

2009

## Von Lester Taylor v. State of Utah : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

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VON LESTER TAYLOR,

Petitioner - Appellant,

vs.

STATE OF UTAH,

Respondent - Appellee.

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No. 20090771

Appeal from the Third Judicial District Court in Summit County  
District Court No. 070500645  
Bruce C. Lubeck, District Judge, Presiding

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UTAH APPELLATE COURTS

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Petitioner-Appellant Von Lester Taylor (“Mr. Taylor” or “Petitioner”) respectfully submits this Reply Brief.

## **ARGUMENT**

### **I. MR. TAYLOR IS FACTUALLY INNOCENT**

#### **A. Respondent Misunderstands the Conviction**

One question dominates this case: Is Mr. Taylor innocent of the intentional murders of Kaye Tiede and Beth Potts? Respondent disputes Mr. Taylor’s innocence in a number of ways, many of which make it clear that the facts of this case require further inquiry and examination. However, the trial court denied Mr. Taylor’s request for an evidentiary hearing on innocence. Mr. Taylor raises his innocence herein not as a road to relief in itself, but rather as an exemption to procedural bar.

Respondent argues that Mr. Taylor’s

claim that he is innocent is legally insupportable. It rests on the faulty premise that he can be guilty of capital murder only if he fired a kill shot. But Taylor could also be guilty as an accomplice, and he admitted that he “was a participant in the events that led to the deaths of Ms. Tiede and Ms. Potts.” (R672). Therefore, even if his claims were true, that he did not fire the shots that actually killed Beth Potts and Kay [sic] Tiede, Taylor is not “innocent” because his admitted participation makes him guilty as an accomplice and guilty of felony murder.

(Appellee’s Br. at 11.)

Respondent is correct that Mr. Taylor does claim that he can only be guilty if he fired a kill shot because that was the basis for the guilty plea he entered. Mr. Taylor pled guilty to two counts which were identical but for the victim’s name. Count I read:

That on or about the 22nd day of December, 1990, in Summit County, State of Utah, the defendant, Von Lester Taylor, did intentionally or knowingly cause the death of Beth Potts, and the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons, to wit: Beth Potts and Kaye Tiede, were killed.

ROA at 1559.

Count II was identical but for the victim's name, Kaye Tiede, and the reversal of names at the end. Mr. Taylor pled guilty to "intentionally or knowingly" causing the death of Beth Potts and Kaye Tiede. As both victims died of gunshot wounds, if Mr. Taylor did not in fact fire any kill shots, then he did not actually cause anyone's death.

Respondent would like the plea agreement to cover more than it does. Respondent posits that "Taylor could also be guilty as an accomplice . . . even if his claims were true, that he did not fire the shots that actually killed Beth Potts and Kay [sic] Tiede, Taylor is not 'innocent' because his admitted participation makes him guilty as an accomplice and guilty of felony murder." (Appellee's Br. at 11.)

Mr. Taylor is seeking post-conviction relief from this Court for his May 1, 1991 guilty plea and May 24, 1991 sentence of death -- that is all. What Mr. Taylor could have been guilty of is not only irrelevant to this proceeding, it is speculative. Mr. Taylor did not plead guilty to felony murder or even any felony that properly constitutes the underlying felony for felony murder. Mr. Taylor is on death row for something that he factually did not do. Mr. Taylor's unjust conviction may not simply be ignored because he could have possibly been convicted of a different crime and sentenced to the same sentence he is currently serving.

Respondent is well aware of this; that is why Respondent crafted what should properly be referred to as the “Taylor revisions” to the Utah Code. Respondent cites the revisions to the code in footnote 5 of its brief; “[i]f Taylor did not actually engage in the conduct for which he was convicted, he could file a petition for determination of factual innocence under Utah Code § 78B-9-401 through 405 (West 2010). He has not done so and his innocence claim cannot meet the requirements of that statute.” (Appellee’s Br. at 11 n.5.) The Attorney General’s Office crafted the newly minted definition of factual innocence after the filing of the Petition at bar, transparently attempting to tailor it to exclude Mr. Taylor’s claim of factual innocence. If this Court allows its determinations to follow legislative changes made after judgment, then no petitioner in the State of Utah can ever hope to prevail when wrongly convicted because the code may always be changed to continue that particular person’s incarceration.

**B. Mr. Taylor Is Factually Innocent**

Respondent states that “Taylor has never provided any affidavit or declaration asserting that he did not shoot Kay [sic] or Beth. At his own trial, [co-defendant] Deli testified that Taylor did all of the shooting and that Deli shot no one.” (Appellee’s Br. at 12.) Respondent’s reliance on Mr. Deli’s “testimony” is inappropriate for three reasons: First, it is well documented that transcripts do not exist from Mr. Deli’s trial. Respondent relies on the declaration of a witness in the courtroom to support Deli’s alleged testimony. Second, even if Mr. Deli did testify to the purported statement, using the statement to assess Mr. Taylor’s guilt amounts to a Sixth Amendment violation because Mr. Taylor has had no opportunity to cross-examine Mr. Deli on the matter. *See Ohio v. Roberts*, 448

U.S. 56, 63, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (“the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that ‘a primary interest secured by [the provision] is the right of cross-examination.’” (internal citation omitted)). Finally, Mr. Taylor alleges that Mr. Deli killed both Kaye Tiede and Beth Potts. Perjuring himself to avoid the death penalty was successful for Mr. Deli, who was subsequently convicted of second degree murder and received life in prison with the possibility of parole.

Respondent’s critique that Mr. Taylor has never provided any affidavit or declaration asserting his innocence is not true. Mr. Taylor’s First Amended Federal Petition for Writ of Habeas Corpus, which pleads the exact same facts regarding his innocence, is a verified pleading. Moreover, Mr. Taylor has repeatedly requested a hearing to develop the facts underlying this claim. An affidavit or declaration without the chance for cross-examination is not likely to convince a court of Mr. Taylor’s credibility.

Respondent inappropriately and incorrectly accuses Mr. Taylor of misstating the evidence. Respondent claims that Mr. Taylor’s assertion that Linae Tiede “unequivocally stated that Mr. Taylor carried a .38 caliber handgun and Edward Deli carried a .44 caliber weapon” is inaccurate. (Appellee’s Br. at 12.) Linae Tiede witnessed the shootings of her mother and grandmother from several feet away. (RT 3:507-09.) Mr. Taylor’s Petition provided the pinpoint cites for Ms. Tiede’s testimony on the subject, along with the associated trial exhibit list. Taken together, it is clear that Mr. Taylor was absolutely correct when he pled that Ms. Tiede “unequivocally stated that Mr. Taylor carried a .38 caliber handgun and Edward Deli carried a .44 caliber weapon. (RT 3:499, 503; Ex. 76<sup>1</sup>.)”

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<sup>1</sup> Pet. Ex. bates no. 572.



(ROA at 218.) Linae Tiede believed that Edward Deli fired shots from the .44, while Von Taylor fired shots from the .38. (RT 3:499, 503; Ex. 76.) The evidence available without further factual development clearly indicates that Mr. Deli carried the .44 caliber weapon.<sup>2</sup>

Respondent's argument emphasizes that "Linae never *saw* Taylor with the .44," as though emphasizing that word means something detrimental to Mr. Taylor's assertion of factual innocence. (Appellee's Br. at 12 (emphasis in original).) Mr. Taylor posits that this fact bolsters his claim.

