Supreme Court's Advisory Committee on the Rules of Criminal Procedure

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

*The meeting is scheduled
in the Council Room.

April 21, 2015
12:00 p.m. - 2:00 p.m.

Agenda

1. Welcome and approval of minutes	-	Patrick Corum
2. Rule 14 - subpoenas	-	Patrick Corum
3. Rule 7(h)(2)	-	Douglas Thompson
4. Rule 38 and Manning	-	Patrick Corum
5. Remote services rules	-	Patrick Corum
6. HB 308 update	-	Jeffrey Gray
7. Rule 7 rewrite update	-	Judge Brendan McCullagh
8. Rule 22 - State v. Houston	-	Brent Johnson
9. Rule 18, peremptory challenges	-	Brent Johnson
10. Other business		
11. Adjourn		

Rule 38. Appeals from justice court to district court.

(a) Appeal of a judgment or order of the justice court is as provided in Utah Code Section 78A-7-118. A case appealed from a justice court shall be heard in a district courthouse located in the same county as the justice court from which the case is appealed. In counties with multiple district courthouse locations, the presiding judge of the district court shall determine the appropriate location for the hearing of appeals.

(b) The notice of appeal.

(b)(1) A notice of appeal from an order or judgment must be filed within 30 days of the entry of that order or judgment.

(b)(2) Contents of the notice. The notice required by this rule shall be in the form of, or substantially similar to, that provided in the appendix of this rule. At a minimum the notice shall contain:

(b)(2)(A) a statement of the order or judgment being appealed and the date of entry of that order or judgment;

(b)(2)(B) the current address at which the appealing party may receive notices concerning the appeal;

(b)(2)(C) a statement as to whether the defendant is in custody because of the order or judgment appealed; and

(b)(2)(D) a statement that the notice has been served on the opposing party and the method of that service.

(b)(3) Deficiencies in the form of the filing shall not cause the court to reject the filing. They may, however, impact the efficient processing of the appeal.

(c) Motion to reinstate period for filing appeal.

(c)(1) Upon a showing that a defendant was deprived of the right to appeal, the justice court shall reinstate the thirty-day period for filing an appeal. A defendant seeking such reinstatement shall file a written motion in the justice court and serve the prosecuting entity. The court shall appoint counsel if the defendant qualifies for court-appointed counsel. The prosecutor shall have 21 days after service of the motion to file a written response. If the prosecutor opposes the motion, the justice court shall set a hearing at which the parties may present evidence. If the justice court finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the justice court within 30 days after the date of entry of the order.

(c)(2) Absent a showing of excusable neglect, a motion to reinstate may be filed no later than one year after the original time for appeal has expired.

~~(c)~~(d) Duties of the justice court. Within five days of receiving the notice of appeal, the justice court shall ~~transmit to~~ notify the appropriate district court ~~a certified~~ of the appeal. ~~packet containing copies of:~~

~~(c)(d)(1) the notice of appeal;~~

~~(c)(d)(2) the docket;~~

~~(c)(d)(3) the information or citation;~~

~~(c)(d)(4) the judgment and sentence, if any; and~~

~~(c)(d)(5) any other orders and papers filed in the case.~~

~~(d)~~(e) Duties of the district court.

~~(d)~~(e)(1) Upon ~~receipt~~ being notified of the appeal ~~packet from the justice court,~~ the district court shall hold a scheduling conference to determine what issues must be resolved by the appeal. The district court shall send notices to the appellant at the address provided on the notice of appeal. Notices to the other party shall be to the address provided in the justice court docket for that party.

~~(d)~~(e)(2) If the defendant is in custody because of the matter appealed, the district court shall hold the conference within five days of ~~the receipt of the appeals packet~~ being notified of the appeal. If the defendant is not in custody because of the matter appealed, the court shall hold the conference within 30 days of ~~receipt of the appeals packet~~ being notified of the appeal.

~~(e)~~(f) District court procedures for trials de novo. An appeal by a defendant pursuant to Utah Code Ann. §78A-7-118(1) shall be accomplished by the following procedures:

~~(e)~~(f)(1) If the defendant elects to go to trial, the district court will determine what number and level of offenses the defendant is facing.

