

1984

State of Utah v. Elroy Tillman : Brief of Appellant

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IN THE SUPREME COURT OF
THE STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff-Respondent,)	
)	
vs.)	Case No. 19000
)	
ELROY TILLMAN,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is a criminal proceeding brought by the State of Utah against Elroy Tillman charging him with Murder in the First Degree, a capital offense, pursuant to Section 76-5-202, Utah Code Annotated, 1953, as amended.

DISPOSITION IN LOWER COURT

On January 14, 1984, a jury found appellant guilty as charged and on January 20, 1983, the same jury found for the death penalty and on February 4, 1983, the trial court sentenced appellant to death by shooting.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this Court reversing the judgment of guilt rendered at trial, reversing the sentence of death and remanding the case for a new trial, for new sentencing procedures or for the imposition of a life sentence.

STATEMENT OF FACTS

On May 26, 1982, at about Bryant Avenue and 1300 East, Salt Lake County, Utah, Mark Allen Schoenfeld received several blows to the head with a blunt instrument and died sometime later as a result of asphyxiation caused by a burning mattress.

The dead victim was discovered by the State's first witness, Craig A. Jones, who had smelled smoke about 4 a.m., investigated, and some time later at 6:10 a.m. entered the victim's apartment through the partially ajar front door. The witness warned the downstairs occupants and had his wife call the Fire Department. Through the witness, the State introduced State's Exhibits 1-3, which depict the building exterior. (Tr. 1/4/83, 111-128) (All references to transcript are 1983 dates of trial with the appropriate page numbers.)

Dr. Monique Riser, Assistant Medical Examiner, conducted an autopsy on the victim after viewing the body at the scene (see State's Exhibits 6-8, 10, 11) and determined that the cause of death was asphyxiation; however, several blows to the head contributed to the death and, of themselves, the blows could have resulted in death (Id. 136) as could the burning injuries solely cause death. (Id. 134) The witness concluded three to six blows were struck, none of which left residue or imprinted fabric in the wounds, although if a shirt had been placed over the victim's head when the blows were struck, the witness in most cases would have expected to see fabric imprint.

(Id. 147-153) The blows were indistinguishable with respect to apparent force. (Id. 156) Times of death were narrowed down to 12 midnight to 1 a.m. (Tr. 1/5, 8-10)

Kenneth Dailey, an arson investigator, testified he investigated the subject fire on the morning of May 26, 1982, and determined the point of origin was along the perimeter of the mattress on which the victim was found. The witness, through State's Exhibit 18, was able to pinpoint the origin of the fire at the bottom of the mattress. (Id. 25-47)

Clarence Montgomery of the Woods Cross Police Department testified that on April 13, 1982, he observed an axe in the back of the vehicle driven by appellant. The axe handle had been wrapped with black tape and the axe head itself was bigger than a Boy Scout hatchet. (Id. 96-104)

Lori Groneman, age 22, then testified she had known appellant for five and one-half years and had lived with the appellant in the State of California and Utah as late as August of 1980. She began dating the victim steadily in February, 1982, although she had sexual relations with appellant as late as January, 1982. (Id. 101-119)

The witness testified she received daily calls from appellant after she terminated the relationship in January of 1982 and on occasion saw defendant around Sperry Univac where she was employed. She recalled a threatening sign found on her front lawn during September, 1980, which she attributed to appellant because of unique writing characteristics. She also

indicated sugar was put into the gas tank of her car and that appellant had claimed automobile damage during the same week. (Id. 120-135)

During March of 1982 the witness received threatening phone calls from a female caller, and in April of 1981 she received a pistol from appellant. She also asserted appellant followed her three times during a two year span. (Id. 136-149)

Lori Groneman testified she went to the victim's home after work on May 25, 1982, and arrived there with the victim between 5:20 and 6 p.m., had dinner consisting of barbequed shish kebabs shortly before 10 p.m. and was taken home by the victim approximately 11 p.m. with a 20- or 25-minute driving time one way. (Id. 150-170)

She also stated the appellant had threatened her life in 1980 on two occasions, and in 1982 the appellant had pushed her against a car during an argument. (Id. 170-178) The witness said she recognized the voice of Carla Sagars after meeting her in person at the County Attorney's office. (Id. 178-188)

During proceedings on January 6, 1983, Ms. Groneman testified to numerous phone calls between her and the appellant, and detailed at some length her opinion of appellant's threats, misconduct of dubious impact which, although allegedly reported to police, never resulted in any arrest or police action. (Tr. 1/6, 114-133)

She further testified about a gun appellant gave her in April, 1981, and the fact she bought a gun herself in March, 1982. The witness countless times volunteered information about her fears of appellant. (See for illustration only Tr. 1/6, 121, 123, 125, 129, 130, 140, 146-147, 148.)

The thrust of the witness' testimony was that she and the appellant had a tumultuous relationship for some years resulting in the witness' fear of appellant.

With respect to the alleged "burglary" of the victim's residence involving some stereo speakers, the witness testified that appellant's speakers at all times remained at the home of the witness with the knowledge of appellant. (Id. 167)

Carla Sagars, the State's immunized key witness, testified on January 6th (Tr. 1/6, 191, et seq.) that as an employee of the Federal Government she met appellant in August of 1980 and thereafter became romantically involved with appellant. (Id. 198) Approximately two to three months before the homicide, Ms. Sagars began placing calls to Lori Groneman's residence to convey threats or questions allegedly at appellant's request. (Id. 200-206) Appellant was not present with the witness when calls were made. The witness also testified that on two occasions she had purchased a .22 caliber revolver, shot one of them in appellant's presence and discussed silencers with the appellant. (Id. 208-222) She alleged the appellant said he was going to make a silencer. (Id. 223-227) She further testified she and appellant drove past the victim's house a

number of times between March, 1982, and the day of the homicide (May, 1982); that she obtained the victim's name from a new car sticker; and that she and appellant discussed explosives being placed on the victim's car. (Id. 228-236) She indicated a couple of attempts were made to discharge a bomb of some sort. (Id. 237-243) Poisoning was discussed by the witness and appellant (Id. 243-248), and the witness snooped around the victim's residence at appellant's request. (Id. 252-256) These activities culminated in Carla Sagars going to the victim's house to kill him. (Id. 260-263) The witness recounted that appellant threatened to "do it" himself. (Id. 265)

