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# UNREPRESENTED AND UNTIMELY: THE PCRA'S DISSERVICE TO INDIGENT PRISONERS

Nathan Marigoni\*

## I. INTRODUCTION

Utah's Post-Conviction Remedies Act (PCRA) imposes a nearly impossible burden on indigent prisoners who have not received their constitutional guarantee of effective counsel in a non-capital criminal proceeding. The PCRA establishes the sole remedy available to prisoners to challenge a conviction after exhausting available appeals, replacing the common law writ of habeas corpus with a more restrictive procedure.<sup>1</sup> Various elements of the statute conspire to require the indigent prisoner—without the benefit of appointed counsel—to discover, investigate, prepare, and file a petition claiming ineffective performance of their trial or appellate counsel within one year of exhaustion of their appellate rights. Once the limitations period expires, the prisoner is barred from challenging his or her conviction in state court on the basis of this violation of a constitutional right.<sup>2</sup>

This Note analyzes the particular burden that the PCRA places on indigent defendants, in non-capital cases, without the benefit of appointed counsel in post-conviction proceedings through constitutional or statutory provisions. Because these defendants must often move forward *pro se* in challenging their convictions, they may not recognize the ineffective performance of their counsel as a potential ground for relief. Even where the shortcomings of counsel are recognized, the defendant may not have sufficient resources and legal knowledge to bring a petition within the one-year period allowed by statute. The limited tolling provisions provided for in the statute do not adequately address the challenges facing these defendants, as they relate only to exceptional circumstances of government misconduct. Compounding the problem is the removal of the “interests of justice” exception from the PCRA, precluding judicial review of meritorious petitions that are not timely filed. Because a post-conviction petition is often the only avenue for an indigent prisoner to vindicate his or her right to effective counsel, these restrictions on this remedy likely run afoul of the Utah Constitution's open courts provision.

Part II of this Note examines the legal background against which these issues arise, briefly reviewing the development of habeas corpus as post-conviction relief in the United States and Utah, and the right to counsel guaranteed by the Sixth Amendment of the United States Constitution, as incorporated against the states through the Fourteenth Amendment. Part III discusses the legal issues raised by the replacement of a broad habeas corpus remedy with the more narrowly fashioned

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<sup>1</sup> UTAH CODE ANN. § 78B-9-102 (West 2009); *see infra* Part II.B.

<sup>2</sup> UTAH CODE ANN. § 78B-9-106.

PCRA relief under the Utah Constitution, and how the Utah Supreme Court could intervene to protect indigent defendants.

## II. BACKGROUND—HABEAS CORPUS AND POST-CONVICTION RELIEF

While this Note analyzes only state court post-conviction remedies under the PCRA, the development of federal habeas law has had significant influence on the development of Utah's common law and statutory post-conviction remedies. This subpart will therefore briefly survey the development of habeas corpus as a post-conviction remedy under the United States Constitution before discussing habeas corpus under the Utah Constitution and the PCRA.

### A. *Development of Habeas Corpus in the United States*

Most modern post-conviction relief remedies can trace their lineage to the writ of habeas corpus, or similar common law writs.<sup>3</sup> The writ of habeas corpus has often been called The Great Writ, or the Writ of Liberty, due to its important role in enforcing the rule of law in Anglo-American common law jurisdictions since the issuance of the Magna Carta.<sup>4</sup> While the precise extent of post-conviction habeas corpus relief in the English law remains a subject of debate,<sup>5</sup> the power of the United States federal courts to consider habeas writs by prisoners in federal custody was made clear beginning with the Judiciary Act of 1789.<sup>6</sup> As a result, the scope of federal habeas practice in this country has been governed largely by statute; the United States Supreme Court has thus far refrained from recognizing a constitutional right to post-conviction review inconsistent with congressional action.<sup>7</sup> The writ in the United States was originally understood to authorize only challenges to the jurisdiction of the convicting court.<sup>8</sup> However, in the early

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<sup>3</sup> 7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 28.1(a) (3d ed. 2000). The writ of coram nobis is often discussed in tandem with the writ of habeas corpus, although the writ of coram nobis had no custody requirement, and only required that a conviction was rendered against the petitioner. 18 WILLIAM G. WHEATLEY, AM. JUR. TRIALS § 1 (1971).

