Case No. 20190254-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellee,

v.

KEITH SCOTT BROWN,
Defendant/Appellant.

Brief of Appellee

Appeal from the denial of a motion under rule 4(f), Utah Rules of Appellate Procedure, seeking not merely to reinstate Defendant's right to direct appeal, but to also declare the Plea Withdrawal Statute's jurisdictional deadline unconstitutional and thus allow an untimely challenge to Defendant's guilty pleas to one count of sodomy on a child, a first-degree felony, and two counts of sexual abuse of a child, second-degree felonies, in the Fourth Judicial District, Utah County, the Honorable Christine Johnson presiding

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INTRODUCTION

After abusing his daughters for years, Defendant Keith Scott Brown pled guilty to child sodomy and child sex abuse. He forfeited every available opportunity to challenge his guilty pleas. A year and a-half after sentencing, Brown brought an untimely challenge to his pleas. He claimed that he was in no condition to understand what he was doing at his plea hearing because he was in a serious car accident three days before that hearing. But at his sentencing six weeks after his plea hearing, he said nothing about his condition at the plea hearing.

The Plea Withdrawal Statute, Utah Code §77-13-6, includes a jurisdictional deadline on motions to withdraw a guilty plea. That deadline

requires a defendant to move to withdraw his plea before his sentence is announced. The legislature carefully drew the line there because challenges that are raised after a defendant has heard his sentence—or, as it appears in this case, his parole date—are less likely based on a legitimate defect in the plea and more likely based on an unwillingness to accept the consequences of the agreed-upon plea. The Plea Withdrawal Statute's deadline is thus intended to further the finality of plea-based convictions, conserve state resources, and reduce the emotional toll on crime victims that guilty-plea challenges can bring by discouraging challenges based on mere pleader's remorse after receiving an unfavorable sentence or parole date.

The deadline does this by depriving trial and appellate courts of jurisdiction to hear untimely claims. An untimely defendant can still challenge his plea, but he must do so under the Post-Conviction Remedies Act (PCRA), which has its own time and procedural bars designed to promote finality and which affords defendants fewer resources to challenge their pleas.

Because timely plea challenges are more likely to be based on legitimate defects in the plea, the legislature has chosen to provide more resources to defendants who meet the deadline. Timely defendants are entitled to state-funded counsel to pursue their challenges in both their

criminal case and on direct appeal. And because the Fourteenth-Amendment right to the effective assistance of counsel attaches to those proceedings, timely defendants may also bring a subsequent PCRA action claiming that their counsel was ineffective in challenging their plea.

In contrast, because untimely challenges are more likely based on mere pleader's remorse, the legislature has chosen to provide fewer resources and more limited review to untimely defendants. They are not entitled to state-funded counsel under the PCRA, although a post-conviction court can appoint pro bono counsel. And while these defendants can appeal the post-conviction court's ruling, they are not able to claim in that appeal, or in a subsequent PCRA proceeding, that their pro bono counsel was ineffective. There is no Fourteenth-Amendment right to the effective assistance of counsel in PCRA proceedings because they are only collateral proceedings.

Brown claims that the Plea Withdrawal Statute's deadline denies him his state constitutional right to appeal, and several other state and federal constitutional rights, because it requires defendants who miss its deadline to seek "first review" of their plea in a proceeding where they lack a Fourteenth-Amendment right to the effective assistance of counsel. Brown also complains that the Plea Withdrawal Statute's deadline is unconstitutional

because it is a procedural rule, and article VIII, section 4 of the Utah Constitution grants only this Court the authority to make procedural rules.

This Court should not reach Brown's claims because the rule he relies on to bring them cannot afford him the relief he seeks—an opportunity to raise an untimely challenge to his guilty pleas. Brown seeks relief under rule 4(f), Utah Rules of Appellate Procedure, which allows a trial court to reinstate a defendant's right to a direct appeal. But rule 4(f)'s remedy is limited to restoring whatever right to appeal existed when that right was improperly forfeited. It does not allow a defendant to expand his appellate rights. Because that is what Brown seeks, he cannot obtain that relief in this proceeding.

If this Court reaches the merits of Brown's claims, it should nevertheless affirm. This Court has already considered and rejected Brown's first claim. It has held that the Plea Withdrawal Statute can constitutionally bar untimely guilty-plea challenges in both the trial court and on direct appeal, even though that leaves the PCRA as the only available opportunity for untimely defendants to challenge their guilty pleas. Brown demonstrates no reason to question that precedent because he does not acknowledge, let alone challenge it, or even attempt to distinguish it.

Brown's second claim likewise demonstrates no constitutional defect in the statute. The Plea Withdrawal Statute's deadline is constitutional because it is jurisdictional. The state constitution gives the legislature the authority to limit the district court's general jurisdiction and to regulate the exercise of this Court's appellate jurisdiction. The constitution therefore recognizes that statues regulating access to the courts' jurisdiction do not fall within the realm of procedural rules that this Court has primary responsibility to adopt.

If it were necessary to analyze the substantive/procedural distinction here, the deadline is substantive because it is intended to further public policies, not merely to ensure the orderly progress of litigation. But even if the deadline might nevertheless appear procedural, this Court must view it as substantive because it is inextricably intertwined with the statute's substantive provisions, which are designed to further finality and conserve state resources.

STATEMENT OF THE ISSUES

1. Rule 4(f), Utah Rules of Appellate Procedure, allows a court to restore a defendant's right to appeal when he is improperly denied that right. But the rule restores only whatever right to direct appeal the defendant possessed when he was denied that right.

Can Brown use rule 4(f) to expand his appellate rights by obtaining an opportunity to raise what would otherwise be a jurisdictionally barred challenge to his guilty plea?

Standard of Review. None applies because the State raises this argument as an alternative basis to affirm.

2a. This Court held in *State v. Rettig*, 2017 UT 83, ¶¶22, 61, 416 P.3d 520, that applying the Plea Withdrawal Statute's deadline to jurisdictionally bar consideration of untimely guilty-plea challenges does not deny defendants their right to appeal under article I, section 12 of the Utah Constitution. The Court reached this holding even though defendants who miss the deadline must challenge their guilty plea for the first time under the PCRA, where they do not have a right to state-funded counsel, or to the effective assistance of counsel. Brown raises the same claim that *Rettig* resolved, but does not ask this Court to overrule *Rettig*. Instead, he argues that *Rettig* did not resolve this issue.

Has this Court already resolved this issue against Brown?

2b. Brown also claims that applying the time limit in the plea withdrawal statute denies him his constitutional rights under the Due Process, Equal Protection, and Open Courts Clauses of the state and federal constitutions, because it requires him to challenge his guilty plea without the

right to the effective assistance of counsel in litigating that challenge. But he does not explain how *Rettig's* rejection of the premise underlying these constitutional claims did not also resolve them. Nor does he acknowledge that in *State v. Merrill*, 2005 UT 34, ¶¶21-47, 114 P.3d 585, this Court held that the Plea Withdrawal Statute did not violate these additional constitutional provisions, even though the statute requires untimely defendants to challenge their guilty pleas without the right to counsel or the effective assistance of counsel.

Has Brown shown that *Rettig* and *Merrill* did not also resolve his additional constitutional challenges?

3. Article VIII, section 4 of the Utah Constitution grants this Court the authority to "adopt rules of procedure and evidence to be used in the courts of the state." Article VIII, sections 3 and 5 grant the legislature the authority to regulate the exercise of this Court's appellate jurisdiction and to limit the district court's original jurisdiction. The Plea Withdrawal Statute's deadline defines the circumstances under which a defendant may access trial and appellate court jurisdiction to challenge his guilty plea.

Is the Plea Withdrawal Statute's deadline a procedural rule that unconstitutionally encroaches on this Court's rulemaking authority?

Standard of Review for issues 2a, 2b, and 3. A constitutional challenge is a question of law reviewed for correctness. *State v. Allgier*, 2017 UT 84, ¶13, 416 P.3d 546.

STATEMENT OF THE CASE

A. Fact Summary.

Brown sexually abused each of his three daughters for years beginning when they were ten or eleven years old and continuing well into their teen years. R1-2,95,476-79. The total number of his abusive acts easily numbered in the thousands. R95,476-79.

Nevertheless, at his daughters' request, Brown was charged with, and pled guilty to, only three counts—one count of sodomy on a child, a first-degree felony, and two counts of sexual abuse of a child, second-degree felonies. R1-2,6,90,94-96,476-79.

B. Procedural history.

Brown knew exactly what he would be convicted of and what his sentence would be before the case even began. R85-90,93-95. Brown, his daughters, and the prosecutor negotiated the plea agreement before the Information was filed. R6,9,85-90,93-95. Under that agreement, the State would charge, and Brown would plead guilty to, only the three counts listed above. R1-2,6,90,94-96. The agreement also provided that Brown would be

sentenced to ten years to life for child sodomy rather than the most severe possible term of fifteen years to life. R6,9,85-86,90,93-95. The State also agreed to recommend concurrent sentences, and the trial court agreed to bind itself under rule 11(i), Utah Rules of Criminal Procedure, to impose the agreed-upon sentence. R9,86,90,238-39. Brown represented that he was willing to take full responsibility for his actions. R474.

