IN THE SUPREME COURT OF THE STATE OF UTAH

Troy Michael Kell, Petitioner-Appellant, v. LARRY BENZON, Warden of the Utah State Prison, Respondent-Appellee.	PUBLIC Case No. 20180788 District Court Case. No. 180600004 Death Penalty Case

APPELLANT'S SUPPLEMENTAL BRIEF

Appeal from the Sixth Judicial District Court,
In and For Sanpete County, Honorable Wallace Lee

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INTRODUCTION

This Court has long emphasized fundamental fairness, due process, and the correction of injustices in deciding both whether a petition for writ of habeas corpus should receive merits review and whether the writ should issue. *See Thompson v. Harris*, 144 P.2d 761, 766 (Utah 1943); *Brown v. Turner*, 440 P.2d 968, 969 (Utah 1968); *Johnson v. Turner*, 473 P.2d 901, 904 (Utah 1970); *Helmuth v. Morris*, 598 P.2d 333, 334 (Utah 1979). Following the passage of the Post-Conviction Remedies Act (PCRA) in 1996, and particularly following the 2008 amendments to the statute including language that the PCRA was the "sole legal remedy" in post-conviction cases, the question was left open whether this Court retained its independent constitutional authority to issue writs of habeas corpus. *See Patterson v. State*, 2021 UT 52, ¶ 182, 504 P.3d 92. In two cases following the 2008 amendments, the Court declined to address the question of whether that provision violated the Utah Constitution. *Gardner v. State*, 2010 UT 46, ¶ 94, 234 P.3d 1115; *Winward v. State*, 2012 UT 85, ¶¶ 8, 17, 293 P.3d 259. The Court suggested the possibility of an "egregious injustice" exception to the PCRA, but in both cases found that, even if such an exception existed, the petitioner would not satisfy it. *Gardner*, 2010 UT 46, ¶ 94; *Winward*, 2012 UT 85, ¶ 17.

In *Patterson*, however, the Court recently held that there is no egregious injustice exception to the PCRA. *Patterson*, 2021 UT 52, ¶ 71. The Court also affirmed that Utah courts retain constitutional authority over the writ of habeas corpus independent of the PCRA. *Id*. ¶ 33. The Court noted that the question under the Court's traditional writ

authority was whether "the bars and exceptions we borrowed from the PCRA and adopted in rule 65C [are] so narrow that without some sort of additional exception like those we had previously recognized, rule 65C and the PCRA violate a petitioner's constitutional rights?" *Id*. ¶ 193. The Court concluded that "under the current version of rule 65C, we can only hear a time-barred case . . . when failure to do so would violate a petitioner's constitutional rights." *Id*. ¶ 194.

In light of its recent holding in *Patterson*, the Court requested supplemental briefing from the parties in this case. The Court asked the parties to address several questions focused on two main topics. First, whether failure to review Mr. Kell's petition on the merits would violate his rights under the Utah Constitution, and second, how the Court has historically addressed untimely petitions under its traditional writ authority and whether Mr. Kell's failure to comply with the time bar in rule 65C and the PCRA should limit this Court's power to grant relief under that authority. (Supp. Br. Order at 4.) For the reasons discussed below, Mr. Kell submits that failure to review the merits of his claim would violate his rights under the Suspension, Due Process, and Open Courts clauses of the Utah Constitution. Furthermore, nothing in the Court's historical habeas jurisprudence suggests there is any limitation on this Court's authority to review a petitioner's habeas claims based on his failure to bring them sooner. Therefore, the Court should exercise its power to issue a writ of habeas corpus in this case.

ARGUMENT

I. Application of the procedural bars in the PCRA and Rule 65C would violate Mr. Kell's constitutional rights, and this issue is adequately preserved

Strict application of the time and procedural bars in rule 65C and the PCRA in this case would violate Mr. Kell's rights under the Suspension, Due Process, and Open Courts Clauses of the Utah Constitution. Under the jurisprudence of this Court, an interpretation of the Court's writ authority that forecloses review of meritorious claims of a violation of a constitutional right, and leaves no "escape valve" for the courts to correct an "obvious injustice or a substantial and prejudicial denial of a constitutional right," does not comply with the Utah Constitution. *Manning v. State*, 2004 UT App 87, ¶ 15 n.4, 89 P.3d 196; *Chess v. Smith*, 617 P.2d 341, 343 (Utah 1980). This interpretation is supported by case law from the Supreme Court of the United States, as well as the supreme courts of several other states. Mr. Kell adequately preserved this argument in his prior briefing.

A. Suspension

The quintessential requirement of the Suspension Clause is that the courts have the authority to correct injustices through the writ of habeas corpus. Although courts may certainly place rules and limits on the procedures by which individuals may petition for the writ, it is essential that these procedures contain a safety valve to ensure the court has authority to correct sentences and convictions where failure to do so would result in a violation of the individual's constitutional rights. Under the Suspension Clause, the writ must always be an available tool to the courts to correct judgments that "are so constitutionally flawed that they result in fundamental unfairness" and to protect

"constitutional guarantees of liberty."[1] *Hurst v. Cook*, 777 P.2d 1029, 1034-35 (Utah 1989). Removing 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. *Cf. Julian v. State*, 966 P.2d 249, 253 (Utah 1998). In other words, if Mr. Kell has presented a meritorious claim of a constitutional violation on which he would otherwise obtain relief but the Court is without the authority to consider the merits of that claim due to the time and procedural bars of rule 65C and the PCRA, then application of the bars works a suspension of the writ in this case. The Utah Constitution demands that this Court must retain its independent authority to issue a writ where there is an obvious injustice or a substantial and prejudicial denial of a constitutional right.

As this Court stated in *Patterson*, the plain language of article VIII, sections 3[2] and 5,[3] and article I, section 5 of the Utah Constitution, make clear that "the Legislature can

[1] Article I, section 5 of the Utah Constitution reads in full: "The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it."

[2] Article VIII, section 3 of the Utah Constitution reads in full: "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."

[3] Article VIII, section 5 of the Utah Constitution reads in full: "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

neither expand nor diminish the substantive writ authority the people of Utah granted the judicial branch." *Patterson*, 2021 UT 52, ¶ 144. The courts obtain their authority over the writ of habeas corpus from both articles. *Id*. ¶¶ 83-84. But the judicial branch's exercise of its authority remains subject to the Suspension Clause, and neither the legislature nor the courts themselves may create such restrictions on the writ as to amount to an effective suspension. *See In re Bonner*, 151 U.S. 242, 259 (1894) ("[I]t should be constantly borne in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source, -equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals."). In *Julian*, this Court noted that "the Utah Constitution 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.' Hence, the legislature may not impose restrictions which limit the writ as a judicial rule of procedure, except as provided in the constitution." *Julian*, 966 P.2d at 253 (citations omitted). Because the Court based this limit on the Suspension Clause, not on separation of powers, it applies with equal force to the courts themselves. In other words, the Court is no more at liberty than the legislature to place such limitations on the availability of the writ as would effectively suspend the writ.

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shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause."

The Court in *Patterson* found that "the flexible one-year statute of limitations" did not amount to a suspension of the writ. *Patterson*, 2021 UT 52, ¶ 212. The Court based its holding in part on the holdings of other federal and state courts finding that a statute of limitations did not amount to a suspension of the writ. *Id*. ¶¶ 210-12. The federal cases, however, found that the procedural limitations of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) did not offend the Suspension Clause only because they contained adequate safety valves. For example, in *Delaney v. Matesanz*, relied upon by the *Patterson* Court, the First Circuit Court of Appeals held that "the one-year limitation period of section 2244(d)(1), as embellished by the tolling provision of section 2244(d)(2), does not suspend the writ because, *when read in tandem*, these provisions neither gut the writ of habeas corpus nor render it impuissant to test the legality of a prisoner's detention." *Delaney v. Matesanz*, 264 F.3d 7, 13 (1st Cir. 2001) (emphasis added). The Eleventh Circuit similarly held in *Wyzykowski v. Department of Corrections* that "[i]n light of the above mentioned exceptions" the one-year limitations period did not constitute a suspension of the writ. *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1217 (11th Cir. 2000); *see also Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (noting the statute of limitations under AEDPA "is not jurisdictional and as a limitation may be subject to equitable tolling"); *Lott v. State*, 150 P.3d 337, 342 (Mont. 2006) (finding that, where time bar did not allow petitioner to challenge unconstitutional sentence, it violated the Suspension Clause).

The United State Supreme Court has similarly relied on the continued existence of procedural safeguards to find that certain restrictions did not amount to a suspension of the writ. For example, in *Felker v. Turpin*, 518 U.S. 651 (1996), the Court found that new limitations placed on "second and successive" habeas petitions under 28 U.S.C. § 2244 did not amount to a suspension of the writ. The Court's holding was based, in part, on its finding that the provisions "did not constitute a substantial departure from common-law habeas procedures. The provisions, for the most part, codified the longstanding abuse-of-the-writ doctrine." *Boumediene v. Bush*, 553 U.S. 723, 774 (2008) (citing *Felker*, 518 U.S. at 664).

Furthermore, prior to its Suspension Clause analysis in *Felker*, the Supreme Court noted that the AEDPA did not withdraw from the Supreme Court the jurisdiction to review habeas petitions filed in the Court under its original jurisdiction. *Felker*, 518 U.S. at 660-61. And the Court left open the question of whether petitions filed originally in the Supreme Court were subject to the procedural restrictions of the AEDPA at all. *Id*. at 663; *see also In re Davis*, 557 U.S. 952 (2009) (Stevens, J., concurring) (interpreting *Felker* as "expressly leaving open the question whether and to what extent the [AEDPA] applies to original petitions"); *Boumediene*, 553 U.S. at 777-78 (noting that in *Felker* the Court found the AEDPA did not "strip from this Court the power to entertain original habeas corpus petitions"). Thus, even if 28 U.S.C. § 2244 restricts the authority of a federal district court to review a second or successive habeas petition, *Felker* left open the possibility of a safety

valve—an original petition unencumbered by the restrictions applied to petitions filed in the lower courts.[4]

Furthermore, as the Court noted in *Boumediene*, restrictions on federal habeas corpus review apply "*after* . . . proceedings in state court have taken place." *Boumediene*, 553 U.S. at 774 (emphasis added). They therefore do not impair a petitioner's right to pursue habeas corpus relief in state court. But the reverse is not true. A procedural bar that prevents a petitioner from obtaining review of his federal constitutional claims in state court will most often also prevent him from obtaining review in federal court, thereby barring him from obtaining review at all, even of a claim on which he would otherwise obtain relief. *See* 28 U.S.C. §§ 2254(b)(1), (c); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999); *See also* Randy Hertz & James S. Liebman, 1 Federal Habeas Corpus Practice and Procedure § 7.2 (7th ed. Matthew Bender 2021) ("Assuming, then—as the Supreme Court did in *Felker v. Turpin*—'that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789,' certain propositions necessarily

[4] The contrary conclusion—that 28 U.S.C. § 2244 applies to original petitions filed in the Supreme Court and therefore foreclosed this safety valve—would aggravate the Suspension Clause concerns. *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 631-32 & nn.3-5 (9th Cir. 1997), *affirmed on other grounds in Martinez-Villareal*, 523 U.S. 637 (1998); Randy Hertz & James S. Liebman, 1 Federal Habeas Corpus Practice and Procedure (7th ed. Matthew Bender 2021) § 7.2 & n.129 (collecting cases supporting the proposition that "some of the lower federal courts have suggested that a Suspension Clause violation might arise if a prisoner had no postconviction opportunity (either in the lower federal courts or on original writ to the Supreme Court, and either in an initial or numerically successive federal petition) to raise a particular claim.").

follow with regard to state prisoners' right of access to state postconviction proceedings. First, the right of habeas corpus is lost if individuals are unable to petition at least *some* court for postconviction relief." (footnote omitted)). Restrictions on a petitioner's ability to access state postconviction review therefore implicate Suspension Clause concerns that do not necessarily arise when federal habeas review is limited.

