1982

# Pierre Dale Selby et al v. Lawrence Morris : Petitioner's Reply Memorandum

Utah Supreme Court


Timothy K. Ford; Parker Nielson; Attorneys for Petitioner;
Earl Dorius; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

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| WILLIAM ANDREWS | : | |
| Petitioner, | : | Case No. 18230 |
| v. | : | |
| LAWRENCE MORRIS, Warden of the Utah State Prison, | : | |
| Respondent. | : | |

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PETITIONER'S REPLY MEMORANDUM

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ORIGINAL PETITION FOR A WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutues

Respondent's Brief makes evident the reason it asked the United States District Court to remand this case, and then delayed once it returned here: Respondent apparently believes it can persuade this Court to construct special new rules--of waiver, non-retroactivity, and harmless error in capital sentencing--to deny these two Petitioners, and them alone, the protections of the sentencing standard announced in State v. Wood. In case it cannot, Respondent has sponsored legislation which would permit resentencing in capital cases, got it passed while this case was pending,[1] and now asks the Court to create another exception, specially for this case, and permit these two men to be resentenced under that new statute.

Petitioner prays this Court will not be persuaded, with life at stake, to carve out such ad hoc exceptions to the rule of law. The size of Respondent's Brief should not be mistaken for substance. For all its length, it cites no authority anywhere that contravenes the clear, controlling precedents Petitioner has presented. Its arguments are based on distortions of the facts, and misconstruction of the law.

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[1] Respondent falsely says this case was brought after the February 16, 1982 passage of SB 60. RP 85.

I. THE ISSUES HERE HAVE NEVER BEEN WAIVED.

Though it was at Respondent's insistence this Petition was filed, its first argument now is that it should be dismissed. Ignoring the facts of record in this Court, Respondent now says the issues here have not been raised before, and are waived.

When Petitioner raised the burden of proof argument on direct appeal, Respondent made no waiver claim, and this Court considered and rejected it on its merits. State v. Andrews, 574 P.2d 709, 710 (Utah 1977); see Brief of Respondent, State v. Andrews No. 13902 at 12.[2] When Petitioner again challenged the burden of proof at sentencing in his Postconviction Petition, Respondent said his "arguments [were] ... very similar as to the direct appeal" and should be rejected for that reason. See Transcript of Proceedings, Andrews v. Morris, Third District No. C-78-7126, attached as Appendix A-1. The District Court so found and dismissed, and on appeal from that dismissal this Court agreed: "the standard of proof issue was raised on direct appeal in Pierre" and the Postconviction Petitions "simply reframed the same issues." Pierre v. Morris, 607 P.2d 812, 814, 813 (Utah 1980); accord Andrews v.

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[2] petitioner has not attached copies of documents previously filed by the parties in this case in this Court, because he assumes they are part of the Court's records. Of course, he will supply them on request.

Morris, 607 P.2d 816, 819 and n.9 (Utah 1980).[3]

Respondent now asks this Court to reverse itself, rewrite this history, and hold this claim has somehow been waived--not because of any rule of procedure violated by Petitioner's court-appointed counsel, but because of minor differences in the specific terms of the burden of proof arguments in Pierre and Wood.

Certainly, the Pierre argument Petitioner adopted was not directed specifically at the relative weight of aggravating and mitigating circumstances, because it was "in that case (State v. Pierre) the court first established that the burden of proof in capital cases is that 'the totality of aggravating circumstances must ... outweigh the totality of mitigating circumstances.'" Brief of Respondent in Opposition to Rehearing at 21, Andrews v. Morris, No. 16168. Despite that--and despite the fact that "[t]he signals from ... [the Supreme] Court have not ... always been easy to decipher," Lockett v. Ohio, 438 U.S. 586, 602 (1978), so "there has developed a great deal of consternation and confusion about the death penalty," State v. Kelbach, 569 P.2d 1100, 1103 (Utah 1977)--

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[3] As Respondent notes, Pierre and Andrews took different approaches in their postconviction appeals. Andrews' arguments focused on intervening changes in the case law and governing constitutional principles, not the merits of the various issues his petition raised. Andrews v. Morris, supra, 607 P.2d at 822-24. Several of the cases he cited formed the basis of the decision in State v. Wood. See id. at 11-15. Pierre's postconviction argument went directly to the burden of proof issue in the same terms it was decided in Wood. Pierre v. Morris, supra, 607 P.2d at 814-15; see Resp.Br. at 10. Neither approach succeeded.

