

1979

# William Andrews v. Lawrence Morris : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

-----  
:  
WILLIAM ANDREWS,

Plaintiff-Appellant, :

-vs- :

Case No.  
16168

LAWRENCE MORRIS, as Warden :  
of the Utah State Prison, :

Defendant-Respondent. :  
:

-----  
BRIEF OF RESPONDENT  
-----

APPEAL FROM THE DISMISSAL OF A PETITION  
FOR A WRIT OF HABEAS CORPUS IN THE **THIRD**  
JUDICIAL DISTRICT COURT, IN AND FOR **SALT**  
LAKE COUNTY, STATE OF UTAH, THE HONORABLE  
JAMES S. SAWAYA, JUDGE, PRESIDING  
-----

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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WILLIAM ANDREWS, :  
Plaintiff-Appellant, :  
-vs- : Case No.  
LAWRENCE MORRIS, as Warden : 16168  
of the Utah State Prison, :  
Defendant-Respondent. :  
----- :

BRIEF OF RESPONDENT

-----

STATEMENT OF THE NATURE OF THE CASE

Appellant petitioned for a post-conviction writ of habeas corpus in the Third Judicial District Court to which respondent moved to dismiss. The Honorable James S. Sawaya granted respondent's motion and dismissed the petition with prejudice.

DISPOSITION IN THE LOWER COURT

The Court below heard oral arguments on the respondent's motion to dismiss and thereafter granted the motion on November 30, 1978, and also denied appellant's motion for a stay of execution.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the judgments and order of the lower court.

## STATEMENT OF FACTS

On November 15, 1974, appellant was found guilty by a jury of three counts of murder in the first degree and two counts of aggravated robbery. The gruesome facts surrounding the crimes were previously recited to this Court on appellant's and his co-defendant's direct appeals in State v. Pierre, 572 P.2d 1338 (Utah 1977); and State v. Andrews, 574 P.2d 709 (Utah 1977). See also the Statement of Facts in the State of Utah's brief in opposition to appellant's petition for certiorari in Andrews v. State, United States Supreme Court No. 77-6743, cert. denied October 2, 1978, which is part of the record on appeal in the instant case.

After a bifurcated sentencing hearing, the jury determined that appellant's case was a proper case for the imposition of the death penalty, and appellant was sentenced to death by shooting at the Utah State Prison.

Appellant and his co-defendant took direct appeals to the Utah Supreme Court raising constitutional challenges to their convictions and sentences. This Court subsequently affirmed the convictions and sentences in State v. Pierre,



supra, and State v. Andrews, supra. Motions for a rehearing of the appeals were made by appellant and his co-defendant without supporting authorities, and these motions were subsequently denied by this Court.

On or about April 20, 1978, appellant petitioned the United States Supreme Court for writ of certiorari and the State filed a brief in opposition to his petition. (These pleadings were made part of the proceedings before Judge Sawaya and are also part of the record on appeal in the instant case.) On October 2, 1978, the petition for writ of certiorari was denied by the high court.

On or about November 15, 1978, appellant filed a petition for a writ of habeas corpus in the Third Judicial District Court, and also applied for a stay of his execution which was then set for December 7, 1978. Again, he raised numerous constitutional challenges to his conviction and sentence. Significantly, in his petition, appellant also sought an order from the court granting him authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts alleged in his petition and for an additional sixty days after the completion of any hearing on his petition to brief the issues of law raised in his petition. The clear implication

of these requests is that petitioner had neither ascertained the facts nor the controlling law to support his legal claims when he filed his petition despite the fact that he had had approximately one year to do so from the date his conviction was affirmed by the Utah Supreme Court.

Accordingly, respondent filed a motion to dismiss the petition on November 24, 1978, alleging that (1) petitioner could not, by writ of habeas corpus, raise issues that were or could have been raised in his direct appeal to the Utah Supreme Court; (2) prosecutorial discretion in charging a capital felony is permissible under recent rulings of the United States Supreme Court; and (3) all issues raised by petitioner were addressed in prior pleadings submitted by the State in prior proceedings and adequately dispose of petitioner's issues on the merits. (Such pleadings were annexed to respondent's motion to dismiss.)

On or about November 28, 1978, appellant filed an amended petition with the Third District Court, again raising constitutional challenges to his conviction and sentence. Again, petitioner sought an order from the court for adequate time for briefing, discovery and preparation for any hearing on his claims and for sufficient authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts alleged in his petition.

Respondent, forthwith, filed a motion to dismiss appellant's amended petition on November 29, 1978, reasserting the arguments raised in the prior motion to dismiss, but adding additional arguments that certain claims in the amended petition could be dismissed as a matter of law and others were frivolous.

Respondent's motion to dismiss and appellant's application for a stay of execution came on for hearing on November 30, 1978. Appellant expressed no objection to the hearing proceeding on November 30th (Hearing Transcript of November 30, 1978, at 3, 5). After full argument, Judge Sawaya commented from the bench that he had reviewed the Utah Supreme Court's rulings on appellant's and his co-defendant's direct appeals, and said, ". . . it seems to me that it [the cases] covers nearly every issue that could possibly be raised in a capital case except the one . . . on the question of whether or not the death sentence is being imposed in a fair manner." (Hearing Transcript of November 30, 1978, at 32.) However, on that latter issue, Judge Sawaya commented as follows:

One thing that disturbs me is the fact that, regardless of our feeling about capital punishment, it seems that what you [appellants] are urging is that in any situation where an individual is convicted and sentenced to death I guess we should wait over a few years period and see whether or not there are others that are so

convicted and sentenced and then if it is not being imposed on an equal pattern then the man should have a stay and should have a new trial or something. I'm not sure I buy that theory but I'm willing to give it some consideration. I'm not sure that I have a right to even voice an opinion about it. The question is whether or not there is a new issue that should be considered and the only one that I can see is the one involving prosecutorial discretion as it affects the imposition of the death penalty so I'll consider it and I'll have you a ruling probably about noon today. (T.32).

It should be noted that earlier in the hearing, respondent referred the court to his legal analysis of the issue of prosecutorial discretion in charging capital offenses contained at pages six and seven of his memorandum in support of his motion to dismiss, and argued that the issue was one that could be disposed of as a matter of law because the claim had previously been raised to and rejected by the United States Supreme Court in prior capital cases (T.26).

Later on November 30, 1978, Judge Sawaya issued a memorandum decision granting respondent's motion to dismiss and concluding as follows:

It is the opinion of the Court that the Petition For Writ of Habeas Corpus filed herein raises no issue of fact or law material to determination of the legality and constitutionality of the conviction, confinement or sentence of the Petitioner which were not raised or could not have been raised on appeal to the Supreme Court of the State of Utah. (R.118).

He also signed an order on November 30, 1978, granting respondent's motion which read as follows:

IT IS HEREBY ORDERED that respondent's motion to dismiss petitioner's petition for a writ of habeas corpus is granted on the ground that all issues raised in petitioner's petition were known or should have been known at the time petitioner took his direct appeal from his conviction to the Utah Supreme Court, and all issues either were raised or could have been raised on that appeal, and habeas corpus may not be used to relitigate appealed issues or to raise issues which could have been raised on appeal. Maguire v. Smith, 547 P.2d 697 (Utah 1976); Bennett v. Smith, 547 P.2d 696 (Utah 1976); Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968); and Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967). Accordingly, petitioner's petition for a writ of habeas corpus is dismissed with prejudice, and petitioner's application for a stay of execution is denied. (R.119-120).

Finally, on December 4, 1978, Judge Sawaya entered the following findings of fact and conclusions of law:

1. No developments of fact or law material to the determination of the legality and constitutionality of the conviction and sentence of the Petitioner herein have occurred since the filing of Petitioner's direct appeal to the Utah Supreme Court and that Court's decision on that appeal.
2. All the issues regarding the constitutionality of the processes for death sentences under Utah law, the constitutionality of the death sentence in Petitioner's case, and the effect of any alleged prejudicial publicity or influences on Petitioner's trial which are raised or could have been raised by this Petition are the same issues that Petitioner raised in his direct appeal to the Utah Supreme Court.
3. Petitioner's claim that Utah's death penalty law is being applied arbitrarily and discriminatorily fails to state a claim on which relief could be granted or on which a hearing need be held. Moreover, petitioner could and should have raised such issue on direct appeal.
4. Constitutional issues identical to those raised

and decided on direct appeal cannot be raised again in collateral proceedings.

5. Constitutional challenges to the pattern of application of a criminal statute or the excessiveness of a criminal sentence which were not but could have been raised on direct appeal cannot be raised through collateral proceedings. (R.124-125).

From the above rulings, appellant now brings this appeal.

POINT I

THE WRIT OF HABEAS CORPUS IN UTAH IS PROPERLY LIMITED BY JUDICIAL INTERPRETATION TO EXCLUDE ISSUES THAT COULD OR SHOULD HAVE BEEN RAISED ON DIRECT APPEAL.

A

A STATE MAY FREELY RESTRICT THE AVAILABILITY OF A POST-CONVICTION WRIT OF HABEAS CORPUS.

In Carter v. Illinois, 329 U.S. 173 (1946), the United States Supreme Court examined the requirements of the due process clause of the Fourteenth Amendment in regard to a state prisoner's claim of denial of his right to assistance of counsel. The court found that the due process clause did not impose uniform standards upon the states with respect to procedural details in their individual systems of criminal justice. The Court stated further:

Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . In respecting the duty laid upon them by Mooney v. Holohan, States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or coram nobis. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. . . . So long as the rights under the

United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated. (Citations omitted.)

329 U.S. at 175-76.

This philosophy was reaffirmed in Young v. Ragen, 337 U.S. 235 (1949), wherein it was emphasized that "Illinois may choose the procedure it deems appropriate for the vindication of federal rights." Id. at 238. The most revealing statement of the deference afforded states in fashioning post-conviction remedies is found in Justice Jackson's concurring opinion in Brown v. Allen, 344 U.S. 443 (1953):

The states all allow some appeal from a judgment of conviction which permits review of any question of law, state or federal, raised upon the record. No state is obliged to furnish multiple remedies for the same grievance. Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. A state properly may deny habeas corpus to raise either state or federal issues that were or could have been raised on appeal. Such restriction by the state should be respected by federal courts. (Emphasis added.)

344 U.S. at 541.

The reference to "issues that were or could have been raised on appeal" is virtually identical to the language used by this Court and the lower courts in the Utah cases as discussed infra.

In Hysler v. Florida, 315 U.S. 411 (1942), an individual convicted of murder sought a writ of coram nobis from the Supreme Court of Florida which had affirmed his conviction



on direct appeal three years earlier. The Florida Supreme Court refused to grant the petition. The United States Supreme Court granted certiorari on the question of whether due process had been denied the petitioner because of the alleged use of perjured testimony by the prosecution at trial. In affirming the denial of the writ, the Court found that Florida's post-conviction process met the requirements of due process. (It is significant to note that Florida, like Utah in Rule 65B(i), Utah Rules of Civil Procedure, requires that the petitioner assert and show a "substantial denial" of a claimed constitutional right.) The United States Supreme Court decried what it described as an "unedifying story in the administration of criminal justice" and "leaden-footed, dilatory procedure." The clear import of the decision in Hysler was that the Court would not question the particular details of a state post-conviction procedure where a remedy, such as coram nobis or habeas corpus, was sought after an individual had been properly tried, convicted and denied relief by the highest court of the state on direct appeal. Because the collateral attack on the conviction was instituted some three years after the judgment was affirmed on appeal, the Supreme Court of Florida was encouraged to exercise "the vigilance of a hard-headed consideration of appeals to it for upsetting a conviction,"

Id. at 422.