<sup>4</sup> Clark D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1087, 1089 (1995).

<sup>5</sup> *Id.*; Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375 (1998).

<sup>6</sup> Forsythe, *supra* note 4, at 1081.

<sup>7</sup> *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (“[T]he power to award the writ by any of the courts of the United States, must be given by written law,” and we have likewise recognized that judgments about the proper scope of the writ are “normally for Congress to make.” (quoting *Ex parte Bollman*, 4 Cranch 75, 94 (1807), and *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996))).

<sup>8</sup> *Bowen v. Johnston*, 306 U.S. 19, 23 (1939) (“Where the District Court has jurisdiction of the person and the subject matter in a criminal prosecution, the writ of habeas corpus cannot be used as a writ of error. The judgment of conviction is not subject to collateral attack.”).

twentieth century, the United States Supreme Court interpreted the scope of federal habeas review to include challenges based upon deprivation of rights guaranteed by the United States Constitution, on the reasoning that such violations deprive the convicting court of jurisdiction to enter judgment or sentence.<sup>9</sup> By 1969, the protections of the writ had become nearly coterminous with due process.<sup>10</sup> However, toward the close of the twentieth century, at least partly in response to lengthy and highly publicized capital appeals processes,<sup>11</sup> Congress imposed significant limitations on the availability of federal *habeas* relief with the Antiterrorism and Effective Death Penalty Act of 1996.<sup>12</sup> This legislation imposed a one-year limitations period on habeas petitions filed in the federal courts by prisoners in state custody, and precluded such prisoners from obtaining relief with successive petitions if an initial petition was unsuccessful.<sup>13</sup> It also included provisions intended to spur revision of state habeas corpus procedures to reduce the burden placed on federal courts for review of prisoners in state custody.

### *B. Development of Habeas Corpus in Utah*

The writ of habeas corpus has similarly been a foundational part of Utah's common law. When the Utah Constitution was drafted in 1895, the drafters saw fit to include a clause forbidding suspension of the writ in the Declaration of Rights in Article I.<sup>14</sup> While the writ under the Utah Constitution was construed to allow a petitioner to collaterally attack a criminal conviction, the original scope of the writ was restricted to claims that the convicting court lacked jurisdiction, or that a sentence was unlawful.<sup>15</sup> However, by the mid-twentieth century, the Utah

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<sup>9</sup> *Id.*; *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938).

<sup>10</sup> *See* *Fay v. Noia*, 372 U.S. 391, 409 (“The course of decisions of this Court . . . makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction.”); *see also* *Clarke*, *supra* note 5, at 375 n.2.

<sup>11</sup> *See* 142 CONG. REC. S3475–76 (daily ed. Apr. 17, 1996) (statement of Sen. Orrin Hatch).

<sup>12</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

<sup>13</sup> *Id.* §§ 101, 106.

<sup>14</sup> UTAH CONST. art I, § 5.

<sup>15</sup> *Winnovich v. Emery*, 93 P. 988, 993 (Utah 1908) (“Where a party who is in confinement under judicial process is brought up on habeas corpus, the court or judge before whom he is returned will inquire . . . [w]hether the court or officer issuing the process under which he is detained had jurisdiction of the case, and has acted within that jurisdiction in issuing such process. If so, mere irregularities or errors of judgment in the exercise of that jurisdiction must be disregarded on this writ, and must be corrected either by the court issuing the process, or on regular appellate proceedings.”); *see also* *Connors v. Pratt*, 112 P. 399, 400–01 (Utah 1910) (overturning sentence on writ of habeas corpus because information upon which conviction was obtained was signed and filed pursuant to unconstitutional statute); *Roberts v. Howells*, 62 P. 892, 892 (Utah 1900) (vacating

