PUBLIC

In the Supreme Court of the State of Utah

State of Utah, Plaintiff / Appellee v. Keith Scott Brown, Defendant / Appellant	Case No. 20190254-SC

Brief of Appellant

Appeal from Order Denying Motion to Reinstate Defendant's Right to Appeal with Commensurate Right to Effective Assistance of Counsel entered in the Fourth Judicial District, Provo Division, the Honorable Christine Johnson presiding

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Oral Argument Requested
Defendant is Currently Incarcerated

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INTRODUCTION

Codified in Utah Code § 77-13-6, Utah's Plea Withdrawal Statute has always been prone to causing a little constitutional mischief in the criminal justice system.

Originally enacted in 1980 without time restriction, the statute was amended in 1989 to require a criminal defendant to request withdrawal of their plea "within 30 days after the entry."[1] This thirty-day limitation "after entry" was initially interpreted to mean "from the date of the plea colloquy." *See State v. Price*, 837 P.2d 578, 582-84 (Utah Ct.App. 1992). After this time limitation was deemed to be a

[1] Utah Code § 77-13-6(2)(b) (1989).

jurisdictional prerequisite to further review,[2] the language "within 30 days after entry of the plea" was thereafter interpreted to mean 30 days after entry of the final judgment. *State v. Ostler*, 2001 UT 68, ¶ 11, 31 P.3d 528. This interpretation recognized both the jurisdictional nature of the provision and the "absurdity" it would be for a defendant to have their appeal rights on the plea question cut-off before the defendant had even been convicted of the underlying offense. *Id.* ¶ 10. This Court also noted, keenly, that "[a]side from being absurd, such a result might pose constitutional problems." *Id.* ¶ 11. Multiple cases thereafter have noted and affirmed that this thirty-day limit was a procedural bar to plea withdrawals and appeals from guilty pleas.[3]

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[2] *E.g., State v. Johnson*, 856 P.2d 1064, 1067 (Utah 1993).

[3] *E.g., State v. Abeyt*a, 852 P.2d 993, 995 (Utah 1993) ("[T]he plea statute limits defendant's right to withdraw plea to thirty days after entry. Thereafter, the right is extinguished."); *Ostler*, 2001 UT 68, ¶ 10 (stating that if defendant misses thirty-day filing deadline, it "deprive[s] the district court of the power to review a plea"); *State v. Reyes*, 2002 UT 13, ¶ 3, 40 P.3d 630 (holding that court lack jurisdiction to address issue on appeal due to defendant's failure to timely move to withdraw guilty plea within "thirty days after the entry of the plea"); *State v. Merrill*, 2005 UT 34, ¶ 29, 114 P.3d 585 (noting "a jurisdictional bar on untimely motions to withdraw guilty pleas."); *Grimmett v. State*, 2007 UT 11, ¶ 12, 152 P.3d 306 (stating that section 77-13-6 was amended in 1989 to impose strict jurisdictional time limit).

In 2003, the legislature made two major changes. First, the thirty-day deadline was removed and the requirement of withdrawal before final judgment was re-instituted – the amended statute requiring that a motion to withdraw be made "before [a] sentence is announced."[4] Second, a remedy was provided for those who wished to challenge a guilty plea, but who had not filed a motion prior to final judgment – the amended statute requiring that any post-sentencing plea challenges be pursued through the Post Conviction Remedies Act ("PCRA") and the applicable rules of civil procedure.[5] This 2003 change, more than any other moment in the Plea Withdrawal Statute's tortured history, marks the procedural shift that undermined the constitutional rights of the largest category of criminal defendants—those who enter pleas.

Apparently forgetting the "absurdity" and probable constitutional problems created when a defendant's appeal rights are cut-off before final judgment,[6] the jurisdictional nature of the amended statute's

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[4] Utah Code § 77-13-6(2)(b) (2003).

[5] Utah Code § 77-13-6(2)(c) (2003).

[6] *See Ostler*, 2001 UT 68,¶¶ 10-11.

"before sentencing" requirement was consistently reaffirmed.[7] The nail in the proverbial coffin came when this Court held that even ineffective assistance of counsel claims in the context of challenges to guilty pleas were jurisdictionally barred from review on direct appeal.[8]

In 2016, this Court was asked to reconsider its precedent in light of the United States Supreme Court's recognition of the critical nature of the plea bargaining process and the guarantee to effective assistance of counsel during such.[9] This Court also faced the question whether post-conviction remedies satisfy not only Utah's constitutional right to an appeal, but the Sixth Amendment right to counsel on appeal because, unlike a direct appeal, Utah's post-conviction process does not guarantee state-paid counsel to indigent defendants or the effective assistance of that counsel.[10] In partial answer to these questions, this

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[7] *E.g.*, *Grimmett*, 2007 UT 11, ¶ 12.

[8] *E.g., State v. Briggs,* 2006 UT App 448, ¶ 6, 147 P.3d 969; *State v. Rhinehart*, 2007 UT 61, ¶ 14, 167 P.3d 1046; *State v. Harris*, 2011 UT App 274, ¶ 2, 262 P.3d 1209.

[9] *See Missouri v. Frye*, 566 U.S. 134, 144 (2012) ("In today's criminal justice system ... the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."); *Lafler v. Cooper*, 566 U.S. 156, (2012) (noting that "ninety-four percent of state convictions are the result of guilty pleas").

[10] *See Gailey v. State*, 2016 UT 35, ¶ 23, 379 P.3d 1278.

Court held in *State v. Gailey* that, on its face, the Plea Withdrawal Statute does not violate the constitutional right to appeal, but "simply dictates the procedural mechanism for pursuing a claim."[11] This Court did not, however, determine whether the Sixth Amendment right to state-paid counsel and effective assistance of counsel were violated, finding the claim was not ripe.[12]

In a line of cases thereafter, this Court answered some of the questions left open by *Gailey*. In *State v. Rettig*, the Court reiterated that non-compliance with the time strictures in the Plea Withdrawal Statute forecloses review of plea challenges even for plain error and ineffective assistance of counsel.[13] The Court went one step further and found, on its face, "the Plea Withdrawal Statute is not an infringement of the state constitutional right to an appeal because it does not foreclose an appeal but only narrows the issues that may be raised on appeal."[14] In *State v. Algier*, the Court explained, similarly, that the

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[11] *Id.* ¶ 23.

[12] *Id.*

[13] *See State v. Rettig*, 2017 UT 83, ¶ 42, 416 P.3d 520, *cert. denied*, 138 S. Ct. 1563, 200 L. Ed. 2d 757 (2018).

[14] *Id.* ¶ 22.

Plea Withdrawal Statute does not violate the constitutional right to appeal, but simply dictates the procedural mechanism for pursuing a claim that does not altogether foreclose relief.[15]

What neither *Rettig* nor *Allgier* answer, however, is the fundamental question deemed unripe in *Gailey*: Does requiring defendants to pursue review through the post-conviction process violate a criminal defendant's right to appeal with their commensurate right to effective assistance of appellate counsel. *Rettig* also leaves open the question of whether Section 2(b) of the Plea Withdrawawl Statute is constitutional under Utah's separation of powers provisions.

This case now presents these questions head on.

STATEMENT OF ISSUES

1. Is Utah's Plea Withdrawal Statute unconstitutional both on its face and as applied because criminal defendants, like Mr. Brown, who enter pleas but who do not seek to withdraw them are denied their right to appeal any claims with the commensurate right to effective assistance of counsel?

Standard of Review: The constitutionality of a statute is a question of law reviewed for correctness. *See, e.g., Gailey*, 2016 UT 35, ¶ 8; *State v. Nicholls*, 2017 UT App 60, ¶ 13, 397 P.3d 709.

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[15] *See State v. Allgier*, 2017 UT 84, ¶ 23, 416 P.3d 546.

