

1982

Pierre Dale Selby et al v. Lawrence Morris : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PIERRE DALE SELBY a/k/a/ DALE :
S. PIERRE and WILLIAM ANDREWS, :

Petitioners :

-v- :

Case Nos. 18234 & 18230

LAWRENCE MORRIS, Warden, :
Utah State Prison, :

Respondent. :

BRIEF OF RESPONDENT

Original Petition for a Writ of Habeas Corpus

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FILED

SEP 14 1982

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| LAWRENCE MORRIS, Warden, | : | |
| Utah State Prison, | : | |
| | : | |
| Respondent. | : | |

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Petitioners have filed original habeas corpus petitions seeking to set aside their death sentences on the authority of this Court's recent decision in State v. Wood, No. 16486. The procedural posture of petitioners' case is outlined in the Statement of the Facts, below.

RELIEF SOUGHT ON REVIEW

Respondents seek an order from this Court denying petitioners' request for post-conviction relief, and re-affirming their sentences of death.

STATEMENT OF THE FACTS

Petitioners were each convicted of three counts of first-degree murder and two counts of aggravated robbery following a jury trial in the Second District Court, in and for Weber

County, Utah on or about November 15, 1974. Theirs was the first trial under the 1973 Utah Capital Punishment Statutes, Utah Code Ann., §§ 76-3-206, 207 (Supp. 1973); and § 76-5-202 (Supp. 1973). The trial was bifurcated into a guilt phase and penalty phase as required by § 76-3-207. Both received death sentences on each count of first-degree murder.

1. THE TRIAL:

a. THE GUILT PHASE: Evidence adduced at the guilt phase was overwhelming and directly linked the petitioners to the crime.¹ Although this Court has already twice reviewed petitioners' trial on direct appeal and post-conviction review (See State v. Pierre, Utah, 572 P.2d 1338 (1977), cert. denied, 439 U.S. 882 (1978); State v. Andrews, Utah, 574 P.2d 709 (1977), reh. denied, State v. Andrews, Utah, 576 P.2d 857 (1978), cert. denied, 439 U.S. 882 (1978); Pierre v. Morris, Utah, 607 P.2d 812 (1980), cert. denied, 449 U.S. 891 (1980); and Andrews v. Morris, Utah, 607 P.2d 816 (1980), cert. denied, 449 U.S. 891 (1980)). A detailed factual summary of the evidence presented at the guilt phase is provided in Appendix A of this brief for the benefit of those recently appointed justices who have not previously reviewed this case.

The instructions given the jury at guilt phase submitted only the maximum degrees of each of the crimes charged--first-degree murder and aggravated robbery--because there was no

¹There were sixty-six prosecution witnesses and more than 300 exhibits of physical evidence.

evidence presented to warrant instructions on lesser included offenses. See State v. Pierre, 572 P.2d at 1353-54. The instructions defined first-degree murder as killing intentionally or knowingly under any of six aggravated circumstances (Instr. No. 8, A. 351-353), to wit:

1. killing more than one person;
2. creating a great risk of death to others than the victim and himself;
3. killing in perpetration of a robbery;
4. killing in perpetration of a rape;
5. killing for pecuniary gain;
6. killing for personal gain.²

Instruction No. 11 (App. C-16) required the jury to unanimously agree on one of the charged aggravating circumstances to convict and disallowed the jury from accumulating their vote on differing alternatives pleaded by the State. Instruction No. 8 further required that at least one of the charged aggravating circumstances for first-degree murder must be found beyond a reasonable doubt.

b. THE SENTENCING HEARING: Again, for the Court's reference, a detailed summary of the evidence presented at the sentencing phase of petitioners' trial is set forth in Appendix B. Suffice it to say, virtually no mitigating evidence was

²Utah's first-degree murder statute contains eight possible aggravating circumstances which distinguish the crime as a capital offense. Thus, it is significant that the facts of petitioners' crimes were so abhorrent as to warrant an instruction on six of the eight possible statutory aggravating circumstances.

presented in Pierre's behalf, and Andrews' mitigating evidence was most minimal.³

The record reflects that no proposed jury instructions for the sentencing hearing were submitted by the defendants. The sentencing instructions given by the trial court (Appendix C) advised the jury that ". . . the burden of proof to satisfy the jury that a death sentence is appropriate is on the state" (Sent. Instr. No. 2, R. 412), and that "it is your exclusive province to determine the sentence in this case, and you should consider and weigh the factors mentioned in this instruction for this purpose" (Sent. Instr. No. 1, R. 412) (emphasis added). Factors they were instructed to weigh and consider were listed in Sentencing Instruction No. 4 (R. 414-415), and included:

1. All evidence received during the trial [guilt phase];
2. All evidence received during the penalty proceedings relevant to sentence;
3. The nature and circumstances of the crime;
4. The character of each defendant, his background, his general personal history, his mental and physical condition and other factors;
5. Whether he had any significant history of prior criminal activity;

³Andrews claims that four statutory mitigating circumstances arguably were present in his case. However, the evidence at trial clearly refutes his claim that his participation in the crime was "relatively minor" or that he was under the "substantial domination of another person. This Court previously found Andrews' complicity in these murders deep; his actions bold and gross." He "significantly aided in triggering a milieu that ended in catastrophe and death." State v. Andrews, 572 P.2d at 711 (See Appendix A). His age at the time of trial was 20, hardly a "youth" as contemplated by the statute. Finally, although Andrews' prior criminal record was not extensive, it was existant. He admitted to a juvenile record for burglary and confinement in a juvenile detention facility for one year and four months, after which he was convicted as an adult of auto theft (Tr. 4250, 4252-55).

6. Whether the murder was committed while the defendant was under the influence of any mental or emotional disturbance or duress;
7. Whether the defendant acted under duress or substantial domination of another person;
8. The general capacity of the defendant to appreciate the wrongfulness of his conduct, or the ability to conform his conduct to the standards required by law and whether such capacity was substantially impaired as a result of any mental disease, or intoxication;
9. The youth of the defendant at the time of the crime;
10. Whether the defendant was a party to the murder committed by another person and whether his participation was relatively minor or major;
11. Any other factor in mitigation or aggravation that would be considered by a responsible person making such a decision in an appropriate manner (See Utah Code Ann., § 76-3-207 (Supp. 1973)).

The jury was advised that "there is no fixed standard as to the degree of persuasion needed for a particular sentence...." (Instr. No. 2), and was also instructed that they could use the instructions previously given in the case [trial] as they may apply (Sent. Instr. No. 1), and were cautioned that they could not consider any information not presented either at the trial or sentencing proceedings (Sent. Instr. No. 4).

Only Pierre raised any objection to the instructions given on burden of proof generally saying that "if not reasonable doubt," it should "be at least clear and convincing evidence...." (Tr. 4304-05). However, he did not elaborate on how this burden of proof should operate in the sentencing hearing or apply to the aggravating and mitigating factors.

The jury unanimously determined that this was a proper case for the imposition of the death penalty and the petitioners were accordingly sentenced to death.

2. DIRECT APPEAL: Both petitioners directly appealed their convictions and sentences to this Court. See State v. Pierre, Utah, 572 P.2d 1338 (1977), cert. denied, 439 U.S. 882 (1978); State v. Andrews, Utah, 574 P.2d 709 (1977), reh. denied, State v. Andrews, Utah, 576 P.2d 857 (1978), cert. denied, 439 U.S. 882 (1978). Pierre filed an initial brief, the first eight points of which were joined by Andrews in Point I of his initial brief. The only possible reference to burden of proof at sentencing in these early briefs is found in one sentence in Pierre's Point I at p. 16 where he states that the jury was not directed by the trial court to give any greater [sic] weight to the statutory aggravating or mitigating circumstances. Aside from this single comment's obvious ambiguity, it cannot be viewed as preserving the burden of proof issue since Pierre later amended his brief and replaced Point I with a new Point I which did not deal with the issue. His amended brief (which again was joined by Andrews) did contain Point XII which addressed the subject, but in a very narrow context. The appellant's precise framing of the issue was as follows:

The appellant contends that the prosecution has the burden to prove beyond a reasonable doubt the absence of any mitigating factor which the defendant raises in the sentencing proceedings. If this burden is not placed on the State than [sic] the consequence of death can be imposed if the trier of fact finds that the evidence of the aggravating circumstances preponderates over the evidence of the mitigating factors.

Amended Brief of Pierre, Case No. 13903, p. 14.⁴ Accordingly, this Court rejected Pierre's specific claim in State v. Pierre, supra, as follows, finding that the sentencing jury was adequately instructed on burden of proof:

At the penalty phase, aggravating and mitigating circumstances authorized, respectively, by Sections 76-5-202 . . . and 76-3-207 . . . are weighed by the jury. We believe under these procedures our statutes are not constitutionally vulnerable.

572 P.2d at 1345.

Defendant contends that the failure of the District Court to apply the standard of proof beyond a reasonable doubt in the defendant's penalty phase violated the Due Process Clause of the Utah and United States Constitutions. Specifically he contends that the State had the burden to prove beyond a reasonable doubt the absence of any mitigating factor which the defendant raises in this phase, and he cited Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) as controlling (Emphasis added).

Id. at 1346. After distinguishing Mullaney as not controlling matters in a penalty phase, and noting that Gregg v. Georgia, 428 U.S. 152 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976), did not require such a standard at penalty phase, the Court continued:

⁴Petitioner Andrews now claims at footnote 2 of his present brief that Pierre's Point XII was, in fact, a broader statement of the burden of proof issue. However, when the entire Point is read in context, it stands for no more than the narrow legal claim quoted above. Pierre's entire Point XII is included as Appendix D of this brief for the Court's reference.

The substantial thrust of defendant's concern about standard of proof relates to his contention that the State must be required to prove beyond a reasonable doubt the absence of any mitigating factor which he raised in the penalty phase, and that matter has, of course, just been discussed.

Implicit, in that matter, however, is the allegation of error that the Utah Statute, Sec. 76-3-207(2), . . . does not establish a sufficiently high burden on the State in those instances where the penalty of death is imposed, as in this case, to pass constitutional muster, nor he contends, did the District Court's instruction require that sufficiently high burden. That instruction stated that ". . . the burden of proof to satisfy the jury that a death sentence is appropriate is on the State."

We hold that in the penalty phase of capital offenses the burden of proof necessary for a verdict of death over life imprisonment is on the State and that the totality of evidence of aggravating circumstances must therefore outweigh the totality of mitigating circumstances. We believe the District Court's instruction thereon satisfied that requirement in this case. And in our appellate review of this matter we conclude that the aggravating circumstances were overwhelmingly present against the defendant and the mitigating circumstances favoring him most minimal--even from the point of view of inference.

Id. at 1347-48. This Court then found that Utah's standard was better than Georgia's and Texas' in that they did not require that aggravating factors outweigh mitigating ones, and that Utah's standard better met the basic concern mentioned in Gregg, "to minimize the risk of wholly arbitrary and capricious action." Id. at 1348. See also: State v. Andrews, supra, 574 P.2d at 710:

Because a comprehensive review of this case, being a capital one, is appropriate and necessary, we now address matters not specifically raised in defendant's brief, viz. . . . whether the standard of proof applied by the District Court in the defendant's penalty phase violated due process....

As to these . . . matters, the reasons and conclusions stated in Pierre, supra, concerning them apply and control here.

Rehearing was denied in both cases. 576 P.2d 857 (1978). It is significant to note that neither Pierre's nor Andrews' petition for rehearing in any way challenged this Court's decision with respect to the standard of proof at sentencing. The United States Supreme Court denied certiorari on the direct appeals in October, 1978.

3. STATE POST-CONVICTION REVIEW: In November 1978, Pierre and Andrews each filed a Petition for Post-Conviction Relief in Third District Court, Salt Lake County, Utah (C 78-7381 and C 78-7126, respectively). At this point, they began to frame the burden of proof claim in new contexts neither asserted at trial nor on direct appeal. Paragraph 12(a)(4) of Andrews' Amended Petition and Pierre's Petition contended that Utah's capital sentencing statutes provide:

no standards or guidance by which sentencing authorities are to balance enumerated and unenumerated aggravating and mitigating factors in making a capital sentencing determination, or by which they are to determine whether a particular aggravating or mitigating factor has been established.

Andrews (but not Pierre) continued his paragraph 12(a)(4) as follows:

- (a) The jury was not given any standards by which to weigh the various aggravating and mitigating factors which it was allowed to consider in determining sentence;
- (b) The verdicts of the jury were not required to give, and did not give, any indication of what aggravating and mitigating factors the jury found present and what weight it gave to each of them;
- (c) The State was required to meet no burden of proof as to any fact in the sentencing hearing, other than a general burden of persuading the jury

that the death penalty "was appropriate"; and
(d) The jury was not told by what standard it should determine whether or not any particular aggravating or mitigating factor had been established.

Pierre (but not Andrews) raised three additional burden of proof arguments in paragraphs 12(g) (h) and (i) of his Petition, respectively, as follows:

(g) The Utah Capital Punishment Statute is unconstitutional in that it requires the State in the penalty phase of the proceedings to prove that the aggravating circumstances outweigh the mitigating circumstances by a weight of the evidence standard as opposed to a beyond a reasonable doubt standard.

(h) The Utah Capital Punishment Statutes unconstitutionally shift the burden of proof to the defendant in a capital case requiring that he prove that his life should be spared.

(i) The Utah Capital Punishment Statute is unconstitutional in that no meaningful bifurcated hearing is provided for in that the same evidence which must be found by the jury beyond a reasonable doubt in the guilt phase of the trial may be considered by the jury in the penalty phase, thus precluding the jury from finding any sentence other than death once death has been established.

Significantly, Pierre's and Andrews' petitions also sought an order granting them authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts alleged in their petitions and for an additional sixty days after the completion of any hearing to brief the issues of law raised in the petitions. The clear implication of these requests was that petitioners had neither fully ascertained the facts nor the controlling law to support their claims when they filed their petitions despite the fact that they had had approximately one year to do so from the date their convictions were affirmed by the Utah Supreme Court.

The respondent moved to dismiss the petitions alleging, inter alia, that petitioners could not, by writ of habeas corpus, raise issues that were or could have been raised in their direct appeals to the Utah Supreme Court. Judge James S. Sawaya agreed finding that the petitions only raised issues of fact or law which were either already raised or could have been raised on direct appeal, and were issues which were known or should have been known by petitioners at that time, citing Maguire v. Smith, Utah, 547 P.2d 697 (1976); Bennett v. Smith, Utah, 547 P.2d 696 (1976); and Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967). In his Findings of Fact and Conclusions of Law, he also found, inter alia, that: (1) no developments of fact or law material to the determination of the legality and constitutionality of the convictions and sentences of petitioners had occurred since their direct appeals and (2) their claim that Utah's death penalty is being applied arbitrarily and discriminatorily fails to state a claim upon which relief could be granted or on which a hearing need be held; moreover, said issue could and should have been raised on direct appeal.

Both petitioners appealed the above ruling to the Utah Supreme Court. Andrews' brief on appeal focused almost entirely upon habeas corpus doctrines of waiver and the procedure utilized by Judge Sawaya in dismissing the habeas corpus petitions. His Point IV, at pp. 17-23, claimed that dismissal of his petition was improper because certain new United States Supreme Court decisions on the death penalty should have been applied retroactively to his case. However, none of these cases related, in any way, to the

burden of proof claims in his habeas corpus petition, nor did he claim that they did. Andrews failed in his brief to even ask this Court, in the alternative, to review the claims he had raised in his petition.

Pierre's appeal brief from the dismissal of his habeas corpus petition generally alluded to all claims he had raised below saying:

The issues resulting from the Court's opinion in State v. Pierre, supra, include points 12(a) 1, 2, 4 and 5 of appellant's petition for Writ of Habeas Corpus.

Point I at p. 5. He then said:

Issues with respect to the burden of proof to be applied at the sentencing phase also arose out of the ruling in State v. Pierre, supra, and were raised by appellant in his petition for Writ of Habeas Corpus in points 12(g), (h) and (i).

Point I at p. 5. At pp. 6-9, Pierre, like Andrews, spoke of new United States Supreme Court decisions which should have had retroactive application to him, none of which dealt with the burden of proof issues raised in his petition. He also spoke of other issues which he claimed needed factual development in an evidentiary hearing. Again, the burden of proof issue was not one of them. Thus, Pierre's only ground as to why his burden of proof claims should have been heard was that they arose from the State v. Pierre, supra, decision of this Court and that he, therefore, could not have raised them sooner than on habeas corpus. This argument, of course, ignores the fact that Pierre, like Wood, could indeed have argued for the specific degree of persuasion

eventually adopted in State v. Wood, supra, and at the very least could have challenged the standard identified and articulated in State v. Pierre, supra, in his petition for rehearing in that case. He failed to do either. As will be shown, infra, this Court rejected this argument. Finally, in Point II, pp. 10-22, of Pierre's brief, he briefed and argued the burden of proof claims he had raised in paragraphs 12(g), (h), and (i) of his petition below.

This Court affirmed the dismissal of Andrews' petition for post-conviction relief on February 13, 1980, in Andrews v. Morris, Utah, 607 P.2d 816 (1980), cert. denied, 449 U.S. 891 (1980), on the express ground of appellate waiver found by the lower court. This Court also found that (1) the petition was "drawn in conclusional language" and "lacking in factual data to support his allegations, contrary to the mandate of Rule 65B(i)," Utah Rules of Civil Procedure, Andrews v. Morris, 607 P.2d at 821; (2) petitioner "had the burden of showing . . . why the issues raised could not have been raised on appeal" and failed to do so, Id. at 821; (3) no new constitutional decisions had been rendered to warrant habeas relief in petitioner's case even if it were assumed they applied retroactively,⁵ Id. at 822-824; and (4) petitioner's claim that the death penalty was being applied in an arbitrary, capricious and discriminatory manner was properly dismissed as a matter of law on the strength of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). Understandably, this Court did not address the burden

⁵Again, none of these cases dealt with the burden of proof claim.

of proof issue other than in the context of appellate waiver because Andrews had failed to assert the claim in his brief.

The dismissal of Pierre's petition was also affirmed on February 13, 1980, on the express ground of appellate waiver. Pierre v. Morris, Utah, 607 P.2d 812, 813 (1980), cert. denied, 449 U.S. 891 (1980). However, because Pierre had alleged that his burden of proof issue, among others, had arisen from this Court's decision in State v. Pierre, supra, and that he, therefore, could not have raised it on direct appeal, the Court made the following observations:

. . . a cursory review of the record and our opinion in Pierre reveals that none of the foregoing issues [including the burden of proof applicable at the sentencing phase of the trial] arose from the decision in Pierre, but in fact they were part and parcel of it, having been raised by Pierre at that time and ruled upon. He has simply reframed the same issues in the petition now before us.

Id. at 813. The Court, then in dictum, commented on the merits of Pierre's new claims (see footnote 14, infra):

We now turn to Pierre's second assertion of error, viz., that the standard of proof required in the sentencing phase of the trial is unconstitutional in that it: (a) shifts the burden of proof to the defendant; (b) permits the sentencing authority to exercise unguided discretion; and (c) is in effect a mandatory penalty of death in those circumstances where little or no mitigating circumstances are shown.

We note at the outset that the standard of proof issue was raised on direct appeal in Pierre and that we then adopted the totality of proof test as established in Proffitt v Florida, wherein the matter was stated as follows:

"The directions given to the judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed [Emphasis added]."

Contrary to Pierre's contention, the burden of proof is not shifted to the defendant under the Utah sentencing procedure. The defendant is simply afforded the opportunity of presenting any evidence he may have in mitigation. The most that can be said for such a procedure is that the defendant then has the "burden" of going forward, but only if he so desires. The burden of proof remains at all times on the prosecution.

In regard to the remaining contention that the death sentence can be mandatorily imposed, such is without merit under the facts of this case for Pierre did pursue his right to offer evidence of mitigating circumstances and argued the issue to the jury. As we noted in Pierre, the matters which he offered in mitigation were "most minimal--even from the point of view of inference." Also, for the reasons more fully stated in Andrews, we deem the case of Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) cited by Pierre as wholly inapposite.

Id. at 814-15. Summarizing, the Court said:

We reaffirm our holding in Pierre that the statutory system under which the sentence of death was imposed does not violate the Constitutions of Utah or of the United States and that all claimed errors are without merit. Following said statutory procedure, and given the especially heinous nature of the murders in this case, no rational judge or jury could have returned a verdict other than guilty, nor could they have determined other than that the aggravating circumstances thereof clearly outweighed those in mitigation.

Id. at 815.

Finally, with respect to Pierre's claim that he should have been accorded an evidentiary hearing on his claim that the death penalty was being applied in Utah in an arbitrary, capricious and discriminatory manner, this Court replied:

Pierre's third contention as to why issues now presented that could not have been previously presented is that he and Andrews are the first persons faced with death under the 1973 statute and that they are hence entitled to have their offenses compared with those in other Utah death penalty cases with a view toward determining if they are sufficiently aggravated as to warrant the death penalty.