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Respondent submits that just this type of vigilance has repeatedly and properly been exercised by this Court in scrutinizing post-conviction petitions for writs of habeas corpus in Utah. Vigilance is particularly appropriate in the instant case where petitioner has appealed his conviction unsuccessfully to this Court, petitioned for certiorari to the United States Supreme Court without success, and finally, some four years after his conviction, sought collateral relief in state court.

Appellant is candid in admitting that the United States Supreme Court in Case v. Nebraska, 381 U.S. 336 (1965), did not decide that the Fourteenth Amendment required any particular post-conviction criminal process. The Court merely stated that post-conviction remedies were "desirable." Id. at 346. Moreover, the Supreme Court continues to remain steadfast in its position that a state need not even provide for direct appeal of criminal convictions. Ross v. Moffitt, 417 U.S. 600 (1974). The United States Supreme Court's unwillingness to require states to provide post-conviction remedies expressed in Case continues to be the dominant rationale. The Supreme Court recently stated "It does not follow, however, that this Court has the power to compel a State to employ a collateral post-conviction remedy in which specific federal claims may be raised." Huffman v. Florida, No. 77-6025, cert. denied, 435 U.S. 1014, 1017

(1978) (Stevens, J., dissenting) (citing Case v. Nebraska, supra). The concluding paragraph of Justice Brennan's concurring opinion in Case makes it clear:

[T]here is no occasion in this case to decide whether due process requires the States to provide corrective process. The new statute [the Nebraska statute providing for post conviction relief] on its face is plainly an adequate corrective process. Every consideration of federalism supports our conclusion to afford the Nebraska courts the opportunity to say whether that process is available for the hearing and determination of petitioner's claim.

381 U.S. at 347.

Utah also allows an individual to attack his conviction by means of a motion in arrest of judgment (Utah Code Ann. § 77-34-1 (1953), motion for new trial (Utah Code Ann. § 77-38-1 (1953), and the various common law writs of coram nobis, mandamus and prohibition. In short, respondent maintains that Utah has more than adequately provided for the protection of a prisoner's rights, in the spirit of Case v. Nebraska, even though the state is not required to do so by the federal constitution.

It is clear, then, that Utah is free to provide any system of post-conviction criminal process that it deems appropriate. State post-conviction writs of habeas corpus

are not mandated by the federal Constitution. Many other states have adopted a policy in post-conviction habeas corpus cases that is very similar to Utah's. A representative cross-section of the jurisdictions includes Alabama, Arizona, California, Maine, Nevada, New York, Oklahoma, Pennsylvania and Washington.<sup>1</sup> Each of these states prevents a habeas corpus petitioner from raising issues that could have been raised on appeal. The support lent to Utah's position by the adoption of this policy by other states evidences the viability of Utah's decision to limit the scope of post-conviction writs of habeas corpus. Once a state has chosen to enact provisions entitling a prisoner to post-conviction relief, as Utah has done with Rule 65B(i), it

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1 See, e.g., Greer v. State, 49 Ala.App. 36, 268 So.2d 502 (1972); Griswold v. Gomes, 111 Ariz. 59, 523 P.2d 590 (1974); In re Black, 59 Cal.Rptr. 429, 428 P.2d 293 (1967); Boyd v. State, 282 A.2d 169 (Maine 1971); Junior v. Warden, Nevada State Prison, 532 P.2d 1037 (Nev. 1975); People ex rel. White v. LaVallee, 367 N.Y.S.2d 122 (N.Y.A.D. 1975); Young v. State, 451 P.2d 971 (Okla. Cr. 1969); Commonwealth ex rel DeMoss v. Cavell, 423 Pa. 597, 225 A.2d 673 (1967); Koehn v. Pinnock, 80 Wash.2d 338, 494 P.2d 987 (1972).

need only apply such a remedy in a fashion that comports with notions of federal due process. Respondent maintains that the following discussion will sustain a finding that this Court's record in handling post-conviction writs of habeas corpus does in fact meet the requirements of due process.

B

THIS COURT IS EMPOWERED WITH DISCRETION  
TO LIMIT THE SCOPE AND APPLICATION OF  
RULE 65B(i), UTAH RULES OF CIVIL PROCEDURE.

Utah Code Ann. § 78-2-4 (1953), reads:

The Supreme Court of the State of Utah has power to prescribe, alter and revise, by rules, for all courts of the State of Utah, the forms of process, writs, pleadings and motions and the practice and procedure in all civil and criminal actions and proceedings, including rules of evidence therein, and also divorce, probate and guardianship proceedings. Such rules may not abridge, enlarge or modify the substantive rights of any litigant. Upon promulgation the Supreme Court shall fix the date when such rules shall take effect and thereafter all laws in conflict therewith providing for procedure in courts only shall be of no further force and effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed by the Supreme Court.

In 1969 this Court exercised this rule-making power by approving Rule 65B, Utah Rules of Civil Procedure, providing for extraordinary writs. Specifically, Rule 65B(i)(1) states:

(1) Any person imprisoned in the penitentiary or county jail under a commitment of any court, whether such imprisonment be under an original commitment or under a commitment for violation of probation or parole, who asserts that in any

proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the State of Utah, or both, may institute a proceeding under this Rule.

The authorization of the post-conviction use of the writ of habeas corpus is consistent with what scholars have concluded is a valid legislative power to limit, enlarge or amend the so-called "Great Writ." See: Collings, Habeas Corpus for Convicts--Constitutional Right or Legislative Grace?, 40 Calif. L. Rev. 335 (1952); Oakes, Legal History in the High Court--Habeas Corpus, 64 Mich. L. Rev. 451 (1965). The statutory authorization in Utah Code Ann. § 78-2-4 (1953), is, then, a valid delegation by the legislature to this Court of its power to control the writ of habeas corpus. It is respondent's position that given the power to "prescribe, alter and revise" the writ of habeas corpus by rules,<sup>2</sup> this Court also has, a priori the power to define the scope and application of rule 65B(i).

This Court's power is limited only by the provision in Section 78-2-4 that states: "Such rules may not abridge, enlarge or modify the substantive rights of any litigant." Respondent has demonstrated that petitioner has no federal constitutional right to state habeas corpus relief, thus, such a claim could not be included in the phrase "substantive right" as contemplated by Section 78-2-4. The state constitution, Art. I, Sec. 5, is an almost verbatim adoption of the federal suspension clause, Art. I, Sec. 9, Cl. 2. The

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suspension clause is directed at suspects, not at convicts. See Collings, Habeas Corpus for Convicts--Constitutional Rights or Legislative Grace?, 40 Calif. L. Rev. 335, 340-41 (1952). Any modification of the post-conviction writ of habeas corpus does not run afoul of the suspension clause. Thus, any limitations imposed by this Court upon the post-conviction use of the writ cannot deprive petitioner of a state constitutional right. Therefore, as applied to state post-conviction writs of habeas corpus, Section 78-2-4 prohibits only the abridgement, enlargement or modification of the state rights of the litigant. The rights granted petitioner under Rule 65B(i) are procedural as well as substantive. If, in the adjudication of a claim under Rule 65B(i), a petitioner is afforded due process, the state has met its constitutional and statutory obligations for determining a state-created right.

Respondent will demonstrate that due process has been complied with in the instant case. Having established that this Court has the power to control the availability of habeas corpus as a post-conviction remedy, it is necessary to establish that the Utah case law limiting the scope of Rule 65B(i) is reasonable and in furtherance of a legitimate state interest.

C

THIS COURT HAS PROPERLY LIMITED THE POST-CONVICTION WRIT OF HABEAS CORPUS TO ITS COMMON LAW PURPOSES BY ENFORCING A WAIVER DOCTRINE THAT PROMOTES FINALITY IN THE CRIMINAL JUSTICE SYSTEM.

A review of the numerous Utah cases involving post-conviction writs of habeas corpus reveals that the Utah Supreme Court has repeatedly invoked what is essentially a waiver doctrine in regard to recognizable claims. A petitioner may not raise claims in a post-conviction petition for writ of habeas corpus that could or should have been raised on direct appeal. Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968). This standard is imposed whether an appeal is or is not taken. Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967) (no appeal taken); Maguire v. Smith, 547 P.2d 697 (Utah 1976) (appeal taken). The types of claims that are permissible on a post-conviction writ are stated in Rammell v. Smith, 560 P.2d 1108 (Utah 1977):

[T]he writ has its purposes, including the providing of a remedy where it challenges the jurisdiction of the court rendering the judgment, or where the sentence imposed is one not authorized by law, or where it is of an entirely different character than that which the statute prescribes, so that a person is being held under an obviously illegal sentence and it would thus be unconscionable not to examine the issue.

560 P.2d at 1109.



The scope of the writ described in Rammell is somewhat broader than the common law grounds stated in Harlan v. McGourin, 218 U.S. 442 (1910): "Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions." Id. at 448. If a state may restrict the scope of habeas corpus to its common law limits, a practice approved in Carter v. Illinois, supra, then it follows that Utah may permissibly expand the common law limits to the standard set forth in Rammell. Respondent would emphasize that Utah has properly limited the scope of post-conviction habeas corpus to issues involving (1) the jurisdiction of the trial court; (2) the validity of the sentence; or (3) "obvious illegality." Rammell, supra at 1109. The essential constitutional soundness of Utah's post-conviction writ of habeas corpus should not be obscured by the extensive argument in the instant case concerning the waiver doctrine.

An analysis of the habeas waiver doctrine in this case has been muddled by appellant's interjection of elements of collateral estoppel and res judicata. It is necessary to clear up any confusion by examining the exact nature of the concepts of waiver, collateral estoppel and res judicata.

Initially, it must be understood that res judicata has generally been held to be inapplicable in the area of habeas corpus. Fay v. Noia, 372 U.S. 391 (1963). The writ

lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is void, not merely erroneous, so the application of res judicata would contravene the very nature of the writ.

Collateral estoppel and waiver are distinguished in Black's Law Dictionary, 4th Ed. Rev., at 650: "Waiver is voluntary surrender or relinquishment of some known right, benefit or advantage; estoppel is the inhibition to assert it." A party is generally precluded from relitigating an issue that has been decided adversely to him in a prior proceeding. In retrospectively examining the rights of a habeas corpus petitioner, this Court has not found the prisoner estopped from raising issues that could have been raised on appeal but were not. In that case, there has been no adverse decision on the issue. Rather, the position of this Court has been that a petitioner is found to have waived claims that could have been raised on appeal but were not. As stated above, a waiver typically involves an element of intent or knowledge of the giving up of the right. This Court has deemed claims that could have been raised on direct appeal as being within the knowledge of petitioner, supporting the finding of waiver. When the state has created the right of direct appeal of a criminal conviction, it is not unreasonable to enforce a waiver doctrine with respect to another state-created right, habeas corpus. Thus, respondent contends that Utah courts

that the waiver is being reasonably applied in post-conviction cases.

Appellant cites Fay v. Noia, 372 U.S. 391 (1963), as setting forth the proper guidelines for determining whether a petitioner has waived issues that he is attempting to raise in a petition for writ of habeas corpus. Several cases decided after Fay by the United States Supreme Court have severely undercut Fay's "deliberate waiver" doctrine and have left the test of waived issues in an uncertain state.

The most significant recent habeas corpus case decided by the United States Supreme Court is Wainwright v. Sykes, 433 U.S. 72 (1977). In Wainwright, petitioner Sykes was convicted of third degree murder in a Florida circuit court. At trial, testimony was admitted that allegedly violated Sykes' rights under Miranda v. Arizona, 384 U.S. 436 (1966). However, no objection to the evidence was made at trial, as required by Florida's contemporaneous objection rule.<sup>3</sup> Sykes "apparently" did not raise the Miranda issue on direct appeal of his conviction. 433 U.S. at 75. Sykes subsequently filed three unsuccessful post-conviction petitions in Florida state courts which raised the Miranda issue for the first time.

