

1992

Joseph Mitchell Parsons v. M. Eldon Barnes : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Utah Attorney General; Janet C. Graham; Assistant Attorney General; Kris Leonard; Attorneys for Appellee.

Ronald J. Yengich; Yengich, Rich & Xaiz; Gregory J. Sanders; Kirk G. Gibbs; Kipp & Christian; Attorneys for Appellants.

Recommended Citation

Reply Brief, *Parsons v. Barnes*, No. 920126.00 (Utah Supreme Court, 1992).
https://digitalcommons.law.byu.edu/byu_sc1/4075

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

STATE SUPREME COURT
DOCUMENT
KFU
45.9
.S9
DOCKET NO. 920126

BRIEF

IN THE UTAH SUPREME COURT

JOSEPH MITCHELL PARSONS,	:	
	:	
Petitioner/Appellant	:	
	:	Case No. 920126
vs.	:	
	:	
M. ELDON BARNES,	:	
	:	
Defendant/Appellee	:	Priority 3

REPLY BRIEF OF APPELLANT

APPEAL TAKEN FROM AN ORDER DENYING A PETITION FOR HABEAS CORPUS
IN THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,
STATE OF UTAH,
THE HONORABLE DAVID S. YOUNG, PRESIDING

GREGORY J. SANDERS, ESQ.
KIRK G. GIBBS, ESQ.
KIPP & CHRISTIAN, P.C.
City Centre I, Suite 330
175 East 400 South
Salt Lake City, Utah 84111-2314

RONALD J. YENGICH, ESQ.
YENGICH, RICH & XAIZ, P.C.
175 East 400 South #400
Salt Lake City, Utah 84111
ATTORNEYS FOR PETITIONER/
APPELLANT

JAN GRAHAM, ESQ.
UTAH ATTORNEY GENERAL
KRIS C. LEONARD, ESQ.
ASSISTANT UTAH ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114
ATTORNEYS FOR DEFENDANT/APPELLEE

FILED

FEB 26 1993

CLERK SUPREME COURT,
UTAH

IN THE UTAH SUPREME COURT

JOSEPH MITCHELL PARSONS,	:	
	:	
Petitioner/Appellant	:	
	:	Case No. 920126
vs.	:	
	:	
M. ELDON BARNES,	:	
	:	
Defendant/Appellee	:	Priority 3

REPLY BRIEF OF APPELLANT

APPEAL TAKEN FROM AN ORDER DENYING A PETITION FOR HABEAS CORPUS
IN THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,
STATE OF UTAH,
THE HONORABLE DAVID S. YOUNG, PRESIDING

GREGORY J. SANDERS, ESQ.
KIRK G. GIBBS, ESQ.
KIPP & CHRISTIAN, P.C.
City Centre I, Suite 330
175 East 400 South
Salt Lake City, Utah 84111-2314

RONALD J. YENGICH, ESQ.
YENGICH, RICH & XAIZ, P.C.
175 East 400 South #400
Salt Lake City, Utah 84111
ATTORNEYS FOR PETITIONER/
APPELLANT

JAN GRAHAM, ESQ.
UTAH ATTORNEY GENERAL
KRIS C. LEONARD, ESQ.
ASSISTANT UTAH ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114
ATTORNEYS FOR DEFENDANT/APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
Cases	ii
Statutes	iii
Other Authorities	iii
DETERMINATIVE LAW	1
INTRODUCTION	1
ARGUMENT	2
A. All of Appellant's Issues Stand Procedurally Correct Before the Court for Decision	2
B. Depositions Taken Remain a Per Se Violation of Rights	5
C. The Ineffective Assistance of Counsel Claims Have Not Been Refuted	8
1. Investigation	8
2. Jury <i>Voir Dire</i>	9
3. Discovery Request	10
4. Special Verdict Form	11
D. <u>Strickland</u> Should Not Be Strictly Applied to This Case	14
E. The Legal Framework is in Place for State Provided Counsel	17
CONCLUSION	21
ADDENDUM	22
A. §68-3-12, U.C.A.	
B. §76-5-202, U.C.A.	
C. §76-8-502; U.C.A.	
D. Utah Constitution -- Article I, Section 5 and Article I, Section 12	