Pierre's burden of proof argument more closely approximated the decision in Wood than did Wood's argument itself.[4] Even more importantly--though Respondent neglects to mention it--the Court in Pierre, and in Andrews, plainly understood and addressed that argument in its most general terms. See Pet.Br. at 2.

At all times before this Court, Petitioner has attempted to abide by its rules and couch his arguments in terms consistent with the law of this state. No issue has ever been deliberately withheld or "sandbagged" in this case.[5] The burden of proof issue was raised in the clearest terms possible, and fully considered, on the direct appeal. There has been no waiver here.

II. NO AUTHORITY SUPPORTS RESPONDENT'S NON-RETROACTIVITY ARGUMENT.

The single, dispositive question here is whether the rule of Wood should be given limited, prospective application, contrary to the general rule that judicial interpretations of the law are retroactive. For all its verbiage and scattershot case citations,

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[4] Respondent falsely says Wood couched his argument in the same terms this Court decided it. Resp.Br. at 34. In fact, Wood challenged the Utah statute for "failing to require proof of aggravating circumstances beyond a reasonable doubt" and argued "the state should bear the burden of proving that the aggravating circumstances are of such proportion that the mitigating circumstances do not constitute a reasonable or substantial doubt on the question of imposing a sentence of death." Brief of Appellant at 20, 23, State v. Wood, No.16486 (Appendix B).

[5] Respondent's constant attempts to label virtually anything counsel does as a waiver for which Petitioner should pay with his life (e.g., Resp.Br. at 25n.11) are as baseless as they are vicious. If the Court has any doubt of this, Petitioner would ask for the opportunity to establish it at a hearing.

Respondent gives no sound reason such an exception should be made here, and points to no case anywhere which has so limited a decision changing the burden of proof in a criminal case.

As Respondent's inability to find a contrary example confirms, burden of proof decisions are universally held retroactive. And because such decisions relate to the truth-finding function, they are retroactive regardless of any reliance or their impact on the administration of justice.

> "Neither good-faith reliance by the state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." Williams v. United States, 401 U.S. 646, 653, 28 L.Ed.2d 388, 91 S.Ct. 1148 (1971)....

Ivan V. v. City of New York, 407 U.S. 202, 204-205 (1972). The same rule applies whether or not the burden of proof decision is constitutionally compelled. See, e.g., State v. Humphries, 364 N.E.2d 1354 (Ohio 1977), cited in Engle v. Isaac, ___ U.S. ___, 31 Cr.L. 3001, 3003 (April 5, 1982). Thus the Court need not decide in this case that issue, which it declined to reach in Wood.[6]

If it did, Petitioner would argue that Wood's sentencing standard is constitutionally required, at least under this statute, for all the reasons given in the Pierre argument and in State v. Wood, supra, at 11-15. But whether it is based in the constitution or statutory interpretation, its retroactivity is required because

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[6] Respondent falsely suggests Wood held the beyond a reasonable doubt standard was not constitutionally compelled. Resp.Br. at 21-23. In fact, the Court in Wood clearly left that issue open. See State v. Wood, supra, at 13.

it directly relates to the truth-finding function at the most critical phase of the most serious kind of criminal trial.[7]

Even if the issue here did not involve the burden of proof, there would be no valid reason here to depart from the general rule of retroactivity. Respondent has pointed to no considerations of reliance or the affect on the administration of justice which would justify giving Wood limited, prospective application. Only one death sentence has been imposed under jury instructions derived from Pierre: that sentence, which is pending before the Court in State v. Heber Norton, will have to be reversed under any accepted retroactivity jurisprudence, because it is still on appeal.