~~(e)~~(f)(2) Discovery, the trial, and any pre-trial evidentiary matters the court deems necessary, shall be held in accordance with these rules.

~~(e)~~(f)(3) After the trial, the district court shall, if appropriate, sentence the defendant and enter judgment in the case as provided in these rules and otherwise by law.

~~(e)~~(f)(4) When entered, the judgment of conviction or order of dismissal serves to vacate the judgment or orders of the justice court and becomes the judgment of the case.

~~(e)~~(f)(5) A defendant may resolve an appeal by waiving trial and compromising the case by any process authorized by law to resolve a criminal case.

~~(e)~~(f)(5)(A) Any plea shall be taken in accordance with these rules.

~~(e)~~(f)(5)(B) The court shall proceed to sentence the defendant or enter such other orders required by the particular plea or disposition.

~~(e)~~(f)(5)(C) When entered, the district court's judgment or other orders vacate the orders or judgment of the justice court and become the order or judgment of the case.

~~(e)~~(f)(5)(D) A defendant who moves to withdraw a plea entered pursuant to this section may only seek to withdraw it pursuant to the provisions of Utah Code Ann. § 77-13-6.

~~(e)~~(f)(6) Other dispositions. A defendant, at a point prior to judgment, by plea or trial, may choose to withdraw the appeal and have the case remanded to the justice court. Within 10 days of the defendant notifying the court of such an election, the district court shall remand the case to the justice court.

~~(f)~~(g) District court procedures for hearings de novo. If the appeal seeks a de novo hearing pursuant to Utah Code Ann. § 78A-7-118(3) or (4); and

~~(f)~~(g)(1) the court shall conduct such hearing and make the appropriate findings or orders.

~~(f)~~(g)(2) Within 10 days of entering its findings or orders, the district court shall remand the case to the justice court , unless the case is disposed of by the findings or orders, or the district court retains jurisdiction pursuant to §78A-7-118(6).

~~(g)~~(h) Retained jurisdiction. In cases where the district court retains jurisdiction after disposing of the matters on appeal, the court shall order the justice court to forward all cash bail, other security, or revenues received by the justice court to the district court for disposition. The justice court shall transmit such monies or securities within 20 days of receiving the order.

~~(h)~~(i) Other bases for remand. The district court may also remand a case to the justice court if it finds that the defendant has abandoned the appeal.

~~(i)~~(j) Justice court procedures on remand. Upon receiving a remanded case, the justice court shall set a review conference to determine what, if any proceedings need be taken. If the defendant is in custody because of the case being considered, such hearing shall be had within five days of receipt of the order of remand. Otherwise, the review conference should be had within 30 days. The court shall send notice of the review conference to the parties at the addresses contained in the notice of appeal, unless those have been updated by the district court.

~~(j)~~(k) During the pendency of the appeal, and until a judgment, order of dismissal, or other final order is entered in the district court, the justice court shall retain jurisdiction to monitor terms of probation or other consequences of the plea or judgment, unless those orders or terms are stayed pursuant to Rule 27A.

(8) Appendix A. Amendments to statutes and rules (Excerpts)

Although our motivation has been improving hearings and services in our smaller courthouses, these proposed rules are not limited by the size of an operation. They should be vetted by the committees responsible for the rules and by the judges and lawyers involved in the different types of cases.

(a) Remote hearings

(i) Rule of Criminal Procedure 17.5. Hearings with contemporaneous transmission from a different location.

(a) The court may conduct the following hearings with the defendant attending by contemporaneous transmission from a different location:

(a)(1) arraignment;

(a)(2) bail;

(a)(3) change of plea;

(a)(4) early case resolution;

(a)(5) initial appearance;

(a)(6) law and motion;

(a)(7) pretrial conference;

(a)(8) review;

(a)(9) roll call;

(a)(10) waiver of preliminary examination; and

(a)(11) any hearing from which the defendant has been excluded under Rule 17.

(b) The court may conduct the following hearings with the defendant attending by contemporaneous transmission from a different location if the defendant waives attendance in person:

(b)(1) preliminary examination;

(b)(2) probation violation;

(b)(3) restitution;

(b)(4) sentencing; and

(b)(5) trial.

