pon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions." *Harlan v. McGourin*, 218 U.S. 442, 448 (1910). Thus, "habeas corpus…cannot be made to perform the function of a writ of error." *In re Gregory*, 219 U.S. 210, 213 (1911). *See also Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 274 (1942) ("Of course the writ of habeas corpus should not do service for an appeal.") (citing *In re Gregory*, 219 U.S. at 213).

[17] Abuse of the writ is akin to the successive writ doctrine, which holds that "a second petition for a writ of habeas corpus may not raise claims that were heard and decided on the merits in a previous petition." *Successive-Writ Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). Together, these doctrines reinforce the principle that habeas corpus cannot serve as substitute for an appeal, either by raising a claim again or a claim that should have been raised. *See, e.g.*, *Gardner v. Holden*, 888 P.2d 608, 613 (Utah 1994). The successive writ doctrine, like the doctrine of abuse of the writ, was incorporated into the PCRA. *See* U.C.A. § 78B-9-106(1)(b), (d).

This Court expressed the doctrine of abuse of the writ for perhaps the first time in *Ex parte Hays*, 15 Utah 77, 82, 47 P. 612 (Utah 1897). In denying a habeas corpus petition, the Court noted that "the petitioner had an opportunity to bring the matter up in his record on appeal," and held that "[h]e cannot be allowed to bring up part of [his case], and, after this court has affirmed the judgment, have the balance considered upon *habeas corpus*." *Id*.

Since then, the Court has consistently upheld the doctrine, even after it departed from the historic jurisdiction-only scope of habeas review[18] For example, in *Brown v. Turner*, the Court affirmed the denial of a petitioner's

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[18] *See Bruce v. East*, 43 Utah 327, 134 P. 1175 (Utah 1913); *Washington v. Turner*, 17 Utah 2d 361, 362, 412 P.2d 449 (Utah 1966); *Wood v. Turner*, 19 Utah 2d 133, 427 P.2d 397 (Utah 1967); *Bryant v. Turner*, 19 Utah 2d 284, 286-287, 431 P.2d 121 (Utah 1967); *Brown v. Turner*, 21 Utah 2d 96, 98, 440 P.2d 968 (Utah 1968); *Wise v. Turner*, 21 Utah 2d 101, 101-102, 440 P.2d 971 (Utah 1968); *Jaramillo v. Turner*, 24 Utah 2d 19, 20-21, 465 P.2d 343 (Utah 1970); *Johnson v. Turner*, 24 Utah 2d 439, 442-443, 473 P.2d 901 (Utah 1970); *Schad v. Turner*, 27 Utah 2d 345, 346, 496 P.2d 263 (Utah 1972); *Zumbrunnen v. Turner*, 27 Utah 2d 428, 497 P.2d 34 (Utah 1972); *Ainslie v. Smith*, 531 P.2d 864 (Utah 1975); *Gee v. Smith*, 541 P.2d 6, 7 n.1 (Utah 1975); *Harris v. Smith*, 541 P.2d 343, 344 (Utah 1975); *Maguire v. Smith*, 547 P.2d 697, 698 (Utah 1976); *Bennett v. Smith*, 547 P.2d 696, 697 (Utah 1976); *Reddish v. Smith*, 576 P.2d 859, 860 (Utah 1978); *Webster v. Jones*, 587 P.2d 528 (Utah 1978); *Helmuth v. Morris*, 598 P.2d 333 (Utah 1979); *Martinez v. Smith*, 602 P.2d 700 (Utah 1979); *Andrews v. Morris*, 607 P.2d 816, 820 (Utah 1980); *Codianna v. Morris*, 660 P.2d 1101, 1004-05 (Utah 1983); *Wells v. Shulsen*, 747 P.2d 1043, 1044 (Utah 1987); *Robbins v. Cook*, 737 P.2d 225 (Utah 1987); *Bundy v. Deland*, 763 P.2d 803 (Utah 1988); *Gomm v. Cook*, 754 P.2d 1226, 1227 (Utah Ct. App. 1988); *Fernandez v. Cook*, 783 P.2d 547, 549 (Utah 1989); *Gardner v. Galetka*, 2007 UT 3, ¶¶23-30, 151 P.3d 968 (Utah 2007); *Gerrish v. Barnes*, 844 P.2d 315, 319 (Utah 1992); *Kelbach v. McCotter*, 872 P.2d 1033 (Utah 1994); *Gardner v. Holden*, 888 P.2d 608 (Utah 1994).

habeas petition on abuse of the writ grounds. 21 Utah 2d 96, 440 P.2d 968 (1968). The Court observed that "[t]his [was] another in the constantly increasing number of habeas corpus proceedings brought to obtain release from prison years after the original trial and after the time for appeal has long since passed," and held that normal appellate procedures must be followed "[i]f the contention of error is something which is known or should be known to the party at the time the judgment was entered." *Id*. at 98. Otherwise, "the judgment becomes final and is not subject to further attack, except in some unusual circumstances." *Id.*

The abuse of the writ bar was codified legislatively in the PCRA, *see* Utah Code Ann. § 78B-9-106, and by rule in Utah Rules of Civil Procedure Rule 65C. *Patterson* 2021 UT 52 at ¶174 ("[W]e exercise our writ power independent of the PCRA. But…we exercise that power in total harmony with the PCRA."). The relevant provision states that a "petitioner is not eligible for relief under this chapter upon any ground that…could have been but was not raised in the trial court, at trial, or on appeal," or "in a previous request for postconviction relief." Utah Code Ann. § 78B-9-106(1)(c)-(d). Utah courts have upheld this principle since the PCRA was passed, just as they did before. *See, e.g., Archuleta v. State*, 2020 UT 62, 472 P.3d 950; *Taylor v. State*, 2012 UT 5, 270 P.3d 471; *Allen v. Friel*, 2008 UT 56, 194 P.3d 903 ; *Rudolph v.*

*Galetka*, 2002 UT 7, 43 P.3d 467.

Especially serious abuses of the writ arise where the petitioner intentionally or tactically withholds a claim that could have been raised previously. This view was endorsed by the Court in *Hurst v. Cook*, 777 P.2d 1029 (Utah 1989). In *Hurst*, the Court outlined good cause exceptions to its rule not to entertain successive habeas claims—the so-called *Hurst* factors. *Id*. at 1037; *see Patterson*, 2021 UT 52, ¶177. The last of these five good cause exceptions was for "claim[s] overlooked in good faith with no intent to *delay or abuse the writ*." *Hurst*, 777 P.2d at 1037 (citing *Potts v. Zant*, 638 F.2d 727 (5th Cir. 1981), *cert. denied*, 454 U.S. 877 (1981) ("Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or *delay*") (emphasis added)). The Court then held that frivolous claims, previously litigated claims, and claims "*withheld for tactical reasons*" did not fit into this exception and "should be summarily denied." *Id*. (emphasis added). Kell overlooks this branch of the case law when he finds no "discussion in the Court's cases addressing a petitioner intentionally withholding a claim for habeas relief." (KSB 31 n.12).

The previous year, the Court made a similar ruling pronouncing itself "in accord with decisions of federal courts" applying abuse of the writ.

*Andrews v. Shulsen*, 773 P.2d 832, 833-834 (Utah 1988). The Court cited three contemporaneous United States Supreme Court cases as federal decisions it agreed with. *Id. See Straight v. Wainwright*, 476 U.S. 1132, 1133 (1986) (Powell, J., concurring); *Antone v. Dugger*, 465 U.S. 200, 206 (1984); *Woodard v. Hutchins*, 464 U.S. 377 (1984) (Powell, J., concurring). One of these, *Woodard*, vacated a last-minute stay of execution coupled with a new petition for habeas corpus. Justice Powell, writing for five concurring Justices, found that such a last-minute application for relief, "filed with no explanation as to why the claims were not raised *earlier* or why they were not all raised in one petition," was "another example of abuse of the writ" and that "[s]uccessive petitions for habeas corpus that raise claims *deliberately* withheld from prior petitions [also] constitute an abuse of the writ." *Id*. at 378-379 (emphasis added). *See also*, *Wong Doo v. United States*, 265 U.S. 224, 239 (1924). And, though not central to their holding, the Justices did not require affirmative proof of tactical delay in this ruling because the petitioner had had counsel throughout the proceedings and there was no explanation for why the claims were made last minute. *Woodard*, 464 U.S. at 379 n.3.

These cases make clear that the tactical withholding of claims in postconviction proceedings is an abuse of the writ and grounds for dismissal under Utah law.

Though Kell argues that there is no support to show that his delay was tactical, the burden is on Kell to affirmatively disprove delay.[19] Even if it were the State's burden to prove it, there is ample support to conclude that Kell engaged in tactical delay. Kell brutally murdered fellow inmate Ronnie Blackmon twenty-eight years ago and was convicted of aggravated murder by a jury and sentenced to death; his conviction and sentence were affirmed on appeal. *State v. Kell*, 2002 UT 106, 61 P.3d 1019 (*Kell I*). Kell then filed a petition for postconviction relief and a rule 60(b) motion; both were denied, and the Utah Supreme Court affirmed both denials. *Kell v. State*, 2008 UT 62, 194 P.3d 913 (*Kell II*); *Kell v. State*, 2012 UT 25, 285 P.3d 1133 (*Kell III*).

In 2007, while his first postconviction petition was being adjudicated, Kell was appointed current counsel Jon Sands. R726. Five years later, Kell obtained the jury statements in question, and about five-and-a-half years after that, Kell filed a new state postconviction petition presenting these statements for the first time in state court. R1, 50-61. These passages of time, coupled with the fact that Kell has had the same counsel all through the relevant events, clearly demonstrate tactical delay.[20]

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[19] *See Gerrish v. Barnes*, 844 P.2d 315, 320 (Utah 1992). For the reasons discussed here and in the State's original brief, Kell has failed to show a lack of tactical delay.

[20] Previous dilatory tactics engaged in by Kell's current counsel in other

Beyond this, and despite Kell's objections to the contrary, he is clearly incentivized to delay. Common sense and the United States Supreme Court confirm that "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, 277-278 (2005); *see also Lindh v. Murphy*, 521 U.S. 320, 340 (1997) (Rehnquist, C.J., dissenting); *Ford v. Wainwright*, 477 U.S. 399, 429 (1984) (opinion of O'Connor, J.).

Kell tries to wiggle out of this obvious truism by suggesting that it might make sense "where a claim is frivolous on its face," but that his claim is "far from frivolous." KSB 44. Then why did Kell wait nearly six years to bring it? He is right that "[t]here is no reward in remaining on death row under an unconstitutional sentence." *Id*. So why not make the claim as soon as it is known? Kell claims—despite there being no ruling to support him—that his claim would have been procedurally defaulted. *Id*. But wouldn't it have made more sense to argue that procedural default did not apply at the time rather than wait until it certainly did nearly six years later? It was at least debatable as to when Kell "knew or should have known, in the exercise of reasonable diligence," about the information in the jury declarations and thus

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capital cases also suggest that Kell's delay was a tactical one. *See* Resp. Br. 29.

whether his claim was timely. U.C.A. § 78B-9-107(2)(e). But it is certain he knew about it by the time the declarations are dated—May 2012—and that he waited nearly six years—until January 2018—to raise the issue in state court. R50-61.

Kell ignores all of this, assumes a finding that he didn't give the courts a chance to make, and blames it all on previous counsel despite current counsel being on the case for the discovery of the relevant evidence and the ensuing five-and-a-half year delay. KSB 43-46. The Court should not allow such "piecemeal litigation…whose only purpose is to vex, harass, or delay." *Sanders v. U.S.*, 373 U.S. 1, 18 (1963).

Abuse of the writ is concerned with more than the problem of piecemeal litigation. It is also concerned with chronology. Throughout his brief, Kell repeatedly brings up the "mere passage of time" and cites several cases supporting his contention that "[t]here is no indication in the Court's decisions prior to the passage of the 1984 constitutional amendments that the passage of time was a barrier to relief." (KSB 27). *See also id*. at 14, 40, 41. Maybe not on its own, but the passage of time is necessarily implicated in denying relief based on abuse of the writ; is the petitioner bringing a claim *now* that he could and should have brought *previously* on appeal?

Besides, the mere passage of time is not at issue here. Delay is. And delay is "[t]he action of deferring or postponing something." *Delay*, OXFORD ENGLISH DICTIONARY (3d ed. 2020); *see also Delay*, BLACK'S LAW DICTIONARY (11th ed. 2019) (likewise defining delay as an "act"). As in an act designed to postpone presentation of a post-conviction claim. *Delay*, though often including a significant *passage of time*, is what is important here and what has historically been at issue.

For example, one of the cases Kell cites in support of his point is *Tavenner v. Turner*, 28 Utah 2d 238, 501 P.2d 105 (Utah 1972). *Tavenner* involved a rather incorrigible inmate who was convicted of robbery in Utah but "[c]onveniently… escaped from the courtroom just before sentenc[ing]," only to end up in an Idaho prison for five years. *Id*. at 239. Tavenner was later returned to Utah to serve his sentence, and, after a few years, filed a petition for habeas corpus. It was denied, and he tried again two years later. *Id*. He was again rejected, he appealed, and the Court affirmed the denial. *Id*. at 239-240. Kell suggests that the Court's decision was more about Tavenner's antics, "and placed no particular emphasis on the amount of time that passed until the petition was filed or between the two petitions." KSB 28. This misreads the opinion. The Court did recite Tavenner's exploits in the procedural history, but its actual reasoning is simple: "[W]e think defendant long since

had his inning in the court game, that he has not followed the rules with respect to the writ, that the record here demands rejection of the petition, and that our own cases heretofore decided are dispositive." *Tavenner*, 28 Utah 2d at 239-240. The cases cited as dispositive included *Johnson v. Turner*, 24 Utah 2d 439, 473 P.2d 901 (Utah 1970), and *Wood v. Turner*, 19 Utah 2d 133, 427 P.2d 397 (Utah 1967). *Tavenner*, 28 Utah 2d at 240 n.4. In each case, relief was denied because the petitioner "could have tendered the issues upon which he now seeks relief…but failed to do so." *Wood*, 19 Utah 2d at 133. Tavenner's delay decided his case. Kell's delay should decide his.

None of this means that the doctrine of abuse of the writ was an absolute bar on the Court hearing claims that could have been brought on appeal but were not. *Hurst* acknowledged that "habeas corpus is not a substitute for appeal," but also acknowledged that "a conviction may nevertheless be challenged by collateral attack in 'unusual circumstances,' that is, where an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred, irrespective of whether an appeal has been taken." *Hurst*, 777 P.2d at 1035. *See also Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979).

This exception is no surprise given the special status of habeas corpus as "the precious safeguard of personal liberty." *Thompson v. Harris*, 106 Utah

32, 144 P.2d 761, 766 (Utah 1943) (adding that "the writ will lie if the petitioner has been deprived of one of his *constitutional rights*."). But it is also one that proves the rule. Since it only lies for "an obvious injustice or a substantial and prejudicial denial of a constitutional right," *Hurst*, 777 P.2d at 1035, this exception will only be implicated "in rare cases, where…it would be wholly unconscionable not to re-examine the conviction." *Martinez*, 602 P.2d at 702. This is not one of those rare cases; it is an unremarkable example of abuse of the writ.

Kell cites several cases when the Court "addressed and resolved the merits of claims asserted in petitions for writs of habeas corpus even though the issues raised were known or should have been known at the time of conviction or initial appeal." *Hurst*, 777 P.2d at 1035-36. That said, these cases generally relied on the above "unusual circumstances" exception. *See Dunn v. Cook*, 791 P.2d 873, 875-876 (Utah 1990); *Chess v. Smith*, 617 P.2d 341, 343-344 (Utah 1980); *Martinez*, 602 P.2d at 702; *Helmuth v. Morris*, 598 P.2d 333, 334-335 (Utah 1979); *Rammell v. Smith*, 560 P.2d 1108, 1109 (Utah 1977). When they did not, the cases were often very important or unique such that the Court had good reason to fully develop the record. *See, e.g., Gonzales v. Morris*, 610 P.2d 1285 (Utah 1980) (petitioner's challenge based on statute amended after his conviction); *Pierre v. Morris*, 607 P.2d 812 (Utah 1980) (affirming,

along with companion case *Andrews v. Morris*, 607 P.2d 816, denial of habeas petitions of the so-called "Hi-Fi killers," some of the first prisoners sentenced to death under Utah's post-*Furman* death penalty regime). Or the cases didn't actually implicate the doctrine of abuse of the writ at all. *See, e.g.*, *Allgood v. Larson*, 545 P.2d 530 (Utah 1976) (habeas corpus granted after conviction under city ordinance and denial of trial de novo in state district court, but no appeal).

