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 REPLY BRIEF

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

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INTRODUCTION

Mr. Kell received ineffective assistance of counsel in his initial post-conviction ("PCR") proceedings. About this there has been no dispute in these proceedings. Initial PCR counsel conducted no investigation, including failing to interview a single juror. Counsel ultimately filed an amended PCR petition that was just 21 pages in length, contained just one case citation, and did not append a single piece of new evidence. It did not contain a single viable legal claim. In a declaration submitted in Mr. Kell's federal habeas proceedings, PCR counsel stated that he was unprepared and did not investigate, and that these decisions were born out of inexperience, not strategy. The federal district court—the only court that has considered PCR counsel's performance—found that he failed to provide effective assistance of counsel. The federal court specifically noted that 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." (Mem. Decision and Order, *Kell v. Benzon*, No. 2:07-CV-359-CW (D. Utah Nov. 16, 2017), ECF No. 258 at 5 (Aplt. Reply Br., Addendum 1 at 5).[1]) From a practical perspective, counsel effectively waived Mr. Kell's PCR proceedings. But because counsel filed *something*, Mr. Kell has thus far been without a remedy.

[1] References to the record on appeal in the current proceedings will be designated as "PCR II ROA" followed by a page number. Mr. Kell's Opening Brief in this Court will be cited as "Aplt. Br." and his Reply Brief as "Aplt. Reply Br." Respondent's Answering Brief will be cited as "Appellee Br." The parties' supplemental briefs will be cited as "Aplt. Supp. Br." and "Appellee Supp. Br."

The lower court in these proceedings did not directly evaluate PCR counsel's performance under an ineffective assistance of counsel standard. The court nonetheless found that "[a]ll of the facts necessary to support the claim are contained in juror declarations," that there was no allegation that the jurors could not have been interviewed during the initial PCR proceedings, and that therefore "the claim could have been raised in the initial petition." (PCR II ROA 908–09.) The court further found that under the Post-Conviction Remedies Act ("PCRA"), "Mr. Kell had until November 2, 2004, to file his claim . . . Therefore, pursuant to 78B-9-107(2)(c), the court concludes that the claim is barred by the statute of limitations." (PCR II ROA 910.)

Respondent attempts to obscure PCR counsel's default of Mr. Kell's claim by contending that subsequent counsel engaged in intentional delay. No court has made any such finding. Respondent's assertion is unsupported by the record in this case and directly contradicted by the findings of the federal district court, which found "*no indication* that Kell has engaged in intentional or abusive dilatory litigation tactics." (Aplt. Reply Br., Addendum 1 at 11) (emphasis added). In support of this finding the federal court noted:

> Kell noted in his Amended Petition that he would be filing a motion for a stay pursuant to *Rhines* at the appropriate time. Two 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. ECF No. 97. Motions related to discovery and evidentiary hearing were resolved on June 23, 2017 (ECF No. 238), and counsel filed this motion on August 28, 2017. The court does not find Kell to have engaged in intentional or abusive dilatory litigation tactics.

Id. Counsel followed the litigation course laid out by the court and agreed to by Respondent. And Respondent was indisputably on notice of both the substance of the claim and Mr. Kell's intention to raise the claim in state court at the time designated by the stipulated Case Management Schedule.

Nor would filing in state court earlier have had any impact on the status of Mr. Kell's claim under the PCRA. The claim still would have been barred under both the time and procedural bars. *See* Utah Code Ann. §§ 78B-9-106, 78B-9-107. Further, Respondent was not prejudiced in any way. The substance of Mr. Kell's claim is unchanged from his 2013 federal habeas petition, in which he indicated that he would be seeking permission to return to state court "at the appropriate time." Thus, Respondent knew the substance of the allegations it would need to rebut, and that Mr. Kell would be seeking to litigate the claim in a state forum. Respondent had all of the information it needed to conduct any investigation or take any other steps to procure evidence to refute Mr. Kell's allegations that the trial judge entered the jury room during the penalty phase deliberations and gave a supplemental instruction to jurors that unconstitutionally shifted the burden to Mr. Kell to prove his life should be spared, with no notice to Mr. Kell or his counsel.

Respondent suggests an accrual date for Mr. Kell's claim that bypasses PCR counsel's representation and characterizes that accrual date as "generous." (*See, e.g.*, Appellee Br. at 4, 16, 17.) But rather than being generous, this is merely the accrual date that serves Respondent's purposes the best now, allowing Respondent to pretend that the ineffective assistance of PCR counsel does not exist. Furthermore, even the more

"generous" accrual date would only impact the time bar under § 78B-9-106. The claim would still be procedurally barred under § 78B-9-107 because, as the court below found, the claim could and should have been raised in Mr. Kell's previous PCR proceedings. (PCR II ROA 909.) Even if federal counsel were negligent in pursuing relief in state court, under any conception of fundamental fairness, that negligence cannot erase the constitutionally ineffective assistance of counsel that Mr. Kell received in his initial PCR proceedings, particularly when that negligence had no impact on the legal status of Mr. Kell's claim.

Mr. Kell does not argue that the Court should create a rule that petitioners can raise their claims at any time with no regard for the statutory deadlines. But Mr. Kell's case presents unique circumstances that are unlikely to repeat themselves. The amended petition that was filed in Mr. Kell's initial PCR proceedings was so superficial as to be effectively meaningless. Mr. Kell's underlying claim is well-supported and raises a troubling violation of his constitutional rights. To be sure, the time that elapsed during Mr. Kell's federal habeas litigation before he filed his petition in state court is a factor the court should consider. But it is not the only factor. *Codianna v. Morris*, 660 P.2d 1101, 115 (Utah 1983) (Stewart, J., concurring). Mr. Kell was sentenced to death, therefore the consequences of refusing to consider the merits of his claim are particularly dire, both for Mr. Kell personally and for the legitimacy of the state's capital punishment system as a whole. *See People v. Germany*, 674 P.2d 345, 349 (Colo. 1983) ("[U]nconstitutional convictions, in addition to being of suspect reliability, abridge the very charter from which the government draws its authority to prosecute anyone."). Based on the totality of the circumstances in

this case, failure to review the merits of Mr. Kell's claim would violate his constitutional rights. The Court should therefore exercise its constitutional writ authority to grant merits review of Mr. Kell's claim.

ARGUMENT

I. Failure to review Mr. Kell's claim would violate his constitutional rights

In *Patterson*, this Court held that it may review a petition that would be barred under the PCRA "when failure to do so would violate a petitioner's constitutional rights." *Patterson v. State*, 2021 UT 52, ¶ 194. In order to determine if failure to review a petitioner's claim would violate his or her constitutional rights, the Court must consider the equities of the particular circumstances of the case. *See Currier v. Holden*, 862 P.2d 1357, 1371 (Utah Ct. App. 1993). As noted by this Court and others in the past, the inquiry into whether failure to review a claim would violate a petitioner's constitutional rights in a particular case must include consideration of the meritoriousness of the claim and the petitioner's justification for not complying with the statutory bar, which encompasses whether the petitioner has engaged in intentional delay. *See Julian v. State*, 966 P.2d 249, 254 (Utah 1998); *Hurst v. Cook*, 777 P.2d 1029, 1037 (Utah 1989); *Gardner v. Galetka*, 2004 UT 42, ¶ 16; *Adams v. State*, 2005 UT 62, ¶ 16; *Chess v. Smith*, 617 P.2d 341, 344 (Utah 1980); *Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979); *Currier*, 862 P.2d at 1371.