On direct examination Carla Sagars testified at length concerning the details of the homicide commencing with her work day (Id. 276) and ending with her being questioned by detectives some days later. (Id. 333) According to the witness, no mention was made by appellant or the witness at any time prior to or during the homicide that the purpose of entry into the victim's residence was to obtain property. (Id. 369-372)

Ms. Sagars stated appellant planned to enter the victim's house and kill him on the spot. (Id. 417-419) Arson or fires were not discussed. (Id. 420) Some five hours were spent by Ms. Sagars and the appellant in loitering about or inside victim's residence during which time Ms. Sagars attempted to use the telephone or walk around. She did not attempt to warn anyone or call police for fear of losing her job or

perceived revenge from appellant. (Id. 421, 430, 432) A gas can was carried by appellant to the victim's apartment front door and returned to the government automobile after the homicide. The gas can was not observed thereafter. (Id. 444-449) Ms. Sagars stated she crawled into the victim's bedroom, retreated, turned on the kitchen light, re-entered the area and observed the victim breathing but wounded as a result of one blow. (Id. 450-462) Two blows were heard by Ms. Sagars. (Id. 462) Ms. Sagars and appellant left taking a towel, perhaps a shirt, the axe and a gas can with them. Little conversation occurred during the trip home or while discarding the incriminating evidence. (Id. 467-473) Ms. Sagars admitted to still having some of appellant's gloves in her possession. (Id. 476)

Several days after the homicide, Ms. Sagars told police officers she had been with appellant the night of the homicide and that she and appellant had driven to Pineview Reservoir and in the direction of Logan. (Id. 479-480) She never tried to contact appellant after the homicide. (Id. 482-483) She "confessed" to Detective Chapman that appellant had committed the homicide after Miranda-type warnings. (Id. 484-485)

Ms. Sagars counseled appellant against hitting the victim again and opined that the fire should kill him; that the bathroom light should be turned off; that the fire might be a good cover-up for a homicide; that a "smoking in bed" theory might work; and that no property should be taken during the

crime. (Id. 488-493) She denied involvement in setting the fire, although she placed the point of origin away from her position and toward appellant's position (but cf. the testimony of Kenneth Dailey, *supra*). (Id. 493)

On redirect and re-cross, Ms. Sagars indicated the appellant had blood splatters on his jacket although this evidence wasn't previously disclosed in recorded statements. (Id. 502-512)

George Groneman testified that during April, 1982, and thereafter, he logged and recorded incoming phone calls because of the harassing nature of the calls. (Tr. 1/10, 3-17) Mr. Groneman had told appellant phone calls were being recorded. (Id. 38) A threatening sign reportedly was found by family members in early 1982 (cf. Lori Groneman's testimony referring to September, 1980), although the witness was not sure of the precise time frame. (Id. 45)

Kent Haden testified that he was appellant's supervisor during employment wherein appellant installed glass into frames, handled warehousing, etc. (Tr. 1/10, 50-62) Appellant was punctual, a good worker and involved in semi-skilled operations requiring some ability to measure and work with metal. (Ibid.) Appellant used or had access to brown cotton gloves similar to State's Exhibits 13 and 15. (Ibid.)

Brian Taylor, Bountiful Police Officer, testified he took reports of threatening phone calls from Lori Groneman on March 27, 1981, and a few days later investigated Ms. Groneman's

complaint of sugar in the gas tank of her automobile. (Tr. 1/10, 80-83)

Marty Vuyk, Salt Lake City Police Department, testified that he investigated the homicide in question commencing about 6:30 a.m., May 26, 1982. He testified the body had not been moved prior to photographing (Tr. 1/10, 92); that he accompanied Ms. Sagars and other detectives to an area where burned material was recovered (Id. 92-96); that he directed unsuccessful attempts to recover an axe at the north Redwood Road location indicated by Ms. Sagars (Id. 97-99); that gloves were recovered at a point further north on Redwood Road (Id. 100); and laid foundation for the State's Exhibits consisting of a burned shirt and towel and a diagram of the area. (Id. 100-102) He further testified no usable prints were found at the homicide scene. (Id. 106-107) The burned shirt was not identifiable as a man's or woman's shirt. (Id. 109)

Steve Chapman, Salt Lake City Police Department, testified he met Carla Sagars at the airport on May 28, 1982, took statements and procured physical evidence as a result of those statements. (Tr. 1/10, 126-132). He obtained a modified .22 caliber revolver from Ms. Sagars and a .22 caliber revolver from Ms. Groneman. (Id. 132-133) Ms. Sagars gave different stories, the first story being consistent with a statement obtained from appellant on May 26, 1982. (Id. 133-142) In that statement, appellant essentially told Detective Chapman the following salient facts: he understood his Miranda rights

and would talk; he didn't know the victim; he had never been in the area of the homicide; he knew Carla Sagars and had spent and night in question with Ms. Sagars by going to Pineview Reservoir by automobile; he arrived home between 11:45 and 12 [p.m.]; that it was Ms. Sagars' idea to go to Pineview; he didn't drink alcohol; he never saw Ms. Sagars leave that night; he awoke at 7 a.m. and woke his roommate; he had spoken to Lori Groneman as late as May 25, 1982; he had no desire to continue any relationship with Lori Groneman; on the morning of May 26, 1982, he had gone to Ms. Sagars' apartment, his apartment, the airport and back to his apartment; he had a picture of Ms. Groneman but not of Ms. Sagars; he was a close acquaintance of Ms. Sagars and would probably see her when she returned; he was friends with Scribner; he had a telephone number for Lori Groneman and her father's business phone; and that his roommate did not see him return home on the evening of May 25, 1982. (Id. 137-158)

