PUBLIC

20190254-SC

IN THE UTAH SUPREME COURT

STATE OF UTAH,
Appellee/Plaintiff,
v.
KEITH SCOTT BROWN,
Appellant/Defendant.

REPLY BRIEF OF APPELLANT

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

SEAN REYES
Utah Attorney General
CHRISTOPHER BALLARD
Assistant Solicitor General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84111
Attorney for Appellee

ANN M. TALIAFERRO (#8776)
BROWN BRADSHAW & MOFFAT
422 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 532-5297
ann@brownbradshaw.com

DAIN SMOLAND
SMOLAND LAW
422 North 300 West
Salt Lake City, UT 84103
(801) 980-3625
dain@smolandlaw.com
Attorneys for Appellant

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Appellant Keith Scott Brown ("Brown") now replies to the State's Brief of Appellee ("StateBr"). Brown does not waive or abandon any argument fully raised in the Opening Brief of Appellant ("BrownBr") but not further addressed here.

ARGUMENT

> [C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.
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> – *Lafler v. Cooper*, 566 U.S. 156, 169-70 (2012) (internal citations omitted)

> In today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant . . . [C]riminal defendants require effective counsel during plea negotiations. Anything less ... might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.
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> – *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (cleaned up) (internal citations omitted)

Though it is well-recognized that the plea negotiation and entry of plea has become the most critical stage of the criminal justice system, this phase in proceedings has been rendered unreviewable for the vast majority of Utah criminal defendants. This statement is not hyperbole. For all practical purposes, most error that occurs during this critical period has been effectively shielded not only from essential review by the courts, but from the constitutionally guaranteed aid of counsel to raise those issues. Brown urges this Court to recognize Utah's current system of pleas is constitutionally untenable, and to fashion some procedural vehicle that allows errors that occur during this crucial stage to

be brought back out into the light of meaningful appellate review with the essential and constitutionally promised aid of counsel.

I.
HOW WE GOT HERE:
SUMMARY AND BACKGROUND OF THE PROBLEM

Brown has laid out the tortured history of the PWS in his Opening Brief. (BrownBr:1-6). To summarize the most important points, after this Court's 2001 *Ostler* decision, all was figuratively "good" for two years.[1] In 2003, the legislature made multiple major changes to the PWS – these amendments marking the beginning of its constitutional downfall.

It is at this time that the legislature narrowed the grounds for filing a motion to withdraw a plea from the broadly interpreted (and liberally granted) "good cause" showing to the more limited (and harder to establish) showing that the plea was not "knowingly or voluntarily made." *See, e.g., State v. Ruiz*, 2012 UT 29, ¶ 31, 282 P.3d 998 (noting that under prior version of PWS, judges had broad discretion to determine scope of circumstances that constituted "good cause" warranting withdrawal of a plea); *State v. Merrill*, 2005 UT 34, ¶ 32, n.3, 114 P.3d 585 (noting defendants who move to withdraw their guilty pleas within thirty days are not guaranteed any benefits from doing so; plea

[1] The PWS was amended in 1989, to impose a time limit that required a criminal defendant to request withdrawal of their plea "within 30 days after the entry." Utah Code § 77-13-6(2)(b) (1989). In 1992, this thirty-day "after entry" time period was interpreted to mean thirty days from the date of the plea colloquy. *State v. Price*, 837 P.2d 578, 582-84 (Utah Ct. App. 1992). The time period was thereafter clarified by this Court to mean 30-days after entry of the final judgment at sentencing. *See State v. Ostler*, 2001 UT 68, ¶ 11, 31 P.3d 528.

may be withdrawn only upon showing that it was not knowingly and voluntarily made); *State v. Gallegos*, 738 P.2d 1040, 1042 (Utah 1987).

The amendments also modified the 30-day time limit, which, pursuant to this Court's *Ostler* decision, had the effect of making the plea withdrawal window run parallel to the notice of appeal, in favor of the current "before sentence is announced" deadline.[2] As discussed herein, and for a variety of reasons, it is both unreasonable and likely impossible for a criminal defendant to recognize a constitutional error to have occurred in this time period, or to do anything about it if under the guidance of an attorney acting without full information or rendering faulty advice.

Lastly, the requirement was implemented for those who wished to challenge their guilty plea, but who had not filed a motion to withdraw prior to sentencing, to pursue any challenges through the Post Conviction Remedies Act ("PCRA") and the applicable rules of civil procedure,[3] under which the appointment of pro-bono counsel is discretionary; the consideration of appointment does not occur until the petition has been researched, drafted, and filed; and where, if pro-bono counsel is appointed, they need not be effective. *See* Utah R. Civ. P. 65C(j); Utah Code § 78B-9-109.[4]

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[2] *See* Utah Code § 77-13-6(2)(b) (2003); *also*, REVISOR'S STATUTE, 2004 Utah Laws Ch. 90 (S.B. 108).

[3] *See* Utah Code § 77-13-6(2)(c) (2003); *also*, UTAH CODE OF CRIMINAL PROCEDURE AMENDMENTS, 2003 Utah Laws Ch. 290 (H.B. 238); REVISOR'S STATUTE, 2004 Utah Laws Ch. 90 (S.B. 108).

[4] And, unlike the right to an appeal, criminal defendants are not advised as to the time limitations and requirements for filing for post-conviction relief; nor are they

Since these 2003 amendments – during a time period when the United States Supreme Court was expanding the rights of defendants in an effort to protect them from unconstitutional errors during the plea bargaining and plea process[5] – Utah courts have issued a series of opinions solidifying the PWS's strict penalty and broad reach.[6] Most recently, this Court has rendered decisions in *State v. Flora*, 2020 UT 211, 459 P.3d 975[7] and *State v. Badikyan*, 2020 UT 312, 459 P.3d 967.[8] In both, this Court interpreted the

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told they have no right to the assistance of counsel or advised they effectively waive their right to counsel in challenging their plea if a motion to withdraw is not filed.

[5] *See Lee v. United States*, 137 S. Ct. 1958, 1964 (2017)*; Missouri v. Frye*, 566 U.S. 134, 144 (2012); *Lafler v. Cooper*, 566 U.S. 156, 169-70 (2012).

[6] Again, *see* BrownBr: 1-6 for a more detailed recitation of the history.

[7] The *Flora* defendant pled guilty to felony DUI. *Flora*, 2020 UT 2, ¶ 3. Before sentencing, he timely moved to withdraw his plea. *Id.* ¶ 4. After the district court denied his motion, Flora appealed, raising two new arguments under the plain error and IAC exceptions to the preservation rule. *Id.* ¶ 5. Flora's unpreserved claims centered on whether the district court and his attorneys failed to recognize his incompetency during the proceedings. *Id.*

[8] *Badikyan* involved a motion to withdraw a plea to attempted murder. *Badikyan*, 2020 UT 3, ¶ 5. After the change-of-plea hearing, but prior to sentencing, the defendant timely moved to withdraw his plea by sending a pro se letter to the court. *Id.* He argued in the letter that his plea was not knowing and voluntary because he "was very stressed and under much pressure from [his] lawyer." *Id.* The district court appointed conflict counsel, who then filed a formal motion to withdraw Badikyan's plea. *Id.* The district court held an evidentiary hearing, where in addition to translator errors, the defendant testified trial counsel unduly tried "convincing" him to enter into the plea agreement, did not fully explain the immigration consequences, and asserted that mental health issues prevented him from entering a knowing and voluntary plea. *Id.* ¶ 6. The district court denied his motion. *Id.* ¶ 7. On appeal, Badikyan argued "he did not understand the critical elements of attempted murder." *Id.* ¶ 8. Because he did not present this ground for withdrawal to the district court, Badikyan argued he was entitled to present it "under the plain error exception to the preservation rule." *E.g. Id.*

PWS's phrase "any challenge to a guilty plea" in subsection (2)(c) to jurisdictionally prohibit appellate courts from considering any challenge or "unpreserved arguments" not raised as part of a motion to withdraw the plea, again finding a defendant may not rely on normal preservation exceptions when appealing the denial of a motion to withdraw a plea. In both cases, the Court held that "the Plea Withdrawal Statute bars review of unpreserved claims raised *as part of an appeal* from the denial of a timely plea-withdrawal motion." *Badikyan*, 2020 UT 3, ¶ 1 (emphasis added). Respectfully, in doing so, the Court effectively and incorrectly extended the PWS's jurisdictional bar to direct appellate review *of any challenge raised when a plea has been entered* and not just the limited challenges available that the plea was not knowingly and voluntarily entered – the only grounds that may actually be raised in a motion to withdraw a plea. *See Flora*, 2020 UT 2, ¶ 18 (noting issue raised in motion to withdraw had nothing to do with competency, and therefore, defendant did not preserve the plain-error and IAC challenges Flora brings for first time on appeal; while he could likely raise these challenges under common preservation rules, the PWS's preservation rule barred him from doing so here).[9]

[9] The nuanced distinction in the jurisdictional bar to "[a]ny challenge to a guilty plea," and the Court's application of the PWS's jurisdictional bar to any challenge raised when a plea has been entered must be clarified.

