

1991

Utah v. Fred A. Alvarez : Brief of Appellant

Utah Supreme Court

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THE UTAH SUPREME COURT

THE STATE OF

Plaintiff/

v.

FRED A. ALVA

Defendant

OPENING BRIEF IN APPELLATE

Priority No.

THIS IS A
JURY VERDICT
FIRST DISTRICT
DISTRICT COURT
RICHARDSON
IMPRISONED
IMPRISONED

CONVICTION AND FINAL JUDGMENT
CASE OF CRIMINAL HOMICIDE
OFFENSE, ENTERED IN THE
SALT LAKE COUNTY
RESIDING
FIVE YEARS MANDATORY
BY THE COURT.

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IN THE UTAH SUPREME COURT

THE STATE OF UTAH,

Plaintiff/Appellee,

v.

FRED A. ALVAREZ,

Defendant/Appellant.

:

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**INSERT TO OPENING
BRIEF OF APPELLANT**

Case No. 910019

Priority No. 2

THIS IS AN APPEAL FROM A CONVICTION AND FINAL JUDGMENT FROM A JURY VERDICT FOR THE OFFENSE OF CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE A CAPITAL OFFENSE, ENTERED IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY. THE HONORABLE RICHARD MOFFAT, JUDGE, PRESIDING. A SENTENCE OF LIFE IMPRISONMENT WITH A TWENTY YEARS MANDATORY MINIMUM TERM OF IMPRISONMENT WAS IMPOSED BY THE COURT.

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STANDARD OF REVIEW

Due to the number and complexity of the issues raised in this appeal, the standard of review is set forth in the first paragraph of each particular point in the brief.

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,

Plaintiff/Appellee,

v.

FRED A. ALVAREZ,

Defendant/Appellant.

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OPENING BRIEF OF APPELLANT

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OTHER AUTHORITIES

- Boehm, V.R., "Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias," 91968) Wisconsin Law Review 743 22
- Crossan, R., "An Investigation Into Certain Personality Variables Among Capital Tried Jurors," reprinted in Proceedings, 76th Annual Convention APA (1968) . . 21, 22
- Ellsworth and Ross, Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists, 29 Crime and Delinquency, 116-169 (1963) 13
- Fitzgerald and Ellsworth, Due Process vs. Crime Control, 8 Law and Human Behavior 31 (1984), 42 Univ. Colo. L. Rev. 21 13
- Goldberg, F., Capital Scruples, Jury Bias and Use of Psychological Data to Raise Presumptions in the Law, 5 Harvard Civil Rights--Civil Liberties Law Review 53 (1976) 13
- Haney, Juries and the Death Penalty, Readdressing the Witherspoon Question, 26 Crime and Delinquency 412-27 (1980) 13, 20
- Mitchell, H. and Byrne, D., "The Defendant's Dilemma: The Effects of Juror's Attitudes and Authoritarianism on Judicial Decision, 25 Journal of Personality and Social Psychology 123 (1975) 21
- Packer, The Limits of the Criminal Sanction, (1968) 13
- Rokeach, M. MacLellan, D., "Dogmatism and the Death Penalty: A Re-Interpretation of the Duquesne Poll Data," 8 Duquesne Law Review 125 (1970) 22
- Smith, A Trent Analysis of Attitudes Toward Capital Punishment, 1936-1974, in J.A. Davis (ed.) Studies of Social for the Death Penalty: Instrumental Response to Crime or Symbolic Attitude, 17 Law and Society Review, 121-146 (1982) 13
- Thayer, R., "Attitude and Personality Differences Between Potential Jurors Who Could Return the Death Verdict and Those Who Could Not," reprinted in Proceedings of 78th Annual Convention of the APA (1970) 21

Vidmar and Ellsworth, <u>Public Opinion and the Death Penalty</u> , 26 Stan. L. Rev. 1245-1270 (1974)	13
Wilson, <u>Belief in Capital Punishment and Jury Performance</u> , (University of Chicago, unpublished manuscript (1957)	13
Zeisel, H., <u>Some Data on Juror Attitudes Toward Capital Punishment</u> , (University of Chicago Study in Criminal Justice (1968))	13

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,

Plaintiff/Appellee,

v.

FRED A. ALVAREZ,

Defendant/Appellant.

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Priority No. 2

Case No. 910019

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a judgment and conviction for a capital offense. This court has jurisdiction of this appeal pursuant to Utah Code Annotated §78-2-2(3)(i) (1953 as amended).

NATURE OF PROCEEDINGS

This is an appeal from a conviction and final judgment entered against appellant in the Third Judicial District Court, in and for Salt Lake County, the Honorable Richard Moffat, Judge, presiding. On November 29, 1990, appellant was found guilty by a jury of the offense of Criminal Homicide, Murder in the First Degree, a capital offense, as described in Utah Code Annotated §76-5-202 (1953 as amended). Appellant was sentenced to life imprisonment with a twenty-year mandatory minimum enhancement

pursuant to Utah Code Annotated §76-3-203.1 (1953 as amended) was imposed on November 29, 1990. Judgment was entered on December 6, 1990. Notice of appeal was filed on December 3, 1990. An amended notice of appeal was filed on January 2, 1991.

ISSUES PRESENTED FOR REVIEW

1. Does the Utah Constitution prevent the use of a "death qualified" jury to determine a defendant's guilt or innocence in a capital case?
2. Did the State's use of its peremptory challenges to strike two-thirds of the hispanics from the jury venire violate the Equal Protection Clause of the Fourteenth Amendment?
3. Was the evidence sufficient to establish the offense of murder in the first degree?
4. Did the trial court improperly instruct the jury on the elements of first degree murder?
5. Did the trial court erroneously enhance appellant's sentence for acting in concert with two or more other persons?

APPLICABLE CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, Section 1 of the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Constitution, Article I, Section 7:

No persons shall be deprived of life, liberty or property, without due process of law.

Article I, Section 9:

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

Article I, Section 10:

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Article I, Section 12:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused

shall not be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

STATUTORY PROVISIONS AND RULES

Utah Code Ann. §76-1-401 (1953 as amended):

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-21-31 in controlling the joinder of offenses and defendants in criminal proceedings.

Utah Code Ann. §76-1-601(1) (1953 as amended):

"Act" means a voluntary bodily movement and includes speech.

Utah Code Ann. §76-2-202 (1953 as amended):

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Utah Code Ann. §76-3-203.1(1) (1953 as amended):

(a) A person who commits any offense listed in Subsection (3) in concert with two or more persons is subject to an enhanced penalty for the offense as provided below.

(b) "In concert with two or more persons" as used in this section means the defendant and two or more other

persons would be criminally liable for the offense as parties under Section 76-2-202.

Utah Code Ann. §76-3-203.1(5) (1953 as amended):

(a) This section does not create any separate offense but provides an enhanced penalty for the primary offense.

(b) It is not a bar to imposing the enhanced penalties under this section that the persons with whom the actor is alleged to have acted in concert are not identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.

(c) The sentencing judge rather than the jury shall decide whether to impose the enhanced penalty under this section. The imposition of the penalty is contingent upon a finding by the sentencing judge that this section is applicable. In conjunction with sentencing the court shall enter written findings of fact concerning the applicability of this section.

Utah Code Ann. §76-5-202(1)(b) (1953 as amended):

Criminal homicide constitutes murder in the first degree if the actor intentionally or knowingly causes the death of another under any of the following circumstances

. . .

The homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons are killed.

Rule 18(3)(10) of the Utah rules of Criminal Procedure:

The challenge for cause is an objection to a particular juror and may be taken on one or more of the following grounds: . . .

if the offense charged is punishable with death, the entertaining of such conscientious opinions about the death penalty as would preclude the juror from voting to impose the death penalty following conviction regardless of the facts.

STATEMENT OF THE CASE

On June 16, 1990, appellant, Fred A. Alvarez and Richard Gabaldon were jointly charged with two counts of Criminal Homicide, Murder in the First Degree, pursuant to Utah Code Ann. §76-5-202 (1953 as amended). (R. 7-9) The information was amended on July 11, 1990, to include a sentencing enhancement pursuant to Utah Code Ann. §76-3-203.1 (1953 as amended). (R. 11) At the preliminary hearing, the court determined that there was insufficient evidence to hold Gabaldon for trial on the first degree murder charges. The State filed a Second Amended Information charging Gabaldon with two counts of Criminal Homicide, Murder in the Second Degree and charging appellant with the original counts of Criminal Homicide, Murder in the First Degree. (R. 29-31) Prior to trial, Gabaldon plead guilty to two counts of Aggravated Assault, violations of Utah Code Ann. §76-5-103 (1953 as amended), third degree felonies. This was done in exchange for his testimony against appellant. (Tr. 14)

The jury panel was "death qualified" pursuant to Rule 18(e)(10) of the Utah Rules of Criminal Procedure. (Tr. 106 et. seq.) Following selection of the panel, appellant moved for a mistrial based on the State's discriminatory use of its peremptory challenges. (Tr. 484) After a ten day trial, the jury returned a verdict of

guilty as to Count I for the death of Don Newingham and not guilty as to Count II for the death of Shayne Newingham. (R. 193-195) Appellant waived his right to a jury trial for the death penalty phase of the proceedings. (Tr. 1415) The trial judge imposed a sentence of life in prison for the homicide charge which included an enhancement of a mandatory minimum term of twenty years pursuant to Utah Code Ann. §76-3-203.1 (1953 as amended).