Most importantly, none of these cases claimed to overrule the doctrine of abuse of the writ. *See, e.g.*, *Brown v. Turner,* 21 Utah 2d 96, 440 P.2d 968 (Utah 1968) (starts by affirming the doctrine of abuse of the writ followed by just three paragraphs affirming the dismissal of petitioner's petition). And the weight of precedent and the doctrine's "well settled" status, *Codianna*, 660 P.2d at 1104, make it clear that any cases reviewing claims abusing the writ without invoking the "unusual circumstances" exception are outliers and not controlling. *See, e.g., State v. West*, 765 P.2d 891, 898 (Utah 1988) (This rule "is in harmony with our existing case law and the principle that, *except for good cause shown*, claims which were or could have been raised either on direct appeal or in a prior habeas corpus or postconviction complaint or proceeding will be deemed waived and may not be raised in subsequent complaints.") (Hall, C.J., dissenting); *Fernandez v. Cook*, 783 P.2d 547, 550-51 (Utah 1989)

(Hall, C.J., dissenting).

Thus, the overarching rule has always uniformly barred delayed claims, and the existence of rare exceptions only prove that rule.

**2. The Court has repeatedly intimated that it could apply laches to bar delayed petitions, just as sister states and federal courts have.**

The Court has never expressly applied the equitable doctrine of laches to a delayed petition for postconviction relief. But that does not mean that it couldn't. Utah is a small state with relatively little postconviction case law, but the Court's reasoning, together with sister state and federal law, reveal that Utah's common law embraced laches to bar post-conviction relief.

"Laches is not mere delay, but delay that works a disadvantage to another." *Papanikolas Bros. Enterprises v. Sugarhouse Shopping Center Associates*, 535 P.2d 1256, 1260 (Utah 1975). To show laches, both lack of diligence and injury resulting from that lack of diligence are required. *Id*. There is no reason that the evils targeted by laches could not occur in the postconviction setting; if a petitioner waits to bring a claim for many years, it may be very difficult for the State to respond to it because of deterioration of memory, degrading of evidence, death of witnesses, and so on. What's more, delaying execution of a capital sentence is a separate harm to the sovereign, who has a recognized interest in the orderly and expeditious completion of such sentences.

Though Utah courts have not applied the doctrine of laches to delayed petitions for postconviction relief, they have suggested that it would be appropriate to do so. Perhaps the clearest statement of this in Utah caselaw is in *Renn*. There the State argued that a habeas statute of limitations applied to Renn's petition for postconviction relief, and that it should thus be denied. 904 P.2d. at 680-682. But the court determined that the petition, challenging a decision by the state board of pardons, was seeking "the kind of relief that is available by the extraordinary writs of certiorari or mandamus." *Id*. at 682. And the habeas statute of limitations did not apply to certiorari and mandamus. *Id*. at 683. But that did not mean that such writs were not subject to any time limitations. The Court said that, though there was no fixed limitation period for them, "writ[s] of certiorari or mandamus should be filed within a reasonable time after the act complained of has been done or refused," and, if not, "*the equitable doctrine of laches is available to dismiss untimely writs*." *Id*. at 684 (emphasis added).

True, *Renn* dealt with writs of mandamus and certiorari. But the application of laches to those writs would be just as valid as applied to habeas corpus. One reason is that, though habeas corpus is often used as a catch-all for extraordinary writs generally, *see id*. at 683, the other extraordinary writs all worked in concert to structure available post-conviction remedies, among

other purposes. That constellation of extraordinary writs all together served as the precursor to modern post-conviction relief.

The traditional functions of these extraordinary writs show their post-conviction applicability, especially when compared with modern post-conviction provisions and procedures. The writ of habeas corpus, of course, "was classically used to challenge the lawfulness of a physical restraint under which a person was held or the jurisdiction and sentence of a court that convicted a person." *Renn,* 904 P.2d at 681; *compare* Utah Code Ann. § 78B-9-104(1) (providing for relief for unconstitutional and illegal convictions and sentences). Or consider writs of error coram nobis, which "could be used…to modify or vacate a judgment where extra-record facts showed that the defendant had been deprived of his constitutional right to a fair trial, including the right to assistance of counsel." *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981); *compare* Utah Code Ann. § 78B-9-104(1) (providing for relief for violations of the federal and Utah constitutions, ineffective assistance of counsel, and newly discovered evidence). And the writ of mandamus "was designed to compel a person to perform a legal duty incumbent on him by virtue of his office or as required by law." *Renn*, 904 P.2d at 682; *compare* Utah Code Ann. § 78B-9-108 (providing for relief including a new trial, expunction, and release from custody). *See also Johnson*, 635 P.2d 38 ("The postconviction

hearing procedure is a successor to the common-law writ of error coram nobis."), superseded by statute as recognized in *Grimmett v. State*, 2007 UT 11, 152 P.3d 306; *Ward v. Turner*, 12 Utah 2d 310, 313, 366 P.2d 72 (Utah 1961) (recognizing applicability of the "writ[s] of Habeas corpus or coram nobis, or other special writ…"in postconviction relief.).

Extraordinary writs have also shared similar limiting principles in the postconviction context, meaning that if laches applied to some, it would appropriately apply to others. An example is the Court finding that the principle underlying abuse of the writ—that habeas corpus cannot serve as a substitute to appeal—also applies to other extraordinary writs. *See Oregon Short Line R. Co. v. District Court of Third Judicial Dist.*, 30 Utah 371, 85 P. 360, 362 (Utah 1906) ("We…adhere to the doctrine…that this court will not permit a writ of certiorari to be used to exercise the functions of an ordinary appeal."); *Olson v. District Court, Second Judicial Dist., in and for Davis County*, 106 Utah 220, 147 P.2d 471, 472 (Utah 1944) ("[The writ of] Prohibition is not a proceeding for general review and cannot be used as such."); *Anderson v. Baker*, 5 Utah 2d 33, 37, 296 P.2d 283 (Utah 1956) ("An extraordinary writ is not a proceedings for general review, and cannot be used as such."); *Crist v. Mapleton City*, 28 Utah 2d 7, 9, 497 P.2d 633 (Utah 1972) ("A writ of mandamus is not a substitute for and cannot be used…to serve the purpose of appeal,

certiorari, or writ of error.").

Since many or all extraordinary writs have historically had a place in what we now call postconviction relief, the common law and equitable limitations on extraordinary writs, including laches, appropriately applied in the postconviction setting.

More obviously, *Renn* held that laches applied to extraordinary writs, and habeas corpus was an extraordinary writ. If the Court wanted to make clear that it was only referring to writs of certiorari and mandamus, it could have said so. Since habeas corpus petitions were subject to a statute of limitations at the time,[21] *Renn* can be understood as suggesting an independent, equitable limitation on abuse of the writ of habeas corpus.

Though not applied in Utah, the court of appeals approved of the application of laches in the postconviction context elsewhere. In 1993, the Court heard a case challenging the time limitation on filing habeas corpus

[21] Though the statute of limitations at issue had been ruled unconstitutional by the Utah Court of Appeals previously, *see Currier v. Holden*, 862 P.2d 1357 (Utah Ct. App. 1993), later statutes of limitations met constitutional muster. *See Patterson v. State*, 2021 UT 52, ¶203, 504 P.3d 92 (citing "cases like *Winward* [*v. State*, 2012 UT 85]" as upholding "the application of time bars to petitions for extraordinary writs).

petitions then in place. *Currier*, 862 P.2d 1357.[22] There the court found the "inflexible three-month filing period" unreasonable and unconstitutional. *Id*. at 1372. The court cited the federal habeas rules of the time as offering the proper amount of flexibility, specifically pointing to their reliance "on the equitable doctrine of laches…rather than a statute of limitations" to prevent abuse of the writ. *Id*.[23]

*Currier* specifically cited Federal Habeas Corpus Rule 9, which governed "delayed or successive petitions." *Rule 9,* RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (1994). The rule gave federal courts power to dismiss habeas petitions "if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing." *Id*. The same rule also allowed for the

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[22] The statute in question put a limit of three months "[f]or relief pursuant to a writ of habeas corpus. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner." Utah Code Ann. § 78-12-31.1 (1992).

[23] It is appropriate to consult federal and sister state law not only because doing so helps in interpreting our own Constitution and laws, *Patterson*, 2021 UT 52, ¶211, but also because this Court has regularly done so in habeas corpus and other postconviction cases in the past. *See, e.g.*, *Ex Parte Hays*, 15 Utah 77, 47 P. 612, 614 (1897) (relying on several state and federal cases in denying a habeas corpus petition); *Andrews v. Shulsen*, 773 P.2d 832, 833-834 (Utah 1988) (citing United States Supreme Court cases as illustrative of Utah law). Utah's habeas common law has always considered sister state and federal habeas common law as a source of authority and policy.

dismissal of petitions that "fail[] to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." *Id*. Federal law at the time considered it proper to employ both laches and abuse of the writ to "limit[] the right to assert stale claims and to file multiple petitions." *Id*. (Advisory Committee Note).[24] This shows the functional harmony of abuse of the writ—a well settled principle in Utah law—and laches—a less well settled one—in preventing postconviction abuse of the writ.

Several states have also relied on laches in dealing with delayed petitions for postconviction relief and habeas corpus relief more generally.[25]

In the end, laches has uncontroversially applied to delayed petitions

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[24] The rule was later amended because a subsequent limiting statute, the Anti-terrorism and Effective Death Penalty Act (AEDPA), imposed a statute of limitations addressing the problem of delayed petitions. *See Dumas v. Kelly*, 418 F.3d 164, 166 n.2 (2d Cir. 2005).

[25] *See, e.g.*, *Ex parte Medrano*, 2022 WL 1681860 (Tex. Ct. App. 2022) (unpublished); *State v. Pope*, 389 Wis.2d 390 (Wis. 2019); *Davis v. Weber*, 841 N.W.2d 244 (S.D. 2013); *Flint v. State*, 288 Ga. 39, 701 S.E.2d 174 (Ga. 2010); *Jackson v. State*, 125 Nev. 1050 (Nev. 2009); *Wagner v. State*, 77 P.3d 1288 (Kan. Ct. App. 2004); *Paxton v. State*, 903 P.3d 325 (Ok. Crim. App. 1995); *Brumley v. Seabold*, 885 S.W.2d 954 (Ky. Ct. App. 1994); *People ex rel. Wynder v. Mantello*, 177 A.D.2d 988 (N.Y. App. Div. 1991); *Syrovatka ex rel. Syrovatka v. Graham*, 190 Neb. 355 (Neb. 1973) (child custody case); *Com. ex rel. Savage v. Hendrick*, 179 Pa.Super. 601 (Pa. Super. Ct. 1955). *But see*, *State v. Sutphin*, 142 N.M. 191 (N.M. 2007).

for postconviction relief at the federal and state level. Though Utah courts never directly applied laches, case law indicates that the Court approved of such a practice and would presumably, if the right case was presented, have done so as well.

### B. The voters who ratified the 1984 constitutional amendments would have understood the Court's limits on postconviction relief.

The Court ordered briefing on whether "the voters who ratified the 1984 amendments to article VIII of the Utah Constitution" would have understood the above limitations on the Court's ability to issue postconviction relief. Supp. Br. Order, 31 January 2022 at 4. Based on contemporaneous Court rulings and related news coverage, it seems reasonable to believe that they would have.

It should first be noted that the 1984 constitutional amendments did not modify the courts' writ authority. The previous version of the judicial article dealing with the jurisdiction of the Supreme Court granted the Court "original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus." Report of the Utah Constitutional Revision Commission, Office of Legislative Research and General Counsel, B32 (Jan. 1984) (Addendum D). The amended version simplified that language, granting the court "original jurisdiction to issue all extraordinary writs." *Id*.

at B33. The Constitutional Revision Commission made clear that "[t]he original jurisdiction to issue extraordinary writs has been retained, but is written in more general language than that found in the present provision." *Id*. Thus, the substance of that writ authority, including the limitations on it discussed above, was preserved in the amended constitution.

And an informed voter likely would have understood these limitations. As Kell notes in his supplemental brief, several cases about the writ power and its limitations were decided and reported on in the years leading up to the amendments. (KSB 36). This reporting often explained the doctrine of abuse of the writ and other limitations on postconviction relief. For instance, when the *Provo Daily Herald* reported on the Court's decision in *Martinez v. Smith*, 602 P.2d 700 (Utah 1979), it quoted portions of the Court's opinion, including Chief Justice Crockett's statement that "claims of error or impropriety should be asserted in the regular procedure provided for appeals and if that is not done the writ of habeas corpus may not be used as a belated appeal." *High Court Orders Inquiry into Plea*, PROVO DAILY HERALD, Oct. 25, 1979, at 3; *see also Verdict upheld*, DESERET NEWS, May 31, 1976 (abuse of the writ); *Fraud sentence is upheld*, DESERET NEWS, Feb. 22, 1977 (abuse of the writ); *Judiciary-Oriented Bills To Speed Trial Process*, SALT LAKE TRIBUNE, March 11, 1979 (statute of limitations on habeas petitions proposed); *Is Federal Court Too*

*Accessible?*, SALT LAKE TRIBUNE, Jan. 31, 1982 (federal statute of limitations on habeas corpus proposed); *Trial Date Set for Suspect In 3 Cedar City Killings*, SALT LAKE TRIBUNE, Sept. 20, 1985 (abuse of the writ).

The Court has already ruled that the voters understood its common law of habeas corpus, incorporating it into the 1984 amendment. *See Patterson,* 2021 UT 52 at ¶132 ("Our cases in the years leading up to 1984 and closely following it confirm that it was generally understood that extraordinary writs could be used to collaterally challenge a conviction based on factors other than lack of jurisdiction."). And by the Court's reasoning in *Patterson*, the people should be presumed to have understood the common law *limitations* on habeas relief as much as they understood the *substantive* habeas common law remedies that *Patterson* held informed the 1984 amendment. There can be no principled distinction between the public's awareness of substantive versus limiting case law. If the public knew that they were accelerating the Court's case law into the 1984 amendment, then they knew they were accelerating all of it, including limitations.

Thus, the voters who ratified the 1984 constitutional amendment would have understood that there were limitations on postconviction relief, including the doctrine of abuse of the writ, statutes of limitations, and possibly even laches.

### C. The voters who ratified the 1895 Utah constitution may have understood there to be limits on the writ of habeas corpus outside the postconviction context, but such limits would have been rare in a time when habeas relief was more limited in its application.

The Court also asked whether there are "any historical and common law limitations on the writ of habeas corpus outside the context of post-conviction…rooted in a petitioner's delay" and if "the voters who ratified the original Utah Constitution in 1895 underst[ood] these limitations." Supp. Br. Order, 31 January 2022 at 4. The writ of habeas corpus was historically limited in its scope. *Patterson*, 2021 UT 52 at ¶¶110-111. In 1895, it applied in contexts where petitioners had no sensible incentive to delay. The writ was meant to challenge unlawful detentions, which means it applied not only to arrests, but also to child custody disputes, unjustified commitments, and so on. It was only later that the writ began to take on more characteristics of an appeal and began to be used in the postconviction setting. *Patterson*, 2021 UT 52, ¶¶121-129.

