

1992

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

Utah Supreme Court

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

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLEE

- - - - -

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

**UTAH COURT OF APPEALS  
BRIEF**

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JAN GRAHAM (1231)  
Attorney General  
KRIS LEONARD (4902)  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1022

Attorneys for Appellee

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 Appellant

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UTAH

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          Petitioner/Appellant,           :     Case No. 920126  
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Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1022

Attorneys for Appellee

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 Appellant

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IN THE UTAH SUPREME COURT

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

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from an order denying a petition for post-conviction relief in the Third Judicial District Court for Salt Lake County, the Honorable David S. Young, presiding.

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2-2(3)(j) (Supp. 1992).

STATEMENT OF ISSUES PRESENTED ON APPEAL

AND STANDARDS OF APPELLATE REVIEW

1. Did the prosecution's failure to notify petitioner before taking sworn statements of two witnesses violate petitioner's constitutional rights to due process, to the assistance of counsel, and to confront and cross-examine the witnesses? In reviewing a denial of habeas corpus relief, this Court will uphold the trial court's factual findings unless "clearly erroneous," but will review the lower court's legal conclusions for correctness. Termunde v. Utah State Prison, 786 P.2d 1341, 1342 (Utah 1990).

2. Was petitioner denied effective assistance of trial counsel due to the cumulative effect of counsel's allegedly

substandard conduct? An ineffective assistance of counsel claim in a habeas proceeding presents a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 2070 (1984). The factual findings are reviewed for clear error, and the questions of law are reviewed for correctness. State v. Templin, 805 P.2d 182, 186 (Utah 1990).

3. Is petitioner constitutionally entitled to payment by the State of the costs and attorney's fees incurred in pursuing his first state habeas petition and the initial appeal therefrom? Although petitioner seeks a ruling on this issue as a matter of constitutional law, the district court found that the claim presented a legislative question, not a judicial one. Constitutional and statutory interpretation claims present questions of law which this Court reviews for correctness. City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah), cert. denied, 111 S. Ct. 120 (1990); State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990); Provo City Corp. v. Willden, 768 P.2d 455, 457 (Utah 1989).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

All pertinent constitutional, statutory, or rule provisions are included in the separately-bound addenda submitted herewith.

#### STATEMENT OF THE CASE

Upon a plea of guilty entered on September 18, 1987, petitioner Joseph Mitchell Parsons was convicted of murder in the first degree, a capital felony, in violation of Utah Code Ann. § 76-5-202 (1978); of aggravated robbery, a first degree felony, in

violation of Utah Code Ann. § 76-6-302 (1978); and of theft of an operable motor vehicle, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1978) (Fifth Dist. Record [hereinafter "5th R."] at 79-86, 87; Fifth Dist. Arraignment Transcript at 9). Sentencing proceedings were conducted January 26 through 29, 1988, in the Fifth Judicial District Court in and for Iron County, State of Utah (5th R. at 146-155). A sentencing jury unanimously imposed the death penalty (5th R. at 297-99).

Petitioner, through appointed trial counsel, appealed to the Utah Supreme Court (5th R. at 403-04). The Court affirmed petitioner's convictions and sentence in State v. Parsons, 781 P.2d 1275 (Utah 1989) (a copy of the opinion is submitted herewith as Addendum A). Petitioner filed a petition for rehearing in the Utah Supreme Court on December 4, 1989 (5th R. unnumbered, letter dated Dec. 19, 1989). The Court denied the petition on January 22, 1990 (5th R. unnumbered, Remittitur dated Jan. 22, 1990).

Petitioner filed a pro se petition for habeas corpus relief in the Third Judicial District Court of Salt Lake County, State of Utah, on March 8, 1990 (Third Dist. R. [hereinafter "3d R."] at 2-5). The court appointed counsel for petitioner, and counsel filed an amended petition on October 22, 1990, which challenged the legality and constitutionality of petitioner's sentence under the federal and state constitutions based on an allegation of ineffective assistance of defense counsel at trial (3d R. at 14, 17-23). An evidentiary hearing was held on May 24,

1991 (3d R. at 214). Thereafter, the court denied the petition (3d R. at 249-67). Petitioner appeals from the district court's ruling, asking this Court to vacate his sentence.

#### STATEMENT OF FACTS

Late on August 30, 1987, Richard L. Ernest saw petitioner hitchhiking near Barstow, California, and stopped to offer him a ride (Sent. Tr. II at 666, 680-83; Sent. Tr. IV at 1035, 1038-39, 1080-81).<sup>1</sup> At that time, petitioner was on parole from a Nevada prison after a conviction of armed robbery (Sent. Tr. III at 900-01, 915-17; Sent. Tr. IV at 1015-17, 1028).

At approximately 3:00 a.m. on August 31, 1987, Ernest pulled into a rest area near Cedar City, Utah, and both men settled in to sleep (Sent. Tr. IV at 1040-41, 1094-97, 1102, 1116). Petitioner claimed at the penalty hearing that Ernest made two sexual advances (Sent. Tr. IV at 1041-42, 1099, 1101-02). When petitioner attempted to exit the car after the second advance, Ernest tried to stop him, and, in the ensuing struggle, petitioner stabbed Ernest several times (Sent. Tr. III at 862, 868; Sent. Tr. IV at 1042-44, 1101-03, 1106-08).

Petitioner pushed Ernest's body out of the car a mile down the road, then drove five miles further to a convenience store where he cleaned up and assumed Ernest's identity to purchase food and gas (Sent. Tr. II at 548, 712, 717-19, 722-26; Sent. Tr. IV at 1045-50, 1111, 1113-16, 1122, 1127). Later that

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<sup>1</sup> The penalty phase transcript is comprised of multiple volumes. Citations thereto in this brief will be: Sent. Tr. [vol.] at [page].

morning, he again used Ernest's money and credit cards to obtain lodging and to purchase several items (Sent. Tr. II at 739-42, 748-54, 757-62; Sent. Tr. III at 775-77, 780-82; Sent. Tr. IV at 1051-53, 1128-30, 1136-41).

Police officers were alerted to the credit card purchases and petitioner's unusual activities (Sent. Tr. II at 569-70, 583-84, 597-98). At 4:15 p.m. on August 31, the police found petitioner in Ernest's car at a rest area and arrested him (Sent. Tr. II at 598; Sent. Tr. III at 789-91; Sent. Tr. IV at 1055, 1142-43). At 10:50 a.m. on September 1, the police discovered Ernest's body (Sent. Tr. II at 548, 588-89).

The court appointed James Shumate to represent petitioner (5th R. at 69-71).<sup>2</sup> A preliminary hearing began on September 17, 1987, but, at petitioner's request, was not completed (5th R. at 4-22, 76-77). On September 18, petitioner entered a plea of guilty to all three counts (5th R. at 87). He elected to be sentenced by a jury, and the jury imposed the death penalty following the penalty hearing (5th R. at 299).

#### SUMMARY OF THE ARGUMENT

Point I: This Court should not consider the merits of the first issue because petitioner did not timely raise it in his direct appeal, although he should and could have done so. He offers no "unusual circumstances" to justify his failure.

Should this Court reach the merits of petitioner's claim, it should conduct only a federal constitutional analysis.

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<sup>2</sup> Mr. Shumate is now a Fifth District Court Judge.

Petitioner presents no separate state analysis in his brief and made only nominal reference to the state constitution in the district court during the habeas proceedings.

Under a federal constitutional analysis, the two statements are not depositions but are sworn investigative statements. They were part of the State's early pre-trial investigation and were used only by petitioner at trial. There is no evidence that the State attempted to "create" testimony by taking the statements under oath, and petitioner's claim that the statements prejudicially "locked in" testimony is purely speculative. He establishes no denial of a constitutional right.

Finally, petitioner has abandoned his claim that his trial counsel's failure to attack the statements constitutes ineffective assistance where he does not present the argument to this Court, and he withdrew the argument at the district court level to pursue the issue as a substantive error.

Point II: All of the alleged deficiencies in the conduct of petitioner's trial counsel constitute reasonable trial strategy or otherwise fall within the wide range of professionally competent assistance. Further, petitioner fails to establish the requisite prejudice for any of his claims. As none of the claimed errors are either substantial or prejudicial, the cumulative error doctrine does not apply.

Point III: The federal constitution does not require the state to provide counsel to indigent inmates at state expense for pursuit of postconviction review. Petitioner provides no

valid basis for his suggested expansion of state constitutional rights beyond those recognized at the federal level.

