

1986

Utah v. Douglas Carter : Amicus Curiae Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David L. Wilkinson; attorney general; Gary H. Weight, James P. Rupper; Aldrich, Nelson, Weight and Esplin.

Lionel H. Frankel, Kevin J. Kurumada; counsel for american civil liberties union.

Recommended Citation

Brief of Amicus Curiae, *Utah v. Carter*, No. 860063.00 (Utah Supreme Court, 1986).
https://digitalcommons.law.byu.edu/byu_sc1/788

This Brief of Amicus Curiae is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
45.9
.S9
DOCKET NO.

UTAH SUPREME COURT

BRIEF

860063

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	Criminal No. 9707
	:	Supreme Court No. 860063
vs.	:	
	:	
DOUGLAS CARTER,	:	Argument Priority
	:	Classification No. 1
Defendant-Appellant.	:	

AMICUS CURIAE BRIEF

Appeal from the Fourth Judicial District
Court of Utah County, State of Utah

The Honorable Cullen Y. Christensen, District Judge

LIONEL H. FRANKEL
KEVIN J. KURUMADA
Counsel for
The American Civil Liberties
Union
3981 Mt. Olympus Way
Salt Lake City, UT 84124

GARY H. WEIGHT
JAMES P. RUPPER
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, UT 84603

DAVID L. WILKINSON
UTAH ATTORNEY GENERAL
236 State Capitol
Salt Lake City, UT 84114

FILED
NOV 1 6 1987

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
	:	Criminal No. 9707
Plaintiff-Respondent,	:	Supreme Court No. 860063
	:	
vs.	:	
	:	Argument Priority
DOUGLAS CARTER,	:	Classification No. 1
	:	
Defendant-Appellant.	:	

AMICUS CURIAE BRIEF

Appeal from the Fourth Judicial District
Court of Utah County, State of Utah

The Honorable Cullen Y. Christensen, District Judge

LIONEL H. FRANKEL
KEVIN J. KURUMADA
Counsel for
The American Civil Liberties
Union
3981 Mt. Olympus Way
Salt Lake City, UT 84124

GARY H. WEIGHT
JAMES P. RUPPER
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, UT 84603

DAVID L. WILKINSON
UTAH ATTORNEY GENERAL
236 State Capitol
Salt Lake City, UT 84114

TABLE OF CONTENTS

	<u>Page</u>
THE INTEREST OF THE AMICUS CURIAE	1
STATEMENT	1
STATEMENT OF ADDITIONAL ISSUES PRESENTED FOR REVIEW . . .	2
FACTS	3
SUMMARY OF THE ARGUMENT	9
ARGUMENT	
I. IT IS WELL ESTABLISHED THAT IN A CAPITAL CASE, THE COURT WILL REVIEW MANIFEST ERRORS EVEN THOUGH NO OBJECTION WAS RAISED BELOW AND EVEN IF NOT RAISED BY COUNSEL ON APPEAL	10
II. THE FAILURE OF THE TRIAL JUDGE TO INSTRUCT THE JURY ON THE STATUTORY MEANING OF "ESPECIALLY HEINOUS, ATROCIOUS, CRUEL, OR EXCEPTIONALLY DEPRAVED", AS THAT LANGUAGE IS QUALIFIED IN THE UTAH STATUTE WAS MANIFEST ERROR AND VIOLATED DEFENDANT'S RIGHTS UNDER UTAH LAW AND THE CONSTITUTION OF THE UNITED STATES	13
III. THE INSTRUCTIONAL ERROR ON THE AGGRAVATING CIRCUMSTANCE, "ESPECIALLY HEINOUS, ATROCIOUS, ETC.", WAS MAGNIFIED BY IMPROPER AND MISLEADING ARGUMENT TO THE JURY BY THE PROSECUTOR	24
IV. ON REMAND, THE TRIAL COURT SHOULD INSTRUCT THE JURY THAT A HOMICIDE DOES NOT QUALIFY AS ESPECIALLY HEINOUS, ATROCIOUS, ETC., UNDER U.C.A. 76-5-202(1)(q), UNLESS THE JURY FINDS THAT THE DEFENDANT (1) INTENTIONALLY TORTURED THE VICTIM OR (2) INTENTIONALLY OR KNOWINGLY INFLICTED SERIOUS PHYSICAL ABUSE OR SERIOUS BODILY INJURY IN ADDITION TO AND BEFORE CAUSING THE VICTIM'S DEATH OR (3) THAT THE MANNER BY WHICH THE VICTIM WAS KILLED CAUSED PROLONGED SUFFERING AND WAS INTENDED BY THE PERPETRATOR TO CAUSE OR WAS KNOWN TO BE LIKELY TO CAUSE PROLONGED SUFFERING BY THE VICTIM BEFORE DEATH.	27
V. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF COUNSEL'S FAILURE TO MAKE MOTIONS FOR DISCOVERY AND COUNSEL'S FAILURE TO TAKE ADVANTAGE OF THE PROSECUTOR'S OPEN FILE POLICY, AS WELL AS THE DEFENSE COUNSEL'S FAILURE TO FULLY INVESTIGATE THE CIRCUMSTANCES OF DEFENDANT'S CONFESSION, RELEVANT POSSIBLE MITIGATING EVIDENCE, AND APPLICABLE UTAH CASE LAW AND STATUTES WHICH HAD AN OBVIOUS BEARING ON THE DEFENSE OF THIS CASE	32

VI. THOUGH OTHER ERRORS REQUIRE REVERSAL OF THE DEATH PENALTY AND REMAND FOR FURTHER PROCEEDINGS, THE COURT SHOULD TAKE THE OCCASION OF THIS CASE TO PROVIDE ADDITIONAL INSTRUCTIONS TO BE GIVEN IN THE PENALTY PHASE OF A CAPITAL CASE TRIED TO A JURY	38
VII. ALTHOUGH THE RECORD IS INSUFFICIENT TO PROVIDE AN ADEQUATE BASIS FOR PROPORTIONALITY REVIEW, IT APPEARS THAT THE DEFENDANT IN THIS CASE DOES NOT DESERVE DEATH WHEN COMPARED WITH OTHER UTAH MURDER CASES	41
CONCLUSION	42

CASES CITED

<u>Barclay v. Fla.</u> , 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).	18,21,22,23,24
<u>Brewer v. Williams</u> , 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).	12,36
<u>Cartwright v. Maynard</u> , 822 F.2d 1477 (10th Cir. 1987)	20,21
<u>Codianna v. Morris</u> , 660 P.2d 1101 (Utah 1983)	32
<u>Collins v. Lockhart</u> , 754 F.2d 258 (8th Cir. 1985, cert. den., 474 U.S. 1013	20,21
<u>Ford v. State</u> , 374 So.2d 496 (Fla. 1979)	17
<u>Godfrey v. Georgia</u> , 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)	13,14,22,27,28,31
<u>Henderson v. State</u> , 281 Ark. 406, 664 S.W.2d 451 (1984)	18
<u>Hopkinson v. State</u> , 632 P.2d 79 (Wyo. 1981)	17,18
<u>Jackson v. State</u> , 451 So.2d 458 (Fla. 1984)	30
<u>Jones v. Commonwealth</u> , 228 Va. 427, 323 S.E.2d 554 (1984)	30

<u>Kimmelman v. Washington,</u> — U.S. —, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986). .	33
<u>Maine v. Moulton,</u> 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). .	12
<u>Massiah v. United States,</u> 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). .	12,36
<u>People v. Davenport,</u> 41 Cal. 3rd 247, 710 P.2d 861 (1985) 221 Cal. Rptr. 794	31
<u>State v. Cooper,</u> 718 S.W.2d 256 (Tenn. 1986)	30
<u>State v. Cornell,</u> 304 Ore. 27, 741 P.2d 501 (1987)	30
<u>State v. Frame,</u> 723 P.2d 401 (Utah 1986)	33
<u>State v. Johnson,</u> 740 P.2d 1264 (Utah 1987)	15
<u>State v. Irwin,</u> 304 N.C. 93, 282 S.E.2d 439 (1981)	17
<u>State v. Lairby,</u> 699 P.2d 1187 (Utah 1984)	33
<u>State v. Osborn,</u> 102 Idaho 405, 631 P.2d 187 (1981)	30
<u>State v. Norton,</u> 675 P.2d 577 (Utah 1983)	11
<u>State v. Palmer,</u> 224 Neb. 282, 399 N.W.2d 706 (1986)	29
<u>State v. Preston,</u> 673 S.W.2d 1 (Mo. 1984)	30
<u>State v. Pierre,</u> 572 P.2d 1338 (Utah 1977)	38
<u>State v. Ramseur,</u> 106 N.J. 123, 524 A.2d 188 (1987)	28,29
<u>State v. Shaffer,</u> 725 P.2d 1301 (Utah 1986)	15,38
<u>State v. Stenback,</u> 78 Utah 350, 2 P.2d 1050 (1931)	11