Finally, in arguing against Mr. Taylor's factual innocence, Respondent relies on Mr. Taylor's "admissions" to Dr. Moench more than half a dozen times. Mr. Taylor's statements to Dr. Moench cannot be taken at face value because Mr. Taylor was prone to overstatement. Dr. Moench himself has stated that he

did not assume all statements made to [him] by Mr. Taylor and Mr. Deli were true. Because my evaluation was limited to determining Mr. Taylor's and Mr. Deli's sanity at the time of the offense, it was not necessary for me to fully develop the truth or falsity of these statements further. For example, although he may have dabbled in satanic cult worship, I am skeptical that Mr. Taylor could have done this regularly on Saturdays for five years and kept his family unaware. I do not believe his statement that a three-year-old girl was sacrificed at one such ritual event to which he was invited but did not attend. However, he may have believed it. My report reflects the statements made to me by Mr. Taylor and Mr. Deli, but cannot be interpreted as offering an opinion on the truth or falsity of those statements.

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<sup>2</sup> In the same paragraph where Respondent criticizes Mr. Taylor's assertion that Mr. Deli carried the .44 caliber weapon, Respondent says, "Deli also had a gun in his belt," but does not explain that the evidence at trial was that the gun in his belt was the .44. (Appellee's Br. at 12.) Unfortunately, more than a few of Respondent's facts in Part I of its Brief are not a wholly accurate recap of the transcript testimony.

(Pet. Ex. 6.)

**C. Respondent's Arguments Highlight the Vast Factual Discrepancies in This Case**

Mr. Taylor supplemented his Petition with a declaration from Dr. Sharon Schnittker. (Pet. Ex. 117.) Dr. Schnittker, the coroner who conducted the autopsies of both victims, stated that she could not be sure that the .38 caliber bullet she found in Kaye Tiede's jacket either caused Gunshot Wound #2, or that it even went through Ms. Tiede's body. (Pet. Ex. 117, at ¶¶ 5-6.) More importantly, Dr. Schnittker declared that she could not exclude a .44 caliber bullet having caused Gunshot Wound #2. (Pet. Ex. 117, at ¶ 7.)

Despite Dr. Schnittker's declaration under oath, Respondent ignores Dr. Schnittker's self-doubt, reminding this Court that "Dr. Schnittker, testified that the fatal wound to Kay [sic] was consistent with a .38." (Appellee's Br. at 12.) It is exactly the prejudice of this now questionable testimony that makes Mr. Taylor's sentence of death so ripe for review. Respondent states that "Dr. Schnittker's declaration does not dispute, contradict, or discredit her autopsy results and testimony" (Appellee's Br. at 14), but it absolutely does.

Respondent's continued assertion that Beth Potts was shot with a .38 caliber bullet is disturbing. (Appellee's Br. at 15.) The analysis of the evidence, as explained at length in Mr. Taylor's Petition, makes it clear that Ms. Potts was never shot with a .38 caliber slug. At a minimum, Respondent overstates the evidence when it states that "[a]ll available evidence establishes that Taylor fired the shot that killed Kay [sic] Tiede." *Id.* at 14.

Respondent seeks to task this Court with the burdensome and time consuming undertaking of sorting through the evidence, but that project should properly have been performed by the trial court below. Because Mr. Taylor's exception to procedural bar is largely based on his factual innocence, the trial court erred in failing to hold an evidentiary hearing on the matter.

## **II. THE DISTRICT COURT CORRECTLY RULED THAT CLAIMS ALREADY RAISED ARE PROCEDURALLY BARRED**

Respondent's inconsistent arguments delay and complicate this litigation. Mr. Taylor willingly agreed with the district court's determination that claims 1-4, 6-8, 11, 13, 15-18, 20, 22-23, and 26 are procedurally barred under Utah's Post-Conviction Remedies Act ("PCRA"). Mr. Taylor concedes that these claims are barred because they were denied on the grounds previously considered by this Court and denied on the merits. Accordingly, they are exhausted and ripe for federal review on the merits and need not be relitigated herein. *See Cone v Bell*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1769, 1781, 173 L. Ed. 2d 701 (2009) ("When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is ripe for federal adjudication.).

However, Mr. Taylor's attempt to avoid further litigating two-thirds of his claims has hit an unlikely road block in Appellee's Brief. After arguing at length in its Motion to Dismiss Petition for Post-Conviction Relief, filed on February 15, 2008 (ROA 531-

627), that these claims were already raised before this Court, Respondent now claims that “[i]t is not and has never been the State’s position that all of the claims previously raised were presented to this Court.” (Appellee’s Br. at 16 n.6.) Respondent’s current contention notwithstanding, it was formerly the State’s position that these claims were previously before this Court. (*See* ROA 553, 557, 559-60, 568-69, 570, 575, 577-78, 582-85, 588, 598-99, 609-10.) The State is belatedly changing its position to try to prevent Mr. Taylor from receiving federal merits review of these claims.

Mr. Taylor is trying to streamline the litigation, but Respondent’s current stance is only its latest attempt at preventing him from doing so by over-litigating this case. If Mr. Taylor had briefed the claims that had already been presented to this Court, then Respondent would have argued that the claims were successive. Having previously argued in its memorandum in support of its motion to dismiss that this Court had previously considered these claims, Respondent should be estopped from now reversing course. “Under judicial estoppel, ‘a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained.’” *Nebeker v. Utah State Tax Com’n*, 34 P.3d 180, 187 (Utah 2001) (quoting *Tracy Loan & Trust Co. v. Openshaw Inv. Co.*, 132 P.2d 388, 390 (Utah 1942)).

Respondent’s revised contentions notwithstanding, Mr. Taylor has no reason to appeal the district court’s determination because the district court was correct: claims 1-4, 6-8, 11, 13, 15-18, 20, 22-23, and 26 were raised in previous proceedings and have already been presented to this Court either in the direct appeal or on appeal from the state post-

conviction petition.

### **III. MR. TAYLOR MEETS THE EXCEPTIONS TO PROCEDURAL BAR FOR CLAIMS THAT COULD HAVE BEEN RAISED IN HIS PREVIOUS PETITION**

Mr. Taylor's Opening Brief discusses this Court's four basic common law exceptions to procedural bar: unusual circumstances, newly discovered or suppressed evidence, good cause, and that the claims in the petition were neither frivolous nor withheld for tactical reasons.

Determining whether Mr. Taylor is procedurally barred significantly hinges on his claim that he is factually innocent because his innocence meets both the unusual circumstance and good cause exceptions. Because Mr. Taylor pled guilty to two crimes he did not commit and because the district court below failed to hold an evidentiary hearing as requested by Mr. Taylor, there has never been a critical inquiry into Mr. Taylor's participation in the events that led to the deaths of Kaye Tiede and Beth Potts.

Mr. Taylor has never denied his presence at the crime scene, but on its face, the forensic evidence combined with the testimony elicited in the penalty phase indicate that Mr. Taylor is factually innocent of both homicides. Mr. Taylor's Opening Brief explained that innocence is a gateway through procedural bar under *Hurst v. Cook*, 777 P.2d 1029, 1036 (Utah 1989). Accordingly, this Court should set aside the procedural bars, consider Mr. Taylor's claims on the merits, and grant relief.