For example, the *Flora* defendant moved to withdraw his guilty plea and argued that his plea was not knowing and voluntary, because a mix-up with court dates forced him to either plead guilty or go to trial and lose. *See Flora*, 2020 UT 2, ¶ 4. In addition to appealing the denial of his motion to withdraw his plea on this ground, appellate counsel also sought to raise a claim that the defendant's behavior throughout the proceedings should have alerted the district court and trial counsel to a competency issue, and therefore, trial counsel was ineffective, and the court committed plain error, in not investigating the competency issue. *Flora*, 2020 UT 2, ¶ 5-7. Though true that the

II.
WHERE WE ARE TODAY:
THE REALITY OF UTAH'S SYSTEM OF PLEAS

As the State puts it, the PWS creates two classes of criminal defendants, "timely defendants" and "untimely defendants". The State argues, as it has in past PWS cases, that the disparate treatment of the two types of defendants is justified by the twin goals of judicial efficiency and finality. *E.g.*, StateBr:2; *State v. Badikyan*, No. 20180883-SC, Brief of Respondent, at 8 (similar). These are laudable goals as they implicate the interests of the victims of a crime and the public, as well as the judicial system itself. *See, e.g.*, StateBr:2 (citing "the emotional toll on crime victims that guilty-plea challenges can bring"). Indeed, criminal defendants themselves are interested in efficiency and finality as well.

The problem with the State's argument is that the current PWS regime does not actually promote either, as forcing an "untimely defendant" into the PCRA process does not make his eventual plea challenge happen any sooner, or with any more finality. Indeed, the defendant actually has an additional year from the close of his appellate

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competency issue did relate, in part, to the plea, *see Flora*, 2020 UT 2, ¶¶ 5-7, the issue was much more fundamentally related to the proceedings as a whole, since if a defendant is not competent to proceed, the proceedings were required to be stayed. Indeed, defendants have a due process right not to be tried if they are incompetent, *Pate v. Robinson*, 383 U.S. 375, 378 (1966). In other words, the competency issue was an issue independent from the challenge to the voluntariness of the entry of the plea, and as argued by appellate counsel, an independent constitutional issue grounded in failures by both the court and trial counsel that should have been reviewed on appeal under standard preservation principles and not "jurisdictionally barred" by the PWS.

window, or the termination of his appellate case, to file such a PCRA petition.[10] *See* Utah Code §78B-9-107(1)-(2). And as explained *infra*., the "untimely defendant" will likely be required to muddle through the PCRA process pro se, without counsel's advice on appropriate winnowing of legal issues. *See* Utah Code §78B-9-109(1) (court may appoint pro-bono counsel, after petition has been filed and reviewed by the Court, and if it has survived summary dismissal).

In contrast, were counsel able to aid defendants to raise plea-related challenges in some brief time frame after sentencing and before appeal, or, even in the direct appeal, those plea-related arguments would be expressly precluded from any future PCRA petition under the civil rules. *See* Utah Code §78B-9-106(1)(b)-(c) (person not eligible for relief upon any ground raised or addressed at trial or on appeal, or which could have been but was not raised at trial or on appeal). This process would better promote finality and efficiency, as appointed counsel would be available to aid a defendant in raising a claim, including helping that defendant frame legal issues and present them succinctly. In other words, the disparate treatment between "timely defendants" and "untimely defendants" in the current PWS regime is exactly what allows untimely defendant's cases to drag on.

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[10] The State suggests that "untimely defendants" often appeal their sentences based only on mere "pleader's remorse", *see* n.11, *infra*, a suggestion Brown vigorously disputes, as argued herein. But, even assuming it were true, the argument fails on its own terms. The "untimely defendant" suffering pleader's remorse would almost certainly file a direct appeal of the sentence itself – he is, by definition, unhappy with his sentence – and therefore the plea-related challenges would not occur until after that appeal resolved. That is, the type of defendant the State sees as less deserving of exceptions to the "finality" rule has the most drawn-out plea challenges of anyone.

So, in this case, perhaps realizing the logical problems with its "finality and efficiency" justifications, the weight of the State's argument about the presumptive purpose of the PWS shifts to a different effect of the statute, one that goes right to the heart of this appeal. To wit, the State concedes that "untimely defendants" don't get the same "resources" as "timely defendants" (specifically, state-appointed counsel whose competence is guaranteed and reviewable), which it frames as the intended and *positive* result of the PWS. *E.g.*, StateBr:1-3.[11]

However, the State's implicit argument that "untimely" defendants just don't deserve the same rights as "timely" defendants is based upon a fundamentally flawed

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[11] The State justifies:

> 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.
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> 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 postconviction 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.

(StateBr:2-3).

premise that plea challenges raised after sentencing are "less likely based on a legitimate defects in the plea and more likely based on an unwillingness to accept the consequences of the agreed-upon plea." StateBr:1; *also* StateBr:54-55,57. The State apparently believes this conclusion is so obvious that it requires no citation to authority, data, or research. But this callous differentiation between a defendant who deserves constitutional rights and one who does not shows either naive ignorance of, or a marked indifference to, the day-to-day reality in the trenches of the criminal courtroom.[12]

Fundamentally, we are a system of pleas. As the United States Supreme Court has repeatedly noted, the criminal justice system is a "system of pleas." *E.g., Lafler,* 566 U.S. at 170 (noting that "ninety-four percent of state convictions are the result of guilty pleas"). As early as 1979, it was reported that "roughly ninety percent of the criminal

[12] Characterizing the State's position on whether criminal defendants, as a general group, deserve a meaningful opportunity to challenge their pleas as "callous" might seem extreme, but Brown believes it is warranted here. The State's position does seem to reflect an ad hominem attack on a whole class of defendants. Earlier this year, when proposed amendments to the PWS were heard in committee, *see* n.30 infra, several representatives from the Attorney General's Office and other prosecutorial agencies spoke of the "untimely" defendants in less euphemistic terms: "We are opposed to this bill for several reasons. First of all let me just clarify the kind of defendants we're talking about with this bill. We've already heard about Keith Brown and his frivolous challenges to his guilty pleas. Ben Rettig was the defendant who along with his codefendant Mr. Bond, they slit the BYU professor's throat down in Utah County and were charged with aggravated murder. Curtis Allgier was the defendant who tried to escape at the University Hospital and murdered the correction officer there. These are the kind of defendants that are trying to challenge their guilty pleas." *See* Audio Recordings: *Senate Judiciary, Law Enforcement, and Criminal Justice Committee*, UTAH STATE LEGISLATURE (March 9, 2020) (found at https://le.utah.gov/av/committeeArchive.jsp?timelineID=162322) (starting at 1:10:42).

defendants convicted in state and federal courts plead guilty."[13] Recent data from the Utah courts demonstrate this same reality, showing that in the six years between 2014 and 2019, at least 91% of criminal cases statewide were resolved by plea, with most of these years reaching above 93%.[14] By way of sheer number of cases, this amounts to over 30,000 Utah criminal cases each year are resolved by a plea.[15]

Many pleas are entered with an "informational deficit." During the early stages of proceedings when pleas are offered, "defense attorneys are generally at an informational deficit compared to prosecutors, who at the early stages of proceedings typically have access to a full police report, interview statements, and evidence."[16] "Defense attorneys might not have many opportunities to meet with their clients before a plea decision is made."[17] And evidence disclosure rules are not consistently upheld for purposes of plea bargaining, including court rulings that hold a prosecutor need not disclose *Brady*/*Giglio* impeachment evidence[18] in the same manner before a defendant

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[13] Albert Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 1 (1979).

[14] *See* Total Criminal Cases Resolved By Plea (2014-2019), data compiled by the Administrative Office of the Courts, attached in Addendum A.

[15] *See id*.

[16] Kelsey S. Henderson, *Defense Attorneys and Plea Bargains*, *in* A SYSTEM OF PLEAS: SOCIAL SCIENCE'S CONTRIBUTION TO THE REAL LEGAL SYSTEM 37, 45 (Oxford University Press 2019) (citing study).

[17] *See id*. (citing study).