<u>State v. Wallace,</u> 151 Ariz. 362, 728 P.2d 232 (1986)	17,29
<u>State v. Williams,</u> 690 S.W.2d 517 (Tenn. 1985)	17,30
<u>State v. Williams,</u> 383 So.2d 369 (La. 1980)	18
<u>State v. Wood,</u> 648 P.2d 71 (Utah 1982)	11,13,14,15,20,22 27,31,37,38
<u>Stephens v. State,</u> 237 Ga. 259, 227 S.E.2d 261 (1976)	17,19
<u>Stouffer v. State,</u> 742 P.2d 562 (Okla. Ct. Crim. App. 1987)	18
<u>Strickland v. Washington,</u> 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .	33
<u>Williams v. Maggio,</u> 679 F.2d 381 (5th Cir. 1982)	18
<u>Zant v. Stephens,</u> 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) .	18,19,20,22,23

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 6 to United States Constitution: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of counsel for his defense.

Amendment 8 to United States Constitution: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 14, Section 1, to United States Constitution: 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.

Section 76-3-206, U.C.A.: Death or life imprisonment.

(1) A person who has been convicted of a capital felony shall be sentenced in accordance with section 76-3-207, and sentence shall be death or life imprisonment as the court or jury, in accordance with this section, shall determine.

(2) The judgment of conviction and sentence of death shall be subject to automatic review by the Utah State Supreme Court within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Utah State Supreme Court for good cause shown. Such review by the Utah State Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Utah State Supreme Court.

Section 76-3-207, U.C.A.: Capital felony-Sentencing proceeding.

(1) When a defendant has pled guilty to or been found guilty of a capital felony, there shall be further proceedings before the court or jury on the issue of sentence. In the case of a plea of guilty to a capital felony, the sentencing proceedings shall be conducted by the court which accepted the plea or by a jury upon request of the defendant. When a defendant has been found guilty of a capital felony, the proceedings shall be conducted before the court or jury which found the defendant guilty, provided the defendant may waive hearing before the jury, in which event the hearing shall be before the court. If, however, circumstances make it impossible or impractical to reconvene the same jury for the sentencing proceedings the court may dismiss that jury and convene a new jury for such proceedings. If a retrial of the sentencing proceedings is necessary as a consequence of a remand from an appellate court, the sentencing authority shall be determined as provided in subsection (4) below.

(2) In these sentencing proceedings, evidence may be presented as to any matter the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court deems to have probative force may be received

regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and the defendant shall be permitted to present argument for or against sentence of death. Aggravating circumstances shall include those as outlined in 76-5-202. Mitigating circumstances shall include the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The defendant acted under extreme duress or under the substantial domination of another person;

(d) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental disease, intoxication, or influence of drugs;

(e) The youth of the defendant at the time of the crime;

(f) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(g) Any other fact in mitigation of the penalty.

(3) The court or jury, as the case may be, shall retire to consider the penalty. In all proceedings before a jury, under this section, it shall be instructed as to the punishment to be imposed upon a unanimous verdict for death and that to be imposed if a unanimous verdict for death is not found. If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death, the court shall discharge the jury and impose the sentence of life imprisonment.

(4) Upon any appeal by the defendant where the sentence is of death, the appellate court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court for new sentencing proceedings to the extent necessary to correct the error or errors. No error in the sentencing proceeding shall result in the reversal of the conviction of a capital felony. In cases of remand for new sentencing proceedings, all exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing proceedings shall be admissible in the new sentencing proceedings, and:

(a) If the sentencing proceeding was before a jury a new jury shall be impaneled for the new sentencing proceeding;

Section 76-5-202, U.C.A.: Murder in the first degree.

(1) Criminal homicide constitutes murder in the first degree if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

...

(q) The homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.

(2) Murder in the first degree is a capital offense.

STATUTES CITED

§ 76-3-207, U.C.A.

§ 76-5-202(1)(q), U.C.A.

§ 76-5-202(2), U.C.A.

New Jersey Statutes Annotated § 2C:11-3(c)

Oregon Revised Statutes (1983 Rep. Part) § 163.095(1)(e)

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
	:	Criminal No. 9707
Plaintiff-Respondent,	:	Supreme Court No. 860063
	:	
vs.	:	
	:	Argument Priority
DOUGLAS CARTER,	:	Classification No. 1
	:	
Defendant-Appellant.	:	

THE INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union is an association dedicated to the preservation of constitutional rights and liberties. We believe that the rights of all citizens are threatened when the rights of any citizen are denied. We believe that there is no greater challenge to the liberty and security of free citizens than occurs when a death penalty is imposed in violation of State law and the Constitution of the United States. We urge the Court that this is such a case.

STATEMENT

Amicus concurs in the statement of the case contained in page 1-2 of the Brief of Plaintiff-Respondent.

Amicus will not address several points raised in the briefs of Defendant-Appellant. Our failure to address those points is in no way intended to disparage such contentions or indicate our views on their merits. We believe that our role as Amicus is best fulfilled by addressing additional issues rather than reiterating points covered by Appellant's briefs.

STATEMENT OF ADDITIONAL ISSUES PRESENTED FOR REVIEW

1. Did the trial court violate defendant's rights under Utah law and the Constitution of the United States by failing to instruct the jury in accordance with the Utah Statute qualifying and limiting the meaning of "especially heinous, atrocious, cruel, or exceptionally depraved."

2. Does the instructional error require reversal and remand of the case for a new penalty hearing.

3. Was the argument of the prosecutor on the meaning of especially heinous, atrocious, cruel, etc. erroneous and did it aggravate the error resulting from the court's erroneous instructions.

4. What construction should be given to 76-5-202(1)(q) so as to be consistent with constitutional standards and the fair import of the statutory language.

5. Was defendant denied the effective assistance of counsel.

6. Should this Court mandate additional instructions to the jury so as to minimize the risk of a misguided verdict of death.

7. Is there sufficient basis in the record for the court to make a determination on appeal of the proportionality and appropriateness of the death penalty and, if so, is the death penalty disproportionate in this case.

FACTS

On February 27, 1985, Mrs. Eva Oleson was killed in her home, apparently by an intruder. Her hands had been tied behind her back, (R.1119) and she was stabbed ten times with a knife and shot once in the back of the head. (R.1278) The killing of Mrs. Oleson received news media attention in Utah County. (R.375-378) Some of the publicity focused on the fact that Mrs. Oleson was the wife of the Provo Police Chief's uncle. (R.367,376) Subsequently, Appellant Douglas Carter was charged with the crime. In December, 1985 he was tried and convicted of first degree murder and sentenced to death.

The jury found the defendant guilty on two alternative aggravating circumstances: that the killing occurred while the defendant was engaged in the commission or attempt to commit aggravated burglary; and that the killing was especially heinous, atrocious, cruel, or exceptionally depraved. (R.185-186)

In instructing the jury on the elements of murder in the first degree, the trial judge failed to inform the jury of the meaning of the term "especially heinous, atrocious, cruel or exceptionally depraved". (R.138) Though U.C.A. 76-5-202, defining first degree murder, specifically qualifies the term especially heinous, atrocious, etc., in subsection (1)(q), by adding "any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim

before death", the jury was never informed of that qualifying language or of the limited meaning of the statutory term. The qualifying language was also omitted from a jury verdict form that the jury was given to take with them into the jury room for deliberations. (R.185-186)

Defense counsel did not object or take exception to the court's instructions on the guilt phase of the trial.