The only affect of Wood's total retroactivity would be the reversal of the two remaining death sentences imposed under a different standard: those of Petitioner and his co-defendant. To refuse to apply a uniform legal standard because of the impact of reversing one case on "the administration of justice" would amount to nothing more or less than judicial discrimination.

> For our system of justice to command the respect of society, the law must be applied, in all cases, in a judicious and even-handed manner.

State v. Wood, supra at 11. Petitioner cannot believe this Court will accept Respondent's invitation to forget that here.

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[7] Witt v. State, 387 So.2d 922 (Fla. 1977) involved no similar issues. See 387 So.2d at 924. Moreover, Witt appears to have been overruled by Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated on other grounds 50 U.S.L.W. 3981 (1982).

III. THE QUESTION OF HARMLESS ERROR.

Respondent appears to admit that errors in setting the burden of proof at the guilt phase of trial cannot be harmless (Resp.Br. at 70), but turns the constitution on its head by arguing such errors in capital sentencing proceedings can. At least, the sentencing determination in a capital trial is entitled to no less constitutional respect than a determination of guilt or innocence. See Bullington v. Missouri, 101 S.Ct. 1852, 1862 (1981). The basic protections of due process apply to death sentencing proceedings. Gardner v. Florida, 430 U.S. 349 (1977); State v. Wood, supra. Like a guilt determination, a sentencing verdict cannot be affirmed on appeal on a ground substantially different from that on which the jury reached it. Presnell v. Georgia, 439 U.S. 14 (1978).

If there is any constitutional difference between these two types of verdicts, it is that errors in death sentencing proceedings are more serious than errors in guilt trials, not less.

> Death in its finality, differs from life imprisonment more than a hundred-year prison term differs from one of only a year or two. Because of that quantitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Moreover, the necessarily subjective nature of the penalty determination makes it impossible for a reviewing court to determine precisely what factor tipped the balance.

> The ultimate purpose in the penalty phase is not one of fact finding, but the fixing of a penalty, and the fixing of a penalty is a matter of judgment about what penal consequences should attach to the commission of a capital crime by a particular defendant.

State v. Wood, supra, at 16. No reviewing court can ever state with certainty what the result would have been had that judgment been instructed by wholly different standards.

Even if an error in setting a death sentencing standard could be held harmless in some case, it could not be here. No one else has yet been sentenced to death under the Wood standard, regardless of the severity of aggravation or the paucity of mitigation. There is no principled way this Court can say William Andrews would have been. There is no way on this record this Court can know how many of the statutory aggravating circumstances this jury found.[8] And despite Respondent's attempt to deny them, there clearly was evidence from which the jury could have found at least four

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[8] Contrary to Respondent's assertions (Resp.Br. at 3n.2), four of the eight statutory aggravating circumstances listed in UCA 76-5-202 (§§ (a), (e), (g) and (h)) were supported by no evidence whatsoever as to either defendant, and were not submitted by the trial court. Several of those that were submitted were subject to substantial doubt, at least as to Andrews. Certainly, there was no evidence whatever William Andrews was engaged "in the commission of ... rape" UCA 76-5-202(1)(d). Andrews clearly was gone before any rape took place. T.Tr. 3184. There was also no evidence Andrews himself "committed another homicide" (UCA 76-5-202(b)), though the trial court expanded this aggravating circumstance in its "parties" instruction. See Court's Instruction on Guilt, No. 8. The trial court's theory of "personal gain" under UCA 76-5-202(1)(g) was supported by evidence primarily relating to Pierre, not Andrews. See ibid.; T.Tr 3091. And any theory of "pecuniary gain" would involve the same evidence as the aggravating circumstance of robbery. That evidence, at most, could support one additional aggravating factor. Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert denied 431 U.S. 969 (1977); Enmund v. State, 399 So.2d 1362, 1373 (Fla. 1981), reversed on other grounds 50 U.S.L.W. 5087 (1982). Cf. State v. Cherry, 257 S.E.2d 551 (N.C. 1979).