The voters who ratified the 1895 Utah constitution would have been familiar with this limited use of habeas corpus, as it was often reported on in newspapers. *See, e.g., Discharged. Mrs. Brightmore, of Grantsville, a Free Woman*, SALT LAKE HERALD-REPUBLICAN, Feb. 15, 1885

(petitioner released on "technical flaws as to the form of the complaint"); *Hawkins' Children*, SALT LAKE HERALD-REPUBLICAN, Aug. 11, 1886 (child custody case); *Mormon immigrants released on habeas corpus*, SALT LAKE HERALD-REPUBLICAN, Sept. 8, 1886 (Latter-day Saint immigrants released from detention on habeas corpus); *The St. Louis Crook*, SALT LAKE HERALD-REPUBLICAN, Oct. 29, 1887 (release of prisoner on flaw in arrest warrant followed by prompt rearrest); *Among the Judges*, DESERET EVENING NEWS, May 13, 1890 (child custody case); *The Legal Lexicon*, SALT LAKE TIMES, Aug. 29, 1892 (petitioners released after illegal arrest); *The Driggs Case*, PROVO DISPATCH, Oct. 11, 1894 (petitioner released because complaint did not state an offense); *News From Near-By Towns*, SALT LAKE HERALD-REPUBLICAN, November 22, 1895 (petitioner released on habeas corpus after illegal arrest).[26]

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[26] The Court in *Patterson* noted that the Latter-day Saint (LDS) community of Nauvoo had an "imaginative" approach to habeas corpus, noting that it is not clear how much that may have affected early Utahn's understandings of the writ. 2021 UT 52, ¶110 n.22 (quoting BENJAMIN E. PARK, KINGDOM OF NAUVOO: THE RISE AND FALL OF A RELIGIOUS EMPIRE ON THE AMERICAN FRONTIER 126 (2020)). However, as understandable as the Nauvoo approach was in an historical context, it was legally dubious. The Nauvoo charter allowed city leaders to review arrest warrants issued by other jurisdictions and issue writs of habeas corpus. According to one historian, "[t]he net result" of Nauvoo's habeas corpus regime "was not only to help protect the Mormons from legal persecution, real or imagined, but also to make 'outside' law enforceable in Nauvoo only if the city government concurred." ROBERT BRUCE FLANDERS, NAUVOO: KINGDOM ON THE MISSISSIPPI 99 (1975). The city

What is important is that a petitioner in these contexts would have no rational incentive to delay bringing a habeas corpus petition. For example, a person arrested illegally—as is true now—would want to be released as soon as possible; especially if, as was often the case, officers of another state were on the way to extradite them. *See The St. Louis Crook*, SALT LAKE HERALD-REPUBLICAN, October 29, 1887 (petitioner convicted in Missouri released on flaw in warrant). Similarly, parents who wished to recover or retain their custodial rights will seldom, if ever, delay seeking an extraordinary writ. *See Among the Judges*, DESERET EVENING NEWS, May 13, 1890 (parents sought custody of daughters they claimed were going to be forced into polygamous marriages and sent to Mexico).

The postconviction context—and especially habeas petitions in capital cases—is unique in motivating delay in ways that other uses of habeas are not. (*See* the State's original brief).

About twenty years after the ratification of the Utah Constitution, however, the Court seemed to take for granted that there were limitations on

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exercised this power specially to protect LDS leader Joseph Smith Jr. *See, e.g.*, PARK at 179-180. *See also* GLEN M. LEONARD, NAUVOO: A PLACE OF PEACE, A PEOPLE OF PROMISE (2002). This understanding of habeas corpus poses obvious federalism problems and made little sense in 1895 Utah where the territorial government, not the church, held ultimate political power.

the writ of habeas corpus in the context of child custody. In *Harrison v. Harker*, 44 Utah 541, 142 P. 716, 717 (Utah 1914), the Court was asked to decide a father's petition in habeas for custody of his child. In his concurrence, Justice Straup discussed the termination of a parent's custodial rights over their child and wrote that "an abandonment, or a forfeiture, or laches, or a legal surrender, or unfitness, or inability of the parent" need to be shown before a court will interfere with the parent-child relationship. *Id*. at 725. This reasoning was followed in several subsequent cases. *See Jones v. Moore*, 61 Utah 383, 213 P. 191, 194 (Utah 1923) (despite claims of abandonment, father of child had not forfeited custodial rights); *Sherry v. Doyle*, 68 Utah 74, 249 P. 250, 253 (Utah 1926) ("No abandonment or forfeiture or laches or legal surrender or unfitness or inability on the part of the plaintiff was either alleged or shown"); *Walton v. Coffman*, 110 Utah 1, 13, 169 P.2d 97 (Utah 1946) (presumption of preserving natural parent's custodial rights "unless from all of the evidence the trier of the facts is satisfied that the welfare of the child requires that it be awarded to someone other than its natural parent"). Although laches was never applied to terminate parental rights in these cases, it was also never repudiated as grounds for doing so.

The voters who ratified the 1895 Utah constitution may have been familiar with limitations on the writ of habeas corpus rooted in delay. But the

contexts in which habeas petitions were filed at that time would have made such delay incongruous. But the Court has suggested that there might be such limitations in the child custody context. This fits the uniform assumption throughout Utah case law that laches could limit extraordinary writs.

## CONCLUSION

For these reasons, together with those urged in the State's opening brief, the Court should affirm.

Dated November 30, 2022.

SEAN D. REYES
Utah Attorney General

/s/ Erin Riley
ERIN RILEY
TANNER R. HAFEN
ANDREW F. PETERSON
Assistant Solicitors General
Counsel for Appellee

## CERTIFICATE OF COMPLIANCE

*Page/Word Certification*. I certify that in compliance with rule 24, Utah R. App. P., this brief contains 21, 563 words, excluding tables, addenda, and certificates of counsel.

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

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

☐ contains non-public information and is marked accordingly, and that a public copy, with all non-public information removed, will be filed within 7 days.

/s/ Erin Riley
ERIN RILEY
Assistant Solicitor General

## CERTIFICATE OF SERVICE

I certify that on November 30, 2022, the Brief of Appellee, including any addenda, was filed with the Court by email in a searchable PDF attachment and served upon appellant Troy Michael Kell's counsel of record at:

Jon M. Sands
Federal Public Defender
District of Arizona
Lindsey Layer (VA #79151)
Alexandra H. LeClair (AZ #026269)
Arizona Federal Defender's Office
850 West Adams Street, Ste, 201
Phoenix, AZ 85007
Lindsey_Layer@fd.org

Counsel for Appellant

/s/ Melissa Walkingstick Fryer

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

# Addenda

# Addendum A

**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:

(1) whether the petitioner is incarcerated and, if so, the place of incarceration;
(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;
(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;
(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;
(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

(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:

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

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

(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

(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) Summary Dismissal of Claims.**

(1) 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.

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

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

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

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

(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.
(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 upon the respondent a copy of the petition, attachments, memorandum, and an electronic court record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate record of the underlying case has not already been created, the clerk will create the record.

(1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. Service on the Attorney General shall be by mail at the following address:

Utah Attorney General's Office
Criminal Appeals
Post-Conviction Section
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

(2) 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:

(1) consider the formation and simplification of issues;

(2) require the parties to identify witnesses and documents; and

(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.**

(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.

(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(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.**

(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.
(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.
(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.

**USCS Sec 2254 Cases R 9 (1994 ) Delayed or successive petitions**

**(a)** Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

**(b)** Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

**NOTES OF ADVISORY COMMITTEE ON RULES**

This rule is intended to minimize abuse of the writ of habeas corpus by limiting the right to assert stale claims and to file multiple petitions. Subdivision (a) deals with the delayed petition. Subdivision (b) deals with the second or successive petition.

Subdivision (a) provides that a petition attacking the judgment of a state court may be dismissed on the grounds of delay if the petitioner knew or should have known of the existence of the grounds he is presently asserting in the petition and the delay has resulted in the state being prejudiced in its ability to respond to the petition. If the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner. Otherwise, the state has the burden of showing such prejudice.

The assertion of stale claims is a problem which is not likely to decrease in frequency. Following the decisions in Jones v Cunningham, 371 US 236 (1963), and Benson v California, 328 F2d 159 (9th Cir 1964), the concept of custody expanded greatly, lengthening the time period during which a habeas corpus petition may be filed. The petitioner who is not unconditionally discharged may be on parole or probation for many years. He may at some date, perhaps ten or fifteen years after conviction, decide to challenge the state court judgment. The grounds most often troublesome to the courts are ineffective counsel, denial of right of appeal, plea of guilty unlawfully induced, use of a coerced confession, and illegally constituted jury. The latter four grounds are often interlocked with the allegation of ineffective counsel. When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are. It often develops that the defense attorney has little or no recollection as to what took place and that

many of the participants in the trial are dead or their whereabouts unknown. The court reporter's notes may have been lost or destroyed, thus eliminating any exact record of what transpired. If the case was decided on a guilty plea, even if the record is intact, it may not be satisfactorily reveal the extent of the defense attorney's efforts in behalf of the petitioner. As a consequence, there is obvious difficulty in investigating petitioner's allegations.

In McMann v Richardson, 397 US 759 (1970), the court made reference to the issue of the stale claim:

What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. [Emphasis added.] 397 US at 773.

The court refused to allow this, intimating its dislike of collateral attacks on sentences long since imposed which disrupt the state's interest in finality of convictions which were constitutionally valid when obtained.

Subdivision (a) is not a statute of limitations. Rather, the limitation is based on the equitable doctrine of laches. "Laches is such delay in enforcing one's rights as works disadvantage to another." 30A CJS Equity § 112, p. 19. Also, the language of the subdivision, "a petition may be dismissed" [emphasis added], is permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation.

The interest of both the petitioner and the government can best be served if claims are raised while the evidence is still fresh. The American Bar Association has recognized the interest of the state in protecting itself against stale claims by limiting the right to raise such claims after completion of service of a sentence imposed pursuant to a challenged judgment. See ABA Standards Relating to Post-Conviction Remedies § 2.4(c), p. 45 (Approved Draft, 1968). Subdivision (a) is not limited to those who have completed their sentence. Its reach is broader, extending to all instances where delay by the petitioner has prejudiced the state, subject to the qualifications and conditions contained in the subdivision.

The use of a flexible rule analogous to laches to bar the assertion of stale claims is suggested in ABA Standards Relating to Post-Conviction Remedies § 2.4, commentary at 48 (Approved Draft, 1968). Additionally, in Fay v Noia, 372 US 391 (1963), the Supreme Court noted:

Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. United States ex rel Smith v Baldi, 344 US 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. 372 US at 433.

Finally, the doctrine of laches has been applied with reference to another postconviction remedy, the writ of coram nobis. See 24 CJS Criminal Law § 1606(25), p 779.

The standard used for determining if the petitioner shall be barred from asserting his claim is consistent with that used in laches provisions generally. The petitioner is held to a standard of reasonable diligence. Any inference or presumption arising by reason of the failure to attack collaterally a conviction may be disregarded where (1) there has been a change of law or fact (new evidence) or (2) where the court, in the interest of justice, feels that the collateral attack should be entertained and the prisoner makes a proper showing as to why he has not asserted a particular ground for relief.

Subdivision (a) establishes the presumption that the passage of more than five years from the time of the judgment of conviction to the time of filing a habeas petition is prejudicial to the state. "Presumption" has the meaning given it by Fed R Evid 301. The prisoner has "the burden of going forward with evidence to rebut or meet the presumption" that the state has not been prejudiced by the passage of a substantial period of time. This does not impose too heavy a burden on the petitioner. He usually knows what persons are important to the issue of whether the state has been prejudiced. Rule 6 can be used by the court to allow petitioner liberal discovery to learn whether witnesses have died or whether other circumstances prejudicial to the state have occurred. Even if the petitioner should fail to overcome the presumption of prejudice to the state, he is not automatically barred from asserting his claim. As discussed previously, he may proceed if he neither knew nor, by the exercise of reasonable diligence, could have known of the grounds for relief.

The presumption of prejudice does not come into play if the time lag is not more than five years.

The time limitation should have a positive effect in encouraging petitioners who have knowledge of it to assert all their claims as soon after conviction as possible. The implementation of this rule can be substantially furthered by the development of greater legal resources for prisoners. See ABA Standards Relating to Post-Conviction Remedies § 3.1, pp 49--50 (Approved Draft, 1968).

Subdivision (a) does not constitute an abridgement or modification of a substantive right under 28 USC § 2072. There are safeguards for the hardship case. The rule provides a flexible standard for determining when a petition will be barred.

Subdivision (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to allege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those

grounds in a prior petition is inexcusable.

In Sanders v United States, 373 US 1 (1963), the court, in dealing with the problem of successive applications, stated:

Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. [Emphasis added.] 373 US at 15.

The requirement is that the prior determination of the same ground has been on the merits. This requirement is in 28 USC § 2244(b) and has been reiterated in many cases since Sanders. See Gains v Allgood, 391 F2d 692 (5th Cir 1968); Hutchinson v Craven, 415 F2d 278 (9th Cir 1969); Brown v Peyton, 435 F2d 1352 (4th Cir 1970).

With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in Sanders noted:

In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ . . . and this the Government has the burden of pleading. . . .

Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, . . . he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. 373 US at 17--18.

Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

Sanders, 18 USC § 2244, and subdivision (b) make it clear that the court has discretion to entertain a successive application.

The burden is on the government to plead abuse of the writ. See Sanders v United States, 373 US 1, 10 (1963); Dixon v Jacobs, 427 F2d 589, 596 (DC Cir 1970); cf. Johnson v Copinger, 420 F2d 395 (4th Cir 1969). Once the government has done this, the petitioner has the burden of proving that he has not abused the writ. In Price v Johnston, 334 US 266, 292 (1948), the court said:

[I]f the Government chooses . . . to claim that the prisoner has abused the writ of habeas corpus, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. That is not an intolerable burden. The Government is usually well acquainted with the facts that are necessary to make such a claim. Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ.

Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled. However, in Sanders, the court pointed out:

Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay. 373 US at 18.

There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples. In rare instances, the court may feel a need to entertain a petition alleging grounds that have already been decided on the merits. Sanders, 373 US at 1, 16. However, abusive use of the writ should be discouraged, and instances of abuse are frequent enough to require a means of dealing with them. For example, a successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. A known ground may be deliberately withheld in the hope of getting two or more hearings or in the hope that delay will result in witnesses and records being lost. There are instances in which a petitioner will have three or four petitions pending at the same time in the same court. There are many hundreds of cases where the application is at least the second one by the petitioner. This subdivision is aimed at screening out the abusive petitions from this large volume, so that the more meritorious petitions can get quicker and fuller consideration.

The form petition, supplied in accordance with rule 2(c), encourages the petitioner to raise all of his available grounds in one petition. It sets out the most common grounds asserted so that these may be brought to his attention.

Some commentators contend that the problem of abuse of the writ of habeas corpus is greatly overstated:

Most prisoners, of course, are interested in being released as soon as possible; only rarely will one inexcusably neglect to raise all available issues in his first federal application. The purpose of the "abuse" bar is apparently to deter repetitious applications from those few bored or vindictive prisoners . . . . 83 Harv L Rev at 1153--1154.

See also ABA Standards Relating to Post-Conviction Remedies § 6.2, commentary at 92 (Approved Draft, 1968), which states: "The occasional, highly litigious prisoner stands out as the rarest exception." While no recent systematic study of repetitious applications exists, there is no reason to believe that the problem has decreased in significance in relation to the total number of § 2254 petitions filed. That number has increased from 584 in 1949 to 12,088 in 1971. See Director of the Administrative Office of the United States Courts, Annual Report, table 16 (1971). It is appropriate that action be taken by rule to allow the courts to

deal with this problem, whatever its specific magnitude. The bar set up by subdivision (b) is not one of rigid application, but rather is within the discretion of the courts on a case-by-case basis.

If it appears to the court after examining the petition and answer (where appropriate) that there is a high probability that the petition will be barred under either subdivision of rule 9, the court ought to afford petitioner an opportunity to explain his apparent abuse. One way of doing this is by the use of the form annexed hereto. The use of a form will ensure a full airing of the issue so that the court is in a better position to decide whether the petition should be barred. This conforms with Johnson v Copinger, 420 F2d 395 (4th Cir 1969), where the court stated:

[T]he petitioner is obligated to present facts demonstrating that his earlier failure to raise his claims is excusable and does not amount to an abuse of the writ. However, it is inherent in this obligation placed upon the petitioner that he must be given an opportunity to make his explanation, if he has one. If he is not afforded such an opportunity, the requirement that he satisfy the court that he has not abused the writ is meaningless. Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness. 420 F2d at 399.

Use of the recommended form will contribute to an orderly handling of habeas petitions and will contribute to the ability of the court to distinguish the excusable from the inexcusable delay or failure to assert a ground for relief in a prior petition.