Detective Chapman was allowed to testify, over objection, that the Sagars' version was consistent with his observation of the crime scene. (Id. 159) He recounted how Ms. Sagars had led him to the location of various items of physical evidence. (Id. 160-167) On cross-examination he testified that the gun obtained from Ms. Sagars appeared operable but had been modified with a standard plumbing pipe on the barrel. (Id. 175-179) Lab tests of Ms. Sagars' clothes were performed, but since the clothes had been washed or possibly were not worn by Ms. Sagars on the night of the homicide, the

tests proved inconclusive. (Id. 175) He notes that appellant had mentioned going to Ms. Sagars' apartment the evening of May 25, 1982 (Id. 181), but later retracted that statement. (Tr. 1/11, 4-5) Detective Chapman did not directly ask appellant if Ms. Sagars could have slipped out during the night. (Tr. 1/10, 88) Appellant specifically denied killing anyone when prodded by the witness to the effect that the victim had mentioned the appellant's name to Detective Chapman shortly before dying. (Id. 185-188) The witness was unable to locate physical evidence of appellant's presence at the scene such as hair or fingerprints. (Id. 189-190) No witnesses, other than Ms. Sagars, were found to place appellant at the scene or the automobile nearby. (Id. 189)

Detective Chapman further testified that Carla Sagars recanted her initial story when confronted with proof that police knew the source of phone calls and that appellant had "used several people." (Id. 194-196) She told her story and was granted immunity without arrest or incarceration. (Id. 192-202)

Detective Chapman confirmed that Ms. Sagars had stated the fire was started at the foot of the victim's bed, more towards the east side vis-a-vis the west side. (Id. 196-197) He also confirmed that Ms. Sagars had not, during the investigation, mentioned the fact appellant had crawled out of the car window, had not mentioned that appellant had a watch, had not mentioned that appellant had a gasoline can, had not

mentioned that appellant had turned on the kitchen light, and had not mentioned that it was Sagars' idea to light the bed on fire. (Id. 205-207) Neither had she mentioned anything about blood on appellant's jacket. (Ibid.)

On redirect Detective Chapman stated he had not asked specific questions concerning the omissions noted, supra (Id. 209-212), and on re-cross he further defined appellant's statements concerning Ms. Sagars' potential absence from appellant during the time of the homicide. (See Tr. 1/11, 7-11)

Portions of the tape recording of appellant's statement were inaudible or undecipherable. (Id. 10-13)

Oscar Henderson, a firearms expert, testified he had examined the modified .22 caliber revolver and produced a commercially-made silencer for illustration of the effect of such modifications. (Id. 19-35)

Martha Kerr, serologist, testified that in examining the pair of brown gloves in evidence, she detected human blood. (Id. 37) She examined the clothing submitted by Ms. Sagars some time after the homicide and detected no blood. She found no negroid hairs or any hairs on such items. (Id. 39) The victim's pull-over sweater (Exhibit 38) had human blood on it similar to the victim's blood. (Id. 39) She did not examine the gloves for negroid hairs and was not requested to do so. (Id. 49-50)

Robert Brinkman testified as an explosives expert that he received certain residue from Detective Chapman, examined

the same and concluded the residue contained ammonium nitrates. Ammonium nitrate and fuel oil or gasoline in mixture can be explosive. (Tr. 1/11, 67-84)

The State rested and appellant called Dan George who testified that in connection with his employment at a Bountiful auto dealership, he had received reports that Lori Groneman's car had sugar in the gas tank. He examined the affected parts and concluded sugar had been placed into the gasoline tank of the car. He found no evidence of ground glass. (Tr. 1/12, 4-9)

Donald Kartchner, an employee of an engineering firm, testified he had examined a fuel filter submitted for examination and determined sugar was present. He found no ground glass, although extensive analysis was not conducted. (Id. 11-18)

Mark Welch, called by appellant, testified he had become appellant's roommate during March of 1982, in part because of similarity in the fastidious housekeeping habits of the two men. (Id. 18-22) There were no hand tools in the apartment except for a crescent wrench, a pair of pliers and some screwdrivers. (Id. 23) There was no axe or hatchet. (Id. 24) Mr. Welch saw appellant in the morning on May 25, 1982, and again at 4:30 p.m. that day. He testified Carla Sagars arrived between 5:30 and 6:30 p.m. that day wearing a long-sleeved white shirt, not the terrycloth blue-trimmed shirt labeled Defense Exhibit 42. (Id. 27-29)

After Ms. Sagars and appellant went to K-Mart and returned, Mr. Welch invited the two to eat dinner at the

apartment. A friend dropped by and at approximately 7:00-7:30 p.m., appellant and Ms. Sagars left. Appellant stated he and Ms. Sagars were going to drive to Ogden. (Id. 29-31)

Mr. Welch testified he saw appellant return between 10:30 and 11:00 p.m., although he did not see Carla Sagars at that time. He further testified he heard appellant in the bathroom about half an hour afterwards but did not observe or hear Ms. Sagars in the apartment that night. (Id. 32-34) According to Mr. Welch, Ms. Sagars would spend nights with appellant on a fairly regular basis. (Id. 36) Ms. Sagars performed laundry chores for appellant and had access to appellant's room and closet. (Id. 37) He also indicated Ms. Groneman frequently called for appellant, in fact, almost daily. (Id. 38) Appellant had informed the witness of an intention to return to California in the fall of 1982 and that appellant's relationship with Ms. Sagars was ending. (Id. 39-41) On May 24, 1982, Mr. Welch had occasion to view the trunk of the Oldsmobile Cutlass and saw no gasoline can or hatchet. (Id. 41-42)

Mr. Welch had given a sworn statement on May 26, 1982, wherein he had indicated appellant returned at 11 p.m. on May 25, 1982, but Mr. Welch did not then state, nor at trial, that he saw Ms. Sagars in the apartment during the early morning hours of May 26, 1982. (Id. 57-59) Appellant told Mr. Welch that Ms. Sagars had spent the night in the apartment. (Id. 62) Mr. Welch denied that appellant harassed Lori Groneman on the

telephone or vice-versa. (Id. 73) He indicated that appellant had sole access to a storage shed which could have contained hatchets, gas cans, ammonia nitrate, etc. (Id. 74-75) Mr. Welch also stated that George Groneman had called appellant several times shortly before the homicide. (Id. 90-91) The witness brought and identified the shirt which he believed appellant wore on the night of May 25, 1982. (Id. 97-101)

During "in camera" proceedings, Sergeant Kenneth Thirsk was admonished by the Court and counsel to abstain from referring to any polygraph examination of Carla Sagars. (Tr. 1/12, 104-107) The parties stipulated a proffer and objections to polygraph testimony would be forthcoming. (Ibid.)