Respondent repeatedly suggests that these equities have already been balanced by the PCRA, which provides an avenue for relief "so long as the petitioner does not unreasonably delay" and "uses reasonable diligence." (Appellee Supp. Br. at 6, 8.) This

argument implies that if there is a reasonable explanation for the failure to comply with the statutory bars, the bars will be excused. But the current PCRA does not permit "reasonable" delay. There is no consideration under the PCRA of whether delay or failure to include a claim in an earlier petition is reasonable or unreasonable. Under the PCRA, there is no way to account for the ineffective assistance of post-conviction counsel, newfound evidence of racial animus on the part of a participant in the trial, the effects of a global pandemic, excusable negligence, or any other form of reasonable cause for delay that may arise. This is why the Court made clear in *Patterson* that the Court's independent writ authority is not coterminous with the PCRA and "the Legislature can neither expand nor diminish" that independent authority. *Patterson*, 2021 UT 52, ¶ 144.

Of course, as illustrated by the variety of circumstances in the cases cited herein, it would be impossible for a statute to include every possible factual scenario where fundamental fairness and the constitution would require a claim to be heard. This is why courts in this jurisdiction and others have repeatedly found that there must be a safety valve to allow courts to exercise discretion and review a claim for relief pursuant to a writ of habeas corpus where fairness and justice require. In *Patterson*, this Court agreed. Mr. Kell's case satisfies this standard.

A. Strict adherence to the PCRA would result in a suspension of the writ in this case

1. The PCRA does not permit judicial discretion in reasonable circumstances

The parties agree that the Suspension Clause requires the courts to have discretion to review claims and grant relief in appropriate circumstances. (*See* Appellee Supp. Br. at 8; Aplt. Supp. Br. at 3–4.) Mr. Kell also agrees with Respondent's repeated assertions that reasonableness is an appropriate standard to assess whether a petitioner's diligence should excuse his failure to comply with the inflexible time and procedural bars of the PCRA. (*See* Appellee Supp. Br. at 6, 8 (petitioner must exercise "reasonable diligence"), 25 (limitations must accommodate "reasonably diligent petitioner"), 33 (time and procedural bars "allow all reasonably diligent petitioners to vindicate their substantive rights").)

The parties disagree, however, as to whether the PCRA in fact accounts for reasonableness, as Respondent suggests. (*But see* Appellee Br. at 16 ("The statute allows no exceptions to the time bar.").) Respondent argues that the PCRA provides "tremendous flexibility around when claims accrue." (Appellee Supp. Br. at 10–11 (citing Utah Code Ann. § 78B-9-107(2)(a)–(d)).) But all the accrual dates in § 78B-9-107(2)(a)–(d) actually provide is that if a petitioner is still litigating his direct appeal, the state will not require him to litigate in two forums at the same time. This, of course, also serves the interests of the State in not expending resources for litigation that may prove to be unnecessary if the petitioner obtains relief in his direct appeal.

Respondent also cites subsection (2)(e), allowing one year from the time "petitioner knew or should have known" of the basis for a claim, as allowing flexibility in when a claim accrues. While subsection (2)(e) prevents the statute from imposing entirely strict liability, the "should have known" language does not allow a court to account for things like constitutionally ineffective assistance of PCR counsel. It also does not alleviate the risk that important constitutional violations will be dismissed as barred where what the petitioner "should have known" is a close call. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 442 (2000); *Ellis v. Harrison*, 947 F.3d 555, 557–58 (9th Cir. 2020) (Nguyen, J., concurring); *Tillman v. State*, 2005 UT 56.

Respondent also notes that § 78B-9-107(2)(f) allows a petitioner one year to bring claims under § 78B-9-104(1)(g) when a "new rule" is announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals. (Appellee Supp. Br. at 11.) Section 104(1)(g), however, only provides for relief for a new rule that "was dictated by precedent existing at the time the petitioner's conviction or sentence became final." Utah Code Ann. § 78B-9-104(1)(g)(i). But a truly new rule, by definition, was *not* dictated by precedent existing at the time it was decided. *Teague v. Lane*, 489 U.S. 288, 301 (1989). Where the Supreme Court announces a rule that *was* dictated by precedent at the time the petitioner's conviction became final, *see, e.g.*, *Lynch v. Arizona*, 578 U.S. 613 (2016), the claim was already available to the petitioner under the existing precedent, *e.g.*, *Simmons v. South Carolina*, 512 U.S. 154 (1994). Although some new rules may allow a petitioner to pursue relief pursuant to Utah Rule of Criminal Procedure 22(e), *see, e.g.*,

Roper v. Simmons, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002), in other circumstances a petitioner would be without recourse under the PCRA, *see, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment right to counsel applies through the Fourteenth Amendment to the states, overruling *Betts v. Brady*, 316 U.S. 455 (1942)). Thus, section 104(1)(g) would not provide a basis for relief on any claim, let alone add flexibility to Utah's time or procedural bars. *See, e.g.*, *Archuleta v. State*, 2020 UT 62, ¶ 29.

The statutory tolling provisions are also limited, accounting only for instances where a petitioner is prevented from filing due to state action, physical or mental incapacity, or due to "force, fraud, or coercion," but then only if the underlying crime was also committed due to "force, fraud, or coercion." Utah Code Ann. § 78B-9-107(3)(a). Respondent argues that the Suspension Clause is not implicated because "Utah's tolling provisions mirror equitable tolling in federal habeas cases." (Appellee Supp. Br. at 12 n.4.) Although federal courts may grant equitable tolling for reasons similar to those allowed under the PCRA, federal courts also have significant discretion to grant equitable tolling in myriad other circumstances that are not permitted by the statutory exceptions in the PCRA. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 645 (2010) (holding 28 U.S.C. § 2244(d) "is subject to equitable tolling in appropriate cases" and noting that "a nonjurisdictional federal statute of limitations is normally subject to a rebuttable presumption in *favor* of equitable tolling" (citation and quotation marks omitted, emphasis in original)); *Ramos-Martinez v. United States*, 638 F.3d 315, 324 (1st Cir. 2011) (noting

equitable tolling determination depends "on the totality of the circumstances"); *Prieto v. Quarterman*, 456 F.3d 511, 514–15 (5th Cir. 2006) (granting equitable tolling where the district court granted the petitioner's motion for an extension of time to file the petition and set the due date after the deadline under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA")); *Jimenez v. Butcher*, No. 19-50499, 2021 WL 968629, at *2 (5th Cir. Mar. 15, 2021) (granting tolling where post-conviction attorney mislead petitioner to believe petition was being filed); *Williams v. Birkett*, 895 F. Supp. 2d 864, 871 (E.D. Mich. 2012) (granting equitable tolling where law on statutory tolling changed during pendency of petitioner's case); *Butler v. Walsh*, 846 F. Supp. 2d 324, 331 (E.D. Pa. 2012) (equitable tolling granted where prisoner did not have access to habeas forms); *McWhorter v. Davis*, No. 1:20-cv-00215-JLT, 2022 WL 4124889 (E.D. Cal. Sept. 9, 2022) (granting equitable tolling due to the Covid-19 pandemic); *United States v. Duval*, 957 F. Supp. 2d 100, 118 (D. Mass. 2013) (granting tolling where pro se petitioner was confused by instructions from appellate court); *Boyette v. Chappell*, No. 13-cv-04376-WHO, 2014 WL 1248065 (N.D. Cal. Mar. 25, 2014) (granting equitable tolling where there was a delay in appointing counsel in federal habeas proceedings); *Usher v. Mackie*, No. 2:14-cv-163, 2014 WL 5782680, at *3 (W.D. Mich. Nov. 6, 2014) (granting equitable tolling based on combination of factors including petitioner's "ignorance, pro se status, limited literacy, and a series of transfers during which the petitioner had no access to legal materials").