(c) For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous

transmission from a different location if the party not calling the witness waives confrontation of the witness in person.

(ii) Rule of Juvenile Procedure 29B. Hearings with contemporaneous transmission from a different location.

(a) In any delinquency proceeding or proceeding under Section 78A-6-702 or Section 78A-6-703 the court may conduct the following hearings with the minor or the minor's parent, guardian or custodian attending by contemporaneous transmission from a different location:

(a)(1) arraignment;

(a)(2) contempt

(a)(3) detention;

(a)(4) law and motion;

(a)(5) pretrial conference;

(a)(6) review; and

(a)(7) warrant.

(b) The court may conduct the following hearings with the minor or the minor's parent, guardian or custodian attending by contemporaneous transmission from a different location if the minor or the minor's parent, guardian or custodian waives attendance in person:

(b)(1) adjudication

(b)(2) certification to district court;

(b)(3) disposition;

(b)(4) expungement;

(b)(5) permanency;

(b)(6) preliminary hearing;

(b)(7) restitution;

(b)(8) shelter; and

(b)(9) trial.

(c) For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives confrontation of the witness in person.

(iii) Rule of Juvenile Procedure 37B. Hearings with contemporaneous transmission from a different location.

(a) In any abuse, neglect, dependency, or substantiation proceeding and in any proceeding for the termination of parental rights, the court may conduct hearings with the minor or the minor's parent, guardian or custodian attending by contemporaneous transmission from a different location if the minor or the minor's parent, guardian or custodian waives attendance in person.

(b) For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives confrontation of the witness in person.

(iv) Rule of Civil Procedure 43. Evidence.

(a) Form. In all trials, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(v) Code of Judicial Administration Rule 4-106. Electronic conferencing.

Intent:

To authorize ~~the use of electronic conferencing~~ hearings with contemporaneous transmission from a different location in lieu of personal appearances in appropriate cases.

To establish the minimum requirements for contemporaneous transmission from a different location.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

~~(1) In the judge's discretion, any hearing may be conducted using telephone or video conferencing.~~

~~(2) Any proceeding in which a person appears by telephone or video conferencing shall proceed as required in any other hearing including keeping a verbatim record.~~

(1) If the courtroom satisfies paragraph (3), the judge may participate in a hearing by contemporaneous transmission from a different location.

¶ 14 The parties disagree about the standard of review that should apply to Mr. Houston's claims. Mr. Houston admits that none of his claims are preserved, and thus argues under both plain error and ineffective assistance of counsel doctrines. However, Mr. Houston also argues for two alternative, heightened standards of review. First, Mr. Houston contends that he was charged with a "capital" offense, and therefore this court should apply a "manifest prejudice" standard of review to each of his claims. Second, Mr. Houston argues that his sentence is unconstitutional and therefore he can challenge it on appeal as an "illegal" sentence under Utah Rule of Criminal Procedure 22(e), and is thereby excused from the obligation to preserve issues for appeal. In support of his rule 22(e) argument, Mr. Houston cites *State v. Candedo*, in which this court interpreted rule 22(e) to permit review of certain unpreserved constitutional challenges.[7]

¶ 15 The State disagrees with Mr. Houston. First, the State contends that "capital" review does not apply here because this is not a "capital" case.[8] According to the State, a "capital" case is one where the death penalty is sought or imposed; because of his status as a juvenile, Mr. Houston was not, and could not have been, sentenced to death, and as such, "capital" appellate review is not available. Second, the State argues that even if this court can reach Mr. Houston's unpreserved claims under rule 22(e), *State v. Candedo* was wrongly decided and should be overruled. In support of its effort to undo *Candedo*, the State argues that the opinion lacks sufficient analysis and citation to authority, creates an unjustifiable disparity between this court's treatment of unpreserved constitutional challenges to convictions and

---

likelihood of a more favorable outcome" (alteration in original) (internal quotation marks omitted)).

[5] *Id.* ¶ 11.

[6] *State v. Low*, 2008 UT 58, ¶ 19, 192 P.3d 867.