During the penalty phase, the trial court instructed the jury they could consider the aggravating circumstances found by them in the guilt phase, any of the statutory mitigating circumstances, and any other aggravating and mitigating circumstances in determining the appropriate penalty. (R.181-182) Again, they were not informed of the statutory qualification of the term "especially heinous, atrocious, cruel, or exceptionally depraved".

Defense counsel did not object or take exception to the court's instructions in the penalty phase.

During closing argument in both the guilt phase and the penalty phase, the prosecutor repeatedly asserted that the killing was especially heinous, atrocious, and cruel on grounds essentially broader than and sometimes inconsistent with the statutory limiting language. (R.1345, 1350-51, 1437, 1439)

The defense counsel did not object to prosecutor's arguments and never himself argued, or indeed, raised the limited meaning of the especially heinous atrocious, cruel, standard under the Utah statute.

The conclusion seems inescapable that defense counsel was unaware of the existence of the statutory language qualifying and limiting the basis on which his client could be tried and convicted of first degree murder and sentenced to death.

The autopsy report stated that there were eight deep stab wounds close together in the victim's back. (State. Ex.10) Seven of the stab wounds pierced the victims lungs and one pierced her heart. (R.1280) At trial, the medical examiner testified that, "either the stab wounds or the gunshot wound to the head would have been fatal", (R.1281) but the victim was still alive when shot. (R.1282) The only evidence that there was any time interval between the stab wounds and the shooting was in defendant's confession (State EX.3) taken by Lt. Pierpont, the Provo City Police officer who took the statement from defendant the day after his arrest. The only evidence that the victim was conscious after the stab wounds was the statement in the confession that she moaned after being stabbed the first time and again before she was shot. (Id. and R.1187)

Defendant's confession was obtained following approximately ten hours of interrogation over a period of thirty-six hours of detention following his arrest. (R.255-257, 277-278) He was arrested by police in Nashville, Tennessee following an anonymous tip to the Nashville police that a man wanted for murder in Utah was staying at the apartment of a woman in Nashville. (R.263) After his arrest, Utah authorities were notified and Lt. Pierpont and another officer flew to Tennessee, arriving on the morning

following the day of his arrest. (R.289) Questioning by Nashville police continued for some four to five hours following the arrival of the Provo officers. (R.287) Lt. Pierpont then talked to defendant for half an hour, (R.293) following which Lt. Pierpont dictated the confession into a dictaphone machine. (R.305-6) The dictated statement was typed by a Nashville police stenographer and was then given to defendant who read it and signed it. (R.306-7)

Lt. Pierpont testified at a hearing to suppress the confession that the wording of the confession was his; (R.306-7) that he dictated the statement based on what defendant had told him. Lt. Pierpont explained that he dictated a portion then asked defendant if that was correct then dictated another portion and asked if that was correct. (R.307) Lt. Pierpont said that defendant at no time disagreed with or challenged the dictation and made no changes. The statement was signed without change. (R.306)

Defendant was thirty years old at the time of trial. He is a Black man with an I.Q. of 75 (R. 1437) who dropped out of high school in the eleventh grade. (R.1417) At the suppression hearing, he testified that he made the confession because of fear that the woman at whose house he was arrested would be prosecuted and would lose her children unless he cooperated and promises that she would be released if he cooperated. (R.316, 318-320) The police officers from Nashville and Provo who questioned defendant denied that they made any threats or promises to induce

a confession. (R.287, 305) Forms signed by defendant indicate he was several times given Miranda warnings (State Exs.1 and 2) and there is no indication on the record that he ever indicated a desire to have counsel present. Defendant also apparently signed forms waiving extradition. (R.340) No evidence was presented at the suppression hearing on whether defendant had been formally charged with the crime at the time of his arrest and interrogation and no issue was raised about denial of the assistance of counsel. After hearing the testimony of the officers and the defendant the court ruled that the confession was voluntary. (R.60)

Defendant was represented at preliminary examination and at trial by a lawyer from Chicago, Illinois who was retained by defendant's family. Since the defense lawyer was not a member of the Utah bar, the Circuit Court designated the public defender for Utah County "to work in conjunction with defendant's other attorney unless other arrangements are made." (R.4) Subsequently, at arraignment, the District Court granted Mr Weight's motion to allow Chicago defense counsel "to appear in the Court in this matter". (R.30) (The Provo, Utah law firm, which by contract serves as public defender in Utah County, and was associate counsel at trial, now represents defendant before this Court on his appeal.)

Prior to trial, the defense attorney moved for a change of venue on grounds of excessive publicity and prejudice against defendant. (R.66) Defense counsel called several witnesses but

offered no public opinion survey evidence and no witnesses who testified that in their opinion there was extensive prejudice against defendant. The motion for change of venue was denied. (R.90-1) Defense counsel also moved to suppress the confession and gave notice of an intention to raise the defense of insanity but subsequently withdrew that defense, after reports from two court appointed "alienists" were obtained. (R 64,416)

In response to defense counsel's claim of "honest surprise" about certain evidence being offered by the prosecution, the prosecutor stated for the record that defense attorney made no motion to obtain discovery from the prosecution of any relevant matters. (R.1301-2) The defense attorney did not even take advantage of the prosecutor's offer, made several times, that the defense attorney could examine the prosecutor's file in the case. (R.1303) At the trial, defense attorney called no witnesses in the guilt phase of the trial. (R.1339) No witnesses were called by defense in the penalty phase either, (R.1411,1429) but the defense did offer the reports of the two "alienists" who had examined the defendant before trial in connection with the subsequently withdrawn insanity defense. (R.1409) These reports were read to the jury. (R.1411-1429) Just before sentencing defense counsel argued, on a motion in arrest of judgment, "that it was his understanding" that the standard on the penalty phase "should have been whether the reasonable mind or reasonable minds could extract more aggravating circumstances than mitigating circumstances." (R.424)

SUMMARY OF ARGUMENT

This Court will review manifest and prejudicial errors in a capital case even though they were not raised below and are not presented by appellant on appeal.

The trial court instructed the jury in both the guilt phase and the penalty phase to consider whether the homicide was especially heinous, atrocious, cruel or exceptionally depraved, but did not instruct them on the limited and qualified meaning of that phrase under the Utah statute. By failing to instruct the jury about the qualified meaning of the phrase, the court failed to provide meaningful guidance to channel and limit the jury's discretion as required by Utah law and the United States Constitution. This error was clearly prejudicial and requires that the case be remanded for a new penalty hearing.

The instructional error was magnified by argument of the prosecutor asserting that the killing was especially heinous atrocious and cruel for reasons inconsistent with the meaning of that term under the Utah statute.

This Court should provide guidance on remand as to the meaning of the statute and should interpret it to reach only killings which are accompanied by an intention to torture or killings in which there is also an intentional or knowing infliction of serious physical abuse or serious bodily injury in addition to the acts done causing death.

The defendant was denied the effective assistance of counsel because counsel failed to exercise the diligence of a reasonably competent professional in failing to familiarize himself with Utah law, in failing to resort to available discovery, and in failing to raise the limited meaning of an especially heinous, atrocious, or cruel homicide under Utah law. Because of counsel's failure, the question of whether the death penalty was appropriate in this case was never properly presented to the jury and cannot properly be evaluated by this Court on appeal.

This court should take the occasion to clarify the instructions to be given the jury by mandating instructions which make clear that the law regards life imprisonment as no less an appropriate penalty than is death in a capital case.

Though, because of the ineffective assistance of counsel, the record is inadequate for full appraisal on appeal of the proportional appropriateness of the death penalty in this case, it seems that the death penalty is disproportionately severe when this case is compared with other first degree murder cases.

I

IT IS WELL ESTABLISHED THAT IN A CAPITAL CASE, THE COURT WILL REVIEW MANIFEST ERRORS EVEN THOUGH NO OBJECTION WAS RAISED BELOW AND EVEN IF NOT RAISED BY COUNSEL ON APPEAL.

