

1992

# Joseph Mitchell Parsons v. M. Eldon Barnes : Brief of Appellant

Utah Supreme Court

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Utah Attorney General; R. Paul Van Dam; Assistant Attorney General; Charlene Barlow; Attorneys for Appellee.

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

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UTAH  
DOCKET NO. 920126

2001

IN THE UTAH SUPREME COURT

JOSEPH MITCHELL PARSONS,  
Petitioner/Appellant

VS.

M. ELDON BARNES,  
Defendant/Appellee

Case No. 9201

Priority 3

ADDENDUM TO 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 84111-231

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

R. PAUL VAN DAM, ESQ.  
UTAH ATTORNEY GENERAL  
CHARLENE BARLOW, ESQ.  
ASSISTANT UTAH ATTORNEY GENERAL  
236 State Capitol Building  
Salt Lake City, Utah 84114  
ATTORNEYS FOR DEFENDANT/APPELLEE

P 17 1992

IN THE UTAH SUPREME COURT

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

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ADDENDUM TO BRIEF OF APPELLANT

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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

R. PAUL VAN DAM, ESQ.  
UTAH ATTORNEY GENERAL  
CHARLENE BARLOW, ESQ.  
ASSISTANT UTAH ATTORNEY GENERAL  
236 State Capitol Building  
Salt Lake City, Utah 84114  
ATTORNEYS FOR DEFENDANT/APPELLEE

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### INTRODUCTION


Included in this Addendum are the fundamental documents reflecting the decision of the Third District Court. Also included are reproductions of the relevant Jury Instructions, Special Verdict Form, and statutes, rules, and constitutional provisions. All references to statutes are to Utah Code Ann., 1953, as amended.

All of the statutes reproduced are the versions in effect during the time period of August, 1987 through January, 1988. Some portions of the relevant statutes and constitutional provisions have been omitted for the convenience of the court as irrelevant to the issues presented.

All of the printed material included in this Addendum has been reproduced from the Utah Code Ann. published by the Michie Company.

DATED this 17<sup>th</sup> day of September, 1992.

KIPP & CHRISTIAN, P.C.

  
\_\_\_\_\_  
GREGORY J. SANDERS, ESQ.

KIRK G. GIBBS, ESQ.

RONALD J. YENGICH, ESQ.

YENGICH, RICH & XAIZ

Attorneys for Plaintiff/Appellant

***ADDENDUM "A"***

**Memorandum Decision of Third District Court**

**FILED DISTRICT COURT**  
**Third Judicial District**

**DEC 09 1991**

SALT LAKE COUNTY  
By *[Signature]*  
Deputy Clerk

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

-----

JOSEPH MITCHELL PARSONS,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 900901405
vs.	:	
N. ELDON BARNES,	:	
Defendant.	:	

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The above-entitled matter came on for trial on the 24th of May, 1991. At the conclusion of the evidence and at the request of counsel, the matter was set for final closing argument August 13, 1991.

At trial, the plaintiff/petitioner was present and represented by his attorneys Gregory J. Sanders, and Ronald J. Yengich, Director of the Rocky Mountain Defense Fund as associated counsel. The State was represented by its counsel, Ms. Charlene Barlow and Kirk M. Torgensen. The parties having submitted their respective pleadings and the Court now being fully advised, makes this its:

00249

## MEMORANDUM DECISION

STATEMENT OF PROCEDURAL FACTS

1. On March 8, 1990, the plaintiff, pro se, filed a Complaint for habeas corpus relief.

2. The Court set a pre-hearing conference for March 16, 1990, on which day the State filed its Answer.

3. The Court then discussed with the petitioner, appearing pro se the appointment of counsel and the future scheduling of proceedings, and stayed the execution date then set for April 30, 1990.

4. The Court appointed Messrs. Sanders and Yengich on May 2, 1990, and requested that they review the case and consider filing an Amended Petition. An Amended Petition was filed on the 22nd of October, 1990. (NOTE: The Court wishes to note here an expression of appreciation to each counsel for the petitioner, whose appearance and participation was pro bono. This effort by counsel represents the finest evidence of charitable legal work well beyond that which might be expected.)

5. This case was reviewed by the Utah State Supreme Court on direct appeal in the case of State v. Joseph Mitchell

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Parsons, 781 P.2d 1275, decided October 13, 1989. Thereafter a rehearing was denied on January 22, 1990. Before the Supreme Court in the appeal, the petitioner was represented by his defense attorney who assisted him in the trial and appeal of the original case.

Petitioner has exhausted his appellate remedies and now seeks relief through this Petition for Habeas Corpus.

STATEMENT OF FACTS RELATED TO THE OFFENSE

6. Upon a plea of guilty, the defendant was convicted of Murder in the First Degree, a Capital Offense, in violation of Section 76-5-202 (1978, Supp. 1989). The Court thereafter conducted a sentencing proceeding in harmony with Section 76-3-207 (1978, Supp. 1989), and the jury unanimously concluded the death penalty was appropriate and such was ordered by the trial judge.

7. The criminal offense occurred in late afternoon on August 30, 1987. The defendant had been hitchhiking on Interstate 15 near Barstow, California. The victim, Richard L. Ernest, offered a ride to Mr. Parsons. Mr. Ernest agreed to take the petitioner to Denver, Colorado.

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8. At approximately 3:00 a.m. on August 31, 1987, the petitioner and Mr. Ernest drove into the Lunt Park rest area on Interstate 15 near Cedar City. Mr. Ernest stated he was too tired to continue driving, and stopped for some sleep. The petitioner claims that Mr. Ernest made a homosexual advance, to which the petitioner responded, "That's not my style," and requested to be left alone. Again, according to the petitioner, when Mr. Ernest made a second advance, the petitioner pulled from his sock a five inch double-edged knife and stabbed Mr. Ernest in the chest, rendering multiple blows which were fatal.

9. The petitioner then drove Mr. Ernest's vehicle away from the rest stop, pulled over on the shoulder of the highway, and pushed Mr. Ernest's body out of the car covering it with a sleeping bag.

10. The petitioner then drove to Beaver, Utah, where he changed his clothes, washed the victim's blood from himself and from the inside of the vehicle, and emptied personal belongings and carpentry tools of the victim into a dumpster. He thereafter assumed the victim's identity, purchasing food, gas, etc. with Mr. Ernest's credit cards.

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11. Law enforcement officers, thereafter, having been alerted to the credit card transactions and the unusual activities at the service station in Beaver, and later having found the victim's body, were able at approximately 4:15 p.m. on August 31, to apprehend the petitioner at a rest area on Interstate 70.