The State filed the Information on 10 February 2011, and Brown entered his guilty pleas one week later at his initial appearance. R1-2,4-12. On Valentine's Day, three days before his plea hearing, Brown was driving his wife down Little Cottonwood Canyon when he drove his car off the road and it plunged 300 to 500 feet down the canyon. R30-31,35-37. Brown was nevertheless able to appear at his plea hearing and entered the previously agreed-upon guilty pleas at that hearing. R85-90. After questioning Brown in detail, the trial court found that he entered his pleas knowingly and voluntarily. R12,89.

Brown certified, both in his written plea statement and orally at the hearing, that he had read his plea statement "paragraph by paragraph," that he understood it, and that he understood his plea would waive several constitutional rights, including his right to appeal his conviction. R6-12,86-87. He also certified, both in his statement and at the hearing, that he had

received "every opportunity" he wished to discuss the matter with his attorney. And most relevant to the issue here, he certified that he was "acting freely and voluntarily," that he was not "under the influence of any drugs or medication," and that there was no reason not to proceed. R6-12,86-87. The trial court reminded Brown that any attempt to withdraw his guilty plea had to be made by motion before it announced his sentence, and Brown also certified in his written statement that he understood that requirement. R10,88.

Six weeks after he entered his guilty pleas, the trial court sentenced Brown according to the agreement. R17-18,93-96. It imposed concurrent prison sentences of ten years to life on the child-sodomy count, and one to fifteen years on the two child-sex-abuse counts. R17-18,93-96. The court reminded Brown that "it's through the consent of your victims that you are receiving the sentence that you are today." R94. The court noted that had Brown committed child sodomy in 2011 when he entered his pleas, his sentence would have been a minimum-mandatory term of twenty-five years to life. R95. The court further noted that "there could have been many more charges[,] as there were many more violations." R95.

Brown did not move to withdraw his guilty plea, or raise any concern about the plea hearing, before the trial court announced his sentence. R239.

Brown's first attempt to challenge his guilty pleas

Over a year and a-half after his sentencing, Brown filed a "motion for misplea" in his criminal case. R20-56. Contrary to what he certified at the plea hearing and failed to raise at his sentencing hearing, he claimed for the first time that, given his car accident and the medications he was taking following the accident, "he was not in a condition to understand the basic consequences of his decision." R24 (quotation simplified).

The trial court concluded that it had no jurisdiction to consider the untimely guilty-plea challenge. R70-71. The court nevertheless observed that it "did not find Mr. Brown to have any appearance of intoxication" at the plea hearing, and that Brown had "affirmatively denied any consumption of drugs, alcohol, or medication." R70. The court further observed that Brown was not sentenced until six weeks after his plea hearing and therefore had "ample opportunity to attempt to withdraw his plea." R70. The court "remain[ed] convinced that the plea was knowingly and voluntarily made." R70.

Brown appealed and the Court of Appeals affirmed, holding that it "lack[ed] jurisdiction to consider the belated [guilty plea] challenge." *State v. Brown*, 2013 UT App 99, ¶1, 300 P.3d 1289. This Court denied Brown's

petition for writ of certiorari. *State v. Brown*, 308 P.3d 536 (Utah 2013). As did the United States Supreme Court. *Brown v. Utah*, 571 U.S. 992 (2013).

Brown's second attempt to challenge his guilty pleas

In November 2013, more than two and a-half years after his sentencing, Brown filed an untimely petition under the PCRA seeking to challenge his guilty pleas. R173-236 (Fourth District Case No. 130401823). In addition to claiming that the effects of his car accident rendered him incapable of entering a valid plea, Brown now also claimed that his attorney incorrectly predicted the amount of prison time he would serve on his indeterminate sentence and that one of his attorneys had a potential conflict of interest. R176-77,183.

The post-conviction judge—who had also accepted Brown's pleas, imposed his sentence, and rejected his prior misplea motion raising some of the same arguments—dismissed the petition as untimely. R238-42. The court also emphasized that Brown received the sentence that the parties discussed and agreed to before the plea hearing, including during in-chambers discussions, and that this was the sentence the court bound itself to impose under rule 11(i), Utah Rules of Criminal Procedure. R238. The further court emphasized that it was clear from all those discussions, and also from

Brown's Presentence Investigation Report, that he faced a minimum of 11 years in prison. R238-41.

The court reiterated its prior finding and continued belief "that Brown's pleas were knowing and voluntary," that Brown had acknowledged that the factual basis supporting his pleas was accurate, and that in addition to acknowledging his guilt at the plea hearing, Brown also admitted his crimes to representatives of Adult Probation and Parole (AP&P) as part of the presentence investigation. R238-39. The court also noted that if Brown had been truly impaired when he entered his pleas, "he had six weeks to contemplate this issue and could have moved to withdraw the pleas…. Instead, [he] confessed his crimes to the AP&P investigator and was sentenced accordingly." R242.

Brown appealed and the Court of Appeals again affirmed. *Brown v. State*, 2015 UT App 254, ¶1,361 P.3d 124. This Court again denied a petition for writ of certiorari. *Brown v. State*, 366 P.3d 1213 (Utah 2016).

Brown's third attempt to challenge his guilty pleas

Six years after his sentencing, Brown filed a second untimely petition under the PCRA challenging his guilty pleas. R134-280 (Fourth District Case No. 170401388). He repeated the claims from his first petition and asked the post-conviction court to consider them under the "egregious injustice"

exception to the PCRA recognized in *Gardner v. State*, 2010 UT 46, 234 P.3d 1115. R258-71. The post-conviction court granted the State's motion for summary judgment and dismissed Brown's petition as procedurally barred.[1] R332-33. This time, Brown did not appeal.

The current proceeding

Undaunted, and after his two untimely PCRA actions, Brown returned again to his criminal case and, now seven years after sentencing, filed the motion at issue here, a "motion to reinstate Defendant's right to appeal with commensurate right to effective assistance of counsel." R321-352. He asked the trial court to reinstate his time for filing a direct appeal pursuant to rule 4(f), Utah Rules of Appellate Procedure, not because he was denied that right through no fault of his own, but because, in his view, the Plea Withdrawal Statute unconstitutionally denied him that right. R321,333-51. He thus asked the trial court to declare the statute unconstitutional and reinstate his right to bring an untimely challenge to his guilty plea in a reinstated direct appeal. R321,333-51.

[1] Although this order is not in the appellate record for this case, Brown refers to it in his motion to reinstate his right to appeal. R332-33.

The trial court again denied Brown's challenge to his guilty plea, relying on this Court's precedent upholding the constitutionality of the statute. R439 (Addendum B is the trial court's ruling).

Brown timely appeals. R441.

SUMMARY OF ARGUMENT

I. This Court should reject this appeal on the alternative and independent basis that the vehicle Brown relies on—rule 4(f), Utah Rules of Appellate Procedure—does not allow him to raise the constitutional issues he asks this Court to consider. Rule 4(f) provides a narrow remedy, reinstating only whatever appellate rights a defendant possessed when his right to a direct appeal was improperly forfeited. It does not allow a defendant to expand those rights by, among other things, raising a jurisdictionally barred challenge to his guilty plea. Brown therefore seeks relief that the rule cannot provide—a declaration that the Plea Withdrawal Statute's jurisdictional deadline is unconstitutional and, as a result, an opportunity to raise what would otherwise be a jurisdictionally barred challenge to his guilty plea in a reinstated direct appeal.

Brown had a way to challenge his guilty plea—a timely PCRA petition. But he forfeited that opportunity when he missed that filing deadline.

Because that the rule Brown relies on cannot provide him the relief he seeks, this Court should affirm on this basis alone, without considering the merits of Brown's constitutional challenges.

II. Brown claims that the Plea Withdrawal Statute's deadline denies him his state constitutional right to appeal, and also violates his rights under the state and federal Due Process, Equal Protection, and Open Courts Clauses. He reasons that if the deadline is applied to bar him from challenging his guilty plea in his criminal case or in a direct appeal, then it is unconstitutional because it requires him to seek "first review" of his guilty plea through a process where he does not have a Fourteenth-Amendment right to the effective assistance of counsel. But this Court has already considered and resolved these issues against Brown.

In *State v. Rettig*, this Court held that the deadline does not deny untimely defendants their state constitutional right to appeal, even though it requires those defendants to litigate their challenge to their guilty plea for the first time under the PCRA where they do not have a Fourteenth-Amendment right to the effective assistance of counsel. The *Rettig* court therefore also rejected the premise on which Brown's additional constitutional challenges are based—that the legislature cannot cut off a defendant's opportunity to challenge his guilty plea for the first time in a proceeding to which a

Fourteenth-Amendment right to the effective assistance of counsel attaches. Brown does not challenge *Rettig's* holding. Instead, he ignores it.

Brown also ignores that in *State v. Merrill*, this Court held that the statute did not violate the state and federal Due Process, Equal Protection, and Open Courts Clauses, even though it requires defendants to bring untimely challenges to their guilty pleas only under the PCRA. Brown makes no attempt to explain how *Merrill* did not also already resolve his additional constitutional claims. Nor does he attempt to distinguish *Merrill* or meet his high burden to show that it should be overturned. Instead, he ignores its holding. Brown therefore fails to show that this Court has not already resolved these constitutional claims against him.

III. Finally, Brown complains that the Plea Withdrawal Statute's deadline is unconstitutional because it is a legislatively created procedural rule and therefore invades this Court's authority to adopt procedural rules pursuant to article VIII, section 4 of the Utah Constitution. But the deadline is constitutional because it is jurisdictional. The legislature has constitutional authority to limit the district court's general jurisdiction and to regulate this Court's exercise of its appellate jurisdiction. The constitution therefore recognizes that statutes regulating access to the courts' jurisdiction do not fall within the realm of procedural rules that this Court has primary

responsibility to adopt. It does not matter that the legislature exercised its authority by enacting a deadline.