The foregoing contention was addressed in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, wherein it was determined that it is not necessary to undertake such a case-by-case comparison. That conclusion rests upon that court's interpretation of Proffitt v. Florida, supra. In Proffitt, the court determined that the Florida statute is constitutional "on its face" and that the Florida system satisfies the constitutional deficiencies identified in Furman. With this we do not disagree. Consequently, we deem the issue to be one of law, not fact, and hence one that could have been presented on direct appeal. In any event, the trial court correctly dismissed as a matter of law since the Utah statute is clearly constitutional "on its face" and we determined in Pierre that it was meticulously followed.

Id. at 814.

Both petitioners petitioned for rehearing claiming, inter alia, that the Court had chosen to address only certain concerns contained in their habeas corpus petitions. (The Court had, of course, discussed the burden of proof issue in Pierre v. Morris, supra.) They also claimed that this Court's decision in

State v. Brown, Utah, 607 P.2d 261 (1980),⁶ reaffirmed the totality of aggravating circumstances outweighing the totality of mitigating circumstances test established in State v. Pierre, supra, and that the jury was not so instructed in their case. State v. Pierre, supra, had, of course, held otherwise. Rehearing was accordingly denied.

Following yet another denial of certiorari in the United States Supreme Court, petitioners filed for federal habeas corpus relief in the United States District Court, District of Utah, Civil Nos. C 78-0461 and 0462, having exhausted their state court remedies. However, on September 21, 1981, this Court issued its per curiam opinion in State v. Wood, No. 16486. Judge David K. Winder ordered all federal proceedings temporarily stayed, and directed petitioners to make application in the Utah Supreme Court to determine whether Wood applied retroactively to petitioners so as to result in a reversal of their sentences of death (See Exhibit A to petitioners' present petitions).

This Court's final opinion in Wood issued on May 13, 1982, held that it was error for the sentencing judge to impose the death penalty "in the face of evidence which creates a reasonable or substantial doubt as to the appropriateness of that penalty." Wood at 11. Hence, Wood's death sentence could not be "sustained when the mitigating factors [were] sufficiently strong when compared with the aggravating factors to create a substantial and reasonable doubt that the death penalty [was] appropriate,"

⁶Brown was rendered on February 7, 1980, just six days prior to issuance of the decision in petitioners' cases.

Id. at 6, and where such doubt was in fact expressed by the sentencing judge. See Id. at 7. The Court then set down the appropriate standard to be followed in an attempt to eliminate the possibility that future sentencing judges or juries would commit similar error in applying the totality of proof test identified in State v. Pierre, supra:

The sentencing body, in making the judgment that aggravating factors "outweigh," or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the conclusion that the death penalty is justified and appropriate after considering all the circumstances. This means that upon consideration of all of the circumstances relating to this defendant and this crime the sentencing authority must be convinced beyond a reasonable doubt that the death penalty should be imposed.

Id. at 15. This standard, to the extent that it adds a reasonable doubt requirement in the consideration of whether the death penalty is "justified and appropriate," is a clear departure from one expressly and consistently upheld in all previous cases construing Utah's present capital punishment law, namely that in the penalty phase of a capital case:

. . . the burden of proof necessary for a verdict of death over life imprisonment is on the State and . . . the totality of evidence of aggravating circumstances must therefore outweigh the totality of mitigating circumstances (Emphasis added).

State v. Pierre, supra, 572 P.2d at 1347-48. See also: State v. Andrews, supra, 574 P.2d at 710; State v. Codianna, Utah, 573 P.2d 343, 348 (1977); State v. Brown, supra, 607 P.2d at 268, 270

(1980); Pierre v. Morris, supra, 607 P.2d at 814-15. The Court has apparently now added a degree of persuasion to the burden of proof which had been previously upheld.

The judgments of conviction and sentence are final in petitioners' cases--"final" meaning "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari [to the United States Supreme Court] had elapsed" all before the new rule was announced. Linkletter v. Walker, 381 U.S. 618, 622, n. 5 (1965).

Petitioners now ask this Court (1) to apply its decision in Wood, supra, retroactively to their cases and overturn their death sentences twice previously upheld by this Court; and (2) to find that they were sentenced under a statutory scheme which is being applied arbitrarily, capriciously and discriminatorily in Utah.

ARGUMENT

POINT I

PIERRE'S AND ANDREWS' PETITIONS FOR WRITS OF HABEAS CORPUS SEEKING VACATION OF THEIR DEATH SENTENCES BASED ON RETROACTIVE APPLICATION OF THE SENTENCING STANDARD ANNOUNCED IN STATE V. WOOD, SUPRA, OR ON THE ALTERNATIVE GROUND THAT THEY WERE SENTENCED UNDER A STATUTORY SCHEME THAT PERMITTED ARBITRARY, CAPRICIOUS, AND DISCRIMINATORY APPLICATION OF THE DEATH PENALTY, SHOULD BE DENIED IN THAT THE CLAIMS DO NOT RISE TO THE LEVEL OF A SUBSTANTIAL DENIAL OF PETITIONERS' CONSTITUTIONAL RIGHTS, AS REQUIRED BY RULE 65B(i), UTAH RULES OF CIVIL PROCEDURE, AND RAISE ISSUES WHICH CANNOT BE CONSIDERED ON HABEAS CORPUS, PER ANDREWS V. MORRIS, UTAH, 607 P.2D 816 (1980), EITHER BECAUSE THE ISSUES HAVE BEEN WAIVED OR HAVE ALREADY BEEN ADJUDICATED BY THIS COURT.

Petitioners seek post-conviction relief through petitions for writs of habeas corpus pursuant to the provisions of Rule 65B(i), Utah Rules of Civil Procedure. That rule reads, in pertinent part:

Any person imprisoned in the penitentiary or county jail under a commitment of any court, whether such imprisonment be under an original commitment or under a commitment for violation of probation or parole, who asserts that in any proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the State of Utah, or both, may institute a proceeding under this Rule (Emphasis added).

In State v. Wood, supra, this Court held that the appropriate standard to be followed by the sentencing authority in a capital case is the following:

After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.

Id. at 15, quoting from this Court's Wood per curiam opinion issued September 21, 1981. It further stated:

The sentencing body, in making the judgment that aggravating factors "outweigh," or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the conclusion that the death penalty is justified and appropriate after considering all the circumstances. This means that upon consideration of all of the circumstances relating to this defendant and this crime the sentencing authority must be convinced beyond a reasonable doubt that the death penalty should be imposed.

Id. at 15.

The Court made clear that its decision to require this new standard was based not on federal or state constitutional grounds, but "on the preferred grounds of statutory construction." Id. at 13. It conceded that:

Whether the United States Supreme Court would hold that the reasonable doubt standard must be applied in presentence hearings in capital cases as a requirement either of the Eighth or the Fourteenth Amendments, is problematic because of the wide variety of state statutory schemes that exist. The conclusion in any particular case might well turn on the over-all effectiveness of the statutory scheme in minimizing capriciousness.

Id. at 13.

In fact, the United States Supreme Court has never, as a matter of constitutional law, required a particular burden of proof or burden of persuasion for determining whether the death penalty should be imposed in a particular case. See Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Stephens v. Zant, ____ U.S. ____, 102 S.Ct. 1856 (1982); Eddings v. Oklahoma, ____ U.S. ____, 102 S.Ct. 869 (1982); Hopper v. Evans, ____ U.S. ____, 31 Cr.L. 3041 (May 24, 1982). It simply has held that state capital punishment statutes must be designed to sufficiently guide the sentencing authority in its decision on the death sentence so as to avoid arbitrary and capricious application of that sanction. Furman v. Georgia, 408 U.S. 238 (1972). Accordingly, the use of or the degree of a burden of proof at a sentencing hearing may vary from state to state, depending on the statutory scheme adopted. The Supreme

Court implicitly recognized this in its review of three different state statutes in Gregg, supra, Jurek, supra, and Proffitt, supra.⁷

In short, the Wood decision is expressly grounded solely on principles of statutory construction and not on state or federal constitutional law. The burden of persuasion announced therein is merely an evolutionary development in Utah's system of criminal justice. The new standard, although it is clearly an attempt to improve this state's capital sentencing procedures, does not represent a change of constitutional magnitude. This Court has never held that the former sentencing standard, identified in State v. Pierre, Utah, 572 P.2d 1338 (1977), cert. denied, 439 U.S. 882 (1978) as a totality of the proof test, deprived petitioners, or any other capital defendants, of a fair penalty hearing free of arbitrariness and capriciousness. See Pierre v. Morris, supra, 607 P.2d at 815. Therefore, failure to apply the Wood standard in petitioners' cases could not constitute a substantial denial of their constitutional rights under either the Eighth or the Fourteenth Amendments. Because Rule 65B(i) clearly limits the right to petition for post-conviction relief under said rule to an individual who has suffered "a substantial denial of his rights under the Constitution of the United States or of the State of Utah," petitioners' contention that they are entitled to relief thereunder is entirely without merit.

⁷Texas' statute provided for a burden of proof at sentencing phase; the Florida and Georgia statutes did not.

Secondly, this Court's decision in Andrews v. Morris, supra, prohibits petitioners from raising the burden of persuasion issue on habeas corpus because they failed to adequately raise the issue at trial and on direct appeal (where they could and should have), and therefore it has been waived or forfeited for purposes of post-conviction relief.⁸ In Andrews v. Morris, the proper scope and limitations upon the use of habeas corpus after conviction were plainly set out:

It [habeas corpus] is not a substitute for and cannot properly be treated as a regular appellate review [citation omitted]. It is an extraordinary remedy which is properly invocable only when the court had no jurisdiction over the person or the offense, or where the requirements of law have been so disregarded that the party is substantially and effectively denied due process of law, or where some such fact is shown that it would be unconscionable not to re-examine the conviction. [Citing Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967)].

Id. at 820, quoting from Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968). See also: Bennett v. Smith, Utah, 547 P.2d 696

⁸It should be noted here that (1) neither Pierre nor Andrews submitted jury instructions at penalty phase (2) Andrews did not object at all to the jury instructions given at penalty phase, and although Pierre did object, his objection was entirely too broad to be interpreted as going to the specific burden of persuasion issue raised in Wood; (3) as noted infra, the burden of proof issue raised by petitioners on direct appeal was expressly limited to their contention that the State should be required to prove beyond a reasonable doubt the absence of mitigating circumstances; and (4) although petitioners have, since State v. Pierre, supra, argued that they could not have presented the burden of proof issue on direct appeal because that decision itself raised the issue (see Pierre v. Morris, 607 P.2d at 813, where this Court rejected that argument), they failed to raise the issue in their petitions for rehearing on direct appeal, where they clearly could have.

(1976); Maguire v. Smith, Utah, 547 P.2d 697 (1976).⁹ Citing Fay v. Noia, 372 U.S. 391 (1963), Stone v. Powell, 428 U.S. 465 (1976) and Wainwright v. Sykes, 433 U.S. 72 (1977), the Court the noted that "Utah law appears to be entirely consistent with the evolving federal law" in this area. Id.

A review of that "evolving federal law" at this point will aid in reaching a fuller understanding of the soundness of Utah's appellate waiver doctrine. The federal courts, in a spirit of comity between the federal and state courts, out of respect for

⁹Respondent and this Court recognizes that habeas corpus review has its place in rare cases where injustices have occurred which rise to a level of a substantial likelihood of constitutional deprivation making it wholly unconscionable not to review the conviction. Webster v. Jones, Utah, 587 P.2d 528, 530 (1978), and Martinez v. Smith, Utah, 602 P.2d 700, 702 (1979). However, petitioners claim that because this is a capital case it would be per se unconscionable not to accord them review. This notion was expressly rejected by this Court in Pierre v. Morris, supra, 607 P.2d at 815:

"No issues have been made to appear such that 'it would be wholly unconscionable not to re-examine.' [Citing Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967).] The severity of the death penalty standing alone does not render it unconscionable for this Court to deny further review. Rather, it is the substance of the claims asserted that governs [Citing Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979)."

See also: Spinkellink v. State, 350 So.2d 85, 86-87 (Fla. 1977) (England, J., concurring).

"Although death is indeed different, I do not believe either the federal or the state constitution requires a different basis for according post-conviction relief in death penalty cases, and I see more harm than good in providing one."

finality of judgments, and to prevent the "sandbagging" of issues by defense attorneys, have rejected attempts by state prisoners on federal habeas corpus to raise issues not adequately preserved in the state courts and have deemed such issues waived or forfeited. Wainwright v. Sykes, 433 U.S. 72 (1977).

In Sykes, the United States Supreme Court reversed a decision of the Fifth Circuit Court of Appeals which had affirmed the issuance of a writ of habeas corpus to a Florida state prisoner because a statement was illegally obtained in violation of Miranda and was used against him at trial. The Supreme Court reversed because Sykes did not properly raise the matter at trial in violation of Florida's contemporary objection rule.¹⁰ The Court, realizing the importance of state court judgments and after noting that a contrary rule would encourage "sandbagging" by defense lawyers,¹¹ said:

¹⁰Utah's contemporaneous objection rule is found in Rule 4 of Utah's Rules of Evidence and Rule 46, Utah Rules of Civil Procedure. See also: State v. Starlight Club, Utah, 406 P.2d 912 (1965); State v. Tritt, Utah, 463 P.2d 806 (1970); and State v. McMahon, Utah, 489 P.2d 112 (1971). Utah law also requires that objections to jury instructions be noted. See Rule 51, Utah Rules of Civil Procedure; State v. Dubois, Utah, 98 P.2d 354 (1940); and State v. Peterson, Utah, 240 P.2d 504 (1952).

¹¹Illustrative of the "sandbagging" problem is footnote 1 of petitioners' present habeas corpus petitions where they say they are limiting their issues to those based on this Court's decision in State v. Wood and that they do not intend to waive or abandon any other issue relative to the legality of their convictions and sentences by not incorporating it into their petitions. One wonders how long the criminal justice system must wait for them to finally reveal their claims and bring this litigation to an end. Their failure to assert all claims should, indeed, preclude them from doing so at a later date.

The failure of the federal habeas courts generally to require compliance with a contemporaneous objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turns to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous objection rule surely falls within this classification.

We believe the adoption of the Francis rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a tryout on the road for what will later be the determinative federal habeas hearing. There is nothing in the Constitution or in the language of § 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedures in making known his objection.

Id. at 90.

Similarly, in Francis v. Henderson, 425 U.S. 536, 541-42 (1976), the high Court noted the strong interests of government in requiring prompt assertion of federal constitutional rights: (1) to quickly avoid the necessity of a second trial; and (2) to

minimize the possibility that a re-trial cannot occur because of the staleness of the case if reversed years later. The Court then said:

If, as Davis held, the federal courts must give effect to these important and legitimate concerns in § 2255 proceedings, then surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions. Those considerations require that recognition be given "to the legitimate interests of both State and National Governments, and . . . [that] the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always [endeavor] to do so in ways that will not unduly interfere with the legitimate activities of the States." Younger v. Harris, 401 U.S. 37, 44. "Plainly the interest in finality is the same with regard to both federal and state prisoners. . . . There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations." Kaufman v. United States, 394 U.S. 217, 228."

See also: Davis v. United States, 411 U.S. 233 (1973), and Estelle v. Williams, 425 U.S. 501 (1976).

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The rationale of the above cases extends not only to a state's contemporaneous objection rule at trial but also to a state's procedural rule that precludes a defendant from raising issues for the first time in state post-conviction proceedings, which could and should have been raised on direct appeal. Much like a contemporaneous objection rule, the doctrine of appellate waiver requires a defendant to timely raise appealable issues on direct appeal or they will be deemed waived. The rule thus promotes finality of judgments and prevents "sandbagging" by

defense counsel. As noted earlier, Utah has adopted such a rule in Rule 65B(i) and in a long line of cases commencing with Bryant v. Turner, supra, and Brown v. Turner, supra.¹² Finding its position "entirely consistent with the evolving federal law" exemplified in Wainwright v. Sykes, Stone v. Powell,¹³ Estelle v. Williams, and Francis v. Henderson, all supra, this Court in Pierre v. Morris, supra, and Andrews v. Morris, supra, applied the doctrine of appellate waiver to petitioners' cases as to issues not raised on direct appeal.¹⁴ Such application of appellate waiver is supported by the fact that each of the petitioners in Sykes, Francis and Davis, all supra, had not only failed to raise objections at trial, but had also failed to raise the issues on appeal, and the United States Supreme Court made note of this fact in each opinion. Moreover, the Sykes Court twice framed the central issue there as being "the reviewability of federal claims

¹²Many states adhere to a similar doctrine of appellate waiver: Alabama, Arizona, California, Florida, Maine, Nevada, New York, Oklahoma, Pennsylvania, and Washington, among others.

¹³In Stone v. Powell, supra, the Court held that a state prisoner who asserted that his trial had been prejudiced by the admission of evidence procured in an illegal search and seizure should be denied federal habeas relief unless he could show that he had been denied a full and fair opportunity to litigate that claim in the state court.

¹⁴The Court also addressed the merits of petitioners' various legal claims in dictum, apparently in an abundance of caution, and perhaps with a view of showing a lack of error despite the clear application of the waiver doctrine. Such an approach by a state court was recognized as permissible in Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir. 1979); Stewart v. Ricketts, 451 F.Supp. 911 (D.C. GA. 1978); Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980); and Morishita v. Morris, F.Supp. ____ C 80-0729A (D.C. Utah 1981) (attached as Appendix E).

which the state court has declined to pass on because not presented in the manner prescribed by its procedural rules," 433 U.S. at 81-82; and "we deal only with contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure." Id. at 87 (emphasis added). Thus, the scope of the issue was not limited strictly to contemporaneous objection rules. Sykes in fact has been repeatedly applied to the procedural default of appellate waiver. See United States v. Frady, ____ U.S. ____, 31 Cr. L. 3013, 3016 (1982); Norris v. United States, ____ F.2d ____, 31 Cr. L. 2443 (7th Cir. 1982); Sincox v. United States, 571 F.2d 876, 879 (5th Cir. 1978); Forman v. Smith, 633 F.2d 634 (2d Cir. 1980), cert. denied, 450 U.S. 1001 (1981); Barker v. Jones, 511 F.Supp. 527 (D.C.E.D.N.Y. 1981); and Morishita v. Morris, supra (Appendix E).

As a general proposition, then, petitioners are barred from litigating issues on habeas corpus which were neither preserved at trial by way of a contemporaneous objection nor timely asserted on direct appeal. The issues are deemed waived.

The sole exception to this rule is where the petitioner adequately shows both "cause" for his failure to comply with the state's procedural rule, and actual prejudice resulting from the alleged constitutional violation. Sykes, supra, 433 U.S. at 90-91.¹⁵ Sykes focuses on whether the petitioner in fact had a

¹⁵The Wainwright Court expressly rejected the "knowing and deliberate waiver of a known right" standard previously enunciated in Fay v. Noia, 372 U.S. 391 (1963).

justifiable reason for not asserting his claim. In the absence of such a reason the claim is deemed to be forfeited¹⁶ regardless of whether the petitioner, or his counsel acting for him, consciously intended to waive a claim known to exist. Even if a justifiable reason exists, Sykes, also deems the claim forfeited unless the petitioner can show that failure to assert it caused him "actual prejudice." Sykes, supra, at 91. The United States Supreme Court did not give precise definition to the required "cause" and "prejudice" elements of Sykes in that opinion, but recently in Engle v. Isaac, ____ U.S. ____, 31 Cr. L. 3001 (1982), and United States v. Frady, supra, the two prongs of the Sykes test were clarified and the scope of Sykes was expanded. Notable is the Supreme Court's statement in Engle, supra, where the habeas petitioners urged that Sykes requirement of a showing of "cause and prejudice" be limited to cases in which the constitutional issue raised did not involve the truth-finding function of the trial. After discussing the significant costs of habeas review the Court concluded:

We do not believe, however, that the principles of Sykes lend themselves to this limitation. The costs outlined above do not depend upon the type of claim raised by the prisoner. While the nature of a constitutional claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing. We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief. Id. at 3007.

¹⁶Forman v. Smith, 633 F.2d 634, 638 (2d Cir. 1980), states that a "forfeiture" under Wainwright is the more appropriate term as compared to a "waiver" under Fay v. Noia, supra.

Thus, the Supreme Court extended Sykes, requiring a demonstration of cause and actual prejudice, to govern in all collateral attacks following procedural default, including the failure to take a direct appeal. See also: United States v. Frady, supra, 31 Cr. L. 3013, 3017 (1982).

As stated earlier, the Sykes Court "left open for resolution in future decisions the precise definition of the 'cause and prejudice' standard. . . ." Id. at 87, and merely noted that Sykes had offered no explanation for his failure to object at trial, and the evidence of guilt at trial was "substantial to a degree that would negate any possibility of actual prejudice" resulting from the alleged constitutional violation. Id. at 91. In an earlier decision, the United States Supreme Court held that "cause" was not shown where the facts concerning the constitutional issue were "notorious and available" to the defense in the "exercise of due diligence" at the time the objection should have been raised and that the failure to exercise due diligence combined with the absence of prejudice from the alleged illegalities precluded the raising of the issue. Davis v. United States, 411 U.S. at 238.

The United States Supreme Court clarified the Sykes "cause and prejudice" test somewhat in Engle, supra, and Frady, supra. In Engle the petitioners claimed to have been denied due process by jury instructions that imposed upon them the duty of proving an affirmative defense. The Court held that the state's long-standing practice of employing this type of instruction did

not establish "cause" for petitioners' failure to object to the instructions at trial, specifically:

[T]hat the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not by-pass the state court simply because he thinks they will be unsympathetic to the claim (Emphasis added).

