2002

State of Utah v. Scott Joseph Merrill : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20020887-SC
v.	:	
SCOTT JOSEPH MERRILL,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM DENIAL OF MOTION TO WITHDRAW NO CONTEST PLEA TO AGGRAVATED MURDER, A CAPITAL OFFENSE UNDER UTAH CODE ANN. § 76-5-202 (SUPP. 1998), IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH, THE HONORABLE BRYCE K. BRYNER, PRESIDING

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 20020877-SC**
v.	:	
SCOTT JOSEPH MERRILL,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the denial of a motion to withdraw a no contest plea to aggravated murder, a capital offense. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(i) (Supp. 2002).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

I. Did the trial court correctly apply well-established precedent to deny defendant's untimely motion to withdraw his no contest plea?

Whether the trial court properly followed precedent is a question of law reviewed for correctness. *State v. Martinez*, 2002 UT 80, ¶ 5, 52 P.3d 1276.

II. Should this Court reach defendant's inadequately briefed claims that a jurisdictional time limit on filing a motion to withdraw a guilty plea violates the separation of powers and open courts provisions of the Utah Constitution or the federal due process clause?

No standard of review applies to this issue.

III. Do defendant's claims that the 30-day jurisdictional limit in the plea statute violates the uniform operation of the laws have any merit?

A. Does the 30-day time limit violate the uniform operation of laws provision by limiting the time a defendant has to challenge his plea where the statute specifically preserves defendant's right to challenge his plea in post-conviction proceedings?

B. Does the 30-day limit violate the uniform operation of laws provision by unfairly subjecting some people to greater prison terms than others?

C. Does defendant have standing to challenge the plea statute as unconstitutional because defendants are not entitled to appointed counsel in post-conviction proceedings where defendant was appointed counsel to assist him with his post-conviction proceeding in this case?

The constitutionality of a statute presents a question of law reviewed for correctness. *State v. Martinez*, 2002 UT 80, ¶ 6, 52 P.3d 1276. Whether a defendant has standing to raise a claim is "primarily a question of law" reviewed with "minimal discretion to the trial court." *Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373 (Utah 1997).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following provisions are attached at Addendum A:

U.S. Const. amend XIV;
Utah Const. art. I, § 7
Utah Const. art. I, § 11;
Utah Const. art. I, § 24;
Utah Const. art. V, § 1;
Utah Code Ann. § 77-13-6 (1999).

STATEMENT OF THE CASE

Defendant was charged by amended information with aggravated murder, a capital offense, in violation of Utah Code Ann. §§ 76-5-202(1)(d) (Supp. 1998) & 76-3-203 (1999); aggravated robbery, a first degree felony, in violation of Utah Code Ann. §§ 76-6-302 (1999) & 76-3-203; and criminal mischief, a second degree felony, in violation of Utah Code Ann. §§ 76-6-106 (Supp. 1998) & 76-3-203 (R. 127-28). All three counts also charged firearm enhancements (R. 127-28). After a preliminary hearing, defendant was bound over as charged (R. 153-57).

On December 6, 1999, defendant informed the trial court that he did not intend to present any mental illness defense and that his mental competency would not be an issue in the guilt phase of his trial (R. 264-65).

On February 17, 2000, defendant appeared before the court at a change of plea hearing (R. 391-93, 471). At that hearing, defendant called Nancy Beth Cohn, Ph.D., who testified that, after examining defendant on three occasions, she had concluded that defendant was competent to enter into a plea agreement (R. 471:5). After the court completed a plea colloquy pursuant to rule 11, Utah Rules of Criminal Procedure,

defendant executed both a "Statement of Defendant and Rule 11(h)(2) Disposition" and a "No Contest Statement" in support of his no contest plea to aggravated murder (R. 378-88, 389-90; R. 471:6-19). In exchange for defendant's plea, the State agreed to dismiss the remaining charges and to recommend a sentence of life in prison with the possibility of parole, the lowest possible penalty for the crime to which defendant pled (R. 378-88; R. 471:4-5). After accepting defendant's plea, the trial court sentenced defendant, at the same hearing, according to the State's recommendation (R. 391-92; 471:21). Defendant was informed at that hearing that he had thirty days to move to withdraw his plea (R. 383; 471:15).

After thirty days had expired, defendant's trial counsel filed a petition for post-conviction relief challenging the validity of defendant's plea (R. 394-97). Defendant's current counsel was then appointed to replace his trial counsel (R. 400). On April 11, 2001, new counsel filed a motion to withdraw defendant's guilty plea, which was subsequently removed from defendant's post-conviction case and filed in his criminal case (R. 398-99, 400, 402-03). Based on the motion to withdraw, the trial court ordered that defendant's petition for post-conviction relief be dismissed without prejudice (R. 400). The trial court subsequently dismissed defendant's motion to withdraw for lack of jurisdiction (R. 460-63).

Defendant filed a timely notice of appeal from the denial of his motion (R. 464).

STATEMENT OF THE FACTS[1]

On October 29, 1998, defendant hid himself among rocks overlooking an isolated road on which Charles W. Watterson operated a grading machine (R. 382). As Mr. Watterson approached defendant's location, defendant "fired [his] weapon into Mr. Watterson and did not stop firing until he was dead (approximately seven seconds)" (R. 382). Defendant then walked over to Mr. Watterson and "intentionally took items of personal property from the victim's person" (R. 382).

When Mr. Watterson was found a short while later, he had gunshot wounds to his head, bicep, right shin, chest, and back (R. 469:12-18). Some thirty-five spent .22 caliber casings were found in the adjacent area (R. 469:44-52). A firearms expert from the Utah State Crime Lab confirmed that the casings were shot from a Ruger 10.22 semiautomatic weapon purchased by defendant in 1994 (R. 469:70, 73, 76, 226-44). Footprints consistent with defendant's boots were found throughout the area where Mr. Watterson was shot (R. 469:43, 62, 85, 119, 135-37, 145, 147-54, 157, 174-86).

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[1]Because defendant pleaded no contest to aggravated murder, no trial was held in this case. Consequently, the statement of the facts is taken from defendant's plea statement and his preliminary hearing.

In his statement of facts, defendant relies heavily on his petition for post-conviction relief and an alleged report concerning defendant's mental health status prior to entering his plea, apparently prepared by Nancy Beth Cohn, Ph.D. *See* Aplt. Br. at 3-8. He also makes allegations concerning how his prior counsel reacted to him when he contacted them seeking to withdraw his plea. Aplt. Br. at 7. None of these documents or "facts" are contained in the record. Consequently, the State asks this Court to strike those references from defendant's brief. *See, e.g.*, Utah R. App. P. 24(a)(9) (requiring party to support argument with citation to "the record"); *Low v. Bonacci*, 788 P.2d 512, 513 (Utah 1990) ("[This Court] do[es] not consider new evidence on appeal.").