[18] Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecutor must disclose exculpatory evidence to the defendant, which includes impeachment evidence, promises

accepts a plea bargain as would be necessary prior to trial.[19]

Defendants frequently face time pressures. Often, "plea offers are provided with an expiration attached."[20] This Court has recognized plea bargains "can be contingent, time limited, or withdrawn as the prosecution reevaluates its case." *State v. Greuber*, 2007 UT 50, ¶ 13, 165 P.3d 1185. In Utah, cases have been increasingly set at a faster pace due to victim's rights legislation which provides that "[v]ictims and witnesses, particularly children, should have a speedy disposition of the entire criminal justice process," Utah Code § 77-37-3(1)(h), and grants alleged victims "the right to a speedy disposition of the charges free from unwarranted delay caused by or at the behest of the defendant." Utah Code § 77-38-7(2). Because of time pressures, however, studies have shown that the accused may accept a plea "under the influence of a substance or because they did not know better, which suggests that if time had not been a factor," the accused "could have waited until they sobered up or until their comprehension of the situation had improved."[21]

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and other consideration given to witnesses. *See also, Giglio v. United States,* 405 U.S. 150, 154 (1972) (exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence").

[19] *E.g., Medel v. State*, 2008 UT 32, ¶ 24, 184 P.3d 1226 ("in cases where the defendant pleads guilty . . . his constitutional right to evidence is even more limited") (citing *United States v. Ruiz*, 536 U.S. 622, 633 (2002)).

[20] Miko Wilford and Annmarie Khairalla*, Innocence and Plea Bargaining, in* A SYSTEM OF PLEAS: SOCIAL SCIENCE'S CONTRIBUTION TO THE REAL LEGAL SYSTEM 132, 138 (Oxford University Press 2019).

[21] *Id.*

Relatedly, in Utah, many pleas are entered absent a preliminary hearing. Because plea offers are often contingent upon waiver of the preliminary hearing, many defendants enter pleas without this critical proceeding. Even if a preliminary hearing is held, the standard for bindover is low with all evidence and inferences viewed in the light most favorable to the prosecution. *E.g., State v. Homer*, 2017 UT App 184, ¶ 9, 405 P.3d 958. Beyond the low standard, Utah constitutional amendments and recent litigation surrounding the purpose of a preliminary hearing and a defendant's ability to obtain information, confont and cross-examine State witnesses, and even a defendant's ability to independently subpoena witnesses and alleged victims to testify, have made the preliminary hearing, from the perspective of a criminal defendant, little more than an exercise in futility. *E.g.*, *State v. Timmerman*, 2009 UT 58, ¶¶ 14-16, 218 P.3d 590 (under Utah constitutional amendment, defendants no longer afforded Sixth Amendment right to confrontation at a preliminary hearing); Utah Rule of Evidence 1102 (allowing for "reliable hearsay" at preliminary hearings); *State v. Nielsen*, Case No. 20190272-SC (pending case involving defendant subpoena to alleged minor victims).

Many criminal defendants are in custody pretrial. It comes as no surprise that "[i]n an effort to be released, criminal defendants detained pretrial feel more inclined to accept plea bargains than criminal defendants who have been released pretrial."[22] "Defendants detained pretrial are more likely to enter guilty pleas regardless of actual

[22] Alexander Shalom, *Bail Reform As A Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921, 921 (2014) (citing authority).

guilt because of the coercive effects of long detentions" and "[i]n fact, detained defendants plead guilty twice as much as released defendants in order to secure their release."[23] Related to the informational deficit problems, those defendants who are in custody pretrial are "[e]ffectively cut off from communication with persons outside the detention facility, the incarcerated defendant is unable to arrange meetings with witnesses who could testify in his defense, to assist in the investigation of his case, or to provide his attorney with the facts to support a counter-narrative of the events leading to the criminal charge(s) against him."[24]

Many pleas are therefore entered without a defendant's understanding of the evidence, the law, or the process. Because, as shown, many pleas are entered before trial counsel has investigated the facts and the law of the case, many pleas are entered without a defendant's full understanding and appreciation of the State's evidence or lack thereof. *Cf., Greuber*, 2007 UT 50, ¶ 13 (recognizing an attorney's failure to properly investigate or assess evidence might militate in favor of accepting a plea).

The entry of the plea, itself, poses an additional set of problems. In all practicality, for many defendants, the plea forms may be discussed for a few minutes before entry. Even if more time is spent, the plea forms themselves are problematic given that forms

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[23] Lydette S. Assefa, *Assessing Dangerousness Amidst Racial Stereotypes: An Analysis of the Role of Racial Bias in Bond Decisions and Ideas for Reform*, 108 J. CRIM. L. & CRIMINOLOGY 653, 668 (2018).

[24] Clara Kalhous, John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 801 (2012).

used to describe pleas and plea offers "are frequently written at an eighth-grade level or higher", though on average, "defendants read at or below the sixth-grade level."[25] This does not even account for language barriers that regularly arise. And while cognitive ability could surely have some bearing on the decision to plea, the prevalence of higher-order vocabulary and legalese make it difficult for almost anyone to understand the plea forms and the plea process itself. [26]

With respect to the very waivers of rights at issue here, Utah's defendants are not fully advised. Although Utah's plea forms do advise the defendant of their right to appeal the sentence and the time limit for doing so, and also advise that "any challenge to [a] plea made after sentencing must be pursued under the Post-Conviction Remedies Act," criminal defendants are not told anything about what PCRA is, what it entails, and crucially, not told of the time limits for filing or the fact that there is no right to counsel in seeking relief. (*E.g*. R.8-10). In essence, criminal defendants are not advised that by entering a plea, they are waiving their right to the assistance of counsel for any further challenge if a motion to withdraw is not filed prior to sentence.

Once the plea is entered, no motion to withdraw is filed in most circumstances. Often because a defendant is being represented by the same attorney, trial counsel does not advise (or does not know at that point) of grounds to support withdrawal. At times, a defendant files letters seeking to withdraw the plea, which are stricken by trial counsel.

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[25] Wilford and Khairalla, *supra* note 20, at 140 (citing studies).

[26] *Id.*

E.g., State v. Rettig, 2017 UT 83, ¶ 1, 416 P.3d 520. Instead, there is every incentive for trial counsel to advise the defendant to remain passive, not attempt to withdraw the plea, and "accept responsibility" for the offense, not only to insure that the prosecutor and perhaps the presentence-report-author offers a positive sentencing recommendation, but so the judge will impose a more lenient sentence. And therefore, in the majority of cases, no motion to withdraw a plea is filed. Utah court data shows that in less than 1% of cases – less than roughly .25% to be more precise – a motion to withdraw a plea was made before sentencing.[27]

Or, perhaps, at the time the plea is entered, time is waived for sentencing and the defendant is sentenced that same day. *E.g.*, *Gailey v. State*, 2016 UT 35, ¶ 1, 379 P.3d 1278 (noting that over the course of a few hours, defendant entered her initial appearance in the district court, was appointed counsel, waived her right to a preliminary hearing and trial, pled guilty, waived the waiting period for sentencing, and received judgment and sentence). Between 2014 and 2019, Utah court data shows that plea and sentencing occurred on the same day, on average, 41% of the time.[28]

And even if a defendant does file a motion to withdraw the plea prior to sentencing, since 2003, the grounds for withdrawing that plea have been limited. Where

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[27] *See* Cases with a Motion to Withdraw Plea before Sentencing (2014-2019), data compiled by the Administrative Office of the Courts, attached in Addendum A.

[28] *See* Cases With a Plea and Sentencing on the Same Date (2014-2019), data compiled by the Administrative Office of the Courts, attached in Addendum A (showing roughly between 37% and 48% of the cases).

motions to withdraw pleas prior to sentencing were once "liberally granted" because of the enormity of the rights defendants were waiving in comparison to a lack of prejudice to the State, now, once a defendant utters the word "guilty", it is not enough to show "good cause," but a defendant must show that plea itself was not knowingly and voluntarily entered. *E.g., Ruiz*, 2012 UT 29, ¶ 31. This showing must still be made prior to sentencing, leaving the defendant in the very same pressured position without full information, full investigation, and perhaps, without ability to comprehend the nature of the charges, possible defenses, and other facts and circumstances of the case. And if all challenges, whether known or not, are not made during this time, a defendant is barred from appellate review. *Accord State v. Flora* and *State v. Badikyan* discussed *supra*. Indeed, some issues which do affect the voluntariness of a plea, but which remain unknown until sentencing or thereafter, are effectively precluded from appellate review due to the timing which the issues are discovered.[29]

This is the reality and not the simple timely/untimely dichotomy the State advances. And this reality also does not support the State's characterization that defendants who do not seek to challenge their pleas prior to sentencing are somehow

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[29] Such as where a prosecutor breaches a plea agreement for a sentencing recommendation, that breach renders the plea not knowingly and voluntarily entered. *See e.g., State v. Smit*, 2004 UT App 222, ¶ 18, 95 P.3d 1203; *State v. Norris*, 2002 UT App 305, ¶ 13, 57 P.3d 238; *State v. Copeland*, 765 P.2d 1266, 1274, 1276 (Utah 1988). Of note, in these cited cases, the defendants were able to file a motion to withdraw their guilty pleas based upon the prosecutor's breach, because the plea withdrawal deadline was *after sentencing*. *E.g. Smit*, 2004 UT App 222, ¶ 18 (2002 version of PWS which required that good cause be shown).