AMENDMENT NOTES

1976. Act Sept. 28, 1976, in subdiv. (a), deleted "If the petition is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the petitioner, that there is prejudice to the state. When a petition challenges the validity of an action, such as revocation of probation or parole, which occurs after judgment of conviction, the five-year period as to that action shall start to run at the time the order in the challenged action took place." after "the state occured."; and, in subdiv. (b), substituted "constituted an abuse of the writ" for "is not excusable".

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

(1) A petitioner 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 in the trial court, at trial, or on appeal;
(c) could have been but was not raised in the trial court, 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 postconviction 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 an appeal from an order granting or denying postconviction 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 the court's own motion, provided that the court gives the parties notice and an opportunity to be heard.

(3) (a) Notwithstanding Subsection (1)(c), a petitioner may be eligible for relief on a basis that the ground could have been but was not raised in the trial court, at trial, or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.
(b) Notwithstanding Subsections (1)(c) and (1)(d), a petitioner may be eligible for relief on a basis that the ground could have been but was not raised in the trial court, at trial, on appeal, or in a previous request for postconviction 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).

(5) This section does not apply to a petition filed under Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence.

**Utah Code Annotated § 78B-9-107 (2022) Statute of limitations for postconviction relief**

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

(2) For purposes of this section, the cause of action accrues on the later 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 that 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)(g) is established.

(3) (a) 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)(h), due to force, fraud, or coercion as defined in Section 76-5-308.

(b) 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-9-402.

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

(6) This section does not apply to a petition filed under Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence.

# Addendum B

IN THE

SUPREME COURT OF THE STATE OF UTAH

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Troy Michael Kell,

Appellant,

v.

Larry Benzon, Warden, Utah State Prison,

Appellee.

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Case No. 20180788

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Supplemental Briefing Order

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Before us is Mr. Kell's second petition for post-conviction relief from the death sentence he received in 1996. The district court dismissed this petition because Mr. Kell did not comply with the procedural requirements of the Post-Conviction Remedies Act (PCRA). Mr. Kell asks us to excuse this noncompliance under the so-called "egregious injustice" exception to the PCRA referenced in our opinions in *Gardner v. State*, 2010 UT 46, 234 P.3d 1115, and *Winward v. State*, 2012 UT 85, 293 P.3d 259. He also asks us to bypass the PCRA's requirements by exercising our "traditional authority over collateral proceedings." But as we recently determined in *Patterson v. State*, there is no egregious injustice exception, and we can only hear a case otherwise barred by the PCRA "when failure to do so would violate a petitioner's constitutional rights." 2021 UT 52, ¶ 196, --- P.3d ---. With this clarification in mind, we now request supplemental briefing

on whether affirming the dismissal of Mr. Kell's petition would violate his rights under the Utah Constitution.

To obtain post-conviction relief, a petitioner must comply with the requirements set forth in the PCRA and Utah Rule of Civil Procedure 65C. The district court dismissed Mr. Kell's petition after finding that he failed to satisfy two of these requirements. The first requirement, known as the "procedural bar," prevents courts from granting relief on claims that were raised or could have been raised in a previous request for post-conviction relief. UTAH CODE § 78B-9-106(1)(d). The second requirement is the PCRA's statute of limitations, also known as the "time bar," which precludes review of all claims not raised "within one year after [a petitioner's] cause of action has accrued." Id. § 78B-9-107(1).

In *Gardner* and *Winward*, we acknowledged the possibility that an exception to these requirements may exist in cases where "denying relief [to a petitioner] would result in an egregious injustice." *Gardner*, 2010 UT 46, ¶ 93; *Winward*, 2012 UT 85, ¶¶ 1618. This acknowledgement was rooted in our authority under the Utah Constitution to "issue all extraordinary writs," including writs of habeas corpus granting post-conviction relief. UTAH CONST. art. VIII, § 3; *Gardner*, 2010 UT 46, ¶¶ 9394; *Winward*, 2012 UT 85, ¶ 17. But even though we broached the subject of a potential egregious injustice exception in these cases, we never "definitively opined that such an exception actually exists." *Patterson*, 2021 UT 52, ¶ 172.

Indeed, we have recently determined in *Patterson v. State* that the egregious injustice exception does not exist. *Id.* ¶¶ 172196. In *Patterson*, we affirmed that this court has the power to issue post-conviction writs "independent of the PCRA." *Id.* ¶¶ 33, 176. The people of Utah vested its courts with this power when they amended article VIII of the Utah Constitution in 1984. *See id.* ¶¶ 130171. But the use of this power "is largely hidden from view because rule 65C--which incorporates the PCRA--governs [its] exercise." *Id.* ¶ 176. And by incorporating the PCRA into rule 65C, we have chosen to exercise our writ authority "in total harmony with the PCRA." Id. In so doing, we have "eliminated" any pre-PCRA exceptions that could be applied to save a time barred or procedurally barred petition. *Id.* ¶ 194. So under this framework, the proper inquiry is not "whether there is some new 'egregious injustice' exception that we might define and apply in an appropriate case." *Id.* Rather, "[t]he real question is . . . whether application of the procedural bars found in the PCRA and rule 65C violate[s] a petitioner's constitutional right to avail herself of the writ the Utah Constitution guarantees." *Id.* ¶ 195.

Accordingly, petitioners seeking to overcome the PCRA's procedural and time bars through our constitutional writ power must show that the application of these bars "would violate [their] constitutional rights." *Id.* ¶ 196. But the parties' briefs, having been filed before our decision in *Patterson*, do not directly address this question. Understandably, they focus on whether Mr. Kell qualifies for the egregious injustice exception and on whether we can use our constitutional writ power to apply common law exceptions that existed prior to the PCRA. *See, e.g., Hurst v. Cook*, 777 P.2d 1029, 1037 (Utah 1989) (identifying five "unusual circumstances" that provide "good cause" for asserting a claim for relief that was or could have been asserted in a previous petition). But given our ruling in *Patterson*, Mr. Kell cannot take advantage of the nonexistent egregious injustice exception. Nor can he obtain relief under the pre-PCRA exceptions, which we eliminated when we adopted rule 65C. And although Mr. Kell invokes the Utah Constitutions Suspension Clause, he does not argue that the application of the PCRA's time and procedural bars to his petition would violate it. For these reasons, we now seek supplemental briefing on how our ruling in *Patterson* affects Mr. Kell's claim.

In addition, we note that Mr. Kell raised his current claim approximately five-and-a-half years after discovering the facts upon which it is based. And while this delay clearly runs afoul of the PCRA's time bar, it is unclear whether it would adversely affect Mr. Kell's ability to obtain relief under our constitutional writ power. Some of our previous cases suggest that petitioners who promptly seek post-conviction relief are in a stronger position to obtain it, and that those who wait must justify their delay. The *Winward* framework, for example, required a petitioner to demonstrate "a reasonable justification for missing the [PCRA's] deadline." 2012 UT 85, ¶ 18. We borrowed this requirement from the "interests of justice" exception to the PCRAs time bar that existed before 2008. *See id.*, ¶ 20 n. 5 (explaining that "if a petitioner cannot prove that he [or she] would prevail under [the] former interests of justice exception . . . then a petitioner certainly cannot qualify under a more rigorous standard such as 'egregious injustice.'"); *see also Adams v. State*, 2005 UT 62, ¶ 16, 123 P.3d 400. And even under the pre-PCRA "good cause" exceptions, we required petitioners seeking to raise claims "overlooked in good faith" to show that they did not intend "to delay or abuse the writ" of habeas corpus. *Hurst*, 777 P.2d at 1037.

Accordingly, the court now requests supplemental briefing on the following questions:

1. Has Mr. Kell adequately and properly presented and preserved the issue of whether application of the PCRA and rule 65C's time and procedural bars to his claim violates the Suspension Clause or any other provision of the Utah Constitution? If so, what are the arguments for and against such constitutional violations.

2. Does the fact that Mr. Kell filed his current petition approximately five-and-a-half years after discovering the facts upon which it is based adversely affect his ability to obtain relief under this court's constitutional writ power?

a. Are there any historical limitations, rooted in a petitioner's delay, on the right to post-conviction relief under the Utah Constitution? For example, would a petitioner historically have been barred from obtaining habeas relief if he or she withheld a claim for tactical reasons? Would he or she have been allowed to bring a claim that could have been but was not raised on appeal or in a previous post-conviction petition? Or would a petition brought after a substantial delay have been subject to the common law doctrine of laches?

b. Assuming any historical limitations existed, did the voters who ratified the 1984 amendments to article VIII of the Utah Constitution understand these limitations to apply to this court's power to issue post-conviction writs?

c. Are there any historical or common law limitations on the writ of habeas corpus outside the context of post-conviction collateral proceedings that are rooted in a petitioner's delay? Did the voters who ratified the original Utah Constitution in 1895 understand these limitations to apply to habeas corpus proceedings?

The parties should meet to set a mutually approved briefing schedule and report the agreed upon deadlines or any failure to reach an agreement back to the court within fourteen days from the date of this order. The supplemental briefs shall clearly indicate "Supplemental Brief" on the cover and shall comply with rule 27 of the Utah Rules of Appellate Procedure as to size, margins, typeface, and contents of cover, and with rule 26(b) as to service. Compliance with other formatting and content provisions of the appellate rules, including the binding and color cover requirements described by subparts (c) and (d) of rule 27, is not required for a supplemental brief.

**Dated:** January 31, 2022
12:34:23 PM

FOR THE COURT:

/s/ Thomas R. Lee
Associate Chief Justice

# Addendum C

**MULTI-STATE SURVEY OF THE MEANING OF STATE OPEN COURTS OR REMEDY CLAUSES**

**Majority Position: No significant burden upon not upon the legislature's ability to alter or abrogate rights and remedies**

***1. Constitutional access to courts provisions do not prevent legislature from changing or eliminating common law rights***

**Colorado** - "The constitutional right to access does not create a substantive right. Rather, it simply assures that if a right does accrue under the law the courts will be able to effectuate it. Thus, the 'access right' guarantees access to the courts only when an individual has a viable claim for relief. The constitutional right of access does not prevent the General Assembly from changing laws which create rights or from placing valid limitations upon any remedy." *Norsby v. Jensen*, 916 P.2d 555, 563-64 (Colo. App. 1995) (citations omitted).

**Idaho** - "It is well established that the 'open courts' provision governing access to courts of justice does not prohibit the legislature from abolishing or modifying a common-law right of action." *Olsen v. J. A. Freeman Co.*, 791 P.2d 1285, 1296 (Idaho 1990).

**Louisiana** - "We interpret art. 1, § 22 to be a mandate to the judiciary of this state rather than a limitation on the legislature. Article 1, § 22 guarantees that the courts will be open to ensure an adequate remedy by due process of law; however, where, as here, a person has no cause of action that is a vested property right, this constitutional provision affords no substantive relief." *Crier v. Whitecloud*, 496 So.2d 305, 310 (La. 1986).

**Massachusetts** - "Article] 11 of the Massachusetts Declaration of Rights. However, art. 11 has never been construed to grant to any person a vested interest in any rule of law entitling such person to

insist that it shall remain unchanged. Statutes modifying or abrogating common law rights do not violate art. 11." *Plummer v. Gillieson*, 692 N.E.2d 528, 532 (Mass. App. Ct. 1998) (citation omitted).

**Montana** - "Article II, Section 16 of the Montana Constitution does not guarantee a fundamental right to any particular cause of action or remedy and . . . the Legislature has the power to alter or abrogate previously available causes of action and constrict liability." *Ross v. Great Falls*, 967 P2d 1103, 1109 (Mont. 1998).

**Mississippi** - "These terms, 'law of the land,' 'due course of law,' 'due process of law,' do not mean the general body of law, 'common and statute,' as it was at the time the constitution took effect. For that would seem to deny to the legislature the power to alter, change or amend the law. Yet we know that it is every day's practice for the law-making department of the government to repeal old laws, enact new, and change remedies." *Brown v. Board of Levee Comm'rs*, 50 Miss. 468, 479 (Miss. 1874).

**Missouri** - "Claims for injuries are recognized by common law and by statute. The legislature may abolish such recognition." *Kilmer v. Mun*, 17 S.W.3d 545, 554 (Mo. 2000) (legislature cannot enact procedural bars to accessing the courts that are unreasonable and arbitrary).

**Nebraska** - *Radke v. H.C. Davis Sons' Mfg. Co., Inc.*, 486 N.W.2d 204, 206 (Neb. 1992) (Legislature can create and abolish rights. It cannot abolish a cause of action, or immunity to such action, once the specific right has vested).

**New Mexico** - "Access to the courts encompasses the ability of a party to have access to the judiciary to resolve legal claims. Nevertheless, such access is not boundless. A right of access to the courts does not guarantee the continued existence of a cause of action or remedy."

*Trujillo v. City of Albuquerque*, 965 P.2d 305, 311 (N.M. 1998) (citations omitted).

**North Carolina** - "It is well established that '[n]o one has the right for the General Assembly not to change a law.' Additionally, 'no person has a vested right in a continuance of the common or statute law. It follows that, generally speaking, a right created solely by the statute may be taken away by its repeal or by new legislation.'" *Waste Industries USA, Inc. v. State*, 725 S.E.2d 875, 892 (N.C. App. 2012) (citations omitted).

**Ohio** - "Thus, the General Assembly has the right to determine what causes of action the law will recognize and to alter the common law by abolishing the action, by defining the action, or by placing a time limit after which an injury is no longer a legal injury." *Ruther v. Kaiser*, 983 N.E.2d 291, 295 (Ohio 2012).

**Oklahoma** - "[T]he right to remedy guarantee afforded by Art. 2, § 6 is a mandate to the judiciary and is not intended to be a limitation on the authority of the legislature. Art. 2, § 6 was not intended to preserve a particular remedy for given causes of action in any certain court of the state, nor was it intended to deprive the Legislature of the power to abolish remedies for future accruing causes of action . . ., or to create new remedies for other wrongs as in its wisdom it might determine. In any event, so long as the legislature acts within its authority, we are powerless to interfere with the wisdom or policy of § 22's limit on the benefits recoverable for soft tissue injuries." *Gee v. All 4 Kids*, 149 P.3d 1106, 1108-09 (Okla. 2000) (internal quotations and citations omitted).

**Pennsylvania** - "This Court would encroach upon the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts. To do so would be to place certain rules of the 'common law' and certain non-constitutional decisions of courts above all change except by constitutional

amendment. Such a result would offend our notion of the checks and balances between the various branches of government, and of the flexibility required for the healthy growth of the law." *Freezer Storage, Inc. v. Armstrong Cork Co.*, 382 A.2d 715, 721 (Pa. 1978).

**South Dakota** - *Cleveland v. City of Lead*, 2003 SD 54, ¶¶ 33-45, 663 N.W.2d 212 (No one has a vested interest in any rule of the common law. The common law can be changed at the will of the legislature).

**Tennessee** - "[The open courts] Section of our constitution has been interpreted by this Court as a mandate to the judiciary and not as a limitation upon the legislature." *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978).

**Washington** - *1519-1525 Lakeview Blvd. v. Apartment Sales Corp.*, 6 P.3d 74, 81-82 (Wash. Ct. App. 2000) (Open courts provision does not prevent the legislature from abrogating common law remedies).

**Wisconsin** - "The legislature formulates the statutory law of Wisconsin, pursuant to constitutional authority. The legislature's authority includes the power to define and limit causes of action and to abrogate common law on policy grounds." *Aicher v. Wisconsin Patients Comp. Fund*, 613 N.W.2d 849, 864 (Wis. 2000).

**Wyoming** - "The right to access to the courts is a fundamental right. The provision is not a limitation on lawmakers who, in the proper exercise of the legislative power, may alter or abolish common law causes of action as long as that legislative action does not violate some other provision of our constitution. The open courts provision was included in our constitution to insure equal administration of justice by the judiciary and did not intend application to the legislature nor to create a fundamental right to full legal redress. No one has a vested right to any rule of common law." *Greenwalt v. Ram Restaurant Corp. of Wyoming*, 2003 WY 77, ¶ 33, 71 P.3d 717 (citations omitted).

### *2. Legislature can alter or abolish common law rights if its actions are reasonable*

**Arkansas** - *White v. City of Newport*, 933 S.W.2d 800, 803 (Ark. 1996) (Court must decide whether the "legislature acted reasonably when it abolished or diminished that right").

