

1978

State of Utah v. Emery Dean Beck : Appellant's Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Steven W. Allred; Attorney for Defendant-Appellant Robert B. Hansen; Attorney for Plaintiff-Respondents

Recommended Citation

Brief of Appellant, *Utah v. Beck*, No. 15412 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/843

This Brief of Appellant 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 (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and
Respondent,

-vs.-

EMERY DEAN BECK,

Defendant and
Appellant.

Supreme Court No.

APPELLANT'S BRIEF

* * * * *

AN APPEAL FROM THE JUDGMENT OF THE TRIAL COURT IN AND FOR SUMMIT COUNTY, STATE OF UTAH, BY
HONORABLE STEWART M. HANSON, JR. PRESIDING JUDGE

* * * * *

Steven W. Allred
225 South Second East
Suite 200
Salt Lake City, Utah 84111

Attorney for Defendant -
Appellant

Robert B. Hanson
Attorney General
236 State Capitol
Salt Lake City, Utah 84111

Attorney for
Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

	-----0-----	
STATE OF UTAH,	:	
	:	
Plaintiff and	:	
Respondent,	:	
	:	
-vs.-	:	Supreme Court No. 15412
	:	
EMERY DEAN BECK,	:	
	:	
Defendant and	:	
Appellant.	:	
	:	
	-----0-----	

APPELLANT'S BRIEF

* * * * *

AN APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT
COURT IN AND FOR SUMMIT COUNTY, STATE OF UTAH,
HONORABLE STEWART M. HANSON, JR. PRESIDING

* * * * *

Steven W. Allred
225 South Second East
Suite 200
Salt Lake City, Utah 84111

Attorney for Defendant -
Appellant

Robert B. Hansen
Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Plaintiff -
Respondent

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF CASE.....	1
DISPOSITION IN LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
ARGUMENT.....	5

POINT I

DEFENDANT WAS, PURSUANT TO AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, § 7 OF THE CONSTITUTION OF THE STATE OF UTAH, ENTITLED TO A PRE- LIMINARY HEARING BEFORE A LAW TRAINED JUDGE.....	5
---	---

POINT II

THE STATEMENT OF PROBABLE CAUSE ON FILE HEREIN FAILS TO MEET THE REQUIREMENTS OF AMENDMENT IV OF THE CONSTITUTION OF THE STATE OF UTAH IN THAT IT FAILED TO SET FORTH SUFFICIENT FACTS TO JUSTIFY AN INDEPENDANT FINDING BY A MAGISTRATE OF PROBABLE CAUSE CAPABLE OF SUPPORTING A WARRANT ARREST.....	7
---	---

POINT III

THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS AT THE CONCLUSION OF THE STATE'S CASE.....	10
--	----

POINT IV

THE COURT ERRED IN REFUSING TO HEAR DEFENDANT'S POST-SENTENCE MOTIONS.....	13
---	----

POINT V

THE COURT ERRED IN SENTENCING DEFENDANT TO CONSECUTIVE SENTENCES.....	15
--	----

POINT VI

THE POSSIBLE IMPOSITION OF THE DEATH PENALTY IN PLEA BARGAINING IS UNCON- STITUTIONAL AS TENDING TO DEPRIVE DEFENDANT OF BASIC CONSTITUTIONAL RIGHTS AND FURTHER TENDING TO DEPRIVE DEFENDANT OF HIS ABILITY TO FREELY DETERMINE HIS COURSE.....	17
--	----

POINT VII

SECTION 76-5-202(1)(e), UCA 1953, IS UNCONSTITUTIONAL AS BEING IN VIOLATION OF ARTICLE I, § 24, CONSTITUTION OF UTAH.....	23
AFFIDAVIT OF EMERY DEAN BECK (EXHIBIT "A").....	25
AFFIDAVIT OF STEPHEN LOVE (EXHIBIT "B").....	27
AFFIDAVIT OF STEVEN W. ALLRED (EXHIBIT "C").....	29

AUTHORITIES CITED

CASES

<u>Aguilar v. Texas</u> , 378 U.S. 108.....	8
<u>Bank v. Turner</u> , 29 Utah 2d 154, 506 P.2d 73 (1973)...	18
<u>Combs v. Turner</u> , 25 Utah 2d 397, 483 P.2d 437 (1971).	18
<u>Giordenello v. U.S.</u> , 357 U.S. 480.....	7
<u>Henline v. Smith</u> , 548 P.2d 1271 (1976).....	14
<u>Johnson v. U.S.</u> , 333 U.S. 10.....	9
<u>McGuutha v. California</u> , 91 S.Ct. 1454, 402 U.S. 183 (1971).....	22
<u>Nathanson v. U.S.</u> , 290 U.S. 41.....	8
<u>Pope v. United States</u> , 88 S.Ct. 2145, 392 U.S. 183 (1971).....	22