## ARGUMENT

### POINT I

PETITIONER'S SUBSTANTIVE CHALLENGE TO THE SWORN STATEMENTS IS PROCEDURALLY BARRED, AS IT SHOULD AND COULD HAVE BEEN RAISED ON DIRECT APPEAL; ALTERNATIVELY, THE DISTRICT COURT CORRECTLY FOUND THAT THE STATEMENTS WERE MERELY INVESTIGATIVE, AND PETITIONER'S SPECULATIVE ARGUMENTS DO NOT ESTABLISH ANY CONSTITUTIONAL VIOLATION

#### A. Procedural Bar

Petitioner claims that the prosecution's failure to provide him with notice of and an opportunity to appear at the taking of the two sworn statements denied him his due process rights, his right to counsel, and his right to confront witnesses under the federal and state constitutions (Br. of App. at 11-12). His failure to raise this issue in his direct appeal and his untimely presentation of this issue in his habeas proceedings procedurally bar review of the merits.

Generally, habeas corpus proceedings are used to attack a conviction when an obvious injustice or a substantial denial of a constitutional right occurred at trial. Gerrish v. Barnes, No. 900352, slip op. at 8 (Utah Dec. 16, 1992); Fernandez v. Cook, 783 P.2d 547, 549 (Utah 1989); Bundy v. DeLand, 763 P.2d 803, 804 (Utah 1988). A petitioner cannot raise issues in his habeas petition that could or should have been raised on direct appeal absent unusual circumstances justifying the failure to raise the issues earlier. Gerrish, slip op. at 8; Jensen v. DeLand, 795

P.2d 619, 620 (Utah 1989); Fernandez, 783 P.2d at 549; see Bundy, 763 P.2d at 804; Wells v. Shulsen, 747 P.2d 1043, 1044 (Utah 1987) (per curiam); Codianna v. Morris, 660 P.2d 1101, 1104 (Utah 1983). Claims of ineffective assistance of counsel come within this "unusual circumstances" exception when the same counsel represented the petitioner at trial and on direct appeal.<sup>3</sup> Fernandez, 783 P.2d at 549; see Hurst v. Cook, 777 P.2d 1029, 1035-36 & n.6 (Utah 1989) (collecting cases on "unusual circumstances" and indicating that such circumstances exist where a petitioner is unjustifiably denied an opportunity to raise an issue on direct appeal). In this case, petitioner's claim of a substantive constitutional violation is asserted independent of his ineffectiveness argument; therefore petitioner must establish unusual circumstances justifying his failure to raise the substantive violation on direct appeal.

Petitioner relies on his trial memorandum from the habeas proceedings as adequately raising the issue (Br. of App. at 12), and makes no reference to or justification for his failure to include the point in his direct appeal. His habeas petition was based on several alleged instances of ineffective assistance which encompassed the sworn statements (3d R. at 17-23; copy submitted herewith as Addendum B). It was not until the

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<sup>3</sup> The fact that trial counsel also represented a defendant on direct appeal constitutes an unusual circumstance only in the context of a claim of ineffective assistance because counsel cannot be expected to raise his own ineffectiveness. Fernandez, 783 P.2d at 549-50. This concern does not apply in areas of substantive error. See id., 783 P.2d at 550.

day before the evidentiary hearing that petitioner filed the trial memorandum which, for the first time, asserted that the taking of the statements constituted a substantive due process violation warranting reversal of his conviction (3d R. at 188-213; copy submitted herewith as Addendum C). When asked to procedurally bar the issue, the district court refused, saying that "when the focus of the petitioner's claim[, as] 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." (3d R. at 256; copy submitted herewith as Addendum D). The court then addressed the issue in the manner in which it was first presented: part of the claim of ineffective assistance of counsel (3d R. at 253-55, 257-65; Addendum D).

The district court erred in refusing to procedurally bar this issue. See Pierre v. Shulsen, 802 F.2d 1282, 1283 (10th Cir. 1986), cert. denied, 481 U.S. 1033 (1987). This Court must correct that error to achieve consistent application of Utah's procedural bar rules. Where state courts fail to consistently apply the state procedural bar rules, federal courts are not bound by those rules in federal postconviction review and may reach the merits of issues otherwise not properly before them. Harris v. Reed, 489 U.S. 255, 260-61, 109 S. Ct. 1038, 1043 (1989) (generally, federal courts are not prevented from reaching the merits of a claim on habeas unless the last state court rendering a judgment "clearly and expressly" states that its

decision rests on a state procedural bar); Andrews v. Deland, 943 F.2d 1162, 1188-92 (1991), cert. denied, 112 S. Ct. 1213 (1992); Church v. Sullivan, 942 F.2d 1501, 1506-08 (10th Cir. 1991).

Because the substantive issue petitioner now seeks to have reviewed was not raised in his direct appeal, despite its availability, and petitioner advances no justification for his failure to timely raise the issue, there are no "unusual circumstances" and the issue should be procedurally barred.

## B. Merits

### 1. State Constitutional Review

Petitioner asserts that this Court should find a per se violation of his rights under both the state and federal constitutions (Br. of App. at 17). However, he made only nominal reference to the state constitution in his trial memorandum to the district court during his habeas review (see Addendum C), and he has provided no separate analysis in his brief to this Court based on state constitutional provisions. Consequently, a separate state constitutional analysis is not warranted. State v. Lafferty, 749 P.2d 1239, 1247 & n.5 (Utah 1988), habeas corpus granted on other grounds, 949 F.2d 1546 (10 Cir. 1991).

### 2. Federal Constitutional Review

Petitioner characterizes the two sworn statements he now challenges as "depositions" and contends that the taking of depositions without notice to or the presence of petitioner or his counsel constitutes a per se violation of his due process

right, his right to counsel, and his right to confront and cross-examine witnesses against him.

The district court found 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. . . . The statements were from the beginning readily available to defense counsel, and were only generated in order to preserve investigative information." (3d R. at 260-61; 276-77; Addendum D). The court thus concluded "that the statements were not 'depositions', but were rather 'sworn statements' generated by a careful and thoughtful investigative prosecutor." (3d R. at 261; Addendum D). Petitioner challenges the latter finding. This Court will uphold the trial court's factual findings unless it finds them to be "clearly erroneous." Termunde v. Utah State Prison, 786 P.2d 1341, 1342 (Utah 1990).

#### A. Characterization of Statements

As petitioner recognizes, the timing and nature of the statements are important. This case, characterized by the prosecutor as a major case (Evidentiary Hearing Transcript [hereinafter "H.C. Tr."] at 352), involved a murder occurring in the early morning hours of August 31, 1987. Petitioner was apprehended later the same day (Sent. Tr. III at 789-91). The victim's body was found a day later on September 1 (Sent. Tr. II at 548, 588-89; H.C. Tr. at 352). The information was originally filed on September 2, 1987, two days after the murder (5th R. at 72). On the same day, the State took the two sworn statements

now challenged by petitioner (H.C. Tr. at 69; see statements of Chad Williams and Beverly Ernest on file with this Court). One statement was from the victim's widow, a California resident who was emotionally distraught, having lost her estranged husband to a brutal murder only two days earlier (H.C. Tr. at 60-61; Ernest Statement). The second statement came from a witness whose testimony and identification of petitioner was a key part of the prosecution's case and who was in fear of his life (H.C. Tr. at 60, 67-68; Williams Statement).

The reasonableness of questioning an identification witness and the widow of the murder victim during the initial stages of an investigation is clear. Defendant suggests that the prosecutor's precaution of taking the statements under oath changed the interviews into depositions, which he has a right to attend. He cites no authority providing that the State cannot conduct its investigatory interviews under oath or that, if it does so, defendant must be present (see discussion of rule 14, Utah Rules of Criminal Procedure, infra). Scott Burns, the Iron County Prosecuting Attorney, arranged to take the statements under oath in order to prepare and investigate his case (H.C. Tr. at 62, 71). The State neither used nor intended to use the statements at trial (H.C. Tr. at 65-66, 70). When the statements were made, the prosecutor did not know what petitioner's claims or defenses were (H.C. Tr. at 57-58), and he did not fully understand the events surrounding the murder (H.C. Tr. at 62-63), as evidenced by his filing of an amended information on September

10 (5th R. at 1-3). The State took at least four other unchallenged statements on or about September 2, seeking to "put everything in perspective" early in the case, including the timing and sequence of events (H.C. Tr. at 62-63). As the district court recognized, the case for both parties was at the investigatory stage. Petitioner took advantage of the State's investigation by using one statement during the penalty phase to attempt to impeach the victim's widow (Sent. Tr. III at 888-92).