SUMMARY OF THE ARGUMENT

Point I. Defendant claims that the trial court erred as a matter of statutory construction in interpreting the plea statute to contain a 30-day jurisdictional time limit on filing motions to withdraw pleas. Because defendant's argument is directly contrary to dispositive precedent, his claim fails.

Point II. Defendant claims that the statutory 30-day jurisdictional limit on filing motions to withdraw pleas violates the separation of powers and open courts provisions of the Utah constitution, and the federal due process clause.[2] Defendant provides no relevant legal authority or reasoned analysis to support his claims. Consequently, this Court should reject these claims as inadequately briefed.

Point III. Defendant raises three challenges to the 30-day jurisdictional limit in the plea statute under the federal equal protection clause and the state uniform operation of laws provision. First, he claims the statute is unconstitutional because it limits the time a defendant has to challenge his plea. This claim fails because the plain language of the statute recognizes a defendant's right to challenge his plea outside the 30-day limit through a petition for post-conviction relief.

Second, defendant claims that the plea statute is unconstitutional because it allows some people to "obtain immediate relief from an unconstitutional plea through a motion

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[2]Because defendant does not identify whether his due process claim is based on the state or federal constitution but cites primarily to federal law, the State assumes defendant brings this claim under the federal due process clause only.

to withdraw," but forces others to remain incarcerated for a much longer period of time while they "exhaust appellate remedies and then seek post-conviction relief." Defendant provides no legal support for his assertion that defendants who plead guilty must appeal their convictions prior to seeking post-conviction relief. In fact, because most defendants waive their right to appeal by pleading guilty, most *cannot* seek appellate review of their pleas before seeking such relief. Because defendant fails to explain how the plea statute otherwise impedes his right to withdraw his plea, defendant's claim fails.

Finally, defendant claims the plea statute is unconstitutional because "defendants are not entitled to appointed counsel in post-conviction proceedings." To have standing to present this claim, defendant must have been adversely affected by that difference. In this case, defendant was not adversely affected because he was in fact appointed counsel in his post-conviction proceeding. Consequently, defendant does not have standing to assert this claim.

ARGUMENT

I. THE TRIAL COURT CORRECTLY APPLIED WELL-ESTABLISHED PRECEDENT TO DENY DEFENDANT'S UNTIMELY MOTION TO WITHDRAW HIS NO CONTEST PLEA

Defendant claims that the trial court "incorrectly held that Utah Code Ann. § 77-13-6(2)(b) acts as a jurisdictional bar to motions for withdrawal of pleas filed after the thirty day limitation prescribed by the statute." Aplt. Br. at 8. As if raising a question of first impression, defendant claims that the trial court's ruling was erroneous as a matter of

statutory construction. Aplt. Br. at 10. Because the jurisdictional nature of the limitations period of the plea statute is well-settled in Utah, defendant's claim lacks merit.

Section 77-13-6, the plea statute, provides:

> (1) A plea of not guilty may be withdrawn at any time prior to conviction.
>
> (2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.
>
> (b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.
>
> (3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure.[3]

Utah Code Ann. § 77-13-6 (1999).

A. Controlling law holds that the plea statute's filing deadline is a jurisdictional limitation on filing motions to withdraw pleas.

In 1992, the court of appeals held that the 30-day time limit in section 77-13-6(b)(2) for filing motions to withdraw guilty pleas was jurisdictional. *See State v. Price*, 837 P.2d 578, 583 (Utah App. 1992), *overruled on other grounds by State v. Ostler*, 2001 UT 68, ¶ 11, 31 P.3d 528. In reaching that conclusion, the court likened the 30-day time limit for filing motions to withdraw to the 30-day time limits for filing notices of appeal

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[3]"In 1996, rule 65B[] was renumbered and is currently designated as rule 65C of the Utah Rules of Civil Procedure." *Jacobs v. State*, 2001 UT 17, ¶ 1 n.1, 20 P.3d 382. As of the date defendant filed his motion to withdraw, the plea statute had not been amended to reflect that change. *See* Utah Code Ann. § 77-13-6 (1999) (last amended in 1994). When the plea statute was amended in 2003, however, the legislature corrected the reference. *See* Utah Code Ann. § 77-13-6(2)(c) (Supp. 2003).

and petitions for writ of certiorari under rules 4 and 48, Utah Rules of Appellate Procedure. *Id.* at 582; *see also Ostler*, 2001 UT 68, ¶ 11 n.3.

The court of appeals noted that, like the provisions governing pleas, both rules 4 and 48 provided exceptions to the general 30-day limitations period. *Price*, 837 P.2d at 582-83 (citing Utah R. Crim. P. 11(6) (providing failure to advise defendant of time limit for filing motion to withdraw plea may be ground for extending time for filing motion); Utah R. App. P. 4(e) (providing for extension of time for filing notice of appeal upon showing of excusable neglect or good cause if motion is filed within 30 days of initial deadline); Utah R. App. P. 48(e) (providing for extension of time for filing petition for writ of certiorari upon showing of excusable neglect or good cause if motion is filed within 30 days of initial deadline)). The court then noted, however, that "Utah's appellate courts have held that such provisions do not destroy the jurisdictional nature of these time limit rules." *Id.* at 583. The court of appeals concluded that the same result applied to the statutory plea limitations period. Thus, "[i]f a defendant is informed of the statute's thirty-day deadline for filing a motion to withdraw a guilty plea, section 77-13-6(2)(b) is jurisdictional." *Id.* at 583.