Sergeant Thirsk testified to the jury he had discussed Ms. Sagars' testimony with Ms. Sagars a few days before trial commenced. In response to the accusation by Sergeant Thirsk that he did not believe Ms. Sagars' story, (actually based on polygraph results of which the jury was not aware), the following colloquy occurred:

Q Would you, Officer, be so kind as to tell the jury and the Court the content of that conversation as best you can recall, relating to your questions and her answers in response thereto?

A The conversation regarded Carla's particular activities herself during the incident at Mark Schoenfeld's home. During that conversation at one point I told her that I did not believe her answers to my questions and told her that I believed she had in fact struck Mark and I made that accusation.

Q Did she respond to that accusation?

A Yes, she did.

Q And what was her response?

A Her response was, "If you want me to say I hit him, I will."

I then said, "I don't want you to say that unless it's the truth. Tell me what happened."

She said, "I will testify that I hit him if that's what you want."

I then asked her, "How many times did you hit him," and she responded, "Twice."

I then asked, "Which side did you hit him?"

She said, "The left side."

I then asked, "Which side of the bed were you on?"

And she said, "I don't recall."

I then asked, "Did Tillman hand you the weapon?"

Her response was, "He must have."

I then asked, "Did Tillman tell you to hit Mark?"

Her response was, "He must have."

I then told her I didn't want to know what must have happened, I wanted to know what did happen. Her response was, "I don't know why I am telling you this, it isn't true anyway. I didn't hit him." (Id. 110-111)

Sergeant Thirsk also recounted that Carla Sagars had admitted that she was in the victim's room the moment blows were struck contrary to a previous denial of having been in the room at that time. (Id. 112-113) The witness noted other

inconsistencies in Ms. Sagars' responses during the two (undisclosed polygraph) interrogations such as mentioning the kitchen light switch in the second interrogation but not in the first (Id. 114-115), and mentioning turning off a bathroom light in the second interrogation, but not in the previous interrogation. (Id. 116) Sergeant Thirsk noted inconsistencies involving the gas can, revolver and light switch. (Id. 118)

Appellant rested, having reserved "in camera" the proffer of the polygraph evidence.

The State recalled Lori Groneman as a rebuttal witness. She testified appellant customarily shaved his body hair including hair on his hands although he appeared not to have done so before or during the trial. (Tr. 1/12, 135-136) On cross-examination Ms. Groneman admitted that appellant had returned her calls, according to taped telephone conversations, and that she had no way of knowing the existence or lack of body hair during May of 1982. (Id. 137-138)

The parties rested, having reserved appellant's proffer of polygraph evidence for the next day. The jury was dismissed until January 14, 1982, at 9 a.m. (Tr. 1/12, 138-140)

On January 13, 1982, appellant proffered the testimony of Dr. Kircher and Sergeant Thirsk relative to polygraph examinations in general and Ms. Sagars' deceptive performance in a polygraph conducted January 3, 1982, two days before trial. (See generally Tr. 1/13, et seq.) On January 3, 1982, Sergeant

Thirsk conducted a polygraph examination of Carla Sagars. He concluded she was deceptive in denying relevant questions 5 and 7 set forth below:

Question 5: At the exact instance any of the blows were struck, were you holding the weapon?

Question 6: Was the weapon ever in your possession when Mark was struck with it?
(Id. 89)

Sergeant Thirsk received verification of his conclusions from three other polygraph examiners, all of whom were law enforcement employees. (Id. 86, 90-91)

Closing arguments and jury instructions were conducted January 14, 1983.

On January 14, 1983, the jury returned a verdict of guilty upon one count of criminal homicide, murder in the first degree, a capital offense. On January 20, 1983, the case reconvened for the "penalty phase." Prior to commencement of the proceedings, appellant had filed a motion to admit evidence of Ms. Sagars' polygraph. (Record at 281)

Charles Illsley, a sergeant at West Valley City Police Department, testified as a fingerprint expert over appellant's objection and stated that in his opinion the fingerprints of appellant were the same as the fingerprints contained in the exemplified and certified copies of fingerprints sent to the witness by various correctional and judicial agencies. The witness also prepared a large exhibit listing appellant's purported convictions in other jurisdictions. (Tr. 1/20, 5-16)

Appellant renewed his objection to evidence of past convictions. (Id. 67-68)

William T. Bailey testified that as a federal probation officer he first met appellant in 1980 when appellant was released from a federal halfway house to probation. (Tr. 1/20, 18) Over objection, Mr. Bailey testified that parolees sign a parole agreement which prohibits the usual and sundry activities generally proscribed of parolees, including the possession of firearms or explosives. (Id. 20)

The State rested. Appellant called Roscoe Fowler, appellant's brother, who testified that appellant fulfilled the father role in his life, as well as the role of brother. (Id. 24-35)

Mark Welch testified that appellant gave of himself willingly, was a positive influence in the witness' life and would never become indebted to the witness for one red cent. (Id. 38-40) Mr. Welch recounted how appellant strove to be with his (appellant's) son and had a close family relationship. Appellant assisted others and gave his time voluntarily to those in need. (Id. 40-43)

Creola Fowler, appellant's mother, testified that appellant was the fifth child out of eight children. Appellant never had the benefit of a father. She never observed any violent behavior by appellant other than the usual schoolyard scraps of a young boy. She opined that God should judge her son, not society at this trial. Although appellant's mother

acknowledged just that. . . . [Appellant] said that he was "the rap" for others in the area. . . . (Id. 52-53)

Deris Tullata testified that she was the wife of appellant and that a son, age 11, was the result of that marriage. She considered appellant to be intelligent, understanding and honest in his dealings with her and her son. She described the relationship between appellant and their son as "very close." (Id. 53-59) She indicated that although appellant paid little by way of child support, the appellant fed and necessities for his son in 1982, and that she made no demands on appellant for money since she was employed and self-supporting. (Id. 60-63)

The jury was instructed and summation by counsel was presented. The verdict was death.

