IN THE UTAH SUPREME COURT

SOLOMON LEE FORD,	:	
Petitioner/Appellee,	:	Case No. 20060720
v.	:	
STATE OF UTAH,	:	
Respondent/Appellant.	:	

APPELLANT'S REPLY BRIEF

APPEAL FROM A JUDGMENT GRANTING POST-CONVICTION RELIEF, THE HONORABLE JOHN PAUL KENNEDY, THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH, PRESIDING

THOMAS B. BRUNKER (4804)
Assistant Attorney General
MARK SHURTLEFF (4666)
Utah Attorney General
Heber Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

Appellant's counsel

TROY BOOHER
Snell & Wilmer, L.L.P.
15 West South Temple, Ste. 1200
Salt Lake City, Utah 84101-1004.

Appellee's counsel

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CASE STATEMENT

Ford was serving a one-to-fifteen-year prison sentence for possession of a firearm by a restricted person. In his case statement, Ford asserts that the "underlying basis for [his] conviction is thin enough – possession of a dangerous weapon, where no functional weapon was ever found, let alone produced as evidence . . . ." Appellee's Brief at 6. Ford provides no record citation for this assertion. Therefore, the Court should disregard it. Utah R. App. P. 24(a)(7).[1]

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[1]If the Court does not disregard the statement, then the State asks that it take judicial notice of the record from the underlying criminal case. (The State will refer to the criminal record as "CR," and the post-conviction record as "PCR.") The State's uncontradicted evidence at trial established that Ford, a convicted bank robber, walked into his girlfriend's apartment cleaning what looked like a shotgun barrel. Ford then pointed a small-caliber, chrome handgun at his girlfriend's male friend, cocked it, and told him to leave. (Ford's girlfriend testified that Ford asked her friend to leave and that, when Ford did, he had something silver in his hand.) Both witnesses also saw Ford carrying shotgun shells at this time. Although police never found the handgun or the shotgun barrel, there was no evidence to contradict the eye-witness testimony that Ford had both. Upon searching the

Ford also asserts that he was acquitted on the assault charge and refers only to R52. Appellee's Brief at 10. PCR52 includes only the State's recitation that he was convicted on the weapons charge, not that Ford was acquitted on the assault charge.[2]

STANDARD OF REVIEW

Ford asserts that the standard of review for appointing counsel under Utah Const. Art. I, § 12, is "abuse of discretion." Appellee's Brief at 3. However, the issue is whether the post-conviction court properly interpreted section 12 as giving Ford the right to counsel for this post-conviction appeal. This Court reviews a lower court's constitutional interpretations for correctness. *See, e.g. Duke v. Graham*, 2007 UT 31 ¶ 7, 153 P.3d 540.

ARGUMENT

I. THAT FORD HAS SERVED MOST OF HIS SENTENCE HAS NO RELEVANCE TO WHETHER THE POST-CONVICTION COURT CORRECTLY SET ASIDE HIS CONVICTION

Ford was serving a one-to-fifteen-year sentence on his conviction for possession of a

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apartment where Ford had stayed for two days prior to threatening a man with small-caliber, semi-automatic handgun, they found a holster that would fit a small-caliber, semi-automatic handgun. They also found a red gym bag in the apartment that contained a shotgun stock and shotgun shells. A police officer testified that the only piece of the shotgun missing from the pieces found in the gym bag was the barrel. The renter's son testified that Ford left things at their apartment and brought gym bags with him. Although he could not identify the red gym bag as one of Ford's, he testified that it was not his, his younger brother's, or, to his knowledge, his mother's. Ford's girlfriend testified that Ford had carried a red gym bag similar to the one police found from the trunk of his car to the apartment where police found the red gym bag with the shotgun parts and shells. (CR580-82 587-88, 591-92, 595-97, 613-14, 629-93.)

[2]Again, if the Court does not disregard the statement, it should take judicial notice of the criminal record, which establishes that the State moved to dismiss the aggravated assault charge, and the trial court granted the motion (CR773-74).

firearm by a restricted person. Ford recites that he had served thirteen years of that sentence when, in his fourth post-conviction action, he convinced a court to set aside his conviction and let him out of prison. *See, e.g.*, Appellee's Brief at 1, 14.

To the extent Ford invites this Court to affirm based on some notion that he has served enough of his sentence, the law forecloses that consideration. The Board of Pardons and Paroles, not the judiciary, has sole authority to determine how much time Ford should serve on his unchallenged sentence. *See, e.g., Foote v. Utah Bd. of Pardons*, 808 P.2d 734, 735 (Utah 1991). The Board concluded that Ford should serve all fifteen years. Apparently, he did not do what the Board would have considered sufficient to grant him early release. This Court has no authority to circumvent that determination by affirming an order setting aside the conviction on which it was based. It may affirm only if the decision to set aside the conviction was legally correct. For the reasons argued, it was not.

II. FORD HAS NOT CARRIED HIS BURDEN OF ESTABLISHING THAT HIS CLAIM IS NOT PROCEDURALLY BARRED

By its own terms, the Post-Conviction Remedies Act applies to all post-conviction proceedings that, like Ford's fourth post-conviction petition, were initiated after the PCRA's effective date. Utah Code § 78B-9-103 (2008). Further, the PCRA plainly bars Ford's claims and no PCRA exceptions apply. § 78B-9-106(1)(d).

Ford does not argue the contrary. Rather, Ford argues that this action falls "squarely within the historical scope of the Court's constitutional [writ] authority" because it purports to challenge the trial court's jurisdiction to try Ford in the first place. From this, Ford concludes that the PCRA does not apply at all; therefore, the PCRA procedural bar rules could not bar

merits review of Ford's fourth post-conviction claims. He also appears to argue that no common law procedural bars apply, and, alternatively, that the Court should find "good cause" to forgive the procedural bars and reach his claim's merits. Appellee's Brief at 14-22. The law supports none of Ford's arguments.