TABLE OF AUTHORITIES

CASES

<u>Anders v. California</u> , 386 U.S. 738 (1967)	18
<u>Gerrish v. Barnes</u> , 202 Utah Adv. Rep 7 (Utah 1992)	2, 3
<u>Hurst v. Cook</u> , 777 P.2d 1029 (Utah 1989)	20
<u>Johnson v. Department of Employment Sec.</u> , 782 P.2d 965 (Utah App. 1989)	5
<u>Murray v. Giarratano</u> , 492 U.S. 1 (1989)	19
<u>Nichols v. State</u> , 425 P.2d 247 (Alaska 1967)	21
<u>Pennsylvania v. Finley</u> , 481 U.S. 551 (1987)	18, 19
<u>People v. Adcox</u> , 763 P.2d 906 (Cal. 1988)	14
<u>Pratt v. City Council of Riverton</u> , 639 P.2d 172 (Utah 1981)	5
<u>Roberts v. State</u> , 751 P.2d 507 (Alaska App. 1988)	21
<u>Spangler v. District Court of Salt Lake County</u> , 104 Utah 584, 140 P.2d 755 (Utah 1943)	6
<u>State v. Booker</u> , 709 P.2d 342 (Utah 1985)	16
<u>State v. Johnson</u> , 635 P.2d 36 (Utah 1981)	20
<u>State v. McCumber</u> , 622 P.2d 353 (Utah 1980)	7
<u>State v. Parsons</u> , 781 P.2d 1275 (Utah 1989)	11
<u>State v. Templin</u> , 805 P.2d 182 (Utah 1990)	11, 16
<u>State v. Vigil</u> , 840 P.2d 788 (Utah App. 1992)	10, 11
<u>State, ex rel. Stephen v. Smith</u> , 747 P.2d 816 (Kan. 1987)	21
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	14-17

STATUTES

Utah Code Annotated:

§68-3-12	6
§76-5-202	12
§76-8-502	6

OTHER AUTHORITIES

Utah Constitution:

Article I, Section 5	20
Article I, Section 12	20

DETERMINATIVE LAW

Those provisions of the Utah Constitution and Utah statutes cited herein are reproduced in the Addendum.

INTRODUCTION

It is not the intent of this Reply Brief to rebut point by point the arguments made by the state. Appellant stands on the argument of the principal brief as being sufficient to show that his sentence should be vacated.

This Reply Brief is intended to respond in general themes to assist the court in remaining focused on the issues presented. For example, it is shown herein that the various procedural objections of the state to the presentation of the issues are misplaced and that this court may fully consider the substantive points raised.

This Reply Brief shows that the substantive questions of ineffective assistance of counsel have not been effectively rebutted by the state. When one adds up the numerous omissions of the original counsel, it is seen, taken as a total picture, that Mr. Parsons did not receive effective assistance of counsel at a level required by the federal and Utah Constitutions.

The legal framework is in place for this court to hold that representation in a habeas corpus proceeding arising from a capital offense should be provided by the state for an indigent petitioner. With the framework in place, all that is needed is for this court to make a fundamental public policy decision and

thereby breathe life into the applicable constitutional provisions protecting accused persons.

ARGUMENT

A. ALL OF APPELLANT'S ISSUES STAND PROCEDURALLY CORRECT BEFORE THE COURT FOR DECISION

The state weaves through its brief several claims that certain issues of the appellant are not appropriately before this court because of procedural defects. A close examination of the record shows that Parsons has all of his issues properly before this court for decision.

The state argues first at page 7 of its brief that the issue of whether the two depositions taken by the state were taken in violation of fundamental rights is not properly before the court. The state correctly points out that an accused is required to raise all appropriate issues in the original direct appeal absent unusual circumstances justifying the failure to raise the issue. The state further correctly points out that the unusual circumstances exception is raised when claims of ineffective assistance of counsel are made and the same counsel represented the accused at trial and on appeal. Gerrish v. Barnes, 202 Utah Adv. Rep. 7 (Utah 1992).

The record shows that in the Amended Complaint for Extraordinary Writ -- Habeas Corpus, Parsons alleged that depositions were taken in violation of the Utah Rules of Criminal Procedure and constitute a denial of the defendant's right to due process, denial of the right to confront witnesses, and denial of right to

effective assistance of counsel at all critical stages of the criminal proceeding. Third Dist. R., p. 17. A reading of this Amended Complaint shows that this issue was raised in the context of ineffective assistance of counsel and, admittedly, interwoven with the direct claim of violation of constitutional rights.