Supreme Court held in *Thompson v. Harris*<sup>16</sup> that “the writ will lie if the petitioner has been deprived of one of his constitutional rights such as due process of law,”<sup>17</sup> mirroring the broadening of the Writ under federal habeas practice.<sup>18</sup> In 1969, the Supreme Court of Utah adopted Rule 65B(i) of the Utah Rules of Civil Procedure, establishing a procedural rule for implementation of post-conviction relief as a branch of habeas corpus.<sup>19</sup> By 1989, post-conviction relief had been so absorbed by the writ of habeas corpus that the Court in *Hurst v. Cook* observed that they formed a single remedy under the Utah Constitution, embodied in Rule 65B.<sup>20</sup>

In 1995, the Utah Attorney General, dissatisfied with the procedures and application of Rule 65B by the courts, sought legislative changes to make the administration of post-conviction relief more uniform, and to reduce the length of the post-conviction appeals process.<sup>21</sup> The following year, the state legislature passed the Post-Conviction Remedies Act (PCRA), based on draft legislation prepared by the Attorney General’s office.<sup>22</sup> The stated intent of the PCRA was to take the development of this area of the law out of judicial hands, and place it in the control of the legislature.<sup>23</sup> The legislature anticipated, as a result of this new remedy, the common law writ of habeas corpus would no longer be available to challenge a conviction or sentence.<sup>24</sup> In coordination with the legislature’s statutory change, the Utah Supreme Court adopted Rule 65C of the Utah Rules of Civil Procedure to embody the new statutory post-conviction remedy.<sup>25</sup>

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sentence of imprisonment for failure to pay a fine due to the state, after the right to punish by imprisonment had been exhausted).

<sup>16</sup> 144 P.2d 761 (Utah 1943).

<sup>17</sup> *Id.* at 766.

<sup>18</sup> In reaching the conclusion that the writ was not limited to jurisdictional questions, the *Thompson* court cited only the United States Supreme Court’s decisions in *Johnson v. Zerbst* and *Bowen v. Johnston* for the proposition that the writ was an appropriate remedy for a violation of constitutional rights such as due process. *Thompson*, 144 P.2d at 766. However, under federal law, post-conviction habeas relief is provided for by statute, rather than common law development of the writ. *See supra* Part II.A. The Utah Supreme Court’s approach to broadening habeas relief in the absence of comparable state statutory authority has been regularly criticized by the Utah Attorney General in cases challenging the constitutionality of the Post-Conviction Remedies Act. *See* Brief of Appellee at 36–39, *Gardner v. Utah*, 234 P.3d 1104 (Utah 2010) (No. 20100436-SC).

<sup>19</sup> *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989).

<sup>20</sup> *Id.* at 1032–34.

<sup>21</sup> Jerry Spangler & Nicole A. Bonham, *Will Utah Expedite Death-Row Appeals?*, DESERET NEWS (Oct. 29, 1995), <http://www.deseretnews.com/article/447543/WILL-UTAH-EXPEDITE-DEATH-ROW-APPEALS.html>.

<sup>22</sup> *Id.*; Post-Conviction Remedies Act, H.B. 214, 1996 Leg., Gen. Sess. (Utah 1996).

<sup>23</sup> *See* Utah H.B. 214.

<sup>24</sup> *See id.*

<sup>25</sup> UTAH R. CIV. P. 65C advisory committee’s note (“This rule replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence . . .”).