[7] 2010 UT 32, ¶ 13, 232 P.3d 1008 ("[I]f an offender's sentence is unconstitutional, the sentence is not authorized by the 'judgment of conviction,' and is therefore illegal.").

[8] The State also argues that, in any event, the "manifest and prejudicial error standard is equivalent to plain error review."

unpreserved constitutional challenges to sentences, and is inconsistent with the rule announced in *State v. Yazzie*.[9]

¶ 16 As we describe in greater detail below, we hold that each of Mr. Houston's constitutional challenges falls within the narrow scope of rule 22(e)'s exception to the preservation of claims. We therefore decline the State's request to overrule our precedent in *State v. Candedo*. Under rule 22(e), we treat Mr. Houston's claims as if they had been preserved, reviewing conclusions of law for correctness and granting no deference to the district court.[10] Because rule 22(e) provides a higher standard than "manifest prejudice" review, we decline to address Mr. Houston's alternative argument.

¶ 17 A claim of ineffective assistance of counsel is also an exception to our preservation doctrine.[11] For "ineffective assistance of counsel claims, we review a lower court's purely factual findings for clear error, but [we] review the application of the law to the facts for correctness."[12]

ANALYSIS

I. MR. HOUSTON PROPERLY BROUGHT FACIAL CONSTITUTIONAL CHALLENGES TO HIS SENTENCE UNDER UTAH RULE OF CRIMINAL PROCEDURE 22(e)

¶ 18 Utah Rule of Criminal Procedure 22(e) provides that "[t]he court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." We hold that the rule encompasses facial constitutional challenges to the sentence that do not implicate a fact-intensive analysis. We also conclude that each of Mr. Houston's constitutional challenges to his sentence meets these criteria, and therefore his claims are properly brought under rule 22(e).

¶ 19 Under our traditional preservation doctrine, "generally an appellant must properly preserve an issue in the district court

---

[9] 2009 UT 14, ¶ 13, 203 P.3d 984.

[10] *See State v. Prion*, 2012 UT 15, ¶ 13, 274 P.3d 919.

[11] *Low*, 2008 UT 58, ¶ 19.

[12] *Archuleta v. Galetka*, 2011 UT 73, ¶ 25, 267 P.3d 232 (alteration in original) (internal quotation marks omitted).

before it will be reviewed on appeal."[13] The issue must have been "presented to the district court in such a way that the court has an opportunity to rule on [it]."[14] These preservation rules exist both to serve judicial economy and to prevent a defendant from failing to object to an issue in the hopes of reversal of a conviction on appeal.[15] However, "[o]ur preservation requirement is self-imposed and . . . . [c]onsequently, we exercise wide discretion when deciding whether to entertain or reject matters that are first raised on appeal."[16] We have therefore recognized limited exceptions to the rule, including when the issue arises under exceptional circumstances or where a plain error has occurred.[17]

¶ 20 Rule 22(e) operates as another limited exception to the preservation doctrine.[18] In *State v. Candedo*, we explained that the rule "allows an appellate court to vacate [an] illegal sentence" even if the legality of the sentence was never raised in the proceedings below.[19] We stated that our preservation rules do not apply in the context of a rule 22(e) challenge "because an illegal sentence is void and, like issues of jurisdiction [may be raised] at any time."[20]

---

[13] *O'Dea v. Olea*, 2009 UT 46, ¶ 15, 217 P.3d 704; *accord Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828.

[14] *Patterson*, 2011 UT 68, ¶ 12 (alteration in original) (internal quotation marks omitted).

[15] *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346; *see also State v. Prion*, 2012 UT 15, ¶ 19, 274 P.3d 919.

[16] *Patterson*, 2011 UT 68, ¶ 13.

[17] *Holgate*, 2000 UT 74, ¶¶ 11–13.

[18] *Prion*, 2012 UT 15, ¶ 20; *State v. Brooks*, 908 P.2d 856, 860 (Utah 1995) ("[R]ule 22(e) permits the court of appeals to consider the legality of a sentence even if the issue is raised for the first time on appeal.").

[19] 2010 UT 32, ¶ 9, 232 P.3d 1008 (internal quotation marks omitted).

[20] *Id.* (alteration in original) (internal quotation marks omitted).