**Illinois** - "It is well established that section 12 of article I of the Illinois Constitution prohibits the legislature from arbitrarily eliminating a cause of action. However, the legislature may eliminate a cause of action if it is a reasonable exercise of the 'legislature's police power in providing for the general welfare.'" *M.E.H. v. L.H.*, 669 N.E.2d 1228, 1233 (Ill. Ct. App. 1996) (citations omitted).

**Indiana** - "Although we reject the . . . argument that the constitution precludes the General Assembly from modifying or eliminating a common law tort, the legislature's authority is not without limits. Section 12 requires that legislation that deprives a person of a complete tort remedy must be a rational means to achieve a legitimate legislative goal." *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 979 (Ind. 2000).

**Maine** - "The open courts provision means the courts must be accessible to all persons alike without discrimination, at times and places designated for their sitting, and afford a speedy remedy for every wrong recognized by law as remediable in a court. We do not construe section 19 as prohibiting reasonable limits on the time within which a claimant must seek redress in the courts." *Maine Med. Ctr. v. Cote*, 577 A.2d 1173, 1176 (Maine 1990).

**Maryland** - *Gooslin v. State*, 752 A.2d 642, 644 (Md. Ct. Spec. App. 2000) (Access to the courts is subject to reasonable regulation by the legislature).

**Minnesota** - *Olson v. Ford Motor Co.*, 558 N.W.2d 491, 496-97 (Minn. 1997) (Constitutional Remedy/Access provision prohibits legislature from eliminating common law remedies that were recognized at the time a statute was enacted unless the legislature has a legitimate legislative purpose using a reasonableness test).

**New Hampshire** - *Trovato v. DeVeau*, 736 A.2d 1212, 1214 (N.H. 1999) (Right to a remedy clause treated as an equal protection clause mandating a remedy for any statutory or common law right applicable at the time of the injury. Provision guards against arbitrary and discriminatory infringements of access to the courts).

**South Carolina** - *Wright v. Colleton County Sch. Dist.*, 391 S.E.2d 564, 570 (S.C. 1990) (Right to a remedy provision does not guarantee full compensation to all injured persons where limitation is neither arbitrary nor discriminatory).

**Texas** - "To demonstrate that a statute violates [the open courts provision], a litigant must show 1) that the statute restricts a well-recognized common law cause of action, and 2) that the restriction is unreasonable or arbitrary when balanced against the purpose of the statute." *St. Lukes Episcopal Hospital v. Agbor*, 952 S.W.2d 503, 508 (Tex. 1997).

***3. Open courts or right to remedy clause used as a due process clause and no limitation placed on legislature's ability to alter or abolish the common law***

**Kansas** - "Kansas does not recognize a separate right to an open court, independent from the recognized right to due process. Section 18 of the Kansas Constitution Bill of Rights only recognizes and guarantees a person's independent right to due process." *Bonin v. Vannaman*, 929 P.2d 754, 770 (Kan. 1996) (Kansas does not place any limit on the

legislature's ability to amend or abolish the common law). "Once the legislature has spoken, the legislative statement supersedes the common law." *In Re Marriage of Traster*, 339 P.3d 778, 791 (Kan. 2014).

**North Dakota** - *Bouchard v. Johnson*, 555 N.W.2d 81, 89 (ND 1996) (Open courts clause also used as due process clause).
"Our research shows that the portion of Section 9 relied upon by the plaintiffs has been repeatedly construed as a guarantee of access to our State system of justice." *Andrews v. O'Hearn*, 387 N.W.2d 716, 723 (ND 1986) (footnote omitted).

**Vermont** - "We have considered Article 4 the equivalent to the federal Due Process Clause. It does not create substantive rights, however; it merely provides access to the courts." *Quesnel v. Town of Middlebury*, 706 A.2d 436, 439 (Vt. 1997) (citation omitted).

**Minority Position - Significant restrictions on the ability of legislatures to alter the common law and/or statutory rights and remedies**

**Alabama** - *Lankford v. Sullivan, Long & Hagerty*, (Ala. 1982) (Legislature can only abolish or alter the common law if either the right is voluntarily relinquished by its possessor in exchange for equivalent benefits or protection, or the legislation eradicates or ameliorates a perceived social evil and is thus a valid exercise of the police power).

**Arizona** - A.R.S. Const. Art. 18 § 6. Recovery of damages for injuries.
"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation, except that a crime victim is not subject to a claim for damages by a person who is harmed while the person is attempting to engage in, engaging in or fleeing after having engaged in or attempted to engage in conduct that is classified as a felony offense."

**Connecticut** - "[A]rticle first, § 10, prohibits the legislature from abolishing or significantly limiting common law and certain statutory rights that were redressable in court as of 1818, when the constitution was first adopted, and which were 'incorporated in that provision by virtue of being established by law as rights the breach of which precipitates a recognized injury . . . .' The legislature is precluded, therefore, from abolishing or substantially modifying any such right unless it enacts a reasonable alternative to the enforcement of that right." *Binette v. Sabo*, 710 A.2d 688, 691 (Conn. 1998) (citations omitted).

**Delaware** - "With regard to the public it may be accepted that the legislature may not abolish the common law right of action to recover damages for negligent injury without substituting another substantially adequate remedy, for such right of action is a fundamental and essential right founded in natural justice." *Young v. O.A. Newton & Son Co.*, 477 A.2d 1071, 1076 (Del. Supr. 1984) (quoting *Gallegher v. Davis*, 183 A. 620 (Del.Super. 1936).

**Florida** - "We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. s 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." *Kluger v. White*, 281 So.2d 1, 4 (Fla. 2002).

**Kentucky** – "In other words, we are of opinion that the convention intended to extend the common-law right of action to recover both

compensatory and exemplary damages for injuries not resulting in death to cases in which death ensued; and a very forcible argument in favor of this construction is found in section 54 of the constitution, where it is provided that "the general assembly shall have no power to limit the amount to be recovered for injuries resulting in death or for injuries to person or property." *Williams v. Wilson*, 972 S.W.2d 260, 265 (Ky. 1998) (quoting *Louisville & Nashville R.R. v. Kelly's Adm'x*, 38 S.W. 852, 854 (Ky. 1897).

**Oregon** - *Horton v. Oregon Health & Sci. Univ.*, 2016 WL 2587403 (Ore. May 5, 2016) (Establishing new remedy clause test that balances three factors: 1) where the legislature has not altered a common law duty but has completely denied a remedy for its breach, or only permits an insubstantial remedy, the remedy clause has been violated; 2) the reasons for the legislature's action, whether the remedy permitted the individual is substantial in light of the overall statutory scheme; 3) the reason for the legislature's departure from the common law measured against the extent to which the legislature has departed from common law).

**Rhode Island** - *Dowd v. Rayner*, 655 A.2d 679, 683 (R.I. 1995) (legislature can put reasonable limits and burdens on claims, but cannot absolutely prohibit them).

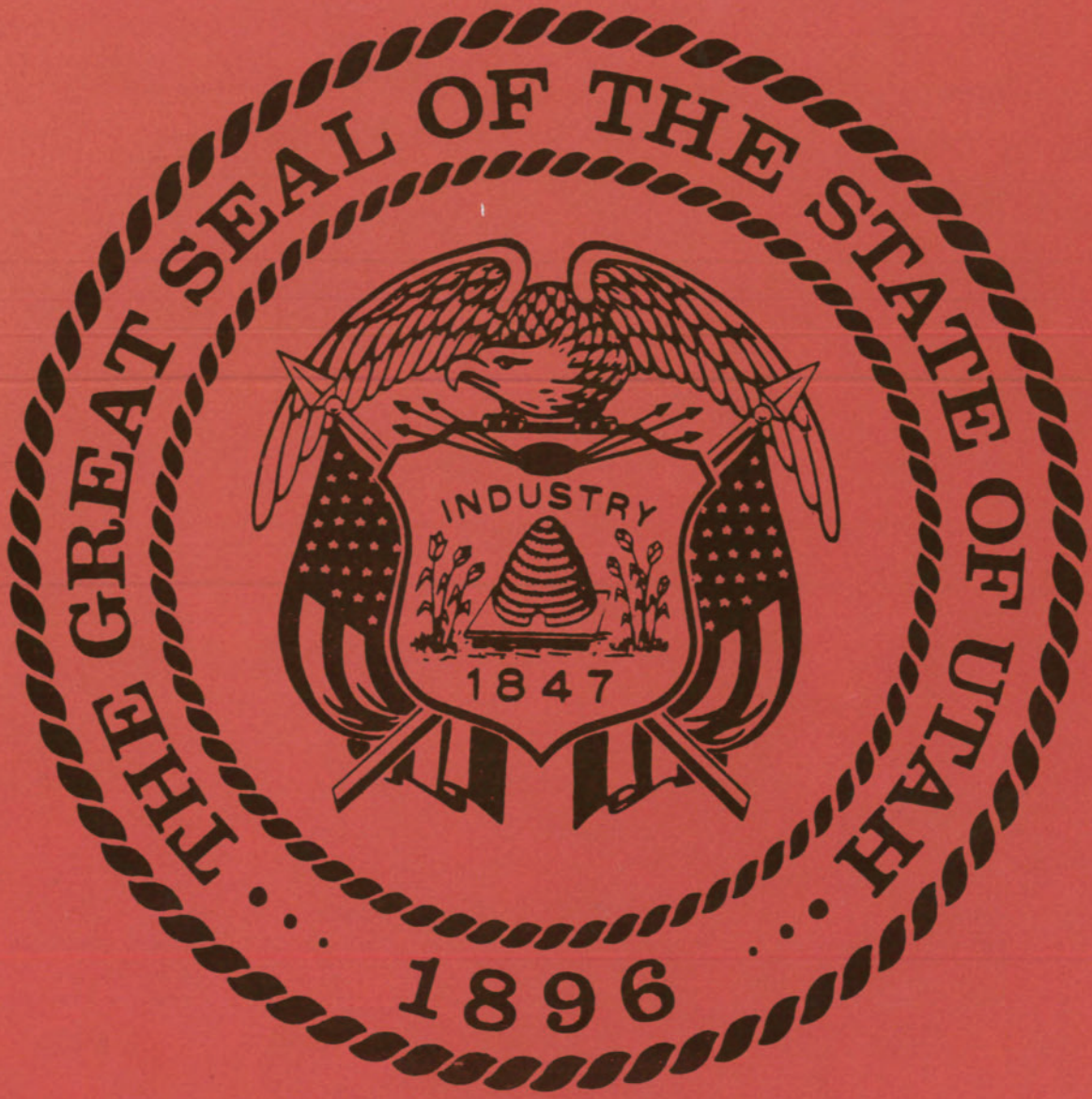
**Utah** - "We have interpreted the open courts clause to prevent the legislature from passing a law that 'abrogates a cause of action existing at the time of [the law's] enactment' unless it (1) provides 'an effective and reasonable alternative remedy' or (2) 'seeks to eliminate a clear social or economic evil' by means that are not 'arbitrary or unreasonable.'" *Scott v. Universal Sales Inc.*, 2015 UT 64, ¶ 52, 356 P.3d 1172 (footnote omitted).

**West Virginia** - "When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court

adjudication, thereby implicating the certain remedy provision of article III, section 17 of the Constitution of West Virginia, the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose." *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634, 645 (W.Va. 1991).

# Addendum D

# Report of the
## CONSTITUTIONAL REVISION COMMISSION
**Submitted to the Governor and the 45th Legislature of the State of Utah for the years 1982 and 1983**




**January 1984**
**Second Printing**

# REPORT OF THE

# UTAH CONSTITUTIONAL REVISION COMMISSION

SUBMITTED TO THE GOVERNOR AND THE

45TH LEGISLATURE OF THE STATE OF UTAH

OFFICE OF LEGISLATIVE RESEARCH
AND GENERAL COUNSEL
436 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

JANUARY 1984
SECOND PRINTING

B2

# Utah Constitutional Revision Commission

436 State Capitol • Salt Lake City, Utah 84114 • (801) 533-5481

Honorable Scott M. Matheson
Governor of the State of Utah

Honorable Members of the 45th Legislature
of the State of Utah

The Utah Constitutional Revision Commission is pleased to submit this report of its work during the 1982 and 1983 legislative interims. The work of the commission during this period has included further study of the Judicial and the Education Articles as well as a review of the Legislative Article.

The commission has devoted a great deal of time and attention in preparing the recommendations included in this report. In addition to its own detailed study, the commission has received input from a broad cross section of interested parties, including public officials, interested organizations and citizen groups, as well as the public at large. Their participation was a valuable contribution in preparing the commission recommendations.

This report will discuss in depth the commission's proposals for major revisions of the Judicial Article (Article VIII) and the Education Article (Article X). The commission has also proposed an important amendment to the Legislative Article (Article VI). The report also includes an overview of previous commission recommendations and a summary of the 1982 election, reviewing the four constitutional amendments that were on the ballot.

The Utah Constitutional Revision Commission has been charged to conduct a comprehensive examination of the Utah Constitution and to recommend those changes necessary to provide Utah with the tools to address present and future needs. We appreciate the opportunity we have had to serve in this capacity, and hope that our efforts will receive serious consideration and ultimately prove to be of benefit to the people of Utah.

UTAH CONSTITUTIONAL REVISION
COMMISSION

Karl N. Snow, Jr.
Chairman

William G. Fowler
Vice Chairman

TABLE OF CONTENTS

# INTRODUCTION

## THE UTAH CONSTITUTIONAL REVISION COMMISSION ANNUAL REPORT, 1982 AND 1983

This report contains a review of the studies and recommendations of the Constitutional Revision Commission for the years 1982 and 1983. The report contains the following information:

- Legislative action taken on commission recommendations made to the Budget Session of the 44th Legislature - January, 1982 (See Report of the Constitutional Revision Commission - January 1982.)

- The commission's involvement with, and the results of, the 1982 General Election;

- A review of the commission's recommendations to the General Session of the 45th Legislature; and

- The commission's recommendations to the Budget Session of the 45th Legislature, or if necessary, a special session of the 45th Legislature. The commission has prepared proposals for significant change to three articles of the Utah Constitution: (a) the Judicial Article, (b) the Education Article, and (c) the Legislative Article. For each recommendation discussed, an introduction and overview will be offered, followed by a detailed section-by-section analysis which will include old and new language, explanations, and a rationale.

# CHAPTER I

## BACKGROUND

## THE CONSTITUTIONAL REVISION COMMISSION

The Constitutional Revision Commission was originally organized in 1969 to study and recommend needed revisions of the Utah Constitution. Concerns had been expressed for many years that the Utah Constitution needed serious overhaul. However, a proposal to call a constitutional convention to completely rewrite the constitution had been rejected by the voters in 1966.

At the same time the commission was organized, the Utah Legislature proposed the Gateway Amendment. This amendment allowed for the revision of entire constitutional articles which could then be presented to the public as a single ballot issue. The Gateway Amendment was approved by the electorate at the 1970 General Election.

### Commission Activities - Prior to 1977

The Constitutional Revision Commission existed on an ad hoc basis until 1977. During this period, the commission proposed the following amendments:

--Legislative Article (partial revision)
presented to the 39th Legislature, January 1971 (approved)
approved by voters, November 1972

--Executive Article
presented to the 40th Legislature, January 1973 (approved)
rejected by voters, November 1974

--Elections and Right of Suffrage Article
presented to 41st Legislature, January 1976 (approved)
approved by voters, November 1976

--Congressional and Legislative Appointment Article
presented to 41st Legislature, January 1976 (not approved)

### Establishment of the Commission as a Permanent Body

The Utah Constitutional Revision Commission was established as a permanent commission by the 42nd Legislature in 1977. The commission is empowered to, "make a comprehensive examination of the Constitution of the State of Utah, and of the amendments thereto, and thereafter to make recommendations to the

governor and the legislature as to specific proposed constitutional amendments designed to carry out the commission's recommendations for changes therein." (See Appendix A for a copy of the statute.)