If it were necessary to analyze the substantive/procedural distinction here, the deadline is substantive. The constitution uses the term "procedural" to distinguish legal provisions that are within the legislature's domain from those that are within the judiciary's. Public policy is the legislature's domain; the orderly progress of litigation is the judiciary's. The Plea Withdrawal Statute's deadline is designed to further public policies, including the finality of guilty pleas and the conservation of state resources. It is therefore substantive.

Even if the deadline appears procedural, this Court must nevertheless viewed it as substantive because it is inextricably intertwined with the statute's substantive provisions. The pre-sentencing deadline is essential to the statute's purposes of furthering the finality of guilty pleas and conserving state resources by keeping those challenges focused on legitimate defects in the plea.

ARGUMENT

Brown seeks relief under rule 4(f), Utah Rules of Appellate Procedure, to declare unconstitutional the Plea Withdrawal Statute's deadline on motions to withdraw a guilty plea. R321. This Court should reject his

challenge at the outset because rule 4(f) cannot provide the relief he seeks—an opportunity to expand his rights on direct appeal beyond those that were available had he taken a timely appeal.

If a rule 4(f) motion is the proper vehicle for the relief Brown seeks, this Court should nevertheless deny that relief because Brown has not shown that the statute is unconstitutional. Brown argues that the statute is unconstitutional for two independent reasons. First, he argues that the Plea Withdrawal Statute's jurisdictional deadline, Utah Code §77-13-6(2), denies him several state and federal constitutional rights, most prominently, what he terms the right to "first review" of his guilty-plea challenge with a right to the effective assistance of counsel, regardless of when he brings that challenge. R333-52. Second, he claims that the deadline is also unconstitutional because it is a procedural rule that the legislature, not this court, adopted. R349-52.

Brown argues that although this Court has repeatedly considered the constitutionality of the Plea Withdrawal Statute, it has not resolved these two issues. Br.Aplt.6. Brown is wrong about the first. This Court's holdings in *State v. Rettig*, 2017 UT 83, ¶¶17-22, 416 P.3d 520, and *State v. Merrill*, 2005 UT 34, ¶¶21-47, 114 P.3d 585, have already rejected his claims that the legislature cannot constitutionally cut off a defendant's opportunity to challenge his

guilty plea in a direct appeal where he would enjoy the right to the effective assistance of counsel.

Brown is correct that this Court has not addressed his second issue—whether the statutory deadline is a procedural rule that only this Court has constitutional authority to promulgate. But Brown has not shown that it is.

I.

This Court should affirm on the independent and alternative basis that rule 4(f)—which is the only basis for this appeal—cannot provide Brown the remedy he seeks—an expansion of his right to a direct appeal.

The Plea Withdrawal Statute is constitutional, as explained below. But even if it were not, this Court should affirm because the remedy Brown seeks is not available under the rule that is the entire foundation for his motion—rule 4(f), Utah Rules of Appellate Procedure. Brown recognizes that even if his right to a direct appeal were restored, this Court would not have jurisdiction to consider a challenge to his guilty plea. Br.Aplt.15,26-27; *Rettig*, 2017 UT 83, ¶¶17-22. He therefore asks this Court not only to restore his right to a direct appeal, but to allow him to expand that right to let him challenge his guilty plea in that appeal because, he contends, the Plea Withdrawal Statute's deadline is unconstitutional. That exceeds what rule 4(f) permits.

Rule 4(f) "was adopted to implement the holding and procedure outlined in *Manning v. State*, 2005 UT 61, 122 P.3d 628." Utah R. App. P. 4

advisory committee note. The *Manning* court addressed the appropriate remedy for a defendant who has been denied her right to appeal. 2005 UT 61, ¶11. Before *Manning*, this Court had established in *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981), that a defendant who proved that she was denied her right to appeal was entitled to be resentenced nunc pro tunc, which "restarted the appeal clock." *Grimmett v. State*, 2007 UT 11, ¶18, 152 P.3d 306; *see also Manning*, 2005 UT 61, ¶¶21-22.

But a *Johnson* resentencing had a very "limited scope and purpose." *Grimmett*, 2007 UT 11, ¶20. Its "'*only effect*'" was "'to provide the defendant with another opportunity to pursue the direct appeal that he was previously denied.'" *Id.* ¶21 (quoting *State v. Gordon*, 913 P.2d 350, 356 (Utah 1996)). A *Johnson* resentencing "'merely returned [the defendant] to the position he was in before his appeal was dismissed.'" *Id.* (quoting *Gordon*, 913 P.2d at 356). It did not allow the defendant to raise new issues—like an untimely challenge to his guilty plea—that he could not have raised had he initially taken a timely direct appeal. *See id.* ¶¶21-25.

The *Manning* court "discarded nunc pro tunc resentencing," *Grimmett*, 2007 UT 11, ¶19, and replaced it with "a more direct mechanism to reinstate this right," *Manning*, 2005 UT 61, ¶28. *Manning* recognized the sentencing court's power to "reinstate the time frame for filing a direct appeal." *Id.* ¶31.

But *Manning* also recognized that its more direct remedy was different only in form, not substance, from the limited *Johnson* resentencing. 2005 UT 61, ¶¶34-37; *Grimmett*, 2007 UT 11, ¶¶19-25. Like *Johnson's* resentencing, *Manning's* reinstatement of the right to a direct appeal merely puts a defendant back in "'the position he was in before his appeal was dismissed.'" *Grimmett*, 2007 UT 11, ¶21. It does not allow him to raise new issues, either in the trial court or on appeal, that he could not have raised had he initially taken a timely direct appeal. *Id.*¶¶21-25. Indeed, the *Manning* court recognized that because Manning herself had not filed a timely motion to withdraw her guilty plea, an appellate court would not have jurisdiction to review her plea, even if she could prove that she was entitled to reinstatement of her direct appeal. *See* 2005 UT 61, ¶34-37.

Even if Brown could prove that he was denied his right to appeal under rule 4(f), that relief would reinstate only his right to appeal his sentence, as it did in *Manning*. Brown cannot expand his appellate right to include a challenge to his plea. *See Manning*, 2005 UT 61, ¶¶34-37; *Grimmett*, 2007 UT 11, ¶¶21-25. This Court should therefore affirm on the alternate ground that the relief Brown seeks is not available under rule 4(f). *See Bailey v. Bayles*, 2002 UT 58, ¶13, 52 P.3d 1158 (holding that an appellate court may affirm on "any legal ground or theory apparent on the record") (quotation simplified).

And the rule 4(f) limitation does not leave appellants' in Brown's position without a means to challenge their pleas. They can still do so under the PCRA. But Brown forfeited that remedy when he failed—twice—to timely seek relief. In essence, he is asking this Court to excuse his own failure.

But even if rule 4(f) can afford Brown the remedy he seeks, he is not entitled to it because he has not shown that the Plea Withdrawal Statute is unconstitutional.

II.

This Court has already rejected Defendant's claims that the Plea Withdrawal Statute's deadline violates his constitutional rights by requiring him to raise his first challenge to his guilty pleas without a Fourteenth Amendment right to the effective assistance of counsel.

Brown argues that the Plea Withdrawal Statute denies him his right to appeal under article I, §12 of the Utah Constitution, and several other state and federal constitutional rights, because it requires him to seek "first-review" of his untimely guilty-plea challenge under the PCRA. Br.Aplt.19-36. This requirement is unconstitutional in his view because he is not entitled to a Fourteenth-Amendment right to the effective assistance of counsel under the PCRA to litigate his claim. This in turn will foreclose him from complaining about that counsel's performance in a subsequent challenge to his plea. He claims that the Due Process clauses of the Utah Constitution and

the Fourteenth Amendment entitle him to the effective assistance of counsel in any proceeding that amounts to "'first review'" of an issue.[2] Br.Aplt.25-31.

He also argues that by shifting untimely guilty-plea challenges to the PCRA, the Plea Withdrawal Statute's deadline denies him other state and federal constitutional rights. Br.Aplt.29-36. In addition to the state constitutional right to an appeal and the Fourteenth Amendment right to the effective assistance of counsel in that appeal, he argues that the statute violates: the state and federal Due Process Clauses (U.S. Const. amend. V, Utah Const. art. I, §7); the federal Equal Protection Clause (U.S. Const. amend. XIV); Utah's Uniform Operation of Laws Clause (Utah Const. art. I, §24); and Utah's Open Courts Clause (Utah Const. art. I, §11). Br.Aplt.29-36.

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[2] Brown suggests that the right to the effective assistance of counsel in a direct appeal also stems from the Sixth Amendment's right to counsel and the Fifth Amendment's Due Process Clause. Br.Aplt.30-31. He is wrong. If a state has provided the right to appeal, the Fourteenth Amendment's Due Process and Equal Protection Clauses provide the source of the right to counsel in that direct appeal. *See Douglas v. California*, 372 U.S. 353, 355-58 (1963); *Evitts v. Lucey*, 469 U.S. 387, 398 (1985). The Sixth Amendment guarantees counsel only in a "criminal prosecution"; it says nothing about an appeal. U.S. Const. amend. VI. And the Fifth Amendment guarantees due process only by the federal government, not the states. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In fact, the federal constitution does not require states to provide an appeal of a criminal conviction at all. *See Evitts*, 469 U.S. at 393.