Gardner v. Galetka, 2004 UT 42 ¶¶ 17-18, 94 P.3d 26, refutes Ford's argument that the PCRA and its procedural bar rules do not apply at all, as well as his apparent assumption that the PCRA and constitutional post-conviction review are mutually exclusive.[3] In *Gardner*, this Court held that the PCRA and its procedural bar rules apply to all post-conviction cases that, like Ford's fourth petition, were filed after the PCRA's effective date. The Court further held that it would defer to the PCRA's procedural bar exceptions that incorporated the pre-PCRA common law exceptions. The Court continued only that the Court's common law procedural bar exceptions that had not been incorporated into the PCRA retained their "constitutional

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[3]Ford cites three cases for the apparent proposition that the legislature may impose no restrictions on post-conviction review: *Julian v. State*, 966 P.2d 249 (Utah 1998), *Frausto v. State*, 966 P.2d 849 (Utah 1998), and *State v. Barrett*, 2005 UT 88, 127 P.3d 682. Appellee's Brief at 16, 22. However, *Julian* and *Barrett* were not PCRA cases. *Julian* was decided under pre-PCRA law. *Julian*, 966 P.2d at 250 (petition filed under former, pre-PCRA Utah R. Civ. P. 65B). *See also Julian v. State*, 52 P.3d 1168, 1170-71 (Utah 2002) (holding that the PCRA did not apply to Julian's post-conviction action because he commenced it before the PCRA's effective date). *Barrett* involved the State's rule 65B extraordinary relief petition, claiming that a district court judge had exceeded his authority. *State v. Barrett*, 2005 UT 88, 127 P.3d 682. That case, and present rule 65B have nothing to do with collateral review of a criminal conviction. *Id.*; Utah R. Civ. P. 65B (excluding from its coverage cases governed by Utah R. Civ. P. 65C and, by necessary extension, the PCRA). *Frausto* did address a PCRA action. Ford asserts that this Court recognized in *Frausto* that "'no statute of limitations may be constitutionally applied to bar a habeas petition.'" Appellee's Brief at 22 (quoting *Frausto*, 966 P.2d at 851.) He apparently relies on this language to suggest that the legislature may set no limits on the availability of collateral relief from a conviction. However, Ford misstates this as the Court's opinion: only one justice joined that reasoning.

significance." *Id.* at ¶¶ 13-19.[4] Thus, under *Gardner*, Ford may avoid the PCRA's procedural bar only if he can establish that an unincorporated common law exception excuses the applicable procedural bars. He has not done so.

Ford appears to argue that no procedural bar applies to his fourth petition because he purports to challenge the trial court's subject matter jurisdiction. Appellee's Brief at 15-19. That is not the law. In *Hurst v. Cook*, 777 P.2d 1029 (Utah 1989), this Court recognized that a challenge to a trial court's jurisdiction has always been permitted in a collateral proceeding. *Id.* at 1034. However, the Court also recognized that successive petitions are barred unless the petitioner can establish "'unusual circumstances'" or "'good cause'" to justify reaching the merits of claims raised in a successive petition. *Id.* at 1037 (citation omitted). The Court included a list of examples of "good cause" that would excuse the default and permit merits review in a successive petition. *Id.* Noticeably absent from that list is a challenge to a trial court's subject matter jurisdiction even though the Court recognized that such challenges were a traditional basis for habeas relief. *Id.*[5]

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[4]The State acknowledges, as it must, that this Court has concluded that the judicial branch has state constitutional authority for post-conviction review of a criminal conviction under. Gardner, 2004 UT 42 ¶¶ 17-18. The State does not agree that the Court decided *Gardner* correctly and reserves its right to challenge *Gardner* in future cases. However, because Ford has not met his burden to establish that even the common law procedural bar exceptions require merits review of his fourth-petition claim, the State has chosen to argue the case under the existing precedent.

[5]Ford cites *Sullivan v. Turner*, 448 P.2d 907 (Utah 1968) for the proposition that "lack of jurisdiction precludes all procedural bars." Appellee's Brief at 18. Ford misstates *Sullivan*. At most, *Sullivan* stands for the proposition that a jurisdictional challenge may be raised in a first post-conviction petition. It does not support Ford's sweeping assertion that a jurisdictional challenge "precludes all procedural bars" no matter how many prior petitions the convicted person has filed. As explained in the text, *Hurst* stands for the contrary

Ford also has not established that any common law exception applies.[6] Both the PCRA and the common law bar relief based on claims that the petitioner has litigated and lost in a prior proceeding, and neither recognizes any exception. § 78B-9-106(1)(d); *Carter v. Galetka*, 2001 UT 96 ¶ 15; 44 P.3d 626. As detailed in Appellant's Brief, Ford litigated and lost in his third petition the same jurisdictional challenge that he litigated and won in his fourth petition. Appellant's Brief at 10-12. That is, he argued in both that his beyond-a-reasonable-doubt conviction was illegal because a commissioner bound him over for trial on that charge.

Ford argues that the fourth-petition jurisdictional claim differs from the third-petition jurisdictional claim. According to Ford, his third-petition claim "stemmed from an unconstitutional delegation [of judicial authority], not a violation" of his right to a preliminary hearing. Appellee's Brief at 20.

However, as Ford recognizes, the substance of the action rather than the label controls. Appellee's Brief at 17-18 n.8. Both claims depended on the same argument: that the trial court lacked jurisdiction to try him because the legislature unconstitutionally delegated to commissioners the authority to preside at preliminary hearings. Appellant's Brief at 10-11. The claim that Ford contends was new in his fourth petition depended on the same jurisdictional argument that Ford raised and lost in his third. Because he raised no substantively different

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proposition.