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<sup>3</sup> Florida Rule Crim. Proc. 3.190(i), cited in 433 U.S.

Sykes then sought habeas corpus relief in federal district court, where he raised the Miranda issue again. The United States District Court for the Middle District of Florida ruled, inter alia, that Sykes had not lost his right to raise the issue by failing to object at trial or on direct appeal. The court reasoned that only "exceptional circumstances" of "strategic decisions at trial" would effect a waiver of issues in later habeas corpus actions. The Fifth Circuit Court of Appeals affirmed, relying on the "deliberate bypass" rule in Fay v. Noia. The United States Supreme Court reversed, citing Davis v. United States, 411 U.S. 233 (1973), and Francis v. Henderson, 425 U.S. 536 (1976), as limiting Fay v. Noia, and concluding that a failure to comply with state procedural requirements would bar the raising of those issues for the first time on federal habeas corpus absent a showing of cause for the noncompliance and prejudice resulting from the state procedural waiver. The precise definition of the "cause" and "prejudice" standard was explicitly left open for future decisions, the court noting:

. . . [o]nly that it is narrower than the standard set forth in dicta in Fay v. Noia, 372 U.S. 391 (1963), which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention. It is the sweeping language of Fay v. Noia, going far beyond the facts of the case eliciting it, which we today reject.

433 U.S. at 87-88.

The Court lists its reasons for narrowing the "deliberate bypass" standard as including the valid function of the state procedural requirement itself, the contribution to finality in criminal litigation, the prevention of "sand-bagging" on the part of defense lawyers and the desire to make the state trial the "main event." Id. at 88-90. Appellant concedes the legitimacy of the deliberate bypass rule and finality in the criminal justice system at page 8 of his brief, where he states:

This does not mean that a prisoner may relitigate through post conviction proceedings the self same issues decided against him in his direct appeal, or that criminal defendants may bypass issues in appealing their convictions and hold them in reserve for post conviction proceedings.

While Wainwright deals with a federal habeas corpus case, respondent submits that the court's statements concerning waiver of issues are applicable to the instant case in particular and Utah habeas corpus proceedings in general.

Wainwright v. Sykes was applied in the manner urged by respondent in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied \_\_\_ U.S. \_\_\_ (March 26, 1979). Petitioner Spenkelink (spelled "Spinkellink" by the Fifth Circuit Court of Appeals) failed to raise a claim of improper jury selection to the Florida Supreme Court on appeal of his 1973 conviction for first degree murder. (Spenkelink

was sentenced to death as a result of the conviction.) Spenkelnk's arguments in his petition for federal habeas corpus relief were largely based upon United States Supreme Court cases decided after his appeal had been taken, an obvious similarity to the instant case. Despite Spenkelnk's arguments, the Fifth Circuit clearly indicated that Wainwright v. Sykes would seem to preclude the raising of issues waived in a state proceeding. (The Florida Supreme Court had held the claim waived in Spenkelink v. State, 350 So.2d 85 (Fla. 1977).) The Fifth Circuit proceeded to discuss Spenkelnk's claims as a matter of law, but the citation of Wainwright v. Sykes is a clear indication of Wainwright's broad applicability, extending even to a death penalty case.

The state procedural ground at issue in the instant case is the failure to raise certain issues on direct appeal from the conviction. As with the Florida contemporaneous objection rule in Wainwright, strict adherence to the Utah habeas corpus waiver doctrine furthers several legitimate state interests. (See: Henry v. Mississippi, 379 U.S. 443 (1965).) The refusal to hear issues on habeas corpus petitions that could or should have been raised on direct appeal (1) furthers finality in the criminal justice system, (2) prevents "sandbagging" on the part of defense lawyers, (3) serves to make the direct appeal more of a "main event." These same considerations were persuasive to the Wainwright Court.

Respondent urges this Court to consider these factors in addition to the freedom of this state to fashion its own remedy, argued above, and find Utah's habeas corpus waiver doctrine a valid policy in furtherance of a legitimate state interest.

D

APPELLANT HAS FAILED TO MEET  
HIS BURDEN OF SHOWING THAT THE  
INSTANT PETITION INVOLVES SUCH  
UNFAIRNESS THAT IT WOULD BE  
UNCONSCIONABLE NOT TO EXAMINE  
THE CLAIMS RAISED.

In his concurring opinion in Wainwright v. Sykes, supra, Justice White states, "I do agree that it is the burden of the habeas corpus petitioner to negative deliberate bypass and explain his failure to object." Id. at 99. Extending this statement to the instant case, respondent submits that appellant has the burden of showing why relief should be granted in the instant case. That is, he must show why the issues raised in his petition for writ of habeas corpus could not have been raised on appeal. Appellant has failed to make such a showing.

Appellant raised the following claims in his Third District Court petition: (the paragraph numbers refer to the actual numbers of his petition below which is part of the record before this Court).

11A. predisposition of jury and failure of trial judge to grant various motions.

12. unconstitutionality of death sentence for various reasons.

12A. sentencing statute permits arbitrary and discretionary imposition of death penalty; inadequate guidelines for sentencing authority.

12A(1). unguided and unfettered discretion in sentencing authority.

12A(1)(a). jury in determining sentence needed no other facts than those brought out in guilt phase.

12A(1)(b). jury was required to state only one of two possible sentences.

12A(2). no requirement of finding or pleading of aggravating circumstance.

12A(2)(a). state not required to plead aggravating circumstance.

12A(2)(b). no instruction to jury of unanimity.

12A(2)(c). jury not required to specify which aggravating circumstance it relied on.

12A(3). consideration of unspecified aggravating and mitigating circumstances.

12A(3)(a). evidence of irrelevant past misconduct admitted.

12A(3)(b). jury not required to specify its

finding on mitigating circumstances or aggravating circumstance



12A(3)(c). trial court description of alternate sentences.

12A(3)(d). prosecutor's urging of death penalty.

12A(4). absence of standards for balancing aggravating and mitigating factors.

12A(4)(a). jury not given standards for weighing factors.

12A(4)(b). jury not required to specify weight given to various factors.

12A(4)(c). inappropriate burden of proof in sentencing phase.

12A(4)(d). jury not informed of burden of proof it should look for.

12A(5). no provision for appellate or other review.

12A(5)(a). appellate review based only on cases actually appealed.

12A(5)(b). failure of this Court to specifically review findings of aggravating or mitigating circumstances.

12A(5)(c). failure of this Court to analyze presence of passion or prejudice.

12A(5)(d). failure of this Court to compare sentences.

12B. arbitrary and discriminatory pattern and practice of imposition of death penalty since 1973.

12C. no finding that petitioner personally took any lives or intended to do so.

12D. purposeless infliction of pain by hanging or shooting; infliction of psychological torture.

The petitioner in a habeas corpus proceeding has the burden of proving the grounds upon which he relies for his release by providing evidence that is clear and convincing. McGuffey v. Turner, 18 Utah 2d 354, 358, 423 P.2d 166, 169 (1967). Appellant has not shown any evidence to support the above-enumerated claims that even approaches a clear and convincing standard. Because such a showing has not been made, appellant failed to state a claim upon which relief can be granted. Appellant argues that he did not have an opportunity to present such evidence. That is not the case. Judge Sawaya afforded appellant an opportunity to provide support for his claims in the hearing on respondent's motion to dismiss. Appellant did not make such a showing and thus failed to meet his burden. Moreover, each issue was of such a nature that it could properly be disposed of as a matter of law.

Judge Henry J. Friendly in his article, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 155-156 (1970), has concluded that habeas corpus should not be available upon a mere open assertion that a "constitutional" right has been denied. Of course, non-constitutional claims that

could have been raised on appeal are clearly waived. Wolff v. Rice, 428 U.S. 467 (1976). Appellant's naked assertions of "unconscionability" and the "unjustifiable" conduct of Judge James S. Sawaya in this case are not substantial enough to merit consideration.

Appellant cites Rammell v. Smith, *supra*, (claim of improper sentence), Horne v. Turner, 29 Utah 2d 175, 506 P.2d 1268 (1973), (claim of involuntary guilty plea), Zumbrunnen v. Turner, 27 Utah 2d 428, 497 P.2d 34 (1972) (claims of involuntary guilty plea and ineffective assistance of counsel), Webster v. Jones, 587 P.2d 528 (Utah 1978), (claim of denial of right to counsel), to indicate the willingness of this Court to entertain exceptional claims. In each of the four cases, this Court held that the waiver doctrine applied and refused to grant relief in any of the cases. Contrary to appellant's assertion at page 9 of his brief, the dicta in the cases concerns the instances in which the writ will be granted, not the waiver doctrine and the error of attempting to use habeas as a substitute for appeal.

Respondent submits that the claims in the instant case do not merit consideration in a writ of habeas corpus. If this Court disagrees, it should proceed to a determination on the merits of the case

immediately. A remand of the case is not warranted as requested by appellant. Pursuant to the language in Rammell, supra and other cases, this Court will decide issues raised in otherwise defective petitions if it so chooses. The instant case is one involving protracted litigation and a high degree of public concern. The interests of justice would best be served by a decision from this Court if it should be determined that the waiver doctrine is not a bar to appellant's claims.

Appellant repeatedly protests that he is being "forced" into federal court by the operation of Utah's habeas corpus waiver doctrine. Respondent submits that rather than "forcing" petitioners into federal court for a hearing on their claims, Utah is instead properly enforcing a waiver doctrine that is consistent with the federal trend announced in Wainwright v. Sykes, supra. The waiver doctrine also furthers the legitimate (acknowledged as such by appellant) state interests in finality and the integrity of the judicial process. Utah's waiver doctrine will not cause undue friction with the federal courts (resulting from a federal hearing on a claim deemed waived by state courts) because federal courts, following Wainwright, will lend increasing credence to a state court's enforcement of a procedural waiver.

To summarize, respondent contends that Utah, as a state, is free to choose whether it will provide post-conviction habeas corpus relief. Having chosen to do so, this Court is properly empowered to limit the scope of habeas corpus as a remedy in any manner that it deems is in furtherance of a legitimate state interest. The method of limitation chosen is a waiver doctrine that limits the writ to virtually its common law scope. The waiver doctrine is consistent with the trend of United States Supreme Court case law that stresses finality in the criminal justice system. Under the facts of this case, appellant has failed to show why the Utah waiver doctrine should not continue to apply and therefore his claim for post-conviction relief should be denied.

POINT II.

RESPONDENT'S MOTION TO DISMISS WAS PROPERLY GRANTED PURSUANT TO THE DISTRICT COURT'S AUTHORITY BASED ON RULES OF PROCEDURE, STATUTES AND CASE LAW.

Appellant asserts that post-conviction petitions for writs of habeas corpus are civil in nature and are governed by the Utah Rules of Civil Procedure. He then argues that motions to dismiss such petitions must be made pursuant to the appropriate rule, Rule 12(b), and then cites certain civil cases (not involving habeas corpus matters) which have held that Rule 12(b) motions should not be granted when they raise "matters outside the pleadings." He states that if matters outside the pleadings are raised, the motion to dismiss must be treated as one for summary judgment under Rule 56. Further, he contends that it is impermissible for a court to summarily convert the motion into one for summary judgment without first giving the parties the opportunity to fully present evidence and contest the factual allegations on which the motion is based, and that it is error to require the opposing party to state how he will establish his claims. Finally, he asserts that Judge Sawaya impermissibly granted respondent's motion to dismiss because in determining that the Utah waiver doctrine (Point I, supra), barred appellant from habeas corpus relief, the court needed, but did not have, the entire record of prior

proceedings before it. Additionally, he claims that he raised certain issues in his petition which were not and could not have been raised on appeal which were factual in nature, and thus which could not be disposed of on the pleadings.