Brown argues that this Court has not decided these issues. Br.Aplt.6. It has.

A. This Court has already held that applying the Plea Withdrawal Statute's jurisdictional deadline does not deny untimely defendants the right to appeal under article I, section 12 of the Utah Constitution.

Brown correctly states that although the defendant in *Gailey v. State*, 2016 UT 35, ¶22, 379 P.3d 1278, claimed that applying the Plea Withdrawal Statute's deadline to require her to raise her untimely guilty-plea challenge in a PCRA proceeding would deny her the right to state-funded counsel and the effective assistance of that counsel in bringing that challenge, this Court held that the issue was not ripe. Br. Aplt.5 (citing *Gailey*, 2016 UT 35, ¶23). This Court believed the issue needed time to mature because Gailey had not yet sought and been denied the effective assistance of counsel in challenging her guilty plea under the PCRA. *Gailey*, 2016 UT 35, ¶23. In other words, because the Plea Withdrawal Statute's deadline had not yet been applied in a way that denied Gailey the core element of the right to appeal that she claimed would be lacking under the PCRA, this Court left the issue for another day. *See id.*

That day came just a year later in *State v. Rettig*, 2017 UT 83, ¶17, 416 P.3d 520. Brown correctly acknowledges that this Court again considered the constitutionality of the Plea Withdrawal Statute in *Rettig*, and *State v. Allgier*,

2017 UT 84, 416 P.3d 546. Br.Aplt.6. He claims, however, that neither case answered "the fundamental question deemed unripe in *Gailey*: Does requiring defendant 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." Br.Aplt.6.

Brown is wrong. *Rettig* squarely addressed and rejected Brown's claim, and *Allgier* reaffirmed that holding. The *Rettig* court explained that it was deciding "the question left unanswered in *Gailey*"—"whether the Plea Withdrawal Statute could be *applied* in a manner infringing the state constitutional right to appeal." 2017 UT 83, ¶¶16, 17. The *Rettig* court recognized (1) that the unresolved issue in *Gailey* concerned "the lack of a right to counsel under the PCRA"; and (2) that the *Gailey* court refused to resolve that issue because Gailey "might ultimately be afforded the core element of an appeal that she claimed to be lacking under the PCRA," the assistance of counsel. *Id.* ¶16. Thus, the issue left unresolved in *Gailey*, but that *Rettig* addressed head on, is Brown's issue: whether "the lack of a right to counsel under the PCRA" renders the Plea Withdrawal Statute's deadline unconstitutional because applying it requires untimely guilty-plea challenges to proceed only under the PCRA. *See Rettig*, 2017 UT 83, ¶16.

The *Rettig* court held that it did not. *Id.* ¶¶17-22. It held that "the Plea Withdrawal Statute is not an infringement of the state constitutional right to appeal because it does not foreclose an appeal but only narrows the issues that may be raised on appeal." *Id.* ¶22. Because the Plea Withdrawal Statute "does not foreclose an appeal," it did not matter that, like Gailey, Rettig also had not yet sought and been denied the effective assistance of counsel in a PCRA proceeding. *Id.* ¶¶1-3. In other words, the Plea Withdrawal Statute is "constitutional as applied," even though it requires defendants who miss its deadline to challenge their guilty plea only under the PCRA where they do not have a Fourteenth-Amendment right to state-funded counsel or to the effective assistance of counsel. *Id.* ¶¶3,22,27.

There is no basis to reconsider that holding here because Brown does not challenge it. Rather, he ignores it. Br.Aplt.6,26-29.

The closest he comes to challenging it is to suggest, incorrectly, that the United States Supreme Court has held that defendants enjoy a Fourteenth-Amendment right to the effective assistance of counsel whenever they seek "'first review' of an issue where that 'first review' is the equivalent of a direct appeal." Br.Aplt.25-26. Brown cites *Martinez v. Ryan*, 566 U.S. 1, 1 (2012), as support.

But *Martinez* says nothing about states' federal constitutional obligations to their litigants. *Martinez* addressed only the federal-habeas litigation consequences from whatever processes the states choose to provide their citizens.

In *Martinez*, the Supreme Court confronted whether the "right to effective counsel" should extend to "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id.* at 8. Recognizing its prior holdings establishing the "constitutional rule" that "there is no right to counsel in collateral proceedings," the Court expressly declined to resolve whether an "exception" to that rule "exists as a constitutional matter." *Id.* at 9. The *Martinez* court therefore expressly declined to adopt Brown's claim that the Fourteenth Amendment requires states to guarantee the effective assistance of counsel in a proceeding other than a direct appeal, even when that proceeding is a defendant's first opportunity to raise a particular challenge to his conviction. *Id.* at 8.

Brown also cites *Halbert v. Michigan*, 545 U.S. 605, 615 (2005), to support his claim. Br.Aplt.26. But it too is inapposite. Although *Halbert* was decided long before *Martinez*, the *Martinez* court did not view it as controlling on whether a defendant is entitled to counsel in first-review proceedings other than direct appeals. *Martinez*, 566 U.S. at 11-12. *Halbert* addressed a different

issue. It resolved only when a right to counsel attaches in the direct appeal of an issue that state law allowed a defendant to raise on direct appeal. It did not purport to restrict the states' authority to limit what may be appealed.

The *Halbert* court addressed whether a state could refuse to provide counsel to a defendant who challenges his plea on direct appeal, merely because the state has made direct appeals from plea-based convictions discretionary, rather than appeals of right. *See* 545 U.S. at 609-10. The Court held that a state could not, because the question of whether to grant the appeal depended on the merits of the challenge, and pro se defendants seeking first-tier review were ill-equipped to articulate such challenges. *Id.* at 618-24. The Court further noted that under Michigan law, a defendant who pleads guilty "does not thereby forfeit all opportunity for appellate review." *Id.* at 618. The Court therefore concluded that Michigan's scheme for raising guilty plea challenges was more characteristic of a direct appeal (to which the right to state-funded counsel attached) rather than a discretionary one (to which it did not), even though the appeal was technically discretionary. *See id.* Indeed, Michigan's scheme clearly gave wealthy defendants who pled guilty and sought the opportunity to challenge their convictions on appeal an advantage over similarly situated indigent defendants.

The Plea Withdrawal Statute does not create a scheme like the one held unconstitutional in *Halbert*. Unlike Michigan defendants who plead guilty but maintain the right to seek a discretionary direct appeal, a Utah defendant who misses the deadline to withdraw his plea does "forfeit all opportunity for [direct] appellate review" of his guilty plea, *id.* at 618, and can only challenge his plea under the PCRA. Thus, every Utah defendant who misses the deadline is treated identically. And, unlike Michigan defendants, a Utah defendant who must challenge his guilty plea under the PCRA will obtain merits review of his challenges if he complies with the PCRA's time and procedural bars. That review is not discretionary. *Halbert* therefore also provides Brown no support.

Neither *Martinez* nor *Halbert*, which both predate *Rettig*, undermine *Rettig's* holding that applying the Plea Withdrawal Statute's deadline does not deny defendants their state constitutional right to appeal. Thus, contrary to Brown's claim, this Court has already resolved this claim against him. *See Rettig*, 2017 UT 83, ¶3; *Allgier*, 2017 UT 84, ¶28.

B. This Court has also rejected Defendant's claims that the deadline violates other state and federal constitutional rights.

Rettig has also already resolved Brown's other constitutional challenges to the Plea Withdrawal Statute that stem from the lack of the Fourteenth-Amendment right to counsel in the PCRA. In addition to

claiming a violation of his state constitutional right to appeal, Brown argues that making the PCRA the first opportunity for untimely guilty-plea challenges also violates Utah's Open Courts and Uniform Operation of Laws Clauses, and the Federal Due Process and Equal Protection Clauses. Br.Aplt.29-36. But all of these claims are premised on his assertion that this procedure violates his right to appeal his guilty plea, or in his words to obtain "'first review'" of his plea "with the assistance of [constitutionally-guaranteed effective] counsel." Br.Aplt.29 (quotation simplified). As explained, *Rettig* rejected that premise. *See* 2017 UT 83, ¶3.

Moreover, like Brown, the defendant in *State v. Merrill*, 2005 UT 34, ¶¶21-47, 114 P.3d 585, also argued that the Plea Withdrawal Statute's deadline violated Utah's Open Courts and Uniform Operation of Laws Clauses, and the Federal Due Process and Equal Protection Clauses. The *Merrill* court rejected those claims. *See id.* In doing so, it expressly held that "the absence of a right to counsel to seek PCRA relief … fails to jeopardize the constitutionality of section 77-13-6." *Id.* ¶47.

As he does with *Rettig's* holding, Brown acknowledges, but does not challenge *Merrill's* holding. Br.Aplt.29-36. Nor does Brown attempt to explain how his claims are distinguishable from those this Court already addressed in *Rettig* and *Merrill*. Br.Aplt.29-36.

Both *Rettig* and *Merrill* establish that the absence of a Fourteenth-Amendment right to the effective assistance of counsel to challenge a guilty plea under the PCRA does not render the Plea Withdrawal Statute's deadline unconstitutional under any of the provisions Brown identifies. *See Rettig*, 2017 UT 83, ¶3; *Merrill*, 2005 UT 34, ¶48. This Court has therefore already rejected Brown's constitutional challenges based on the absence of a right to the effective assistance of counsel under the PCRA.