In reviewing and revising the Utah Constitution, the commission has sought to develop a document that protects essential rights and basic institutions while at the same time allowing for flexibility to address future needs. The commission has, therefore, recommended deleting references to policies or practices that could be better established by statute. In addition, the commission has tried to eliminate certain ambiguities between long-standing practice and actual constitutional language. In many cases, constitutional requirements and prohibitions have been ignored for years. The commission has recommended removing these long-neglected provisions as well as other outdated sections from the constitution.

The commission consists of 16 members. The president of the senate appoints three state senators, the speaker of the house appoints three state representatives, and the governor appoints three members. Six members are then chosen by these nine appointees. The director of the Office of Legislative Research and General Counsel serves as an ex officio member. (Exhibit 1 contains a complete list of the Constitutional Revision Commission's members and staff.)

## Commission Activities - Since 1977

Since 1977, the commission has been active in reviewing and revising the constitution. It has recommended revisions of the following:

--Revenue and Taxation Article
presented to the 43rd Legislature, January 1980 (approved)
rejected by voters, November 1980
presented to the 44th Legislature, January 1982 (approved)
approved by voters, November 1982

—Labor Article
presented to the 43rd Legislature, January 1979 (approved)
approved by voters, November 1980

--Executive Article
presented to the 43rd Legislature, January 1979 (approved)
approved by voters, November 1980

--Judicial Article
presented to the 44th Legislature, January 1982 (not approved)

In addition to these formal study proposals, the commission has assisted in developing other constitutional amendments which have been submitted to the legislature independently. The commission has been instrumental in obtaining legislative and public approval for these changes. Specifically, these proposals include:

--Legislative Compensation Commission
presented to the 44th Legislature, January 1982 (approved)
approved by voters, November 1982

--Corporate Officers Amendment
presented to the 44th Legislature, January 1982 (approved)
approved by voters, November 1982

As a bipartisan body, composed of both legislators and and citizen members, the Constitutional Revision Commission has demonstrated a unique capacity to develop meaningful proposals for improving the Utah Constitution.

EXHIBIT 1
MEMBERS OF THE UTAH CONSTITUTIONAL REVISION COMMISSION

| | |
|---|---|
| Karl N. Snow, Jr., Chairman<br>(term expired 1983<br>reappointed until 1989) | Senate Appointee<br>State Senator<br>Provo |
| William G. Fowler, Vice Chairman<br>(term expired 1983,<br>reappointed until 1989) | Governor Appointee<br>Citizen Member<br>Salt Lake City |
| James E. Faust<br>(term expired 1981,<br>reappointed until 1987) | CRC Appointee<br>Citizen Member<br>Salt Lake City |
| Norman H. Bangerter<br>(appointed 1981,<br>term expires 1987) | House Appointee<br>State Representative, Speaker of the House<br>West Valley City |
| Martin B. Hickman<br>(term expired 1979<br>reappointed until 1985) | CRC Appointee<br>Citizen Member<br>Provo |
| Raymond L. Hixson<br>(term expired 1983,<br>reappointed until 1989) | CRC Appointee<br>Citizen Member<br>Salt Lake City |
| Richard C. Howe<br>(term expires 1985) | CRC Appointee<br>Citizen Member<br>Murray |
| Dixie Leavitt<br>(term expired 1981,<br>reappointed until 1987) | CRC Appointee<br>Citizen Member<br>Cedar City |
| Clifford S. LeFevre<br>(term expires 1985) | House Appointee<br>State Representative<br>Clearfield |
| Eddie P. Mayne<br>(term expired 1979,<br>reappointed until 1985) | CRC Appointee<br>Citizen Member<br>West Valley City |
| Jon M. Memmott<br>(ex officio) | Director, Office of Legislative Research<br>and General Counsel<br>Layton |
| Jefferson B. Fordham<br>(appointed 1981,<br>term expires 1987) | Governor Appointee<br>Citizen Member<br>Salt Lake City |

| | |
|---|---|
| Darrell G. Renstrom (term expired 1983) | Senate Appointee<br>State Senator<br>Ogden |
| Wilford R. Black (appointed 1983, term expires 1989) | Senate Appointee<br>State Senator<br>Salt Lake City |
| G. LaMont Richards (term expired 1979, reappointed until 1985) | House Appointee<br>State Representative<br>Salt Lake City |
| Phyllis C. Southwick (term expired 1983, reappointed until 1989) | Governor Appointee<br>Citizen Member<br>Bountiful |
| Glade M. Sowards (term expired 1981, reappointed until 1987) | Senate Appointee<br>State Senator<br>Vernal |

The following were constituted commission subcommittees during the period covered by this report.

| Education Article Subcommittee | Judicial Article Subcommittee |
|---|---|
| Mr. Clifford S. LeFevre, Chairman | Dr. Martin B. Hickman, Chairman |
| Rep. G. LaMont Richards | Mr. William G. Fowler |
| Sen. Karl N. Snow, Jr. | Elder James E. Faust |
| Mr. Dixie Leavitt | Dr. Jefferson Fordham |
| Speaker Norman H. Bangerter | Justice Richard C. Howe |
| Mr. Eddie P. Mayne | Mr. Darrell G. Renstrom |
| Mr. Raymond L. Hixson | Dr. Phyllis C. Southwick |
| Sen. Wilford R. Black | Sen. Glade M. Sowards |
| Mr. Jon M. Memmott | Mr. Jon M. Memmott |

Staff

| | |
|---|---|
| Roger O. Tew | Executive Director, 1981 - Present |
| Robin Riggs | Research Assistant, 1980 - 1982 |
| Ivan Legler | Research Assistant, 1981 |
| Kevin Howard | Research Assistant, 1982 - 1983 |
| Brian McKell | Research Assistant, 1983 |
| Shelly Cordon | Research Assistant, 1983 - Present |
| Jan Poulson | Secretary, 1981 - Present |

## REPORT OF THE 1982 BUDGET SESSION

The Constitutional Revision Commission presented two major proposals to the Budget Session of the 44th Legislature: a revision of the Revenue and Taxation Article, and a revision of the Judicial Article. (See Report of the Constitutional Revision Commission - January 1982.) In addition, the legislature considered three other constitutional amendments, two of which the commission was instrumental in developing.

### Revenue and Taxation Article Revision

The Revenue and Taxation Article Revision (introduced as SJR 3) proposed a series of changes to the present constitution dealing with tax policy. Collectively, the proposal provided the legislature with the authority to implement various tax exemptions and policies.

The legislature approved the Revenue and Taxation Article Revision as presented by the commission with the following amendments (see Appendix B for a copy of the resolution as amended by the legislature):

1. The proposed tax exemption for tangible personal property was deleted.

2. The residential property tax exemption ceiling was lowered. The commission had proposed that the residential property tax exemption be limited at 50 percent of the property's assessed valuation. The legislature lowered the ceiling to 45 percent.

3. The vertical revenue sharing proposed by the commission was deleted. This provision would have authorized revenue sharing between the state and its political subdivisions.

The most controversial provision of the amendment was the residential property tax exemption. During the 1982 Budget Session, the legislature passed legislation to implement the exemption at a level of 25 percent (HB 142 - 1982). Enactment of the measure was tied to the passage of the Tax Article by the electorate.

### Judicial Article Revision

The commission introduced a comprehensive revision of the Judicial Article to the 1982 Budget Session of the legislature. The proposal (HJR 10) was considered and approved by the house of representatives. The senate, however, deferred action on the proposal. Chapter II discusses the issues raised by the legislature, and subsequent efforts to develop an acceptable Judicial Article revision.

### Other Constitutional Amendments

#### Legislative Compensation Commission

The Budget Session of the 44th Legislature also considered and approved a measure calling for the establishment of a legislative salary commission. This

proposal, while not formally introduced as a commission recommendation, was actually the product of previous commission study efforts. The amendment, introduced as SJR 5, provided for the creation of an independent legislative salary commission to recommend salary levels for legislators. The governor would appoint the members of the salary commission. The legislature would be required to approve, reject or lower the recommendations. (See Appendix B for a copy of the resolution.)

SJR 5 provided needed flexibility in establishing legislative compensation. It removed the specific dollar figures from the constitution and allowed the legislature to create by legislative rule a mechanism for reimbursing expenses. The measure was endorsed by the commission.

Legislative Residency Amendment

A final constitutional amendment considered and approved by the 1982 Budget Session was HJR 1. This proposal required legislators to live in their districts throughout their term of office. If a legislator moves from the district, the office would be vacated and filled according to existing statutory procedures. The measure originated independently of the commission, but did receive an endorsement from the commission prior to the 1982 General Election. (See Appendix B for a copy of the resolution.)

Corporate Officers Amendment

This measure (introduced as HJR 27) proposed to remove a seldom-enforced prohibition on corporate officers holding public office in municipalities which grant a business license to the corporation. The commission did not formally introduce the proposal to the legislature, but the issue was originally raised by commission studies. After approval by the legislature, the measure received commission endorsement. (See Appendix B for a copy of the resolution.)

## REPORT OF THE 1982 GENERAL ELECTION

The 1982 General Election ballot included four constitutional amendments.

1. Proposition 1--Revenue and Taxation Article Revision
2. Proposition 2--Legislative Compensation Commission Amendment
3. Proposition 3--Legislative Residency Amendment
4. Proposition 4--Corporate Officers Amendment

The previous section detailing the actions of the 1982 Budget Session briefly outlined the four proposals and the Constitutional Revision Commission's involvement with each proposed amendment. This section describes the commission's efforts to achieve voter approval in the 1982 General Election. These efforts were ultimately successful, with all four proposed amendments being approved by the electorate.

The Constitutional Revision Commission took an active role in providing educational information about the proposed amendments. In addition, the commission provided information to the lieutenant governor for the official voter information pamphlet which was distributed to all voters of the state.

The commission carefully avoided expending any public funds for advertising or any direct promotional efforts for the amendments. Its efforts were confined to providing general educational information on the Utah Constitution and issues surrounding the 1982 ballot proposals. The commission was instrumental in developing a wide-ranging informational program which included a speaker's bureau and informational mailings to public officials and civic groups. Commission members also appeared on various media programs to discuss the amendments.

An independent promotional organization was created by interested citizens to solicit funds and to directly promote the passage of the amendments--particularly Proposition 1. This organization, known as Citizens for Constitutional Improvement, actively raised money and campaigned for the amendments.

In the final analysis, however, it was the direct involvement by the governor, the legislature, both major political parties, the education community, and other key public leaders, which convinced the electorate of the need to approve the proposed amendments. Their efforts focused primarily on the passage of Proposition 1. All of the amendments, however, received broad support and endorsement. (Exhibit 2 summarizes the actual election results.)

EXHIBIT 2
1982 CONSTITUTIONAL AMENDMENTS
GENERAL ELECTION SUMMARY

Final Vote Summary

Proposition 1 - Tax Article Revision

| | | |
|---|---|---|
| For | 341,263 | 64.7% |
| Against | 185,924 | 35.3% |

Proposition 2 - Citizen Salary Commission

| | | |
|---|---|---|
| For | 352,195 | 67.1% |
| Against | 172,380 | 32.9% |

Proposition 3 - Residency Requirement

| | | |
|---|---|---|
| For | 403,694 | 82.7% |
| Against | 84,229 | 17.3% |

Proposition 4 - Corporate Officers

| | | |
|---|---|---|
| For | 293,289 | 62.5% |
| Against | 176,270 | 37.5% |

## REPORT OF THE 1983 GENERAL SESSION

The Constitutional Revision Commission did not recommend any proposals to the 1983 General Session of the 45th Legislature. Commission studies had not been completed for consideration for the legislature at its general session. The commission, therefore, voted to introduce any proposed amendments to either the 1984 Budget Session or to a subsequent special session. It should be noted that the commission unanimously endorsed the concept of a special session to review constitutional amendments.

## CHAPTER II

## JUDICIAL ARTICLE

### BACKGROUND

The following information summarizes the Constitutional Revision Commission's Judicial Article study. The material includes a brief review of the commission's action from 1980 to 1982, as well as a more extensive review of the commission's Judicial Article study since the 1982 Budget Session.

Judicial Article Study 1980 to 1982
(See Report of the Constitutional Revision Commission - January 1982)

The Constitutional Revision Commission actually first examined the Judicial Article (Article VIII) in 1975. At the direction of the Utah Legislature (SJR 3 - 1973), the commission reviewed the positions of a special task force on court organization and the Utah State Bar which had recommended changes in the Judicial Article. (See Utah Courts Tomorrow - Report and Recommendations of the Unified Court Advisory Committee, September 1972, and the recommendation of the Utah State Bar, April 1972). The commission, after a preliminary examination of the proposals, declined to recommend any changes in Article VIII to the legislature.

The Constitutional Revision Commission began its most recent review of the Judicial Article in 1980 by supporting a simple amendment to eliminate automatic appeals to the supreme court (HJR 20 - 1980). The measure was ultimately rejected by the legislature. However, even though the commission supported the proposal, there was concern that the entire Judicial Article merited extensive review. As such, a total review of the article was included on the commission's 1981 study agenda.

During the 1981 study year, a Judicial Article Subcommittee was formed to more clearly focus the commission's resources on the Judicial Article study. The commission staff did extensive background work on the problems associated with the present Judicial Article. Several hearings were conducted with representatives of the judiciary to discover areas of concern. The commission's work indicated that, in addition to the appeals problems, other substantive issues warranted review. Specifically, changes in the administration of the judiciary and clarification of the judicial selection process were needed.

The Constitutional Revision Commission defined three major objectives that the revised Judicial Article should address. They were:

1. to articulate the role of the judiciary as a co-equal branch of government within the historical framework of the system of checks and balances;

2. to provide the means to develop a more efficient and effective judicial system; and

3. to attract and maintain quality judges. The proposal, introduced to the 1982 Budget Session of the legislature as HJR 10, was developed to accomplish these objectives.

The 1982 Budget Session

HJR 10 was reviewed closely by the legislature. After significant amendments, the proposal was adopted by the house of representatives. These amendments concerned incorporating a specific reference to justice of the peace courts and restoring the general authority of the legislature to establish the judicial selection process. However, the measure was not acted upon by the senate.

It was in fact the controversy over the selection of judges which ultimately precluded action by the senate. Just prior to the beginning of the legislative session, the Utah Supreme Court ruled on a controversial case challenging the authority of the senate to review judicial appointments. Matheson v. Ferry, 641 P.2d 674 (1982). In this case, the Court struck down the statutory provision requiring senate confirmation of judicial appointments. The political atmosphere surrounding the case made adoption of the Judicial Article revision impossible. As a result, no action was taken and the commission was asked to further study the revision.

The 1982-1983 Judicial Article Study

Following the actions of the 1982 Budget Session, the Constitutional Revision Commission again undertook a review of the Judicial Article. The Judicial Article subcommittee was reconstituted and began to work on the article.

Further study was slowed, however, by a second court case. Again, the governor challenged a statute providing for senate confirmation of judicial appointments. The action was resolved by the Utah Supreme Court shortly before the beginning of the 1983 General Session. Matheson v. Ferry, 657 P.2d 240 (1982). As a result, the commission did not introduce a proposal to the 1983 General Session.

Following this second litigation on judicial selection, the Judicial Article subcommittee began its work in earnest. It was decided by the subcommittee to support most of the previous positions taken in developing HJR 10. However, the subcommittee did reexamine those issues raised by the legislature in 1982.

On the justices of the peace issue, the subcommittee again supported deleting specific reference to them from the constitution. As before, this action was taken to provide legislative flexibility and to avoid unnecessary specificity. The commission, however, did not intend that this recommendation reflect on the value of the justice of the peace system. Rather, the commission position simply states that no court of limited jurisdiction should be mentioned in the constitution.

In examining the selection process for judges, primary concern centered on balancing the interests of the legislature, the governor, the courts, and the public. The subcommittee's study indicated that aspects of the current selection process, specifically the election procedures, contained significant potential for abuse. In some instances, incumbent judges stand for a retention election only based on their

record as a judge. If opposed, however, an incumbent judge must participate in a contested election. In the view of the subcommittee, this "hybrid" approach provided neither meaningful review of judges' records nor protection against undue politicizing of judicial elections. As a result, the subcommittee again recommended retention elections only for incumbent judges.

The commission had previously not included senate confirmation as part of the judicial selection process. It felt that the original commission proposal provided adequate legislative involvement at the nominating level. However, the subcommittee now recommended that a senate rejection provision be included, coupled with a strict prohibition on legislative involvement at the nominating level. This approach satisfied concerns over any one governmental branch exercising undue control over judicial appointments.