statutory mitigating circumstances[9]--and substantial non-statutory mitigation as well.[10]

The jury deliberated on this sentence for over two hours. T.Tr. 4304-6. No one knows, or can know, what it believed, what it rejected, and how it weighed the facts it found in reaching its decision. This is not a matter about which appellate courts can simply speculate: "the reasoning of the plurality opinion in

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[9] Even Respondent admits Andrews' criminal record was "not extensive" (Resp.Br. at 4n.2). Andrews was 19 at the time of this crime. Respondent's attempt to deny the jury could have found that mitigating ignores the meaning of the word "youth", and the constitutional prohibition against limiting its scope--and contrasts sharply with the public pronouncements of the Attorney General who prosecuted this appeal that John Michael Calhoun's "tender age" of 18 1/2 should preclude his death sentence for the cold blooded murder of two people. Salt Lake Tribune, April 18, 1980, B8:1.

Respondent's denial that Andrews' participation in these killings was minor relative to Pierre's ignores the fact--conveniently omitted from its summary of the evidence--that Andrews was not present when any of the killings took place. T.Tr 3188. Its denial that there was any evidence Andrews was dominated by Pierre ignores the testimony of Orren Walker that Andrews "was disturbed during the whole evening" (T.Tr. 3176-7), protested when Pierre first fired his gun, apparently argued with Pierre, and was twice heard to say "I can't do it, I'm scared." T.Tr. 3073, 3091, 3183.

There remains real doubt William Andrews' participation in this crime was sufficient to support a death sentence. See Enmund v. Florida, 50 U.S.L.W. 5087 (June 2, 1982). At the least, it was a fact which was constitutionally required to be considered in mitigation. See id. at 50 U.S.L.W. 5093ff (concurring opinion of Justice O'Connor).

[10] Andrews' impoverished and deprived childhood and background --which is undisputed and acknowledged even by Respondent's summary of the facts--was a factor the jury was constitutionally required to take into consideration in mitigation, Eddings v. Oklahoma, 50 U.S.L.W. 4161 (January 19, 1982), though it was not listed in the statute.

Lockett compels a reversal so ... not [to] 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' 438 U.S., at 605." Eddings v. Oklahoma, supra, 50 U.S.L.W. at 4165 (concurring opinion of Justice O'Connor). The error in this sentencing instruction requires reversal. See State v. Brown, 607 P.2d 261 (Utah 1980).

IV. TO CREATE UNIQUE LEGAL RULES FOR THIS CASE WOULD BE TO PERMIT ARBITRARY AND DISCRIMINATORY IMPOSITION OF THE DEATH SENTENCE.

Respondent wholly misconstrues the discrimination claim made here. Petitioner has not--out of respect to this Court's rules--reraised the same allegations of arbitrariness and discrimination rejected in Andrews v. Morris, supra, 607 P.2d at 825. The claim here is more limited: it is that the affirmance of the death sentences in this case, under a sentencing standard different from that applied in all others, would inject an additional element of arbitrariness and discrimination into this case, and separately violate the Constitution.

This claim is predictive; but it is not general. To single out two men for special, unequal treatment under an unaltered statute, would create an arbitrariness and an equal protection denial not based on statistics, but on specific acts directed toward those individuals. See Dobbert v. Florida, 432 U.S. 282 (1977). The fact those same two men are the only two blacks sentenced under this statute would raise a serious inference of discrimination. See Smith v. Balkcom, 671 F.2d 858, 859 (11th Cir. 1982). But regardless of race, it would violate the Constitution to "permit this unique penalty to be so wantonly and freakishly

imposed." Furman v. Georgia, 408 U.S. 238, 310 (1972)(concurring opinion of Justice Stewart).