On January 28, 1983, the case was continued to February 4, 1983, on motion of appellant in order to allow the State time to respond to appellant's motion in arrest of judgment filed that morning.

On February 4, 1983, appellant argued his motion to arrest judgment, and on March 17, 1983, appellant argued his motion for new trial.

Both motions were denied and thereafter, appellant filed his notice of appeal. The record on appeal was supplemented with transcripts as of November 11, 1983. Appellant is currently housed at maximum security in the State Prison.

ARGUMENT

I

COUNSEL'S COMMENTS CONCERNING DEFENDANT'S FAILURE TO TESTIFY REQUIRE REVERSAL.

During closing arguments at the guilt phase of the trial, counsel for the State argued: "You have had a chance to look at Elroy Tillman during these proceedings. Detecting remorse? Detecting anything?" (Tr. 1/14, 28)

This comment implied or inferred that appellant had not shown remorse of any kind because he had not testified in his own behalf, and therefore, he was obviously guilty. Such impermissible comment might have escaped unnoticed by the jury; however, the comment was preceded by comments ostensibly directed at Carla Sagars but clearly designed to impress the jury that appellant was guilty because he exercised a constitutional right. That comment was:

Even though you may say to yourselves, Carla Sagars isn't any better than Elroy Tillman, she did have a heart and she did tell the truth, and she didn't demand immunity, she didn't demand an attorney or all the other things indicative of guilt. (Tr. 1/14, 2-24)

Comparing, in one sentence, the conduct of the impeached witness with the conduct of appellant at trial in the exercise of his constitutional rights clearly inferred the message ending: "... as Elroy Tillman has done (to indicate guilt)."

During his rebuttal, to defense counsel's summation

to the jury in the penalty phase of the trial, the prosecuting attorney again referred to appellant's lack of remorse. Appellant submits that these comments were designed to penalize appellant's failure to testify in his own defense; that they had that express effect; and that they therefore deprived appellant of the due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 12 of the Constitution of Utah. They impermissibly tainted the process which resulted in the jury returning a verdict of death despite the unextraordinary circumstances of this case. As a result, this Court should set aside the finding of guilt and/or the verdict of death, and remand for further proceedings.

The central offending comment of counsel during penalty is at lines 1 through 15 of page 114 (Tr. 1/20). And, though the statement suffers the failure of precise syntax common to oral expression, the sense of the statement is this:

. . .there is not a system [for the control and governance of human affairs] on the face of the earth--including the mosaic law or the law of Christianity--that will work unless the individual sole (sic) wishes it to work. [Mr. Tillman's conduct, as demonstrated by his felony record indicates that he does not respect any such system]. [He has rebelled] against the most sacred of obligations, to protect human life. . .[and] all the other things that Elroy Tillman has broken along the way. [N]o system in the world will work without the person himself--humility-wise and with remorse--saying, "I want it to work." And you haven't heard Elroy Tillman say that.

reduced to syllogistic form, counsel's argument was this:

By his prior conduct Tillman has demonstrated that he has no respect for the law and is therefore likely to continue to pose a serious threat to society. Were he at least to speak to you and declare his willingness to abide the law, then there might be some hope of rehabilitating him. But he hasn't stood before you and expressed humility or remorse, or sworn that he will honor the sacred obligation to protect human life and conform his actions to the rules. Therefore, you should require his death.

Though disagreeing with the rationale of the argument, appellant acknowledges its compelling force and persuasiveness. State's counsel was an articulate and forceful advocate. It is precisely because the argument is so persuasive that it has repeatedly been held to impermissibly penalize the right to remain silent and thus deny due process.

In Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965), the Supreme Court held that the Fifth Amendment, in its direct application to the federal government and its bearing on the states under the Fourteenth Amendment, expressly forbids comment by the prosecution on the accused's silence. In specifying the reasons for the Court's holding, Justice Douglas said:

. . .comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," [citation omitted] which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

Defendant contends that the reason a defendant refuses to testify is that his prior convictions will be introduced in evidence to impeach him [statutory citations omitted] and not that he is unable to deny the accusations. It is true that the defendant might fear that his prior convictions will prejudice the jury, and that therefore another possible inference can be drawn from his refusal to take the stand. [Internal references omitted.]

This holding has never been reversed or substantially modified. In commenting on the application of the rule to particular factual contexts, the Fifth Circuit held in United States v. Rochan, 563 F.2d 1246 (1977), that:

To reverse for improper comment by the prosecutor, we must find one of two things: that "the prosecutor's manifest intention was to comment upon the accused's failure to testify" or that the remark was "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Id. at 1249

In Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967), the Supreme Court held that (1) violation of the Griffin rule is constitutional error and that once the error has been proven the burden is on the state to show that the error was harmless beyond a reasonable doubt. In Anderson v. Nelson, 390 U.S. 523, 20 L.Ed.2d 81, 88 S.Ct. 1133 (1968), rehearing denied 391 U.S. 929, the Supreme Court reiterated its allegiance to strict application of the Griffin rule. There, improper comments had been made and the conviction was challenged by Federal Writ of Habeas Corpus which was granted

by the U.S. District Court. The Ninth Circuit reversed. The Supreme Court reversed and reinstated the Writ, saying:

We agree with Judge Ely that comment on a defendant's failure to testify cannot be labeled harmless error in a case where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal. We find this is such a case. Id. 390 U.S. at 523-524

Though counsel's unlawful comment during penalty is found in a single unrepeatd sentence, that sentence formed the basis of an extensive, well-reasoned and logically persuasive argument in favor of death and drew further sustenance from prior references during the guilt phase. He made it plain to the jury that death was the appropriate penalty because defendant had not verbally manifest his intent to comply with society's rules of conduct in the future should he be permitted to live. Finally, under the Court's instructions, the jury was not permitted to return a verdict of death unless it found, beyond a reasonable doubt, that death was the only appropriate alternative. We certainly cannot be certain beyond a reasonable doubt that the State's improper argument did not influence the jury to return its verdict mandating the ultimate penalty. The edicts of the highest court in the land require relief in this case.