There is no evidence supporting petitioner's claim that the prosecution deliberately attempted to "create" testimony (Br. of App. at 13). There is no evidence that any of the information in the statements was false or that either individual would have testified differently at the penalty phase if they had not given their statements to the prosecutor under oath. The prosecution voluntarily opened its file to defense counsel, and the taking of the statements under oath memorialized the investigation and enabled the State to provide petitioner with a copy of the exact information its investigation uncovered. Use of both an oath and a reporter was merely a precaution occasionally used by the prosecutor and generated by the nature of the crime.

The prosecutor's motives for conducting interviews under oath, and the timing and nature of the interviews, support the trial court's finding that the statements were investigative sworn statements.

## B. Constitutional Violations

As petitioner recognized, the district court did not address this issue on constitutional grounds. The court's failure is without consequence, however, as the issue is procedurally barred (see subsection A, supra). However, even if the court had addressed the constitutional grounds, it would have found no merit to counsel's argument.

Petitioner initially asserts that the taking of the statements violated rule 14(h), Utah Rules of Criminal Procedure, and that the violation has constitutional significance (Br. of App. at 13-14). Rule 14(h) outlines the method by which either party in a criminal proceeding may preserve the testimony of any material witness whom the party has reason to believe will be unable to attend a trial or hearing; the party would apply to the court for an order permitting examination of the witness by deposition, giving notice to the opposing party (a copy of the rule is submitted herewith as Addendum E). Scott Burns, the prosecuting attorney, testified that his reasons for taking the statements in question were not those involved in rule 14(h) (H.C. Tr. at 69-70). Although he was concerned with the anxieties harbored by each individual (H.C. Tr. at 60-61), the record does not indicate that he had any belief or reason to believe that either would be unable to appear in court if necessary. In fact, both individuals testified at the penalty phase. Burns acknowledged not only that he did not intend to use the statements at trial, but that he knew he would likely not be

allowed to do so (H.C. Tr. at 70). He intended to gain and preserve the information for his own investigative use (H.C. Tr. at 62, 71). As the threshold for invoking rule 14(h) did not exist, any failure to proceed under the rule has no bearing here.

Petitioner further argues that the prosecution's taking of sworn statements without his presence violated his right to confront and cross-examine the witnesses. The primary object of the right of confrontation is to prevent depositions and ex parte affidavits from being used against the accused at trial in lieu of a personal examination and cross-examination of the witness against him. State v. Anderson, 612 P.2d 778, 785 (Utah 1980). That object was not violated here as the prosecution did not use the sworn statements in court, and petitioner took full advantage of his right to confront and cross-examine the witnesses, both of whom testified at the penalty phase. As noted above, the statements were sworn interviews of potential witnesses taken during an investigation two days after a murder. As they were not depositions, petitioner had no constitutional right to be present. Petitioner's comparison of these early, investigatory statements with the right to cross-examine witnesses at a preliminary hearing and the right to have counsel present during a pre-trial line-up is not helpful. The statements did not prevent petitioner from presenting evidence to the court, but provided him with potential impeachment material.

Petitioner contends that the taking of sworn statements from key witnesses concerning key issues "permanently tainted"

the witnesses by freezing their testimony without benefit of cross-examination (Br. of App. at 17). This argument is purely speculative. Petitioner offers no proof that the witnesses' testimony was false or in any other manner "tainted."

Petitioner's contention that the prosecution's mention of perjury to the victim's widow "locked in" her testimony is also speculative (Br. of App. at 16). Petitioner has not demonstrated that the testimony would have changed absent the prosecutor's reference to perjury or that the perjury reference resulted in testimony more favorable to the prosecution than might otherwise have been given. Oaths are administered to give a greater assurance of veracity, and a witness has a right to know the legal ramifications arising from testifying under oath. The district court affirmatively found that "the taking of the sworn statements [did not] in any way affect[] the testimony of the witnesses. . . . Had the witness been more closely cross-examined by vigorous defense counsel there would have been no change." (3d R. at 261; Addendum D). Petitioner's speculative assertions do not establish a denial of his constitutional rights and are without merit.

Finally, petitioner affirmatively used one sworn statements during the penalty phase, attempting to impeach the victim's widow (Sent. Tr. III at 888-92). He does not cite this as part of his counsel's ineffectiveness. Petitioner cannot use the statements, then complain that their existence constitutes

prejudicial error. See State v. Parsons, 781 P.2d 1275, 1285 (Utah 1989); State v. Tillman, 750 P.2d 546, 560-61 (Utah 1987).

### C. Abandonment of Ineffective Assistance Claim

Petitioner presents this issue as a substantive due process violation only. When he first raised this issue substantively in the district court, he ceased to assert that the statements related to his trial counsel's allegedly ineffective representation (3d R. at 188-213; Addendum C). Although the district court addressed the issue under the ineffective assistance argument, petitioner does not challenge that ruling insofar as it relates to his counsel's performance. Accordingly, he has abandoned the claim as a basis for his ineffectiveness argument. See Armstrong Rubber Co. v. Bastian, 657 P.2d 1346, 1348 (Utah 1983) (failure to include argument in brief on appeal constitutes abandonment of claim); Salt Lake City v. Towne House Athletic Club, 18 Utah 2d 417, 420, 424 P.2d 442, 445 (1967); Linford v. Linford, 116 Utah 21, 26, 207 P.2d 1033, 1035 (1949); see also State v. Moya, 815 P.2d 1312, 1315 n.6 (Utah App. 1991).

## POINT II

PETITIONER HAS FAILED TO DEMONSTRATE THAT HE  
RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT  
THE PENALTY PHASE

### A. Introduction

Petitioner contends that his counsel at the sentencing proceedings rendered ineffective assistance, in violation of petitioner's sixth amendment right (Br. of App. at 18-42). He cites eight areas of conduct, one of which he claims individually

warrants reversal of his sentence, and all of which he claims cumulatively warrant reversal.

To establish a claim of ineffective assistance of counsel, petitioner must first show specific deficiencies which "fall outside the wide range of professionally competent assistance[,]" and second, establish a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. Frame, 723 P.2d 401, 405 (Utah 1986); see also Strickland v. Washington, 466 U.S. 668, 690, 694, 104 S. Ct. 2052, 2066, 2071 (1984); State v. Carter, 776 P.2d 886, 893 (Utah 1989); State v. Verde, 770 P.2d 116, 118-19 n.2 (Utah 1989). When petitioner challenges a death sentence, the focus of the second prong of the test becomes "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. Proof of deficient performance must not be speculative but a demonstrable reality. State v. Jones, 177 Utah Adv. Rep. 3, 5 (Utah Dec. 31, 1991); Codianna v. Morris, 660 P.2d 1101, 1109 (Utah 1983). A legitimate choice of trial strategy which fails to produce anticipated results does not constitute ineffective assistance, Codianna, 660 P.2d at 1109, and petitioner has the burden of showing that counsel's actions were not conscious trial strategy. State v. Bullock, 791 P.2d 155, 160 (Utah 1989), cert. denied, 487 U.S. 1024 (1990); State v. Medina, 738 P.2d 1021, 1023 (Utah 1987). The court need not

determine whether petitioner has met the first prong of the test before examining the second prong "'[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice[.]'" Frame, 723 P.2d at 405 (quoting Strickland, 466 U.S. at 697). This standard is applicable to claims of ineffective assistance claims in habeas proceedings. See Strickland, 466 U.S. at 697 (federal habeas); Bundy v. Deland, 763 P.2d 803, 805-06 (Utah 1988) (state habeas); Codianna, 660 P.2d at 1108-14 (state habeas).

Although petitioner recognizes this two-part test, he urges this Court to abandon or limit application of the second (prejudice) prong and to focus on the first (substandard performance) prong (Br. of App. at 18-20). He argues that once he shows that counsel rendered deficient performance, he is entitled to reversal of his sentence whether or not counsel's conduct rendered the result of the sentencing proceedings unreliable. His suggestion that the mere existence of a deficiency is sufficient to warrant setting aside the sentencing outcome is without merit and was specifically rejected by the United States Supreme Court in Strickland, 466 U.S. at 691-94. The suggestion provides no workable principle as it requires the assumption of prejudice in areas where it is equally likely that no prejudice occurred. See Strickland, 466 U.S. at 693.