12. Thereafter, as stated earlier, the defendant pled guilty to Capital Homicide. The penalty portion of the proceedings ensued wherein the death penalty was ordered. The conviction and sentence were appealed and affirmed.

13. This post-conviction petition was filed, raising the following issues:

ISSUES HEREIN CONSIDERED

14. The petitioner alleges that his sentence is unconstitutional and in violation of the due process clause of the Fifth Amendment to the United States Constitution, and Articles I and VII of the Utah Constitution. He specifically claims that the assistance of his trial and appellate counsel was ineffective, justifying relief for the following alleged deficiencies:

00253

A. There was insufficient investigation of the offense and particularly the penalty evidence to mitigate the petitioner's conduct.

B. Counsel erred in allowing his client to plead guilty to Capital Homicide rather than directly trying the case.

C. Counsel erred in failing to prepare expert psychological witnesses for the defense in sentencing.

D. Counsel erred in failing to exclude a juror who communicated with a witness in the courthouse during a recess of the proceedings.

E. Counsel erred in failing to request of the court to determine if certain jurors had an improper predisposition or bias in regard to the death penalty.

F. Prosecution erred in obtaining significant sworn statements or "depositions" of witnesses without notice to opposing counsel and in violation of the Utah Rules of Criminal Procedure.

G. Counsel erred in failing to file adequate discovery motions.

H. Counsel erred in failing to advise the petitioner regarding his rights at preliminary hearing.

00254

I. Counsel erred in failing to meet with the petitioner for a sufficient length of time to adequately prepare.

J. Counsel erred in failing to adequately investigate or request the Court inquire of the venire's awareness of media reporting of the incidents.

K. Counsel erred in failing to submit an appropriate special verdict form.

L. Counsel erred in failing to challenge the prosecutor for failure to have filed an appropriate bond as required by law.

M. Prosecution erred in failing to provide petitioner with compensated counsel in pursuing his rights to post-conviction relief.

15. Based upon the foregoing claims, the State filed a Motion for Partial Summary Judgment and claimed in its Memoranda, among other things, that the issues for post-conviction relief as stated above could not be considered because they could or should have been raised on appeal consistent with Utah case law.

The Court will now address each of the respective claims.

00255

PETITIONER'S CLAIMS COULD OR SHOULD HAVE BEEN  
RAISED ON APPEAL

16. The Utah Supreme Court in Hurst v. Cook, 777 P.2d 1029 (Utah 1989), stated that post-conviction relief should be sought only in "unusual circumstances" and the majority of issues that could or should have been raised on appeal should not be re-examined in post-conviction hearings. See also, Brown v. Turner, 21 Utah 2d 96, 44 P.2d 968 (1968).

17. While it would be easy to review the above-stated issues as to whether they were available for consideration by the Court at the time of appeal and then reject them in that they could or should have been raised at that time; unfortunately, when the focus of the petitioner's claim is stated herein, is on the effectiveness of counsel, and since that same counsel handled both the trial and appeal, it seems appropriate and equitable that this Court consider those arguments on their merits. Therefore, this Court rejects the claim that the issues could or should have been raised on appeal, and reviews the issues, as follows:

00256

**A. SUFFICIENCY OF THE INVESTIGATION PRIOR TO TRIAL**

18. The petitioner claims that his attorney failed to adequately investigate the underlying offense through the use of an authorized investigator and/or to seek adequate evidence of mitigation for the penalty phase.

19. Counsel for the defendant testified that he spent several hundred hours working on the case. After a review of the file and listening to the testimony of the witnesses, the Court cannot find any basis upon which the Court could conclude that a further investigation would have yielded other information that would have affected the result.

20. The petitioner has further failed to proffer any information, including information regarding the alleged homosexual encounter or invitation which could cause the Court to conclude that the result would be affected in the least.

21. The Court will not and cannot conclude that further investigation would have provided something now not even proffered or alleged. To so conclude would cause courts to set minimum time allocations for cases to be investigated. That would not be an acceptable standard.


00257

B. COUNSEL ERRED IN ALLOWING HIS CLIENT TO PLEAD  
GUILTY TO CAPITAL HOMICIDE

22. The petitioner has continually admitted that he was responsible for killing the victim in this case. The petitioner himself became frustrated during the course of the preliminary hearing. He apparently didn't want to hear the evidence, and he requested strongly of his counsel that the preliminary hearing terminate. Petitioner was advised that that could not occur without the consent of the prosecution, and that the prosecution would not consent without a clear, unequivocal plea to Capital Homicide. The petitioner considered fully that decision, and determined to enter the plea.

23. Not only does an accused individual have the right to plead "not guilty," they also have the right to plead "guilty." That was done in this case. As a part of the legitimate trial strategy, the petitioner determined that it would not be to his advantage to have the same jury consider both the evidence related to guilt or innocence, and deliberate thereon, and thereafter consider the evidence related to punishment with a view then toward aggravating and mitigating circumstances and deliberate thereon. That strategy is a very

00258





legitimate strategy which the petitioner elected to make knowingly. This Court finds no flaw therein.

**C. COUNSEL ERRED IN FAILURE TO PREPARE PSYCHOLOGICAL WITNESSES FOR THE DEFENSE**

24. No testimony was proffered as to the benefits of such psychological witnesses, and this Court cannot speculate on the result of that failure. This is particularly so when the standard required in Strickland is that there must be a probability that the result would be in doubt if the error had not occurred. I cannot find any basis to so conclude or speculate and decline to do so.

**D. COUNSEL ERRED IN FAILURE TO EXCLUDE A JUROR WHO COMMUNICATED WITH A WITNESS DURING A RECESS**

25. The Court finds that the conversation between the juror and the witness, while unfortunate, was casual and the parties were specifically asked whether they continued to raise their objection or challenge to that juror. The petitioner and his counsel declined to do so. The State in what was described as "an abundance of caution" asked that the juror be replaced with an alternate, which then the defendant refused. The State certainly could not be held to having a defect in its

conviction and sentence based upon such acquiescence by the defendant.

E. CLAIMED JUROR RELIGIOUS PREDISPOSITION IN  
FAVOR OF THE DEATH PENALTY

26. This claim was abandoned by the petitioner and counsel, and need not be further considered.

F. THE "DEPOSITIONS" TAKEN WITHOUT NOTICE TO  
OPPOSING COUNSEL

27. On September 2, the day the Information was filed, and only two days after the arrest of the petitioner, a sworn statement was taken of the victim's wife, Ms. Beverly Ernest. The statement was taken without notice to opposing counsel and likely at a time when no counsel had, in fact, been named. Later, on September 4, further sworn statements were taken of prisoners in the Iron County Jail who had been cellmates with the petitioner.