As discussed *infra*, under this Court's historic habeas jurisprudence, although the Court generally 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, the Court would nonetheless consider a petitioner's claims where it would be "unconscionable not to re-examine the conviction." *Gallegos v. Turner*, 409 P.2d 386, 387 (Utah 1965). This evaluation turned on the merits of the underlying claim itself. *See, e.g.*, *id.*; *Brown*, 440 P.2d at 969-70; *Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979); *Chess v. Smith*, 617 P.2d 341, 344 (Utah 1980); *Dunn v. Cook*, 791 P.2d 873, 876 (Utah 1990). In order to obtain review, a petitioner had to show "there was an obvious injustice or a substantial and prejudicial denial of a constitutional right." *Dunn*, 791 P.2d at 876 (citing *Hurst*, 777 P.2d at 1035). The Court was therefore never without the authority to issue the writ where the Constitution and fundamental fairness required it.

In sum, an interpretation of the Court's writ authority that forecloses review of meritorious claims that a petitioner's conviction or sentence was obtained in violation of the state or federal constitution, or prevents the Court from "assur[ing] fundamental fairness . . . when the nature of the alleged error was such that it would be unconscionable

not to reexamine" and "assure that substantial justice was done," *Dunn*, 791 P.2d at 876 (internal quotation marks and citations omitted), results in an unconstitutional suspension of the writ. *See also In re Bonner*, 151 U.S. at 259 (finding that where petitioner was subject to "excess of punishment," "[t]o deny the writ of habeas corpus . . . is a virtual suspension of it").

B. Due Process

The Due Process Clause of the Utah Constitution requires that "[n]o person shall be deprived of life, liberty or property, without due process of law." Utah Const. art. I, § 7. In addition, federal due process requires that, where a state chooses to provide an avenue for post-conviction relief, the procedures associated therewith must be adequate to vindicate the substantive rights of its petitioners. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69-70 (2009). "[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); *see also Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 293 (1998) (Stevens, J., concurring) ("[I]f a State establishes postconviction proceedings, these proceedings must comport with due process."); *Allen v. Butterworth*, 756 So. 2d 52, 54 (Fla. 2000) ("The successive motion standard of [Florida's Death Penalty Reform Act of 2000] prohibits otherwise meritorious claims from being raised in violation of due process.").

As discussed above, strict application of time or procedural bars, in the absence of some safety valve, may lead to petitioners, like Mr. Kell, being unable to vindicate their substantive rights at all. Because application of procedural bars in state court generally also precludes federal review, *see Coleman v. Thompson*, 501 U.S. 722, 750 (1991), strict adherence to a time or procedural bar may result in petitioners, like Mr. Kell, being executed without any court ever addressing his meritorious constitutional claim. Similarly, petitioners alleging errors of state law would be without adequate process to vindicate their rights. *See Lewis v. Jeffers*, 497 U.S. 764, 780 ("[F]ederal habeas corpus relief does not lie for errors of state law."); *Estelle v. McGuire*, 502 U.S. 62, 70 (1991) (denying habeas petition because alleged errors of state law do not amount to violations of federal rights); *see also Lott v. State*, 150 P.3d 337 (Mont. 2006) (finding time bar unconstitutional where petitioner raised error of purely state law).

Although not presently at issue in this case, strict adherence to the time and procedural bars of rule 65C would also violate the Due Process Clauses of the Utah and federal constitutions to the extent that it would bar claims that were not previously ripe for consideration. For example, claims challenging a method of execution, or challenging a petitioner's competency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), would almost never ripen until well after the limitations period had passed. *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 632 (9th Cir. 1997) (per curiam) (observing "patent" and "difficult" constitutional problems if 28 U.S.C. § 2244 were interpreted to bar newly ripened incompetency claims presented in second-in-time petitions), *affirmed on other*

grounds in Stewart v. Martinez-Villareal, 523 U.S. 637 (1998); *Cf. Archuleta v. State*, 2020 UT 62, ¶¶ 79-80, 472 P.3d 950 (discussing tension between ripening of so-called *Lackey* claims, which by definition require significant passage of time, and the procedural and time bars of the PCRA); *State v. Ortiz*, 1999 UT 84, ¶¶ 1-2, 987 P.2d 39. Rule 65C does not appear to allow any exceptions to the time bar for claims that were not previously ripe. Utah R. Civ. P. 65C; Utah Code Ann. §§ 78B-9-106(1), 78B-9-107(2). If interpreted strictly, this would almost certainly violate a petitioner's rights under both the Due Process and Suspension Clauses. *See Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) (to preserve statute's constitutionality, concluding that restriction on "second or successive" habeas petitions under 28 U.S.C. § 2244(b) was not intended to govern a *Ford* claim that ripened after resolution of the first habeas petition); *Martinez-Villareal*, 523 U.S. at 643 (construing second-in-time habeas petition as continuation of the first rather than impermissible "second or successive" petition, where it presented claim that had previously been dismissed as premature).

C. Open Courts

Article I, section 11 of the Utah Constitution states, "All courts shall be open, and every person, for an injury done to the person 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, with or without counsel, any civil cause to which the person is a party." Utah Const. art. I, § 11. There is no analog to the Open Courts Clause in the federal

constitution. This Court has stated that "[t]he clear language of the section guarantees access to the courts and a judicial procedure that is based on fairness and equality." *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985).

The Court has interpreted the Open Courts Clause to provide both procedural and substantive protections. *Laney v. Fairview City*, 2002 UT 79, ¶ 33, 57 P.3d 1007; *see also Berry*, 717 P.2d at 675 (noting the Open Courts Clause is related to the Due Process Clause both "in their historical origins and to some extent in their constitutional functions"). Under the Open Courts Clause, 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. *See Berry*, 717 P.2d at 675-77.

Both the Utah Court of Appeals and this Court have previously found that the Open Courts Clause applies in the habeas corpus context. In *Currier v. Holden*, the Utah Court of Appeals held that a three-month statute of limitations for filing a post-conviction petition was "an unreasonable limitation on the constitutional right to petition for a habeas corpus writ" that violated the petitioners' rights under the Open Courts Clause. *Currier v. Holden*, 862 P.2d 1357, 1358 (Utah Ct. App. 1993), *cert. denied sub nom. McClellan v. Holden*, 870 P.2d 957 (Utah 1994). The court found that "neither the language of the open courts provision nor [the] supreme court discussion about the provision" suggested that it was limited to certain contexts, but rather that the clause applies broadly to "the availability of legal remedies to vindicate individuals' interest 'in the integrity of their persons, property, and reputations.'" *Id.* at 1361 (quoting Utah const. art I, § 11).

In *Julian*, the Utah Supreme Court held that application of a much longer four-year statute of limitations also violated the Open Courts Clause as applied to a habeas petitioner because it did not provide sufficient flexibility. Quoting *Currier*, the Court held that the statute of limitations ran afoul of the Open Courts Clause because it "'remove[d] flexibility and discretion from state judicial procedure, thereby diminishing the court's ability to guarantee fairness and equity in particular cases.'" *Id*. at 253 (quoting *Currier*, 862 P.2d at 1368 n.18, alteration in *Julian*). The fact that the limitations period at issue in *Julian* was much longer than the one considered in *Currier*—four years, as opposed to 90 days—was not sufficient to cure the constitutional error because the longer statute was "equally inflexible." *Id*. Furthermore, the Court found that "if the proper showing is made, the mere passage of time can *never* justify continued imprisonment of one who was been deprived of fundamental rights, regardless of how difficult it may be for the State to reprosecute that individual." *Id*. at 254 (emphasis in original); *see also Frausto v. State*, 966 P.2d 849, 851 (Utah 1998) ("Therefore, in light of *Julian*, courts must always consider the "interests of justice" exception in section 78-35a-107 when a petitioner raises meritorious claims.").

A few years later in *Manning v. State*, the Court of Appeals addressed a new statute of limitations applicable to postconviction petitions. *Manning v. State*, 2004 UT App 87, 89 P.3d 196. Following the Court of Appeals' decision in *Currier*, the legislature amended the statute of limitations applicable to post-conviction petitions, lengthening it to one year, and allowed a court to "'excuse a petitioner's failure to file within the time limitations' if it finds that 'the interests of justice [so] require.'" *Id*. ¶ 16 (quoting Utah Code Ann. §78-

35a-107(3) (1996), alteration in *Manning*). The court upheld that limitations period. The court noted that the "'interests of justice' escape valve alleviates the concern we expressed in *Currier v. Holden*." *Id*. ¶ 16 n.4.