Counsel's argument was closely similar in content and identical in thrust to the penalty phase argument found "most egregious" in State v. Sloan, 298 S.E.2d 92 (S.C., 1982) at

95, set forth below:

The solicitor urged the jury to consider appellant's plea of not guilty as evidence that appellant lacked remorse. "Has anyone said to you he's sorry, sorry for what he did? . . . What have you been told up until you found him guilty. He has pled not guilty. As he sits in this courtroom, he is not guilty. . . Is that someone who wants to be rehabilitated?"

This argument was clearly improper, as no right is more fundamental than the right of an accused to plead not guilty and put the State to its proof. A defendant's exercise of his right to plead not guilty is never a permissible basis upon which to impose the death penalty; this is particularly true in a capital case in this state, where a defendant must plead not guilty to have his sentence determined by a jury. S.C. Code Ann., Section 16-3-20(B). Ibid.

See also, Pope v. State, ____ So.2d ____, (Fla., 1983), 34 Cr.L.Rptr. 2166, similarly holding an inferred comment on defendant's silence is error.

This court has spoken in State v. Eaton, 569 P.2d 1114 (1977), saying:

The error of principal concern here is defendant's claim of improper remarks of the prosecutor during his argument to the jury. The prosecutor stressed the fact that only the prosecution's key witness (the alleged buyer, Ken Goode) and the defendant "really know what took place in that house;" and then asked ". . . What does the defendant tell us?" He also stated that: "I listened to the entire defense in this case and never heard one shred of evidence from the defendant to prove any motive any reason that showed that Ken Goode was out to get blacks in this community."

. . . We approve and reaffirm that duty

and privilege of analyzing the whole evidence as a general proposition. However, there is a point beyond which it must not go in regard to the defendant's constitutional right just referred to; and this includes that it should not be impaired or destroyed by making comments on the failure of the defendant to take the witness stand.

It is to be noted that in the Kazda case, referred to above, the distinction we have just discussed was pointed out; and that although the prosecution did analyze the evidence, it made no such reference to the fact that the defendant did not testify as was done here. Upon a fair analysis of the prosecutor's remarks here, the conclusion cannot be escaped that it was but a thinly disguised attempt to do indirectly what the prosecutor knew could not properly be done directly; that is, to comment on the fact that the defendant had chosen not to take the witness stand; and to persuade the jury to draw inferences as to his guilt because of his exercise of that constitutional privilege.

Consistent with the nature of the criminal proceedings and the protections accorded those accused of crime under our law, including the presumption of innocence and the burden of the state to prove the defendant's guilt beyond a reasonable doubt, we believe that, on appeal, when there is a reasonable doubt as to whether the error below was prejudicial, that doubt should be resolved in favor of the defendant. This is especially true where the error involved is one which transgresses against the exercise of a constitutional right. Consequently, the rule which we have numerous times stated is that if the error is such as to justify a belief that it had a substantial adverse effect upon the defendant's right to a fair trial, in that there is a reasonable likelihood that in its absence there may have been a different result, the the error should not be regarded as harmless; and conversely, if the error is such that it is clear beyond a reasonable doubt that it was harmless in that the result

would have been the same, then the error should not be deemed prejudicial and warrant granting a new trial.

When the defendant's attacks on his conviction are considered in the light of the foregoing principals, and in connection with the total picture as presented in this case, including the nature of the pivotal evidence of the state, which we advert to below, we cannot conclude with the required assurance that the matters complained of were not prejudicial. (Footnotes omitted.)

More recently, this Court has made its view of such improper argument equally clear. In State v. Wiswell, 639 P.2d 146 (1981), the Court reversed defendant's conviction of two counts of aggravated robbery where in trial, defendant had argued that he was present at the scenes of the crimes but that he was an unwilling participant in the robberies. To rebut this defense, the prosecutor had adduced evidence and argued to the jury in rebuttal that after defendant had been arrested and Mirandized, he had failed to mention that fact in protest of his arrest. The Court held:

The case that appears to be the controlling case is Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240, (1976). Even if it could be validly argued that defendant's objection and the court's attempt to cure the matter by striking the admonition were effective, this cannot be said about prosecutor's comments during his final argument. The continued attempts by the prosecutor to put the defendant's silence before the jury after his having been advised of his right to remain silent amounts to prosecutorial misconduct.

The references to defendant's silence are fundamental error, which could have affected the result and are therefore

prejudicial. The reasons for extending this protection are adequately discussed in Doyle, supra, and need not be repeated here. Reversed and remanded for new trial.

See also State v. Hales, 652 P.2d 1290 (Utah, 1982). Those rules having been made clear by the Court, we must turn to State v. Brown, 607 P.2d 261 (1980), wherein the Court specifically speaks to the level of care which must be exercised in the trial of capital cases to avoid any just criticism that the death penalty has been imposed arbitrarily or unfairly.

Justice Wilkins:

Scrupulous care must be exercised by the State in capital cases in both the guilt-determining and penalty phases in presentation of evidence and argument because of the acknowledged uniqueness of the death penalty. Citing Mr. Justice Stevens in Gardner v. Florida, 430 U.S. 349, 357-58 (1976).

That "scrupulous care" must extend to all facets of the trial process in both the guilt and penalty phases of the trial. A capital case requires even closer scrutiny than other trials and:

. . .[t]he prosecutor's actions at sentencing. . .must be viewed differently. At the sentencing phase of trial, the jury must not be influenced by any arbitrary factors. A prosecutor may not incite the passions of a jury when a person's life hangs in the balance. Brooks v. Francis, 716 F.2d 780 (11th Cir., 1983) at 288.

At trial, defendant did not testify either during the guilt phase or in the penalty phase. This was a permissible tactical choice. (United States v. Gibson, 536 F.2d 1110 (5th

Circuit, 1976))

To nullify defendant's tactical decisions by means of fundamental error of constitutional magnitude specifically designed to influence the jury to return a verdict of death and to seek the death penalty on the basis the defendant has not stepped forward and testified to express his remorse or willingness to abide by the laws of society, is such fundamental error that the penalty proceedings must be set aside. The overwhelming weight of authority requires reversal of the penalty and further proceedings or the imposition of a life sentence.

To allow comments on appellant's silence, however subtle, to infect the guilt determination proceedings in a capital case likewise is such fundamental error that those proceedings must also be reversed and the case remanded for further proceeding.

II

COMMENTS DURING SUMMATION WERE IMPROPER AND, IN SUM, REQUIRE REVERSAL.

A number of assertions were made throughout arguments during the guilt and penalty phases of trial which cumulatively warrant reversal, especially when viewed in light of the comments discussed at Part I of this brief relative to appellant's failure to testify. Although the clairvoyance of hindsight may tend to elevate the impact of isolated comments, appellant submits that the cumulative effect of the below-quoted comments impermissibly injected a fervor and passion into the process

sufficient to sway the jury into returning the sentence of death. Such comments include, in addition to the comments treated elsewhere, the following:

And I consider it significant that the police from Bountiful who testified on the stand were getting between ten and fifteen reports of incidences daily from the Gronemans during 1982. . . . Tr. 1/14 at 97.

Not only is the factual content patently erroneous (cf. Tr. 1/10, 79-83), the comment also interjects the personal opinion of the prosecutor. In State v. Johnson, 663 P.2d 48 (Utah, 1983), this Court stated, though dictum, that statements evincing the prosecutor's personal opinion and references to improper factors would have required reversal had the Court not already found independent grounds to reverse the conviction. Personal opinions of the prosecutor generally have been held to constitute reversible error. See, e.g., Bowder v. State, 639 P.2d 889 (Wyo., 1982), and cases cited therein.

At Tr. 1/14, 106:

I kind of would like to wonder what would happen, for instance, if the Mormon Tabernacle Choir observed the whole killing, how would Mr. Barber attempt to discredit them? Think about that one.

Besides interjecting personal opinions and beliefs (State v. Johnson, supra), this comment further appeals to the religious feelings of the jury. Convictions should not be obtained by inciting passions or prejudices of the jury. (State v. Valdez, 513 P.2d 422 (Utah, 1973), and State v. Creviston,

646 P.2d 750 (Utah, 1982))

During penalty phase, Tr. 1/20 at 83:

If you are cowards and you must say to yourselves, "The law has no meaning and we can randomly go about intentionally, knowingly killing people," and that is the signal you will portray unless you find the appropriate sentence in this case. . . .

This comment was a pure and simple appeal to jury passion, closely analogous to young lads at play using the derisive "chicken!" call to initiate a particularly daring or dangerous youthful stunt.

Also during penalty phase, Tr. 1/20 at 84:

. . .but if I have conveyed to you any meaning other than the most serious and solemn of duties to present to you in this case, I apologize for that because it's a serious and solemn duty and I wouldn't be asking you for the penalty of death under any other circumstances or conditions than serious and solemn responsibilities and duties." (Emphasis added.)

A prosecutor's request for the death penalty predicated upon his assertion that he would not seek the same penalty again if the jury did not return with a recommendation (under the South Carolina system) of death warranted reversal in State v. Plath, 284 S.E.2d 221 (S.C., 1981). The comment quoted above again injected the personal feelings of the prosecuting attorney and was designed to have the jury consider matters improperly before them. (State v. Johnson, supra)

The A.B.A. Standards for Criminal Justice apply to prosecution and defendant alike (Sections 5.8 and 7.8, 1st Ed.,

respectively) and appellant's counsel does not assert defense counsel likewise did not make some improper comment or argument during this trial. Feelings run high during such cases, but as professionals, those personal feelings have no place in counsel's demeanor or speech; nor should personal feelings and passions influence the trial and penalty of any criminal case. A capital case deserves more. Both the guilt phase and penalty phase were tainted and therefore should both be reversed and remanded for a new trial.

III

EXCLUSION OF POLYGRAPH OPINION EVIDENCE WAS A DENIAL OF "DUE PROCESS".

Appellant filed a motion in limine requesting the evidentiary admission of expert testimony concerning the foundation of polygraphs and the results of a polygraph performed upon the State's critical witness, Carla Sagars, by Sergeant Kenneth Thirsk of the Salt Lake City Police Department. (Record at 89)

Appellant also filed a separate motion to permit the introduction of such polygraph evidence during the penalty phase. (Record at 281) Both requests were denied although the trial court permitted defense counsel to call and examine Sergeant Thirsk concerning statements made by Carla Sagars during the particular polygraph examination which occurred only two

days before trial. (Tr. 1/12, 108-135) The Court required counsel to abstain from any mention of polygraph or the fact Ms. Sagars was shown deceptive. (Id. 101-107)

The jury was later excused to permit appellant to make a proffer relative to the polygraph test in question and further to permit laying a foundation evidence. (Tr. 1/13, 1-122)

A. EXCLUSION OF POLYGRAPH EVIDENCE DURING
THE GUILT PHASE WAS REVERSIBLE ERROR

The trial court was of the opinion that absent express authorization from this court, polygraph results were inadmissible. (Tr. 1/3, 119) Appellant contends the Rules of Evidence (hereafter U.R.E.) and case law both permit the introduction of properly founded expert opinions and polygraph results.

The Utah Rules of Evidence at time of trial provided as follows:

Rule 46. When a person's character or a trait of his character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, however, to the limitations of Rules 47 and 48.

Rule 47. Subject to Rule 48, when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved in the same manner as provided by Rule 46, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait

to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove his guilt or innocence of the offense charged, (i) may not be excluded by the judge under Rule 45 if offered by the accused to prove his innocence, and (ii) if offered by the prosecution to prove his guilt, may be admitted only after the accused has introduced evidence of his good character.

Rule 48. Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality on a specified occasion.

Opinion testimony is also governed by Rule 56 set forth below:

(1) If the witness is not testifying as an expert, his testimony in the form of opinion or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

(2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

(3) Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission.

(4) Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues

to be decided by the trier of the fact.

and Rule 58, also reproduced below:

Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross-examination he may be required to specify such data.

The general gist and intent of the foregoing rules was not substantially modified with the September 1, 1983, adoption of new rules of evidence.

Stipulations concerning the admissibility of polygraph evidence result in treatment as any other evidence. See e.g., State v. Jenkins, 523 P.2d 1232 (Utah, 1974). Also, in State v. Tanner, 675 P.2d 539 (Utah, 1983), a bench trial in which polygraph results were admitted over the State's objection but not cross-appealed, the Court noted that weight and credibility of polygraph results are for the finder of fact. (Id. 551) Admissibility of the polygraph was not in issue.