28. While the statements were called "depositions" when they were taken, the prosecutor Mr. Scott Burns testified that he did not consider the statements to be formal "depositions" and that he had no intention of using the statements in trial. This Court finds that these "depositions" were nothing more than investigative sworn statements, and in fact worked to the

benefit of the petitioner during the course of the penalty phase of the trial. It was only the petitioner's counsel who used the sworn statements in examining witnesses.

29. The statements were from the beginning readily available to defense counsel, and were only generated in order to preserve investigative information.

30. This Court can find no evidence that the taking of the sworn statements in any way affected the testimony of the witnesses. There is no evidence that I can see from a review of the record that examination as to the victim's alleged ownership of the gun, his general relationship with his wife, and his having left California with cash failed to create in my mind any issues that could have been preserved, enhanced or utilized to benefit the petitioner or the State in any other way than came forth at trial. Had the witness been more closely cross-examined by vigorous defense counsel there would have been no change. Thus, I cannot find any factual basis to conclude that there was any prejudice as a result of the taking of the statement without notice to opposing counsel and the petitioner. I find that the statements were not "depositions", but were rather "sworn statements" generated by a careful and thoughtful investigative prosecutor.



**G. COUNSEL FAILED TO FILE ADEQUATE DISCOVERY MOTIONS**

31. The Court finds this issue to be without merit, there is no reason to file a discovery motion, other than out of an abundance of caution when the motion would, as in this case, yield nothing. The prosecutor had a continual open file policy and would often present the defense attorney with information simultaneous to receipt of the same by the prosecutor. On many occasions each would review new information at the same time. No information has been presented by the petitioner to show that the discovery motions would have yielded anything. To find merit in the claim of ineffective assistance of counsel on that basis would cause the Court to speculate well beyond appropriate circumstances.

**H. COUNSEL FAILED TO ADVISE THE PETITIONER  
REGARDING HIS RIGHTS FOR WAIVER OF PRELIMINARY HEARING**

32. The record reveals that the petitioner was adequately advised of the consequences of waiving the preliminary hearing. It was at the petitioner's insistence that the hearing be discontinued and that he be allowed to plead guilty to the killing. The petitioner in this court made a full

00262

admission to the killing, and has apparently never denied it. The waiver of the preliminary hearing on that basis cannot be found deficient. The only issues at a preliminary hearing are whether (1) there is probable cause to believe an offense has been committed, and whether (2) there is probable cause to believe the individual accused committed the offense. Both of those issues were openly, willingly, and knowingly admitted throughout the proceedings.

**I. COUNSEL FAILED TO MEET WITH THE PETITIONER FOR A  
SUFFICIENT LENGTH OF TIME TO ADEQUATELY PREPARE**

33. Without a predicate showing that further meetings would have yielded information that could cause the Court to doubt the quality of the representation and/or the conviction, courts should not engage in speculation as to the amount of time necessary for counsel and their clients to meet. This would require speculation beyond the purview of this Court, and beyond that which is appropriate in this case.

**J. COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE  
VENIRE'S AWARENESS OF THE MEDIA REPORTING OF THE INCIDENT**

34. This offense happened in a relatively unpopulated part of Utah, where it is natural to expect that many people would

00263

have heard of the events. There is, however, no evidence to show that further inquiry into the media reporting of the events and the venire's knowledge of the same would affect the result, thus this issue fails for want of sufficient evidence in support.

**K. THE FAILURE TO COUNSEL TO SUBMIT AN APPROPRIATE  
SPECIAL VERDICT FORM**

35. The Special Verdict form utilized by the court has been reviewed on appeal by the State Supreme Court and the argument has been rejected. I find no basis upon which to infer that counsel was ineffective through allowing without further objection the same.

**L. COUNSEL FAILED TO CHALLENGE THE PROSECUTOR  
FOR FAILURE TO HAVING FILED THE REQUIRED BOND**

36. There is no basis upon which the Court should grant relief for this issue. The bonding of a county prosecutor is principally to provide indemnity of the prosecutor to the public in the event of some type of malfeasance or inappropriate performance in office. Since there is no right to relief in this case on that basis, the Court finds the petitioner fails for lack of standing to raise the issue.

**M. THE PETITIONER HAS BEEN PREJUDICED IN PURSUING  
HIS POST-CONVICTION RELIEF DUE TO THE FAILURE TO  
PROVIDE COSTS AND FEES**

37. Unfortunately, this issue remains a legislative determination. The petitioner's representation herein was superb. This Court has grave concerns that petitioners in prison seeking post-conviction relief may not have adequate access to counsel to raise issues that appropriately should be carefully reviewed by a court. Unfortunately, that assistance is not provided at taxpayer's expense, and thus lawyers are often constrained to accept the request of a judge to perform pro bono services as was done here in significant post-conviction cases. This is an unfortunate present circumstance, but not a matter for judicial resolution.

Based upon the foregoing review and analysis of the issues submitted by the petitioner in his Petition seeking a Writ of Habeas Corpus, the Court finds that the same is and should be denied.

Ms. Barlow and Mr. Torgensen are requested to prepare Findings of Fact, Conclusions of Law, and an Order consistent

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herewith. The Court further orders that in the event this matter is not appealed within 30 days as allowed by law, that the matter may be certified to the District Court for setting of the execution date.

Dated this 9<sup>th</sup> day of December, 1991.



DAVID S. YOUNG  
DISTRICT COURT JUDGE

00266



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 9 day of December, 1991:

Gregory J. Sanders  
Ronald J. Yengich  
Attorneys for Petitioner  
175 East 400 South, Suite 400  
Salt Lake City, Utah 84111

Charlene Barlow  
Kirk Torgensen  
Assistant Attorneys General  
Attorneys for Defendant  
236 State Capitol  
Salt Lake City, Utah 84114

C. Porter

00267

***ADDENDUM "B"***

**Findings of Fact and Conclusions of Law  
of Third District Court**

FILED DISTRICT COURT  
Third Judicial District

Jan 28 1992

SALT LAKE COUNTY

By CP Deputy Clerk

R. PAUL VAN DAM (3312)  
Attorney General  
CHARLENE BARLOW (0212)  
Assistant Attorney General  
Attorneys for Respondent  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1021

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH

---

JOSEPH MITCHELL PARSONS,	:	
Petitioner,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
v.	:	
N. ELDON BARNES,	:	CASE NO. 900901405
Respondent.	:	Judge David S. Young

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The above-entitled matter came on regularly for hearing on May 24, 1991, and August 13, 1991, before the Honorable David S. Young. Petitioner, Joseph Mitchell Parsons, was present and represented by Gregory J. Sanders and Ronald J. Yengich. Respondent was represented by Charlene Barlow and Kirk Torgensen, Assistant Attorneys General. The Court being fully advised in the premises hereby enters its Findings of Fact and Conclusions of Law as follows:

00268

### FINDINGS OF FACT

1. That petitioner was hitchhiking on August 30, 1987, on Interstate 15 near Barstow, California, when the victim, Richard L. Ernest, offered him a ride to Denver, Colorado.