In this brief, we raise and argue a number of points which have not been presented in appellant's briefs and were not raised

by objections at trial. But all of the errors which we address herein are "manifest and prejudicial", in and of themselves and in their cumulative effect. This Court has repeatedly ruled that on direct appeal in a capital case, it will review the record for such errors even though no proper objection was made at trial. State v. Norton, 675 P.2d 577, 581 (Utah 1983), State v. Wood, 648 P.2d 71, 77 (Utah 1982), State v. Stenback, 78 Utah 350, 2 P.2d 1050 (1931). As the Court noted in Stenback, "this court, in a capital case such as this, may and should sua sponte consider manifest and prejudicial errors which are neither assigned nor argued." 78 Utah at 365, 2 P.2d, at 1056.

Amicus will not address several points raised in appellant's briefs. Our failure to address those points is in no way intended to disparage such contentions or to indicate our view on their merits.

An issue which is not manifest on this record and is therefor not addressed in this brief is the possible denial of defendant's Sixth Amendment right to counsel when interrogated at the Nashville police station over a thirty-six hour period following his arrest. Defendant signed a confession and waived extradition to Utah without the advice of counsel. It appears from the record that defendant was more than a mere suspect and may already have been formally charged with the crime. (The information in this case was dated as subscribed and sworn to by Lt. Pierpont as complainant on April 12, 1985 in Provo Utah.) (R.27) But Lt. Pierpont's testimony establishes that he flew all

night to arrive in Nashville on the morning of April 12, 1985, and took defendant's confession at approximately 3:00 P.M. that day in Nashville, Tennessee. If defendant had been formally charged with the murder, Sixth Amendment rights under Massiah v. United States, 377 U.S. 201 (1964); Brewer v. Williams, 430 U.S. 387 (1977); and Maine v. Moulton, 474 U.S. 159 (1985), would apply. At least arguably as well, the result should be the same if the charges were ready to be filed but were simply being held in abeyance for some reason. As the Court noted in Maine v. Moulton, the police had "an affirmative duty not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." 474 U.S. at 171. The Massiah, Brewer, Moulton line of cases suggest that mere compliance with Miranda warning requirements may not be sufficient to protect the Sixth Amendment right to counsel, after a defendant has been formally charged with the crime he is being questioned about.

This brief discusses the ineffectiveness of defense counsel insofar as such ineffectiveness is manifest on the record. It must be noted however, that a more extensive showing on this issue would be possible by the development of non-record evidence in a habeas corpus proceeding. The raising of the manifest incompetence issue by amicus at this point ought not to preclude collateral proceedings if, for some reason, this Court were to find in favor of the State on direct appeal.

II

THE FAILURE OF THE TRIAL JUDGE TO INSTRUCT THE JURY ON THE STATUTORY MEANING OF "ESPECIALLY HEINOUS, ATROCIOUS, CRUEL, OR EXCEPTIONALLY DEPRAVED", AS THAT LANGUAGE IS QUALIFIED IN THE UTAH STATUTE WAS MANIFEST ERROR AND VIOLATED DEFENDANT'S RIGHTS UNDER UTAH LAW AND THE CONSTITUTION OF THE UNITED STATES.

In State v. Wood, 648 P.2d 71 (Utah 1982), this Court ruled that it was error for the sentencing judge to consider the ruthlessness and brutality of the murder as an aggravating factor. The sentencing judge had considered such factor under the general provision in U.C.A. 76-3-207 authorizing the trier of fact to consider "any other facts in aggravation or mitigation of the penalty". Despite that statutory language, the Court ruled that consideration of so indefinite and uncertain a standard as ruthlessness and brutality was "improper". The Court noted that in Godfrey v. Georgia, 446 U.S. 420 (1980), the United States Supreme Court held that a Georgia aggravating factor, that the killing was "outrageously or wantonly vile, horrible and inhuman", had to be narrowed to meet constitutional standards because, it was so broad as to describe all murders, thereby allowing "the jury unlimited discretion in imposing the death penalty". 648 P.2d 71, at 86. This Court then concluded that the sentencing process in the Wood case "was flawed because the

aggravating factor relied on was constitutionally impermissible ... since it describes all murders and therefore fails to provide any guideline for channeling discretion."

Less than a year after the Court's decision in State v. Wood, the Utah legislature amended the first degree murder provision of the Utah Code, U.C.A. 76-5-202, to add a number of additional statutory aggravating factors. One such aggravating factor, U.C.A. 76-5-202(1)(q) was carefully qualified and limited to avoid the constitutional infirmity found by this Court in the Wood case and by the Supreme Court of the United States in the Godfrey case. U.C.A. 76-5-202(1)(q) provides:

The homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.

Despite the clear qualification and limitation of the statute, the jury in this case was instructed on several occasions in the course of the trial that they should convict the defendant of first degree murder if they found that the homicide was "especially heinous, atrocious, cruel, or exceptionally depraved." The special verdict form, taken by the jury into the jury room and used by them in reporting their verdict, used this same wording. In the penalty phase, they were instructed to weigh the aggravating factors found in the guilt phase in determining the penalty. The jury was never instructed in either the guilt phase or the penalty phase, that Utah law required that the heinousness, atrociousness, cruelty, or exceptional depravity

"must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death".

Absent instruction on the meaning of especially heinous, atrocious, cruel, etc., the jury was free to speculate on the meaning of those words and to exercise an untrammelled and unguided discretion.

The failure to instruct the jury in accordance with the required limitation of the Utah statute was manifest error and violated defendant's rights under the statute, prior Utah case law, the Utah Constitution, and the Constitution of the United States.

The error may be harmless so far as the guilt phase of the trial is concerned, since the jury also found the homicide was committed while in the course of an aggravated burglary. State v. Johnson, 740 P.2d 1264 (Utah 1987); State v. Shaffer, 725 P.2d 1301 (Utah 1986). But unlike the Johnson and Shaffer cases which resulted in sentences of life imprisonment imposed by the judge, the aggravating circumstances were here presented to the jury as a basis for imposing the death penalty. The erroneous instructions were clearly prejudicial in the penalty phase since the jury was expressly told to weigh the aggravating factors found in the guilt phase in determining the penalty. Despite this Court's decision in State v. Wood, and the clear language of the Utah statute, the jury in this case was given no guideline to follow on the meaning of especially heinous, atrocious, etc, when weighing that factor in determining the penalty. Indeed, the

question of the applicability of subsection (q) in this case has never been passed upon by anyone to date.

It may be conceded that evidence in the case might warrant a jury in finding "serious bodily injury before death", but the point was neither argued nor addressed at trial and the jury never so found. Indeed, the only evidence that there was any appreciable time between the stab wounds and the shooting of the victim appears in the confession, dictated by an interrogating officer to a stenographer in defendant's presence on the second day of an in custody interrogation without counsel. The confession was signed by defendant but can hardly be regarded as a completely accurate and reliable account of the details of the homicide, even if one accepts its "voluntariness". The State Medical Examiner testified that the stab wounds pierced the heart and would have been fatal but the victim was still alive when shot. (R.1281) This testimony raises a question about how much time could have passed between the stab wounds and the shooting. If there was only a brief interval, that fact would make this case a very doubtful one for finding aggravating circumstance (q). Yet this issue was not pursued at trial, defense counsel asked no questions of the Medical Examiner at trial, and apparently, neither the jury, the judge, the prosecutor, nor the defense counsel considered the significance of such facts to the question of whether the homicide was especially heinous, atrocious, or cruel.

It certainly would not be appropriate for this Court to make

a factual finding that a jury would necessarily have found subsection (q) applied if they had been properly instructed. The weighing of aggravating and mitigating factors involves more than just finding that they are present or that they are absent. What is called for is a qualitative evaluation of the factors and the jury might well have weighed the subsection (q) factor differently if they had been properly instructed about what the legal standard was. This Court must not undertake to do the jury's weighing for it by speculating upon what a properly instructed jury would have decided. The death penalty is too serious and final a penalty to be imposed by speculation about what someone else's judgment would have been.

The Supreme Courts of several states have reversed death sentences and remanded for new penalty proceedings following findings that one of several aggravating factors considered by a jury was invalid or unconstitutional; see Hopkinson v. State, 632 P.2d 79 (Wyo. 1981); State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981); State v. Williams, 690 S.W.2d 517 (Tenn. 1985). See also State v. Wallace, 151 Ariz.362, 728 P.2d 232, 239 (1986), in which the court returned a case for resentencing because one of two aggravating factors found by the trial judge was not supported by the evidence.