Preservation: Preserved in Mr. Brown's Motion to Reinstate Right to Appeal with Commensurate Right to Effective Assistance of Counsel. *Generally*, R321-353 (including specific argument related to the right to appeal, R342; to due process, R344; to equal protection and uniform operation of law, R 345; and to open courts, R348).

2. Is Subsection (2)(b) of Utah's Plea Withdrawal Statute an unconstitutional assumption of the Court's exclusive rule-making power?

Standard of Review: The constitutionality of a statute is a question of law reviewed for correctness. *See, e.g., Gailey*, 2016 UT 35, ¶ 8.

Preservation: Preserved in Mr. Brown's Motion to Reinstate Right to Appeal with Commensurate Right to Effective Assistance of Counsel. *Generally*, R321-353 (including specific argument related to the separation of powers /rule making powers, R349).

3. If Utah's Plea Withdrawal Statue is unconstitutional, what is an appropriate remedy or procedural mechanism to afford Mr. Brown, and other similarly situated defendants, the opportunity to challenge his conviction on appeal (or in a first review) with the commensurate right to effective assistance of state-paid counsel?

Standard of Review: The Court has authority and mandate to fashion procedural remedies necessary to vindicate constitutional rights. *See, e.g., Manning v. State*, 2005 UT 61, ¶ 26, 122 P.3d 628.

Preservation: Preserved in Mr. Brown's Motion to Reinstate Right to Appeal with Commensurate Right to Effective Assistance of Counsel. *Generally*, R321-353 (including specific request for to fashion remedy, R351-52).

STATEMENT OF THE CASE

This is an appeal of the District Court's denial of Mr. Brown's Motion to Reinstate Defendant's Right to Appeal with Commensurate Right to Effective Assistance of Counsel (herein "Motion to Reinstate Appeal") which was filed under the *Manning* rubric, as no other procedural remedy currently exists.

The relevant factual background is as follows:

During the criminal proceedings, Brown was represented by attorneys Keith Barton and Steven Shapiro, then-of Keith Barton & Associates ("trial counsel"). *E.g.*, R6, Statement of Defendant in Support of Guilty Plea and Certificate of Counsel (prepared by Steven Shapiro of Keith Barton & Associates).

On February 10, 2011, Brown was charged by Information with one count of Sodomy Upon a Child (Count 1), a first degree felony, and two counts of Sexual Abuse of a Child (Counts 2-3), second degree felonies. R1-2.

On February 17, 2011, at his initial appearance, Brown waived a preliminary hearing and entered a plea, pleading guilty as charged. R6-12.

Brown has asserted that the plea was not entered knowingly and voluntarily, and was also the product of ineffective assistance of trial counsel. R22-27, Mr.Brown's Memorandum in Support of Motion for Misplea; R271-280, Mr. Brown's Second Petition for Post-Conviction Relief.

On March 31, 2011, the district court sentenced Brown to concurrent statutory prison terms of ten years to life for the first degree felony and one to fifteen years on each of the second degree felonies. R15-16.

Brown did not seek to withdraw his guilty pleas at any time before sentencing. *See*, *generally,* Docket, case no. 111400408. Brown has asserted that he was unaware of the requirement to do so and that any failure was the product of ineffective assistance of trial counsel. R271-280, Mr. Brown's Second Petition for Post-Conviction Relief.

A notice of appeal was not filed. Brown has asserted that any failure to do so was the product of ineffective assistance of trial counsel. *Id.*

Motion for Misplea/Post-Conviction Proceedings

During the Motion for Misplea and subsequent postconviction proceedings, Brown was represented by attorneys Taylor Hartley, H.D. Gailey, and other attorneys associated on the pleadings (cumulatively "post-conviction counsel"). *E.g.*, R20.

Motion for Misplea

On November 6, 2012, post-conviction counsel filed a pleading entitled a "motion for misplea," seeking to set aside Brown's guilty pleas on multiple grounds, including the ground that when Brown pled guilty, he had just been severely injured in a car accident, was suffering from the trauma related to that accident, and was also under the influence of medication, all circumstances that rendered him unable to knowingly and voluntarily enter a guilty plea. *E.g.*, R20-21, Motion for Misplea; R22-56, Memorandum in Support of Motion for Misplea; R60-62, State's Response to Motion for Misplea; R63-67, Reply to State's Response to Motion for Misplea.

On December 3, 2012, the district court denied the motion. *See* R70-72, Ruling and Order on Motion for Misplea.

Brown appealed. *See State v. Brown*, 2013 UT App 99, 300 P.3d 1289 (per curiam) ("Brown I").

The Utah Court of Appeals summarily dismissed the appeal for lack of jurisdiction, explaining:

> Failure to file a motion to withdraw a guilty plea within the time frame required by section 77-13-6 deprives the trial court and appellate courts of jurisdiction to review the validity of the plea . . . The failure to file a timely motion to withdraw a guilty plea "extinguishes a defendant's right to challenge the validity of the guilty plea on appeal." . . . "Any challenge to a guilty plea not made within the time period specified in [section 77–13–6(2)(b)] shall be pursued under Title 78B, Chapter 9, Post–Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure."

Brown I, 2013 UT App 99, ¶ 3 (citations omitted).

Brown filed a petition for a writ of certiorari in both the Utah Supreme Court and the United States Supreme Court. Both petitions were denied. *See State v. Brown*, 308 P.3d 536 (Utah 2013); *Brown v. Utah*, – U.S.– , 134 S.Ct. 544, 187 L.Ed.2d 370 (2013).

First Petition for Post-Conviction Relief (Case No. 130401823)

On November 25, 2013, post-conviction counsel filed a petition for post-conviction relief under Utah's PCRA in case no. 130401823. *See,* Petition for Post-conviction Relief; Memorandum in Support of Petition for Relief under the Post-Conviction Remedies Act, filed in Case 130401823; R327, Mr. Brown's Motion to Reinstate Appeal (citing same).

The PCRA petition alleged that Brown received ineffective assistance of counsel in violation of the Sixth Amendment in a multitude of ways, including: (1) Mr. Barton and other members of his

firm gave incorrect advice about the consequences of pleading guilty and (2) there were multiple conflicts of interest. *See, generally, id.*

The PCRA petition also alleged violations of Brown's 5th and 6th Amendment rights to due process and effective assistance of counsel in the pre-plea and plea phases of the case, alleging that Brown's plea was not knowingly and voluntarily entered. *See, id.*

On March 21, 2014, without an evidentiary hearing, the district court found, in relevant part, that any challenge to the validity of Brown's plea was procedurally barred because he could have moved to withdraw his plea but did not do so. *See* Ruling Dismissing Plaintiff's Petition in Case 130401823; R328, Mr. Brown's Motion to Reinstate Appeal (citing same).

Brown appealed. *See Brown v. State*, 2015 UT App 254, 361 P.3d 124 ("Brown II"). Brown contended that he received ineffective assistance of counsel and contended that the pleas themselves were unknowing and involuntary. *See, e.g., Brown II*, 2015 UT App 254, ¶¶ 4-5. The Court of Appeals ultimately found that Brown's claims were all procedurally barred, and relevant to the issues here, found the "challenge to the validity of his pleas [was] procedurally barred because he could have, but did not, move to withdraw his pleas." Id. ¶¶ 22-23.

Consequently, the Court of Appeals did not consider the merits of the arguments.

A petition for a writ of certiorari was sought from the Utah Supreme Court and denied. *See Brown v. State*, 366 P.3d 1213 (Utah 2016).