Id. at 3007. The Engle Court also concluded:

Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling unawareness of the objection as cause for a procedural default (Emphasis added).

Id. at 3008.

Federal Circuit courts have added additional criteria to the "cause and prejudice" standard. In Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir. 1977), reh. denied en banc, 554 F.2d 474, cert. denied, 434 U.S. 957 (1977), the court held that a mere allegation that the petitioner's trial counsel was ineffective in failing to raise the objection was insufficient to show "cause." In fact, the court determined that if this assertion were accepted,

it would effectively eliminate any requirement of showing cause at all. If a petitioner could not demonstrate any legitimate cause, he would only have to raise the spectre of ineffective assistance of counsel to get his challenge heard.

Id. at 683. Similarly, the Second Circuit Court of Appeals in Indiviglio v. United States, 612 F.2d 624, 631 (2d Cir. 1979), held that it was:

irrelevant whether counsel's failure to raise at trial Indiviglio's present Fourth Amendment claim is characterized either as a matter of sheer inadvertence or as one of professional judgment . . . because neither is sufficient to constitute "cause" . . .

See also: Estelle v. Williams, 425 U.S. at 512, n. 9; and Polizzi v. United States, 550 F.2d 1133, 1138 (9th Cir. 1976).

The above cases indicate that "cause" is not easily established, nor should it be if Sykes is to have any force.

On the question of what constitutes prejudice, the United States Supreme Court in United States v. Frady, supra, concluded that:

[T]he degree of prejudice [must] be evaluated in the total context of the events at trial. . . .

[Petitioner] must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they work to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions (Emphasis by the Court).

Id. at 3018. See also: Sykes, supra, at 91; United States v. Agurs, 427 U.S. 97, 112-113 (1976); Forman v. Smith, supra, at 641-643; and Morishita v. Morris, supra (Appendix E).

In Evans v. Britton, 472 F.Supp. 707 (S.D. Ala. 1979) (affirmed, Hopper v. Evans, supra, ____ U.S. ____, 31 Cr.L. 3041 (1982)), the federal habeas court applied the "cause and prejudice" test to a capital murder case where the adequacy of jury instructions was in issue. The court stated with respect to the "prejudice" element that:

there is no prejudice at all flowing from the procedural default since there is little if any likelihood that any other verdict would have been reached by the jury.

Id. at 711.

On direct appeal to this Court, Pierre and Andrews generally discussed reasonable doubt as a standard at penalty phase (see Appellant's Amended Brief, State v. Pierre, No. 13903, Point XII, pp. 12-15) (Appendix D). However, their specific contention concerning the need for such standard was that:

the prosecution has the burden to prove beyond a reasonable doubt the absence of any mitigating factor which the defendant raises in the sentencing proceedings.

Id. at p. 14. That was the only burden of proof issue petitioners raised; their general argument for a reasonable doubt standard at penalty phase cannot be interpreted as going to all aspects of the sentencing process in that it was clearly limited to the issue concerning proof of absence of any mitigating factor.¹⁷ Unlike Walter Wood, petitioners did not argue that the sentencing authority must be convinced beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors before the death penalty can be imposed (see Appellant's Brief, State v. Wood, supra, at p. 23). Quite simply, petitioners could and should have raised on direct appeal the very issue Wood raised on his, but they failed to do so. See Engle v. Isaac, supra, 31 Cr. L. at 3008.

¹⁷This Court recognized the limited nature of appellants' argument and addressed that issue only. See State v. Pierre, 572 P.2d at 1347-48; State v. Wood, supra, at 10.

Petitioners argue that even if they did not raise the burden of proof issue on direct appeal, that issue could not be deemed waived because this Court addressed the issue sua sponte in State v. Pierre, supra, as it is permitted to do per State v. Stenback, 78 Utah 350, 2 P.2d 1050 (1931). However, even if this Court considers the issue preserved as to petitioners on that basis, it is preserved only to the extent to which it was addressed. State v. Pierre announced only that the State had the burden of proof necessary for a verdict of death over life imprisonment and that the totality of evidence of aggravating circumstances must therefore outweigh the totality of mitigating circumstances.

Id. at 1347-48. It went no further. Although the decision identified the totality of proof test as the appropriate standard of proof to be applied at sentencing phase, it "did not specify what the requisite standard of persuasion or certitude was to justify the determination that aggravating outweighed mitigating circumstances." Wood at 10. In short, as was also stated in Wood at 9, "the precise issue raised by Wood in this case has not been addressed before by this Court" (emphasis added). Therefore, the State v. Pierre Court's sua sponte consideration of the burden of proof issue certainly did not preserve the degree of persuasion issue (addressed for the first time in Wood) as to petitioners, if such sua sponte consideration, in fact, preserved any issue at all as to them.

Under the "cause and prejudice" test of waiver established in Wainwright v. Sykes, supra, petitioners, having

offered no compelling reason or "cause" why the issue was not raised on direct appeal, cannot raise it through collateral proceedings. Also, "prejudice" has not been, nor, indeed, can it be shown for two reasons. First, respondent has shown that petitioners' claim respecting the degree of persuasion issue (i.e., failure to apply the Wood standard in their cases) does not constitute a substantial denial of their constitutional rights and can be dismissed as a matter of law. Second, the evidence in their cases, like that in Wainwright v. Sykes, supra, and Evans v. Britton, supra (affirmed ____ U.S. ____, 31 Cr.L. 3041 (1982)), was "substantial to a degree that would negate any possibility of actual prejudice," and there is "little likelihood that any other verdict would have been reached."¹⁸ The degree of prejudice "must be evaluated in the total context of the events at trial" and infect "his entire trial with error of constitutional dimensions." Frady, supra, at 3018.

The doctrine of waiver, as heretofore followed in Utah and as thoroughly explained in Andrews v. Morris, supra, requires that this Court dismiss the burden of persuasion issue as waived by petitioners for purposes of post-conviction habeas corpus. Such application of the waiver doctrine is "a fair means of assuring finality of appeals without any sacrifice of constitutional rights." Andrews v. Morris, 607 P.2d at 821.

Finally, petitioners' allegations that the death penalty has been and is being arbitrarily, capriciously, and discriminatorily applied in Utah (specifically inconsistent use

¹⁸See Point III of this Brief, p. 64.

of differing standards of proof at sentencing) in Utah simply recasts broader issues already adjudicated by this Court. Rule 65B(i) deals with prior adjudication as follows:

(2) . . . The complaint shall further state that the legality or constitutionality of his commitment or confinement has not already been adjudged in a prior habeas corpus or other similar proceeding; and if the complainant shall have instituted prior similar proceedings in any court, state or federal, within the State of Utah, he shall so state in his complaint, . . . and shall set forth the reasons for the denial of relief in such other court. In such case, if it is apparent to the court in which the proceeding under this Rule is instituted that the legality or constitutionality of his confinement has already been adjudged in such prior proceedings, the court shall forthwith dismiss such complaint, giving written notice thereof by mail to the complainant, and no further proceedings shall be had on such complaint (emphasis added).

As noted in Andrews v. Morris, supra, Andrews conceded that the issues of arbitrary, capricious, and racially discriminatory application of the death penalty in Utah "were substantially raised and addressed on the direct appeal." Id. at 818, 819. That same court then again addressed the merits of those issues in its decision on Andrews' habeas corpus appeal and found they could be disposed of as a matter of law. Id. at 825. See also: Pierre v. Morris, 607 P.2d 812 (1980), cert. denied, 449 U.S. 891 (1980). In their instant petitions, Pierre and Andrews offer extremely tenuous evidence in an effort to resurrect the arbitrary, capricious and discriminatory application of the death penalty claim previously considered in Andrews v. Morris, Pierre v. Morris, and State v. Pierre, supra. Clever recasting of issues already adjudicated by this Court, in an effort to have them reconsidered on habeas corpus, is prohibited by Rule 65B(i) and further, should not, in the interests of finality of cases,

judicial economy, and the integrity of the criminal justice system, be tolerated here. See Andrews v. Morris, 607 P.2d at 821.

Moreover, the Andrews v. Morris Court, citing Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), specifically rejected petitioners' contentions that their cases should be compared with later capital cases to determine whether their death sentences had been arbitrarily, capriciously, and discriminatorily imposed. The "new" evidence of a higher burden of proof instruction either being given or proposed in later capital cases (which petitioners contend is evidence of arbitrary, capricious, and discriminatory application of Utah's death penalty statute) is no more compelling than the evidence they sought to offer in Andrews v. Morris, and should not operate to trigger the sort of later case comparison previously denied petitioners therein as a matter of law as an unworkable approach. See Spinkellink, supra. In short, petitioners again have failed to specifically allege facts showing arbitrary, capricious, and discriminatory application of the death penalty statutes in their cases.¹⁹ These, indeed, are the only relevant facts for this type of inquiry. Accordingly, this Court's refusal to engage in later case comparison on the basis of the instant petition would be in harmony with Andrews v. Morris and a consistent application of the Spinkellink rationale expressly adopted therein.

¹⁹See Point IV of this Brief.

In sum, Pierre's and Andrews' instant petitions for writs of habeas corpus should be denied in that they fail to allege a substantial denial of petitioners' constitutional rights and raise issues which cannot be considered on habeas corpus, per Rule 65B(i) and Andrews v. Morris, supra, either because those issues have been waived or have already been adjudicated by this Court.

POINT II

IF THIS COURT DECIDES THAT THE ISSUES PRESENTED BY PETITIONERS ARE APPROPRIATE FOR CONSIDERATION UNDER THIS STATE'S RULES GOVERNING HABEAS CORPUS PROCEEDINGS, THE NEW DECISIONAL RULING ANNOUNCED IN STATE V. WOOD, SUPRA, SHOULD NOT BE APPLIED RETROACTIVELY TO PETITIONERS' CASES.

Many courts have commenced the inquiry on whether to apply a new decision retroactively by first determining whether the change in decisional law is of significant constitutional magnitude, or is merely an "evolutionary refinement in the criminal law" which attempts to improve an aspect of the criminal justice system but is not of such constitutional dimension as to warrant abandoning the principle of finality of judgments or warrant application of the new ruling to prior cases--especially those where judgments are final. See Witt v. State, Fla., 387 So.2d 922 (1980), cert. denied, 449 U.S. 1067 (1980).

In Witt, supra, the defendant had been convicted of first-degree murder and sentenced to death. His conviction and sentence having been affirmed on direct appeal, the defendant then petitioned for post-conviction habeas corpus relief to obtain the

benefit of subsequent favorable developments in state case law relating to capital punishment. Most of the changes dealt with sentencing procedures (e.g. significance of improper aggravating circumstances, extent of written findings by the sentencing authority, definitions of mitigating circumstances, and the admissibility of certain types of evidence at sentencing). Presented with the issue of when a change in decisional law mandates a reversal of a once valid conviction and sentence of death on post-conviction habeas corpus, the court denied the defendant relief, reasoning that not every change in the law should open the door to post-conviction habeas corpus. Setting aside the doctrine of finality would be justified only where the new decision constituted a major change designed to cure fundamental unfairness in either process or substance. The court further concluded that non-constitutional changes should not be cognizable on collateral attack lest the criminal justice system be forever burdened with tentative and inconclusive trial and appellate court judgments:

We reject, therefore, in the context of an alleged change of law, the use of post-conviction relief proceedings to correct individual miscarriages of justice or to permit roving judicial error corrections, in the absence of fundamental and constitutional changes which cast serious doubt on the veracity or integrity of the original trial proceeding.

We emphasize at this point that only major constitutional changes of law will be cognizable in capital cases under Rule 3.850.

. . .

In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal

law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, or for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit (Emphasis is the Court's).

387 So.2d at 929-30. Finally, the court held that those issues relating to sentencing refinements in a capital case are "nonconstitutional, evolutionary developments in the law, arising from our case-by-case application of Florida's death penalty statute," and may not be raised on collateral attack. 387 So.2d at 930.

The Florida court has repeatedly applied the rationale of Witt, supra, to other capital cases where a sentence of death was imposed. See: Alvord v. State, 396 So.2d 184 (Fla. 1981); Hargrave v. State, 369 So.2d 1127 (Fla. 1981). Both Alvord and Hargrave claimed, inter alia, deficiencies in the sentencing proceedings and changes in the decisional law on these matters.) Additionally, in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), a death row inmate sought the benefit of a later decisional ruling of the Florida Supreme Court on federal habeas corpus.²⁰ The Fifth Circuit

²⁰The Florida Supreme Court had announced in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), that for a trial judge to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Court of Appeals distinguished the new state court ruling from Mr. Spinkellink's case, but added that "In any event, Tedder [the new ruling] was decided after the Florida Supreme Court reviewed defendant's case." 578 F.2d at 604, n. 25. Mr. Spinkellink was subsequently executed.

Other courts have supported the distinction between constitutional and non-constitutional changes in decisional law made in Witt, supra. In Michigan v. Payne, 412 U.S. 47, 54 (1973), the high Court concluded that retroactive application is not suggested where the new rule creates a protective umbrella serving merely to "enhance" a constitutional guarantee, but not conferring a constitutional right that had not existed prior to the decision. In State v. Wallace, 604 S.W.2d 890 (Tenn. Cr. App. 1980), the court found that principles of a new case mandating stricter standards for acceptance of guilty pleas than those constitutionally required should apply prospectively only. In Commonwealth v. Rightnour, 469 Pa. 107, 364 A.2d 927 (1976), the court limited post-conviction relief narrowly to constitutional claims only.²¹

This Court recently noted in Pierre v. Morris, 607 P.2d at 814, that the previous standard for sentencing approved in State v. Pierre, supra, was expressly upheld by the United States Supreme Court in Proffitt, supra:

²¹This view is totally consistent with Utah's rule governing post-conviction proceedings, Rule 65B(i), Utah Rules of Civil Procedure, which limits review only to claims of "a substantial denial of . . . rights under the Constitution of the United States or the State of Utah or both. . . ." See Point I, supra.

We note at the outset that the standard of proof issue was raised on direct appeal in Pierre and that we then adopted the totality of proof test as established in Proffitt v. Florida, wherein the matter was stated as follows:

"The directions given to the judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed" (Emphasis added).

(Emphasis is this Court's). Florida's death penalty law did not and does not presently additionally require the degree of persuasion suggested by this Court in Wood, nor was such a standard constitutionally mandated or even approved in Proffitt. See also: Fla. Stat. Ann., § 921.141(2)(3); and Spinkellink v. Wainwright, 578 F.2d at 587-88. As noted in Point I, the Wood standard simply represents an "evolutionary refinement in the criminal law" which attempts to improve or "enhance" an aspect of the criminal justice system. Witt, supra; Michigan v. Payne, supra. Moreover, the former standard in Utah clearly was not so fraught with hazards as to "cast serious doubt on the veracity or integrity of the original [sentencing] proceeding." Witt, 387 So.2d at 929. Therefore, the new standard for sentencing proceedings enunciated in Wood (a case where the Court's decision was based on neither federal nor state constitutional grounds but on the "preferred grounds of statutory construction," Id., at 13) should not be applied retroactively to Utah's other capital cases--especially not to petitioners' where the judgments are final.

However, if after considering the Witt and Payne rationale, this Court is still uncertain as to the retroactive effect of Wood, the United States Supreme Court's analysis of retroactivity questions involving constitutional changes in decisional law is relevant and helpful. Certain basic standards or principles for determining which rules are to be accorded retroactive effect have emerged in the last fifteen years, culminating in the case of Brown v. Louisiana, 447 U.S. 323, 65 L.Ed. 159, 100 S.Ct. 2214 (1980), where the Court finally concurred on the following list of principles extrapolated from earlier cases.²² See also: United States v. Johnson, ____ U.S. ____, 31 Cr.L. 3100 (June 21, 1982).²³

First, "the Constitution neither prohibits nor requires retrospective effect," and:

in appropriate cases the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application.

Linkletter v. Walker, 381 U.S. 618, 628-29 (1965); Johnson v. New Jersey, 384 U.S. 719, 726-27 (1966). See also: Wainwright v. Stone, 414 U.S. 21 (1973), holding that:

²²See generally Brown v. Louisiana, 447 U.S. at 327-29. The above annotation is taken largely from Brown, supra, but with additional supplementation of case authority.

²³Johnson modifies, to a certain extent, retroactivity law concerning the Fourth Amendment, but the Court makes clear that its decision "leave[s] undisturbed our [retroactivity] precedents in other areas." 31 Cr.L. at 3107.

A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions. Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 364, 77 L.Ed. 360, 53 S.Ct. 145, 85 ALR 254 (1932).

Thus, the question of retroactivity is not itself a constitutional one.

Second:

resolution of the question of retroactivity does not automatically turn on the particular provision of the Constitution on which the new prescription is based, for "Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." Johnson v. New Jersey, *supra*, at 728.

Brown, 447 U.S. at 327.

Third, the test to decide whether a new constitutional doctrine should be applied retroactively contemplates the consideration of three criteria:

(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

Stovall v. Denno, 388 U.S. 293, 297 (1967).

Fourth, "[f]oremost among these factors is the purpose to be served by the new constitutional rule." Desist v. United States, 394 U.S. 244 (1969). The two remaining factors will have controlling significance only when the purpose of the new rule

does not clearly favor either retroactivity or prospectivity. Michigan v. Payne, 412 U.S. 47, 55 (1973); Hankerson v. North Carolina, 432 U.S. 233, 242-44 (1977); Adams v. Illinois, 405 U.S. 278, 280 (1972) (plurality opinion of Brennan, J.).

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

regardless of the other two factors listed above. Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion of White, J.) (emphasis added); Accord: Hankerson v. North Carolina, supra, at 243; Gosa v. Mayden, 413 U.S. 665, 679 (1973) (plurality opinion of Blackmun, J.); Ivan V. v. City of New York, 407 U.S. 203, 204 (1972).

Conversely, where the Court has expressly declared a rule of criminal procedure to be "a clear break with the past," Desist v. United States, 394 U.S. at 248, it almost invariably has gone on to find such a newly minted principle non-retroactive. See United States v. Peltier, 422 U.S. 531, 547, n. 5 (1975) (Brennan, J., dissenting) (collecting cases). In this second type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the "'new' constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course," Williams v. United States, 401 U.S. at 659 (plurality opinion). Once the Court has found that the new rule was unanticipated, the second and third Stovall factors--reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule--have virtually compelled a finding of nonretroactivity. See, e.g., Gosa v. Mayden, 413 U.S. at 672-673, 682-685 (plurality opinion); Michigan v. Payne, 412 U.S. at 55-57 (footnote omitted).

United States v. Johnson, ____ U.S. ____, 31 Cr.L. 3100, 3103-3104 (June 21, 1982).

Fifth, the extent to which the purpose of a new constitutional rule requires its retroactive application "is necessarily a matter of degree." Johnson v. New Jersey, supra, at 729. For example, in Stovall v. Denno, supra, 388 U.S. at 298, the Court noted that although the new rule was aimed at avoiding unfairness at trial by enhancing the fact-finding process, the extent to which the condemned practice infected the integrity of the truth-determining process was a question of probabilities and such probabilities had to be weighed against the prior justified reliance upon the old standard and the impact upon the administration of justice. Thus, if the new standard only "marginally implicate[s] the reliability and integrity of the fact-finding process," Tehan v. United States, ex rel. Shott, 382 U.S. 406, 415 (1966); Johnson v. New Jersey, supra, at 729-30; and Gosa v. Mayden, 413 U.S. 665, 681-82 (1973) (plurality opinion of Blackmun, J.), or merely "tends incidentally" to avoid unfairness at trial, Gosa, supra, at 680, and there already exist additional safeguards that minimize the likelihood of past injustices, Johnson, supra, at 730; Stovall, supra, at 299; Michigan v. Payne, supra, at 54, and the former standard or rule did not necessarily "infec[t] the integrity of the truth-determining process at trial" (as a matter of probabilities), Stovall, supra, at 298; and Johnson, supra, at 729, and when an assessment of those probabilities does not indicate that the condemned practice casts doubt upon the reliability of the

determinations of guilt in past criminal cases, or undermined the basic accuracy of the fact-finding process at trial, Williams v. United States, supra, at 646, such that there was a "significant chance that innocent men had been wrongfully punished in the past," United States v. U.S. Coin & Currency, 401 U.S. 715, 724 (1971), then retroactive application is not required.

As the Gosa Court summarized:

[t]he fact that a new rule tends incidentally to improve or enhance reliability does not in itself mandate the rule's retroactive application. . . . Thus, retroactivity is not required by a determination that the old standard was not the most effective vehicle for ascertaining the truth, or that the truth-determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to prevent distortion in the process.

413 U.S. at 680. Thus, if the old process did not undermine the integrity of the fact-finding process and was not a serious flaw in that process, no retroactive application is required.