playing the system. Truth be told, it appears that once a guilty plea is entered, the State's true desire is to close that case file permanently and not allow it to be reopened, *even on* post-conviction relief. The State, in appellate courts and to the legislature, consistently make the argument that requiring plea-challenges be made in post-conviction proceedings is a fair and just avenue of review, similar to direct appeal.[30] But, the State's first argument opposing such a plea challenge raised in a post-conviction petition is "procedural bar"– the State arguing that the person cannot assert the claim because it could have been raised previously by a motion to withdraw the plea. *See* Utah Code § 78B-9-106(1)(c).[31] The State's related second argument – the pro se petitioner's claims

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[30] Legislation was proposed in the recent 2020 legislative session, to amend the plea withdrawal statute. The amendments included striking the 2(c) requirement making any challenge to a guilty plea be pursued under the PCRA, and added language that provided a defendant who failed to withdraw a plea before sentence was announced could seek remedy under the PCRA, or on appeal if the defendant claimed the defendant failed to withdraw the plea because of plain error, IAC, or exceptional circumstances. *See* 2020 Utah Senate Bill No. 252, Utah Sixty-Third Legislature - 2020 General Session. Representatives from the Utah Attorney General's Office spoke against the Bill making the same policy arguments iterated in this and other PWS appeals. *See* Audio recordings: *Senate Judiciary, Law Enforcement, and Criminal Justice Committee*, UTAH STATE LEGISLATURE (March 9, 2020) https://le.utah.gov/av/committeeArchive.jsp?timelineID=162322 (starting at 1:10:42).

[31] *E.g.*, *Gutierrez v. State*, 2016 UT App 101, 372 P.3d 90 (PCRA procedurally barred defendant's claims based on allegedly involuntary guilty pleas, State's alleged failure to disclose evidence, and counsel's alleged ineffectiveness in failing to provide him documents; each claim was based upon facts that were known at time defendant filed, and then withdrew, his motion to withdraw his guilty pleas; claims could have been raised in trial court or on direct appeal; and defendant did not assert that his attorney caused his failure to raise claims in trial court or on direct appeal, in order to qualify for limited exception to procedural bar); *Brown v. State*, 2015 UT App 254, ¶ 22, 361 P.3d 124 (PCRA precludes relief for any claim that "could have been but was not raised at trial or on appeal"; a petition for post-conviction relief is a collateral attack of a conviction

should be dismissed due to pleading failures.[32] So, the real unfair gamesmanship is on *the State's* part. It happens regularly. And it is successful.

III.
WHERE WE ARE IS CONSTITUTIONALLY UNTENABLE

A. The Failure To Afford A Procedure Of "First Review" With The Right To Effective Assistance Of Counsel Violates A Number Of Rights Guaranteed By The Utah And Federal Constitutions

1. That There Is No Current Remedy for Brown's Request Makes Brown's Point, Rather than Giving this Court Reason to Deny It

The State initially argues this Court should reject Brown's appeal on the basis that Brown has no remedy. (StateBr;15,20-23). Explaining that the remedy Brown seeks is not one available under the rules and the *Manning* procedure within which Brown brought his claims to the district court, the State sums up its argument:

> Brown therefore seeks relief that the rule cannot provide – a declaration that the Plea Withdrawal Statute's jurisdictional deadline is unconstitutional

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and/or sentence and is not a substitute for direct appellate review; "Brown's challenge to the validity of his pleas [was] procedurally barred because he could have, but did not, move to withdraw his pleas").

[32] For example, even though the PWS requires that "any challenge" be raised under PCRA, when a petitioner, such as Flora, raises as a proper ground for relief that he was incompetent, and therefore, his "conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution," Utah Code § 78B-9-104, the State files a motion for summary judgment not only arguing procedural bar (that this could have been raised previously at trial but was not), but also contending that the petitioner has not asserted an exception to the procedural bar rules – specifically, that the petitioner has not asserted ineffective assistance on the part of prior counsel for failing to raise this ground below. So, any suggestion that the PCRA is simply a "different vehicle" for a defendant to be able to raise his substantive claims is not correct. Indeed, Flora will likely not be able to raise his simple issue of incompetence as a standalone constitutional violation.

> 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.

(StateBr:15).

Ironically, the State's argument and Brown's argument are the same – under the current PWS scheme, Brown has been afforded no vehicle to raise his challenges *with the assistance of counsel*. Because Brown was not afforded his right to counsel to timely raise his claims, and because Brown has already filed and was denied post-conviction relief without the assistance of appointed counsel and without consideration of the merits of his claim, Brown's claims were ripe.[33] He therefore endeavored to seek relief in the district court through an avenue most closely analogous to the relief he requested. (BrownBr:8; R323). As explained in Brown's Motion, the fact that "no remedy exists in statute or rule to make real the promise afforded by a constitutional right gives rise to questions of what tool should be deployed to protect that right." *State v. Rees*, 2005 UT 69, ¶ 14, 125 P.3d 874. The tool employed here was a *Manning*-type motion. (R323).

In *Manning v. State*, this Court held that a "criminal defendant claiming denial of the right to appeal *must* file a motion in the trial court for reinstatement of a denied right to appeal." 2005 UT 61, ¶ 1, 122 P.3d 628 (emphasis added); *also State v. Cox*, 2006 UT 32, ¶ 11, 137 P.3d 806. Accordingly, because the Utah Supreme Court specifically

[33] *Compare Gailey*, 2016 UT 35, ¶ 29 (Gailey's claim not ripe because she not in position to show she will not be appointed PCRA counsel in the future).

directed that motions seeking reinstatement of a defendant's denied right to appeal *must* be filed in the trial court, Brown filed his request under the *Manning* rubric as it was most analogous and consistent with his claim. (R321-322,333-334). Also, because Brown sought relief relating to the need for assistance of counsel, Brown filed his request as a *Manning*-motion in the criminal case where the right to counsel is afforded, rather than as a civil petition for extraordinary relief under Utah Rule of Civil Procedure 65B, where no right to counsel attached.[34]

There was simply no clear-cut vehicle within which Brown's request squarely fell. But, the fact that there was no clear remedy for Brown's request actually serves to make Brown's point, rather than giving this Court reason to deny it.

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[34] The *Manning* Court explained the predecessor "*Johnson Remedy*":

> Coram nobis principles were . . . essential to the *Johnson* remedy. Consistent with the United States Supreme Court's coram nobis rulings in "right to appeal" criminal cases, which direct that petitions be filed in the underlying criminal case, . . ., motions for *Johnson* resentencings are filed in the underlying criminal case rather than as separate civil proceedings, as would be required if the remedy were based solely on rule 65B or its successor postconviction procedures. This is an important element of the *Johnson* remedy, partly for judicial economy in reviewing the record, *but mostly because an attorney's assistance is not guaranteed to indigent defendants in postconviction civil proceedings*. By contrast, a *Johnson* motion filed in the underlying criminal case guarantees defendants the right to state-paid counsel in seeking a first appeal . . .This is important because the right to representation is an integral part of the right to appeal *Johnson* sought to protect.

Manning, 2005 UT 61, ¶ 16.

2. The "Right to Appeal" Extends Beyond Simply Affording A Mechanism To Raise An Issue

In its simplest iteration, Brown demonstrates that Utah's PWS is unconstitutional because criminal defendants who enter pleas but who do not seek to withdraw them prior to sentencing are denied any avenue of "first review" with the right to assistance of counsel attached. Brown's complaint, then, is not one necessarily focused on the PWS's deadline itself, or even the jurisdictional bar to direct appeal imposed by that deadline. (*E.g.*, StateBr:25,30 (framing Brown's claim to be that the PWS's "deadline" is what violates Brown's state and federal constitutional rights)). Brown's complaint focuses on the *sanction imposed which absolutely denies him,* and others like him, *an avenue of first review with the aid of appointed counsel*. *See* Utah Code § 77-13-6(2)(c).

So, although the State is correct that this Court has already found the PWS does not, on its face, "foreclose an appeal" but "only narrows the issues that may be raised on appeal" (StateBr:27), it is the denial of the right to the assistance of counsel in raising the barred issues in a "first review" to an appellate court that is the crux of Brown's argument. (BrownBr:25-27,29).[35] It is this denial of counsel which implicates the other constitutional rights Brown has detailed. (BrownBr:29-36). And, it is the assistance of counsel which Brown requests this Court fashion some procedural remedy to afford. (BrownBr:45-46). *Also see*, *Rettig*, 2017 UT 83, ¶¶ 115-17 (Durham, J., concurring).