And as to his federal constitutional claims, it is clear that the states have no federal constitutional obligation to provide any appeal at all. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."). When a state does provide an appeal, Fourteenth Amendment protections apply. *See Evitts v. Lucey*, 469 U.S. 387, 396-400 (1985). But those protections apply only to what the state allows a defendant to appeal. They do not obligate the states to allow a defendant to appeal anything and everything.

Indeed, the law has never entitled a defendant to state-funded counsel merely because he is alleging for the first time that his trial counsel was ineffective. Rather, the existence of a Fourteenth-Amendment right to the effective assistance of counsel depends on when, not whether, a defendant asserts a claim of counsel ineffectiveness.

This rule puts Brown's challenges to his plea-counsel's effectiveness on the same footing as any other constitutional challenge. For example, when a defendant's appointed appellate counsel fails to recognize and argue a constitutional error that occurred at trial, the defendant's only remedy is under the PCRA. *See State v. Rees*, 2005 UT 69, ¶¶18-19, 125 P.3d 874 (recognizing that claims of ineffective assistance of appellate counsel must be raised under the PCRA and not in "an additional direct appeal"). Likewise, if the prosecution violates its duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 82, 87 (1963), and a defendant does not discover the violation before the deadline for filing a motion for new trial expires—ten days under rule 24(c) Utah Rules of Criminal Procedure—he can seek relief only under the PCRA.[3] So too for a defendant who discovers new evidence of actual innocence after the deadline for filing a motion for new trial. All these constitutional claims must be raised in post-conviction review, where there is no right to counsel or the effective assistance of counsel.

Because a defendant is not entitled to state-funded counsel, or the effective assistance of counsel, merely because he asserts that his plea counsel was ineffective, this Court has already repeatedly held that the legislature

[3] A court may extend the ten-day deadline, but only if the request is made before the original deadline expires. *See* Utah R. Crim. P. 24(c).

may properly require a defendant who misses the Plea Withdrawal Statute's deadline to use the PCRA as his only avenue for vindicating his constitutional right to effective plea counsel. *See Merrill*, 2005 UT 34, ¶47; *Rhinehart*, 2007 UT 61, ¶14; *Rettig*, 2017 UT 83, ¶¶3, 51. This Court has therefore already determined that the statute can constitutionally require untimely defendants to pursue their first challenge to plea counsel's effectiveness under the PCRA.

III.

The deadline does not invade this Court's constitutional authority to make procedural rules because the deadline defines the courts' jurisdiction; alternatively, the deadline is substantive, or so inextricably bound to the substantive provisions of the statute, that it must be viewed as substantive.

Brown also argues that the Plea Withdrawal Statute's subsection (2)(b) violates article VIII, section 4 of the Utah Constitution because it "is an unconstitutional assumption of the court's exclusive power to adopt procedural rules." Br.Aplt.36 (bolding and capitalization omitted). He contends that from its first enactment in 1989, the statutory deadline on motions to withdraw guilty pleas has been an unconstitutional procedural rule because it "'prescribes the manner and means of raising a particular issue in court proceedings,'" Br.Aplt.43 (quoting *Rettig*, 2017 UT 83, ¶¶58-60), and was not passed in compliance with the requirements for a legislative amendment to existing rules of procedure, Br.Aplt.36-45 (citing *Brown v. Cox*, 2017 UT 3, ¶¶17-24, 387 P.3d 1040).

Brown is incorrect for three reasons. First, because article VIII gives the legislature power to enact statutes governing court jurisdiction, the proper inquiry is whether the deadline is jurisdictional, not whether it is substantive or procedural. As this Court has repeatedly held, the Plea Withdrawal Statute's deadline is jurisdictional. Second, if the substantive/procedural distinction matters, the deadline is substantive because it furthers important public policy interests—concerns within the legislature's domain—not merely the orderly progress of litigation—the domain of this Court's procedural rules. Third, even if the deadline could be deemed to fall within the types of rules that have been traditionally viewed as "procedural," it is so inextricably intertwined with the statute's substantive components that it must be viewed as a substantive provision that is within the legislature's power to promulgate.

"When confronted with a constitutional challenge to a statute, [this Court will] presume the statute to be constitutional, resolving any reasonable doubts in favor of constitutionality." *Richards v. Cox*, 2019 UT 57, ¶39, 450 P.3d 1074 (quotation simplified). Brown has not rebutted this presumption.

A. The deadline is constitutional because it is jurisdictional.

The proper inquiry here is whether the statute is jurisdictional, not whether it is substantive or procedural. The same constitutional

amendments that granted this Court procedural-rulemaking authority in 1984, simultaneously granted the legislature power to statutorily regulate access to both this Court's appellate jurisdiction and the district court's original jurisdiction. The constitution intends for these powers to exist harmoniously. The constitution therefore implicitly recognizes that statutes regulating access to the court's jurisdiction do not fall within the realm of procedural rules that this Court has primary responsibility to adopt. Indeed, the process of replacing the statutory rules of criminal procedure with court-governed rules of procedure that the 1984 amendments necessitated demonstrates that filing deadlines for accessing jurisdiction, including appellate jurisdiction, were never intended to be viewed as procedural rules within this Court's control.

In 1984, Utahns comprehensively amended article VIII, the Utah Constitution's judicial article. *See* 1984 Laws of Utah, Constitutional Resolutions, SJR1, p.268. These amendments vested the state's judicial power "in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the legislature by statute may establish." Utah Const. art. VIII, §1.

The amendments defined the subject-matter jurisdiction of these two constitutional courts and granted the legislature power to regulate access to

that jurisdiction. The amendments granted this Court "original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States." *Id.* §3. They also granted this Court "appellate jurisdiction over all other matters *to be exercised as provided by statute*, and power to issue all writs and orders necessary" for it to exercise its jurisdiction. *Id.* (emphasis added). The requirement that this Court's appellate jurisdiction is "to be exercised as provided by statute" grants the legislature constitutional authority to limit how this Court exercises its appellate jurisdiction over a class of cases or over issues in a particular case.

As for the district court, the amendments granted it "original jurisdiction in all matters except as limited by this constitution *or by statute*, and power to issue all extraordinary writs." *Id.* §5 (emphasis added). Thus, the amendments also granted the legislature power to regulate not only access to the district court's original jurisdiction, but to limit that jurisdiction by statute. *See id.*

The amendments also granted this Court the power to "adopt rules of procedure and evidence to be used in the courts of the state," and granted the legislature the power to "amend" those rules "upon a vote of two-thirds" of both houses. *Id.* §4. But this grant of power to make procedural rules does not diminish the simultaneous grant to the legislature of the power to

regulate access to court jurisdiction. The constitution intends these two powers to coexist. Thus, a statute is constitutional if it regulates jurisdiction, even if it also appears to be procedural.

The Plea Withdrawal Statute's deadline is unquestionably jurisdictional. This Court has repeatedly and unanimously recognized this in an unbroken line of opinions spanning more than a quarter century. *See State v. Allgier*, 2017 UT 84, ¶21, 416 P.3d 546; *State v. Rettig*, 2017 UT 83, ¶¶33, 41-44, 416 P.3d 520; *Gailey v. State*, 2016 UT 35, ¶20, 379 P.3d 1278; *State v. Ott*, 2010 UT 1, ¶18, 247 P.3d 344; *State v. Rhinehart*, 2007 UT 61, ¶¶10-14, 167 P.3d 1046; *Grimmett v. State*, 2007 UT 11, ¶¶8, 25, 152 P.3d 306; *State v. Nicholls*, 2006 UT 76, ¶¶6-7, 148 P.3d 990; *State v. Merrill*, 2005 UT 34, ¶¶13-20, 114 P.3d 525; *State v. Reyes*, 2002 UT 13, ¶3, 40 P.3d 630; *State v. Mullins*, 2005 UT 43, ¶11 n.2, 116 P.3d 374; *State v. Abeyta*, 852 P.2d 993, 995 (Utah 1993).

In fact, the deadline is doubly jurisdictional. It regulates the exercise of both the district court's original jurisdiction and this Court's appellate jurisdiction. A statutory limit on a district court's original jurisdiction to hear an issue will necessarily limit an appellate court's jurisdiction to hear that same issue. When a district court lacks jurisdiction to consider an issue, the only question on appeal is whether the district court correctly determined that it lacked jurisdiction. An appellate court cannot review a jurisdictionally

barred issue for "plain error or ineffective assistance of counsel." *See Rettig*, 2017 UT 83, ¶¶42, 51; *Reyes*, 2002 UT 13, ¶4 (holding that a court "cannot … use plain error to reach an issue over which it has no jurisdiction").

Because the legislature has express constitutional authority to regulate access to both the district court's original jurisdiction and this Court's appellate jurisdiction, the Plea Withdrawal Statute's jurisdictional deadline is constitutional under both art. VIII, §3 (appellate jurisdiction) and art. VIII, §5 (district court jurisdiction).

The deadline does not have to be constitutional under both provisions. In theory, either constitutional provision justifies the statute. But in practice, a statutory limit on the district court's jurisdiction to hear an issue will also limit an appellate court's jurisdiction over that same issue. And as demonstrated, a statute is constitutional under article VIII if it is jurisdictional.