2. That at approximately 3:00 a.m. on August 31, 1987, Mr. Ernest stated that he was too tired to continue driving and pulled into the Lunt Park rest area on Interstate 15 near Cedar City, Utah. Petitioner claims that Mr. Ernest made a homosexual advance, to which the petitioner responded, "That's not my style," and requested to be left alone. According to petitioner, Mr. Ernest made another sexual advance. In response, petitioner pulled a five-inch, double-edged knife from his sock and stabbed Mr. Ernest in the chest, administering multiple stab wounds which were fatal.

3. That petitioner drove Mr. Ernest's car away from the rest stop, pulled over on the shoulder of the highway, pushed Mr. Ernest's body out of the car, and covered it with a sleeping bag.

4. That petitioner drove to Beaver, Utah, where he changed his clothes, washed the victim's blood from himself and from the inside of the vehicle, and emptied Mr. Ernest's personal belongings and carpentry tools into a dumpster. Petitioner then

00269

assumed the victim's identity, purchasing food, lodging, gas, etc., with Mr. Ernest's credit cards.

5. That law enforcement officers became alerted to petitioner's activities at the service station in Beaver and to the credit card transactions. They found Mr. Ernest's body, then arrested petitioner at approximately 4:15 p.m. on August 31, 1987, at a rest area on Interstate 70.

6. That petitioner was convicted of murder in the first degree, a capital offense, upon a plea of guilty.

7. That after a sentencing hearing, a jury unanimously concluded that the death penalty was appropriate and such was ordered by the trial judge.

8. That petitioner's case was reviewed by the Utah Supreme Court on direct appeal and was affirmed in State v. Parsons, 781 P.2d 1275 (Utah 1989); a petition for rehearing was denied on January 22, 1990.

9. That on direct appeal, petitioner was represented by his original trial counsel.

10. That petitioner is currently incarcerated in the Utah State Prison.

11. That petitioner filed a pro se petition for postconviction relief on March 8, 1990.

00270

12. That the court appointed counsel for petitioner on May 2, 1990.

13. That counsel filed an amended petition on October 22, 1990.

14. That in that petition, petitioner alleges that his sentence is unconstitutional and violative of the due process clause of the fifth amendment of the United States Constitution and articles I and VII of the Utah Constitution.

15. That petitioner specifically claims that the assistance of his trial and appellate counsel was ineffective, based on the following alleged deficiencies:

A. There was insufficient investigation of the offense and particularly the penalty evidence to mitigate petitioner's conduct.

B. Counsel erred in allowing his client to plead guilty to capital homicide rather than taking the case to trial.

C. Counsel erred in failing to prepare expert psychological witnesses for defense in sentencing.

D. Counsel erred in failing to exclude a juror who communicated with a witness in the courthouse during a recess of the proceedings.

00271

E. Counsel erred in failing to request of the court to determine if certain jurors had an improper predisposition or bias with regard to the death penalty.

F. Prosecution erred in obtaining significant sworn statements or "depositions" of witnesses without notice to opposing counsel and in violation of the Utah Rules of Criminal Procedure.

G. Counsel erred in failing to file adequate discovery motions.

H. Counsel erred in failing to advise the petitioner regarding his rights at preliminary hearing.

I. Counsel erred in failing to meet with the petitioner for a sufficient length of time to adequately prepare.

J. Counsel erred in failing to adequately investigate or request the Court to inquire of the venire's awareness of media reporting of the incident.

K. Counsel erred in failing to submit an appropriate special verdict form.

L. Counsel erred in failing to challenge the prosecutor for failing to file an bond as required by law.

M. Prosecution erred in failing to provide petitioner with compensated counsel in pursuing his rights to postconviction relief.

00272

E. Counsel erred in failing to request of the court to determine if certain jurors had an improper predisposition or bias with regard to the death penalty.

F. Prosecution erred in obtaining significant sworn statements or "depositions" of witnesses without notice to opposing counsel and in violation of the Utah Rules of Criminal Procedure.

G. Counsel erred in failing to file adequate discovery motions.

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K. Counsel erred in failing to submit an appropriate special verdict form.

L. Counsel erred in failing to challenge the prosecutor for failing to file an bond as required by law.

M. Prosecution erred in failing to provide petitioner with compensated counsel in pursuing his rights to postconviction relief.



16. That in response to these claims, respondent filed a motion for partial summary judgment and claimed, inter alia, that the issues for postconviction relief as stated above could not be considered because they could or should have been raised on appeal consistent with Utah case law.

17. That the fact that petitioner has focused upon effectiveness of counsel and that the same counsel served petitioner for both trial and appeal provides the "unusual circumstance" to allow petitioner to raise these issues in a postconviction proceeding. Hurst v. Cook, 777 P.2d 1029 (Utah 1989).

Taking petitioner's claims in order, the Court finds:

A. Sufficiency of the investigation prior to trial.

18. Trial counsel testified that he spent several hundred hours working on the case.

19. After reviewing the file and the testimony, the Court cannot find any basis upon which to conclude that a further investigation would have yielded other information which would have affected the result of petitioner's case.

20. Petitioner has failed to proffer any information, including information regarding the alleged homosexual advance or invitation which could cause the Court to conclude that the result of this case would have been affected by further investigation.

**B. Counsel erred in allowing petitioner to plead guilty to capital homicide.**

21. Petitioner has continually admitted that he was responsible for killing the victim.

22. Petitioner became frustrated during the course of the preliminary hearing because he did not want to hear the evidence against him.

23. Petitioner strongly requested of his counsel that the preliminary hearing terminate; he was advised that that could not occur without the consent of the prosecution and that the prosecution would not consent without a clear, unequivocal plea to capital homicide.