	<u>Page</u>
<u>Rugendorf v. U.S.</u> , 376 U.S. 528.....	9
<u>Shapiro v. Thompson</u> , 89 S.Ct. 1322, 394 U.S. 618 (1969).....	22
<u>Sheldimine v. Jones</u> , 550 P.2d 207 (1975).....	5
<u>Spinelli v. U.S.</u> , 393 U.S. 108.....	9
<u>State v. Alexander</u> , 15 Utah 2d 14, 386 P.2d 411.....	14
<u>State v. Bridge</u> , 3 Utah 2d 281, 282 P.2d 1043 (1955).	14
<u>State v. Forsyth</u> , 560 P.2d 337 (1977).....	17
<u>State v. Garfield</u> , 552 P.2d 129 (1976).....	14
<u>State v. Park</u> , 17 Utah 2d 90, 404 P.2d 677 (1965)...	14
<u>State v. Plum</u> , 14 Utah 2d 124, 378 P.2d 671 (1963)..	14
<u>State v. Soper</u> , 559 P.2d 951 (1977).....	14
<u>Strong v. Turner</u> , 22 Utah 2d 294, 452 P.2d 323 (1969).....	18
<u>United States v. Jackson</u> , 88 S.Ct. 1209.....	19
<u>U.S. v. Ventresca</u> , 380 U.S. 102.....	8
<u>Whitely v. Warden</u> , 401 U.S. 566.....	9

STATUTES

Utah Code Annotated 1953

§67-15-1	11,23
§67-15-7	11
§76-3-401	15
§76-3-401(2)	15
§76-3-401(4)	16,17
§76-3-401(5)	17
§76-3-401(5)(c)	16

	<u>Page</u>
Utah Code Annotated 1953	
§76-5-202(1)(e)	10,23
§77-18-1.1	5
§77-19-9	5
§77-62-3	13
§78-4-8	6
§78-5-4	5

CONSTITUTIONS CITED

CONSTITUTION OF THE UNITED STATES

Amendment V.....	5
------------------	---

CONSTITUTION OF THE STATE OF UTAH

Article I §7.....	5
Article I §24.....	23
Amendment IV.....	7

IN THE SUPREME COURT OF THE STATE OF UTAH

-----0-----
STATE OF UTAH, :
 :
 :
Plaintiff and :
Respondent, :
 :
-vs.- : SUPREME COURT NO. 15412
 :
EMERY DEAN BECK, :
 :
 :
Defendant and :
Appellant. :
 :
-----0-----

BRIEF OF APPELLANT

-----0-----
NATURE OF THE CASE

This is a criminal action wherein the defendant was originally charged and tried for first degree murder. The jury was unable to reach a verdict and was discharged. Subsequent thereto, defendant entered a plea of guilty to murder in the second degree and was sentenced to an indeterminate sentence of five years to life. Defendant alleges certain errors in the original trial which, coupled with the possibility of the death penalty, deprived him of the opportunity to make a free and intelligent decision.

DISPOSITION IN LOWER COURT

The lower court, after the jury failed to reach a verdict, discharged the jury. Subsequent thereto, the defendant entered a plea of guilty to second degree murder. At sentencing, the court imposed the statutory sentence of five years to life but ordered that said sentence shall be served consecutive to any sentence the defendant was presently serving. The Court declined to hear certain post-sentence motions of the defendant and he is presently at the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Defendant herein respectfully seeks to have his plea of guilty vacated and be granted a new trial on charges of second degree murder. Alternatively, defendant seeks to have the consecutive portion of his sentence suspended and be given credit for the time served pending trial and interim disposition of this matter.

STATEMENT OF FACTS

The defendant has filed an Affidavit of Impeccability in this matter and, as a result of such condition, was unable to afford a complete transcript of these proceedings. As such, counsel has included certain statements

that are unsupported by record reference. In the event the State seriously questions any of such statements, the defendant respectfully requests leave to have that particular portion transcribed.