Parsons later filed a Statement of Claims with the Third District Court which further explained, at page 4, that claims were made of constitutional violations in the taking of these depositions. Third Dist. R., p. 113. The issues were raised again in the Trial Brief in the Third District Court and were considered over the objection of the state at that time. Third Dist. R., p. 188.

Summarizing the record, Parsons raised in the Third District Court the taking of key depositions as a direct violation of certain constitutional rights and as evidence of ineffective assistance of counsel for the failure to object to the taking of the depositions. The unusual circumstances required by Gerrish are raised by this proceeding. First, if the court agrees that the taking of sworn depositions of witnesses after charging constitutes a violation of constitutional rights, an obvious injustice or substantial denial of a constitutional right occurred in the original trial court. Second, where the same counsel represented Mr. Parsons at trial and at appeal, failure to make a timely objection to the taking of these depositions is evidence of ineffective assistance of counsel which may be considered in a habeas corpus proceeding.

The second major procedural objection the state makes at page 44 of its brief is that Parsons abandoned his federal arguments in the trial court concerning whether he is entitled to representation at the expense of the government. The state supports its objection by referring to a Memorandum in Opposition to a Motion for Partial Summary Judgment filed by Parsons in which he focuses his argument on Utah constitutional principles. Third Dist. R., p. 92. An examination of the record shows that Parsons always claimed that he had a right to costs, expenses, and fees for counsel and investigators under the United States Constitution. His Amended Complaint, at page 5, so stated initially. Third Dist. R., p. 21. The Memorandum was a response to a Motion for Partial Summary Judgment on the question of payment of attorney's fees. Third Dist. R., p. 46. The next consideration of the point is the final ruling of the trial court which does not state whether the court considered federal constitutional issues. Third Dist. R., p. 280.

In summary, Parsons raised the federal constitution in claiming he was entitled to have counsel provided in a habeas corpus proceeding, the state attacked the issue by summary judgment to which response was made primarily in light of the state constitution, and the motion was denied. The federal questions pled in the Amended Complaint were still before the court and denied without mentioning either the federal or state constitutions. There is no real evidence of an abandonment of reliance upon the federal constitution.

While the trial court did not make clear to what extent it considered the federal constitution on this point, it is apparent that the issue is properly before the court now. This court has long held that an exception to the general rule that issues not raised at trial cannot be raised later is when constitutional issues are raised when a person's liberty is at stake. Pratt v. City Council of Riverton, 639 P.2d 172 (Utah 1981). The Utah Court of Appeals has more recently affirmed that rule by stating constitutional issues may be raised for the first time on appeal where liberty is at stake. Johnson v. Department of Employment Sec., 782 P.2d 965 (Utah App. 1989).

The objection of the state to the raising of federal constitutional issues at this point is not well taken because such issues could have been raised even if Parsons had not pled them at the trial court level.

B. DEPOSITIONS TAKEN REMAIN A PER SE VIOLATION OF RIGHTS

Parsons raises on appeal issues addressing two depositions taken by the prosecutor after Parsons was charged and without the presence of Parsons or his counsel. The arguments made in the principal brief are not repeated here.

A reading of the state's brief shows that its response does not meet squarely the constitutional arguments but, instead, is merely a relabeling of the depositions as mere sworn statements given to the prosecutor. The effect of this is to reduce the proceeding from one of formality to nothing more than a casual recorded interview with prosecutors and police officers.

Parsons does not claim that a prosecutor or police officer may not interview a key witness prior to trial. A fundamental error occurs here because of the taking of an oath. The taking of an oath constitutes a legal turning point at which penalties under the law attach for willful misstatements. Spangler v. District Court of Salt Lake County, 104 Utah 584, 140 P.2d 755 (Utah 1943).

The Utah Code is particularly instructive where it provides in §68-3-12(2)(k) that in construing statutes, courts are to consider that every oral statement under oath is embraced in the term "testify". Put another way, the Utah Code is defining testify as statements made under oath. These depositions are, then, "testimony".

The penalty which attaches is found in §76-8-502 which provides for punishment of a second degree felony for false material statements under oath.

One searches the law in vain for penalties attaching to misstatements made to a prosecutor in an informal interview. One also searches the law in vain to find authority for a prosecutor to take a "sworn statement" outside of the rules of criminal procedure.

In light of the significance of the giving of an oath, the original argument made by Parsons remains unrefuted. Depositions in this case were taken at a critical stage of the proceeding because charging had occurred. Witness testimony was taken under circumstances in which their stories were locked in without

benefit of cross-examination. The chilling effect on a witness later at trial to alter their statement in any way is obvious.