[35] And in fact, the PCRA procedures require a pro se petitioner, without the aid of counsel, to first draft and file a petition to the district court which imposed sentencing, and thereafter, appeal to the appellate court if and when that petition is denied. *E.g.*, Utah R. Civ. P. 65C. So a "first review" by an appellate court is even more removed.

3. Brown Has Not Ignored Authority And The Court Has Not Rejected All Of Brown Claims

The State claims this Court has already rejected all of Brown's claims, also asserting that Brown has ignored this Court's prior authority. The State is wrong.

a. *State v. Rettig* Did Not Dispose of Brown's Claims

The State claims that this Court, in *Rettig*, already rejected Brown's claims regarding the right to counsel's assistance, and that there is no basis to reconsider that holding because Brown does not challenge it. (StateBr:25-27,30). Specifically, the State claims that *Rettig* squarely addressed and rejected Brown's claim, and *Allgier* reaffirmed. (StateBr:26). This is not so.

In *Rettig*, this Court reiterated that non-compliance with the PWS's time strictures forecloses review of plea challenges even for plain error and ineffective assistance of counsel. *See Rettig*, 2017 UT 83, ¶ 11. The Court also confirmed *Gailey*'s "holding and threshold premise" that the PWS does not, on its face, violate the constitutional right to appeal, reasoning that the PWS "is not an infringement of the state constitutional right to an appeal because it does not foreclose an appeal but only narrows the issues that may be raised on appeal." *Id*. ¶¶ 15, 22 (emphasis added). But that holding speaks to a different problem than the one Brown raises – that the PWS sanction requires a criminal defendant to pursue first review of all plea-phase issues without the appointment and aid of effective assistance of counsel. (BrownBr:6,17-18). This Court's holding in *Rettig*, therefore, does

not, as the State suggests, address Brown's issue "head on". (State Br:26).[36]

Further, this Court's *Rettig* decision is flawed. The Court's analysis focused *not on the constitutional right to counsel to assist in raising claims for review*, but on *principles of preservation and waiver* to determine what issues may be raised for review and when, finding that "[r]ules requiring preservation of an issue at specific times and by required means have never been thought to impinge on the constitutional right to an appeal. Such rules simply establish the concept of waiver in litigation. And that is uncontroversial." *Rettig*, 2017 UT 83, ¶ 18 (cleaned up). Notably, when talking in terms of preservation, the Court's analysis focused on the "plain error" exception to preservation. *E.g.*, *Rettig*, 2017 UT 83, ¶¶ 46,47,49. After discussing only plain error review, the *Rettig* Court jumps to the conclusion, seemingly out of nowhere, that the PWS is a jurisdictional bar to both plain error *and* IAC review. *Id*. ¶¶ 50-51. This leap highlights the major flaw in *Rettig*'s "preservation/jurisdiction" analysis – the failure to recognize that although ineffective assistance of counsel, like plain error or exceptional circumstances, "is sometimes characterized as an exception to preservation," IAC fundamentally differs from the other preservation exceptions because it "is a stand-alone constitutional claim attacking the performance of a criminal defendant's counsel." *State v.*

[36] Although this Court stated it was "now reach[ing] the question left unanswered in *Gailey*," i.e., whether the Plea Withdrawal Statute could be *applied* in a manner infringing the constitutional right to an appeal and the "core element" of the right to assistance of counsel on appeal, *Rettig*, 2017 UT 83, ¶ 17, this Court engaged in no reasoned analysis discussing why the failure to afford counsel to aid defendants in raising such issues in a first review did not violate the right to effective assistance of counsel.

Johnson, 2017 UT 76, ¶ 22, 416 P.3d 443.[37]

This is all to say that IAC is different. *E.g., Rettig*, 2017 UT 83, ¶ 111 (Durham, J., concurring). An IAC claim is a question of a constitutional magnitude, and the courts recognize that counsel cannot be expected to assert one's own ineffectiveness during the time of representation. *E.g., Rudolph v. Galetka*, 2002 UT 7, ¶ 7, 43 P.3d 467. And unique to Utah, Rule 23B of the Utah Rules of Appellate Procedure provides an avenue for IAC claims to be raised on appeal where the right to counsel still attaches – IAC claims that might include trial counsel's failure to preserve, investigate, or other deficient performance in the plea bargaining phase of criminal proceedings.[38] The dual role of an IAC claim as both a preservation exception and a standalone constitutional claim is the direct product of Utah's unique 23B procedure, and one the *Rettig* Court failed to recognize before concluding that any IAC claims involving a challenge to the plea were not "preserved" if not timely raised before sentencing, and therefore barred from direct

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[37] Of note, even the State agrees that this was a flaw in *Rettig's* reasoning, and points out that although *U.S. v. Weathers* (a case cited by the Rettig majority) does hold that plain error can be waived under federal rule 12, that same case acknowledges that IAC claims were still reviewable. (StateBr:46 (*citing U.S. v. Weathers*, 186 F.3d 948, 958 (D.C. Cir. 1999)). The State also cites *State v. Ferry*, 2007 UT App 128, where our Court of Appeals reviewed an IAC claim for failure to file a suppression motion, even though Utah's Rule 12(f) would deem it "waived." (StateBr:46).

[38] *Also see, State v. Allgier*, 2017 UT 84, ¶ 13 n.1, 416 P.3d 546 (noting that Allgier argues that he received ineffective assistance of counsel at the plea hearing, and that he filed a motion to remand his case for findings necessary to determine his ineffective assistance of counsel claim under Rule 23B of the Utah Rules of Appellate Procedure; but because Court dismisses the appeal for lack of jurisdiction, Court does not address claim of ineffective assistance and dismisses his 23B motion).

appeal. *E.g.*, *Rettig*, 2017 UT 83, ¶ 115-16 (Durham, J., concurring).[39]

The State's attempt to distinguish the guidance of the United States Supreme Court in *Martinez v. Ryan* and *Halbert v. Michigan* is likewise unavailing. (StateBr:28-30). The State simply does not counter the seemingly clear proposition that pro-se defendants are not adept at self-representation, especially in post-trial proceedings, which like a trial, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over. Appeals by defendants convicted by their pleas may involve a variety of complicated issues that are "no less complex than other appeals." *Halbert v. Michigan*, 545 U.S. 605, 621 (2005). A criminal appellant must face an adversary proceeding governed by intricate rules and procedures, where "an unrepresented appellant is unable to protect the vital interests at stake." *E.g.*,

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[39] A "preservation exception" based on IAC does not exist in the civil arena, where IAC is not recognized. And no such recognized avenue exists in the federal system either where IAC claims generally cannot be raised on appeal. Indeed, in the federal appeal system for a criminal case, plain error is reviewed under a heightened and onerous standard different than that applied in Utah State Courts, and IAC claims are presumably left to collateral proceedings. *E.g.,United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc) (IAC claims should be brought in collateral proceedings, not on direct appeal; such claims brought on direct appeal are presumptively dismissible and virtually all will be dismissed); *United States v. Anthony*, 942 F.3d 955, 972 (10th Cir. 2019) (setting forth four-part plain error standard).

Also of note and relevant here, in the federal system, counsel may be appointed and paid under the Criminal Justice Act to aid indigent petitioners in collateral proceedings. In fact, in both capital and noncapital cases, the court *must appoint* counsel for an indigent movant when an evidentiary hearing is required or when necessary for the movant's effective utilization of discovery. In other circumstances, the court has discretion in deciding whether to appoint counsel. *E.g., United States v. Leopard*, 170 F.3d 1013, 1014 (10th Cir. 1999) (per curiam); Thirty-Sixth Annual Review of Criminal Procedure, *28 U.S.C. § 2255 Relief for Federal Prisoners*, 36 Geo. L.J. Ann. Rev. Crim. Proc. 921, 934 (2007).

Penson v. Ohio, 488 U.S. 75, 85 (1988); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The same can be said for post-conviction collateral proceedings. And surely, "[w]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). Indeed, Utah's PCRA is a minefield of procedural bars, rules, and standards that are even more onerous than appeal, and most *attorneys* are not well-equipped to navigate it, let alone a pro se defendant.

Thus, when a criminal defendant *is required* to raise claims for the first time in post-conviction proceedings rather than on direct appeal – as this Court has concluded is required pursuant to the PWS's directives when challenges to a plea are not made prior to sentencing – *Halbert v. Michigan* speaks to this scenario. *Halbert* guides that no matter the formal categorization of the review, when "the appellate court's ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive," and when the court sits as an "error-correction" body, assistance of counsel is required and the absence of counsel violates the defendant's Fourteenth Amendment rights. *See Halbert*, 545 U.S. at 607, 617, 619-20.

b. *State v Merrill* Did Not Dispose of Brown's Claims

The State likewise contends that in *State v. Merrill*, 2005 UT 34, ¶¶ 21-47, 114 P.3d 585, this Court also rejected all of Brown's claims. (StateBr:30-32). Again, the State is wrong.