Utah's procedural bars, contained in § 78B-9-106, similarly do not allow for the exercise of judicial discretion. Under the language of the statute, a petitioner "is not eligible

for relief" on any ground that could have been but was not raised at trial, on appeal, or in a previous request for post-conviction relief, unless the failure to do so was due to the ineffective assistance of trial or appellate counsel, or force, fraud, or coercion. Utah Code Ann. §§ 78B-9-106(1)(c)–(d), (3)(a)–(b). Respondent argues these provisions "prevent[] petitioner from not seeking relief as a strategic decision, or as a form of tactical delay, and then later attempting to seek relief in a post-conviction petition" and that even under the previous standard for reviewing a claim, claims that could have been raised previously were barred absent a showing of good cause. (Appellee Supp. Br. at 13–14, 17–18 (discussing *Hurst v. Cook*, 777 P.2d 1029 (Utah 1989).) But, as Mr. Kell noted in his Supplemental Brief, it is the presence of something like a good cause exception—the ability of courts to exercise discretion—that has been an essential component in many courts finding that time or procedural bars do not offend the Suspension Clause. (*See* Aplt. Supp. Br. at 7–8, 20–23.) Despite Respondent's repeated implications that the PCRA allows the merits of a claim to be heard where there is "reasonable diligence" on the part of a petitioner, the PCRA contains no such exception where a claim is defaulted because of delay that was not strategic or tactical, but in fact was reasonable and should be excused.

Respondent also contends that the *Hurst* exceptions are now covered by exceptions in the PCRA and related rules. (Appellee Supp. Br. at 19.) Respondent states that *Hurst* mentioned cases involving (1) ineffective assistance of counsel, (2) discovery of new exculpatory evidence, (3) fraud committed on the court by the knowing use of false evidence, (4) an illegal sentence, (5) denial of the right to appeal, and (6) challenges to

guilty pleas.[2] (Appellee Supp. Br. at 19.) But what the Court in *Hurst* explicitly stated could establish good cause was much broader, including: "(1) the denial of a constitutional right pursuant to new law that is, or might be, retroactive, (2) new facts not previously known which would show the denial of a constitutional right or might change the outcome of the trial, (3) the existence of fundamental unfairness in a conviction, (4) the illegality of a sentence, or (5) a claim overlooked in good faith with no intent to delay or abuse the writ." *Hurst*, 777 P.2d at 1037 (internal citations omitted).[3] In later cases the Court made clear that the factors identified in *Hurst* were not intended to be exhaustive. *See Candelario v. Cook*, 789 P.2d 710, 712 (Utah 1990). *Hurst* contained a safety valve that the current PCRA prohibits, where judicial discretion may be exercised when a factual scenario arises that is not covered by the statutory bars in the current PCRA, but it would be fundamentally unfair for the court not to consider the merits of a claim.

The *Hurst* Court also cited as examples of appropriate exercises of the writ authority cases that would now be barred under the PCRA. *See, e.g.*, *Helmuth v. Morris*, 598 P.2d

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[2] Although Respondent did not provide a citation for which cases cited in *Hurst* it was referring to, the categories listed appear to be from cases mentioned in footnote 6 of the Court's opinion. *See Hurst*, 777 P.2d at 1036 n.6.

[3] Regarding the "fundamental unfairness" factor the Court noted that it need not rise to the level of a violation of the Due Process Clause. Rather, "[t]here can be occasions where a trial was infected with a fundamental unfairness that would not meet federal due process standards. By fundamental unfairness, we do not mean that the whole trial was fundamentally unfair. Such a conclusion would, of course, invoke the due process clause. What we do mean is an unfairness that is short of due process that nevertheless raises a fair question as to whether a new trial should be granted." *Hurst v. Cook*, 777 P.2d 1029, 1037 n.10 (Utah 1989).

333, 334 (Utah 1979) (petition based on claim that guilty plea was not knowing and voluntary); *Brown v. Turner*, 440 P.2d 968 (Utah 1968) (petitioner who elected to represent himself argued he was not informed of right to counsel or consequences of guilty plea)[4]; *State v. West*, 765 P.2d 891 (Utah 1988) (petitioner pled guilty to second-degree felony, unaware that crime had been changed to third-degree felony); *see also, e.g.*, *Parsons v. Barnes*, 871 P.2d 516, 519 (Utah 1994) (post-dating *Hurst* and reviewing claim that could have been raised on direct appeal because "'procedural default is not always determinative of a collateral attack on a conviction' where, as in this case, 'it is alleged that the trial was not conducted within the bounds of basic fairness or in harmony with constitutional standards.'" (quoting *Hurst*, 777 P.2d at 1036)).

Indeed, many of the cases where this Court exercised its discretion under its writ authority, including those where the Court found constitutional violations mandated relief, would be barred based on the inflexible language of the current PCRA. For example, in *Tillman v. State*, 2005 UT 56, the petitioner argued in a second post-conviction petition that the prosecution had violated its *Brady* obligations by failing to disclose transcripts and

[4] Respondent asserts that "challenges to guilty pleas" are accommodated under the PCRA because they can be raised under § 78B-9-104(1)(a) or § 77-13-6, if timely filed. (Appellee Supp. Br. at 19.) Of course, the availability of a ground for relief under § 78B-9-104 does not provide any flexibility to the time or procedural bars in §§ 78B-9-106 and 78B-9-107. Furthermore, in order for a motion to be timely under § 77-13-6 it must be filed before the defendant is sentenced. Utah Code Ann. § 77-13-6(2)(b); *see also* Utah Code Ann. § 77-13-6(2)(c) ("Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.").

recordings of interviews of the state's main witness, who was also involved in the crime, that appeared to have been conducted shortly before trial. *Tillman*, 2005 UT 56, ¶ 5. Tillman argued he could not have raised the claim earlier because the state did not disclose the recordings, but the state countered that the prosecution had maintained an open file and Tillman's counsel could have uncovered the recordings at any point previously had they reviewed the file, which they admittedly did not do. *Id.* at ¶ 17.

The Court noted that both the common law and the PCRA prohibited a petitioner from raising a claim that could have been raised in a prior post-conviction proceeding. *Id*. at ¶ 20. The Court declined to decide if the claim could have been raised earlier, however, and noted that the Court had "consistently recognized exceptions to this general rule in 'unusual circumstances' where 'good cause' excuses a petitioner's failure to raise the claim earlier." *Id*. The Court further noted 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 ¶ 21 (quoting *Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979)). The Court concluded that "even if we agree with the State that Tillman technically could have filed his current *Brady* claims in one of his previous petitions for post-conviction relief" it was "persuaded that Tillman's *Brady* claim was overlooked in good faith with no intent to delay or abuse the post-conviction process." *Id*. at ¶¶ 23, 25.

Although Tillman obtained relief on his *Brady* claim, it is not certain that the merits of Tillman's claim would have been considered but for the Court's ability to exercise its

discretion to review his claim. Although the recordings were not turned over to the defense, the Court noted that the prosecution had maintained an open file and that counsel failed to review that file during any of the prior proceedings. The Court also noted repeatedly that much of what was contained in the recordings was cumulative of evidence that had been presented at trial and found that "the suppressed transcripts do not contain any earthshattering revelations." *Id*. ¶ 92. Nonetheless, the Court ultimately concluded that several aspects of the transcripts were material because, although they did not undermine confidence in Tillman's conviction, they would have "aided Tillman's efforts to mitigate his moral culpability" and undermined confidence in the jury's decision to sentence Tillman to death. *Id.* at ¶ 94.