The supreme court reached the same conclusion one year later in *State v. Abeyta*, 852 P.2d 993 (Utah 1993) (per curiam). When Abeyta pleaded guilty to his crime in 1988, the plea statute contained no time limit for filing a motion to withdraw a plea. *Id.* at 995. About a year after Abeyta entered his plea, the statute was amended to require that motions to withdraw be made within thirty days of the plea. *Id.* When Abeyta filed a

motion to withdraw his plea in 1991, the trial court "dismissed the motion for lack of jurisdiction inasmuch as it was brought more than thirty days after the entry of Abeyta's plea." *Id.* at 994. On appeal, Abeyta claimed that the trial court erred in barring his motion as untimely. *Id.*

This Court held that the 30-day limitations period could not be applied retroactively to Abeyta. *Id.* at 995. In so holding, this Court recognized, as had the court of appeals in *Price*, that the 30-day limitation period was jurisdictional. *Id.* This Court stated: "The amendment to the plea statute limits a defendant's right to withdraw his or her guilty plea to thirty days after entry of the plea. *Thereafter, the right is extinguished.*" *Id.* (emphasis added). "The amendment is therefore substantive, not procedural, . . . and may not be applied retroactively." *Id.* Consequently, the trial court in that case *did* have jurisdiction to hear the motion to withdraw the plea. *Id.* This Court thus resolved what it termed "the threshold issue of the trial court's jurisdiction." *Id.*

Over the past decade, the court of appeals has consistently applied *Abeyta* and *Price* to hold that a trial court lacks jurisdiction to hear motions to withdraw pleas filed outside the 30-day statutory limit. *See, e.g.*, *State v. Dean*, 2002 UT App 323, ¶ 6, 57 P.3d 1106, *cert. granted*, 64 P.3d 586 (Utah 2003); *State v. Melo*, 2001 UT App 392, ¶ 4, 40 P.3d 646; *State v. Chatelain*, 2001 UT App 81, at *1 (unpublished); *State v. Tarnawiecki*, 2000 UT App 186, ¶ 10, 5 P.3d 1222, *abrogated on other grounds by State v. Reyes*, 2002 UT 13, ¶¶ 3-4, 40 P.3d 630; *State v. Tijerina*, 2000 UT App 180, at *1 (per curiam) (unpublished); *State v. Ostler*, 2000 UT App 28, ¶ 7, 996 P.2d 1065, *aff'd on*

other grounds, 2001 UT 68, 31 P.3d 528, *and abrogated on other grounds by State v. Reyes*, 2002 UT 13, ¶¶ 3-4, 40 P.3d 630; *State v. Swensen*, 1999 UT App 340, at *1 (per curiam) (unpublished); *State v. Yurko*, 1998 WL 1758385 at *1, No. 981335-CA (Utah App. Oct, 22, 1998) (per curiam); *State v. Canfield*, 917 P.2d 561, 562 (Utah App. 1996).

This Court has also reaffirmed the jurisdictional nature of the statutory 30-day limit. In *State v. Ostler*, 2001 UT 68, 31 P.3d 528, this Court held that the 30-day period ran from the date of judgment rather than the date the plea was taken in court. 2001 UT 68, ¶ 11. In so holding, this Court first noted that the purpose of the 30-day deadline in the statute "was to set guidelines to prevent defendants from filing motions to withdraw guilty pleas many months or even years after final disposition of the case." *Id.* ¶ 9. It then noted that, "[i]f the thirty-day limitation ran from the plea colloquy, as the state argues, a district court *could not entertain such a motion* . . . brought before the entry of judgment and conviction, but more than thirty days from the taking of the plea." *Id.* ¶ 10. Implicit in this statement, and consistent with the purpose of the 30-day deadline, is the fact that the trial court loses jurisdiction over, and thus "could not entertain," a motion filed outside the 30-day limit set by section 77-13-6(2)(b). Also, consistent with the conclusion that the 30-day limit is jurisdictional, the Court noted that "[t]he running of the thirty-day limit parallels the running of the thirty-day limit of filing a notice of appeal or a petition for a writ of certiorari under rule 4, and rule 48 of the Utah Rules of Appellate Procedure." *Ostler*, 2001 UT 68, ¶ 11, n.3; *see also Price*, 837 P.2d at 582-83.

More recently, in *State v. Reyes*, 2002 UT 13, 40 P.3d 630, this Court held that it lacked jurisdiction to consider the validity of a plea where Reyes had not filed a timely motion to withdraw under rule 77-13-6(b)(2):

> We decline to address this issue because we do not have jurisdiction to address it. Section 77-13-6 of the Utah Code was amended in 1989 to require a defendant to file a motion to withdraw a guilty plea within thirty days after the entry of the plea. Utah Code Ann. § 77-13-6 (1999). We have held that failure to do so extinguishes a defendant's right to challenge the validity of the guilty plea on appeal. *See State v. Abeyta*, 852 P.2d 993 995 (Utah 1993) (noting that "the plea statute limits a defendant's right to withdraw his or her guilty plea to thirty days after entry of the plea" and that "[t]hereafter, the right is extinguished"); *State v. Ostler*, 2001 UT 68, ¶ 10, 31 P.3d 528 (noting that "because *State v. Johnson*, 856 P.2d 1064, 1067 (Utah 1993), requires a defendant to move for a withdrawal in the district court before he can challenge a plea on appeal, his appeal rights on the plea question could be cut off."). Accordingly, because Reyes did not move to withdraw his guilty plea within thirty days after the entry of the plea, we lack jurisdiction to address the issue on appeal.

Reyes, 2002 UT 13, ¶ 3; *see also State v. Johnson*, 856 P.2d 1064, 1067 (Utah 1993). The Court then distinguished a case involving an earlier version of the statute, "under which the filing of a motion to withdraw a guilty plea was an issue of preservation, *not, as is now the case, an issue of jurisdiction*." *Reyes*, 2002 UT 13, ¶ 4 (emphasis added).

Few principles, therefore, are so clearly established as the jurisdictional nature of the 30-day limit on filing motions to withdraw guilty pleas.

B. The trial court properly applied this precedent in denying defendant's motion as untimely.

The doctrine of stare decisis, "'under which the first decision by a court on a particular question of law governs later decisions by the same court, is a cornerstone of Anglo-American jurisprudence that is crucial to the predictability of the law and the fairness of adjudication.'" *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994) (quoting *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993)).

The doctrine therefore imposes strict requirements on courts to follow the dictates of previously established law. First, "[v]ertical stare decisis . . . compels a court to follow strictly the decisions rendered by a higher court." *Id.* at 399 n.3. Thus, "lower courts are obliged to follow the holding of a higher court, as well as any 'judicial dicta' that may be announced by the higher court." *Id.*

Second, "[h]orizontal stare decisis . . . requires that a [higher court] follow its own prior decisions," thus requiring the supreme court to follow its own decisions, and requiring "each panel [of the court of appeals] to observe the prior decisions of another [panel]." *Id.*

"[T]he doctrine [of horizontal stare decisis] is neither mechanical nor rigid as it relates to courts of last resort." *Menzies*, 889 P.2d at 399. However, "[t]hose asking [this Court] to overturn prior precedent have a substantial burden of persuasion." *Id.* at 398; *see also Wheeler v. McPherson*, 2002 UT 16, ¶ 12 n.3, 40 P.3d 632. They can succeed only if this Court becomes "'clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come

by departing from precedent.'" *Menzies*, 889 P.2d at 399 (quoting John Hanna, *The Role of Precedent in Judicial Decision*, 2 Vill.L.Rev. 367, 367 (1957)); *see also Wheeler*, 2002 UT 16, ¶ 12 n.3; *City of Hildale v. Cooke*, 2001 UT 56, ¶ 36, 28 P.3d 697.