The purpose of the constitutional right to effective assistance of counsel is to ensure a fair trial. Id., 466 U.S. at 696-97; State v. Templin, 805 P.2d 182, 186 (Utah 1990). To

that end, the overriding concern in reviewing a claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial or sentencing cannot be relied on as having produced a just result. Strickland, 466 U.S. at 686-87; Templin, 805 P.2d at 186; Frame, 723 P.2d at 405. In requiring proof of both deficient conduct and prejudice, the U.S. Supreme Court in Strickland explained:

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. [citations omitted]. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Strickland, 466 U.S. at 691-92. Given the fluid nature of the legal profession and the infinite variety and unpredictable nature of possible errors in counsel's conduct, a petitioner who establishes that certain errors by counsel were unreasonable must also show that the errors actually had an adverse effect on the defense. Id., 466 U.S. at 693; see also Verde, 770 P.2d at 118-19; Frame, 723 P.2d at 405; State v. Geary, 707 P.2d 645 (Utah 1985). Both prongs apply equally to capital and non-capital cases. See Strickland, 466 U.S. at 686-87; State v. Gardner, 789 P.2d 273, 288 (Utah 1989), cert. denied, 494 U.S. 1090 (1990).

Petitioner contends that, "by the nature of the issue presented[,]" the Utah Supreme Court in State v. Templin, 805 P.2d 182 (Utah 1990), adopted the position that the second prong

of the test need not always be applied (Br. of App. at 20). To the contrary, in Templin, this Court specifically relied on both parts of the Strickland test in finding that Templin was denied his constitutional right to effective assistance of counsel. Templin involved a failure to reasonably investigate the availability of prospective defense witnesses. This Court specifically reiterated its position that "[d]efendant has the burden of meeting both parts of [the Strickland] test," and found that both parts of the test had been met. Templin, 805 P.2d at 186. After first finding that counsel's performance was deficient, this Court reviewed the testimony that would have been given by the prospective witnesses and the totality of the evidence adduced at trial. Id., 805 P.2d at 188. It found that the record did not strongly support the conviction, the expected testimony would have directly affected the credibility of the one person on whom the State's case rested, and the testimony would not have been cumulative. Id. As the testimony affected the "entire evidentiary picture," it was of sufficient import to establish a reasonable probability that the outcome would have been different had the witnesses testified at trial. Id.

Petitioner must meet both prongs of the Strickland test to establish his claim of ineffective assistance of counsel. His failure to demonstrate in any of his claims either that his trial counsel's performance was deficient or that he was prejudiced by that performance will be addressed individually hereafter.

### B. Inadequate Pre-trial Investigation

Petitioner contends that his trial counsel's performance was deficient because counsel undertook substandard pretrial investigation into the victim's alleged homosexual tendencies and failed to seek an autopsy of the victim to look for physical signs of homosexual activity (Br. of App. at 21). Petitioner argues that this conduct alone warrants reversal of his death sentence without the need to inquire into the existence of prejudice (Id. at 22).<sup>4</sup>

Petitioner's failure to establish the requisite prejudice defeats his claim of ineffective assistance.<sup>5</sup> Codianna, 660 P.2d at 1110. Petitioner also fails to make the showing required under the first prong of the test. Although he identifies counsel's allegedly substandard performance, petitioner does not show how the performance was deficient.

The United States Supreme Court in Strickland spoke directly to the issue of the adequacy of pretrial investigation:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In

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<sup>4</sup> Although petitioner opines that some of the claims of deficient conduct by themselves justify reversal of his sentence, he identifies only this issue as being individually sufficient.

<sup>5</sup> Contrary to petitioner's assertion that some issues do not lend themselves to proof of prejudice under the second prong of the test, prejudice has been required and ineffectiveness found where defendants have alleged insufficient investigation by counsel. Templin, 805 P.2d at 187-89; State v. Crestani, 771 P.2d 1085, 1091-92 (Utah App. 1989).

other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. See generally Templin, 805 P.2d at 188 (a decision to cease investigation may be a tactical decision following adequate initial inquiry). In this case, the record illustrates that counsel's investigation was adequate to support his decision not to investigate the matter further.

Petitioner's expert at the evidentiary hearing indicated that a failure to conduct any investigation would be substandard (H.C. Tr. at 81). Judge James Shumate, petitioner's trial counsel, testified at the evidentiary hearing that he, in fact, investigated the victim's sexual orientation. Counsel recognized that the victim's sexual preference was important as potential substantiation for the defense petitioner asserted and as a potentially mitigating circumstance (H.C. Tr. at 16-17, 31). He indicated that "[he] was concerned from the outset[,] because of [petitioner's] relation to [counsel] of the events surrounding the homicide, as to whether or not there might be any indication that the decedent was, in fact, prone to homosexual tendencies, had any homosexual background, or orientation whatsoever." (H.C. Tr. at 16-17). Judge Shumate spoke with the victim's family members, the victim's widow, the victim's stepfather, and Bruce Opp, a friend of the victim for two years (Sent. Tr. II at 679, 692; H.C. Tr. at 15-18, 21-22). Although the exact content of

counsel's investigation was not revealed, the record provides a clear picture of counsel's findings. The victim's widow, who had been married to the victim for ten years, emphatically testified at the penalty hearing that the victim did not have homosexual tendencies (Sent. Tr. III at 883; Sent. Tr. IV at 1187-89), that he dated other women (Sent. Tr. IV at 1189), and that he had an affair with another woman (Id.). Her sworn statement, provided to Judge Shumate by the prosecution the same month it was taken (H.C. Tr. at 44), indicated that the victim had a girlfriend at the time she first met him (Ernest Statement at 4), and that he had "a very good friend" whom he had kissed and "cared for very much[.]" (Ernest Statement at 32). Opp testified that homosexuality "was the farthest thing from [the victim's] mind" and that the victim dated other women once he became estranged from his wife (Sent. Tr. IV at 1177). Even the prosecution's investigation failed to reveal evidence of any homosexual tendencies (H.C. Tr. at 56-59).

Counsel conducted adequate investigation into the issue to permit a reasoned determination concerning further investigation. His decision not to proceed further in the face of the information obtained from the victim's family and friends is a reasonable tactical decision which does not amount to deficient performance. See, e.g., Strickland, 446 U.S. at 690-91; Codianna, 660 P.2d at 1110.

Petitioner merely assumes that actual evidence of homosexual tendencies might have been found which may have

resulted in a different sentencing outcome. The record indicates that the contrary is more likely. In addition to the information outlined above, the record contains testimony from the victim's father-in-law and uncle-in-law who testified at the penalty phase that the victim had no homosexual tendencies (Sent. Tr. IV at 1176-77, 1180-81, 1184-85). The victim stayed with Bruce Opp one night following his separation from his wife, but he slept in his van outside Opp's home (Sent. Tr. III at 830).<sup>6</sup> The evidence belies the likelihood that any evidence of the victim's alleged homosexuality would have been found. Further investigation likely would not have resulted in a different outcome in the sentencing proceedings. Absent evidence that counsel's failure to investigate further prejudiced petitioner, that failure cannot establish ineffective assistance. Codianna, 660 P.2d at 1110.

#### C. Deficient Guilty Plea Advice

Petitioner next argues that he received ineffective representation because his counsel advised him to plead guilty as charged to capital homicide, aggravated robbery, and theft. He argues that the advice to plead guilty was not a legitimate trial strategy but was deficient because his counsel mistakenly led him to believe that the plea was in his best interests when in fact he received no "benefit" from the bargain (Br. of App. at 24-25).

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<sup>6</sup> In contrast, the Iron County Attorney testified at the evidentiary hearing that his investigation indicated that petitioner was known to have had a homosexual partner while incarcerated in a Nevada prison and had demonstrated homosexual tendencies while in the Iron County Jail (H.C. Tr. at 58, 72).

This challenge to petitioner's guilty plea necessarily fails because he does not make the required allegation that there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial absent counsel's advice. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985) (when a claim of ineffective counsel involves a guilty plea, the prejudice requirement focuses on whether counsel's actions affected the outcome of the plea process). Even if the allegation had been made, petitioner's repeated assertions of guilt, both before and after entering his plea, and his adamant desire to end the preliminary hearing make it unlikely that he would have insisted on going to trial.