At the very least, this Court should remand this case for fact development to determine whether the procedural bars apply. That action would be consistent with what the United States Supreme Court did in *Schlup v. Delo*, 513 U.S. 298, 315, 115 S. Ct. 851,

130 L. Ed. 2d 808 (1995), where the Court determined that innocence constitutes a gateway through which a habeas petitioner may pass to have his otherwise barred constitutional claim considered on the merits. In *Schlup*, the Supreme Court decided that further proceedings were necessary due to the fact-intensive nature of the inquiry. *Schlup*, 513 U.S. at 332. The Supreme Court noted that the “District Court’s ability to take testimony from the few key witnesses if it deems that course advisable, convinces us that the most expeditious procedure is to order that the decision of the Court of Appeals be vacated and that the case be remanded.” *Id.*

The district court should have performed such a function in this case. Testimony from a few key witnesses, including Dr. Sharon Schnittker, could affirmatively establish Mr. Taylor’s factual innocence once and for all.

**A. This Court’s Common Law Exceptions Excuse Any Procedural Default Herein**

**1. Claims Fourteen and Twenty-Four Meet the Standard for the Newly Discovered Evidence Exception**

**a. Claim Fourteen**

Discussing Claim Fourteen, Respondent argues,

Taylor’s trial counsel certainly knew how venire members had answered voir dire questions, and therefore knew who stated they were LDS or not. He also knew which venire members were stricken by the State. Regardless of whether any of Taylor’s prior counsel actually received or reviewed the voir dire notes, Taylor fails to establish that his claim that venire members were stricken because of their religion is based on evidence that his trial counsel did not already know.

(Appellee’s Br. at 21.)

Respondent is correct in its first three points, but in its final detail, Respondent argues that Mr. Taylor failed to “establish” evidence that trial counsel could not have known. Although trial counsel knew the prospective jurors’ religious affiliation based on the voir dire questioning, he did not know the prosecutor’s scoring system for evaluating jurors, or the scores attributed to the prospective jurors. Likewise, he could not have known that religion was being considered in the prosecutor’s analysis of the prospective jurors. Most importantly, trial counsel could not have known that the prosecutor chose to jump over jurors that he had initially deemed less desirable to remove prospective juror Holly Conner purely based on the fact that she was a Methodist and not a member of the Church of Jesus Christ of the Latter-day Saints.

The issue here is Utah’s limitation on newly discovered evidence; however, this Court may find it persuasive that in *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005), the United States Supreme Court granted relief on a habeas petitioner’s claim that the prosecution made racially motivated peremptory strikes after noting that the prosecutors “marked the race of each prospective juror on their juror cards.” *Miller-El*, 545 U.S. at 264. Defense counsel in that case knew the race of the prospective jurors at the time of trial, but that did not prevent the Supreme Court from granting relief based on the juror cards presented on habeas. The same type of conduct was present in this case, only the prosecutor marked the religion of the prospective jurors on his juror scorecard. (Pet. Ex. 77.)

Newly discovered evidence of a discriminatory peremptory strike satisfies the *Hurst* good cause standard here, as it did in *Andrews v. Barnes*, 779 P.2d 228 (1989).

Respondent's citation to the revised PCRA (§ 78B-9-104(e)(iv)) is inappropriate because claims of discrimination in jury selection do not require a showing of prejudice for relief to be granted. The PCRA attempts to limit review by requiring that when "viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received." § 78-35a-104(e)(iv). Whether jurors were excluded based solely on their religious affiliation is not an issue that goes to either Mr. Taylor's guilt or sentence, as it is not Mr. Taylor's actions that are being scrutinized in this claim. It is an issue that goes to whether his trial passes constitutional muster.

Mr. Taylor's challenge to the striking of prospective jurors based on their religion is based in the Utah State Constitution:

The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; *nor shall any person be incompetent as a witness or juror on account of religious belief* or the absence thereof.

Utah Constitution, Art. I, § 4 (emphasis added).

The PCRA cannot trump Article I, section 4 of the Utah Constitution because the legislature cannot abrogate this right without a constitutional amendment.

**b. Claim Twenty-Four**

The information Scott Manley provided to federal habeas counsel could not have been discovered through the exercise of reasonable diligence by prior counsel because their hands were tied by the State. As explained in Mr. Taylor's Opening Brief, Mr.



Manley's declaration was obtained after a properly funded investigation by the Office of the Federal Public Defender. This Court cannot determine whether post-conviction counsel could have discovered Mr. Manley sooner without first addressing whether post-conviction counsel's funding was adequate.

Respondent argues that Mr. Taylor "has essentially conceded that prior counsel *could* have obtained the declaration if they had located and interviewed Manley. That fact alone defeats Taylor's claim." (Appellee's Br. at 22.) Mr. Taylor does believe that post-conviction counsel could have obtained the declaration if he had been able to locate Mr. Manley, but the State's failure to pay court ordered funds to counsel prevented him from being able to locate Mr. Manley.

Respondent further contends that "Taylor has never asserted that trial or appellate counsel lacked the funding to locate and interview Manley." (Appellee's Br. at 22.) Respondent is incorrect. Mr. Taylor's Petition addressed the massive funding problem that trial counsel faced. In fact, it was the focus of the Rule 23(b) Hearing. As Mr. Taylor explained, "[a]t the Rule 23(b) Hearing, Mr. Savage sought to show that trial counsel was ineffective because the Summit County payment scheme for salary and expenses in capital cases was so minimal as to constitute ineffective assistance of counsel per se." Petition at 16. Claim 6.C explained in detail the conflict of interest that arose from trial counsel's inadequate funding. Furthermore, in arguing that trial counsel's failures bar post-conviction relief, Respondent strives to create an unreasonable precedent where the ineffectiveness of trial counsel becomes the basis for denying post-conviction relief.

Respondent is correct that Mr. Taylor has not asserted that appellate counsel lacked

the funding to locate and interview Mr. Manley because to entertain that debate is to ignore the purpose and limitations of appellate counsel. Appellate counsel is limited by the boundaries of the record. It is beyond the scope of appellate counsel's appointment to investigate new evidence, that is the domain of post-conviction counsel. *Draper v. Washington*, 372 U.S. 487, 506, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963).

Respondent further dismisses Mr. Taylor's discovery by stating that he has "failed to establish that he meets the additional PCRA requirements for newly discovered evidence," citing to § 78B-9-104(e)(iii), which prohibits mere impeachment evidence. (Appellee's Br. at 22.) Respondent does not address the point made in Mr. Taylor's Opening Brief that Mr. Manley's declaration is not merely impeachment evidence because it describes misconduct by the police. In any event, impeachment evidence falls within the rule announced in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (citing *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)).

Besides the fact that this distinction renders the PCRA inapplicable, the PCRA cannot control here because the Utah State Legislature cannot legislate away federal constitutional law. The newly discovered *Brady* violation excuses Mr. Taylor's delay in bringing this claim.

## **2. Good Cause**

Respondent's Brief does not counter Mr. Taylor's Opening Brief arguments in support of good cause. (Appellee's Br. at 17-18.)

### **3. Mr. Taylor's Claims Are Not Frivolous, Nor Were They Withheld for Tactical Reasons**

Respondent argues that the burden is Mr. Taylor's because "[u]nder the PCRA, the respondent has the burden of pleading any ground of preclusion, such as a procedural bar, 'but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.' § 78B-9-105." (Appellee's Br. at 19.)