There are cases from other states in which courts have upheld a death penalty despite a finding that the jury considered invalid or unconstitutional aggravating factors; Stephens v. State 237 Ga. 259, 227 S.E.2d 261 (1976); Ford v. State, 374

So.2d 496 (Fla. 1979); State v. Williams, 383 So.2d 369 (La. 1980); Henderson v. State, 281 Ark. 406, 664 S.W.2d 451 (1984); Stouffer v. State, 742 P.2d 562 (Okla. Ct. Cr. App. 1987); see also Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982). We urge that this latter group of cases are distinguishable, or wrong, or in some cases both wrong and distinguishable. This Court should, instead, follow the approach taken by the Supreme Court of Wyoming which concluded in Hopkinson v. State, 632 P.2d at 172:

When we do not know whether the result of the weighing process would have been different had the impermissible aggravating factor not been present and when a man's life is at stake, we must return the case to the trial court for a new sentencing trial.

The cases which reject the Hopkinson approach, do so on one of two theories: either a finding that consideration of the invalid aggravating factor was harmless error, or a conclusion that the appellate court itself has the power to assess the penalty and, making the assessment, that death is appropriate. Neither theory ought to apply in the present case under Utah law. We shall further address the harmfulness of the error, *infra*. As to the role of this Court, we urge that U.C.A. 76-3-207(4) provides the appropriate procedure where this Court finds prejudicial error; remand to the trial court for new sentencing proceedings.

The United States Supreme Court has upheld the constitutionality of the Georgia rule, Zant v. Stephens, 462 U.S. 862 (1983); and of the Florida rule, Barclay v. Florida, 463 U.S. 939 (1983); allowing affirmance of a death penalty despite the

invalidity of one of the aggravating circumstances considered by the jury. Neither of these decisions warrants this Court in adopting a similar rule as a matter of Utah law.

In Zant v. Stephens, supra, the defendant was sentenced to death by the Georgia jury which had found two statutory aggravating factors. While the case was on appeal, one of the aggravating factors found by the jury was, in another case, held to be unconstitutionally vague by the Georgia Supreme Court. The Georgia Court of Appeals nevertheless affirmed the death penalty in the Stephens case because it found the two remaining aggravating circumstances adequately supported the sentence. This position was upheld by the Georgia Supreme Court. Subsequently, Stephens challenged the death penalty by federal habeas corpus. He was successful before the Fifth Circuit but that court's decision was reversed by the Supreme Court. In reversing, the Supreme Court emphasized the Georgia Supreme Court's interpretation of the role of the Georgia jury in a death penalty case. In Georgia, once a statutory aggravating factor is found the jury has full discretion in determining the penalty in light of all relevant factors and is not required to weigh the statutory aggravating and mitigating factors in reaching its decision. The Supreme Court stated it was not expressing any opinion about cases where the jury was required by state law to weigh the statutory aggravating and mitigating factors in reaching a decision on the penalty; 462 U.S. at 890.

Unlike the Stephens case, a Utah jury is required to do more

than merely find an aggravating circumstance before it may choose to impose the death penalty. Utah juries must also weigh the aggravating and mitigating factors and determine that the death penalty is the appropriate penalty beyond a reasonable doubt. State v. Wood, supra, 648 P.2d at 71. In Cartwright v. Maynard, 822 F.2d 1477, (10th Cir. 1987), the court struck down an Oklahoma death sentence because one of the aggravating factors considered by the jury in weighing the penalty was the unconstitutionally vague standard that the killing was "especially heinous, atrocious, or cruel." The court ruled that Zant v. Stephens didn't apply because the jury in Oklahoma weighs the aggravating and mitigating factors in determining the penalty. The court said:

A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments.

822 F.2d at 1483. A similar approach was taken in Collins v. Lockhart, 754 F.2d 258, (8th Cir. 1985), cert. den. 474 U.S. 1013, in which the court struck down as unconstitutional, a statutory aggravating circumstance which duplicated a provision which was part of the definition of first degree murder. The court then noted that there were other statutory aggravating factors validly found by the jury. Despite this latter fact, the court concluded that the death penalty was unconstitutionally imposed because in Arkansas the jury is charged with the responsibility of weighing the aggravating circumstances against the mitigating circumstances in determining whether or not the

death penalty should be imposed.

In Barclay v. Florida, 463 U.S. 939, the Court reviewed a death sentence imposed by the trial judge who had improperly considered defendant's prior criminal record as an aggravating factor though, under Florida law, such record should not have been considered. Six members of the Court found no constitutional flaw in the decision of the Florida Supreme Court upholding the death penalty though the trial judge had incorrectly considered as aggravating, a factor that he should not have considered. Justice Rehnquist for four members of the Court emphasized that the decision of the Florida Supreme Court involved the application of Florida's harmless error rule and that the Florida decision was "butressed" by its unique procedural context under Florida law. The trial judge's decision was one overriding a jury recommendation of life imprisonment and such an overriding decision will only be upheld by the Florida Supreme Court if that court finds that "virtually no reasonable person could differ" 463 U.S. at 958. The opinion of Justice Stevens, joined by Justice Powell, also emphasized the particular provisions of Florida law which provided safeguards to assure that the death penalty was not imposed in an arbitrary or unprincipled way.

In Cartwright v. Maynard, supra, and in Collins v. Lockhart, supra, the Tenth and Eighth Circuit Courts of Appeals concluded that Barclay v. Florida did not apply outside the narrow confines of a sentencing structure and procedure like that of Florida's.

This case, unlike the Barclay case, does not involve a sentence imposed by a judge who has provided written findings of fact explaining the reasons for his or her decision. And unlike the Barclay case the present case involves an unconstitutionally vague aggravating circumstance particularly susceptible to misconstruction and misinterpretation by a jury in the absence of limiting instructions; Godfrey v. Georgia, supra; State v. Wood, supra.

The Zant and Barclay cases conclude that, given the provisions of Georgia and Florida law there involved, Federal Constitutional standards were not violated in those cases. In each case the Court rejected the contention that the improper consideration of invalid aggravating factors rendered the decisions vulnerable to a charge that the penalty was imposed in an arbitrary or unprincipled way. But in the present case the vague and standardless language considered by the jury was invalid precisely because it invited the jury to consider whatever they interpreted the vague and standardless language to mean and then, following the trial judges instructions, weigh whatever the language meant to them in determining the appropriate penalty. They were not just allowed to consider whatever the vague language meant to them, they were expressly directed to weigh such and consider it, in determining the appropriate penalty. Indeed, they were bound to consider it, whatever it meant, in determining the penalty.

The Zant and Barclay cases are both distinguishable on another

ground. In each case, the improper aggravating factor was relatively minor, when compared with other statutory aggravating factors in the case. In Zant, the defendant had previously been convicted of a capital felony, and was an escaped convict at the time he committed the homicide for which he was sentenced to death. The fact that he committed the murder while in the course of a burglary and robbery and had many prior burglary and robbery convictions was admissible for the jury to consider, even though not itself a statutory aggravating circumstance. The aggravating circumstance improper to consider was that defendant was a "person who has a substantial history of serious assaultive criminal convictions". In Barclay, the killing was of an eighteen year old hitchhiker who was killed because of his race by defendant and codefendants who sought thereby to trigger a race war. Aggravating factors found by the trial judge were that Barclay had knowingly created a great risk of death to many persons, had committed the murder while engaged in kidnapping, had endeavored to disrupt governmental functions and law enforcement and that the homicide had been especially heinous, atrocious or cruel. The aggravating circumstance the Florida court invalidly considered was a previous felony conviction.

In the present case, the aggravating circumstance about which the jury was erroneously instructed was one of two found by the jury, and must have been given considerable weight by the jury.

Another major reason why neither Zant v. Stephens nor

Barclay v. Florida controls this case is that in those cases the Supreme Court, mindful of its limited role in reviewing state law under the Federal Constitution, essentially deferred to what it regarded as permissible interpretations of state law. Certainly, not everything the Supreme Court finds to be permissible should be accepted as desirable by state Supreme Courts interpreting their own state law and state constitutions. This Court, applying its responsibility to interpret State law and the State Constitution, should not treat the Supreme Court's restraint in those cases as warranting a decision to uphold a death penalty imposed by a Utah jury misinstructed about the applicable Utah statutory standard to be followed in determining whether death was the appropriate penalty.