The full Constitutional Revision Commission considered and adopted the subcommittee recommendations with minor amendments. The full commission restored a provision regarding public prosecutors. Current language provides for elected county attorneys. The subcommittee supported deletion of the provision, arguing for legislative flexibility. The full commission adopted a provision establishing a system of public prosecutors to be selected as provided by statute.

The Recommendations to the 1984 Budget Session

As with other commission recommendations, changes made in the Judicial Article by the commission are comprehensive and do not follow closely the order of the present article. Although the commission's proposal is different in organization from that found in the present constitution, much of the substance of the present article is retained.

The following material presents a comparative outline showing the relationship between the current constitution and the commission proposal, and a section-by-section analysis of the commission's proposal. The discussion will present the current constitutional language as it relates to issues raised by the new proposal. A short statement outlining the commission's rationale is also included. (Appendix C contains a copy of the complete commission proposal as well as a copy of the present Judicial Article.)

## COMPARATIVE OVERVIEW

The following information is a summary comparing the Constitutional Revision Commission's proposed Judicial Article revision and the present Judicial Article. The information is organized by subject matter and shows how each document addresses specific issues.

| CRC PROPOSED JUDICIAL ARTICLE REVISION | PRESENT JUDICIAL ARTICLE |
|---|---|
| 1. Court Structure (Section 1)<br>•Specifically mentions supreme court and district court.<br><br>•Allows other courts by statute (juvenile, circuit, j.p.'s). | 1. Court Structure (Section 1)<br>•Specifically mentions supreme court, district court, and j.p.'s.<br><br>•Allows other courts by statute (juvenile, circuit). |
| 2. Supreme Court Organization (Sec. 2)<br>•Five justices plus additional.<br><br>•Chief justice to be selected as provided by law.<br><br>•Court may hear cases in panels. | 2. Supreme Court Organization (Sec. 2)<br>•Five justices plus additional.<br><br>•Chief justice automatically justice with least remaining time on term.<br><br>•All cases must be heard by a majority. |
| 3. Supreme Court Jurisdiction (Sec. 3)<br>•Original jurisdiction over extra-ordinary writs and "certified" state law questions.<br><br>•General appellate jurisdiction to be exercised as provided by statute. | 3. Supreme Court Jurisdiction (Sec. 4)<br>•Original jurisdiction over certain specified writs.<br><br>•Appellate jurisdiction which requires all cases filed originally in district court to be heard. Specified how appeals to be processed from j.p. courts. |
| 4. Supreme Court Rulemaking Authority (Sec. 4)<br>•Empowers supreme court to adopt court rules.<br><br>•Empowers supreme court to govern practice of law. | 4. Supreme Court Rulemaking Authority (Sec. 4)<br>•No stated authority for rulemaking or governance of the practice of law<br><br>•Powers derived from inherent judicial authority powers. |

| | |
|---|---|
| •Authorizes use of retired judges and pro tempore. (See Sec. 2) | •Sec. 2 authorizes use of a district court judge to sit on supreme court. No specific mention for use of other retired judges. |
| •Supreme court by rule manages the appellate process. | •Sec. 5 authorized use of judges pro tempore |
| 5. District Court and Trial Court Organization and Jurisdiction (Sec. 5)<br>•Original jurisdiction except as limited by statute. | 5. District Court Organization and Jurisdiction (Secs. 5, 7, 8, 9)<br>•Original jurisdiction except as as limited by law. |
| •Appellate jurisdiction as provided by statute. | •Appellate jurisdiction from specific trial courts. |
| •Guarantees right of appeal. | •Lists specific writs. |
| •Eliminates reference to specific writs. | |
| 6. Number of Judges/Judicial Districts (Sec. 6)<br>•Allows legislature to establish judicial districts (eliminates reference to specific districts). | 6. Number of Judges/Judicial Districts (Secs. 5, 6, 8, 16)<br>•Specifies seven districts, the organizati of the seven may be changed. |
| 7. Qualifications for Judges (Sec. 7)<br>•Supreme court - 30 years/five-year resident, admitted to practice. | 7. Qualifications for Judges (Secs. 2, 5)<br>•Supreme court - 30 years/five-year resident, admitted to practice. |
| •Other courts of record - 25 years/ Three year resident, admitted to practice. | •District Court - 25 years/three-year resident, admitted to practice. |
| •If district established, residency in district. | •Resident of judicial district. |
| •Courts not of record - as provided by law. | •No mention of other courts. |
| 8. Judicial Selection (Secs. 8, 9)<br>•Judicial Nominating Commissions (no legislative involvement). | 8. Judicial Selection (Sec. 3)<br>•Method to be established by statute. |
| •Governor appointment. | •Prohibition on partisan involvement. |
| •Senate review. | Statutory Method<br>-Nominating Commissions<br>-Governor appointment<br>-Stand for election at first general election following term-retention if unopposed. (Juvenile court does not stand for election - subject to senate review.) |
| •Unopposed retention election after Three years/then at end of each term. | |
| •Prohibition on partisan involvement. | |

| | |
|---|---|
| 9. Judicial Prohibitions (Sec. 10)<br>•Private practice of law.<br>•Holding elective nonjudicial offices.<br>•Offices in political party. | 9. Judicial Prohibitions<br>•No similar prohibitions exist in article. |
| 10. Judicial Administration (Sec. 11)<br>•Establishes a judicial council.<br>•Representatives from each court.<br>•Chief justice head of council | 10. Judicial Administration (Sec. 7)<br>•No similar provision exists.<br>-Present judicial council exists by statute.<br>•District court has supervisory authority over "inferior" courts. |
| 11. Discipline and Removal of Judges (Sec. 12)<br>•Establishes a judicial conduct commission.<br>•Standards for discipline.<br>•Impeachment still retained. | 11. Discipline and Removal of Judges (Secs. 11, 27, 28)<br>•General legislative authority to develop standards for removal of judges.<br>•Removal-by-address (2/3 vote of each house).<br>•Forfeiture by absence. |
| 12. Judicial Salaries (Sec. 13)<br>•Legislature to provide for compensation. | 12. Judicial Salaries (Sec. 20)<br>•$3,000 until changed by law. |
| 13. Retirement of Judges (Sec. 14)<br>•Legislature to establish standards (deletes "uniform" requirement.) | 13. Retirement of Judges (Sec. 28)<br>•Legislature to establish uniform standards for retirement. |
| 14. Public Prosecutors (Sec. 15)<br>•Legislature to provide for system of public prosecutors.<br>•Selected as provided by statute.<br>•Admitted to practice law. | 14. Public Prosecutors (Sec. 10)<br>•Each county to have attorney.<br>•Elected to four-year term.<br>•No qualifications. |

NOTE -- The proposed CRC revision deleted the following sections:

Sec. 8 - Justice of the Peace Jurisdiction
Sec. 11 - Removal by Address
Sec. 13 - Disqualification of Judges
Sec. 14 - Supreme Court Clerk
Sec. 15 - Appointment of Relatives to Office
Sec. 18 - Style of Process
Sec. 19 - Form of Civil Action

Sec. 14 - Supreme Court Clerk
Sec. 15 - Appointment of Relatives to Office
Sec. 18 - Style of Process
Sec. 19 - Form of Civil Action
Sec. 21 - Judges to be Conservators of Peace
Sec. 22 - Reporting Defects in Law
Sec. 23 - Publication of Decision
Sec. 24 - Extending Judges Terms
Sec. 25 - Decisions to be in Writing
Sec. 26 - Syllabus of Cases
Sec. 27 - Forfeiture of Office Due to Absence

## SECTION-BY-SECTION ANALYSIS

### Section 1 - Vesting of Judicial Powers

#### Present Language

> Section 1. The Judicial power of the State shall be vested in the Senate sitting as a court of impeachment, in a supreme court, in district courts, in justice of the peace, and such other courts inferior to the Supreme Court as may be established by law.
>
> Sec. 17. The Supreme and District Courts shall be courts of record, and each shall have a seal.

#### Proposed Language

> Section 1. The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the legislature by statute may establish. The supreme court, the district court, and such other courts designated by statute shall be courts or record. Courts not of record may also be established by statute.

#### Explanation

This section vests the judicial power of the state in the Utah Supreme Court, establishes a trial court of general jurisdiction known as the district court, and deletes specific reference to justice of the peace courts. Other courts of limited jurisdiction, such as the juvenile court and the circuit court, are also not mentioned specifically. Courts other than the supreme court and district court would be established by the legislature. The proposed article specifically allows for the creation of courts not of record such as justice of the peace courts. Courts not of record are those courts which do not develop appealable records. The proposal also deletes the reference to the senate sitting as a court of impeachment.

#### Rationale

This provision establishes the supreme court and the general jurisdiction trial court (district court) as the constitutional foundation of the court system. The legislature is empowered to establish additional courts as needed. Most constitutional scholars feel that specific delineation of courts is unnecessary.

The provision does contain a reference to the trial court of general jurisdiction, however, since that court is fundamental to a judicial system. The reference to the senate sitting as a court of impeachment is removed because impeachment is actually a legislative function. The Legislative Article (Article VI, Sec. 18) contains a similar provision regarding the role of the senate in impeachment cases. As such, the removal of this provision from the Judicial Article will have no impact on the impeachment process.

## Sec. 2 - The Supreme Court

### Present Language

> Sec. 2. The Supreme Court shall consist of five judges, which number may be increased or decreased by the legislature, but no alternation or increase shall have the effect of removing a judge from office. A majority of the judges constituting the court shall be necessary to form a quorum or render a decision. If a justice of the Supreme Court shall be disqualified from sitting in a cause before said court, the remaining judges shall call a district judge to sit with them on the hearing of such cause. Every judge of the Supreme Court shall be at least thirty years of age, an active member of the bar, in good standing, learned in the law, and a resident of the state of Utah for the five years next preceding his selection. The judge having the shortest term to serve, not holding his office by selection to fill a vacancy before expiration of a regular term, shall be the chief justice, and shall preside at all terms of the Supreme Court, and in case of his absence, the judge, having in like manner, the next shortest term, shall preside in his stead.

### Proposed Language

> Sec. 2. The supreme court shall be the highest court and shall consist of at least five justices. The number of justices may be changed by statute, but no change shall have the effect of removing a justice from office. A chief justice shall be selected from among the justices of the supreme court as provided by statute. The chief justice may resign as chief justice without resigning from the supreme court. The supreme court by rule may sit and render final judgment either en banc or in divisions. The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of the supreme court. If a justice of the supreme court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause.

### Explanation

This section retains the provision setting the number of supreme court justices at five, but allows the legislature the authority to add additional justices. The proposed language also allows the court to sit in divisions to render decisions not

involving constitutional issues. Otherwise, a full majority is still necessary to render a decision. Also, in case of a justice's disqualification only an active judge from a lower court may be called in to sit with the supreme court.

The proposed article also provides for the selection of a chief justice in a manner provided by statute. The current procedure provides for the selection of the chief justice according to length of service on the bench. The chief justice may also resign as chief justice without resigning from the supreme court.

Qualifications for supreme court justice have been moved to Sec. 7 of the proposed revision.

## Rationale

By providing the legislature with the authority to expand the supreme court, the revision gives the legislature an additional option to deal with increasing caseloads. Likewise, allowing the court to sit in divisions is another tool for caseload management. The new selection process for the chief justice is recommended because the chief justice will have more administrative responsibilities under the new Judicial Article. A change in the process for selecting the chief justice will permit a justice with appropriate administrative skills to be selected for the position. The commission felt the legislature should be free to determine the method for selecting the chief justice.

Finally, the commission felt that only active judges should be used to fill temporary vacancies on the supreme court. The present constitution states that a district court judge may be used. Historically, however, retired supreme court justices have also been called to fill temporary vacancies. The proposed revision empowers the supreme court to establish rules for the use of retired judges for proceedings in lower courts (Sec. 4). However, the commission felt that only active judges should be so employed for the supreme court. The commission recommendation follows federal court procedures where retired judges are used for lower court proceedings, but not for the supreme court.

## Sec. 3 - Jurisdiction of the Supreme Court

## Present Language

> Sec. 4. The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus. Each of the justices shall have power to issue writs of habeas corpus, to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court, or before any district court or judge thereof of in the State. In other cases the Supreme Court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction. The Supreme Court shall hold at least three terms every year and shall sit at the capital of the State.

Proposed Language

> Sec. 3. The supreme court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The supreme court shall have appellate jurisdiction over all other matters to be exercised as provided by statute and power to issue all writs and orders necessary for the exercise of the supreme court's jurisdiction or the complete determination of any cause.

Explanation

The proposed article outlines the jurisdiction of the supreme court. The revision gives the court the original jurisdiction to issue all extraordinary writs and to answer questions of state law in federal courts. The supreme court is vested with appellate jurisdiction over all other matters. However, the legislature is empowered to determine how that jurisdiction will actually be exercised. The court is also given the necessary authority to issue writs and orders for the full exercise of its appellate jurisdiction. The provision deletes reference to the terms of the court as well as the requirement that the court sit at the capital of the state.

Rationale

This section, in outlining the appellate and original jurisdiction of the supreme court, grants broad authority to the court. The court's original jurisdiction has been expanded to include dealing with questions of state law when used in federal courts. The original jurisdiction to issue extraordinary writs has been retained, but is written in more general language than that found in the present provision. The court retains general appellate jurisdiction over all matters. However, the method of exercising that jurisdiction is left to statute. The commission felt that the court should not be compelled to actually hear all matters, but rather, options such as an intermediate appellate court should be available. Vesting the authority with the legislature established maximum flexibility to deal with caseload management. The commission deleted the reference to court terms and location of sittings on the basis that these items are better handled by court rule or statute.

Sec. 4 - Supreme Court Rulemaking

Present Language

There is no language in the present constitution providing the Supreme Court with rulemaking authority. Any present rulemaking authority exists pursuant to statute or by inference regarding the traditional role of the judiciary.

> Sec. 5. . . . Any cause in the district court may be tried by a judge pro tempore, who must be a member of the bar sworn to try the cause, and agreed upon by the parties, or their attorneys of record. . . .

Proposed Language

> Sec. 4. The supreme court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. Except as otherwise provided by this constitution, the supreme court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The supreme court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

Explanation

This section gives the supreme court general authority to establish rules of procedure and evidence for the state's various courts. The court is also charged with responsibility for managing the appellate process in those courts. The rulemaking authority also includes a specific responsibility to govern the practice of law, including the admission to practice and the discipline of attorneys. Lastly, the section provides for rulemaking to govern the use of retired judges and judges pro tempore and sets basic qualifications for judges pro tempore.

Rationale

Members of the commission felt that the rulemaking authority of the supreme court should be specifically included in the constitution. This power is considered essential to the maintaining an independent judiciary. The revision also provides the supreme court with clear constitutional authority for the governance of the practice of law. The commission felt that the practice of law is an inherent function of the judiciary. Lastly, the commission decided that the supreme court should be charged with managing the appellate process of the courts since it historically has assumed that role. The provision regarding judges pro tempore is taken essentially from Sec. 5 of the present Judicial Article. The court is granted broad authority to employ retired judges, subject to the limitation outlined in Sec. 2.

Sec. 5 - Jurisdiction of the District Court and Other Courts

Present Language

> Sec. 5. . . . All civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken, in such areas as may be provided by law. . . .
>
> Sec. 7. The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. The District Court or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and other writs necessary to carry into effect their orders, judgments and decrees, and to give them a general control over inferior courts and tribunals within their respective jurisdictions.

Sec. 8. . . . The jurisdiction of justices of the peace shall be as now provided by law, but the legislature may restrict the same.

Sec. 9. From all final judgments of the District Courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below, and under such regulations as may be provided by law. In equity case the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the Court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgments of justices of the peace in civil and criminal cases to the District Courts on the questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute.

## Proposed Language

Sec. 5. The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the supreme court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

## Explanation

The proposed article deletes all reference to the jurisdiction of courts other than the district court. The district court is vested with general trial jurisdiction except as may be limited by statute or the constitution. It also gives the court power to issue all extraordinary writs, and permits appellate jurisdiction of the court to be established by statute. The jurisdiction of all other courts is established by statute. Finally, the proposal establishes a right of appeal to an appropriate appellate court.