Defendant, at the commencement of the time pertinent hereto, was serving a seven to ten year prison sentence in the State of Wyoming with a probable release date of November 12, 1982 (R.3). On June 28, 1976, a Complaint was filed charging the defendant with the first degree murder of Highway Patrol Trooper William Antoniewicz (R.5). Said Complaint was accompanied by a statement of probable cause (R.6). The defendant submitted a Motion to Dismiss on the basis of the failure of probable cause (R.8). Also filed was a Demand for a Law Trained Judge to preside at the preliminary hearing (R.9). Argument on said motions were heard and denied (R.316-329). Upon completion of the preliminary hearing, the defendant was bound over to the district court to stand trial on the charges (R.421). The defendant again submitted the aforesaid motions to the district court (R.16) with supporting memoranda (R.17-22). Said motions were again denied. Several additional pre-trial motions not pertinent to this appeal were filed and in some fashion disposed of.

At the conclusion of the State's case, at the time of trial, defendant moved for acquittal or, alternatively,

for dismissal of the charges against the defendant for failure to prove 1) that the victim was a peace officer, and 2) that the victim was acting in a manner protected by the statute (R.442-450). Said motion was denied (R.450). After completion of the defendant's case, the jury retired to deliberate. The jury was unable to reach a verdict and was discharged (R.288).

Subsequent to the first trial, the State amended its information to allege second degree murder (R.294) and defendant entered a plea of guilty thereto (R.296).

Prior to defendant pleading guilty, he was advised of the probable length of his sentence (Exhibits "A", "B", and "C" attached hereto).

At the time set for sentencing the Court imposed the statutory sentence of five years to life (R.302, 303) and also indicated that such sentence would run consecutively with his Wyoming sentence (R.302, 303). Objection to such sentencing was noted (R.302). Within two weeks of the commitment, defendant filed a Motion to Allow Credit for Jail Time Served (which was approximately one year) and to amend the sentence as it pertained to the imposition of consecutive sentences (R. 304, 305). Without notice or hearing, the Court determined it no longer had jurisdiction and summarily denied both motions (R. 306). This matter was then appealed.

ARGUMENT

POINT I

DEFENDANT WAS, PURSUANT TO
AMENDMENT V OF THE CONSTI-
TUTION OF THE UNITED STATES
AND ARTICLE I, § 7 OF THE
CONSTITUTION OF THE STATE
OF UTAH, ENTITLED TO A PRE-
LIMINARY HEARING BEFORE A
LAW TRAINED JUDGE

Both the Constitution of the United States and the State of Utah provide that no person shall be deprived of life or liberty without due process. Defendant believes that, as such, it is violate of these provisions to deny defendant a preliminary hearing before a law trained judge.

The Utah legislature reacted, in its 1975 general session, to a growing concern across the country regarding this problem by enacting §78-5-4, Utah Code Annotated (1953), which provides that a defendant has the right to be tried and sentenced before a judge who is a member of the Utah State Bar. The statute is, however, silent as to that right with regards to a preliminary hearing. However, it should be noted that in grand jury proceedings, the alternative to preliminary hearings, provisions are made for the presence of, or accessability to, a district judge. A defendant should not be denied that right simply because an alternative method was chosen. See §77-18-1.1 and §77-19-9, UCA (1953).

The Utah Supreme Court, in Shelmidine v. Jones, 550 P.2d 207 (1975), stated:

"It is thus seen that in a considerable portion of our State there are some very practical problems in placing restrictions upon justices of the peace and requiring professional courts to handle minor offenses. If it were not for those justices in our sparsely populated rural counties an accused would often encounter inconvenience in delay of time and distance of travel before he could have his case disposed of. It seems to be a sound observation that continues to serve a useful purpose by providing a readily accessible and expeditious means of handling minor cases; and that it is more than an aid in assuring the constitutional guarantees of a speedy disposition of one's case, and thus of due process of law, than the contrary. (Emphasis added).

The Court's reasoning is certainly well taken. However, an examination of that reasoning substantiates defendant's claim. The Court held that in minor cases due process is best served by permitting the accused easy and convenient access to the courts. In severe felonies, as is the case here, that reasoning falls and rightfully so. In this instance the inconvenience that may be suffered by the defendant is so insignificant as to be negligible when weighed against the possible sentence herein.

In addition, the holding of a preliminary hearing before a non-law-trained judge violates the equal protection clauses of the state and federal constitutions. The fact that a defendant is charged with an offense in a sparsely populated or unincorporated area should not work so as to deprive him of his rights. It is to be noted that a person charged with an offense in Salt Lake City, for instance, would have a preliminary hearing before a city judge, whom, by statute, must be law-trained. (S. 28-4-8, UCA 1953). It can readily

be assumed that such individuals are more cognizant of basic legal procedures and requirements than are lay judges. Such knowledge is fundamental in the protection of a defendant's basic rights and such rights should not be tampered with as a mere result of the location of the charge.