Here, defendant claims that the trial court erred in dismissing his motion to withdraw for lack of jurisdiction. However, in challenging the court's ruling, defendant essentially ignores the foregoing precedent, as well as the policy considerations, legislative history, and analogous time limitations provisions upon which their holdings were based. *See* Aplt. Br. at ii-iii, 10-14, 22-25 (not citing to *Price;* claiming *Abeyta*'s conclusion that 30-day limitation was substantive did not address jurisdictional issue; dismissing *Ostler* and *Reyes* as merely dicta).

Instead, defendant relies on a conclusory attempt at statutory construction, *see* Aplt. Br. at 10-11 (failing to discuss or apply any rule of statutory construction in concluding statute is facially ambiguous as to the creation of a jurisdictional bar); on an illusory policy consideration, *see* Aplt. Br. at 13-14 (arguing time limitation "imprudently squander[s] precious judicial resources" by not allowing court in which plea was entered to hear motion to withdraw; ignoring Rule 65C(b) and (f), Utah Rules of Civil Procedure, which provide that, when possible, a petition for post-conviction relief should be heard by same court that presided over defendant's trial or plea); and on case law addressing unrelated time provisions, including one case which itself distinguishes the time provision in the plea statute from the provision at issue there, *see* Aplt. Br. at 11-12 (citing *James v. Galetka*, 965 P.2d 567, 570 (Utah App. 1998) (holding that because criminal statute of

limitations was not jurisdictional, defendant could waive limitations in order to plead to a lesser crime), and *State v. Tyree*, 2000 UT App 350, ¶¶ 5-10, 17 P.3d 587 (holding requirement that court sentence defendant within 45 days after conviction was directional, not mandatory; distinguishing *Price*).

Because defendant fails to acknowledge the plethora of controlling case law holding that the statutory 30-day limit for withdrawal pleas is jurisdictional, he has not met the "substantial burden of persuasion" required for overturning that precedent. *Menzies*, 889 P.2d at 398. This Court should therefore reject defendant's claim that the trial court erred when, consistent with that precedent, it dismissed defendant's untimely motion for lack of jurisdiction.

II. THIS COURT SHOULD NOT REACH DEFENDANT'S INADEQUATELY BRIEFED CLAIMS THAT A JURISDICTIONAL TIME LIMIT FOR MOVING TO WITHDRAW A PLEA VIOLATES THE SEPARATION OF POWERS AND OPEN COURTS OF THE UTAH CONSTITUTION AND THE FEDERAL DUE PROCESS CLAUSE

Defendant alternatively claims that, if the statutory 30-day limit is jurisdictional, it "violates due process, . . . the doctrine of separation of powers, and the open courts doctrine." Aplt. Br. at 14. This Court should reject defendant's claims as inadequately briefed.

When considering a constitutional challenge to a statute, "'this [C]ourt presumes that the statute is valid'" and "'resolve[s] any reasonable doubts in favor of constitutionality.'" *State v. Pritchett*, 2003 UT 24, ¶ 28, 69 P.3d 1278 (quoting *State v. Morrison*, 2001 UT 73, ¶ 5, 31 P.3d 547) (additional citations omitted). The person

raising such a challenge bears the burden of demonstrating the unconstitutionality of a statute. *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 920 (Utah 1993).

A. Because defendant provides no analysis of the separation of powers and open courts provisions in relation to the plea statute, this Court should reject these claims as inadequately briefed.

Rule 24(a)(9), Utah Rules of Appellate Procedure, provides that a defendant's brief "shall contain . . . citations to the authorities, statutes, and parts of the record relied on." Utah R. App. P. 24(a)(9). "Implicitly," that rule "requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998); *see also State v. Wareham*, 772 P.2d 960, 966 (Utah 1989). Thus, under rule 24(a)(9), this Court "is not simply a depository in which the appealing party may dump the burden of argument and research." *State v. Honie*, 2002 UT 4, ¶ 67, 57 P.3d 977 (rejecting inadequately briefed claim in death penalty case), *cert. denied*, 123 S.Ct. 257; *see also State v. Bisner*, 2001 UT 99, ¶ 46 n.5, 37 P.3d 1073. Where defendant challenges the constitutionality of a statute, his burden under rule 24(a)(9) is particularly heavy because, as stated, "this [C]ourt presumes that the statute is valid" and "resolve[s] any reasonable doubts in favor of constitutionality." *Pritchett*, 2003 UT 24, ¶ 28.

Defendant has not carried his briefing burden. Specifically, although defendant challenges the plea statute under the separation of powers and open courts provisions, he never identifies the language of those constitutional provisions or the analyses applicable under them. Moreover, he never addresses the language of the statute whose

constitutionality he challenges or applies the applicable constitutional analyses to it. *See* Aplt. Br. at 14-17, 17-18. Instead, defendant cites to two irrelevant cases, *Julian v. State*, 966 P.2d 249 (Utah 1998), and *Hurst v. Cook*, 777 P.2d 1029 (Utah 1989), explains their holdings and, without any further analysis, concludes that those holdings apply here. Aplt. Br. at 16-17. Because neither *Julian* nor *Hurst* are dispositive of defendant's claims, defendant's conclusory reliance upon them is inadequate to support those claims.

Julian and *Hurst* both addressed the extent to which a defendant's constitutional right to habeas corpus relief could be limited by either statute or rule. *See Julian*, 966 P.2d at 252-54 (addressing constitutionality of inflexible 4-year catch-all statute of limitations to petitions for writs of habeas corpus); *Hurst*, 777 P.2d at 1032-33 (addressing rule limiting defendant's ability to raise claims in successive habeas petitions).

In doing so, both opinions identified the separation of powers and open courts provisions as provisions that protect a person's right to petition for the writ. *Julian*, 966 at 253; *Hurst*, 777 P.2d at 1033-34. However, neither provided any in-depth analysis under those provisions. *See Julian*, 966 P.2d at 253; *Hurst*, 777 P.2d at 1033-34.

Moreover, both decisions hinged on the fact that the writ of habeas corpus is specifically protected under the state constitution, that it "is the only legal form of judicial process referred to in the Utah and United States Constitutions," *Hurst*, 777 P.2d at 1033, that it "'is one of the most important of all judicial tools for the protection of individual liberty,'" and "often the only remedy available to a person who has been imprisoned in

violation of due process," and that, "'[q]uintessentially, the Writ belongs to the judicial branch of government.'" *Julian*, 966 P.2d at 253 (quoting *Hurst*, 777 P.2d at 1033, 1034).