The claim also fails because counsel's advice constituted a legitimate trial strategy, and petitioner has failed to prove otherwise. The fact that it did not have the anticipated result does not render counsel's representation deficient. Bullock, 791 P.2d at 160. Judge Shumate testified in detail at the evidentiary hearing regarding the purpose behind entering the plea: to blunt the thrust of the evidence to be presented to the penalty phase jury in hopes of finding the jury more amenable to a sentence other than death (H.C. Tr. at 29-30). Petitioner admitted at both the preliminary and the evidentiary hearings that he killed the victim (H.C. Tr. at 43-44, 51, 63). Judge Shumate determined that a guilt phase would allow the State the opportunity to emphasize and re-emphasize the crimes in detail to the jury (H.C. Tr. at 29-30). He also recognized the

possibility that once the jury had seen the evidence throughout the guilt phase, the emotional momentum likely to be generated by the details of the homicide would be against petitioner and could render the jury more likely to impose a death sentence during the penalty phase (H.C. Tr. at 30). He discussed this strategy and the possibility of entering a guilty plea with petitioner at length, providing petitioner with the opportunity to fully consider the move (H.C. Tr. at 27-30, 47-48). Petitioner admitted that before he entered his plea, he knew the evidence the State possessed (H.C. Tr. at 45-46), he knew that he would still face the penalty phase (5th R. at 81-82; H.C. Tr. at 51-52), and he knew the State had a good chance of getting the death penalty (H.C. Tr. at 47). Despite his self-serving claim that Judge Shumate told him that there was only "a possibility of getting the death penalty[,]" (*id.*), petitioner knew that he could still receive a death sentence (H.C. Tr. at 47, 51-52, 54), and that his counsel's opinion was not binding (5th R. at 82-83). Judge Shumate's judgment, analysis and determination were made in light of his extensive prior trial experience, including more than eleven years as a defense attorney handling more than 150 jury trials, and experience as associate counsel on one prior capital case and as lead counsel on two prior capital cases (H.C. Tr. at 8-11, 35-36). Under the circumstances of this case, this strategy clearly meets an objective standard of reasonableness, and counsel's advice pursuant to this strategy lies within the

wide range of professionally competent assistance. Frame, 723 P.2d at 405.

Petitioner's contention that the lack of any "meaningful benefit" from the plea bargain renders counsel's representation deficient has no basis in the record. Plea bargaining is both tolerated and encouraged by our legal system. Bordenkircher v. Hayes, 434 U.S. 357, 363-65, 98 S. Ct. 663, 667-68 (1978). The "mutuality of advantage" upon which plea bargaining is based was satisfied in this case. See id., 434 U.S. at 363; State v. West, 765 P.2d 891, 896 (Utah 1988). Both petitioner and Judge Shumate testified at the evidentiary hearing that the plea was primarily based on petitioner's strong desire to waive his preliminary hearing (H.C. Tr. at 26-27, 44-46, 63).<sup>7</sup> Article 1, section 13 of the Utah Constitution and rule 7(7)(a), Utah Rules of Criminal Procedure, permit a petitioner to waive his preliminary hearing with the prosecution's consent. The prosecution withheld its consent in this case for three legitimate reasons: 1) to preserve testimony created at the preliminary hearing; 2) to avoid the possibility that a future defect in the trial would be claimed because of the waiver; and 3) to avoid the possibility that a potential change of counsel between the preliminary hearing and the trial might result in a defect because necessary evidence was not established in the record (H.C. Tr. at 63-64, 100-01). The bargain ultimately

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<sup>7</sup> The plea bargain is addressed further in subsection F, infra.

struck by the parties required that the State relinquish its concerns and permit waiver of the preliminary hearing in exchange for a guilty plea. In return, petitioner gained several benefits: 1) the ability to employ the strategy outlined above; 2) the cessation of the preliminary hearing proceedings as adamantly desired by petitioner; 3) the return of certain items of clothing; and 4) the return of money petitioner possessed when arrested (5th R. at 79-86; H.C. Tr. at 47-48). Additionally, petitioner agreed to plead guilty to only one of the numerous aggravating circumstances alleged in the information: a previous conviction for a violent felony (H.C. Tr. at 24-25). As this Court recognized in the direct appeal, "[i]t is clear from the record that great care was taken to ascertain the voluntariness of his plea." State v. Parsons, 781 P.2d 1275, 1280 (Utah 1989).

The benefits petitioner received were clearly meaningful to him, despite his assertions to the contrary. Petitioner actively sought to waive the preliminary hearing before it began (H.C. Tr. at 27, 45). When Judge Shumate's attempts to secure the prosecution's consent failed, the hearing commenced. Judge Shumate testified that once the preliminary hearing started, petitioner "was extremely agitated and upset . . . [and] had no desire whatsoever to go through [with it]." (H.C. Tr. at 27). Shumate explained that not only did petitioner want the proceedings stopped, but he "became extremely adamant, basically said, I don't want this to go farther any more" and authorized counsel to "just do whatever it takes to get this

thing stopped." (Id.). Scott Burns indicated that petitioner made similar statements in open court at the preliminary hearing (H.C. Tr. at 63). Petitioner readily admitted his repeated attempts to waive the preliminary hearing (H.C. Tr. at 44-46). Further, petitioner thought the clothing and money sufficiently important below to actively pursue them before any plea agreement was struck (5th R. at 54-55), and to push the prosecution to return them to him when the State's performance was delayed (5th R. at 96-97, 107-08).

Entering a guilty plea was a valid legal strategy, and defendant received the benefit he bargained for. He has not shown that absent counsel's advice he would have insisted on going to trial. Accordingly, counsel's recommendation to enter the guilty plea was not ineffective representation.

#### D. Inadequate Juror/Witness Contact Investigation

Petitioner claims that his counsel was ineffective because, after a witness and a juror had contact at the penalty phase, counsel did not actively examine the witness, did not ask the juror if he had been influenced by the contact, and specifically waived the issue for appellate review by commenting that he saw no prejudice from the contact (Br. of App. at 26-27).

Petitioner relies heavily on the "strict approach" to juror/witness contact taken by this Court in State v. Pike, 712 P.2d 277, 279-81 (Utah 1985). However, when faced with petitioner's substantive challenge to the contact on direct appeal, this Court held that "[e]ven analyzing the facts under

the standards provided in [Pike], . . . we could find no error." Parsons, 781 P.2d at 1285 (citation omitted). Where there was no substantive error arising from the contact, counsel's waiver of the "error" and his failure to more vigorously interrogate the witness and the juror cannot constitute ineffective assistance. See Codianna, 660 P.2d at 1109; State v. Malmrose, 649 P.2d 56, 58 (Utah 1982) (a failure to act when the act would have proven futile will not establish ineffective assistance).

E. Failure to File a Formal Discovery Motion

Petitioner next complains that his counsel was ineffective because he did not file a formal discovery request and that his sentence should be vacated solely because of counsel's allegedly improper conduct. He expressly fails to establish any prejudice from the lack of a formal discovery motion, claiming that, under State v. Booker, 709 P.2d 342 (Utah 1985), he has "lost forever the right to discover and apply information that may exist." (Br. of App. at 30). In Booker, defense counsel did not make the discovery request required under Utah Code Ann. § 77-35-16 (1982), either written or oral, at any time. Booker, 709 P.2d at 346. He was therefore unable to assert error in the prosecution's failure to provide him with a police report prior to trial. Id. Booker is inapposite to this case, as petitioner here presents a constitutional argument and does not contest the evidence that the prosecution had an open file policy and provided all information to defense counsel as it was received. Petitioner does not claim that undiscovered

information existed during trial or was found subsequent to trial which affects this case. Speculation that exculpatory evidence may be found in the future which may be adversely affected by the lack of a formal discovery motion will not support a finding of ineffective assistance. State v. Colonna, 766 P.2d 1062, 1068 (Utah 1988) (mere speculation is insufficient); Bundy, 763 P.2d at 806. Because there does not appear to be any possibility of prejudice to petitioner due to the lack of a formal motion, petitioner's claim must be denied. See State v. Morgan, 813 P.2d 1207, 1210 (Utah App. 1991).