The Utah Supreme Court cases on retroactivity of new decisional law have been consistent with the above federal standards. State Farm Insurance Co. v. Farmers Insurance Exchange, 27 U.2d 166, 493 P.2d 1002, 1003 (1972), recognized that courts may make their rulings prospective only (citing Great Northern Ry. Co. v. Sunburst Oil Co., 287 U.S. 358 (1932), and Linkletter v. Walker, supra), and that relevant factors to be considered are whether there was justifiable reliance on prior decisions of the courts, whether those who so relied could be substantially harmed if retroactive effect were given, and

whether retroactive operation might greatly hinder the administration of justice. See also: State v. Belgard, Utah, 615 P.2d 1274, 1275-76 (1980) (where a new decision which changed the elements of a crime was applied only to those defendants whose judgments were not yet final, citing Linkletter, supra, among others). Note also State v. Kelbach, Utah, 569 P.2d 1100 (1977), a capital murder case where this Court first refused to modify existing decisional law; but, in dictum, stated that even if the law were changed so as to allow the State to appeal, the Court would apply it prospectively only and would not give the State the benefit of any new ruling for the following reasons:

. . . the law should not be changed . . . during the course of a particular proceeding to have a retroactive effect thereon. . . . [T]o so rule in this case retroactively would violate what we regard as a higher principle: that of honoring established law. If there is to be such a change in the law, whether by legislative act or by judicial decision, it seems that it should have only prospective effect and that fairness and good conscience require that it should not be applied retroactively to adversely affect rights as they existed at the time a particular controversy arose (again citing Great Northern Ry. Co. v. Sunburst Oil Co., supra).

Id. at 1102. As a result, the lower court's order setting aside Myron Lance's and Walter Kelbach's death sentences was allowed to stand. Other Utah cases on retroactivity are as follows: State v. Kelbach, 23 U.2d 231, 461 P.2d 297 (1969) (new rule requiring counsel at lineups not applicable to those whose lineups occurred prior to United States Supreme Court decision establishing the rule, citing Stovall v. Denno, supra); Stanton v. Stanton, Utah, 564 P.2d 303 (1977) (new decision would have no retroactive

effect except to case before the Court); Cypert v. Washington Co. School Dist., 24 U.2d 419, 473 P.2d 887 (1970) (new United States Supreme Court ruling would not be applied retroactively to cases which were final); Hamilton v. S.L. Co. Sewerage Improvement Dist. No. 1, 15 U.2d 216, 390 P.2d 235 (1964) (new Utah Supreme Court decision would not affect similar cases which were final); Prettyman v. Utah State Dept. of Finance, 27 U.2d 333, 496 P.2d 89 (1972) (applied new ruling to case which was settled after the new ruling was announced); and Williams v. Utah State Dept. of Finance, 23 U.2d 438, 464 P.2d 596 (1970) (Court refused to indulge the legal fiction that the prior caselaw which was overruled never really existed, and applied the new ruling prospectively only).

With the above principles in mind, we may now consider why Wood, supra, should not be applied retroactively to Pierre and Andrews.²⁴

First, the major purpose of the new ruling in Wood, supra, does not clearly favor retroactive application. While it may have slightly modified, "enhanced," or "incidentally improved" the standard to be used in capital sentencing proceedings by adding a degree of persuasion to an already approved burden of proof, it did not overcome a previous sentencing standard which

²⁴Again, respondent submits that since the new ruling in Wood, supra, is not of constitutional magnitude, as stated therein at p. 13, the rationale of Witt, supra, should apply rather than the criteria established for new constitutional rulings. However, should this Court decide otherwise, the above principles still do not compel retroactive application. See infra.

"substantially impaired" a sentencing authority's truth-finding function or which raised serious questions about or "undermined" the basic accuracy of previous sentencing decisions so that there was a "significant chance" that convicted capital defendants had been wrongfully punished.

For example, in Pierre's sentencing proceeding, the evidence of aggravating circumstances, which had been proved at the guilt phase beyond a reasonable doubt, was "overwhelming" and the mitigating circumstances were "most minimal--even from the point of view of inference." State v. Pierre, supra, 572 P.2d at 1348 (quoted in Wood at 10). As to Andrews' sentencing hearing, this Court concluded:

that so far as the verdict for death is concerned,
the evidence discloses over-
whelmingly that the jury could reasonably and
unarbitrarily find as it did,

State v. Andrews, supra, 574 P.2d at 710; and that:

The record in this case reveals the evidence
supporting the aggravating circumstances charged and
discloses that the evidence in mitigation of the
offense was virtually nonexistent.

Andrews v. Morris, supra, 607 P.2d at 823.

Thus, the accuracy of the jury's sentence determinations under either the pre-Wood or Wood standard can hardly be doubted given the circumstances of petitioners' cases. Moreover, the former sentencing standard could hardly be characterized as "infecting the integrity of the truth-determining process." Utah's overall statutory scheme prior to Wood hardly lacked

integrity. It was extremely demanding, requiring proof of at least one statutory aggravating circumstance beyond a reasonable doubt, proof that the totality of aggravation outweighed the totality of mitigation, and a unanimous jury verdict before the death penalty could be imposed. Having previously recognized that, with respect to a standard of proof, Utah's law more fully minimized the risk of arbitrary and capricious sentencing than did Georgia's or Texas's, both of which were upheld by the United States Supreme Court, see State v. Pierre, 572 P.2d at 1348, this Court now merely attempts to improve the sentencing process by attaching additional requirements which, at best, tend only "incidentally to improve or enhance [its] reliability" and integrity, or to avoid unfairness. Gosa, 413 U.S. at 680. The former standard provided a sufficient safeguard to minimize the likelihood of past injustices. As previously noted, Gosa also stated that retroactivity is not required where the former standard was "not the most effective vehicle for ascertaining the truth," and the new standard is simply designed to better aid that process. Id. at 680.

It may be noted that in two cases where the United States Supreme Court has enunciated a new rule, the purpose of which related to burdens of proof to establish guilt in a criminal case, broad retroactive application of the new decision was favored. Hankerson v. North Carolina, supra, applied Mullaney v. Wilbur, 421 U.S. 684 (1975)²⁵ retroactively except to those

²⁵Mullaney required that the State persuade the jury beyond a reasonable doubt as to all elements of the crime, including that of unlawfulness, to wit, the absence of self-defense.

defendants who had not preserved the issue at trial or on direct appeal.²⁶ Ivan V. v. City of New York, supra, gave In re Winship, 397 U.S. 358 (1970)²⁷ full retroactive effect. However, both cases dealt only with the guilt-innocence determination of a criminal trial where the State must establish the very existence of the facts constituting the elements of the crime. Understandably, the high Court concluded in both cases that the purpose of the new ruling was to overcome an aspect of the criminal trial which substantially impaired the truth-finding function and which raised serious questions about the accuracy of prior guilty verdicts, whereas Wood, supra, involved proceedings at penalty phase which are fundamentally different from those at guilt phase. The focus at penalty phase is not so much on whether facts do or do not exist (although Utah does require the State to prove the existence of statutory aggravating circumstances beyond a reasonable doubt at guilt phase before they may be considered for sentencing), but on an evaluative weighing of the sentencing criteria to determine the appropriate punishment for one already adjudged guilty. A sentencer must necessarily evaluate behavioral, sociological, and psychological factors along with the nature of the crime, and in this setting the United States Supreme Court has approved a mere weighing or, at most, a preponderance of the evidence standard. See Proffitt, supra; Lockett v. Ohio, 438

²⁶See Hankerson, 432 U.S. at 244, n. 8.

²⁷Winship held that proof beyond a reasonable doubt is required at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult.

U.S. 586 (1978); and Eddings v. Oklahoma, ____ U.S. ___, 102 S.Ct. 869 (1982). Thus, Hankerson, supra, and Ivan V., supra, are hardly controlling simply because they dealt with burden of proof issues concerning the determination of guilt or innocence. Moreover, unlike those two cases, Wood did not modify the burden of proof aspect of Utah's sentencing procedure--only the burden of persuasion. Finally, not every case dealing with modifications of burdens of proof has been given general retroactive application. See People v. Brown, 172 Cal. Rptr. 221 (Cal. App. 1981); and United States v. Peterson, 611 F.2d 1313 (10th Cir. 1979) (new ruling applying the preponderance test to the quantum of proof necessary for the admission of a co-conspirator's hearsay statement applied prospectively only).

Equally important is that Wood announced an entirely new and unanticipated principle of law which represents a "sharp break in the web of the law." Milton v. Wainwright, 407 U.S. 371, 381, n. 2 (1972) (Stewart, J., dissenting). As explained in the recent case of United States v. Johnson, supra:

Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, see, e.g. Desist v. United States, supra; Williams v. United States, supra, or disapproves a practice this Court arguably has sanctioned in prior cases, see, e.g. Gosa v. Mayden, 413 U.S. at 673 (plurality opinion); Adams v. Illinois, 405 U.S. at 283; Johnson v. New Jersey, 384 U.S. at 731, or overturns a longstanding and wide-spread practice to which this Court has not spoken, but which a near-unanimous body or lower court authority has expressly approved. See, e.g. Gosa v. Mayden, 413 U.S. at 673 (plurality opinion) (applying nonretroactively a decision that "effected a decisional change in attitude that had prevailed

for many decades"); Stovall v. Denno, 388 U.S. at 299-300. See also: Chevron Oil Co. v. Huson, 404 U.S. at 107; Cipriano v. City of Houma, 395 U.S. 701 (1969); Milton v. Wainwright, 407 U.S. at 381-382, n. 2 (Stewart, J., dissenting) ("sharp break" occurs when "decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon.").

31 Cr.L. at 3104. As noted earlier, the Court also said that if the change in law does constitute a clear break from the past:

the second and third Stovall factors--
reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule--virtually compel a finding of non-retroactivity.

Id.

Although the Johnson Court concluded that the case it was considering for retroactive application

[did] not fall into that narrow class of decisions whose nonretroactivity is effectively preordained because they unmistakably signal "a clear break with the past," Desist v. United States, 394 U.S. at 248,

31 Cr. L. at 3104-3105, Wood clearly does in that it disapproves a standard sanctioned by this Court in prior cases and essentially "overrules clear past precedent . . . , disrupt[ing] a practice long accepted and widely relied upon." Johnson, 31 Cr. L. at 3104. Thus, the retroactivity question raised by petitioners is controlled by prior United States Supreme Court precedents denying retroactive application of similar changes in decisional law.

Alternatively, having at least shown that the purpose of the new ruling in Wood, supra, does not clearly favor retroactive application, the two remaining criteria can be considered.

The second factor is the extent of good faith reliance placed on the former standard. Stovall v. Denno, supra, 388 U.S. at 297. Where there is good faith reliance on the previous rule as opposed to reliance which was not justified, this may be considered as a factor in denying retroactive application. If there is support given the prior view by respectable authorities, or by the weight of authority, reliance was reasonable. England v. La. State Bd. of Med. Examiners, 375 U.S. 411 (1964); and Stovall, supra. In Linkletter v. Walker, supra, 381 U.S. 618 (1965), the Court noted that the states had fairly relied on the prior overruled case, followed its command, and the Court had repeatedly refused to reconsider the earlier rule thus giving its implicit approval of the former rule. In Johnson v. New Jersey, supra, 384 U.S. 719 (1966), the Court found relevant the fact that the new ruling was not "clearly foreshadowed" in earlier cases, and that law enforcement could not have foreseen the direction of the court or have been aware there was a change in the wind. See also: Stovall, supra, and Michigan v. Payne, supra, 412 U.S. 47 (1973). Generally, see Annotation at 65 L.Ed.2d 1219, 1237-1240.

Respondents have already shown that prior to Wood, supra, this Court had repeatedly upheld the previous sentencing standard in every reported capital case construing Utah's present death penalty laws, and that the United States Supreme Court also approved that standard in Proffitt, supra. Thus, there has been good faith and justifiable reliance on the former rule by trial judges and prosecutors alike. The Wood, supra, ruling was not "clearly foreshadowed" in earlier cases, notwithstanding the

concurring opinion of one justice in State v. Brown, supra, 607 P.2d at 271-276 (Stewart, J., concurring). Thus, Wood should not be given retroactive effect.

The third criteria is the effect that retroactive application will have on the administration of justice. If it would impose a substantial burden on the administration of justice it should not be given retroactive effect. For example, retroactive application should not occur where the State might be unable to retry defendants because of the unavailability of evidence long since destroyed, misplaced, or deteriorated, or because of the unavailability of witnesses or, if located, the possibility that their memories had dimmed. Linkletter v. Walker, supra. Nor should retroactive application attach where it might force the release of prisoners found guilty by trustworthy evidence, Johnson v. New Jersey, supra, or in instances in which no actual prejudice has been suffered. Michigan v. Payne, supra; and Reddick v. Commonwealth, 409 N.E.2d 764 (Mass. 1980).

Respondents have already shown that the sentences imposed in the instant cases were based upon trustworthy evidence, and petitioners would be hard-pressed to show that they suffered actual prejudice by the application of the former sentencing standard in their cases, given the paucity of mitigating circumstances presented at their sentencing proceedings.²⁸ In addition, the impact on the public's lack of trust in and respect for the judicial system should not be overlooked. The message

²⁸See Point III of this Brief.

would be clear that a capital defendant need only delay the execution of his sentence by repeated appeals and post-conviction collateral attack proceedings awaiting an eventual change in the law to avoid the death penalty. The doctrine of finality of judgments would be seriously jeopardized, and the ultimate penalty of capital punishment would be effectively thwarted. Such a state of affairs carries the potential of increasing the murder rate and creating a societal mentality for vigilante justice where the public is unable to satisfy its sense of retribution. See Gregg v. Georgia, 428 U.S. 153, 183-84 (1976) (plurality opinion). The impact on the administration of justice would, indeed, be great.

It has been argued that broad retroactivity should apply to cases involving capital punishment. Indeed, this notion was asserted by Mr. Pierre in Pierre v. Morris, supra, 607 P.2d at 814, and was rejected as follows:

The fourth contention advanced, that the law pertaining to capital punishment is highly technical and hence some issues have not been apparent to counsel and legal commentators, has no merit. Such a "wait and see" approach was expressly rejected in Spinkellink and we deem it to be an obviously untenable position since its adoption would totally frustrate the criminal process. Id. at 814.

Similarly, Spinkellink v. State, 350 So.2d 85, 86-87 (Fla. 1977) (England, J., concurring), rejected the argument that because death is different, the court should treat a capital case differently in terms of applying regular rules of procedure:

On the premise that "death is different," appellant's counsel invited the trial court and now invites us to expand established judicial boundaries in order to accommodate appellant's desire for an evidentiary hearing on a variety of matters. . . .

I readily concede appellant's premise that death is different. Moreover, I cannot help but share many of counsel's stated and unstated concerns regarding appellant's impending execution. I cannot, however, for these reasons alone, accept appellant's invitation to discard or set aside well-established principles of law. . . .

[A]ppellant frankly invites us to expand the scope of Rule 3.850 review in death penalty cases. For a number of reasons, such as the inadvisability of fragmenting legal challenges to a conviction or sentence, the prospect of unending challenges in each death penalty cases as the law evolves, and the fact that some of these claims have already been considered and rejected by this Court on appellant's original appeal or otherwise, I must decline appellant's invitation. Although death is indeed different, I do not believe either the federal or the state constitution requires a different basis for according post-conviction relief in death penalty cases, and I see more harm than good in providing one (emphasis added).

See also: Witt, supra; Alvord, supra; Hargrave, supra; and Spinkellink v. Wainwright, supra.

Based on the foregoing, Wood, supra, should not be applied retroactively to any capital cases where the sentence has already been imposed. However, should this Court determine that retroactive application may be appropriate, the final inquiry is the extent or scope of that application.

The United States Supreme Court has utilized several different approaches depending on the particular rule involved including: (1) complete denial of retroactive application so as

not to apply the new rule even in the case in which it was announced (England v. La. State Bd. of Med. Examiners, 375 U.S. 411 (1964)); (2) retroactive application only to the party in the case where the new rule was announced, but to no others (Johnson v. New Jersey, supra, 384 U.S. 719 (1966)); (3) partial extension of retroactive application to those pending on direct appeal when the new rule was announced (Linkletter v. Walker, supra); and (4) full retroactive application even to those whose cases had become final when the new rule was announced (Ivan V. v. City of New York, supra).

The concern in the instant cases is whether retroactivity should extend to petitioners, whose judgments are final. The United States Supreme Court, in reviewing (1) the purpose behind the new rule, (2) the reliance on the former rule, and (3) the impact on the administration of justice, has repeatedly refused to extend a new ruling to cases which are final, even where fundamental rights are involved. See Linkletter v. Walker, supra; Angelet v. Fay, 381 U.S. 654 (1965); Tehan v. United States, supra; Hamling v. United States, 418 U.S. 87 (1974); Jenkins v. Georgia, 418 U.S. 153 (1974); United States v. Addonizio, 442 U.S. 178, 184, n. 11 (1979); and Brown v. Louisiana, supra, 447 U.S. 323 (1980). Generally, such a drastic extension of retroactivity has occurred only where it is clearly evident that the new rule overcomes an aspect of the trial which substantially impaired the truth-finding function, and respondent has already shown this element is not present in the instant cases. The Supreme Court of California has also refused to

extend retroactivity to final cases where there is no material dispute as to the facts relating to the conviction. Pryor v. Municipal Court, 158 Cal. Rptr. 330, 599 P.2d 636 (1979).

Certainly there was no material factual dispute at Pierre's and Andrews' sentencing proceeding.

In addition to the above factors, concerns for the doctrine of finality of judgments and for adherence to post-conviction remedy procedural rules come into play. Collateral attack based upon a change in the law should only be permitted where the change is major and of substantial constitutional proportions, and where unfairness is so fundamental in either process or substance that it would be wholly unconscionable not to set aside the doctrine of finality and review the issues. Witt, supra; Webster v. Jones, Utah, 587 P.2d 528 (1978).

Utah's appellate waiver doctrine, fully discussed in Point I, is an adequate and compelling reason for denying retroactive application of Wood to petitioners' cases. As has already been shown, petitioners failed to raise, on direct appeal, the specific burden of persuasion issue that Wood raised. In short, they failed to preserve that issue--a fact which is of critical importance to the question of retroactivity.

In Hankerson v. North Carolina, supra, the Supreme Court applied its decision in Mullaney v. Wilbur, supra, retroactively. However, the Hankerson Court qualified its ruling in a footnote which reads as follows:

Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g., Fed. Rule Crim. Proc. 30.

Id. at 244, fn. 8 (emphasis added).

The proper application of footnote 8 of Hankerson is demonstrated in Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980), cert. denied, 449 U.S. 1004 (1980, reh. denied, 449 U.S. 1119 (1981)). Petitioner therein sought the retroactive benefit of Mullaney, like that given in Hankerson, through federal habeas corpus proceedings (having already been denied such relief in the North Carolina state courts). The Fourth Circuit reversed the district court decision giving petitioner the retroactive benefit of Mullaney on the ground that petitioner's failure to preserve the Mullaney issue on direct appeal in state court, in accordance with state law,

barred [him] from seeking federal habeas corpus relief because he failed to comply with valid State procedural requirements which are an adequate and independent State ground for preventing direct review of the merits of the question either in his direct criminal appeal or on appeal on collateral review.

620 F.2d at 1063. Relying on footnote 8 of Hankerson, the court stated:

It is clear that the Supreme Court intended North Carolina to have the protection of footnote 8 and that the North Carolina courts have used that protection in the intended manner. To take the prisoner's view in our case would have us remove that protection and, in effect, overrule footnote 8.

There are only two basic ways a defendant can forfeit his right to review of a jury charge in North Carolina on a particular issue: by not excepting on that ground as required by Rule 10 and by not otherwise raising it on direct appeal. The petitioner did neither in this case, and thus, if footnote 8 in Hankerson is to have any meaning in North Carolina, it must apply in this case. . . . If a federal court ignores North Carolina procedural bars and grants federal habeas corpus relief, then new trials will be required and the inferior federal courts will be stripping North Carolina of the protection afforded by the Supreme Court in footnote 8. This result would be doubly inconsistent since Hankerson itself was a North Carolina case.

As is the case in North Carolina, Utah's waiver doctrine clearly prohibits litigation of "unpreserved" issues in habeas corpus proceedings. Andrews v. Morris, supra; Pierre v. Morris, supra; Rule 65B(i), Utah Rules of Civil Procedure. Therefore, for precisely the same reasons the Fourth Circuit refused to apply Mullaney retroactively in Cole (i.e., due to North Carolina's procedural rules barring litigation of "unpreserved" issues on direct appeal and collateral attack, and a recognition that such rules could effectively bar retroactive application of new decisional law (per footnote 8 of Hankerson)), this Court should deny retroactive application of Wood to petitioners' cases.

POINT III

EVEN IF THIS COURT FINDS THAT STATE V. WOOD, SUPRA, SHOULD APPLY RETROACTIVELY TO PETITIONERS' CASES AND THAT THERE WAS ERROR AT THEIR SENTENCING PROCEEDINGS, SUCH ERROR WAS HARMLESS AND PETITIONERS' DEATH SENTENCES SHOULD NOT BE DISTURBED.

The standard for review of a capital case was clearly set out in State v. Wood, supra:

On direct appeal in capital cases, it is the established rule that this Court will review an error, even though no proper objection was made at trial and even though the error was not raised on appeal, if the error was manifest and prejudicial. State v. Pierre, Utah, 572 P.2d 1338 (1977); see also: State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936); State v. Stenbeck [sic], 78 Utah 350, 2 P.2d 1050 (1931). In the penalty phase, it is our duty to determine whether the sentence of death resulted from error, prejudice or arbitrariness, or was disproportionate. State v. Pierre, supra.