1. Subsection (2)(b) is jurisdictional alone, or when read—as it must be—together with subsection (2)(c).

Subsection (2)(b) of the statute is jurisdictional either alone, or when read together with subsection (2)(c). The *Rettig* court appeared to distinguish between subsection (2)(b) and (2)(c) and suggest that it was only the interaction between the two that made the statute jurisdictional. *See* 2017 UT 83, ¶44. The *Rettig* court stated that subsection (2)(b) "sets a strict rule of

preservation—a requirement that a motion to withdraw be filed before the sentence is imposed," and that subsection (2)(c) "prescribes a strict waiver sanction." *Id.* ¶47. The Court explained that this creates "both a preservation rule and a waiver sanction that stands as a jurisdictional bar." *Id.* ¶44.

This Court was correct that the Plea Withdrawal Statute's deadline is jurisdictional. But its jurisdictional nature does not depend on subsection (2)(c). It is the deadline itself in subsection (2)(b) that is jurisdictional. But even if the two subsections depend on each other, subsection (2)(b) is still a constitutional jurisdictional provision because it must be read in harmony with subsection (2)(c).

Abeyta established that the deadline on motions to withdraw is itself jurisdictional. The *Abeyta* court analyzed the 1989 version of the Plea Withdrawal Statute. *See* 852 P.2d at 995. That version was enacted before the PCRA and provided, in relevant part, "A request to withdraw a plea of guilty or no contest is made by motion, and shall be made within 30 days after entry of the plea." Utah Code §77-13-6(2)(b) (1989). The statute's then subsection (3) provided that the deadline did "not restrict the rights of an imprisoned person under Rule 65B(i), Utah Rules of Civil Procedure," the precursor to the PCRA. *See id.* §77-13-6(3).

Analyzing these provisions, this Court held that it was subsection (2)(b)'s deadline for filing a motion to withdraw that was itself a substantive, jurisdictional provision because it "extinguished" the right to move to withdraw a guilty plea once the deadline passed. *Abeyta*, 852 P.2d at 995. The jurisdictional nature of the deadline did not depend on any requirement that untimely challenges be pursued in a collateral proceeding. *See id.* Indeed, the 1989 statute possessed no such requirement. Rather, it merely noted a possible alternative remedy and clarified that its provisions did nothing to restrict an untimely defendant's right to that remedy. *See* Utah Code §77-13-6(3) (1989).

The legislature presumably adopted *Abeyta's* jurisdictional interpretation of the Plea Withdrawal Statute's deadline because it has not amended the statute to contradict that interpretation. *See Keene Corp. v. U.S.*, 508 U.S. 200, 212 (1993) (presuming that when Congress reenacts statutory language that has been previously interpreted in "settled law … Congress was aware of these earlier judicial interpretations and, in effect, adopted them"). Rather, the legislature has merely reset the jurisdictional deadline to pre-announcement of sentence, a point that better serves the public interest in furthering finality.

The 1989 version of the statute required a defendant to file a motion to withdraw his plea "within 30 days after the entry of the plea." Utah Code §77-13-6(2)(b) (1989). Both the State, and the trial courts, interpreted "entry of the plea" to occur when the district court accepted the guilty plea at the plea hearing. *See State v. Price*, 837 P.2d 578, 581-83 (Utah App. 1992), *overruled by State v. Ostler*, 2001 UT 68, ¶11, 31 P.3d 528. But this Court later disagreed with this interpretation. *See Ostler*, 2001 UT 68, ¶11. In *Ostler*, the court held that a plea is not "entered" until a district court enters its "final judgment of conviction" after sentencing. *See id.* ¶11 & n.3. *Ostler* therefore overruled the *Price's* holding that the Plea Withdrawal Statute's deadline "runs from the date of the plea colloquy." *Id*.

In 2003, the legislature amended the statute to reestablish a pre-sentencing deadline. It "removed the thirty-day filing deadline and instead required that a 'request to withdraw a plea of guilty … shall be made by motion before sentence is announced.'" *See Gailey*, 2016 UT 35, ¶15 (citing Utah Code §77-13-6(2)(b)).

Current subsection (2)(c)'s provision that an untimely challenge "shall be pursued under" the PCRA does not make subsection (2)(b)'s deadline any more jurisdictional than it has been since its original enactment in 1989, as *Abeyta* established. Rather, it is merely a signpost, pointing untimely

defendants to their only possible remedy. Had *Abeyta*, or some other case interpreted the deadline as non-jurisdictional, and the legislature had added subsection (2)(c) in response, then there might be an argument that the deadline cannot be jurisdictional without subsection (2)(c). But that is not how the statute has evolved. Rather, the legislature has merely reset what both it and this Court always understood to be a jurisdictional deadline.

The *Rettig* court therefore incorrectly classified subsection (2)(c) as "establishing a new remedy or cause of action." 2017 UT 83, ¶57. Subsection (2)(c), which was not enacted until 2003, did not "establish" the PCRA as a remedy for a defendant who misses the deadline for moving to withdraw his plea. *See* 2003 Laws of Utah ch. 290, §1. Rather, the legislature "established" the PCRA seven years earlier in 1996, when it enacted it as sections 78B-35a-101 to -110. *See* 1996 Laws of Utah ch. 235, §§1-10. The *Rettig* concurrence therefore correctly observed that "nothing in subsection (2)(c) creates or expands a defendant's rights under the PCRA," rather, it merely "point[s] defendants to a pre-existing remedy." 2017 UT 83, ¶124 (Durham, J., concurring). Since the 1989 inception of subsection (2)(b)'s jurisdictional deadline, the Plea Withdrawal Statute's subsection (2)(c), and its predecessors, have merely directed untimely defendants to their only alternative remedy. Before the PCRA was enacted in 1996, that remedy was

to seek extraordinary relief under rule 65B, Utah Rules of Civil Procedure. After the PCRA was enacted it governed untimely challenges to guilty pleas. Given *Abeyta*, the Plea Withdrawal Statute's deadline requires no additional language to make it jurisdictional.

But even if subsections (2)(b) and (2)(c) depend on one another to create a jurisdictional deadline, subsection (2)(b) is still jurisdictional because both subsections must be read together. Statutory interpretation is not a game of divide and conquer. Rather, this Court interprets statutes "as a whole" and reads statutory provisions "in harmony with each other" and with related statutes. *Dale T. Smith & Sons v. Utah Labor Com'n*, 2009 UT 19, ¶7, 218 P.3d 580. As this Court correctly held in *Rettig*, "[t]he Plea Withdrawal *Statute* is a jurisdictional bar." 2017 UT 83, ¶51 (emphasis added).

2. The legislature, not this Court, may enact jurisdictional filing deadlines.

The legislature may properly enact statutes that define a court's jurisdiction to hear a case or an issue within a case. The *Rettig* court suggested that jurisdictional bars like the Plea Withdrawal Statute's deadline are "a proper subject for our rules of procedure." 2017 UT 83, ¶35. But this characterization runs afoul of the limits on this Court's constitutional authority. As shown, the legislature, not this Court, has the sole authority to define the courts' jurisdiction over matters not otherwise specified in the

constitution. Saying that the courts may affect their jurisdiction through their rule-making authority is antithetical to the clear constitutional mandate.

The *Rettig* concurrence got it right on this point. As Justice Durham explained, nothing in the Utah Constitution grants this Court the authority to define or otherwise regulate its own jurisdiction, or the jurisdiction of any other state court, including the jurisdiction to decide a particular case or issue. *See id.* ¶70 (Durham, J., concurring).

Article VIII, section 4, says nothing about jurisdiction, either explicitly or implicitly. It provides only that this 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." Utah Const. art. VIII, §4. It also grants the legislature power to amend those rules. *See id.* The *Rettig* majority identified nothing in §4, or any other constitutional provision, to support the assertion that the power to promulgate jurisdictional rules of preservation and waiver "is a proper subject for [this Court's] rules of procedure." 2017 UT 83, ¶35.

The *Rettig* court cited Rule 12 of the Utah Rules of Criminal Procedure, and the analogous federal rule, as examples of procedural, jurisdictional rules. *See id.* ¶32-33. But decisions interpreting those rules do not support the conclusion that they are jurisdictional, even though those rules dictate

that failure to timely raise certain issues in the district court waives those issues.

For example, *Rettig* cited *U.S. v. Weathers*, 186 F.3d 948, 954, 959 (D.C. Cir. 1999), for the proposition that rule 12 of the Federal Rules of Criminal Procedure is a jurisdictional rule. 2017 UT 83, ¶33 n.5. *Weathers* did hold that an appellate court cannot review for plain error an untimely multiplicity challenge to an indictment because, under federal rule 12, untimely multiplicity challenges are waived. *See* 186 F.3d at 954. But the *Weathers* court nevertheless acknowledged that it could review whether counsel was ineffective for waiving the issue. *See id.* at 958.

Similarly, in *State v. Ferry*, 2007 UT App 128, ¶¶10-17, 163 P.3d 647, our court of appeals held that counsel was ineffective for not raising a timely motion to suppress evidence. It did so even though rule 12(f), Utah Rules of Criminal Procedure, deems that omission a "waiver." *See* Utah R. Crim. P. 12(f).