STATEMENT OF THE FACTS

On Friday, June 8, 1990, appellant and fifteen to twenty other juveniles and young adults were at a party at the home of Kim and Richard Gabaldon. (Tr. 1098, 1059) There was considerable use of alcohol at that party. (Tr. pp. 607, 609, 613, 1091, 1115) At approximately 11:30 p.m. a group of five uninvited individuals arrived. They included Don and Shayne Newingham (father and son, respectively), Robert Rivas, Kenny Salas and Paul Velasquez. (Tr. pp. 963, 918) Before going to the Gabaldon residence, those five had been drinking. The Newinghams and Salas were also using cocaine. (Tr. 864, 867, 916-17)

At the Gabaldon residence, Salas and Don Newingham got out of the car and approached the door. (Tr. 920-21) Gabaldon met the two at the front door and informed them that they were not welcome. (Tr. 621-22) When asked to leave, Don Newingham objected vehemently and became verbally abusive to those at the party. (Tr. at 623, 631, 636, 684, 899, 1052, 1263, 1286) At that point, appellant pulled a knife from his pants, held it to his chest and requested Don Newingham to leave.

(Tr. 615). Newingham continued to argue, and stated, "I'm not going to let no young punk pull no knife out on me because I'm going to stick him first." (Tr. 636, 1264) A pocket knife was found in Newingham's possession. (Tr. 735)

Salas and Don Newingham eventually left the house and moved toward their car. (Tr. 925) Several of the individuals from inside the house followed them, including appellant, Gabaldon and Anthony DeHerrera. (Tr. at 635, 662, 925, 1265) As the group approached, Paul Valasquez exited the vehicle to talk with appellant. They met in front of the car where appellant informed Valasquez that he was welcome to come back to the party, but the Newinghams were not welcome because Gabaldon did not know them. (Tr. 880, 1264) As appellant and Valasquez spoke, an altercation broke out between Don Newingham and Gabaldon. (Tr. 880) Salas and Valasquez testified that Gabaldon struck Don Newingham in the face with his fist. The larger Newingham was then able to get Gabaldon to the ground and began to beat Gabaldon with his fists. (Tr. 681, 927) Salas and Valasquez testified at that time, appellant jumped on Don Newingham's back and stabbed him several times with a knife. (Tr. 682, 927) Salas testified further that Don Newingham was able to push himself off the ground, causing appellant to fall backwards. (Tr. 928) He also testified that appellant, while falling, accidentally stuck himself in the leg with the knife. (Tr. 926)

Appellant testified that when the fight broke out between Gabaldon and Don Newingham, he kicked at Newingham and was stabbed in the leg. (Tr. 1265) Appellant then stated that he then began wildly swinging the knife that he had

previously produced. (Tr. 1266) Appellant indicated that he may have struck the elder Newingham with the knife, but was not sure. (Tr. 1325) Kriss Blackhorse and Shauna Pina, both of whom had been at the party, testified that after the fight ended, Anthony DeHerrera entered the house carrying two knives. (Tr. 1014, 1143) Those witnesses and others who spoke with DeHerrera after the fight stated that DeHerrera bragged about stabbing the father. (Tr. 1055, 1097, 1114)

During the initial altercation between Don Newingham and Gabaldon, Shayne Newingham got out of the car and began to fight with others. (Tr. 884) He struck Manuel Martinez in the head, then threw Martinez into a truck, knocking him unconscious. (Tr. 1031, 1054, 1124, 1234) The younger Newingham then struck both Fernando Negrete and Manuel Alvarez with his fists. (Tr. 1092) There was contradictory testimony about how Shayne Newingham was stabbed. Paul Valasquez testified that he observed appellant stick Shayne Newingham with the knife after Don Newingham had been stabbed. (Tr. 886) Anthony Valerio testified that as Shayne Newingham "got the best" of Gabaldon, he observed Anthony DeHerrera stab Shayne Newingham in the shoulder. (Tr. 1236) Gabaldon testified that as he fought with Shayne Newingham, DeHerrera was striking Newingham in the back. (Tr. 675)

Dr. Todd Gray, Utah State Medical Examiner, testified that both Shayne and Don Newingham died as a result of multiple stab wounds. (Tr. 983, 1001) Shayne Newingham had two knife wounds in his back, another near his armpit and a fourth in the abdomen. (Tr. 961-976) Don Newingham suffered three knife wounds to his

back. (Tr. 893-1000) Dr. Gray testified that all of the wounds were consistent with injuries that may be inflicted by a large hunting knife. (Tr. 983, 1002) Such a knife had been located by police detectives in a washing machine, under towels in the Gabaldon residence. (Tr. 768)

SUMMARY OF THE ARGUMENT

The process of "death qualification" of a jury panel violates the protections of the Utah Constitution. Such a process results in jury panels that are more prone to convict a capital defendant than juries that are not been subject to that procedure. A separate jury should be selected for the penalty phase of a capital trial if the "death qualification" procedure is to be employed.

The State used its peremptory challenges in a discriminatory manner in excluding hispanics from jury service. The reasons stated by the prosecutor for the exercise of those challenges were inconsistent with the information elicited from the potential jurors who were stricken. The exercise of the peremptory challenges in such a discriminatory manner violated the Equal Protection Clause of the Fourteenth Amendment.

The evidence is insufficient to establish that the two homicides were committed incident to a single act, scheme, course of conduct or criminal episode. That is the additional element that distinguishes first from second degree murder. The offense of conviction should be ordered reduced from first to second degree murder.

The trial court responded to a question from the jury during its deliberations in a manner that would lead the jury to believe that one of the elements of first degree murder need not be proved. Such an instruction relieved the State of proving that element of the offense. That error requires that a new trial be ordered.

The application of the "gang enhancement" statute violated appellant's constitutional right to due process of law as that statute is void for vagueness and allows punishment for the unproved acts of unnamed third parties. Furthermore, appellant should have been entitled to a jury determination of his liability under that statute. Finally, the evidence was insufficient to establish that appellant acted in concert with two or more individuals who shared the intent to cause the death of another. Consequently, the trial court erroneously applied the twenty year minimum mandatory enhancement to appellant's sentence.

ARGUMENT

POINT I

THE PROCESS OF "DEATH QUALIFICATION" OF THE JURY VENIRE VIOLATES THE PROTECTIONS OF THE UTAH CONSTITUTION AS IT RESULTS IN A JURY PANEL MORE PRONE TO CONVICT.

Prior to trial, appellant objected to the "death qualification" of the jury venire, (R. 129; 376 at 8) That is the process of questioning potential jurors about their opinions regarding the death penalty pursuant to Rule 18(e)(10) of the Utah Rules of Criminal Procedure. Appellant contended that the procedure creates juries which are

conviction prone in violation of his state constitutional rights as described in Article I, Sections 7, 9, 10 and 12 of the Utah Constitution. This position has been rejected under a federal constitutional analysis.¹ However, a state constitutional analysis warrants another result. Since this is a legal issue a standard of review of correction of error should be employed. Oats v. Chavez, 749 P.2d 659 (Utah 1988).

The Supreme Court first addressed the practice of death qualification of juries and held that individuals expressing concern about the death penalty could not be excluded for cause from the jury if they would follow the court's instructions regarding the death penalty. Witherspoon v. Illinois, 391 U.S. 510, 517-18, (1968). The Court did not address the issue of whether death qualification was per se unconstitutional. However, the Court issued an invitation for presentation of factual

¹See State v. Valdez, 748 P.2d 1950 (Utah 1987) (holding that pursuant to Lockhart v. McCree, 476 U.S. 162 (1986), death qualification of a jury did not violate the defendant's federal constitutional rights, defendant's state constitutional rights specifically were not addressed); State v. Schaffer, 725 P.2d 1301 (Utah 1986) (relying on Lockhart and its analysis this Court held that "the individual, sequestered death-qualification voir dire of prospective jurors in a capital homicide case does not, in and of itself, violate the defendant's right to a fair and impartial jury." Id. at 1312.); State v. Moore, 697 P.2d 233 (Utah 1985) (the exclusion of individuals who would apply the death penalty in cases even if the mitigating circumstances outweighed the aggravating circumstances as well as individuals who would never apply the death penalty, provides a balance to the death qualification process. However, this Court noted, "We realize that the disqualification of such persons does not fully meet defendant's point about conviction-prone jurors . . ." Id. at 237); State v. Norton, 675 P.2d 577 (Utah 1983) (holding that like "Witherspoon Excludables" individuals that would automatically impose the death penalty must be excused for cause); See also, State v. Lafferty, 749 P.2d 1239 (Utah 1988); State v. Schreuder, 726 P.2d 1215 (Utah 1986); State v. Codianna, 573 P.2d 343 (Utah 1977); State v. Kelbach, 461 P.2d 297 (Utah 1969).

data on that question in the future. The Court noted that with the presentation of stronger evidence, death qualified juries may be shown to be conviction prone:

The question would then arise whether the State's interest in submitting the penalty issue to the jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence given the possibility of using one jury to decide guilt and another to fix punishment.