Respondent contends that appellant has failed to recognize the unique nature of habeas corpus proceedings and the concomitant rules of procedure which govern such actions. Consequently, appellant's arguments distort the actual mechanics of Judge Sawaya's granting of the motion to dismiss and attempt to apply the doctrine of res judicata where it is wholly inapplicable. As shown, supra, in Point I, res judicata is generally conceded to be unavailable in habeas corpus. Fay v. Noia, supra. The two principles of habeas corpus procedure that respondent asserts are applicable are (1) a special, rigid set of rules and burdens of pleading placed on a petitioner by Rule 65B(i), Utah Rules of Civil Procedure and (2) the waiver doctrine (not res judicata), discussed supra, in Point I. A review of appellant's arguments on this point reveals his confusion.

Initially, appellant's error concerning his reliance on res judicata is exhibited by the repeated reference to the doctrine throughout Point I. of his brief. Appellant states, "A [m]otion claiming that one lawsuit should be dismissed because it is barred by the decision in

another is not a motion under Utah Rules of Civil Procedure 12(b) but a matter for summary judgment under Rule 56 since it requires examination of materials and facts beyond the pleadings." (Emphasis added). Brief of appellant at 12. The language "barred by the decision in another" clearly reflects the underlying concepts of the doctrine of res judicata. As stated in Green, Basic Civil Procedure, Ch. VIII "Res judicata" (1972), at p. 203: "Nevertheless, the judgment is conclusive, not because there has been a merger, but because the judgment establishes a bar to the plaintiff's suit." (Emphasis added). In the instant case, Judge Sawaya did not find that appellant's petition for writ of habeas corpus was barred from consideration, rather he found that the petition must be dismissed because appellant had waived the right to raise the issues that formed the substance of the petition without which appellant had failed to state a claim.

Apart from the basic misconception concerning the doctrine of res judicata, appellant also misapplies certain characteristics of a motion for summary judgment with what respondent initiated as a motion to dismiss in Third District Court and what, as evidenced by Judge Sawaya's ruling, remained a motion to dismiss. Appellant quotes Strand v. Associated Students of University of Utah, 561 P.2d



191 (Utah 1977) for the proposition that, "It is error to consider a motion to dismiss as a motion for summary judgment without giving the adverse party an opportunity to present pertinent material." Brief of appellant at 12. Respondent asserts that appellant was given an opportunity to "present pertinent material" by submitting it to the court in his petition for writ of habeas corpus; indeed, he was required to do so by Rule 65B(i)(2). His failure to support his petition with pertinent material was a basis for the granting of the motion to dismiss. Appellant should not be allowed to demand a subsequent opportunity to present evidence on a claim that he has failed to state in the first place. The court in Spinkellink v. Wainwright, 578 F.2d 590 (5th Cir. 1978), U.S. cert denied (March 26, 1979), also supports respondent's argument that appellant's opportunity to present material evidence of his claims was in his petition by stating, "Fourteen months is sufficient time in which to assemble evidence for collateral review proceedings." 578 F.2d 591, n. 11. Appellant had twelve months in which to assemble the evidence for his petition for writ of habeas corpus in the instant case. (November, 1977 to November, 1978, the date his appeal was decided by this Court to the date of the filing of his petition in Third District Court).

Appellant next contends that, "It is error for a trial court to convert a motion to dismiss into a motion for summary judgment or to require the plaintiff to state 'how he will establish his claim . . .'", citing several non-habeas corpus civil cases in support of this argument (Emphasis added). Brief of appellant at 12-13. It is Rule 65B(i) which requires the petitioner to state how he will establish his claim in his pleading, not the trial court. Because Judge Sawaya determined that appellant's petition failed to establish a claim, he was merely enforcing the requirements of Rule 65B(i) pursuant to respondent's motion to dismiss, not acting in accordance with procedure under a motion for summary judgment. Appellant concedes that "The kind of dismissal that the District Court entered in this case is specifically reserved by the rules of civil procedure for pleadings which on their face fail to state a cause of action." Brief of appellant at 14. Respondent will demonstrate how appellant's petition failed to state a claim and additional reasons for appellant's error in arguing that a motion for summary judgment was issued instead of a motion to dismiss.

Respondent agrees that post-conviction habeas corpus is a civil remedy which is generally governed by Utah's Rules of Civil Procedure. Burleigh v. Turner, 15 Utah 2d 118, 388 P.2d 412, 414 (1964). However, it must be recognized that

unlike a regular civil case (where motions to dismiss or motions for summary judgment are asserted at the earliest stage of the proceedings often after only an initial complaint has been filed commencing the action), a post-conviction habeas corpus action commences after numerous prior court proceedings have already occurred where the accused has had prior opportunity to raise constitutional challenges to his pending or actual incarceration. There has already been (1) prior opportunity for pre-trial motions (i.e., suppression hearings, challenges to the constitutionality of the statute under which the accused is charged, etc); (2) a prior conviction where adjudication of facts and law has been made; and (3) prior appellate review of the petitioner's case. Thus, this Court through its rule-making authority set forth in Utah Code Ann. § 78-2-4 (1953), has the power to fashion specialized rules governing post-conviction writs of habeas corpus. Moreover, as discussed in Point I., supra, this Court may, by judicial interpretation, restrict the availability of any post-conviction habeas corpus rule (e.g., the waiver doctrine).

This Court has, in fact, enacted a special rule governing habeas corpus in Rule 65B(i). That rule, unlike rules governing the filing of complaints in routine civil cases, additionally requires that the habeas corpus complaint (petition):

1. Assert a substantial denial of constitutional rights;
  2. Identify the proceedings in which the complainant was convicted;
  3. Set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated;
  4. Have attached thereto affidavits, copies of records, or other evidence supporting each allegation, or shall state why the same are not attached;
  5. State whether the conviction has been reviewed on appeal, and, if so, identify such appellate proceedings and state the results thereof;
  6. State whether the legality or constitutionality of his commitment or confinement has already been adjudged in a prior habeas corpus or other similar proceeding.
- Rule 65B(i)(2).

Thus, habeas corpus complaints must be much more comprehensive than those in regular civil cases. The petitioner must explain the grounds for the complaint, and demonstrate to at least a threshold degree, their substance through supporting attachments, etc. Mere naked, unsupported allegations or legal conclusions do not satisfy this requirement. Rather, the petitioner has a burden to make an initial showing of merit, and must

provide the reviewing court with certain information so that a determination may be made by the court whether the petition is frivolous, whether issues raised have been previously adjudicated, or whether they are excluded by the waiver doctrine. Such determinations may even be made before the respondent is required to file an answer or other responsive pleading. Rule 65B(i)(2). (Also see the Rules governing federal writs of habeas corpus under 28 U.S.C.; § 2254, which provide for such summary dismissal prior to requiring any pleading by respondent).

Contrary to appellant's assertions, a determination of the applicability of Utah's waiver doctrine may clearly be made by the court based on the face of the habeas corpus pleadings without the entire record of any prior proceedings before the court. Given the comprehensive nature of the habeas corpus pleadings, the reviewing court may determine expeditiously that the petitioner appealed his conviction and raised certain issues on appeal. (Recall that Rule 65B(i)(2) requires the petitioner to identify the appellate proceedings and state the results). The court may, then, based upon an objective determination, summarily dismiss any issues which it sees were previously adjudicated on appeal. Likewise, a subjective determination may be made whether the issues now raised in the complaint could or should have been raised on direct appeal, and if so, determine that they are excluded by the waiver doctrine. (Point I, supra).

In the instant case, appellant failed to completely provide the court with the information required by Rule 65B(i) when he filed his complaint. Thus, when respondent filed his motion to dismiss, he attached copies of the requisite documents contemplated by Rule 65B(i), to-wit: copies of prior decisions of the Utah and United States Supreme Courts and briefs filed by the respective parties in those actions. These documents clearly provided ample basis for the court to determine that the issues raised in appellant's complaint either were raised or could have been raised on direct appeal. Moreover, appellant was accorded the opportunity at the hearing on respondent's motion to dismiss to rebut the applicability of the waiver doctrine and explain why the issues in his petition were not raised on appeal. Obviously, the court found the appellant's arguments (excuses) unpersuasive.

Appellant asserts that Judge Sawaya must have the entire record of prior proceedings before him "in order to make a determination that the raising of an issue is foreclosed by the doctrine of res judicata," citing Parrish v. Layton City Corp., 542 P.2d 1086 (Utah 1975). Again, appellant has confused the doctrine of res judicata with the unique habeas corpus doctrine of waiver and thus the case is inapplicable. Moreover, given the drastic difference between the extent and

scope of the pleadings in habeas corpus as opposed to regular civil pleadings, the case has little application. Also, it should be noted that in Parrish a summary judgment was reversed and the matter remanded because ". . . [a] survey of the record (revealed) that the defendant never submitted a copy of the pleadings and judgment (in the prior decision) . . . ." (Emphasis added.) Parrish, supra, at 1087. The clear implication of Parrish is that a determination of res judicata may be made without an evidentiary hearing when the court has the pleadings and judgment from the previous proceeding before it which was the situation in the instant case.

Finally, it is difficult to see how a copy of the complete record of this case, presumably including the 5000 page trial transcript and hundreds of exhibits, would have had any relevance to a determination of the waiver doctrine issue. The only critical question was whether the issues raised in the habeas corpus complaint were or could have been raised on appeal. Judge Sawaya did not have to go beyond the face of the pleadings in reaching his decision on the waiver doctrine, and thus could properly rule on respondent's motion to dismiss without converting it into a motion for summary judgment. In doing so, he made a determination of the legal insufficiency of appellant's claims because relief could not be granted thereon due to the waiver doctrine.

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A party's assertion that questions of fact exist, may be dismissed by a court if, in reality, the factual assertions merely color what is essentially a legal issue. Spinkellink v. Wainwright, 578 F.2d 582, 590-591. In Spinkellink, the Fifth Circuit Court of Appeals stated:

When, however, it affirmatively appears from the petition that a petitioner is not entitled to the writ, an evidentiary hearing is unnecessary. . . . For example, if a petitioner's habeas corpus allegations raise legal questions only, a district court's refusal to hold an evidentiary hearing does not violate the directives of Townsend (Townsend v. Sain, 372 U.S. 293 (1963)) or Section 2254(d). . . . This rule would also apply when a trial court holds an inadequate evidentiary hearing, for if only questions of law are involved, an evidentiary hearing to develop fully the facts underlying a petitioner's complaints would be pointless. (Citations omitted.)

578 F.2d 590.

Appellant focuses on essentially five issues which he contends were improperly dismissed by Judge Sawaya. Scrutiny of these issues reveals that each was either an issue that could or should have been raised on appeal, or was a legal issue that could properly be disposed of by Judge Sawaya without an evidentiary hearing. The issues discussed here are raised at pages 13-14 of the Brief of Appellant.