The Court of Appeals addressed the framework for assessing a violation of the Open Courts Clause in *Currier*.[5] The court noted that in assessing a challenge under the Open Courts Clause a court must "first inquire[] into whether a statute abrogating an existing remedy provides 'an effective and reasonable alternative remedy,'" and "if no alternative remedy is provided, examine[] whether the statute eliminates 'a clear social or economic evil' through means that are not unreasonable or arbitrary." *Currier*, 862 P.2d at 1362 (quoting *Berry*, 717 P.2d at 680). Looking to this Court's precedent, the Court of Appeals noted courts should also consider "the degree to which a statute impairs an individual's right to seek remedy," and "the nature of the right impaired." *Id*. at 1163. Quoting this court's decision in *Condemarin v. University Hospital*, the court stated that "'[t]he greater the intrusion upon the constitutionally protected interest, the greater and more explicit the state's reasons must be' for enacting the particular statute." *Id*. (quoting *Condemarin v.*

[5] The *Patterson* Court cited *Petersen v. Utah Lab. Comm'n*, 2017 UT 87, ¶ 20, 416 P.3d 583, for the proposition that only if a statute has "abrogated a cause of action" does it violate the Open Courts Clause, and found that Patterson's claim failed because he did not "apply the *Petersen* framework to rule 65C's time bar." *Pattersen*, 2021 UT 52, ¶¶ 201, 202. Although *Currier* was decided before *Petersen*, the two cases recite the same basic framework, and both rely heavily on this Court's decision in *Berry*. *Compare Peterson*, 2017 UT 87, ¶ 20 *with Currier*, 862 P.2d at 1362. *Currier*, however, discusses application of the Open Courts Clause specifically within the context of habeas corpus.

Univ. Hosp., 775 P.2d 348, 358 (Utah 1990), alteration in *Currier*). The *Currier* court found that the statute of limitations at issue created a "relatively severe limitation on an individual's right to petition for habeas corpus relief," suggesting the court should "carefully scrutinize the purpose and effectiveness" of the limitation. *Id*. at 1364. As to the nature of the right impaired, the court noted that Utah courts have attributed greater legal significance to "individual liberties historically considered as 'the indispensable conditions of a free society' than to 'liberties which derived merely from shifting economic arrangements." *Id*. (quoting *Allen v. Trueman*, 110 P.2d 355, 365 (Utah 1941)). The court further noted, "The Utah Supreme Court has deemed the writ 'the precious safeguard of personal liberty' and defined habeas corpus as 'a procedure for assuring that one is not deprived of life or liberty in derogation of a constitutional right.'" *Id*. at 1365 (quoting *Hurst*, 777 P.2d at 1034). Accordingly, the court found the limitations at issue required higher scrutiny.[6] *Id*. The court noted that statutes of limitation "do not create a total abrogation of all remedies," as was forbidden by this Court in *Berry*. Therefore, a reviewing court will invalidate a statute of limitations "if it imposes a disability 'on individual rights which is too great to be justified by the benefits accomplished.'" *Id*. (quoting *Condemarin*, 775 P.2d at 358).

[6] The court found that consideration of the nature of the right impaired "only has potential to modify the review of limitations on important, if not constitutionally based personal rights," therefore "we suspect that the analysis in this opinion will rarely trigger heightened scrutiny of statutes of limitations, preserving the legislative prerogative in most instances." *Currier*, 862 P.2d at 1372.

To make this determination the court balanced "the nature of the action, the interests of government and the interests of the litigant." *Id*. at 1369. Balancing these factors required the court to "weigh the countervailing interests of the State and of a petitioner" and "to consider these interests relative to the nature of the writ of habeas corpus." *Id*. at 1370. In balancing these factors the court noted the importance of the right to a writ of habeas corpus, as expressed by both the Utah Supreme Court and the Supreme Court of the United States, and the lack of flexibility in the statute of limitations, allowing the state to apply the limitations period "regardless of the equities of the particular situation." *Id*. at 1371. The court ultimately held that balancing both parties' interests and considering those interests relative to the nature of the Great Writ, "the inflexible three-month filing period created by this statute of limitations is unreasonable" and the statute therefore violated the Open Courts Clause. *Id*. at 1372.

In *Julian*, this Court essentially applied the court's holding in *Currier* to application of the four-year catch-all statute of limitations to petitions for writ of habeas corpus, albeit with less analysis.[7] The Court noted the importance of the writ as "'the precious safeguard of personal liberty' because it is often the only remedy available to a person who has been imprisoned in violation of due process of law." *Julian*, 966 P.2d at 253 (quoting *Hurst*, 777 P.2d at 1033 and citing *Brown*, 440 P.2d at 969). Relying on *Currier*, and the district court's

[7] In the same section of its opinion the Court also addressed the Separation of Powers Clause of article V, section 1, and the Suspension Clause of article I, section 5. *See Julian*, 966 P.2d at 253.

analysis thereof, the Court concluded that "although the four-year catch-all statute is noticeably longer than the ninety-day statute struck down by *Currier*, it is equally inflexible," and therefore still violated the Open Courts Clause of the Utah Constitution. *Id*.

In *Patterson*, the Court questioned whether the decisions in *Julian* and *Currier* could be squared with the Court's later decision in *Winward*. *Patterson*, 2021 UT 52, ¶ 203. But the only time the Open Courts Clause was mentioned in *Winward* is in a footnote to the concurring opinion. *Winward*, 2012 UT 85, ¶ 57 n.10 (Lee, J., concurring). The footnote stated, "A statute that prescribes time limits for invocation of a judicial remedy cannot possibly amount to cruel punishment, deny all right to appeal, close the courts to petitioners, or infringe on this court's jurisdiction to promulgate rules." *Id*. The statement did not represent the opinion of the Court, nor did it even attempt to grapple with the Court's analysis in *Julian*, or the extensive analysis conducted by the Court of Appeals in *Currier*—generally understood by both the courts of the state and the legislature as binding precedent on the matter. *See Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 681 (Utah 1995) (recognizing the holding in *Currier* had "the binding effect of stare decisis on other panels of the Court of Appeals and the lower courts); *Manning*, 2004 UT 87, ¶ 16 n.4 (noting the legislature lengthened the statute of limitations and added the "interests of justice" exception in response to the Court of Appeals' decision in *Currier*). The opinion of the Court in *Winward* addressed only the argument that the PCRA's one-year statute of limitations "unconstitutionally strip[ped] the Court of its habeas corpus authority," and

then found only that it was not properly preserved below. *Id*. ¶¶ 7-8. Addressing Mr. Winward's argument that there existed an "egregious injustice" exception to the PCRA's procedural bars, the Court stated it would be "improvident for us to address our constitutional authority to consider the merits of claims that are barred by the PCRA's procedural limitations in a case that does not raise a meritorious claim." *Id*. ¶ 17. Nothing in the Court's opinion in *Winward* undermines its analysis in *Julian*, or the more extensive analysis of the Court of Appeals in *Currier*, concluding that an inflexible statute of limitations applied to petitions for writ of habeas corpus violates the Open Courts Clause.

Thus, in the habeas context, Utah courts have repeatedly held that in order to comply with the Open Courts Clause, any statute of limitations must include an "escape valve." As the Court noted in *Patterson*, the PCRA no longer contains such an escape valve. *See Patterson*, 2021 UT 52, ¶¶ 182-83. Accordingly, when the Court exercises its independent authority over the writ of habeas corpus, it must maintain an "escape valve" from the time and procedural bars in order to comply with the Open Courts Clause.

In this case, as in *Currier*, Mr. Kell's right to ensure he is "not deprived of life or liberty in derogation of a constitutional right" also requires higher scrutiny. *Currier*, 862 P.2d at 1365 (quoting *Hurst*, 777 P.2d at 1034). This is even more true in Mr. Kell's case where his very life is at stake. Failure to allow Mr. Kell any avenue for relief on his meritorious constitutional claim would "impose[] a disability 'on individual rights which is too great to be justified by the benefits accomplished,'" *id*. (quoting *Condemarin*, 775 P.2d at 358), and would therefore violate Mr. Kell's rights under the Open Courts Clause.

D. Sister States

As the Court recognized in *Patterson*, although the decisions of other state courts do not dictate how this Court must interpret the Utah constitution, they can provide useful guidance in analyzing the constitutionality of statutes and rules. *Patterson*, 2021 UT 52, ¶ 211. The analyses from several states are informative here.

In *Lott v. State*, the Montana Supreme Court addressed a collateral challenge that was based on two state court decisions issued after the petitioner's time to seek post-conviction relief had expired. *Lott v. State*, 150 P.3d 337 (Mont. 2006). The court acknowledged that Mr. Lott was procedurally barred from seeking relief. *Id*. at 338, 342. But the court also noted that the purpose of the writ of habeas corpus was to be "'a means of guaranteeing that [justice] be accomplished and that a miscarriage of justice will be remedied.'"[8] *Id*. at 342 (quoting *State v. Perry*, 758 P.2d 268, 273 (Mont. 1988), alterations in *Lott*). "The central function of the courts," the court wrote, "is the pursuit of justice. Like all human endeavors, this pursuit is occasionally flawed. The writ of habeas corpus is designed to correct such flaws[.]" *Id*. The Court concluded that because the procedural bar prevented the petitioner from seeking habeas relief and precluded correction of a "troubling" error, it effected an unconstitutional suspension of the writ. *Id*.

[8] Like Utah, Montana updated its constitution after it was initially ratified, in 1972. The Montana court concluded that when the delegates ratified the Suspension Clause at the 1972 Constitutional Convention, "they intended to enshrine habeas corpus as recognized and applied in Montana as of 1972." *Lott*, 150 P.3d at 342.

In two cases—*People v. Germany*, 674 P.2d 345 (Colo. 1983), and *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993)—the Colorado Supreme Court similarly found that, absent protections for otherwise meritorious claims, statutes of limitations on the writ of habeas corpus violate the Due Process and Suspension Clauses of the Colorado Constitution. In *Germany*, the petitioners wanted to challenge old convictions that the prosecution intended to use to support guilt or enhance punishment in then-pending criminal cases. *Germany*, 674 P.2d at 352. The court found that the due process protections of the U.S. and Colorado constitutions "prevent the state from employing a system of forfeiture with respect to constitutional claims solely on the basis of a time bar, without affording [the] accused a meaningful opportunity to establish that the failure to make a timely challenge was the result of circumstances amounting to justifiable excuse or excusable neglect." *Id*. at 353.

In *Patterson*, the Court noted the Colorado court's decision in *Wiedemer* in finding that a statute of limitations did not inherently violate the Suspension Clause. *Patterson*, 2021 UT 52, ¶ 211 ("The Colorado Supreme Court has found its statute of limitations on habeas petitions constitutional because it does not 'deny persons an adequate avenue of relief.'" (quoting *Wiedemer*, 852 P.2d at 435)). But importantly, in *Wiedemer* the Colorado court only upheld the statute that it had struck down 10 years earlier in *Germany* after the legislature amended it to allow petitioners to justify procedural default.[9] *See id.* at 437. The

[9] The updated statute allowed an exception from the limitations period "[w]here the court

Colorado court's holding that the statute did not violate the Suspension Clause was contingent on the "broad exceptions" to the time bar in the statute. *Id*. at 434. The court's opinion makes clear that but for these broad exceptions, it would find the time limitations offended both the Suspension Clause and the Due Process Clause, as it had just 10 years earlier in *Germany*. *Id*. at 434, 435.