In *Adams v. State*, 2005 UT 62, the petitioner alleged ineffective assistance of counsel at trial and on appeal based on his attorneys' failure to raise a voluntary intoxication defense, but he filed his petition after the statute of limitations had expired. *Adams*, 2005 UT 62, ¶¶ 4, 12. The state argued that the statute provided "generous opportunities" to correct errors and that the interests of justice exception should apply only in "truly extraordinary circumstances," such as when there is new DNA evidence that shows actual innocence. *Id.* at ¶ 13. The Court disagreed, finding that the analysis of whether a petitioner had met the interests of justice exception should "involve examination of both the meritoriousness of the petitioner's claim and the reason for an untimely filing." *Id.* at ¶ 16. The Court stated, "We do not establish as a hard and fast rule that a petitioner must be able to demonstrate both that his claim is meritorious and that he was justified in

raising it late; rather, we expect that the district court will give appropriate weight to each of those factors according to the circumstances of a particular case." *Id.* at ¶ 16. The Court remanded the case to the district court for consideration of the merits of Adams's claim. Contrary to Respondent's assertions, relying solely on the current rigid PCRA would mean that the Court would have been without any discretion to review the merits of Adams's claim. *See* Utah Code Ann. §§ 78B-9-107, 78B-9-106(e).

The petitioner in *Julian v. State*, 966 P.2d 249 (Utah 1998), similarly filed his petition over six-and-a-half years after his conviction was affirmed on direct appeal. *Id.* at 250. The petition raised claims of improperly admitted testimony and ineffective assistance of trial and appellate counsel, and thus would not have satisfied any of the tolling provisions under § 78B-9-107. The Court nonetheless granted merits review, noting that "when a court grants relief pursuant to a habeas corpus petition, it does so on the ground that the petitioner has been wrongfully incarcerated. . . . Therefore, if the proper showing is made, the mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights, 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) (finding, where petitioner missed the one-year statute of limitations, that "proper consideration of meritorious claims raised in a habeas petition will always be in the interests of justice").[5]

[5] Respondent argues that the *Julian* court was primarily concerned with cases of innocence,

Many other examples exist in the caselaw of meritorious claims on which petitioners obtained relief, but which would likely be unreviewable under the time or procedural bars of the current PCRA. *See, e.g.*, *Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (per curiam) (evidence that juror harbored racial animus discovered seven years after trial); *Williams v*, 529 U.S. at 442 (evidence that juror concealed disqualifying information during voir dire not discovered until federal habeas proceedings); *Foster v. Chatman*, 578 U.S. 488 (2016) (evidence prosecution violated *Batson v. Kentucky*, 476 U.S. 79 (1986), discovered through open records request after state post-conviction proceedings had concluded); *In re Gay*, 457 P.3d 502, 525 (Cal. 2020) (relief granted on second habeas petition where, among many errors, trial attorney fraudulently induced petitioner to retain him and initial petition identified "some but not all of the deficiencies" alleged in the second petition); *Ellis*, 947 F.3d at 557–58 (Nguyen, J., concurring) (evidence that defense attorney harbored racist views uncovered 12 years after trial).

Respondent also contends that because the Court previously had the discretion to review cases presenting an obvious injustice in the past does not mean the elimination of that discretion violates the Suspension Clause. (Appellee Supp. Br. at 14–15.) Contrary to

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which is now addressed by other statutes. (Appellee Supp. Br. at 20.) The Court mentioned innocence only once, as an example of the worst outcome that could occur if a statute of limitations were applied without judicial discretion. *Julian*, 966 P.2d at 254. Julian himself did not assert his innocence in his appeal, nor did the Court in any way suggest that innocence cases were its only or primary concern. *Id*. ("Under our reasoning in this case, proper consideration of meritorious claims raised in a habeas corpus petition will *always* be in the interests of justice.").

Respondent's assertion, the pre-PCRA cases are important because many were decided pursuant to this Court's independent constitutional writ authority, which, as the Court made clear in *Patterson*, "the Legislature can neither expand nor diminish." *Patterson*, 2021 UT 52, ¶ 144. In all the cases discussed above, the courts relied on discretion either in the applicable statute or through the common law to correct an "obvious injustice or a substantial and prejudicial denial of a constitutional right." *Dunn v. Cook*, 791 P.2d 873, 876 (Utah 1990).

Respondent instead suggests that this Court's independent authority is curtailed by the PCRA, pointing to the Court's statement that it has exercised that power "in total harmony with the PCRA." (Appellee Supp. Br. at 4–5 (quoting *Patterson*, 2021 UT 52, ¶ 174).) But the Court was simply explaining why the statutory schema resulted in its independent writ authority being "largely hidden from view," *Patterson*, 2021 UT 52, ¶ 174, not suggesting that the PCRA set the limits of its authority over the writ. Indeed, the holding of *Patterson* would be meaningless if that language meant the Court were prevented from exercising discretion to grant review in any case that would be barred under the PCRA.

A suspension of the writ occurs where procedural requirements "so impair the mechanisms for postconviction relief as to deny persons a meaningful opportunity to attack the constitutionality of prior convictions." *People v. Wiedemer*, 852 P.2d 434 (Colo. 1993). As this Court noted in many of its pre-PCRA cases, this inquiry must address the circumstances of the particular case. *See Gallegos v. Turner*, 409 P.2d 386, 387 (Utah

1965) (finding review appropriate where there are "such circumstance[s] that it would be wholly unconscionable not to re-examine the conviction"). Thus, the strength of Mr. Kell's claim is important, as is the fact that because of his PCR counsel's grossly negligent representation and the state's failure to provide any remedy for it, he has been denied a meaningful opportunity to have his claim heard. Failure to review Mr. Kell's claim under the Court's independent writ authority would violate Mr. Kell's rights under the Suspension Clause.

2. Other states have similarly required courts to retain discretion to issue the writ in order to satisfy the Suspension Clause

Respondent contends that Mr. Kell "cherry-picks language" from cases from other jurisdictions to support his arguments and fails to compare them with Utah's "flexible time and procedural bars." (Appellee Supp. Br. at 22.) For example, Respondent implies that the exceptions under the Colorado statute at issue in *People v. Wiedemer*, 852 P.2d 424, 437 (Colo. 1993), are comparable to those under the PCRA. (Appellee Supp. Br. at 24.) Respondent is mistaken. The Colorado statute contains several important distinctions. First, under the Colorado law there is no time limit on the ability to bring a collateral attack for convictions for class 1 felonies.[6] Colo. Rev. Stat. Ann. § 16-5-402(1). Second, the statute contains several exceptions that maintained the courts' discretion, including where the petitioner's failure to seek relief within the allotted time "was the result of

[6] At the time *Wiedemer* was decided, the death penalty was a sentencing option for class 1 felonies. Colorado abolished the death penalty on March 23, 2020. *See* Colo. Rev. Stat. Ann. § 16-11-901.

circumstances amounting to justifiable excuse or excusable neglect." Colo. Rev. Stat. Ann. § 16-5-402(2)(d). This clause acts as a safety valve which Utah's current PCRA lacks.

The Colorado Supreme Court in *Wiedemer* found that it was the presence of "exceptions for those situations where [the limitation periods'] reasonableness might be drawn into question" that rendered the statute constitutional. *Wiedemer*, 852 P.2d at 437. In explaining the importance of these exceptions, the court noted the practical reason the court must maintain discretion: "Because the strength of the individual and societal interests implicated in the insulation of convictions from collateral attack will vary with every situation in which section 16–5–402 is invoked, any attempt to define precisely the meaning of the exception would be unworkable and unwise." *Wiedemer*, 852 P.2d at 441.