In *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003), the United States Supreme Court held that if the substance of a claim was not raised in a prior post-conviction petition, there is a presumption that the reason for not raising it was tactical. To overcome that presumption, a petitioner must show there was no conceivable tactical basis for counsel's actions. *Id.*

Mr. Taylor's Opening Brief explained why the district court was wrong when it found that "[a]ll of the claims raised in Petitioner's successive petition that were not previously raised are claims for which a reasonable basis can be articulated as to why they were not raised in a prior proceeding." (ROA at 1298.) Mr. Taylor has voluminously detailed state post-conviction counsel's failings. Mr. Taylor has gone as far as he can without the assistance of the courts in ordering factual development. This Court should remand Mr. Taylor's case with instructions to the district court to hold an evidentiary hearing to allow him to prove the lack of conceivable tactical basis for counsel's actions.

Mr. Taylor's Petition made the "substantial threshold showing" that is necessary to require discovery or an evidentiary hearing. *Wade v. United States*, 504 U.S. 181, 186, 112 S. Ct. 1840, 118 L. Ed. 2d 524 (1992); *United States v. Berger*, 251 F.3d 894, 907 n.4

(10th Cir. 2001); *United States v. Duncan*, 242 F.3d 940, 946 (10th Cir. 2001).

Mr. Taylor has been plagued by ineffective counsel for two decades. While this Court did not find prejudice in its most recent review of this case, it did find that trial counsel's performance was deficient. Appellate counsel was too focused on his personal battle with trial counsel to adequately represent Mr. Taylor, and state post-conviction counsel was constrained by inadequate funding. Mr. Taylor has thus far shown that there was no conceivable tactical basis for counsel's actions because there can be no conceivable tactical basis to pleading someone guilty to a crime they did not commit or to furthering a factually innocent person's sentence of death. The district court's presumption of a tactic or strategy was wrong and further inquiry is necessary.

**B. The Statutory Right to the Effective Assistance of Post-Conviction Counsel is an Exception to Procedural Bar**

The district court found that Mr. Taylor has a statutory right to the effective assistance of post-conviction counsel. (ROA at 1266.) The right to effective assistance of post-conviction counsel that this Court recognized in *Menzies v. Galetka*, 2006 UT 81, 150 P.3d 480, is meaningless if Mr. Taylor has no opportunity to assert it.

Both Respondent and the district court get mired down in a debate as to the application of PCRA section 78-35a-106(1)(d), missing the point that Mr. Taylor's unique situation does not fit the definition of the procedural bar at all.

Respondent argues that because Mr. Taylor's right to post-conviction counsel is statutory, the Legislature has the sole authority to define its reach. According to Respondent, because section 202 of the PCRA says nothing about the successive-petition

procedural bar, this Court should not find that such an exception exists. Both Respondent and the district court are incorrect -- the Utah legislature does not have the sole authority to define the reach of the right to post-conviction counsel. Regardless of what the PCRA reads, it is still this Court that defines the reach and scope of habeas corpus rights and procedures.

Because “habeas corpus is the precious safeguard of personal liberty,” the judicial branch has ultimate authority over habeas remedies both before and after conviction. *Thompson v. Harris*, 144 P.2d 761, 766 (Utah 1943). The historical importance of the writ of habeas corpus has caused this Court to reserve for itself the power to define habeas-type remedies and procedures, in order to protect the writ from political pressures.

This Court has forcefully protected habeas remedies from Utah’s political branches and has consistently and repeatedly rejected legislative efforts to curtail the availability of habeas relief. This Court has not only relied on the separation of powers, it has invoked the state constitution’s open courts provision and designated habeas corpus as “[q]uintessentially” a judicial power. *Hurst*, 777 P.2d at 1033-34; *see also Menzies v. Galetka*, 2006 UT 81, ¶ 84; *Gardner v. Galetka*, 2004 UT 42, ¶¶ 17-18, 94 P.3d 263; *Tillman v. State*, 2005 UT 56, ¶ 22, 128 P.3d 1123; and *Julian v. State*, 966 P.2d 249, 253 (Utah 1998) (citing Utah Const. art. V, § 1, art. I, § 5, art. I, § 11).

Consistent with that reserved power, this Court may define the scope of procedural bar and determine when the existing statutory structure is inapplicable to the situation before this Court. PCRA § 78-35a-106(1)(d) cannot be applied in the way Respondent urges because the language of the statute is self-preclusive, and because if applied as

argued by Respondent, post-conviction counsel would have to bring the ineffectiveness claim against themselves in order to enjoy this Court's recognized right to effective post-conviction counsel. Such an illogical paradigm cannot be the intent of the legislature or this Court.

The statute precludes any claim that "was raised or addressed in any previous request for post-conviction relief *or could have been*, but was not, raised in a previous request for post-conviction relief." *Id.* (emphasis added.) This provision fails to encompass Mr. Taylor's claim because the lack of proper funding rendered post-conviction counsel unable to fully perform his duties under recognized ABA Guidelines. This distinction places Mr. Taylor outside the statutory scheme relied on by Respondent.

Respondent's contention that post-conviction counsel should have brought the ineffectiveness claim against himself fails on multiple levels, the most obvious of which is that a proper prejudice analysis could not be performed without the discoveries made by properly funded federal habeas counsel. Moreover, Respondent's model expands the scope of the ineffectiveness claim against former post-conviction counsel, because if counsel is tasked with asserting a claim of ineffectiveness against themselves, their failure to do so gives rise to another claim of ineffectiveness. Respondent's theorem leaves no avenue for redressing that claim.

**C. Neither of the Alternative Bases of Affirmance Proposed by Respondent Are Appropriate Means of Denying Mr. Taylor Relief**

Respondent suggests that this Court may affirm the district court ruling either because Mr. Taylor "never proved ineffective assistance of prior post-conviction counsel"

or because “he had no right to the effective-assistance of post -conviction counsel.” (Appellee’s Br. at 26.) The first assertion is simply wrong, and the latter requires this Court to make a major departure from this Court’s prior precedents.

**1. Mr. Taylor’s Prior Post-Conviction Counsel Was Ineffective**

Respondent correctly identifies the requirements of deficient performance and prejudice underlying a finding of ineffective assistance of counsel. Respondent then makes it appear as though Mr. Taylor did not explain how he met those elements, saying that, “Taylor argues only that his prior counsel ‘was prevented from developing [the procedurally barred] claims by lack of funding.’ (Taylor’s br. at 20). That bare assertion does not prove ineffective assistance.” (Appellee’s Br. at 27.) Mr. Taylor made far more than a “bare assertion.” Mr. Taylor’s detailed analysis of the lack of funding spans six pages in his Opening Brief. (Petitioner’s Brief at 21-26.) It also spans six pages in the Petition at 410-15. Additionally, Pet. Ex. 106 contains 135 pages of documents on which Mr. Taylor’s claim is founded. Mr. Taylor’s detailed analysis of prejudice is found in the Opening Brief at 17, 29, 30, 43, 44, 46, and 49. Respondent adds that “Taylor has not established that the funds provided were insufficient.” (Appellee’s Br. at 27.) The courts themselves established that when they found that further funds were “reasonable and necessary.” Respondent does not address that part of Mr. Taylor’s argument.

**2. Inadequate Funding for Mr. Taylor's Prior Post-Conviction Counsel Defeats the Procedural Bar**

**a. The Funding Prior Post-Conviction Counsel Received Was Inadequate**

There is a logical disconnect between Respondent's argument that "Taylor has not supported the factual predicate that the funding was inadequate" (Appellee's Br. at 28) and the four court orders for payment of \$57,300 as "reasonable and necessary." *See* Opening Brief at 25-26. As Mr. Taylor previously argued in his Opening Brief, either Justice Nehring and Judge Noel were wrong when they ruled that those funds were necessary, or the district court is wrong now in concluding that Mr. Taylor was not harmed by the State's failure to pay roughly two-thirds of those funds to post-conviction counsel.