Julian held that a statute of limitations containing no exceptions cannot bar a habeas corpus petition because "the legislature may not impose restrictions which limit the writ as a judicial rule of procedure, except as provided in the constitution," especially where such restrictions "'remove[] flexibility and discretion from state judicial procedure, thereby diminishing the court's ability to guarantee fairness and equity in particular cases.'" *Julian*, 966 P.2d at 253 (citation omitted).

For similar reasons, *Hurst* held that "[t]he general judicial policy favoring the finality of judgments cannot . . . always prevail against an attack by a writ of habeas corpus" because procedural rules can never preclude a defendant from raising new meritorious claims in a habeas petition. *Hurst*, 777 P.2d at 1035.

Neither *Julian* nor *Hurst* are dispositive of defendant's claims. First, *Julian* and *Hurst* did not involve motions to withdraw guilty pleas, but dealt only with an avenue of relief that this Court has held is guaranteed under the Utah Constitution. *See* Utah Const. art. I, § 5. A motion to withdraw a guilty plea, which is purely a statutory right, *see* Utah Code Ann. § 77-13-6(2)(b), enjoys no such constitutional protection.

Second, as *Julian* recognized, the writ of habeas corpus "is often the only remedy available to a person who has been imprisoned in violation of due process of law." *Julian*, 966 P.2d at 253. In contrast, a motion to withdraw a guilty plea is *not* the only

remedy available to one who believes his plea was taken in violation of due process. Indeed, as the plea statute expressly provides, a defendant who does not timely move to withdraw his plea may still challenge that plea in a post-conviction proceeding within the controlling statutory limitations. *See* Utah Code Ann. § 77-13-6(3) ("This section does not restrict the rights of an imprisoned person under Rule 65[C], Utah Rules of Civil Procedure."); *see also id.* § 78-35a-101 to -110 (2002) (defining scope of post-conviction relief).

Because a defendant has another avenue for relief, an inflexible limitation on the time for filing a motion to withdraw does not prevent a court from reviewing the constitutionality of a defendant's guilty plea, *see* Aplt. Br. at 17, nor does it deny defendants "access to the courts . . . to challenge their conviction[s] obtained in violation of their constitutional rights," *see id.* For the same reason, the statutory time limit does not "diminish[] the court's ability to guarantee fairness and equity in particular cases" or "[dis] allow[] the judicial branch to fulfill its role as a distinct and separate branch of government and its duty to fairly and equitably administer justice," Aplt. Br. at 16-17.

As a consequence, defendant's conclusory reliance on *Julian* and *Hurst*, without any additional constitutional or statutory analysis, is inadequate to support his separation of powers and open courts claims. Therefore, this Court should reject those claims as inadequately briefed.[4]

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[4]Defendant's claims would fail, even if adequately briefed.
The separation of powers provision of the Utah Constitution, provides:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the

> Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments[] shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Defendant does not indicate under which clause he challenges the plea statute. Because defendant makes no argument that section 77-13-6 allows the legislature to exercise judicial powers, the State assumes he raises his claim under the first clause, "the general separation of powers principle." *In re Young*, 1999 UT 6, ¶ 7, 976 P.2d 581. That clause "is only offended when there is an attempt by one branch to dominate another in that other's proper sphere of action." *Id.*, 1999 UT 6, ¶ 23. In the plea statute, the legislature expressly preserves the defendant's right to seek judicial relief in post-conviction proceedings. *See* Utah Code Ann. §§ 77-13-6(2)(b), 78-35a-101 to -110; *see also id.* § 77-13-6(2)(c) (Supp. 2003) (as amended effective May 5, 2003). Thus, nothing in the statute reflects an attempt by the legislature to dominate the judiciary in the judiciary's proper sphere of action.

Moreover, the separation of powers provision does not prohibit the legislature from legislating in areas of the judicial arena over which the legislature retains some constitutional control. *Cf. In re Young*, 1999 UT 6, ¶ 24 (finding no violation of separation of powers where legislators merely perform functions constitution "intended them to perform"); *see also Matheson v. Ferry*, 641 P.2d 674, 676 (Utah 1982) (Bullock, D.J., joined by Hall, C.J., with one justice concurring specially). Article VIII, section 5 of the Utah Constitution specifically provides that "[t]he district court shall have original jurisdiction in all matters *except as limited* by this constitution or *by statute*. . . ." Utah Const. art. VIII, § 5 (emphasis added). Thus, the constitution itself gives the legislature authority to limit the trial court's jurisdiction by statute.

Defendant's open courts claim is similarly unavailing. The open courts provision of the Utah Constitution, provides:

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

Utah Const. art. I, § 11. Under the open courts provision, "[t]he Legislature does, of course, have the power to abrogate . . . remedies." *Day v. State*, 1999 UT 46, ¶ 40, 980 P.2d 1171. However, the provision "'impose[s] some substantive limitation on the legislature to abolish judicial remedies in a capricious fashion.'" *Laney v. Fairview City*, 2002 UT 79, ¶ 30, 57 P.3d 1007 (citation omitted; emphasis omitted). Thus, the legislature may abolish judicial remedies "'if the law provides an injured person an effective and reasonable alternative remedy 'by due course of law' for vindication of his constitutional interest.'" *Day*, 1999 UT 46, ¶ 40 (citation omitted). It may also abolish

B. This Court should also reject defendant's inadequately briefed due process claim.

Defendant also claims that interpreting the 30-say limitation period as jurisdictional violates his due process rights. Aplt. Br. at 17-18. Defendant reasons that, because accepting an involuntary plea violates due process, interpreting section 77-13-6(2)(b) as jurisdictional "violates due process since the court has not determined whether the plea was knowing and voluntary." Aplt. Br. at 18.

As stated, rule 24(a)(9), Utah Rules of Appellate Procedure, requires a defendant to clearly identify the issues he raises on appeal and to provide legal and analytical support for them. *See also Honie*, 2002 UT 4, ¶ 67; *Bisner*, 2001 UT 99, ¶ 46 ; *Thomas*, 961 P.2d at 305; *Wareham*, 772 P.2d at 966. This rule's requirements are particularly burdensome when one challenges the constitutionality of a statute because "this [C]ourt presumes that the statute is valid" and "resolve[s] any reasonable doubts in favor of

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judicial remedies—even if no reasonable alternative remedy exists—"'if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.'" *Id.* (citation omitted).