Id. at 520, n. 10.

Such evidence is now available. The Zeisel and Goldberg studies presented to the Supreme Court in Witherspoon, have since been perfected, published and reviewed.² Additional studies have also been conducted. See generally: Grigsby v. Mabry, 569 F.Supp. 1273, 1292, 1302-05 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (8th Cir. 1985), *rev'*, Lockhart v. McCree, *supra*.³ In 1986, this additional evidence

²See: Goldberg, F., Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law, 5 Harvard Civil Rights--Civil Liberties Law Review 53 (1976); Wilson, Belief in Capital Punishment and Jury Performance, (University of Chicago, unpublished manuscript (1957); Zeisel, H., Some Data on Juror Attitudes Toward Capital Punishment, (University of Chicago Study in Criminal Justice (1968)).

³Haney, Juries and the Death Penalty, Readdressing the Witherspoon Question, 26 Crime and Delinquency 412-27 (1980); Packer, The Limits of the Criminal Sanction (1968); Vidmar and Ellsworth, Public Opinion and the Death Penalty, 26 Stan.L.Rev. 1245-1270 (1974); Smith, A Trent Analysis of Attitudes Toward Capital Punishment, 1936-1974, in J.A. Davis (ed.) Studies of Social for the Death Penalty: Instrumental Response to Crime or Symbolic Attitude, 17 Law and Society Review, 121-146 (1982); Ellsworth and Ross, Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists, 29 Crime and Delinquency, 116-169 (1963); Fitzgerald and Ellsworth, Due Process vs. Crime Control, 8 Law and Human Behavior 31 (1984), 42 Univ. Colo. L. Rev. 21.

was presented to the Supreme Court. The Court reversed the district court and court of appeals' holdings that death qualification violated a capital defendant's constitutional rights. Lockhart v. McCree, *supra*.⁴ See also, Adams v. Texas, 448 U.S. 38 (1980); Wainwright v. Witt, 469 U.S. 412 (1985).

In spite of the Court's interpretation of the federal constitution this court should consider the constitutionality of death qualification pursuant to the more expansive rights of the Utah Constitution. This court is not bound by the Supreme Court's decisions on the federal constitution in interpreting the Utah Constitution. Oregon v. Haas, 420 U.S. 714, (1975); State v. Larocco, 749 P.2d 460 (Utah 1990). See, e.g., State v. Earl, 716 P.2d 803, 806 (Utah 1986). Article I, Sections 7, 9, 10 and 12 of the Utah Constitution do not support the current practice of using the same death qualified jury to decide both the guilt and penalty phases of a capital trial.⁵

A.

**The Utah Constitutional Provisions Provide Greater
Protections to Capital Defendants Than the Respective
Federal Counterparts.**

This court has held the language in the last sentence of Article I, Section 9 of the Utah Constitution, "Persons arrested or imprisoned shall not be treated with

⁴One year later the United States Supreme Court extended the Lockhart holding to co-defendants who were not charged with a crime subject to the death penalty. Buchanan v. Kentucky, ___ U.S. ___, 107 S.Ct. 2906, (1987). However, the Buchanan analysis is likewise not binding on this court's analysis under the Utah Constitution.

⁵Lockhart, 476 U.S. at 184.

unnecessary rigor," creates a protection more expansive than the federal counterpart. State v. Bishop, 717 P.2d 261, 267 (Utah 1986). This court has also interpreted Article I, Section 7 of the Utah Constitution to afford the accused greater protection than the due process clause of the federal constitution. In State v. Brickey, 714 P.2d 644 (Utah 1986), the due process protection of the Utah Constitution was extended to safeguard an accused from the refileing of criminal charges already dismissed at a preliminary hearing. In State v. Saunders, 622 P.2d 738, 742 (Utah 1985), the court cited State v. McCumber, 622 P.2d 353 (Utah 1980), in recognizing due process is violated when prejudicial evidence reaches the jury where severance would have prevented that evidence from being admitted, thus curing the problem.

Support for more expansive rights for the capital defendant can be found in the discussion and debates of the State Constitution Convention regarding Article I, Section 10:⁶

Mr. Evans(Weber): But I see no reason why the trial of ordinary criminal cases, there might not be a jury of nine, as well as in civil cases, with a unanimous verdict, except possibly in the case where the punishment might be capital. A case so grave as that, some provision might be made why the time-honored system of the jury might be unchanged. I introduce this amendment, so it will raise these questions, and I doubt not but that it will be

⁶Article I, Section 10 provides:

In capital cases the right of the trial by jury shall remain inviolate. In Courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded. [emphasis added]

discussed with all deliberation, but for the best interest of the new State, and also from a point of economy, if the service can be retained the same. I hope it carried.

[emphasis added]

Proceedings Constitutional Convention 1895, Volume I at 258-59.

Mr. Squires. There is another provision there about capital punishment is not there?

Mr. Evans (Weber): Yes: and I thank the gentlemen for calling my attention to it. In capital offenses, where a man is upon trial for his life, we preserve the old common law jury of twelve men, who must render a unanimous verdict. The provision is carefully drawn, and I think expresses the view of the committee of the whole the other day, when we were discussing that question.

Proceedings Constitutional Convention 1895, Volume I at 493.

The official report of the proceedings and debates of the constitutional convention indicates that economy and expense were the concern in reducing the number of jurors required to sit in non-capital cases.⁷ Analysis of the history of Article I, Section 10 illustrates concerns for economy and expense were not sufficient to compromise the rights of those individuals facing the death penalty. In Lockhart the Supreme Court relied heavily on considerations of economy and efficient trial management to uphold the State of Arkansas' interest of having one jury sit and

⁷Reference to expense and economy can be found in the Proceedings Constitutional Convention 1895, Volume I at 259, 261, 276, 278, 279, 287 and 296.

decide both the issue of guilty and punishment.⁸ Thus, the basis for the decision in Lockhart is inapplicable to an analysis of the Utah Constitution. The historical basis of the Utah Constitution excluding economic consideration from the jury selection process in capital cases. That line of reasoning does not provide support for the practice of death qualifying the jury sitting during the guilt phase of such a trial. The constitutional debates support the position that the jury considering innocence or guilt should not be death qualified. In the event the defendant is found guilty, a second jury should be impaneled. That jury may be subjected to the "death qualification" process.

The legislature has contemplated and provided for circumstances where it is impractical to reconvene the jury that determined guilt for the sentencing phase. In such situations, the court may convene a new jury for the limited purpose of sentencing, Utah Code Ann. §76-3-207(1) (1953 as amended). In light of the conviction prone nature of a death qualified jury⁹, this court should require trial courts

⁸This concern was articulated by the Court as follows,

. . . in most, if not all, capital cases much of the evidence adduced at the guilt phases of the trial will also have a bearing on the penalty phase: if two different juries were to be required, such testimony would have to be presented twice, once to each jury.

Lockhart, 476 U. S. at 181.

⁹See: Point I, B, infra.

to engage in a bifurcated proceeding in which the jury determining guilt would not be subjected to the death qualification process.

B.

Empirical Studies Demonstrate that a Death Qualified Jury is More Prone to Convict Than Juries Not Subject to That Procedure.

In determining the effect of the death qualification procedure, this court should consider Mr. Justice Marshall's persuasive summary of the reasoning of the studies described in Grigsby v. Mabry, *supra*. He noted,

In the wake of Witherspoon, a number of researchers set out to supplement the data that the Court had found inadequate in that case. The results of these studies were exhaustively analyzed by the District Court in this case, see Grigsby v. Mabry (Grigsby II), 569 F.Supp. 1273, 1291-1308 (E.D.Ark. 1983) and can only be briefly summarized here. [footnote omitted] The data strongly suggest that the death qualification excludes a significantly large subset--at least 11% to 17%--of potential jurors who could be impartial during the guilt phase of the trial. [footnote omitted] Among the members of the excludable class are a disproportionate number of blacks and women. See *id.*, at 1283, 1293-1294.

The perspectives on the criminal justice system of jurors who survive death qualification are systematically different from those of excluded jurors. Death-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more distrustful of defense attorneys, and less concerned about the danger of erroneous convictions. *Id.* at 1283, 1293, 1304. This prosecution bias is reflected in the greater readiness of death qualified jurors to convict or to convict more serious charges. *Id.* at 1294-1302; Grigsby v. Mabry, 758 F.2d 226, 233-236 (8th Cir. 1985). And, finally, the very

process of death qualification--which focuses attention on the death penalty before the trial has ever began--has been found to predispose the jurors that survive it to believe that the defendant is guilty. 569 F.Supp., at 1302-1305; 758 F.2d at 234.

Lockhart v. McCree, supra at 156-57 (Marshall J., dissenting).