Respondent's factual support appears to be homespun. Footnote 12 cites as support Respondent's previous argument in its Reply to Petitioner's Opposition to Respondent's Motion to Dismiss, which in turn relied on Respondent's November 17, 2000 argument to the district court.

Not described by Respondent in Footnote 12 is the part of that argument where Respondent conceded that there would be future problems for Respondent if the court ruled that funds were reasonable and necessary and the State failed to pay them.

MR. BRUNKER: --and what--what I'm concerned about is that when we get into the Federal Court, when we say, well, we're--we--they expended the funds that were provided to them, there was no motion or no adequate attempt to obtain more funds, we're entitled to the expedited proceedings that Mr. Taylor will in turn argue, well, no, we had orders from the State trial court that there were more funds that should



have been granted and will use that to say that the State had not provided reasonable and necessary--

THE COURT: Well, yeah, but if--if--if I find that--that they're reasonable and it's ultimately determined that you have to pay them, we'll have to get into that, I suppose, and you pay them, then how are you--how are you hurt in Federal Court?

MR. BRUNKER: Well, if--if ultimately they're paid, we wouldn't be, I think that's correct.

(Pet. Ex. 106, at bates no. 921-22).

It is indisputable that the State refused to pay most of those funds. It is difficult to reconcile how the district court could both consider these funds to be necessary and regard the initial state post-conviction petition to be adequate when it was produced without the benefit of the investigation and experts that these funds were meant to obtain. Either the district court was wrong in the first instance, or in its current ruling.

Mr. Taylor has repeatedly requested an evidentiary hearing to determine what funds were received and what were used. Such an inquiry is obviously necessary, as the district court's calculations were materially incorrect. Appellee's Brief chose not to address Mr. Taylor's argument describing how the district court's calculations were necessarily incorrect; instead, Respondent accused Mr. Taylor of "argu[ing] that the district court's calculations are not correct based on information that was not before the district court." (Appellee's Br. at 28.) Respondent is partially correct. Pages 24-25 of the Opening Brief cite to documents included in Addendum C to the Opening Brief. C-1 and C-2 were erroneously omitted from Exhibit 106, but the other seven pages were part of Pet. Ex. 106: C-3 = Ex. 106, at 987; C-4&5 = Ex. 106, at 990-91; C-6 = Ex. 106, at 992;

C-7 = Ex. 106, at 994; C-8 = Ex. 106, at 995; C-9 = Ex. 106, at 996. It only takes one of the bills in Pet. Ex. 106 to make Mr. Taylor's point correct, and three of them were before the district court. Obviously, Respondent's follow-up point that Mr. Taylor "does not argue or establish that the district court was incorrect based on the record in front of it" is incorrect. (Appellee's Br. at 28-29.)

Finally, Respondent cites a Seventh Circuit case for the point that ineffectiveness does not mean that counsel performed the investigation that the best attorney with unlimited time and resources would have done. (Appellee's Br. at 29.) Mr. Taylor has never made such a claim, rather he has made the point that post-conviction counsel was prevented from performing the basic investigation outlined by the ABA Guidelines.<sup>3</sup> The United States Supreme Court has referred to the guidelines as "guides to determining what is reasonable." *Rompilla v. Beard*, 545 U.S. 374, 387, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). This Court has also looked to the guidelines for evidence of the prevailing norms. *Taylor v. State*, 2007 UT 12, ¶¶ 49-53, 156 P.3d 739.

**b. Mr. Taylor Was Prejudiced by the Inadequate Funding**

Respondent argues that Mr. Taylor has "failed to allege, let alone identify, anything in this particular case to support the theory that *his* defense suffered." (Appellee's Br. at 30 (emphasis in original).) Among other things, proper investigation brought the troubles with Mr. Manley's story to light, along with the extrinsic evidence considered by the

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<sup>3</sup> See addendums to Petitioner's Opposition to Motion to Dismiss Petition for Postconviction Relief. (ROA at 659.)

jurors. Had the evidence of Mr. Taylor's factual innocence been before the jury with the newly discovered information about Mr. Manley, a reasonable trier of fact could not have found him guilty of the offenses he pled guilty to. Moreover, the extrinsic evidence considered by the jurors necessitates the reversal of his sentence in and of itself.

**3. Mr. Taylor Had a Right to the Effective Assistance of Post-Conviction Counsel**

**a. The 2008 Amendments to the PCRA Cannot Apply Retroactively Because to Do So Would Cut off Mr. Taylor's Substantive Right to Effective Assistance of Post-Conviction Counsel and Violate Ex Post Facto and Due Process Principles**

The 2008 amendments to the PCRA cannot apply to Mr. Taylor's case. This Court has already found that the pre-amendment PCRA in effect at the time Mr. Taylor filed his Petition conferred on Mr. Taylor a right to effective assistance of post-conviction counsel. The right to effective assistance of post-conviction counsel is a substantive right. Because the 2008 amendment purports to negate this right, it cannot be applied retroactively.

In *Menzies*, this Court held that the PCRA's provision for counsel confers a right to effective assistance of post-conviction counsel. *Menzies*, 2006 UT 81, ¶ 82.

Given the high stakes inherent in [capital post-conviction] proceedings—life and liberty—providing a petitioner the procedural safeguard of appointed counsel is an important step in assuring that the underlying criminal conviction was accurate. We refuse merely to pay lip service to this legislatively created protection by holding that a petitioner in a post-conviction death penalty proceeding is only entitled to ineffective assistance of appointed counsel.

*Id.* The state makes no contention that the right to effective assistance of post-conviction counsel is not a substantive right. Instead, they assert that the PCRA is procedural and

that the 2008 amendment merely clarifies its procedures. (Appellee's Br. at 31-37.) Even assuming for the sake of argument that these contentions are correct, they do not by themselves establish that the 2008 amendments can be applied retroactively.

"A long-standing rule of statutory construction is that we do not apply retroactively legislation enactments that alter substantive law or affect vested rights unless the legislature has clearly expressed that intention." *Olsen v. Samuel McIntyre Inv. Co.*, 956 P.2d 257, 261 (Utah 1998). This rule is modeled on the rules of construction in the Utah Code: Utah Code Annotated § 68-3-3 states that "[n]o part of these revised statutes is retroactive, unless expressly so declared." Utah Code Ann. § 68-3-3 (2007); *accord* *Goebel v. Salt Lake City S. R.R. Co.*, 2004 UT 80, ¶ 39, 104 P.3d 1185 ("A statute is not to be applied retroactively unless the statute expressly declares that it operates retroactively."). The 2008 amendment to § 78B-9-202(4) contains no such declaration.

More importantly, the practical effect of retroactive application is to cut off the only remedy available to petitioners who have had their right to the effective assistance of post-conviction counsel violated. The pre-amendment PCRA created a right to the effective assistance of post-conviction counsel that the 2008 amendments purport to take away. Because even a procedural or clarifying amendment will not be applied retroactively if the effect of doing so results in the deprivation of a vested right, the state's arguments for retroactivity must fail. *Olsen*, 956 P.2d at 261 (holding that amended notice requirements could not be applied retroactively because doing so would affect the plaintiff's right to benefits); *Brown & Root Indus. Serv. v. Industrial Com'n*, 947 P.2d 671, 675 (Utah 1997) (holding that an amendment that would bar a claim could not be

retroactively applied); *see also In re Disconnection of Certain Territory from Highland City*, 668 P.2d 544, 548-49 (1983) (holding that by changing the factors a court must consider in rendering its decision, the amendment became substantive and could not be applied retroactively); *Goebel*, 2004 UT 80, ¶ 39 (“[R]etroactivity is not favored in the law.” (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988))).