First, appellant contends that Judge Sawaya "[r]ejected Appellant's specific allegation that the death penalty was being imposed on him for reasons not permissible under the Constitution," citing page 28 of the transcript of the November 11, 1978, hearing before Judge Sawaya. The issues raised by



Mr. Ford, counsel for appellant, at page 28, included the element of prosecutorial discretion in imposing the death penalty as well as "[w]e are not limiting our allegations to prosecutorial discretion but we are looking, as the Court did in Furman, at the whole system." (Emphasis added.) Respondent contends that the court was adequately informed on the issue of prosecutorial discretion on the basis of the pleadings. A discussion of the issue was included in respondent's memorandum to the court in support of his motion to dismiss. As for the "issues" raised in reference to "the whole system," respondent maintains that this claim is exactly the type of "vague and speculative" issue which Judge Sawaya found unworthy of consideration. Appellant cannot be found to have met the burden of Rule 65B(i), requiring specificity, by simply alleging a legal conclusion that elements of discretion are improperly present in "the whole system." Moreover, the issue of prosecutorial discretion could have been raised on appeal, as shown by respondent's memorandum to the lower court tracing the roots of the argument to Gregg v. Georgia, 428 U.S. 153 (1976), and other earlier cases. The remaining claims of discretion throughout the entire system were properly dismissed as a matter of law as failing to comply with the pleading requirements or Rule 65B(i).

Second, appellant argues that "[t]he death penalty was being administered 'arbitrarily and discriminatorily against the poor and outcast whose alleged victims are white'." This issue is dealt with dispositively in Point V, infra, and is precisely the type of seemingly factual claim that can nevertheless be dismissed as a matter of law. It was dealt with in just this fashion in Spinkellink, supra, wherein the court stated that such legal issues in general could be disposed of without a hearing, 578 F.2d 590, and that a claim of racial discrimination specifically should be dismissed as a matter of law. Id. at 612-616. Certiorari was denied by the United States Supreme Court on this issue and others in Spinkellink on March 26, 1979.

Third, appellant argues that "[t]he jury in his case was actually affected and prejudiced by improper outside influences." The essence of this claim is that appellant is now prepared to show actual jury prejudice because of alleged improper influence and that he did not and could not raise this claim on appeal because he did not know he had to show actual prejudice to prevail on this claim until this Court rendered its decisions in State v. Pierre, supra, and State v. Andrews, supra (Trans. 11/30/78 at 9). The issue of jury prejudice was in fact raised on direct appeal and respondent at that time clearly argued that

appellant's burden was to show actual prejudice. Appellant failed to rebut that argument by means of a reply brief, oral argument or petition for rehearing. The issue clearly was not a novel one that arose out of this Court's opinion. Rather, this Court merely accepted the legal arguments and prior case authorities on this issue which were asserted by respondent. Appellant, on direct appeal, clearly could and should have argued that he was not required to show actual jury prejudice to prevail, or, in the alternative, assert on appeal any facts to support a claim of actual jury prejudice. Thus, this issue was properly dismissed by Judge Sawaya under the waiver doctrine as being an issue which either was raised or could have been raised on direct appeal.

Fourth, appellant contends that the verdicts of guilt were not sufficient enough to comply with what appellant argues is a requirement of Lockett v. Ohio, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), i.e., that appellant was never found to have taken life or intended to take life. This argument is dealt with in more detail in Point IV, infra, wherein respondent argues (1) that appellant's conduct in the instant case is so distinguishable from defendant Lockett's as to make the case inapplicable, (2) appellant attempts to elevate one statement of a concurring Justice (in disregard of the central holding of the case) far beyond its meaning, and (3)

appellant has failed to make the requisite showing for retroactive application of the case. This issue is legal in nature, going to the constitutional basis of Utah's death penalty procedure, and was a proper matter for dismissal as a matter of law.

Finally, appellant asserts that the court "[r]uled that substantial claims of constitutional rights violations were not available to appellant, without determining from any record whether he had personally waived them or whether his counsel had in any previous proceeding been afforded the opportunity to assert them." Appellant's brief, pp. 13-14. This claim combines appellant's claim of the necessity of a complete record (discussed supra within this Point) and the standard of waiver (discussed supra in Point I). The issue concerning the record is an issue of law. The issue of the waiver of claims is resolved by a comparison of the pleadings in the habeas corpus case with those filed in earlier actions plus the decisions in prior cases. As a result, it, too, could be dismissed as a matter of law.

The above analysis of the five points asserted by appellant on this issue indicates the soundness of Judge Sawaya's ruling. Each one was properly dismissed because it could have been raised on appeal or because it was a legal issue subject to a motion to dismiss.

As a concluding argument on this point, respondent avers that the district courts of this state have inherent and statutory power in aid of their jurisdiction to dismiss sua sponte any matter which, in the sound discretion of the court, is not an appropriate matter for further consideration. This would encompass appellant's assertion that Judge Sawaya improperly reached the merits of certain issues in the petition. The courts need not rely upon counsel to point out every impropriety or deficiency in proceedings, but may act upon its own, with due process, to provide justice. Such power is necessary, for example, to increase the productivity and efficiency of the courts through elimination of matters lacking a proper case or controversy. Such elimination is especially necessary in habeas corpus cases, where significant numbers of frivolous allegations are brought by prisoners hoping to escape justice. Utah Code Ann. § 78-7-24 (1978), specifically states:

[W]hen jurisdiction is, by statute, conferred on a court or judicial officer, all means necessary to carry it into effect are also given and, in the exercise of jurisdiction. [sic] If the course of proceeding is not specifically pointed out, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or of the rules of procedure. (Emphasis added.)

In the present case, the judge, in order to satisfy himself that there was a proper case or controversy before him, heard at length from appellant concerning what evidence

he might introduce in support of his allegations. Appellant was not able to cite one piece of relevant, material evidence which he intended to introduce to establish his claims and which was not subject to rejection as a matter of law.<sup>4</sup> In the face of the absence of allegations of relevant evidence to be presented at a hearing, the court had not only the power, but the obligation to dismiss the case as a matter of law.

To summarize, respondent submits that the procedure employed by Judge Sawaya in this case was properly grounded in Utah rules, statute, and case law. A motion to dismiss, not a motion for summary judgment, was granted pursuant to valid authority and based upon adequate information supplied by the pleadings and oral argument of counsel.

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4 Concerning allegations 12A, 2, 3, and 4 (of appellant's amended petition), appellant merely stated that the Utah Supreme Court had not effectively dealt therewith, and that appellant wanted to "force" the Utah Supreme Court to "face those issues." (Trans. of 11/30/78 at 15-16).

Concerning allegations 12A, E and F, appellant stated that they were going to produce evidence of seven cases of murders as heinous as appellant's where the death penalty was not imposed (T.17-18). Such evidence is not relevant to the issues as a matter of law as discussed *infra*, Point V.

Concerning the final allegations 12G, H and I, no evidence was mentioned; only a frivolous argument was made that there is no bifurcated hearing in Utah on all relevant aggravating and mitigating circumstances because one such circumstance (the one necessary to raise the crime from second to first degree murder) has already been heard during the guilt phase of the trial (T.18-19).

See the virtual absence of mention of any new, relevant evidence from separate counsel (T.26-29).

POINT III.

PETITIONER MAY NOT BENEFIT FROM THE  
RETROACTIVE APPLICATION OF NEW CASE  
LAW IN A PETITION FOR A COLLATERAL REMEDY  
SOUGHT AFTER A DIRECT APPEAL HAS BEEN  
TAKEN.

Appellant seeks to reap the benefits of case law that has been announced since his direct appeal was decided in November, 1977. Appellant argues that selected cases should be retroactively applied, citing Hankerson v. North, Carolina, 432 U.S. 233 (1977) in support of his contention. The underlying rationale of Hankerson and the very cases cited as controlling authority therein highlight the crucial distinction that appellant has failed to make. That is, cases arising in the context of a collateral remedy (habeas corpus) do not profit from retroactive application of new case law, whereas cases before an appellate court on direct appeal do benefit therefrom.

Hankerson v. North Carolina, was before the United States Supreme Court on direct appeal, the appellant claiming error in the trial court's failure to instruct on a theory of self-defense. Subsequent to his conviction, yet prior to the decision of the Supreme Court of North Carolina on appeal, the case of Mullaney

v. Wilbur, 421 U.S. 684 (1975), was decided, giving support to the appellant's claim. The United States Supreme Court reversed the decision of the North Carolina Supreme Court and held Mullaney to be retroactive. Justice Powell, concurring in Hankerson, stressed the importance of finality in the criminal justice system and historical limitations on habeas corpus in embracing the concurring opinion of Justice Harlan in Williams v. United States, 401 U.S. 646, 676 (1971). Justice Marshall, also concurring in Hankerson, noted the distinction between collateral attack and direct review and also cited Justice Harlan's opinion in Williams as setting forth the correct position.

In Williams, Justice Harlan distinguishes the function of the Court on direct review as opposed to habeas corpus or some other collateral remedy and differentiates between the nature of the two proceedings themselves. Justice Harlan concludes that on petitions for writs of habeas corpus, the petitioner may not benefit from case law that arose after the direct appeal of petitioner's conviction. The two exceptions to this position are (1) matters concerning substantive due process and (2) a denial of procedures that are "implicit in the concept of ordered liberty." 401 U.S. at 693.



As an example of the first exception, Justice Harlan cites Stanley v. Georgia, 394 U.S. 557 (1969). For the second exception, Yick Wo v. Hopkins, 118 U.S. 356 (1886). Respondent submits that the claims raised by appellant in the instant case do not even approach the dramatic reversal of prior case law as involved in Stanley (First Amendment private possession of obscene material) or Yick Wo (landmark equal protection case). Justice Harlan's position opposing the retroactive application of law in habeas corpus cases is clear.

Habeas corpus always has been a collateral remedy providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in re-adjudicating convictions according to all legal standards in effect when a habeas petition is filed. Indeed, this interest in finality might well lead to a decision to exclude completely certain legal issues, whether or not properly determined under the law prevailing at the time of trial, from the cognizance of courts administering this collateral remedy.

401 U.S. 682-83.

Numerous other habeas corpus cases support the non-retroactivity position of Justice Harlan. See, e.g., Desist v. United States, 394 U.S. 244 (1969) (seizure of speech); Linkletter v. Walker, 381 U.S. 618 (1965) (refusal to retroactively apply Mapp v. Ohio); Adams v. Illinois, 405 U.S. 278 (1972) (presence of counsel at preliminary hearing); Johnson v. New Jersey, 384 U.S. 719 (1966) (refusal to retroactively apply Miranda and Escobedo). The reluctance of the United States Supreme to invoke retroactivity is apparent.

In State v. Belgard, 25 Utah 2d 188, 479 P.2d 343 (1971), the Utah Supreme Court in effect refused to retroactively apply Miranda v. Arizona, 384 U.S. 436 (1966), to a guilty plea by the defendant entered in 1963. While Belgard involves a retroactivity provision concerning Miranda (Miranda was expressly made non-retroactive. 384 U.S. at 732), and thus is not directly on point, respondent submits that this Court is sensitive to the policy arguments concerning retroactivity, as evidenced by Belgard and State v. Kelbach, 569 P.2d 1100 (Utah 1977). In Kelbach, this Court refused to give retroactive application to a proposed judicial change to the state's

right to appeal. The decisions of the Utah Supreme Court reflect a limitation on retroactivity that is consistent with the position of the United States Supreme Court expressed in Williams, supra.

Appellant asserts that a defendant cannot be bound by a waiver of a right resulting from the acts of his counsel. Respondent contends that appellant's assertion is contradicted by the recent case of Wainwright v. Sykes, 433 U.S. 72 (1977) (Chief Justice Burger, concurring). Chief Justice Burger concludes that a defendant is, indeed, bound by the decisions of his counsel at trial. See also McMann v. Richardson, 397 U.S. 759 (1970). Respondent submits that the same logic applies to strategic decisions involved in taking an appeal. Picking two or three selected issues for appeal as opposed to the so-called "shotgun" approach is a decision that counsel, as the person best informed, must make. Just as a layman cannot be expected to make objections during the course of a trial, he cannot be expected to formulate issues for the appeal of his conviction. Therefore, the Wainwright rationale concerning matters waived at trial should be equally applicable in the instant case concerning the appeal process.