Petitioner hopes and believes this Court will not permit that and will reject Respondent's attempts to make special rules for this case on their merits. He raises this issue now only because the rules of exhaustion--and the unyielding barrage of waiver arguments he has been subjected to--force him to spell out all constitutional objections he would have to a contrary result. That result, and this issue, should never be reached.

V. THIS CASE CANNOT BE REMANDED FOR RESENTENCING.

The law in effect at the time of the trial in this case--like the law in effect at the time of Walter Wood and Gerald Paul Brown --did not provide for new sentencing proceedings on remand of a capital case. UCA 76-3-207(3) (Supp. 1974). While it delayed this litigation, Respondent prevailed upon the legislature to pass a new statute, which permits such resentencing on retrial. See Resp.Br. at 85. That statute does not contain any express declaration it should be applied retroactively. Under the law of this state, it should have no effect on either this case or this petition, both of which long preceded its effective date. As Petitioner has previously argued in his responding memorandum, to hold otherwise would violate not only that clear state law, but the ex post facto and bill of attainder clauses of the Constitution. For all those reasons, this last ditch effort to create yet another special set of rules for this case should be rejected by this Court.

VI. CONCLUSION

This should not be a difficult case. After careful and extensive deliberation, for sound and humane reasons, this Court has interpreted Utah's capital punishment statute to include a sentencing standard appropriate to "the gravity of the decision to be made and the constitutional environment in which that decision must be made." State v. Wood, supra, at 14. That standard clearly was not followed in William Andrews case. Andrews' counsel challenged the standard that was applied on direct appeal. William Andrews should not be consigned to his death simply because that appeal came too soon.

DATED this 1st day of October, 1982.

Respectfully submitted,

Timothy K. Ford
Attorney for William Andrews

# APPENDIX A

that issue.

As to 12-A, he said, again, fairly representing the situation, that the arguments are very similar as to the direct appeal.

As to 12-B, he talks about the pattern of imposition of the death penalty and endeavored to indicate that that was the reason that the Dunsdon case was continued and have had that matter already resolved, that that was not the reason for that and I would point out with respect to the fact that that's not a new issue, that on page eight of the Andrews' Amended Petition, unlike the Petition for Habeas Corpus in Pierre which does not specifically set forth the time periods but which obviously are applicable as to both cases, it reads as follows: "The pattern of imposition of the death penalty in Utah and in the United States since the enactment in July, 1973, of the statutory system under which petitioner was sentenced, shows that the sentence of death is being imposed so rarely and arbitrarily and discriminatorily against the poor and outcast whose alleged victims are white, as to separately violate the Eighth and Fourteenth Amendment principles of Furman v. Georgia. Since July, 1973, dozens of persons in Utah and hundreds of persons in the United States have been convicted of homicides committed under circumstances which would make them capital under the governing State statutes; petitioner is one of the tiny minority of these, chosen randomly at best and discriminatorily at worst, who has actually been sentenced to death as a result of such convictions."

Now, Your Honor, more than three years after the time that this so-called pattern began in July of 1973, these

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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| WILLIAM ANDREWS,<br><br>Petitioner,<br><br>v.<br><br>LAWRENCE MORRIS, Warden of the Utah State Prison,<br><br>Respondent. | : | FINDINGS AND CONCLUSIONS ON ORDER DISMISSING PETITION FOR HABEAS CORPUS<br><br>CASE NO. 78-7126 |

In support of its order dated November 30, 1978, granting Respondent's Motion to Dismiss the Petition and denying the Motion by Petitioner for a stay of execution, the Court now makes the following findings and conclusions:

1. No developments of fact or law material to the determination of the legality and constitutionality of the conviction and sentence of the Petitioner herein have occurred since the filing of Petitioner's direct appeal to the Utah Supreme Court and that Court's decision on that appeal.