The California Supreme Court recently discussed the constitutional implications of strict limitations on second or subsequent habeas petitions. In *In re Friend*, the California court addressed a new law that, if read broadly, would bar most second or subsequent habeas petitions, with very narrow exceptions. *In re Friend*, 489 P.3d 309, 315-16 (Cal. 2021). The court avoided determining whether the new limitations violated the California Constitution by construing the statute to incorporate prior, broader, judge-made exceptions to its restrictions, but noted that the constitutional issues were "both novel and serious." *Id*. at 321; *see also id*. ("It is a significant question whether such a drastic restriction on the effectiveness of the habeas corpus remedy would comport with the principles of substantial justice that lie at the core of our state Constitution's habeas protections."). The court also noted that "[t]he due process implications of this approach are likewise substantial," particularly in light of "the weighty private interest at stake in a capital habeas corpus proceeding, the risk of error created when potentially meritorious claims are barred even if

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hearing the collateral attack finds that the failure to seek relief within the applicable time period was the result of circumstances amounting to justifiable excuse or excusable neglect." Colo. Rev. Stat. Ann. § 16-5-402(2)(d).

presented as promptly as reasonably possible upon discovery, and the dignitary significance of ensuring the validity of death judgments before execution," and that "[t]o foreclose such claims by capital prisoners raises substantial questions of procedural fairness." *Id*.

E. This issue is adequately preserved

The Court asked the parties to brief whether "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 of the provision of the Utah Constitution." (Supp. Br. Order at 4.) Mr. Kell did adequately preserve his argument 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. (*See* Br. Aplt. at 33-35; Reply Br. Aplt. at 22-23; PCR II ROA at 824-27.)

The Court's order for supplemental briefing stated that "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." (Supp. Br. Order at 3.) In fact, Mr. Kell did argue that an inflexible statute of limitations would violate article I, section 5 and article VIII, sections 3 and 5 of the Utah Constitution. (Br. Aplt. at 33-35.) Specifically, Mr. Kell argued that "[b]ecause the courts' writ power is granted directly by the constitution, the legislature has no authority to diminish or restrict that power." (Br. Aplt. at 33.) In addition, Mr. Kell argued based on this Court's decision in *Julian* that the

constitution required the continued application of the "interests of justice" exception or something comparable. (Br. Aplt. at 34-35.) Mr. Kell concluded, "The only way to avoid the constitutional infirmities of the 2008 amendments to the PCRA is to conclude that the judicial exceptions to the time and procedural bars survive the amendments." (Br. Aplt. at 35; *see also* Br. Aplt. at 11-12.)

To the extent that there is any uncertainty as to the arguments made in Mr. Kell's briefs, at the time Mr. Kell filed his opening brief in this case, it was not clear whether the "egregious injustice exception" that was left open by the Court in *Winward* and *Gardner* would apply under the PCRA, or whether the Court retained its constitutional writ authority, outside of the PCRA. Thus, Mr. Kell focused a substantial portion of his briefing on the application of the "egregious injustice" exception. (*See* Br. Aplt. at 26-32; Reply Br. Aplt. at 17-22; PCR II ROA at 11-16.) The Court acknowledged in *Patterson* that the framing of *Winward* forced petitioners to "aim at an amorphous, and possibly non-existent" standard. *Patterson*, 2021 UT 52, ¶ 191. In *Patterson*, the Court held for the first time that "there is no egregious injustice exception to the time bars of the PCRA or rule 65C." *Id*. ¶ 71. The Court also held for the first time that "we exercise our writ power independent of the PCRA." *Id*. ¶ 174. Thus, the Court's decision in *Patterson* changed the legal context in which Mr. Kell's claim would be decided and clarified several issues that remained uncertain at the time Mr. Kell filed his initial brief in this case. Mr. Kell should not be faulted for not anticipating the changes to the legal framework in which his case would be decided that were brought about by the Court's decision in *Patterson*.

II. No common law doctrine or historical limitation on the writ of habeas corpus prevents the Court from granting relief under its constitutional writ authority

The second question of the Court's Supplemental Briefing Order asks the parties to address the timing of Mr. Kell's petition and whether it should "adversely affect his ability to obtain relief under this court's constitutional writ power[.]" (Supp. Br. Order at 4.) Based on the Court's jurisprudence, particularly as it existed in the years leading up to the voters' ratification of the 1984 amendments to the Utah Constitution, the timing of a petition for writ of habeas corpus does not prevent the Court from granting relief where the petitioner raises a meritorious claim that his conviction or sentence was obtained in violation of his constitutional rights.

A. Historical limitations on the writ

1. Although the Court traditionally barred claims that were or could have been raised on appeal from review in habeas corpus, the Court always maintained the authority to correct injustices in habeas proceedings

In general, in the Court's early history there is no discussion of any limitations on the Court's authority to issue the writ based on when the petitioner filed his claim. Decisions addressing any limits on the writ instead focused on how the writ functioned substantively. *See, e.g., Ex parte Hays*, 47 P. 612, 613 (Utah 1897) (refusing to allow writ to be used to address "questions which arose during the trial of the case"); *Winnovich v. Emery*, 93 P. 988, 989 (Utah 1908) (determining whether proceedings in habeas corpus are civil or criminal); *Bruce v. East*, 134 P. 1175, 1176 (Utah 1913) (after judgment has been entered, the sufficiency of the criminal complaint cannot be reviewed on habeas corpus but

only on appeal); *Stoker v. Gowans*, 147 P. 911, 913 (Utah 1915) (determining juvenile delinquency proceedings could not be reviewed through habeas corpus proceedings); *Areson v. Pincock*, 220 P. 503, 504 (Utah 1923) (sufficiency of proof not a proper inquiry in habeas corpus proceedings); *Thompson v. Harris*, 144 P.2d 761, 766 (Utah 1943) (determining the writ is not limited to questions of jurisdiction in the strict sense of the word but "will lie if the petitioner has been deprived of one of his constitutional rights such as due process of law").

The first discussion of the balance, often cited in current case law, between finality of judgments and protection of individual liberties appears to come in *Thompson v. Harris*, 152 P.2d 91 (Utah 1944). As the Court noted in *Patterson*, 2021 UT 52, ¶¶ 122-24, this case was among the earliest in which the Court found that the writ could be used "to determine whether or not the petitioner had been deprived of any constitutional right." *Thompson*, 152 P.2d at 92.

In considering this issue, the Court noted:

> Somewhere and sometime there must be an end to litigation. The writ of habeas corpus must not be used to discover and correct all errors which might creep into a criminal trial. The time for taking an appeal has wisely been limited by law. If the writ of habeas corpus were to be used to reach all defects in the trial which could be raised by a timely appeal, no conviction could ever become final.

Id. Balancing this against the prisoner's constitutional rights, the Court questioned, "where can we draw the line?" *Id*. The Court ultimately determined the balance should be drawn based on substantive considerations: "We believe that the only sound line that can be drawn

is to restrict the use of the writ of habeas corpus to the correction of jurisdictional errors and to errors so gross as to in effect deprive the defendant of his constitutional substantive or procedural rights." *Id*.

There 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. For example, in *Maxwell v. Turner*, the Court decided a habeas petition challenging whether a guilty plea was knowing and voluntary which was brought five years after conviction. *Maxwell v. Turner*, 435 P.3d 287, 287-88 (Utah 1967). Similarly, in *Sydall v. Turner*, the petitioner filed a petition 11 years after he was convicted and sentenced. *Sydall v. Turner*, 437 P.2d 194, 194 (Utah 1968). The Court noted that habeas was not intended to replace an appeal but did not make any comment on the time elapsed and still proceeded to address the petition on the merits. *Id*.

In *Tavenner v. Turner*, the Court noted that the petitioner had escaped from the courtroom after he was convicted but before he could be sentenced. *Tavenner v. Turner*, 501 P.2d 105, 105 (Utah 1972). He then spent five years in an Idaho prison, before being brought back to Utah and sentenced. *Id*. He filed his first habeas petition "a few" years later, and a second habeas petition two years after first one was denied. *Id*. The Court referred the matter to the district court for a hearing "to resolve any doubts." *Id*. The district court denied the petition and Mr. Tavenner appealed, arguing that he was "denied due process under the Fourteenth because of coercion" and "denied counsel under the Sixth." *Id*. The Court found that the "record belies these contentions, we 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." *Id*. (footnotes omitted). But the Court's statements were based on the overall behavior of the defendant, including escaping and fleeing to another state, and placed no particular emphasis on the amount of time that passed until the petition was filed or between the two petitions. *Id*. This was consistent with other decisions from the Court addressing petitions for writ of habeas corpus filed well after the petitioner was convicted and sentenced. *See, e.g.*, *Wise v. Turner*, 440 P.2d 971 (Utah 1968) (petition for writ of habeas corpus filed four years after conviction denied on basis that issue could have been raised on appeal, had petitioner appealed, and was apparent from face of record); *State v. Gordon*, 913 P.2d 350, 352 (Utah 1996) (petition for post-conviction relief filed nearly 10 years after conviction); *Whetton v. Turner*, 497 P.2d 856 (Utah 1972) (habeas proceedings initiated eight years after conviction, which had not been appealed); *Lancaster v. Cook*, 753 P.2d 505, 506 (Utah 1988) (petitioner filed habeas corpus petition nine years after guilty plea and conviction, court nonetheless remanded for development of record and did not comment disapprovingly on passage of time); *Kelbach v. McCotter*, 872 P.2d 1033, 1036 (Utah 1994) (noting petitioner "waited fifteen years to bring a habeas petition" but denying petition on grounds that issue could have been, but was not, raised on appeal).

During this period the Court did express concern about petitioners raising claims in habeas corpus proceedings that had already been decided on appeal, or that could have been but were not raised on appeal. *See, e.g.*, *Wise*, 440 P.2d at 972 (denying relief where

issue was reviewable on appeal and petitioner had not appealed conviction); *Gentry v. Smith*, 600 P.2d 1007, 1008 (Utah 1979) (petition denied where court found appellant was using writ as "a substitute for an appeal"); *Reddish v. Smith*, 576 P.2d 859, 860 (Utah 1978) ("Matters that could have been raised on appeal cannot be used as a ground for habeas corpus."); *Short v. Smith*, 550 P.2d 204 (Utah 1976); *Harris v. Smith*, 541 P.2d 343, 344 (Utah 1975); *Johnson v. Turner*, 498 P.2d 654 (Utah 1972) (identical issues raised on appeal and in habeas corpus); *Poe v. Turner*, 497 P.2d 1384 (Utah 1972) (same).