Although Brown and the defendant in *Merrill* both raise challenges under the same constitutional provisions, the specific claims are different. Further, the 1999 version of the PWS at issue in *Merrill* required a motion to withdraw a plea for good cause and within 30 days after entry of judgment, thus running in tandem with the right to file a notice of appeal and at a time where the right to counsel still attached. *See Merrill*, 2005 UT 34, ¶¶ 13,46. The differing versions of the PWS at issue, and therefore, the differences in the attachment of the right to counsel, is one overarching distinguishing feature between Brown's claims and Merrill's.

Beyond this, Brown's claims and Merrill's are just different. For example, *Merrill* attacked the constitutionality of the thirty-day limitation insisting "*that the imposition of this, or any, finite period to bring a motion to withdraw a guilty plea* violates five constitutional guarantees," *Id.* ¶ 21.[40] The Court described the brief as painting "his claims of unconstitutionality with a broad brush and little pigment" leaving an "absence of a visible analytical landscape . . . with little to view and assess." *Id.* ¶¶ 21-22.

With regard to *Merrill*'s "open courts" challenge, *Merrill* contended that the right to petition to withdraw a guilty plea is the equivalent of a habeas corpus petition, and argued that the legislature has no more authority to limit the time to file a motion seeking

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[40] Listing: (1) the open courts provision of article I, section 11 of the Utah Constitution; (2) the separation of powers provision of article V, section 1 of the Utah Constitution; (3) the promise of due process contained in the Fourteenth Amendment to the United States Constitution; (4) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and (5) the uniform application of laws provision found in article I, section 24 of the Utah Constitution.

to withdraw a guilty plea than to impose filing deadlines on habeas corpus petitions. *Id.* ¶¶ 21-22. Thus, the Court's rejection of *Merrill*'s argument is not a rejection of Brown's "open courts" challenge, which is based on the Open Courts Clause guarantee "that every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law," the assurance that "citizens of Utah have a right to a remedy", and the clause's guard against laws that unreasonably "diminish or eliminate a previously existing right to recover for an injury." (BrownBr:35). The right diminished here is the right to seek review by an appellate court with the right to assistance of counsel.

Merrill's "separation of powers" claim had "much in common with his open courts claim" as he again attempted to align a petition for habeas corpus with a motion to withdraw a guilty plea, arguing that the legislature had no authority to limit the time to file a motion seeking to withdraw a guilty plea. *Merrill*, 2005 UT 34, ¶ 27. Brown's separation of powers argument is not the same, as set forth in Point III.B, below, and does not seek to align a petition for habeas corpus with a motion to withdraw a guilty plea.

Merrill's "due process" claims are more relevant in this current appeal, but still not dispositive of Brown's claim. Merrill contended that he did not enter a voluntary and knowing plea because he was suffering from religious delusions brought about by his medicine, Zoloft. *Id.* ¶ 6. Merrill argued that a jurisdictional bar on untimely motions to withdraw guilty pleas denies him and similarly situated defendants "a means by which they can reappear before the [district] court and have these due process rights enforced." *Id.* ¶ 29. This Court noted that an unknowing or involuntary guilty plea is likely to

constitute a denial of due process, and "an absolute prohibition against providing a forum to a defendant in which he may assert defects in his guilty plea would certainly violate constitutional due process guarantees." *Id.* However, the Court found that the PWS did not create an absolute bar and thus the statutory scheme satisfies the demands of due process. *Id.* ¶ 30. Again, Brown's due process claims are not the same, and are not based upon the jurisdictional bar itself, but the requirement that the claims be brought without effective assistance of counsel. In *Merrill*, this problem was not at issue because the 30-day window to withdraw the plea ran at the same time as the 30-day time to file a notice of appeal, and the right to counsel still attached.

Finally, Merrill raised claims under the Equal Protection Clause of the United States Constitution and the uniform operation of laws provision of the Utah Constitution, which the Court recognized as being substantially parallel. *Id.* ¶ 31. According to Merrill, the PWS unconstitutionally discriminated against a class of defendants who delay their attempts to withdraw guilty pleas after the statutory thirty-day deadline has passed, imposing disparate treatment in two ways: (1) those who meet the deadline "can obtain immediate relief," while those who do not meet the deadline must remain incarcerated while they "exhaust appellate remedies" before seeking post-conviction relief through the PCRA; and (2) defendants seeking post-conviction relief are not guaranteed the benefit of appointed counsel because the PCRA permits courts to appoint counsel on a pro bono

basis but does not require it. *Id.* ¶ 32. Merrill's second contention is most similar to Brown's. [41]

The Court found that the PWS treated alike every defendant who entered a guilty plea. The PWS extends to each of these defendants the opportunity to obtain relief from the consequences of his plea by filing a motion within thirty days of entry of a final judgment, and thus, it "applies equally" to all defendants who plead guilty, including those whose guilty pleas were unlawfully obtained or who, for some other reason, may be entitled to withdraw their pleas. *Id.* ¶ 39. Accordingly, in Merrill's case, the Court found "where a defendant chooses to subject himself to the requirements of the PCRA by failing to file a motion to withdraw within thirty days, the consequences of that choice, to the extent it results in consigning a defendant to a class, is not unconstitutionally arbitrary or unreasonable." *Id.* ¶ 41. One distinguishing factor in this day, as shown above, is that defendants don't necessarily willingly "choose" to subject themselves to the requirements

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[41] Brown argues that the PWS has created two classes of similarly situated convicted criminal defendants: 1) those defendants convicted upon guilty plea who did not move to withdraw their guilty plea prior to sentencing; and 2) all other convicted criminal defendants, whether convicted by plea or by trial. The PWS then imposes disparate treatment upon the class made up of those defendants who enter a plea (in district court) but do not attempt to withdraw it prior to sentencing, regardless of the reason for failure to withdraw, who are denied a "first review" of their challenges with the commensurate right to effective assistance of counsel, whereas all other criminal defendants convicted of a crime (whether by plea or by trial) are afforded their full rights to appeal any issue with the guaranteed right to effective assistance of state paid counsel. (BrownBr:34). And now with the Court's most recent decisions in *Flora* and *Badikyan*, a criminal defendant who actually did attempt to withdraw his plea, but did not raise all potential claims of error during the plea bargaining phase of proceedings, is also denied the right to raise additional challenges with the effective assistance of counsel.

of the PCRA, because today's statute, unlike in *Merrill*'s, requires withdrawal for only limited reasons and prior to sentencing, a time period where a defendant often does not know of the grounds available, or potentially, the grounds have not yet arisen (such as in the case of a prosecutorial breach of the plea bargain). But also importantly, in addressing Merrill's contention as to the absence of counsel on PCRA relief, the Court rejected the claim because, in part, Merrill made no demonstration that PCRA petitioners like himself, who seek to withdraw guilty pleas, are ever required to pursue their claims unaided by counsel, and thus, could not conclude that defendants who seek post-conviction relief are denied operational uniformity of the laws in this matter. *Id.* ¶ 47. Unlike *Merrill*, and in context of the current statutory scheme, it is seemingly without dispute that PCRA petitioners who seek to withdraw guilty pleas are required to pursue their claims unaided by counsel. Brown clearly wasn't told of the time limits in order to file for PCRA relief, or the fact that he would not have the right to counsel's assistance. And indeed, here, Brown went unaided by counsel to bring any PCRA claims until the limitations period had run. Thus, the current PWS scheme, contrary to the scheme at issue in Merrill, does impart hardship on defendants.

B. The PWS Also Violates Utah's Separation Of Powers Provision As Subsection (2)(B) Is An Unconstitutional Assumption Of The Court's Exclusive Power To Adopt Procedural Rules

1. The State's Argument That Subsection (2)(B) Is Jurisdictional Is Unavailing As The State Oversimplifies The Amorphous Concept Of Jurisdiction

The State argues that the procedural/substantive distinction is irrelevant in this

case because subsection 2(b) of the PWS is jurisdictional. (StateBr:35). While it is true that this Court has long described the PWS as jurisdictional, (StateBr:38 (citing cases)), this Court should nevertheless find that subsection 2(b) is a procedural aspect of the jurisdictional scheme that is properly within this Court's purview and not the legislature's.