¶ 21 While it is clear that the preservation rule does not apply to a defendant's challenge to an illegal sentence, we have had few occasions to discuss what constitutes an "illegal sentence." In *State v. Yazzie*, we adopted a definition of "illegal sentence" from the United States Court of Appeals for the Tenth Circuit:

> [An illegal sentence is] one which is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.[21]

¶ 22 In *Candedo*, we elaborated on this definition. We concluded that "if an offender's sentence is unconstitutional, the sentence is not authorized by the 'judgment of conviction,' and is therefore illegal."[22] In that case, the district court placed Francisco Candedo on nine years' probation after he pleaded guilty to three felonies arising from his involvement in a fraudulent investment scheme.[23] Rather than object to the length of his probation at sentencing, Mr. Candedo challenged on direct appeal the legality of the duration of his probation sentence under rule 22(e), arguing that his sentence violated his

---

[21] 2009 UT 14, ¶ 13, 203 P.3d 984 (alteration in original) (quoting *United States v. Dougherty*, 106 F.3d 1514, 1515 (10th Cir. 1997)).

[22] 2010 UT 32, ¶ 13. We disagree with the State that this definition is inconsistent with *Yazzie*, or that it is otherwise unsupported by legal authority. We squarely rejected these arguments in *Candedo*. *See id.* ¶¶ 12–14. We also note that our holding in *Candedo*—that an illegal sentence encompasses an unconstitutional sentence—is consistent with the Tenth Circuit's definition and application of this term. *See United States v. Groves*, 369 F.3d 1178, 1182 (10th Cir. 2004) ("Because the defendant reserved the right to appeal an 'illegal sentence,' and because an unconstitutional sentence is 'illegal,' we hold that the defendant is entitled to challenge his sentence . . . ."); *United States v. Lyman*, 261 F. App'x 98, 100 (10th Cir. 2008) (noting that an unconstitutional sentence is an example of an illegal sentence).

[23] 2010 UT 32, ¶ 1.

substantive due process rights under the United States Constitution.[24] The court of appeals affirmed Mr. Candedo's sentence without reaching the merits of his constitutional claim.[25] On certiorari review, we determined that the court of appeals erred when it failed to reach Mr. Candedo's constitutional challenge.[26] We concluded that "[b]ecause an illegal sentence under rule 22(e) includes constitutional violations," a defendant may raise arguments concerning the constitutionality of the sentence, even if unpreserved.[27]

¶ 23 We again considered the scope of rule 22(e) in *State v. Prion*, a case in which the defendant raised statutory and double jeopardy challenges to his sentence.[28] We recognized that the *Candedo* "formulation, if broadly construed, raises the prospect of abuse."[29] We cautioned that such abuse could arise "if rule 22(e) were construed broadly to sanction a fact-intensive challenge to the legality of a sentencing proceeding asserted long after the time for raising it in the initial trial or direct appeal."[30] In considering the scope of the rule, we also explained that our rule 22(e) derived from a former Federal Rule of Criminal Procedure that authorized a court to correct illegal sentences.[31] We recognized that federal courts traditionally limited challenges under the federal rule to attack sentences that exceeded the statutory maximum, violated double jeopardy, or were facially ambiguous or internally inconsistent.[32] Some circuits appear to have recognized a broader

---

[24] *Id.*

[25] *Id.*

[26] *Id.* ¶ 2.

[27] *Id.* ¶ 11. We nonetheless affirmed Mr. Candedo's sentence because we determined that it did not violate due process. *Id.* ¶ 25.

[28] 2012 UT 15, ¶ 10.

[29] *Id.* ¶ 20 (internal quotation marks omitted).

[30] *Id.*

[31] *Id.* ¶ 22; *see* FED. R. CRIM. P. 35(a) (1984). The federal rule was repealed in 1987. *See Prion*, 2012 UT 15, ¶ 22 n.8.