POINT II

THE STATEMENT OF PROBABLE CAUSE ON FILE HEREIN FAILS TO MEET THE REQUIREMENTS OF AMENDMENT IV OF THE CONSTITUTION OF THE STATE OF UTAH IN THAT IT FAILED TO SET FORTH SUFFICIENT FACTS TO JUSTIFY AN INDEPENDANT FINDING BY A MAGISTRATE OF PROBABLE CAUSE CAPABLE OF SUPPORTING A WARRANT ARREST.

A review of the complaintant's statement of probable cause shows only one allegation that pertains to the defendant: "The defendant, Emery Dean Beck, has been indentified as the murderer of William Antoniewicz by witnesses and by the defendant's own admission." The Supreme Court of the United States has, on several occasions, held that such a minimal statement is not sufficient to support a warrant of arrest.

The Complaint must contain an affirmative allegation that the affiant spoke with personal knowledge of the matters contained in the statement of probable cause. Giordenello v. U.S., 357 U.S. 480.

Recitals of some of the underlying circumstances in the statement is essential if the magistrate is to perform his detached function and not serve as a rubber stamp for

the police. U.S. v. Ventresca, 380 U.S. 102.

A statement based only on suspicion without any statement of adequate supporting facts is insufficient for issuance of a warrant. Nathanson v. U.S., 290 U.S. 41.

A Complaint must: 1) contain an affirmative allegation that the complainant spoke with personal knowledge of the matters contained therein; 2) indicate the sources for complainant's belief; 3) set forth any other sufficient information upon which a finding of probable cause could be made. Aguilar v. Texas, 378 U.S. 108. In reviewing the statement supplied herein, it is clear that it fails totally to meet the first requirement, makes no reference to the sources except as "witnesses", and totally fails to set forth any other information sufficient to support a magistrate's finding of probable cause.

In Aguilar, supra, the Court held that the statement not only contained "no affirmative allegation that the affiant spoke with personal knowledge of matter contained therein, it does not even contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge". In this case, as in Aguilar, the complainant's statement is fatally defective and must be quashed. The Court also required, in Aguilar, that the magistrate must be informed of some of the underlying circumstances from which the informant concluded that a crime had been committed by

the accused as well as some of the underlying circumstances from which the complainant concluded that the source was credible and his information reliable. The statement relied upon herein totally fails to meet requirements set forth by the Court.

In Spinelli v. U.S., 393 U.S. 410, 416, the Court states:

"Applying these principles to the present case, we first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function. Though the affiant swore that his confidant was "reliable", he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that Aguilar's other test has not been satisfied. The tip does not contain sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information - it is not alleged that the informant personally observed Spinelli at work or that he placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Cf. Jaben v. United States, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed. 2d. 345 (1965). In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

See also, Whitely v. Warden, 401 U.S. 566; Johnson v. U.S., 333 U.S. 10; Rugendorf v. U.S., 376 U.S. 528.

The Court's attention is further invited to the particular section which charges the defendant with first degree murder, §76-5-202. Nowhere does the statement of probable cause offer even the slightest fact which would substantiate the charge of first degree murder. It should further be noted that no witnesses were ever called who identified defendant as the murderer as per the allegation of the statement of probable cause.

POINT III

THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS AT THE CONCLUSION OF THE STATE'S CASE

The defendant was charge with violating §76-5-202 (1)(e), murder in the first degree, to-wit:

"76-5-202(1)(e). The homicide was committed for the purpose of avoiding or preventing an arrest by a peace officer acting under the color of legal authority or for the purpose of effectuating an escape from lawful custody."

The state failed to prove elements necessary to sustain a conviction upon that charge.

A.

The state failed to establish in any manner that Trooper Antoniewicz was witness to any offense, was in the process of arresting anyone, or had called in any offense. In fact, the testimony was that his citation book and service revolver were both in their places, evidencing a presumption contrary to an arrest.

B.

William Antoniewicz was not a peace officer within the purview of the statute. Title 67, Chapter 15, UCA 1953, provides for the training of peace officers. §1 announces the intent of the legislature, to-wit:

"67-15-1. To better promote and insure the safety and welfare of the citizens of this state ... there is created...the division of peace officer training..."