As pointed out in *Rettig*, the "jurisdictional" label is a problematic one, as it is often used to mean different things in different contexts. *See Rettig*, 2017 UT 83, ¶ 36. "Jurisdictional' is sometimes used to describe a court's authority to review a given subject matter. *Id*. And this is the type which is unquestionably the sole purview of the legislature. *Id*. ¶ 37. However, this Court also uses the term "jurisdictional bar" to describe what is, in essence, a strict rule of preservation and waiver, as this Court has interpreted the PWS to be. *See, e.g., id*. ¶ 34. And this Court has long acted under the understanding that this latter type of "jurisdiction" – that is, a strict rule of preservation and waiver—is still subject to this Court's procedural control. *See id.* ¶ 35 ("[T]his kind of "jurisdictional bar" [in the P.W.S.] is a proper subject for our rules of procedure."); *id*. ¶ 36 n.6 ("[O]ur power to amend a rule does not mean that it is not jurisdictional").

Rule of Appellate Procedure as Analogy

The State points to the time limit for filing a notice of appeal, and the history of that rule, as a useful example (StateBr:48-49), and Brown agrees that it is, just not for the purpose the State intends.

As the State explained, this Court's Rules Committee "imported" the statutory 30-day window for filing a Notice of Appeal into the rules of appellate procedure when they were adopted following the 1984 constitutional amendment. (StateBr:48). This time window for filing the notice of appeal is considered (and was at the time) "jurisdictional." *See, e.g., Nelson v. Stoker*, 669 P.2d 390, 392 (Utah 1983); *Yost v. State*, 640 P.2d 1044, 1047-48 (Utah 1981).

The State also points to historical Rule 22(b)'s language prohibiting the Court from enlarging the time for filing a notice of appeal "except as provided by law" to argue that "those involved in the process . . . recognized that jurisdictional deadlines were the legislature's domain." (StateBr:49). A closer look at Rule 22 and its subsequent amendments makes clear, however, that "those involved in the process," namely, this Court's Rules Committee, did assert this Court's authority to enlarge the time for filing a notice of appeal. Rule 22 now reads that a court cannot enlarge the time frames that are jurisdictional under the *rules*. *See* Utah R. App. P. 22(b)(2) (current) ("This rule does not authorize the court to extend the jurisdictional deadlines specified by any of the *rules* listed in Rule 2", cross-referencing rules 4(a), 4(b), and 4(e), *et al.*) (emphasis added). Notably absent is a reference to the *statutory law*. Implicitly, the current language recognizes that the notice of appeal deadline is a matter of this Court's rules, which an individual court cannot disregard in a certain pending case before it, but that this Court could amend through the rules themselves.

Additionally, even looking back to 1985, other parts of the then-newly-adopted rules indicate that this Court did claim its authority to modify or enlarge the 30-day appeal filing deadline. In the Advisory Committee Note to Rule 4, the Committee explained that it was revising a previous rule of procedure specifying a "one month" time limit for certain notices of appeal to a less confusing "30-day" limit, and says "it is intended that the 30-day time limit . . . shall be applicable in all cases, *notwithstanding a statute or other rule to the contrary*." Utah R. App. P. 4 (1985), adv. com. note.

Moreover, some of Rule 4's provisions *do* modify and effectively enlarge the time for filing a notice of appeal. *E.g*., Utah R. App. P. 4(b)(extending deadline when certain substantive motions are filed); *Id*. 4(e) (allowing the Court to grant extensions of time based either on motions for extension filed before or after the 30-day window); *Id*. 4(f) (allowing the Court to reinstate time period for filing a notice of appeal when defendant can show he was "deprived" of that right). Many of these rules extending the 30-day deadline have been modified well after the Rules were originally "imported" from statute.[42]

Rule 4(f) bears special mention, as it was an adoption of the procedural mechanism created by this Court in *Manning*, in 2005. *See* Utah R. App. P. 4, advisory committee note. To wit, this Court endorsed Kansas' procedure which "provides for narrow exceptions to the thirty-day jurisdictional rule." *Manning*, 2005 UT 61, ¶ 29. Under

[42] *See* UTAH COURT RULES-APPROVED, http://www.utcourts.gov/utc/rules-approved/category/urap004/ (last visited May 6, 2020) (listing four changes to Rule 4 of the Utah Rules of Appellate Procedure in the last 15 years).

Manning and Rule 4(f), a trial court is empowered to reinstate the time frame for filing a notice of appeal when defendant can show he was unconstitutionally deprived of his right to appeal. *Id*. ¶ 31. Though *Manning* itself was a revision of a similar – but no longer applicable – principle this Court had previously established under a *Coram Noblis* foundation, *see id.* ¶¶ 12-19, (explaining *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981)), the important point here is that *Manning* and Rule 4(f) represent an avenue to enlarge the 30-day filing window *with no previous basis in statutory law*. As such, Rule 4(f) represents perhaps the clearest example of this Court's claimed authority to modify and enlarge even a filing deadline so ostensibly "jurisdictional" as the 30-day Notice of Appeal deadline. This Court has similar power over the PWS filing deadline.

2. A Deadline Is Not Substantive Just Because It Appears To Address Policy Concerns Like Speed, Finality, and Economy

The State argues that even if subsection 2(b) of the PWS is not jurisdictional such that it can only be under the legislature's purview, it is nonetheless substantive rather than procedural, therefore remaining under the legislature's exclusive purview for that reason. (StateBr:45). Brown appreciates the general framework the State sets up to evaluate the distinction, and its contention that for this purpose the "proper distribution of power" is a relevant criteria of review. *See id*. at 49-52. He even agrees with the premise that the PWS seems to address underlying policy issues of "speed, economy and finality" in the plea bargaining system.[43] *Id*. at 53. But that does not settle the question, because speed,

[43] Although not well, or constitutionally, as argued at length, *supra*.

economy and finality also perfectly describe the policy concerns of this Court's procedural rule making. *Central Water Conservancy v. King*, 2013 UT 13, ¶ 26-27, 297 P.3d 619 (court finds that time limit found in Utah Rule of Civil Procedure 7(f)(2) "designed to ensure judicial efficiency and finality" and asks its advisory committee to revise rule); *State v. Belgard*, 844 P.2d 211, 214 (Utah Ct. App. 1991) (Utah Rule of Criminal Procedure 12(d) "increases judicial efficiency and economy, creates a system of advocacy, and fosters finality in convictions."). There is just nothing about the concerns of speed, economy, and finality that take a filing deadline out of the Court's control and places it into the legislature's sole domain.

3. Legislative Changes To The Deadline In The PWS Do Not Prove That Subsection 2(b) Is "Inextricably Intertwined" With Whe Underlying Substance; They Demonstrate The Opposite

In the alternative, and citing to *State v. Drej*, the State argues that the filing deadline in subsection 2(b) is "critical" to achieving the statute's substantive purpose and therefore inextricable from it. (StateBr:58 (*citing State v. Drej*, 2010 UT 35, ¶ 30, 233 P.3d 476)). In *Drej*, this Court concluded that an arguably procedural component of a statute—a burden of proof allocation—could not be separated from the underlying substance of the statute "without leaving the right or duty created meaningless." 2010 UT 35, ¶ 31. But the history of the PWS counsels that the filing deadline is not such a provision. As noted herein, and in Brown's initial brief, the PWS was created without a filing deadline at all. (*E.g.*, BrownBr:39 (citing historical statute)). Clearly, the substantive "right or duty" created by the PWS, as it was originally envisioned, did not

depend on a certain deadline. And the fact that the PWS has been twice amended since then—first to a 30-day deadline, then to the current pre-sentencing deadline[44]—does not mean that a pre-filing deadline is "critical" to the statute's purpose any more than it means the original PWS lacked any purpose.

The State's argument seems to imply that because the legislature made these amendments, they must be substantive. (StateBr:59).[45] But that argument simply begs the question. If those amendments were (as they appear to be) procedural adjustments to the manner and process of invoking a statutory right, they are within this Court's constitutional wheelhouse. There is even evidence that the legislature amended the filing deadline *in consultation* with this Court's rule making body.[46]

In other words, the Separation of Powers Provision in the Utah Constitution recognizes that *this Court* is in the best position to set and evaluate the efficiency and effectiveness of its procedural rules. Declaring subsection 2(b) unconstitutional and crafting one of the remedies suggested in Point IV, *infra*, does not eviscerate the PWS as a whole. Rather, such a procedural revision could preserve the substantive rights and duties created by the legislature – the right for defendants to withdraw a plea, the duty to

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[44] (BrownBr:39-44 (detailing historical revisions of PWS)).

[45] The State argues that: "The legislature confirmed the critical nature of a presentencing deadline when it amended the statute post-*Ostler* to reset the deadline to a point that better furthers finality and conserves state resources."