Although petitioner's failure to meet the second (prejudice) prong of the ineffectiveness test defeats this claim, he also fails to meet the first prong. Petitioner cites no authority holding that the failure to file written discovery requests constitutes per se ineffective assistance of counsel. See, e.g., State v. Vigil, 840 P.2d 788, 791 (Utah App. 1992) (failure to file formal discovery motion is not per se ineffective assistance). As long as counsel adequately investigated the case through methods other than by formal discovery, his failure to file a written motion would not constitute deficient performance. See id., 840 P.2d at 791-92. In this case, counsel adequately investigated the case, in part through an informal discovery arrangement with the prosecution whereby both parties had access to any information in the police or county attorney's files (H.C. Tr. at 22-24, 35, 59). The prosecutor voluntarily provided defense counsel with copies of

various documents, acquiring an on-going duty to disclose any material which he may discover. State v. Knight, 734 P.2d 913, 916-17 (Utah 1987). No breach of that duty has been alleged by petitioner. Further, the prosecutor testified that everything he used or discovered was given to defense counsel (H.C. Tr. at 59), and defense counsel testified that everything used by the State at trial had been made available to him previously (H.C. Tr. at 35). Petitioner has not shown that the failure to formalize the discovery arrangement in this case prevented his counsel from obtaining any information not already made available to him. Where counsel discovered all relevant information, his failure to file a formal discovery motion cannot constitute ineffective assistance. See Codianna, 660 P.2d at 1109, 1113 (failure to file motions or object when such conduct would add nothing to the proceedings does not establish ineffective assistance).

#### F. Failure to Prevent Entry of Plea

Petitioner avers that the prosecutor unconstitutionally coerced his guilty plea, and that trial counsel was ineffective in not preventing petitioner from entering the plea, not challenging at the preliminary hearing the constitutionality of the prosecutor's refusal to consent to waiver of the preliminary hearing, and not attacking the guilty plea on appeal based on duress by the prosecution (Br. of App. at 32-33). He does not claim any prejudice from this allegedly deficient conduct.

Petitioner essentially argues that Judge Shumate should have fought to obtain the waiver of the preliminary hearing

without entering the plea bargain. However, the entry of the plea not only was a means by which to waive the hearing, but, as previously established, was a tactical decision made in the exercise of reasonable professional judgment (see subsection C, supra). Because the prosecution would consider no other plea arrangement (H.C. Tr. at 29, 45, 63-64), a refusal to enter the plea would have resulted in continuation of the preliminary hearing, and the defensive strategy behind the plea would have been lost to petitioner. The existence of other options considered more reasonable by appellate counsel does not render trial counsel's conduct ineffective. Bullock, 791 P.2d at 160; Medina, 738 P.2d at 1023-24. This Court will not second-guess the strategic decisions of trial counsel. Bullock, 791 P.2d at 160; Codianna, 660 P.2d at 1110. As petitioner has not established that counsel's failure to pursue waiver of the preliminary hearing in lieu of entering a plea was not a reasonable strategic decision or that petitioner was prejudiced by counsel's failure to so act, petitioner's ineffectiveness claim should be denied.

Petitioner also challenges trial counsel's failure to attack the guilty plea on appeal based on the prosecution's alleged exercise of duress in obtaining the plea. However, he fails to establish how such conduct is deficient. The State's consent to waiver of the preliminary hearing is required by rule and by state constitution. Utah R. Crim. P. 7(7)(a); Utah Const. art. I, § 13. Petitioner cites no authority for his suggestion

that the prosecutor's use in the plea bargaining process of his consent to the preliminary hearing waiver is reversible error. Withholding consent does not rise to the level of duress merely because petitioner is adamant about his desire to waive the preliminary hearing. Any duress which may have existed did not make the plea any less a tactical decision or a reasonable exercise of trial counsel's judgment. A challenge to the plea on direct appeal would have suggested invited error, which is looked on with disfavor by appellate courts. Parsons, 781 P.2d at 1280; State v. Tillman, 750 P.2d 546, 560-61 (Utah 1987). In this case, counsel's failure to challenge the plea on appeal is within an objective standard of reasonableness and, hence, is not deficient performance.

#### G. Inadequate Trial Preparation

Petitioner contends that his trial counsel spent an inadequate amount of time with him outside of the courtroom and that this conduct is sufficiently deficient to warrant reversal of his death sentence. Instead of establishing how the amount of time spent together constituted deficient performance, petitioner urges this Court to hold that it is per se ineffective for counsel in a capital case to meet with his client outside the courtroom for a total of between four and twenty hours (Br. of App. at 33-34). Once again petitioner fails to show how this allegedly deficient conduct resulted in prejudice.

This Court has not established the arbitrary time limit petitioner seeks to create in order to measure defense counsel's

performance, and petitioner provides no legal authority to do so here. Instead, by noting the disparate estimates given by himself and Judge Shumate regarding time spent together on the case and arguing that Shumate was not credible, petitioner seeks a re-evaluation of the district court's credibility determination. He fails to show that additional time spent with his trial counsel would have yielded any information not already available to counsel at trial.

The time counsel actually spent with petitioner was a fraction of the time he spent on the case as a whole. Judge Shumate testified that he spent eight to ten hours on the case prior to the preliminary hearing, 400 to 500 hours total working on the case, and 100 hours taking the direct appeal (H.C. Tr. at 28-29, 34-35, 37-39). He outlined the type of work he undertook, including the use of extensive discovery. In addition to the evidence he ultimately adduced at the penalty phase, counsel discovered what evidence the State would later present to the sentencing jury. Absent a suggestion of what relevant additional information would have been revealed had counsel spent more time with petitioner, counsel's failure to meet further with petitioner should not be presumed to be deficient or prejudicial.

#### H. Failure to Conduct Adequate Voir Dire

Petitioner argues that his trial counsel rendered deficient performance by failing to conduct an adequate voir dire from which an appellate court could determine whether a change of venue should have been sought due to publicity about the murder

(Br. of App. at 36). Counsel's alleged failure to make the necessary record, petitioner argues, should release him from the burden of establishing prejudice under the second prong of the Strickland test (Id.). However, the record is sufficient to establish that the publicity did not affect the impartiality of the seated jurors and that counsel's failure to seek a change of venue was not ineffective assistance.

Although an accused must be tried by a fair and impartial jury, he is not entitled to be tried by a jury that has heard nothing about his case. State v. James, 819 P.2d 781, 797 (Utah 1991); State v. Lafferty, 749 P.2d 1239, 1250 (Utah 1988), habeas corpus granted on other grounds, 949 F.2d 1546 (10th Cir. 1991). The fact that most of the jurors had some exposure to the case does not establish a due process violation. Gardner, 789 P.2d at 277. The voir dire process need only establish the impartiality of the jurors. Id., 789 P.2d at 277-78; State v. James, 767 P.2d 549, 551 (Utah 1989). This Court has not mandated the questions to be asked in voir dire. See James, 819 P.2d at 797; State v. Worthen, 765 P.2d 839, 844 (Utah 1983).

Contrary to petitioner's assertion, sufficiently thorough questioning of the venire occurred here. The district court questioned the venire individually in chambers, asking each prospective juror what information he or she had received about the case, the source of the information, and whether he or she had formed an opinion about petitioner's sentence based on what they had heard (Sent. Tr. IA & IB at 95-100, 117-20, 126-29, 165-

67, 207-09, 268-71, 290-95, 314-18, 348-50, 378-83, 412-14, 418-21; a copy of the relevant voir dire of the seated jury is submitted herewith as Addendum F). Following the questioning, the district court was satisfied with the jurors' impartiality. Neither the record nor petitioner's argument to this Court demonstrate any error in that determination. Some of the seated jurors had no media exposure at all (H.C. Tr. at 207-09, 412-14, 418-21), and the remaining jurors either had formed no opinion or had formulated light impressions which they were willing to set aside in order to listen to the evidence and apply the law (Sent. Tr. IA & IB at 95-100, 117-20, 126-29, 165-67, 268-71, 290-95, 314-18, 348-50, 378-83; Addendum F). This is sufficient to establish the impartiality of the jury. Gardner, 789 P.2d at 277-78; Lafferty, 749 P.2d at 1250-51. Petitioner has failed to explain what additional questions should have been asked and how those questions would have caused a different result. Hence, he has not demonstrated how the original voir dire was insufficient.