The division was the agency invested with the responsibility of training peace officers to "better promote and insure the safety and welfare of the citizens..." §67-15-7, UCA 1953, reaffirms this intent by stating in part:

"Notwithstanding any provisions of any general [,] special or local law or charter to the contrary, no person shall after July 1, 1968, receive an original appointment on a permanent basis as a peace officer of any law enforcement unit in this state unless such person has previously been awarded a certificate by the commissioner of public safety, attesting to his satisfactory completion of an approved peace officer basic training program; and every person who is appointed on a temporary basis, or for a peace officer of any law enforcement unit in this state, shall forfeit his position as such unless he previously has satisfactorily completed, or within eighteen months from the date of his appointment satisfactorily completes, a peace officer basic training school for officers and is awarded a certificate attesting thereto."(Emphasis added).

It is apparent that the legislature, in mandatory terms, has announced its intention that untrained individuals should not be performing the role of a peace officer. The undisputed evidence was that Mr. Antoniewicz had not completed peace officer training. The corpus delicti of this charge requires the state to prove that the victim was a peace officer within the meaning of the statute. This is especially true where the defendant has raised a presumption contrary to the statute. The state made no effort to rebut this presumption and, in fact, were incapable of rebuttal. However, the Court, without any evidence in support thereof, on its own volition, undertook to argue the state's case. The Court stated:

"All right. The other thing is that 67-15-7 sets up, or contemplates setting up, law enforcement or peace officers on the same basis that you have an appointment for a commission in the Military; that is, the first appointment you get is a temporary appointment pending either some further certification or training or conduct or whatever, and the second one is the permanent appointment. The qualifying language with regard to the first paragraph is "permanent". In the second phrase, after the semicolon, the qualifying word is the word "temporary". I point that out simply so you will know what the basis for my thinking is." (R.449).

This finding by the Court is without any evidentiary foundation and is not within the purview of matters available for judicial notice by the Court. The obligation was on the state to prove that Mr. Antoniewicz was either trained or within an exception. They did neither and such failure cannot be salvaged by the unsubstantiated interpretations of the Court.

POINT IV

THE COURT ERRED IN REFUSING TO HEAR DEFENDANT'S POST-SENTENCE MOTIONS

As set forth, supra, the Court sentenced defendant to an indefinite term, said term to run consecutively with other prison terms. Defendant, believing the Court's practice to be improper, filed a Motion to Amend Sentence (R.305). Additionally, the defendant moved for credit for time served (R.306). Said denial was purportedly based on the fact that defendant had been turned over to the warden of the state prison and, accordingly, the Court had been divested of further jurisdiction in the matter. Such determination is, however, unsupported by the statutory and case law of this state. The Court erroneously presumed that §77-62-3, UCA 1953, (granting the board of pardons the power to determine the length of sentences within the statutory parameters) divested the trial court from any jurisdiction whatsoever subsequent to sentencing and commitment.

It should be noted that no statutory authority for such position can be found. To the contrary, the courts have repeatedly stated that the trial court, under varying circumstances, has residual authority. In State v. Soper , 559 P.2d 951, (1977), the Court through Justice Maughan announced:

"A sentence in a criminal case is a final judgment, and one seeking to set aside such final order has the burden of producing convincing proof of fact which constitutes a legal ground for setting aside such sentence. A motion to set aside a plea after sentencing is addressed to the sound discretion of the trial court."

While defendant herein did not go to the extreme of moving to set aside the sentence, such authority is implicit in the above language. Defendant did not seek a reversal of the Court's sentence but only for clarification as to its term and the opportunity to present to the Court argument in support of his position that the Court erred in the manner of imposing sentence. Such reasoning was earlier announced by Justice Maughan in State v. Garfield, 552 P.2d 129 (1976). See also State v. Plum, 14 Utah 2d 124, 378 P.2d 671 (1963).

Correction of an erroneous action by the trial court is also a legitimate basis for allowing residual jurisdiction. See Henline v. Smith, 548 P.2d 1271 (1976); State v. Park, 17 Utah 2d 90, 404 P.2d 677, (1965); State v. Alexander, 15 Utah 2d 14, 386 P.2d 411; and State v. Bridge, 3 Utah 2d 281, 282 P.2d 1043 (1955). Such error

was alleged herein to the trial court and defendant was entitled to be heard thereon. If the court's ruling is upheld it can only mean that a defendant has no practical means of clarifying or correcting a sentence short of appeal. Certainly it cannot be argued that the board of pardons has the authority to amend said sentence. That authority lies initially with the trial court and secondarily with the appellate court in the event of abuse of discretion.