24. Petitioner fully considered the options and determined to enter the guilty plea.

25. It was legitimate trial strategy to decide that it was not to petitioner's advantage to have the same jury consider both the evidence related to guilt or innocence, and deliberate thereon, and then consider the evidence related to punishment and deliberate thereon.

26. Petitioner knowingly chose to plead guilty and avoid having the jury consider the evidence to determine guilt or innocence.

00275

C. Counsel erred in failing to prepare psychological witnesses for the defense.

27. No testimony was proffered as to the benefits of such psychological witnesses.

D. Counsel erred in failing to exclude a juror who communicated with a witness during a recess.

28. The conversation between the juror and the witness, while unfortunate, was casual.

29. The parties were specifically asked by the court whether they continued to raise objection to or challenge that juror; petitioner, as well as his counsel, declined to do so.

30. The State, in an abundance of caution, asked that the juror be replaced with an alternate; however, defendant rejected that request.

E. Claimed juror religious predisposition in favor of the death penalty.

31. This claim was abandoned by petitioner and his counsel at the evidentiary hearing.

F. The "depositions" taken without notice to defense counsel.

32. On September 2, the day the information was filed, and only two days after the arrest of petitioner, a sworn statement was taken of the victim's wife, Ms. Beverly Ernest.

00276

33. The statement was taken without notice to opposing counsel and, in all likelihood, at a time when no counsel had been appointed.

34. On September 4, other sworn statements were taken.

35. While the statements were called "depositions" when they were taken, the prosecutor, Scott Burns, testified that he did not consider the statements to be formal "depositions" and that he had no intention of using the statements at trial.

36. These "depositions" were nothing more than investigative sworn statements, which, in fact, worked to petitioner's benefit when petitioner used them during the course of the penalty phase of the proceeding. The statements were only used by petitioner's counsel, not by the prosecution.

37. The statements were available to defense counsel from the beginning, and were generated only to preserve investigative information.

38. There is no evidence that the taking of the sworn statements in any way affected the testimony of the witnesses.

39. There is no evidence that examination as to the victim's alleged ownership of a gun, his general relationship with his wife, and his having left California with cash could have preserved, enhanced, or utilized any issue which did not already come forth in the proceedings.

40. Had the witnesses been closely cross-examined by vigorous defense counsel during the taking of the statements there would have been no different result.

41. There was no prejudice to petitioner as a result of the taking of the statements without notice to petitioner and defense counsel.

G. Counsel failed to file adequate discovery motions.

42. There is no reason to file a discovery motion, other than out of an abundance of caution, when the motion would, as in this case, yield nothing new.

43. The prosecutor had a continual open file policy and would often present defense counsel with information simultaneous to receipt of the same by the prosecutor. On many occasions both counsel would review new information at the same time.

44. Petitioner has presented no evidence to show that formal discovery motions would have yielded anything more than the open file policy yielded.

H. Counsel failed to advise petitioner regarding his rights for waiver of preliminary hearing.

45. The record demonstrates that petitioner was adequately advised of the consequences of waiving the preliminary hearing.

00278

46. It was at petitioner's insistence that the hearing be discontinued and that he be allowed to plead guilty to the homicide.

47. At the evidentiary hearing in this matter, petitioner again admitted to killing the victim.

48. The only issues to be resolved at a preliminary hearing are whether (1) there is probable cause to believe an offense has been committed, and (2) there is probable cause to believe the individual accused committed the offense; both of these issues were openly, willingly, and knowingly admitted by petitioner throughout the proceedings.

I. Counsel failed to meet with the petitioner for a sufficient length of time to adequately prepare.

49. Petitioner has not shown that additional meetings between petitioner and his trial counsel would have yielded additional information; consequently, petitioner has failed to raise doubts about the quality of the representation and/or the conviction based on the time spent with trial counsel.

J. Counsel failed to adequately investigate the venire's awareness of the media reporting of the incident.

50. This offense occurred in a relatively unpopulated part of Utah; consequently, it may be expected that many people would have heard of the events.

00279

51. Petitioner has presented no evidence to show that further inquiry into the media reporting of the events and the venire's knowledge of the same would have affected the result of this case.

K. The failure of counsel to submit an appropriate special verdict form.

52. The special verdict form used by the court in this matter was reviewed on appeal by the Utah Supreme Court and petitioner's argument was rejected; consequently, failure to object to the verdict form did not make counsel ineffective.

L. Counsel failed to challenge the prosecutor for failing to have filed a bond require by law.

53. The law requiring bonding of a county prosecutor has been formulated principally to provide indemnity to the public in the event of some type of malfeasance or inappropriate performance in office by the prosecutor.

54. Petitioner has no standing to raise this issue.

M. Petitioner has been prejudiced in pursuing his postconviction relief due to the failure to provide costs and fees.

55. This issue is a legislative decision, not one for judicial resolution.

56. Petitioner's representation herein was superb.

57. This Court has grave concerns that petitioners seeking postconviction relief may not have adequate access to

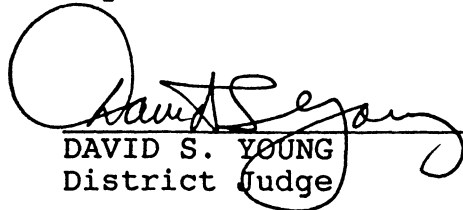
counsel to raise issues that appropriately should be carefully reviewed by a court because counsel in postconviction proceedings is not provided at taxpayers' expense. The fact that lawyers are often constrained to accept the request of a judge to perform pro bono services in significant postconviction cases, as was done here, is an unfortunate present circumstance; however, it is not a matter for judicial resolution.

CONCLUSIONS OF LAW

1. That, based upon the findings of fact, petitioner did not have ineffective assistance of counsel at trial and on appeal.

2. That this petition should be and is denied.

DATED this 28<sup>th</sup> day of January, 1992.

  
\_\_\_\_\_  
DAVID S. YOUNG  
District Judge

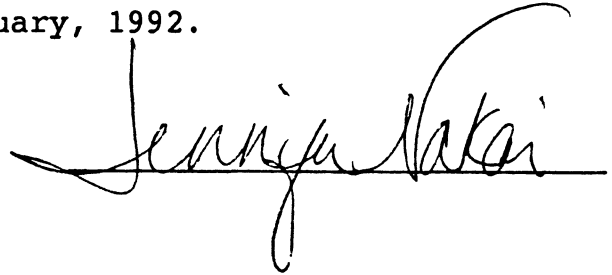
APPROVED AS TO FORM:

\_\_\_\_\_  
Gregory J. Sanders



CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Findings of Fact and Conclusions of Law was mailed, postage prepaid, to Gregory J. Sanders, 175 East 400 South, Suite 330, Salt Lake City, Utah 84111, and Ronald J. Yengich, 175 East 400 South, Suite 400, Salt Lake City, Utah 84111, Attorneys for petitioner, this 19th day of January, 1992.