[6]Both the PCRA and common law place the burden of establishing an exception on Ford. § 78B-9-105; *Hurst*, 777 P.2d at 1037.

claim in his fourth-petition, it was procedurally barred. *See Hurst*, 777 P.2d at 1037.[7]

Ford also asserts that the third post-conviction court did not dispose of his jurisdictional challenge because it purportedly "expressly construed the pro se petition as *not* raising a jurisdictional challenge." Appellee's Brief at 19 (emphasis in Appellee's Brief). He relies on the third post-conviction court's conclusion that Ford's third petition did not "state" a challenge to the trial court's subject matter jurisdiction to try him. *Id.*

Again, Ford promotes form over substance because the third post-conviction court resolved against Ford the basis for his fourth-petition challenge to the trial court's jurisdiction. In his fourth petition, Ford alleged that the trial court lacked jurisdiction to try him because a commissioner served as the magistrate at his preliminary hearing. The third post-conviction court concluded in an alternative merits ruling that allowing a commissioner to preside at Ford's preliminary hearing was not an unconstitutional delegation of judicial authority.[8]

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[7]Ford takes issue with the State's argument that he was not entitled to raise his jurisdictional argument in successive petitions until he found a post-conviction court that agreed with him. According to Ford, that "is precisely what the writ of habeas corpus entitles him to do," relying on a footnote in *Hurst*. Appellee's Brief at 21 n.10. However, the footnote to which Ford cites refers to a "commentator['s]" "bit of relevant history concerning habeas corpus." *Hurst*, 777 P.2d at 1035 n.4. *Hurst* does not adopt that historical view that petitioners are entitled to repeated merits determinations of the same claim. As established in the text, *Hurst* stands for the contrary proposition.

[8]Ford also misreads the third post-conviction court's conclusion. In the third post-conviction action, the State acknowledged that Ford's unconstitutional-delegation claim appeared to be a challenge to the trial court's jurisdiction to try him (PCR64). The State continued, however, that Ford had established no jurisdictional defect (PCR64-65). The third post-conviction court concluded that the unconstitutional-delegation claim "d[id] not state a challenge to the [trial court's] jurisdiction to try [Ford]" (PCR54-55). In context, the third post-conviction court concluded that Ford had not established a jurisdictional defect, not that he had not attempted to raise a jurisdictional challenge.

Ford also suggests that the State has conceded that the third- and fourth-petition

Even if the litigated-and-lost procedural bar does not apply, the could-have-been raised bar does. Ford argues, however, that the default should be excused under *Hurst* because it would be "fundamentally unfair" not to excuse his failure to raise the fourth-petition claim in his third petition. In support, he argues that this court decided *Jones v. Utah Bd. of Pardons and Paroles*, 2004 UT 53, 94 P.3d 283, between his third and fourth petitions. He alleges that *Jones* sheds new light on his unconstitutional delegation argument. Therefore, according to Ford, it would be fundamentally unfair not to re-assess that claim in light of *Jones*. Appellee's Brief at 21-22.

However, newly decided authority will excuse the successive-petition bar only when it applies retroactively and would entitle the petitioner to relief. *See, e.g., Hurst*, 777 P.2d at 1036. *Cf. also Andrews v. Morris*, 677 P.2d 81 (Utah 1983) (holding that petitioners were not entitled to post-conviction relief based on a new rule of law decided after their convictions became final on direct appeal because the new rule did not apply retroactively).[9] Ford has not argued, let alone established that *Jones* applies retroactively. Further, even if *Jones* applied retroactively, it would not affect the outcome of Ford's case. *Jones* holds only that the unconstitutional delegation of judicial authority doctrine does not apply to the board of pardons because it is not a court of record. *Jones*, 2004 UT 53 ¶ 17. It does not hold that the probable cause determination and

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claims differed. Appellee's Brief at 20. Rather, the State consistently argued that Ford raised and lost in his third petition the claim that he raised in his fourth petition (PCR47-47, 106-107). The State argued only in the alternative that, if the fourth post-conviction 6ourt construed the claim as different from that raised in the third petition, then the claim was still barred as one that could have been, but was not raised in the third petition (PCR107).

[9]The PCRA inferentially incorporates this exception. *Gardner*, 2004 UT 42 ¶14.

bindover by a court commissioner robbed the district court of jurisdiction to try Ford.

In sum, Ford has never sustained his burden of overcoming the procedural bar under either the PCRA or the common law. The Court should reverse the fourth post-conviction court without reaching the merits of his claim. However, even if the Court were to excuse Ford's default, his claim fails on its merits as explain in points III and IV.

III. THE JURY'S UNCONTESTED BEYOND-A-REASONABLE-DOUBT GUILTY VERDICT IS NOT VOID BECAUSE A QUASI-JUDICIAL OFFICER MADE THE UNCONTESTED PROBABLE CAUSE DETERMINATION TO BIND FORD OVER FOR TRIAL

Article I, section 13 provides that "[o]ffenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate...." At the time of Ford's section 13 hearing, "magistrate," by statue, included court commissioners. § 77-1-3 (1993).

According to Ford, however, the "magistrate" referred to in Article 1, section 13, must mean an Article VIII judge. From this, Ford argues that the unchallenged beyond-a-reasonable-doubt jury verdict was null because a law-trained commissioner with criminal law experience rather than Article VIII judge made the unchallenged determination that the evidence was sufficient to establish probable cause that Ford committed the crime for which a jury later convicted him beyond a reasonable doubt. Appellee's Brief at 22-34.

In the end, Ford cites no case, and the State knows of none, where this Court or the court of appeals has overturned an uncontested beyond-a-reasonable-doubt guilty verdict because a court commissioner, a "quasi-judicial officer," made the uncontested probable-cause determination that resulted in binding the defendant over for trial. Ford cites only *State v. Ortega*,

751 P.2d 1138 (Utah 1988); *State v. Pettit*, 93 P.2d 675 (Utah 1939); and *State v. Nelson*, 176 P. 860 (Utah 1918). Appellee's Brief at 33. However, in all three cases, this Court vacated the convictions because the defendant had been bound over on a crime different from that on which the jury later convicted him. *Ortega*, 751 P.2d at 1139-40; *Pettit*, 93 P.2d at 676-77; *Nelson*, 176 P. at 860-62. Ford was bound over and tried on the same crime.[10] *Compare State v. Marshall*, 2005 UT App 269U at 1 (holding that the jury verdict was valid because "Marshall received a preliminary hearing consistent with the charge bound over"), *cert. denied*, 124 P.3d 634 (2005).[11]