Second Petition for Post-Conviction Relief
(Case No. 130401823;Refiled in Case No. 170401388)

On June 6, 2017, post-conviction counsel filed a second petition. *See* Second Petition for Post Conviction Relief and Memorandum in Support filed in Case no. 130401823; R330 (citing same). The second petition sought to raise the egregious injustice exception the Court of Appeals refused to consider in the first petition. *Id.*

On July 13, 2017, the State filed a motion to dismiss for lack of jurisdiction, arguing that the district court was without authority to adjudicate a second post-conviction petition. The State noted that if Brown wished to proceed with another post-conviction case, he must file a petition under a new case number. *See* Motion and Memorandum in Support of Motion to Dismiss Second Petition for Post-conviction Relief for Lack of Jurisdiction; *also* State's Reply in Support Of Motion to Dismiss Second Petition for Postconviction Relief for Lack of

Jurisdiction filed July 13, 2017 in case 130401823; R330-31 (citing same).

On September 8, 2017, the district court granted the State's motion, noting in a footnote that if Brown wished to proceed with another post-conviction case, he must file a petition as a new case with a new case number. R331 (citing same).

Brown did so, and refiled under a new case number on September 22, 2017, *See* Complaint and Second Petition for Post Conviction Relief in Case 17041388; R331 (citing same).

On October 27, 2017, the State again filed a Motion for Summary Judgment. *See* Motion for Summary Judgment; Memorandum in Support of Motion for Summary Judgment in case 170401388; R332 (citing same). The State argued, in part, that all claims raised were procedurally barred in that they were, or could have been raised previously. *Id.*

On November 6, 2017, post-conviction counsel filed a memorandum in opposition, arguing that material facts were disputed, and pleaded with the court to hold an evidentiary hearing. *See* Memorandum Opposition Motion for Summary Judgment in case 170401388, R332 (citing same). Post-conviction counsel also pointed out that no claims had been previously addressed on their merits. *Id.*

On December 1, 2017, the district court issued its ruling and order granting summary judgment. *See* Ruling and Order on respondent's Motion for Summary Judgment in case 170401388, R332-33 (citing same).

Brown did not appeal from this order. *See, generally*, Docket in case 170401388, R333 (citing same).

Motion to Reinstate Right to Appeal
With Commensurate Right to Counsel

Because no court had ever ruled on the merits of Brown's claims due in large part to the Plea Withdrawal Statute's bar in raising these issues, and because Brown had been afforded no procedural mechanism to raise these claims with the effective assistance of counsel, on May 14, 2018, Brown filed a "Motion to Reinstate Defendant's Right to Appeal with the Commensurate Right to Effective Assistance of Counsel." R321-353.

In the Motion to Reinstate, Brown made it clear that he was not therein again detailing the grounds of ineffective assistance of counsel or the reasons why his plea was invalid. By the Motion to Reinstate, Brown was attempting to invoke his constitutional right to first review of these issues with his commensurate right to effective assistance of counsel, as well as the other applicable constitutional guarantees. By

the Motion to Reinstate, Brown requested that the Plea Withdrawal State, which posed the jurisdictional bar to his claims, be found unconstitutional and that some procedural mechanism be fashioned wherein he could then raise and detail his plea-based claims and have them reviewed on the merits. R322, 405-406.

After the State submitted a response, R410-429, and oral argument was held, the Court denied the Motion to Reinstate by written order issued March 21, 2019. R436-440. The district court recognized it was being asked to find the Plea Withdrawal Statute unconstitutional in violation of a number of constitutional provisions, and even more specifically, asked to find that application of the Plea Withdrawal Statute denied Mr. Brown his right to a direct appeal or first review of his claims by an appellate court with the aid of effective assistance of counsel. The district court also recognized that it was being asked to suggest that some remedy be fashioned. *E.g.*, R437-438.

After consideration of the parties' arguments, the district court found it was not in a position to overrule prior holdings of higher courts who have previously determined that Utah's Plea Withdrawal Statute is constitutional, and for this reason, denied Brown's motion. R439.

SUMMARY OF ARGUMENT

Through a long line of decisions interpreting Utah's Plea Withdrawal Statute (summarized in the Introduction), Utah precedent has created a gauntlet of jurisdictional rules that have effectively cut off meaningful first review with the assistance of counsel for the vast majority of criminal defendants: those who plead guilty and for whom a motion to withdraw plea is not filed before sentencing, for whatever reason.

Because the only procedural avenue this precedent leaves those defendants does not include the right to counsel, those defendants are effectively denied their appellate and associated rights as guaranteed under both the Utah and United States Constitution. In sum, the fundamental failure of the Plea Withdrawal Statute to afford Mr. Brown his right to appeal (or first review) of his pre-sentencing claims *with the attached right to effective assistance of counsel* violates a number of rights guaranteed by the Utah Constitution, including the right to appeal these specific claims,[16] to due process,[17] to defend by

[16] *Accord* Utah Const. art. I, § 12.

[17] *Accord* Utah Const. art. I, § 7.

counsel,[18] to uniform operation of the law,[19] and to open courts;[20] as well as those rights guaranteed by the Constitution of the United States to effective assistance of counsel,[21] due process,[22] and equal protection.[23]

The Plea Withdrawal Statute is also unconstitutional for an independent reason: it violates constitutional separation of powers provisions and the rule making authority of the Utah Supreme Court.[24] As time-limits for filing a motion to withdraw a plea found in the current Subsection 2(b), and the previous version it replaced, are purely procedural rules adopted by the legislature out of whole-cloth, they violate the separation of powers provisions of Article 8, Section 4, which only allows the legislature to "amend" procedural rules already adopted by this Court.

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[18] *Accord* Utah Const. art. I, § 12.

[19] *Accord* Utah Const. art. I, § 24.

[20] *Accord* Utah Const. art. I, § 11.

[21] *Accord* U.S. Const. amend. VI.

[22] *Accord* U.S. Const. amend. V and XIV.

[23] *Accord* U.S. Const. amend. XIV.

[24] *Accord* Utah Const. art. VIII, § 4, Utah Const. art. V, § 1.

For these reasons, the Court should declare Utah's Plea Withdrawal Statute unconstitutional in its current form, and fashion an appropriate procedural remedy to guarantee the rights of criminal defendants such as Mr. Brown.

ARGUMENT

I. UTAH'S PLEA WITHDRAWAL STATUTE IS UNCONSTITUTIONAL BECAUSE CRIMINAL DEFENDANTS, LIKE MR. BROWN, WHO ENTER PLEAS BUT WHO DO NOT SEEK TO WITHDRAW THEM ARE DENIED THEIR RIGHT TO APPEAL ANY PRE-SENTENCING CLAIMS WITH THE COMMENSURATE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A. The State and Federal Constitutions Unquestionably Guarantee Criminal Defendants the Right to a Direct Appeal With The Commensurate Right To Effective Assistance of Appellate Counsel; Denial of that Right is So Fundamental as to Amount to Structural Error

Article 1, Section 12 of the Utah Constitution provides:

> In criminal prosecutions the accused shall have the right to appear and *defend in person and by counsel*, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, *and the right to appeal in all cases*.

Utah Const. art. I, § 12 (emphasis added).

This guaranteed right to appeal is violated when the right is unconstitutionally withheld through no fault of the individual. *See, e.g., Johnson v. State*, 2006 UT 21, ¶ 24, 134 P.3d 1133; *Manning*, 2005 UT 61, ¶ 31. Recognizing that Utah courts have a keen interest in restoring the right to appeal if it has been denied due to Utah's constitutional mandate and other due process implications, this Court has concluded that a readily accessible and procedurally simple method is necessary by which persons improperly denied their right to appeal may *promptly* exercise the right. *Id.* ¶ 26.[25]

Due process protections are likewise implicated. Both the Fifth Amendment and Article 1, Section 7 of the Utah Constitution promise that no person "shall be deprived of life, liberty or property, without due process of law." Utah Const. art. I, § 7; U.S. Const. amend. V. The "failure to provide a direct appeal from a criminal case implicates the guarantee of due process under article I, section 7 of the Utah Constitution . . . when a defendant has 'been prevented in some meaningful way from proceeding' with a first appeal of right." *Manning*,

[25] *Also C.f., State v. Hallett*, 856 P.2d 1060, 1062 (Utah 1993) (once it is determined "that a defendant has been denied the constitutional right to appeal, a direct appeal should be provided immediately, without adjudication of any other claims, such as ineffective assistance of counsel").