Respondent avers that the reasoning of Justice Harlan in Williams, supra, is sound. If finality did not have a legitimate place in the criminal justice system, retroactivity could be used to extend post conviction litigation almost indefinitely. Every minor change in any part of the law touching a conviction could be used as a vehicle to reconsider a case time and time again. The case law that has arisen since appellant's conviction does not effect a radical change in the prior law. Certainly appellant has not been denied any procedure that is implicit in the concept of ordered liberty.

Appellant states that the new constitutional doctrine that he relies upon "touches the truth-finding function" and is therefore "presumably retroactive". (Brief of Appellant at 17). The phrase "truth finding function" is taken from Ivan V. v. City of New York, 407 U.S. 203 (1972), wherein the Court stated,

Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. (Emphasis added)

Id. at 204.

In citing this passage from Ivan V., the Court emphasizes that there must be substantial impairment of the truth-finding function in order for the retroactivity doctrine to take effect. 432 U.S. at 243.

Appellant has not shown with any specificity (1) any substantial impairment of the truth-finding function or (2) how the new case law upon which he places his reliance raises serious questions about the accuracy of the guilty verdict in appellant's conviction. Respondent submits that the failure to make these showings removes any "presumptive retroactivity" and in fact indicates that retroactivity is entirely inappropriate in the instant case.

#### POINT IV

THE UTAH DEATH PENALTY STATUTES REMAIN  
CONSTITUTIONALLY SOUND IN LIGHT OF  
RECENT UNITED STATES SUPREME COURT  
DECISIONS.

Respondent submits that appellant's arguments concerning the constitutionality of Utah's death penalty statutes, like the other claims raised in the petition for writ of habeas corpus filed below, are precluded by the waiver doctrine discussed supra in Point I. That is, these arguments could and should have been raised on direct appeal. Also, respondent submits that appellant has failed to make an adequate showing to merit retroactive application of the new cases upon which he relies. Respondent's arguments on retroactivity are discussed in Point III, supra. However, should this Court desire to review the merits of these claims, respondent maintains that the issues are without legal merit.

Appellant raises three basic claims in attacking the constitutionality of Utah's death penalty statutes. First, he claims that the sentencing portion of the trial in a Utah capital case is deficient in the following respects: (a) no notice is given to a defendant of the grounds (aggravating circumstances) upon which the death

penalty is sought; (b) the State is not required to expressly plead or prove the grounds supporting the death penalty; (c) no factual findings stating the specific considerations relied upon by the jury is required and (d) appellate review is not adequate because of the absence of factual findings. Second, appellant argues, based on Lockett v. Ohio, 98 S.Ct. 2954 (1978), that the death penalty may not be applied to appellant because he was not specifically found to have personally taken life or intended to take life. Third, he argues that the method of execution in Utah constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Respondent submits that the sentencing portion of Utah's death penalty statutes is sound. The claim of lack of notice of the grounds upon which the State seeks to rely in supporting the death penalty is rebutted by the succinct clarity of Utah Code Ann. § 76-5-202 (1953), as amended. This section lists the eight aggravating circumstances for first degree murder, one or more of which must be alleged, proved beyond a reasonable doubt and found by the trier of fact in a capital case. Any criminal defendant faced with a capital charge is put on notice of these eight aggravating circumstances; if

the prosecution cannot prove at least one of the eight, a death sentence cannot be imposed. The statutory enumeration of these factors allows a defendant to prepare a defense on each of the grounds; he is sufficiently aware of what elements the State must prove and what the trier of fact must find in order to support a death sentence.

Appellant relies heavily upon Gardner v. Florida 430 U.S. 349 (1977), and Presnell v. Georgia, \_\_\_\_\_ U.S. \_\_\_\_\_, 58 L.Ed. 2d 207 (1978), in attempting to show that no notice was given to him of the specific grounds relied upon by the sentencing authority. Thus, appellant argues, he had no opportunity to contest these grounds. Gardner and Presnell are easily distinguishable from the instant case.

In Gardner, an individual was convicted for first degree murder for the killing of his wife in "a crime of 'marital passion'". While the jury considered the appropriate sentence, the trial judge ordered a presentence report on the defendant. The jury returned a recommendation of life imprisonment. The trial judge, relying on a confidential section of the presentence report which was not revealed to the defendant nor included as part of the record on appeal, ordered that the death penalty be imposed. The Florida



Supreme Court affirmed the conviction and the sentence. The United States Supreme Court reversed, emphasizing the secret nature of the information relied upon by the judge and stating:

[i]t is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia.

430 U.S. at 361.

The facts of Gardner are markedly different than those in the instant case. Appellant here was not sentenced on the basis of any "secret information"; as shown from the discussion of § 76-5-202, he was on adequate notice of the grounds upon which the sentencing authority would rely. Appellant had ample opportunity to explain or deny any of the aggravating circumstances relied upon by the prosecution. Most importantly, a complete record was transmitted to this Court for review. Appellant states that "Gardner stands for the proposition that a system that permits the death sentence to be imposed without giving open and specific and consistent

reasons cannot be sustained." (Brief of Appellant at 29). That proposition is not frustrated by the Utah system which, in the instant case, provided the Utah Supreme Court with a complete record on appeal that included each and every basis for the imposition of the death penalty. No secret information was present in the instant case; full disclosure existed, thus preserving the constitutionality of Utah's capital sentencing phase.

Presnell v. Georgia, supra, is even more inapposite. In Presnell, Georgia statutes required that the prosecution prove under the facts of the case murder committed while engaged in the commission of a kidnapping with bodily injury in order to support a capital offense. The offenses of rape and sodomy had also been committed by the defendant in addition to the murder and kidnapping. The key element in the prosecution's case in support of the death penalty was a finding of bodily injury in connection with the kidnapping charge. Despite the fact that the jury had not explicitly found any bodily injury, the Georgia Supreme Court affirmed the death sentence, stating that evidence of bodily injury was clearly apparent from a review of the record.

In reversing the sentence, the United States Supreme Court found that the defendant had no notice whatsoever of the grounds upon which the state was relying to prove the requisite aggravating circumstance. 58 L.Ed. 2d at 211, n.3. Thus, the defendant was denied any opportunity to rebut the state's case before it was submitted to the jury during the sentencing phase.

In the instant case, appellant was on notice of the provisions of § 76-5-202 before the case was submitted to the jury during the sentencing phase. Unlike Presnell, the "fundamental principles of procedural fairness" were adhered to in appellant's case. The jury in the instant case had already found at least one aggravating circumstance proved beyond a reasonable doubt before the sentencing phase began. Thus, appellant cannot complain that he was denied the chance to rebut the state's case against him in the sentencing portion of the trial. Neither the case law nor the facts of the instant case supports appellant's contention that he had no notice of the grounds upon which the death penalty would be based.

Appellant also argues that the state was not required to plead or prove any aggravating circumstances beyond a reasonable doubt. This argument is also refuted by the fact that the state had to prove at least

prove one aggravating circumstance beyond a reasonable doubt at the guilt phase. Contrary to appellant's assertion, the United States Supreme Court has never explicitly required the prosecution to provide aggravating circumstances at the sentencing phase in addition to those proved at the guilt phase. In Jurek v. Texas, 428 U.S. 262 (1976), the Court approved of a procedure very similar to Utah's and stated:

While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances. For example, the Texas statute requires the jury at the guilt-determining stage to consider whether the crime was committed in the course of a particular felony, whether it was committed for hire, or whether the defendant was an inmate of a penal institution at the time of its commission. . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed.

428 U.S. at 270.

Appellant's reliance on Gardner v. Florida is misplaced, as argued above; Gardner involved secret, unrevealed

information used in the sentencing phase which did not form the basis for a sufficient record on appeal. The instant case does not suffer from the same procedural infirmities.

Appellant next argues that the absence of written factual findings by the jury in the sentencing phase amounts to prejudicial error. This issue was, in fact, raised on appellant's direct appeal and expressly rejected by this Court. State v. Pierre, supra; State v. Andrews, supra. The issue was also raised by appellant in his petition for certiorari which was also rejected by the United States Supreme Court. The argument is also unpersuasive.

Requiring the state to prove at least one aggravating circumstance beyond a reasonable doubt at the guilt phase of the proceedings in Utah minimizes the need for written findings of an aggravating circumstance. Indeed, such a requirement is much more favorable to the accused than Florida's system which merely requires the finding of an aggravating circumstance at the sentencing hearing by a majority vote and later gives the trial judge a virtual veto power. Under such a system, written findings become much more critical and necessary.

Moreover, under the Georgia capital sentencing procedure, there is no requirement that a record be kept of the sentencing hearing. Rather, all the Georgia procedure provides for is a transcript of the trial (not the sentencing

proceeding) and a six and one-half page questionnaire completed by the trial judge which is transmitted to the reviewing court. In Utah, the transmission to the reviewing court of the entire transcript of the sentencing proceeding provides far more information than does a six and one-half page questionnaire--such a transcript better enables the reviewing court to examine for itself whether the sentence of death is supported by the evidence and to determine if prejudicial error occurred. In short, the reviewing court need not rely solely on the trial judge's or jury's characterization of the sentencing proceeding.

Thus, Utah's appellate review procedure in which the entire trial and sentencing transcript is reviewed to determine if the sentence resulted from prejudice, arbitrary action or caprice, better fulfills the constitutional concerns of Gregg, Jurek and Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, the United States Supreme Court has stated that so long as the record reveals the evidentiary basis for the imposition of the death penalty so as to ensure that the appellate court may conduct a comprehensive review of the proceedings and ensure that the penalty was not imposed arbitrarily or capriciously, the concerns of Furman v. Georgia, 408 U.S. 238 (1972), are met. Gardner v. Florida, supra at 361 (1977).

The Supreme Court made it very clear in Jurek, supra, that written findings by the sentencing authority were not necessary for compliance with the mandates of either

the Eighth or Fourteenth Amendments. Under the Texas statutory scheme, all the jury is required to do is answer "yes" to the following questions:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Proc., Act. 37.071 (Supp. 1975-1976).

The Texas Criminal Code of Procedure does not require that the factors which were considered by the jury in answering the questions be written and transmitted to an appellate court for review of the sentence, nor does the jury have to specify which aggravating circumstances they found present in the case. Furthermore, no statutory mitigating circumstances are even provided to guide the jury. Yet, the Supreme Court held that the Texas statutory scheme met the requirements of Furman. Nor did the Texas statutory scheme require that the Texas Court of Criminal Appeals conduct any particular type of appellate review--and yet it was not found to be con-

The record in this case revealed the evidence supporting the aggravating circumstances charged and disclosed that the evidence presented in mitigation of the offense was virtually nonexistent. Respondent submits that so long as the entire record of the proceeding is such that it discloses to the reviewing court the evidence which motivated the death sentence in every case in which it is imposed, such a record meets the requirements of Gregg, Jurek and Proffitt.

Some final comments on the issue of written findings must be made. It is important for this Court to take note of what appellant Andrews does not contend on this point. He does not contend that he was sentenced to death on the basis of information which was not contained in the record of either the trial or the sentencing proceeding. Nor does he contend that the record which was transmitted to, and carefully reviewed by, the Utah Supreme Court did not contain any evidence which was presented at either the guilt or sentencing phases of the bifurcated proceeding, cf. Gardner v. Florida, 430 U.S. 349, 360-361 (1977).