Id. at 4.

The overriding concern of the Wood Court was:

. . . whether a death sentence may be sustained when the mitigating factors are sufficiently strong when compared with the aggravating factors to create a substantial and reasonable doubt that the death penalty is appropriate.

Id. at 6 (emphasis added). It then "address[ed] the issue of whether the death penalty was lawfully imposed in this case." Id. (emphasis added).

In Wood, the sentencing authority, Judge Baldwin, expressed substantial doubt as to the appropriateness of the death penalty after considering the aggravating and mitigating evidence, yet he imposed the death sentence anyway. Notwithstanding his

finding that the aggravating circumstances preponderated, Judge Baldwin's comments, taken as a whole, indicate that he was not convinced that total aggravation outweighed total mitigation. Accordingly, his decision to impose the death sentence on Wood was overturned as the type of arbitrary, capricious and disproportionate action this Court is mandated to prevent in its review of capital cases. Wood at 4; State v. Pierre, supra. Because the sentencing process went awry in Wood due to the failure of Judge Baldwin properly to follow the State v. Pierre sentencing standard, this Court felt compelled to eliminate the possibility that future sentencing bodies would commit the same error--i.e., imposition of the death penalty "in the face of evidence which creates a reasonable or substantial doubt as to the appropriateness of that penalty." Wood at 11. Thus, it created the reasonable doubt requirement to guarantee that the State v. Pierre totality of proof test would be properly applied in the future, as it had been in cases tried before Wood. Nothing in the Wood opinion casts the slightest doubt on the propriety of the death sentences imposed in petitioners' cases. In short, the element of substantial doubt as to the appropriateness of the death penalty (i.e., as to whether total aggravation outweighed total mitigation), so evident in the Wood case, was not present in petitioners' cases.

This Court has repeatedly noted the overwhelming nature of the aggravating circumstances and the paucity of mitigation present in petitioners' crimes. In State v. Pierre, the Court

said:

[I]n our appellate review of this matter we conclude that the aggravating circumstances were overwhelmingly present against the defendant and the mitigating circumstances favoring him most minimal--even from the point of view of inference.

Id. at 1348; see also: Wood at 10.

In State v. Andrews, 574 P.2d at 711, it concluded:

[S]o far as the verdict of death is concerned, the evidence discloses overwhelmingly that the jury could reasonably and unarbitrarily find as it did, and after our review of the matter, we hold that because of defendant's involvement in these murders and his background and characteristics, disproportionality between the crimes of murder and the death sentence does not exist.

In Pierre v. Morris, supra, the Court stated:

We reaffirm our holding in Pierre that the statutory system under which the sentence of death was imposed does not violate the Constitutions of Utah or of the United States and that all claimed errors are without merit. Following said statutory procedure, and given the especially heinous nature of the murders in this case, no rational judge or jury could have returned a verdict other than guilty, nor could they have determined other than that the aggravating circumstances thereof clearly outweighed those in mitigation.

Id. at 815.

The language quoted above, particularly that from Pierre v. Morris, indicates without question that, in the eyes of this Court, the sentencing authority in petitioners' cases could not and did not have a reasonable or substantial doubt that the "aggravating factors 'outweigh[ed],' or [were] more compelling than, the mitigating factors" and "the death penalty [was] justified and appropriate after considering all the

circumstances." Wood at 15. In Wood, this Court reiterated that in State v. Pierre, supra,

. . . We did hold, on an independent review of the evidence of aggravating and mitigating factors pursuant to our duty to make such a review, that "the aggravating circumstances were overwhelmingly present against the defendant and the mitigating circumstances favoring him most minimal--even from the point of view of inference."

Id. at 10.

In Utah, reversal for error is not automatic. Section 77-35-20, Utah Code Ann. (1953), as amended, Rule 30, states in part:

(a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

See State v. Hutchison, ____ P.2d ____, Utah Supreme Court No. 17663, September 3, 1982.

Utah Code Ann., § 77-42-1 (1953), as amended, reads:

After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment.

This Court's interpretation of the above rule and its standard for determining harmless error is well settled:

The mandate of our statute⁷ (fn. 7: Sec. 77-42-1, U.C.A., 1953), and the policy firmly established in our decisional law, is that we do not upset the verdict of a jury merely because some error or irregularity may have occurred but will do so only if it is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been

a different result⁸ (fn. 8: State v. Pierre, supra). Closely related to, and to the same practical effect here, is the rule as sometimes stated: that there should be no reversal if it can be fairly concluded beyond a reasonable doubt that the error had no prejudicial effect upon the complaining party⁹ (fn. 9: Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

State v. Urias, Utah, 609 P.2d 1326, 1329 (1980). See also: State v. Hutchison, supra; State v. Sandoval, Utah, 590 P.2d 346 (1979); State v. Howard, Utah, 544 P.2d 466 (1975); State v. Winkle, Utah, 535 P.2d 82 (1975); State v. Johnson, Utah, 478 P.2d 491 (1970); and especially State v. Pierre, supra, 572 P.2d at 1356-57 (Crockett, J., concurring).

Applying these statutory rules and this Court's interpretation thereof to the petitioners' cases, the absence of the Wood sentencing standard at their penalty hearings does not constitute prejudicial, reversible error. The jury's conclusion that the aggravating circumstances outweighed the mitigating and that the death penalty was appropriate for Pierre and Andrews would not be different under Wood. The gruesome details of their crimes and the grossly aggravating factors therein are well established (See Appendix A) and the paucity of mitigating evidence is also well established (Appendix B). Therefore, this Court, through its independent review function in a capital case, should not hesitate to conclude again that any sentencing body could and would, with no reasonable or substantial doubt as to its appropriateness, impose the death penalty on petitioners. That conclusion does not differ from the one previously arrived at by the jury and by this Court in State v. Pierre, supra, State v. Andrews, supra, Pierre v. Morris, supra, and Andrews v. Morris, supra.

Petitioners argue that since the jury in their cases was not given the appropriate standard under which to make the sentencing decision, their death sentences should be automatically vacated; and that this Court cannot, on review, substitute its judgment for that of the jury's. However, by determining that this instruction error was harmless, the Court does not decide for itself what petitioners' sentences should be; it merely decides that, based on its independent and comprehensive review of the entire record (it being the duty of the Court "to determine whether the sentence of death resulted from error, prejudice or arbitrariness, or was disproportionate," Wood at 4, citing State v. Pierre, supra) the jury's conclusion would not have been different. This is a perfectly legitimate function of the Court in reviewing a capital sentencing decision. Other states engage in a similar process; Brown v. State, Fla., 381 So.2d 690 (1980) is illustrative:

Although improper aggravating circumstances ... went into the calculus of the trial judge's sentence decision and there was identified a mitigating circumstance (appellant's age), nevertheless, Elledge v. State, 346 So.2d 998 (1977) does not compel a reversal of the sentence judgment in this case. This is so because unlike Elledge, here "we can know" that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d at 1003. . . . This case then is dissimilar to Elledge, but like Hargrave v. State, Fla., 366 So.2d 1 (1978), where the doubling up of aggravating circumstances was not fatal to the imposition of a death sentence even in light of the existence of two mitigating circumstances. Here, as there, ample other statutory aggravating circumstances exist to convince us that the weighing process has not been compromised.

Id. at 696. Accord: Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938 (1980), but see Zant v. Stephens, ____ U.S. ____, 31 Cr.L. 3035 (May 3, 1982).

Quoting from Jackson v. Virginia, 443 U.S. 307, 320, n. 14 (1979), petitioners further argue that "the Supreme Court's 'cases have indicated that failure to instruct a jury on the necessity of proof beyond a reasonable doubt can never be harmless error.'" First, and of major significance, petitioners' quote is a misquote. Footnote 14 of Jackson actually reads:

Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error (emphasis added).

Petitioners' omission of the words "of guilt" is critical. As conceded by this Court in Wood and as shown earlier by respondent, the United States Supreme Court has never held that a reasonable doubt standard is constitutionally mandated at the penalty phase of a capital case (as is mandated at the guilt phase of any criminal trial, In re Winship, 397 U.S. 358 (1970)). In fact, the Supreme Court has implicitly recognized that there is no set burden of proof for capital sentencing, and that a variety of statutory schemes can satisfy the constitutional requirements pronounced in Furman v. Georgia, supra--i.e., that the process be free of arbitrariness and caprice. See Gregg, Jurek, and Proffitt, all supra. Hence, the quote from Jackson is inapposite; it speaks only to the determination of guilt, where a reasonable doubt standard is constitutionally required. Given that this

Court has consistently upheld the State v. Pierre sentencing standard as constitutional, and that the reasonable doubt requirement announced in Wood is merely a safeguard to assure that the totality of proof test is properly applied, failure to give a reasonable doubt instruction in petitioners' cases (where this Court expressly held "the Utah statute . . . was meticulously followed," Pierre v. Morris, 607 P.2d at 814) did not deprive them of a fair, constitutionally sound penalty hearing and thus was not prejudicial.

Finally, petitioners also allude to State v. Brown, Utah, 607 P.2d 261 (1980) as an example of where a death sentence was reversed partly because it was imposed without proper burden of proof instructions. Citing Brown to support the argument that improper burden of proof instructions at penalty phase constitute reversible error is misleading in that the error identified therein was a complete failure to give the burden of proof instruction required by State v. Pierre:

We hold failure to instruct that the State in this case sustained the burden of proof in the penalty phase was prejudicial error. Without that instruction, the jury was not suitably directed on a most basic matter required by Pierre, and hence the standard required therein in cases involving "the unique and irretrievable sanction of death" that the "risk of discrimination, arbitrariness, caprice, and irrationality [should be] reduced to a minimum" was not met. [572 P.2d at 1356.]

Brown, 607 P.2d at 270.

In conclusion, the failure to sentence petitioners under the Wood standard was not:

State v. Urias, supra, at 1329. It was harmless error and therefore should not result in a reversal of petitioners' death sentences.

POINT IV

PETITIONERS' ALLEGATION THAT THEY WERE SENTENCED UNDER A STATUTORY SCHEME WHICH PERMITTED ARBITRARY, CAPRICIOUS AND DISCRIMINATORY APPLICATION OF THE DEATH PENALTY SHOULD BE DISMISSED AS A MATTER OF LAW, AND AN EVIDENTIARY HEARING NEED BE HELD THEREON.

Petitioners allege that the sentencing standard required by State v. Wood, supra, had either been applied by the trial court or proposed by the State, before Wood was decided, in the prosecutions of several capital defendants (all of whom were white), and that this, in itself, is sufficient to require a reversal of their death sentences on the ground that such inconsistency in proposed or applied sentencing standards constitutes an arbitrary, capricious, and discriminatory application of Utah's death penalty statute. Alternatively, they argue that this Court should order an evidentiary hearing to more fully consider the claim. However, because petitioners' allegations are nothing more than a thinly veiled attack on the constitutionality of this state's capital punishment laws--which raises legal, not factual issues--their instant petitions should be dismissed as a matter of law without an evidentiary hearing which is neither necessary nor required.

In the leading case of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, reh. denied, 441 U.S. 937 (1979), the Fifth Circuit Court of Appeals rejected claims nearly identical to petitioners'; thus, the reasoning therein is directly on point with respect to the issues confronting this Court now. As the Circuit court did with Spinkellink's claims, petitioners' allegations that (1) Utah's death penalty has been applied arbitrarily and capriciously, and (2) that it has been applied discriminatorily on the basis of race, will be analyzed separately.

In Spinkellink, the petitioner first claimed that Florida's death penalty was being arbitrarily and capriciously applied in violation of the Eighth and Fourteenth Amendments and that his case, when compared to a "plethora" of Florida capital cases decided after his, would not be deemed the "sort of homicide . . . sufficiently heinous in Florida to merit the penalty of death." Id. at 600. However, the Circuit court concluded that the language from Proffitt indicating that "[o]n its face the Florida system thus satisfies the constitutional deficiencies identified in Furman," 428 U.S. at 253, could only mean that a death penalty statute which is constitutional on its face "conclusively removes the arbitrariness and capriciousness which Furman held violative of the Eighth and Fourteenth Amendments." 578 F.2d at 604. Therefore, the only concern was whether the Florida courts had followed the statute in imposing Mr. Spinkellink's death sentence; "a comparison of [his] case with other Florida death penalty cases would be unnecessary." Id. To

read the United States Supreme Court decisions otherwise, the Spinkellink court reasoned, would create serious problems and likely render capital punishment laws unworkable:

First, every criminal defendant sentenced to death . . . could through federal habeas corpus proceedings attack the statute as applied by alleging that other convicted murderers, equally or more deserving to die, had been spared, and thus that the death penalty was being applied arbitrarily and capriciously, as evidenced by his own case. The federal courts then would be compelled continuously to question every substantive decision of the Florida criminal justice system with regard to the imposition of the death penalty. The intrusion would not be limited to the Florida Supreme Court. It would be necessary also, in order to review properly the Florida Supreme Court's decisions, to review the determinations of the trial courts. And in order to review properly those determinations, a careful examination of every trial record would be in order. A thorough review would necessitate looking behind the decision of jurors and prosecutors, as well. Additionally, unsuccessful litigants could, before their sentences were carried out, challenge their sentences again and again as each later convicted murderer was given life imprisonment, because the circumstances of each additional defendant so sentenced would become additional factors to be considered. The process would be never-ending and the benchmark for comparison would be chronically undefined. Further, there is no reason to believe that the federal judiciary can render better justice . . . reasonable persons can differ over the fate of every criminal defendant in every death penalty case. If the federal courts retried again and again the aggravating and mitigating circumstances in each of these cases, we may at times reach results different from those reached in the Florida state courts, but our conclusions would be no more, nor no less, accurate. Such is the human condition. . . .

The Supreme Court in Proffitt, or in Furman, Gregg, Jurek, Woodson or Roberts, could not have intended these results.

578 F.2d at 604-605.

Noting that Utah's death penalty statute "is clearly constitutional 'on its face'" and had been "meticulously followed" in petitioners' cases, Pierre v. Morris, 607 P.2d at 814, the companion cases of Pierre v. Morris, supra, and Andrews v. Morris, supra, expressly adopted the Spinkellink view in upholding the trial court's dismissal, as a matter of law, of the arbitrary and capricious issue raised therein. In their instant petitions, Pierre and Andrews have failed to allege anything new that casts doubt on the resolution of that issue in those two decisions. In short, they assert no facts to show that the State failed to act in accordance with the guidelines and within the limits of Utah's death penalty law in their own cases. See also Point III, supra.

Second, Spinkellink argued, inter alia, that Florida's death penalty was being applied discriminatorily against defendants whose victims were white, apparently because Florida prosecutors, jurors, trial judges, and supreme court justices valued black lives less than they did white. Noting that:

[this] contention must fail as a matter of law on both the constitutional grounds relied upon [i.e., the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment],

578 F.2d at 613, the Circuit court dealt first with the Eighth Amendment argument:

Assuming for the sake of argument that the petitioner's statistics are accurate, his contention must fail as a matter of law on both of the constitutional grounds relied upon. The allegation that Florida's death penalty is being discriminatorily applied to defendants who murder whites is nothing more than an allegation that the

death penalty is being imposed arbitrarily and capriciously, a contention we previously have considered and rejected. To allege discriminatory application of the death penalty, as meant in the context of this case, is to argue that defendants who have murdered whites have received the death penalty when other defendants who have murdered blacks, and who are equally or more deserving to die, have received life imprisonment. In order to ascertain through federal habeas corpus proceedings if the death penalty had been discriminatorily imposed upon a petitioner whose murder victim was white, a district court would have to compare the facts and circumstances of the petitioner's case with the facts and circumstances of all other Florida death penalty cases involving black victims in order to determine if the first degree murderers in those cases were equally or more deserving to die. The petitioner thus requests the same type of case-by-case comparison by the federal judiciary that we have previously rejected in considering the petitioner's contention that Florida's death penalty is being imposed arbitrarily and capriciously. We need not repeat the myriad of difficult problems, legal and otherwise, generated by such federal court intrusion into the substantive decision making of the sentencing process which is reserved to the Florida state courts under Section 921.141.

The court then relied on two Supreme Court decisions, Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), to explain why Spinkellink's claim under equal protection failed. Deciding that a District of Columbia Metropolitan Police Department entrance exam did not violate Fourteenth Amendment equal protection even though the exam had a racially disproportionate impact as evidenced by a far greater failing rate for blacks than for whites, the Washington Court noted:

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. . . . But our cases have not embraced the

proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

426 U.S. at 239 (emphasis in original). The Court also stated:

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact--in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires--may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

426 U.S. at 242.

The following year, in Arlington Heights, the Court reaffirmed its position that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," and that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," Id. at 265. There, it held that the Village of Arlington Heights' refusal to rezone certain land did not violate Fourteenth Amendment equal protection in that such refusal was not racially motivated but designed to protect property values and maintain the Village's zoning plan.

As Spinkellink recognized, Washington and Arlington Heights mandate that even if a statute has a racially disproportionate impact, an "equal protection challenge must fail [where] the discrimination is explainable on nonracial grounds." 578 F.2d at 615.²⁹ Although the Spinkellink court relied to a certain extent on an earlier evidentiary hearing in the district court where the state presented evidence which effectively rebutted Spinkellink's allegations by demonstrating that factors other than race explained the racially disproportionate impact of Florida's statute, it emphasized that "these explanations were provided in an evidentiary hearing on the petitioner's contention that was not constitutionally required." 578 F.2d at 616, n. 41 (emphasis added). It also clearly set out when an evidentiary hearing would be permitted:

[W]ith respect to the contention that Florida's death penalty is being imposed arbitrarily and capriciously, [we do] not . . . say that federal courts should never concern themselves on federal habeas corpus review with whether Section 921.141 is being applied in a racially discriminatory fashion. If a petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination against him, see Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-68, 97 S.Ct. 555, 564-65, 50 L.Ed.2d 450 (1977), either because of his own race or the race of his victim, the federal district court should intervene and review substantively the sentencing decision. We emphasize once again, see note 28 supra, that this Court anticipates that such intervention will be infrequent and only for the most compelling reasons. Mere conclusory

²⁹See also Personnel Admin. of Mass., et al., v. Feeney, 442 U.S. 256 (1979) and Schweiker v. Wilson, 450 U.S. 221 (1981), both decided after the Fifth Circuit opinion in Spinkellink, and which reaffirmed the reasoning in Washington and Arlington Heights.

allegations, as the petition makes here, such as that the death penalty is being "administered arbitrarily and discriminatorily to punish the killing of white persons as opposed to black persons," Petitioner's Brief at 2, do not constitute such reasons and would not warrant an evidentiary hearing. This is so on Eighth Amendment grounds as well as on Fourteenth Amendment equal protection grounds, because the intrusionary effect would be the same.

578 F.2d at 614, n. 40 (Emphasis added).

Like Spinkellink, Pierre and Andrews have failed to make a prima facie case of racial discrimination by "show[ing] some specific act or acts evidencing intentional or purposeful racial discrimination against [them]."30 In fact, the proffered affidavits from defense attorneys and a former prosecutor showing that sentencing instructions different from those given in petitioners' cases were given or proposed in certain other capital cases is far less indicative of racial discrimination than was the statistical data proffered by Spinkellink. The affidavits correctly indicate that a Wood-like sentencing standard was either applied by the trial court or proposed by the State in the capital prosecutions of Robert Phillips, John Calhoun, Ervil LeBaron, and Joseph Paul Franklin, but, significantly, there is not the

30See also: Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858 (5th Cir. 1982), where the court concluded:

As in Spinkellink, we find [petitioner's] claim brimming with "[m]ere conclusory allegations" of discrimination, id., and wanting in proof of intentional discrimination against him in this particular case.

Id. at 585 (emphasis added).

slightest implication therein that the use of such standard was racially motivated.³¹ Neither Mr. Lubeck, nor Mr. Yocom, nor Mr. Hill, nor Mr. Iwasaki makes any reference to even the possibility of racial discrimination in favor of capital defendants who are white and against those who are black (or discrimination based upon any other impermissible classification). Their affidavits, stating nothing more than they do, clearly do not make a prima facie case of discrimination and are not, in any sense, sufficient basis to warrant an evidentiary hearing.

Furthermore, the different sentencing instructions given or proposed in the Phillips, Calhoun, and LeBaron cases are easily explainable on non-racial grounds. Those three defendants were tried, convicted and sentenced after this Court issued its opinion in State v. Brown, supra. Justice Stewart's concurring opinion in Brown argued for the sentencing standard this court eventually adopted in Wood, supra. That concurring opinion no doubt caused some defense attorneys, prosecutors and the Attorney General's Office some concern. One plausible view of the potential impact of the opinion was that as long as the ultimate burden of weighing the totality of the aggravating factors against the totality of the mitigating ones remained intact, attaching a reasonable doubt standard to that weighing made no real substantive difference. In other words, whether a sentencing authority only slightly found that the aggravating circumstances outweighed the mitigating (or what Justice Stewart described as "preponderating"), or greatly

³¹There is no doubt why the Wood standard was given in Franklin's case, in that the Wood per curiam had already issued and mandated such.

found that they preponderated made no real difference in the final analysis. Either way, the aggravating factors preponderated. Thus, under this view, there would be no harm in proposing an instruction as suggested by Justice Stewart, and at the same time satisfy his concerns. In any event, the confusion created by the Brown concurring opinion would explain on non-racial grounds why sentencing instructions different from those used in petitioners' cases were given or proposed in some post-Brown capital prosecutions.³² Because the defendants in those cases happened to be white is simply a matter of coincidence and not a clear indication of racially discriminatory application of Utah's death penalty statute.³³

Finally, the instant petitions do not meet the requirements of state law concerning application for post-conviction relief. Rule 65B(i), Utah Rules of Civil Procedure, reads, in pertinent part, as follows:

³²Justice Stewart's characterization of the State v. Pierre sentencing standard as a "preponderance of evidence test," Brown, 607 P.2d at 274 (Stewart, J., concurring), may have further contributed to the confusion, since the application of traditional burden of proof notions to the penalty phase decision was admittedly a new concept in this state. (It should be noted that the appropriateness of such application of traditional burden of proof standards, especially "beyond a reasonable doubt," in a non-factfinding context is questionable. See Addington v. Texas, 441 U.S. 418 (1979).)