The cases that Ford cites on section 13's history and policy contradict rather than support his argument that only an Article VIII judge may serve as a section 13 magistrate. That is, they establish that a section 13 examination and commitment by a court commissioner provided to

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[10]Ford cites all three for the proposition that "[w]here a defendant does not waive his right to have each charge against him first presented to a magistrate, and yet the State fails to do so, the trial court *cannot obtain subject matter jurisdiction.*" Appellee's Brief at 33 (emphasis added). However, none of those cases actually held that a section 13 hearing and commitment is a jurisdictional prerequisite to trial. Further, the real defect in the preliminary hearings at issue was the lack of notice. That is, the evidence presented at the preliminary hearing varied significantly from the evidence on which the jury later convicted the defendants. Ford has never alleged that the evidence presented at his preliminary hearing varied from that on which the jury later convicted him or that any unidentified variance prejudiced him.

[11]Ford states that "[t]he State concedes that 'a preliminary hearing and bindover are "essential to a court's jurisdiction over a felony . . . ."'" Appellee's Brief at 30. Ford's statement is correct. However, the State never has conceded that a preliminary hearing before an Article VIII judge is a pre-requisite to a trial court's jurisdiction, and the argument here an in Appellant's Brief at 15-30 establishes otherwise. Further, the State made its concession in the court of appeals based on controlling court of appeals authority. Appellant's Brief at 22-23, citing *Marshal*, 2005 UT App 269U. Since the State made that concession, this Court has called *Marshal* into question. *See, e.g., State v. Rhinehart*, 2007 UT 61 ¶¶ 19-20, 167 P.3d 1046. *Rhinehart* states that this Court is not bound by *Marshal* and states the broad proposition that a subsequent jury verdict cures defects in the preliminary hearing. *Id.*

Ford all of the protections that section 13 afforded.

"The fundamental purpose served by [a section 13 examination and commitment] is the ferreting out of groundless and improvident prosecutions. The effectuation of this primary purpose relieves the accused from the substantial degradation and expense incident to a modern criminal trial when the charges against him are unwarranted or the evidence insufficient." *Ortega*, 751 P.2d at 1140. *See also, e.g., State v. Brickey*, 714 P.2d 644, 646 (Utah 1986). Ford got this. The court commissioner heard evidence supporting the charges against Ford, found that the prosecution was not groundless, and bound Ford over for trial. Ford's subsequent conviction beyond-a-reasonable doubt substantiated that determination. The examination and commitment before the court commissioner shielded Ford "from the substantial degradation and expense" of a criminal trial on groundless charges. *Cf., e.g., Rhinehart*, 2007 UT 61 ¶20 (a jury verdict cures preliminary hearing defects). *See also, e.g., State v. Winfield*, 2006 UT 4 ¶26, 128 P.3d 1171 (same).

The State agrees with Ford that, to effectuate section 13's purpose, the person who examines the evidence and commits the defendant for trial must be "neutral and detached." Appellee's Brief at 29. That is, a section 13 examination and commitment protects against prosecutorial abuses that may result from prosecutors having unsupervised power to institute a prosecution. By necessary extension, the person who makes that determination cannot be beholden to the prosecutor.[12]

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[12]That is the principle for which *Coolidge v. New Hampshire*, 403 US. 443 (1971), on which Ford relies (Appellee's Brief at 29), stands. *Coolidge* involved a New Hampshire law that allowed the prosecuting official to serve as the magistrate who issued search warrants. *Id.* at 447. Thus, the entity investigating the defendant was the same entity that issued a search warrant to assist in that investigation. Not surprisingly, the Supreme Court held that the New Hampshire statute violated Coolidge's Fourth Amendment rights because the

Again, Ford got this benefit. The statutory "magistrate" who examined the evidence and committed Ford for trial was not the prosecutor or in any way beholden to the prosecutor. Rather, she was a "quasi-judicial officer[] of [a] court[] of record." She was hired and supervised by the judicial branch machinery. That is, she was appointed by the Judicial Council with the concurrence of a majority of the Article VIII judges whom they serve. She had to comply with the Judicial Council's rules, and orientation and educational requirements. She was subject to Judicial Council performance evaluations and to Judicial counsel rules for investigations of complaints. She had to "comply with the Code of Judicial Conduct to the same extent as full-time judges." § 78-3-31 (West 2004). She had no ties to the prosecuting agency. Thus, Ford was entitled to and got an examination and commitment by a "neutral and detached" statutory magistrate.[13]

For the reasons argued here and in Appellant's Brief, Ford's uncontested beyond-a-

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probable cause determination was not made "by a *neutral and detached* magistrate;" instead, it was made "by the officer engaged in the often competitive enterprise of ferreting out crime." *Id* at 449 (emphasis added).

[13]Ford insists that the court commissioner "was not a member of the judicial branch." Appellee's Brief at 29-30. He also asserts that the State "does not deny . . . that Mr. Ford's preliminary hearing was not conducted by a member of the judicial branch." Appellee's Brief at 23. As to what the State "does not deny," the State does not deny only that an Article VIII judge did not take on the role of magistrate at Ford's preliminary hearing. The State has not conceded that a court commissioner is "not a member of the judicial branch." Ford does not explain how a "quasi-judicial officer" who is hired and supervised exclusively by the judicial branch, and who is subject to all of the rules that govern the judicial branch is not "a member of the judicial branch." In any event, as explained in the text, the fact that a court commissioner is hired and controlled by the judicial branch gave to Ford all section 13 guaranteed. It assured that he was not forced through a criminal trial on nothing more than the prosecuting agency's say so. Rather, he went to trial only after a "neutral and detached" "quasi-judicial officer" examined the evidence and found that it was sufficient to meet the probable cause standard necessary to commit him for trial.

reasonable-doubt conviction is not void because a "neutral and detached" court commissioner, who had to be law trained and have criminal law experience, examined the evidence and committed Ford for trial after making the requisite and uncontested probable cause finding. Also for the reasons argued here and in Appellant's Brief, that is true even if the legislature technically violated Article VIII by allowing a "quasi-judicial officer" who is wholly controlled by the judicial branch to make an uncontested probable cause determination.