A handwritten signature in cursive script, reading "Jennifer Nakai", written over a horizontal line.



***ADDENDUM "C"***

**Order Denying Post-Conviction Relief**

FILED DISTRICT COURT  
Third Judicial District

Jan 28 1992

SALT LAKE COUNTY

By \_\_\_\_\_ Deputy Clerk

R. PAUL VAN DAM (3312)  
Attorney General  
CHARLENE BARLOW (0212)  
Assistant Attorney General  
Attorneys for Respondent  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1021

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH

---

JOSEPH MITCHELL PARSONS,	:	
Petitioner,	:	ORDER
v.	:	
N. ELDON BARNES,	:	CASE NO. 900901405
Respondent.	:	Judge David S. Young

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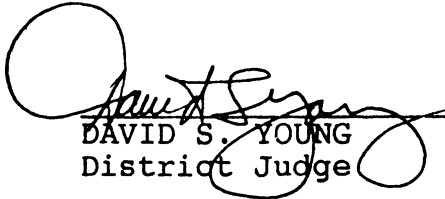
The above-entitled matter came on regularly for hearing on May 24, 1991, and August 13, 1991, before the Honorable David S. Young. Petitioner, Joseph Mitchell Parsons, was present and represented by Gregory J. Sanders and Ronald J. Yengich. Respondent was represented by Charlene Barlow and Kirk Torgensen, Assistant Attorneys General. The Court having entered its Findings of Fact and Conclusions of Law, and good cause appearing therefore, it is hereby:

00283

ORDERED, ADJUDGED AND DECREED as follows:

1. That the petition for postconviction relief is denied.

DATED this 28<sup>th</sup> day of January, 1992.

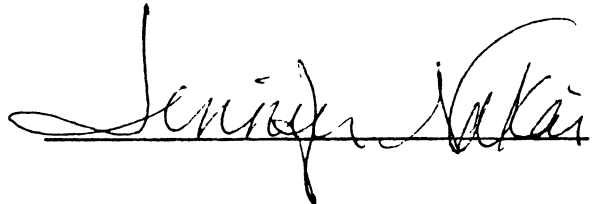
  
DAVID S. YOUNG  
District Judge

APPROVED AS TO FORM:

\_\_\_\_\_  
Gregory J. Sanders

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Order was mailed, postage prepaid, to Gregory J. Sanders, 175 East 400 South, Suite 330, Salt Lake City, Utah 84111, and Ronald J. Yengich, 175 East 400 South, Suite 400, Salt Lake City, Utah 84111, Attorneys for petitioner, this 6<sup>th</sup> day of January, 1992.

  
\_\_\_\_\_  
Jennifer Nakai

00284

***ADDENDUM "D"***

**Special Verdict Questions and Form**

FIFTH JUDICIAL DIST. COURT  
IRON COUNTY  
**FILED**  
JAN 29 1988  
*David D. Bradley* CLERK  
*Cecilia A. Johnson* DEPUTY

SPECIAL VERDICT QUESTIONS

Prior to entering your verdict on one of the following verdict forms, you are instructed to answer each and all of the following Special Verdict Questions:

After duly considering the evidence and applying the law as instructed, do you find beyond a reasonable doubt that the defendant, Joseph Mitchell Parsons, intentionally or knowingly caused the death of Richard L. Ernest while the said Joseph Mitchell Parsons was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit Aggravated Robbery.

✓ YES, we so find unanimously.

           NO, we are unable to so find unanimously.

After duly considering the evidence and applying the law as instructed, do you find beyond a reasonable doubt that the defendant, Joseph Mitchell Parsons, intentionally or knowingly caused the death of Richard L. Ernest for pecuniary gain.

✓ YES, we so find unanimously.

           NO, we are unable to so find unanimously.

After duly considering the evidence and applying the law as instructed, do you find beyond a reasonable doubt that the defendant, Joseph Mitchell Parsons, being a person on parole, knowingly possessed or had in his custody or under his control a firearm.

✓ YES, we so find unanimously.

           NO, we are unable to so find unanimously.

DATED this 29 day of January, 1988.

Clement L. B. Adams  
Jury Foreperson

IRON COUNTY  
**FILED**  
JAN 29 1988  
*David G. Yordley* CLERK  
*William A. Johnson* DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY

STATE OF UTAH

---

STATE OF UTAH,	)	VERDICT FORM NO. 1
Plaintiff,	)	
vs.	)	
JOSEPH MITCHELL PARSONS,	)	Criminal No. 1153
Defendant.	)	

---

We the jury impaneled in the above case, unanimously  
render a verdict imposing the sentence of death.

DATED this 29 day of January, 1988, at Parowan,  
Iron County, Utah.

*Clifford B. Adams*  
JURY FOREPERSON



***ADDENDUM "E"***

**Jury Instruction 14**

INSTRUCTION NO. 14

With respect to aggravating and mitigating circumstances, the law of the State of Utah provides:

AGGRAVATING CIRCUMSTANCES

The defendant intentionally or knowingly caused the death of Richard L. Ernest under any of the following circumstances:

1. While the said Joseph Mitchell Parsons was engaged in the commission of or an attempt to commit, or flight after committing or attempting to commit aggravated robbery and/or
2. For pecuniary gain and/or
3. The said Joseph Mitchell Parsons had previously been convicted of a felony involving the use or threat of violence to a person.

You may consider as aggravating circumstances those circumstances listed above.

MITIGATING CIRCUMSTANCES

1. "The defendant has no significant history of prior criminal activity."
2. "The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance."
3. "The defendant acted under extreme duress or under the substantial domination of another person."
4. "At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of the law

was substantially impaired as a result of mental disease, intoxication or influence of drugs."

5. "The youth of the defendant at the time of the crime."

6. "Whether the defendant was an accomplice in the murder committed by another person and his participation was relatively minor."

7. "Any other fact in mitigation of the penalty."

The foregoing are direct quotations from the law. In stating them to you the Court does not intend to imply that any of them are applicable to this case. Whether or not they are applicable is for you to determine from all the evidence.

***ADDENDUM "F"***

**Jury Instructions 15 and 15A**

INSTRUCTION NO. 15

You are instructed that Aggravated Robbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear, and in the course of committing the robbery a person uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife, or a deadly weapon.