2. All the issues regarding the constitutionality of the processes for death sentencing under Utah law, the constitutionality of the death sentences in Petitioner's case, and the effect of any alleged prejudicial publicity or influences on Petitioner's trial which are raised by this Petition are the same issues that Petitioner raised in his direct appeal to the Utah Supreme Court.

3. Petitioner's claim that Utah's death penalty law is being applied arbitrarily and discriminatorily fails to state a claim on which relief could be granted or on which a hearing need be held.

4. Constitutional issues identical to those raised and decided on direct appeal cannot be raised again in collateral proceedings.

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

DATED: December 4th, 1978.

JAMES S. SAWAYA, DISTRICT JUDGE

ATTEST
W. STERLING EVANS
Clerk
By

STATE OF UTAH
COUNTY OF SALT LAKE } ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT

THIS 4 DAY OF Dec 19 78

W. STERLING EVANS, CLERK

BY _____ DEPUTY

# APPENDIX B

offense in exchange for his testimony, it was incumbent on the Court to issue a cautionary instruction, although not requested to do so.

Johann had an obvious motive to color his testimony against appellant so as to assure favorable treatment for himself and avoid exposure to the death penalty. The significance of his testimony against appellant compelled a cautionary instruction to the jury. Johann was the state's chief witness, the only one who claimed to witness the shooting. His credibility was a crucial issue.

Jury instructions must be construed as a whole. (See State v. Coffey, 564 P.2d 777 (1977) and cases cited therein) In appellant's case, no instructions were given regarding intoxication, no cautionary instruction was given and an instruction on flight was given where none was warranted by the evidence.

On balance, the instructions were inadequate, misleading and weighted in favor of the prosecution. That, in conjunction with the Court's restriction on appellant's direct testimony left the jury little alternative but to convict for first degree murder. Thus, a reversal and remand for a new trial is appropriate.

## POINT V

## THE UTAH CAPITAL SENTENCING STATUTE, SECTION 76-3-207, U.C.A., DENIED APPELLANT DUE PROCESS BY SHIFTING THE BURDEN OF PROOF TO APPELLANT AND BY FAILING TO REQUIRE PROOF OF AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT

The Utah capital sentencing statute, as construed by this Court in State v. Pierre, 572 P.2d 1338 (1977), requires only that the state prove ". . .that the totality of evidence of aggravating circumstances must therefore outweigh the totality of mitigating circumstances" in order to sustain a verdict of death rather than life imprisonment.

As applied to appellant's case, such a rule effectively eliminates the need for the state to produce any evidence of aggravation at the penalty phase inasmuch as the aggravating circumstances for purposes of the penalty phase are identical to those which apply in the guilt phase. In other words, the state must already have proven beyond a reasonable doubt the existence of at least one of the aggravating circumstances listed in Section 76-5-202, Utah Code Annotated(1953), in order to achieve a verdict of guilty as to first degree murder.

Therefore, as a practical matter, the burden of going forward shifted to appellant to raise mitigation and the burden of proof shifted to appellant to produce sufficient mitigating evidence so as to outweigh the aggravating circumstances.

Such a result is a clear violation of appellant's right to Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 7 of the Utah Constitution. (See also In re Winship, 397 U. S. 358, 25 L. Ed.2d 368, 90 S. Ct. 1068 (1970); Mullaney v. Wilbur, 421 U. S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975))

In Speiser v. Randall, 357 U. S. 513, 2 L. Ed.2d 1460, 78 S. Ct. 1332 (1958), the Supreme Court reversed California state judgments denying petitioners a property tax exemption for refusal to sign a loyalty oath on their tax returns. The Court held that the statute requiring the oath impermissibly shifted the burden of proof of non-involvement in the proscribed advocacy to the taxpayer and violated the Free Speech Clause of the First Amendment.

In considering the appropriate burden and standard of proof applicable in a situation involving fundamental rights, the Court stated:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of his guilt. 357 U. S. at 525-526.