## Rationale

A trial court of general jurisdiction is considered essential to a judicial system. As such, the district court is vested with that authority. However, there are instances where limited authority for specialized matters may better be vested in specialized trial courts. This section provides for those options. The district court is also given the authority to issue all extraordinary writs. The jurisdiction of other courts is to be established by statute. The commission felt that the authority to establish the jurisdiction of most state courts properly lies with the legislature.

The proposed article also removes the provision mandating an appeal of all final judgments of the district courts to the supreme court. This proposal would instead provide for a right of appeal to any appropriate appellate court. The actual

determination of how this appeal would be discharged would be determined by statute or court rule. Again, this language was chosen to provide flexibility in determining how the appellate process should be established. It should be noted that the guaranteed right of appeal does not apply to matters raised originally with the supreme court. The court's original jurisdiction is very limited, however, and the commission felt that the court should not be mandated to hear appeals from its own original decisions.

In addition to removing the supreme court's mandated appeals language, the proposal also removes language requiring "de novo" appeals from the justice of the peace courts to the district court.

## Sec. 6 - Judicial Districts and Number of Judges

### Present Language

> Sec. 5. The state shall be divided into seven judicial districts, for each of which, at least one judge shall be selected as hereinbefore provided. Until otherwise provided by law, a district court at the county seat of each county shall be held at least four times a year. . . .
>
> Sec. 6. The Legislature may change the limits of any judicial district, or increase or decrease the number of districts, or the judges thereof. No alteration or increase shall have the effect of removing a judge from office. In every additional district established, a judge or judges shall be selected as provided in section 3 of this article.
>
> Sec. 8. The Legislature shall determine the number of justices of the peace to be elected, and shall fix by law their powers, duties and compensation. . . .
>
> Sec. 16. This section specifically outlines the present judicial districts for the district court. The most recent alignment of the seven judicial districts became effective July 1, 1982.

### Proposed Language

> Sec. 6. The number of judges of the district court and of other courts of record established by the legislature shall be provided by statute. No change in the number of judges shall have the effect of removing a judge from office during a judge's term of office. Geographic divisions for all courts of record except the supreme court may be provided by statute. No change in divisions shall have the effect of removing a judge from office during a judge's term of office. The number of judges of courts not of record shall be provided by statute.

### Explanation

This section removes the specific limitation of seven judicial districts for the district court from the constitution. Instead, the provision allows the legislature to

establish appropriate judicial districts. This section also empowers the legislature to determine the number of judges, but prevents political manipulation of judges by preventing any change in number from removing a judge from office during the judge's term. Otherwise, geographic determination of judicial districts and number of judges is to be established by statute.

Rationale

This section is basically unchanged from the present constitutional language. The recommended change does, however, remove the specific enumeration of judicial districts. In keeping with the policy of making constitutional language more general, the specific duties, powers, and qualifications of judges were removed from this section and included in broader language in Sections 7, 8, and 9 of the proposed article.

Sec. 7 - Judicial Qualifications

Present Language

> Sec. 2. . . . Every judge of the Supreme Court shall be at least thirty years of age, an active member of the bar, in good standing, learned in the law, and a resident of the state of Utah for the five years next preceding his selection. . .
>
> Sec. 5. . . . Each judge of a district court shall be at least twenty-five years of age, an active member of the bar in good standing, learned in the law, a resident of the state of Utah three years next preceding his selection, and shall reside in the district for which he shall be selected. . . .

Proposed Language

> Sec. 7. Supreme court justices shall be at least 30 years old, United States citizens, Utah residents for five years preceding selection and admitted to practice law in Utah. Judges of other courts of record shall be at least 25 years old, United States citizens, Utah residents for three years preceding selection, and admitted to practice law in Utah. If geographic divisions are provided for any court, judges of that court shall reside in the geographic division for which they are selected.

Explanation

The proposed article indicates that judges of all courts of record must be citizens of the United States, Utah residents (five years for the supreme court, three for other courts) and admitted to practice law in Utah. The present article sets specific age and residency requirements for certain courts, but they are scattered among several sections in the Judicial Article. In addition, the proposed language contains a more general residency requirement than that

found in the present article. Specifically, the provision states that if courts are divided into districts, judges must reside in the district for which they are selected.

Rationale

The commission agreed with those experts who indicated that specific requirements beyond those of professional competence, age, United States citizenship and basic residency should not be included in the constitution. By placing specific qualifications in the constitution, it is intended that the legislature be precluded from establishing additional requirements.

Sec. 8 - Judicial Selection

Present Language

Sec. 3. Judges of the supreme court and district courts shall be selected for such terms and in such manner as shall be provided by law, provided, however, that selection shall be based solely upon consideration of fitness for office without regard to any partisan political considerations and free from influence of any person whomsoever, and provided further that the method of electing such judges in effect when this amendment is adopted shall be followed until changed by law.

Proposed Language

Sec. 8. When a vacancy occurs in a court of record, the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the judicial nominating commission having authority over the vacancy. The governor shall fill the vacancy within 30 days after receiving the list of nominees. If the governor fails to fill the vacancy within the time prescribed, the chief justice of the supreme court shall within 20 days make the appointment from the list of nominees. The legislature by statute shall provide for the nominating commissions' composition and procedures. No member of the legislature may serve as a member of, nor may the legislature appoint members to any judicial nominating commission. The senate shall consider and render a decision on each judicial appointment within 30 days of the date of appointment. If necessary, the senate shall convene itself in extraordinary session for the purpose of considering judicial appointments. The appointment shall be effective, unless rejected by a majority vote of all members of the senate. If the senate rejects the appointment, the office shall be considered vacant and a new nominating process shall commence. Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political considerations.

Sec. 9. Each judicial appointee of a court of record shall be subject to an unopposed retention election at the first general election held more than three years after appointment. Following initial voter approval, each supreme court justice every tenth year, and each judge of other courts of

record every sixth year, shall be subject to an unopposed retention election at the corresponding general election. Judicial retention elections shall be held on a nonpartisan ballot in a manner provided by statute. If geographic divisions are provided for any court of record, judges of those courts shall stand for retention election only in the geographic divisions to which they are selected. Judges of courts not of record shall be selected in a manner, for a term, and with qualifications provided by statute.

Explanation

The proposed article specifically provides for the method of selecting judges for all courts of record. The procedure includes the following components:

1. Judicial Nominating Commissions - Legislative participation is strictly prohibited. The nominating commissions would recommend three names to the governor.

2. Gubernatorial appointment - The Governor would make an appointment from the nominating commission recommendations.

3. Review by the senate - A majority vote would be necessary to reject a nominee. In addition, the senate could call itself into session to review judicial appointments.

4. Uncontested retention elections - The initial retention election would be held at the first general election three years after appointment. Subsequent elections would be held at the conclusion of each term of office.

Under the proposal, the term of office for supreme court justices is ten years and the terms for judges of other courts of record judges is six years. These terms are the same as those found in the present constitution. Partisan considerations are prohibited as a basis of selection. Also included is a reference stating that if geographic divisions are created for a court, judges will stand for retention election only in their respective division. This position reaffirms existing practice.

The present constitution provides for the selection process to be set entirely by statute. However, direct partisan involvement is prohibited. The scope of legislative authority, however, has been limited through recent court decisions.

Rationale

One of the principal objectives of the Constitutional Revision Commission's study of the Judicial Article was to provide a mechanism to attract and retain quality individuals to serve in the judiciary. Due to the importance of this issue, the Constitutional Revision Commission departed from its usual policy of legislative flexibility and proposed a specific selection process to be included in the constitution.

The Constitutional Revision Commission carefully reviewed the experiences and constitutions of other states, as well as the United States Constitution. The selection process proposed by the Constitutional Revision Commission is based on the following conclusions:

- The judicial selection process must balance the interests of the legislature, the governor, the courts, and the public.

- Absent actionable behavior, selection to the bench contemplates a permanent position. As such, judicial terms are longer than terms for other political offices. (Note: The United States Constitution provides for the lifetime appointment of all federal judges.)

- Periodic public review is necessary to evaluate the performance of sitting judges. However, that review should focus on the record of the judge and not become a contest between personalities or parties.

- The selection process must balance the public's right to review with the protection for the judiciary to render unpopular but legally correct decisions.

The commission feels that its proposal grants a meaningful, but not excessive, role to both the legislature and the governor. Likewise, the public's right to periodically evaluate judges is preserved. Lastly, the necessary protections are maintained to preserve an independent judiciary.

## Sec. 10 - Conflict of Interest

### Present Language

There is no language in the present constitution establishing guidelines or restrictions in the area of conflict of interest. Such restrictions, if any, are provided by statute.

### Proposed Language

Sec. 10. Supreme court justices, district court judges, and judges of all other courts of record while holding office may not practice law, hold any elective non-judicial public office or hold office in a political party.

### Explanation

The private practice of law, holding elected public office, and the holding office in a political party are prohibited for judges by the proposed article.

### Rationale

Most members of the judiciary expressed concern over the absence of such a provision in the present constitution. For this reason, the commission inserted this provision. It is similar to comparable language found in other state constitutions.

## Sec. 11 - Court Administration

### Present Language

There is no present language in the constitution dealing directly with administration of the judiciary. Sec. 7 does contain language authorizing the district court to exercise supervisory authority over other "inferior courts".

Sec. 7. . . . The District Courts or any judge thereof, shall have power to issue. . . writs necessary to carry into effect their orders, judgments and decrees, and to give them a general control over inferior courts and tribunals within their respective jurisdictions.

Sec. 14. The Supreme Court shall appoint a clerk, and a reporter of its decisions, who shall hold their offices during the pleasure of the Court. Until otherwise provided, Court Clerks shall be ex officio clerks of the District Courts in and for their respective counties, and shall perform such other duties as may be provided by law.

### Proposed Language

Sec. 11. A Judicial Council is established, which shall adopt rules for the administration of the courts of the state. The Judicial Council shall consist of the chief justice of the supreme court, as presiding officer, and such other justices, judges and other persons as provided by statute. There shall be at least one representative on the Judicial Council from each court established by the constitution or by statute. The chief justice of the supreme court shall be the chief administrative officer for the courts and shall implement the rules adopted by the Judicial Council.

### Explanation

The proposed article specifically establishes a Judicial Council to be composed of representatives from each level of the judiciary. The council would act as the administrative body for the court with the chief justice as presiding officer.

### Rationale

This section addresses the issue of whether or not there should be a central administrative authority for the entire judicial branch of government. The commission determined that centralized authority would create a more efficient and effective judicial administration. The proposal, therefore, establishes a single judicial governing body, the Judicial Council, to represent all courts. The inclusion of a representative from every court level would insure the participation of all courts in the administrative process. In addition, placing the chief justice at the head of the council focuses administrative and presiding authority in the senior judicial officer of the state. The commission felt that the legislature should determine the composition of the council (with limited guidelines) to ensure maximum flexibility in developing an administrative body for the judiciary.

Some questions arose over the administrative authority of the judicial council and the rulemaking authority of the supreme court. The commission felt that the primary role of the council lies in developing basic administrative policies including consolidated budgeting procedures, personnel systems, relations with other governmental entities, and the management of judicial resources. The role of the supreme court is to establish the actual adjudication procedures used by the courts. In addition, the supreme court is specifically charged with the management of the appeals process.

## Sec. 12 - Judicial Conduct

### Present Language

> Sec. 11. Judges may be removed from office by the concurrent vote of both houses of the Legislature, each voting separately; but two-thirds of the members to which each house may be entitled must concur in such vote. The vote shall be determined by yeas and nays, and the names of the members voting for or against a judge, together with the cause or causes of removal, shall be entered on the journal of each house. The judge against whom the house may be about to proceed shall receive notice thereof, accompanied with a copy of the cause alleged for his removal, at least ten days before the day on which either house of the Legislature shall act thereon.
>
> Sec. 27. Any judicial officer who shall absent himself from the State of district for more than ninety consecutive days, shall be deemed to have forfeited his office: Provided, That in case of extreme necessity, the Governor may extend the leave of absence to such time as the necessity therefor shall exist.
>
> Sec. 28. The Legislature may provide uniform standards for mandatory retirement and for removal of judges from office. Legislation implementing this section shall be applicable only to conduct occurring subsequent to the effective date of such legislation. Any determination requiring the retirement or removal of a judge from office shall be subject to review, as to both law and facts, by the Supreme Court.

### Proposed Language

> Sec. 12. A Judicial Conduct Commission is established, which shall investigate complaints against any justice or judge and conduct confidential hearings concerning the removal or involuntary retirement of a justice or judge. The legislature by statute shall provide for the composition and procedures of the Judicial Conduct Commission. On recommendation of the Judicial Conduct Commission, the supreme court, after a hearing, may censure, remove, or retire a justice or judge for action which constitutes willful misconduct in office, willful and persistent failure to perform judicial duties, disability that seriously interferes with the performance of judicial duties, or conduct prejudicial to the administration of justice which brings a judicial office into disrepute. The power of removal conferred by this section is alternative to the power of impeachment.

Explanation

Under this section, a Judicial Conduct Commission is established to review complaints against judges and to conduct confidential hearings. The revision provides the Judicial Conduct Commission with the authority to make recommendations to the supreme court concerning discipline or the removal of judges. The section also outlines the parameters of judicial misconduct and provides that the composition and procedures of the commission shall be established by the legislature. Other means of disciplining or removing judges have been deleted, including the "removal by address" power of the legislature (Sec. 11), forfeiture of office by absence (Sec. 27), and other statutory methods (Sec. 28). The provision further provides that the method of discipline and removal used by the commission is to be an alternative to the impeachment power which is provided in the Legislative Article.

Rationale

The commission initially felt that specific standards of judicial conduct would be best left to legislative determination. However, as alternative methods of judicial discipline were reviewed, the commission discovered that most of these methods were either vague regarding grounds for removal, or lacked a fundamental regard for due process.This was particularly true regarding the "removal by address" provision in Sec. 11.

The commission concluded that the establishment of the Judicial Conduct Commission was the best system and important enough to warrant constitutional inclusion. The role of the legislature is still preserved with the impeachment power.

Sec. 13 - Judicial Compensation

Present Language

> Sec. 12. The Judges of the Supreme and District Courts shall receive at stated times compensation for their services, which shall not be diminished during the terms for which they are selected.
>
> Sec. 20. Until otherwise provided by law, the salaries of supreme and district judges, shall be three thousand dollars per annum, and mileage, payable quarterly out of the State treasury.

Proposed Language

> Sec. 13. The legislature shall provide for the compensation for all justices and judges. The salaries of justices and judges shall not be diminished during their terms of office.

Explanation

The proposed article provides for judicial compensation by statute and prohibits diminution of judicial salaries during their terms of office.

Rationale

Specific dollar amounts in the constitution were deleted because they unduly restrict constitutional flexibility. In addition, the present language concerning diminution of judicial salaries was retained to prevent political manipulation or retribution on the part of the legislature and to help insure judicial independence.

Sec. 14 - Retirement and Removal From Office

Present Language

Sec. 28. The Legislature may provide uniform standards for mandatory retirement and for removal of judges from office. Legislation implementing this section shall be applicable only to conduct occurring subsequent to the effective date of such legislation. Any determination requiring the retirement or removal of a judge from office shall be subject to review, as to both law and facts, by the Supreme Court.

This section is additional to, and cumulative with, the methods of removal of justices and judges provided in Sections 11 and 27 of this article.

Proposed Language

Sec. 14. The legislature may provide standards for the mandatory retirement of justices and judges from office.

Explanation

The proposed article permits the legislature to provide standards for the mandatory retirement of judges. There is little change from the present language as it relates to judicial retirement. However, the term "uniform" has been deleted. The commission has substituted the Judicial Conduct Commission (Sec. 12) for the legislative authority regarding judicial removal standards. Supreme court review of removal actions is also included in Sec. 12.

Rationale

The commission saw no need to substantially change this section as it relates to mandatory judicial retirement standards. The commission deleted the term "uniform" because it felt that the legislature should be free to set different retirement standards for the judges of the various courts.

Sec. 15 - County Attorneys

Present Language

Sec. 10. A county attorney shall be elected by the qualified voters of each county who shall hold his office for a term of four years. The