Here, the plea statute expressly permits a defendant to seek post-conviction relief as an alternative remedy should he not file a timely motion to withdraw his plea. *See* Utah Code Ann. §§ 77-13-6(2)(b), 78-35a-101 to -110. Thus, the statute meets the first requirement under the open courts provision. Moreover, the statute discourages defendants from abusing the criminal justice system by defining a period after which their pleas become final. *See Ostler*, 2001 UT 68, ¶¶ 9-10; *cf. Gerrish v. Barnes*, 844 P.2d 315, 321 (Utah 1992) (recognizing that "society's interest in the effectiveness and integrity of the criminal justice system requires a finality of judgment that should severely limit repetitive appeals and collateral attacks"). Thus, the statute also meets the alternative second requirement under the open courts provision.

constitutionality." *Pritchett*, 2003 UT 24, ¶ 28 (citations and internal quotation marks omitted).

Here, defendant opens his argument by citing numerous rights of a criminal defendant that the due process clause protects. Aplt. Br. at 17-18 (due process requires that State prove defendant's guilt beyond a reasonable doubt; that defendant's relinquishment of constitutional rights be knowing and voluntary; that defendant's guilty plea be entered knowingly and voluntarily; and that defendant receive notice of the charges against him). Each of these propositions are supported by citation to legal authority. Aplt. Br. at 17-18. The State questions none of these propositions.

Defendant then argues that "[b]ecause there are questions regarding Merrill's competency to enter a plea, this Court must find that the requirement of § 77-13-6(2)(b) is directory and remand the case to decide whether the defendant was legally capable of entering his plea" since "Merrill and other similarly situated defendants do not have a means by which they can reappear before the trial court and have these due process rights enforced if they do not file a motion to withdraw their pleas within thirty days." Aplt. Br. at 18. However, defendant cites no statutory or case authority for these assertions.

Nor can he. First, as with his first two constitutional claims, defendant completely ignores section 77-13-6(3), which provides that a defendant may seek post-conviction relief from his plea if he fails to meet the 30-day deadline in sub-section (2)(b). Thus, contrary to defendant's contention, he "and other similarly situated defendants *do* . . . have a means by which they can reappear before the trial court and have these due

process rights enforced if they do not file a motion to withdraw their pleas within thirty days." Aplt. Br. at 18 (emphasis and ellipses added). In fact, defendant's prior counsel understood this, as evidenced by his filing a post-conviction petition. Current counsel was also surely aware of this avenue for relief because he initially filed the instant untimely motion to withdraw as part of that proceeding.

Second, "[w]hat the Fourteenth Amendment . . . require[s] . . . is an opportunity . . . granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (citations and internal quotation marks omitted). Defendant makes no showing that a 30-day period in which to file a motion to withdraw a guilty plea fails to comply with this requirement. *See, e.g.*, *Carlisle v. United States*, 517 U.S. 416, 421, 429 (1996) (upholding rule providing that trial court loses jurisdiction to enter postverdict judgment of acquittal if defendant fails to file motion within *seven* days even if defendant's motion "is accompanied by a claim of legal innocence"; refusing "to fashion a new due process right out of thin air" where "[p]etitioner has failed to proffer any historical, textual, or controlling precedential support for his argument that the inability of a district court to grant an untimely postverdict motion for judgment of acquittal violates [due process]"); *Seeco, Inc. v. Hales*, 973 S.W.2d 818, 820 (Ark. 1998) (holding requirement that plaintiffs opt out of class action suit within 30 days does not violate due process); *In re Adoption of Baby Girl H.*, 635 N.W.2d 256, 264-65 (Neb. 2001) (holding statute requiring putative father to file paternity action within 30 days after filing notice of intent

does not violate due process); *Antelope Valley Improvement v. State Bd. of Equalization*, 992 P.2d 563, 567 (Wyo. 1999) (holding 30-day deadline for filing appeal does not violate due process), *clarified on other grounds*, 4 P.3d 876 (Wyo. 2000).

Consequently, this Court should reject defendant's claim as inadequately briefed.

III. DEFENDANT'S CLAIMS THAT A 30-DAY JURISDICTIONAL LIMIT IN THE PLEA STATUTE VIOLATES THE UNIFORM OPERATION OF LAWS PROVISION LACK MERIT

Defendant claims that the jurisdictional time limit in section 77-13-6(2)(b) "violates equal protection and uniform operation of laws by differentiating between defendants who can withdraw their illegal pleas based solely on the time at which the defendant files a motion to withdraw." Aplt. Br. at 18-19. First, defendant claims that the time limit is unconstitutional because it "subjugates a criminal defendant's exercise of his due process rights and liberty interests" to a time constraint. Aplt. Br. at 20. Second, defendant claims that the time limit is unconstitutional because it creates two different classes subjected to "significantly" different periods of incarceration based on whether they "can obtain immediate relief from an unconstitutional plea through a motion to withdraw" or "must exhaust appellate remedies and then seek post-conviction relief." Aplt. Br. at 21. Finally, defendant claims that the time limit is unconstitutional "because defendants are not entitled to appointed counsel in post-conviction proceedings unless they are under a sentence of death." Aplt. Br. at 21. Each of defendant's claims fails.

Because the analysis applied under the uniform operation of laws provision is at least as rigorous as that required under the equal protection clause, if the statute

"comports with the uniform operation of laws provision of the Utah Constitution," this Court "need not reach the question of whether it violates the federal Equal Protection Clause." *State v. Schofield*, 2002 UT 132, ¶ 18 N.3, 63 P.3d 667.[5]

The uniform operation of laws provision of the Utah Constitution provides that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. Under this provision, "'[f]irst, a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute.'" *State v. Mohi*, 901 P.2d 991, 997 (Utah 1995) (quoting *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984)).

Thus, in reviewing a statute under this provision, this Court "first determine[s] what classifications . . . are created by the statute. Second, [it] must determine whether different classes . . . are treated disparately. Finally, if any disparate treatment exists between classes . . . [it] must determine whether the legislature had any reasonable objective that warrants the disparity.'" *Schofield*, 2002 UT 132, ¶ 12 (quoting *Mohi*, 901 P.2d at 997). In the criminal sphere, the overriding concern is that, "[o]nce an offender is charged with a particular crime, that offender must be subjected to the same or substantially similar procedures and exposed to the same level of jeopardy as all other offenders so charged." *Mohi*, 901 P.2d at 1004.

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[5]The Equal Protection Clause provides: "No state shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1.

A. The 30-day limit does not violate the uniform operations of law provision by limiting the time a defendant has to challenge his plea where the statute specifically preserves defendant's right to challenge his plea in post-conviction proceedings.