Contrary to Respondent's assertions, California law also affords greater flexibility in determining whether a "second or subsequent" petition can be addressed on the merits than does Utah's PCRA. Respondent is correct that in *In re Friend* both the petitioner and the state agreed that a petition was not "successive" if it raised claims that could not have been raised in an earlier petition. *In re Friend*, 489 P.3d 309, 316 (Cal. 2021). As the court explained in the following paragraphs, however, that is because "successiveness restrictions have a long history in habeas corpus law, and the concept of successiveness has acquired a particular meaning in that context." *Id.* The court thus retained discretion to determine whether a petition (or claim) fell under the particular meaning of "successive" under the court's caselaw. Under California law a claim might be filed in a second or subsequent petition, but it is not considered "successive" if, for example, the factual basis

of the claim was previously unknown and the petitioner had no reason to believe the claim could be made; the claim is based on a change in the law; or where failure to raise the claim was due to the ineffective assistance of prior habeas counsel. *Id.* at 317 (citing *In re Clark*, 855 P.2d 729 (Cal. 1993)). As the California court explained, "When we have barred a claim as "successive," it is because we have concluded that the claim was omitted from an earlier petition *without justification*, and its presentation therefore constitutes abuse of the writ process."[7] *Id.* at 318 (emphasis added). California law thus maintains a safety valve that permits merits review of a claim where there is a reasonable explanation for delay in raising it. Utah's inflexible PCRA maintains no such safety valve.

Respondent also cites several cases in footnote 5 of its supplemental brief to argue that other states have found that statutes of limitations do not violate the Suspension Clause. (Appellee Supp. Br. at 22 & n.5.) But in most of the cases Respondent cites, the state law allows for greater flexibility and discretion than the Utah PCRA. Respondent cites *Carson v. Hargett*, 689 So. 2d 753, 755 (Miss. 1996), but that case did not hold that a statute of limitations did not violate the Suspension Clause. The Mississippi court simply noted that the state's argument that the Post-Conviction Collateral Relief Act abolished the writ of

[7] The process in California was a two-step inquiry to determine if a petitioner could obtain review of a second-or-subsequent petition. As discussed above, if the petitioner could provide a "justification," the petition was not considered "successive" at all. However, even if the petition were deemed "successive," the court could still review it if the petitioner satisfied certain exceptions. *See In re Clark*, 855 P.2d 729, 734 (Cal. 1993). The court's decision in *In re Friend* addressed the impact of a new statute only on the first step of that inquiry.

habeas corpus was incorrect. *Id.* Mississippi's three-year statute of limitations in fact has several exceptions, including that evidence that was not "reasonably discoverable" at trial would have "caused a different result in the conviction or sentence." Miss. Code Ann. § 99-39-5.

The Kentucky case Respondent cites, *Commonwealth v. Marcum*, 873 S.W.2d 207 (Ky. 1994), also did not hold that a statute of limitations did not suspend the writ. *Marcum* addressed which of two available procedures for post-conviction relief—one through habeas corpus and one through a procedure instituted by rule of court—was properly applied to the petitioner's case and how courts should balance when a petitioner was entitled to one procedure versus the other. *See id.* at 210 ("Thus the issue here involves the balance between the Commonwealth's need for the orderly procedure as provided for by RCr 11.42 and the prisoner's right to an expeditious release through habeas corpus when it is patently obvious he is being unlawfully detained."). The court noted that the Kentucky Court of Appeals had held in an earlier case that in order for a petition for habeas corpus to be entertained there must be a "showing of inadequacy of the remedy provided by RCr 11.42." *See Wingo v. Ringo*, 408 S.W.2d 469, 470 (Ky. Ct. App. 1966). In that case, the court of appeals went on to exercise its discretion to nonetheless rule on the petition. *Id.*

In the Missouri case, *White v. State*, 779 S.W.2d 571 (Mo. 1989), the defendant filed a motion to set aside his guilty plea, not a petition for habeas corpus, outside of the statutory time limit. *Id.* at 571; *see also id.* at 572 ("The present action is not a habeas corpus proceeding[.]"). Missouri's postconviction statute does have fairly restrictive limits, *see*

Mo. Stat. § 547.360, however the Missouri Supreme Court has held that the writ of habeas corpus is still available "to raise jurisdictional issues" or where a "manifest injustice" would result. *See, e.g.*, *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000) (quoting *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445–46 (Mo. 1993)). Utah's rigid PCRA lacks any such safety valve that is akin to a "manifest injustice" exception to the statutory bars.

Finally, in *Campbell v. State*, 500 P.2d 303 (Okla. Crim. App. 1972), the Oklahoma Court of Criminal Appeals addressed a question of whether the writ of coram nobis, "previously available on certain narrow grounds involving errors of fact," was absorbed into the state's post-conviction statute and found that it was. *Id.* at 303. Considering the question of whether the same was true for the writ of habeas corpus, the court held that it was not absorbed into the statute. *Id.* The court cited *Lamb v. Page*, 482 P.2d 615 (Okla. Crim. App. 1971), which held "notwithstanding the provisions of [the post-conviction statute], that the privilege of the Writ of Habeas Corpus, being guaranteed by Article 2, Section 10, of the Oklahoma State Constitution, is not suspended or otherwise changed by the statute."[8] *Lamb*, 482 P.2d at 617.

[8] The Oklahoma Court of Criminal Appeals later held that a petitioner must first pursue relief through the statutory process before pursuing a writ of habeas corpus. *See Twyman v. Oklahoma Pardon and Parole Bd.*, 837 P.2d 480, 481 (Okla. Crim. App. 1992). The post-conviction statute bars subsequent applications "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application." 22 Okla. Stat. Ann. § 1086.

Thus, most of the cases relied upon by Respondent in fact support Mr. Kell's argument that discretion to correct constitutional errors is an essential component of compliance with the Suspension Clause.

3. Federal Law

Respondent argues that the holding in *Felker v. Turpin* that the Supreme Court retained its original jurisdiction was entirely separate from its Suspension Clause holding, and that the PCRA also does not strip original habeas jurisdiction from the appellate courts. (Appellee Supp. Br. at 25–26.) Respondent did not address Mr. Kell's explanation that the Supreme Court's Suspension Clause analysis in *Felker*, and as later discussed by the Court in *Boumediene v. Bush*, rests in large part on the Court's finding that the provisions at issue "did not constitute a substantial departure from common-law habeas procedures." *Boumediene v. Bush*, 553 U.S. 723, 774 (2008). The *Felker* Court found that the statute had effectively codified the Court's abuse-of-the-writ doctrine, which the Court noted consists of "a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)).

The law as upheld in *Felker* was thus inclusive of the rules and judicial decisions which continued to provide safeguards and avenues for courts to exercise discretion to grant review based on the circumstances of a particular case. Indeed, the federal system provides safeguards at multiple points during the progression of a federal habeas case. As discussed above, in addition to the statutory tolling provisions in 28 U.S.C. § 2244(d), a

court may grant equitable tolling in the court's discretion, based on the totality of the circumstances. *See Holland*, 560 U.S. at 645; *Ramos-Martinez*, 638 F.3d at 324. Unlike in Utah, federal courts may also exercise discretion to review the merits of a claim that would otherwise be found to be procedurally defaulted where, in the court's view, a petitioner can establish "cause and prejudice" or a "fundamental miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Martinez v. Ryan*, 566 U.S. 1, 17 (2012); *Schlup v. Delo*, 513 U.S. 298 (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992).