This court needs to consider the great weight of these studies. In Grigsby, the state's witness conceded that the studies were conducted with sound methodology. Grigsby, supra, at 1309. Further, no evidence or studies contrary to those presented to the trial court in Grigsby were provided by the state. As noted by Justice Marshall,

Yet even after considering the evidence adduced by the State, the Court of Appeals properly noted: "There are no studies which contradict the studies submitted [by respondent]; in other words, all of the documented studies supported the district court's findings." [Grigsby v. Mabry] 758 F.2d at 238.

476 U.S. at 190. (Marshall, dissenting)

Courts reviewing these studies have found that the death qualification process "stacks the deck" against the defendant, creating a conviction prone jury that is underrepresentative of the community. Grigsby v. Mabry, supra, at 1292, 1302-05; Hovey v. Superior Court, 616 P.2d 1301 (Cal. 1980). In State v. Moore, supra, the court noted that with respect to studies evidencing death qualified juries being more inclined to convict than non-death-qualified juries, this court stated, "The defendant's data may well be correct. It is, of course, settled that a State may not entrust the

determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" Witherspoon, supra, at 521.¹⁰

C.

**The Death-Qualification of the Jury in this Case Requires
That Appellant Receive a New Trial.**

It is not disputed that the voir dire in the instant case was carefully conducted in an effort to mitigate negative effects.¹¹ However, the process of death qualification is inherently flawed and the trial court's care in conducting voir dire merely served to heighten the jurors' focus on the death penalty and a presumption of guilt.¹² Individuals who have scruples concerning the death penalty tend to have

¹⁰The district court judge in Grigsby stated:

"A jury so selected [through the use of the death qualification process] will not, therefore, be composed of a cross section of the community, rather, it will be composed of a group of persons who are uncommonly predisposed to favor the persons who are uncommonly predisposed to favor the prosecution, a jury "organized to convict."

Grigsby, 569 F. Supp. at 1304 relying on Haney, Juries and the Death Penalty Readdressing the Witherspoon Question, supra.

¹¹The general text of the voir dire concerning death penalty issues is set forth at R. 281-284. Counsel were allowed to further question those jurors expressing scruples about the death penalty to determine if such scruples could be set aside if the aggravating factors outweighed the mitigating factors.

¹²The district court judge in Grigsby summarized the effect of focusing on the death penalty prior to trial as follows:

By focusing on the penalty before the trial actually begins the key participants, the judge, the prosecutor and the defense counsel convey the impression that they all believe the defendant is guilty, that the

"due process" concerns whereas individuals who survive death qualification tend to have "law and order" concerns. Grigsby, supra, at 1311.¹³ The process of questioning jurors on the issue of the death penalty allows the State to identify and remove individuals who tend to focus on "due process" concerns. Those individuals would tend to view the evidence from a more neutral position than individuals who focus on "law and order" concerns and tend to be conviction prone.

On the basis of the currently available studies on death qualification, this court should find that such a process and the subsequent removal of individuals from the jury panel based on information received during that process creates a jury that is conviction prone. Consequently, that process violates the protections of the Utah Constitution. Furthermore, the history and background of the Utah Constitution are inconsistent with the economic concerns that underlie the rulings of the federal

"real" issue is the appropriate penalty, and that the defendant really deserves the death penalty.

Grigsby 569 F. Supp. at 1303.

¹³Mitchell, H. and Byrne, D., "The Defendant's Dilemma: The Effects of Juror's Attitudes and Authoritarianism on Judicial Decision," 25 Journal of Personality and Social Psychology 123 (1975); Thayer, R., "Attitude and Personality Differences Between Potential Jurors Who Could Return the Death Verdict and Those Who Could Not," reprinted in Proceedings of 78th Annual convention of the APA (1970); Crossan, R., "An Investigation Into Certain Personality Variables Among Capital Tried Jurors," reprinted in Proceedings, 76th Annual Convention APA (1968); Boehm, V.R., "Mr. Prejudice, Miss Sympathy, an the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias," (1968) Wisconsin Law Review 743; Rokeach, M. MacLellan, D., "Dogmatism and the Death Penalty: A Re-Interpretation of the Duquesne Poll Data," 8 Duquesne Law Review 125 (1970).

constitutional cases. The procedure of "death qualification" was applied in appellant's case. Appellant's conviction should be reversed and the case remanded to the district court for a new trial.

POINT II

THE STATE'S SYSTEMATIC USE OF PEREMPTORY CHALLENGES TO EXCLUDE MINORITY JURORS FROM THE PANEL VIOLATED THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

Following the jury selection and prior to the swearing in of the jury, appellant objected to the prosecution's discriminatory use of peremptory strikes to remove minority jurors. (Tr. 513)¹⁴ Subsequent to the objection, the trial court required the prosecutor state the reasons for exercising the challenges against two of the three hispanics on the panel. (Tr. 524-25) Based on those explanations, the trial court found those peremptory challenges were not race related. In reviewing the factual determinations of the trial court, this court should employ a clearly erroneous standard. State v. Cantu II, 778 P.2d 517 (Utah 1989).

The State may not systematically exclude minorities from a jury through the use of peremptory challenges. Batson v. Kentucky, 476 U.S. 79 (1986), State v. Cantu II, supra; State v. Span, 819 P.2d 329 (Utah 1991). The Supreme Court summarized such challenge to a racially based exercise of peremptory challenges as follows:

¹⁴In State v. Bankhead, 727 P.2d 216, 217 (Utah 1986), this court held that such a challenge must be brought prior to the swearing in of the jury. See also: Utah Code Ann. §78-46-16(1) (1953 as amended).

In Powers v. Ohio, 499 U.S. ____, (1991), we held that a criminal defendant, regardless of his or her race, may object to a prosecutor's race-based exclusion of persons from the petit jury. Our conclusion rested on a two-part analysis. First, following our opinions in Batson and in Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970), we made clear that a prosecutor's race-based peremptory challenge violated the equal protection rights of those excluded from jury service. 499 U.S. 113. Second, we relied on well-established rules of third-party standing to hold that a defendant may raise third-party standing to hold that a defendant may raise the excluded juror's equal protection rights.

Edmonson v. Leesville Concrete Co. Inc., ____ U.S. ____, 111 S.Ct. 2077, 2081 (1991).

This court has recently addressed this issue in State v. Cantu II, supra, and State v. Span, supra. The issue was also addressed by the Utah Court of Appeals in State v. Harrison, 805 P.2d 769 (Utah App. 1991).

A.

Appellant Established a Prima Facie Case of Discrimination in the Prosecutor's Use of Peremptory Challenges.

The determination of whether " . . . a prima facie case has been established requires consideration of all relevant circumstances, including whether there has been a pattern of strikes against members of a particular group." Edmonson, supra, at 2088. This court has established the following requirements:

The elements necessary to such a prima facie case include (1) as complete a record as possible, (2) a showing that persons excluded belong to a cognizable group under the representative cross-section rule, and (3) a showing that there exists "a strong likelihood that such persons are being

challenged because of their group association rather than because of any specific bias." (citation omitted).

State v. Cantu II, *supra*, at 518.

In the instant case, seventy-seven jurors were called to appear before the court, three were excused by the court prior to trial, fourteen were excused for cause, and twenty-four were stricken by peremptory challenges. (R. 223-26) At least four of the potential jurors were hispanic.¹⁵ (Tr. 489-94, 514-25) Hispanics are a cognizable minority. Hernandez v. New York, ___ U.S. ___, 111 S.Ct. 1859 (1991), State v. Cantu I, 750 P.2d 591 (Utah 1988), State v. Harrison, *supra*. Of those potential jurors, one was excused for cause,¹⁶ two were challenged by the prosecution's first and fifth peremptory strikes, Annie Sanchez and Wendy Mayeda, respectively. One other, Robert Galvez, sat on the jury. (R. 223-26) The state's exclusion of 67% of the potential hispanic jurors constitutes a prima facie showing of discrimination.

In Span, the prosecution's use of a peremptory challenge to strike the only minority juror constituted a prima facie case of discriminatory use of the challenge. In United States v. David, 803 F.2d 1567 (11th Cir. 1986), the court held that "under Batson, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown", 803 F.2d at 1571. In Reynolds v. State,

¹⁵The parties and court determined race based on juror surnames and appearance. (Tr. 519-20)

¹⁶Madylon Ramos was an acquaintance of appellant's parents. (Tr. 55)

576 So.2d 1300, 1301 (Fla. 1991), the court noted that excusal of all minority members was sufficient to shift the burden of proof to the state. See also, Floyd v. State, 539 So.2d 357, 361 (Ala.Cr. App. 1987). Additionally, the mere fact that one hispanic juror sat on the jury does not preclude a prima facie showing of a discriminatory use of peremptory challenges. People v. Granillo, 242 Cal.Rptr. 639, 645 (Cal. App. 1987).

The defendant and the stricken jurors need not be of the same racial minority to advance a Batson challenge, Powers v. Ohio, supra. However, racial identity between the defendant and jurors heightens the inference of discrimination,

. . . racial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias takes this form, it may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred. [Batson] 111 S.Ct. at 1373-74.

Span, supra at 23. In this case, the minority jurors who were stricken were of the same race as appellant. The inference of discrimination is heightened in this case even though one hispanic sat on the jury.