Defendant claims that "[b]ecause the state's interest in reprosecuting the individual in a speedy fashion does not justify a time limit on claiming a deprivation of fundamental rights, section 77-13-6(2)(b) violates equal protection." Aplt. Br. at 21. Moreover, defendant asserts, "[b]ecause the time period elapsed because of Merrill's mental illnesses, it would be patently and fundamentally unfair to deny him relief that he could have obtained had he not been stricken with mental illness." Aplt Br. at 22. Defendant's claim is based solely on language from *Julian v. State*, 966 P.2d 249, 254 (Utah 1998). *See* Aplt. Br. at 20-21.

As previously discussed, *Julian* held that any inflexible statute of limitations on petitions for the constitutionally-protected writ of habeas corpus are unconstitutional. *Julian*, 966 P.2d at 254; *see also* Point II.A., *supra.* While defendant's motion to withdraw his plea is time-barred by section 77-13-6, that section does not impose a statute of limitations on petitions for writ of habeas corpus. *See* Utah Code Ann. § 77-13-6. It merely imposes a time limitation for challenging a plea through a motion to withdraw in the criminal proceeding. *See id.* After that time has expired, defendant may still challenge his plea, but must do so in a petition for post-conviction relief. *See id.* § 77-13-6(2)(b), (3). Because defendant can challenge his plea both before and after the time limitation in the statute, the statute does not, contrary to defendant's claim, impose "a

time limit on claiming a deprivation of fundamental rights." Aplt. Br. at 21. Consequently, defendant's claim fails.

Moreover, to the extent defendant claims that the time limitation discriminates against the mentally ill defendant by "deny[ing] him relief that he could have obtained had he not been stricken with mental illness," *see* Aplt. Br. at 22, defendant's claim is inadequately briefed. *See* Utah R. App. P. 24(a)(9) (requiring argument section of brief to include citation to legal authority); *Honie*, 2002 UT 4, ¶ 67; *Bisner*, 2001 UT 99, ¶ 46 n.5; *Thomas*, 961 P.2d at 305; *Wareham*, 772 P.2d at 966. To demonstrate a violation under the equal protection or uniform operation of laws provisions on this basis, defendant must show that the 30-day statutory limit creates classes of defendants based on their mental status and then arbitrarily discriminates among them on that basis. *See Schofield*, 2002 UT 132, ¶ 12; *Mohi*, 901 P.2d at 997. Defendant, who cites to no legal authority to support his claim, has not made such a showing. *Honie*, 2002 UT 4, ¶ 67; *Bisner*, 2001 UT 99, ¶ 46 n.5; *Thomas*, 961 P.2d at 305; *Wareham*, 772 P.2d at 966. In any case, nothing in the plea statute mandates that a mentally ill defendant be given less relief if he challenges his plea through a post-conviction petition than he would have received had he filed a timely motion to withdraw. *See* Utah Code Ann. § 77-13-6.

Consequently, defendant's first uniform operation of the laws claim fails.

B. The 30-day limit does not violate the uniform operation of laws provision by unfairly subjecting some people to greater prison terms than others.

Alternatively, defendant claims that the 30-day limit for filing motions to withdraw pleas violates the uniform operation of laws provision because, for no compelling reason, it allows some people to "obtain immediate relief from an unconstitutional plea through a motion to withdraw" while forcing others to remain incarcerated while they pursue "the more circuitous route" of "exhaust[ing] appellate remedies and then seek[ing] post-conviction relief." Aplt. Br. At 21. Defendant's claim lacks merit.

First, defendant provides no legal support for his claim that a defendant who can no longer file a motion to withdraw under the plea statute "must exhaust appellate remedies" prior to seeking post-conviction relief from his plea. *See* Aplt. Br. at 21; *see also* Utah R. App. P. 24(a)(9) (requiring argument section of brief to include citation to legal authority); *Honie*, 2002 UT 4, ¶ 67; *Bisner*, 2001 UT 99, ¶ 46 n.5; *Thomas*, 961 P.2d at 305; *Wareham*, 772 P.2d at 966. In fact, in most cases, the defendant expressly waives his right to appeal at the same time he enters his plea. *See* Utah R. Crim. P. 11(e)(8), (i). Indeed, this Court has held that a person pleading guilty *cannot* appeal his conviction without first filing a timely motion to withdraw. *See Reyes*, 2002 UT 13, ¶ 3. Finally, because "[t]he running of the thirty-day limit parallels the running of the thirty-day limit of filing a notice of appeal or a petition for a writ of certiorari," *State v. Ostler*, 2001 UT 68, ¶¶ 9, 11 n.3, the period for filing an appeal will expire simultaneously with the period for filing a motion to withdraw a plea under section 77-13-6(2)(b). Thus, if a defendant

misses the 30-day period for filing a motion to withdraw, he will also have missed the 30-day period for filing a notice of appeal. *See* Utah R. App. P. 4. Such a person, therefore, would *not* have to "spend [additional time] incarcerated" "exhaust[ing] appellate remedies" before he could file a post-conviction relief. Aplt. Br. at 21.

Second, defendant fails to demonstrate how section 77-13-6 otherwise determines how long a person will be incarcerated on a guilty plea. *See id.* In fact, under the statute, every defendant who determines he has a basis to challenge his plea may immediately begin trial court proceedings to do so. *See* Utah Code Ann. § 77-13-6. If he is inside 30 days of his final judgment, he may do so by filing a motion to withdraw. *Id.* § 77-13-6(2)(b). If he is outside those 30 days, he must do so by filing a petition for post-conviction relief. *Id.* § 77-13-6(3). In either case, his ability to challenge his plea is immediate, and defendant has provided no evidence that one proceeding necessarily takes any longer than the other.

In any case, such a claim under the facts of this case is clearly disingenuous. Here, defendant apparently did not determine he had a basis for challenging his plea until more than 30 days after his final judgment. Pursuant to section 77-13-6(3), defendant's prior counsel then properly filed a petition for post-conviction relief in order to assert that challenge (R. 394-97). Had current counsel merely proceeded with that petition instead of pursuing an untimely motion to withdraw and an appeal from the denial of that motion, defendant's plea challenge would likely have already been resolved. Thus, in this case, the time defendant will spend incarcerated—assuming arguendo he is innocent—has been

increased, not because section 77-13-6 required him to file a post-conviction petition for relief instead of a motion to withdraw, but because current counsel has decided to challenge defendant's plea through this "more circuitous route." Aplt. Br. at 21.

Consequently, this Court should reject defendant's claim.

C. Defendant does not have standing to challenge the plea statute as unconstitutional because defendants are not entitled to appointed counsel in post-conviction proceedings where counsel was appointed to assist defendant with his post-conviction proceeding in this case.