In 2008, the Utah legislature amended the PCRA, resulting in two changes to that are significant to this discussion.<sup>26</sup> First, while the statute originally established the PCRA remedy as “a substantive legal remedy” for any person to challenge a conviction or sentence after exhausting appellate rights,<sup>27</sup> the 2008 amendment identifies the PCRA as “the sole remedy,” replacing all prior remedies, including extraordinary common law writs.<sup>28</sup> Second, the 2008 amendment to the PCRA removed the “interests of justice” exception of the statute, which allowed a court to excuse a late filing if the interests of justice required.<sup>29</sup> These two changes to the PCRA, taken together, diminish the ability of the courts to correct potential injustices that may occur as a result of the review-limiting provisions of the PCRA.

### C. *Effective Assistance of Counsel*

The Sixth Amendment to the United States Constitution guarantees every defendant in a criminal proceeding the right to the assistance of counsel.<sup>30</sup> This right has been incorporated against the states via the due process clause of the Fourteenth Amendment.<sup>31</sup> Specifically, due process obliges state courts to provide appointed counsel to indigent defendants, as a fundamental and essential prerequisite to a fair trial.<sup>32</sup> The right to counsel is the right to effective assistance, and the failure of effective assistance of counsel in a criminal proceeding is a violation of the defendant’s constitutional right.<sup>33</sup> This constitutional guarantee, however, extends through the various stages of a trial to a single non-discretionary appeal and no further.<sup>34</sup> There is no right to counsel on discretionary appeals, nor is there a right to counsel when making a collateral attack on a conviction through a post-conviction proceeding.<sup>35</sup>

Because the right to effective assistance of counsel is a component of due process, deprivation of this right can be challenged through a writ of habeas corpus, or a similar post-conviction remedy.<sup>36</sup> While ineffective assistance of counsel at trial may be challenged on direct appeal, ineffective performance of appellate counsel, including a failure to raise the issue of ineffective assistance of

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<sup>26</sup> S.B. 277, 2008 Leg., Gen. Sess. (Utah 2008).

<sup>27</sup> See UTAH CODE ANN. § 78-35a-102 (West 2009).

<sup>28</sup> § 78B-9-102.

<sup>29</sup> *Id.*; cf. UTAH CODE ANN. § 78-35a-107.

<sup>30</sup> U.S. CONST. amend. VI.

<sup>31</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

<sup>32</sup> *Id.* at 344.

<sup>33</sup> *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Powell v. Alabama*, 287 U.S. 45, 71–72 (1932); see also U.S. CONST. amend VI.

<sup>34</sup> *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

<sup>35</sup> *Id.*

<sup>36</sup> *E.g.*, *Cuyler v. Sullivan*, 446 U.S. 335, 342–45 (1980).

trial counsel, must typically be challenged in a post-conviction proceeding.<sup>37</sup> Thus, one of the fundamental roles of such post-conviction proceedings is to provide a remedy for the defendant who has been denied his constitutional right to effective assistance of counsel as a critical component of due process.

### III. ANALYSIS

One issue facing the current iteration of the PCRA stems from the unique position of indigent defendants in non-capital cases, who rely on appointed counsel during the trial and appeal phase of the criminal proceeding, but must proceed unrepresented with a PCRA petition due to a lack of resources to retain private counsel.<sup>38</sup> For such a prisoner, an ineffective assistance of appellate counsel claim will likely be the centerpiece of a PCRA petition because most other due process claims relating to the conviction or sentencing are likely to have been exhausted on appeal.<sup>39</sup> But an ineffective assistance of counsel claim is uniquely disadvantaged with respect to the statute of limitations, which begins to run at the time of counsel's failure,<sup>40</sup> severely limiting the window during which a prisoner must discover, investigate, and pursue his or her claim. The PCRA, in effect, puts indigent defendants in a position where adequate access to a remedy for the violation of their constitutional right to counsel is not available. Because access to a post-conviction remedy for violation of such a due process right was available to defendants at the time the PCRA was enacted, the open courts provision of the Utah Constitution forbids the legislature from arbitrarily eliminating such a remedy.<sup>41</sup> This constitutional question provides an avenue for the Utah Supreme Court to intervene to ameliorate the impact of the PCRA on these defendants.