POINT V

THE COURT ERRED IN SENTENCING DEFENDANT TO CONSECUTIVE SENTENCES.

As previously stated, at the time of sentencing, defendant was already serving a prison sentence in Wyoming. Aware of that fact, the Court, in sentencing the defendant in the instant matter, said:

"...it is the judgment of the Court that you be sentenced to the maximum sentence that the law permits, an indeterminate term in the Utah State Prison of not less than five years to the end of your life, and that the sentences run consecutive with any other sentence that you may currently be serving." (R.455-456)
(Emphasis added).

The imposition of consecutive sentences is authorized by 76-3-401, UCA 1953, but is authorized with specific limitations. Subsection (2) of that section, for instance, provides:

"(2) A court shall consider the gravity and circumstances of the offenses...in determining whether to impose consecutive sentences."

It is noted that the court is to consider not the singular offense but the "offenses". There is no showing by the record or by the court that inquiry was made into the Wyoming offense and certainly no showing that the "gravity and circumstances" of that offense were considered by the court. This failure to inquire and consider is augmented by the court's failure to reconsider the sentence as per Point IV of this Argument. But for such inquiry and consideration, the court is incapable of imposing consecutive sentences.

In addition, subsection (4) indicates:

"(4) If a court lawfully determined to impose consecutive sentences, the aggregate minimum of all sentences imposed may not exceed twelve years' imprisonment and the aggregate maximum of all sentences imposed may not exceed thirty years' imprisonment. However, this limitation does not apply if an offense for which defendant is sentenced authorizes the death penalty or life imprisonment."

It is clear that the final sentence precludes the limitations imposed in the first part of the section. Certainly they would be precluded in this matter.

Once precluded, all matters relying thereon must also be precluded. Contrary to that fact, the court imposed a consecutive sentence pursuant to subsection (5)(c)

which is wholly dependant upon the introductory language -

"(5) The limitation of subsection (4) applies:

In circumventing the preclusion, the court was able to take cognizance of a fact that, but for such circumvention, could not have been taken into account, i.e. the sentence imposed in another court.

Since the limitations of (4) do not apply in this case, neither do those of (5) and without those factors, the court was without authority to take judicial notice of another states actions in sentencing the defendant.

POINT VI

THE POSSIBLE IMPOSITION OF
THE DEATH PENALTY IN PLEA
BARGAINING IS UNCONSTITUTIONAL AS TENDING TO DEPRIVE
DEFENDANT OF BASIC CONSTITUTIONAL RIGHTS AND FURTHER
TENDING TO DEPRIVE DEFENDANT
OF HIS ABILITY TO FREELY
DETERMINE HIS COURSE.

While defendant does not argue herein that Utah's death penalty is necessarily unconstitutional per se, it is argued that it can be, and in fact was in this case, employed in an unconstitutional fashion. A variety of courts have held on numerous occasions that plea bargaining is an acceptable means of disposing of criminal matters so long as the basic give-and-take concept remains viable. This Court has oft times stated the rule applied universally in determining the validity of a guilty plea. In State v. Forsyth, 560 P.2d 337 (1977), the Court at 338 announced:

"...for a plea of guilty to be valid it must appear that the accused had clear understanding of the charge and without undue influence, coercion, or improper inducement voluntarily entered such plea."

See also Banks v. Turner, 29 Utah 2d 154, 506 P.2d 73 (1973); Combs v. Turner, 25 Utah 2d 397, 483 P.2d 437 (1971); and Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323 (1969).

Coercion, in this case, need not be assumed. The possible result of a trial in this matter was death. The entry of a guilty plea to a lesser charge assured the defendant that he would not be put to death. What possible greater coercion or influence can be conceived but death? It is to be noted that prison time was not a frightening possibility to the defendant. He was, at the time of entering his plea, already serving a prison sentence in the State of Wyoming. Further, as set forth in the Affidavits attached hereto and marked Exhibits "A", "B" and "C", the defendant had information regarding the average time served for second degree murder.

As such, the defendant was faced with the following facts in arriving at his decision:

1. Being presently under a commitment to the Wyoming State Prison, to plead guilty and serve an average of seven years for the charge; or

2. Demand a trial and face a possible death penalty.

It is not unreasonable to assume that many persons under similar circumstances might choose the same course as did the defendant - this regardless of the guilt or innocence of the defendant. Such action does not provide the type of remedial or punitive action contemplated by plea bargaining. It is not inconceivable that an individual who is totally innocent of a first degree murder charge might choose to plead guilty to a reduced charge. Such an argument is not an indictment of plea bargaining in general in that in most instances it is a decision involving more or less time whereas in matters of the instant kind it is a decision of life versus death - the ultimate decision and one that cannot, under any circumstances, be taken lightly or assumed by way of a general rule fitting all cases alike.

The United States Supreme Court has taken note of this situation and in United States v. Jackson, 88 S.Ct. 1209, 390 U.S. 570 (1968), struck down the death penalty provision of the Federal Kidnapping Act. In so doing, the Court said:

"Under the Federal Kidnapping Act, therefore, the defendant who abandoned the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenious enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die.

Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. But, as the Government notes, limiting the death penalty to cases where the jury recommends its imposition does have another objective: It avoids the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnapping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might wish to provide.

The Government suggests that the Act thus operates "to mitigate the severity of punishment," it is irrelevant that it "may have the incidental effect of inducing defendants not to contest in full measure." We cannot agree. Whatever might be said of Congress' objectives, they cannot be pursued by means that

needlessly chill the exercise of basic constitutional rights. Cf. United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508; Shelton v. Tucker, 364 U.S. 479, 488-489, 81 S.Ct. 247, 252, 5 L.Ed. 2d 231. The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear. The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial. In some States, for example, the choice between life imprisonment and capital punishment is left to jury in every case - regardless of how the defendant's guilt has been determined. Given the availability of this and other alternatives, it is clear that the selective death penalty provision of the Federal Kidnapping Act cannot be justified by its ostensible purpose. Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnapping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. See Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106.

It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For

the evil in the federal statute is not that it necessarily coerces guilty pleas and jury wiavers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. "

See also Pope v. United States, 88 S.Ct. 2145, 392 U.S. 651 (1968); Shapiro v. Thompson, 89 S.Ct. 1322, 394 U.S. 618 (1969); McGuutha v. California, 91 S.Ct. 1454, 402 U.S. 183 (1971).

The use of the death penalty as a plea bargaining tool is such as "... to chill the assertion of constitutional rights..." and further tends to "...needlessly encourage..." guilty pleas. Such use is not only chilling in those instances wherein the State may initially believe it has a legitimate capital offense but later reduces it, but also is evil in that it is conceivable if not probable that prosecutors may overcharge a suspect of first degree murder in order to coerce him into pleading guilty to the crime with which he should have been charged in the first instance.

Surely the congestion of the courts, the cost to the taxpayer and other reasons commonly set forth as justification for plea bargaining cannot be used as justification for threatening a defendant with the death penalty in order to coerce him to plead guilty to a lesser charge.

POINT VII

Section 76-5-202(1)(e), UCA
1953, IS UNCONSTITUTIONAL AS
BEING IN VIOLATION OF ARTICLE
I, §24, CONSTITUTION OF UTAH.

Article I, §24, Constitution of Utah, provides:

"All laws of a general nature
shall have uniform operation."

Section 76-5-202 (1)(e), UCA 1953, the section with which defendant was originally charged with violating, purports to provide a penalty for the murder of a peace officer which is greater than that imposed for murdering other persons in similar circumstances. Defendant would not argue that peace officers are employed in a dangerous and necessary position. However, defendant does not contend that such a voluntary assumption of that position should not, to the exclusion of all other persons, act as a special penalty for a crime committed against them. An example may be of some value in discerning the lack of uniformity.

Let us suppose that an individual is assaulted by another individual and the life of the first individual is in jeopardy but for the aid and assistance of a private citizen. In offering said aid, the private citizen is killed. The killer can be charged with second degree murder. However, if by some coincidence the person aiding the assaulted person is a peace officer, his death is chargeable as first degree murder.

What justification can be used in such situation for imposition of a greater penalty for the peace officer?

It is granted that peace officers should be shielded against such offenses but it is no less conceded that a person assuming the role of a samaritan should also be sheilded. There appears to be no justification for the mandatory imposition of a first degree murder charge solely on the fact that the victim was a peace officer - in fact such a distinction violates aforesaid constitutional provision.

RESPECTFULLY SUBMITTED this _____ day of _____, 1978.

/s/
STEVEN W. ALLRED
Attorney for Emery Dean Beck

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing Appellant's Brief were duly mailed, United States Post, postage prepaid, to the Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, on this _____ day of _____, 1978.