**b. The State Has Not Carried its Substantial Burden to Show Why this Court Should Overrule its Precedent in *State v. Menzies***

“Those asking [this Court] to overturn prior precedent have a substantial burden of persuasion . . . mandated by the doctrine of stare decisis.” *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994) (“*Menzies* (1994)”) (citation omitted). This Court has stated that it will not overturn its own precedent “unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions *and* that more good than harm will come by departing from precedent.” *Id.* at 399 (quoting John Hanna, *The Role of Precedent in Judicial Decision*, 2 Vill. L.Rev. 367 (1957) (emphasis added)); *accord Hoyer v. State*, 2009 UT 38, ¶ 26, 212 P.3d 547. The State has not met its burden or shown any good reason why this Court should suddenly overrule its well-reasoned, and much-needed, holding in its 2006 *Menzies* decision.

The State argues that “the Legislature intended to provide for funded counsel who had the requisite qualifications and no more.” (Appellee’s Br. at 37.) The basis for the State’s argument is its position that the Court misunderstood the legislature’s motivation in enacting section 202 of the PCRA, the statute that affords death-sentenced petitioners

the appointment of compensated counsel during post-conviction proceedings. The focus of the State's proof of the legislature's motivation are the words of one state representative during a House floor debate, that section 202 could entitle Utah to speedier *federal* habeas proceedings under the opt-in provisions of the federal Antiterrorism and Effective Death Penalty Act ("AEDPA").<sup>4</sup> Thus, the State argues, any procedural right this Court may extend to such petitioner which might slow down *state* post-conviction proceedings is in conflict with this legislative (or at least that one legislator's) purpose, i.e., to speed through post-conviction review no matter the devastating consequences.

First, in *Menzies*, this Court did not rely on legislative history to interpret section 202, which unambiguously entitles a death-sentenced petitioner to appointed and compensated counsel. Instead, the Court relied on the fact that the legislature established a statutory right to counsel. *Menzies*, 2006 UT 81, at ¶ 82.<sup>5</sup> This Court's holding in *Menzies* was based the substantive protection of "the constitutional guarantees of life and liberty," that it could extend to a death-sentenced citizen, and its acknowledgment that it "simply cannot allow [such a citizen's] sentence to be carried out without allowing him to exercise his right to post-conviction review." *Id.* at ¶ 110 (citing *Hurst*, 777 P.2d at

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<sup>4</sup> Chapter 154 of the AEDPA provides a state with certain procedural benefits in capital federal habeas cases if the State has "opted in" to its provisions. 28 U.S.C. §§ 2261-2266. A state with a post-conviction procedure can opt in by establishing a system for the appointment of counsel to represent capital defendants in state post-conviction proceedings. Utah has never established that its post-conviction system complies with the requirements for opt-in status.

<sup>5</sup> Additionally, even prior to the 1997 legislation providing for funded counsel in capital post-conviction cases, Utah law already provided for compensation to assigned counsel in certain post-conviction proceedings, including proceedings alleging the denial of a constitutional right. *Gardner v. Holden*, 888 P.2d 608, 622 & n.5 (Utah 1994) (quoting former Utah Code Ann. § 77-32-3(3)).

1035). Based on the importance of capital post-conviction proceedings and the “high stakes inherent in such proceedings—life and liberty—,” this Court used its “constitutional authority over such cases” to judicially extend to death-sentenced petitioners a statutory right to *effective* representation. *Id.* at ¶ 83. Thus, this Court relied on its judicial power and its refusal “merely to pay lip service to this legislatively created protection by holding that a petitioner in a post-conviction death penalty proceeding is only entitled to ineffective assistance of appointed counsel.” *Id.* at ¶ 82.

The fact that one representative was motivated to enact section 202 to “opt in” to certain federal procedural benefits, does not trump this Court’s constitutional authority to oversee procedural protections of capital-sentenced petitioners in its state post-conviction proceedings. *See, e.g., State ex rel. Napolitano v. Brown*, 982 P.2d 815, 817-19 (Ariz. 1999) (striking statutory time limits, enacted to allow Arizona to utilize opt in provisions of the AEDPA, as unconstitutionally violating state separation of powers).

Furthermore, whatever the motivation that one House representative may have had in enacting section 202, the result is that section 202 unambiguously grants a death-sentenced petitioner the right to counsel in post-conviction proceedings. Only when a statute is ambiguous will a court look to other interpretive tools such as legislative history. *State v. Holm*, 2006 UT 31, ¶ 16, 137 P.3d 726 (citing *Adams v. Swensen*, 2005 UT 8, ¶ 8, 108 P.3d 725). The right was unambiguously created and therefore the Court need not look to what motivated the legislature to create that right. Because that right was created by the legislature, this Court’s use of its constitutional authority to recognize the inherent statutory right to effective counsel was appropriate. Consideration of one legislator’s

motivation to attack this Court's decision in *Menzies* is not.

Respondent fails to carry its burden to show either that this Court's holding in *Menzies* was originally erroneous or that more good than harm will come from departing from its past establishment of a much-needed remedy to what this Court has recognized as a systemic problem in its capital post-conviction review. This Court expressed concern regarding the lack of competent capital defense counsel, and the resulting effect on this Court's ability to feel satisfied in its review of capital convictions, when it stated that, "[o]ur judicial oath to support, protect, and defend the Constitution must, of necessity, include the requirement that we take measures within our authority and responsibility to see that the mandates of the Constitution are observed." *Archuleta v. Galetka*, 2008 UT 76, ¶ 18, 197 P.3d 650. At present, the right and remedy established by this Court in *Menzies* is one of the few measures within the judiciary's authority to do so.

#### **IV. MR. TAYLOR'S CLAIMS ARE NOT TIME BARRED**

##### **A. Mr. Taylor Provided a Legally Sufficient Excuse for Taking More than One Year to File His Petition**

Mr. Taylor's claims present exactly the factual scenario that has been deemed by this Court to satisfy the "interests of justice" exception to the timeliness bar. *Adams v. State*, 2005 UT 62, ¶ 18, 123 P.3d 400 (holding that petitioner's claim of ineffective assistance of counsel satisfied the exception and that a court "should rely not only on the petitioner's memorandum . . . but also on the initial petition itself"); *Julian*, 966 P.2d at 254 (holding that because petitioner's claims "undermined the court's confidence in the trial's outcome," the court did not abuse its discretion in hearing the claims under the



interests of justice exception).

**B. Mr. Taylor's Claims Are Meritorious**

**1. Claim Five - Change of Venue**

Respondent lodges four challenges to this claim: (1) that Mr. Taylor's voluntary guilty plea constituted a waiver of all non-jurisdictional defects; (2) that Mr. Taylor failed to demonstrate either actual or presumed juror prejudice; (3) that Mr. Taylor has not established that any biased juror actually sat; and (4) that having passed the jury for cause, Mr. Taylor may not now claim that jury was not impartial.

Respondent claims that a voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, including pre-plea constitutional violations, citing *State v. Parsons*, 781 P.2d 1275, 1278 (Utah 1989). (Appellee's Br. at 41.) *Parsons* is inapposite, because the defendant in that case entered an unconditional guilty plea to capital murder and did not attack the voluntary and intelligent character of his plea on appeal. *Parsons*, 781 P.2d at 1278. In contrast, Mr. Taylor has pled that his guilty plea to capital murder was not intelligent and is thus constitutionally defective. (See Petition Claim Three; ROA at 199-216.) Because Mr. Taylor's guilty plea was constitutionally defective, he did not waive his venue claim or his right to challenge any other pre-plea constitutional violations.

In order to determine whether Mr. Taylor waived his constitutional violations by pleading guilty, this Court must inquire into whether his guilty plea was knowing and voluntary. See *James v. Galetka*, 965 P.2d 567, 570, 573-74 (Utah Ct. App. 1998).

As detailed in Claim Five of the Petition, extensive pre-trial publicity prejudiced the jury pool in Summit County to such an extent that it was almost certain Mr. Taylor

would not get a fair trial in that county.

Respondent argues that Mr. Taylor failed to demonstrate either actual or presumed juror prejudice and that Mr. Taylor has not established that any biased juror actually sat, noting that “Taylor’s bare statement that Mr. Moore was biased does not establish bias.” (Appellee’s Br. at 42.) Again, Respondent uses the term “bare” to describe a not insubstantial amount of the underlying Petition. (ROA at 274-77, 304-11; supported by Petition Exs. 20, 21, 40.) Mr. Taylor’s Petition has sufficiently pled facts demonstrating juror prejudice and bias.

Finally, Respondent cites *State v. Pearson*, 943 P.2d 1347, 1350 (Utah 1997) for the proposition that when a defendant passes a jury for cause, he necessarily concedes that the jury he faced was impartial. *Pearson* never held that this Court should refuse to consider evidence of jury bias because a defendant had passed the jury panel for cause. *Pearson*, 943 P.2d at 1350. Instead, *Pearson* stands for the mundane proposition that a district court does abuse its discretion by denying a motion for change of venue when “there is no evidence in the record of jury bias.” *Id.*

Because Mr. Taylor has thoroughly pled facts evidencing Mr. Moore’s bias, Mr. Taylor meets the *Lafferty v. State*, 2007 UT 73, 175 P.3d 530, standard cited by Respondent. Mr. Taylor was not tried by a fair and impartial jury and a merits determination by the district court would have found that trial counsel was ineffective and the district court erred in denying Mr. Taylor’s change of venue motion.

## **2. Claim Nine - Trial Court Error in Failing to Properly Strike Venire Members for Cause**

Respondent's argument states that, "[a] defendant does not have a constitutional right to unfettered use of his peremptory challenges. And Taylor had a duty to cure any erroneous denial of a for-cause challenge by removing the juror with a peremptory challenge." (Appellee's Br. at 44-45.) Mr. Taylor is confused by Respondent's argument. Distilled to its essence, Respondent argues that the trial court did not error in failing to properly strike venire members for cause because Mr. Taylor's obligation was to use his peremptories to clean up after the trial court's mistakes. That is not the purpose of peremptory challenges.

Respondent correctly cited to *State v. Wach*, 2001 UT 35, 24 P.3d 948, where the Court noted that

to prevail on a claim of error based on the trial court's failure to remove a prospective juror for cause, a defendant must demonstrate prejudice, *viz.*, show that a member of the actual jury that sat was partial or incompetent. [citation] Accordingly, in determining whether the trial court committed reversible error in this case, we must apply a two-part test: First, we must determine whether the trial court committed legal error by failing to excuse for cause prospective jurors No. 3 and No. 21. Second, we must determine whether the trial court's failure to strike the prospective jurors prejudiced [petitioner].

*Id.* at ¶ 24.

Under the test announced in *Wach*, Mr. Taylor prevails. As detailed in the Petition (ROA 294-311), the district court failed to remove several jurors who should have been struck for cause. One of those jurors, Mr. Moore, ultimately was empaneled. The

prejudice arising from Mr. Moore's participation on the jury is well documented.

Mr. Taylor's obligation to clean up after the district court had finite limitations. Because so many of Mr. Taylor's peremptories were used on jurors who should properly have been struck for cause, Mr. Taylor's ability to act as a safety net for the court was limited. Accordingly, Mr. Moore, who was clearly excludable for cause, made it onto the jury. This is not a failure on Mr. Taylor's part that excuses the district court's error.

### **3. Claim Twelve - Blood Atonement In the Voir Dire**

Appellee's Brief states that "[t]o prevail on a claim of error based on the failure to remove a juror for cause, a defendant must 'show that a member of the jury was partial or incompetent.'" (Appellee's Br. at 47.) As the crux of Respondent's argument is that Mr. Taylor has failed to make that showing and Mr. Taylor has already shown how that is incorrect, Mr. Taylor need not elaborate on his Opening Brief further.

### **4. Claim Fourteen - The Exclusion of Non-Church of Jesus Christ of Latter-Day Saints Members from the Jury**

Appellee's Brief states that "Taylor has not provided, and the State has not found any Utah case holding that it is a violation of the Utah Constitution to use a peremptory challenge to strike a juror based on religion." (Appellee's Br. at 48.) Mr. Taylor does not believe that such a case exists. Mr. Taylor calls on this Court to establish a new rule of law in this State. It is a new rule because it is not dictated by precedent, but Mr. Taylor is not asking this Court to fashion a rule of its own devising, but rather one consistent with the Utah Constitution. *See* Utah Constitution, Art. I, § 4.

Justice Thomas has argued that preventing the use of peremptories based on

religion is a logical extension of the prohibition of peremptories based on race and gender. Dissenting from the denial of certiorari in a case where the prosecutor responded that she had struck the venireman because he was a Jehovah's Witness, Justice Thomas, joined by Justice Scalia, explained that,

Given the Court's rationale in *J.E.B.*,<sup>6</sup> no principled reason immediately appears for declining to apply *Batson*<sup>7</sup> to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause. . . . *J.E.B.* would seem to have extended *Batson*'s equal protection analysis to all strikes based on the latter category of classifications – a category which presumably would include classifications based on religion.

*Davis v. Minn.*, 511 U.S. 1115, 1117, 114 S. Ct. 2120, 128 L. Ed. 2d 679 (1994) (Thomas, J., dissenting.); *Larson v. Valente*, 456 U.S. 228, 244-46, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

Citing to *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), Respondent argues that, “[a] post-conviction petition is not an appropriate forum to argue for new law. Postconviction relief is generally unavailable for claims that rest on a new rule announced or created after direct appeal.” (Appellee’s Br. at 48.) However, “[a] close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that

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<sup>6</sup> *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

<sup>7</sup> *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

opinion.” *Danforth v. Minnesota*, 552 U.S. 264, 277, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008). *Danforth* makes it clear that this Court is not constrained in its interpretation of State constitutional law by *Teague*.

Respondent’s second point is that “Taylor claims that [his discovery of Exhibit 77] ‘shifts the burden of proof’ to the State to explain the impermissible peremptory strikes. . . . Taylor bears the burden of proof, and he cites no argument or case law for his claim that the burden shifts.” (Appellee’s Br. at 49.) Mr. Taylor’s Petition cited the United States Supreme Court for that point.

A three-step process is triggered by an assertion that a party has used peremptory challenges in a biased manner. When the opponent of a peremptory challenge has made out a prima facie case of discrimination, the burden shifts to the proponent of the strike to provide a neutral explanation. If a neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful discrimination. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995); *see also Batson*, 476 U.S. at 96-98.

(ROA at 351.)

The import of discovering Pet. Ex. 77 is that it provides the foundation for making out a prima facie case of discrimination, thus necessitating the *Batson* inquiry.