This part first analyzes the particular circumstances of the indigent prisoner, then the unique nature of the ineffective assistance of counsel claim in a PCRA petition. Finally, subpart C discusses the open courts provision, and how the Court could find the PCRA unconstitutional.

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<sup>37</sup> *Taylor v. State*, 156 P.3d 739, 746 (Utah 2007) (“[T]he post-conviction proceeding present[s the defendant] with his first opportunity to challenge the effectiveness of his appellate counsel.”).

<sup>38</sup> While there is no constitutional right to appointed representation in any post-conviction proceeding, the PCRA provides for mandatory appointment of counsel for indigent defendants in death penalty cases. UTAH CODE ANN. § 78B-9-202 (West 2009). Thus, while prisoners sentenced to death are certainly not in an enviable position when compared to non-capital defendants, they are more likely to have the legal resources to adequately pursue a PCRA challenge to their conviction or sentence.

<sup>39</sup> The PCRA precludes relief upon any ground that was, could have been, or may still be raised on direct appeal. UTAH CODE ANN. § 78B-9-106(1). Thus, irregularities relating to the trial that are available to argue on appeal will generally not be considered as a grounds for relief under the PCRA.

<sup>40</sup> See discussion *infra* Part III.B.

<sup>41</sup> See *Laney v. Fairview City*, 57 P.3d 1007, 1016–17 (Utah 2002).

### A. *The Indigent Defendant*

Indigent defendants are those too poor to retain their own attorney, and for which the state is obligated to pay for counsel on such a defendant's behalf pursuant to the United States Supreme Court decision in *Gideon v. Wainwright*.<sup>42</sup> The paradigm indigent defendant has no training in the law, and lacks the skill and knowledge to prepare a legal defense, even if his defense to a crime is perfect.<sup>43</sup> For this reason, states are required by the Fourteenth Amendment to provide such defendants appointed and compensated counsel before sentencing them to prison.<sup>44</sup> However, once an indigent defendant is imprisoned in Utah, he has no right to the same assistance of counsel in preparing for a complicated post-conviction process, despite the fact that his resources are even further restricted as a prisoner.

Utah state judges have regularly observed that the resources available to prisoners to prepare for a post-conviction proceeding are inadequate to the task: “[M]ost minimal legal research materials are lacking at the prison, and the legal services provided to assist the prisoners are grossly inadequate. Under such circumstances, it is a cruel joke to presume . . . that virtually all prisoners are abusing the system when they file [untimely petitions].”<sup>45</sup> “[A] petitioner trying to ascertain his or her rights . . . must make these complex legal decisions with limited knowledge of the law, limited access to legal assistance and often no access to a law library.”<sup>46</sup> Thus, it should be of no surprise that the limiting provisions of the PCRA impact indigent defendants most harshly. This is particularly evident when an indigent seeks to challenge the effective performance of his state-appointed counsel through a post-conviction petition under the PCRA.

### B. *Ineffective Assistance of Counsel Under the PCRA*

The Post-Conviction Remedies Act precludes relief upon any ground a petitioner may bring that is barred by the one-year limitations period established in the statute.<sup>47</sup> The date of accrual upon which the statute of limitations begins to run will generally fall on the date that all appeals are exhausted or waived, or “the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based . . . .”<sup>48</sup> Utah courts have interpreted this statute to preclude relief where petitioner's counsel was aware of facts, and the failure to bring that evidence forward on behalf of the petitioner

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<sup>42</sup> 372 U.S. 335, 336–45 (1963); ACLU OF UTAH, FAILING GIDEON: UTAH'S FLAWED COUNTY-BY-COUNTY PUBLIC DEFENDER SYSTEM 2 (2011).

<sup>43</sup> *Gideon*, 372 U.S. at 344–45 (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

<sup>44</sup> *Id.*

<sup>45</sup> *Adams v. State*, 123 P.3d 400, 406 (Utah 2005) (quoting *Julian v. State*, 966 P.2d 249, 259 (Utah 1998) (Zimmerman, J., concurring)).