³³It should be noted that before Brown was issued, the State v. Pierre standard was consistently used in capital prosecutions. See, e.g., State v. Codianna, Marvel, and Dunsdon, 573 P.2d 343 (1977), cert. denied, 439 U.S. 882 (1978).

The complaint shall . . . set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated. The complaint shall have attached thereto affidavits, copies of records, or other evidence supporting such allegations, or shall state why the same are not attached.

Andrews v. Morris, 607 P.2d at 821, specifically cited this section of the Rule in upholding the trial court's denial of petitioners' request for an evidentiary hearing on their arbitrary, capricious, and discriminatory application claim. California has adopted a position similar to that taken in Rule 65B(i) and Andrews v. Morris:

The basic remedy available to correct arbitrary Authority action is the writ of habeas corpus. (See In re Tucker, supra, 5 Cal. 3d 171, 95 Cal. Rptr. 761, 486 P.2d 657). A plea for such relief, however, will not receive judicial consideration unless the petitioner alleges with particularity the circumstances constituting the People's claimed wrongful conduct and demonstrates how he is prejudiced thereby. (In re Swain (1949), 34 Cal. 2d 300, 209 P.2d 793.)

In re Sturm, 113 Cal. Rptr. 361, 368, 521 P.2d 97, 104 (1974). Accord: People v. Jackson, 168 Cal. Rptr. 603, 618 P.2d 149 (1980).

The instant petitions fail to "set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated." To say that the affidavits attached thereto plainly and concisely set forth evidence of arbitrary, capricious and discriminatory application of Utah's capital punishment law in petitioners' cases borders on the absurd. Once again, Pierre and

Andrews have come to the courts of this state with petitions for post-conviction relief which raise no issues of fact, only issues of law, and therefore, as was held in Andrews v. Morris and Pierre v. Morris, an evidentiary hearing is not required. See also: Gonzalez v. Morris, Utah, 610 P.2d 1285 (1980).

In sum, although petitioners have alleged certain facts pertaining to the sentencing instructions given or proposed in several later capital cases, such does not amount to an allegation of specific acts of invidious discrimination against them which would invalidate their death sentences. Spinkellink, supra; see also: Mitchell v. Hopper, 538 F.Supp. 77 (S.D. Ga. 1982); Ross v. Hopper, 538 F.Supp. 105 (S.D. Ga. 1982). Moreover, petitioners have not shown that "their . . . sentences were imposed outside the limits set by [Utah] law, that the statutes were not followed for some reason or that the courts were derelict in their duties. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)." Mitchell v. Hopper, supra, at 90. These are the same critical deficiencies identified by the Fifth Circuit Court in Spinkellink whose reasoning is directly applicable to the cases at bar. Any suggestion that the holding of Spinkellink is questionable under Furman v. Georgia, supra, because it precludes constitutional challenges to the application of a death penalty statute is clearly erroneous. Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858 (5th Cir. 1982), leaves little doubt concerning the Fifth Circuit's intentions in Spinkellink:

In Spinkellink this court observed "that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and

capriciousness--and therefore the racial discrimination--condemned in Furman have been conclusively removed." Spinkellink, 578 F.2d 582, 613-14 (5th Cir. 1978) (footnotes omitted). [Petitioner] construes Spinkellink as precluding constitutional challenges to the application of a death penalty statute and argues that Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) [footnote omitted], overrules Spinkellink on this point. Spinkellink, however, effected no such broad prohibition. It merely established that in the absence of proof of "some specific act or acts evidencing intentional or purposeful . . . discrimination against [the petitioner]" on the basis of race, sex, or wealth, a petitioner is not entitled to relief on habeas corpus. 578 F.2d at 614, n. 40 (emphasis added).³² (footnote 32: Indeed, three times the court took great pains to point out that its rejection of Spinkellink's [sic] claim that his death sentence was arbitrarily and capriciously imposed did not preclude as applied attacks on the death penalty statute. 578 F.2d at 606., n. 28, 614 n. 40, 616 n. 42.

Id. at 584-585 (emphasis in original).

Accordingly, this Court has no reason to depart from its previous reliance on Spinkellink, see Andrews v. Morris and Pierre v. Morris, and should, as a matter of law, deny petitioners relief and deny an evidentiary hearing on their allegations that Utah's death penalty statute has been arbitrarily, capriciously, and discriminatorily applied.

POINT V

IF THIS COURT FINDS THAT STATE V. WOOD, SUPRA, SHOULD APPLY RETROACTIVELY TO PETITIONERS' CASES AND THAT THERE WAS PREJUDICIAL ERROR AT THEIR PENALTY HEARINGS, PETITIONERS SHOULD BE RESENTENCED UNDER THE PROVISIONS OF UTAH CODE ANN., § 76-3-207(4) (1953), AS AMENDED, 1982 LAWS OF UTAH, CHAPTER 19.

On February 16, 1982, the Legislature amended part of Utah Code Ann., § 76-3-207 (1953), as amended,³⁴ to read:

Upon any appeal by the defendant where the sentence is of death, the appellate court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court for new sentencing proceedings to the extent necessary to correct the error or errors. . . . In cases of remand for new sentencing proceedings, all exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing proceedings shall be admissible in the new sentencing proceedings; and:

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

(b) If the sentencing proceeding was before a judge, the original trial judge shall conduct the new sentencing proceeding; or

(c) If the sentencing proceeding was before a judge and the original trial judge is unable or unavailable to conduct a new sentencing proceeding, then another judge shall be designated to conduct the new sentencing proceeding.

1982 Laws of Utah, Chapter 19 (new language is emphasized). The new language replaced a former provision requiring the trial court, on remand for prejudicial error in the sentencing proceeding, to impose the sentence of life imprisonment.

Because petitioners' habeas corpus actions come to this Court after § 76-3-207 was amended, the revised sentencing procedures in subpart (4) are applicable to them if, in light of State v. Wood, supra, the Court determines that there was prejudicial error at their sentencing proceedings. Section

³⁴The relevant subpart formerly was (3) but is now (4).

76-3-207(4) contemplates such application, since the words "any appeal," therein, certainly include post-conviction habeas corpus appeals brought after the date of Senate Bill 60's enactment by capital defendants convicted and sentenced prior to the change in law. Senate Bill 60 did not except such defendants from the operation of the new procedures and there is nothing in Utah's present statutory law or past case law indicating that they would be exempt; therefore the Legislature must have intended for the amendments to apply prospectively to them.³⁵

Up to this point, there has been no adjudication of prejudicial error at sentencing in petitioners' cases. Thus, if the Court now finds such error and reverses petitioners' death sentences, it is compelled to remand the cases to the trial court for resentencing in accordance with § 76-3-207(4).

If, however, the Court decides to characterize application of § 76-3-207(4) to petitioners as retrospective, in that the amended sentencing procedures were not in effect at the time of the commission of their crimes, such retrospective application is permissible under both Utah law and federal constitutional law.

First, it is necessary to deal with the question of whether retroactive application in these cases would violate the Ex Post Facto Clause of the United States Constitution (Article I,

³⁵Application is prospective in that § 76-3-207(4) would apply to all post-conviction habeas corpus actions and other appeals decided after the date of enactment, including those brought by defendants convicted and sentenced before passage of Senate Bill 60.

Section 10) or its counterpart in the Utah Constitution--Article I, Section 18. The case of Dobbert v. Florida, 432 U.S. 282 (1977), clearly indicates that it would not.

A brief overview of pre-Dobbert ex post facto caselaw is essential to a complete understanding of Dobbert. Very early on, in analyzing the ex post facto clause, the United States Supreme Court focused on whether a new law resulted in the infliction of a greater punishment than the law previously annexed to the crime; and if it did, the retroactive application of the new law would be ex post facto. It also determined that changes in a statute which were procedural in nature and did not affect the substantial rights of the defendant would not be considered ex post facto. Mallett v. North Carolina, 181 U.S. 589 (1900); Beazell v. Ohio, 269 U.S. 167 (1925). In connection with the "substantial rights" theory, the Court maintained that even though a procedural change in the law may work to disadvantage a defendant, such change would not constitute an ex post facto violation. Hopt v. Utah, 110 U.S. 574 (1884); Thompson v. Missouri, 171 U.S. 380 (1898). In short, the historical background illustrates a development of two main themes: (1) retroactive application of a new law which provides for greater punishment than provided for under the previous law violates the ex post facto clause; and (2) changes in the law which are procedural in nature and do not deprive an individual of any substantial rights enjoyed under the prior law are not ex post facto (even though they may disadvantage a defendant to some degree).

The issue before the Court in Dobbert was whether Florida's death penalty statute, upheld in Proffitt, could be applied to an offense committed prior to its enactment. Of the three separate ex post facto claims made by Dobbert, one is particularly relevant. He argued that the statutory change in the role of the judge in the sentencing process between the time the offense was committed and the time of his trial constituted an ex post facto violation. Rejecting that argument, the Court said:

Petitioner views the change in the Florida death-sentencing procedure as depriving him of a substantial right to have the jury determine, without review by the trial judge, whether that penalty should be imposed. We conclude that the changes in the law are procedural, and on the whole ameliorative,⁶ and that there is no ex post facto violation. (fn. 6: These are independent bases for our decision. For example, in Beazell v. Ohio, 269 U.S. 167 (1925), we found a procedural change not ex post facto even though the change was by no means ameliorative.)

Id. at 292.

Justice Rehnquist, writing for the majority, further explained the Court's position:

It is equally well settled . . . that "[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed." Gibson v. Mississippi, 162 U.S. 565, 590 (1896). "[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see Malloy v. South Carolina, 237 U.S. 180, 183, and not to limit the legislative control of remedies and modes of procedure which did not affect matters of substance." Beazell v. Ohio, supra, at 171.

Id. at 293.

The Dobbert opinion repeatedly emphasized that although a change in the statutory law may disadvantage a defendant, if the change is procedural and has "neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict," it is not ex post facto. Id. at 392, citing Hopt. v. Utah, 110 U.S. 574, 589 (1884). The Hopt case is an excellent example of where a procedural change clearly worked to the detriment of the defendant yet was not held to be ex post facto. There, a witness considered legally incompetent to testify at the time the offense was committed was, by virtue of a statutory amendment, rendered competent and gave very damaging testimony against the defendant at trial.

Finally, the Dobbert Court concluded:

In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.

Id. at 293-94.

The foregoing discussion of the fundamental principles of ex post facto law and the language excerpted from Dobbert establish that Dobbert represents a natural culmination of the guidelines laid down in the early Supreme Court cases of Hopt, supra, Beazell, supra, and Calder v. Bull, 3 U.S. 386 (1798). Therefore, it is solid precedent and directly on point with respect to the applicability of Utah's amended sentencing statute to Pierre and Andrews.

Some may point to decisions from several jurisdictions as casting doubt on the validity of Dobbert. See, e.g., People v. Teron, 22 Cal. 2d 103, 151 Cal. Rptr. 633, 588 P.2d 773 (1979); State v. Lindquist, 99 Idaho 766, 589 P.2d 101 (1979); People v. Hill, 78 Ill. 2d 465, 401 N.E.2d 517 (1980); Hudson v. Commonwealth, Ky., 597 S.W.2d 610 (1980); State v. Collins, La., 370 So.2d 533 (1979); and State v. Rodgers, S.C., 242 S.E.2d 215 (1978). However, a careful reading of those cases reveals that they in no way reject the reasoning of Dobbert. The following from the Supreme Court of Louisiana's opinion in State v. Collins, supra, is representative of the view shared by all the courts cited above:

For reasons similar to those assigned recently by the California Supreme Court in People v. Teron [supra], the United States Supreme Court's decision in Dobbert v. Florida is inapposite to the present case. In Dobbert, a majority of the United States Supreme Court indicated that, for purposes of the ex post facto clause of the federal constitution, a Florida statute in some respects similar to the 1976 Louisiana legislation could be applied retroactively as an "ameliorative" or "procedural" enactment. However, the Supreme Court was not faced with the question presented in the instant case of whether, as a matter of state statutory and jurisprudential law, a penal measure should be interpreted to apply to offenses committed prior to the effective date of the legislation. In Dobbert the Florida Supreme Court had previously concluded as a matter of state law that the new legislation could be applied retroactively to an antecedent offense.⁵ (fn. 5: Prior to trial, Dobbert had applied to the Supreme Court of Florida for a constitutional stay of trial alleging the application of an ex post facto law and a violation of equal protection. This application was denied. See Dobbert v. Florida [supra, at 286-87]). On appeal of his conviction, the Florida Supreme Court affirmed the conviction and death sentence without discussing the ex post facto

argument. Dobbert v. State, 328 So.2d 433 (Fla. 1976). Shortly after the decision in Dobbert was rendered by the Florida Supreme Court, that court reduced a death sentence to life imprisonment based on ex post facto principles and equal protection requirements. The state court's opinion in Dobbert was not mentioned. Lee v. State, 340 So.2d 474 (Fla. 1976). See also: Note, 1978 Brigham Young U. L. Rev. 484, 489 (1978). Thus, the United States Supreme Court was concerned only with the constitutionality of Florida's retroactive application of its death penalty statute under the federal ex post facto clause. See, People v. Teron, *supra*, at 782.

Id. at 535.

In short, retroactive application of valid death penalty statutes was denied in the cases above due not to a rejection of Dobbert, but for at least one of two other reasons: (1) the defendants therein had been convicted and sentenced to death under statutes later declared unconstitutional and replaced by ones which were constitutional and which the state wished to apply retroactively to those defendants; and (2) state law prohibited retroactive application of the new statute. Thus, the cases were factually distinct from Dobbert (Dobbert was convicted and sentenced under a constitutional death penalty statute which Florida law allowed to be retroactively applied to him).

In the instant cases, petitioners were convicted and sentenced under a statute which this Court has repeatedly declared constitutional. Thus, in that respect, their cases are unlike those above.³⁶ The State is not attempting to apply

³⁶Respondent recognizes that State v. Collins, *supra*, is an exception; it denied retroactive application of the new death penalty law solely on the ground that Louisiana statutes prohibit such.

retroactively an entirely new statute to petitioners--i.e., the essence of Utah's capital punishment law was not altered by the amendments contained in Senate Bill 60. Furthermore, Utah law does not prohibit the retroactive application of a new statute. Although the Utah Supreme Court has established the general rule that legislative enactments operate prospectively rather than retrospectively, unless expressly declared otherwise. In re Ingraham's Estate, 106 Utah 337, 148 P.2d 340 (1940), State v. Kelbach, Utah, 569 P.2d 1100 (1977), as an exception to the general rule, procedural changes in statutes may have retrospective effect. See Petty v. Clark, 113 Utah 204, 192 P.2d 589 (1948); Okland Construction v. Industrial Commission, Utah, 520 P.2d 208 (1974). This Court's comments in State v. Coleman, Utah, 540 P.2d 953 (1975)--where the application of a 1973 statute prohibiting possession of a dangerous weapon by a person convicted of a crime of violence to the defendant, who had been convicted of assault with a deadly weapon in 1969, was not an ex post facto violation under the federal or state constitutions--reflect some of the Court's concerns in this area:

It appears that the legislature was not interested in imposing a heavier burden or greater penalty upon those who had previously been convicted of crime. The legislature acted within its authority in restricting the use and possession of firearms by those who by their prior conduct had demonstrated an unfitness to be entrusted with those weapons (footnote omitted).

Id. at 954.

Like the change in Florida law at issue in Dobbert, the modification of Utah's capital sentencing law is clearly procedural. Although a defendant is disadvantaged in that he no longer receives a "windfall" life sentence if prejudicial error is found in his sentencing proceedings, the new law does not result in the infliction of a greater punishment than the law previously annexed to the crime. In re Medley, 134 U.S. 160 (1890). First-degree murder, as it did before the change in law, carries with it two possible sentences--life imprisonment or death. The automatic life sentence a defendant received under the prior law if prejudicial error was found was not annexed to the crime; it was attached to a procedure. A change in that procedure simply alters the method for determining whether the death sentence will be imposed by modifying the procedural remedy--a remand for a new penalty hearing replaces the automatic life sentence. At resentencing, the defendant faces possible sentences identical to those he faced under the former law. In analyzing ex post facto issues, the phrase "annexed to the crime" is of crucial importance in the sense that for a change in a statute to materially alter the situation of the defendant to his disadvantage, the change must be in the punishment annexed to the crime.

Employing this rationale, the United States Supreme Court, in Portley v. Grossman, 444 U.S. 1311 (1980), held that there was no ex post facto violation in a parole hearing where the California Parole Commission applied statutory guidelines in effect in 1978 when the petitioner's parole was revoked rather

than guidelines in effect when he was originally sentenced in 1972. The Court commented:

The guidelines operate only to provide a framework for the Commission's exercise of its statutory discretion. The terms of the sentence originally imposed have in no way been altered. . . . The guidelines, therefore, neither deprive applicant of any pre-existing right nor enhance the punishment imposed. The change in guidelines assisting the Commission in the exercise of its discretion is in the nature of a procedural change found permissible in Dobbert, *supra*.

Id. at 1312-13. The same rationale explains why habitual criminal statutes utilizing convictions secured prior to the passage of the statute in order to stiffen punishment for the primary offense to not violate the ex post facto clause. McDonald v. Massachusetts, 180 U.S. 311 (1901); Gryger v. Burke, 334 U.S. 728 (1948). See also: Pettway v. United States, 216 F.2d 106 (6th Cir. 1954), cert. denied, 355 U.S. 918 (1957), and Payne v. Nash, 327 F.2d 197 (8th Cir. 1964).

Recent caselaw out of Arizona is particularly relevant. In State v. Watson, Ariz., 586 P.2d 1253 (1978), the Arizona Supreme Court was faced with a situation somewhat similar to the one presented in petitioners' cases. Watson had been convicted and sentenced under a death penalty statute which unconstitutionally limited his right to show all mitigating circumstances at the sentencing hearing (a violation of Lockett v. Ohio, 438 U.S. 586 (1978)). The court held that the constitutional and unconstitutional portions of Arizona's statute were severable, and, citing Dobbert, that Watson's resentencing

under the "cured" statute (i.e., that unconstitutional portions having been severed) exposed him to a procedural change only and was not an ex post facto violation.

Like the change in Arizona's statute, brought about by Watson to meet constitutional concerns, the modification of Utah's law, brought about by legislation to meet state policy concerns, is purely procedural. By holding that a capital defendant was entitled, per Lockett, supra, to present any relevant evidence in mitigation at sentencing and that the statutory provision to the contrary was invalid, the Watson court simply "revised" one particular aspect of the state's capital sentencing procedures and left the remainder intact. The Utah Legislature similarly has revise done particular aspect of this state's capital sentencing procedures by providing for the resentencing proceedings discussed earlier; and as was the case in Arizona, retroactive application of the revised procedures to a defendant convicted and sentenced under the prior statute is not ex post facto.

After Watson was decided, a group of prisoners, convicted and sentenced to death under Arizona's pre-Watson statute, brought a class action in federal district court to prevent the remand of their cases for resentencing in compliance with Watson. They argued, inter alia, that retroactive application of the revised sentencing procedures would constitute an ex post facto violation. However, the Ninth Circuit Court of Appeals affirmed the district court's rejection of that claim, stating:

The Supreme Court in Dobbert held that the new Florida statute was not an ex post facto law both because it was procedural and ameliorative. 432 U.S. at 294, 97 S.Ct. at 2298. That is, it "neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment nor changed the proof necessary to convict." 432 U.S. at 293, 97 S.Ct. at 2298. The "change" in the Arizona statute as a result of the interpretation by Watson is likewise both procedural and ameliorative. Its only effect was to enlarge the ability of defendants to introduce mitigating circumstances at sentencing. Thus, no ex post facto problems arise even with respect to those appellants tried and sentenced before Watson.

Knapp v. Cardwell, 667 F.2d 1253, 1263 (9th Cir. 1982).

The ex post facto issue considered in Watson and Knapp arose in a factual context not unlike that present in petitioners' cases. Therefore, the Arizona Supreme Court's and Ninth Circuit's decisions, in addition to the Dobbert opinion, are solid, well reasoned precedents for the retroactive application of a procedural change in a state's capital sentencing scheme which are directly applicable to petitioners' cases. Accordingly, this Court should reject any ex post facto claims.