IV. FORD HAS NOT ESTABLISHED THAT ALLOWING A COURT COMMISSIONER TO PRESIDE AT A PRELIMINARY HEARING IS A CORE JUDICIAL FUNCTION.

Ford argues that allowing a court commissioner to serve as a section 13 magistrate is an unconstitutional delegation of a core judicial function. As explained in point III of this reply and in Appellant's Brief, even if Ford is correct, the delegation did not create a jurisdictional defect.

In any event, Ford has not rebutted the State's arguments that a hearing before and bindover by a magistrate is not an exercise of a core judicial function.[14] Rather, this Court's clear authority establishes the contrary. This Court clearly held in *Humphrey* that a magistrate who binds a defendant over for trial is not acting as a judge. *State v. Humphrey*, 823 P.2d 464, 467 (Utah 1991). Because a committing magistrate is not serving as a judge, a judge does not have to serve as a magistrate when the magistrate binds a defendant over to stand trial.

Ford nevertheless argues that because magistrates can issue final, appealable orders, they

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[14]Ford also argues that allowing commissioners to preside a preliminary hearings violates separation of powers. Appellee's Brief at 40-41. The separation of powers analysis is inextricably tied to the unconstitutional delegation argument. *Salt Lake City v. Ohms*, 881 P.2d 844, 852 (Utah 1994). Because Ford has not established an unconstitutional delegation of a core judicial function, he has not established a separation of powers violation.

do exercise final, judicial authority. Appellee's Brief at 27-28, 39. Therefore, according to Ford, allowing a commissioner to serve as a magistrate is an unconstitutional delegation of a core judicial function.

Ford relies on *State v. Jaeger*, 886 P.2d 53 (Utah 1994), to support this argument. Ford is correct that, under *Jaeger*, the State may appeal a magistrate's order dismissing an information.[15] However, the *Jaeger* Court distinguished the *Humphrey* reasoning on which the State relies in this case. *Jaeger* recognized that *Humphrey* differentiated between magistrates and judges in that "the orders of judges are appealable whereas the orders of magistrates are not, as they are nonadjudicative." *Id.* at 54 n.2. However, the Court explained that when a judge serving as a magistrate dismisses an information, "[i]t is as though [the judge], who took off his judicial hat and put on his magistrate's hat to conduct the preliminary hearing, removed that hat and put his judicial hat back on just prior to entering his judgment of dismissal and discharge." *Id.* 886 P.2d at 54 n.2.

At best, *Jaeger* may stand for the proposition that, when a magistrate dismisses an information, she has exercised a core judicial function. (Of course, had the magistrate dismissed the information against Ford, he would not have complained.) However, both *Jaeger* and *Humphrey* recognize that, when, as here, a magistrate commits the defendant to the district court for trial, it has not entered a final order. In that circumstance, the magistrate "ha[s] [done] nothing more than move the case along by issuing a routine interlocutory bind-over order, as was the case in *Humphrey* and as happens following the vast majority of preliminary hearings."

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[15]This result follows because the State cannot refile and has no other way to challenge the dismissal order. *Id.* at 54-55.

Id. Because the commissioner did not enter a final adjudication when it bound Ford over for trial, she did not exercise a core judicial function. *Compare Ohms*, 881 P.2d 844, 850-53 (giving commissioners the authority to enter final adjudications is an unconstitutional delegation of judicial authority).

The State also argued in its Appellant's Brief that the magistrate's bindover order did not constitute a core judicial function as defined by *Ohms* because "a district judge may review a commissioner's probable cause determination subsequent to a bindover, and the district judge's review requires no deference to the commissioner's decision." Appellant's Brief at 17-18. Ford responds that this argument is faulty because, according to him, a bindover order, like a search warrant, "is immediately enforceable, as no further judicial determination is necessary to bindover the accused." Appellee's Brief at 37.

This argument flies in the face of *Humphrey*'s plain language. There, this Court recognized that the bindover order merely "requires the defendant 'to answer [the information] in the district court.'" *Humphrey*, 823 P.2d at 465 (citation omitted, alteration in *Humphrey*). "At that point, the district court has the inherent authority and the obligation to determine whether its original jurisdiction has been properly invoked. In doing so, the district court need show no deference to the magistrate's legal conclusion." *Id.* at 465-66 (emphasis added).

Further, unlike the search warrant situation at issue in *State v. Thomas*, 961 P.2d 299 (Utah 1998), the judicial review occurs before the rights that the bindover is designed to protect will be violated. A search warrant will be executed before a district judge reviews it. "[O]nce armed with an issued warrant, law enforcement proceeds to search and seize at will." *Id.* at 303.

Although the citizen may have a later remedy upon judicial review – suppression of the illegally seized evidence – the rights that the warrant was designed to protect already will have been violated.

By contrast, a bindover order will not be "executed" – that is, the defendant will not have suffered the "substantial degradation and expense" of a criminal trial – until after the district court reviews the order. *Humphrey*, 823 P.2d at 465-66. Thus, the magistrate's determination is subject to full, non-deferential judicial review before the rights that section 13 protects are at risk of being violated.