[32] *Prion*, 2012 UT 15, ¶ 22 (citing *United States v. Pavlico*, 961 (con't.)

application of the federal rule, such as when the sentence is generally "in violation of the Constitution,"[33] is based on "misinformation of a constitutional magnitude,"[34] or even when the sentence violates another federal rule.[35]

¶ 24 In *Prion*, we held that the defendant's statutory and double jeopardy challenges properly fell within the ambit of rule 22(e).[36] Such challenges attacked "facial defects" that "could

---

F.2d 440, 443 (4th Cir. 1992), and *Hill v. United States*, 368 U.S. 424, 430 (1962)); *see also State v. Higginbotham*, 917 P.2d 545, 551 (Utah 1996) (remanding to the trial court under rule 22(e) to correct a sentence enhancement made in violation of the statute).

[33] *United States v. Hovsepian*, 307 F.3d 922, 927–28 (9th Cir. 2002); *see also Hill*, 368 U.S. at 430 (finding no illegal sentence under rule 35(a) when the sentence was not "legally or constitutionally invalid in any other respect").

[34] *United States v. Plain*, 856 F.2d 913, 916 (7th Cir. 1988) (quoting *United States v. Tucker*, 404 U.S. 443, 447 (1972) (considering a rule 35 motion when a sentencing authority bases the sentencing decision on erroneous factual information)).

[35] *Cook v. United States*, 171 F.2d 567, 569 (1st Cir. 1948) (vacating a sentence that violated Federal Rule of Criminal Procedure 43 because the defendant was not present before the court when his sentence was increased).

[36] 2012 UT 15, ¶¶ 23–24. The concurrence misreads our holding in *Prion* as limiting rule 22(e) challenges to only those permitted under the antecedent federal rule. *Infra* ¶¶ 114–31. But we nowhere stated that we were adopting the federal limitation. In fact, reading *Prion* to adopt such a limitation would require us to have overruled our earlier decisions in *Candedo*, 2010 UT 32, and *State v. Telford*, 2002 UT 51, 48 P.3d 228 (per curiam). In *Candedo*, we expressly found that the defendant's substantive due process claim fell within the scope of the rule:

> We therefore hold that the court of appeals erred in failing to reach the merits of Candedo's substantive due process challenge because the definition of illegal sentence under rule 22(e) is sufficiently broad to include constitutional violations that threaten the validity of the

(con't.)

easily be corrected without the need for factual development in the original trial court."[37] We therefore reviewed the defendant's claims on the merits, ultimately concluding that his sentence violated double jeopardy.[38]

¶ 25 Mr. Houston now brings a host of constitutional claims that we have not previously addressed under rule 22(e). Today, we draw on our previous decisions to articulate the standard for a criminal defendant who brings an unpreserved claim under rule 22(e) that his or her sentence is illegal, and we reiterate the concern expressed in earlier cases that "rule 22(e) claims must be narrowly circumscribed to prevent abuse."[39]

¶ 26 We therefore hold that under rule 22(e), a defendant may bring constitutional challenges that attack the sentence itself and not the underlying conviction,[40] and which do so as a facial challenge rather than an as-applied inquiry.[41] This standard

---

> sentence. This holding allows us to reach the merits of Candedo's claim . . . .

2010 UT 32, ¶ 14. And in *Telford*, "[a]lthough we rejected Telford's separation of powers and Eighth Amendment challenges to his sentence, *we reached and considered the merits of those challenges under rule 22(e).*" *Id.* ¶ 11 (citing *Telford*, 2002 UT 51, ¶¶ 3–4) (emphasis added). We would not denigrate our holdings in those cases as "relatively unimportant." *Infra* ¶ 121 n.1.

[37] *Prion*, 2012 UT 15, ¶ 22.

[38] *Id.* ¶ 63.

[39] *Candedo*, 2010 UT 32, ¶ 9 (quoting *Telford*, 2002 UT 51, ¶ 5).

[40] *See Brooks*, 908 P.2d at 859 ("[A]n appellate court may not review the legality of a sentence under rule 22(e) when the substance of the appeal is . . . a challenge, not to the sentence itself, but to the underlying conviction.").