Finally, retroactive application of the revised sentencing procedures to petitioners does not deny them equal protection of the laws. All other convicted capital defendants in Utah who have obtained reversals of their death sentences and automatic sentences of life imprisonment under the pre-Senate Bill 60 statute did so through appeals considered before the enactment of Senate Bill 60. Because petitioners' instant habeas corpus appeals will be considered after the enactment of Senate Bill 60,

they simply are not similarly situated to those who received the automatic life sentences. Even if they were similarly situated, proof that application of the new resentencing provisions is not rationally based and is, in fact, motivated by a discriminatory purpose based on race or some other impermissible classification, is required to show a violation of the Equal Protection Clause. See Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); and Personnel Administration of Mass. v. Feeney, 442 U.S. 256 (1979). As the Court stated in Feeney, supra,

"Discriminatory purpose" . . . implies more than an intent as volition or intent as awareness of consequences. See United Jewish Organization v. Carey, 430 U.S. 144, 179 (concurring opinion) (footnote omitted). It implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group (footnote omitted).

Id. at 279. The Utah Legislature's decision to revise the state's capital sentencing procedures is nothing more than an attempt to bring Utah in line with a large number of other states in this respect,³⁷ notwithstanding that it may have been aware of the possible effect on habeas corpus appeals like those brought now by petitioners.

³⁷See, e.g., Acts of Alabama (Regular Session 1981), Vol. 1, Act 178, § 15(a); Ark. Stat. § 43-2617; Del. Code Ann. 11 § 4209(g)(4); Code of Ga. Ann. § 27-2537(2); Id. Code § 19-2827(f); Ky. Rev. Stat. § 532.025 (2); L.S.A. Criminal Procedure Article 905.1(B); Ann. Code of Md. 27 § 414(f)(i); Vernon's Ann. Mo. Stat. § 565.006(3); N.H. Rev. Stat. Ann. § 630.5(VII)(b); Gen. Stat. of N.C. § 15A-2000(d)(3); Comp. Laws of S.C. § 16-3-25(E)(2); S.D. Codified Laws 23A-27A-13(2); Wyo. Stat. § 6-4-103(e)(iii).

In sum, if this Court views the application of § 76-3-207(4) to petitioners as retroactive, such application to defendants in their situation was intended by the Legislature and is consistent with both Utah law and federal constitutional law. A finding of prejudicial error at petitioners' penalty hearings should have but one result: a remand of their cases to the trial court for resentencing under the recently revised procedures.

CONCLUSION

Based upon the foregoing, respondent submits that petitioners' habeas corpus petitions lack legal merit and should be dismissed or denied with prejudice. Alternatively, if prejudicial error is found in their cases, the matters should be remanded to the trial court for the convening of a new sentencing hearing under § 76-3-207(4) (1953), as amended, 1982 Laws of Utah, Chapter 19.

Respectfully submitted this 13th day of September, 1982.

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CERTIFICATE OF MAILING

I hereby certify that I served two true and exact copies
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this 13th day of September, 1982.

Susan Patton

APPENDIX A

The evidence adduced at the guilt phase reflected the following:

On April 22, 1974, the basement of the Hi Fi Shop in downtown Ogden, Utah, became the scene of a brutal and torturous detention, robbery and murder which left three people dead and two wounded but miraculously alive.

Stanley Walker, assistant manager of the Hi Fi Shop, in his early twenties, Michelle Ansley, a 19-year-old employee and part-time model, and Cortney Naisbitt, a 17-year-old relative of the shop's owner, were taken captive at gunpoint into the basement of the Hi Fi Shop by petitioners Dale S. Pierre and William Andrews (Tr. 3069-3070) to facilitate the methodical removal of virtually the entire inventory of stereo equipment from the store for transport to a rented storage locker.

Stanley's father, Orren Walker, became alarmed when Stanley did not come home for dinner (Tr. 3060-3061). His paternal concern led him to the Hi Fi Shop as he sought the whereabouts of his son (Tr. 3061, 3063, 3067). The back door of the Shop was unlocked. He entered and saw that much of the stereo equipment which had been on display earlier that afternoon was now missing (Tr. 3064-3065). As he approached the stairway to the Shop's basement, Pierre and Andrews confronted him with guns and forced him down the stairs. Orren found the three young people lying on the floor, bound hand and foot, pleading for their lives (Tr. 3073-3075). Pierre tried to force Orren to give some unknown

drink to the young people (Tr. 3077). When Orren refused, Andrews threateningly placed a gun at his head saying "Man, there is a gun at your head" (Tr. 3077-3078). Pierre and Andrews then tied Orren's hands and feet and placed him by the others (Tr. 3078-3079).

Like Orren Walker, Carol Naisbitt became concerned about her son, Cortney, when he failed to return home from an errand (Tr. 2540-2541, 2080-2081). She sought her son at the Hi Fi Shop at about 8:00 p.m. (Tr. 1171-1172, 2541). Pierre and Andrews captured her at gunpoint and laid her bound next to her son (Tr. 3080-3081, 3083).

Eventually, in front of the others, Piere compelled Carol Naisbitt to drink the unknown liquid--a caustic substance which caused her to cough and sputter (Tr. 3084-3085). Andrews had told the victims that it was a mixture of vodka and a German drug which would help them to sleep (Tr. 3077). The substance was later identified as sodium hydroxide, a chemical compound consistent with liquid Drano (Tr. 2208-2210). In turn Cortney, Stanley, Michelle and Orren were also forced to drink (Tr. 3085-3087). Each successive ingestion caused coughing and spitting, yet Andrews continued to pour and Pierre continued to administer the corrosive chemical (Tr. 3084-3085). Orren Walker, one of the two survivors, tried to let the chemical slowly drain unnoticed out of his mouth (Tr. 3087); his forehead became scarred from lying in the resulting pool. Apparently to ensure that the Drano

did its desired work, both assailants now covered each victim's mouth with tape (Tr. 3087-3088).¹

Time passed but the five lived on. Finally, Pierre shot Carol Naisbitt in the head while she lay next to her son (Tr. 3101-3184). Cortney fell next victim to Pierre's gun, also shot in the head (Tr. 3103). Orren Walker then heard a bullet strike the floor near his head (Tr. 3101). Next, Orren heard his own son shot by Pierre (Tr. 3102). Another bullet "stung" into Orren's head (Tr. 3103). He began to do a simple mental multiplication and to move his toes and fingers to determine how bad his wound was (Tr. 3103, 3105). Pierre left momentarily, and Orren heard Michelle ask his son Stanley if he were all right (Tr. 3102); Stanley was able to reply that he had been shot (Tr. 3102).

Pierre returned, untied Michelle who had not been shot, and took her into a back room (Tr. 3103-3104) while Orren feigned death (Tr. 3105). When she returned she was naked and had been raped (Tr. 3106, 3110) (The State Medical Examiner determined sexual intercourse, post mortum) (Tr. 2176-2179). Michelle lay back down at her appointed place and was herself shot in the back of the head by Pierre (Tr. 3109-3110). Stanley was then shot a final time; his breathing, which his father, Orren, had been able to hear up to that time, now ceased (Tr. 3110).

¹The State Medical Examiner testified that the Drano would have caused the deaths of the murder victims but for the gunshot wounds they later sustained and the promptness of the medical attention some survivors received (Tr. 2200).

Later Pierre tried to discern if Orren Walker was dead (Tr. 3112). He attempted to strangle Orren with an electrical cord (Tr. 3110, 3119). Only by carefully tensing the muscles of his neck was Orren able to survive the strangulation attempt while still playing dead (Tr. 3110). The cord was left so tightly tied, his head swelled (Tr. 3119). Orren then felt a pointed object shoved into his ear and kicked three times (Tr. 3111, 3113). The object was a long ballpoint pen (Tr. 3124). Somehow Orren was able to keep from flinching as he felt the pen go deeper and deeper with each kick (Tr. 3112, 3113). Finally, both assailants were gone.²

After some time, Orren heard the voice of his other son upstairs (Tr. 3116), and the hours of immediate terror were over. The entire episode had lasted approximately four hours. Michelle and Stanley lay dead (Tr. 3120); Carol Naisbitt died en route to the hospital (Tr. 2543, 3120). Cortney survived to face five weeks of coma (Tr. 2546), five months of intensive care (Tr. 2551), several operations (Tr. 2544-2545, 2548-2549, 2551), peritonitis (Tr. 2550), blindness of the right eye (Tr. 2552-2553), partial paralysis of his right side (Tr. 2547-2548, 2552-2553), and loss of part of his esophagus and stomach lining (Tr. 2549-2551). As of the trial date, November, 1974, he was still

²Although there was some evidence that Andrews did not personally wish to be the one to put the bullets through the heads of the victims or be present when it occurred, there was absolutely no evidence that he lacked a conscious desire that the execution-style shootings eventually occur, and he did nothing to stop the onslaught by Pierre (Tr. 3096).

hospitalized, and except for water and clear liquids, was being fed directly into the stomach (Tr. 2552). Orren Walker also survived to give his eyewitness testimony at the trial. (Tr. 3057-3136).

Besides the personal account of Orren Walker, witness after witness corroborated his testimony and implicated Pierre and Andrews.

One witness, George Platco, overheard Andrews two months prior to the crime state that someday he would like to rob "a hi fi shop and would kill anyone who got in his way" (Tr. 1549). Two witnesses saw both Pierre and Andrews together in the Hi Fi Shop two days before the robbery-murder writing prices down and looking all over the store, even down the back stairs (Tr. 1578-1580, 1588, 1591-1592).

The owner of the rented storage locker in which the stereo items were found specifically identified Pierre as the person who had rented that particular locker the morning of the crime, supposedly to store a car (Tr. 1665-1670). Over \$20,000 worth of stereo equipment was recovered from the storage locker which also contained a bottle of liquid Drano, a cup like that used to administer the poison at the scene, and personal items from the shop. Much of the equipment was identified by specific serial number as having come from the Hi Fi Shop (Tr. 2447, 2865-2885, 2936-2955). Fingerprints of Pierre and Andrews were on some of this equipment. Personal items like a one-of-a-kind sculpture, a towel purchased in Brazil, a piece of broken display moulding

and chairs were specifically identified as coming from the Hi Fi Shop (Tr. 2917-2919).

A black acquaintance of petitioners' codefendant, Keith Roberts (who was convicted of aggravated robbery but not the homicides), saw Pierre and Andrews exit Andrews' blue van about 5:30 p.m. on the evening of the murders, three-quarters of a block east of the Hi Fi Shop (Tr. 1688, 1700-1703). They walked in the direction of the Shop while the van made a U-turn and drove that same direction (Tr. 1700-1703). Another witness also saw Pierre and Andrews exit the blue van and walk in the direction of the Shop (Tr. 1689-1690).

Another witness saw Andrews' blue van backed up to the rear door of the Hi Fi Shop about 6:30 p.m. and two black men passing stereo equipment into it (Tr. 1828-1830). Another witness saw Carol Naisbitt enter the back of the Shop about 8:00 p.m. and specifically identified Pierre as being at the back of the Shop somewhat later (Tr. 1771-1772). Pierre asked the witness a question and she remembered his accent (Tr. 1721). Other witnesses mentioned Pierre's Trinidad accent (Tr. 1593, 1667, 3294).

While looking for empty deposit bottles, the day after the crime, two young boys found purses, wallets, credit cards and other personal effects of the victims in the trash dumpster outside of Pierre's and Andrews' barracks at Hill Air Force Base (Tr. 2121-2129, 2136-2138).

A search of Pierre's room at the barracks the day after the crime yielded the signed copy of the storage locker agreement and articles from the Hi Fi Shop (Tr. 2467, 2473-2575). Andrews' room also contained Orren Walker's watchband (Tr. 3053-3055, 3096), items from the Hi Fi Shop (Tr. 2582-2588), and surgical gloves (Tr. 2583) (At one time Orren Walker had heard sounds like rubber gloves coming from the assailants' direction) (Tr. 3094-3095).

Pierre and Andrews gave a portable cassette player to a girl to "hold"; the stereo was from the Hi Fi Shop and contained Orren Walker's watch (Tr. 2322-2323, 2427, 2940, 3097).

Three weeks prior to the crime Pierre was seen at the movie "Magnum Force," a scene from which depicts a pimp pouring Drano down a prostitute's throat to kill her (Tr. 1614-1615).

Andrews called only one witness, a duty sergeant, to rebut George Platco's testimony regarding Andrews' statement that he wanted to rob a Hi Fi Shop and would kill anyone who got in his way (Tr. 3682).

See also the factual summary of this Court in State v. Pierre, 572 P.2d at 1343-1344.

APPENDIX B

During the sentencing phase of Utah's bifurcated capital proceeding, the State called Dr. Louis G. Moench (Tr. 4130), who had given Pierre a psychiatric examination on October 14, 1974, at the request of the defense (Tr. 4130-4135). The doctor testified only that Pierre was able to distinguish both legally and morally between right and wrong and suffered from no mental defect or illness which would interfere with his ability to make decisions or to conform his actions to what he perceived to be right or wrong. Dr. Moench also stated that Pierre was of average intelligence (Tr. 4136-4137).

Lt. John Farrer Regni (Tr. 4138), an Air Force personnel officer, was called by the State to testify concerning Pierre's and Andrews' military records. Pierre's record revealed that he had wrongfully appropriated an automobile from another airman (Tr. 4152), had failed to report to duty on several occasions (Tr. 4153), had twice written checks with insufficient funds (Tr. 4153), and was a "marginal performer" with limited potential as an airman (Tr. 4155). Petitioner Andrews' military record reflected a court-martial and time lost, a letter of reprimand for leaving the scene of an accident (Tr. 4142), another letter of reprimand for leaving his appointed place of duty (Tr. 4143), and that he had twice failed to go to his appointed place of duty. Petitioner Andrews was listed as a marginal performer and of limited potential as an airman (Tr. 4146). Andrews made no objection to this evidence, stipulated to its admissibility, and admitted some of it for his own purposes (Tr. 4160-62).

The State also called Mr. Allan Roe, a clinical psychologist at the Utah State Prison, who stated that during the past eight years, ten persons serving life sentences for first-degree murder had been released from the Utah State Prison. The persons released had served an average of thirteen years, one month (Tr. 4165), with the longest serving seventeen years, and the shortest nine years, one month (Tr. 4171). He also stated that three of those released thereafter committed other murders.

Evidence of Andrews' prior conviction of auto theft was admitted without objection (Tr. 4162, 4194-4195).

Pierre and Andrews then presented evidence of mitigating circumstances. Mr. Gerald Smith, Ph.D., a professor of criminology at the University of Utah, stated that in his opinion, the death penalty is not a deterrent (Tr. 4197-4234).

Mr. Frazier Crocker, Jr., former chaplain at the Utah State Prison, gave a historical overview of capital punishment and stated that in his opinion, biblical text did not support the imposition of capital punishment (Tr. 4234-4247).

Pierre did not take the stand or present further evidence of mitigating circumstances in his case.

Andrews testified that he was twenty years old; he was the youngest child in a family of five boys and one girl; he had never known his father and his mother had supported the family; he had run away from home when he was ten years old; he was taken away from his parents and reared by an aunt and uncle until he was fifteen; he had received an eighth grade education; he again ran

away from home at age fifteen and burglarized a cafe; he was in a juvenile detention center for one year and four months; he then joined the Job Corps where he received a general education diploma (equivalent to graduation from high school) and a welding certificate; he pled guilty to auto theft in San Antonio, Texas; and was placed on probation; and then joined the Air Force (Tr. 4247-4270).

IN THE DISTRICT COURT OF DAVIS COUNTY, UTAH

THE STATE OF UTAH,)
)
 Plaintiff,)
)
 vs)
)
 KEITH ROBERTS, DALE PIERRE,)
 WILLIAM ANDREWS,)
)
 Defendants.)
)

INSTRUCTIONS TO THE JURY
ON SENTENCING
Case No. 2122

MEMBERS OF THE JURY:

No. 1.

It is the duty of the court to instruct you in the law that applies to the sentence procedure, and it is your duty, as jurors, to follow the law as I state it to you, regardless of what you personally believe the law is or ought to be. On the other hand, it is your exclusive province to determine the sentence in this case, and you should consider and weigh the factors mentioned in this instruction for that purpose. You may use the instructions given you in the case as they apply.

No. 2.

You are instructed that it would be improper for you to again debate the question of guilt or innocence of any defendant already found guilty. There is no fixed standard as to the degree of persuasion needed for a particular sentence, as the law leaves that consideration to the jury but the burden of proof to satisfy the jury that a death sentence is appropriate is on the State.

No. 3.

The jury, when considering a sentence, has a right to know how said sentence might be carried out.

The law of Utah reads:

"The punishment of death must be inflicted by hanging the defendant by the neck until he is dead, or by shooting him, at his election. If the defendant neglects or refuses to make election, the court at the time of passing the sentence must declare the mode and enter the same as a part of the judgment, together with the court's setting of a date for the act."

A judgment of death must be executed by the warden of the state prison, within the interior walls of the state prison. The Board of Corrections of the state prison shall provide the necessary apparatus for the execution.

The warden must invite the presence of a physician and the county attorney of the county; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, that he wishes to be present. Together with such peace officers as the warden may think expedient to witness the execution, but no other persons than those mentioned in this section shall be present at the execution, nor shall any person under age be permitted to witness the same.

In the event you judge a sentence of life, the confinement shall be at the Utah State Prison. Whether a defendant sentenced to life actually serves his life or is released is within the province of the Board of Pardons as that board has total control of the length of such a sentence.

No. 4.

The jury may consider all evidence received by it during the trial itself and shall be judge of whether that evidence does or does not contain material which is helpful to the jury in determining what the sentence should be under these instructions. The jury should also consider all evidence which it has received during this proceeding. The jury should not consider nor be influenced by any information not presented in either the trial itself or during this sentencing proceeding, and should not be influenced in any way by any news reports, rumor, or other information which has reached the jurors, because each side has a right to challenge the evidence reaching the jury, and each side can do so only if they are fully aware of it.

You may consider the nature and circumstances of the crime, the character of the defendant, his background, his general personal history, his mental and physical condition, and other factors.

You may consider

- (a) Whether or not the defendant has any significant history of prior criminal activity;
- (b) Whether or not murder was committed while the defendant was under the influence of any mental or emotional disturbance or duress;
- (c) Whether or not the defendant acted under duress or substantial domination of another person;
- (d) The general capacity of the defendant to appreciate the wrongfulness of his conduct, or the ability to conform his conduct to the standards required by law and whether or not such capacity was substantially impaired as a result of any mental disease, or intoxication;
- (e) The youth of the defendant at the time of the crime;
- (f) Whether or not the defendant was a party to the murder committed by another person and whether his participation was relatively minor or major;

(g) Any other factor in mitigation or aggravation should be considered by a responsible person making such a decision in an appropriate manner.

No. 5.

You are instructed that you should not attempt to represent the views of the community as a legislator might do for his constituents, but are to fix the sentence which you as an individual believe is appropriate.

No. 6. You are instructed that you need not pass the same sentence against both defendants, but should decide each case with the same seriousness as you would if it were the only matter before you at this proceeding. You also must fix an appropriate sentence for each count of the verdict of first degree murder. This does not mean that you may not consider whether or not multiple murders were committed in determining the sentence for any one count because you may do so, but if counts of first degree murder are returned by the jury, which counts are not necessarily a part of one general act, the jury could in proper cases render a different type of sentence for each. The court does not now know, and perhaps will never know, the exact theory each juror acted on in its verdict.

While it may appear to be unnatural to reach inconsistent sentences on different counts as to one defendant, in the event that some type of appellate procedure upsets your conviction of one count or error or further evidence was discovered that upsets the conviction of one count but the other counts and conviction thereon remain, the sentence could then be carried out as to the remaining count or counts.

Your proceeding should be presided over by your foreman, as you should record your finding as to each count as to each defendant. Each count is identified on the verdict form. Below is

place where you would designate your sentence as presented. It reads as follows:

The defendant is sentenced to death_____.

The defendant is sentenced to life imprisonment_____.

The jury is unable to reach a verdict_____.

You are instructed that it requires the unanimous concurrence of all twelve (12) jurors to render a sentence of either life or death. In the event you are unable to reach a verdict, the court is required by law to enter a verdict of life imprisonment.

Each juror must make his own decision as to what the sentence should be but should do so only after consideration of appropriate factors with his fellow jurors. He should not hesitate to change when earlier impressions were erroneous. No juror should, however, agree to any sentence which does not represent his own judgment on the matter.

No.7.

The constitution and laws of this state absolutely prohibit the trial judge from making any comment about the witnesses or the evidence and I am not in any way permitted to assist you in determining what is or is not the truth in this case.

Therefore, you are instructed that if during this trial I have said or done anything which has suggested to you that I am inclined to favor the claim or position of either party, you are not to permit yourselves to be influenced by any such suggestion.

I have not intended to indicate any opinion as to which witnesses are, or are not, worth of belief, nor which party should prevail. If any expression of mine has seemed to indicate an opinion relative to any of these matters, you should disregard it, because you are the sole and only judges of the facts.

Dated this _____ day of November 1974.

Judge

APPENDIX D

In Mullaney that the XII. should not be
extended: THE FAILURE OF THE TRIAL JUDGE TO APPLY THE STANDARD
OF PROOF BEYOND A REASONABLE DOUBT IN THE APPELLANT'S HEARING
ON SENTENCE VIOLATED THE DUE PROCESS CLAUSE OF THE UTAH AND
UNITED STATES CONSTITUTIONS.