<sup>46</sup> *Currier v. Holden*, 862 P.2d 1357, 1370 (Utah Ct. App. 1993).

<sup>47</sup> UTAH CODE ANN. § 78B-9-106 (West 2009).

<sup>48</sup> § 78B-9-107.



forms the basis for petitioner's ineffective assistance of counsel claim.<sup>49</sup> By making a determination that evidence known to counsel and later discovered by the petitioner is not "newly discovered" because petitioner is charged with counsel's knowledge,<sup>50</sup> the court severely curtails the limitations period in which a petitioner can bring an ineffective assistance of counsel claim. The ultimate result of such an interpretation of the statute is that a defendant who discovers the ineffectiveness of his or her counsel more than a year after the next latest deadline (typically exhaustion of appellate rights) will be precluded from bringing a petition under the PCRA, even though counsel's ineffectiveness is certainly "newly discovered" to the petitioner.

Such an inflexible statute of limitations is particularly troublesome with respect to the indigent defendant described above, who has neither the resources to retain private counsel, nor the benefit of appointed counsel to navigate the post-conviction process. Without the benefit of legal training or consultation, indigent defendants may not immediately suspect their representation was inadequate,<sup>51</sup> and a later discovery of counsel's ineffective performance will not resurrect a right to petition for relief. Even where the conscientious prisoner discovers a valid claim that his or her rights were violated, the legal services available to prisoners are "grossly inadequate," making it "nearly impossible" for such a prisoner to completely pursue his or her claims within the statutory period.<sup>52</sup> The PCRA's failure to extend any sort of exception to prisoners in these circumstances essentially renders all claims for ineffective assistance of counsel time-barred, as a practical matter.<sup>53</sup> This effectively abrogates the prisoner's only remedy to enforce his or her guarantee of effective assistance of counsel.

Thus, while the PCRA's limitations period purports to allow some flexibility by allowing petitioners to bring other newly discovered claims, the statute is stubbornly strict with regard to one of the most important claims a petitioner may bring to vindicate their due process rights. The limitations period of the PCRA indirectly strips from indigent defendants their only remedy to challenge a deprivation of their right to effective assistance of counsel. However, "[i]t is not within the power of the legislature, under the guise of a limitation provision, to cut off an existing remedy entirely . . . ."<sup>54</sup> Arbitrary abrogation of remedies by the legislature is forbidden by the open courts provision of the Utah Constitution as discussed below.

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<sup>49</sup> *Brown v. Utah*, No. 100903670, \*34–35 (Utah D.2d Dec 21, 2010).

<sup>50</sup> *Id.*

<sup>51</sup> *Currier*, 862 P.2d at 1375 (Orme, J., concurring).

<sup>52</sup> *Adams v. State*, 123 P.3d 400, 406 (Utah 2005).

<sup>53</sup> *See Currier*, 862 P.2d at 1375 (Orme, J., concurring).

<sup>54</sup> *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985) (quoting 51 Am. Jur. 2d *Limitations of Actions* § 28 (1970)) (discussing the role of the open courts provision as a limitation on legislative action).

*C. Utah's Open Courts Provision*

As discussed above, the effect of the PCRA's limitations period is to preclude many indigent defendants from vindicating their constitutional right to counsel. Further, because the statute fails to provide a reasonable alternative to the habeas corpus remedy that it abrogated, the Court could rule that the statute runs afoul of the open courts provision of the Utah Constitution.<sup>55</sup>

The open courts provision of the Utah Constitution provides that "every person, for an injury done to him . . . shall have remedy by due course of law."<sup>56</sup> The Utah Supreme Court has interpreted this provision to protect the substantive right to remedies, rather than simply a guarantee of procedural rights and court access.<sup>57</sup> While the Court has characterized the ambit of the open courts provision as overlapping with the due process clause,<sup>58</sup> the provision has an independent significance as a limit on the power of the legislature to abrogate existing remedies.<sup>59</sup>