2005 UT 61, ¶ 26. Although the federal due process clause does not guarantee a "right to an appeal in the same sense that there is a right to a trial," federal due process does guarantee the "right not to be denied an appeal for arbitrary or capricious reasons." *Griffin v. Illinois*, 351 U.S. 12, 37 (1956) (J. Harlan, dissenting).

The rights to effective assistance of counsel and state paid counsel for indigent defendants also attach to the right of first appeal. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Utah Constitution contains a similar protection, providing that "[i]n criminal prosecutions the accused shall have the right to appear and defend in person and by counsel[.]" Utah Const. art. I, § 12. This right to the assistance of counsel includes the right to effective counsel and extends beyond the trial into a criminal defendant's first appeal as of right. The right to the assistance of counsel also includes the right to state paid counsel for indigent defendants. *See, e.g., Douglas v. People of State of Cal.*, 372 U.S. 353, 357-58 (1963) (due process and equal protection require counsel in first appeal of right); *Gailey*, 2016 UT 35, ¶ 26 ("The Sixth Amendment right to counsel extends to a defendant's first appeal as of

right. This right includes the right to state-paid counsel for indigent defendants").[26]

The constitutional requirements of counsel on appeal, of substantial equality to indigent defendants, and of fair process "can only be attained where [appellate] counsel acts in the role of an active advocate in behalf of his client . . ." *Anders v. State of California*, 386 U.S. 738, 744 (1967). Thus, the denial of counsel on appeal has been deemed one of those rights deemed so basic and fundamental that its denial amounts to structural error. *See Penson v. Ohio*, 488 U.S. 75, 88 (1988). This is so because "[t]he need for forceful advocacy does not

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[26] *See also, e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987) ("[D]enial of counsel to indigents on first appeal as of right amount[s] to unconstitutional discrimination against the poor."); *Evitts*, 469 U.S. at 396 ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney"); *Entsminger v. Iowa*, 386 U.S. 748, 751 (1967) ("As we have held again and again, an indigent defendant is entitled to the appointment of counsel to assist him on his first appeal"); *Lafferty v. State*, 2007 UT 73, ¶ 39, 175 P.3d 530 ("The Due Process Clause of the Fourteenth Amendment ensures criminal defendants a right to effective assistance of appellate counsel"); *Gardner v. Holden*, 888 P.2d 608, 622 (Utah 1994) (Utah Code § 77-32-304 provides for assignment of counsel at state expense "during the trial proceedings and the first appeal of right or other remedies before or after conviction that the attorney considers to be in the interest of justice"); *State v. Johnson*, 635 P.2d 36, 37 (Utah 1981) (stating that in all criminal prosecutions, accused has a constitutional right to a timely appeal and if indigent, has constitutional right to the appointment of counsel to assist in that appeal).

come to an abrupt halt as the legal proceeding moves from the trial to appellate stage." *Id.* at 85. "Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over." *Id.* The United States Supreme Court explained in *Evitts v. Lucey*:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake.

469 U.S. at 396.

Thus, a denial of counsel during this important stage of review leaves criminal appellants bereft of any of the protections afforded by due process or the guarantee to assistance of counsel on appeal. Such a complete denial of counsel constitutes "structural error" since "assistance of counsel has been denied entirely or during a critical stage of the proceeding.'" *State v. Maestas*, 2012 UT 46, ¶ 57, 299 P.3d 892.[27]

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[27] *See also, e.g., State v. Collins*, 2014 UT 61, ¶ 46, 342 P.3d 789 ("Among the errors that are deemed structural are: (1) a complete denial of right to counsel, (2) the lack of an impartial trial judge, (3) racial discrimination in grand jury selection, (4) denial of the right of

For example, the United States Supreme Court has uniformly found constitutional structural error "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic,* 466 U.S. 648, 659 n.25 (1984).[28] In *Strickland*, the United States Supreme Court recognized that the "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *U.S. v. Strickland* 466 U.S. 668, 692 (1984). In *United States v. Cronic*, the Supreme Court made clear that if "no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." 466 U.S. at 654. And *Chapman v. California* noted that the right to counsel is "so basic to a fair trial that [its] infraction can never be treated as

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self-representation at trial, (5) denial of the right to a public trial, and (6) an erroneous reasonable-doubt instruction").

[28] *See also, Maestas*, 2012 UT 46, ¶ 57 ("denial of counsel is a structural error that does not require a showing of harm 'where assistance of counsel has been denied entirely or during a critical stage of the proceeding.' A critical stage is 'a step of a criminal proceeding . . . that h[olds] significant consequences for the accused'"); *State v. Curry*, 2006 UT App 390, ¶¶ 8, 9 n.3., 147 P.3d 483 (presuming prejudice where Defendant was denied his right to counsel at a critical stage of the proceeding, a motion to suppress hearing, and noting other critical stages include arraignment, preliminary hearing, and trial); *State v. Cabrera*, 2007 UT App 194, ¶ 20, 163 P.3d 707 (criminal defendant has the right to the assistance of counsel at restitution hearings).

harmless error." 386 U.S. 18, 23 and n.8. Accordingly, "[b]ecause the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage . . . the presumption of prejudice must extend as well to the denial of counsel on appeal." *Penson*, 488 U.S. at 88.

B. The Plea Withdrawal Statute's Procedure for "First Review" of Pre-Sentencing Claims is Unconstitutional Both on Its Face and As-Applied to Mr. Brown

1. *Criminal Defendants Are Guaranteed the Right to Effective Assistance of Counsel upon "First Review" of an Issue*

As noted above, the Utah constitution mandates a criminal appeal "in all cases", Utah Const. art. I, § 12 , and the failure to provide a direct appeal also implicates the guarantee of due process. A criminal defendant is also constitutionally entitled to the effective assistance of counsel on appeal, and an indigent defendant is entitled to such counsel at state expense. *See* Argument Sec. I(A), *supra*.

The United States Supreme Court has also recognized that the right to assistance of counsel attaches in the "first review" of an issue where that "first review" is the equivalent of a direct appeal:

> [W]here the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise the ineffective-assistance claim, the collateral proceeding is the equivalent of a

> prisoner's direct appeal as to that claim because the state habeas court decides the claim's merits, no other court has addressed the claim, and defendants "are generally ill equipped to represent themselves" where they have no brief from counsel and no court opinion addressing their claim.

Martinez v. Ryan, 566 U.S. 1, 1 (2012) (syllabus) (citing *Halbert v. Michigan*, 545 U.S. 605, 617 (2005) (holding that the "Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review")).

The United States Supreme Court has further explained:

> Whether formally categorized as . . . an appeal or [some other disposal] . . . the intermediate appellate court's ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive. Parties like [defendant], however, are disarmed in their endeavor to gain first-tier review.

Halbert, 545 U.S. at 607.

Indeed, "[a] prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance . . ." *Martinez*, 566 U.S. at 12.

2. *The Current State of Utah Law Denies Defendants, Like Mr. Brown, the Right to a "First Review" of All Pre-Sentencing Issues with the Commensurate Right to Effective Assistance of Counsel*

Under the current state of Utah law, Brown has been denied his right to "first review" with his commensurate right to the effective

assistance of counsel with regard to any pre-sentencing claims, including claims questioning the validity of his plea or claims of ineffective assistance of counsel during that stage of proceedings.[29] This denial of rights to appeal stems directly from the Plea Withdrawal Statute, which provides in relevant part:

> (2)(a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.
> (b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.
> (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, Post-conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

Utah Code § 77-13-6 (2).

Although plea bargains clearly benefit the system, *see Blackledge v. Allison*, 431 U.S. 63, 71 (1977), "no procedural device for the taking of guilty pleas is so perfect in design and exercise as to warrant a per se rule rendering it 'uniformly invulnerable to subsequent challenge.'" *Id.*

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[29] A criminal defendant has a right to effective assistance of counsel when being advised in the plea bargaining stage of proceedings. *See, e.g., Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (Sixth Amendment right to counsel extends to pretrial plea negotiations); *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985).

at 73 (*quoting Fontaine v. United States*, 411 U.S. 213, 215 (1973)). Defendants simply must be afforded some mechanism to challenge their guilty pleas. *See id.* at 71-74.

Under Utah Code § 77-13-6 (2), however, Brown, and other similarly situated convicted defendants like him, is afforded no ability to obtain appellate review of any pre-sentencing issues because, even though it may have been the product of ineffective assistance of counsel or other issues, Brown did not file a motion to withdraw his plea prior to being sentenced. *Accord* Utah Code§ 77-13-6 (2)(b)-(c)*; see also, e.g., Nicholls*, 2017 UT App 60, ¶ 21; *State v. Coleman*, 2013 UT App 131, ¶ 3, 302 P.3d 860; *Manning*, 2005 UT 61, ¶ 37. Instead, Brown's only remedy to challenge his plea-based conviction or other pre-sentencing issues, including the involuntary nature of the plea and claims of ineffective assistance of counsel during that stage of proceedings, is through post-conviction relief. *Accord* Utah Code§ 77-13-6 (2)(c). *Also, e.g., Rettig*, 2017 UT 83, ¶ 42; *Nicholls*, 2017 UT App 60, ¶¶31-32; *Allgier*, 2017 UT 84, ¶27; *Gailey*, 2016 UT 35, ¶ 3*; Rhinehart*, 2007 UT 61, ¶ 14; *State v. Stone*, 2013 UT App 148, ¶ 5, 305 P.3d 167. This Court has explained that requiring these claims to be raised in post-conviction proceedings does not deny a criminal defendant the "constitutional right to an appeal" but merely "provides an alternative

procedural route for challenging a plea." *Gailey*, 2016 UT 35, ¶ 3; *also, Allgier*, 2017 UT 84, ¶ 23 (plea withdrawal statute not violate constitutional right to appeal, "[i]t simply dictates the procedural mechanism for pursuing a claim; it does not altogether foreclose relief").

However, the constitutional quandary arises precisely from the fact that a criminal defendant is not entitled to effective assistance of state paid counsel in post-conviction proceedings. *See Gailey*, 2016 UT 35, ¶ 28; *Stone*, 2013 UT App 148, ¶ 8 n.1. The now-accepted "alternative procedural route" essentially pushes the vast majority of claims concerning the validity of a guilty plea, as well as the vast majority of pre-sentencing claims of ineffective assistance, into a vehicle of "appellate review" which itself, does not guarantee effective assistance of counsel. This is constitutionally untenable and the very problem noted by Justice Durham in her concurrence in *Rettig*. *See Rettig*, 2017 UT 83, ¶ 116-117 (Durham, J., concurring).

3. As a Result of the Denial of a "First Review" with the Assistance of Counsel, the Plea Withdrawal Statute Violates a Number of Federal and State Constitutional Provisions

As a consequence of requiring all pre-sentencing claims to be brought through a vehicle of "appellate review" which does not

guarantee effective assistance of counsel, the Plea Withdrawal Statute violates the following constitutional provisions:

Right to Appeal:
Utah Const. art. I, § 12

As argued in Section I(A), *supra*.

Right to Effective Assistance of State Paid Counsel on Appeal:
Utah Const. art. 1, § 12
U.S. Const. amends. V, VI, and XIV

When a state grants a defendant the right to appeal, that state must "act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts*, 469 U.S. at 393 (citing *McKane v. Durston*, 153 U.S. 684 (1894)). Thus, the Sixth Amendment right to effective counsel extends beyond the trial and into a defendant's first appeal as of right. This right includes the right to state-paid counsel for indigent defendants. *See e.g., Douglas,* 372 U.S. at 357-58 (due process and equal protection require counsel in first appeal of right); *Evitts*, 469 U.S. at 393; *Jones*, 463 U.S. at 756–57; *Baker v. Kaiser*, 929 F. 2d 1495, 1498 (10th Cir. 1991); *Gailey*, 2016 UT 35, ¶ 26.[30] Just as with the right to counsel during trial proceedings,

[30] *See also Finley*, 481 U.S. at 554 ("[D]enial of counsel to indigents on first appeal as of right amount[s] to unconstitutional discrimination against the poor."); *Holden*, 888 P.2d at 622 (articulating that Utah Code § 77–32–304 "provides for the assignment of counsel at state

the right to counsel on appeal is violated unless the defendant "executes a 'voluntary, knowing, and intelligent' waiver of his right to counsel on appeal." *Romero v. Tansy*, 46 F.3d 1024, 1031 (10th Cir. 1995); *see also Hardiman v. Reynolds,* 971 F.2d 500, 506 (10th Cir. 1992).

Here, Brown's right to "first review" or direct appeal with the commensurate right to effective assistance of counsel has been denied. As such, a direct appeal or first review with the benefit of effective assistance of state paid counsel should be provided immediately, without the necessity of collateral adjudication of any other claims.

The Right to Due Process of Law:
U.S. Const. amends. V and XIV; Utah Const. art. I, § 7

As argued in Section I(A), *supra*.

The Right to Equal Protection and Uniform Operation of the Law:
U.S. Const. amend. XIV; Utah Const. art. 1, § 24

The federal Equal Protection Clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see also Grace United*

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expense only during the trial proceedings and the first appeal of right or other remedies before or after conviction that the attorney considers to be in the interest of justice."); *Evitts*, 469 U.S. at 396 ("A first appeal as of right ... is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney").

Methodist Church v. City of Cheyenne, 451 F.3d 643, 659 (10th Cir. 2006). "Equal protection 'is essentially a direction that all persons similarly situated should be treated alike.'" *Grace United Methodist Church*, 451 F.3d at 659 (quoting *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985)). The equal protection clause prevents a state from enacting a law that denies any person equal protection unless there is a reason to distinguish that person or group from the general population.

Article I, § 24 of the Utah Constitution guarantees "[a]ll laws of a general nature shall have uniform operation." A law does not operate uniformly, however, if persons similarly situated are not treated similarly. *See State v. Drej*, 2010 UT 35, ¶ 33, 233 P.3d 476 (citing authority for proposition that the Utah provision restrains the legislature from "classifying persons in such a manner that those who are similarly situated with respect to the purpose of a law are treated differently by that law"). This constitutional protection thereby requires that similarly situated individuals be treated alike under the law unless there is a constitutionally legitimate basis for treating them differently. *See Greenwood v. City of North Salt Lake*, 817 P.2d 816, 821 (Utah, 1991); *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984). "In order for a law to be constitutional under the uniform operation of laws

provision, it is not enough that it be uniform on its face. What is critical is that the operation of the law be uniform… [W]hen persons are similarly situated, it is unconstitutional to single out one person or group of persons from among the larger class on the basis of a tenuous justification that has little or no merit." *Gallivan v. Walker*, 2002 UT 89, ¶ 37, 54 P.3d 1069 (internal quotes and citations omitted).

"Despite their dissimilar language, [the state uniform operation and the federal equal protection] provisions 'embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same.'" *Id.* ¶ 31 (citing authority). "Even though the uniform operation of laws provision is the state's analogue to equal protection under federal law, [Utah courts'] construction and application of Article I, § 24 are not controlled by the federal courts' construction and application of the Equal Protection Clause." *Drej*, 2010 UT 35, ¶ 33. "The uniform operation of laws clause, however, is at least as exacting as its federal counterpart" and the "Utah provision may, in some circumstances, be more rigorous than the standard applied under the federal constitution." *Id.* (Internal punctuation and brackets omitted).

Here, the Plea Withdrawal Statute has created two classes of similarly situated *convicted criminal defendants* – 1) those defendants convicted upon guilty plea who did not move to withdraw their guilty plea prior to sentencing; and 2) all other convicted criminal defendants, whether convicted by plea or by trial. The statute then arbitrarily imposes disparate treatment upon one of the classes of convicted criminal defendants. One class of convicted criminal defendant (the class made up of those defendants who enter a plea but do not attempt to withdraw it prior to sentencing, regardless of the reason for failure to withdraw, the actual validity of the plea, or ineffective assistance of counsel) is denied a "first review" or direct appeal with the commensurate right to effective assistance of counsel, whereas all other criminal defendants convicted of a crime (whether by plea or by trial) are afforded their full rights to appeal any issue, including issues surrounding the conviction or ineffective assistance of counsel, with the guaranteed right to effective assistance of state paid counsel. This disparity violates federal equal protection and state uniform operation of the law guarantees.[31] Because there is no reasonable objective that

[31] In analyzing the constitutionality of a statutory scheme under the *uniform operation of laws provisions*, the courts engage in a three-part inquiry. "First, we determine what, if any, classification is created

warrants this disparity, the disparate treatment is arbitrary and the statute is constitutionally infirm.

The Right to Open Courts:
Utah Const. Art. 1, § 11

Article I, Section 11, of the Utah Constitution provides:

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

The Utah Open Courts Clause ensures "that citizens of Utah have a right to a remedy for an injury." *Judd ex rel. Montgomery v. Drezga,* 2004 UT 91, ¶ 10, 103 P.3d 135. This Clause guards against laws that unreasonably "diminish[es] or eliminate[s] a previously existing right to recover for an injury." *Id.*; *see Merrill*, 2005 UT 34, ¶23.

Here, the statute has removed the ability of Brown and any other criminal defendant in Utah who enters an involuntary and unknowing guilty plea, perhaps based upon the ineffective assistance of counsel,

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under the statute." *Drej*, 2010 UT 35, ¶ 34. "Second, we inquire into whether the classification imposes on similarly situated persons disparate treatment." *Id.* "Finally, we analyze the scheme to determine if 'the legislature had any reasonable objective that warrants the disparity.'" *Id.*

and who does not seek to withdraw that plea, again perhaps based upon the ineffective assistance of counsel, from remedy for an injury with their right to effective assistance of counsel attached.

Although Utah precedent has thus far justified the Plea Withdrawal Statute as not denying a criminal defendant the right to appeal but only limiting those claims which can be made and the procedural vehicle for making them, *see, e.g., Allgier*, 2017 UT 84, ¶ 23, this interpretation also effectively denies criminal defendants like Mr. Brown a right to a direct appeal with the commensurate right to effective assistance of counsel, as argued above. Such interpretation therefore "diminishes" or effectively "eliminates" these defendants' previously existing right to appeal. *See Drezga*, 2004 UT 91, ¶ 10.

II. SUBSECTION (2)(B) OF UTAH'S PLEA WITHDRAWAL STATUTE IS AN UNCONSTITUTIONAL ASSUMPTION OF THE COURT'S EXCLUSIVE POWER TO ADOPT PROCEDURAL RULES

Beyond the numerous other constitutional issues noted in Section I, *supra*, the Plea Withdrawal Statute also violates of the separation of power dictates of art. VIII, § 4 and art. V, § 1, of the Utah Constitution.

A. Utah's Constitution Invests the Supreme Court with the Exclusive Purview to Adopt "Purely Procedural" Rules; the Legislature May Only "Amend" Extant Rules, and Must Do So Explicitly

The Utah Constitution provides:

> 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. The legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature…

Utah Const. art. VIII, § 4.

Under the plain language of Art. VIII, § 4, "adopting" rules of procedure is the province of the Supreme Court; the legislature may only "amend" those rules of procedure. *Brown v. Cox*, 2017 UT 3, ¶17, 387 P.3d 1040. As noted by this Court in *Rettig*, the important initial distinction under Art. VIII, § 4, then, is whether the statutory provision in question is best classified as "procedural" or "substantive". *See Rettig*, 2017 UT 83, ¶¶52-60; ¶¶119-121 (J. Durham, concurring in result). If "procedural", the relevant provision may nonetheless be a constitutional exercise of legislative authority if it is "so intertwined with a substantive right that the court must view it as substantive." *Id.* ¶120 (*citing Drej*, 2010 UT 35, ¶25-31) (J. Durham, concurring in result).

Those "purely procedural" provisions are unconstitutional unless they are themselves amendments of Supreme Court rules passed by a super-majority. Utah Const. art. VIII, § 4, art. V, § 1 (separation of powers provision). Moreover, the legislature is entitled to no presumption that "purely procedural" statutory provisions passed by a super-majority are amendments of Supreme Court rules. *Cox*, 2017 UT 3, ¶23 ("We will not assume that the Legislature intended to exercise its check on our authority to enact rules just because a statutory amendment passed by a supermajority can be interpreted in a fashion that conflicts with an existing rule of evidence or procedure.") It must be explicit. *Id.* ¶18-20; *Rettig*, 2017 UT 83, ¶120 (J. Durham, concurring in result)(citing same).

Specifically, the amendment must be made by joint resolution or other mechanism containing "a clear expression of the Legislature's intent to modify our rules." *Cox*, 2017 UT 3, ¶20; *see also id.* ¶19 (noting that current legislative rules require that proposals "to amend the Utah Supreme Court's Rules of Procedure or Rules of Evidence must include" a specific resolving clause)(*citing* Joint Rule 4-1-301(4)).

B. The 1989 and 2003 Amendments to The Plea Withdrawal Statute Are Both Unconstitutional Legislative Adoptions of Purely Procedural Rules, Not Explicit Amendments of Supreme Court Rules

1. The 1989 Amendment

As noted above, the original plea withdrawal statute, as enacted in 1980, "did not include a time limitation for withdrawing a guilty plea." *Gailey*, 2016 UT 35, ¶ 12 (*citing* Utah Code § 77-13-16 (1982)). Correspondingly, this Court allowed a defendant to withdrawal a guilty plea approximately *three years* after sentencing. *Id.* ¶ 12 (*citing* *Abeyta*, 852 P.2d at 994-96). Obviously, this Court had adopted no procedural rules limiting that plea-withdrawal time frame.

"But in 1989 the legislature amended the statute and created a thirty-day filing limitation on the defendant's right to withdraw a guilty plea." *Gailey*, 2016 UT 35, ¶13 (*citing* Utah Code § 77-13-6(2)(b)). In reviewing the legislative history behind this addition, this Court found that "the purpose of the statute was to *set guidelines* to prevent defendants from filing motions to withdraw guilty pleas many months or even years after final disposition of the case." *Ostler*, 2001 UT 68, ¶9 (emphasis added). That is, with the 1989 amendment, the legislature created a *procedural rule* where none had existed before. *See* Sec.

II(B)(ii), *infra*. (arguing that timing deadlines are procedural (in the context of the 2003 amendments)).