The Supreme Court has also construed the bar on "second or successive" petitions not to include second-in-time petitions filed where the first petition was dismissed for failure to exhaust, even though if the terms of the statute were construed literally, such petitions would be barred. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) ("[N]one of our cases … ha[s] ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition."); *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007) ("The phrase 'second or successive' is not self-defining. It takes its full meaning from our case law[.]"). The Court in *Martinez-Villareal* construed the statute, in conformance with pre-AEDPA law and practice, to permit second-in-time, post-exhaustion petitions so as to avoid "far-reaching and seemingly perverse" "implications for habeas practice." *Id.* at 644; *see also Panetti*, 551 U.S. at 942–47 (applying reasoning of *Martinez-*

Villareal to hold that § 2244's successive petition rules do not apply to a second-in-time petition raising incompetency to be executed claim that was not raised in previous petition).

Indeed, over 25 years after the AEDPA was passed, the type of claims that may be exempt from § 2244's "second or successive" requirements is still an issue that is being considered in the Supreme Court and the Courts of Appeals. *See Halprin v. Davis*, 140 S. Ct. 1200, 1200–02 (2020) (statement of Sotomayor, J., respecting the denial of certiorari) (explaining that although habeas corpus petitioner had made "potent arguments" that second-in-time petition should be exempt from successive petition rules because petitioner "never 'had a full and fair opportunity to raise [judicial bias] claim in [his] prior application'" and that Court should "exercise its 'traditional equitable authority' to excuse defaulted claims that do not satisfy § 2244(b)'s literal text," but not dissenting from denial of certiorari because state court proceedings were underway which could potentially render federal procedural question moot); *Storey v. Lumpkin*, 142 S. Ct. 2576, 2577–78 (2022) (statement of Sotomayor, J., respecting the denial of certiorari) ("The facts of this case offer a cautionary tale for those Courts of Appeals that have yet to define what constitutes a restricted 'second or successive habeas corpus application,' 28 U.S.C. § 2244(b)(2), in the context of prosecutorial misconduct."); *Johnson v. Bredesen*, 558 U.S. 1067, 1070 (2009) (statement of Stevens, J., joined by Breyer, J., respecting the denial of certiorari) ("I am persuaded that a *Lackey* claim, like a claim that one is mentally incompetent to be executed, should, at the very least, not accrue until an execution date is set" and accordingly should not be subject to successive petition requirements if brought in second-in-time

petition); *In re Jackson*, 12 F.4th 604, 613 (6th Cir. 2021) (Moore, J., concurring) (concluding that "previously unavailable *Brady*-type claims" should not be subject to § 2244(b)'s restrictions on second-or-successive petitions); *Long v. Hooks*, 972 F.3d 442, 486–88 (4th Cir. 2020) (en banc) (Wynn, J., concurring) (same); *Scott v. United States*, 890 F.3d 1239, 1249 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 842 (2019) (arguing *Brady* claims should be exempt from § 2244's restrictions, but nonetheless following circuit precedent requiring the opposite); *Brown v. Muniz*, 889 F.3d 661, 668 n.5 (9th Cir. 2018) (declining to apply § 2244 to *Brady* claim), *cert. denied sub nom. Brown v. Hatton*, 139 S. Ct. 841 (2019); *Crawford v. Minnesota*, 698 F.3d 1086, 1090 (8th Cir. 2012) (concluding that "at least nonmaterial Brady claims in second habeas petitions" are subject to second-or-successive rules, but question of whether "all *Brady* claims in second habeas petitions are second or successive regardless of their materiality" was "not presented" in the case) *Douglas v. Workman*, 560 F.3d 1156, 1193 (10th Cir. 2009) (declining to apply the § 2244(b)(2) requirements where prosecutor concealed facts underlying petitioner's *Brady* claim until after he filed his first habeas petition).

Finally, the Court in *Patterson* put to rest any question that the scope of the writ in Utah is limited to that established by federal law. *See Patterson*, 2021 UT 52, ¶¶ 83–85.

B. Strict adherence to the PCRA would violate Due Process

Respondent contends that the fact that Mr. Kell may be unable to raise his claim in federal court does not establish a violation of the Due Process clause. Specifically, Respondent argues that "[a] State has no authority to tell the federal court what claims it

must review, nor may the federal court dictate to the state court what it must review." (Appellee Supp. Br. at 32.) Mr. Kell does not contend otherwise. But in addressing claims related to the applicability of the AEDPA bars to relief the Supreme Court has repeatedly discussed the availability of state-court review in assessing whether a restriction violates a petitioner's Due Process rights. In *Boumediene*, the Court noted that "AEDPA applies, moreover, to federal, postconviction review after criminal proceedings in state court have taken place." *Boumediene*, 553 U.S. at 774; *see also McFarland v. Scott*, 512 U.S. 1256, 1261 (1994) (Blackmun, J., dissenting from denial of certiorari) ("State habeas corpus proceedings are a vital link in the capital review process, not the least because all federal habeas claims first must be adequately raised in state court . . . [to avoid being denied in federal court as] procedurally defaulted or waived[.]"). In *Panetti*, the Court urged that "the practical effects of our holdings[] should be considered when interpreting AEDPA." *Panetti*, 551 U.S. at 945. "This is particularly so," the Court found, "when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Id*. (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)). This is precisely the risk that Mr. Kell now faces.

Mr. Kell's Due Process rights were violated when the trial court gave jurors an unconstitutional jury instruction, outside of the presence of Mr. Kell and his counsel and off the record, which shifted the burden of proof to Mr. Kell in the sentencing determination. Three jurors signed declarations regarding this event. (Aplt. Br., Addenda 4, 5, 6.) One juror in particular stated that she was having a difficult time voting for the

death penalty but "felt more comfortable voting for death" after the judge spoke with jurors. (Aplt. Br., Addendum 6, ¶ 2.) The facts supporting this claim have never been disputed.

As a result of PCR counsel's wholly inadequate representation, this claim was neither raised nor investigated in Mr. Kell's initial PCR proceedings. (*See* PCR II ROA 59–61.) In addition to denying Mr. Kell the opportunity for judicial review of this claim in his initial PCR proceedings, the default of this claim in state court almost certainly bars this claim from review in federal court as well. Unless this Court exercises its independent constitutional writ authority to review the merits of this claim, if Mr. Kell is executed it will be with no court having ever addressed this constitutional violation that goes directly to jurors' decisions whether to sentence Mr. Kell to life or death. *See Germany*, 674 P.2d at 353 ("We are satisfied that due process protections . . . prevent the state from employing a system of forfeiture with respect to constitutional claims solely on the basis of a time bar, without affording an 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."); *cf. 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."). The Court should exercise its independent writ authority to prevent this violation of Mr. Kell's Due Process rights.

C. The Open Courts Clause

1. This case is not the appropriate vehicle to reassess the Court's Open Courts jurisprudence

Respondent argues that the Court should overturn *Berry v. Beech Aircraft Corp.* and its progeny because the Open Courts Clause should be understood to offer only procedural protections. (Appellee Supp. Br. at 38.) Although Respondent is correct that *Berry* has been understood to say that the Open Courts Clause provides both procedural and substantive protections, which Mr. Kell noted in his Supplemental Brief (Supp. Br. Aplt. at 13), Mr. Kell's arguments addressed only the procedural protections of the Open Courts Clause (*See* Supp. Br. Aplt. at 13–19; Appellee Supp. Br. at 38). Thus, overturning the substantive protections under *Berry* would not impact the analysis in this case. This case is therefore not an appropriate vehicle to reconsider *Berry*.