Finally, defendant claims that the 30-day time limit for filing a motion to withdraw is unconstitutional because it creates two classes "subjected to significantly disparate treatment . . .[where] defendants are not entitled to appointed counsel in post-conviction proceedings unless they are under a sentence of death." Aplt. Br. at 21. Because defendant was appointed counsel in his post-conviction proceedings, he lacks standing to bring this claim.

> The first step [in determining whether one has standing to raise a claim is whether the] complainant [has a] personal stake in the controversy: 'One who is not adversely affected has no standing.' There must also be some causal relationship alleged between the injury to the [complainant], the governmental actions and the relief requested.

State v. Mace, 921 P.2d 1372, 1379 (Utah 1996) (quoting *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983)).

If defendant cannot establish standing under this first step, the Court must then decide "whether anyone else would have a 'more direct interest in the issues who can more adequately litigate the issues.'" *Id.* (quoting *Jenkins*, 675 P.2d at 1150). If someone

else would have a "more direct interest in the issues," defendant lacks standing and the inquiry stops. *Id.* "[I]f there are no better litigants under the second step, then [this Court] will move to the third step, which is 'to decide if the issues raised by the [defendant] are of sufficient public importance in and of themselves to grant . . . standing.'" *Id.* (quoting *Jenkins*, 675 P.2d at 1150).

Here, defendant does not have standing to bring this claim because he has not been adversely affected by what he claims is the disparate treatment created by the statute, and someone adversely affected is better suited to bring such a claim.

As defendant acknowledges, section 78-35a-109 allows trial courts to appoint counsel for a post-conviction petitioner if the court finds that the petitioner's petition has merit. *See* Aplt. Br. at 21; *see also* Utah Code Ann. § 78-35a-109 (1) (2002) ("If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis."). In such a case, appointed counsel has the same duty to competently represent the defendant in his post-conviction proceeding as he would have on a motion to withdraw. *See* Utah R. Prof. Cond. *passim*.[6]

In this case, defendant was appointed counsel to assist him in his post-conviction proceedings (R. 400). Thus, he has not been affected by the disparate treatment he alleges section 77-13-6 demands. Consequently, defendant lacks standing to bring this

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[6]Appointed counsel in a post-conviction proceeding is generally not paid for his services, *see* Utah Code Ann. §§ 78-35a-109(1), 78-35a-202(2)(c) (2002); appointed counsel assisting in a motion to withdraw is, *see* Utah Code Ann. 77-32-301 (1999). Defendant will be represented either way. Thus, the real issue here is whether defense counsel will be compensated.

claim unless no one else "would have a more direct interest in the issue[]" *and* the issue raised is "of sufficient public importance in and of [it]sel[f] to grant . . . standing." *Mace*, 921 P.2d at 1379 (citations and internal quotation marks omitted). Here, a person not appointed counsel to pursue his post-conviction petition "would have a more direct interest in the issue" defendant now raises. *Id.*

Consequently, defendant's claim fails for lack of standing.[7]

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[7]In any case, defendant's claim fails on its merits. First, the classes defined under section 77-13-6 are clear on the statute's face. The first class consists of those who challenge their pleas within 30 days of final judgment and thus can proceed by filing a motion to withdraw a guilty plea under section 77-13-6(2)(b). *See* Utah Code Ann. § 77-13-6(2)(b). The second class consists of those who do not challenge their pleas within 30 days of the final judgment and thus must proceed by filing a petition for post-conviction relief under rule 65C. *Id.* §§ 77-13-6(2)(b), (3). *See State v. Schofield*, 2002 UT 143, ¶ 12, 63 P.3d 667 (explaining that, in reviewing statute under uniform operation of laws provision, first duty is to determine what classifications are created by the statute); *State v. Mohi*, 901 P.2d 991, 997 (Utah 1995).

Second, although the State agrees that some in the latter class will be treated disparately because they will not be appointed counsel, *see* Aplt. Br. at 25, that disparate treatment is perfectly consistent with the purpose of the plea statute, which "was to set guidelines to prevent defendants from filing motions to withdraw guilty pleas many months or even years after final disposition of the case," thereby "preventing lengthy delays before the filing of motions to withdraw." *State v. Ostler*, 2001 UT 68, ¶¶ 9-10, 31 P.3d 528. The statute's classifications then—which merely recognize that "'society's interest in the effectiveness and integrity of the criminal justice system requires a finality of judgment that should severely limit repetitive appeals and collateral attacks,'" *Gerrish v. Barnes*, 844 P.2d 315, 321 (Utah 1992) (citation omitted)—are no different than those defined by people who file timely notices of appeal and people who do not. *See Ostler*, 2001 UT 68, ¶ 11 n.3 (analogizing statutory limit for filing motions to withdraw to limits placed on notices of appeal and petitions for writ of certiorari). In both cases, if the defendant misses the reasonable and appropriate deadline, his only avenue for challenging his conviction is a petition for post-conviction relief. *See* Utah Code Ann. § 77-13-6(3); *Earle v. Warden of Utah State Prison*, 811 P.2d 180, 180-81 (Utah 1991) (holding appellate court lacked jurisdiction to consider petition for writ of certiorari filed outside 30-day limit; acknowledging that defendant can still pursue his claims in petition for post-conviction relief); s*ee also Mohi*, 901 P.2d at 997 (explaining that statute is constitutional if "'the different treatment given the classes [is] based on differences that have a

CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's conviction and sentence.

RESPECTFULLY SUBMITTED 28 July 2003.

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reasonable tendency to further the objectives of the statute'" (citation omitted); *Schofield*, 2002 UT 132, ¶ 12. Outside of his own conclusory statements, defendant provides no legal support for his contentions that such disparate treatment "is acutely unfair" or that it "deprives the defendant of fundamental rights," *see* Aplt. Br. at 22.

CERTIFICATE OF MAILING

I certify that on 28 July 2003, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLEE*** to Stephen R. McCaughey, 10 West Broadway, Suite 650, Salt Lake City, Utah 84101, Attorney for Appellant.

Karen A. Klucznik

Addendum A

U.S. Const. amend. XIV, § 1

Section 1. [Citizenship — Due process of law — Equal protection.]

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

Utah Const. art. I, § 7

Sec. 7. [Due process of law.]

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

Utah Const. art. I. § 11

Sec. 11. [Courts open — Redress of injuries.]

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

Utah Const. art. I, § 24

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

Utah Const. art. V, § 1

Section 1. [Three departments of government.]

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

Utah Code Ann. § 77-13-6 (1999)

77-13-6. Withdrawal of plea.

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

(2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.

(3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure.