

2009

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

Utah Court of Appeals

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Mark Shurtleff, Attorney General; Thomas Brunker; Erin Riley, Assistant Attorney General; Attorneys for Appellee.

Sean K. Kennedy; Brian M. Pomerantz; Megan Moriarty; Attorneys for Appellant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

VON LESTER TAYLOR,  Petitioner - Appellant,  vs.  STATE OF UTAH,  Respondent - Appellee.	No. 20090771
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Appeal from the Third Judicial District Court in Summit County  
District Court No. 070500645  
Bruce C. Lubeck, District Judge, Presiding

BRIEF OF APPELLANT

MARK SHURTLEFF  
Attorney General

THOMAS BRUNKER  
ERIN RILEY  
Assistant Attorneys General  
160 East 300 South, 6th Floor  
Salt Lake City, Utah 84111  
(801) 366-0180

*Attorneys for Appellee*

SEAN K. KENNEDY  
Federal Public Defender  
for the Central District of California

BRIAN M. POMERANTZ  
Deputy Federal Public Defender  
321 E. 2nd Street  
Los Angeles, CA 90012  
(213) 894-8859

MEGAN MORIARTY  
Assistant Federal Public Defender  
405 South Main St., Suite 350  
Salt Lake City, Utah 84111  
(801) 538-5091

*Attorneys for Appellant*

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UTAH APPELLATE COURTS

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MARK SHURTLEFF  
Attorney General

THOMAS BRUNKER  
ERIN RILEY  
Assistant Attorneys General  
160 East 300 South, 6th Floor  
Salt Lake City, Utah 84111  
(801) 366-0180

*Attorneys for Appellee*

SEAN K. KENNEDY  
Federal Public Defender  
for the Central District of California

BRIAN M. POMERANTZ  
Deputy Federal Public Defender  
321 E. 2nd Street  
Los Angeles, CA 90012  
(213) 894-8859

MEGAN MORIARTY  
Assistant Federal Public Defender  
405 South Main St., Suite 350  
Salt Lake City, Utah 84111  
(801) 538-5091

*Attorneys for Appellant*

## **PARTIES TO THE PROCEEDING**

The caption as set forth on the cover of this brief lists the parties to this proceeding in the district court.

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## STATEMENT OF JURISDICTION

This is an appeal from a district court's final order denying a petition for post-conviction relief in a capital case filed by Von Lester Taylor ("Mr. Taylor" or "Petitioner"). This Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(I). The district court entered its order denying the petition on August 17, 2009. (ROA 1211; Addendum B.) Mr. Taylor timely filed a notice of appeal from that order on September 15, 2009. (ROA 1320; Utah R. App. P. 4(a).)

## ISSUES, STANDARD OF REVIEW, PRESERVATION

### Issue

Whether the district court erred in holding that Claims 5, 9, 10, 12, 14, 19, 21, 24, 25, and 27 are procedurally barred because they were not raised in Mr. Taylor's initial post-conviction petition.

### Standard of Review

This Court must "review an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law." *Taylor v. State*, 2007 UT 12, ¶13 (quoting *Gardner v. Galetka*, 2004 UT 42, ¶7, 94 P.3d 263 ("*Gardner III*") (quoting *Rudolph v. Galetka*, 2002 UT 7, ¶4, 43 P.3d 467)). "When confronted with ineffective assistance of counsel claims," this Court "review[s] a lower court's purely factual findings for clear error, but review[s] the application of the law to the facts for correctness." *Taylor*, 2007 UT 12, ¶13 (quoting *Menzies v. Galetka*, 2006 UT 81, ¶58, 150 P.3d 480).

## **Preservation**

This issue arises from the district court's ruling and is thus exempt from preservation at that level.

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

Texts of the following constitutional provisions, statutes, and rules are in

Addendum A:

Federal Rules of Evidence 606(b)

Utah Code of Admin. Proc. Rule 25-14-5

Utah Code Ann. § 78-35a-104

Utah Code Ann. § 78-35a-106

Utah Code Ann. § 78-35a-202

Utah Code Ann. § 78A-3-102

Utah Code Ann. § 78B-1-103

Utah Code Ann. § 78B-9-104

Utah Code Ann. § 78B-9-106

Utah Constitution, Art. I, § 4

Utah Rules of Appellate Procedure, Rule 4(a)

Utah Rules of Appellate Procedure, Rule 23B

Utah Rules of Appellate Procedure, Rule 24(c)

Utah Rules of Criminal Procedure 8

Utah Rules of Evidence 606(b)

## STATEMENT OF THE CASE

### **Nature of the Case**

Mr. Taylor is in state custody at the Utah State Prison in Draper, Utah. He is sentenced to death.

### **The Course of Proceedings**

On November 5, 2007, Mr. Taylor filed a Petition for Relief under the Post-Conviction Remedies Act (“PCRA”) in the district court (“Petition”). (ROA 1-486.) Respondent filed a motion to dismiss on February 15, 2008. (ROA 528-627.) Petitioner filed an opposition on May 13, 2008. (ROA 659-800.) On June 13, 2008, Respondent moved for permission to file a supplemental memorandum in support of its motion to dismiss. (ROA 823-30.) Petitioner opposed that motion on June 23, 2008. (ROA 831-37.) Respondent filed a reply on that request on June 26, 2008 (ROA 838-48), and the district court on that same date allowed the supplemental memorandum by the State. (ROA 849-50.) On July 25, 2008, the State filed its supplemental memorandum. (ROA 863-86.) Petitioner filed an opposition on August 27, 2008. (ROA 887-933.) On February 26, 2009, Respondent filed a reply. (ROA 974-1163.) The district court held oral argument on the motion to dismiss on July 14, 2009. (ROA 1330.) On August 17, 2009, the district court granted the State’s motion to dismiss in its Ruling and Order (“Ruling”). (ROA 1211.) Mr. Taylor timely filed his notice of appeal on September 15, 2009. (ROA 1320-22.)

### **Disposition in the Court Below**

Mr. Taylor is appealing the district court's denial of his Petition as successive and procedurally barred. (ROA 1211.)

### **Statement of Facts<sup>1</sup>**

On December 14, 1990, after spending the day searching for employment, Mr. Taylor failed to return to the halfway house where he was staying. One week later Mr. Taylor and Edward Deli broke into the Tiede family cabin after seeing Rolf and Kaye Tiede leave their Summit County cabin with their family and luggage in tow.

The following day, after an overnight shopping trip in Salt Lake City, the Tiedes returned to the cabin. Part of the family parked at the gate to the Beaver Springs development and Kaye Tiede, together with her mother, Beth Potts, a woman in her mid-70s, and daughter Linae Tiede, age 20, drove two snowmobiles to the cabin, which was located approximately two miles from the gate on Weber Canyon road. Rolf Tiede and his 16 year-old daughter Tricia Tiede drove to a repair shop to pick up additional snowmobiles which were being repaired.

Linae Tiede was the first to arrive at the cabin. When she opened the door at the top of the stairs Mr. Taylor confronted her with his gun drawn. Once Kaye Tiede and Ms. Potts were upstairs, Kaye Tiede offered Mr. Taylor money. As she reached into her jacket, Mr. Taylor shot her near her left shoulder. Based on the testimony at trial and the

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<sup>1</sup> The Statement of Facts is primarily derived from the Ruling, which described its summary of the facts as “[g]leaned from the record of court proceedings as found by the court and jury at the time.” (ROA 1216.) The basis for the Statement of Facts is found in the ROA at 1216-20, except as otherwise noted.

forensic evidence, it appears that Mr. Taylor's shot was responsible for a graze wound on Kaye Tiede's left arm, and not Gunshot Wound #2, as originally thought. (See Petition Exhibit 117.<sup>2</sup>) Ms. Potts was then shot several times, including at least once in the chest and in the head, either of which could have been the cause of her death.

Linae Tiede witnessed the shootings of her mother and grandmother from several feet away. (RT<sup>3</sup> 509.) She unequivocally stated that Mr. Taylor carried a .38 caliber handgun and Edward Deli carried a .44 caliber weapon. (RT 499, 503.) Linae Tiede believed that each fired shots from their respective weapons. (RT 499, 503.)

Extremely damaging to Mr. Taylor was the testimony of Dr. Sharon Schnittker of the Utah State Medical Examiner's Office, who performed the autopsies on Beth Potts and Kaye Tiede. (RT 700.) Dr. Schnittker testified that .38 caliber bullets were responsible for at least two of the bullet wounds, Gunshot Wound #2 to Beth Potts, and Gunshot Wound #2 to Kaye Tiede. (RT 704, 707.) Dr. Schnittker only recovered one bullet from the two autopsies, a .38 caliber slug that she tied to Gunshot Wound #2 to Kaye Tiede. (RT 707-08.) Moreover, Gunshot Wound #2 to Kaye Tiede was identified to be a fatal shot, having gone through from the shoulder, fracturing the second and third ribs, and passing through the upper lobe of the left lung, and into the aorta, through the right lung, and finally fracturing the fourth right rib before exiting. (RT 710.)

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<sup>2</sup> Because the clerk's office did not bates number every page of the Record on Appeal, Petitioner must frequently use alternative descriptions for reference.

<sup>3</sup> "RT" refers to the reporter's transcripts of the Capital Homicide Sentencing Phase lodged with the Utah Supreme Court in *Utah v. Taylor*, Case No. 910496.

The projectiles recovered from the scene and analyzed by the Utah State Crime Laboratory indicate that with the possible exception of a bullet graze to Kaye Tiede's arm, and the non-fatal pellet shots fired by Mr. Taylor, all of the other injuries to Kaye Tiede and Beth Potts were in fact caused by the .44 caliber weapon carried by Mr. Deli. (See State's Trial Exs. 28 to 38.) The exhibits at trial showed that five .44 magnum bullets were recovered either from the bodies of Kaye Tiede and Beth Potts, or the floor area under their bodies, while only two .38 caliber bullets were recovered. (Petition Exhibit 85.) One of those .38 caliber bullets was wrongfully assumed to have penetrated Ms. Tiede, and the other "was examined and *could not be excluded* as having been fired from the Smith and Wesson .38 caliber revolver." (*Id.*; emphasis added.) No evidence definitively proved that the second bullet was fired from the .38 caliber handgun. (*Id.*)

The evidence from the penalty phase trial and the expert reports make clear that five .44 caliber bullets passed through the victims. (Petition Exhibit 86.) The autopsy reports and the testimony of Dr. Schnittker unequivocally prove that the two women were only penetrated by five actual bullets, along with Kaye Tiede being wounded by some bird shot and a superficial graze along her arm.<sup>4</sup> (RT 699-722; Petition Exhibits 83&84.) As with the bullet that grazed Kaye Tiede, the bird shot from the .38 was not fatal. (RT 710.)

The Bullet Analysis compiled by Detective Joseph Offret on February 28, 1991,

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<sup>4</sup> The bird shot all came from the .38 caliber Smith and Wesson taken from Dennis Anderson's cabin. The .38 caliber bird shot was packed by a friend of Mr. Anderson's who was a gun expert and loaded most of his own ammunition. These cartridges were lightly packed for killing woodpeckers. According to Mr. Anderson, it "is easy to tell the difference between bird shot and regular bullets." (Petition Exhibit 114, at ¶6.)

reported the results of the examination of the eight bullets recovered from the Tiede Cabin and the one bullet recovered by the coroner. (Petition Exhibit 86.) Detective Offret conclusively determined that bullets # 1 (JB13), #2 (JB15), #5 (JB42), #6 (JB46), and #7 (JB48) were all fired through the bodies of either Kaye Tiede or Beth Potts. (*Id.*) Having made this determination, combined with the bird shot from the .38, there are no unaccounted for entrance wounds. Bullets 1, 2, 5, 6, and 7, were *all* .44 caliber rounds. The coroner was incorrect when she assumed that the .38 she found in Kaye Tiede's clothing had passed through her body.

There is no physical evidence tying Mr. Taylor to Beth Potts' shooting. While one of the wounds was thought to have been caused by a .38 caliber bullet (RT 704), no bullet was ever recovered that matched that wound.

Mr. Taylor was assumed to have been responsible for killing Kaye Tiede because the .38 caliber bullet found in the clothing of Kaye Tiede was in the general proximity of Gunshot Wound #2's exit. Dr. Schnittker has since admitted that she cannot be certain that the .38 caliber bullet she recovered actually caused the injuries of Gunshot Wound #2 to Kaye Tiede, as was previously indicated at trial. (RT 707-08.)

During the autopsy of Kaye Tiede, I recovered a spent medium caliber bullet in the right shoulder region during removal of the victim's sweatshirt. Although this bullet was close to the exit of Gunshot Wound #2, and could have caused the through-and-through bullet track in the body, I found no exit perforation through the underlying T-shirt between the exit of the skin and the sweatshirt. I would have expected to find such a perforation if the recovered projectile was responsible for Gunshot Wound #2. An unattached bullet in the clothing may have changed position within the

clothing by movement of the body after being shot and post-mortem. The location of this bullet is consistent with Gunshot Wound #2, but I cannot be certain that this bullet caused the injuries of Gunshot Wound #2.

Because the bullet I recovered was not recovered from the body itself, I know of no characteristics on the bullet at this point, that allow me to definitively conclude that it went through Kaye Tiede.

(Petition Exhibit 117, ¶¶5-6.)

Although the crime lab and Detective Offret implied that the one bullet fired from the .38 caliber passed through Kaye Tiede, no conclusive determination was made, and the evidence shows that the .38 caliber bullet actually superficially grazed Kaye Tiede's arm. (Petition Exhibit 86.) Whereas the five .44 caliber bullets were either referred to as having "passed through" or having been "fired through" one of the victims, Detective Offret merely states that JB213, the .38 caliber slug, "was recovered from the body of Kaye Tiede at the Medical Examiner's Office." (Petition Exhibit 86.) This conclusion was patently incorrect, as the autopsy report shows that the bullet was not recovered from the body, it was pulled from her sweatshirt:

The projectile passes through-and-through the body and *no projectile is recovered from the body itself*. During removal of the sweatshirt, a projectile is located in the right shoulder region which appears to be adjacent to the exit of Gunshot Wound #2. It is a lead projectile with a base diameter of 0.8 cm and is submitted in an evidence container.

(Petition Exhibit 84, at 620; emphasis added.)

After the shooting ended, as Mr. Taylor and Mr. Deli were preparing to leave, Mr. Tiede and his daughter Tricia arrived. Mr. Taylor grabbed Linae by the throat and held

his gun to her back. Mr. Tiede and Tricia were both ordered into the garage and Mr. Taylor asked Mr. Tiede for money. Mr. Tiede complied and then Mr. Taylor shot Mr. Tiede in the face with bird shot. Mr. Taylor shot Mr. Tiede again in the head with bird shot while Mr. Tiede was lying face down on the ground. Gasoline was scattered through the cabin and it was set on fire before Mr. Taylor and Mr. Deli left with Linae and Tricia.

When the four of them arrived at the gate to the development, they got into the Tiedes' car and drove away. Mr. Tiede took a snowmobile to the Weber Canyon Road gate, where he found a family member and they called the police. Mr. Taylor and Mr. Deli were apprehended shortly thereafter. Neither Linae nor Tricia were harmed.

On May 1, 1991, Mr. Taylor pled guilty to two counts of capital homicide in the deaths of Kaye Tiede and Ms. Potts and the State agreed to dismiss several other felony counts of attempted aggravated murder, aggravated arson, aggravated kidnapping, aggravated robbery, theft, and failure to respond to an officer's signal to stop. On May 16, 17, 21, and 22, 1991, the penalty phase trial was conducted. On May 24, 1991, the jurors returned a unanimous sentencing decision in favor of death for Mr. Taylor on each count of capital homicide. Mr. Taylor then sought to withdraw his guilty plea, which was denied by the trial court.

Through his trial counsel, Elliott Levine, Mr. Taylor appealed to this Court on July 8, 1992. However, after Mr. Taylor's opening brief was filed, on July 20, 1992, the State requested that the brief be stricken and that Mr. Levine be removed from his representation of Mr. Taylor. Although Mr. Levine was ordered to withdraw and was

replaced by Bruce Savage in September 1993, the opening brief was not stricken. During the direct appeal, this Court remanded the case to the trial court for an evidentiary hearing under Utah Rules of Appellate Procedure, Rule 23B, on the claim that trial counsel had been ineffective. Evidence was presented to the trial court at that hearing on May 15, 16, 18, 22, 23, and 24, 1995. The trial court concluded that Mr. Taylor had not been deprived of his right to effective representation under the Sixth Amendment.

Mr. Savage then pursued the direct appeal by filing Mr. Taylor's brief on June 3, 1996. On October 24, 1997, this Court issued its opinion rejecting all of Mr. Taylor's appellate claims. *State v. Taylor*, 947 P.2d 681 (1997). The United States Supreme Court denied the petition for a writ of certiorari on October 5, 1998.

On February 23, 1998, Richard P. Mauro was appointed as post-conviction counsel pursuant to the PCRA. Approximately one year later, Mr. Taylor filed his Petition for Relief Under the Utah PCRA. On May 30, 2002, Mr. Taylor filed his First Amended Petition for Relief Under the Utah PCRA. Respondent, Hank Galetka, who was the warden/respondent at the time, filed a motion for summary judgment on September 13, 2002. Oral argument on the motion for summary judgment was heard on April 18, 2003. On March 1, 2004, the post-conviction trial court granted Respondent's motion for summary judgment and denied post-conviction relief on all of Mr. Taylor's claims. The signed order and judgment was entered on September 22, 2004.

Mr. Taylor timely appealed that decision and this Court affirmed the post-conviction court on January 26, 2007. *Taylor v. State*, 2007 UT 12, 156 P.3d 739.

The request for a rehearing was denied on March 27, 2007. On September 4, 2007, Mr. Taylor filed a federal petition for writ of habeas corpus and, on November 2, 2007, a first amended petition was filed in federal court. Although Mr. Taylor's federal case was, and is, still pending, on November 5, 2007, he filed this Petition.

### **SUMMARY OF ARGUMENT**

Utah state law provides several exceptions to procedural bar, including: unusual circumstances, newly discovered or suppressed evidence, good cause, and that the claims in the petition were neither frivolous nor withheld for tactical reasons. Mr. Taylor has alleged in two claims (Fourteen and Twenty-Four) that newly discovered evidence preempts the procedural bar. The first of these violations, that the prosecution excluded non-Church of Jesus Christ of Latter-Day Saints members from the jury because of their religion, rendered the penalty phase unconstitutional under the Utah State Constitution.

Mr. Taylor's entire case suffers from "the existence of fundamental unfairness in a conviction," as Mr. Taylor has credibly pled that he is actually innocent. Mr. Taylor's innocence of the intentional murders of Kaye Tiede and Beth Potts renders his conviction fundamentally unfair. Mr. Taylor's innocence is a gateway through procedural bar under *Hurst v. Cook*, 777 P.2d 1029, 1036 (Utah 1989). Accordingly, there is good cause for Claims 5, 9, 10, 12, 14, 19, 21, 24, 25, and 27 to be raised in the Petition currently before this Court and the district court erred in holding that these claims were procedurally barred because they could have been, but were not previously raised. Accordingly, the Court should set aside the procedural bars, consider Mr. Taylor's claims on the merits, and grant

relief. Alternatively, the Court should reverse the district court and remand the case to allow the district court to consider the claims on the merits, and to afford Mr. Taylor the discovery and evidentiary hearing he requested below to further develop the facts entitling him to relief.

## **ARGUMENT**

### **I. Introduction**

Petitioner appeals the denial of Claims 5, 9, 10, 12, 14, 19, 21, 24, 25, and 27, which the district court determined were barred because they could have been, but were not previously raised on direct appeal or in Petitioner's initial petition for post-conviction relief. (See Utah Code Ann. § 78-35a-106(1)(d); *Gardner v. Holden*, 888 P.2d 608, 613 (Utah 1994) (“*Gardner II*”).)

Mr. Taylor hereby raises and preserves, but does not brief at length any of the claims deemed successive by the district court. Noting that “Petitioner candidly and commendably concedes that the following claims were raised and addressed in a prior proceeding” (ROA 1274-79), the district court determined that Claims 1-4, 6-8, 11, 13, 15-18, 20, 22-23, 26, and 28-30 are procedurally barred under the PCRA:

All of the foregoing claims were raised and addressed in a prior proceeding, either at trial, on direct appeal, in Petitioner's initial petition for post-conviction relief, or in his appeal from the denial of his initial petition for post-conviction relief and, therefore, they are procedurally barred under the PCRA and no statutory exception exists that would permit the Court to consider the merits of these claims.

(ROA 1279-80 (citing Utah Code Ann. § 78B-9-106(1)(b) and (d)).)

Mr. Taylor filed these claims in the Petition before this Court to obviate any exhaustion arguments in federal court and to allow both this Court and the district court to fully consider the cumulative error claim.

The district court's independent review concurs with both Respondent's (ROA 976-77) and Mr. Taylor's analysis that Claims 1-4, 6-8, 11, 13, 15-18, 20, 22-23, 26, and 28-30 were previously before this Court. Therefore, Mr. Taylor will not burden this Court with arguments on the merits of most of these claims again unless this Court determines that it has not had a full opportunity to review one of these claims before, or if Respondent reverses course and contends that any or all of these claims have not previously been presented to this Court for consideration.

This Court's rule on successive petitions is clear, "ground for relief from a conviction or sentence that has once been fully and fairly adjudicated on appeal or in a prior [post-conviction] proceeding should not be readjudicated unless it can be shown that there are 'unusual circumstances.'" *Hurst*, 777 P.2d at 1036. While unusual circumstances exist in the form of Mr. Taylor's assertion of innocence, which would act as a gateway through procedural bar under *Hurst*, these claims appear to be unnecessarily repetitive unless the Court should conclude that these claims are not successive and were not previously before this Court.

If this Court determines that Respondent, Petitioner, and the district court were incorrect in their analysis, Mr. Taylor requests that he be permitted to file supplemental briefing of the relevant claims at that point. Alternatively, if Respondent challenges the

district court's holding, Mr. Taylor will brief the claims in his reply pursuant to Utah Rules of Appellate Procedure, Rule 24(c). Ultimately, if this Court, after examining the Petition, agrees with Judge Lubeck of the district court that these claims are not materially different from what was previously presented to this Court, then there is no cause to reexamine Claims 1-4, 6-8, 11, 13, 15-18, 20, 22-23, and 26 in this appeal.<sup>5</sup>

## **II. Procedural Bar**

### **A. Mr. Taylor's Petition Was Timely**

The district court “opted to simply assume that Petitioner’s successive petition was timely filed and consider first whether the successive claims are procedurally barred.” (ROA 1273.) Nonetheless, Mr. Taylor’s claims would not be subject to timeliness restrictions because the “interests of justice” exception articulated by this Court in *Julian v. State* applies herein. *Julian v. State*, 966 P.2d 249, 254 (1998) (“proper consideration of meritorious claims raised in a habeas corpus petition will *always* be in the interests of justice. It necessarily follows that *no* statute of limitations may be constitutionally applied to bar a habeas petition”) (emphasis in original). Mr. Taylor has pled that he is actually innocent of the two murders he was convicted of, therefore if he were facing a timeliness bar, the interests of justice exception would apply.

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<sup>5</sup> Mr. Taylor previously moved to withdraw Claim Twenty-Eight (lethal injection) from the Petition. In the wake of new developments of law, Mr. Taylor does not believe that the Petition was the proper forum to present that claim as pled. Claims Twenty-Nine (ineffective assistance of state post-conviction counsel) and Thirty (cumulative error) are being raised again by Mr. Taylor because they have necessarily changed since their first presentation to this Court. The ineffective assistance of state post-conviction counsel could not be fully realized by state post-conviction counsel and cumulative error has changed with the addition of Claims 5, 9, 10, 12, 14, 19, 21, 24, 25, and 27.

## **B. The New PCRA Is Not Retroactive**

The district court correctly held that the PCRA does not retroactively apply. (ROA 1266.) Therefore, Mr. Taylor was entitled to the effective representation of post-conviction counsel throughout his initial post-conviction proceeding.

## **C. Utah State Law Provides Several Exceptions to Procedural Bar**

The district court noted that both the PCRA and the common law preclude a petitioner from obtaining “relief . . . upon any ground 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.” (ROA 1243-44 (citing Utah Code Ann. § 78-35a-106(1)(d); *Gardner II*, 888 P.2d at 613 (“Issues that could and should have been raised on direct appeal, but were not, may not properly be raised in a habeas corpus proceeding absent unusual circumstances.”).))

This Court has recognized four basic exceptions to this procedural bar: unusual circumstances, newly discovered or suppressed evidence, good cause, and the claims in the petition were neither frivolous nor withheld for tactical reasons.

### **1. Unusual Circumstances**

In *Hurst v. Cook*, this Court held that claims previously raised and addressed may be considered if the petitioner is able to demonstrate “unusual circumstances.” *Hurst*, 777 P.2d at 1036. See also *Tillman v. State*, 2005 UT 56, ¶20, 128 P.3d 1123 (the Utah Supreme Court has “consistently recognized exceptions to [the procedural bar] rule in ‘unusual circumstances’ where ‘good cause’ excuses a petitioner’s failure to raise the

claim earlier.”)

Unusual circumstances include newly discovered evidence. *Hurst*, 777 P.2d at 1036. In addition to the other exceptions explained *infra*, Mr. Taylor’s Petition explains that two claims (Fourteen and Twenty-Four) rest on newly discovered evidence and are therefore exempt from procedural bar.

## **2. Newly Discovered Evidence**

There are two instances of newly discovered evidence in the Petition. The clearest example is found in Claim Fourteen, where Mr. Taylor has pled that the prosecution excluded non-Church of Jesus Christ of Latter-Day Saints members from the jury because of their religion. This exclusion deprived Mr. Taylor of the right to trial by a jury drawn from a representative cross-section of the community in violation of the Utah Constitution. Specifically, juror Holly Conner was impermissibly struck by the prosecution. Ms. Conner was similarly situated to the jurors accepted by the prosecution in every aspect except for her religion.

This violation was uncovered by federal habeas counsel when they were provided with one of the prosecutors’ notes by the district court. (Petition Exhibit 77, at Bates Nos. 575-80.) Those notes were not provided to any of Mr. Taylor’s former counsel. As detailed in Section IV(D)(4), *infra*, those notes allowed Mr. Taylor’s current counsel to discover the exclusion of non-Church of Jesus Christ of Latter-Day Saints members from the jury because of their religion.

Additionally, Claim Twenty-Four described the newly discovered evidence within

Scott Manley's declaration. Mr. Manley's declaration was obtained after a thorough, time consuming, and costly investigation by the Office of the Federal Public Defender. Because state post-conviction counsel did not receive the funding deemed reasonable and necessary by the district court, he could not locate and interview Mr. Manley.

### **3. Good Cause**

In *Hurst*, this Court identified five "good cause" common law exceptions to the procedural bar rule. *Hurst*, 777 P.2d at 1037. Those exceptions are: (1) the denial of a constitutional right pursuant to new law that is, or might be, retroactive; (2) new facts not previously known which would show the denial of a constitutional right or might change the outcome of the trial, (3) the existence of fundamental unfairness in a conviction, (4) the illegality of a sentence, and (5) a claim overlooked in good faith with no intent to delay or abuse the writ. *Id.* The latter four are all applicable in Mr. Taylor's case. Moreover, this Court has held that these five exceptions are not an exhaustive list. *See Gardner v. Galetka*, 2007 UT 3, ¶18, 151 P.3d 968 ("*Gardner IV*") ("We later clarified that this list of 'good cause' exceptions is not exhaustive.").

The third of those reasons, "the existence of fundamental unfairness in a conviction," applies to Mr. Taylor's entire case. Mr. Taylor has credibly pled that he is actually innocent. If Mr. Taylor is innocent of the murders of Kaye Tiede and Beth Potts, then his conviction and sentence for intentional murder are fundamentally unfair. Mr. Taylor's innocence is a gateway through procedural bar under *Hurst*. *See also Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992) ("We have

previously held that even if a state prisoner cannot meet the cause and prejudice standard, a federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a ‘miscarriage of justice.’”).

There is good cause for Claims 5, 9, 10, 12, 14, 19, 21, 24, 25, and 27 to be raised in the Petition currently before this Court. While the district court held that these claims could have been, but were not previously raised, that conclusion should not be determinative because Mr. Taylor is actually innocent. Moreover, some of these claims relate to new facts not previously known. These two factors, in combination and individually, have resulted in a fundamentally unfair conviction. Moreover, the claims were overlooked in good faith with no intent to delay or abuse the writ.

*Hurst* is not alone in explaining exceptions to procedural bar. In *Gardner IV*, this Court held that:

procedural default is not always determinative of a collateral attack on a conviction where it is alleged that the trial was not conducted within the bounds of basic fairness or in harmony with constitutional standards.” Therefore, even where a claim of error could have been raised earlier, post-conviction relief may be available in those “rare cases” or “unusual circumstances” where “an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred” that would make it “unconscionable” not to reexamine the issue.

*Gardner IV*, 2007 UT 3, ¶17.

#### **4. The Claims Were Neither Frivolous Nor Withheld for Tactical Reasons**

According to this Court’s definition in *Gardner III*, a claim is frivolous if it is

facially implausible. *Gardner III*, 2004 UT 42, ¶21. Tactical reasoning was addressed by the United States Supreme Court in *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) (“When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.”). Cited by the district court in its Ruling, the court noted that

Other than merely asserting that his claims were overlooked in good faith, Petitioner nowhere demonstrates that they were not withheld for tactical reasons. It may well be that all of the claims he now raises which could have been raised in a prior post-conviction petition are non-frivolous in nature, but the Court must presume that post-conviction counsel had a legitimate tactical reason for not raising them in the prior petition . . . in order to overcome this presumption, Petitioner must show that “there was no ‘conceivable tactical basis for counsel’s actions.’” [citation] Not only has Petitioner not even attempted to specifically meet his burden, it is unlikely that he could do so.

(ROA 1297-98.)

The district court is incorrect, Mr. Taylor voluminously detailed state post-conviction counsel’s failings. If, after examining the Petition, the district court believed that state post-conviction counsel may have had a tactical basis for his failure to bring these claims, it should have held an evidentiary hearing to further examine the issue. This is not dissimilar to what this Court did in regards to trial counsel when it ordered the Rule 23B hearing.

A defendant has a right to discovery or an evidentiary hearing if they make a “substantial threshold showing.” *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 fn.4 (10th Cir.

2001); *United States v. Duncan*, 242 F.3d 940 (10th Cir. 2001). Mr. Taylor made such a showing in the Petition.

There is no conceivable basis for ignoring Mr. Taylor's innocence or doing less than everything to overturn his death sentence, therefore the district court's presumption of a tactic or strategy was wrong and further inquiry was necessary.

### **III. Statutory Right to the Effective Assistance of Post-Conviction Counsel**

The district court held that under the PCRA, Mr. Taylor had a statutory right to post-conviction counsel. (ROA 1263.) "[T]he PCRA required the trial court to determine whether the petitioner was indigent and, if so, 'promptly appoint counsel who is qualified to represent [petitioners] in death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure.'" (ROA 1263 (citing Utah Code Ann. § 78-35a-202(1)(2)(a)).) This right to counsel would be meaningless without a right to effective counsel. *See Menzies*, 2006 UT 81, ¶82 ("[petitioner] has a statutory right to effective assistance of counsel under Utah Code section 78-35a-202.")

The district court properly noted that the right to the effective assistance of counsel is a substantive right. However, the district court wrongly concluded that Mr. Taylor was prohibited from bringing Claims 5, 9, 10, 12, 14, 19, 21, 24, 25, and 27 because they could have been, but were not, raised in a prior post-conviction petition. In order to have been raised in a prior petition, state post-conviction counsel would have had to have had the opportunity to properly plead the claims. State post-conviction counsel was prevented from developing these claims by his lack of funding.

#### **IV. The District Court Erred in Procedurally Barring Claims that Were Not Raised in Petitioner's Initial Post-Conviction Petition**

The district court relied on *Menzies* and Utah Code Ann. § 78-35a-106 to determine that:

because the right to post-conviction counsel is a legislatively created protection, it is constitutionally permissible, and within the Legislature's power, to exclude from the PCRA an exception to the procedural bar for successive claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition based upon ineffective assistance of post-conviction counsel. Therefore, Petitioner cannot rely on a statutory right to the effective assistance of post-conviction counsel to overcome the procedural bar for successive claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction proceeding.

(ROA 1271.)

First, the district court failed to distinguish between ineffective assistance of counsel in failing to bring a claim that could have been brought and ineffective assistance of counsel in being *unable* to bring a claim because of a State manufactured impediment. Second, because Mr. Taylor is actually innocent of the intentional murders, he is not procedurally barred from raising these claims at this time.

##### **A. Mr. Taylor Was Denied Critical Funds Necessary to Properly Challenge His Conviction and Sentence**

Mr. Taylor has pled that his state post-conviction counsel was prevented from properly investigating his case and accumulating evidence as a result of the State's deliberate interference with funding. Although the district court ultimately determined that the lack of funding did not excuse any of the procedural bars, it conceded that a lack

of adequate funding may result in constitutional or statutory violations. (ROA 1292.) The court recognized that *Menzies* noted that “it may be the case that the statutory [funding] scheme imposes a crippling burden on [the petitioner].” *Menzies*, 2006 UT 81, ¶20 n.3.

State post-conviction counsel attempted to investigate both guilt and penalty issues but was hampered by Utah law, which initially capped expenditures at \$10,000 per case. This amount was intended to cover all “expenses,” which included the costs of retaining investigators, experts, and consultants. State post-conviction counsel repeatedly explained to the district court that the funding cap prevented him from fully developing the factual bases of Mr. Taylor’s habeas claims. (Petition Exhibit 106, at bates nos. 864-74.)

Mr. Taylor’s prior post-conviction petition was impaired by (1) the limitations on expenditures pursuant to Utah Code of Admin. Proc. Rule 25-14-5; (2) generally insufficient funds from the Utah Division of Finance (“DOF”); (3) state litigation that complicated and delayed the authorization and release of funds; and (4) substantial delays by the DOF, amounting to, at times, years between the order for payment of funds and the actual release of funds to state post-conviction counsel.

The district court dismissed the problem because of state post-conviction counsel’s failure to use the funds he did have in his possession. However, as explained by Mr. Taylor’s current counsel at the oral argument before the district court on July 14, 2009, if the quantity of funds remaining are too little to afford that which is needed, it might as well be nothing:

when you really look at it, if, for instance, you want to hire a social historian, which is something that the ABA guidelines

suggest should happen in each capital case, if a social historian costs \$5,000 and you have \$1,000 left, you can't spend that \$1,000 to get the social historian. You're not going to get the social historian that you need for \$1,000. So it's a catch 22. Do you have \$1,000? Yes. Will it get you something? No. And I think that may have been part of the problem. Is the experts he needed, the investigation he needed, exceeded the funds he had.

(ROA 1330; Transcript of July 14, 2009 hearing at 28-29.)

In order for the district court to properly evaluate the impact of the lack of funding, it was critical that there be clarity on what funds remained. There is a material discrepancy between what the district court determined and what Mr. Taylor contends. According to the Ruling,

based upon the information provided by Petitioner and the State in their pleadings, it appears that, although the post-conviction court authorized up to \$40,258.59 in litigation expenses beyond the \$10,000 maximum at the time, prior post-conviction counsel ultimately only requested actual litigation expenses in the amount of \$11,555.16, leaving unused the amount of \$8,444.84 by the court's math.<sup>6</sup> Even if incorrect, the principle is sound. Even if prior post-conviction counsel could not do all he wanted, funding in some amount existed to do more. Despite the apparent funding problems Petitioner argues existed during his prior post-conviction proceedings, it is difficult for the Court to conclude that, with unused litigation funds still available in some amount, the new evidence that Petitioner now possesses is evidence that could not have been discovered through the exercise of reasonable diligence as a result of insufficient funding.

(ROA 1287-88.)

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<sup>6</sup> The district court evidently relied on Respondent's figures. (See ROA 1030.) State post-conviction counsel was later allotted an additional \$10,000 under an increase in the funding regulation. This increase brought his total investigative budget to \$20,000.

Mr. Taylor concurs that if over \$8,400 remained of the \$20,000 he received, state post-conviction counsel was not financially prevented from raising these claims. However, Mr. Taylor's math is very different from the district court's and Respondent's. Mr. Taylor believes that less than \$2,000 remained.

State habeas counsel had reached the \$10,000.00 limit by March 2000. (ROA 1024.) State habeas counsel filed a request with the DOF for expenses exceeding the \$10,000.00 on July 31, 2000 (State's Ex. 10 to Reply to Petitioner's Opposition to Respondent's Motion to Dismiss), but was denied on August 16, 2000. (State's Ex. 11 to Reply to Petitioner's Opposition to Respondent's Motion to Dismiss.) When the Utah Attorney General's Office opposed state habeas counsel's OSC for court-approved funds over the statutory limit on November 13, 2000, the cap was still \$10,000.00. (State's Ex. 13 to Reply to Petitioner's Opposition to Respondent's Motion to Dismiss.) State habeas counsel was forced to expend a significant amount of time and energy fighting the \$10,000.00 limit--rather than working on Mr. Taylor's initial post-conviction petition. After March 2000, state habeas counsel had no way of investigating the case until January 2001 when the statute changed and Mr. Taylor became entitled to an additional \$10,000 in expenses. (ROA 1028.)

The district court was incorrect in its conclusion that state habeas counsel submitted expenses to DOF totaling \$11,555.16, because while the expenses as of May 23, 2002 were close to that number, state habeas counsel later submitted bills to the DOF of \$4,000.00 for Dr. Linda Gummow on September 13, 2002, \$1,530.27 on March 24,

2003 for Ted Cilwick, \$300.00 on March 25, 2003 for Dr. Gummow, and \$650.01 On October 13, 2003 for Mr. Cilwick, for total expenses (including the district court's \$11,555.16 figure) of \$18,035.44. (*See* Addendum C.) That means state habeas counsel had less than \$2,000.00 left unused. The problem facing state habeas counsel has been before this Court before. *See Menzies*, 2006 UT 81, ¶20.

The district court's conclusion that "[e]ven if incorrect, the principle is sound," is wrong for the reason explained by counsel at oral argument.

Turning a blind eye to the costs of conducting a proper post-conviction investigation is not sound. Post-conviction proceedings are expensive. As a third circuit judge, Justice Nehring gave the first order on October 8, 1998 for \$5,000 to be paid to state post-conviction counsel. (Petition Exhibit 106.) Several orders for funds deemed "reasonable and necessary" by the district court followed. Judge Noel ordered almost \$9,000 be paid for investigation on March 31, 1999. (Petition Exhibit 106.) He ordered almost \$3,500 on January 18, 2000. (Petition Exhibit 106.) Finally, saying it was "reasonable and necessary," Judge Noel ordered \$10,000 to be given to state post-conviction counsel on July 26, 2000 for the retention of an investigator, \$4,800 on that same date for the retention of a mental health expert, and up to \$25,000 for a mitigation specialist. (Petition Exhibit 106.) 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 would have obtained. Either the district court was wrong in the

first instance, or in its current ruling. Mr. Taylor posits to this Court, as he did to the district court, that at a minimum, an evidentiary hearing is necessary to: (1) determine what funds were received and what were used, and (2) whether the funds were reasonable and necessary in the first instance.<sup>7</sup>

In the alternative, should this Court determine that Justice Nehring and Judge Noel's orders are entitled to the presumption of correctness, then Mr. Taylor's state post-conviction counsel must have had his hands unreasonably tied throughout the course of the initial post-conviction litigation, and the failure to plead the claims appealed herein was a direct result of the State's failure to "make good" on the amounts ordered to be paid.

#### **B. Meritorious Claims Are Always Subject to Review**

In each of the claims not raised in Petitioner's prior post-conviction petition, Mr. Taylor should not be procedurally defaulted for the following reasons:

Mr. Taylor argued at the district court below that these claims are not procedurally barred because: (1) new facts not previously known show the denial of a constitutional right or might have changed the outcome of Mr. Taylor's trial; (2) fundamental unfairness existed in Mr. Taylor's conviction; and/or (3) these claims were overlooked in good faith with no intent to delay or abuse the writ. Each of these factors constitutes "good cause"

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<sup>7</sup> Mr. Taylor need not address the district court's own "infinite continuum of litigation" conundrum at length. Denying relief to Petitioner, the district court argued that inadequate funding cannot be a basis for a common law exception to the procedural bar rule because "if 40,000 is provided for post-conviction proceedings, it can always be claimed that \$60,000 was needed; if that is provided, \$80,000 could be claimed as necessary, and there could never be an end to such a claim. There is never enough time or money." (ROA 1303.) However, the amounts alleged herein as reasonable and necessary came from the findings of two district court judges, not from Petitioner.

to justify the filing of these claims. *Hurst*, 777 P.2d at 1037. This Court’s holding in *Hurst* survives the enactment of the PCRA. *Gardner III*, 2004 UT 42, ¶17.

Moreover, the principles of *Julian* regarding statutes of limitation apply equally to procedural bar. *Julian*, 966 P.2d at 254. The district court’s Ruling provides no guidance regarding the court’s analysis of the claims or why they were deemed non-meritorious.

**C. The PCRA Has Been Crafted by the Utah Attorney General’s Office to its Decided Advantage**

Utah is uniquely situated in that the state legislature relies on the Utah Attorney General’s Office (“UAGO”) to draft legislation relating to post-conviction proceedings. As a result, the UAGO has been able to craft the PCRA to its decided advantage. As the UAGO was the drafter of this legislation, they should be estopped by this Court from arguing in favor of procedural bars now that their impartiality has resulted in a denial of Mr. Taylor’s basic constitutional rights.

**D. Mr. Taylor’s Claims Are Meritorious**

A claim is meritorious when it has “an arguable basis in fact, where the alleged facts would support a claim for relief.” *Adams v. State*, 2005 UT 62, ¶19.

**1. Claim Five - Ineffective Assistance of Counsel and District Court Error in Connection with Mr. Taylor’s Change of Venue Motion**

**Standard of Review:** The Court reviews a district court’s application of the PCRA *de novo*. See *Kell v. State*, 2008 UT 62, ¶8, 194 P.3d 913. The Court reviews a district court’s application of the common-law procedural bar *de novo*. See *Parsons v. Barnes*, 871 P.2d 516, 518 (Utah 1994); *Dunn v. Cook*, 791 P.2d 873, 876-77 (Utah 1990). “When

confronted with ineffective assistance of counsel claims,” this Court “review[s] a lower court’s purely factual findings for clear error, but review[s] the application of the law to the facts for correctness.” *Taylor*, 2007 UT 12, ¶13 (quoting *Menzies*, 2006 UT 81, ¶58).

**a. This Claim Could Not Have Been Brought Earlier**

The town of Coalville, Utah was too small for Mr. Taylor to get a fair trial in such a high profile case. (ROA 233-48.) A defendant is entitled to a venue change when there is a reasonable likelihood that pretrial publicity will deny the defendant a fair trial. Actual prejudice need not be shown if the publicity is so inflammatory that the defendant cannot receive a fair and impartial trial. *Sheppard v. Maxwell*, 384 U.S. 333, 352-53, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). However, in most situations actual prejudice will need to be established to prevail on this claim. This Court held in *Lafferty v. State* that,

[w]hen a change of venue decision is challenged on appeal following a jury verdict, the determinative question is ‘whether [the] defendant was ultimately tried by a fair and impartial jury.’ The standard for review is abuse of discretion. In *Stubbs*, for example, we relied on the juror’s actual voir dire answers to conclude that the jury pool was so tainted that the trial court probably could not impanel an impartial jury.

*Lafferty v. State*, 2007 UT 73, ¶42 (Utah 2007) (quoting *State v. Stubbs*, 2005 UT 65, ¶¶10, 18, 123 P.3d 407 (quoting *State v. Widdison*, 2001 UT 60, ¶38, 28 P.3d 1278)).

Because Mr. Taylor brought this claim after the jury’s verdict and not on an interlocutory appeal, it is his burden to show that he was not ultimately tried by a fair and impartial jury. One of the few ways to make such a showing is to interview the jurors themselves. After conducting interviews with approximately three-quarters of the jurors,

Mr. Taylor's federal habeas counsel was able to establish that he was not ultimately tried by a fair and impartial jury. While a general venue claim could admittedly have been brought on appeal, only through post-conviction investigation could the specific facts necessary to make a determination of fairness and impartiality have been accumulated.

**b. The District Court Erred in Failing to Consider this Claim Because Good Cause Pre-Empted the Procedural Bar**

State post-conviction counsel had neither the individual resources, nor the funds to seek additional resources, that were required to interview the jurors and conclusively establish the prejudice of the trial court's ruling denying the change of venue motion. The investigation performed by federal habeas counsel revealed that most of the jurors knew one another, as well as Mr. Taylor's prosecutors. Additionally, many were tied either by friendship or relationship to members of the Sheriff's Department.

Mr. Taylor's Petition substantively pled that a biased juror sat because juror number five, Blaine Moore, was neither open-minded nor impartial in his jury service. State post-conviction counsel's failure to plead this claim is understandable when viewed in the context of the resources expended by the Office of the Federal Public Defender in establishing the claim. After investigators narrowed potential addresses, many times multiple visits to the juror's home were necessary before finding and interviewing each juror. Moreover, Mr. Taylor's jurors were not only spread across Utah, but also peppered around California. Without significant resources, these interviews could not have occurred. Because Mr. Moore has passed away, interviews with as many jurors as

possible were necessary to conclusively establish his bias.

The district court abused its discretion in denying Claim Five without a thorough inquiry into the denial of funding and its impact on this claim.

Claim Five is meritorious and presents new facts not previously known which show the denial of a constitutional right. The failure to raise it earlier was the result of the ineffective assistance of prior state post-conviction counsel occasioned by his lack of funding. Moreover, Mr. Taylor's actual innocence provides good cause to consider this claim. Therefore, Mr. Taylor's claim is not procedurally barred.

**2. Claim Nine - Mr. Taylor Was Prejudiced by the Trial Court's Error in Failing to Properly Strike Venire-Members for Cause During the Penalty Phase Voir Dire**

**Standard of Review:** The Court reviews a district court's application of the PCRA *de novo*. See *Kell*, 2008 UT 62, ¶8. The Court also reviews a district court's application of the common-law procedural bar *de novo*. See *Parsons*, 871 P.2d at 518; *Dunn*, 791 P.2d at 876-77.

**a. The Trial Court Erred in Denying this Claim Because it Is Not Procedurally Barred and the State's Arguments to Dismiss Were Baseless**

The State's main argument in opposition to Claim Nine was that "Taylor did not use all of his available peremptory challenges. Therefore, he could have used one of his peremptory challenges to strike juror Moore, if he had wanted to." (ROA 571.) The State's assertion directly contradicted the record, which makes it clear that Mr. Taylor

exhausted all of his peremptory challenges. (CT<sup>8</sup> 125-27; RT 463.) Mr. Taylor is uncertain as to basis for the State's assertion.

The State further justified its Motion to Dismiss by citing to this Court's determination that trial counsel may have had strategic reasons for keeping Mr. Moore. (ROA 571.) Although there could be no reasonable strategic reason for trial counsel choosing to keep Mr. Moore, the point is irrelevant, as this claim is against the trial court, not trial counsel.

Mr. Taylor has now provided substantial evidence that Mr. Moore was unconstitutionally biased; accordingly, the trial court's erroneous denial of a for-cause challenge and trial counsel's exhaustion of his peremptory challenges in removing other unconstitutionally biased jurors, caused Mr. Taylor to be prejudiced by the trial court's determination.

Claim Nine is meritorious and, as in Claim Five, presents new facts obtained via a costly in-depth post-conviction investigation, that were not previously known and which show the denial of a constitutional right. (ROA 294-311.) Moreover, Mr. Taylor's actual innocence provides good cause to consider this claim. Therefore, Mr. Taylor's claim is not procedurally barred.

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<sup>8</sup> "CT" refers to the clerk's transcripts lodged with the Utah Supreme Court in *Utah v. Taylor*, Case No. 910496.

**3. Claim Twelve - Mr. Taylor's Venire Was Prejudicially Biased by the Trial Court's Introduction of Blood Atonement into the Voir Dire**

**Standard of Review:** The Court reviews a district court's application of the PCRA *de novo*. See *Kell*, 2008 UT 62, ¶8. The Court also reviews a district court's application of the common-law procedural bar *de novo*. See *Parsons*, 871 P.2d at 518; *Dunn*, 791 P.2d at 876-77.

**a. The Trial Court Erred in Denying this Claim Because it Is Not Procedurally Barred and the State's Arguments to Dismiss Were Baseless**

Blood atonement is a particularly insidious additive to a capital penalty phase. Its inclusion upends mitigation entirely, creating a situation where it is an act of benevolence and compassion to sentence someone to death.

Once again the State submits that it "does not agree that Taylor ran out of peremptory challenges before he could strike Mr. Moore. According to the State's review, Taylor's counsel did not use all of his available peremptory challenges R. 125-27; 316:465-66)." (ROA 576.) This is a material fact in dispute that necessitated that the district court grant an evidentiary hearing.

Claim Twelve is meritorious and presents new facts not previously known which show the denial of a constitutional right. (ROA 318-29.) Moreover, Mr. Taylor's actual innocence provides good cause to consider this claim. Therefore, Mr. Taylor's claim is not procedurally barred.

**4. Claim Fourteen - The Exclusion of Non-Church of Jesus Christ of Latter-Day Saints Members from the Jury Because of Their Religion Deprived Mr. Taylor of the Right to Trial by a Jury Drawn from a Representative Cross-Section of the Community**

**Standard of Review:** The Court reviews a district court's application of the PCRA *de novo*. *See Kell*, 2008 UT 62, ¶8. The Court also reviews a district court's application of the common-law procedural bar *de novo*. *See Parsons*, 871 P.2d at 518; *Dunn*, 791 P.2d at 876-77.

**a. The District Court Wrongly Held That Mr. Taylor Did Not Argue That This Claim Constituted Newly Discovered Evidence**

The district court is materially incorrect in stating that, "Petitioner nowhere argues that the foregoing claims are ones that could not have been known and raised in a prior post-conviction petition." (ROA 1295.)

In his Opposition to Respondent's Motion to Dismiss, Mr. Taylor argued:

This claim evolves from federal counsel's acquisition of Exhibit 77 to the Petition. Despite state habeas counsel's request for all records from the district court, he never received Exhibit 77. (Addendum A; Decl. of Richard Mauro, ¶6.) . . . As the State withheld this document from state habeas counsel, there is no credible argument in favor of barring this claim. Claim Fourteen is meritorious *and presents new facts not previously known*.

(ROA 762; emphasis added.)

This Claim is based on newly discovered evidence which strongly indicates that the prosecution was striking jurors based on their religious affiliation. The newly discovered evidence rule requires all of the following:

- (I) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;
- (ii) the material evidence is not merely cumulative of evidence that was known;
- (iii) the material evidence is not merely impeachment evidence; and
- (iv) 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.

Utah Code Ann. § 78-35a-104(e)(i)-(iv)<sup>9</sup>.

**b. Prior Counsel Did Not Receive the Prosecutor's Notes**

When federal habeas counsel requested Mr. Taylor's "entire file" from the district court in mid-2007, counsel was provided with copies of several pages of handwritten notes initially generated by one of the prosecutors. These notes, submitted with the Petition as Exhibit 77, were never provided to state post-conviction counsel, despite his request for all records from the district court. (Addendum A to Petitioner's Opposition to Motion to Dismiss Petition for Post-Conviction Relief (ROA 659-800); Decl. of Richard Mauro, ¶6.) The revelation of this document a decade later, when federal counsel made the same request, was significant. Petition exhibit 77 does more than indicate that

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<sup>9</sup> Although Mr. Taylor's facts fit the criteria of Utah Code Ann. §78-35a-104(e), he does not believe that the code section is mandatorily applicable because the newly discovered evidence relates to structural error.

the prosecutors were improperly striking jurors based on their religion, it shifts the burden of proof to the prosecution to explain the impermissible peremptory strikes.

The Petition goes to great pains to conduct the sort of inquiry mandated by *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed 2d 196 (2005) and *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and explains the facts at issue that make this claim worthy of relief. (ROA 336-53.) Mr. Taylor will not burden this Court with a recapitulation of what has already been pled in detail. Although the United States Supreme Court has failed to extend to jurors the right to be free from religious persecution, this Court should do so under the Utah State Constitution. The Utah State Constitution states:

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).

Additionally, Utah Code states that a “qualified citizen may not be excluded from jury service on account of . . . religion . . .” Utah Code Ann. § 78B-1-103 (formerly Utah Code Ann. § 78-46-3). *See also State v. Ball*, 685 P.2d 1055, 1057 (Utah 1984).

The prosecutor’s notes make clear that there was no permissible purpose for striking juror Holly L. Conner. Because the prosecutor instituted and followed a scoring system for each of the jurors, it is apparent that Ms. Conner was struck for grounds outside of her attitudes regarding the death penalty, or any other permissible distinction.

The Ruling concluded that Mr. Taylor

does not discuss nor demonstrate that the new evidence he now possesses is evidence that could not have been discovered through the exercise of reasonable diligence and included in a prior post-conviction petition. *See* Utah Code Ann. § 78B-9-104(1)(f)(I) [sic] (“neither the petitioner nor petitioner’s counsel knew of the evidence. . . in time to include the evidence in any previously filed . . . post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence.”).

(ROA 1300.)

That determination is materially incorrect. There was absolutely no way for state post-conviction, appellate, or trial counsel to have known that the prosecutor was striking jurors based on religion. No amount of diligence could have led to the discovery. In fact, state post-conviction counsel requested the same files from the same district court, but for some unknown reason was never given these same notes. State post-conviction counsel exercised reasonable diligence to no avail. Mr. Taylor does not know why the notes only now came to light, but now that they have, this claim is timely raised. This evidence is not cumulative of previously known evidence because there was no way to know why the prosecutor struck Ms. Conner until his notes surfaced.

The striking of Ms. Conner constitutes structural error, therefore no inquiry pursuant to Utah Code Ann. § 78-35a-104(e)(i)-(iv) is necessary.

**c. This Claim Is Not Procedurally Barred**

The district court's determination ignores the reality of how this document made its way to counsel. Had the document been provided to counsel earlier, it could have been included in a prior post-conviction petition, but it was not. Accordingly, Utah Code Ann. § 78-35a-104(e)(I) permits an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence on the grounds that newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because petitioner's counsel did not know of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence.

Finally, the State failed to provide material evidence by not turning over the prosecutor's notes to state post-conviction counsel sooner. As the State withheld this document from state post-conviction counsel, there is no credible argument in favor of barring this claim. Claim Fourteen is meritorious and presents new facts not previously known which show the denial of a constitutional right. Moreover, Mr. Taylor's actual innocence provides good cause to consider this claim. Therefore, Mr. Taylor's claim is not procedurally barred.

**5. Claim Nineteen - The Jury Was Prejudiced by its Consideration of Extrinsic Evidence in Violation of the Due Process and Equal Protection Clauses of the United States Constitution**

**Standard of Review:** The Court reviews a district court's application of the PCRA

*de novo*. See *Kell*, 2008 UT 62, ¶8. The Court also reviews a district court's application of the common-law procedural bar *de novo*. See *Parsons*, 871 P.2d at 518; *Dunn*, 791 P.2d at 876-77.

**a. The Jurors Considered Two Pieces of Constitutionally Impermissible Extrinsic Evidence Prior to or During Deliberations**

Juror Jerry Lewis explained that,

At the end of each day everyone on the jury, including the alternates, would meet for 10-20 minutes to compare notes and discuss the case amongst ourselves. We would compare notes to see if there was something we had missed that someone else had caught. We talked as a group to make sure everyone was on the same page and to explain our interpretation to the people who had questions about something.

(Petition Exhibit 23, at ¶5.)

Jurors are not permitted to discuss the case with *anyone* prior to deliberations. This conduct between the jurors violated the court's instruction and substantially effected the verdict, as it removed the individual opinion that each juror is expected to bring to deliberations. *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987) (“[It is] the almost invariable assumption of the law that jurors follow their instructions.”).

Additionally, the jury foreperson, Richard Andrews, impermissibly suggested that the jurors put themselves in the place of the victims. “There was one woman in particular who was hesitant to vote for death. She voted for death after the foreman said something like, ‘if it was your mother or daughter, how would you vote?’” (Petition Exhibit 20, at

¶10.)

That suggestion interfered with the jury's function to weigh the evidence and determine whether the government had sustained its burden of proof. To the same degree that it is improper for a prosecutor to inflame the passions or prejudice of the jury by implying that the jury has a different role, it is equally impermissible for one juror to take on that role for the state. *See United States v. Manning*, 23 F.3d 570, 574 (1st Cir. 1994) ("Arguments urging a jury to act in any capacity other than as the impartial arbiter of the facts in the case before it are improper."); *Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1580 (10th Cir. 1984); *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978) (Golden rule appeals are regarded as "improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.").

In the district court, the State criticized Mr. Taylor for not having provided an affidavit or statement from jury foreperson Richard Andrews in support of this claim. (ROA 587.) Mr. Andrews passed away on December 18, 2003. The State's protest highlights the prejudice that delays in this case have caused and provides a prime example of the prejudice suffered by Mr. Taylor as a result of the deficiencies of former counsel. Had an evidentiary hearing been previously conducted on this issue, Mr. Andrews' testimony would be preserved as part of the record. Fearful that more evidence may disappear if not properly sought out and preserved now, Mr. Taylor requested that the district court hold an evidentiary hearing on this and the other claims in his Petition. The

district court wrongly failed to grant a hearing.

**b. Utah Rule of Evidence 606(b) Allows for an Inquiry into the Extrinsic Evidence Considered by the Jury**

The State argued in the district court that Utah R. Evid. 606(b) prevents the jurors' declarations from being considered. Utah R. Evid. 606(b) is based on Federal Rule of Evidence 606(b), disallowing the admission of evidence of mental processes of the jury. The Tenth Circuit has recognized that juror testimony about consideration of extrinsic evidence may be considered by a reviewing court:

While a juror 'may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention,' a juror 'may not testify as to . . . the effect of anything . . . concerning the juror's mental processes in connection therewith.' Fed. R. Evid. 606(b). *See generally Tanner v. United States*, 483 U.S. 107, 117-27, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987) (discussing the common-law history of Rule 606(b) and the policies underlying it). As we observed in *Simpson*, the dichotomy established by Rule 606(b) permits a juror to testify (either literally or by way of affidavit) on the question of 'whether any extraneous prejudicial information was improperly brought to bear upon a juror . . . [but] a juror may not testify as to the *effect* the outside information had upon the juror.' [*United States v. Simpson*, 950 F.2d [1519,] 1521 [(10th Cir. 1991)] (emphasis in original); *Mattox v. United States*, 146 U.S. 140, 149, 13 S. Ct. 50, 36 L. Ed. 917 (1892) (recognizing a distinction between affidavits bearing on 'the motives and influences' of the jurors, which are inadmissible to impeach the verdict, and affidavits bearing on the 'existence of any extraneous influence,' which are admissible).

*United States v. Davis*, 60 F.3d 1479, 1482-83 (10th Cir. 1995).

The distinction between intrinsic and extrinsic evidence is "not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took

place; rather, the distinction [is] based on the nature of the allegation.” *Tanner*, 483 U.S. at 117. The Supreme Court has “held admissible the testimony of jurors describing how they heard and read prejudicial information not admitted into evidence.” *Tanner*, 483 U.S. at 117 (quoting *Mattox*, 146 U.S. at 149).

Therefore, whether Mr. Taylor’s jury considered extrinsic evidence is an issue that requires factual development in an evidentiary hearing. The evidence elicited would not be barred by the rules of evidence.

Claim Nineteen is meritorious and presents new facts not previously known which show the denial of a constitutional right. Moreover, Mr. Taylor’s actual innocence provides good cause to consider this claim. Therefore, Mr. Taylor’s claim is not procedurally barred.

**6. Claim Twenty-One - Mr. Taylor’s Constitutional Rights Were Violated by the Improper Admission of Evidence at the Penalty Phase of His Trial**

Mr. Taylor re-pled this claim because he believed that the State might have argued that some of the facts raised in this claim were not previously before this Court. As the State appears to concede that parts (a), (c), (d), and (f) of this claim have already been raised and are fully exhausted, Mr. Taylor accepts the State’s representation as true and need not oppose the dismissal by this Court of those parts of Claim Twenty-One as successive.

The dismissal of subsections (b) and (e) as procedurally barred is inappropriate because Mr. Taylor has pled actual innocence.

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

**Standard of Review:** The Court reviews a district court's application of the PCRA *de novo*. See *Kell*, 2008 UT 62, ¶8. The Court also reviews a district court's application of the common-law procedural bar *de novo*. See *Parsons*, 871 P.2d at 518; *Dunn*, 791 P.2d at 876-77.

**a. The District Court Erred in Declaring the Evidence of Scott Manley's Fabricated Testimony to Be Procedurally Barred**

Information obtained from Scott Manley, describing the extent of the prosecution's relationship with him, shows that the State failed to disclose critical impeachment evidence to Mr. Taylor. (Petition Exhibit 115.) Neither Respondent, nor the district court addressed the fact that impeachment evidence falls within the *Brady* rule. *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)).

In his declaration, Mr. Manley states that he was pressured by the parole officers who led him to the interrogation room: "two parole officers told me that they knew Von was guilty and they expected me to make the story on Von bigger. They told me that if I did not do it they were going to send me back to the joint on some big heavy time." (Petition Exhibit 115, ¶5.) This information could have been used to impeach the testimony of Mr. Manley. Because the State failed to disclose the circumstances under which Mr. Manley was interrogated, the State failed to disclosed material exculpatory evidence in violation of *Brady* and its progeny.

Scott Manley's declaration was obtained after a thorough, time consuming, and costly investigation by the Office of the Federal Public Defender. Mr. Manley was found in custody in the State of California, and declared that his statement to law enforcement was a product of coercion and deception. (Petition Exhibit 115, ¶¶5-6.) Had state post-conviction counsel received the funding deemed reasonable and necessary by the district court, he would have located and interviewed Mr. Manley, and been able to discredit his highly damaging testimony, thus reducing the weight of the evidence against Mr. Taylor.

Mr. Manley was identified as a necessary witness by state post-conviction counsel. Unable to obtain the necessary funding to locate Mr. Manley, neither Petitioner nor Petitioner's counsel knew of the evidence at the time of the state post-conviction proceeding. His declaration constitutes newly discovered evidence. This material evidence is not merely cumulative of evidence that was known, and is not merely impeachment evidence, as it describes misconduct by the police. Finally, viewed with all the other evidence, the newly discovered material evidence undermines a critical witness against Mr. Taylor, removing premeditation from the jury. Without that evidence, no reasonable trier of fact could have found Mr. Taylor guilty of the offense of intentional murder. *See* Utah Code Ann. § 78-35a-104(e)(i)-(iv).

Because it meets the statutory requirements for newly discovered evidence, and because Mr. Taylor's actual innocence provides good cause to consider this claim, it is not procedurally barred.

**8. Claim Twenty-Five - Mr. Taylor's Death Sentence Is Disproportionate to His Culpability and Violates His Constitutional Rights**

**Standard of Review:** The Court reviews a district court's application of the PCRA *de novo*. See *Kell*, 2008 UT 62, ¶8. The Court also reviews a district court's application of the common-law procedural bar *de novo*. See *Parsons*, 871 P.2d at 518; *Dunn*, 791 P.2d at 876-77.

**a. Recently Developed Evidence Indicates That Mr. Taylor May Not Have Killed Anyone**

It is a fundamental precept that if Mr. Taylor's co-defendant, who only received a life sentence, was the actual killer of Kaye Tiede and Beth Potts, then Mr. Taylor's sentence is disproportionate to his culpability and violates his constitutional rights. Mr. Taylor's post-conviction petition has included, among other things, a declaration from the coroner who examined Kaye Tiede and Beth Potts' bodies that questions her testimony against Mr. Taylor at trial.

Dr. Schnittker's declaration calls into question many of the facts relied on by the State, and raises substantial concerns surrounding whether Mr. Taylor was even guilty of the two murders he pled guilty to. (Petition Exhibit 117.) This information was effectively unavailable to state post-conviction counsel, as he was improperly limited by the lack of funding he received from the State. Mr. Taylor has credibly pled actual innocence, meeting the "good cause" exception to procedural bar. Moreover, because the additional evidence in this claim was developed with adequate funding and revealed facts not previously known which questioned "the existence of fundamental unfairness in

[Petitioner's] conviction," it further meets the good cause exception. *See Gardner III*, 2004 UT 42, ¶14; *Hurst*, 777 P.2d at 1037.

## **9. Claim Twenty-Seven - Inadequate Appellate Record**

**Standard of Review:** The Court reviews a district court's application of the PCRA *de novo*. *See Kell*, 2008 UT 62, ¶8. The Court also reviews a district court's application of the common-law procedural bar *de novo*. *See Parsons*, 871 P.2d at 518; *Dunn*, 791 P.2d at 876-77.

### **a. The District Court Erred in Failing to Order a Hearing into the Prejudice Caused by the Inadequate Appellate Record**

In Claim Twenty-Seven, Mr. Taylor argues, in part, that the transcript of Mr. Taylor's penalty phase appears to be possibly incorrect, and that the transcripts of Edward Deli's trial are no longer available. According to the transcript of Mr. Taylor's penalty phase, Cheryl Chamberlain stated that one of her sons was married to a sister of one of the prosecutors. (RT 113.) After interviewing veniremembers, federal habeas counsel has been unable to confirm the statement attributed to Ms. Chamberlain. Mr. Taylor alleges that if the record is not sound on this one point, then Mr. Taylor cannot rely on any portion of the record being correct, potentially depriving appellate and habeas counsel of the ability to recognize errors at trial and bring claims appropriately thereon. Thus, Mr. Taylor's claim has an arguable basis in fact, that is, that the information attributed to Ms. Chamberlain is incorrect. The potential error in the record supports Mr. Taylor's claim that his right to an accurate and complete record may have been violated. *See, e.g., Frank*

*v. Mangum*, 237 U.S. 309, 327-28, 35 S. Ct. 582, 59 L. Ed. 969 (1915); *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

Mr. Taylor has further alleged that he has been harmed by the fact that Edward Deli's trial transcripts are no longer available. Although Mr. Taylor and Mr. Deli were not tried together, they were charged with identical counts except for an additional count against Mr. Taylor for failure to respond to an officer's signal to stop. (CT 2-5.) Yet, Mr. Deli was sentenced to two counts of second-degree murder, whereas Mr. Taylor was given the death penalty for the two homicides. Given that the State seems to have introduced the same evidence against both defendants, a proper comparison of the different results must entail a comparison of the transcripts of both trials.<sup>10</sup> If the prosecution knowingly used false evidence or acted in bad faith, pursuing fundamentally inconsistent theories in separate trials against co-defendants charged with the same murders, the prosecution may have violated due process. *See, e.g., Nguyen v. Lindsey*, 232 F.3d 1236, 1240 (9th Cir. 2000). A transcript of Mr. Deli's trial is necessary to make the required comparison.

Here again, state post-conviction counsel was precluded from obtaining information to support this claim by the lack of funding available to him. State post-conviction counsel was effectively prevented from interviewing the veniremembers as

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<sup>10</sup> If the same evidence was indeed used against both defendants, and the only difference between the defendants was that Mr. Taylor pled guilty, the different results support a conclusion that Mr. Taylor's counsel's deficient performance in inducing Mr. Taylor to plead guilty was prejudicial to Mr. Taylor. Similarly, if the only difference was the introduction of the Scott Manley taped statement, the different result supports Mr. Taylor's claim that Mr. Taylor was prejudiced by the trial court's error in admitting the taped statement into evidence. (Petition Exhibit 17, at ¶6.)

well as the jurors from Mr. Taylor's trial. (Addendum A to Petitioner's Opposition to Motion to Dismiss Petition for Post-Conviction Relief (ROA 659-800); Decl. of Richard Mauro, ¶8.) Because this claim is meritorious and because the evidence to support this claim reveals new facts not previously known which would show the denial of the constitutional right to an accurate and complete record, Mr. Taylor meets the "good cause" exception and is therefore not procedurally barred. Moreover, Mr. Taylor's actual innocence provides a good cause exception to consider this claim.

**10. Claim Twenty-Nine - Ineffective Assistance of State Counsel**

The district court held that "[b]ecause Petitioner's claim of ineffective assistance of prior post-conviction counsel is not a claim that challenges his conviction or sentence, it is not a cognizable ground for relief under the PCRA and, therefore, not a claim for which the PCRA can provide a legal remedy." (ROA 1309.)

The district court missed the import of this claim. Claim Twenty-Nine is not pled to warrant relief as a stand alone claim, but rather to explain universal failures that undermined Mr. Taylor's initial state post-conviction proceeding and that excuse procedural bar.

**11. Claim Thirty - Mr. Taylor Was Denied His Constitutional Rights Because of the Cumulative Impact of Errors**

With the addition of even a single new claim, this Court must conduct a new cumulative error analysis. Mr. Taylor is entitled to have this Court consider the cumulative effect of the new facts developed in the investigation paid for by federal counsel and the newly discovered evidence uncovered by counsel.

Because Mr. Taylor has pled that he is actually innocent and has presented new facts not previously known which show the denial of a constitutional right, his claim is not procedurally barred.

**E. No Claims Were Withheld for Tactical Reasons**

State post-conviction counsel had no incentive to withhold claims for tactical reasons. There was no conceivable tactical basis for counsel's withholding of claims that could potentially yield relief for Mr. Taylor. For instance, Claim Fourteen alleges structural error. Should this Court find that the Utah Constitution prohibits the striking of jurors on the basis of religion, Mr. Taylor will be entitled to a new penalty phase. Likewise, Claim Twenty-Four undermines the testimony of Scott Manley, the witness who led the jury to believe that the crime was premeditated.

As discussed *supra*, tactical reasoning was addressed in *Gentry*, where it was noted that “[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.” *Gentry*, 540 U.S. at 5. *Gentry* further stated “[t]he issues counsel omitted were not so clearly more persuasive than those he discussed that their omission can only be attributed to a professional error of constitutional magnitude.” *Gentry*, 540 U.S. at 9. It is telling that Claims such as Twelve, Fourteen, Nineteen, and Twenty-Four are strong claims that are more persuasive than some of the claims in Petitioner's initial state post-conviction petition, including Claims Sixteen, Twenty, and Twenty-Five.

The district court's conclusion 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,” is confusing at best. (ROA 1297.) The district court supports this statement by way of example, stating that “given all of the circumstances of the case and the limitations in terms of time, funding, and resources, it is certainly plausible that these claims were not raised in the initial post-conviction petition because they were weaker or less persuasive than the other claims that were raised.” (ROA 1298.)

After finding that funding was not at issue, the district court puts it squarely in question. The prejudice of the lack of funding is inherent in this statement by the district court. The district court’s explanation strongly supports Mr. Taylor’s fundamental argument on appeal that he should not be penalized because of the lack of funding.

The district court’s hypothesis that these are weaker claims is incorrect. Nowhere in the Ruling is there evidence that the district court engaged in an analysis or weighing of the claims in the initial state post-conviction petition versus the Petition currently before the Court.

Because no claims were withheld for tactical reasons, the district court was required to consider whether any of the common law exceptions to the procedural bar rule apply to this Petition. The district court failed to make such a consideration. (ROA 1299.)

Finally, the district court’s reliance on *Gentry* is misplaced, as *Gentry* relates to trial counsel, not state post-conviction counsel.


## 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 30, 2010

By:   
BRIAN M. POMERANTZ  
Deputy Federal Public Defender

Attorney for Appellant  
VON LESTER TAYLOR

# Addendum A

## **Fed. Rules of Evidence Rule 606 (3d ed.)**

### Federal Rules of Evidence

#### ARTICLE VI. WITNESSES

##### Rule 606. Competency of Juror as Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

**Utah Administrative Code R25-14-5.**  
**Payment of Reasonable Litigation Expenses.**

The Division of Finance shall pay reasonable litigation expenses not to exceed a total amount of \$20,000 except as provided in subsection (2).

(2) The Division of Finance shall pay amounts exceeding the total amount if:

- (a) before services are performed or expenses are incurred, appointed counsel files a request with the court to exceed the total amount;
- (b) appointed counsel serves the request upon the Division of Finance before or on the date of filing the request with the court;
- (c) the Division of Finance is allowed to respond to the request; and
- (d) the court determines there is sufficient cause to exceed the total amount in accordance with Section 78B-9-202.

(3) Travel costs, including mileage, per diem for meals, and lodging will be reimbursed based on state rates and criteria published in rule or policy by the Division of Finance. Travel is not reasonable when the purpose of the travel can reasonably be accomplished in another way, such as by telephone or correspondence.

## **Utah Code Ann. § 78-35a-104**

78-35a-104. Grounds for relief -- Retroactivity of rule.

(1) Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; or

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) 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.

(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity.

Enacted by Chapter 235, 1996 General Session

**Utah Code Ann. § 78-35a-106**

78-35a-106. Preclusion of relief -- Exception.

(1) A person is not eligible for relief under this chapter upon any ground that:

- (a) may still be raised on direct appeal or by a post-trial motion;
- (b) was raised or addressed at trial or on appeal;
- (c) could have been but was not raised at trial or on appeal;
- (d) 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; or
- (e) is barred by the limitation period established in Section 78-35a-107.

(2) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

Enacted by Chapter 235, 1996 General Session

## **Utah Code Ann. § 78-35a-202**

78-35a-202. Appointment and payment of counsel in death penalty cases.

- (1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent defendants.
- (2)
  - (a) If a defendant requests the court to appoint counsel, the court shall determine whether the defendant is indigent and make findings on the record regarding the defendant's indigency. If the court finds that the defendant is indigent, it shall promptly appoint counsel who is qualified to represent defendants in death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure.
  - (b) A defendant who wishes to reject the offer of counsel shall be advised on the record by the court of the consequences of the rejection before the court may accept the rejection.
  - (c) Costs of counsel and other reasonable litigation expenses incurred in providing the representation provided for in this section shall be paid from state funds by the Division of Finance according to rules established pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

Enacted by Chapter 76, 1997 General Session

## **U.C.A. 1953 § 78A-3-102**

Formerly cited as UT ST § 78-2-2

§ 78A-3-102. Supreme Court jurisdiction

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the School and Institutional Trust Lands Board of Trustees;

(iv) the Board of Oil, Gas, and Mining;

(v) the state engineer; or

(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire, and State Lands;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the

Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

CREDIT(S)

Laws 2008, c. 3, § 344, eff. Feb. 7, 2008; Laws 2008, c. 382, § 2209, eff. May 5, 2008; Laws 2009, c. 344, § 41, eff. May 12, 2009.

## **Utah Code Ann. § 78B-1-103**

Formerly cited as U.C.A. § 78-46-3

§ 78B-1-103. Jurors selected from random cross section -- Opportunity and obligation to serve

(1) It is the policy of this state that:

(a) persons selected for jury service be selected at random from a fair cross section of the population of the county:

(b) all qualified citizens have the opportunity in accordance with this chapter to be considered for service; and

(c) all qualified citizens are obligated to serve when summoned, unless excused.

(2) A qualified citizen may not be excluded from jury service on account of race, color, religion, sex, national origin, age, occupation, disability, or economic status.

## **U.C.A. 1953 § 78B-9-104**

Formerly cited as UT ST § 78-35a-104

§ 78B-9-104. Grounds for relief--Retroactivity of rule

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) 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; or

(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or

(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted.

(2) The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or Part 4, Post-Conviction Determination of Factual Innocence.

CREDIT(S)

Laws 2008, c. 3, § 1168, eff. Feb. 7, 2008; Laws 2008, c. 288, § 3, eff. May 5, 2008.

## **U.C.A. 1953 § 78B-9-106**

Formerly cited as UT ST § 78-35a-106

### **§ 78B-9-106. Preclusion of relief--Exception**

(1) A person is not eligible for relief under this chapter upon any ground that:

- (a) may still be raised on direct appeal or by a post-trial motion;
- (b) was raised or addressed at trial or on appeal;
- (c) could have been but was not raised at trial or on appeal;
- (d) 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; or
- (e) is barred by the limitation period established in Section 78B-9-107.

(2) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time. Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

CREDIT(S)

Laws 2008, c. 3, § 1170, eff. Feb. 7, 2008; Laws 2008, c. 288, § 5, eff. May 5, 2008.

**U.C.A. 1953, Const. Art. 1, § 4**

Constitution of Utah  
Article I. Declaration of Rights  
Sec. 4. [Religious liberty]

The rights of conscience shall never be infringed. 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. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

CREDIT(S)

Laws 1999, S.J.R. 5, § 1, adopted at election Nov. 7, 2000, eff. Jan. 1, 2001.

## **Utah Rules of Appellate Procedure, Rule 4**

### **Title II. Appeals from Judgments and Orders of Trial Courts**

#### **RULE 4. APPEAL AS OF RIGHT: WHEN TAKEN**

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Time for appeal extended by certain motions.

(b)(1) If a party timely files in the trial court any of the following motions, the time for all parties to appeal from the judgment runs from the entry of the order disposing of the motion:

(b)(1)(A) a motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(b)(1)(B) a motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(b)(1)(C) a motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(D) a motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure; or

(b)(1)(E) a motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(b)(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in Rule 4(b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in Rule 4(b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) Filing prior to entry of judgment or order. A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party

may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) Extension of time to appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) Motion to reinstate period for filing a direct appeal in criminal cases. Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that he was deprived of his right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

(g) Appeal by an Inmate Confined in an Institution. If an inmate confined in an institution files a notice of appeal in either a civil or criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (f), the 14-day period provided in paragraph (d) runs from the date when the trial court receives the first notice of appeal.

CREDIT(S)

[Amended effective November 1, 1998; April 1, 1999; November 1, 2002; November 1, 2005; November 1, 2006.]

## **Utah Rules of Appellate Procedure, Rule 23B**

### **Title V. General Provisions**

#### **RULE 23B. MOTION TO REMAND FOR FINDINGS NECESSARY TO DETERMINATION OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM**

(a) Grounds for motion; time. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion shall be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.

The motion shall be filed prior to the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. In no event shall the court permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party.

(b) Content of motion; response; reply. The content of the motion shall conform to the requirements of Rule 23. The motion shall include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits shall also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. The motion shall also be accompanied by a proposed order or remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed on remand.

A response shall be filed within 20 days after the motion is filed. The response shall include a proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed by the trial court in the event remand is granted, unless the responding party accepts that proposed by the moving party. Any reply shall be filed within 10 days after the response is filed.

(c) Order of the court. If the requirements of parts (a) and (b) of this rule have been met, the court may order that the case be temporarily remanded to the trial court for the purpose of entry of findings of fact relevant to a claim of ineffective assistance of counsel. The order of remand shall identify the ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed by the trial court. The order shall also direct the trial court to complete the proceedings on remand within 90 days of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of reasonable length.

If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) Effect on appeal. Oral argument and the deadlines for briefs shall be vacated upon the filing

of a motion to remand under this rule. Other procedural steps required by these rules shall not be stayed by a motion for remand, unless a stay is ordered by the court upon stipulation or motion of the parties or upon the court's motion.

(e) Proceedings before the trial court. Upon remand the trial court shall promptly conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Any claims of ineffectiveness not identified in the order of remand shall not be considered by the trial court on remand, unless the trial court determines that the interests of justice or judicial efficiency require consideration of issues not specifically identified in the order of remand. Evidentiary hearings shall be conducted without a jury and as soon as practicable after remand. The burden of proving a fact shall be upon the proponent of the fact. The standard of proof shall be a preponderance of the evidence. The trial court shall enter written findings of fact concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in accordance with the order of remand. Proceedings on remand shall be completed within 90 days of entry of the order of remand, unless the trial court finds good cause for a delay of reasonable length.

(f) Preparation and transmittal of the record. At the conclusion of all proceedings before the trial court, the clerk of the trial court and the court reporter shall immediately prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court shall immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court shall transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) Appellate court determination. Upon receipt of the record from the trial court, the clerk of the court shall notify the parties of the new schedule for briefing or oral argument under these rules. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.

CREDIT(S)

[Adopted effective October 1, 1992; amended effective April 1, 1998.]

## **Utah Rules of Appellate Procedure, Rule 24**

### **Rule 24. Briefs.**

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the

appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the

taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the

draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

## Utah Rules of Criminal Procedure, Rule 8

### Rule 8. Appointment of counsel

(a) A defendant charged with a public offense has the right to self representation, and if indigent, has the right to court-appointed counsel if the defendant faces a substantial probability of deprivation of liberty.

(b) In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court shall appoint two or more attorneys to represent such defendant and shall make a finding on the record based on the requirements set forth below that appointed counsel is proficient in the trial of capital cases. In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements:

- (1) at least one of the appointed attorneys must have tried to verdict six felony cases within the past four years or twenty-five felony cases total;
- (2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a capital or a felony homicide case which was tried to a jury and which went to final verdict;
- (3) at least one of the appointed attorneys must have completed or taught within the past five years an approved continuing legal education course or courses at least eight hours of which deal, in substantial part, with the trial of death penalty cases; and
- (4) the experience of one of the appointed attorneys must total not less than five years in the active practice of law.

(c) In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors:

- (1) whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;
- (2) the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;
- (3) the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;
- (4) the diligence, competency and ability of the attorneys being considered; and
- (5) any other factor which may be relevant to a determination that counsel to be appointed

will fairly, efficiently and effectively provide representation to the defendant.

(d) In all cases where an indigent defendant is sentenced to death, the court shall appoint one or more attorneys to represent such defendant on appeal and shall make a finding that counsel is proficient in the appeal of capital cases. To be found proficient to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

(1) at least one attorney must have served as counsel in at least three felony appeals; and

(2) at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.

(e) In all cases in which counsel is appointed to represent an indigent petitioner pursuant to Utah Code Ann. Section 78B-9-202(2)(a), the court shall appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and shall make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:

(1) at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;

(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;

(3) at least one of the appointed attorneys must have attended and completed or taught within the past five years an approved continuing legal education course which dealt, in substantial part, with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;

(4) at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and

(5) the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.

(f) Mere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal.

(g) Cost and attorneys' fees for appointed counsel shall be paid as described in Chapter 32 of Title 77.

(h) Costs and attorneys fees for post-conviction counsel shall be paid pursuant to Utah Code Ann. Section 78B-9-202(2)(a).

## **Utah Rules of Evidence, Rule 606**

### **Article VI. Witnesses**

#### **RULE 606. COMPETENCY OF JUROR AS WITNESS**

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

CREDIT(S)

[Amended effective October 1, 1992.]

# **Addendum B**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

VON LESTER TAYLOR,  Petitioner,  vs.  STATE OF UTAH,  Respondent.	<b>RULING and ORDER</b>  Case No. 070500645  Judge BRUCE C. LUBECK  DATE: August 17, 2009
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The above matter came before the court on July 14, 2009 for oral argument on respondent's motion to dismiss.

Petitioner was present through Brian M. Pomerantz and Megan B. Moriarty and respondent was present through Thomas B. Bruncker and Erin Riley. Counsel for petitioner waived the appearance of petitioner.

In this capital homicide case petitioner filed a successive petition (petitioner calls it a complete petition) for relief under the Utah Post Conviction Remedies Act and URCP, Rule 65C, on November 5, 2007.

To explain the delays involved in this case, the court notes that petition contained 426 pages of argument. It contained just over 5 volumes of attachments, perhaps 1000 pages of material.

The parties have often either informally or by motion and order obtained extensions of filing deadlines under the rules given the complexity, length and importance of the issues.

Respondent filed a motion to dismiss, consisting of 89 pages, on February 15, 2008. Petitioner filed an opposition response on May 13, 2008, and it was 129 pages in length. On June 13, 2008, respondent moved for permission to file a supplemental memorandum in support of its motion to dismiss. Petitioner opposed that on June 23, 2008. Respondent filed a reply on that request June 26, 2008, and the court on that same date, June 26, 2008, allowed the supplemental memorandum by the State. On July 3, 2008, the parties stipulated to substitute the State of Utah as the correct respondent rather than the warden named in the petition. On July 25, 2008, the State filed a supplemental memo of rather standard length, 23 pages. Petitioner filed an opposition on August 27, 2008. On March 4, 2009, respondent filed a 179 page reply. On March 13, 2009, respondent filed a request to submit. Based thereon oral argument was scheduled originally for April 22, 2009. Respondent filed on March 17, 2009, a notice that permission to file a sur reply may be filed. Respondent also moved to continue the oral argument due to the press of other business and unavailability of counsel. This date was then scheduled for oral argument.

Oral argument was held and the court took the issues under advisement. Before the hearing the court carefully considered the memoranda and other materials submitted by the parties. The court has read all of the pleadings and all of the transcripts that are part of this record, including the preliminary hearing and penalty phase hearing, that are on file in the office of the clerk of this court. The court has examined the exhibits which are attached to the pleadings and has examined the trial exhibits which still remain in the office of the clerk of this court in Summit County. Since taking the issues under advisement, the court has further considered the law and facts relating to the issues and the memoranda of the parties. Now being fully advised, the court renders the following Ruling and Order.

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### I. Background

Gleaned from the record of court proceedings as found by the court and jury at the time, almost nineteen years ago, on December 14, 1990, Petitioner left the Orange Street Community Correctional Center in Salt Lake City and failed to return. On December 21, 1990, Petitioner, along with an accomplice, Edward Deli, broke into the family cabin of Rolf and Kaye Tiede in Summit County while the Tiedes were in Salt Lake City shopping. The following day, the Tiedes returned to the cabin. Part of the family parked at the gate to the Beaver Springs development and Ms. Kaye Tiede, together with her mother, Beth Potts, a woman in her mid-70s, and daughter Linae Tiede, age 20, drove two snowmobiles to the cabin, which was located approximately two miles from the gate which was on the Weber Canyon road. Mr. Rolfe Tiede and his 16 year-old daughter Ticia Tiede drove to a repair shop to pick up additional snowmobiles which were being repaired.

Linae was the first to arrive at the cabin and when she opened the door at the top of the stairs Petitioner confronted her with his gun drawn. He ordered Kaye Tiede and Ms. Potts upstairs. Ms. Potts needed assistance because she was partially blind and needed help walking. Once all three were upstairs, Kaye Tiede offered Petitioner money and whatever else he wanted. Petitioner shot Kaye Tiede near her left shoulder. The bullet

passed through her lungs and aorta, causing her death. Ms. Potts was then shot several times, including at least once in the chest and in the head, either of which could have been the cause of her death. During the shooting, Linae began to pray, but Petitioner told her that praying would not help because he worshiped the devil.

Once the shooting ended, Petitioner determined that he, Deli, and Linae would leave and that the cabin should be burned in order to prevent the discovery of any fingerprints. As they were preparing to leave, Mr. Tiede and his daughter Ticia arrived. Petitioner grabbed Linae by the throat and held his gun to her back. Mr. Tiede and Ticia were both ordered into the garage and Petitioner asked Mr. Tiede for money. Mr. Tiede complied and then Petitioner ordered Deli to shoot Mr. Tiede. When Deli hesitated, Petitioner shot Mr. Tiede in the face. Petitioner said nothing. Prior to leaving the cabin with Linae and Ticia, Petitioner returned to the garage, shot Mr. Tiede again in the head while Mr. Tiede was lying face down on the ground "pretending" to be dead, and poured gasoline over him. Gasoline was scattered through the cabin and it was set on fire before Petitioner and the others left. When Petitioner, Deli, Linae, and Ticia arrived at the gate to the Beaver Springs development at the Weber Canyon Road, Petitioner ordered everyone into the Tiede's car and they drove away. Mr. Tiede, who was not

killed by the attack, was ultimately able to arouse himself, and take a snowmobile to the Weber Canyon Road where he found a family member and they called police. Following a high-speed chase, Petitioner and Deli were apprehended and the two girls were safely taken from Petitioner and Deli.

On December 24, 1990, Petitioner was charged with two counts of capital homicide in the deaths of Kaye Tiede and Ms. Potts, in addition to several other felony counts of attempted aggravated murder, aggravated arson, aggravated kidnaping, aggravated robbery, theft, and failure to respond to an officer's signal to stop.

On May 1, 1991, Petitioner pleaded guilty to the two counts of capital homicide and the State agreed to dismiss all of the other charges. On May 16, 17, 21, and 22, 1991, a sentencing proceeding was convened for the purpose of receiving evidence concerning the appropriate sentence that should be imposed upon Petitioner by the jury. Following their deliberations, on May 24, 1991, the jurors returned a unanimous sentencing decision in favor of death for Petitioner on each count of capital homicide.

Petitioner then sought to withdraw his guilty plea, which was denied by the trial court.

Through his trial counsel, Elliott Levine ("Levine"), Petitioner appealed to the Utah Supreme Court on July 8, 1992. However, after Petitioner's opening brief was filed, on July 20,

1992, the State requested that the brief be stricken and that Levine be removed from his representation of Petitioner. Although Levine was ordered to withdraw and was replaced by J. Bruce Savage ("Savage") in September 1993, the opening brief was not stricken. During the direct appeal, the Supreme Court remanded the case to the trial court for an evidentiary hearing under Utah Rules of Appellate Procedure, Rule 23B, on the claim that trial counsel had been ineffective. Evidence was presented to the trial court at that hearing on May 15, 16, 18, 22, 23, and 24, 1995. The trial court concluded that Petitioner had not been deprived of his right to effective representation under the Sixth Amendment.

Savage then pursued the direct appeal by filing Petitioner's brief on June 3, 1996. On October 24, 1997, the Utah Supreme Court issued its opinion rejecting all of Petitioner's appellate claims. *State v. Taylor*, 947 P.2d 681 (Utah 1997) (*Taylor I*). The United States Supreme Court denied the petition for a writ of certiorari on October 5, 1998.

On February 23, 1998, Richard P. Mauro ("Mauro") was appointed as post-conviction counsel pursuant to the PCRA to represent Petitioner in his post-conviction action. Approximately one year later Petitioner filed his Petition for Relief Under the Utah Post-Conviction Remedies Act. On May 30, 2002, Petitioner filed his First Amended Petition for Relief Under the Utah Post-

Conviction Remedies Act. Respondent, Hank Galetka, who was the warden/respondent at the time, filed a motion for summary judgment on September 13, 2002. Oral argument on the motion for summary judgment was heard on April 18, 2003. On March 1, 2004, the post-conviction trial court, granted Respondent's motion for summary judgment and denied post-conviction relief on all of Petitioner's claims. The signed order and judgment was entered on September 22, 2004.

Petitioner timely appealed that decision and the Utah Supreme Court affirmed the post-conviction court, the Honorable Frank. G. Noel, on January 26, 2007. *Taylor v. State, 2007 UT 12, 156 P.3d 739 (Taylor II)*. The request for a rehearing was denied on March 27, 2007. The Office of the Federal Public Defender for the District of Utah was appointed to represent Petitioner in federal court on March 6, 2007. On September 4, 2007, Petitioner filed a federal petition for writ of habeas corpus and, on November 2, 2007, a first amended petition was filed in federal court. Although Petitioner's federal case was, and is, still pending, on November 5, 2007, Petitioner filed this successive petition for post-conviction relief.

To explain the delays involved in this case, the Court notes that the successive petition contained 426 pages of argument and over five volumes of attachments. Moreover, the parties have, either informally or by motion and order, obtained extensions of

the filing deadlines given the complexity, length, and importance of the issues raised. On February 15, 2008, Respondent filed a motion to dismiss, consisting of 89 pages. Petitioner filed a 129 page response in opposition on May 13, 2008. On June 13, 2008, Respondent requested permission to file a supplemental memorandum in support of its motion to dismiss, which Petitioner opposed on June 23, 2008. Respondent filed a reply on that request on June 26, 2008 and the Court, on that same date, allowed the supplemental memorandum by Respondent. On July 3, 2008, the parties stipulated to substitute the State of Utah as the correct respondent rather than the warden of the Utah State Prison. On July 25, 2008, Respondent filed its supplemental memorandum in support of the motion to dismiss and Petitioner filed his response in opposition to the supplemental memorandum on August 27, 2008. On March 4, 2009, Respondent filed a 179 page reply to Petitioner's opposition to the motion to dismiss. On March 13, 2009, Respondent filed a request to submit and, based upon this request, oral argument was scheduled for April 22, 2009. Petitioner moved to continue that date due to conflicts with counsel's schedule. On March 17, 2009, Respondent filed a request for permission to file a sur reply. Oral argument on the motion to dismiss was held on July 14, 2009 and the Court took the issues raised under advisement.

## II. Summary of the Arguments

### **A. Claims Raised in the Successive Petition**

Petitioner raised thirty (30) separate grounds for relief in his successive (complete) petition. These include claims that trial counsel was ineffective because he failed to properly investigate the case, failed to conduct an adequate mitigation investigation, failed to adequately counsel and advise Petitioner in connection with his pleas of guilty to two counts of capital homicide, failed to properly litigate and renew the motion for change of venue, was laboring under an actual conflict of interest, performed deficiently during the jury selection process including failing to properly challenge jurors, failed to make appropriate challenges for cause, failed to uncover potential juror bias, and failed to submit voir dire questions, failed to present an adequate mitigation case, and failed to challenge the State's case in aggravation. Petitioner has now abandoned one of those thirty claims.

Petitioner alleges that appellate counsel was ineffective because he failed to properly argue the correct legal standard for ineffective assistance of trial counsel and failed to raise issues that could, and should, have been raised.

Petitioner asserts a claim that because the funding available for his initial post-conviction petition and counsel was inadequate, his prior post-conviction counsel was unable to

provide effective representation.

Petitioner also raises claims asserting that the trial court committed error including that the court improperly denied Petitioner's motion for change of venue, improperly conducted individual voir dire of prospective jurors in chambers, failed to properly grant Petitioner's challenges for cause, asked impermissible questions and ignored responses during jury selection, improperly excluded prospective jurors who were not members of the LDS Church, provided jurors with confusing and erroneous jury instructions and a special verdict form, and improperly admitted evidence.

In addition to the foregoing claims related to alleged trial court error and ineffective assistance of trial, appellate, and post-conviction counsel, Petitioner also asserts that his conviction and death sentences should be vacated because he did not receive the competent assistance of mental health experts, he is actually innocent of causing the deaths of Kaye Tiede and Beth Potts, there is no factual basis for his guilty pleas, a disproportionate number of the jurors who served were members of the LDS Church, jurors were improperly influenced by LDS Church practices and the relationship between Church leaders and the victims' families, there was juror misconduct, there was prosecutorial misconduct, the State failed to disclose exculpatory evidence, the sentences of death are disproportionate

to Petitioner's culpability, the Utah death penalty scheme is unconstitutional because it fails to narrow the class of murderers eligible for the death penalty, there is an inadequate appellate record, lethal intravenous injection constitutes cruel and unusual punishment under the Eighth Amendment, (that claim is now abandoned) and the cumulative impact of all the errors committed in his case violated his constitutional rights.

**B. State's Motion to Dismiss**

The State responded to Petitioner's successive petition with a motion to dismiss.

First, the State argues that most of Petitioner's claims were raised and adjudicated in a prior proceeding and, therefore, under both the PCRA and the common law they are absolutely procedurally barred. See Utah Code Ann. § 78-35a-106(b) and (d) (2007).<sup>1</sup>

Second, all of Petitioner's claims are ones that could have been, but were not, raised in a prior proceeding. Therefore, under the PCRA, they are all procedurally barred. See Utah Code Ann. § 78-35a-106( c) and (d).

Third, the State initially argued that all of Petitioner's claims were time-barred because they were not raised within one

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<sup>1</sup>In 1996, the PCRA was found in Title 78, Chapter 35a. In 2008, the PCRA was re-codified as Title 78B, Chapter 9. All references in this ruling to Title 78, Chapter 35a are to the version of the PCRA that existed at the time Petitioner filed his successive post-conviction petition in 2007.

year of the petition's accrual date and he had not shown that any of the claims satisfied the interests of justice exception; i.e., he had not established that he had a legitimate reason for not raising the claim in a prior proceeding nor that any of his claims were meritorious. See Utah Code Ann. § 78-35a-107(3). According to the State, the time frame for "accrual" of the post-conviction action under the PCRA, even under the 1996 version, was the date on which the petition for a writ of certiorari was denied, which was October 5, 1998. Thus, Petitioner's successive post-conviction petition is eight years late.

However, in a supplemental memorandum, the State argues that the 2008 amendments to the PCRA, which removed the interests of justice exception to the statute of limitations and replaced it with an equitable tolling provisions, apply to Petitioner's successive petition. Thus, according to the State, the interests of justice exception cannot be relied upon by Petitioner to excuse an untimely claim. Furthermore, because Petitioner has not shown that the tolling provision applies to any of his claims, all of his claims are time-barred under 2008 amendments to the PCRA.

Finally, the State argues that Petitioner's claim of ineffective assistance of post-conviction counsel must be dismissed because it is not a proper claim under the PCRA. At the time Petitioner filed his successive petition, the PCRA

"establishe[d] a substantive legal remedy for any person who challenges a conviction or sentence." Utah Code Ann. § 78-35a-102. Because a claim of ineffective assistance of post-conviction counsel is not a challenge to Petitioner's conviction or sentence, it is not a claim for which relief can be granted under the PCRA. Moreover, in its supplemental memorandum addressing the applicability of the 2008 amendments to the PCRA, the PCRA now states that "[n]othing in this chapter shall be construed as creating the right to the effective assistance of post-conviction counsel, and relief may not be granted on any claim that post-conviction counsel was ineffective." Utah Code Ann. § 78B-9-202(4). In light of this new language, the State also argues that the current version of the PCRA precludes Petitioner from obtaining relief on his ineffective assistance of post-conviction counsel claim.

**C. Petitioner's Response to the State's Motion to Dismiss**

In response to the State's motion to dismiss, Petitioner begins by asserting that he was falsely led to believe that he, rather than his co-defendant Edward Deli, caused the deaths of Kaye Tiede and Ms. Potts and therefore he is factually innocent of the murders to which he pleaded guilty. According to Petitioner, his factual innocence necessarily "trumps the procedural and timeliness bars relied on by the State." (Pet'r

Mem. in Opp. at 15.) The failure to discover this new evidence concerning his factual innocence and to raise the claims in his first petition was the result of ineffective assistance of post-conviction counsel, which in turn was the result of the inadequate amount of funding that was made available to prior post-conviction counsel. Petitioner argues that his claims are not time-barred because the mere passage of time can never justify the continued imprisonment of one who has been denied fundamental rights. Moreover, the interests of justice exception under the PCRA has been satisfied.

In addition, he also argues that he has shown "good cause" or "unusual circumstances" to overcome the procedural bar raised by the State. Specifically, he contends that as a result of the lack of adequate funding and ineffective assistance of prior post-conviction counsel his claims could not have been raised in an earlier petition and new facts not previously known demonstrate either the denial of a constitutional right, that the outcome of his trial might have been different, or the existence of fundamental unfairness in his conviction. Because his claims were overlooked in good faith with no intent to delay the post-conviction process, Petitioner contends that good cause exists that permits him to raise these claims in his successive petition, despite the procedural bar.

**D. Supplemental Memoranda**

Prior to filing a reply to Petitioner's opposition, the State filed a supplemental memorandum in which it argues that the 2008 amendments to the PCRA that removed the interests of justice exception to the time-bar and ostensibly clarified that post-conviction petitioners do not have a right to the effective assistance of counsel, apply retroactively to Petitioner's successive post-conviction petition. Therefore, the State asserts, Petitioner cannot rely upon the interests of justice exception to excuse the untimely filing of any successive claim and cannot assert as a ground for relief that his post-conviction counsel provided ineffective representation.

In Petitioner's memorandum in opposition to the State's supplemental memorandum, he argues that the Utah Supreme Court has exclusive authority to define post-conviction remedies and procedures. Because the Supreme Court has already held that the mere passage of time can never justify rejecting a meritorious claim, removing the interests of justice exception from the PCRA is necessarily ineffectual. Moreover, Petitioner also argues that the 2008 amendments cannot apply retroactively because (1) the interests of justice exception constitutes a vested right that cannot be removed retrospectively, and (2) he has a right under the Utah Constitution to the effective assistance of post-

conviction counsel that the legislature cannot extinguish.

**E. State's Reply**

In reply, the State repeats the arguments that were set forth in its supplemental memorandum concerning the retroactive application of the 2008 amendments to the PCRA. In addition, the State argues that even if the 2008 amendments do not apply, claims alleging ineffective assistance of post-conviction counsel are not cognizable under the PCRA, Petitioner has no state or federal constitutional right to the effective assistance of post-conviction counsel, the statutory right to post-conviction counsel does not give Petitioner the right to a claim of ineffective assistance of post-conviction counsel in a successive petition, and in any event, Petitioner has failed to establish that his post-conviction counsel was, in fact, ineffective.

Further, the State also contends that Petitioner's claims are procedurally barred because they are claims that were either raised and addressed, or could have been, but were not, raised in a prior proceeding and Petitioner has failed to show that any exception applies or that unusual circumstances exist. Finally, although Petitioner frequently asserts that, with appropriate funding finally provided, his current counsel have discovered new evidence in the case, Petitioner has not shown that any of the recently discovered evidence satisfies the requirements of the

"newly discovered evidence" standard set forth in the PCRA. At best he is essentially making a claim of ineffective assistance of post-conviction counsel, a claim for which no relief may be granted under the PCRA.

### **III. Discussion**

#### **A. Legal Analysis**

##### **1. The Interests of Justice Exception**

###### **a. Introduction**

Under the provisions of the PCRA as they existed when Petitioner filed his successive post-conviction petition, a petitioner was "not eligible for relief . . . upon any ground that . . . [was] barred by the limitation period established in Section 78-35a-107." Utah Code Ann. § 78-35a-106(1)(e). As with the current version of the PCRA, the statute of limitations entitled a petitioner to "relief only if the petition [was] filed within one year after the cause of action [had] accrued." Utah Code Ann. § 78-35a-107(1). Nevertheless, at the time Petitioner filed his successive petition, the PCRA included an exception that, if satisfied, would excuse an untimely filing. Under this exception, "if the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations." Utah Code Ann. § 78-35a-107(3).

In considering this exception, the Utah Supreme Court has

specifically held that a trial court "presented with an untimely post-conviction petition must consider the interests of justice exception before disposing of the petition . . . [and] has no discretion to grant relief on an untimely . . . petition if the 'interests of justice' do not so require." *Johnson v. State*, 2006 UT 21, ¶16, 134 P.3d 1133. On the other hand, if the trial court makes specific findings in support of the interests of justice exception, then the untimeliness of the successive petition must be excused. See *id.* at ¶17. "An analysis of what constitutes an exception in the 'interests of justice' should involve examination of both the meritoriousness of the petitioner's claim and the reason for an untimely filing." *Adams v. State*, 2005 UT 62, ¶16, 123 P.3d 400. However, it is not necessarily required that both prongs of this test be satisfied. As noted by the Supreme Court, depending upon the facts of the particular case under consideration, some claims may require no justification for an untimely filing--such as a claim of actual innocence supported by DNA evidence--while "an entirely frivolous claim would not meet the 'interests of justice' exception even with the best possible excuse for the late filing." *Id.* In other cases, a clear assessment of both prongs will be necessary to determine whether the interests of justice exception is satisfied. "[W]e expect that the district court will give appropriate weight to each of [these] factors according to the

circumstances of a particular case." *Id.*

**b. Retroactive Application of Statutory Amendments**

During the 2008 legislative session the interests of justice exception was removed from the PCRA and replaced with equitable tolling provisions which toll the limitations period "for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity." Utah Code Ann. § 78B-9-107(3). This change went into effect on May 5, 2008 and therefore, no interests of justice exception currently exists in the PCRA to excuse the failure of a petitioner to timely file a petition for post-conviction relief. "Ordinarily the facts and the law in a given lawsuit are to be applied as of the date of the filing of the original complaint." *Archer v. Utah State Land Bd.*, 392 P.2d 622, 624 ( UT 1964). It is generally true that "legislation is not given retroactive effect." *B.A.M. Dev., L.L.C. v. Salt Lake County*, 2006 UT 2, ¶20, 128 P.3d 1161. See also *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."); Utah Code Ann. § 68-3-3 ("No part of these revised statutes is retroactive, unless expressly so declared.").

However, "[a]n exception to the general rule against retroactivity applies to changes which are procedural only." *Olsen v. Samuel McIntyre Inv. Co.*, 956 P.2d 257, 261 (Utah 1998). Unlike substantive law, which "creates, defines[,] and regulates the rights and duties of the parties which may give rise to a cause of action," procedural law "prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective." *Petty v. Clark*, 192 P.2d 589, 593-594 (Utah 1948). Thus, "statutes which operate in furtherance of a remedy already existing and which neither create new rights nor destroy existing rights . . . appl[y] retrospectively to accrued or pending actions to further the legislature's remedial purpose." *Marshall v. Industrial Comm'n*, 704 P.2d 581, 582 (Utah 1985). Furthermore, "statutory amendments that merely clarify an ambiguity in an original statute will be given retroactive effect." *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 440 (Utah 1997) (emphasis added). See also *Oakland Constr. Co. v. Industrial Comm'n*, 520 P.2d 208, 210-211 (Utah 1974) (general principle against retroactive application "has no application where the later statute or amendment deals only with clarification or amplification as to how the law should have been understood prior to its enactment." (emphasis added)). That is, "an exception exists for amendments clarifying statutes, which are applied

retroactively, so long as they 'do not enlarge, eliminate, or destroy vested or contractual rights.'" *Keegan v. State*, 896 P.2d 618, 620 (Utah 1995) (quoting *Board of Equalization v. Utah State Tax Comm'n ex rel. Benchmark, Inc.*, 864 P.2d 882, 884 (Utah 1993)). Nevertheless, as the Utah Court of Appeals has expressly held, "[w]hen the Legislature amends a statute, we presume it intended to make a substantive, rather than procedural or remedial change." *Wilde v. Wilde*, 2001 UT App 318, ¶13, 35 P.3d 341.

**c. Whether the 2008 Amendments to the PCRA Apply  
Retroactively**

Nowhere in the 2008 amendments is there language declaring that the removal of the interests of justice exception should apply retroactively. In addition, because the amendments also do not expressly state that they are clarifying in nature, there is a rebuttable presumption that the amendments are substantive and, therefore, should not be applied retroactively. See *State v. Amador*, 804 P.2d 1233, 1234 (Utah Ct. App. 1990) ("Every amendment not expressly characterized as a clarification carries the rebuttable presumption that it is intended to change existing legal rights and liabilities."). See also *Thomas v. Color Country Mgmt.*, 2004 UT 12, ¶36, 84 P.3d 1201 (Durham, C.J., concurring) (same). Even without the presumption, however, a

persuasive argument exists that removing the interests of justice exception from the PCRA constitutes a substantive change.

Whether an amendment affects substantive rights "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). See also *Goebel*, 2004 UT 80 at ¶39 ("Convenience, reasonableness, and justice are factors we consider in deciding whether a statute has a merely remedial or procedural purpose.").

When Petitioner filed his successive post-conviction petition in November 2007 he had a reasonable expectation that if the State raised the time-bar as a ground for dismissing the claims, he would have the opportunity to argue that the interests of justice exception applies and that his untimely filing should be excused. Having reasonably relied on the existence of the interests of justice exception to excuse his untimeliness, to now preclude him from asserting it would constitute an unfair windfall for the State and would be unfair to some one in Petitioner's position. Moreover, in the same way that a legislative amendment removing the defense of an expired statute of limitations is a change that affects the vested rights of a defendant, see *Roark v. Crabtree*, 893 P.2d 1058, 1062 (Utah 1995) ("Since 1900, this court has consistently maintained that the

defense of an expired statute of limitations is a vested right."), it follows by force of logic that a legislative amendment removing a statutory exception to the defense of an expired statute of limitations is also a change that affects the vested rights of a plaintiff. Thus, the 2008 amendments are substantive in nature because they eliminate a vested right held by Petitioner at the time he filed his successive post-conviction petition. See *Smith v. Cook*, 803 P.2d 788, 792 (Utah 1990) (a statute is considered substantive if it "eliminate[s] or destroy[s] vested rights.").

Notwithstanding language in *Keegan* suggesting that clarifying statutes cannot be applied retroactively if they eliminate vested rights, *Keegan*, 896 P.2d at 620, the State argues that *Keegan* does not state the governing law. The State contends that the purpose of the 2008 amendments was to clarify the unamended PCRA, and therefore the amendments should be applied retroactively to Petitioner's case. The court does not find this argument to be persuasive.

First, despite the State's contention otherwise, more recent cases appear to provide support for *Keegan*. The case of *Evans & Sutherland*, which was decided after *Keegan*, specifically states that "under a long-standing exception to the general rule against applying statutes retroactively, statutory amendments that merely clarify an ambiguity in an original statute will be given

retroactive effect." Use of the word "merely" certainly suggests that amendments that do more than simply clarify should not be applied retroactively. Clearly, as the *Keegan* case holds, changes that enlarge, eliminate, or destroy vested or contractual rights do more than merely clarify and, therefore, are not applied retroactively. Furthermore, the case of *Kilpatrick v. Wiley*, 2001 UT 107, 37 P.3d 1130, which the State cites as an example of a recent case that ostensibly treats the clarifying exception as independent from the general rule against retroactivity, also can be read as supporting *Keegan*. After stating that legislative amendments may be applied retroactively when the purpose of the change is to clarify the meaning of an earlier statute, the Supreme Court went on to state that "[f]urther, in light of the fact that we have now reversed the jury's verdict, the plaintiffs have no vested or contractual right that would prohibit application of the amended statute." *Id.* at ¶59. In other words, because the clarifying amendments do not enlarge, eliminate, or destroy vested or contractual rights, i.e. they are procedural, they may be retroactively applied to the case.

Second, the Utah Court of Appeals has directly held that clarifying amendments are procedural in nature. See *Wilde*, 2001 UT App 318 at ¶14 ("A procedural or remedial law 'provides a different mode or form of procedure for enforcing substantive

rights,' or clarifies the meaning of an earlier enactment."

(quoting *Pilcher v. Department of Soc. Servs.*, 663 P.2d 450, 455 (Utah 1983) (emphasis added)). Based upon the foregoing analysis, the principle enunciated in *Keegan* that clarifying amendments may be applied retroactively as long as they do not enlarge, eliminate, or destroy vested or contractual rights, appears to be controlling law.

However, even if the principle set forth in *Keegan* is incorrect, the State has nevertheless failed to persuasively demonstrate that the 2008 amendments are clarifying in nature. Relying on *State v. Bishop*, 753 P.2d 439 (Utah 1988), overruled on other grounds as recognized by *State v. Baker*, 884 P.2d 1280, 1283 (Utah 1994), the State contends that legislative acts amending a statute constitute "persuasive evidence of the legislature's intent when it passed the former, unamended statute," *Id.* at 486, i.e., that the amending statute was meant to clarify. Because, according to the State, the Utah Supreme Court incorrectly interpreted the interests of justice exception in the *Adams* case to allow a petitioner to escape the time-bar any time the petitioner could explain the delay and show that the claim was potentially meritorious, the fact alone that the legislature amended the PCRA to remove the interest of justice exception and replace it with an equitable tolling provision is persuasive evidence that the legislature intended to clarify what

it meant when the interests of justice exception was originally included in the PCRA.

However, while the State correctly quotes *Bishop*, the amending statute referred to in the case was specifically entitled "Clarifying Child Kidnaping and Sexual Abuse Act." *Id.* (emphasis added). It is at least arguable that the language quoted by the State draws its meaning from this context, and therefore that the persuasiveness referred to is tied to the language of the amending statute itself stating that it is clarifying the prior enactment. Thus, simply because the legislature amended the PCRA after the Supreme Court's interpretation of the interests of justice exception in *Adams*, this does not necessarily mean that the legislature intended the 2008 amendments to be clarifying in nature, particularly in light of the fact that, unlike *Bishop*, no legislative language was included in the amendments suggesting that the amendments were intended only to be clarifying.

In addition, citing to the case of *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989), the State also argues that because a "purpose of a statute of limitations is to cut off untimely claims regardless of the claim's potential merit," (State's Supplemental Mem. in Supp. at 9) (emphasis added), the Supreme Court's broad interpretation of the interests of justice exception is illogical insofar as it defeats the purpose of

having a limitations statute in the first place. The *Horton* case states that "[i]n general, statutes of limitation are intended to compel the exercise of a right of action within a reasonable time and to suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh." *Id.* at 1091. Nothing in this language suggests that statutes of limitations are intended to cut off claims regardless of their potential merit. Indeed, following the above-quoted language, *Horton* case cites to *Burnett v. New York Central R.R.*, 380 U.S. 424 (1965) which held that

[s]tatutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." . . . The policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights.

*Id.* at 428 (quoting *Order of Railroad Telegraphers v. Railway*

*Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944) (emphasis added)). This language suggests that it is not true that a limitations statute cuts off untimely claims "regardless of the claim's potential merit." While the State argues that the Utah Supreme Court "made the interests of justice exception so broad, that it defeated the purpose of the statute of limitations," (State's Supplemental Mem. in Supp. at 9), and therefore, that the 2008 amendments removing the interests of justice exception should be viewed as clarifying in nature, this argument is not particularly persuasive given the fact that the "rule" relied upon by the State may not stand for the precise proposition the State suggests it does. The State's arguments simply do not show that the 2008 amendments merely clarify the prior unamended PCRA.

Furthermore, as Petitioner points out, prior to the *Adams* case being decided, the Utah Supreme Court held in *Julian v. State*, 966 P.2d 249 (Utah 1998) that the "proper consideration of meritorious claims raised in a habeas corpus petition will always be in the interests of justice. It necessarily follows that no statute of limitations may be constitutionally applied to bar a habeas petition." *Id.* at 254. Based upon this language, the legislature should have been on notice of the broadness of the Supreme Court's interpretation of the interests of justice exception. Yet, if the 2008 amendments were genuinely intended to clarify the legislature's original intent with respect to the

interests of justice exception, the State has failed to adequately explain why the legislature waited nearly ten years to ultimately remove the interests of justice exception from the PCRA.

Based upon the foregoing analysis, it is the court's conclusion that the 2008 amendments removing the interests of justice exception from the PCRA are not necessarily clarifying in nature. Moreover, even if their purpose is to clarify, the amendments do more than clarify insofar as they eliminate a vested right held by Petitioner at the time he filed his successive post-conviction petition, namely his right to raise the interests of justice exception as a reason to excuse the untimely filing of his successive petition. The 2008 amendments are substantive in nature and, consistent with the general rule against retroactive application of substantive changes, they cannot be applied retroactively. Petitioner is entitled, therefore, to assert the interests of justice exception to excuse the untimeliness of his successive post-conviction petition.

## **2. Procedural Bar Rule**

### **a. Introduction**

The PCRA "establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies." Utah

Code Ann. § 78-35a-102(1). While the "PCRA affords a convicted defendant the opportunity to have his conviction and sentence vacated or modified under certain circumstances," *Lafferty v. State*, 2007 UT 73, ¶44, 175 P.3d 530, because a petition for post-conviction relief "is a collateral attack on a conviction or sentence [and] . . . not a substitute for appellate review," *Taylor II*, 2007 UT 12 at ¶14, a petitioner "is not eligible for relief on claims that were 'raised or addressed' on direct appeal." *Kell v. State*, 2008 UT 62, ¶13, 194 P.3d 913 (citing Utah Code Ann. § 78-35a-106(1)(b) (2002)). See also *Lafferty*, 2007 UT 73 at ¶44 ("Claims that were brought on direct appeal are ineligible for consideration in post-conviction actions."). Such issues are dismissed as an abuse of the post-conviction process without a ruling on the merits. No exceptions exist for this procedural bar under the PCRA, including assertions that appellate counsel less than adequately raised or argued the issues on appeal. See *Kell*, 2008 UT 62 at ¶17 (after opportunity to be heard on appeal, "[w]e presume that this court gave full consideration to the claims, regardless of whether [petitioner's] counsel raised them in the most effective manner.").

In addition to permitting the dismissal of successive post-conviction claims previously raised and addressed at trial or on direct appeal, the PCRA also precludes a petitioner from

obtaining "relief . . . upon any ground 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." Utah Code Ann. § 78-35a-106(1)(d). The same is true under the common law. See *Gardner v. Holden*, 888 P.2d 608, 613 (Utah 1994) (*Gardner I*) ("Issues that could and should have been raised on direct appeal, but were not, may not properly be raised in a habeas corpus proceeding absent unusual circumstances."). Unlike the procedural bar rule that applies to initial post-conviction petitions, see Utah Code Ann. § 78-35a-106(1)(c), which includes a statutory exception based upon ineffective assistance of trial or appellate counsel, see Utah Code Ann. § 78-35a-106(2), no exception based upon ineffective assistance of post-conviction counsel is expressly included in the PCRA that would apply to claims raised in a successive petition for post-conviction relief that could have been, but were not, raised in a prior proceeding. Thus, any successive claim that was raised or that could have been raised, but was not, in a prior post-conviction petition is procedurally barred and no exception exists under the PCRA to excuse this failure.

**b. Common Law Exceptions to the Procedural Bar Rule<sup>2</sup>**

Notwithstanding the language of the PCRA, under the common law as set forth by the Utah Supreme Court, the merits of a claim that was previously raised and addressed in a prior proceeding may be considered by the trial court if the petitioner is able to demonstrate "unusual circumstances." See *Hurst v. Cook*, 777 P.2d 1029, 1036 (Utah 1989) (a "ground for relief from a conviction or sentence that has once been fully and fairly adjudicated on appeal or in a prior habeas proceeding should not be readjudicated unless it can be shown that there are 'unusual circumstances.'"). See also *Allen v. Friel*, 2008 UT 56, ¶12, 194 P.3d 903 ("When the ground for preclusion is that the petitioner already addressed . . . the issue, the petitioner's claim will not be allowed in a post-conviction relief proceeding absent unusual circumstances."); *Lairby v. Barnes*, 793 P.2d 377, 378 (Utah 1990) (same). "For example, a prior adjudication is not a bar to reexamination of a conviction if there has been a retroactive change in the law, a subsequent discovery of suppressed evidence, or newly discovered evidence." *Hurst*, 777

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<sup>2</sup>When Petitioner filed his successive petition for post-conviction relief, the PCRA "establishe[d] a substantive legal remedy for any person who challenge[d] a conviction or sentence for a criminal offense and who ha[d] exhausted all other legal remedies." Utah Code Ann. § 78-35a-102(1). However, in 2008, the phrase "a substantive legal remedy" was removed and replaced with "the sole remedy." Nevertheless, although the "amendment appears to have extinguished [the] common law writ authority for future cases[, b]ecause [Petitioner] sought post-conviction relief prior to the implementation of the 2008 amendment, relief through [the] common law writ authority is still available to him." *Peterson v. Kennard*, 2008 UT 90, ¶16, 201 P.3d 956.

P.2d at 1036.

With respect to claims not previously raised, the Utah Supreme Court has "consistently recognized exceptions to [the procedural bar] rule in 'unusual circumstances' where 'good cause' excuses a petitioner's failure to raise the claim earlier." *Tillman v. State*, 2005 UT 56, ¶20, 128 P.3d 1123 (citing *Hurst*, 777 P.2d at 1036). See also Utah R. Civ. P. 65C( c) ("Additional claims relating to the legality of the conviction or sentence may not be raised in subsequent [post-conviction] proceedings except for good cause shown.").

According to the Supreme Court, it has

long been our law[] that a procedural default is not always determinative of a collateral attack on a conviction where it is alleged that the trial was not conducted within the bounds of basic fairness or in harmony with constitutional standards. Therefore, even where a claim of error could have been raised earlier, post-conviction relief may be available in those "rare cases" or "unusual circumstances" where "an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred" that would make it "unconscionable" not to reexamine the issue.

*Gardner v. Galetka*, 2007 UT 3, ¶17, 151 P.3d 968 (*Gardner III*).

See also *Medel v. State*, 2008 UT 32, ¶20, 184 P.3d 1226

("[P]rocedural defaults (such as the ban on successive petitions) should not be determinative in those rare and unusual cases . . . [where it would be] unconscionable not to reexamine the issue [raised].").

The Supreme Court has identified five "good cause" common law exceptions<sup>3</sup> to the procedural bar rule, three of which have been codified either by statute or procedural rule. These common law exceptions are:

(1) the denial of a constitutional right pursuant to new law that is, or might be, retroactive, (2) new facts not previously known which would show the denial of a constitutional right or might change the outcome of the trial, (3) the existence of fundamental unfairness in a conviction, (4) the illegality of a sentence, [and] (5) a claim overlooked in good faith with no intent to delay or abuse the writ.

*Hurst*, 777 P.2d at 1037. At the time Petitioner filed his successive petition, exception (1) was implicitly included in the PCRA via Section 78-35a-106(d), exception (2) was expressly provided for in Section 78-35a-104(1)(e), and exception (4) was covered by Rule 22(e) of the Utah Rules of Criminal Procedure. Importantly, because the common law exceptions "retain their

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<sup>3</sup>The Utah Supreme Court has also made clear that the list of common law exceptions set forth in *Hurst v. Cook*, 777 P.2d 1029 (Utah 1989) is not an exhaustive list. See *Gardner v. Galetka*, 2007 UT 3, ¶18, 151 P.3d 968 ("We later clarified that this list of 'good cause' exceptions is not exhaustive.").

independent constitutional significance," *Gardner v. Galetka*, 2004 UT 42, ¶15, 94 P.3d 263 (*Gardner II*), they can be asserted by petitioners raising successive post-conviction claims regardless of whether the exception has been included in the PCRA.

However, the Utah Supreme Court has also held that because frivolous claims and claims previously withheld for tactical reasons must be summarily denied, see *Hurst*, 777 P.2d at 1037, post conviction petitioners must first demonstrate that a claim is neither frivolous nor was it withheld for tactical reasons before the post-conviction court is required to consider whether any common law exceptions apply that would excuse a petitioner's failure to raise the successive claim in a prior proceeding. See *Gardner III*, 2007 UT 3 at ¶26 (because "[f]rivolous claims, . . . and claims that are withheld for tactical reasons should be summarily denied[,] . . . a separate and distinct procedural determination for successive post-conviction claims [must be] made before [the trial court] reach[es] an analysis under the 'good cause' common law exceptions."). In other words, the trial court is required to summarily dismiss all successive post-conviction claims that are frivolous or that were withheld for tactical reasons before considering the applicability of the common law exceptions.

A claim is frivolous if it is facially implausible. See *id.*

at ¶21. Thus, a petitioner raising a successive post-conviction claim must first demonstrate that the claim is not facially implausible before requesting that the trial court consider the common law exceptions. As for claims withheld for tactical reasons, in nearly all cases, if the substance of a successive claim was not raised in a prior post-conviction petition, it must be presumed that the reason for not raising it was tactical or strategic in nature. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect."); *Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955))).

Thus, with respect to any successive claim, in order for the trial court to even consider the common law exceptions, the petitioner must overcome the strong presumption that no tactical reasons existed for counsel not to have raised the claim which is now raised in the successive proceeding. That is, the petitioner must demonstrate that "there was no 'conceivable tactical basis for counsel's actions.'" *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (quoting *State v. Bryant*, 965 P.2d 539, 542 (Utah Ct. App. 1998)). See also *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996)

("[W]e give trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis supporting them."); *State v. Farnsworth*, 368 P.2d 914, 915 (Utah 1962) (defendant charged with burglary did not have incompetent counsel where the "record indicate[d] no action or inaction by the trial attorney which could not rationally find explanation in a legitimate exercise of strategy.").

**c. Whether an Exception Exists to the Procedural Bar Rule Based Upon a State Constitutional Right to the Effective Assistance of Post-Conviction Counsel**

In addition to raising an independent claim of ineffective assistance of prior post-conviction counsel, Petitioner also argues that ineffective assistance of post-conviction counsel constitutes a common law exception to the procedural bar rule and, therefore, many of his other claims are not procedurally barred because the failure to raise these claims in his prior post-conviction petition was the result of ineffective representation. In his memorandum opposing the State's supplemental motion to dismiss, he provides support for this argument by arguing that he has both a state constitutional right and a statutory right to the effective assistance of post-

conviction counsel.

There is no question that Petitioner had a state constitutional right to the effective assistance of trial and appellate counsel during his criminal proceedings. See Utah Const. art. I, § 12 ("In criminal prosecutions the accused shall have the right to . . . defend . . . by counsel."). The Utah Supreme Court has expressly held that a "defendant in a criminal proceeding has a constitutional right to the assistance of counsel at all critical stages of the prosecution." *State v. Hamilton*, 732 P.2d 505, 506-507 (Utah 1986) (citing Utah Const. art. I, § 12). See also *State v. Eichler*, 483 P.2d 887, 889 (Utah 1971) ("It is in accordance with the assurance of the Utah State Constitution that an accused be provided with the assistance of counsel at every important stage of the proceedings against him."). This includes not only the criminal trial, but the appeal as well. See Utah Const. art. I, § 12 ("In all criminal prosecutions the accused shall have the right . . . to have a speedy public trial . . . and the right to appeal."). See also *State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985) ("The Utah Constitution provides that a defendant in a criminal prosecution shall have a 'right to appeal in all cases.' This shows that the drafters of our constitution considered the right of appeal essential to a fair criminal proceeding." (quoting Utah Const. art. I, § 12)). Furthermore, as noted above, because the "right

to counsel includes effective assistance of counsel," *State v. Burns*, 2000 UT 56, ¶23, 4 P.3d 795, it follows that Petitioner had a state constitutional right to the effective assistance of counsel both at trial and on appeal.

Nevertheless, the fact that the Utah Constitution guarantees a criminal defendant the right to effective representation at trial and on appeal does not, in and of itself, warrant the conclusion that a state constitutional right to the effective assistance of post-conviction counsel exists. The Utah Supreme Court has never held that post-conviction petitioners in a death penalty case<sup>4</sup> have a state constitutional right to post-conviction counsel. In *Menzies v. Galetka*, 2006 UT 81, 150 P.3d 480, the Supreme Court expressly avoided the issue when it declared that,

[w]hile we have not yet considered whether such a right exists under the Utah Constitution, there is no need to do so in this case . . . . We do not foreclose the possibility that an indigent death row inmate may have a right to the effective assistance of counsel under the Utah Constitution, but that question must wait for

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<sup>4</sup>In the case of *Hutchings v. State*, 2003 UT 52, 84 P.3d 1150, the Utah Supreme Court considered a decision by the Utah Court of Appeals affirming the trial court's dismissal of a successive, non-capital petition for post-conviction relief. One of the claims raised by the petitioner was that he was "wrongfully denied counsel for purposes of . . . his first petition for post-conviction relief. *Id.* at ¶19. The Supreme Court held that while the petitioner "may have benefitted from professional assistance in the drafting and presentation of his [first] petition, there is no statutory or constitutional right to counsel in a civil petition for post-conviction relief." *Id.* at ¶20 (emphasis added).

another day.

*Id.* at ¶84. Because the Supreme Court has never expressly recognized a constitutional right to effective post-conviction counsel, Petitioner bears the burden of demonstrating that a proper interpretation of the Utah Constitution yields such a right.

Although the Supreme Court has held that the "scope of Utah's constitutional protections 'may be broader or narrower than' those offered by the [federal constitution], 'depending on [our] state constitution's language, history, and interpretation,'" *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶9, 140 P.3d 1235 (quoting *West v. Thomson Newspapers*, 872 P.2d 999, 1004 n.4 (Utah 1994)), based upon a careful consideration of Petitioner's arguments, it is the Court's conclusion that Petitioner has not demonstrated that the Utah Constitution includes the right to the effective assistance of post-conviction counsel.

First, Petitioner argues that he has a state constitutional right to post-conviction counsel under Article I, Section 12. However, any reliance on Article I, Section 12's guarantee of the right to counsel is misplaced. While it may be true that the underlying facts associated with a post-conviction petition concern a criminal conviction and sentence, post-conviction proceedings themselves are civil in nature. The Utah Supreme

Court has specifically held that "a petition for post-conviction relief is a civil action, specifically governed by rule 65C of the Utah Rules of Civil Procedure." *Wickham v. Galetka*, 2002 UT 72, ¶10, 61 P.3d 978. See also *Hutchings v. State*, 2003 UT 52, ¶20, 84 P.3d 1150 ("[T]here is no statutory or constitutional right to counsel in a civil petition for post-conviction relief."). Moreover, the Utah Court of Appeals has held that, to "avoid any misconceptions . . . , it is reiterated that the Utah Const. Art. I, § 12 declares the right to be defended by counsel applies only in criminal prosecutions, not civil actions." *Walker v. Carlson*, 740 P.2d 1372, 1373-74 (Utah Ct. App. 1987) (emphasis added). Thus, because post-conviction proceedings are civil in nature, Petitioner cannot justifiably rely upon Article I, Section 12 of the Utah Constitution to argue that he had a state constitutional right to the effective assistance of post-conviction counsel while prosecuting his first post-conviction petition.

Second, although Petitioner claims that there has been a steady movement toward the recognition of a state constitutional right to the effective assistance of post-conviction counsel, his argument relies primarily on language from cases emphasizing the need for state-funded post-conviction counsel and he does not cite to any language suggesting that a state constitutional right to effective post-conviction counsel is or may be necessary.

See, e.g., *Julian*, 966 P.2d at 259 (Zimmerman, J., concurring) (because the "initial post-conviction proceeding is really part of the criminal trial and review process[,] . . . the defendant should be provided with paid counsel and one state-financed automatic post-conviction proceeding." (emphasis added)); *Parsons v. Barnes*, 871 P.2d 516, 530 (Utah 1994) ("We decline to address and decide in this proceeding whether under the Utah Constitution appointed counsel in a first habeas proceeding has a right to be compensated by the state." (emphasis added)); *Gardner I*, 888 P.2d 608 at 622 ("[T]here may be extraordinary cases in which a petitioner for habeas corpus might be entitled under the Utah Constitution to state-compensated counsel, expert witnesses, or investigators." (emphasis added)).

Third, Petitioner argues that while "the [Supreme] Court stated that it has 'not yet considered whether [the right to counsel] exists under the Utah Constitution,' the [Supreme] [C]ourt indicated that such a right may exist, for example when the lack of state funding 'imposes a crippling burden' on capital petitioners." (Pet'r Mem. in Opp. to Supplemental Mot. at 23) (citing *Menzies*, 2006 UT 81 at ¶ 84 and ¶20 n.3.) However, a plain reading of the *Menzies* decision indicates that in footnote 3 the Supreme Court was referring to administrative rules implementing the now-outdated funding requirements of the PCRA and was simply commenting on the fact that the former statutory

funding scheme, with its absolute caps on the payment of attorneys fees and litigation costs, could impose a crippling burden on capital petitioners. While it may be argued that the Supreme Court was suggesting that without sufficient funds, post-conviction counsel may be unable to properly represent his client, i.e. provide effective representation, nowhere in the decision, either impliedly or expressly, did the Supreme Court link inadequate state funding with the existence of a state constitutional right to the effective assistance of counsel. Thus, Petitioner has failed to show that there has been a "steady movement" toward recognizing a state constitutional right to effective post-conviction counsel or that such a constitutional right is required where inadequate funding is provided.

Fourth, Petitioner argues that because the due process clause in Article I, Section 7 of the Utah Constitution has been interpreted by the Utah Supreme Court to provide broader protections than its federal counterpart, the Utah Constitution's due process clause should be interpreted to guarantee the effective assistance of post-conviction counsel.<sup>5</sup> This is

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<sup>5</sup>Presumably, Petitioner makes the argument that the due process clause under the state constitution is broader than its federal counterpart because he recognizes that he had no federal constitutional right to the effective assistance of post-conviction counsel during his initial state post-conviction proceeding. The United States Supreme Court has expressly held that, under the federal constitution, "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). See also *Menzies v. Galetka*, 2006 UT 81, ¶84, 150 P.3d 480 ("We do, however, note that the United States Supreme Court has previously declined to recognize a federal constitutional right to the effective

consistent, he argues, with other jurisdictions that have recognized a state constitutional right to effective post-conviction counsel under the due process clause of their state constitutions. However, the case law from Alaska, Florida, and Mississippi upon which Petitioner relies and the arguments he makes are unpersuasive. It is true that in *Grinols v. State*, 74 P.3d 889 (Alaska 2003) the Alaska Supreme Court held that "the right to counsel in a first application for post-conviction relief is of a constitutional nature, required under the due process clause of the Alaska Constitution," *id.* at 894, and, not surprisingly, that this includes the right to effective representation which may be challenged in a second petition for post-conviction relief. See *id.* at 895. However, whether the Florida Supreme Court has recognized a constitutional right to the effective assistance of counsel under the Florida Constitution is, at best, unclear. As noted in the concurring opinion in *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999), the Florida Supreme Court has "sent out an ambiguous, if not implicitly contradictory signal, when [it] declined to recognize a specific constitutional obligation of the State for provision of post-conviction counsel in capital cases, while at the same time recognizing a limited constitutional due process right to counsel in all post-conviction proceedings." *Id.* at 329

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assistance of counsel in state post-conviction proceedings.").

(Anstead, J., concurring).

The same is true of the Mississippi case, *Jackson v. State*, 732 So.2d 187 (Miss. 1999), cited by Petitioner. Although the concurring opinion in that case stated that the majority erred in suggesting that a right to post-conviction counsel is found in the Mississippi Constitution, see *id.* at 191-92, the majority opinion itself makes no such express conclusion. Rather, in the context of encouraging the Mississippi legislature to establish a statewide public defender system, the Mississippi Supreme Court stated, "[w]e therefore find that [the petitioner], as a death row inmate, is entitled to appointed and compensated counsel to represent him in his state post-conviction efforts." *Id.* at 191. No mention was made whether this entitlement was constitutional or statutory in nature.

Moreover, it is at least noteworthy that the supreme courts of other states have specifically held that their state constitutions do not include a right to post-conviction counsel. See *In re Beasley*, 107 S.W.3d 696, 697 (Tex. App. 2003) ("Similarly, the Texas Constitution provides no right to counsel in a post-conviction collateral attack."); *McKague v. Warden, Nevada State Prison*, 912 P.2d 255, 258 (Nev. 1996) ("The Nevada Constitution also does not guarantee a right to counsel in post-conviction proceedings. . . ."); *State v. Crowder*, 573 N.E.2d 652, 653-654 (Ohio 1991) ("We agree with the court of appeals

that an indigent petitioner has neither a state nor a federal constitutional right to be represented by an attorney in a post-conviction proceeding." ).

Finally, in its reply to Petitioner's memorandum in opposition to the motion to dismiss, the State raises a noteworthy policy argument against the position that the Utah Constitution should be interpreted to guarantee a right to the effective assistance of post-conviction counsel. According to the State, if the Utah Constitution guarantees a right to the effective assistance of post-conviction counsel, it will allow petitioners "to file endless successive petitions re-litigating claims that they previously lost and raising new claims that they should have raised in a prior proceeding, and arguing that the court must reach their merits because any one of a seemingly endless string of post-conviction counsel had been ineffective." (State's Mem. in Reply at 31.) Under this "infinite continuum of litigation" argument, a state constitutional right to post-conviction counsel would result in "an infinite continuum of litigation in many criminal cases." *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993). As the *Bonin* court noted, if a petitioner

has a [constitutional] right to competent counsel in his or her first state post-conviction proceeding because that is the first forum in which the

ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a [constitutional] right to counsel in the second state post-conviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel's performance in the first state post-conviction proceeding. . . . And so it would go.

*Id.* at 429-30. The same conclusion was reached by the Arizona Supreme Court when it considered this same issue. In *State v. Mata*, 916 P.2d 1035 (Ariz. 1996), the Arizona Supreme Court held that

if defendant deserved effective representation on his first [post-conviction petition] to litigate effectiveness on appeal, then it must follow that he be effectively represented on the second in order to litigate the first. This is because defendant's argument is based on the ill-begotten notion that the right to effective counsel on appeal is empty without effective counsel to challenge appellate counsel's performance. According to defendant's own logic, the right to effective assistance on the first [post-conviction petition] would also be meaningless without another proceeding in which defendant could argue that counsel on that petition was inadequate. We reject

this infinitely regressive notion.

*Id.* at 1052-53.

In light of the foregoing policy argument, if the Utah Constitution is interpreted to include a right to the effective assistance of post-conviction counsel, then any capital petitioner would be in a position to effectively delay and even halt the full effects of his sentence. In order to avoid this arguably unjust and one-sided result, the Utah Constitution should not be interpreted to include a right to the effective assistance of post-conviction counsel. Support for this conclusion is found in *Menzies* itself. There the State argued that a state constitutional right to the effective assistance of post-conviction counsel "would make capital post-conviction litigation interminable and end the finality of death sentences." *Menzies*, 2006 UT 81 at ¶84. The Utah Supreme Court side-stepped making a direct ruling on this argument by stating that "[a]s important as finality is, it does not have a higher value than constitutional guarantees of liberty." *Id.* (quoting *Hurst*, 777 P.2d at 1035). Nevertheless, in the context of the State's infinite continuum of litigation argument, the Supreme Court specifically noted that the PCRA prevents this from occurring because "Utah's post-conviction legislation and associated rules contain appropriate limitations to assist courts in streamlining post-conviction review in death penalty cases." *Id.* Since a

constitutional right to the effective assistance of post-conviction counsel would not be subject to the statutory and rule constraints the Supreme Court has held exists to prevent the possibility of endless post-conviction litigation, the Supreme Court's statement is at least an implied rejection of the notion that the Utah Constitution includes a right to the effective assistance of post-conviction counsel.

Based upon a careful assessment of the arguments provided by Petitioner in support of his contention that capital petitioners enjoy a state constitutional right to the effective assistance of post-conviction counsel, it is the Court's conclusion that Petitioner has not sufficiently demonstrated that a proper interpretation of the Utah Constitution includes a right to the effective assistance of post-conviction counsel. Therefore, Petitioner cannot assert an exception, common law or otherwise, to the PCRA's procedural bar for claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition based upon a state constitutional right to the effective assistance of post-conviction counsel because he has failed to demonstrate that a proper interpretation of the Utah Constitution guarantees him such a right.

**d. Whether an Exception Exists to the Procedural Bar  
Rule Based Upon a Statutory Right to the Effective  
Assistance of Post-Conviction Counsel**

Although Petitioner has not shown that he had a state constitutional right to post-conviction counsel during his initial post-conviction proceedings, nor that a common law exception to the procedural bar rule exists based upon constitutional and common law considerations, under the PCRA he had a statutory right to post-conviction counsel. During the pendency of his initial petition for post-conviction relief, the PCRA required the trial court to determine whether the petitioner was indigent and, if so, "promptly appoint counsel who is qualified to represent [petitioners] in death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure." Utah Code Ann. § 78-35a-202(1)(2)(a). In the *Menzies* case, the Utah Supreme Court considered whether the statutory right to post-conviction counsel entitled capital petitioners to the effective assistance of counsel. The Supreme Court noted that "[g]iven the high stakes inherent in such [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." *Menzies*, 2006 UT 81 at ¶82. In order to take seriously this legislatively created protection, the Supreme

Court concluded that the statutory right to post-conviction counsel necessarily includes "a statutory right to effective assistance of counsel." *Id.*

When the State filed its memorandum in support of the motion to dismiss on February 15, 2008, the State did not contest that Petitioner had a statutory right to the effective assistance of post-conviction counsel. However, new amendments to the PCRA that went into effect on May 5, 2008 added language specifically stating that "[n]othing in this chapter shall be construed as creating the right to the effective assistance of post-conviction counsel, and relief may not be granted on any claim that post-conviction counsel was ineffective." Utah Code Ann. § 78B-9-202(4). In light of this change, in both a supplemental pleading filed on July 25, 2008 and its memorandum in reply filed on February 26, 2009, the State argues that the "no effective assistance of counsel" provision in the PCRA retroactively applies to Petitioner's case and, as a result, while he may have had a statutory right to post-conviction counsel, he did not have a statutory right to the effective assistance of post-conviction counsel. Therefore, the State argues, Petitioner cannot overcome the PCRA's procedural bar for claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition by relying on a statutory right to the effective assistance of post-conviction counsel because the PCRA

now expressly denies Petitioner this statutory right.

The State provides three reasons in support of its contention that the new "no effective assistance of counsel" amendment applies retroactively: First, the new amendment is merely procedural in nature because it neither narrows nor eliminates Petitioner's cause of action and only affects how Petitioner will proceed with his litigation. Second, the new amendment merely clarifies the Legislature's original intent with respect to the right to effective representation in post-conviction proceedings that may have been put into question by the Utah Supreme Court's erroneous conclusion in *Menzies* that the prior Section 202 of the PCRA included the right to the effective assistance of post-conviction counsel. Third, the Legislature intended that the new amendment apply to Petitioner's case. During the 2008 legislative session, Petitioner's case was pending and counsel for the State testified before the Senate Judiciary, Law Enforcement, and Criminal Justice Committee and enumerated the problems the new amendment was intended to remedy and that the amendments were needed immediately.

Petitioner argues in response that the *Menzies* decision effectively vested him with a statutory right to the effective assistance of post-conviction counsel and that this Court does not have the authority to overrule the Utah Supreme Court. In

addition, he also contends that his right to the effective assistance of post-conviction counsel is substantive in nature and that the amendment does more than simply clarify the PCRA, it eliminates this substantive right. Therefore, according to Petitioner, the "no effective assistance of counsel" amendment should not be applied retroactively.

After carefully considering the arguments, it is the Court's conclusion that the "no effective assistance of counsel" amendment to the PCRA does not retroactively apply to Petitioner's case and, therefore, that Petitioner was entitled to the effective representation of post-conviction counsel during his initial post-conviction proceeding.

First, the Court finds unpersuasive the State's argument that the Legislature intended the new amendment to apply retroactively. Nowhere in the 2008 amendments to the PCRA is there language that either impliedly or expressly declares that the new legislation should apply retroactively. Moreover, the fact that counsel for the State argued before a Senate committee that "[w]e need these amendments now for the reasons that I've, I've already said," (State's Supplemental Mem. in Supp. at 18,) does little, in the Court's view, to suggest that the Legislature itself intended the 2008 amendments to apply retroactively.

Second, because Petitioner was appointed counsel under the

PCRA and the Utah Supreme Court has held that capital post-conviction petitioners are statutorily entitled to the effective assistance of counsel under the PCRA, the mandate rule requires this Court to abide by the Supreme Court's ruling. Under the mandate rule,

pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case. The lower court must not depart from the mandate, and any change with respect to the legal issues governed by the mandate must be made by the appellate court that established it or by a court to which it, in turn, owes obedience.

*Thurston v. Box Elder County*, 892 P.2d 1034, 1037-1038 (Utah 1995). The fact that the Supreme Court held in a separate case that capital petitioners have a statutory right to the effective assistance of post-conviction counsel does not alter the application of the rule. In light of the Supreme Court ruling in *Menzies*, this Court must afford Petitioner the right to the effective assistance of post-conviction counsel.

Third, while it is true that "statutory amendments that merely clarify an ambiguity in an original statute [must] be given retroactive effect," *Evans & Sutherland*, 953 P.2d at 440, they can only be "applied retroactively[]" so long as they 'do not

enlarge, eliminate, or destroy vested or contractual rights.'" *Keegan*, 896 P.2d at 620 (quoting *Board of Equalization*, 864 P.2d at 884). While not dispositive, the timing of the "no effective assistance of counsel" amendment certainly suggests that it was intended not as a clarification of the prior PCRA, but as a response to the Supreme Court's decision in *Menzies*. In addition, the amendment nowhere includes language indicating that it was enacted for purposes of clarification. Moreover, as noted above, Petitioner had a vested right to the effective assistance of post-conviction counsel during his initial post-conviction proceedings which the amendment would eliminate if applied retroactively.

Finally, the right to the effective assistance of counsel is a substantive right. In the *Menzies* decision, the Supreme Court set aside the trial court's judgment against the petitioner because the deficient performance of his attorney "effectively forfeited the entire post-conviction proceeding itself." *Menzies*, 2006 UT 81 at ¶100. Clearly, post-conviction counsel's failure in that case to provide effective representation literally undermined every substantive right the petitioner was entitled to during the course of the proceedings. The fact that the failure to provide effective representation affected the petitioner's substantive rights is a good indication that the right to the effective assistance of counsel is itself a

substantive right.

For all of the foregoing reasons, it is the Court's conclusion that the "no effective assistance of counsel" provision cannot retroactively apply to Petitioner's case and, therefore, that Petitioner had a statutory right to the effective assistance of post-conviction counsel during his initial post-conviction proceedings.

Despite this conclusion, however, it is not accurate that Petitioner's statutory right requires the Court to read into the PCRA an exception to the procedural bar for successive claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition based upon ineffective assistance of post-conviction counsel. The statutory right to the effective assistance of post-conviction counsel is a legislatively created protection and, therefore, it is the Legislature that has the power, and the prerogative, to determine whether this statutory right constitutes an exception to the procedural bar rule with respect to successive post-conviction claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction proceeding. Indeed, language from the *Menzies* decision itself does not demonstrate otherwise and, in fact, supports this general principle. As previously explained, on appeal in *Menzies* the State presented the Supreme Court with the "infinite continuum of litigation"

argument contending "that 'writing an effective assistance requirement into section [78-35a-202] would make capital post-conviction litigation interminable and end the finality of death sentences.'" *Id.* at ¶84. In response to this argument, the Supreme Court stated that, while "[w]e would be remiss in our constitutional role if we were to allow finality to trump the interests at stake in post-conviction death penalty proceedings[,] . . . Utah's post-conviction legislation and associated rules contain appropriate limitations to assist courts in streamlining post-conviction review in death penalty cases." *Id.* For support, the Supreme Court cited to Section 78-35a-106, where the Legislature excluded from the PCRA any reference to ineffective assistance of post-conviction counsel as an exception to the procedural bar for successive claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition.<sup>6</sup>

Based upon the foregoing analysis, it is the Court's

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<sup>6</sup>In addition, in concluding that the statutory right to post-conviction counsel includes the right to the effective assistance of counsel, the Supreme Court explained that, by providing for this right, it believed the Legislature had expressly recognized the "high stakes inherent in such proceedings." *Menzies v. Galetka*, 2006 UT 81, ¶82, 150 P.3d 480. In order to take seriously the Legislature's provision for the appointment of counsel, it was essential, in the Supreme Court's view, to conclude that the right to post-conviction counsel included the right to the effective assistance of counsel. *See id.* ("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. Therefore, we hold that [the petitioner] has a statutory right to effective assistance of counsel under Utah Code section 78-35a-202."). There was never any indication in the Supreme Court's reasoning that this conclusion was somehow constitutionally mandated.

conclusion that because the right to post-conviction counsel is a legislatively created protection, it is constitutionally permissible, and within the Legislature's power, to exclude from the PCRA an exception to the procedural bar for successive claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition based upon ineffective assistance of post-conviction counsel. Therefore, Petitioner cannot rely on a statutory right to the effective assistance of post-conviction counsel to overcome the procedural bar for successive claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction proceeding.

## **B. Petitioner's Post-Conviction Claims**

### **1. Timeliness**

The statute of limitations set forth in the PCRA required Petitioner to file his successive petition for post-conviction relief within one year from the time his cause of action accrued. See Utah Code Ann. § 78-35a-107(1). In Petitioner's case, his post-conviction action accrued on October 5, 1998, the date on which the United States Supreme Court denied certiorari review of his direct appeal to the Utah Supreme Court. Thus, Petitioner had until October 5, 1999 to file his current post-conviction action. Because his petition was not filed until November 5, 2007, it is over eight years too late, and therefore it is

untimely. With the exception of claim 1,<sup>7</sup> Petitioner does not directly contest the untimeliness of his successive petition other than to quote language from *Julian* indicating that "the mere passage of time can never justify continued imprisonment of one who has been denied fundamental rights." *Julian*, 966 P.2d at 254 (emphasis in original). Rather, Petitioner asserts that the Court should excuse the untimeliness pursuant to the PCRA's "interests of justice" exception. As explained previously in Section III.A.1.a., the Utah Supreme Court has specifically held that a trial court "presented with an untimely post-conviction petition must consider the interests of justice exception before disposing of the petition." *Johnson*, 2006 UT 21 at ¶16. An analysis of what constitutes an exception "in the interests of justice" involves more than simply making a determination that the successive claim is non-frivolous. The Court must go one step further and examine both the meritoriousness of the petitioner's claim and the reason for [the] untimely filing." *Adams*, 2005 UT 62 at ¶16.

The apparent advantage of this approach is that, by engaging in a merits analysis of each untimely successive claim, the post-

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<sup>7</sup>In claim 1, Petitioner asserts that he could only have brought this claim after learning of the Utah Supreme Court's use of an erroneous legal standard to evaluate whether he had been prejudiced by trial counsel's deficient performance during the penalty phase of the trial. Since the Supreme Court's decision affirming the denial of his initial post-conviction petition was not entered until January 26, 2007, he asserted that he had one year from that date to raise this claim.

conviction court will presumably be ensuring that "truly" legitimate claims are not overlooked, i.e., those claims "where 'an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred' that would make it 'unconscionable' not to reexamine the issue." *Gardner III*, 2007 UT 3 at ¶17. However, a merits review of claims is generally inconsistent with the purposes of the procedural bar rule- to promote finality, conserve judicial resources, and encourage the orderly and prompt administration of justice. See *United States v. Wiseman*, 297 F.3d 975, 979-80 (10th Cir. 2002) (procedural bar rule promotes "'the interests of judicial efficiency, conservation of scarce judicial resources, and orderly and prompt administration of justice.'" (quoting *Hines v. United States*, 971 F.2d 506, 509 (10th Cir. 1992)). Indeed, in the case of successive claims that are untimely, this purpose is undermined by the interests of justice analysis which requires that a merits review of each claim be performed even for those claims which may, ultimately, be procedurally barred and, hence, would otherwise not require a merits review.

In order to avoid having to engage in an unnecessary review of the merits of Petitioner's successive claims, the Court has opted to simply assume that Petitioner's successive petition was timely filed and consider first whether the successive claims are procedurally barred. If, and only if, the Court determines that

a claim would not be procedurally barred had it been timely filed will the Court then conduct an interests of justice analysis on that claim to determine whether the untimeliness of the claim should be excused.

## **2. Claims that Were Raised and Addressed in a Prior Proceeding**

Petitioner candidly and commendably concedes that the following claims were raised and addressed in a prior proceeding:

Claim 1, alleging that Petitioner's constitutionally deficient legal representation at the penalty phase of his capital trial requires reversal of his death sentence. This claim was previously raised as claim 1 in the direct appeal of his conviction and sentence, and as claims 4, 17, 18, and 21 in his initial post-conviction petition, and as claims 1, 3, and 10 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 34);

Claim 2, alleging that Petitioner's conviction and sentence of death were obtained in violation of his constitutional right to the competent assistance of mental health experts. This claim was previously raised as claim 1 in the direct appeal, and as claims 3 and 21 in his initial petition for post-conviction relief, and as claims 1 and 7 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp.

at 133-34);

Claim 3, alleging that Petitioner's guilty plea is constitutionally defective. This claim was previously raised as claim 1 in the direct appeal of his conviction and sentence, and as claims 1, 1(a)(1), 1(a)(2), 1(a)(3), 2, and 17 in his initial petition for post-conviction relief, and as claim 2 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 140);

Claim 4, alleging that Petitioner is actually innocent of Kaye Tiede's and Beth Potts' homicides and there is no factual basis for his guilty plea. This claim was previously raised as claims 17 and 18 in his initial petition for post-conviction relief. (See Pet'r Mem. in Supp. at 157);

Claim 6, alleging that Petitioner's conviction and sentence are invalid because defense counsel labored under actual conflicts of interest that adversely impacted his representation of Petitioner. This claim was previously raised as claim 24 in his initial post-conviction petition and as claim 12 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 190);

Claim 7, alleging that Petitioner's penalty phase voir dire was infected by trial court error, prosecutorial misconduct, and the ineffective assistance of trial counsel. This claim was previously raised as claim 14 in his initial petition for post-

conviction relief and as claims 5 and 6 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 201);

Claim 8, alleging that Petitioner was prejudiced by trial counsel's constitutionally ineffective assistance throughout the penalty phase voir dire. This claim was previously raised as claim 14 in the initial petition for post-conviction relief and as claim 5 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 221);

Claim 11, alleging that trial counsel did not submit written proposed voir dire questions to the court and failed to take steps to insure that the jury selection process would result in a fair and impartial jury. This claim was previously raised as claim 14 in the initial petition for post-conviction relief. (See Pet'r Mem. in Supp. at 255);

Claim 13, alleging that the trial court unconstitutionally limited the scope of voir dire and asked inappropriate questions regarding the religion practiced by the jurors. This claim was previously raised as claim 15 in the initial petition for post-conviction relief. (See Pet'r Mem. in Supp. at 270);

Claim 15, alleging that the trial court erred in giving jury instructions and a special verdict form that were unconstitutionally weighed in favor of aggravation over mitigation. This claim was previously raised as claims 7, 9, and

11 in the initial petition for post-conviction relief and as claim 4 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 294);

Claim 16, alleging that the jury instructions contained no option for imposition or consideration of a life sentence in violation of Petitioner's constitutional rights. This claim was previously raised as claims 12 and 13 in the initial petition for post-conviction relief and as claim 4 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 310);

Claim 17, alleging that the reasonable doubt instruction was unconstitutional. This claim was previously raised as claim 6 in the initial petition for post-conviction relief and as claim 4 in the appeal from the denial of his post-conviction petition. (See Pet'r Mem. in Supp. at 322);

Claim 18, alleging that the trial court erred in giving jury instructions at the penalty phase that improperly shifted the burden of proof to Petitioner. This claim was previously raised as claims 5 and 8 in the initial petition for post-conviction relief. (See Pet'r Mem. in Supp. at 327);

Claim 20, alleging that Petitioner's conviction is unconstitutional because there was a complete breakdown in the adversarial process. This claim repeats the claims alleged in claim 1 and claim 6 of his current post-conviction petition. As

noted above, the allegations raised in these claims were previously raised as claims 1 in the direct appeal of his conviction and sentence, and as claims 4, 17, 18, 21, and 24 in his initial post-conviction petition, and as claims 1, 3, 10, and 12 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 34, 190);

Claim 22, alleging that Petitioner's constitutional rights were violated by the improper admission of the taped statement of Scott Manley. This claim was previously raised as claim 22 in the initial petition for post-conviction relief and as claim 8 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 350);

Claim 23, alleging that Petitioner's convictions, confinement, and sentence are unconstitutional due to prosecutorial misconduct. This claim was previously raised as claim 23 in the initial petition for post-conviction relief and as claim 9 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 368);

Claim 26, alleging that the instructions, taken as a whole, fail to narrow the category of persons eligible for the death penalty in violation of Petitioner's constitutional rights. This claim was previously raised as claim 10 in the initial petition for post-conviction relief. (See Pet'r Mem. in Supp. at 390);

Claim 28, alleging that lethal injection violates

Petitioner's Eighth Amendment right to be free from cruel and unusual punishment. This claim was previously raised as claims 20 and 25 in the initial petition for post-conviction relief and as claims 11 and 13 in the appeal from the denial of his post-conviction petition. (See Pet'r Mem. in Supp. at 401);<sup>8</sup>

Claim 29, alleging ineffective assistance of state counsel. With respect to the ineffective assistance of trial and appellate counsel, this claim was previously raised as claim 19 in the initial petition for post-conviction relief and as claim 10 in the appeal from the denial of his post-conviction petition. (See Pet'r Mem. in Supp. at 409);

Claim 30, alleging that Petitioner was denied his constitutional rights because of the cumulative impact of errors. This claim was previously raised as claim 2 in the direct appeal of his conviction and sentence. (See Pet'r Mem. in Supp. at 416).

All of the foregoing claims were raised and addressed in a prior proceeding, either at trial, on direct appeal, in Petitioner's initial petition for post-conviction relief, or in his appeal from the denial of his initial petition for post-

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<sup>8</sup>In addition to acknowledging that this claim was previously raise in his initial petitioner for post-conviction relief and in the appeal from the denial of his petition, in his memorandum in opposition to the State's motion to dismiss, he moved to withdraw this claim on the basis that, "[i]n the wake of new developments, [Petitioner] does not believe that the Petition is the proper forum for this claim in its current form." (Pet'r Mem. in Opp. at 123).

conviction relief and, therefore, they are procedurally barred under the PCRA and no statutory exception exists that would permit the Court to consider the merits of these claims. See Utah Code Ann. § 78B-9-106(1)(b) and (d). See also *Kell*, 2008 UT 62 at ¶13 (a post-conviction petitioner "is not eligible for relief on claims that were 'raised or addressed' on direct appeal."). This is so even for claims that appellate counsel failed to raise in the most effective manner. See *id.* at ¶17 (after opportunity to be heard on appeal, the Utah Supreme Court "presume[s] that [it] gave full consideration to the claims, regardless of whether [petitioner's] counsel raised them in the most effective manner."). See also *State v. Carter*, 776 P.2d 886, 889 (Utah 1989) (Supreme Court has, "after fully considering the substance of particular claims raised on appeal, summarily (and often without written analysis) dismissed the same as meritless or of no effect. . . . Accordingly, after fully reviewing every claim raised in [a] case, we discuss at length only those issues critical to th[e] appeal.").

However, in *Hurst*, the Utah Supreme Court stated that a "ground for relief from a conviction or sentence that has once been fully and fairly adjudicated on appeal or in a prior [post-conviction] proceeding should not be readjudicated unless it can be shown that there are 'unusual circumstances.'" *Hurst*, 777 P.2d at 1036 (emphasis added). Broadly speaking, the Supreme

Court has defined "unusual circumstances" to mean circumstances "where an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred." *Id.* at 1035. Nevertheless, although it remains unclear what, precisely, constitutes the full range of "unusual circumstances," the Supreme Court provided several possibilities, "[f]or example, a prior adjudication is not a bar to reexamination of a conviction if there has been a retroactive change in the law, a subsequent discovery of suppressed evidence, or newly discovered evidence." *Id.*

Petitioner makes several arguments for the proposition that unusual circumstances exist that excuse the procedural bar as it applies to the successive claims he raises that have already been raised and addressed in a prior proceeding.<sup>9</sup>

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<sup>9</sup>In the section of his memorandum in opposition to the State's motion to dismiss where he presents his discussion that the claims that were previously raised are not procedurally barred, Petitioner raises two issues that, in the Court's view, are not relevant to whether "unusual circumstances" exist that would excuse the procedural bar.

First, Petitioner informs the Court that the Utah Attorney General's Office is engaged in a two-pronged effort "to eliminate the Utah Supreme Court's common law exceptions to failures to raise claims in prior proceedings regardless of the resulting unfairness." (Pet'r Mem. in Opp. at 45). The first prong is the Attorney General's unilateral attempt to amend the PCRA to its advantage and to the disadvantage of post-conviction petitioners. The second prong is to amend the Utah Constitution to allow the legislature, rather than the Supreme Court, to define post-conviction procedures, rights, and remedies. Even if what Petitioner asserts is true, simply because the Attorney General may be seeking to amend the PCRA, with or without the input and assistance of other interested parties, has no bearing whatsoever on whether "unusual circumstances" exist that would excuse the procedural bar in this case. Obviously, the Attorney General's Office is entitled to participate in the legislative process and seek to affect the laws of the state just as any other organization or governmental agency or individual is entitled to do. Moreover, Petitioner's bald assertion that the Attorney General's motive is to "seek[] greater power to expedite executions regardless of the merits of the claims," *id.* at 45, is unhelpful and simply irrelevant to any discussion concerning the existence of common law exceptions

First, Petitioner argues that, after having received adequate funds and performing a more thorough investigation of the case than was previously performed by prior post-conviction counsel, new facts not previously known were discovered which (1) establish the denial of a constitutional right, (2) might have changed the outcome of the trial, and (3) establish the existence of fundamental unfairness in Petitioner's conviction.<sup>10</sup> (See Pet'r Mem. in Opp. at 48). Petitioner's basic argument is that, on the basis of new evidence he discovered as a result of more funding and a more thorough investigation of his case, an

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to the procedural bar rule.

Second, with respect to several of his successive claims, including claims asserting issues that were raised and addressed in a prior proceeding, Petitioner argues that "the PCRA has been crafted by the State to its decided advantage . . . [because t]he State has made the original trial court the first stop [for petitioners seeking post-conviction relief]." Id. at 73. According to Petitioner, this model creates a conflict because it is "commonsense that attacking a judge's decisions is an ineffective way of gaining an impartial hearing from a court." Id. As a result, prior post-conviction counsel was prevented from raising claims, or was required to "water down" claims, in order to avoid potentially raising the ire of the post-conviction judge who was the same judge who presided at Petitioner's trial. Contrary to Petitioner's assertions, it was not the Attorney General who was the drafter of the rule that required the trial court to preside over his prior petition for post-conviction relief. Rather, it was mandated by a rule of civil procedure promulgated by the Utah Supreme Court. See Utah R. Civ. P. 65C(f). Furthermore, it is not commonsense, but more a jaded view of Utah's judicial system, that challenging a judge's decision precludes an impartial hearing on whether the judge's prior rulings or actions were correct. Judges are ethically required to be impartial, regardless of the issues that are being considered. See Utah Code of Judicial Conduct, Canon 1 and Canon 3(B). Petitioner has presented no evidence whatsoever that his post-conviction judge acted unethically or was incapable of being impartial when presented with issues relating to how the judge conducted the trial. Again, this argument is unhelpful and irrelevant to any discussion concerning the existence of common law exceptions to the procedural bar rule.

<sup>10</sup>Petitioner also argues that the claims were "overlooked in good faith with no intent to delay or abuse the writ." *Hurst v. Cook*, 777 P.2d 1029, 1037 (Utah 1989). This particular common law exception clearly cannot apply to the claims that were raised and addressed in a prior proceeding. Obviously, if the claims were previously raised, they were not overlooked.

exception to the procedural bar exists for all of the claims he has raised in his successive post-conviction petition that were raised and address in a prior proceeding. Therefore, he contends, the Court should reconsider these previously raised claims in light of the new evidence.

As noted above, in 1989 when the *Hurst* case was decided, the Supreme Court indicated that newly discovered evidence constitutes "unusual circumstances" under the common law that would justify reconsidering a previously adjudicated claim. However, in *Gardner II*, the Supreme Court explained that, with the passage of the PCRA in 1996, the legislature effectively codified the common law "newly discovered evidence" exception to the procedural bar. See *Gardner II*, 2004 UT 42 at ¶14 ("Likewise, the [PCRA] also provides for relief on the basis of 'newly discovered material evidence,' thereby incorporating the second *Hurst* factor."). See also Utah Code Ann. § 78B-9-104(1)(e). In doing so, rather than identifying newly discovered evidence as an exception to the procedural bar rule, the legislature reformulated it as an independent statutory ground for post-conviction relief. As a result, technically there is no exception under the PCRA to the procedural bar rule on the basis of newly discovered evidence.

Moreover, although the Supreme Court has held that "despite the statutory enactment of the majority of the *Hurst* factors, all

five common law exceptions retain their independent constitutional significance and may be examined by this court in our review of post-conviction petitions," *Gardner II*, 2004 UT 42 at ¶15, the Supreme Court also expressly stated that it will "defer to the legislature unless these fundamental safeguards are repealed or otherwise restricted." *Id.* Because the legislature has neither repealed nor otherwise restricted the PCRA's "newly discovered evidence" ground for relief since *Gardner II* was decided, see Utah Code Ann. § 78B-9-104(1); Utah Code Ann. § 78-35a-104(1) (1996), the requirements for relying upon newly discovered evidence under the PCRA and as a common law exception are co-extensive. It follows that because Petitioner has asserted an exception to the procedural bar rule on the basis "of new facts not previously known which show the denial of a constitutional right or might have changed the outcome of [Petitioner's] trial[, and] the existence of fundamental unfairness in [Petitioner's] conviction," (Pet'r Mem. in Opp. at 48) (emphasis added), he cannot overcome the procedural bar for the successive claims he raises that were raised and addressed in a prior proceeding unless he satisfies the requirements set forth in the PCRA for raising a ground for relief based upon newly discovered evidence.

Under the PCRA, reliance upon newly discovered evidence requires a petitioner to establish that

(I) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) 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.

Utah Code Ann. § 78B-9-104(1)(e)(I)-(iv). Nowhere in his pleadings does Petitioner specifically address any of these requirements for relying upon newly discovered evidence. At best, and entirely by implication, he suggests that the new evidence is material, is not merely cumulative, and is not merely impeachment. Significantly, however, Petitioner does not discuss nor demonstrate that the new evidence he now possesses is evidence that could not have been discovered through the exercise

of reasonable diligence and included in a prior post-conviction petition. That is, he does not affirmatively establish that the State, or any other governmental agency, purposefully withheld material evidence or failed to provide material evidence when requested. Moreover, there is no indication that the affidavits and additional reports submitted by Petitioner in his current successive petition could not have been presented in support of the claims he raised in his prior post-conviction proceeding. Rather than argue that the new evidence he now possesses could not have been discovered through the exercise of reasonable diligence, Petitioner instead contends that the evidence was not discovered as a result of inadequate funding for prior post-conviction counsel.

There appears to be little question that prior post-conviction counsel was frustrated at the funding mechanism in place at the time Petitioner's initial petition for post-conviction relief was filed and that post-conviction counsel believed the funding provided was inadequate and permitted him to perform only a perfunctory investigation into Petitioner's case. Petitioner alleges that prior post-conviction counsel requested payments in excess of the funding caps from the Division of Finance ("Finance") pursuant to the administrative rules governing the payment of counsel, but that these requests were denied despite the fact that the post-conviction court authorized

the requested funding. Two separate judges deemed the funding to be reasonable and necessary. Initially, the funding available to prior post-conviction counsel was \$25,000 in attorney fees and \$10,000 in litigation expenses. Prior post-conviction counsel indicated to the post-conviction court that the \$10,000 limit was insufficient to perform an adequate investigation and, ultimately, the court authorized up to \$40,258.59 in litigation expenses beyond the \$10,000 limit. Upon request from prior post-conviction counsel for payment, Finance denied the request.

Subsequently, Finance modified its rules and raised the amount of attorney fees by \$5,000, for a maximum of \$30,000, and the amount for litigation expenses by \$10,000, for a maximum of \$20,000. However, based upon the information provided by Petitioner and the State in their pleadings, it appears that, although the post-conviction court authorized up to \$40,258.59 in litigation expenses beyond the \$10,000 maximum at the time, prior post-conviction counsel ultimately only requested actual litigation expenses in the amount of \$11,555.16, leaving unused the amount of \$8,444.84 by the court's math. Even if incorrect, the principle is sound. Even if prior post-conviction counsel could not do all he wanted, funding in some amount existed to do more. Despite the apparent funding problems Petitioner argues existed during his prior post-conviction proceedings, it is difficult for the Court to conclude that, with unused litigation

funds still available in some amount, the new evidence that Petitioner now possesses is evidence that could not have been discovered through the exercise of reasonable diligence as a result of insufficient funding.

In any event, even if the Court were to conclude that the funding available hampered prior post-conviction counsel's ability to perform the type of investigation he believed was necessary in the case and, for that reason, the new evidence he now has not only was not discovered, but also could not have been discovered, Petitioner fails to discuss or demonstrate that, when viewed with all of the other evidence presented in the case, no reasonable trier of fact could have found him guilty of the offense to which he pleaded guilty or subject to the sentences of death he received following the penalty phase proceedings.

Thus, because Petitioner has failed to satisfy all of the requirements set forth in 78-35a-104(e)(I)-(iv) for relying upon newly discovered evidence, either as an independent post-conviction claim or as a common law exception to the procedural bar rule, the State is entitled to a dismissal of Petitioner's successive claims that were raised and addressed in a prior proceeding.

Second, in addition to asserting an exception to the procedural bar on the basis of newly discovered evidence, Petitioner also specifically argues that ineffective assistance

of trial, appellate, and prior post-conviction counsel are common law exceptions to the procedural bar rule. (See Pet'r Mem. in Supp. at 32-33). Ineffective assistance of counsel is not one of the common law exceptions enumerated in *Hurst* and, although the list in *Hurst* was not intended to be exhaustive, see *Gardner III*, 2007 UT 3 at ¶18 ("We later clarified that this list of 'good cause' exceptions is not exhaustive."), it is also true that the Utah Supreme Court has never formally recognized ineffective assistance of counsel as a common law exception to the procedural bar rule.

In any case, it is simply unclear to the Court how ineffective assistance of trial or appellate counsel can possibly constitute a common law exception to the procedural bar of Petitioner's successive post-conviction claims that were already raised and addressed in a prior proceeding. For example, the fact that trial counsel may have ineffectively raised a claim that Petitioner now raises again in his successive petition is irrelevant to whether the claim was raised and addressed in a prior proceeding, although it would be relevant to an independent claim on direct appeal that trial counsel was ineffective in raising the claim. Thus, while trial counsel's ineffectiveness in raising a claim may itself constitute a separate claim on direct appeal, it does not constitute an exception to the procedural bar rule for successive post-conviction claims that

were raised and addressed in a prior proceeding.

The same is true for ineffective assistance of appellate counsel. The fact that appellate counsel may have ineffectively raised a claim that Petitioner now raises again in his successive petition is irrelevant to whether the claim was raised and addressed in a prior proceeding, although it would be relevant to an independent claim in an initial post-conviction petition that appellate counsel was ineffective in raising the claim. Thus, while appellate counsel's ineffectiveness in raising a claim may itself constitute a separate claim in an initial post-conviction petition, it does not constitute an exception to the procedural bar rule for successive post-conviction claims that were raised and addressed in a prior proceeding.

As for Petitioner's assertion that ineffective assistance of prior post-conviction counsel constitutes a common law exception to the procedural bar rule, this argument also fails. As the Court concluded above in Section III.A.2.c., Petitioner did not demonstrate that a proper interpretation of the Utah Constitution includes a right to the effective assistance of post-conviction counsel. Therefore, Petitioner cannot assert a common law exception to the PCRA's procedural bar for claims that were raised and addressed in a prior proceeding based upon a state constitutional right to the effective assistance of post-conviction counsel because the Utah Constitution does not

guarantee him this right.

Moreover, the Court also concluded above that the right to the effective assistance of post-conviction counsel is a legislatively created protection. As a statutory right, rather than a common law right, Petitioner cannot rely upon this right as the basis for asserting a common law exception to the procedural bar rule for successive post-conviction claims that were raised and addressed in a prior proceeding.

Therefore, because Petitioner has not demonstrated that ineffective assistance of trial, appellate, or post-conviction counsel constitute common law exceptions to the procedural bar rule, the State is entitled to the dismissal of Petitioner's successive claims that were raised and addressed in a prior proceeding.

Finally, in the same section of his memorandum in support of the successive petition where Petitioner discusses the law governing common law exceptions to the procedural bar rule and where he specifically asserts that ineffective assistance of counsel constitutes a common law exception, he also appears to at least imply that the "severe funding limitations [that] ma[de] proper and thorough investigation impossible," (Pet'r Mem. in Supp. at 33), constitutes a common law exception to the procedural bar rule. If this is Petitioner's contention, it is, again, unclear to the Court how this is so. Common law

exceptions enumerated by the Supreme Court deal with the discovery of new or suppressed evidence, new law, and fundamental or constitutional errors. Lack of adequate funding for post-conviction counsel may provide an explanation in support of Petitioner's allegations that prior post-conviction counsel was ineffective or why counsel was unable to do a constitutionally adequate investigation or why counsel failed to discover important evidence in the case. Indeed, in addressing his claim related to the ineffective assistance of post-conviction counsel, Petitioner asserts that "[b]ecause of the administrative rule which severely limit[ed] funding of both the defense and investigation of post-conviction cases, including the retention of the services of crucial and fundamental expert services, . . . [his prior post-conviction] counsel was unable to provide effective assistance of counsel." (Pet'r Mem. in Supp. at 415). See also *Menzies*, 2006 UT 81 at ¶20 n.3 (in the context of commenting on "the funds needed to secure [the petitioner] a proper post-conviction proceeding," the Utah Supreme Court noted that "it may be the case that the statutory [funding] scheme imposes a crippling burden on [the petitioner]."). Thus, it is conceivable that the lack of adequate funding may result in constitutional or statutory violations. However, inadequate funding, in and of itself, is neither a violation of Petitioner's constitutional rights nor, so long as the proper funding rules

are followed, is it a violation of Petitioner's statutory rights.

In the Court's view, the lack of adequate funding is not relevant to whether the procedural bar should be excused with respect to claims raised by Petitioner in his successive post-conviction petition that were already raised and addressed in a prior proceeding.

Based upon the foregoing analysis, all of Petitioner's successive claims listed above (all but Claims 5, 9, 10, 12, 14, 19, 21, 24, 25 and 27) that were already raised and addressed in a prior proceeding are procedurally barred under the PCRA and under the common law and Petitioner has not shown that any statutory or common law exceptions apply that would permit the Court to consider the merits of these claims.

Therefore, the State is entitled to a dismissal of these claims, again, all but Claims 5, 9, 10, 12, 14, 19, 21, 24, 25 and 27.

### **3. Claims that Could Have Been, But Were Not, Raised in Petitioner's Prior Post-Conviction Petition**

The PCRA specifically precludes Petitioner from obtaining "relief . . . upon any ground that . . . could have been, but was not, raised in a previous request for post-conviction relief." Utah Code Ann. § 78-35a-106(1)(d). Such claims are also precluded by the common law. See *Gardner I*, 888 P.2d at 613

("Issues that could and should have been raised on direct appeal, but were not, may not properly be raised in a habeas corpus proceeding absent unusual circumstances."). With respect to the following claims, they are all claims that could have been, but were not, raised in Petitioner's prior post-conviction petition:

Claim 5, alleging ineffective assistance of trial counsel and trial court error in connection with Petitioner's motion to change venue;

Claim 9, alleging that Petitioner was prejudiced by the trial court's error in failing to properly strike venire-members for cause during the penalty phase voir dire;

Claim 10, alleging that the trial court failed to ask numerous voir dire questions resulting in a flawed jury selection process;

Claim 12, alleging that Petitioner's jury venire was prejudicially biased by the trial court's introduction of the concept of "blood atonement" into the voir dire;

Claim 14, alleging that the exclusion from the jury of persons who were not members of the LDS Church deprived Petitioner of the right to trial by a jury drawn from a representative cross-section of the community;

Claim 19, alleging that the jury was prejudiced by its consideration of extrinsic evidence in violation of the due process and equal protection clauses of the United States

Constitution;

Claim 21, alleging that Petitioner's constitutional rights were violated by the improper admission of evidence at the penalty phase of his trial, including (1) the videotape made by Deli of Petitioner in the Tiede's cabin before the homicides, (2) allowing the prosecution to elicit and perform irrelevant and prejudicial in-court "demonstrations," (3) opinion testimony from James Bell, (4) testimony from James Holland, (5) photographs of the Kaye Tiede and Beth Potts before their deaths, and (6) Linæ Tiede's statement regarding Petitioner's purported devil worship;

Claim 24, alleging that the State failed to disclose material exculpatory evidence;

Claim 25, alleging that Petitioner's death sentence is disproportionate to his culpability and violates his constitutional rights; and

Claim 27, alleging that Petitioner has been prejudiced in investigating and presenting post-conviction claims and in gathering additional evidence to prove his entitlement to relief as a result of an inadequate and unreliable appellate record.

Petitioner nowhere argues that the foregoing claims are ones that could not have been known and raised in a prior post-conviction petition. As explained previously in Section III.A.2.a., unlike the procedural bar rule that applies to

initial post-conviction petitions, see Utah Code Ann. § 78-35a-106(1)( c), which includes a statutory exception based upon ineffective assistance of trial or appellate counsel, see Utah Code Ann. § 78-35a-106(2), no exception based upon the ineffective assistance of post-conviction counsel is expressly included in the PCRA. Thus, any successive claim that was raised or that could have been raised, but was not, in a prior post-conviction petition, is procedurally barred and no exception exists under the PCRA to excuse this failure.

However, although no statutory exception applies to excuse the failure to raise these types of claims in a prior post-conviction petition, because the common law exceptions have "independent constitutional significance," *Gardner II*, 2004 UT 42 at ¶15, the common law exceptions may be relied upon in order to overcome the procedural bar. Petitioner asserts that four common law exceptions apply that excuse his procedural default, including the three that were previously discussed in Section II.B.: (1) the discovery of new evidence as a result of more funding and a more thorough investigation of the case, (2) ineffective assistance of prior post-conviction counsel, (3) that severe funding limitations existed at the time Petitioner filed his prior post-conviction petition which made a proper and thorough investigation of his case impossible, and (4) all of the claims that were not previously raised were overlooked in good

faith with no intent to delay or abuse the post-conviction process.

As an initial matter, the Utah Supreme Court has explained that before the post-conviction court is required to consider whether any of the common law exceptions apply to excuse the procedural bar, a determination must be made that the claims that could have been raised in a prior post-conviction petition, but were not, are not frivolous and were not withheld for tactical reasons. See *Gardner III*, 2007 UT 3 at ¶26 (because "[f]rivolous claims, . . . and claims that are withheld for tactical reasons should be summarily denied[,]. . . a separate and distinct procedural determination for successive post-conviction claims [must be] made before [the trial court] reach[es] an analysis under the 'good cause' common law exceptions.").

Other than merely asserting that his claims were overlooked in good faith, Petitioner nowhere demonstrates that they were not withheld for tactical reasons. It may well be that all of the claims he now raises which could have been raised in a prior post-conviction petition are non-frivolous in nature, but the Court must presume that post-conviction counsel had a legitimate tactical reason for not raising them in the prior petition. See *Gentry*, 540 U.S. at 5 ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.").

As explained above, in order to overcome this presumption, Petitioner must show that "there was no 'conceivable tactical basis for counsel's actions.'" *Clark, 2004 UT 25 at ¶6* (quoting *Bryant, 965 P.2d at 542*). Not only has Petitioner not even attempted to specifically meet his burden, it is unlikely that he could do so.

All 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. For example, given all of the circumstances of the case and the limitations in terms of time, funding, and resources, it is certainly plausible that these claims were not raised in the initial post-conviction petition because they were weaker or less persuasive than the other claims that were raised. Raising weaker claims would have distracted the post-conviction court from fuller consideration of the stronger claims. Raising weaker claims could well have been futile and resulted in a determination the claims were frivolous on their face. This could have been seen as reducing the effectiveness of the arguments as to the stronger claims. Any of these reasons constitute a conceivable tactical basis why post-conviction counsel would not have raised them in Petitioner's prior post-conviction petition.

Furthermore, in Petitioner's memorandum in support of his

successive petition, for every claim that could have been, but was not, raised in a prior post-conviction petition, Petitioner states that he fairly presented the issues associated with these successive claims "in state court pleadings, briefs and associated filings, hearing, and argument." (Pet'r Mem. in Supp. at 174, 235, 252, 259, 277, 331, 338, 379, 385, and 394). If that is true, then even though the issues related to his current claims may not have been specifically and discretely raised as an independent claim in his prior post-conviction petition, they are issues that must have been known to prior post-conviction counsel. They are not, therefore, claims that were overlooked in good faith because the issues involved were present in various state court pleadings submitted or argued by Petitioner's prior trial, appellate, or post-conviction counsel.

Because Petitioner has not satisfied his burden of demonstrating that the claims he now raises that could have been, but were not, raised in his prior post-conviction petition were not withheld for tactical reasons, the Court cannot consider whether any of the common law exceptions to the procedural bar rule apply to his successive petition for post-conviction relief. On this basis alone, the State is entitled to the dismissal of these claims.

Nevertheless, even had Petitioner satisfied his burden of demonstrating that his claims were not withheld for tactical

reasons, he has not shown that any common law exceptions apply that would overcome the procedural bar.

First, Petitioner asserts an exception based upon the discovery of new evidence that resulted from a more recent, and more thorough, investigation of the case because of increased funding available. As previously explained in Section II.B., however, because the statutory and common law exceptions for newly discovered evidence are co-extensive, in order to rely upon this common law exception, Petitioner must satisfy the strict requirements set forth in Section 78-35a-104(e)(I)-(iv). Petitioner has not met this strict requirement. At best, and entirely by implication, his pleadings suggests that the new evidence he has discovered is material, is not merely cumulative, and is not merely impeachment. However, he does not discuss nor demonstrate that the new evidence he now possesses is evidence that could not have been discovered through the exercise of reasonable diligence and included in a prior post-conviction petition. See Utah Code Ann. § 78B-9-104(1)(f)(I) (" . . . neither the petitioner nor petitioner's counsel knew of the evidence . . . in time to include the evidence in any previously filed . . . post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence."). He argues that the lack of funding available for prior post-conviction counsel prevented counsel from performing a

constitutionally adequate investigation of Petitioner's case. This argument, however, is at least somewhat contradicted by the fact that unused litigation funds were still available at the conclusion of his prior post-conviction proceedings.

Further, most of the claims do not involve "investigation" but relate to matters in the record--the change of venue issues, voir dire, the admission of certain evidence, the jury composition, and others.

Moreover, Petitioner has failed to demonstrate that, when viewed with all of the other evidence presented in the case, no reasonable trier of fact could have found him guilty of the offense to which he pleaded guilty or subject to the sentences of death he received following the penalty phase proceedings. See Utah Code Ann. § 78B-9-104(1)(f)(iv), formerly 78-35a-104(e) ("... 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."). Because Petitioner has failed to satisfy all of the requirements set forth in the PCRA, he cannot rely upon newly discovered evidence as a common law exception to the procedural bar rule.

Second, Petitioner asserts an exception based upon the ineffective assistance of prior post-conviction counsel. As the Court concluded above in Section III.A.2.c., Petitioner cannot

assert a common law exception to the PCRA's procedural bar for claims that could have been, but were not, raised in his prior post-conviction petition based upon a state constitutional right to the effective assistance of post-conviction counsel because the Utah Constitution does not guarantee him such a right. Moreover, although Petitioner has a statutory right to the effective assistance of post-conviction counsel, because this is a legislatively created right, rather than a common law right, Petitioner cannot rely upon this statutory right as the basis for asserting a common law exception to the procedural bar rule.

Third, Petitioner argues that a common law exception exists based upon the severe funding limitations that existed at the time Petitioner filed his prior post-conviction petition, which made a proper and thorough investigation of his case impossible. As noted above, the lack of adequate funding for post-conviction counsel may provide an explanation in support of Petitioner's allegations that prior post-conviction counsel was ineffective or why counsel was unable to do a constitutionally adequate investigation or why counsel failed to discover allegedly important evidence in the case. However, inadequate funding, in and of itself, is neither a violation of Petitioner's constitutional rights nor, so long as the proper funding rules are followed, is it a violation of Petitioner's statutory rights. Thus, the lack of adequate funding is not a common law exception

to the procedural bar rule that excuses claims that could have been, but were not, raised, in a prior petition for post-conviction relief.

Moreover, as to this argument, it is an argument in this context that relates to the "infinite continuum of litigation" concept, only in this context it is and could be run amok. If \$40,000 is provided for post-conviction proceedings, it can always be claimed that \$60,000 was needed; if that is provided, \$80,000 could be claimed as necessary, and there could never be an end to such a claim. There is never enough time or money. However, the argument is not directly made by Petitioner, but based on this notion, this cannot be a basis for a common law exception to the procedural bar rule.

Finally, Petitioner argues that all of the claims he now raises that could have been, but were not, raised in his prior post-conviction petitioner are claims that were overlooked in good faith with no intent to delay the post-conviction process. Without question, this is a legitimate common law exception to the procedural bar rule that has been expressly recognized by the Utah Supreme Court. See *Hurst*, 777 P.2d at 1037 ("A showing of good cause that justifies the filing of a successive claim may be established by showing . . . a claim overlooked in good faith with no intent to delay or abuse the writ."). However, the explanations Petitioner provides in his pleadings lead the Court

to believe that the claims were not, in fact, overlooked in good faith. As noted above, in Petitioner's memorandum in support of this successive petition, for each claim that could have been, but was not, raised in a prior post-conviction petition, he states that he fairly presented the issues associated with these claims "in state court pleadings, briefs and associated filings, hearing, and argument." (Pet'r Mem. in Supp. at 174, 235, 252, 259, 277, 331, 338, 379, 385, and 394). Thus, the issues on the basis of which he now raises claims that were not raised in his prior post-conviction petition were apparently known, or should have been known, to prior post-conviction counsel. They are not, therefore, claims that the Court can conclude were overlooked in good faith. Again, many of the claims in this category are based on facts in the trial record, not facts that require an independent investigation beyond examination of the written record.

Furthermore, even if the Court's inferences from the language Petitioner uses in his pleadings are not warranted, other than making the bald assertion that the claims were overlooked in good faith, Petitioner fails to provide a detailed argument explaining how the exception applies to his case or the reasons in support of this exception. As the State points out, Petitioner nowhere provides legal support for the proposition that the "overlooked in good faith" exception applies "merely

because the evidence [does] not establish that [Petitioner] held back his claim[s] for tactical purposes." (State's Mem. in Reply at 89-90). Indeed, in light of the Utah Supreme Court's view that exceptions to the procedural bar rule should only apply "in those rare and unusual cases in which 'an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred,' making it unconscionable not to reexamine the issue," *Medel*, 2008 UT 32 at ¶20 (emphasis added), if a procedural bar can be overcome merely by stating that a claim that could have been, but was not, raised in a prior post-conviction petition was overlooked in good faith with no intent to delay, the exception would effectively eviscerate the rule.

Nevertheless, although Petitioner does not set forth a compelling basis for this argument, presumably the reasons he has in support of the "overlooked in good faith" exception are based upon his contention that new evidence exists that went undiscovered until recently because prior post-conviction counsel was either ineffective or insufficient funding was available to perform a constitutionally adequate investigation.

Even these reasons, however, are insufficient for the Court to conclude that the "overlooked in good faith" exception applies in Petitioner's case. In the most recent decision from the Utah Supreme Court where the "overlooked in good faith" exception was addressed in the context of the discovery of new evidence, see

*Tillman*, 2005 UT 56. The Utah Supreme Court carefully set forth the grounds in support of the "overlooked in good faith" exception. There the Supreme Court held that the petitioner's post-conviction claim that the State had failed to disclose material exculpatory evidence "was overlooked in good faith with no intent to delay or abuse the post-conviction process," *id.* at ¶25, because (1) the petitioner "had no reason to believe that there [was] undisclosed [evidence] until the State revealed [its] existence some nineteen years later," and (2) the State had made "affirmative representations . . . that no such [evidence] existed." In Petitioner's case, he does not argue that he had no reason to believe that the new evidence he now possesses did not exist. Nor does he establish that the State, or any other governmental agency, affirmatively represented to his prior post-conviction counsel that this new evidence did not exist.

Based upon the foregoing analysis, all of Petitioner's claims that could have been, but were not, raised in his prior post-conviction petition are procedurally barred under the PCRA and under the common law and Petitioner has not shown that any statutory or common law exceptions apply that would permit the Court to consider the merits of these claims.

Therefore, the State is entitled to a dismissal of these claims, 5, 9, 10, 12, 14, 19, 21, 24, 25, and 27.

#### **4. Claim Alleging Ineffective Assistance of Prior Post-Conviction Counsel**

In claim 29 of his successive petition, Petitioner argues that because the funding mechanism in place during his prior post-conviction proceedings "severely limit[ed the] funding of both the defense and investigation of post-conviction cases, including the retention of the services of crucial and fundamental expert services, and repeated necessity to litigate funding, [Petitioner's prior post-conviction] counsel was unable to provide effective assistance of counsel." (Pet'r Mem. in Supp. at 415). This claim is not procedurally barred insofar as it is not a claim that was raised and addressed in a prior proceeding. Moreover, it is also not a claim that could have been, but was not, raised as a substantive claim in Petitioner's prior post-conviction petition.

On the other hand, it is a claim that, at least in theory, could have been raised in a prior proceeding. That is, a claim of ineffective assistance of post-conviction counsel could have been raised in a Rule 60(b) motion to set aside the judgment, see, e.g., *Menzies*, 2006 UT 81 at ¶2 ("Following the dismissal of [the petitioner's] case, [post-conviction counsel] withdrew and new counsel was appointed. [The petitioner] then moved to set aside the district court's dismissal of his petition for post-conviction relief pursuant to rule 60(b) of the Utah Rules of

Civil Procedure."), or on appeal following the post-conviction court's dismissal of Petitioner's post-conviction petition. Practically speaking, however, this was not possible because prior post-conviction counsel continued his representation of Petitioner through the appeal of the dismissal of the post-conviction petition. See *Pascual v. Carver*, 876 P.2d 364, 366 (Utah 1994) ("Counsel on appeal is not expected to allege his own ineffectiveness as counsel for the defendant at trial."); *Parsons*, 871 P.2d at 521 ("[T]rial counsel cannot reasonably be expected to raise the issue of his or her own incompetence on appeal."). However, given the circumstances this issue may have been properly raised on appeal, not as a *per se* claim that prior post-conviction counsel was ineffective, but as a claim that he was rendered ineffective by the inadequate funding. This court does not believe that such a claim would be precluded by the above authorities.

Nevertheless, a claim of ineffective assistance of prior post-conviction counsel is not a valid basis for relief under the PCRA or the common law and, therefore, the State is entitled to a dismissal of this claim.

As the State points out, when Petitioner filed his successive post-conviction petition, the PCRA provided "a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense." Utah Code Ann. §

78-35a-102(1) (emphasis added). However, whether prior post-conviction counsel was ineffective is immaterial to whether Petitioner's guilty pleas and the imposition of his death sentences complied with constitutional and statutory requirements. Because Petitioner's claim of ineffective assistance of prior post-conviction counsel is not a claim that challenges his conviction or sentence, it is not a cognizable ground for relief under the PCRA and, therefore, not a claim for which the PCRA can provide a legal remedy.

Moreover, although the PCRA allows a petitioner to seek relief on the basis that he "had ineffective assistance of counsel in violation of the United States Constitution or the Utah Constitution," Utah Code Ann. § 78-35a-104(1)(d), a claim of ineffective assistance of prior post-conviction counsel does not fall within the ambit of this ground for relief because Petitioner is not entitled to the effective assistance of post-conviction counsel under either the federal or state constitutions. The United States Supreme Court has expressly held that, under the federal constitution, "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). See also *Menzies*, 2006 UT 81 at ¶84 ("We do, however, note that

the United States Supreme Court has previously declined to recognize a federal constitutional right to the effective assistance of counsel in state post-conviction proceedings." ). In addition, as the Court previously discussed in Section III.A.2.c., Petitioner does not have a right to the effective assistance of post-conviction counsel under the Utah Constitution. Therefore, because Petitioner does not have a constitutional right to the effective assistance of post-conviction counsel under either the federal and state constitutions, he cannot seek post-conviction relief by asserting that he "had ineffective assistance of counsel in violation of the United States Constitution or the Utah Constitution." Utah Code Ann. § 78-35a-104(1)(d).

Based upon the foregoing analysis, Petitioner's claim of ineffective assistance of prior post-conviction counsel is not a recognized ground for relief under the PCRA and, therefore, the State is entitled to a dismissal of this claim, claim 29.

#### **IV. Conclusion**

Almost nineteen years ago, Petitioner was charged with, pleaded guilty to, and was sentenced to death for the murders of Kay Tiede and Beth Potts. On direct appeal to the Utah Supreme Court, Petitioner's guilty pleas and sentence of death for both murders were upheld. Petitioner subsequently filed a petition

for post-conviction relief challenging his guilty pleas and death sentence. After several years of litigation, the post-conviction trial court granted the State's motion for summary judgment and denied post-conviction relief on all of Petitioner's claims. On appeal, the post-conviction court's grant of summary judgment was affirmed. Petitioner then sought relief in federal court. Although Petitioner's federal case was, and is, still pending, Petitioner filed a successive petition for post-conviction relief in state district court raising thirty separate claims. The State responded with a motion to dismiss.

The parties' arguments for and against dismissal of the successive petition has required the Court to resolve numerous legal issues, including: (1) that the 2008 amendments to the PCRA, which removed the interests of justice exception to the time-bar, does not apply retroactively to Petitioner's case and, therefore, that Petitioner is entitled to rely on the interests of justice exception to argue that, if the filing of his successive post-conviction petition was untimely, it should be excused in the interests of justice; (2) that Petitioner has not shown that he has either a federal or state constitutional right to the effective assistance of post-conviction counsel and, therefore, that ineffective assistance of post-conviction counsel is not a common law exception to the procedural bar rule; (3) that the 2008 amendments to the PCRA expressly stating that post-

conviction petitioners do not have a statutory right to the effective assistance of post-conviction counsel, does not apply retroactively to Petitioner's case and, therefore, in light of the *Menzies* decision, Petitioner had the statutory right to the effective assistance of post-conviction counsel during his initial post-conviction proceedings; and (4) that because the statutory right to post-conviction counsel is a legislatively created protection, it is constitutionally permissible, and within the Utah Legislature's power, to exclude from the PCRA an exception to the procedural bar rule based upon ineffective assistance of post-conviction counsel and, therefore, that Petitioner cannot rely on his statutory right to the effective assistance of post-conviction counsel to overcome the procedural bar for successive claims that could have been, but were not, raised in his prior post-conviction petition.

Although the parties disagree on whether the untimeliness of Petitioner's successive post-conviction petition should be excused, in order to avoid performing a merits review of each claim to determine whether the interests of justice exception applies, which has the potential of being both unnecessary and counter-productive, the Court has proceeded on the assumption that Petitioner's successive petition is not time-barred. Relying on the foregoing legal conclusions, and after carefully considering all of Petitioner's claims, the Court concludes that

all of his claims, with the exception of his claim alleging ineffective assistance of post-conviction counsel, are procedurally barred either because they were raised and addressed in a prior proceeding or because they are claims that could have been, but were not, raised in his prior petition for post-conviction relief.

As for the ineffective assistance of post-conviction counsel claim, the Court concludes that it is not a cognizable claim under the PCRA because it is not a challenge to Petitioner's conviction or sentence. Therefore, it is not a claim for which the PCRA can provide a legal remedy.

For all of the foregoing reasons, the Court grants the State's motion to dismiss Petitioner's successive post-conviction petition.

#### Order

IT IS HEREBY ORDERED that the State's Motion to Dismiss Petition for Post-Conviction Relief is granted.

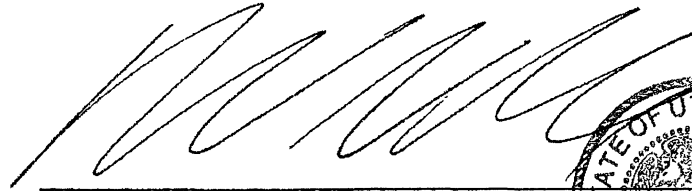
IT IS FURTHER ORDERED that Petitioner's Petition for Relief Under the Utah Post-Conviction Remedies Act is dismissed.

This Ruling and Order constitute the final order of the Court. No further order is necessary to effectuate the Court's

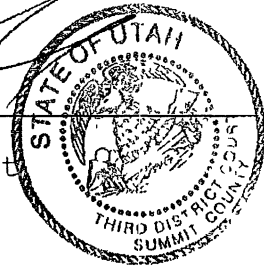
decision.

DATED this 17 day of Aug, 2009.

BY THE COURT:



Judge Bruce C. Lubeck  
Third Judicial District Court



# Addendum C

**RICHARD P. MAURO**  
ATTORNEY AT LAW

43 EAST 400 SOUTH  
SALT LAKE CITY, UTAH 84111  
TELEPHONE (801) 363-9500  
FAX (801) 364-3232

September 13, 2002

Mr. Lynn Vellinga  
Assistant Director  
Utah Division of Finance  
2110 State Office Building  
Salt Lake City, Utah 84114

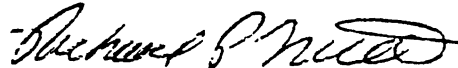
RE: *Von Lester Taylor v. Hank Galetka*, Case No. 990902315. Disbursement of funds for litigation expenses.

Dear Mr. Vellinga:

I have enclosed a bill for Dr. Linda Gummow for services completed as part of litigation expenses in the above matter. This request is made pursuant to Utah Rule of Administrative Procedure 25-14-5.

Please pay Dr. Gummow directly. If you have any questions, please contact me. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard P. Mauro".

RICHARD P. MAURO

FROM : CONGER GUMMOW

JUL. 9. 2002 8:58AM P 2  
P E NO. : 4853702



**Conger & Gummow**  
**247 E. 2100 S.**  
**Salt Lake City, UT 84115**  
**(801)485-8802**

7/9/02

TO: R. Mauro, Esq.

FROM: Linda J. Gummow, Ph.D.

RE: Neuropsychological Evaluation of Von Taylor

The fees for the neuropsychological evaluation of Mr. Taylor including record review and provision of a written summary are itemized in the table below.

<u>Date</u>	<u>Service</u>	<u>Time</u>	<u>Charge</u>
4/10/02	Record Review	10.0	\$1,000.00
4/11/02	Administer Tests	5.0	\$ 500.00
4/12/02	Administer Tests	5.0	\$ 500.00
4/15/02	Administer Tests	5.0	\$ 500.00
4/23/02	Administer Tests	5.0	\$ 500.00
4/27/02	Score Tests and Prepare Summary	5.0	\$ 500.00
5/1/02	Review test results interview family	5.0	\$ 500.00
<b>Total</b>			<b>\$4,000.00</b>

Please remit payment to the address above. Thank you for your courtesy.

Linda J. Gummow, Ph.D.

**RICHARD P. MAURO**  
ATTORNEY AT LAW

43 EAST 400 SOUTH  
SALT LAKE CITY, UTAH 84111  
TELEPHONE (801) 363-9500  
FAX (801) 364-3232

March 24, 2003

Mr. Lynn Vellinga  
Assistant Director  
Utah Division of Finance  
2110 State Office Building  
Salt Lake City, Utah 84114

RE: *Von Lester Taylor v. Hank Galetka*, Case No. 990902315. Disbursement of funds for litigation expenses for investigation.

Dear Mr. Vellinga:

I have enclosed a bill for investigator Ted Cilwick for services completed as part of litigation expenses in the above matter. This request is made pursuant to Utah Rule of Administrative Procedure 25-14-5.

Please pay Mr. Cilwick directly. If you have any questions, please contact me. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard P. Mauro". The signature is fluid and cursive, with a prominent "R" and "M".

RICHARD P. MAURO

# TED CILWICK

**Certified**  
**Paralegal**

**Licensed**  
**Investigator**  
*Lic.#100268*

13820 North 3100 West  
Collinston, Utah 84306

Days 801-242-2209  
Home 435-458-3141

---

March 20, 2003

Dear Rich Mauro:

Here is a bill for work I've done on the Von Taylor death-penalty appeal case.  
Please send it in to the state at your next convenient moment, thank you.

6/4/02	0.4 hrs, meet w/Rich Mauro re further investigation
6/5/02	0.8 hrs, go to Matheson Courthouse, pull Manley prior cases, start looking for him
6/6/02	0.8 hrs, re Manley: talk w/court clerk in Des Moines and write records-request; talk w/warden at prison; do Internet search for him
6/7/02	1.4 hrs, read Mauro petition; in Weber and Davis courthouses, check files re S. Manley; more on Internet
6/14/02	0.1 hrs, talk w/Iowa state police re Manley crim. record request
6/24/02	0.4 hrs, deal w/Iowa state police identification bureau, write them letter re Manley
7/1/02	0.6 hrs, go to Manley address 13 <sup>th</sup> South, talk w/complex mgr.; write memo to Mauro
2/4/03	1.6 hrs, go to L. Gummow's office, meet w/her and Mauro re further invest., inc. family
2/12/03	1.4 hrs, meet w/Rich Mauro; talk w/Taylor's father; talk w/Mary G.; talk w/Kaye C.
2/14/03	1.1 hrs, read materials from Mauro in prep. family interviews
2/15/03	0.1 hrs, talk w/Kaye C. re large meeting
2/27/03	0.1 hrs, talk w/Kaye's husband
3/1/03	4.6 hrs, 36 miles, go to Brigham City, interview client's family and 5 siblings
3/2/03	3.1 hrs, write 9.5-page report yesterday meeting; draft John's release and write him letter; phone conf. w/Mauro re further invest.
3/3/03	2.4 hrs, 46 miles, go to Ogden, find and interview Steve Taylor, write 4-page report; talk on phone w/R. Taylor
3/4/03	1.5 hrs, go to Ogden, look for and find Chris T.'s job, go there 2x; talk

on phone w/T. Taylor about Von-Steve's accident; draft top of affidavit for Mauro

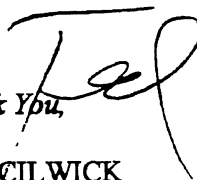
3/6/03      1.9 hrs, in SLC, go to Robert T's home, interview him, write 2.5-page report; talk on phone w/Chris T.'s girlfriend; w/Kathy O.

3/10/03      2.5 hrs, go to Ogden, interview Kathy O., write 2.5-page report; in SLC, meet w/Mauro re my affidavit, further invest.

3/18/03      4.1 hrs, 116 miles, roundtrip Brigham-SLC, meet w/Mauro and family member of victims'

**28.9 Hours; 198 Miles**

28.9 Hours @\$50 ..... \$1,445.00  
 198 Miles @\$0.365 ..... 72.27  
 Fee for Iowa crim. record .. 13.00  
**\$1,530.27 TOTAL**

Thank You,   
 TED CILWICK

**RICHARD P. MAURO**  
ATTORNEY AT LAW

43 EAST 400 SOUTH  
SALT LAKE CITY, UTAH 84111  
TELEPHONE (801) 363-9500  
FAX (801) 364-3232

March 25, 2003

Mr. Lynn Vellinga  
Assistant Director  
Utah Division of Finance  
2110 State Office Building  
Salt Lake City, Utah 84114

RE: *Von Lester Taylor v. Hank Galetka*, Case No. 990902315. Disbursement of funds for litigation expenses.

Dear Mr. Vellinga:

I have enclosed an additional bill for Dr. Linda Gummow for services completed as part of litigation expenses in the above matter. I have also enclosed a copy of the court order authorizing payment. This request is made pursuant to Utah Rule of Administrative Procedure 25-14-5.

Please pay Dr. Gummow directly. If you have any questions, please contact me. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard P. Mauro", with a stylized flourish at the end.

RICHARD P. MAURO

cc. Dr. Linda Gummow



**Conger & Gummow**  
**247 E. 2100 S.**  
**Salt Lake City, UT 84115**  
**(801)485-8802**

3/21/03

TO: R. Mauro, Esq.

FROM: Linda J. Gummow, Ph.D.

RE: Von Taylor

As per your request, I provided three hours of consultation and affidavit preparation in this matter. The charge for this service is \$300.00. Please send the bill in for payment. Payment can be sent to the above address.

Thank you for your courtesy.

Linda J. Gummow, Ph.D.

Cc: David Munk

**RICHARD P. MAURO**  
ATTORNEY AT LAW

43 EAST 400 SOUTH  
SALT LAKE CITY, UTAH 84111  
TELEPHONE (801) 363-9500  
FAX (801) 364-3232

October 13, 2003

Mr. Lynn Vellinga  
Assistant Director  
Utah Division of Finance  
2110 State Office Building  
Salt Lake City, Utah 84114

RE: *Von Lester Taylor v. Hank Galetka*, Case No. 990902315. Disbursement of funds for litigation expenses for investigation.

Dear Mr. Vellinga:

I have enclosed a bill for investigator Ted Cilwick for services completed as part of litigation expenses in the above matter. This request is made pursuant to Utah Rule of Administrative Procedure 25-14-5.

Please pay Mr. Cilwick directly. If you have any questions, please contact me. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard P. Mauro", written in a cursive style.

RICHARD P. MAURO

**Certified**  
**Paralegal**

**Licensed**  
**Investigator**  
*Lic.#100268*


TED CILWICK

# **CERTIFICATE OF SERVICE**

I certify that, on the 30th day of April, 2010, a true and correct copy of the foregoing BRIEF OF APPELLANT was mailed by first-class mail to:

Thomas B. Brunker  
Erin Riley  
Assistant Attorneys General  
Utah Attorney General's Office  
Criminal Appeals  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854

Counsel for Respondent

  
Stephanie Verhamme