The claim by the state that the defense counsel used the statements in his cross-examination is without legal significance. The fact that the defense counsel later used them at trial for questioning purposes does not mean that witnesses were effectively confronted and cross-examined when their testimony was originally taken. The argument is a red herring that fails to focus on the principal issue that the constitutional damage had already been done when the depositions were taken after charging, under oath, and without notice to and attendance of the defense counsel.

Finally, the state's argument that Parsons be required to show that the witnesses were somehow tainted is again misplaced. The analogous situation of tainted line-ups carries no such requirement. Line-ups are to either be done constitutionally correct or the identification is suppressed. There is no subjective questioning of the witness if there is an objective showing that the actual procedures used were inappropriate. See, State v. McCumber, 622 P.2d 353 (Utah 1980). The same constitutional defect is present here. The taking of a deposition without confrontation through cross-examination similarly can be presumed to taint the proceeding because of the potential second degree felony chargeable to the witness that changes testimony later.

The failure to object at trial to this procedure was ineffective assistance of counsel and, standing alone, justifies the vacating of the sentence of death.

**C. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
HAVE NOT BEEN REFUTED**

Parsons has adequately stated his claims concerning the ineffective assistance of counsel and a point by point response to the state is unnecessary. Some general responses are offered, however, where considered helpful to the court.

1. Investigation

The state argues that defense counsel made a sufficient pretrial investigation contrary to the claim of Parsons. There is considerable irony in the state's reliance for this argument on page 24 of its brief on statements addressing the issue of whether the victim had homosexual tendencies taken from the depositions which Parsons claims were constitutionally deficient. The fact remains that the record shows that defense counsel did minimal effort to make inquiry into this key area of defense and Parsons does not know what an adequate investigation would have revealed. The state's response is merely to argue the evidence presented shows the victim did not have homosexual orientation and begs the substantive issue of whether a thorough investigation should have been made.

Mr. Parsons is being sent to his death not knowing what information was available because defense counsel did not thor-

oughly investigate the fundamental facts of his basic mitigating defense. This inadequate representation should not be condoned.

2. Jury Voir Dire

The state makes an overstatement of considerable importance on page 37 of its brief. The state argues that a sufficient questioning of the potential jurors was made and goes on to state that each juror was asked what information had been received about the case. In fact, none of the jurors was asked what they had heard about the case. That is the very purpose that Parsons lists the transcript pages of the *voir dire* of each juror on page 35 of his principal brief.

This failure to ask the jurors what they heard is at the heart of the claim of ineffective assistance of counsel. A reading of the *voir dire* of each of those jurors shows that nobody asked them what information they had received. They made only general statements that they had read about the case in the newspaper or heard about it in other local media but never explained exactly what they had heard.

What a particular juror had heard is far more important to know than the mere fact that they had heard something. Absent that specific inquiry there can be no determination of whether opinions were formed and conclusions drawn on information outside of the evidence. This oversight of basic inquiry is additional evidence of ineffective assistance of counsel.

3. Discovery Request

The state argues at page 31 of its brief that the failure of a defense counsel to make a formal request for discovery does not constitute ineffective assistance of counsel. This court has not directly addressed the question but the state cites the recent case of State v. Vigil, 840 P.2d 788 (Utah App. 1992), for the proposition that failure to file a discovery request is not per se ineffective assistance of counsel.

Vigil involved the claim on direct appeal of ineffective assistance of counsel for failure of the defense counsel to file a discovery request with the prosecutor. The Court of Appeals refused to find ineffective assistance of counsel where the record was clear that the defense counsel conducted an adequate and thorough investigation.

Vigil does not apply to Parsons for two reasons. The first, discussed in considerable detail in the principal brief, is that his defense counsel did not conduct an adequate investigation. As explained in the principal brief, Iron County made available an investigator at the expense of the county which was never used. No legal obligation except the general obligation to disclose exculpatory evidence was imposed on the prosecutor to produce evidence. Vigil is distinguishable because of this lack of investigation.

The second reason Vigil does not apply is that it appears to have been decided wrongly by the Court of Appeals. Again, as explained in the original brief, Utah has no Supreme Court case

on point. The closest one can come is State v. Templin, 805 P.2d 182 (Utah 1990), which stands for the proposition that failure to conduct an investigation is not a tactical decision and constitutes per se ineffective assistance of counsel. While acknowledging Templin, Vigil really does not follow its holding by finding that a motion for discovery does not constitute per se ineffective assistance of counsel. It is hard to harmonize the Templin requirement that counsel actively pursue investigation with the Vigil holding that the sending of a short request for discovery to the prosecutor may be excused. Without repeating the arguments made in the principal brief, this court should hold that failure to conduct the simple act of formal discovery, especially in a capital homicide case, is per se ineffective assistance of counsel.