The title of Senate Bill 81, enacting the 1989 amendment, is also illuminating:

> An act relating to criminal law; *providing procedures* for withdrawal of certain pleas; establishing a time limit for filing a motion to withdraw those pleas; providing appeals from orders denying or granting motions to withdraw pleas; and amending certain rules of evidence if passed by two-thirds vote.
>
> Laws of Utah, 1989, Ch. 65. (emphasis added)

Further, though the act does not actually address any rules of *evidence* (as referenced in the last clause of its introduction), it does include, in its text, an ultimate section that provides:

> This act includes amendments of rules of procedure adopted by the Supreme Court. Passage of the sections of this act that amend the rules of procedure requires a vote of two-thirds of the members of both houses of the Legislature, as required by Article VIII, Sec. 4, Utah Constitution.
>
> Section 4, Laws of Utah, 1989, Ch. 65.

So, the legislature does seem to have explicitly invoked its authority to amend existing Supreme Court rules of procedure with *some* sections of the act, but it does not specify which sections. As the act contains modifications of Utah Code § 77-35-11 and § 77-35-26,[32] as

[32] *See* Laws of Utah – 1989.

well as § 77-13-6 (the plea withdrawal statute), it stands to reason that the legislature was referencing its modifications to Chapter 35 of Title 77, which *were*, at the time, Rules of Criminal Procedure adopted by the Court. *See* Compiler's Notes to Chapter 35 of Title 77, 1989.[33]

The language of Section 4, therefore, does not satisfy the requirement for a joint resolution or another "clear expression of legislative intent to amend" the plea withdrawal statute found in Chapter 13 of Title 77 specifically, and so the modification is unconstitutional on that basis.

Further, if Section 4 of the act were read to include the addition of the time guidelines in the plea withdrawal statute within the "amendments" contemplated, Section 4 *would not be accurate*. That is, the additional timelines added to Title 77, Chapter 13 (the plea withdrawal statute) *were not* "amendments" of rules "adopted" by the Supreme Court, as there was no extant Supreme Court rule on the

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[33] Citing this Court's per curiam order of January 13, 1987, which held:

> Pursuant to the provisions of article VIII, section 4 of the Constitution of Utah, as amended, and rule 11-101(3)(E) of the Code of Judicial Administration, the Court adopts all existing statutory rules of procedure and evidence contained in Utah Code Ann. §§ 77-35-1 to -33 (with certain exceptions not applicable here).

subject to amend. *Cox* , 2017 UT 3, ¶21-22 (citing dictionary definitions of "adopt" and "amend," and pointing out that "amendments do not occur in a vacuum"); *see also* Laws of Utah 1980, Ch. 15 (enacting Utah Code 77-13-6).[34]

The 1989 addition of filing deadlines to the plea withdrawal statute is therefore best characterized as just that: an amendment to a *statute*, rather than an amendment to a Supreme Court *rule*. *See State v. Walker*, 2015 UT App 213, ¶ 15, 358 P.3d 1120 (*citing Allred v. Saunders*, 2014 UT 43, ¶ 3, 342 P.3d 204); *see also Cox*, 2017 UT 3, ¶24 (concluding that Legislature passed relevant section as a bill amending a statute and not a joint resolution amending a rule of procedure, and striking it down as unconstitutional). It is therefore unconstitutional on this basis as well.

a. The 2003 Amendment

In 2003, the legislature removed the 30-day filing deadline from the plea withdrawal statute, and required instead that the motion to

[34] Obviously, as Art. VIII, §4 of the Utah Constitution did not exist until 1984, *see Drej*, 2010 UT 35, ¶25, the enacting language did not include a provision asserting the legislature's authority to modify a Supreme Court rule, but that does not change the fact that the plea withdrawal statute, as it existed in 1989, was unquestionably a statute rather than a codification of Supreme Court rule)

withdraw plea be made "before sentence is announced." *Gailey*, 2016 UT 35, ¶15 (*citing* Utah Code § 77-13-6(2)(b)).

Relevantly, the 2003 Bill was not a joint resolution, and it contains no "resolving clause" nor any other "clear expression of the Legislature's intent to modify [Supreme Court] rules." *See* H.B. 238, enrolled (2003); *Cox*, 2017 UT 3, ¶ 20; *see also id.* ¶ 19 (noting that current legislative rules require that proposals "to amend the Utah Supreme Court's Rules of Procedure or Rules of Evidence must include" a specific resolving clause)(*citing* Joint Rule 4-1-301(4)).[35]

Like the 30-day deadline that proceeded it, the "before sentence" deadline in subsection (2)(b) "is quintessentially procedural" because it "prescribes the manner and means of raising a particular issue in court proceedings." *Rettig*, 2017 UT 83, ¶¶ 58-60 (citing authority). "You can't get much more procedural than a filing deadline." *Id.* ¶ 58.

Though this language is technically dicta, as Rettig himself did not question the constitutionality of subsection 2(b), *id.* ¶ 59, the non-dicta reasoning behind the holding of *Rettig* also counsels for such a

[35] This lack also reinforces the interpretation of Section 4 of the 1989 amendment made above: that the legislature considers Chapter 13 of Title 77 a typical "statute" rather than a codified Supreme Court rule. If it were otherwise, the legislature would have included the resolving language of Section 4 in the 2003 Amendment as well.

result. In finding that the plea withdrawal statute does not actually foreclose an appeal, this Court noted that "it simply establishes a *rule* of preservation or waiver." *Id.* ¶ 17 (emphasis added). The Court also compares the Plea Withdrawal Statute to Rule 12 of the Rules of Criminal Procedure, *id.* ¶ 20, that is, to *procedural rules adopted by this Court.*

Addressing the concurrence's suggestion that Subsection 2(b) could be read as "inextricably intertwined" with the substantive provisions of the statute, the majority in *Rettig* declined to "forecast an answer" but noted that:

> It is troubling to suggest that a time deadline for filing in the trial court could be a matter within the legislature's power if it merely "cut[s] off substantive rights." Most time deadlines, if missed, can extinguish a substantive right. If that characterization is enough to give the legislature the power to promulgate a rule then the limitation in article VIII, section 4 may easily be erased.
>
> *Id.* ¶ 56 n. 11 (internal citations to concurrence omitted).

As argued above, Mr. Brown does disagree with the Court's analysis of the plea withdrawal statute in *Rettig*, because the plea withdrawal statute violates Mr. Brown's right to appeal with the commensurate right to state-paid counsel, *see, generally*, Sec. I, *supra*. (with other associated constitutional arguments); however, insofar as this Court upholds its decision in *Rettig* and the reasoning therein, that

reasoning—likening the plea withdrawal statute to a rule of preservation and waiver, such as those found throughout this Court's case-law and the Rules of Criminal procedure—mandates a finding that the filing deadline in Subsection 2(b) is unconstitutional under the Utah Constitution's separation of powers amendments.

III. PURSUANT TO ITS CONSTITIONAL RULE-MAKING AUTHORITY THIS COURT SHOULD CREATE A PROCEDURAL REMEMDY CONSISTENT WITH MR. BROWN'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS

Based on the foregoing, Mr. Brown requests that this Court find that he has been denied his right to appeal with the commensurate right to the effective assistance of state paid counsel in violation of the numerous federal and state constitutional rights detailed herein. In doing so, the Court should reinstate Brown's time for filing a direct appeal.

Thereafter, some remedy must be fashioned wherein Mr. Brown may assert those issues for which he has been denied appellate review on the merits with his right to effective assistance of counsel (to include issues surrounding the validity of his plea and issues surrounding ineffective assistance of counsel surrounding the entry of his plea). Remedy might include leave to file a direct appeal with a potential Rule

23B Remand hearing, or alternatively, the fashioning of some other type of collateral or special proceeding with the commensurate right to effective assistance of counsel attached.