The majority of the hispanic potential jurors were excluded by the state exercising its peremptory challenges. Those potential jurors were of the same race as appellant. Consequently, appellant established a prima case of discrimination requiring the State bear the burden of establishing race neutral reasons for the use of peremptory challenges against potential jurors Wendy Mayeda and Annie Sanchez.

B.

The State Failed to Provide Sufficient Race Neutral Reasons to Justify the Peremptory Challenges of Potential Hispanic Jurors.

In Floyd v. State, *supra*, the court noted that it is the responsibility of the trial judge to:

. . . not merely accept the specific reasons given by the prosecutor at face value, see Hall, 35 Cal.3d at 168, 672 P.2d at 858-59, 197 Cal.Rptr. at 75; Slappy, 503 So.2d at 356; the judge must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination . . . The evaluation by the trial judge is necessary because it is possible that an attorney, although not intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding to strike the juror.

539 So.2d at 361. This court has articulated the following "list of factors which cast doubt upon the legitimacy of a purportedly race-neutral explanation:

. . . the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reason equally applicable to juror[sic] who were not challenged. State v. Slappy, 522 So.2d 18, 22 (Fla. 1988); See Slappy v. State, 503 So.2d 350 (Fla.App. 1987)

State v. Cantu II, supra. Evaluation of the prosecutor's stated reasons in this case reveals that those reasons are merely a subterfuge for a racially based motivation.¹⁷

In response to the trial court's request for a statement of reasons why Wendy Mayeda was stricken, the deputy county attorney stated:

[Mr. Morgan, Deputy County Attorney]: I would like to proceed in case the Court's finding that there is no systematic exclusion to set aside. The prosecutor's neutral non-race reasons are as follows: Wendy Mayeda, that State took off, Juror No. 21, for the following reasons: She's youthful, she indicated she would be suffering a financial hardship and she also indicated she has personal problems and would have difficulty in concentrating, and that she's going through a separation, even though she is not married at the time. She also indicated that although she would follow the Court's instruction with regard to the death penalty, that she had some scruples over the death penalty, for those reasons, the State elected its peremptory challenge and removed Wendy Mayeda from the panel.

(Tr. 524)

The age of the selected jurors Stacy Korth, (24 years old) and Christine Albrycht, age (28 years old) illustrates that the prosecutor's claim that Wendy Mayeda was removed because of her youth (25 years old) was at best a pretext. With respect to the issue of juror age, this court has noted,

"[a]ge (in adults) . . . may not be used to render an individual incompetent as a prospective juror, but an exploration of the attitudes and convictions that may exist in a person who belongs to those groups is certainly

¹⁷The entire voir dire testimony of both Mayeda and Sanchez is set out in the addendum.

permissible to aid in discovering actual bias or prejudice relating to the subject matter of a particular case.

State v. Ball, 685 P.2d 1055 at 1057 (Utah 1984). The youth of a potential juror and the youth of the defendant is an insufficient reason to rebut a prima facie showing of discrimination absent more detailed questioning during voir dire as to potential juror bias related to the age similarity. Floyd, 539 So.2d at 363. This is particularly true in the instant case where one of the victims is also young. Wendy Mayeda was asked no questions concerning her age or potential bias that her age as related to the defendant's age may raise.

Wendy Mayeda's personal problems were also articulated as a reason for striking her from the jury. Ms. Mayeda never indicated that she could not serve on the jury. She merely appraised counsel and the court that she was having some personal problems.¹⁸ The trial judge acknowledged her concern but noted, "It's a

¹⁸The interchange between the court and Ms. Mayeda went as follows:

The Court: I believe the bailiff indicated to me yesterday that you had some concerns that you wanted to voice privately.

Ms. Mayeda: Yeah. I'm going through a separation right now. We're not married, we just lived together. And I'm just having a really hard time with trying to deal with all that; and then trying to deal with this and concentrate on this, too. And I just wanted to bring that to your attention and let you know.

The Court: . . . I don't mean to belittle your problems, but we do need your services and that you would need to be able to apply your attention and your best efforts to help us solve this case.

Ms. Mayeda: Yes. I would try.

problem that somebody, either you or somebody like you, is going to have to spend some time on this jury . . . All of us in life, unfortunately, have to go through personal crisis as well as do other things that are required of them during the course of their life. . . " (Tr. 237) The trial judge observed Ms. Mayeda's demeanor and ability to concentrate. He was satisfied that she was qualified to serve as a juror. Her response to questioning was appropriate and forthright. There was no indication that Ms. Mayeda would have been impaired in her duties as a juror.

The prosecutor also asserted that Ms. Mayeda was removed because of her scruples concerning the death penalty. This reason to raises other legal concerns.¹⁹ However, when considered in the context of the other reasons given and the manner of exclusion, it is questionable whether this was actually the prosecutor's concern rather than Ms. Mayeda's race. Jurors, Carr, Galvez and Chedester also expressed some degree of concern over the death penalty or appropriate circumstances in which the death penalty should be applied but were not removed by the State. Illustrative of the inconsistency in the prosecutor's asserted concern is the situation with juror Chedester. She was not removed from the venire even after stating that she did not believe in the death penalty, but would be able to apply the law.²⁰

(Tr. 237-238)

¹⁹See: Point I, B, supra.

²⁰Juror Chedester at one point made the following statement: "As I did say, you know, I am not sure if I believe in capital punishment, but probably one of the few that don't." (Tr. 301)

The prosecutor did not challenge Ms. Mayeda for cause based on either her personal problems or her concerns about the death penalty. However, other veniremen were removed for these same reasons. "If the such concerns were valid and substantiated by the record, they would have supported a challenge for cause. "The fact that the prosecutor did not make any such challenge . . . should disqualify him from advancing the concern as a justification of a peremptory challenge." Hernandez v. New York, *supra*, (1991) (Stevens dissenting).

Finally, the prosecutor stated that serving on the jury would be a financial hardship to Ms. Mayeda. There is no support in the record for such a statement. (Tr. 89-96; 236-246) This unsubstantiated reason merely casts doubt on all of the other reasons articulated by the prosecutor. The prosecutor merely rattled off a list of facially appropriate reasons for exercising peremptory challenges, none of which can withstand scrutiny or are supported by the record. The only conclusion to be drawn was that Ms. Mayeda was stricken based on her race.

The prosecutor articulated the following reasons for the use of his initial peremptory challenge against Annie Sanchez:

With respect to Annie Sanchez, Juror No. 46, the State pre-empted her for the following neutral, non-racial reasons. She is youthful, she's 21 years old. She seemed to identify with the defendant during the course of the jury voir dire. She was constantly looking at him. She also indicated that she has scruples against the death penalty, even though she would follow, she had to be talked to quite a bit in comparison to the rest of the jurors, about her ability to pass on the death penalty; therefore, for those

reasons, the State preempted Annie Sanchez, Juror No. 46, using its first preemptory challenge.

Mr. VanSciver [defense counsel]: All right. Seemed to identify with the defendant is the very basis why his preemptory and it's his first one.

Mr. Morgan [the prosecutor]: Good point.

Mr. VanSciver: It's race oriented.

Mr. Morgan: Good point. Like to clarify that. Seemed to identify based upon her youth, based on her eye contact with him and based on her friendliness toward the defendant. Not that she identified in the sense they were from the same culture.

(Tr. 524-25)

The same argument as articulated with respect to Wendy Mayeda's youth applies to Ms. Sanchez. However, Ms. Sanchez was questioned about her potential bias in light of the closeness of her age to the defendant. She was unequivocal in her answer that her youth and the defendant's youth would not effect her ability to render a fair verdict.²¹ No other juror was questioned concerning age bias including either

²¹During the individual voir dire with Ms. Sanchez, the following exchange took place:

Mr. Morgan [the prosecutor]: One question. Mrs. Sanchez, you're 21?

Ms. Sanchez: Yeah.

Mr. Morgan: You think you can take a look at this case, and evidence, and put aside any feelings of sympathy you may have?

Ms. Sanchez: Yeah.

Mr. Morgan: The fact the defendant is very young, is that going to bother you?

Ms. Sanchez: No.

(Tr. 413)

Mr. Cabot Nelson, age 18 (Tr. 154) or Wendy Mayeda. The prosecutor's questioning of Ms. Sanchez on the age issue appears to be a selective attempt to illicit a response that could provide an excuse to remove her from the jury panel. Floyd, supra.

The prosector next noted that Ms. Sanchez appeared to identify with appellant. As noted by trial counsel, this reasoning goes to the heart of a Batson challenge. Absent all of the surrounding facts, this would be a legitimate reason to exclude any juror. However, identification with the defendant is a particularly suspect reason for exclusion, when the potential juror and defendant are of the same race, State v. Span, supra. This is because this perceived identification was no more than a subtle stereotypical race categorizing of the defendant and Ms. Sanchez. Floyd, supra at 361.

Finally, the prosecutor reasoned that "she had to be talked to quite a bit in comparison to the rest of the jurors, about her ability to pass on the death penalty." The record belies this contention. When questioned concerning the death penalty, Ms. Sanchez stated:

The Court: All right. Do you have any feelings about the death penalty?