Even this was not an absolute bar to relief, however, and it was not uncommon for the Court to review the merits of a petitioner's claims where the Court found the issue itself was deserving of review. *See, e.g., Brown*, 440 P.2d at 969 (allowing review "where the requirements of law have been so disregarded that the party is substantially and effectively denied due process of law, or where some such fact is shown that it would be unconscionable not to re-examine the conviction"); *Dunn v. Cook*, 791 P.2d 873, 876 (Utah 1990) (noting "existence of prior appellate proceedings . . . does not ipso facto bar subsequent habeas corpus proceedings" and failure to raise claim on direct appeal "'is not dispositive' of his habeas corpus petition" (quoting *State v. West*, 765 P.2d 891, 194 (Utah 1988) and collecting other cases where claims were nonetheless reviewed).[10]

[10] In *Patterson*, the Court characterized *Dunn*, as well as *Fernandez v. Cook*, 783 P.2d 547 (Utah 1989), and *State v. West*, 765 P.2d 891 (Utah 1988), as being inconsistent with rule 65B(i), for instance by holding a petitioner could not raise a claim that was or should have been raised on appeal, or by allowing an exception if there were "unusual circumstances." *Patterson*, 2021 UT 52, ¶ 176. But both the procedural bar based on claims that were or

In *Johnson v. Turner*, the Court strongly condemned petitioners who failed to file a direct appeal but subsequently pursued a writ of habeas corpus, but maintained that injustices should nonetheless be corrected. The Court stated:

> It makes veritable mockery of the rules of procedure to permit a person to ignore the time limitations for taking procedural steps [of filing a notice of appeal] and obtain an appellate review of a judgment at any time he takes a notion by a habeas corpus proceeding. The efficient and orderly administration of justice and respect for the finality of judgments regularly arrived at demand that the merry-go-round of litigation stop somewhere. Notwithstanding the foregoing, we note here and reaffirm our previously stated position that where it appears that there has been such miscarriage of justice that it would be unconscionable not to reexamine a conviction, and that for some justifiable reason an appeal was not taken thereon, we do not regard rules of procedure as being so absolute as to prevent us from correcting any such obvious injustice.[11]

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could have been raised on appeal and the "unusual circumstances" exception pre-date the implementation of rule 65B(i) in 1969. *See Ex parte Sullivan*, 253 P.2d 378, 381 (Utah 1953) (denying claim that was raised on appeal); *Gallegos v. Turner*, 409 P.2d 386, 387 (Utah 1965) (finding a judgement is not subject to collateral attack under habeas corpus "except in the most unusual circumstances"). As the Court recognized in *Hurst v. Cook*, the Court's construction of rule 65B(i) "[took] place against the constitutional background of the use of the Writ." *Hurst*, 777 P.2d at 1033. The Court's analysis in *Hurst* also illustrates how courts routinely apply both the common law and rules of procedure in addressing claims. *See id*. at 1033-37; *see also, e.g.*, *McQuiggin v. Perkins*, 569 U.S. 383, 396-97 (2013); *Holland v. Florida*, 560 U.S. 631, 646 (2010).

[11] This balance has been echoed by the United States Supreme Court, which noted that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1, 8 (1963). In *Sanders*, the Court found that where a new petition presents a new ground for relief "full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading." *Id*. at 17.

Johnson v. Turner, 473 P.2d 901, 904 (Utah 1970); *see also Dunn*, 791 P.2d at 876 ("[F]inality does prevail unless a petitioner can prove the existence of unusual circumstances.").[12]

2. Utah courts have not applied the doctrine of laches in the context of habeas corpus proceedings

The Court asked the parties to discuss whether "a petition brought after a substantial delay [would] have been subject to the common law doctrine of laches." (Supp. Br. Order at 4.) The Utah courts have not applied the doctrine of laches to petitions for writ of habeas corpus, though a few cases have noted the possibility. These cases are discussed below.

As the Court has explained:

> Laches is not mere delay, but delay that works a disadvantage to another. To constitute laches, two elements must be established: (1) The lack of diligence on the part of plaintiff; (2) An injury to defendant owing to such lack of diligence. Although lapse of time is an essential part of laches, the length of time must depend on the circumstances of each case, for the propriety of refusing a claim is equally predicated upon the gravity of the prejudice suffered by defendant and the length of plaintiff's delay.

Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs., 535 P.2d 1256, 1260 (Utah 1975).

In 1995 the Court did suggest that "the equitable doctrine of laches is available to dismiss untimely writs." *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 684 (Utah

[12] In its Supplemental Briefing Order the Court also asked, "Would a petitioner historically have been barred from obtaining habeas relief if he or she withheld a claim for tactical reasons? (Supp. Br. Order at 4.) Mr. Kell did not uncover any discussion in the Court's cases addressing a petitioner intentionally withholding a claim for habeas relief.

1995). But *Renn* was concerned with the denial of a writ of certiorari, not a writ of habeas corpus, and the court did not discuss the possibility further.

In *Currier*, discussed *supra*, the Court of Appeals noted that the federal system at the time "relied on the equitable doctrine of laches which focuses on whether one party's delay disadvantaged the other party, rather than a statute of limitations." *Currier*, 862 P.2d 1357, 1367 (Utah Ct. App. 1993). The rule "[did] not bar a petition for habeas corpus relief until the state satisfie[d] its burden of demonstrating that it has been unfairly prejudiced by delay" and federal courts did not "recognize even a rebuttable presumption of prejudice until a petitioner has delayed more than five years after the judgment of conviction." *Id*. The court noted that the rule stated that "'a petition *may* be dismissed,'" which "provides the federal court discretion to balance the equities of the particular situation, encourages a petitioner to act with reasonable diligence and guarantees necessary safeguards in hardship cases." *Id*. (quoting 28 U.S.C. § 2254 rule 9); *see also Hurst*, 777 P.2d at 1036 ("[N]either collateral estoppel nor issue preclusion is an absolute defense in a habeas case.").

The Court of Appeals also addressed application of laches in a non-habeas petition for extraordinary relief filed under rule 65B. In *Nicolds v. Utah Board of Pardons and Parole*, the petitioner filed a petition for extraordinary relief regarding his parole grant hearing in front of the Utah Board of Pardons and Parole nearly four years after his parole hearing. *Nicolds v. Utah Bd. of Pardons & Parole*, 2012 UT App 123, ¶ 2, 277 P.3d 652. The district court found that the petition was untimely under the one-year statute of limitations in the PCRA. *Id*. In the alternative, the district court found that a petition filed

after four years "constituted 'an unreasonable delay in which to file the petition' and therefore the petition should be dismissed as untimely under the doctrine of laches." *Id*.

The Court of Appeals found that under this Court's decision in *Renn*, "there is no fixed limitation period governing the time for filing" petitions for extraordinary relief under rule 65B(d). *Nicolds*, 2012 UT App 123, ¶ 3. Addressing the application of laches, the court found that the petitioner had relied on the advice of contract attorneys, therefore the first element of laches requiring an "unreasonable delay or lack of diligence" was not satisfied. *Id*. ¶ 6.

This Court has implied the possibility that laches could apply in the context of a habeas petition in a child custody case. In *Sherry v. Doyle*, 249 P. 250 (Utah 1926), the Court addressed custody of a four-year-old child. The child's father filed a habeas corpus action to obtain custody of the child from the defendants, whom he had paid to temporarily care for the child after her mother passed away. *Id*. at 253. In addressing the father's claim, the Court noted, "No abandonment or forfeiture or laches or legal surrender or unfitness or inability on the part of the plaintiff was either alleged or shown." *Id*.; *See also Jones v. Moore*, 213 P. 191, 194 (Utah 1923) ("For I do not think any one will seriously contend that, as against a stranger, a parent's legal right to the custody of his child will be denied him where an abandonment or a forfeiture, or laches, or a legal surrender, or unfitness, or inability of the parent is not clearly shown." (quoting *Harrison v. Harker*, 142 P. 716, 725 (Utah 1914) (Straup, J., concurring))). Although the Court implied that laches *could* apply in such a situation, it did not subsequently find that it applied.

In sum, this Court has not applied the doctrine of laches in the context of habeas corpus, although in similar contexts it has implied that it could. If the Court were to apply the doctrine of laches to habeas petitions, the burden would be on the State to establish (1) lack of diligence on the part of the petitioner, and (2) an injury to the State resulting from such lack of diligence. *See Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 14, 84 P.3d 1134.

B. The voters who ratified the 1984 amendments to the Utah Constitution would have understood that the Court had the power to issue the writ, even if the petition was untimely

The Court in *Patterson* found that "when the people of Utah amend the constitution, we look to the meaning that the public would have ascribed to the amended language when it entered the constitution." *Patterson*, 2021 UT 52, ¶ 92. Thus, in determining what the voters who ratified the 1984 amendments to the Utah Constitution would have understood about the Court's authority over the writ of habeas corpus, it is appropriate to look to this Court's jurisprudence from that period, as well other sources that may shed light on the intent and understanding of the voters.

For many years prior to the passage of the 1984 amendments to the Utah Constitution the Utah Supreme Court had held that where an issue was previously raised and decided by the Court, or where an issue could have been raised previously but was not, the Court would generally find the petition barred. These procedural bars, however, did not affect the Court's authority to issue the writ in "unusual circumstances," including:

> where the court was without jurisdiction; or there has been a substantial failure to accord the accused due process of law; or perhaps for example where it is indisputably shown that there is mistaken identity; or that there has been a knowing and wil[l]ful falsification of the evidence by the prosecutor; or some other such circumstances that it would be wholly unconscionable not to re-examine the conviction.

Gallegos v. Turner, 409 P.2d 386, 387 (Utah 1965).

Indeed, in the years preceding the 1984 amendments, the Court routinely set aside procedural barriers to review the merits of petitions for writ of habeas corpus. For example, in *Martinez v. Smith*, the petitioner had pled guilty to second degree murder and assault but argued in habeas corpus proceedings that he was induced to plead guilty based on false information. *Martinez v. Smith*, 602 P.2d 700, 701 (Utah 1979). The State argued that these issues should have been raised in an appeal, and the petitioner was therefore barred from habeas relief. *Id*. at 701-02. The Court acknowledged that the usual rule required dismissal, but nonetheless found that "howsoever desirable it may be to adhere to the rules, the law should not be so blind and unreasoning that where an injustice has resulted the victim should be without remedy." *Id*. at 702. Accordingly, the Court found, "the writ should be available in rare cases, where it appears that there is a strong likelihood that there has been such unfairness, or failure to accord due process of law, that it would be wholly unconscionable not to re-examine the conviction." *Id*.