4. Special Verdict Form

The state responds to the Parsons claim that the Special Verdict Form was constitutionally defective by several responses. The first response is that this court approved the Special Verdict Form in the original appeal.

While the original appeal did consider some issues concerning jury instructions, an examination of the case shows that the issue presented here was not raised. See, State v. Parsons, 781 P.2d 1275 (Utah 1989). The thrust of the argument made here is that the original defense counsel missed certain key issues which, if properly presented to this court, would have shown that there were serious defects in the Special Verdict Form and the

way it interacted with the jury instructions. Put simply, this court has not ruled on the issues presented in this proceeding.

The state next argues that the jury is free to consider generally aggravating circumstances when making a determination of penalty and that the inclusion of the aggravating circumstance of acting for pecuniary gain was not prejudicial.

In a pure and abstract sense, the state's argument is correct. That is, a jury is free to consider a number of aggravating circumstances, including those not contained in the statute defining murder in the first degree, for purposes of assessing the penalty. The argument breaks down here because of the actual structure of the verdict form and the jury instructions.

At the risk of repeating the argument in the principal brief, the court is again invited to read jury instructions 14, 15, 15A, 18, and 27 with the Special Verdict Form. Fifth Dist. R., pp. 267 - 270, 273 - 274, 283 - 284, 297 - 299. The court will see that the instructions generally tell the jury that if they find any of the aggravating circumstances listed on the Special Verdict Form that the penalty of death is justified. The problem is, of course, that the pecuniary gain aggravating circumstance is actually a duplication of the robbery aggravating circumstance. Additionally, the aggravating circumstance that Mr. Parsons was a person on parole in possession of a firearm is not a justification, standing alone, for the imposition of capital punishment stated by §76-5-202.

The practical effect of listing aggravating circumstances on a special verdict form is to enhance the likelihood of finding for the death penalty for a juror that has not studied the Utah Code. If one adopts the state's argument, the trial court just as easily could have put on the Special Verdict Form that the jury could consider that the defendant stole a motorcycle once, violated the law of hitchhiking, etc. While other wrongful acts may bear on the question of the character and history of the accused in weighing aggravating and mitigating circumstances, placing them on a special verdict form clearly elevates their importance in the total mix of the decision. The implication of the Special Verdict Form is that the jury, in theory, could find that Parsons did not do the killing in the course of an aggravated robbery nor for pecuniary gain but could still impose the death penalty for being a person on parole in possession of a firearm when a killing occurred even though the firearm was not the instrument of death in the homicide.

The state further tries to avoid the problem of the duplication of aggravating circumstances when robbery and homicide for pecuniary gain are considered by arguing factually that Parsons committed the offense for pecuniary gain. In fact, an examination of the state's argument, at page 40, shows no citation to the record that there was any evidence that the offense was committed for pecuniary gain other than Parsons had the victim's wallet, car, and personal effects after the offense. As pointed out in the principal brief, robbery for the purpose of obtaining

money or property is not pecuniary gain within the meaning of the statute at issue. See People v. Adcox, 763 P.2d 906 (Cal. 1988).

The fact remains that the blending together of aggravating circumstances in the instructions with circumstances justifying alone imposing the death penalty was misleading and clearly had the potential of construing deliberation toward imposition of the death penalty. Failure to identify and object to these issues was a substantial error on the part of the defense counsel which merits reversal of the sentence.

**D. STRICKLAND SHOULD NOT BE
STRICTLY APPLIED TO THIS CASE**

One of the major themes of the state in responding to all of the issues concerning ineffective assistance of counsel is to seek safe harbor in the requirements of Strickland v. Washington, 466 U.S. 668 (1984). Strickland applies a two prong test for ineffective assistance of counsel. The first prong requires the defendant to show that there was some error in the defense with the second prong requiring the defendant to show that prejudice affecting the outcome occurred.

Parsons admits in his principal brief that Strickland could be barrier to his claims made here and confronts the issue head-on by asking this court to not apply Strickland in the circumstances presented. Not unexpectedly, the state argues that Strickland should control because Parsons fails to make a clear showing that the outcome would have been different with respect to certain issues.