Ford also argues that a bindover is a core judicial function within the *Ohms* definition because reviewing courts will give some deference to the magistrate's factual determinations. Appellee's Brief at 38. However, *Ohms* acknowledged that court commissioners may conduct "fact-finding hearings" without violating the constitutional proscription against delegating core judicial functions. *Ohms*, 881 P.2d at 852 n.17. It is the ultimate legal adjudication that *Ohms* forbids. As *Humphrey* demonstrates, the magistrate's legal determination that probable cause exists to try the defendant is fully reviewable by the district court with no deference to the magistrate.[16]

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[16]The State also argued that, even if the legislature unconstitutionally delegated to commissioners the authority to preside at preliminary hearings, the commissioner acted with *de facto* authority with in the meaning of *Ohms* and *Thomas*. Appellant's Brief at 25-28. Ford responds that he, like Ohms and Thomas, should get the benefit of his win. Appellee's Brief at 41-42. However, Ohms and Thomas established defects in their convictions. That is, Ohms was tried before and convicted by a commissioner who lacked the constitutional authority to enter final adjudications. *Ohms*, 881 P.2d 844. Thomas was tried and convicted on the strength of evidence that was seized pursuant to a search warrant that the commissioner lacked constitutional authority to issue. *Thomas*, 961 P.2d 299. However, for the reasons argued in points III and IV of this reply and in Appellant's Brief at 15-29, any

V. FORD HAS NO CONSTITUTIONAL OR STATUTORY RIGHT TO STATE-FUNDED COUNSEL TO DEFEND AGAINST THE STATE'S POST-CONVICTION APPEAL.

Ford does not dispute that he had no right to state-paid counsel to initiate the post-conviction action in the district court. He does not dispute that he would have had no right to state-paid counsel to appeal an adverse post-conviction judgment against him. He insists, however, that a right to counsel attached after he won in the post-conviciton court and the State exercised its right to appeal that decision. This is so, according to Ford, because the discretionary, civil post-conviction action that he initiated in the district court transformed into a non-discretionary, criminal or criminal-equivalent action on a state's post-conviction appeal. Appellee's Brief at 42-58. This rationale undergirds all of Ford's constitutional and statutory arguments.

Ford cites nothing to support his theory that an action may start as one thing and changes to another based solely on the identity of the person who appeals an adverse judgment. To the contrary, "'[a]n action is deemed to be pending from the time of its commencement until its final determination upon appeal . . . .'" *Boucofski v. Jacobsen*, 104 P. 117, 119 (Utah 1909) (citation omitted), *overruled on other grounds by State v. Hansen*, 734 P.2d 421 (Utah 1986). The same discretionary, civil action that Ford started against the State is still pending and will remain pending until this appeal concludes.

Ford insists that he has a Sixth and Fourteenth Amendment right to state-funded counsel. Ford's arguments misstate the law. According to Ford, the Sixth Amendment applies any time

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unconstitutional delegation in this case does not affect Ford's conviction.

the State attempts to use the judicial process to deprive a citizen of his liberty on the ground that citizen has committed a crime. He continues that the State's appeal fits this construct because, if it succeeds, he will go back to prison. Appellee's Brief at 44.

The law refutes Ford's expansive reading of the Sixth Amendment. Ford's Sixth Amendment rights, including his Sixth Amendment right to counsel, ended when he was convicted at trial. *See, e.g., Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 161 (2000) (the Sixth Amendment does not apply to appeals in the criminal case). By its plain language, the Sixth Amendment defines the rights secured to an "accused" in "a criminal prosecution." Ford is not an "accused." The State has not charged him with a crime and does not have to prove the elements of any crime in this appeal. Further, as explained in *Martinez*, which Ford has not acknowledged, "[t]he Sixth Amendment identifies the basic rights that the accused shall enjoy in 'all criminal prosecutions.' They are presented strictly as rights that are available *in preparation for trial and at the trial itself.*" Martinez, 528 U.S at 159-60 (emphasis added). Ford is not seeking representation for trial or to prepare for trial. He is defending a civil post-conviction victory in a post-conviction appeal.[17]

Ford's cases do not establish that he has a Sixth Amendment right to counsel at any level of post-conviction review. Rather, they address the scope of the Fourteenth Amendment right

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[17]Ford also complains that, if the State had opted to forfeit its right to appeal and proceed directly to re-try him, he "unquestionably would have had the right to paid legal representation." Appellee's Brief at 42. Ford is correct, but it does not follow that he has a right to counsel on the post-conviction appeal. Rather, if the State loses this appeal, it still may choose to re-try Ford. At that time, Ford again will be an "accused," the State again will have to prove the elements of a crime before imprisoning Ford, and, as an accused facing an action by the State, Ford again will have all the rights guaranteed by the Sixth Amendment "to prepare for trial and at the trial itself."

to state-funded counsel and only in non-post-conviction review contexts. Ford cites *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); *In re Gault*, 387 U.S. 1 (1967); and *Blankenship v. Johnson*, 118 F.3d 312 (5th Cir. 1997). Appellee's Brief at 44-46. *Lassiter* addressed the factors to apply in determining when due process requires appointing counsel for an indigent parent in a parental termination proceeding. *Lassiter*, 452 U.S. at 31-35. *In re Gault* held that due process entitles indigent juveniles to state-funded counsel in their initial commitment proceedings when they face what would have been a felony sentence if they were an adult. *In re Gault*, 387 U.S. at 29-30. *Blankenship* held that the Fourteenth Amendment entitles criminal appellants to state-funded counsel to defend against discretionary review granted to the State in the criminal appeal. *Blankenship*, 118 F.3d at 317. However, none of these cases create a Sixth Amendment right to counsel beyond the trial and, as *Martinez* establishes, no such right exists.

Ford's Fourteenth Amendment argument fairs no better. By his own admission, he relies on cases that address Fourteenth Amendment rights in contexts other than collateral challenges to a criminal conviction. Ford's Breif at 47-48. However, *Pennsylvania v. Finley*, 481 U.S. 551 (1987), *Ross v. Moffit*, 417 U.S. 600 (1974), and *Halbert v. Michigan*, 545 U.S. 605 (2005) govern the point at which a convicted person loses the Fourteenth Amendment right to state-funded counsel for review of his conviction. Appellant's Supplemental Brief at 32-28.

In his Sixth Amendment argument, Ford erroneously suggests that the *Finley* line of cases establishes as the litmus test for determining when the right to counsel attaches is whether the matter at hand is one that is non-discretionary as to the petitioner. According to Ford, the right to counsel attaches because he must defend in this Court his post-conviction victory in the lower

court. Appellee's Brief at 44-46.