[41] The State argues that such a rule creates an unjustifiable disparity between unpreserved challenges to convictions and to sentences. To the extent that such a dichotomy exists, it is inherent in the rule itself, which allows illegal sentences to be challenged at any time. Moreover, our decision today limits that disparity by restricting constitutional challenges under the rule to only facial attacks.

comports with previous rule 22(e) decisions of this court. For example, in *State v. Telford*, we permitted the defendant to bring some unpreserved constitutional challenges to his sentence under rule 22(e) while ruling that other constitutional claims did not properly fall within the scope of rule 22(e) review.[42] We authorized the defendant's challenge to the indeterminate sentencing scheme under the separation of powers clause of the Utah Constitution.[43] We also allowed claims under the cruel and unusual punishments clauses of the Utah and United States Constitutions, but only to the extent that the defendant argued for "a per se violation."[44] In contrast, we concluded that to the extent that the defendant contested the constitutionality *"as applied to his particular case*, he impermissibly attempt[ed] to employ rule 22(e) to attack his underlying conviction."[45] Similarly, we prohibited review of claims brought under the Sixth Amendment of the United Sates Constitution and article I, section 12 of the Utah Constitution because those clauses did not relate to sentencing.[46]

¶ 27 Limiting constitutional challenges to facial attacks serves judicial economy. As we recognized in *Brooks*, "[w]hen the pertinent facts are undisputed and a purely legal question with respect to which the trial court has no discretion remains to be decided, nothing is to be gained by remanding the case to the trial court."[47] The concurrence argues that our standard creates an unworkable rule because even facial challenges can be fact-

---

[42] 2002 UT 51, ¶¶ 2–5.

[43] *Id.* ¶ 3.

[44] *Id.* ¶ 4; *see Candedo*, 2010 UT 32, ¶ 11 (recognizing that in *Telford* we reviewed separation of powers and cruel and unusual punishment challenges on their merits).

[45] *Telford*, 2002 UT 51, ¶ 7 (emphasis added).

[46] *Id.* ¶ 6. We ultimately concluded that Mr. Telford's sentence did not amount to a constitutional violation. *Id.* ¶¶ 3–4.

[47] 908 P.2d at 860; *see also Prion*, 2012 UT 15, ¶ 20 (warning against permitting rule 22(e) to "sanction a fact-intensive challenge"); *id.* ¶ 22 (explaining that facial defects can easily be corrected by an appellate court without the need to remand for factual development).

intensive.[48] But this argument also misses the mark. In this context, a fact-intensive analysis is one in which "the pertinent legal facts" are disputed or unclear. But where there is a facial constitutional attack, the court need not delve into the record or make findings of fact. Instead, the court is tasked with resolving a legal issue. But that does not mean the analysis will be easy or devoid of any reference to facts. As the opinions in the present case demonstrate, analysis of a purely legal question is often difficult and warrants rigorous debate. The rule we articulate here is not untenable just because it requires hard work by the court.

¶ 28 In the end, finality of judgment and preservation of claims are important, but so too is a criminal defendant's right to endure only those sentences that can be constitutionally imposed. Because Mr. Houston facially attacks the constitutionality of the statute that authorized his sentence, we hold that he has properly challenged it as an "illegal sentence" under Utah Rule of Criminal Procedure 22(e).[49] We next turn to the merits of Mr. Houston's claims. For analytical clarity, we separate his claims into two categories. First, we address his facial constitutional claims, and we analyze the sentence for correctness under rule 22(e)'s exception to preservation. Next, we address Mr. Houston's claims brought under the framework of ineffective assistance of counsel. We ultimately conclude that all of Mr. Houston's claims fail and therefore affirm his sentence of life without the possibility of parole.

II. MR. HOUSTON'S SENTENCE OF LIFE WITHOUT PAROLE DOES NOT VIOLATE THE UTAH OR THE UNITED STATES CONSTITUTION

¶ 29 We begin by addressing Mr. Houston's six constitutional challenges to his sentence. Mr. Houston argues that his sentence: (A) is unconstitutional under the United States Supreme Court case *Apprendi v. New Jersey*,[50] (B) is unconstitutional because the

---

[48] *Infra* ¶¶ 128–29.

[49] In light of this limiting construction, we decline the State's request for us to overrule our holding in *Candedo*, 2010 UT 32.