CONCLUSION

Brown has been denied his right to a direct appeal or "first review" by an appellate court with the aid of effective assistance of state paid counsel. Mr. Brown must be afforded some vehicle (be it direct appeal, post-conviction relief, a petition for extraordinary writ, or some other collateral proceeding), with the attached guarantee to effective assistance of counsel in order to afford him the opportunity to raise his claims and have them reviewed on their merits. The unique posture of this case renders these issues ripe for decision where they may have not been ripe before. *See, e.g., Nicholls*, 2017 UT App 60, ¶ 46 n.4 (not reaching request to fashion a procedural mechanism or consider whether other avenues of relief might be available, such as a petition for extraordinary relief); *Gailey*, 2016 UT 35, ¶ 3 (declining to reach issue of state-paid counsel on post-conviction relief because Gailey had not yet sought relief under the PCRA).

CLAIM FOR ATTORNEY'S FEES

There are no claims for attorneys' fees.

Respectfully submitted this 7th day of August, 2019.

/s/ Ann Marie Taliaferro
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Certificate of Service and Rule Compliance

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I, Dain Smoland, certify that this brief contains **10,026 words**, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery.

In compliance with the typeface requirements of Utah R. App. P. 27(b), I also certify that this brief has been prepared in a proportionally spaced font using Microsoft Word v.15.31 in Century font, 13-point.

I also certify that this brief contains no non-public information in compliance with the non-public information requirements of Utah R. App. P. 21(g).

/s/ Dain Smoland
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SMOLAND LAW
Co-Counsel for Appellant

Addendum A
to Appellant's Brief

State v. Brown
20190257-SC

Order Denying Motion to Reinstate Defendant's Right to Appeal with Commensurate Right to Effective Assistance of Counsel

Judge Chrisitine Johnson
Fourth District Court

The Order of the Court is stated below:
Dated: March 21, 2019 02:22:10 PM
/s/ CHRISTINE JOHNSON
District Court Judge

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IN THE FOURTH JUDICIAL DISTRICT COURT– PROVO

IN AND FOR UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. KEITH SCOTT BROWN, Defendant.	**ORDER DENYING MOTION TO REINSTATE DEFENDANT'S RIGHT TO APPEAL WITH COMMENSURATE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL** Case No. 111400408 (Judge Christine Johnson)

This matter came before the Court for argument on February 7, 2019, to address the Defendant's Motion to Reinstate His Right to Appeal with the Commensurate Right to Effective Assistance of Counsel. The defendant was present with counsel Ann Marie Taliaferro. The State was present and represented by Deputy Utah County Attorney, David Sturgill.

Based upon the pleadings and documents submitted, the arguments of the parties, and as more fully explained in the Court's oral ruling stated on the record and incorporated herein, the Court finds and orders as follows:

1.The Defendant has filed a Motion to Reinstate Defendant's Right to Appeal with Commensurate Right to Effective Assistance of Counsel and Request for Hearing.

2.The Defendant's Motion raises a predominantly legal issue and asserts:

a.That because Brown entered a guilty plea, and because he did not move to withdraw his plea, his only recourse to raise issues regarding that plea is through post-conviction relief proceedings, for which he is not guaranteed the effective assistance of counsel.

b.As a result, Brown argues that under the current state of Utah law[1] and "Utah's Plea Withdrawal Statute" codified in Utah Code § 77-13-6, he has been denied his right to a direct appeal or "first review" of his claims by an appellate court with the aid of effective assistance of state paid counsel.

c.Brown further asserts that not only was he denied his right to appeal with these attached rights through no fault of his own, but that he must be afforded some procedural vehicle with the attached guarantee to effective assistance of counsel in order to afford him the opportunity to raise his "ineffective assistance" and "invalid entry of plea claims" and have them reviewed on their merits.

d.Brown raises these legal issues in the context of a "*Manning* motion"[2] or a Motion to Reinstate Time to Appeal under Rule 4(f) of the Utah Rules of Appellate Procedure.

e.Approximately three months after Brown filed his motion, the Utah Court of Appeals decided *State v. Stewart*, 2018 UT App 151, which was issued August 16, 2018. In *Stewart*, the Utah Court of Appeals reversed a district court's denial of a Motion to Reinstate Time to Appeal since the defendant in the criminal case was never advised that he had the right to appeal with the right to appointed counsel. The Court of Appeals concluded that "a defendant

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1 *See, e.g*., *State v. Rettig*, 2017 UT 83, ¶ 42, *cert.denied*, No. 17-7927, 2018 WL 1116262 (U.S. Apr. 16, 2018); *State v. Nicholls*, 2017 UT App 60, 397 P.3d 709; *Gailey v. State*, 2016 UT 35, 379 P.3d 1278.

2 *See Manning v. State*, 2005 UT 61, 122 P.3d 628.

is entitled to be informed of his right to counsel on appeal, and this right is inherent in a defendant's right to an appeal." *Stewart*, 2018 UT App 151, ¶ 14. The Court of Appeals also discusses many of the rights Brown invoked by his own motion. Based upon this decision, Brown also argues that the record shows he was never advised of his right to appeal with the assistance of counsel, and therefore, that he has established he was not fully informed of his right to appeal, which is the first showing required under a "*Manning* motion."

f.Brown acknowledges, however, that this first showing is only half the requirement, and acknowledges that he must also show "prejudice" in that he would have appealed. But, Brown argues, therein lies the problem– he could not have appealed the issues he seeks surrounding his conviction and the entry of his plea because he did not seek to withdraw his plea prior to sentencing. Rather, all pre-sentencing claims, including claims of ineffective assistance, must be raised in post-conviction proceedings where there is no right to counsel, let alone state paid counsel.

g. Thus, Brown argues Utah's Plea Withdrawal Statute is unconstitutional both on its face and as-applied to Brown as it has resulted in him being denied his right to appeal with the commensurate right to the effective assistance of state paid counsel in violation of the numerous federal and state constitutional rights detailed by Brown's motion.

3.As noted by the State, however, Utah's Plea Withdrawal Statute has been found to be constitutional under many of the same provisions Brown now asserts.[3]

4.The State also argues:

a.It is well established that a defendant's right to appeal will be considered

3 *See State v. Allgier,* 2017 UT 84, 416 P.3d 546; *State v. Merrill,* 2005 UT 34, 114 P.3d 585.

waived where the defendant enters a knowing and voluntary guilty plea, during which he expressly waives the right to appeal, and his plea is entered in accordance with rule 11 of the Utah Rules of Criminal Procedure. *See State v. Corwell*, 2005 UT 28, ¶ 21.

b.Any challenge to a knowing and voluntary guilty plea, or to the waivers contained therein, may only be undertaken following a timely motion for withdrawal of the guilty plea. *See State v. Reyes*, 2002 UT 13, ¶ 3.

c.Defendant's guilty pleas were entered knowingly and voluntarily, and strictly adhered to Rule 11 of the Utah Rules of Criminal Procedure.

d.Moreover, Defendant failed to timely move to withdraw his pleas. As a result, for the same reasons outlined in *State v. Manning*, Defendant cannot avail himself of the remedy created by that decision unless the plea withdrawal statute is unconstitutional.

After considering these arguments of the parties,

THIS COURT FINDS that it is not in a position to overrule prior holdings of higher courts, including the Utah Supreme Court, who have determined that Utah's Plea Withdrawal Statute is constitutional.

FOR THIS REASON, the Defendant's Motion to Reinstate His Right to Appeal with the Commensurate Right to Effective Assistance of Counsel is DENIED.

Approved as to Form:

/s/ David Sturgill
Electronic signature attached by filer
with permission

THIS ORDER SHALL BECOME EFFECTIVE WHEN ELECTRONICALLY SIGNED BY THE COURT ON THE FIRST PAGE HEREIN

Addendum B
to Appellant's Brief

State v. Brown
20190257-SC

Constitutional Provisions Central to the Case

Utah Const. art. V, § 1

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.