Ms. Sanchez: No.

The Court: If, in this case, after the evidence were heard by the jury regarding mitigating circumstances and aggravating circumstances, and you personally don't worry about the other jurors. But you personally were convinced beyond a reasonable doubt and to your own satisfaction that the aggravating circumstances out weighed the mitigation circumstances; and secondly, that death was the only appropriate penalty; would you be able to vote for the death penalty?

Ms. Sanchez: Yes. (Tr. 409)

Other potential jurors were subjected to much more extensive questioning about the death penalty.²²

The prosecutor's use of peremptory challenges to strike Ms. Mayeda and Ms. Sanchez in a discriminatory manner meets the requirements of Cantu II. Both of those potential jurors belong to a cognizable racial group. The record indicates that there is a strong likelihood that those two jurors were challenged because of their race rather than any specific bias. The acceptance of the prosecutor's reasons for exercising the peremptory challenges as not based on race was clearly erroneous. The use of the State's peremptory challenges in this manner denied the potential jurors of their constitutional right to equal protection. As previously discussed, appellant has third party standing to challenge the denial of that right. Appellant's judgment and conviction should be reversed and a new trial ordered.

POINT III

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE TWO HOMICIDES WERE COMMITTED INCIDENT TO A SINGLE ACT, SCHEME, COURSE OF CONDUCT OR CRIMINAL EPISODE.

In reviewing the sufficiency of the evidence on appeal, the court must consider the evidence in a light most favorable to the jury's verdict. State v. Stewart, 729 P.2d 610 (Utah 1986). This court must further determine if the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have

²²Illustrative of such questioning of potential jurors expressing concern about the death penalty is that of potential juror Johnson. (Tr. 323-335)

entertained a reasonable doubt as to appellant's guilt. State v. Hamilton, 827 P.2d 232 (Utah 1992).

The appellant was convicted of the offense of Criminal Homicide, Murder in the First Degree, as described in Utah Code Ann. §76-5-202(1)(b) (1953 as amended).

That statute provides:

Criminal homicide constitutes murder in the first degree if the actor intentionally or knowingly causes the death of another under any of the following circumstances

. . .

The homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons are killed.

That statute has not previously been interpreted by the courts of this state. The questionable part as applied to this case requires that the "death was caused under circumstances where the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed." That is the element that distinguishes first degree from second degree murder. Second degree murder is established if the State proves that the defendant knowingly or intentionally caused the death of another. Utah Code Ann. §76-5-203 (1953 as amended).

The word "act" and the phrase "criminal episode" are defined in the criminal code. "Act" is defined in Utah Code Ann. §76-1-601(1) (1953 as amended). That statute provides: "'Act' means a voluntary bodily movement and includes speech."

The phrase "single criminal episode" is defined in Utah Code Ann. §76-1-401 (1953 as amended). That statute provides:

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

The cases addressing this statute generally deal with a single defendant committing a series of criminal offenses. In State v. Ireland, 570 P.2d 1206 (Utah 1977), this court held that there was not a single criminal episode where the defendant committed a robbery in one county and kidnapped hitchhikers in another county. Likewise, in State v. Cornish, 571 P.2d 577 (Utah 1977), the evidence did not establish a single criminal episode where the defendant unlawfully took a vehicle then failed to stop at the command of a police officer. In State v. Parker, 705 P.2d 1174 (Utah 1985), this court held that separate burglaries in separate buildings in an apartment complex do not constitute a single criminal episode.

"Scheme" and "course of conduct" are not defined by statute. However, there are several cases interpreting a similar provision in the Washington homicide statute. In State v. Kincaid, 103 Wash.2d 304, 692 P.2d 823 (1985), the court noted that the phrase "common scheme or plan" as used in that double homicide statute required that there be a connection or nexus between the murders and the victims. The court went on to note that a "scheme or plan" is a design, method of action or system formed to accomplish a purpose. In Kincaid the defendant entered a house and killed two

people. Earlier, in State v. Grigsby, 97 Wash.2d 493, 647 P.2d 6 (1982), that same court had held that the statute requires that there be a nexus between the killings to constitute a common scheme or plan as described in the homicide statute.

In this case appellant was acquitted of Count II for the murder of Shayne Newingham. Consequently, the two homicides were not caused by the same act. All of the other provisions of the statute require some type of agreement or plan. There was no evidence of such a scheme, plan or common objective in this case. The Newinghams were not expected at the party. The evidence supporting the conviction indicated that Don Newingham and Kenny Salas came to the door of the residence. (Tr. 920-921) When they were told to leave, Newingham objected and appellant showed a knife and requested them to leave. (Tr. 615) Salas got Newingham to the car where Gabaldon struck Newingham in the face. (Tr. 681, 927) Newingham knocked Gabaldon to the ground and appellant stabbed Newingham in the back, resulting in his death. (Tr. 682, 927)

The jury was instructed on this issue of accomplice liability. (Tr. 301).²³ and appellant was acquitted of the death of Shayne Newingham as alleged in Count II of

²³That instruction provided:

Every person acting with the mental state required for the commission of the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense is criminally liable as a party for such conduct.

(R. 301)

the Information. Consequently, the State is not entitled to the same inferences with respect to that count as it is with respect to the offense of conviction. The evidence indicated that Shayne Newingham got out of the car as the fight broke out with his father. (Tr. 884) He knocked out Manuel Martinez then hit Manuel Alvarez and Fernando Negrete. (Tr. 1031, 1054, 1092, 1124, 1234) Shayne Newingham was stabbed with a large knife and died as a result of those wounds. (Tr. 983) The entire fight lasted only a matter of minutes.

There was no evidence of any plan, scheme or criminal objective to cause the deaths of Shayne and Don Newingham. Consequently, there was insufficient evidence to establish the element that distinguished first from second degree murder. The judgment and conviction for murder in the first degree must be reversed. The case should be remanded to the district court with an order to impose judgment for the lesser offense of murder in the second degree.

POINT IV

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY TO DISREGARD AN ESSENTIAL ELEMENT OF THE OFFENSE OF FIRST DEGREE MURDER.

The trial court initially correctly instructed the jury on the elements of first degree murder as described in Count I of the Information. (R. 303) However, in response to questions from the jury raised during their deliberations, the court improperly instructed the jury to disregard an essential element of that offense. (R.

200) Questions relating to jury instructions are matters of law which this court reviews for correctness. State v. Hamilton, supra.

Paragraph 3 of the jury instruction number 11 described the element that distinguished first from second degree murder.²⁴ (R. 303) That paragraph stated,

"That Fred A. Alvarez caused said death under circumstances where the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed. (R. 303)

Defense counsel had argued during the course of the proceedings that appellant would have to be criminally liable for both murders to be convicted of first degree murder. (Tr. 1405) During their deliberations, the jurors made written requests for clarification of this paragraph of instruction number 11.

The critical question asked by the jury during their deliberations was as follows, "In Instruction no. 11 element no. 3. [sic] Do you need to satisfy all elements listed or just one?" (R. 200) The court responded, over objection of appellant (Tr. 1407), as follows: "Any single element set forth in paragraph no. 3 of Instruction no. 11 is sufficient." (R. 200) In another inquiry, the jury asked if they needed to find the defendant guilty of both murders to convict him of Murder in the First Degree? (R. 196) The trial court responded by directing the jurors to instructions 6, 11, 12, 13 and 18. (R. 196)

²⁴See: Point III, infra.

The third element described in Instruction no. 11 contains two parts. First, the death was caused under circumstances where the homicide was committed incident to one act, scheme, course of conduct or criminal episode. Second, two or more persons were killed. Utah Code Ann. §76-5-202(1)(b) (1953 as amended). By telling the jury that only one of the parts or elements of that third paragraph need be established, the trial court essentially told the jury that the State need to prove only that two or more persons were killed.²⁵ It is error for the trial court to fail to instruct the jury on an essential element of the offense. In State v. Laine, 618 P.2d 33 (Utah 1980) the court held that it is prejudicial error to instruct the jury that the offense of theft by deception requires an intent to deprive. Likewise, in State v. Harmon, 712 P.2d 291 (Utah 1986), the court found prejudicial error in failing to instruct the jury on the elements of attempt, when the defendant is charged with attempted robbery. In the instant case, it was error to instruct the jury to disregard one of the two parts of the element that distinguished first from second degree murder.

The answer to the jury's inquiry was clearly a misstatement of the law. There is a reasonable likelihood, based on this instruction and the response to the subsequent question, that the jurors believed that they need only find that two persons were killed to convict appellant of first degree murder. Furthermore, as

²⁵The appropriate response to the question would be to instruct the jury that they had to find any one of the alternatives of one act, scheme, course of conduct or criminal episode. Further, the jury would also have to find that alternative occurred when two or more persons were killed.

previously discussed,²⁶ the evidence was not sufficient to prove the first requirement of this particular element. That increases the likelihood that the jurors found only that two deaths occurred. Consequently, the error was prejudicial. The judgment and conviction must be reversed and a new trial ordered.

POINT V

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ENHANCING APPELLANT'S SENTENCE PURSUANT TO UTAH CODE ANNOTATED §76-3-203.1 (1953 AS AMENDED).