2. Respondent's argument for overruling *Berry* is not persuasive

Even if this were an appropriate case to reconsider *Berry*, Respondent's argument is unpersuasive. Respondent argues the text of the Open Courts Clause does not promise that past remedies will continue to exist or bar the legislature from changing the law regarding injury or available remedies. (Appellee Supp. Br. at 40.) But nothing in the Court's analysis in *Berry* implies that it does. The Court in *Berry* explicitly stated that "neither the due process nor the open courts provision constitutionalizes the common law or otherwise freezes the law governing private rights and remedies" and noted that "one of the important functions of the Legislature [is] to change and modify the law that governs relations between individuals as society evolves and conditions require"). *Berry v. Beech*

Aircraft Corp., 717 P.2d 670, 676 (Utah 1985); *see also id.* ("Necessarily, the Legislature has great latitude in defining, changing, and modernizing the law, and in doing so may create new rules of law and abrogate old ones.").

Berry established a two-part framework for addressing claims under the Open Courts Clause: "This two part test first inquires into whether a statute abrogating an existing remedy provides 'an effective and reasonable alternative remedy,' and second, if no alternative remedy is provided, examines 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). Nowhere in the Court's analysis does *Berry* suggest the legislature is *barred* from changing causes of action or remedies. It simply requires that where the legislature chooses to do so, it provides an alternative remedy or, if no alternative is provided, the statute be directed toward solving a clear societal problem in a way that is not "unreasonable or arbitrary."

Respondent suggests a framework for categorizing Open Courts jurisprudence from other states and suggests that Utah is in the "distinct minority of states" that place "significant restrictions on the ability of legislatures to alter the common law and/or statutory rights and remedies."[9] (Appellee Supp. Br. at 52, Addendum C at 7.) But Respondent's categorization is misguided. Many of the states Respondent places into the

[9] This "distinct minority" is comprised of 10 of the 40 states that have an Open Courts Clause. (Appellee Supp. Br., Addendum C.)

three "majority" categories do not apply tests that meaningfully differ from the *Berry* test in either their text or their practical application. For example, Respondent places Wyoming in "category 1," which does "not prevent [the] legislature from changing or eliminating common law rights." (Appellee Supp. Br., Addendum C at 1.) But Wyoming requires laws infringing on common law rights to have a "permissible legislative object." *Greenwalt v. Ram Rest. Corp. of Wyoming*, 71 P.3d 717, 728 (Wyo. 2003). Wyoming also applies a two-part test for establishing an Open Courts violation that is not dissimilar from Utah's: "[F]irst, he must show that he has a well-recognized common-law cause of action that is being restricted; and second, he must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute." *Id.* at 729 (Wyo. 2003); *see also, e.g.*, *Soares v. Gotham Ink of New England, Inc.*, 586 N.E.2d 32, 34 (Mass. App. Ct. 1992) ("[T]he Legislature may enact a statute that abolishes a common law cause of action without providing a substitute remedy if the statute is rationally related to a permissible legislative objective." (quotation marks and citations omitted)).

Most of the remaining states, regardless of how Respondent categorized them, require something in the vein of Utah's test—that the legislature's actions be reasonable, not arbitrary, and/or related to a legitimate legislative purpose. *See, e.g.*, *Cent. Oklahoma Pipeline, Inc. v. Hawk Field Servs., L.L.C.*, 400 S.W.3d 701, 710 (Ark. 2012) ("This court has held that, in determining whether a statute violates article 2, section 13, the proper inquiry is whether the General Assembly's enactment of the statute provides a reasonable means of achieving a permissible public-policy objective."); *Firelock, Inc. v. Dist. Court*

of 20th Judicial Dist., 776 P.2d 1090, 1096 (Colo. 1989) ("Generally, a burden on a party's right of access to the courts will be upheld as long as it is reasonable."); *McIntosh v. Melroe Co., a Div. of Clark Equip. Co.*, 729 N.E.2d 972, 977–78 (Ind. 2000) (Section 12 requires that legislation that deprives a person of a complete tort remedy must be a rational means to achieve a legitimate legislative goal."); *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 508 (Tex. 1997) ("To demonstrate that a statute violates this constitutional guarantee, a litigant must show 1) that the statute restricts a well-recognized common law cause of action, and 2) that the restriction is unreasonable or arbitrary when balanced against the purpose of the statute."); *see also Laney v. Fairview City*, 2002 UT 79, ¶ 32 ("[W]e should rely on our own state history and precedent to determine the purpose and meaning of article I, section 11's protection.").

Regarding this Court's Open Courts jurisprudence in the habeas context, Respondent argues only that the concerns in *Currier*, *Julian*, and *Manning* were simply that the statutes at issue were too short and did not have the current statute's flexible accrual dates. (Appellee Supp. Br. at 37–38.) As discussed above, Respondent fails to explain how the accrual dates make any meaningful difference. Although it requires several lines of statute to account for the various possibilities, the possible accrual dates in § 78B-9-107(2)(a)–(d) account for one thing: time for a petitioner to complete his direct appeal proceedings. No matter where he chooses to end those proceedings, the statute of limitations begins to run the next day and runs for exactly one year. (*See* Appellee Br. at 16 ("The statute allows no exceptions to the time bar.").) Subsection 107(2)(e) provides a

small measure of flexibility, but the specter of whether a petitioner "should have known" of the claim limits that flexibility. *See Tillman*, 2005 UT 56, ¶¶ 17, 20 (state argued that petitioner "should have known" of *Brady* claim during prior proceedings and Court declined to find otherwise, instead exercising its independent discretion to review the claim). Moreover, although the statute of limitations at issue in *Julian* did not contain the explicit provisions regarding accrual, the Court engaged in essentially the same analysis to determine when the statute would have begun to run. *See Julian*, 966 P.2d at 252.

More importantly, the accrual date of a claim was simply not the issue. The Court in *Julian* made clear that because the writ is "the precious safeguard of personal liberty," the courts must have the discretion to review a petition where the interests of justice require. *Id*. at 253–54. In *Currier*, the Court was concerned with the brevity of the statute of limitations, but it was equally concerned with the "lack of any provision for excusable delay." *Currier*, 862 P.2d at 1370; *see also id.* at 1371 (noting the problems of imposing a legal defense of a statute of limitations "regardless of the equities of the particular situation"). In *Manning*, the Court of Appeals confirmed that "[t]he 'interests of justice' escape valve alleviates the concern we expressed in *Currier v. Holden*." *Manning v. State*, 2004 UT App 87, ¶ 16 n.4.

3. Failure to review the merits of Mr. Kell's claim would violate his rights under the Open Courts Clause

Applying the PCRA bars to Mr. Kell's claim would violate his rights under the Open Courts Clause in two ways. First, Mr. Kell has raised a meritorious claim that his

constitutional rights were violated. Under the Court's reasoning in *Julian*, where a petitioner has raised a meritorious claim for relief, which is to say "establish[ed] that he or she has been deprived of due process of law or that 'it would be unconscionable not to re-examine the conviction," barring review of the petition would violate the Open Courts Clause. *Julian*, 966 P.2d at 254.