The following year the Court decided *Chess v. Smith*, 617 P.2d 341 (Utah 1980). There, the petitioner was convicted of aggravated robbery and similarly did not file an appeal. *Id*. at 343. He later filed a habeas petition alleging his due process rights were

violated when he appeared at trial in identifiable prison clothes. *Id*. The Court found that although the claim was the type that should be raised on appeal, habeas corpus "can be used to attack a judgment of conviction in the event of an obvious injustice or a substantial and prejudicial denial of a constitutional right in the trial of the matter." *Id*. "[I]t would be unconscionable," the Court explained "not to determine the truth of the petitioner's allegations because, if true, they constitute reversible error." *Id*. at 344.

As illustrated by the Court's decisions in *Martinez* and *Chess*, the existence of "unusual circumstances" allowing review of an otherwise barred petition was a substantive test, turning on the merits of the claim itself. As the Court explained in 1990 in *Dunn v. Cook*, relying on pre-1984 cases, "In short, the unusual circumstances test was intended to assure fundamental fairness and to require reexamination of a conviction on habeas corpus when the *nature of the alleged error* was such that it would be unconscionable not to reexamine and thereby to assure that substantial justice was done." *Dunn v. Cook*, 791 P.2d 873, 876 (Utah 1990) (cleaned up, emphasis added).

Cases decided after the 1984 constitutional amendments also shed light on the scope of the Court's writ authority at the time the amendments were passed. Citing pre-1984 cases, the Court noted in *State v. West*, that it had "frequently addressed the merits of habeas claims even though the issues were not raised at the time of conviction or on direct appeal." *State v. West*, 765 P.2d 891, 893-94 (Utah 1988). In *Gardner v. Holden*, the Court gave a more complete explanation:

> Issues raised and disposed of on direct appeal of a conviction or a sentence cannot properly be raised again in a Rule 65B proceeding and should be dismissed as an abuse of the writ without a ruling on the merits. Issues that could and should have been raised on direct appeal, but were not, may not properly be raised in a habeas corpus proceeding absent unusual circumstances. The unusual circumstances test requires a showing of an obvious injustice or a substantial and prejudicial denial of a constitutional right. The unusual circumstances test was intended to assure fundamental fairness and to require reexamination of a conviction on habeas corpus when the nature of the alleged error was such that it would be unconscionable not to reexamine and thereby to assure that substantial justice was done.

Gardner v. Holden, 888 P.2d 608, 613 (Utah 1994) (cleaned up); *see also Gomm v. Cook*, 745 P.2d 1226, 1227 (Utah 1988) (noting the "established principles" that a "petitioner cannot raise issues in post-conviction proceedings that could have been raised on direct appeal, except in unusual circumstances" and "post-conviction review may be used to attack a judgment of conviction in the event of an obvious injustice or a substantial and prejudicial denial of a constitutional right").

Both before and after the 1984 constitutional amendments the focus was on achieving justice based on "the nature of the alleged error." As the Court explained in *West*, "The provisions of rule 65B(i) do serve to promote justice. However, its language may at times conflict with the most just result in any given case." *West*, 765 P.2d at 895. "We do not advocate a wholesale disregard for rule 65B(i) or for the general prohibition against successive postconviction complaints. Instead, where an injustice results and the rule allows, we will permit a cause to be heard." *Id*.

There is no mention in the 1984 voter information pamphlet of the Court's authority over the writ of habeas corpus, or of any limit on the Court's power to issue the writ despite

the existence of procedural barriers, or that the changes to the constitutional amendment would in any way alter the court's habeas corpus doctrine. *See Proposition No. 3: Judicial Article Revision*, Utah Voter Information Pamphlet, at 14-20 (1984), *available at* https://elections.utah.gov/Media/Default/Historical%20VIPs/1984%20VIP.compressed.pdf (last visited May 31, 2022) (Addendum 2). Nor did the report of the Constitutional Revision Commission indicate any substantive changes to the functioning of the writ. *See* Constitutional Revision Commission, Report of the Utah Constitutional Revision Commission Submitted to the Governor and the 45th Legislature of the State of Utah for the Years 1982 and 1983, at 26 (Addendum 1). Furthermore, local media outlets covered the cases cited above, providing explanations of the process and the relief obtained. *See, e.g.*, *High Court Orders Inquiry into Plea*, PROVO DAILY HERALD, October 25, 1979, at 3 (quoting Utah Supreme Court's opinion that claim should have been raised on appeal but "howsoever desirable it may be to adhere to the rules the law should not be so blind and unreasoning that were [sic] an injustice has resulted the victim should be without remedy"); *Prisoner Wins Rehearing of Case*, SALT LAKE TRIBUNE, October 28, 1979, at 24; *Death Sentence Rare in Salt Lake County*, SALT LAKE TRIBUTE, December 14, 1981, at 17; *Appeals Exhausted, Justices Tell Killer*, SALT LAKE TRIBUTE, March 4, 1983, at 34. Nor did local media coverage leading up to the election in which the amendments were ratified suggest that the amendments would effect any change to the writ of habeas corpus. *See, e.g.*, Dr. Martin B. Hickman, *Amending the Judicial Article Merits Close Attention*, SALT LAKE TRIBUTE, October 14, 1984, at 18; *Voters Have Chance to Amend Utah's*

Constitution, SALT LAKE TRIBUTE, November 4, 1984, at 8; *Judicial Revisions are Long Overdue in Utah*, PROVO DAILY HERALD, October 29, 1984, at 11 (news articles attached collectively as Addendum 3).

As with statutory construction, in the absence of information indicating the contrary, the Court should assume the voters understood the meaning of habeas corpus to be consistent with this Court's decisions on the matter. *See Cannon v. McDonald*, 615 P.2d 1268, 1270 (Utah 1980) ("In interpreting the statutory language care must be taken to construe the words used in light of the total context of the legislation, and when the construction of a section involves technical words and phrases which are defined by statute, the provision must be construed according to such peculiar and appropriate meaning or definition."); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."); *Winward v. State*, 2015 UT 61, ¶ 12 (quoting Frankfurter); *Maxfield v. Herbert*, 2012 UT 44, ¶ 31, 284 P.3d 647 (same).

Thus, the available sources indicate that voters in 1984 would have generally understood that, where there was "an obvious injustice or a substantial and prejudicial denial of a constitutional right," it was within the Court's authority to issue the writ, notwithstanding the applicability of any procedural bars.

C. Limitations on the writ of habeas corpus outside the post-conviction context

The Court asked the parties to discuss "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" and whether voters who ratified the original Utah Constitution in 1895 would have understood those limitations to apply to habeas corpus proceedings. (Supp. Br. Order at 4.) Mr. Kell did not uncover any cases outside of the post-conviction context in which delay by a petitioner is specifically discussed or relied upon by Utah courts as a reason to deny a writ of habeas corpus either before or after 1895.

As noted above in the discussion on the doctrine of laches, it could be argued that the issue of delay has tangentially arisen in the context of child custody cases. *See Sherry v. Doyle*, 249 P. 250 (Utah 1926); *Jones v. Moore*, 213 P. 191, 194 (Utah 1923). But in neither *Sherry* nor *Jones*, nor any subsequent case, did the Court insinuate that delay *in and of itself* would be sufficient to bar a parent's claim to custody of their child. Indeed, the Court never used the word "delay," but instead noted concepts "abandonment or forfeiture or laches or legal surrender," which denote some indication of an intent to relinquish a right on the part of the petitioner. *Sherry*, 249 P. at 253; *Jones*, 213 P. at 194. The Court never implied that the passage of time alone would be sufficient to bar a claim.

III. Mr. Kell's claim raises a substantial and prejudicial denial of a constitutional right and the Court should exercise its constitutional writ authority to review the merits of Mr. Kell's claim

The Court in this case should consider Mr. Kell's claim under its constitutional writ authority, notwithstanding the time and procedural bars under rule 65C and the PCRA. As

Justice Stewart explained in his concurring opinion in *Codianna*, "a procedural default is only one factor to be considered in deciding whether a habeas court should address the merits of [a] claim." *Codianna v. Morris*, 660 P.2d 1101, 1115 (Utah 1983) (Stewart, J., concurring). He continued:

> That factor in all cases must be viewed against the possibility that a serious injustice may have resulted from a defective trial. This State has long taken the firm position that a procedural default is not, and cannot be, solely determinative of the ultimate question of whether a trial on the merits was conducted according to fundamental concepts of basic fairness. The mechanical and inflexible application of legal procedures must not be used to overwhelm the law of the land and permit a miscarriage of justice.

Id.; *see also Julian v. State*, 966 P.2d 249, 254 (Utah 1998) ("[I]f the proper showing is made, the mere passage of time can never justify continued imprisonment of one who has been deprived of fundamental rights[.]").

As it has historically done, the Court should consider the merits of Mr. Kell's claim for relief because he has demonstrated "a substantial and prejudicial denial of a constitutional right" such that "it would be unconscionable not to reexamine and thereby to assure that substantial justice was done." *Gardner v. Holden*, 888 P.2d 608, 613 (Utah 1994) (internal citations and quotation marks omitted).

A. Mr. Kell has raised a claim of a substantial and prejudicial denial of a constitutional right

Mr. Kell raised one claim in the instant petition – that his Due Process rights under the state and federal constitutions were violated when the trial judge entered the jury room during penalty phase deliberations and, without the knowledge of Mr. Kell or his counsel, gave jurors an instruction which unconstitutionally shifted the burden to Mr. Kell to prove

his life should be spared. (Br. Aplt. at 12-17.) Three jurors signed declarations recalling the judge providing clarification on a point of law during the penalty phase deliberations. (*See* Br. Aplt, Addenda 4, 5, 6.) One juror specifically stated that she "had a difficult time voting for the death penalty" but after the judge told jurors "that Mr. Kell's attorneys had to show [] that Mr. Kell's life should be spared," she "felt more comfortable voting for death." (Br. Aplt. Addendum 6, ¶ 2.) In addressing Mr. Kell's motion under *Rhines v. Weber*, 544 U.S. 269 (2005), the federal district court found the claim was "potentially significant" (Mem. Decision and Order, *Kell v. Benzon*, No. 2:07-CV-359-CW (D. Utah, Nov. 16, 2017), ECF No. 258 at 10 (Reply Br. Aplt. Addendum 1).)

In such circumstances, where the error constitutes an "obvious injustice or a substantial and prejudicial denial of a constitutional right," and particularly where Mr. Kell has been sentenced to death, "it would be unconscionable not to determine the truth of the petitioner's allegations." *Chess*, 617 P.2d at 344. Furthermore, to deny merits review would amount to an unconstitutional suspension of the writ of habeas corpus and a denial of Mr. Kell's rights under the Due Process and Open Courts Clauses.