The amended information filed in this case alleged a sentencing enhancement pursuant to Utah Code Ann. §76-3-203.1 (1953 as amended).²⁷ (R. 10-11) A general objection based on constitutional grounds was made to this enhancement. (Tr. 1422) The review of the constitutionality of this provision involves a legal question and the court should apply a correction of error standard, State v. Hamilton, supra. The issue of whether the evidence was sufficient to establish the elements of the enhancement provision should be reviewed under the same standard as described in Point III, supra.²⁸

The applicable portion of that statute provides:

- (1) (a) A person who commits any offense listed in subsection (3) in concert with two or more persons is

²⁶See: Point II, supra.

²⁷Commonly referred to as the "gang enhancement".

²⁸See page 28, supra.

subject to an enhanced penalty for the offense as provided below.

(b) "In concert with two or more persons" as used in this section means the defendant and two or more other persons would be criminally liable for the offense as parties under Section 76-2-202.

The statute involves two due process violations. First, it is void for vagueness. Second, the statute allows for enhanced penalties based on uncharged or unproved conduct of unnamed persons. The third legal question relates to the right to a jury trial in the application of the enhancement. In this case, the trial court committed further error because there was insufficient evidence to apply the statute.

A.

Utah Code Annotated §76-3-203.1 (1953 as amended) is Void for Vagueness.

The due process clauses of both the federal and state constitutions prohibit the application of criminal statutes that are vague. In Grayned v. City of Rockford, 408 U.S. 104 (1972), the Court described this doctrine:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to

policemen, judges, and juries for resolution on an ad hoc and subjective bias, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," it operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [citations omitted]

408 U.S. at 108-109.

In Kolender v. Lawson, 461 U.S. 352 (1983), the Court explained that the vagueness doctrine is critical with respect to a legislative failure to define criminal standards:

Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression.

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections. [citations omitted]

461 U.S. at 357-358.

The first issue to be addressed under this test is whether Utah Code Ann. §76-3-203.1 (1953 as amended) gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, Grayned, supra. It would be unlikely that a person of ordinary intelligence could understand what it is to act in concert, or with joint intent, with two or more unidentified people. That person would be unable to conform his conduct to such a law. See Utah Code Ann. §76-3-203.1(1)(a) and (b); Utah Code Ann. §76-2-202; Utah Code Ann. §76-3-203.1 §(5)(b).

The next issue to be addressed is whether Utah Code Ann. §76-3-203.1 (1953 as amended) provides explicit standards for those who apply the statute or does it impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application, Grayned, supra. The statute covers any situation where more than two people may be charged with a crime. There are no limits on the discretion of prosecutors who may request that the statute be applied in a particular case. Likewise, there is no requirement that a prosecutor has to request the enhancement. Furthermore, the statute may be applied based on the actions of uncharged and unnamed individuals, thus denying defendants notice of the allegations against them and precluding a defendant from meeting those allegations. In State v. Roberts, 612 P.2d 360 (Utah 1980) and State v. Casarez, 656 P.2d 1005 (Utah 1982). The court found that fundamental fairness required that a criminal defendant

be allowed to inspect a presentence report. Relying on the actions of uncharged and unnamed parties is analogous to preventing a defendant from meeting the unfounded accusations in a presentence report. The final problem with respect to the lack of standards is that the statute does not provide any particular burden of proof to be applied by the judge in making his findings.²⁹ That allows the statute to be applied in an arbitrary and discriminatory manner. The trial judge in this case did not make any conclusions that any particular burden of proof was applied by him. (R. 346-7)

The last issue to be addressed under the federal standard is whether the statute infringes upon sensitive areas of basic First Amendment freedoms and might chill the exercise of those protected freedoms. Grayned, supra. This statute does potentially impinge on the right to association, freedom of speech, to peaceably assemble and receive the benefits of uniform operation of the law.

In addition to these three tests the due process clause of the Utah Constitution requires that legislation must meet its purpose in a rational manner. In State v. Copeland, 765 P.2d 1266 (Utah, 1988), this court held that Article I, Section 7 of the Utah Constitution required that portions of a statute governing the sentencing of mentally ill offenders be stricken because the statutory provisions bore no rational relationship to the purposes of the statute. The legislative history of the gang

²⁹When a death sentence is at issue the State must meet a burden or "proof beyond a reasonable doubt" State v. Wood, 648 P.2d 71 (Utah 1982). That same burden of proof ought to be applied to the enhancement statute.

enhancement statute indicates that it was intended to be used in relatively limited circumstances.³⁰

While the purpose of the statute is not clear on its face. The record of the senate and house debates indicates that the statute was intended by the legislature to be enforced in select cases involving gangs. Senator Fordham, the sponsor of the bill in the Senate, stated,

Originally, we had a bill called the "Organization Gang Bill." In an working with California, who this bill was patterned after, their bill, and after they passed their law, we had an influx of gang members coming from California and infiltrating into Utah and establishing residence here and working as ah in their organization as members of, who had broken off from the California gangs. I think we need to send a message to these organized people that there isn't a place for them in Utah.

(T. 8)

The house sponsor of the bill, Representative Rushton, described Utah Code Ann. §76-3-203.1 as necessary to combat the gang-organized crime stemming from California-based crack cocaine franchises (T. 1-3)

Both Senator Fordham and Representative Rushton explained that the model for the Utah statute was the California Street Terrorism Prevention Act.³¹ The apparent reason that the Utah statute was drafted without direct reference to its true purpose was that the California prosecutors were having difficulties enforcing the explicit

³⁰The debate on this statute in the legislature is attached in the addendum.

³¹Attached in the addendum.

California Act. That is because the California Act had a very limited purpose expressed in the body of the statute. The Utah Statewide Association of Prosecutors and other law enforcement groups hoped to avoid those difficulties by drafting Utah Code Ann. § 76-3-203.1 (1953 as amended) in a "benign" manner. (T. 8; 2-3) While the language of the statute does not expressly indicate, Utah Code Ann. §76-3-203.1 (1953 as amended) was designed to be applied in very narrow circumstances. In introducing the bill to the house, Representative Rushton explained its intended narrow applicability:

[T]he idea behind the enhanced penalties in California and the idea here was to get that center core, that's the core group of hardened criminals that supplies the money, supplies the impetus for a true criminal street gang. We've got to differentiate that between a street gang and a criminal street gang--it's a different world altogether. Ah, it gets to the hardened core, and the social workers tell us that the only thing to do with them to allow social workers to work with the remainder of the young people at risk in these gangs is to get that hardened core off the streets. The enhanced penalty is designed for that purpose.

(T. 3)

During the house floor debates, Representative Joann Millner voiced concern that the representatives should take personal responsibility to befriend and rehabilitate local street gang members. (T. 4) In response to her comments, Representative Rushton reassured,

And ah, this law is directed at the core, it's not directed, as Joann has expressed, kids that are at risk, you see them wearing the gang signs, their ball cap turned around

backwards on the West, or they sign X other with finger signs like this as they go by. Each gang has its own finger sign. Ah, these people that are at risk, and these are kids at risk. This bill is directed at that core criminal element, that three percent of those six hundred gang members that have been identified that provide the father figure in these gangs. And they provide also the connection the California gangs, the connection to the crack cocaine, the money that is fueling this explosion of gang activity in our cities and I'd like to ask you for your support for this bill . . .

(T. 7) When Representative Prante asked how the broadly worded statute could be limited in its application, as intended, Representative Rushton indicated that the proper, limited enforcement of the act was insured by judicial discretion in imposing the sentence enhancement. (T. 6-7)

This enhancement statute was not intended to be applied to a street fight during a party where more than three people are involved on any one side as was the situation in this case. The statute covers any situation where three or more people may be involved in the commission of a crime. The breadth of the statute is not logically related to the concerns and intent of the legislature in enacting the enhancement statute.

If the provisions of Utah Code Ann. §76-3-203.1 (1953 as amended) fails only one of the federal tests it is impermissibly vague and violates the due process clause of the federal constitution. The statute also fails the state constitutional test as its provisions are not rationally related to its purpose. The application of this provision

to enhance appellant's sentence violated his right to due process of law. The mandatory minimum sentence enhancement must be ordered vacated.

B.

Due Process is Violated by Allowing a Criminal Sentence to be Enhanced by Uncharged Conduct of Unnamed Parties.

Utah Code Ann. §76-3-206.1(5)(b) (1953 as amended) provides for sentencing enhancements based on uncharged, unproved conduct of others. That part of the statute provides:

It is not a bar to imposing the enhanced penalties under this section that the persons with whom the actor is alleged to have acted in concert are identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.

Ordinarily, an individual must first be "adjudged guilty of an offense" before he is sentenced. Utah Code. Ann. §76-3-101 (1953 as amended). Pursuant to subparagraph (5) (b), not only does the individual remain responsible for his own actions,³² he is also held accountable for the actions of two other persons. Utah Code Ann. §76-3-203.1(5) (b) (1953 as amended).

These "persons" need not be "identified, apprehended, charged, or convicted".