As explained, when a rule creates a jurisdictional bar, it forecloses any appellate review of the waived issue. *See Rettig*, 2017 UT 83, ¶¶42, 51. But both *Weathers* and *Ferry* recognize that rule 12 of the state and federal criminal rules does not bar appellate review of counsel's waiver of issues governed by those rules. *See Weathers*, 186 F.3d at 954; *Ferry*, 2007 UT App 128, ¶17. Thus,

neither rule is a true jurisdictional bar. The rules establish a rule of preservation, but not a jurisdictional one. *See Weathers*, 186 F.3d at 955-58.

"The jurisdiction of our courts is 'established by the Utah Constitution and by statute." *Rettig*, 2017 UT 83, ¶70 (Durham, J., concurring) (quoting *So. Utah Wilderness Alliance v. Bd. of State Lands & Forestry*, 830 P.2d 233, 234 (Utah 1992)). Nothing in the Utah Constitution grants this Court power over its own jurisdiction. On the contrary, the constitution says the exact opposite. This Court's appellate jurisdiction is "to be exercised as provided by *statute*." Utah Const. art. VIII, §3 (emphasis added). *Rettig* wrongly concluded otherwise.

But if this Court does have constitutional authority to limit its own jurisdiction through rules of preservation and waiver, the constitution does not vest this power exclusively, or even principally, in this Court. Rather, as explained, the constitution gives the legislature the principal authority over this Court's appellate jurisdiction, and the district court's general jurisdiction. *See* Utah Const. art. VIII, §§ 3, 5. Therefore, the Plea Withdrawal Statute's deadline is constitutional because, as demonstrated, it regulates both trial and appellate courts' jurisdiction to decide a particular issue.

3. The process of moving the rules of criminal procedure from the codebook to the rulebook after the 1984 amendments demonstrates that jurisdictional deadlines are the legislature's domain, not this Court's.

Before the 1984 amendments granted this Court procedural-rulemaking authority, the legislature enacted the procedural rules. The legislature enacted the Utah Rules of Criminal Procedure in 1980. *See* 1980 Laws of Utah ch. 14, §1. Section 77-35-26 of that act governed the jurisdictional thirty-day deadline for filing a notice of appeal in a criminal case. *See id*; Utah Code §77-35-26(d)(1) (1980).

After the 1984 constitutional amendments, this Court adopted its own procedural rules, including rule 4(a) of the Utah Rules of Appellate Procedure. Utah R. App. P. 4(a) (1985).[4] That rule imported the statutory thirty-day deadline for invoking this Court's appellate jurisdiction. *See id.*

But the rules also explicitly prohibited this Court from ignoring or enlarging that thirty-day jurisdictional deadline, as well as other jurisdictional deadlines. This Court's rules have always included the power "in a particular case" to "suspend the requirements or provisions of any of" its rules. Utah R. App. P. 2 (1985). But this Court has never had the power to

[4] The statutory and court-adopted procedural rules coexisted from 1985 until 1 July 1990, when the legislature made effective its repeal of the statutory rules of criminal procedure. *See* 1989 Laws of Utah ch.187, §16.

suspend rule 4(a)'s jurisdictional deadline for appeals from final orders or rule 5(a)'s jurisdictional deadline on petitions for interlocutory appeal. *Id.* Likewise, the original rule 22(b), addressing enlargements of time, stated that "the Court may not enlarge the time for filing a notice of appeal … except as specifically authorized *by law*." Utah R. App. P. 22(b) (1985) (emphasis added). This prohibition on this Court's ability to suspend or enlarge the jurisdictional deadline for invoking its appellate jurisdiction demonstrates that those involved in the process of transferring rulemaking power from the legislature to this Court recognized that jurisdictional deadlines were the legislature's domain, not this Court's.

B. The deadline is a constitutional substantive provision because its purpose is to further public policy interests, not merely to further the orderly progress of litigation.

Even if the substantive/procedural distinction matters, the deadline must be considered substantive, and therefore constitutional, because it furthers public policy interests, which are core legislative concerns. The deadline is not procedural, because it is not concerned only with the orderly progress of litigation, which is the judiciary's concern.

1. Statutes that are intended to further public policy interests are substantive.

When a provision must be classified as either substantive or procedural, the definitions of those terms depend on the nature of the

particular problem the distinction is addressing. The line between "substance" and "procedure" shifts as the legal context changes. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). "'Each implies different variables depending upon the particular problem for which it is used.'" *Id.* (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945)).

Identifying the relevant variables for making the substantive/procedural distinction is crucial because using the wrong variables will result in a distinction that will frustrate, rather than further the purposes for which the distinction was invoked. Something can be procedural under one set of relevant variables, but substantive under another. *See Hanna*, 380 U.S. at 471; *Guaranty Trust*, 326 U.S. at 108.

Take statutes of limitations. "Depending on the context, courts have reached different conclusions about whether a statute of limitations is substantive or procedural." *See Lujan v. Regents of University of California*, 69 F.3d 1511, 1516 (10th Cir. 1995) (citing examples). "Statutes of limitations are essentially procedural in nature." *Lee v. Gaufin*, 867 P.2d 572, 575 (Utah 1993). But they are substantive for purposes of applying the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Erie requires federal courts "to apply state substantive law and federal procedural law" when they exercise diversity jurisdiction. *Hanna*, 380 U.S. at

460. *Erie's* purpose is to ensure that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust*, 326 U.S. at 109. *Erie* is concerned with "the proper distribution of judicial power between State and federal courts." *Id.* Therefore, the relevant variables for diversity-jurisdiction purposes under *Erie* draws the substantive/procedural distinction to ensure that "a suit by a non-resident litigant in a federal court" will not have a "substantially different result" than the same suit filed "in a State court a block away." *Id.* Consequently, statutes of limitation—although traditionally procedural—are substantive law for *Erie* purposes to ensure that parties to a diversity suit in federal court get the same result they would have received had the suit been brought in state court. *See Guaranty Trust*, 326 U.S. at 109-12.

For Utah Constitution article VIII, section 4, the relevant variables that should determine the substantive/procedural distinction are those that address the proper distribution of the power to make and amend legal provisions (whether statutes or rules) that courts must apply. Recognizing that there are various types of legal provisions, the constitution gives this Court power only to "adopt rules of procedure and evidence," leaving other kinds of legal provisions to the legislature. Utah Const. art. VIII, §4. Thus, a

provision that primarily concerns the orderly progress of litigation is procedural. Once a court has jurisdiction over a case, moving it through the court is the judiciary's concern.

On the other hand, if a provision's primary purpose is to further public policies, then it is substantive. "[L]egislative powers are policy making powers." *See Carter v. Lehi City*, 2012 UT 2, ¶¶36-38, 269 P.3d 141 (quotation simplified); *Tribune Reporter Printing Co. v. Homer*, 169 P. 170, 172 (Utah 1917) ("[M]atters of public policy are clearly within the province of the Legislature."). As the Colorado Supreme Court explained in defining its "plenary" state constitutional authority "to create procedural rules," "rules adopted to permit the courts to function and function efficiently are procedural whereas matters of public policy are substantive and are therefore appropriate subjects for legislation." *Borer v. Lewis*, 91 P.3d 375, 380 (Colo. 2004) (en banc).

The Plea Withdrawal Statute's deadline is a substantive provision under these relevant variables. Its primary purpose is not to ensure the orderly progress of litigation. Rather, as explained below, its purpose is to secure for Utah's citizens the inherent benefits of plea bargaining: efficiency and finality. As the *Rettig* concurrence recognized "the legislature had one

major concern when it granted defendants the right to enter and withdraw a guilty plea: finality." 2017 UT 83, ¶127 (Durham, J., concurring).

2. The Plea Withdrawal Statute is designed to further the public's interest in the speed, economy, and finality of guilty pleas.

Properly administered plea bargains benefit "all concerned." *See Blackledge v. Allison*, 431 U.S. 63, 71 (1977). The "advantages" of plea bargaining "can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality." *Id.* Allowing "indiscriminate" challenges to guilty pleas "would eliminate the chief virtues of the plea system[:] speed, economy, and finality." *Id.*

Utah's Plea Withdrawal Statute is fine tuned to secure these benefits. It requires a defendant to move to withdraw his guilty plea "before sentence is announced." Utah Code §77-13-6(2)(b) (2019). As explained, this pre-sentencing deadline is critical to the statute. It furthers finality generally by imposing a deadline on motions to withdraw. And it is specifically "intended to prevent a defendant from gaming the system, or experiencing buyer's remorse, by previewing his sentence and then deciding to withdraw his plea if he does not like the sentence imposed." *State v. Rettig*, 2017 UT 83, ¶127 (Durham, J., concurring). The legislature thus set the deadline to challenge a guilty plea at the point it did in order to further finality by limiting the

challenges to what are likely true defects in the plea, rather than pretext challenges to avoid a disappointing sentence.

That timing recognizes that when a guilty-plea challenge is likely based on a true defect in the plea—as evidenced by its being raised before sentencing—the legislature is willing to tip the balance in favor of judicial scrutiny of the plea over finality, and to commit more state resources to that effort. Those resources include state-paid counsel to litigate the motion in their criminal case and to appeal a denial of the motion. *See State v. Merrill*, 2005 UT 34, ¶¶32, 47, 114 P.3d 585 (recognizing that defendants who file timely motions to withdraw are entitled to counsel).