#### I. Failure to Further Object to the Special Verdict Forms

Petitioner argues that his trial counsel rendered ineffective assistance by failing to object to the use of the special verdict forms on the grounds that they: 1) "misled" the jury to impose the death penalty; 2) improperly allowed the jury to consider as an aggravating circumstance an offense not identified in Utah Code Ann. § 76-5-202 (1978); and 3) permitted the jury to find three aggravating factors where only one was available by law (Br. of App. at 38-41). He contends that this

conduct unfairly exposed him to a greater likelihood of receiving the death penalty than otherwise permitted by law.

In petitioner's direct appeal, this Court rejected the argument that the special verdict forms misled the jury toward finding aggravating circumstances and imposing the death sentence. Parsons, 781 P.2d at 1280. Accordingly, any objection by petitioner's trial counsel on the basis that the forms encouraged the rendering of a death sentence would have had no effect on the outcome of the proceedings, and his failure to make the objection would not constitute ineffective assistance. Colonna, 766 P.2d at 1067-68; Codianna, 660 P.2d at 1109, 1113.

Petitioner asserts that the use as an aggravating circumstance in the special verdict forms of the fact that he was a parolee in possession of a firearm required an objection by his trial counsel. This circumstance does not appear in the listed circumstances in Utah Code Ann. § 76-5-202 (1978), which pertained to determining petitioner's guilt in 1987 and 1988 (a copy of the statute is submitted herewith as Addendum G). However, petitioner had already pled guilty; only the penalty phase remained. Determination of aggravating and mitigating circumstances for purposes of imposing an appropriate penalty is not limited to the circumstances listed in the statute. Sentencing for a capital felony in 1988 was governed by Utah Code Ann. § 76-3-207 (1978) (a copy of the statute is submitted herewith as Addendum H). The aggravating factors listed in § 76-5-202 are expressly included in the aggravating circumstances for

sentencing purposes. Utah Code Ann. § 76-3-207 (1978). However, aggravating circumstances for sentencing are not limited to the factors listed in § 76-5-202. The fact that petitioner was a parolee in possession of a firearm constituted information about his "character, background, [and] history" as permitted by § 76-3-207 for sentencing purposes. It was properly included as an aggravating factor in the sentencing phase, and counsel's failure to object to the factor does not amount to deficient performance.

Petitioner also argues that counsel should have objected to the special verdict forms because they listed two statutory aggravating circumstances, i.e., in the course of a robbery and committed for pecuniary gain, which enhanced the likelihood of the death penalty because it divided a single act into two aggravating circumstances. However, the facts demonstrate that each aggravating circumstance was a separate act. The evidence produced at the penalty hearing was that petitioner killed Richard Ernest and took personal property (Ernest's wallet, his car, and the personal effects and tools in the car) from his person or immediate presence by using a dangerous weapon. Utah Code Ann. § 76-6-302 (1978) (a copy of the statute is submitted herewith as Addendum I). Petitioner later used Ernest's identity and credit cards to secure lodging and to purchase items at a retail store. The latter acts were a pecuniary or personal gain separate from the robbery. Hence, a single act was not divided into two aggravating circumstances.

Even if petitioner's argument were correct, the weighing of aggravating and mitigating circumstances is not a numerical function. The jury was instructed to consider the totality of the aggravating and mitigating circumstances, to determine if the total aggravating outweighed the total mitigating beyond a reasonable doubt, and that they must find beyond a reasonable doubt that the death penalty was justified and appropriate (5th R. at 265, Instruction No. 12; copy submitted herewith as Addendum J). The jury was specifically instructed not to weigh the circumstances in terms of relative numbers (Addendum J). The jury can be presumed to have followed the instructions and to have looked at the totality of the circumstances in performing their weighing function. State v. Gardunio, 652 P.2d 1342, 1344 (Utah 1982). That homicide in the course of a robbery and homicide committed for pecuniary gain were given as separate circumstances does not mean that the jury gave them improper weight.

Counsel's challenged performance was not prejudicial to petitioner. This Court, in the direct appeal, found that "the [sentencing] court instructed the jury in meticulous compliance with the standards set forth in State v. Wood and section 76-3-207 and the special verdict questions and instructions did not conflict with these standards[.]" Parsons, 781 P.2d at 1280. Because there was no prejudice from the giving of the instructions and special verdict forms, there would be no

prejudice stemming from counsel's failure to object thereto on the grounds argued by petitioner.

J. Cumulative Effect of Ineffectiveness Claims

Petitioner contends that while some of his claims of ineffective assistance, taken separately, do not justify reversal of his sentence, their cumulative effect establishes that his counsel's ineffective representation (Br. of App. at 20).

The cumulative error doctrine applies only where petitioner establishes the existence of reversible error. Lairby v. Barnes, 793 P.2d 377, 378 (Utah 1990); State v. Johnson, 784 P.2d 1135, 1146 (Utah 1989); Bundy, 763 P.2d at 806. None of the individual points raised by petitioner have been shown to be ineffective assistance of counsel. Each instance of trial counsel's allegedly deficient performance consisted of counsel's exercise of reasonable professional judgment or his omission of objections or formal motions which would have had no effect on the proceedings. There is not a likelihood or even a significant possibility that any of the alleged errors prejudiced petitioner's right to a fair trial, and he has not shown that the results of the sentencing proceedings were unreliable. Accordingly, his request for relief based on cumulative error should be denied. Lairby, 793 P.2d at 378.

### POINT III

PETITIONER IS NOT CONSTITUTIONALLY ENTITLED  
TO REPRESENTATION AT STATE EXPENSE IN  
PURSUING HABEAS RELIEF OR APPEALS THEREFROM

#### A. Introduction and District Court's Ruling

Petitioner seeks to have this Court declare, as a matter of state and federal constitutional law, that the State of Utah must pay attorney's fees and costs for work done on an inmate's behalf in connection with his initial state habeas corpus proceedings and the first appeal therefrom (Br. of App. at 42).<sup>8</sup> He equates the right to seek habeas review with the right to take a direct appeal, claiming that once a state grants either right, it must provide counsel to indigent inmates (Id at 44-45).

Although voicing concern both for the inmate who must rely on pro bono representation and for the lawyers "constrained" to provide such services, the district court simultaneously recognized the "superb" representation given petitioner in this matter and the fact that the question is one for legislative, not judicial, resolution (3d R. at 265, 280-81; Addendum D). Because petitioner has no constitutional right to counsel in a collateral

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<sup>8</sup> Habeas corpus proceedings necessarily involve challenges which impact on a defendant's conviction and/or sentence. Petitioner seeks payment "for the work done in the district court and for the work done in connection with this appeal." (Br. of App. at 42). This relief should not be granted by this Court as it benefits petitioner's current counsel alone and does not impact on petitioner's sentence or conviction. If this Court finds a constitutional right to counsel at state expense in this matter, it should not grant the requested relief but should remand the case for the appointment of counsel and a new evidentiary hearing, ordering the state to pay costs and fees incurred on petitioner's behalf in the new proceeding.

review of his conviction, the State has no obligation to pay attorney's fees for his counsel's representation of him in either the initial habeas proceedings or this appeal therefrom.

## B. Federal Constitution

### 1. Waiver

Petitioner waived federal constitutional review by conceding the issue in the district court. The State submitted a memorandum to the district court in support of its motion for partial summary judgment, using federal law to argue that petitioner has no constitutional right to counsel in state post-conviction proceedings (3d R. at 46-47; copy submitted herewith as Addendum K). In response, petitioner argued that the State's position must fail because

"it relies upon the U.S. Supreme Court decision that states are not required to appoint counsel for indigent death row inmates seeking state post conviction relief. That determination is, of course, made under the federal Constitution [sic]. As explained above in great detail, the Utah Constitution takes an entirely different approach to a writ of habeas corpus."

(3d R. at 92; copy submitted herewith as Addendum L). The remainder of petitioner's response focused solely on the state constitution (3d R. at 92-94; Addendum L). Six days later, petitioner filed a more specific statement of his habeas claims (3d R. at 113-21; copy submitted herewith as Addendum M). That statement expressly ties his claim for costs and attorney's fees to the state constitution, ignoring completely the federal constitution (3d R. at 120; Addendum M). Hence, petitioner has abandoned his federal claim.

## 2. Merits

Generally, the State would rely on its waiver argument and ask this Court to procedurally bar petitioner's argument in this appeal. However, given this Court's position of broadly addressing all issues in direct appeals involving capital cases, the State includes a brief argument on the applicable case law should this Court reach the merits of petitioner's argument.