While acknowledging that Speiser v. Randall, supra, dealt with free speech in a civil context, appellant asserts that the concerns expressed in that case apply more forcefully to a criminal defendant who stands convicted of first degree murder and who faces loss of his life, not the mere loss of his liberty.

The recent history of judicial authority in capital cases in this country has been characterized by a continuing concern by the appellate courts for narrowing the margin of error in the application of the death penalty. The thrust of all such cases since Furman v. Georgia, 408 U. S. 238, 33 L. Ed.2d 346, 92 S. Ct. 2726 (1972), has been to limit and define those circumstances in which imposition of the death penalty is appropriate and to ensure, as much as possible, that the ultimate sanction will not be exacted arbitrarily or discriminatorily.

Appellant urges that the only proper standard of proof to be applied to the penalty phase is that of beyond a reasonable doubt. Thus, the state should bear the burden of proving that the aggravating circumstances are of such proportion that the mitigating circumstances do not consitute a reasonable or substantial doubt on the question of imposing a sentence of death.

While the Utah homicide statute provides a bifurcated proceeding in capital felonies, it ought not to provide a bifurcated standard of proof which substantially lessens the burden to be borne by the state on the crucial issue of the life or death of a criminal defendant.

In this instance, the trial court even evidenced a belief that the proper standard should be beyond a reasonable doubt, but noting that he must apply the preponderance standard set forth in Pierre, supra.

In the recent case of State v. Brown, (Utah Supreme Court, No. 15481, filed February 7, 1980), Justice Stewart, in an opinion concurring in the result, reasoned that Sections 76-1-501 and 502, U. C. A. (1953), provide for the reasonable doubt standard to be borne by the state as to every element of a criminal offense, including the "attendant circumstances" as well. Thus, the language of those sections encompass the aggravating and mitigating circumstances surrounding the commission of a homicide. The Utah penalty hearing statute does not rescind those general criminal provisions.

As presently drawn and construed, the Utah penalty phase statute operates as a virtual mandatory death statute, clearly in violation of the decision in Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed.2d 944, 96 S. Ct. 2978 (1976). The Utah penalty statute should be voided as both facially overbroad and defective as applied.

Appellant contends that if this Court should reject the reasonable doubt standard argued for herein, then it must still find that the sentence of death in this case was inappropriate even under the preponderance standard. The sole significant aggravating circumstance relied upon by the state was the dubious contention that the homicide was committed in the course of a robbery. The mitigating circumstances included the appellant's lack of any prior felony record, his relatively young age (under 40), the fact that he had been gainfully employed until a few months before the homicide and that he suffered some degree of mental impair-

ment or depression as a result of an extended alcohol problem. Thus, the mitigating factors must surely have outweighed the aggravating circumstances and warrant, at the very least, a finding of prejudicial error as to the penalty proceeding.

## POINT VI

### UTAH'S CAPITAL SENTENCING STATUTES VIOLATE DUE PROCESS BY FAILING TO PROVIDE FOR THE SCOPE OF APPELLATE REVIEW MANDATED BY DECISIONS OF THE UNITED STATES SUPREME COURT

Section 76-3-206, U.C.A. (1953), provides for automatic review by the Utah Supreme Court of all cases where a sentence of death has been imposed. Section 76-3-207(3) allows for a reversal of the penalty phase where the Utah Supreme Court finds prejudicial error in that proceeding. Neither section defines the scope of review to be employed by this Court in deciding the appropriateness of the penalty imposed. Nor is there any requirement of specific findings in support of the penalty determination so as to provide an adequate basis for review.

The United States Supreme Court reviewed the Florida capital sentencing procedures in Proffit v. Florida, 428 U. S. 242, 49 L. Ed.2d 913, 96 S. Ct. 2960 (1976). The Florida statute provided, in addition to setting forth the aggravating and mitigating circumstances to be considered, for mandatory review by the Florida Supreme Court, requiring the Court to compare the circumstances of the case before it with those of other capital cases to determine the appropriateness of