Respondent next argues that “Exhibit 77 provides no indication as to why jurors were stricken.” (Appellee’s Br. at 50 (emphasis in original).) “Taylor provides no evidence to establish that potential jurors were stricken because of their religion. Given the fact that the prosecution struck potential jurors who were both LDS and non-LDS, it is more likely that the reasons they were stricken had nothing to do with their religion.”

*Id.*

Respondent's pleading ignores the Petition's four page analysis of the impermissible striking of Holly L. Conner from the venire. (ROA at 341-44.) Deconstructing each of her answers, Mr. Taylor makes out a prima facie case of discrimination. Moreover, as discussed *supra* in section III.A.1.a, this case is not dissimilar to *Miller-El*, where the United States Supreme Court granted relief on a habeas petitioner's claim that the prosecution made racially motivated peremptory strikes after noting that the prosecutors "marked the race of each prospective juror on their juror cards." *Miller-El* at 264.

#### **5. Claim Nineteen - Juror Misconduct**

The majority of Respondent's arguments do not require a response as Mr. Taylor has already provided arguments in support of this claim that are not altered by Appellee's Brief. Moreover, this Court is free to find as it wishes and is not constrained by the lack of a previous holding directly on point.

Furthermore, Respondent's reliance on Utah R. Evid. 606(b) is misplaced for the reasons already articulated in Mr. Taylor's Opening Brief at 40-41.

#### **6. Claim Twenty-Four - The State Failed to Disclose Material Exculpatory Evidence**

Appellee's Brief argues three main points in response to this claim: (1) that Mr. Manley's declaration (Pet. Ex. 115) is unreliable because Mr. Manley suffers from mental illness and has auditory and visual hallucinations; (2) that the prosecution is not responsible for the bad conduct of parole officers; and (3) that this Court has already held

that “even if Manley’s testimony was unreliable, any error the court made in admitting [it] was harmless.” *Taylor v. State*, 2007 UT 12, ¶ 111.

Respondent questions Mr. Manley’s credibility because of his psychological problems, but the problem cuts both ways. If the prosecution knew about Mr. Manley’s mental illness and hallucinations at the time of Mr. Taylor’s trial, these facts should have been disclosed to Mr. Taylor. *See State v. Bakalov*, 979 P.2d 799, 812 (Utah 1999) (“A prosecutor must disclose to the defense psychological evidence regarding a government witness whenever that evidence can substantially affect defense counsel’s ability to impeach the witness.”). Further fact development is required to determine whether the prosecution knew about Mr. Manley’s various mental problems before the trial. As both Petitioner and Respondent have concerns regarding Mr. Manley’s credibility, and because Mr. Taylor has demonstrated that the prosecution likely wrongfully withheld evidence, this Court should remand to the district court for an evidentiary hearing on this claim. *See Codianna v. Morris*, 594 P.2d 874 (Utah 1979) (remanding for evidentiary hearing on claim that prosecution wrongfully withheld evidence).

Mr. Manley’s sworn declaration explains that the parole officers who coerced him into providing a false account of his conversation with Mr. Taylor were working with the police. The fact that they were parole officers and not actual police officers does not change the fact that they were government agents whose actions can be fairly imputed to the prosecutor. *See Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (Responsibility for *Brady* compliance lies exclusively with the prosecution, including the “duty to learn of any favorable evidence known to the others acting on the



government's behalf in the case.”)

This Court has made it clear that any doubts as to whether or not evidence is *Brady* material should be resolved in favor of disclosure.

It is not for a prosecutor to substitute his or her judgment for that of a defendant with respect to whether exculpatory evidence is sufficiently material to warrant disclosure to a defendant when the question is at all close. Where a judgment call must be made as to whether evidence is sufficiently exculpatory to be *Brady* material, doubts should be resolved in favor of disclosure.

*Bakalov*, 979 P.2d 813-14.

Respondent's reliance on this Court's previous holding is misplaced because the newly discovered evidence was not previously before this Court and cannot be dismissed without this Court conducting a new prejudice analysis.

**7. Claim Twenty-Five - Mr. Taylor's Death Sentence Is Disproportionate to His Culpability**

Mr. Taylor agrees with Respondent that this claim is inextricably tied to his actual innocence claim.

Respondent cites to *Tison v. Arizona*, 481 U.S. 137, 150, 158, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987) for its proposition that “Taylor's argument is not supported by the law. A death sentence is constitutionally permissible even for a defendant who did not actually kill the victims so long as he was a major participant in the felony murder who acted with reckless indifference to human life.” (Appellee's Br. at 57.) As noted *supra*, Mr. Taylor was not convicted of felony murder or any felony that qualifies as an underlying felony pursuant to § 76-5-202(1)(d); therefore, Respondent is clearly wrong

in its assertion that “[t]he evidence in this case more than amply meets that standard.” (Appellee’s Br. at 57.)

Finally, the list of horrors cited by Respondent cannot be taken at face value because Mr. Taylor was prone to overstatement. Mr. Taylor’s “admissions” to Dr. Moench, relied on by Respondent, cannot be believed for the reasons already explained *supra*.

#### **8. Claim Thirty - Cumulative Impact**

Respondent’s only argument against this claim is that Mr. Taylor’s claims are procedurally barred and time barred. Because they are not barred for the reasons described throughout this Reply and the Opening Brief, this Court may properly consider cumulative impact pursuant to *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993).

#### **V. THE ATTORNEY GENERAL SHOULD BE ESTOPPED FROM ASSERTING THE PCRA LIMITS ON POST-CONVICTION RELIEF**

Estoppel is the device by which courts prevent their processes from being used for unjust ends. As said in Section 1044 of Lawrence on Equity Jurisprudence: “The most direct and effective method of averting injury through legal proceedings is one applied by the court whose process is invoked, whereby the party seeking any form of judicial relief or remedy, judgment or decree, affirmative or defensive, legal or equitable, to which he is not fairly entitled, is prevented from accomplishing the result by the simple process of denying his right. He is barred or ‘estopped’ from using judicial machinery for unjust ends.”

*Petterson v. Ogden City*, 111 Utah 125, 135-36, 176 P.2d 599 (1947). Because the Utah Attorney General’s Office has crafted the PCRA to its advantage, estoppel is the appropriate remedy to prevent the judicial process from being used to prolong Mr.

Taylor's unconstitutional confinement.

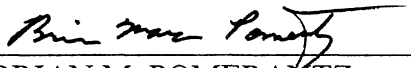
### CONCLUSION

For the foregoing reasons, Mr. Taylor asks that the Court reverse the judgment of the district court, consider his claims on the merits, and grant relief. Alternatively, the Court should reverse the judgment and remand the case to allow Mr. Taylor, after discovery and an evidentiary hearing, to prove exceptions to the defaults and entitlement to relief on the merits.

Respectfully submitted,

SEAN K. KENNEDY  
Federal Public Defender

DATED: April 7, 2011

By:   
BRIAN M. POMERANTZ  
Deputy Federal Public Defender

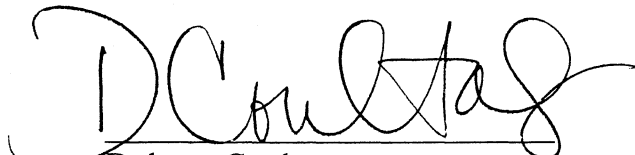
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**CERTIFICATE OF SERVICE**

I certify that, on the 7th day of April, 2011, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was mailed by first-class mail to:

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