The basic purpose of the open courts provision is to protect an individual from arbitrary deprivation of effective remedies protecting basic individual rights.<sup>60</sup> The right to appellate counsel is a fundamental constitutional right,<sup>61</sup> and post-conviction relief is the only effective remedy for a violation of this right.<sup>62</sup> The right to petition a court to overturn a conviction obtained in violation of due process is guaranteed by the Utah Constitution,<sup>63</sup> and this basic and fundamental right is protected by the open courts provision.<sup>64</sup>

Similar statutes have twice been struck by Utah Courts as violating the open courts provision of the Utah Constitution. In *Currier v. Holden*,<sup>65</sup> the Utah Court of Appeals held unconstitutional the legislature's first attempt to impose a statute of limitations on post-conviction relief. The statute provided for a ninety-day limitations period on all petitions for post-conviction relief, and provided a limited tolling provision.<sup>66</sup> In light of the statute's significant curtailment of access to the

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<sup>55</sup> In addition to the open courts challenge, the PCRA is also susceptible to a challenge that it violates the separation of powers, and suspension clauses of the Utah Constitution. These challenges are addressed by the Utah Court of Appeals in *Currier v. Holden*, 862 P.2d 1357 (Utah Ct. App. 1993), but are beyond the scope of this Note.

<sup>56</sup> UTAH CONST. art 1, § 11.

<sup>57</sup> *Laney v. Fairview City*, 57 P.3d 1007, 1017 (Utah 2002).

<sup>58</sup> *Berry*, 717 P.2d at 679.

<sup>59</sup> *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 357 (Utah 1989) (quoting *Berry*, 717 P.2d at 676).

<sup>60</sup> *Id.*

<sup>61</sup> See discussion *supra* Part II.B.

<sup>62</sup> See discussion *supra* Part II.B.

<sup>63</sup> *Padilla v. Utah Bd. Of Pardons*, 839 P.2d 874, 877 n.1 (Utah Ct. App. 1992).

<sup>64</sup> *Currier v. Holden*, 862 P.2d 1357, 1361 (Utah Ct. App. 1993), *cert. denied*, 870 P.2d 957 (Utah 1994).

<sup>65</sup> *Id.* at 1371–72.

<sup>66</sup> UTAH CODE ANN. §§ 78-12-31.1, -36 (West 2009).

constitutionally protected right to petition for habeas relief, the court balanced the petitioner's interest for relief against the interests of the legislature in limiting the filing period.<sup>67</sup> The limitation was found unreasonable after considering the state's interests in finality, efficient prosecution, and avoiding unjust acquittals weighed against the interests of the petitioner in avoiding improper incarceration.<sup>68</sup> In particular, the court noted the burdens facing prisoners in preparing timely petitions, including limited resources and legal assistance.<sup>69</sup> Because the restriction on access to post-conviction release was unreasonable with respect to the benefit to the state, and the burden on a basic individual right, the court ruled the statute of limitations unconstitutional.<sup>70</sup>

In *Julian v. State*,<sup>71</sup> the Utah Supreme Court invalidated a statute of limitations on post-conviction relief similar to that now imposed by the PCRA. The statute provided no exception for judicial review to grant relief in cases of obvious injustice and incorporated a limited tolling provision.<sup>72</sup> Adopting the open courts analysis of the Utah Court of Appeals in *Currier*, the Utah Supreme Court held that the four-year statute of limitations could not be constitutionally applied to bar a habeas corpus petition, because it "remove[d] flexibility and discretion from state judicial procedure, thereby diminishing the court's ability to guarantee fairness and equity in particular cases."<sup>73</sup> That the statute of limitations was substantially longer than the ninety-day statute struck down in *Currier* was not sufficient to cure the constitutional infirmity of its application to habeas petitions.<sup>74</sup>