You are instructed that "deadly weapon" means anything that in the manner of its use or intended use is likely to cause death or serious bodily injury.

You are instructed that "pecuniary gain" is defined as a monetary benefit or financial benefit.

You are instructed that a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense. For purposes of this definition, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

You are further instructed that no defense to the offense of attempt shall arise because the offense attempted was actually committed, or due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

You are instructed that "flight" is defined as a fleeing.

INSTRUCTION NO. 15 A

You may also consider as aggravating circumstances or mitigating circumstances any other evidence admitted at the penalty phase of this trial relating to the nature and circumstances of the crime, the defendant's character, background, mental or physical condition, and any other facts in aggravation<sup>or mitigation</sup>, provided they relate to the nature and circumstances of the crime or the individual characteristics of the defendant.

***ADDENDUM "G"***

**Jury Instruction 18**

INSTRUCTION NO. 18

I have previously instructed you that the State has the burden of proving beyond a reasonable doubt that the totality of the aggravating circumstances outweighs the totality of the mitigating circumstances in this case and that, beyond a reasonable doubt, the imposition of the death penalty is justified and appropriate in the circumstances of this case. You must find that the State has met its burden before you may impose the death penalty in this case.

As an aggravating circumstance in addition to those upon which I have previously instructed you, the State has produced evidence that the defendant, Joseph Mitchell Parsons, committed the crime of being a person on parole in possession of a firearm in violation of the law of this State. Before you may consider evidence that the defendant possessed a firearm before, during or after he admittedly caused the death of Richard L. Ernest, you must find beyond a reasonable doubt, that each and every one of the following elements has been proven by the evidence:

1. That the offense, if any, occurred in the State of Utah,
2. That the offense, if any, occurred on or about August 31, 1987, although the exact date is immaterial,
3. That the defendant, Joseph Mitchell Parsons, was on parole for a felony,



4. That the defendant, knowingly had in his possession or under his custody or control,

5. A firearm.

You are instructed that the .38 caliber pistol located in the glove compartment of the 1986 Dodge Omni is in fact a firearm.

If you find that each and every element stated has been proven by the evidence and beyond a reasonable doubt, then you may consider the possession of the firearm by the defendant as an aggravating circumstance.

If you find that one or more of these elements has not been proven beyond a reasonable doubt, then you may not consider the presence of the firearm in the vehicle for any purpose and you are hereby instructed, in that case, to ignore and disregard the evidence presented regarding the firearm.

A special verdict question will be given so you can state your findings on this question.

***ADDENDUM "H"***

**Jury Instruction 27**

INSTRUCTION NO. 27

When you retire to deliberate, you should appoint one of your fellow jurors to act as foreperson, who will preside over your deliberations and who will sign the verdict to which you agree. In this proceeding a unanimous concurrence of all jurors is required before a verdict can be reached. Your verdict must be in writing and, when found by you, must be returned into court. Two verdict forms have been prepared for your consideration ✓ together with three Special Verdict Questions, which will aid in your deliberations, and which must be answered by unanimous finding during your deliberations. If the final vote of the jury members is "No" or less than a unanimous "Yes" as to any Special Verdict Question, then you may not consider the elements of that individual question as aggravating circumstances. Your foreperson will sign the Special Verdict Questions and the verdict which correctly reflects the result of your deliberations.

The following are the Special Verdict Questions which have been prepared for you:

After duly considering the evidence and applying the law as instructed, do you find beyond a reasonable doubt that the defendant, Joseph Mitchell Parsons, intentionally or knowingly caused the death of Richard L. Ernest while the said Joseph Mitchell Parsons was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit Aggravated Robbery.

After duly considering the evidence and applying the law

as instructed, do you find beyond a reasonable doubt that the defendant, Joseph Mitchell Parsons, intentionally or knowingly caused the death of Richard L. Ernest for pecuniary gain.

After duly considering the evidence and applying the law as instructed, do you find beyond a reasonable doubt that the defendant, Joseph Mitchell Parsons, being a person on parole, knowingly possessed or had in his custody or under his control a firearm.

The Verdict forms which will be furnished to you are as follows:


We the jury, duly-empaneled in the above-entitled case, unanimously render a verdict imposing the sentence of death.

OR

We the jury, duly-empaneled in the above-entitled case, unanimously render a verdict imposing the sentence of life imprisonment.

Your foreperson will sign the appropriate Verdict form and return both forms to the Court.

DATED this 29<sup>th</sup> day of January, 1988.

  
J. PHILIP EVES, DISTRICT JUDGE

***ADDENDUM "I"***

**United States Constitution  
Amendments VI, and XIV**

## **AMENDMENT VI**

### **[Rights of accused.]**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

## **AMENDMENT XIV**

### **Section 1. [Citizenship — Due process of law — Equal protection.]**

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; nor 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.

***ADDENDUM "J"***

Utah Constitution  
Article I, Sections 1, 5, 7, and 12

# **ARTICLE I**

## **DECLARATION OF RIGHTS**

### **Section 1. [Inherent and inalienable rights.]**

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

### **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. 7. [Due process of law.]**

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

### **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.



***ADDENDUM "K"***

**§76-5-201**

**§76-6-301**

**§76-6-302**

**§76-6-404**

**76-5-201. Criminal homicide — Elements — Designations of offenses.**

(1) A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child. There shall be no cause of action for criminal homicide against a mother or a physician for the death of an unborn child caused by an abortion where the abortion was permitted by law and the required consent was lawfully given.

(2) Criminal homicide is murder in the first and second degree, manslaughter, negligent homicide, or automobile homicide.

**76-6-301. Robbery.**

(1) Robbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear.

(2) Robbery is a felony of the second degree.

**76-6-302. Aggravated robbery.**

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) causes serious bodily injury upon another.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

**76-6-404. Theft — Elements.**

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

***ADDENDUM "L"***

**§76-5-202**

(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 injury of the victim before death.

2) Murder in the first degree is a capital offense.

***ADDENDUM "M"***

**§77-22-2**

**77-22-2. Right to subpoena witnesses and require production of evidence — Contents of subpoena — Interrogation before closed court.**

(1) In any matter involving the investigation of a crime, the existence of a crime or malfeasance in office or any criminal conspiracy or activity, the attorney general or any county attorney shall have the right, upon application and approval of the district court, for good cause shown, to conduct an investigation in which the prosecutor may subpoena witnesses, compel their attendance and testimony under oath before any certified court reporter, and require the production of books, papers, documents, recordings and any other items which constitute evidence or may be relevant to the investigation in the judgment of the attorney general or county attorney.