Petitioner recognizes in his opening brief the existence of United States Supreme Court case law which is directly contrary to the position he takes on this issue before this Court (Br. of App. at 45). He then summarily states that the cases "are distinguishable from the circumstances here[,]" and "reserves argument for an appropriate response in a reply brief should the state elect to rely upon these cases." (Id.). He provides no legal analysis and makes no attempt to distinguish the cases. This ploy requires the State to make petitioner's argument for him before it can show that the argument has no merit. The State has no responsibility to make petitioner's argument, and petitioner should not be allowed to distinguish the cases in his reply brief, to which the State cannot respond.

Petitioner cites two United States Supreme Court cases in support of his assertion that he has a federal right to counsel at state expense in state habeas proceedings wherein he raises a new issue for the first time: Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437 (1974), and Douglas v. California, 372 U.S.

353, 83 S. Ct. 814 (1963).<sup>9</sup> Although both cases provide that an indigent inmate has a constitutional right to appointed counsel in his first appeal of right, neither case expands its holding to discretionary appeals in state courts as petitioner urges. Moffitt, 417 U.S. at 610, 612, 616 (neither the due process clause nor the equal protection clause of the federal constitution requires that states provide indigents with counsel to pursue state-granted discretionary appeals in state courts); Douglas, 372 U.S. at 356 (expressly limiting its holding to cases where an indigent inmate is denied appointed counsel in his first appeal of right). Accordingly, both cases are inapposite to petitioner's claim.

The cases recognized without discussion by petitioner as contrary to his position are determinative of this issue. In Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990 (1987), the Supreme Court reiterated and applied its holding in Moffitt that the federal constitutional right of indigent prisoners to appointed counsel which exists in a direct appeal does not exist in state postconviction proceedings. Id., 481 U.S. at 555, 557 (Moffitt's holding and rationale "apply with even more force to postconviction review."). The Supreme Court reaffirmed its position in both Finley and Moffitt in Murray v. Giarratano, 492 U.S. 1, 109 S. Ct. 2765 (1989) (concluding that this rule "should apply no differently in capital cases than in noncapital

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<sup>9</sup> He makes no assertion for relief based on the due process clause of the federal constitution.

cases."), cert. denied, 111 S. Ct. 83 (1990). These decisions require rejection of petitioner's position.

### C. State Constitution

Petitioner seeks to expand his state constitutional rights because he is an indigent capital defendant raising a new issue for the first time in postconviction proceedings (Br. of App. at 48).<sup>10</sup> Utah courts have not expanded the right to appointed counsel beyond the first appeal of right, and petitioner cites no other jurisdiction which has interpreted its own state constitution in the manner he now advocates.

Petitioner begins his argument by urging that the right to appointed counsel which attaches to the state-granted right to a direct appeal applies equally to the state-granted right to habeas review (Br. of App. at 46-47). He provides no legal support or policy for this parallel. The privilege of habeas review in Utah's constitution comes from its federal counterpart,

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<sup>10</sup> As the district court correctly found, the question of state payment of costs and attorney's fees incurred by indigent inmates in postconviction proceedings is a legislative function, and the legislature has not provided for the relief sought by petitioner. Utah Code Ann. § 77-32-1 (1990) (the duties of counsel assigned to represent indigent defendants includes "the taking of a first appeal of right and the prosecuting of other remedies before or after a conviction, considered by the defending counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.") (emphasis added); Utah Code Ann. § 77-32-3(2) (1990) ("assigned counsel shall not have the duty or power under this section to represent an indigent defendant in any discretionary appeal or action for a discretionary writ, other than in a meaningful first appeal of right . . . ."); see also Turtle Management, Inc. v. Haqqis Management, Inc., 645 P.2d 667, 671 (Utah 1982) (Utah "adheres to the well-established rule that attorney's fees generally cannot be recovered unless provided for by statute or contract."). Petitioner presents no statutory argument.

U.S. Const., art. I, § 9, and the inclusion of habeas review in the state constitution separate and apart from the right to a direct appeal suggests that the privileges are not to be granted identical treatment. Utah Const. art. 1, § 5 (habeas), § 12 (direct appeal). While a direct appeal seeks to insure against errors which occurred at the trial level and which are apparent in the record, see, e.g., State v. Theison, 709 P.2d 307, 309 (Utah 1985) (requiring an adequate record before alleged errors may be reviewed on the merits), postconviction review historically arises from the common-law writ of error coram nobis and provides the method by which a district court may look into facts which do not appear on the face of the record but which establish that the prisoner has been deprived of his right to a fair trial. State v. Johnson, 635 P.2d 36, 38 (Utah 1981). These differences support the federal position that direct and collateral review do not carry identical constitutional requirements, dictating against identical treatment thereof.

Petitioner provides no authority or analysis for the distinction of capital and noncapital postconviction proceedings, arguing only that an indigent capital inmate has no reasonable access to habeas review absent appointment of counsel at state expense. Death row inmates have the same reasonable access to state habeas review as any other incarcerated noncapital indigent defendant. The fact that Utah courts grant capital cases a more expansive scope of review on direct appeal, State v. Menzies, 182 Utah Adv. Rep. 3, 4 (Utah Mar. 11, 1992), does not dictate that

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capital cases require application of heightened review in habeas proceedings. See Giarratano, 492 U.S. at 8-10 (finding that the special safeguards accompanying the guilt and penalty phases at the trial level and the first direct appeal provide the degree of reliability required to impose the death penalty, and making no distinction in federal habeas proceedings between the rights of capital and noncapital case petitioners, both of whom must meet the same standards in establishing error). Petitioner provides no basis for this Court to depart from the federal rationale. The severity of petitioner's sentence does not justify an expansion of his state constitutional rights in postconviction proceedings beyond those afforded other indigent inmates. See Pierre v. Morris, 607 P.2d 812, 815 (Utah) (in an appeal from the dismissal of a habeas petition, this Court held that "[t]he severity of the death penalty standing alone does not render it unconscionable for this Court to deny further review."), cert. denied, 449 U.S. 891 (1980). This is especially true where, as here, petitioner not only obtained habeas review, but benefitted from "superb" representation by pro bono counsel.

Petitioner urges that he is entitled to counsel because his habeas petition includes a "new" claim of ineffective assistance of trial counsel. However, raising a new issue in postconviction proceedings which requires the taking of evidence has not been held to convert a collateral proceeding to a direct appeal, as defendant seems to argue. See Coleman v. Thompson, 501 U.S. \_\_\_, 111 S. Ct. 2546, 115 L.Ed.2d 640, 673 (1991) (even where the challenge may only be presented in state postconviction proceedings, there is no federal constitutional right to counsel

in the collateral proceedings). Postconviction proceedings, by definition, do not involve issues which could or should have been raised on direct appeal. Fernandez v. Cook, 783 P.2d 547, 549 (Utah 1989). Therefore, every issue properly raised in habeas proceedings will be raised for the first time, and the district court is in a position to entertain evidentiary hearings to take any additional evidence necessary to fully review the claims. Petitioner may raise his ineffectiveness claim for the first time in his habeas petition due to Utah's exception to its procedural bar rules. He does not explain why this entitles him to expanded constitutional rights.


Finally, petitioner contends that his due process rights were violated because he was denied a thorough investigation into his ineffectiveness claims solely due to his indigency. The mere expense of an investigation is not a sufficient policy reason to require payment of costs and fees by the state as a constitutional right. Petitioner's claim that the proper investigation would require "large sums of money" and his assertion that the necessary evidence to support his claims exists are too speculative to establish a due process violation or to support an expansion of his constitutional rights.

#### CONCLUSION

For the foregoing reasons, the denial of petitioner's habeas petition should be affirmed.


RESPECTFULLY submitted this 26<sup>th</sup> day of January, 1993.

JAN GRAHAM  
Attorney General

  
KRIS C. LEONARD  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to petitioner's attorneys Gregory J. Sanders, KIPP & CHRISTIAN, City Centre I, Suite 330, 175 East 400 South, Salt Lake City, Utah 84111-2314, and Ronald J. Yengich, YENGICH, RICH & XAIZ, 175 East 400 South, #400, Salt Lake City, Utah 84111, this 26<sup>th</sup> day of January, 1993.

A handwritten signature in cursive script, appearing to read "Kipp & Christian", is written over a horizontal line.