The jury in the instant case was not, as appellant argues, free to impose the death penalty for "reasons wholly outside those recognized by law" (Brief of appellant at 21). This Court has mandated that the jury must find that the aggravating factors outweigh the mitigating factors, both of which are clearly expressed by statute. Thus, the



jury's findings are grounded in statutory factors, not reasons outside the law.

Appellant's argument that appellate review is frustrated by the lack of written findings ignores the position taken by the United States Supreme Court in Gardner v. Florida, *supra*. In Gardner, the Supreme Court stated that an adequate basis for appellate review exists when the entire record of the trial is transmitted to the reviewing Court and the record contains the basis for the findings at the trial level. 430 U.S. at 361. Respondent, therefore, submits that appellant's claims of error regarding the procedural aspects of the sentencing phase of Utah's death penalty procedure are without merit or support.

Appellant next argues that relief should be granted on the strength of Lockett v. Ohio, 98 S.Ct. 2954 (1978), in which Justice White stated that "[i]t violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." *Id.* at 2983. It is significant to note the facts upon which Justice White's statement is based.

Sandra Lockett was sentenced to death as a consequence of her participation as the "wheelman" in a robbery of a pawnshop that resulted in the murder of the pawnbroker. The evidence was in conflict as to whether

Lockett even remained in the vicinity of the pawnshop during the robbery (it was suggested that she may have left the area to go and eat lunch elsewhere), much less that she actively participated in the shooting. This is in contrast to appellant's participation in the instant case that was active throughout the course of the robbery and multiple murders. It may be recalled that appellant was an active participant in the administration of the liquid drain cleaner to the victims.

The concurring opinion of Justice Blackmun is a succinct rebuttal to appellant's attempt to expand Justice White's statement far beyond its factual context. Justice Blackmun states:

I do not find entirely convincing the disproportionality rule embraced by my Brother WHITE. The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes. What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robbery participant in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? May we as judges say that for Eighth Amendment

purposes the absence of a "conscious purpose of producing death," ante, at 2960, transforms the culpability of those defendants' actions?

Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder. What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even though not necessary for escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what limitations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?

The requirement of actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite mens rea, involving myriad problems of line-drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States'

criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.

98 S.Ct. 2969-70, n. 2.

In short, respondent contends that the instant case is not, as characterized by Justice Marshall, an imposition of a "purely vicarious theory of liability." 98 S.Ct. at 2972. Appellant was an active participant in the premeditated series of murders that were drawn out in a fashion that can only be characterized as torture. Sandra Lockett was a mere abettor in a murder resulting from a panicked robber. Moreover, the central focus of the Lockett Court is on the failure of the Ohio statute to permit a broad consideration of numerous mitigating circumstances at the sentencing phase. Justice White's statement is ancillary to this primary concern. Since Utah is specifically distinguished from Ohio by Justice Blackmun in note 3 at p. 2971, appellant's argument on this issue should be considered without force.

Appellant's final claim on this point ignores the still vital holding of the Supreme Court in Wilkerson v. Utah, 99 U.S. 130, 134-35 (1879):

Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are

quite sufficient to show that the punishment of shooting as a means of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.

This language was also quoted in Gregg v. Georgia, 428 U.S. 153, 178. Appellant failed to provide, as required by Rule 65B(i)(2), any support in his petition for his argument that execution by shooting does not comport with current standards of public decency. Respondent avers that execution by shooting is consistent with current standards of decency, as evidenced by the failure of the legislature to change the methods of execution in this State. As stated in Gregg:

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Furman v. Georgia, *supra*, at 383

(BURGER, C.J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system, 408 U.S., at 465-470 (REHNQUIST, J., dissenting), is enhanced where the specification of punishments is concerned for "these are peculiarly questions of legislative policy."

428 U.S. at 175-76.

The language in Coker v. Georgia, 433 U.S. 584 (1977), cited by appellant concerning "barbaric" and "excessive" punishments is directed at the imposition of the death penalty for the crime of rape. To attempt to stretch this language to apply to the means used in imposing the sentence is to misapply the Court's reasoning and holding in Coker. Respondent contends that the death penalty itself serves valid penal interests for certain classes of murder and therefore meets the requirements of Coker.

To attempt to rebut the suggestion that the only purpose served by shooting is the satisfaction of doctrines of the Mormon Church would lend credence to another unsupportable argument. No basis for this bald assertion is given and the claim should be dismissed.

To conclude respondent's arguments on this point, it is submitted that Utah's sentencing procedure is sound. The mandates of the United States Supreme Court were observed both in statute and in practice.

Lockett v. Ohio, supra, is inapplicable in this case because (1) appellant's acts were markedly different than defendant Lockett's and (2) Utah's sentencing procedure is expressly distinguished from Ohio's in respect to the consideration of mitigating circumstances. Finally, execution by shooting remains constitutionally sound and Coker v. Georgia is not offended because death is a proportionate sentence for certain classes of murder. Appellant's claims of error should be dismissed.

POINT V.

APPELLANT'S CLAIM THAT THE DEATH PENALTY IS BEING IMPOSED IN UTAH AND THE UNITED STATES RARELY, ARBITRARILY AND DISCRIMINATORILY WAS PROPERLY DISMISSED BY JUDGE SAWAYA AS A MATTER OF LAW.

Appellant's amended petition for habeas corpus relief advanced the theory that Utah imposes the death penalty "rarely and arbitrarily and discriminatorily against the poor and outcast whose alleged victims are "white" and where the defendant is "non-white, male, poor, and a stranger in the community." (Appellant's Amended Petition at 8-9). He further alleged that the "pattern and practice" of the prosecution of the death penalty in Utah since the date of the re-enactment of the death penalty shows that it is being applied capriciously. Interestingly, appellant failed to attach to his petition any supporting factual data for these claims as required by Rule 65B(i)(2), Utah Rules of Civil Procedure, which provides that a post-conviction complaint:

" . . . shall set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated.



The complaint shall have attached thereto affidavits, copies of records, or other evidence supporting such allegations, or shall state why the same are not attached."  
(Emphasis added)

Also see Point II, supra. Moreover, at the hearing before Judge Sawaya on respondent's motion to dismiss the amended petition, appellant was given the opportunity to state what factual data he was relying on in support of this claim and his counsel merely responded with the conclusion that arbitrariness and capriciousness in the application of the death penalty had occurred (T.12).<sup>5</sup>

The district court ruled on appellant's racial prejudice claim based upon two distinct theories. First, he concluded that:

. . . all issues raised in petitioner's petition were known or should have been known at the time petitioner took his direct appeal from his conviction to the Utah Supreme Court, and all issues either were raised or could have been raised on that appeal, and habeas corpus may not be used . . . to raise issues which could have been raised on appeal.

Order of November 30, 1978 at 1-2 (R. 119-120). (Emphasis added).

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5 Mr. Pierre's counsel merely added the claim that prosecutors have in recent cases impermissibly exercised their discretion in charging capital offenses, an issue which was raised to and rejected by the United States Supreme Court in Gregg, Jurek and Proffitt, and the Fifth Circuit Court of Appeals in Spinkellink v. Wainwright, 578 F.2d 582 (1978), cert. denied U.S. (March 26, 1979), as will be shown infra (T.16-17).

Second, he found that the allegation "fails to state a claim on which relief can be granted or on which a hearing need be held . . ." (Findings and Conclusions at 1; R. 124).

Judge Sawaya was squarely within his power in so ruling with respect to the first theory. The issue of discrimination and impermissible discretionary application of the death penalty was raised by appellant in his direct appeal of his conviction, (Appellant Andrews' brief, Point I, which reasserted Point I (p. 7-18) of appellant Pierre's brief in State v. Pierre, supra), and was previously resolved by this Court in State v. Andrews, 574 P.2d 709, 710 (Utah 1977), and State v. Pierre, 572 P.2d 1338, 1345-1349 (Utah 1977). Although the main focus of appellant's argument on this issue during his direct appeal was on the provisions of Utah's capital punishment statutes on their face, nevertheless any claim of discrimination in the way those statutes were applied in appellant's and Mr. Pierre's cases could likewise have been raised on appeal and to a certain extent were. (See Points V and VI of Pierre's brief, pp. 32-42, which were reasserted by appellant Andrews). Respondent concedes that Mr. Andrews and Mr. Pierre were the first to be convicted under Utah's latest capital punishment provisions. Nevertheless, they were certainly not

precluded from raising claims of alleged arbitrariness capriciousness, or discrimination which may have actually occurred during the course of their criminal proceedings. Moreover, any studies, reports, statistical analyses, theses, etc., which were available at the time of their appeal to support their claim of arbitrariness or capriciousness in the imposition of the death penalty could have been appended to their briefs on appeal for this Court's consideration, as per "Brandeis brief" in Muller v. Oregon, 208 U.S. 412 (1908).

Thus, the reasoning expressed in Point I of this brief, supra, on the applicability and validity of the waiver doctrine to this issue is re-asserted by respondent. The authorities outlined in Point I make clear that Judge Sawaya's ruling was proper as a matter of law. His finding that all issues, including the instant one, either were or could have been raised on direct appeal was proper.

Appellant attempts to circumvent the waiver doctrine by asserting that facts have developed since he took his direct appeal which would show that the death penalty in Utah and the United States is being applied in an arbitrary, capricious and discriminatory manner despite legislative efforts to draft capital

punishment statutes which preclude such problems. Appellant's theory is that if he can show discriminatory application of the death penalty occurring since his conviction and appeal, he can then assert that death penalty statutes, including Utah's, are inadequate and unconstitutional, and have such a ruling apply retroactively to him. Appellant also asserts that he should have been granted a hearing to present evidence in support of his claim.

Appellant's suggested approach is not novel and was expressly rejected by the Fifth Circuit Court of Appeals in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied \_\_\_ U.S. \_\_\_ (March 26, 1979).

In Spinkellink, the petitioner attacked Florida's death penalty statute as applied conceding that the United States Supreme Court had already upheld the statute on its face in Proffitt v. Florida, supra. Specifically, he alleged that the statute was being applied arbitrarily, capriciously, excessively, and disproportionately in violation of the eighth and fourteenth amendments, and that the statute was being administered impermissibly and discriminatorily by prosecutors in the plea bargaining process against defendants convicted of murdering whites as opposed to blacks, and against males and poor persons.

Id. at 599. He also cited to seven specific cases where the Florida Supreme Court set aside death sentences despite the fact that they allegedly involved more heinous circumstances than his case. Id. at 602, footnote 25. The Fifth Circuit wrestled with petitioner's suggestion that the courts review subsequent cases in search of evidence of arbitrariness and capriciousness and rejected the approach based on the following rationale:

If this latter interpretation is the correct reading of Proffitt, serious problems arise. First, every criminal defendant sentenced to death under Section 921.141 could through federal habeas corpus proceedings attack the statute as applied by alleging that other convicted murders, equally or more deserving to die, had been spared, and thus that the death penalty was being applied arbitrarily and capriciously, as evidenced by his own case. The federal courts then would be compelled continuously to question every substantive decision of the Florida criminal justice system with regard to the imposition of the death penalty. The intrusion would not be limited to the Florida Supreme Court. It would be necessary also, in order to review properly the Florida Supreme Court's decisions, to review the determinations of the trial courts. And in order to review properly those determinations, a careful examination of every trial record would be in order. A thorough review would necessitate looking behind the decisions of jurors and prosecutors,

as well. Additionally, unsuccessful litigants could, before their sentences were carried out, challenge their sentences again and again as each later-convicted murderer was given life imprisonment, because the circumstances of each additional defendant so sentenced would become additional factors to be considered. The process would be neverending and the benchmark for comparison would be chronically undefined. Further, there is no reason to believe that the federal judiciary can render better justice. As the Florida Supreme Court itself so candidly admits, see Provence v. State, *supra*, 337 So.2d at 787, reasonable persons can differ over the fate of every criminal defendant in every death penalty case. If the federal courts retried again and again the aggravating and mitigating circumstances in each of these cases, we may at times reach results different from those reached in the Florida state courts, but our conclusions would be no more, nor no less, accurate. Such is the human condition. . . .