(2) The subpoena need not disclose the names of possible defendants and need only contain notification that the testimony of the witness is sought in aid of criminal investigation and state the time and place of the examination, which may be conducted anywhere within the jurisdiction of the prosecutor issuing the subpoena, and inform the party served that he is entitled to be represented by counsel. Witness fees and expenses shall be paid as in a civil action.

(3) The attorney general or any county attorney may make written application to any district court and the court may order that interrogation of any witness shall be held in secret; that such proceeding be secret; and that the record of testimony be kept secret unless and until the court for good cause otherwise orders. The court may order excluded from any investigative hearing or proceeding any persons except the attorneys representing the state and members of their staffs, the court reporter and the attorney for the witness.

***ADDENDUM "N"***

**Utah Rules of Criminal Procedure  
Rule 7**

**77-35-7. Rule 7 — Proceedings before magistrate.** (a) (1) When a summons is issued in lieu of a warrant of arrest, the defendant shall appear before the court as directed in the summons.

(2) When any peace officer or other person shall make an arrest with or without a warrant the person arrested shall be taken to a magistrate pursuant to section 77-7-19. If a magistrate is not available in such circuit or precinct, the person arrested shall be taken to the nearest available magistrate for setting of bail. If an information has not been filed one shall be filed without delay before the magistrate having jurisdiction over the offense.

(3) If a person is arrested in a county other than where the offense was committed he shall without unnecessary delay be returned to the county wherein the crime was committed and shall be taken before the proper magistrate as provided in these rules. If, for any reason, the person arrested cannot be promptly returned to such county, he shall, without unnecessary delay, be taken before a magistrate within the county of arrest for the determination of bail and released thereon or other appropriate disposition. Bail, if taken, shall be returned forthwith to the proper magistrate having jurisdiction over the offense together with the record made of the proceedings before such magistrate.

(4) The magistrate having jurisdiction over the offense charged shall, upon the defendant's first appearance before him, inform the defendant:

(i) Of the charge in the information or indictment and furnish a copy thereof to him;

(ii) Of any affidavit or recorded testimony given in support of the information and how he may obtain the same;

(iii) Of his right to retain counsel or have counsel appointed by the court without expense to him if he is unable to obtain his own counsel;

(iv) Of his rights concerning bail or other circumstances under which he may obtain pre-trial release; and

(v) That he is not required to make any statement and that the statements he does make may be used against him in a court of law.

The magistrate shall thereupon allow the defendant reasonable time and opportunity to consult counsel before proceeding further and shall allow him to contact any attorney by any reasonable means without delay and without fee.

(b) If the charge against the defendant is a misdemeanor, the magistrate shall call upon the defendant to plead. If the defendant enters a plea of guilty, he shall be sentenced by the magistrate as provided by law. If the defendant enters a plea of not guilty, a trial date shall be set and it may not be extended except for good cause shown. Trial shall be held in accordance with these rules and law applicable to criminal cases.



(c) If a defendant is charged with a felony, he shall not be called on to plead before the committing magistrate. During the initial appearance before the magistrate, the defendant shall be advised of his right to a preliminary examination. If the defendant waives his right to a preliminary examination, and the prosecuting attorney consents, the magistrate shall forthwith order the defendant bound over to answer in the district court. If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. Such examination shall be held within a reasonable time, but in any event not later than ten days if the defendant is in custody for the offense charged and not later than 30 days if he is not in custody; provided, however, that these time periods may be extended by the magistrate for good cause shown. A preliminary examination shall not be held if the defendant is indicted.

(d) (1) A preliminary examination shall be held in accordance with the rules and laws applicable to criminal cases tried before a court. The state shall have the burden of proof and be required to proceed first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine the witnesses against him. If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall forthwith order, in writing, that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination. If the magistrate does not find probable cause to believe that the crime charged has been committed or that the defendant committed it, the magistrate shall dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law and an order of dismissal. The dismissal and discharge shall not preclude the state from instituting a subsequent prosecution for the same offense.

(2) At a preliminary examination, the magistrate, upon request of either party, may exclude witnesses from the courtroom and may require witnesses not to converse with each other until the preliminary examination is concluded. On the request of either party the magistrate may order all spectators to be excluded from the courtroom.

(3) If the magistrate orders the defendant bound over to the district court, the magistrate shall execute in writing a bind-over order and shall forthwith transmit to the clerk of the district court all pleadings in and records made of the proceedings before the magistrate, including exhibits, recordings and the typewritten transcript, if made, in the magistrate's court.

(e) Whenever a magistrate commits a defendant to the custody of the sheriff, the magistrate shall execute the appropriate commitment order.

(f) When a magistrate has good cause to believe that any material witness in a case pending before him will not appear and testify unless bond

***ADDENDUM "O"***

**Utah Rules of Criminal Procedure  
Rule 14**

**77-35-14. Rule 14 — Subpoena.** (a) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury, in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the county attorney on his own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require.

(b) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects. The court may quash or modify the subpoena if compliance would be unreasonable.

(c) A subpoena may be served by any person over the age of 18 years who is not a party. Service shall be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying him of the contents. A peace officer shall serve any subpoena delivered to him for service in his county.

(d) Written return of service of a subpoena shall be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.

(e) A subpoena may compel the attendance of a witness from anywhere in the state.

(f) When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring him before the court.

(g) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.

(h) Whenever a material witness is about to leave the state, or is so ill or infirm as to afford reasonable grounds for believing that he will be unable to attend a trial or hearing, either party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court shall make whatever order is necessary to effect such attendance.

***ADDENDUM "P"***

**Utah Rules of Criminal Procedure  
Rule 16**

**77-35-16. Rule 16 — Discovery.** (a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) Relevant written or recorded statements of the defendant or co-defendants;

(2) The criminal record of the defendant;

(3) Physical evidence seized from the defendant or co-defendant;

(4) Evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) Any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(c) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case.

(d) Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.


(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 17<sup>th</sup> day of September, 1992, four true and correct copies of the foregoing ADDENDUM TO BRIEF OF THE APPELLANT was mailed, postage prepaid, to the following:

R. Paul Van Dam, Esq.  
ATTORNEY GENERAL  
Charlene Barlow, Esq.  
Kirk M. Torgensen, Esq.  
ASSISTANT ATTORNEYS GENERAL  
Attorneys for Respondent/Appellee  
236 State Capitol  
Salt Lake City, Utah 84114



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