B. Mr. Kell has not engaged in any tactical delay, nor does any delay in this case amount to an abuse of the writ

Throughout his answering brief, Respondent repeatedly argues, without support, that Mr. Kell delayed presenting his claim for tactical reasons. (*See, e.g.*, Br. Aplee. at 8, 9, 10, 11, 13.) Several factors support the conclusion that any delay in this case was not tactical and should not prevent this Court from reviewing the merits of Mr. Kell's claim.

First, the federal district court found there was "*no* indication that Kell has engaged in intentional or abusive dilatory litigation tactics." (Reply Br. Aplt., Addendum 1 at 11 (emphasis added).) The federal court noted that proceedings on Mr. Kell's initial PCR petition ended in 2012, and that shortly thereafter Mr. Kell filed his amended petition for writ of Habeas corpus in federal court, which included for the first time the claim that is the subject of this petition. (*Id*.) In his Amended Petition, Mr. Kell notified the federal court and the State that he intended to file a motion requesting permission to present this claim to the Utah state courts at the appropriate time. (*Id.*) The court further noted that "[t]wo months later the parties entered into the stipulated Case Management Schedule, in which they agreed to address discovery and an evidentiary hearing prior to addressing other issues" and that litigation relating to discovery and an evidentiary hearing was not resolved until five years later. (*Id*.) The *Rhines* motion, requesting the federal court stay those proceedings and that federal habeas counsel be granted the necessary permission to represent Mr. Kell in state court, was filed just over 60 days later.[13] (*See also* Reply Br.

[13] The Court found in *Patterson* that the timely filing of a federal habeas petition did not warrant tolling of the statute of limitations under the PCRA. *Patterson*, 2021 UT 52, ¶ 64. Indeed, the Court has implied that equitable tolling is not available under the PCRA. *Id*. ¶ 58 ("We are not convinced that equitable tolling, if even applicable to PCRA claims, could be appropriately applied to Patterson's claims."). However, even if litigation pursuant to a timely filed federal habeas petition is insufficient to toll the statute of limitations under the PCRA, it is nonetheless relevant to any inquiry into whether any delay on Mr. Kell's part in raising this claim in state court was intentional or amounted to an abuse of the writ. The fact that Mr. Kell was engaged in ongoing litigation over discovery supports Mr. Kell's argument that there was no intentional delay on his part.

Aplt. at 11; Reply Br. Addenda 3 at 16 (explaining that Mr. Kell had not engaged in intentionally dilatory litigation tactics and requesting permission for counsel to represent him in state court proceedings); Reply Br. Addenda 4 at 9 (explaining, *inter alia*, that federal habeas counsel cannot represent petitioners in state court habeas proceedings without permission from the federal judiciary).)

Second, Respondent's oft-repeated suggestion that "delay is its own reward" (Br. Aplee. at 2), presupposes that a petitioner would not obtain relief if the Court were to review the claim on the merits. Where a claim is frivolous on its face, Respondent's assumption would at least logically make sense, even if there were no indication of its truth in any given case. But Mr. Kell's claim is far from frivolous.[14] Where, as here, a petitioner raises a well-supported claim of constitutional error, there can be no logical reason to intentionally delay presentation of the claim and thereby unnecessarily remain under threat of a death sentence. There is no reward in remaining on death row under an unconstitutional sentence which, because of procedural barriers, cannot be corrected. Whatever reward Respondent believes is inherent in delay cannot equal the reward of obtaining relief from an unconstitutional sentence.

Third, given the procedural landscape of both state and federal post-conviction proceedings, intentionally withholding a viable and meritorious claim would risk an almost

[14] Indeed, if Respondent were confident the claim was frivolous and would be denied on the merits, he could prevent delay by simply waiving procedural defenses and allowing the district court to address the claim on the merits. He did not do that here.

certain likelihood that it will *never* be addressed on the merits. Particularly in a capital case, the risk is exponentially greater than any potential reward. *See* John B. Morris, Jr., *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371, 388 n.83 (1985) ("Thus, the primary deterrent to the attorney is the harm to the client that will likely follow from a lost, valid claim. In the context of a capital case, that harm is devastating, and likely to be a serious deterrent to the withholding of claims."). In his dissent in *Wainwright v. Sykes*, Justice Brennan explained why intentionally withholding a claim is never sound strategy: "If he loses on this gamble, all federal review would be barred, and his 'sandbagging' would have resulted in nothing but the forfeiture of all judicial review of his client's claims. The Court, without substantiation, apparently believes that a meaningful number of lawyers are induced into [this] option . . . That belief simply offends common sense."[15] *Wainwright v. Sykes*, 433 U.S. 72, 103 n.5 (1977) (Brennan, J., dissenting); *see also id*. at 104 ("[A]ny realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel.").

Finally, the argument that Mr. Kell tactically delayed presenting this claim ignores the fact that by the time federal counsel uncovered the factual basis for the claim it was

[15] Notably, in the years since Justice Brennan wrote his dissent in *Wainwright*, the procedural barriers to review in federal court have become more restrictive, further removing any incentives for sandbagging misperceived by the *Sykes* majority. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722 (1991); 28 U.S.C. §§ 2244, 2254.

already defaulted by Mr. Kell's initial PCR counsel under rule 65C and Utah Code § 78B-9-106 and §78B-9-107, at a time when Mr. Kell had a statutory right to the effective assistance of post-conviction counsel. (*See* Br. Aplt. at 17-25; Reply Br. Aplt. at 4-14.) As Mr. Kell explained in his opening brief, "It is undisputed that the basis of Mr. Kell's claim would have been discoverable had Mr. Kell's postconviction counsel exercised reasonable diligence." (Br. Aplt. at 25.) The claim was therefore defaulted by initial PCR counsel in 2005. Neither Respondent nor the court below suggested any basis to conclude that the claim would not have been found defaulted under § 78B-9-106(1)(c) or §78B-9-107(2)(e) in 2013. Furthermore, to ignore initial PCR counsel's unquestionably inadequate representation (*see* Br. Aplt. at 18-23, 28-29 (noting that PCR counsel filed a petition that was just 21 pages long, contained one case citation, and appended no new evidence, and did not interview jurors because it did not occur to him to do so)) and focus only on the time that passed while Mr. Kell was litigating his claims in federal court unreasonably places the responsibility for PCR counsel's negligent and objectively unreasonable representation on Mr. Kell and violates the right to effective representation of PCR counsel that the court below acknowledged Mr. Kell had at the time of his initial post-conviction proceedings. *See also* (Reply Br. Aplt., Addendum 1 at 5 (federal district court finding PCR counsel "filed a perfunctory petition, failed to conduct even a cursory investigation of the case, including failing to interview even a single juror, and admitted that none of these decisions were strategic.").)

C. The fact that Mr. Kell was sentenced to death should factor into the Court's determination of whether to review the merits of Mr. Kell's constitutional claim

The Supreme Court has affirmed that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1, 8 (1963). This is particularly true in a capital case where the petitioner's life hangs in the balance. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different form a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); *cf. McFarland v. Scott*, 512 U.S. 849, 859 (1994) ("Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty."); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (noting that in a capital case, "the nature of the penalty is a proper consideration" in determining whether to grant a certificate of appealability).

This Court's habeas jurisprudence has emphasized that the question of whether to review an otherwise barred petition is one of "fundamental fairness." *Codianna v. Morris*, 660 P.2d 1101, 1115 (Utah 1983) (Stewart, J., concurring). "It follows, and it has long been our law, that a procedural default is not always determinative of a collateral attack on a conviction where it is alleged that the trial was not conducted within the bounds of basic fairness or in harmony with constitutional standards." *Hurst v. Cook*, 777 P.2d 1029, 1035-

36 (Utah 1989). The likelihood that a petitioner could be executed without ever having his claim reviewed on the merits should thus weigh in the balance in determining whether "substantial justice [was] done." *Brown v. Turner*, 440 P.2d 968, 969 (Utah 1968).

CONCLUSION

Barring merits review of Mr. Kell's petition due to a strict application of the time and procedural bars pursuant to rule 65C and the PCRA, without an escape valve, would violate Mr. Kell's rights under the Suspension Clause, the Due Process Clause, and the Open Courts Clause of the Utah Constitution. These arguments were adequately preserved in Mr. Kell's opening brief and below. There are no historical limitations on this Court's authority that would prevent the Court from issuing a writ of habeas corpus. Although the Court has historically held that generally a petitioner may not bring a claim in habeas corpus proceedings that could have been raised previously, the Court has routinely granted review where it found that it would be unconscionable not to determine the truth of the petitioner's allegations. The voters who ratified the 1984 amendments to article VIII of the Utah Constitution would have understood that it was within the Court's authority to review a petitioner's claims in such circumstances, notwithstanding the applicability of a procedural bar.

For the reasons stated herein, as well as those stated in his Opening Brief and Reply Brief, this Court should review the merits of Mr. Kell's claim.

Respectfully submitted this 1st day of June, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P.24(g)(1). It contains 14,163 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font of size 13 points.