Id. Nothing contained within subparagraph (5)(b) guides or limits the discretion of the sentencing judge in his "contingent finding" that the enhancement be imposed. Utah

³²A defendant still remains accountable for the underlying crime pursuant to the general sentencing provisions. Only the term would be affected by the State's failure to prove accomplice liability.

Code Ann. §76-3-203.1(5)(c) (1953 as amended) provides "The imposition of the penalty is contingent upon a finding by the sentencing judge that this section is applicable". The accomplices could be exonerated completely. Indeed, the sentence of the targeted individual could even be enhanced without establishing any connection whatsoever between the individual and the other persons. "Gang" activity would not have to actually exist. Mere allegations or the perceived unlawfulness of "in concert" behaviors could still improperly support a mandatory minimum enhanced prison term. See Utah Code Ann. §76-302-3.1(5)(b) (1953 as amended).

In short, since the legislature intended to enhance penalties for "[o]ffenses committed by three or more persons, proof of accomplice liability must precede the enhancement. Utah Code Ann. §76-3-203.1(1). Individuals acting in concert with less than two persons are penalized elsewhere in the Code and are not necessarily subjected to enhanced sentences. Absent proof of the accomplices' convictions, or at minimum criminal liability, a defendant can be punished for the acts of another for which there is no criminal liability. This is what occurred in the instant case. No other persons were convicted of the homicide. Furthermore, the trial judge found that the penalty could be enhanced based on the actions of unnamed persons. (R. 346-7) Such a procedure is obviously fundamentally unfair and violates a criminal defendant's right to due process of law. Appellant's enhanced sentence must be ordered to be vacated.

C.

A Defendant is Entitled to a Jury Finding of Criminal Liability Under the Statute Before the Sentencing Enhancement is Appropriate.

Article I, Section 12 of the Utah Constitution guarantees a defendant the right to a jury trial. A jury, rather than the judge, should first find that the targeted individual acted "in concert with two or more persons." Utah Code Ann. §76-3-203.1(5)(c) (1953 as amended). This is because Utah Code Ann. §76-3-203.1 (1953 as amended) essentially creates a new crime.

In State v. Wedge, 652 P.2d 773 (Ore 1982), a jury convicted the defendant of first degree robbery for his involvement in the charged offense with two other accomplices. Id. at 774. The jury did not necessarily base its verdict on a finding that Wedge used a firearm, although that inference may have been raised in the evidence presented at trial. At the sentencing proceeding, the court found beyond a reasonable doubt that Wedge used or threatened to use a firearm in the commission of the offense. Wedge, supra at 733 fn. 1 (citing Or. Rev. Stat. 161.610[4]). That statute purported to give the sentencing court enhancement power in a manner similar to Utah's statute.

The court agreed with the defendant, explaining that the "use of firearm" was not contained specifically in the charged offense:

Although the challenged statute is denominated an enhanced penalty statute, in effect it creates a new crime. The jury only considered evidence offered on the question

of first degree robbery, and convicted him of that offense, but the defendant was sentenced on the basis of having been found guilty of the crime of "first degree robbery using a firearm." If the legislature had actually described the crime as "first degree robbery using a firearm" the use of a firearm would certainly be an element and there would be no doubt defendant would have a right to a jury determination of guilt. The legislature cannot eliminate constitutional protections by separating and relabeling elements of a crime.

652 P.2d at 778.

Notwithstanding the trial court's "finding beyond a reasonable doubt" that Wedge had used a firearm, the appellate court was unwilling to circumvent the defendant's right to a jury trial absent proof, to a jury's satisfaction, that Wedge had actual physical possession of a gun during the robbery. See Id. at 776, 778. The enhancement could not stem from the inference that because two of the three masked robbers were armed, Wedge was one of the men with a gun. The court specifically stated that "there is no statutory basis for enhanced penalty based on vicarious liability. . .". Id. at 776.

By analogy, the principles of Wedge apply to Utah's gang enhancement statute. Despite a disclaimer to the contrary,³³ the enhancement statute creates a new crime and punishes an individual without a jury determination on accomplice liability. Like the omitted "use of a firearm" element of the first degree robbery offense in Wedge,

³³Utah Code Ann. §76-3-203.1(5)(a) (1953 as amended) provides: "This section does not create any separate offense but provides an enhanced penalty for the primary offense."

the "primary offenses" cited by the gang enhancement statute improperly excludes proof of an element--accomplice liability. A defendant's right to a jury finding on accomplice liability cannot be eviscerated by the trial court's finding made at the time of sentencing. Since the gang enhancement statute allows the trial court to add such an element into the primary offense for purposes of punishment, the statute violates the appellant's right to a jury trial. In Wedge, the court stated, "Because the extent of punishment is to be determined according to the existence of the proscribed fact, it must be proved at trial". Likewise, in State v. Moeller, 860 P.2d 130 (Or. App. 1991), the court stated, "facts which go to the criminal acts for which a defendant is to be punished must be proved to a jury's satisfaction unless admitted or waived". 860 P.2d at 132.

Appellant was not given the opportunity for a jury trial on the issue of the sentencing enhancement. The judgment should be vacated and the case remanded to the district court for a jury determination on the issue of the sentencing enhancement.

D.

The Trial Court's Finding that Appellant Acted in Concert with Two or More People was Clearly Erroneous.

In imposing the twenty year minimum mandatory enhancement to appellant's life sentence, the trial court entered written findings. Those findings provided:

1. The defendant having been found guilty of Criminal Homicide, Murder in the First Degree has been adjudged guilty of a capital offense for which a life sentence has been imposed;

2. This offense was committed in concert with two or more persons, including but not limited to the criminal participation in the assaults causing the deaths of Donald and Shayne Newingham by Richard Gabaldon, Manuel Martinez, Manuel Alvarez, Tony DeHerrera and others unknown, each of which would be criminally liable as parties to the offense.

3. The Court finds no circumstances, in the interests of justice, or otherwise, which would justify suspension of imposition or the execution of the enhanced sentence.

Therefore, the Court finds that the enhanced penalty provided by Section 76-3-203.1, . . . applies and defendant is ordered to serve a minimum term of twenty [20] years in prison.

(R. 346-7)

In defining the phrase "in concert", Utah Code Ann. §76-3-203.1(1)(b) (1953 as amended) provides:

"In concert with two or more persons" as used in this section means the defendant and two or more other persons would be criminally liable for the offense as parties under Section 76-2-202.

The parties statute, Utah Code Ann. §76-2-202 (1953 as amended) provides:

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

The mental state required for a violation of Utah Code Ann. §76-5-202(1)(b) (1953 as amended) is that of intentionally or knowingly causing the death of another.

In its findings, the trial court named four specific individuals who acted "in concert" with the appellant. Of those individuals, Anthony DeHerrera was the only one against whom evidence was admitted indicating involvement in a homicide. (Tr. 1014, 1143, 1236) However, if the jury had believed this evidence in its entirety, appellant would not have been convicted of the homicide charge. Richard Gabaldon, admitted engaging in a fight. (Tr. 636) He admitted to kicking the victims after they were down. (Tr. 654, 656) At no time did Gabaldon admit to causing the death of anyone or intending to cause the death of another. The State's witnesses testified that Gabaldon may have started the fight, but did not have any involvement with any knifings. (Tr. 682, 880, 927) Gabaldon was convicted of the lesser included offense of aggravated assault. (Tr. 14) Clearly, his involvement did not rise to the level of criminal culpability and intent to meet the requirements of Utah Code Ann. §76-2-202 and 76-3-203.1 (1953 as amended).

Manuel Martinez and Manuel Alvarez fall into about the same level of culpability. Both admitted being outside during the fight. (Tr. 1052, 1092) The only evidence of participation in the fight was that Shayne Newingham struck Martinez then threw him into a truck rendering Martinez unconscious. (Tr. 1054) Manuel Alvarez was also beaten by Shayne Newingham and had his jacket and shirt pulled off by Newingham. (Tr. 1092) Alvarez admitted kicking Shayne Newingham after

Newingham was the ground. (Tr. 1093) These two individuals also fail to meet the statutory requirements of culpability to enhance appellant's sentence.

The trial court's finding that appellant acted in concert with two or more other persons is clearly erroneous. The evidence indicates that only one other person, DeHerrera, may have had the requisite intent and performed an act sufficient to qualify under the statute. The judgment should be ordered reversed and the minimum mandatory twenty year sentence vacated.

CONCLUSION

Appellant is requesting three alternative forms of relief. First, the judgment and conviction be reversed and a new trial ordered. The basis for that relief is the improprieties in the jury selection process and the improper instruction given to the jury on the elements of the offense of first degree murder. In the alternative, appellant requests that the judgment and conviction be reversed and the charge reduced to second degree murder. That is based on the insufficiency of the evidence to prove first degree murder. The final alternative requested by appellant is for the judgment to be reversed and the twenty-year mandatory minimum sentence vacated. That is based on the unconstitutionality of the enhancement statute and the lack of sufficient evidence to prove the elements of that statute.

DATED this ____ day of June, 1992.

G. FRED METOS
Attorney at Law

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed/hand delivered
on this ____ day of June, 1992, to:

**PAUL VAN DAM
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114**