Strickland is conceptually quite appealing on its face. It makes for easy memorized rules that resolve a number of cases in hornbook fashion. The problem is that Strickland breaks down in the reality of the situation in which Mr. Parsons finds himself. The record clearly shows that Mr. Parsons is an indigent person incarcerated on Utah's death row, dependent upon *pro bono* appointed counsel, who is a civil litigator advised by one of the state's busiest criminal defense attorneys. The imposition of the second prong of Strickland under these circumstances is unconscionable and does not measure up to fundamental notions of fair play and justice. The following matrix is offered to show the impact of Strickland in a practical sense on Parsons:

<u>ISSUE</u>	<u>STRICKLAND REQUIRES</u>	<u>PARSONS PRACTICAL POSITION</u>
1. Taking of depositions.	Counsel would have impeached statements at time of deposition.	Counsel was not present, never objected, additional interviews are needed in southern Utah and California, in prison, indigent.
2. No investigation was made.	The investigation would have turned up exculpatory information.	No real investigation was done, in prison, no money, trail grows cold.
3. Advice to plead guilty inappropriate.	Defendant would not have pled guilty.	<u>Strickland</u> requirement met -- Parsons own testimony and supporting testimony of expert at trial.
4. Juror/witness contact.	Juror was influenced by contact with witness.	Counsel did not explore at trial fully, interviews needed, in prison, indigent.

- | | | |
|-------------------------------------|---|---|
| 5. No discovery requests were made. | Discovery requests would have produced material evidence. | No motion having been made, right to find out anything has been forever waived under <u>State v. Booker</u> , 709 P.2d 342 (Utah 1985), no resources for investigation. |
| 6. Preliminary hearing waiver | Would not have pled guilty. | <u>Strickland</u> met -- Parsons own testimony, evidence of duress, and statements of expert at Third District trial. |
| 7. Counsel unprepared | Outcome would have been different. | Can only be shown through adequate investigation, in prison, indigent. |
| 8. Venue -- jury voir dire | Jury was biased by pretrial information. | Counsel did not ask what they heard after admitted hearing something, opportunity to question forever lost. |
| 9. Special Verdict Form | Deliberations wrongfully construed toward death. | Counsel did not object, but <u>Strickland</u> met -- instructions and verdict form are patently defective. |

Put at it most basic, Strickland just does not work in all cases. There are, no doubt, a number of issues in which a defendant might reasonably be expected to show that the act or failure to act of his defense counsel would have changed the outcome. State v. Templin, 805 P.2d 182 (Utah 1990), which incorporates Strickland into Utah jurisprudence, is an example of where the standard could be met because of the complete failure to investigate. The issues faced by Parsons as an indigent person, with *pro bono* counsel in prison without resources are not subject to a showing of a different outcome absent the investment

of resources. Practical problems, such as having forever missed the opportunity to conduct a proper jury *voir dire* cannot be addressed in a reasonable manner because the jurors have been dismissed. Only an objective review of the process gives a fair test of the issue.

This court is asked to make a reasonable application of the Strickland second prong by modifying it to consider the nature of the issue raised and the relative practical ability of an accused to address the issue.

**E. THE LEGAL FRAMEWORK IS IN PLACE
FOR STATE PROVIDED COUNSEL**

Page 45 of the state's brief, which accuses Parsons of providing "no legal analysis" and engaging in a "ploy" in the presentation of the argument made cries for a response.

An examination of Parsons' principal brief at pages 42 - 45 shows that he identifies those federal cases which were invoked in the lower court by the state as support for the proposition that there is no right in a habeas corpus proceeding for counsel provided by the state. Contrary to the statement that there is no legal analysis of these cases, a review of those pages shows that there is specific recognition of the holding of the cases and they are distinguished. The author of the brief then leaves it to the state to make its own argument after distinguishing the cases. Rather than being a ploy, an ethical obligation was met to identify seemingly relevant contrary authority.

In Pennsylvania v. Finley, 481 U.S. 551 (1987), an indigent prisoner petitioned for post-trial relief raising identical issues that were raised in the direct appeal. Interestingly, the Pennsylvania Supreme Court held that she was entitled under state law to appointed counsel in her post-conviction proceedings. That counsel withdrew finding that the issues raised by his client were frivolous and another appointed counsel successfully argued to the Pennsylvania Supreme Court that the first counsel improperly withdrew under the standards of Anders v. California, 386 U.S. 738 (1967).