Second, the court below found that this claim was defaulted during Mr. Kell's initial PCR proceedings, at a time when he had a statutory right to the effective assistance of post-conviction counsel. (PCR II ROA 909.) It is undisputed that that right was violated. As the Court held in *Berry*, "once a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person's interest in the cause of action and the law which is the basis for a legal action becomes vested, and a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgment." *Berry*, 717 P.2d at 676. As Mr. Kell argued in his Opening Brief, (Br. Aplt. at 23–24) neither the Court nor the legislature has clearly established an "effective and reasonable alternative remedy." *Berry*, 717 P.2d at 680. In *Menzies*, the Court found that there was a statutory right to the effective assistance of counsel in PCR proceedings and that Mr. Menzies had satisfied the requirements of Rule 60(b)(6) based on his denial of that right. *See Menzies v. Galetka*, 2006 UT 81, ¶¶ 78, 84, 100. But in Mr. Kell's case the Court found that the ruling in *Menzies* allowing relief on a Rule 60(b) motion applied only to default judgments. *See Kell v. State*, 2012 UT 25, ¶¶ 19–20. The Court further noted that the 2008 amendments to the PCRA eliminated the right to the

effective assistance of PCR counsel and that Rule 60(b) could not be used as a means to "evade the PCRA." *Id*. at ¶¶ 23, 24. The Court below, however, found that "the proper procedure is to raise his argument in a rule 60(b) motion in his initial case and not in a subsequent petition." (PCR II ROA 909.) Mr. Kell has thus been left with no remedy for the violation of his right to the effective assistance of PCR counsel.

As to the second *Berry* factor, neither the courts nor the legislature have identified a "clear social and economic evil" that was eliminated by removing the right to effective assistance of counsel in PCR proceedings. No purpose for removing the right was identified in the legislative debate. *See* S.B.277 Post-conviction Remedies Act Revisions (2008 General Session), Senate Floor debate, Feb. 27 & 28, 2008; House Floor Debate, March 3, 2008 (https://le.utah.gov/~2008/bills/static/SB0277.html (last visited Feb. 27, 2023)). As the court in *Currier* recognized, the right at stake is "an important constitutionally based personal right." *Currier*, 862 P.2d at 1365. Accordingly, failure to review the merits of Mr. Kell's claim would violate his rights under the Open Courts Clause.

II. Mr. Kell has not abused the writ or engaged in intentional delay

Respondent continually repeats the assertion that Mr. Kell has engaged in tactical delay. (Appellee Supp. Br. at 16, 21, 27, 70.) But the record on appeal before this Court does not contain any such finding, nor has any court ever made such a finding. The federal district court—the only court to consider whether federal counsel intentionally delayed bringing this claim—found "*no indication* that Kell has engaged in intentional or abusive dilatory litigation tactics." (Aplt. Reply Br., Addendum 1 at 10 (emphasis added).) The

court noted its conclusion was supported by the fact that counsel had followed the case management schedule, stipulated to by Respondent, and had filed a motion for a stay and for permission to represent Mr. Kell in state court at the time contemplated by the schedule.

The only facts that Respondent actually alleges to support its assertion that Mr. Kell engaged in tactical delay are "passages of time" and that Mr. Kell has had the same counsel all through the relevant events.[10] These allegations are insufficient to establish that Mr. Kell has abused the writ or engaged in tactical delay.

In contrast, Mr. Kell has alleged facts supporting his argument that he has not engaged in any intentional or tactical delay. As discussed above, at the time of Mr. Kell's initial PCR proceedings he had a statutory right to the effective assistance of post-conviction counsel. At no point in these proceedings has there been any dispute that this right was violated when PCR counsel, after failing to conduct any meaningful investigation, defaulted Mr. Kell's claim that the trial judge, with no notice to Mr. Kell or his counsel, gave a supplemental instruction to jurors that unconstitutionally shifted the burden of proof to Mr. Kell to prove that his life should be spared. (*See* PCR II ROA at

[10] Respondent frequently asserts that Jon Sands has been counsel to Mr. Kell from the beginning of federal proceedings. First, the Office of the Federal Public Defender for the District of Arizona did not become involved in Mr. Kell's case until 2009, when the Utah Federal Defender withdrew. Mr. Sands is the Federal Defender for the District of Arizona and, as such, is technical counsel of record to every person represented by the Office of the Federal Public Defender for the district. He has not personally been involved in the litigation of this case. Counsel in Mr. Kell's federal proceedings have in fact changed several times throughout the proceedings. (*See Kell v. Benzon*, No. 2:07-CV-359-CW, ECF Nos. 33, 79, 105, 186, 235, 240.)

731–32 (Respondent arguing that Mr. Kell's argument that PCR counsel was ineffective "merely proves that Kell could have brought the claim previously" and that Mr. Kell's allegations are "legally irrelevant").)[11] The only court to review PCR counsel's representation found that 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." (Aplt. Reply Br., Addendum 1 at 5.)

The court below in these proceedings found that PCR counsel could have raised this claim in Mr. Kell's initial PCR proceedings. Specifically, the court found that "[a]ll of the facts necessary to support the claim are contained in juror declarations. Mr. Kell has not alleged that he was unable [to] interview the jurors in time to include the claim in the initial petition or that jurors were uncooperative. Accordingly, the court concludes that the claim could have been raised in the initial petition." (PCR II ROA 908–09.) Regarding the time bar, the district court found that "Mr. Kell had until November 2, 2004, to file his claim. Mr. Kell has not shown by a preponderance of the evidence that he or his counsel, in the exercise of reasonable diligence, could not have interviewed the jurors . . . within a year after his conviction was affirmed on appeal." (PCR II ROA 910.) Thus, under both the time and procedural bars, the district court found that Mr. Kell's claim was barred in 2005.

[11] It was not until briefing in this Court that Respondent suggested that failure to comply with the *time* bar should be attributed to federal habeas counsel (Appellee Br. at 16–17), while simultaneously continuing to argue that the *procedural* bar should be applied because PCR counsel failed to include the claim in Mr. Kell's 2005 PCR petition (Appellee Br. at 18–19).

Respondent's other arguments for precluding relief are unpersuasive. Respondent argues that the cases Mr. Kell cited in his Supplemental Brief to support his argument that review is appropriate in this case warranted review because they were "very important or unique." (Appellee Supp. Br. at 75.) But this argument supports Mr. Kell's point. Under the Court's independent writ authority, it has discretion to review the merits of a claim where the Court finds that it would be constitutionally intolerable to preclude merits review.

The facts Mr. Kell has alleged throughout these proceedings also present unique circumstances. This is a capital case in a state with only seven people on death row. Further, Mr. Kell received shockingly ineffective post-conviction representation, consistent with a concerning pattern in the State, *see Menzies*, 2006 UT 81, ¶¶ 88, 95, at a time when he had a statutory right to effective representation by PCR counsel. To deny review of this claim is to create a situation where Mr. Kell would have been better off if his counsel had not filed a petition *at all*. *Menzies*, 2006 UT 81, ¶ 100; *Kell*, 2012 UT 25, ¶¶ 19–20.

Mr. Kell has also presented a reasonable explanation for not raising this claim earlier in his federal proceedings. Even if this court finds that Mr. Kell's counsel should have raised this claim before they did, the delay is excusable due to the circumstances in this case, including the fact that the state stipulated to the federal case management schedule which contemplated the claim would be filed in state court at the time it was, the fact that Mr. Kell's current counsel is not permitted under the funding scheme for the Administrative Office of the U.S. Courts to exhaust a constitutional claim in state court

without permission from the federal court, and the fact that the federal district court found that Mr. Kell's counsel exercised diligence in presenting this claim to the state court.

The fact that the Court has at times declined to exercise its discretion to grant merits review (*see* Appellee Supp. Br. at 84–85), does not undermine the point that the Court should exercise its discretion under its constitutional writ authority to grant review in this case. *Patterson*, 2021 UT 52, ¶ 194.

CONCLUSION

For the reasons stated herein, and in Mr. Kell's prior briefing, the Court should reverse and remand for consideration of the merits of Mr. Kell's claim.

Respectfully submitted this 28th day of February, 2023.

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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 11,525 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: February 28, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2023, 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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