The PCRA now imposes a similarly heavy burden upon the indigent defendant, with no further benefit to the state in non-capital cases. The attribution of counsel's knowledge to the petitioner cuts off his or her ability to safeguard his or her right to effective counsel, if such claim of ineffective assistance is based on later discovery of information that counsel failed to present in the petitioner's defense.<sup>75</sup> Unless the indigent petitioner discovers that his or her constitutional right to counsel was violated within one year of exhausting the appeals process, any such discovery will not resurrect his claims, as it does not qualify as "newly discovered" evidence under this interpretation of the statute.<sup>76</sup>

Such an interpretation effectively abrogates the availability of an ineffective assistance of counsel claim premised on counsel's failure to present evidence known to counsel, but not discovered by the petitioner until after the limitations period has run. This result eliminates the only procedure available for a petitioner to safeguard his or her right to counsel, unless the petitioner is savvy enough to

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<sup>67</sup> *Currier*, 862 P.2d at 1365.

<sup>68</sup> *Id.* at 1371.

<sup>69</sup> *Id.* at 1370.

<sup>70</sup> *Id.* at 1372.

<sup>71</sup> 966 P.2d 249 (Utah 1998).

<sup>72</sup> *Id.* at 251.

<sup>73</sup> *Id.* at 253 (citing *Currier*, 862 P.2d at 1357).

<sup>74</sup> *Id.*

<sup>75</sup> See discussion *supra* Part III.B.

<sup>76</sup> See discussion *supra* Part III.B.

immediately suspect counsel of deficient performance, fully investigate, and bring a petition under the PCRA within one year—which is frequently not the case.<sup>77</sup> While this statute is a limitations period in theory, it is a complete bar in fact for many petitioners. And because the state's interests in completely restricting access to post-conviction relief for these defendants are no more weighty than those advanced in the *Currier* and *Julian* cases—restricting the filing period generally—this statute fails to provide a reasonable alternative remedy for a petitioner to pursue in enforcing the constitutional right to effective counsel.

By implementing a strict statute of limitations on post-conviction petitions with no exception for judicial review of untimely petitions in cases of obvious injustice, the legislature has imposed an unreasonable restriction on the court's ability to provide the post-conviction remedy. Because the PCRA eliminates the common law habeas remedy without providing a reasonable alternative, the statute likely violates the open courts provision of the Utah Constitution.

#### IV. CONCLUSION

The Post-Conviction Remedies Act's fundamental flaw is its effect on the availability of relief to indigent prisoners. A post-conviction review is often a prisoner's only opportunity to challenge the failure of appellate counsel to provide effective assistance. Because the legislature has eliminated the common law writ of habeas corpus as a method to challenge a conviction or sentence, the PCRA is the only available avenue for a post-conviction review. The indigent defendant, however, is particularly vulnerable to the PCRA's restrictions, due to his or her reliance on appointed rather than private counsel during the appeals phase, and lack of resources to effectively pursue a petition under the strictures imposed by the PCRA.

Without modification to the PCRA statute to lengthen the statute of limitations, or to provide a more generous approach to when a defendant should have discovered his or her counsel's ineffectiveness, indigent defendants will too often be disadvantaged by the PCRA's limitations period. With the courts precluded from reviewing untimely petitions for merit, these defendants will simply be deprived of the only remedy available to vindicate their rights.

While a more forgiving statute of limitations would ease the burden on indigent defendants, a perfect solution is likely impossible without a recognition of the challenges facing such defendants, and a concerted effort by both the legislature and judiciary to ensure that these most vulnerable citizens of the state are dealt with fairly in criminal and post-conviction proceedings.

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<sup>77</sup> See *Adams v. State*, 123 P.3d 400, 405–06 (Utah 2005); *Currier v. Holden*, 862 P.2d 1357, 1375 (Utah Ct. App. 1993) (Orme, J., concurring).