The Supreme Court rejected the application of Anders to the claims made because Anders assumed an underlying right to appointed counsel. The Supreme Court stated that it had never held that prisoners mounting collateral attacks upon their convictions were entitled under the Constitution to a right to appointed counsel.

A reading of the Supreme Court's analysis shows that they place heavy emphasis in their decision on the fact that the underlying action was a "discretionary appeal".

The case is distinguishable because the state actually provided appointed counsel. There is, admittedly, dicta suggesting that there is no federal obligation to provide counsel for a so-called discretionary appeal. This dicta loses force because of the presence of appointed counsel and because the issue considered was whether the earlier counsel had wrongfully withdrawn. The case does not involve the direct request by an

accused person for appointed counsel in a state granted habeas corpus proceeding where access to habeas corpus relief exists as a matter of right under the state constitution.

Murray v. Giartratano, 492 U.S. 1 (1989), appears on its face supportive of the state's position here. There, an inmate under a sentence of death brought a federal civil rights action against the state of Virginia claiming that his rights had been violated for the failure of the state to provide him counsel for state post-conviction relief. The court refers to Finley and states that neither the due process clause of the Fourteenth Amendment nor the Equal Protection Clause requires a state to appoint counsel for indigent prisoners seeking state post-conviction relief.

Murray v. Giartratano is essentially a five/four decision but has four opinions issued. The question of a federal requirement of appointed attorney for post-trial relief is obviously an uncertain one. The case does not discuss the impact of habeas corpus relief being available as a matter of right in the state constitution as contained in the Utah Constitution. The majority opinion clearly talks in terms of discretionary appeals in the state's system as being relatively insignificant for constitutional considerations.

Parsons suggests to this court that the door is left open for the court to analogize to those federal cases which hold that where a first appeal of right is given, states are obligated under the federal constitution to appoint counsel to allow

meaningful access to the system. Granting of a right to habeas corpus in Article I, Section 5, of the Utah Constitution takes the proceeding in this state out of the realm of an act of grace by the state into a right of substance.

As Justice Stewart explained in Hurst v. Cook, 777 P.2d 1029 (Utah 1989), habeas corpus relief in Utah holds a special role in Utah jurisprudence. Habeas corpus is as important in the context of a proceeding claiming ineffective assistance of counsel when the original defense counsel was the same counsel for direct appeal as a direct appeal. A defendant convicted contrary to constitutional principles has no meaningful relief in these circumstances other than the right to habeas corpus relief.

As pointed out in the principal brief, the state constitution also provides framework for requiring the state to provide counsel in habeas corpus matters. The right to habeas corpus in Article I, Section 5 of the Utah Constitution is contained in the same article as the right to direct appeal in Section 12 of Article I. From a convicted person's point of view, relief obtained from direct appeal or from attack through the right of habeas corpus is indistinguishable. Both routes take one to the same courts to consider fundamental constitutional issues. It defies logic to find a fundamental right under Section 12 of Article I which requires the appointment of counsel while not applying the same right for a substantially similar right found in Section 5. See, State v. Johnson, 635 P.2d 36 (Utah 1981).

Other states have found that their constitution guarantees equal access for post-trial relief through appointed counsel. In Nichols v. State, 425 P.2d 247 (Alaska 1967), the state constitution was held to require appointed counsel. See also, Roberts v. State, 751 P.2d 507 (Alaska App. 1988). Kansas also so held under both the federal and state constitutions in State, ex rel. Stephen v. Smith, 747 P.2d 816 (Kan. 1987).

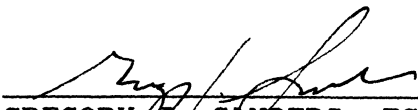
This court is respectfully requested to hold that which is fundamentally fair. This court is asked to find that where there is a state granted right of habeas corpus relief that stands on an equal footing under the state constitution with the first direct appeal that the federal Constitution requires equal access to the system. The court is further respectfully requested to find that the state constitution requires the appointment of counsel for the first exercise of the right of habeas corpus in a capital homicide case.

CONCLUSION

This court is respectfully requested to vacate the sentence of death of Mr. Parsons.

DATED this 26th day of February, 1993.

KIPP & CHRISTIAN, P.C.



GREGORY J. SANDERS, ESQ.
KIRK G. GIBBS, ESQ.