Ford misstates that authority. In *Finley*, 481 U.S. 551 (1987), the Supreme Court held that there was no right to state-funded counsel in state post-conviction review. However, it did not found that decision, as Ford suggests, on who was prosecuting and who was defending the action. Appellee's Brief at 46. Rather, it construed the Fourteenth Amendment to extend the right to state-funded counsel to "the first appeal of right, and no further." *Id.* at 555. The Supreme Court continued that there was no right to counsel in post-conviction review because it was "even further removed from the criminal trial" than the discretionary criminal appeals where no right to counsel attached. *Id.* at 556-57. Thus, it is the proximity to the criminal trial that governs the Fourteenth Amendment right to counsel, not the identity of the person defending at specific stages.[18]

Ford also relies on Utah Const Art. I, §§ 7 and 12 to support his argument that he has

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[18]Along this same line, Ford contends that he is entitled to counsel because he is in no different position than the appellant in *Blankenship*, who had to defend against the State's discretionary review. Ford is wrong. *Blankenship* involved discretionary review in a criminal appeal. The Fifth Circuit held only that the Fourteenth Amendment right to counsel extends into that review when the defendant won the criminal appeal in the intermediate court and the State asked for and received discretionary review by the State's high court. *Blankenship*, 118 F.3d at 317. To support that holding, the Fifth Circuit reasoned, "'[b]ut where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.'. . . In the instant case, Blankenship was without counsel the only time the merits of his *only appeal* were decided against him." *Id* (citation omitted, emphasis in *Blankenship*). Ford is not defending an intermediate win in his criminal appeal against discretionary review in his criminal appeal. Ford is over a decade and multiple post-conviction petitions past his criminal appeals. Ford is in a vastly different position than Blankenship. The Fifth Circuit's reference to the "one and only appeal" makes clear that it would not have extended the right to state-funded counsel to a post-conviction petitioner defending his post-conviction win on his fourth post-conviction petition in the State's post-conviction appeal.

a state constitutional right to state-funded counsel to defend the post-conviction appeal. Appellee's Brief at 49-53. In his section 12 argument, Ford again broadly asserts "that whenever the State is attempt to regain the right to imprison on the basis of a violation of a criminal statute, the right to counsel attaches." Appellee's Brief at 51. The law does not support this broad assertion.

Section 12 clearly does not apply because section 12 applies only in criminal proceedings. *See Neel v. Holden*, 886 P.2d 1097, 1103 (Utah 1994). This is not a criminal proceeding. *See* previous argument in this point, Appellant's Supplemental Brief at 27-30. In fact, this Court's precedent to the effect that the rights section 12 guarantees only to a criminal defendant do not attach in parole revocation proceedings refutes Ford's argument that a proceeding becomes criminal within the meaning of section 12 any time that the outcome may result in incarceration.[19]

Ford's reliance on *Julian v. State*, 966 P.2d 249 (Utah 1998) and *Parsons v. Barnes*, 871 P.2d 516 (Utah), *cert. denied*, 513 U.S. 966 (1994), is also misplaced. Appellee's Brief at 51. In fact, those cases undercut his argument that a post-conviction petitioner has a right to counsel under

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[19]Ford purports to distinguish *Neel* because it involved a parole grant hearing rather than a parole revocation hearing. Appellee's Brief at 50. However, *Neel* makes clear the Court did not limit its conclusion to parole grant hearings. Rather, the Court tied its section 12 analysis to its Sixth Amendment analysis. It continued that, "[i]f the Sixth Amendment does not guarantee the right to counsel in a *parole revocation* hearing, it certainly does not guarantee that right in an offender's initial post-revocation parole grant hearing." *Neel*, 886 P.2d at 1103-1104 (emphasis added). In a later case, this Court stated categorically that "parole proceedings" are not criminal proceedings to which the rights that a criminal defendant enjoys will attach. The Court did not distinguish parole grant proceedings from parole revocation proceedings. *Monson v Carver*, 928 P.2d 1017, 1030 (Utah 1996). *See also Malek v. Friel*, 2004 UtApp 237U (citing *Neel* for the proposition that parole revocation proceedings are civil; therefore, there is no right to counsel).

section 12. In *Parsons*, Justice Zimmerman opined that the distinction between the criminal proceedings and post-conviction review was a fiction, and that post-conviction review was an integral part of the criminal process. *Parsons*, 871 P.2d at 530-31. He would have recognized a right to state-funded counsel in post-conviction review. *Id.* However, only one justice joined him. *Id.* at 531. Even more telling, when Justice Zimmerman repeated those sentiments in *Julian*, 966 P.2d at 259, he failed to garner any votes, including that of the justice who joined him in *Parsons*. Thus, this Court has never "suggested" that post-conviction petitioners have the right to state-funded counsel at any level of post-conviction review.[20]

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[20]Ford also relies on *State v. Eichler*, 483 P.2d 887 (Utah 1971), for the proposition that section 12 guarantees him state-funded counsel in this post-conviction appeal because, if he loses, he may return to prison. Appellee's Brief at 49-50. However, *Eichler* was not a post-conviction proceeding or any other kind of civil appeal. It was an appeal from a probation revocation initiated in the criminal case, where section 12, on which this Court relied, facially applies. Therefore, *Eichler* does not stand for the broad proposition for which Ford cites it: that a section 12 right to counsel attaches in proceedings outside of the criminal process where a person may be returned to prison. Further, *Neel*, *Monson*, and *Malek*, discussed in the text, make clear that section 12 does not apply outside of the criminal prosecution.

For this reason, Ford's criticism of the State for relying on *Beal v. Turner*, 454 P.2d 624 (Utah 1969) is misplaced. The State cited *Beal* for the proposition that Art. I, § 7 due process does not guarantee counsel at parole revocation proceedings. Appellant's Supplemental Brief at 26 (citing Beal, 454 P.2d at 625). *Eichler* did not overrule *Beal*, as Ford suggests. Appellee's Brief at 50. Rather, as stated, *Eichler* was a criminal appeal and relied on section 12, which defines the rights of criminal defendants. *Beal* was a civil habeas case and addressed section 7 due process rights. *Beal*, 454 P.2d at 625. Further, *Eichler* cited to *Beal*, but did not state that it was overruling *Beal*. *Eichler*, 483 P.2d at 424 n.6. Because *Eichler* and *Beal* addressed different constitutional provisions in different kinds of proceedings, one criminal and the other civil, *Eichler* did not overturn *Beal*. In fact, those cases support the State's argument that section 12 does not apply outside of criminal proceedings.