[46] *See* 2003 Amendment HB238, Statement of House Rep Katherine Bryson on House Floor Debate 2/28/03 ("This bill is actually the result of extensive negotiations between SWAP and the Court and is now supported by both").

file a motion and prove that the plea was not knowing and voluntary – while making *the process* of plea withdrawal and subsequent challenges happen as quickly, efficiently, and fairly as reasonably possible.[47] And, were the legislature to disagree with this Court's procedural adjustments to the PWS, it is free to override those decisions in the manner the Separation of Powers Provision sets out. (*See* BrownBr:38 (detailing constitutional process for legislature to amend Court's rules)).[48]

IV
THE REMEDY

Fear not. Though the Court should find the PWS is unconstitutional,[49] the remedy itself is rather simple – afford defendants the opportunity to withdraw their pleas in a short time period after sentencing and with the assistance of counsel.[50]

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[47] The logic by which this Court upheld the PWS in *Rettig* supports this conclusion. The Court found that hypothetical adjustments to the filing deadline would not *infringe* the underlying right to appeal unless those changes were absurdly extreme. *Rettig*, 2017 UT 83, ¶ 23.

[48] Assuming *arguendo* that this Court holds the PWS unconstitutional only on the Separation of Powers provision to the Utah constitution, and not based on the other constitutional arguments made herein.

[49] Because Subsection (2)(b) is a violation of Separation of Powers, and/or because the application of Subsection (2)(c) effectively impairs a number of fundamental constitutional guarantees associated with the denial of counsel to a large number of criminal defendants.

[50] Anticipating the retort to this suggestion, the State has indicated that the legislative intent is to prevent defendants from challenging their pleas after sentence is announced. (*E.g.*, StateBr:2,41,53). But that purported legislative intent is not really borne out. As noted in *Ostler*, comments made in the floor debates of the 1989 amendments which set the thirty-day deadline suggest that the purpose of the deadline was to prevent defendants from filing motions to withdraw guilty pleas many months or years after final disposition of the case. *See Ostler*, 2001 UT 68, ¶ 9. The comments also

In essence, returning to the *Ostler*-era time frame would most effectively solve the problem. *See Ostler*, 2001 UT 68, ¶ 11 (interpreting PWS time limitation to be 30-days after entry of the final judgment at sentencing). To do so, this Court need only invoke its rule-making authority and provide that motions to withdraw a plea be made within a specified time after sentencing, further tolling the time for appeal until any such motion, if filed, is decided.[51] During this time period after sentence but before appeal, the right to counsel still adheres.

Or, if it is found more desireable to keep these issues in the PCRA realm, some remedy must be fashioned to effectuate the right to counsel to aid defendants in litigating these issues both in the district court and thereafter on appeal if necessary. *See* n.35 *supra*.

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reflect "an understanding that the thirty-day limitation would not begin to run until *after entry of judgment and sentencing*." *Id*. (quoting comments) (emphasis added). Thus, the State's continued representation that the legislative intent of the time period is to prevent defendants from challenging the plea once sentence is announced is simply not supported.

Indeed, the fact that criminal defendants *who enter pleas in the district court* have, alone, been singled out and denied any opportunity for relief from their sentence and judgment seems to be an unintended consequence in the application of the PWS, rather than true legislative intent. *Every other litigant in the court system* has some brief opportunity to seek relief from an entered judgment, be it a motion for relief from a judgment or order in a civil case, *see* Utah R. Civ. P. 60, or a motion for new trial in the criminal realm. *See* Utah R. Crim. P. 24. Even criminal defendants who pleads guilty to misdemeanor offenses in the justice court (including DUI and domestic violence offenses), are able to obtain relief through the avenue of direct appeal from justice court, a guaranteed trial de novo. *See* Utah Code § 78A-7-118.

[51] The caveat to this remedy is that the courts must truly recognize the nuanced distinction that only limited grounds serve as the basis for a motion to withdraw a plea, and that the jurisdictional bar that applies to "[a]ny challenge to a guilty plea" is not the same as independent issues or challenges in the plea bargaining phase of proceedings. The language in *Flora* and *Badikyan* would therefore need to be reconsidered and clarified.

Criminal defendants must also be adequately advised of time frames for filing and procedures for obtaining counsel.

The State suggests that any remedy which revives a defendant's ability to try and withdraw his plea after sentence is announced will unleash a parade of horribles: "that could open to challenge every guilty plea that has not already been challenged" and "both district and appellate courts will have to reconsider the validity of guilty pleas entered years or even decades ago." (StateBr:60-61). To the contrary, the type of defendants who would fall into that situation is limited: they necessarily took plea deals, but are unhappy with the results of those plea deals; they necessarily are willing to risk (and affirmatively seek) undoing that plea deal and facing even more serious sentences, and they were unable to have their plea challenges reviewed on the merits previously. That, surely, is not an insignificant group, but neither is it an overwhelming group.

Most importantly, to receive any remedy, a defendant must have *a valid legal argument* for withdrawal and prove it to the court. Again, mere "pleader's remorse"– which the State incorrectly asserts motivates most "untimely" defendants – is not *a valid legal argument* that would be successful. And, if a defendant can demonstrate a valid legal argument, then that defendant absolutely deserves to be able to withdraw his plea.

It is true that allowing remedy will take some additional time and resources, but constitutional rights simply may not be sacrificed in the name of judicial economy. *State v. Gibbons*, 740 P.2d 1309, 1314 (Utah 1987).

CONCLUSION

Based upon the foregoing, the Opening Brief of Appellant, and any further argument, this Court should find the PWS unconsitutional in its current form and application, and fashion a remedy that provides Brown, and others like him, the ability to seek review of his plea-based challenges with the aid of effective assistance of counsel.

RESPECTFULLY SUBMITTED this 15th day of June, 2020.

/s/ *Ann Marie Taliaferro*
ANN MARIE TALIAFERRO
Attorney for Appellant Brown

/s/ *Dain Smoland*
DAIN SMOLAND
Attorney for Appellant Brown

CERTIFICATE OF COMPLIANCE

This Reply Brief DOES NOT comply with the type-volume limitation of Utah R. App. P. 24(f)(1). Appellant filed a motion for enlargement of the word limitation, which was granted June 12, 2020.

I, certify that this brief now contains **12,392 words**, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery.

In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using WordPerfect X6 in Times New Roman 13 point.

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

/s/ *Ann Marie Taliaferro*

ANN MARIE TALIAFERRO

CERTIFICATE OF DELIVERY

I hereby certify that on the 15th day of June, 2020, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was mailed, postage prepaid, emailed, or hand-delivered to:

Chris Ballard
Assistant Attorney General
Criminal Appeals Division
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84111
cballard@agutah.gov

/s/ *Ann Marie Taliaferro*
ANN MARIE TALIAFERRO
Attorney for Appellant

ADDENDUM A

2014-2019
Case Data Charts

Data compiled by the Administrative Office of the Courts

TOTAL CRIMINAL CASES RESOLVED BY PLEA

Year	Filed Criminal Cases*	Disposed Criminal Cases*	Cases with a Plea	Cases Resolved by a Plea	% of Filed Criminal Cases Resolved by a Plea	% of Disposed Criminal Cases Resolved by a Plea	% of Cases with a Plea Resolved by a Plea
2014	41,244	39,867	34,192	31,871	77.27	79.94	93.21
2015	41,320	39,006	32,164	30,004	72.61	76.92	93.28
2016	42,591	46,522	33,306	30,919	72.60	66.46	92.83
2017	45,129	42,534	35,426	33,214	73.60	78.09	93.76
2018	45,604	43,576	36,947	34,492	75.63	79.15	93.36
2019	45,138	42,683	36,660	33,423	74.05	78.31	91.17

* Criminal cases include the following case types: State Felony, Infraction, Misdemeanor DUI, Other Misdemeanor, and Not Applicable

Data compiled by the Administrative Office of the Courts, (received Apr. 3, 2020).

Cases with a Motion to Withdraw Plea before Sentencing

Year	Cases with a Plea	Cases with a Motion to Withdraw Plea before Sentencing	% Cases with a Motion to Withdraw Plea before Sentencing
2014	34,192	86	0.25
2015	32,164	67	0.21
2016	33,306	74	0.22
2017	35,426	91	0.26
2018	36,947	72	0.19
2019	36,660	57	0.16

* Criminal cases include the following case types: State Felony, Infraction, Misdemeanor DUI, Other Misdemeanor, and Not Applicable

Data compiled by the Administrative Office of the Courts, (received Apr. 3, 2020).

CASES WITH A PLEA AND SENTENCING ON THE SAME DATE

Year	Cases with a Plea	Cases with Plea and Sentence on Same Date	% Cases with Plea and Sentence on Same Date
2014	34,192	16,627	48.63
2015	32,164	11,904	37.01
2016	33,306	14,205	42.65
2017	35,426	14,501	40.93
2018	36,947	14,407	38.99
2019	36,660	14,102	38.47

* Criminal cases include the following case types: State Felony, Infraction, Misdemeanor DUI, Other Misdemeanor, and Not Applicable

Data compiled by the Administrative Office of the Courts, (received Apr. 3, 2020).