III

THE INSTRUCTIONAL ERROR ON THE AGGRAVATING CIRCUMSTANCE, "ESPECIALLY HEINOUS, ATROCIOUS, ETC.", WAS MAGNIFIED BY IMPROPER AND MISLEADING ARGUMENT TO THE JURY BY THE PROSECUTOR.

The error in failing to instruct the jury on the limited and qualified meaning of the subsection (q) especially heinous, atrocious, etc., was aggravated by argument of the prosecutor emphasizing the heinous nature of the killing on grounds inconsistent with the statutory meaning of subsection (q). So that the argument can be fairly appraised in context, we quote it extensively. In the guilt phase the prosecutor argued as follows:

Did he kill her in an exceptionally heinous, atrocious and cruel manner. You think about it. I know you will. You'll put yourself in a house and think about your husband's down feeding the horse. Your young son has gone off with some friends to go bowling or otherwise enjoy the evening, you are alone, there's ring at the doorbell, you answer it, there's a man standing there, it's dark, 8:00 o'clock or thereabouts, a February night in the winter, in Provo and the phone rings. You go to answer it, you come back and the man is no longer standing outside the door, he's inside your home. He has uninvitedly stepped inside the dwelling place. And what does he do? He brandishes a firearm and says I want your money, and Mrs. Oleson gives him the money, and she runs for her life, she grabs the first weapon she can lay her hands on when she's passing through the kitchen, and then he takes her, and murders her. And if you want to think about heinous and atrocious and cruel, you just take time and sit in the jury room and think about him pulling the trigger of that gun three times. It doesn't fire. He fixes that. It doesn't fire again. He fixes that and then he shoots her right in the head at point blank range. And she was still alive after he stabbed her. Look at the length of the blade of that knife. Think about the medical examiner's testimony of thing being in there seven-and-a-half inches deep. As I look at it, he's punched that knife in there clear to the handle. Not once but eight times. Punctured her lung five times punctured her heart, broke three ribs, fractured the ribs with the force of the blow. And she survives that only to be murdered with the firearm. ...

(R.1351-1352). In the penalty phase the prosecutor similarly argued factors unrelated to the Utah statute's requirements as establishing that the homicide was especially heinous and cruel:

You take that scale of justice and you put on this side, Eva Oleson, you put "atrocious" you put "cruel" and you put the fact that an aggravated burglary was committed in her own home; and then you go to this side and you look for mitigating circumstances, you look for the five that I just talked about, the youth of the defendant, prior criminal history, mental disease and defect, intoxication. You search the evidence, search the record, search what's been put in this trial before you, and you ask yourselves; can that side of the scale of justice what sits in this side of the scale.(sic). You put the body of Eva Oleson in your mind with the stab marks in her back and the gunshot wound to her

head with such force and velocity that the gun powder itself blows into her brain. And you talk about heinous and cruel and atrocious, and you talk about the fact that that woman was still alive, still breathing and gasping for air in the most pain that anybody can endure in this life, you put her on that side of your scale of justice, ladies and gentlemen, and you ask yourself whether there is any mitigating circumstance or fact whatsoever in this world that can outweigh that beyond a reasonable doubt

(R.1437). Parenthetically, it must be noted that there was no evidence at trial that the victim was gasping for breath or was in severe pain. Also prejudicial was the prosecutor's argument expressing anger that the defense attorney had dared to argue that the homicide might not qualify as especially heinous and cruel:

His lawyer stood up here yesterday and talked about murder is murder is murder, and he actually tried to suggest to you that this is a murder, sure and its a bad thing but it doesn't raise itself to the level to the level of heinous, cruel and atrocious. That angers me, And, I submit to you it should anger you.

(R.1438). What had triggered the prosecutor's "anger" was an argument by defense counsel at the guilt phase that dared to suggest that the homicide might be a murder but still might not qualify as especially heinous and cruel. Unless instructed to the contrary, reasonable people might well feel anger at a defense counsel who argued that an intentional murder of a defenseless woman during a burglary was not heinous, atrocious, and cruel. But the reasonableness of such feelings aggravates rather than excuses the error since the Utah standard means something different and the jury in this case was never so informed. The argument of the prosecutor encouraged and invited

the jury to apply precisely the kind of unlimited discretion that this Court held to be constitutionally impermissible in State v. Wood and the United States Supreme Court held to be improper in Godfrey v. Georgia.

IV

ON REMAND, THE TRIAL COURT SHOULD INSTRUCT THE JURY THAT A HOMICIDE DOES NOT QUALIFY AS ESPECIALLY HEINOUS, ATROCIOUS, ETC., UNDER U.C.A. 76-5-202(1)(Q), UNLESS THE JURY FINDS THAT THE DEFENDANT (1) INTENTIONALLY TORTURED THE VICTIM OR (2) INTENTIONALLY OR KNOWINGLY INFLICTED SERIOUS PHYSICAL ABUSE OR SERIOUS BODILY INJURY IN ADDITION TO AND BEFORE CAUSING THE VICTIM'S DEATH OR THAT THE MANNER BY WHICH THE VICTIM WAS KILLED CAUSED PROLONGED SUFFERING AND WAS INTENDED BY THE PREPETRATOR TO CAUSE OR WAS KNOWN TO BE LIKELY TO CAUSE PROLONGED SUFFERING BY THE VICTIM BEFORE DEATH.

This case must be remanded for resentencing or retrial because of manifest errors. On remand, the trial court will be faced with the need to construe the meaning of U.C.A. sect.76-5-202(1)(q). There is need for this Court to provide additional guidance on the meaning of the subsection. In construing the statute the Court should be guided by three important considerations:

(1) The subsection was intended by the legislature to be constitutional; it was therefore intended to meet the

requirements of Godfrey v. Georgia and related cases;

(2) Therefor, the aggravating factor should be construed so that it serves to distinguish a category of intentional or knowing killings which may be deserving of the law's most severe punishment because such killings are exceptionally culpable, even when compared with intentional or knowing murders in general;

(3) Due consideration must be given to the language of the statute, its fair import, and the legislative choices reflected in the language.

The approach suggested is essentially that followed and by the Supreme Court of New Jersey in a recent landmark case; State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987). In that case the Court construed New Jersey's aggravating factor:

the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

N.J.S.A. 2C:11-3(c). In construing the factor to avoid unconstitutional vagueness and achieve the intended meaning of the legislature, the court ruled:

this aggravating factor exists if the murder involved torture, depravity of mind, or an aggravated battery to the victim. Torture or aggravated battery to the victim shall be found if the defendant intended to cause, and did in fact cause severe physical or psychological pain or suffering to the victim prior to the victim's death, "severity" measured either by the intensity of the pain, or the duration of the pain, or a combination of both.

524 A.2d, at 231. Of course this Court, construing Utah's Statute must recognize the differences as well as the similarities when comparing our statute with those of other states. For example, Utah requires physical torture so

psychological pain or suffering would not suffice. Accordingly, Amicus urges that the jury should be instructed that subsection (q) applies where the killer intentionally tortured the victim physically, or intentionally or knowingly inflicted serious physical abuse or serious bodily injury in addition to and before causing the victim's death wounds or injuries which caused death, or where the manner of killing was one which caused prolonged suffering and was intended by the perpetrator to cause or was known to be likely to cause prolonged suffering by the victim before death. It should not qualify for subsection (q) that the victim received one or more fatal wounds but did not die immediately. The jury should be further instructed that the mere fact that defendant inflicted several wounds with intent to kill her would not be enough in itself, to show that the killing was especially heinous, atrocious, cruel, etc., even if the first wounds inflicted did not immediately cause death.

The standard set forth above reflects the language of the Utah statute which requires that the homicide be especially heinous, atrocious, cruel, or exceptionally depraved; and also provides that any of the foregoing must be shown by physical torture, serious physical abuse, or serious bodily injury of the victim before death. The Utah provision is more limited than that of some other states with comparable language. State v. Ramseur, supra. Compare: State v. Wallace, 151 Ariz. 362, 728 P.2d 232, 237 (1986); State v. Palmer, 224 Neb. 282, 399 N.W.2d 706, 728-32 (1986); State v. Osborn, 102 Idaho 405, 631 P.2d 187,

212-214 (1981); State v. Cooper, 718 S.W.2d 256 (Tenn. 1986); Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984); State v. Preston, 673 S.W.2d 1, 11 (Mo. 1984). Jackson v. State, 451 So. 458 (Fla. 1984). Thus, a homicide proceeded by physical torture would clearly fit subsection (q), but a homicide would not qualify under the Utah provision merely because the defendant desecrated the body after the killing or killed without any reason for doing so. While such a homicide might be said to be especially heinous, atrocious, etc., it would not meet the statute's requirement that such be shown by "physical torture, serious physical abuse, or serious bodily injury of the victim before death". The Florida Supreme Court, interpreting Florida's comparable aggravating circumstance, has said that "actions after the death of the victim are irrelevant in determining this aggravating circumstance." Jackson v. State, supra, 451 So. 2d at 463. Compare State v. Williams, supra at 690 S.W.2d 528-530. The Florida Supreme Court also ruled in Jackson that Florida's aggravating circumstance requires evidence that the victim remained conscious at the time multiple injuries were inflicted.

In requiring physical torture as one of the subsection (q) alternatives, Utah's provision resembles that of Oregon which makes it an aggravating factor that the murder was committed "in the course of or as a result of intentional ... torture of the victim", ORS 163.095(1)(e); construed in State v. Cornell, 304 Ore. 27, 741 P.2d 501 (1987), to require that the perpetrator have the intent to inflict intense pain as one reason for his

intentional act; 741 P.2d, at 504. The Supreme Court of California has reached a similar conclusion in interpreting the California statute; People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 875 (1985):

The very use of the term torture to describe the class of murders to which the subdivision applies necessarily imports into the statute a requirement that the perpetrator have the sadistic intent to cause the victim to suffer pain in addition to the pain of death, which intent is distinct from the intent to cause the victim's death.

While Utah's subsection (q), differs from California law and Oregon law in that torture is only one of three alternative ways that the homicide may be shown to qualify as especially heinous, atrocious, etc., the other alternatives must be construed in a way which makes sense of the entire subsection. If any serious bodily injury inflicted before death qualified to make subsection (q) applicable, then all murders caused by seriously injuring the victim who nevertheless survived for some measurable time, however brief, would qualify and there would be no case where the other two alternatives in subsection (q) would ever need to be considered. More importantly, the problem posed by the Godfrey and Wood cases would still exist under subsection (q). The statute's language would describe almost all intentional murders and therefore fail to provide any guideline for channeling discretion; State v. Wood, 648 P.2d 71, 86. For these reasons, the Court should construe the statute to apply only to homicides in which there is an intentional or knowing infliction of pain, serious physical abuse, or serious bodily injury for its own sake

or as something apart and additional to the homicidal acts.

V

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF COUNSEL'S FAILURE TO MAKE MOTIONS FOR DISCOVERY AND COUNSEL'S FAILURE TO TAKE ADVANTAGE OF THE PROSECUTOR'S OPEN FILE POLICY, AS WELL AS THE DEFENSE COUNSEL'S FAILURE TO FULLY INVESTIGATE THE CIRCUMSTANCES OF DEFENDANT'S CONFESSION, RELEVANT POSSIBLE MITIGATING EVIDENCE, AND APPLICABLE UTAH CASE LAW AND STATUTES WHICH HAD AN OBVIOUS BEARING ON THE DEFENSE OF THIS CASE.

In Codianna v. Morris, 660 P.2d 1101, 1109 (Utah 1983), this Court stated the standard applicable to determining a claim of ineffective assistance of counsel: "The Sixth Amendment demands that defense counsel exercise the skill, judgment, and diligence of a reasonably competent defense attorney." The Court then identified considerations necessary to a determination of whether to reverse for ineffective assistance of counsel:

- (1) The burden is on the defendant and proof of such must be demonstrable and not a speculative matter
- (2) A lawyer's legitimate ... choice of trial strategy or tactics that did not produce the anticipated result does not constitute ineffective assistance
- (3) It must appear that any deficiency in performance of counsel was prejudicial.

Subsequently, in State v. Frame, 723 P.2d 401 (Utah 1986), the Court reiterated these considerations, but explained that the showing of prejudice only required defendant to establish a "reasonable probability ... that but for counsel's error the result would have been different." The Court further defined "reasonable probability" as that "sufficient to undermine confidence in the reliability of the verdict." 723 P.2d at 405, citing State v. Lairby, 699 P.2d 1187, 1204 (Utah 1984), and Strickland v. Washington, 466 U.S. 674 (1984).

This Court's standard is consistent with that announced by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984); and reiterated in Kimmelman v. Washington, ___ U.S. ___, 106 S.Ct. 2574 (1986), requiring defendant to show "both that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 106 S.Ct. at 2583.

Because defense counsel in this case failed to exercise the diligence of a reasonably competent counsel, and because the defendant was clearly prejudiced thereby in the penalty phase of the trial, this case must be remanded for a new penalty hearing.

First, it seems clear that counsel was not aware of the meaning or language of U.C.A. sect. 76-5-202(1)(q), since he neither objected to the court's erroneous instructions nor argued the failure of the evidence to meet subsection (q)'s requirements in support of his contention in closing argument at the guilt

phase that although the homicide might have been murder it nevertheless was not so heinous, atrocious, or cruel. Yet, for an attorney to go to a state where he was not a member of the bar to defend a capital case and then fail to familiarize himself with that state's statute defining first degree murder and defining the aggravating circumstances relevant to imposition of the death penalty is clearly a failure to perform as a competent professional. Similarly, the failure to make a motion for discovery under Rule 16 of the Rules of Criminal Procedure for all written or recorded statements made by the defendant and for the autopsy report was clearly incompetent. But counsel made no such motion. (R. 1302-3). Had the defense counsel obtained the confession and the autopsy report in advance of trial he would have recognized that the autopsy report indicated a stab wound through the heart as well as several stab wounds which punctured the lungs. Yet the confession says that after stabbing the victim defendant went around the house searching for things to steal before returning to the victim and shooting her. If counsel had obtained the confession and the autopsy report in advance, as a competent attorney, he would have recognized that there were substantial questions whether the victim was conscious after the stab wounds were inflicted and whether the victim could have survived the stab wounds for more than a brief interval. But the defense attorney never raised these questions, did not even ask the medical examiner a single question in cross examination, and did not object to the prosecutor's statement in

final argument in the penalty phase that the victim suffered "the most pain that anybody could ever endure in this life ", (R.1437); though there was no evidence in the record to support that assertion by the prosecutor.

Since counsel's strategy in the case was to call no witnesses in the guilt phase, it would seem that minimally competent performance required him to familiarize himself with what Utah law required the prosecution to prove and to find out before trial what evidence the prosecutor intended to present. Under these circumstances, failure to make a motion for discovery was a failure to perform competently; but defense counsel compounded that failure by failing even to take advantage of the prosecutor's offer to allow defense counsel to examine the prosecution file. (R.1304) Counsel's unfamiliarity with Utah law was graphically illustrated by defense counsel's argument in arrest of judgment just before the court imposed the death sentence. Counsel urged the court to set aside the judgment arguing:

"it was my understanding that the standard, based on the evidence presented, the standard should have been that the reasonable mind or reasonable minds as such, hearing the evidence could not extract more aggravating circumstances than mitigating circumstances."

(R.424). While this mis-statement was not prejudicial since the court when denying the motion made clear that the appropriate standard required a finding beyond a reasonable doubt, defense counsel's unawareness of the correct standard demonstrated his complete unfamiliarity with the applicable Utah law.

Other aspects of defense counsel's performance, perhaps explainable as failed trial strategy, add perspective to counsel's failures to discover or prepare adequately on Utah law. Counsel made a motion for change of venue but offered neither opinion survey evidence nor witnesses to support his claim of local prejudice, though he did call witnesses to testify to extensive pretrial publicity. Defendant called no witnesses at trial; the only evidence offered by defense at the penalty phase was the reading of the reports of two "alienists", a psychologist and a psychiatrist, who had been appointed by the court before trial to examine defendant and report to the court following a notice from defense counsel of intention to rely on the defense of insanity. No family members were called; no other evidence was offered in mitigation.