Admittedly, the basis for the *Beal* decision is unclear and, if it relied on the idea that a parolee has no liberty interest in his continued freedom, *Neel* does overrule it. See *Neel*, 886 P.2d at 1101. See also Appellant's Supplemental Brief at 26 n.7. However, *Neel* nowhere intimates that a parolee facing possible re-incarceration has a blanket right to counsel, and the cases on which it relies stand for the proposition only that there may be some circumstances where due process requires providing counsel at a parole revocation

Ford's invitation to craft a section 7 due process right to state-funded counsel to defend post-conviction appeals also is unavailing. As explained in this point and Appellant's Supplemental Brief at 26, whether Ford actually has a legally cognizable liberty interest is still under review.

Further, Ford's section 7 argument rests, as it did below, on little more than a bare assertion that the Court should create a right to counsel to defend the state post-conviction appeal because it would be fair. The State constitution does not provide a blank slate to write policy for the State. Rather, the Court's duty in discerning the rights secured by the Utah Constitution is to discern the people's intent. *American Bush v. City of South Salt Lake*, 2006 UT 40 ¶12 n.3, and ¶¶ 77 and 84, 140 P.3d 1235 (Durrant, J., concurring).[21] The people have made that intent manifest: they have provided for state-funded counsel in death-penalty post-conviction cases; all other petitioners are relegated to representing themselves or to representation by *pro bono* counsel. *Compare* §§ 78B-9-109 and 202.[22]

Moreover, if the state framers had intended to provide counsel to persons collaterally challenging a criminal conviction, they knew how to do it. They specifically provided counsel to criminal defendants. They did not do the same for post-conviction petitioners. Thus, the

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proceedings. See Appellant's Supplemental Brief at 26 n.7. Also as argued a parolee has a greater liberty interest than Ford. In any event, all of the law refutes Ford's broad proposition a person is entitled to counsel he may be re-incarcerated. Appellee's Brief at 51.

[21]Ford never even acknowledges the State's argument under *American Bush* or attempts to satisfy it pre-requisites for fashioning a state constitutional rule.

[22]The State recognizes that Ford claims that the Indigent Defense Act rather than the PCRA applies to the counsel issue in this case. Of course, if the Court agrees, there would be no need to craft a state constitutional remedy, as Ford invites the Court to do.

Utah Constitution's plain text suggests that the framers did not consider state-funded counsel to be integral to defending in the appellate courts a post-conviction win in the district courts. *See* Appellant's Supplemental Brief at 30-31.

Ford's fairness argument also is counter-intuitive. Ford concludes that it would not be fair to make him defend his post-conviction victory *pro se*. However, he has not disputed that he had no due process right to counsel to attain that victory in the first place. He has not explained why it was fair to require him to take on the burden *pro se* of proving his entitlement to post-conviction relief, but it would be unfair to require him to defend it where the burden of upsetting that victory has shifted to the State. His bare conclusion that this distinction exists is insufficient for resorting to the state constitution to overwrite the legislature's determination of when Ford is entitled to state-funded counsel. *Cf. State v. Honie*,2002 UT 4 ¶61 n.7, 57 P.3d 977 (declining to adopt a state constitutional rule where Honie had not demonstrated in "any meaningful fashion" why the Court should apply cited constitutional provisions to create the proposed rule), *cert. denied*, 537 U.S. 863.[23]

Finally, as detailed in the Appellant's Supplemental Brief at 9-18, the IDA applies only to criminal cases and only to persons "under arrest" and facing a "criminal charge." Ford is not under arrest or facing a criminal charge. It does not apply, as Ford mischaracterizes it, merely because a prior conviction will result in his re-incarceration.[24]

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[23]Ford's argument that providing paid counsel would facilitate the accuracy of this appeal's outcome also does not justify creating a right to counsel. The same could be said of the proceeding below, where Ford does not dispute that he had no right to counsel.

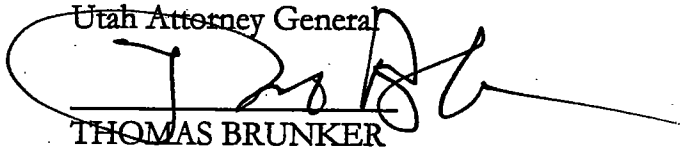
[24]Ford also asserts that the "criminal" characterization cannot govern the IDA's reach "because the IDA applies to juvenile proceedings, which are civil proceedings." Appellee's

CONCLUSION

For the reasons argued here and in the State's opening briefs, the post-conviction court erroneously vacated Ford's uncontested beyond-a-reasonable-doubt conviction and erroneously appointed state-funded counsel to defend that victory on appeal.

DATED March 25, 2008.

MARK SHURTLEFF
Utah Attorney General



THOMAS BRUNKER
Assistant Attorney General

Appellant's counsel

Brief at 54. Ford provides no citation for his statement that the IDA applies to juvenile proceedings. In fact, the statement appears to be false. The Juvenile Court Act, not the IDA, provides for state-funded counsel to represent indigent juveniles. *See In re W.B.J.*, 966 P.2d 295, 297 and n.2 (Utah App. 1998)

Of course, if the State loses this appeal and chose to re-try Ford, he would be entitled to counsel under the IDA if he is indigent.

DELIVERY CERTIFICATE

I certify that, on March 25, 2008, two true and correct copies of the foregoing APPELLEE'S SUPPLEMENTAL BRIEF were hand-delivered to Ford's counsel, Mr. Troy Booher, Snell & Wilmer, L.L.P., 15 West, South Temple, Suite 1200, Salt Lake City, Utah 84101-1004.