But that is not all. Defendants who raise timely motions are also entitled to two opportunities to attempt to upset the finality of their convictions in state court. If their initial challenge does not succeed in the trial or appellate court, they can file a new action under the PCRA collaterally challenging their counsel's performance in attacking their guilty pleas, again with the right to appeal any denial.[5]

When a guilty-plea challenge is likely a pretext born of pleader's remorse caused by imposition of an unfavorable sentence—evidenced by its

[5] The defendant may also attempt to challenge his guilty plea through a petition for writ of habeas corpus in federal court.

not being raised until after sentencing—the legislature has concluded that finality should take the lead, and consequently that these challenges should be entitled to fewer state resources. Defendants who first challenge their pleas under the PCRA are not entitled to state-paid counsel in litigating that claim or appealing its denial, but the court may appoint pro bono counsel. *See id.*; Utah Code §78B-9-109(1).

That PCRA proceeding will also be that defendant's only opportunity to bring an action in state court to upset the finality of his plea-based conviction. That defendant cannot bring a subsequent post-conviction petition challenging pro bono counsel's assistance.[6] *See id.* §78B-9-109(3).

The legislature has good reason to be concerned about defendants manufacturing challenges to their guilty pleas after becoming dissatisfied with their sentences—or as it appears in this case—their parole date. For example, in *State v. Reyes*, 2002 UT 13, ¶1, 40 P.3d 630, the State dismissed a child-sodomy charge and allowed the defendant to plead guilty to child rape. He was sentenced to prison for fifteen years to life. *Id.* Approximately eight years later, he filed a motion under rule 22(e), Utah Rules of Criminal Procedure, purportedly challenging his sentence as illegal. *Id.* ¶1. The

[6] A federal-habeas challenge may also be available to this untimely defendant.

district court denied the motion and Reyes appealed. *Id*. ¶2. But on appeal, he did not challenge the denial of his rule 22(e) motion. *Id*. ¶3. Rather, he attacked his guilty plea, arguing that the trial court plainly erred in accepting it. *Id*.

Likewise, the defendant in *State v. Nicholls*, 2017 UT App 60, ¶4, 397 P.3d 709, accepted a plea bargain to avoid the possibility of the death penalty and was sentenced to life in prison without parole. He filed an untimely motion to withdraw his guilty plea, then sought to challenge his plea under "the guise of a sentencing challenge under rule 22(e)," and then challenged his plea again in under the PCRA. *Id*. ¶¶4-6. The post-conviction court denied the petition on its merits and this Court affirmed, holding that Nicholls had demonstrated no defect in his plea. *Id*. ¶¶6-8; *see also Nicholls v. State*, 2009 UT 12, ¶41, 203 P.3d 976. Undaunted, and like Brown here, Nicholls returned to the district court and sought to have the time for filing a direct appeal from his conviction and sentence reinstated. *Nicholls*, 2017 UT App 60, ¶9. When the district court denied that motion, Nicholls appealed, and again attempted to challenge his guilty plea. *Id*. ¶¶17, 47.

As *Reyes*, *Nicholls*, and this case itself all demonstrate, "[t]here is reason for concern about [the] prospect" of "indiscriminate" challenges to guilty pleas. *Blackledge*, 431 U.S. at 71. "More often than not a prisoner has

everything to gain and nothing to lose" from challenging his guilty plea. *Id.* The Plea Withdrawal Statute's deadline is the linchpin in the legislature's efforts to promote finality and conserve state resources for cases that are more likely to be based on legitimate defects in guilty pleas, rather than mere pleader's remorse.

The State's and victims' interest in finality is strongest with a guilty plea. It usually comes after the prosecution has made significant concessions in exchange for finality and resource preservation. It always includes an admission of at least some level of culpability. And that admission is not accepted until the district court has "personally" ensured that the defendant made the admission knowingly and voluntarily. *See State v. Abeyta*, 852 P.2d 993, 995 (Utah 1993).

Once a defendant enters a guilty plea, the prosecutor's office and the courts should be able to focus their resources on the next case, and especially cases where the defendant is challenging his guilt and asserting his full panoply of constitutional rights. Crime victims should also be allowed to move on with their lives, assured that challenges to guilty pleas will be limited.

The legislature set the Plea Withdrawal Statute's deadline to secure the public's interest in the finality and efficiency of guilty pleas and conserve

state resources for the cases where they are most needed. Crafting the best way to further these policies is the legislature's sole prerogative. The deadline is therefore a substantive provision for purposes of article VIII, section 4. As such, it falls within the legislature's domain, not this Court's.

C. Even if the deadline has procedural components, it must be viewed as substantive because it is inextricably intertwined with the statute's substantive provisions.

Substantive statutes can include procedural components when they are critical to achieving the statute's substantive purposes. *See State v. Drej*, 2010 UT 35, ¶30, 233 P.3d 476. For example, the defendant in *Drej* argued that the special mitigation statute, section 76-5-205.5, included an unconstitutional procedural rule because it required defendants to shoulder the burden of proving special mitigation. This Court disagreed. *Drej,* 2010 UT 35, ¶31. Although the provision allocating the burden of proof could be characterized as procedural, "a procedural rule may be so intertwined with a substantive right that the court must view it as substantive." *Id*. ¶30. This Court therefore concluded that even if the burden-of-proof component of the statute were procedural, it could not be separated from the substantive right to argue that special mitigation should reduce murder to manslaughter "without leaving the right or duty created meaningless." *Id*. ¶31.

Likewise, the deadline on motions to withdraw a guilty plea, even if technically procedural, must be viewed as substantive. As explained, it plays a critical role in the statute by furthering the policies described above. The legislature confirmed the critical nature of a pre-sentencing deadline when it amended the statute post-*Ostler* to reset the deadline to a point that better furthers finality and conserves state resources.

Because procedural provisions are almost always concerned with furthering a statute's substantive purposes, other state supreme courts are extremely hesitant to hold that a provision unconstitutionally infringes their constitutional rulemaking authority. As Justice Durham observed, "many courts in states with a constitutional provision that mirrors ours are 'extremely hesitant to characterize a subject as purely procedural and consequently within the exclusive authority of the Supreme Court.'" *Rettig*, 2017 UT 83, ¶121 (quoting *Ohlhoff v. Ohlhoff*, 586 A.2d 839, 844 (N.J. Super. 1991)). For example, the Colorado Supreme Court has held that despite its sole authority to promulgate rules of procedure, it will "strive to avoid any unnecessary confrontations of constitutional authority, and instead seek to reconcile the language and intent of the legislative enactment with [its] own well-established rules of procedure." *Borer v. Lewis*, 91 P.3d 375, 380 (Colo.

2004) (en banc); *see also Rettig*, 2017 UT 83, ¶121 n.28 (Durham, J., concurring) (collecting similar cases).

When the procedural components of a statute do not directly conflict with this Court's rules and are inextricably connected to the statute's substantive provisions, this Court will not strike down the statute's procedural components under article VIII, section 4. *See Drej*, 2010 UT 35, ¶31. The Plea Withdrawal Statute's deadline is just such a provision, even if it is procedural. This Court should therefore uphold it.

D. If the deadline is unconstitutional, then there is a risk that every previously unchallenged guilty plea will become open to challenge.

If the deadline is unconstitutional, then that could open to challenge every guilty plea that has not already been challenged because there may be no applicable deadline that would bar the motion to withdraw. The defendant in *Abeyta* could challenge his three-year-old guilty plea because there was no statutory deadline on motions to withdraw when he entered it. *See* 852 P.2d at 994-95. *See also State v. Gibbons*, 740 P.2d 1309, 1311 (Utah 1987) (holding that although Gibbons had appealed, the Court could still remand to allow him to challenge his guilty plea in district court because statute in effect when he pled set "no time limit for filing a motion to withdraw").

Absent an enforceable deadline, both district and appellate courts will have to reconsider the validity of guilty pleas entered years or even decades ago.[7]

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted on January 29, 2020.

SEAN D. REYES
Utah Attorney General

s/ *Christopher D. Ballard*
CHRISTOPHER D. BALLARD
Assistant Solicitor General
Counsel for Appellee

[7] Brown's Point III argues that if this Court finds that he has been denied his constitutional rights, it should reinstate his time for filing a direct appeal. Br.Aplt.45-46. Because the Plea Withdrawal Statute's jurisdictional bar is a constitutional jurisdictional bar, he is not entitled to any remedy.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 13,176 words excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

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

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

s/ *Christopher D. Ballard*
CHRISTOPHER D. BALLARD
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on January 31, 2020, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

s/ *Lee Nakamura*

Addenda

Addendum A

U.S. Const. amend. V. Criminal actions, due process of law.

No person shall be ... deprived of life, liberty, or property, without due process of law....

U.S. Const. amend. VI. Rights of accused.

In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV, §1. Due process, equal protection.

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.

Utah Const. art. I, §7. Due process of law.

No person shall be deprived of life, liberty or property, without due process of law.

Utah Const. art. I, §11. Courts open.

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

Utah Const. art. I, §12. Rights of accused persons.

In criminal prosecutions the accused shall have ... the right to appeal in all cases.

Utah Const. art. I, §24. Uniform operation of laws.

All laws of a general nature shall have uniform operation.

Utah Const. art. VIII, §3. Jurisdiction of Supreme Court.

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

Utah Const. art. VIII, §4. Rulemaking power of Supreme Court -- Judges pro tempore -- Regulation of practice of law.

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. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

Utah Const. art. VIII, §5. Jurisdiction of district court and other courts—Right of appeal.

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

Utah Code §77-13-6. Withdrawal of plea.

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(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.

Amended by Chapter 3, 2008 General Session

Addendum B

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