The United States Supreme Court has recently held
that the prosecution must prove beyond a reasonable doubt
the absence of any defense which may mitigate the degree
of homicide. In Mullaney v. Wilbur, 421 U.S. 684 (1975)
the Court ruled that the Due Process Clause of the Fourteenth
Amendment requires that the prosecution prove beyond a
reasonable doubt the absence of the element of heat of
passion or sudden provocation when the element is properly
presented in a criminal case. In that case, the question
involved the law of the State of Maine which required the
defendant to establish by a preponderance of evidence that
he acted in the heat of passion to reduce the crime from
murder to manslaughter. The ruling was founded on the
fundamental concept that the reasonable doubt standard in
criminal cases "is the traditional burden which our
system of justice deems essential." at 702.
The Mullaney decision was an extension of the
doctrine first developed in the case of In re Winship,

397 U.S. 364 (1970), which required that the prosecution
prove beyond a reasonable doubt every fact necessary to

constitute the crime charged. The State of Maine argued

in Mullaney that the Winship doctrine should not be ~~bar~~ the extended in the case before the Court because the absence of the heat of passion on sudden provocation is not a ~~fact~~ fact necessary to constitute a crime. ~~homicide~~.

The Supreme Court rejected this distinction and ~~her~~ stated that the State had chosen to distinguish in homicide ~~on~~ cases between those who kill in the heat of passion and ~~ignat~~ those who kill in the absence of this mitigating factor; ~~which~~ The requirement of proof beyond a reasonable doubt was found by the Supreme Court to apply not only when guilt or ~~at~~ ~~center~~ innocence is in issue but also when the degree of culpability is to be determined. The Court said: ~~mitigating factor~~ which

"The safeguards of due process are not ~~if~~ rendered unavailable simply because a determination may have already have been ~~consequence~~ reached that would stigmatize the defendant and that might lead to a significant impair- ~~that~~ ment of personal liberty." at 698.

The Court recognized that potential difference in the ~~circumstances~~ ~~preponderate~~ restrictions of personal liberty which are involved in the ~~mitigating factors~~ punishments attendant to different degrees of the same crime may be greater than the potential deprivation of personal liberty involved when the issue is guilt or innocence in many lesser crimes.

In death penalty cases, where the scales can be tipped in favor of either the life or death of the defendant, the potential for the deprivation of personal liberty by ~~by~~ the State is substantial. No greater impairment of an

individual's rights exists which is more drastic than the penalty of death. The safeguards of due process and the reasonable doubt standard must, a fortiori, apply when the death penalty is involved in the homicide.

Under the Utah Law, the determination of whether the defendant will be punished by death or by life imprisonment depends upon whether the penalty of death is mitigated by any of the seven statutory enumerated circumstances which the judge or jury must consider in their decision. Utah Code Annotated 76-3-207 (Supp. 1975). The appellant contends that the prosecution has the burden to prove beyond a reasonable doubt the absence of any mitigating factor which the defendant raises in the sentencing proceedings. If this burden is not placed on the State then the consequence of death can be imposed if the trier of fact finds that the evidence of the aggravating circumstances preponderates over the evidence of the mitigating factors.

In the case before the Court, the trial judge instructed the jury during the penalty phase of the trial as follows:

"There is no fixed standard as to the degree of persuasion needed for a particular sentence, as the law leaves that consideration to the jury, but the burden of proof to satisfy the jury that a death sentence is appropriate is on the State. (T. 4273)

The trial court did not even instruct the jury that they must bring back the death sentence only upon a finding

based upon the preponderance of the evidence.

The appellant submits that the trial judge's failure to apply the traditional reasonable doubt standard to the determination of whether or not the death penalty would be imposed violated the Due Process Clause of the Fourteenth Amendment and the Due Process Clause of the Utah Constitution, Article I, Section 7.

CONCLUSION

On the basis of the foregoing Points, the appellant respectfully submits that the judgment rendered at trial be reversed and the case remanded to the trial court for the purpose of a new trial, or that, in the alternative, this Court should order that appellant's sentence of death be set aside, and direct the trial court on remand to impose the sentence of life imprisonment.

Respectfully submitted,

D. GILBERT ATHAY

ROBERT VAN SCIVER

Nov 16 4 15 PM '01

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

| | | |
|--------------------------|---|---------------------------|
| LONNY MORISHITA, |) | |
| |) | |
| Petitioner, |) | |
| |) | ORDER DISMISSING PETITION |
| v. |) | FOR WRIT OF HABEAS CORPUS |
| |) | |
| LAWRENCE MORRIS, Warden, |) | C 80-0729A |
| Utah State Prison, and |) | |
| THE ATTORNEY GENERAL OF |) | |
| THE STATE OF UTAH, |) | |
| |) | |
| Respondents. |) | |

Lonny Morishita has petitioned this court for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner claims that a state court judge's failure to make written findings and conclusions in connection with a hearing that resulted in the revocation of petitioner's probation denied him due process of law, guaranteed by the Fourteenth Amendment to the U.S. Constitution. The State of Utah has moved to dismiss the petition. The case was referred by this court to the U.S. Magistrate who, after oral argument, found that petitioner's due process rights had not been violated. Accordingly, the magistrate recommended that respondent motion to dismiss be granted. Thereafter, petitioner filed objections to the magistrate's report and recommendation, and a hearing was set at which the court considered petitioner's objections. At the hearing the court indicated its inclination to adopt the magistrate's findings.

Afterwards, however, upon further consideration of the issues raised by the petition, a question arose as to whether the

magistrate, in deciding petitioner's claim on its merits, had pursued the proper course. Because a federal court is barred under certain circumstances from reaching the merits of a state prisoner's habeas claim when the state court itself has declined to pass on the merits, the court felt that additional briefing was necessary to illuminate this issue. At the court's request, both petitioner and respondent have submitted supplemental memoranda. The court has carefully considered the arguments of counsel and now concludes, for reasons set forth below, that it is barred from passing on the merits of petitioner's habeas corpus claim.

BACKGROUND

The following facts give rise to the § 2254 claim now pending before the court. In 1978, Mr. Morishita pleaded guilty in Utah's Third District Court to the crime of aggravated robbery. On September 15, 1978, the presiding judge, Jay E. Banks, sentenced the petitioner to prison but stayed execution of the sentence and placed petitioner on probation. One of the conditions of his probation was that petitioner not at any time have weapons in his possession.

In May, 1979, petitioner was arrested. The arresting officers alleged that at the time of the arrest petitioner was in possession of a firearm. Shortly thereafter, petitioner's probation officer charged petitioner with possession of a firearm, and on May 29 and June 1, 1979, probation revocation proceedings were held before Judge Banks. At the conclusion of the hearing, Judge Banks revoked petitioner's probation on the ground that he had had a firearm in his possession. Petitioner was then committed to the Utah State Prison, to serve the sentence formerly

imposed on him by Judge Banks in 1978 for aggravated robbery.

Although Judge Banks did not, in connection with the revocation hearing, make written findings and conclusions, the court reporter took down the proceedings, which were later transcribed. The transcript does not indicate what underlying facts Judge Banks relied on to find that petitioner had possession of a gun; however, it does reveal clearly that this ultimate fact was found. At the conclusion of the hearing the court stated: "It's the finding of the Court that you violated the terms of your probation."

Petitioner did not take a direct appeal from Judge Banks' decision revoking his probation. Instead, he later filed a habeas corpus petition in Third District Court, alleging that Judge Banks' failure to make written findings and conclusions denied him due process of law. The district court dismissed this petition. Petitioner then appealed to the Utah Supreme Court, which affirmed the district court's dismissal. Morishita v. Morris, 621 P.2d 691 (Utah 1980).

The Supreme Court found that petitioner, by failing to pursue a direct appeal from Judge Banks' decision revoking his probation, had waived his right to challenge the revocation proceedings in a habeas action. Therefore, it declined to decide petitioner's due process claim on its merits. The Court stated:

A writ of habeas corpus is not an available remedy on the facts alleged in the petition. The appropriate procedure was for plaintiff to appeal the probation revocation order. A habeas corpus proceeding is not intended as a substitute for an appeal, Gentry v. Smith, Utah, 600 P.2d 1007 (1979), and will not lie in the absence of a claim of fundamental unfairness in the trial or a substantial and

prejudicial denial of a person's constitutional rights. (Citations omitted.) Plaintiff's claim that it was error not to enter findings of fact and conclusions of law does not rise to that level, especially in view of the fact that a transcript of the proceedings was made.

621 P.2d at 692-3. Although the Utah Supreme Court, by the above language, clearly indicates that petitioner's failure to appeal made it inappropriate for the Court to rule on the merits of his claim, it nonetheless in a footnote then proceeded to offer its view on the due process issue. In footnote 2 of its opinion, the Court stated:

We are aware of the due process requirements set forth in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct 1756, 36 L.Ed. 2d 656 (1973), for probation revocation proceedings, yet find the requirement for written findings inapplicable in the instant case. . . .

Id. at 693, n. 2.

Having failed in the state courts, petitioner now brings his due process claim to this court, under 28 U.S.C. § 2254. This court holds, however, that petitioner's failure to take a direct appeal from Judge Banks' decision to revoke his probation constitutes a procedural default which bars this court from passing on the merits of petitioner's claim.

DISCUSSION

Since before the turn of the century, the U.S. Supreme Court has recognized that when a state court declines to reach the merits of a habeas corpus petitioner's claim due to his failure to comply with a state procedural requirement, the federal courts should respect this state procedural default, and likewise refuse to reach the merits of the petitioner's claim. In re Wood, 140 U.S. 278 (1890); Markuson v. Boucher, 175 U.S. 184 (1899);

Ex Parte Spencer, 228 U.S. 652 (1913); Brown v. Allen, 344 U.S. 443 (1953). This has not been an inflexible rule, however. Certain circumstances have always been recognized where, notwithstanding a state procedural default, it is nonetheless appropriate for a federal court to reach the merits of a state prisoner's habeas petition. The seminal decision in the recent history of the "procedural default" doctrine is Fay v. Noia, 372 U.S. 391 (1963).

In Fay, the petitioner was convicted of felony murder in state court, but failed to appeal his conviction. Later, petitioner applied to a state court for a writ of coram nobis, alleging that the trial court had improperly admitted into evidence petitioner's coerced confession. The state court denied his petition for post-conviction relief because he had failed to take a direct appeal from his conviction, which under state law operated as a waiver of his right to attack his conviction collaterally.

Petitioner then presented his claim to the federal courts under 28 U.S.C. § 2254. The U.S. Supreme Court held that even though the state courts had refused, due to petitioner's failure to appeal, to entertain his petition for post-conviction relief, the federal courts were still empowered to reach the merits of the claim. The Court determined that a federal court must reach the merits of § 2254 claims unless it finds that the petitioner's procedural default was a "deliberate circumvention of state procedures." 372 U.S. at 440. The adoption of this "deliberate by-pass" standard had the effect of opening wide the federal court doors to state prisoners whose procedural defaults

had prevented state courts from hearing their post-conviction claims. See Note, The Need for Habeas Corpus Reform in Utah: A Challenge from the Federal Courts, 1979 Utah L. Rev. 159.

The permissive rule of Fay v. Noia was recently limited by the Supreme Court's decision in Wainwright v. Sykes, 433 U.S. 72 (1977). In Sykes, the Court passed on a state prisoner's claim that the state trial court had improperly admitted into evidence statements made by him in violation of his Miranda rights. The claim had previously been raised in a state habeas proceeding, but was rejected because the petitioner had failed to comply with a state procedural rule requiring a contemporaneous objection to the admission of evidence. The Sykes court found that the petitioner's failure to satisfy the state's contemporaneous objection rule operated as a procedural default barring federal habeas relief, unless the petitioner could demonstrate "cause" for his failure to comply with the procedural requirement and "prejudice" if the federal court failed to hear his claim. 433 U.S. at 87. The Supreme Court declined in Sykes to give substance to this "cause" and "prejudice" standard, except to state that "it is narrower than the standard set forth in dicta in Fay v. Noia. . . ." Id. The court found that the cause and prejudice standard was not satisfied on the record before it, and dismissed the petition.

The question now arises whether the cause and prejudice standard adopted in Sykes, a case where the procedural default was a failure to make a contemporaneous objection at trial, is also the appropriate standard here, where the default is a failure to take a direct appeal from the trial court's decision.

The Sykes court expressly declined to rule on this issue, stating that: "(w)e have no occasion today to consider the Fay rule as applied to the facts there (failure to appeal) confronting the Court" 433 U.S. at 88, n. 12.

Counsel have not addressed this issue, both apparently assuming that the Sykes standard governs in this case. The issue has been addressed by only two courts of appeals which have, without extensive analysis, reached opposing results. The Fifth Circuit, in Sincox v. United States, 571 F.2d 876, 879 (5th Cir. 1978), held that Sykes governs; the Third Circuit, in Boyer v. Patton, 579 F.2d 284, 286 (3rd Cir. 1978), found Fay to be the governing standard.

The Second Circuit has ruled on a closely related issue, however, in a carefully reasoned opinion which this court believes is helpful in resolving the issue now before it. In Forman v. Smith, 633 F.2d 634 (2d Cir. 1980), the Court held that the Sykes, not the Fay, standard should be applied to a party who appeals his state conviction but neglects to raise a federal issue on the appeal, and later seeks to raise the omitted issue in a federal habeas proceeding. The court recognized that this situation was different than a failure to take any appeal at all, and expressly declined to indicate whether the result it reached should also apply in that situation. 633 F.2d at 640, n. 8.

The Second Circuit reached its decision by identifying four factors that the Supreme Court had relied on in Sykes requiring adoption of the cause and prejudice test where the procedural default was a failure to make a contemporaneous objection

at trial. The factors identified were: 1) considerations of comity, 2) the need for finality, 3) the need for accuracy, and 4) the interest of trial integrity. 633 F.2d at 639. After careful analysis of each of these factors, the court concluded that the Sykes rationale dictated with equal force that the cause and prejudice standard should govern when a party fails to raise an issue on appeal. This court believes that, though the Sykes rationale does not apply identically to a failure to take any appeal at all, it nonetheless requires the same result reached by the Second Circuit.

Having concluded that the Sykes cause and prejudice standard governs in this case, two issues remain for the court's resolution. First, does the Utah Supreme Court's discussion of the merits of petitioner's claim in a footnote to its opinion constitute a "ruling on the merits" requiring this court to proceed to the merits of petitioner's claim? Second, assuming that the Utah Court's footnote discussion does not constitute a "ruling on the merits," has the petitioner demonstrated "cause" and "prejudice" sufficient to oblige this court to reach the merits?

IS THE UTAH SUPREME COURT'S FOOTNOTE DISCUSSION A
"RULING ON THE MERITS?"

The Supreme Court in Sykes held that a federal court may not, without a showing of cause and prejudice, pass on claims arising under federal law which were not "resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure." 433 U.S. at 87. Therefore, if the petitioner's claim was "resolved on the merits"

by the state court, this court may also reach the merits of petitioner's claim. Petitioner argues that the Utah Court resolved the merits of his due process claim when it briefly discussed and rejected his claim on its merits in footnote 2 of its opinion.

Though petitioner cites several cases in support of his argument, the court finds that none of the cited cases deals directly with the issue presented here. The case most closely on point appears to be the Tenth Circuit's decision in Bromley v. Crisp, 561 F.2d 1351 (10th Cir. 1977), where the Court stated the general principle that "constitutional claims are not to be rejected in federal habeas suits on grounds of waiver where the state courts have considered the claims on their merits" 561 F.2d at 1360. This court of course accepts this principle, which is a necessary corollary of both Fay and Sykes. The above-quoted language does not address the precise question presented here, however--whether, when the merits of a claim are discussed, but the court's decision is clearly not grounded on the merits, this discussion constitutes a "resolution on the merits" within the meaning of Sykes.

Respondents' arguments are addressed directly to this issue. Respondents contend that when the state court expressly invokes its procedural default rule, as was done here, and then in dicta also expresses its views on the merits of the claim presented, the federal court should likewise dismiss the claim based upon the procedural default. This view is supported by authority, Ratcliff v. Estelle, 597 F.2d 474 (5th Cir. 1979); Stewart v. Ricketts, 451 F. Supp. 911 (D.C. Ga. 1978), and logic.

Here the Utah Court has specifically based its decision on defendant's procedural default, not on the merits of his claim. The court's invocation of its default rule in the body of its opinion is clear; the merits are discussed only in passing in a footnote. In this court's view a state court's decision to apply its procedural default rule where a party has failed to comply with a state procedural requirement should, to the extent possible, be respected by the federal courts. Indeed, this view is part of the rationale underlying the Supreme Court's decision in Sykes. A state court should not, therefore, be forced to run the risk that a federal court will disregard its application of its default rule merely because it chooses to articulate what its view of the merits would be, assuming it were to decide the case on its merits. To so straight-jacket the state courts would serve no purpose.

Several purposes, on the other hand, are potentially advanced by permitting a state court to express its views on the merits. First, a state court's dicta views may prove helpful to the federal court, should it find cause and prejudice, and therefore decide the claim on the merits. In addition, as will appear, the state court's view on the merits may offer guidance to the federal court which, when applying the Sykes standard, must determine whether "prejudice" will inure to a party if his claim is not heard on the merits. Therefore, this court does not believe that the Utah Supreme Court's dicta discussion of the merits of petitioner's claim should be regarded as a resolution on the merits requiring this court to proceed to the merits of petitioner's claim.

APPLICATION OF THE CAUSE AND PREJUDICE STANDARD

The final issue is whether petitioner has demonstrated "cause" for his failure to appeal and, further, that "prejudice" will result if his claim is not decided on its merits. Petitioner argues preliminarily that in order for the court to decide whether there is cause and prejudice, a hearing must be held to resolve disputed factual issues. While this might well be the case in other circumstances, see Humphrey v. Cady, 405 U.S. 504, 517 (1972), the court feels that it can fairly dispose of this issue on the basis of the record now before it.

The court notes that the Sykes cause and prejudice standard is stated in the conjunctive. Thus, to avoid the effect of his state procedural default, a federal habeas petitioner must show both cause and prejudice. Here, petitioner simply has not nor could he establish the prejudice necessary under the cause and prejudice standard to permit this court to decide his claim on its merits.

Though the Supreme Court in Sykes declined to define the terms cause and prejudice, it shed some light on what showing would be necessary to satisfy the prejudice part of the test when it stated that "(t)he other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent. . . ." 433 U.S. at 91. "Prejudice" apparently is something closely akin to "harmful error," and two Justices in Sykes suggested that the majority, by use of the term "prejudice," had adopted a "harmless error" standard. See 433 U.S. at 98, White, J., concurring; 433 U.S. at 117, Brennan, J., dissenting. The lower federal courts

have had few occasions to give substance to Sykes' "prejudice" standard, but at least one has stated that "'prejudice' means a serious doubt of the defendant's guilt." Canary v. Bland, 583 F.2d 887, 894 (6th Cir. 1978). The court is convinced that, applying either a "harmless error" or a "serious doubt" standard, no prejudice is present here, inasmuch as petitioner has twice already had his claim decided on its merits.

The Utah Supreme Court has expressed its view, in footnote 2 of its opinion, discussed supra, that petitioner's due process claim is without merit. Morishita v. Morris, 621 P.2d 691, 693, n. 2 (Utah 1979). In addition, the U.S. Magistrate, to whom this § 2254 petition was initially referred, reached and rejected petitioner's claim. Petitioner has now, therefore, had the benefit of the views of two tribunals on his due process claim. This court has determined it cannot find that he will in any way be prejudiced by this court's failure to express its opinion.

Because petitioner plainly fails to establish prejudice under the Sykes standard, it is unnecessary to determine whether cause existed for his failure to appeal.

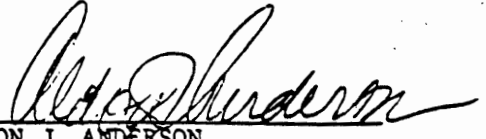
Accordingly,

IT IS HEREBY ORDERED that Lonny Morishita's petition for habeas corpus relief under 28 U.S.C. § 2254 is dismissed.

DATED this 16 day of November, 1981.

as mailed to counsel on 11/16/81 dp
las E. Wahlquist, Esq.
Exchange Place, #100
Lake City, Utah 84111

F. Dorius
stant Atty. General
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· DAVID L. WILKINSON
ATTORNEY GENERAL
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DEPUTY ATTORNEY GENERAL

September 17, 1982

Mr. Geoffrey Butler
Supreme Court Clerk

Dear Mr. Butler,

Please note the following correction in Respondent's Brief, Pierre and Andrews v. Morris, Case Nos. 18234 & 18230, filed September 14, 1982. The last sentence of page 71 should read:

In conclusion, the failure to sentence petitioners under the Wood standard was not "something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result."

I apologize for the omission of certain language therein.

Very truly yours,

A handwritten signature in cursive script, reading "Earl F. Dorius".

EARL F. DORIUS
Assistant Attorney General

EFD/sp

cc: Timothy K. Ford
Parker Nielson
D. Gilbert Athay

FILED

SEP 17 1982