At the hearing to suppress the confession, defense counsel elicited no evidence relevant to whether defendant was afforded his Sixth Amendment right to counsel under Massiah v. United States, 377 U.S. 201 (1964), and Brewer v. Williams, 430 U.S. 387 (1977). Perhaps the failure to pursue the motion for change of venue by offering more evidence in support of it reflects trial strategy or the unavailability of evidence. Perhaps the failure to call witnesses in the penalty phase is similarly explainable. But failure to take advantage of available discovery procedures, failure to take advantage of the prosecutor's open file offer, failure to familiarize himself with the relevant statutory standard and compare the language of the statute with the

language of the information and the instructions to the jury hardly qualifies as competent representation of a client whose life was at stake. These errors were far from harmless.

It cannot be said that the failure of representation had no effect on the result of the trial. Defendant had a real defense; that this homicide, though murder was not especially heinous, atrocious, cruel, or exceptionally depraved under the applicable Utah standard because it was not shown to have involved physical torture, serious physical abuse, or serious bodily injury of the victim before death, as Utah law requires. The issue was never raised and the evidence on the question was never pursued, presented, or determined at trial. Arguments by the prosecutor to the jury which were clearly inconsistent with the language of subsection (g) were allowed to go without challenge and without objection. This Court, like the judge and jury below, can only speculate on the question of whether the victim suffered for a substantial period after being stabbed, can only speculate whether she suffered intense pain, as the prosecutor argued, can only speculate whether she was conscious after being stabbed, can only speculate whether the defendant did indeed, wander about the house, for a minute, or three minutes, or four minutes, as the statement dictated by Lt. Pierpont and signed by the defendant might suggest.

In State v. Woods, this Court reiterated that in reviewing a capital case, the Court would determine whether the sentence of death "was disproportionate"; 648 P.2d at 77, citing State v.

Pierre, 572 P.2d 1338 (Utah 1977). How can the Court begin to make such assessment in this case? Failure of defense counsel to develop evidence relevant to the determination of guilt and penalty under Utah law; failure of defense counsel to present at trial matters relevant to this Court's assessment of the proportional appropriateness of the death penalty in this case require that the case be remanded for a new penalty hearing.

VI

THOUGH OTHER ERRORS REQUIRE REVERSAL OF THE DEATH PENALTY AND REMAND FOR FURTHER PROCEEDINGS, THE COURT SHOULD TAKE THE OCCASION OF THIS CASE TO PROVIDE ADDITIONAL INSTRUCTIONS TO BE GIVEN IN THE PENALTY PHASE OF A CAPITAL CASE TRIED TO A JURY.

This Court should mandate additional instructions to the jury in a capital case to assure that jury deliberations do not proceed on the assumption that death is a more appropriate penalty in a capital case than life imprisonment. The Court's decision in State v. Wood, supra, though providing important protections for the defendant in a capital case needs further elaboration and explanation in the form of a mandatory instruction to the jury. In State v. Shaffer, Utah, 725 P.2d 1301 (1986), this Court noted the findings in a study by Professor Craig Haney that the process of "death qualifying" a jury tended itself to have an impact on the jury and among other effects, to make them more likely to assume that the law disapproves of

persons who oppose the death penalty and more likely to believe that the defendant deserves the death penalty. 725 P.2d at 1311; referring C. Haney; Juries and the Death Penalty: Readdressing the Witherspoon Question, 26 Crime and Delinq. 512, 523 (1980). Responding to the indications of the Haney study, this Court approved an approach whereby voir dire would be conducted individually with the jurors sequestered to minimize side effects of death qualification.

We urge an additional protection: that the jurors be instructed at the commencement of the trial that the fact that the case is potentially a capital case should in no way be regarded as suggesting the appropriateness of that penalty. During the penalty phase that instruction should be repeated and the jury should also be told that the law regards a sentence of life imprisonment as no less appropriate in capital cases than the penalty of death; that the choice of penalty should be determined after consideration of all the evidence but that death should be regarded as an exceptional penalty to be imposed only if the jury finds beyond a reasonable doubt that the evidence in aggravation outweighs the evidence in mitigation and also finds beyond a reasonable doubt that death is more appropriate than life imprisonment as the penalty in the case.

Such an instruction would serve to mitigate the fact that the jury will sentence the defendant with only the case specific facts before them and without information which would allow them to appraise the case in comparison with and in proportion to

other first degree murder cases. Lacking such basis for comparison, a jury is likely to conclude that the death penalty is the usual penalty rather than the exception or that they are abusing discretion if they allow an inclination to mercy to affect the process of weighing aggravating and mitigating factors. Such an instruction would also serve to offset the fact that the jury uniquely, in the whole spectrum of criminal justice sentencing in Utah, is the only sentencer without previous experience in sentencing, without exposure to and prior consideration of the purposes of punishment. Any sentencing judge will have thought about the policies of sentencing and corrections and will bring prior thought and prior experience in the system to the difficult task of sentencing in a capital case. But when a jury sentences in a capital case, it is only instructed on the case specific facts and is given no basis for making judgments of proportional appropriateness. Of course, once the jury decides in favor of death, a presumption of correctness precludes completely de novo reconsideration of the appropriateness of their decision. But, since they have only the case specific facts before them, the jury's decision is likely to be skewed in favor of a death sentence.

An instruction making clear that life imprisonment is a fully appropriate penalty in a "capital case" would partially alleviate the risk that the very description of the case or the process of death qualification conveyed a notion that the law had a preferred penalty. An instruction that the death penalty is an

exceptional penalty for exceptional cases would simply convey information to the jury that everybody else in the system of criminal justice knows.

VII

ALTHOUGH THE RECORD IS INSUFFICIENT TO PROVIDE AN ADEQUATE BASIS FOR PROPORTIONALITY REVIEW, IT APPEARS THAT THE DEFENDANT IN THIS CASE DOES NOT DESERVE DEATH WHEN COMPARED WITH OTHER UTAH MURDER CASES.

There are significant gaps in the record as a result of the failure of the proceedings below to focus upon the factors relevant to a determination that the killing was especially heinous, atrocious, cruel, etc., under Utah law. Thus, relevant considerations about the suffering of the victim can only be the subject of speculation. So too, relevant data about the defendant does not appear in the record because of defense counsel's failure to offer such evidence in the penalty phase. Nevertheless, some facts relevant to a judgment about the proportional appropriateness of the death penalty may be asserted. Defendant killed one victim in what appears to be a sudden outburst of unplanned violence. There is no indication of a prior history of violent acts. He has two prior burglary convictions before coming to Utah, but these were apparently not violent or aggravated burglaries.

Murder is a terrible crime. But neither the crime nor the criminal in this case are distinguishable from many cases in

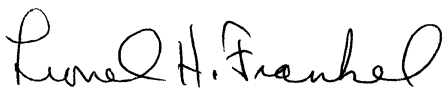
which the death penalty is not imposed. The penalty imposed in this case seems disproportionately severe.

CONCLUSION

The penalty of death was imposed on defendant in a trial where basic rights under Utah law were violated. The jury received no guidance on the elements of a homicide committed in an especially heinous, atrocious, or cruel manner. The statutory limitation, designed to provide a constitutional check on untrammelled jury discretion, was ignored by court and counsel. The prosecutor aggravated the error by improper argument and the defense counsel failed to exercise reasonable diligence and professional competence, all to defendant's grave prejudice. For these reasons, the case must be remanded for a new penalty hearing.

This Court should provide additional guidance for such hearing, on the meaning of the statutory aggravating factor and should mandate additional instructions to minimize the risk of misguided imposition of the death penalty.

Respectfully submitted,

By 
LIONEL H. FRANKEL
Counsel for
The American Civil Liberties Union

CERTIFICATE OF SERVICE

I hereby certify that I personally delivered four true and correct copies of the foregoing Amicus Curiae Brief to David L. Wilkinson, Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 this 16th day of November, 1987. And that I mailed four true and correct copy of the above Amicus Curiae Brief to Gary H. Weight and James P. Rupper of Aldrich, Nelson, Weight & Esplin, 43 East 200 North, P.O. Box "L", Provo, Utah 84603 this 16th day of November, 1987.

Lucretia H. Frankel