The Supreme Court in Proffitt or in Furman, Gregg, Jurek, Woodson, or Roberts, could not have intended these results. We understand these decisions to hold that capital punishment is not unconstitutional per se, and that a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty - so long as it does so through a statute with appropriate standards to guide discretion. If a state has such a properly drawn statute--and there can be no doubt that Florida has--which the state follows in determining which convicted defendants receive

the death penalty and which receive life imprisonment, then the arbitrariness and capriciousness condemned in Furman have been conclusively removed. For us to read these cases otherwise would thrust this Court and the district courts into the substantive decision making of the state court sentencing process which is rightfully reserved to the Florida state judiciary under Section 921.141. Under the Constitution, as well as fundamental notions of federalism and comity, that is not the role of the federal courts. Cf. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

A review of the record demonstrates dramatically that the Florida state trial court and the Florida Supreme Court performed their unenviable duty of sentencing Spenkelink (sic) under Section 921.141 with care and concern. Our inquiry must end there. As for Spenkelink's contention that this Court should go further, we think the remarks of Justice White in his concurring opinion in Gregg v. Georgia *supra*, 428 U.S. at 226, 96 S.Ct. at 2949 (White, J., concurring), are responsive:

Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment a lesser penalty or are acquitted or never charged seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued in effect that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional

law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner. The petitioner's contention is without merit.

Id. at 604-606.

Thus, Judge Sawaya's rejection of this approach based on either the waiver doctrine or on the merits was certainly proper.

Secondly, as noted earlier, appellant Andrews also claims that Judge Sawaya erred in not granting him an evidentiary hearing to establish factually that the death penalty is now being applied in a racially discriminatory manner. The Fifth Circuit Court in Spinkellink also addressed this issue. They noted that Spinkellink had, in fact, received an evidentiary hearing on this claim in the federal district court (he claimed



on appeal that it was inadequate and desired a remand to put on further evidence), however, they held that such a hearing was unnecessary because the issue could have been disposed of as a matter of law. The Court reasoned as follows:

Assuming for the sake of argument that the petitioner's statistics are accurate, his contention must fail as a matter of law on both of the constitutional grounds relied upon. The allegation that Florida's death penalty is being discriminatorily applied to defendants who murder whites is nothing more than an allegation that the death penalty is being imposed arbitrarily and capriciously, a contention we previously have considered and rejected. To allege discriminatory application of the death penalty, as meant in the context of this case, is to argue that defendants who have murdered whites have received the death penalty when other defendants who have murdered blacks, and who are equally or more deserving to die, have received life imprisonment. In order to ascertain through federal habeas corpus proceedings if the death penalty had been discriminatorily imposed upon a petitioner whose murder victim was white, a district court would have to compare the facts and circumstances of the petitioner's case would be [sic] (with) facts and circumstances of all other Florida death penalty cases involving black victims in order to determine if the first degree murderers in those cases were equally or more deserving to die.

The petitioner thus requests the same type of case-by-case comparison by the federal judiciary that we have previously rejected in considering the petitioner's contention that Florida's death penalty is being imposed arbitrarily and capriciously. We need not repeat the myriad of difficult problems, legal and otherwise, generated by such federal court intrusion into the substantive decision making of the sentencing process which is reserved to the Florida state courts under Section 921.141. As we previously noted, this Court reads Furman, Gregg, Proffitt, Jurek, Woodson, and Roberts as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness--and therefore the racial discrimination--condemned in Furman have been conclusively removed. Florida has such a statute and it is being followed. The petitioner's contention under the eighth and fourteenth amendments is therefore without merit.<sup>40</sup>

Footnote 40:

As we pointed out in footnote 28 supra with respect to the contention that Florida's death penalty is being imposed arbitrarily and capriciously, this is not to say that federal courts should never concern themselves on federal habeas corpus review with whether Section 921.141 is being applied in a racially discriminatory fashion. If a petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination against him, see Village of Arlington Heights v. Metropolitan Housing

Development Corp., 429 U.S. 252, 266-68, 97 S.Ct. 555, 564-65, 50 L.Ed. 2d 450 (1977), either because of his own race or the race of his victim, the federal district court should intervene and review substantively the sentencing decision. We emphasize once again, see note 28, supra, that this Court anticipates that such intervention will be infrequent and only for the most compelling reasons. Mere conclusory allegations, as the petition makes here, such as that the death penalty is being "administered arbitrarily and discriminatorily to punish the killing of white persons as opposed to black persons," Petitioner's Brief at 2, do not constitute such reasons and would not warrant an evidentiary hearing. This is so on eighth amendment grounds as well as on fourteenth amendment equal protection grounds, because the intrusionary effect would be the same.

Id. at 613-614. (Emphasis added).

(For the Court's analyses of petitioner's Fourteenth amendment approach to this issue, see 578 F.2d 614-616 wherein it concluded that for relief, petitioner would have to allege and prove a deliberate, racially discriminatory intent or purpose by the state to show a violation of the Equal Protection Clause).

Thus, Judge Sawaya properly ruled that this issue failed to state a claim and did not require an evidentiary hearing.

Appellant's next claim is that because of prosecutorial discretion in charging capital felonies and in the plea bargaining process, a pattern and practice has emerged which shows a discriminatory, arbitrary and capricious application of the death penalty. This claim also was properly disposed of by the lower court as a matter of law in that the United States Supreme Court has repeatedly dealt with the claim and rejected it.

The notion of prosecutorial discretion in charging a capital felony was fully and repeatedly discussed in the following cases: Mr. Justice Stewart's opinion in Gregg at page 199; Mr. Justice White's opinion in Gregg at pages 224-225; Mr. Justice Powell's opinion in Proffitt at page 254; Mr. Justice Stevens' opinion in Jurek at page 274; Mr. Justice Stewart in Woodson v. North Carolina, 428 U.S. at 284 (1976); and finally, Mr. Justice White's dissent in Roberts v. Louisiana, 428 U.S. at 348-349 (1976). The clear import of these discussions is that such an element of discretion in the prosecution of capital cases is essential to the administration of the criminal justice system. Discretion at this stage does not rise to the level of a constitutional defect in the state process regarding a capital felony. The permissible latitude given a state prosecutor is addressed by Mr. Justice Stewart in Gregg:

First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is

convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles. The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty could be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.<sup>50</sup>

50. The petitioner's argument is nothing more than a veiled contention that Furman indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charges, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of the jury nullification would not be permitted. Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.

Moreover, it would be unconstitutional. Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in Woodson v. North Carolina, post, \_\_\_ U.S. p. \_\_\_, 96 S.Ct. p. 2978, and Roberts v. Louisiana, post, \_\_\_ U.S. p. \_\_\_, 96 S.Ct. p. 3001. The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment. In the federal system it also would be unconstitutional to prohibit a President from deciding, as an act of executive clemency, to reprieve one sentenced to death. U.S. Const., Art. II, § 2.

The opinions of the other Justices in the various cases cited above echo the reasoning of Mr. Justice Stewart. See also the Fifth Circuit Court of Appeals legal analysis of the issue in Spinkellink, supra, at 578 F.2d 582, 606-609.

While the exact nature of appellant's claim of error in his petition is not clear from the face of it, Gregg, Proffitt, Jurek, Woodson, Roberts and Spinkellink, indicate that an attack on the discretion of the prosecutor in charging a capital felony is misdirected. Judge Sawaya was justified, therefore, according to the above cases, to reject appellant's prosecutorial discretion claim as a matter of law since it is an improper basis upon which to grant appellant relief. The Supreme Court is clear in its holding that discretion during the prosecution stage of a criminal proceeding is proper and cannot be considered as a factor in the arbitrary application argument in capital cases. The balancing approach taken by the Supreme Court in this area demonstrates its unwillingness to delve into the complex decision process of prosecutors and therefore determined that such review is improper. Such a ruling is sound and respondent urges this Court to adopt this position.

Finally, respondent submits that the cases above discussed--Gregg, Jurek, Proffitt, etc.--have provided

state courts with sufficient guidelines for testing for arbitrariness and discrimination in death penalty cases so as to make rulings on this issue as a matter of law possible. Moreover, it was not necessary for the United States Supreme Court, in these cases, to have further post-conviction evidentiary hearings in order to reach decisions on these legal questions. The Court's decisions were based solely upon review of the trial court and state appellate court records. As a matter of judicial economy, this Court and the lower court may properly rely and accept prior rulings on these issues as authority for resolution of the matter. There is no need to relitigate the same claims.

In any event, respondent contends that appellant's claims are most speculative. For example, in his brief, appellant contends that Judge Sawaya denied him a chance to advance his evidentiary and authoritative theories of arbitrariness. He claims the court "heard neither this evidence nor legal argument from the petitioner," (appellant's brief at 25). This simply is not true.

Appellant was given the opportunity to state to the lower court what his claims of arbitrariness consisted of (Tr.10-11). Instead, appellant's counsel merely stated that "we would hope to have an expeditious hearing in which



we can establish that claim in Utah Courts." (Tr.13).

Respondent contends, therefore, that inasmuch as concrete, specific claims of arbitrary and capricious application of the death penalty were not made readily apparent to the lower court, Judge Sawaya was justified in ruling, as a matter of law, that the claims lacked sufficient merit. Clearly, Judge Sawaya could do so since appellant's claim was seen to be most speculative. Appellant should not be permitted to raise issues if he has insufficient facts upon which to base his claims and does so only in an effort to be granted an additional forum "in which [appellant] can establish that claim. . . ." Respondent suggests that such claims are only attempts by appellant to delay and thwart his heretofor affirmed sentence.

Finally, appellant contends throughout his brief that Judge Sawaya granted respondent's motion to dismiss without sufficient legal authority or basis. Yet, respondent referred Judge Sawaya to the legal arguments contained in the State's brief in opposition to certiorari in the United States Supreme Court and the respondent's brief filed with this Court in appellant's direct appeal following his conviction (Tr.25,26). Respondent's motion to dismiss, his supporting memoranda and the attached above mentioned

briefs were all before Judge Sawaya. Thus, he was justified in ruling on the merits as a matter of law and granting respondent's motion to dismiss.

Respondent urges this Court to find that appellant's claim of racial discrimination in the application of this State's death penalty is foreclosed by the United States Supreme Court decisions, supra, and Spinkellink, supra, and is therefore without merit. Respondent further urges this Court to rule that Judge Sawaya was therefore justified in granting respondent's motion to dismiss as a matter of law.

#### CONCLUSION

For the above reasons, respondent submits that Judge Sawaya's order granting respondent's motion to dismiss and denying appellant a stay of execution was sound based upon the application of this Court's waiver doctrine that issues which were or could have been raised on direct appeal may not subsequently be raised in a post-conviction petition for a writ of habeas corpus.

Moreover, appellant failed to raise any claim upon which relief could be granted due to the vague and speculative nature of the claims, and the added fact that he may not benefit from a retroactive application of the new case law he relied upon in support of his petition.

Finally, this Court should affirm the lower court's ruling inasmuch as the Utah death penalty statutes remain constitutionally sound in light of recent United States Supreme Court decisions, and should uphold the dismissal of appellant's claim of arbitrary and capricious application of the death penalty inasmuch as it lacks legal merit.

Respectfully submitted,

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