RONALD J. YENGICH, ESQ.
YENGICH, RICH & XAIZ
Attorneys for Plaintiff/Appellant

A D D E N D U M

A

§68-3-12, U.C.A.

68-3-12. General rules.

In the construction of these statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the statute:

- (1) "Month" means a calendar month, unless otherwise expressed, and the word "year," or the abbreviation "A.D." is equivalent to the expression "year of our Lord."
- (2) "Oath" includes "affirmation," and the word "swear" includes "affirm." Every oral statement under oath or affirmation is embraced in the term "testify," and every written one, in the term "depose."
- (3) "Signature" includes any name, mark, or sign written with the intent to authenticate any instrument or writing.
- (4) "Writing" includes printing, handwriting, and typewriting.
- (5) "Person" includes individuals, bodies politic and corporate, partnerships, associations, and companies.
- (6) The singular number includes the plural, and the plural the singular.
- (7) Words used in one gender comprehend the other.
- (8) Words used in the present tense include the future.
- (9) "Property" includes both real and personal property.
- (10) "Land," "real estate," and "real property" include land, tenements, hereditaments, water rights, possessory rights, and claims.
- (11) "Personal property" includes every description of money, goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, right or title to property is created, acknowledged, transferred, increased, defeated, discharged, or diminished, and every right or interest therein.

B

§76-5-202, U.C.A.

(1) 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:

(a) The homicide was committed by a person who is confined in a jail or other correctional institution.

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

(c) The actor knowingly created a great risk of death to a person other than the victim and the actor.

(d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, sexual abuse of a child, child abuse of a child under the age of 14 years, as otherwise defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnaping, kidnaping, or child kidnaping.

(e) The homicide was committed for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant's or another's escape from lawful custody.

(f) The homicide was committed for pecuniary or other personal gain.

(g) The defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide.

(h) The actor was previously convicted of first or second degree murder or of a felony involving the use or threat of violence to a person. For the purpose of this paragraph an offense committed in another jurisdiction, which if committed in Utah would be punishable as first or second degree murder, is deemed first or second degree murder.

(i) The homicide was committed for the purpose of: (i) preventing a witness from testifying; (ii) preventing a person from providing evidence or participating in any legal proceedings or official investigation; (iii) retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation; or (iv) disrupting or hindering any lawful governmental function or enforcement of laws.

(j) The victim is or has been a local, state, or federal public official, or a candidate for public office, and the homicide is based on, is caused by, or is related to that official position, act, capacity, or candidacy.

(k) The victim is or has been a peace officer, law enforcement officer, executive officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew or reasonably should have known that the victim holds or has held that official position.

(l) The homicide was committed by means of a destructive device, bomb, explosive, infernal machine, or similar device which the actor planted, hid, or concealed in any place, area, dwelling, building, or structure, or mailed or delivered, or caused to be planted, hidden, concealed, mailed, or delivered and the actor knew or reasonably should have known that his act or acts would create a great risk of death to human life.

(m) The homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance.

(n) The homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity.

(o) The victim was a person held or otherwise detained as a shield, hostage, or for ransom.

(p) The actor was under a sentence of life imprisonment or a sentence of death at the time of the commission of the homicide.

(q) The homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily in-

C

§76-8-502, U.C.A.

76-8-502. False or inconsistent material statements.

A person is guilty of a felony of the second degree if in any official proceeding:

(1) He makes a false material statement under oath or affirmation or swears or affirms the truth of a material statement previously made and he does not believe the statement to be true; or

(2) He makes inconsistent material statements under oath or affirmation, both within the period of limitations, one of which is false and not believed by him to be true. In a prosecution under this section, it need not be alleged or proved which of the statements is false but only that one or the other was false and not believed by the defendant to be true.

D

**Utah Constitution
Article I, Section 5 and
Article I, Section 12**

ARTICLE I
DECLARATION OF
RIGHTS

Sec. 5. [Habeas corpus.]

The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it

Sec. 12. [Rights of accused persons.]

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 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.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 2nd day of February,
1993, two true and correct copies of the foregoing REPLY BRIEF OF
APPELLANT was mailed, postage prepaid, to the following:

Jan Graham, Esq.
UTAH ATTORNEY GENERAL
Kris C. Leonard, Esq.
ASSISTANT ATTORNEY GENERAL
Attorneys for Respondent/Appellee
236 State Capitol
Salt Lake City, Utah 84114


A handwritten signature in cursive script, appearing to read "Kris C. Leonard", is written over a horizontal line.