/s/

EXHIBIT "A"

IN THE SUPREME COURT OF THE STATE OF UTAH

	-----0-----	
	:	
STATE OF UTAH,	:	
	:	
Plaintiff and	:	A F F I D A V I T
Respondent,	:	
	:	
-vs.-	:	
	:	
EMERY DEAN BECK,	:	
	:	
Defendant and	:	No. 15412
Appellant.	:	
	:	
	-----0-----	

COMES NOW Emery Dean Beck and, being first duly sworn upon his oath, deposes and says:

1. He is the defendant in the above-referenced matter.
2. Prior to entering his guilty plea to murder in the second degree, he was advised by his counsel that the average prison term served for said offense was between seven and eight years.
3. Said information was considered in reaching his decision to plead guilty to said offense.
4. Affiant felt that the options available to him, specifically the possibility of the death penalty, were so onerous as to preclude any choice but the one ultimately made.
5. The decision to enter the guilty plea to a reduced charge was based on a fear of possible greater consequences, not on the particular guilt or innocence of the

defendant to the offense charged.

6. But for the possible imposition of the death penalty, defendant would not have plead guilty but, to the contrary, would have insisted on a jury trial on the original charges.

DATED this 3rd day of June, 1978.

EMERY DEAN BECK
Defendant-Affiant

STATE OF UTAH)
 : ss.
County of Salt Lake)

On this _____ day of _____, 1978,
personally appeared before me Emery Dean Beck who, being
first duly sworn upon his oath, acknowledged to me that he
executed the foregoing instrument and that the contents
thereof are true and correct to his best knowledge and belief.

SUBSCRIBED AND SWORN to before me on the day and
date first above-written.

NOTARY PUBLIC
Residing in: \

My commission expires:

EXHIBIT "B"

IN THE SUPREME COURT OF THE STATE OF UTAH

	-----0-----	
	:	
STATE OF UTAH,	:	
	:	
Plaintiff and	:	A F F I D A V I T
Respondent,	:	
-vs.-	:	
	:	
EMERY DEAN BECK,	:	
	:	
Defendant and	:	No. 15412
Appellant.	:	
	-----0-----	

COMES NOW Stephen Love and, being first duly sworn on oath, deposes and says:

1. He is the director of parole for the State of Utah.

2. Prior to the entry of defendant's guilty plea herein, affiant was contacted by defendant's counsel.

3. Pursuant to counsel's inquiry, affiant advised counsel that the average prison term served for murder in the second degree was between seven and eight years.

DATED this 10th day of April, 1978.


STEPHEN LOVE
Affiant

EXHIBIT "B" - Page 2

STATE OF UTAH)
 : ss.
County of Salt Lake)

On this 6th day of June, 1978, personally appeared before me Stephen Love who, being first duly sworn upon his oath, acknowledged to me that he executed the foregoing Affidavit and that the contents thereof are true and correct to his best knowledge and belief.

SUBSCRIBED AND SWORN to before me on the day and date first above-written.

Stephen T. Love
NOTARY PUBLIC.

Residing in: West Salt Lake City, Utah

My commission expires:

12/82

EXHIBIT "C"

IN THE SUPREME COURT OF THE STATE OF UTAH

	-----0-----	
	:	
STATE OF UTAH,	:	
	:	
Plaintiff and	:	A F F I D A V I T
Respondent,	:	
	:	
-vs.-	:	
	:	
EMERY DEAN BECK,	:	
	:	
Defendant and	:	No. 15412
Appellant.	:	
	:	
	-----0-----	

COMES NOW Steven W. Allred and, being first duly sworn on oath, deposes and says:

1. He is, and has been at all times pertinent hereto, counsel for the defendant.

2. Prior to the entry of defendant's guilty plea herein, affiant contacted Stephen Love, director of parole for the State of Utah.

3. Pursuant to affiant's inquiry, Mr. Love advised affiant that the average prison term served for murder in the second degree was between seven and eight years.

4. Said information was transmitted to defendant for his consideration in determining the advisability of entering the guilty plea ultimately entered herein.

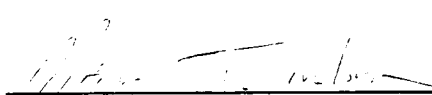
DATED this 10th day of August, 1978.

EXHIBIT "C" - Page 2

STATE OF UTAH)
 : ss.
County of Salt Lake)

On this 16th day of April, 1978, personally appeared before me Steven W. Allred who, being first duly sworn upon his oath, acknowledged to me that he executed the foregoing Affidavit and that the contents thereof are true and correct to his best knowledge and belief.

SUBSCRIBED AND SWORN to before me on the day and date first above-written.



NOTARY PUBLIC

Residing in: Not a resident

My commission expires:

11-1-82