[50] 530 U.S. 466 (2000).

functions and its impact on principles of retribution and rehabilitation). And the majority offers responses similarly invoking social science material. *Supra* ¶¶ 58–59 (addressing the special status of minors based on "science and social science research, including longitudinal studies and brain mapping"). With this background, it seems apparent that the cruel and unusual punishment challenge asserted by Houston is a fact-intensive one. For me, this underscores the untenable nature of the standard adopted by the court today. In time the court will be required to reject it, and replace it with a more workable one. I would avoid that problem by retaining the standard we articulated in *Prion*.

¶ 130 Finally, I would register a plea that we revisit this issue immediately through our rulemaking process. Our law as it stands under rule 22(e) as written is confusing, fuzzy, and perverse. The confusion is in the terms of the rule. The rule as it stands is a trap for an unwary litigant. We should not retain a rule that says one thing and means another. The fuzziness is in the court's standard as articulated today. There is no clear, established distinction between "facial" and "as-applied" challenges to a sentence.[187] So the standard we have adopted is sure to lead to uncertainty and arbitrary decisionmaking going forward. Lastly, the perversion is in a legal regime that suspends the law of preservation for "facial" constitutional challenges to a *sentence* while retaining the law of preservation for parallel challenges to a *conviction*. That is backwards. If anything, an unconstitutional conviction ought to be more troubling.

---

[187] *See Am. Fed'n of State, Cnty., & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 865 (11th Cir. 2013) ("[T]he line between facial and as-applied relief is a fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation."); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000) ("There is no single distinctive category of facial, as opposed to as-applied, litigation.").

Utah State Courts

Brent Johnson <brentj@utcourts.gov>

Re: Other rule issues

3 messages

Debra Moore <debram@utcourts.gov> Mon, Nov 24, 2014 at 3:19 PM
To: Judge Samuel McVey <smcvey@utcourts.gov>
Cc: Brent Johnson <brentj@utcourts.gov>

Yes, Brent Johnson staffs this committee and I've copied him on these emails so that he can give your input to the Chair.

On Thu, Nov 20, 2014 at 3:31 PM, Judge Samuel McVey <smcvey@utcourts.gov> wrote:
Debra,

I have a Criminal Rules suggestion below. Could you give it to whoever is on the Criminal Rules Committee?
THanks

——— Forwarded message ———
From: **Judge Derek Pullan** <dpullan@utcourts.gov>
Date: Thu, Nov 20, 2014 at 1:42 PM
Subject: Re: Other rule issues
To: Judge Samuel McVey <smcvey@utcourts.gov>

Thanks Sam.
I will forward on your attorney's fees suggestion to the chair of the rules committee. He prioritizes our work. The peremptory challenge issue is one for the criminal rules committee. I am not on that one and I am not sure who is from our district.

On Thu, Nov 20, 2014 at 11:21 AM, Judge Samuel McVey <smcvey@utcourts.gov> wrote:
Derek,
A couple of other suggestions:

A misdemeanor jury trial calls for 3 peremptory challenges per side--even for class B's and C's. There is no federal constitutional right to peremptories--I don't think there is a state right. I suggest the number of peremptories for class B and C's be reduced to tow at the most, or even one. Also, in felony cases, each side has one peremptory per alternate juror. Thus we treat alternates to a higher status than the mandatory panel of 8 where each side gets 4 perempt. strikes, or a ratio of 50%. I suggest up to two alternates only merit 1 strike. 3 or 4 merit two strikes. This maintains a closer parity to the eight number and could reduce the need for a larger venire panel.

Cheers, Sam

Debra J. Moore, District Court Administrator
Utah Administrative Office of the Courts
P. O. Box 140241
Salt Lake City, UT 84114-0241
801-578-3971

Brent Johnson <brentj@utcourts.gov> Mon, Nov 24, 2014 at 8:49 PM
To: Debra Moore <debram@utcourts.gov>
Cc: Judge Samuel McVey <smcvey@utcourts.gov>

We don't meet again until at least February but I will make certain this is on the agenda.

[Quoted text hidden]

Judge Samuel McVey <smcvey@utcourts.gov> Mon, Nov 24, 2014 at 10:00 PM
To: Brent Johnson <brentj@utcourts.gov>

Thanks Brent
[Quoted text hidden]