By: s/ Lindsey Layer
Lindsey Layer

Dated: June 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2022, the original of the foregoing Appellant's Supplemental Brief was filed through electronic mail with the Clerk's Office and one copy was mailed via First Class Mail, postage prepaid, to the following:

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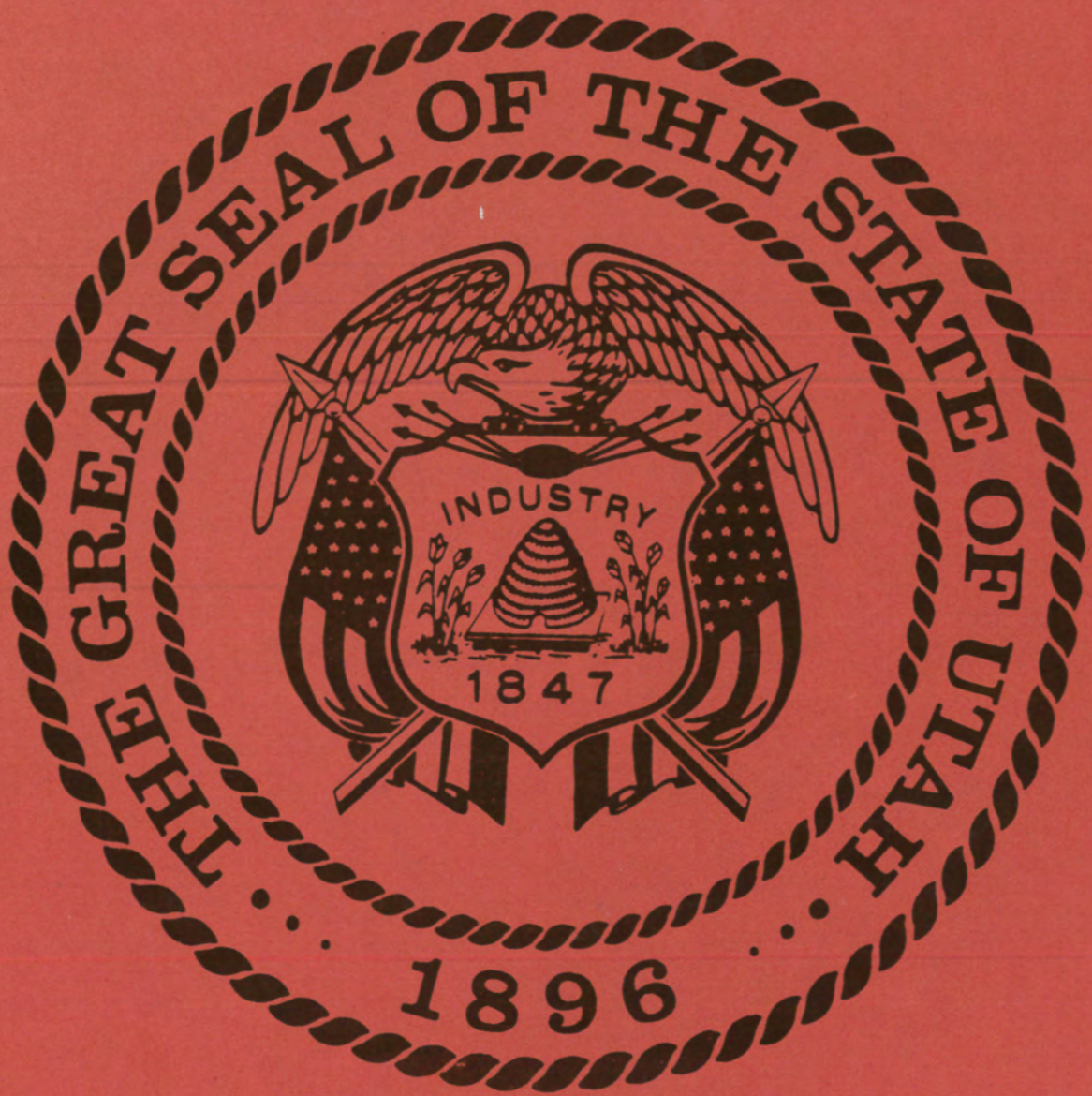
Troy Michael Kell v. Larry Benzon, Warden, Utah State Prison
Utah Supreme Court Case No. 20180788
Addenda Index

Addendum 1

Troy Michael Kell v. Larry Benzon, Warden, Utah State Prison
Utah Supreme Court Case No. 20180788

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
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JANUARY 1984

SECOND PRINTING

Utah Constitutional Revision Commission

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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

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

Darrell G. Renstrom (term expired 1983)	Senate Appointee State Senator Ogden
Wilford R. Black (appointed 1983, term expires 1989)	Senate Appointee State Senator Salt Lake City
G. LaMont Richards (term expired 1979, reappointed until 1985)	House Appointee State Representative Salt Lake City
Phyllis C. Southwick (term expired 1983, reappointed until 1989)	Governor Appointee Citizen Member Bountiful
Glade M. Sowards (term expired 1981, reappointed until 1987)	Senate Appointee State Senator 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) •Specifically mentions supreme court and district court. •Allows other courts by statute (juvenile, circuit, j.p.'s).	1. Court Structure (Section 1) •Specifically mentions supreme court, district court, and j.p.'s. •Allows other courts by statute (juvenile, circuit).
2. Supreme Court Organization (Sec. 2) •Five justices plus additional. •Chief justice to be selected as provided by law. •Court may hear cases in panels.	2. Supreme Court Organization (Sec. 2) •Five justices plus additional. •Chief justice automatically justice with least remaining time on term. •All cases must be heard by a majority.
3. Supreme Court Jurisdiction (Sec. 3) •Original jurisdiction over extra-ordinary writs and "certified" state law questions. •General appellate jurisdiction to be exercised as provided by statute.	3. Supreme Court Jurisdiction (Sec. 4) •Original jurisdiction over certain specified writs. •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) •Empowers supreme court to adopt court rules. •Empowers supreme court to govern practice of law.	4. Supreme Court Rulemaking Authority (Sec. 4) •No stated authority for rulemaking or governance of the practice of law •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) •Original jurisdiction except as limited by statute.	5. District Court Organization and Jurisdiction (Secs. 5, 7, 8, 9) •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) •Allows legislature to establish judicial districts (eliminates reference to specific districts).	6. Number of Judges/Judicial Districts (Secs. 5, 6, 8, 16) •Specifies seven districts, the organizatic of the seven may be changed.
7. Qualifications for Judges (Sec. 7) •Supreme court - 30 years/five-year resident, admitted to practice.	7. Qualifications for Judges (Secs. 2, 5) •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) •Judicial Nominating Commissions (no legislative involvement).	8. Judicial Selection (Sec. 3) •Method to be established by statute.
•Governor appointment.	•Prohibition on partisan involvement. Statutory Method -Nominating Commissions -Governor appointment -Stand for election at first general election following term-retention if unopposed. (Juvenile court does not stand for election - subject to senate review.)
•Senate review.	
•Unopposed retention election after Three years/then at end of each term.	
•Prohibition on partisan involvement.	

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

powers and duties of county attorneys, and such other attorneys for the state as the legislature may provide, shall be prescribed by law. In all cases where the attorney for any county, or for the state, fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney pro tempore.

Proposed Language

Sec. 15. The legislature shall provide for a system of public prosecutors who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute. Public prosecutors shall be selected in a manner provided by statute and shall be admitted to practice law in Utah. If a public prosecutor fails or refuses to prosecute, the supreme court shall have power to appoint a prosecutor pro tempore.

Explanation

The section deletes specific reference to county attorneys and establishes a system of public prosecutors. The prosecutors would be selected as provided by statute. A requirement that public prosecutors be qualified to practice law is also included. The section retains the authority to appoint prosecutors pro tempore, but clarifies that the supreme court is to be the appointing authority.

Rationale

The commission felt that requiring each county to elect a county attorney was unduly restrictive and precluded the establishment of other prosecutorial structures such as district attorneys. The proposal requires the legislature to establish a system of professionally competent public prosecutors. The prosecutors would be selected as provided by statute. The commission felt that since there are legitimate reasons for requiring elected as well as appointed prosecutors, the legislature should be free to set public policy in this area.

Miscellaneous Provisions

The following sections of Article VIII were considered by the commission to be unnecessary or outdated and were deleted from the proposal. In most cases, similar provisions could be established by either court rule or statute.

1. Disqualification of Judges, Nepotism

Sec. 13. Except by consent of all the parties, no judge of the supreme or inferior courts shall preside in the trial of any cause where either of the parties shall be connected with him by affinity or consanguinity within the degree of first cousin, or in which he may have been of counsel, or in the trial of which he may be presided in any inferior court.

Sec. 15. No person related to any judge of any court by affinity or consanguinity with the degree of first cousin, shall be appointed by such court or judge to, or employed by such court or judge in any office or duty in any court of which such judge may be a member.

Rationale

The essence of these provisions could be more appropriately retained by statute or court rule.

2. Style of Process--"The State of Utah"

Sec. 18. The style of all process shall be, "The State of Utah," and all prosecutions shall be conducted in the name and by the authority of the same.

Rationale

This provision is a procedural requirement better stated by court rule.

3. Forms of Civil Action

Sec. 19. There shall be but one form of civil action, and law and equity may be administered in the same action.

Rationale

Although there are historical distinctions surrounding this provision, its importance is largely symbolic and could be stated by court rule.

4. Judges to be Conservators of Peace

Sec. 21. Judges of the Supreme Court, District Courts, and justices of the peace, shall be conservators of the peace, and may hold preliminary examinations in cases of felony.

Rationale

The language of this section is outdated and inconsistent with the rest of the proposal.

5. Judges to Report Defects in Law

Sec. 22. District Judges may, at any time, report defects and omissions in the law to the Supreme Court, and the Supreme Court, on or before the

first day of December of each year, shall report in writing to the Governor any seeming defect or omission in the law.

Rationale

This provision is outdated and and could be stated by court rule.

6. Publication of Decision, Supreme Court Decisions to be in Writing

Sec. 23. The legislature may provide for the publication of decisions and opinions of the Supreme Court, but all decisions shall be free to publishers.

Rationale

This provision is outdated and not needed in the constitution. The requirements could be established by statute.

7. Effect of Extending Judges' Terms

Sec. 24. The terms of office of Supreme and District Judges may be extended by law, but such extension shall not affect the terms for which any judge was elected.

Rationale

This provision was considered unnecessary.

8. Decisions to be in Writing

Sec. 25. When a judgment or decree is reversed, modified or affirmed by the Supreme Court, the reasons therefor shall be stated concisely in writing, signed by the judges concurring, filed in the office of the clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom, may give the reasons of his dissent in writing over his signature.

Rationale

The commission is generally supportive of the concept of written court opinions. However, it felt that a rigid constitutional mandate was unnecessary. This same requirement could easily be imposed by statute or court rule. It should be noted that the present language applies only to the supreme court. As such, no similar constitutional requirement exists regarding decisions by other courts, even when functioning in an appellate capacity. Also, no similar provision is contained in the U.S. Constitution.

9. Court to Prepare Syllabus

Sec. 26. It shall be the duty of the court to prepare a syllabus of all the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

Rationale

This requirement was considered unnecessary for inclusion in the constitution and could be stated by statute.

Section 2 - Transition Provision

Section 2. This amendment shall not shorten the term of office or abolish the office of any justice of the supreme court, any judge of the district court, or judge of any other court who is holding office of the effective date of this amendment. Justices and judges holding office on the effective date of this amendment shall hold their respective offices for the terms for which elected or appointed and at the completion of their current terms shall be considered incumbent officeholders. Existing statutes and rules on the effective date of this amendment, not inconsistent with it, shall continue in force and effect until repealed or changed by statute.

Rationale

This section is included as part of the amendment resolution, but is not part of the actual Judicial Article. The section is intended to ensure a smooth transition after the approval of the amendment and to protect sitting judges. Specifically, judges holding office on the effective date of the amendment are considered incumbent officeholders and therefore not subject to reappointment. At the completion of their term, they would stand for a retention election as provided in the Judicial Article.

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;