With respect of case law at time of trial, the companion cases of State v. Abel, 600 P.2d 994 (Utah, 1979), and State v. Collins, 612 P.2d 775 (Utah, 1980), both raised the admissibility issue before this court and both were found deficient with respect to the evidentiary record regarding foundation. In Abel, involving a polygraph given the

defendant concurring the victim's consent, this court held:

This brings us to the third point. A large number of states have ruled upon the admissibility of lie detector tests, and most of them have excluded those tests from evidence, at least in the absence of a stipulation. This does not, of course, foreclose this Court from reassessing the question of reliability and admissibility of the test. It may well be that recent developments in this area of endeavor, as argued by the State, have progressed to the point where polygraph tests should be held admissible irrespective of a stipulation. But in this particular case, we do not find a sufficient foundation in either the briefs or the testimony in the trial court for assessing the reliability and probative value of a polygraph examination given the alleged perpetrator of the crime to determine the issue of an alleged rape victim's consent. 600 P.2d at 998

Collins, supra, also involved a polygraph test administered upon defendant with respect to the victim's consent. There was a similar evidentiary deficiency in the record with respect to foundation, and consequently, defendant-appellant's claim of improper exclusion of polygraph results was denied. The Court tendered guidance to those "in the trenches" seeking to lay a proper foundation for review of admissibility issues. At 612 P.2d 778, the Court suggested the expert testify concerning the following factors:

- (1) validity of underlying theory;
- (2) practical application of theory to fabrication detection;
- (3) verifiability; and
- (4) successful deception by subject.

Using the dictum of Collins, counsel proffered the testimony of Sergeant Thirsk and Dr. John Kircher, M.S., Ph.D, to establish the test results and foundation for admission.

Dr. Kircher, employed at the University of Utah in the Department of Psychology with a speciality in experimental psychology (Defendant's Exhibit 46), testified to the basic polygraph test theory (Tr. 1/13, 6-9); the validity of the theory in field studies and laboratory studies indicating a 90-95% accuracy (Id. 9-11); to the practical application of the theory to deception detection (Id. 11-13 and 14-24); and the likelihood of successful deception of the examiner by a deceptive person. (Id. 47-48, 55-77)

Kenneth Thirsk testified that as an experienced, licensed polygraph examiner, he conducted a polygraph examination of Carla Sagars on January 3, 1983, free of any threat or hypnosis, expecting the test to run smoothly with a positive result (Id. 80-84). When posed the relevant questions "At the exact instant any of the blows were stuck, were you holding the weapon?" and "Was the weapon ever in your possession when Mark was struck with it?", Carla Sagars denied the questions; but analysis of the polygraph tracings by Sergeant Thirsk and three other State employees clearly indicated deception. (Id. 80-91)

In order to illustrate the adequacy of defendant's

proffer (which naturally is substantially limited in detail and depth and seeks merely to state the general nature of the testimony sought to be admitted; see Rule 5, Utah Rules of Evidence in effect at trial, now denoted Rule 103), this portion of the brief will address the nature of the proffered testimony with respect to each of the four foundational criteria suggested by this court in Collins:

(1) Validity of underlying theory

Control question techniques have been validated in both field studies and laboratory studies which indicate a 90-95% validity. (Tr. 1/13 at 6-13)

(2) Practical application of theory to fabrication detection

Measurement of physiological activity (Id. 11-13) is compared numerically (Id. 15-17) and a correlation coefficient of .97 indicating sound practical application. (Id. 18-19)

Control questions are discussed beforehand to avoid surprise and its reaction. (Id. 63) Such occurred in this case. (Id. 85)

(3) Verifiability

Numerical techniques have a correlation co-efficient of .97 (Id. 18-19) and other studies have discounted the friendly polygraph hypothesis. (Id. 61-62)

The instant polygraph charts were blind scored by three other examiners, all of whom were enforcement related. (Id. 86, 90, admitted exhibits at 91) Scoring showed deception. (Id. 90-91)

(4) Successful Deception

Studies have been directed at false negative error which is not applicable to this case. (Id. 14 and especially 47-48) There is no evidence to suggest a deceptive person can be termed truthful. (Id. 55-56)

The adequacy of the proffer must be interpreted in light of the very limited use sought; i.e., for impeachment purposes and to indicate the factual circumstances of Ms. Sagars' statement she hit the victim twice.

Naturally any proffer must pass the muster of (1) relevance, (2) competency and (3) policy. See e.g., Commonwealth v. Vitello, 381 N.E.2d 582 (Mass., 1978), for application to polygraph evidence.

(1) Relevant evidence is defined as evidence tending to make the existence of any material fact more or less likely. (Rule 1(2), U.R.E. (now Rule 401)) If the proffered testimony is believed, such testimony undoubtedly is relevant to the credibility of the State's main witness. See United States v. Ridling, 350 F.Supp. 90, n. 5 (E.D. Mich., 1972).

(2) Competent evidence from an expert is defined as evidence ". . .based on facts or data personally known or made known to the witness at the hearing and within the scope of the special knowledge, skill, experience or training possessed by the witness." (Rule 56(2), U.R.E. (now Rules 702, 703 and 704)) Such competency in polygraph admissibility cases was deemed lacking as early as 1923 in Frye v. United States, 293 F. 1013

(D.C. App.), and a host of decisions annotated at 53 A.L.R.3d 1005 in which the courts generally held that polygraph theory and techniques had not risen to the appropriate level of acceptance within the scientific community. That view essentially ignored the basic tenet that the jury is the exclusive judge of credibility of any and all witnesses. (Section 78-21-1, Utah Code Annotated, 1953, as amended; State v. Jenkins, supra, and authorities cited at n. 7 on 1234, and State v. Tanner, supra.) Most trial practitioners are aware of the "stock" expert witness credibility instruction to the effect that the jury can choose to believe or disbelieve any expert witness. See e.g., DeVitt and Blackmar, Federal Jury Practice and Instructions, Section 15.22 (3rd Ed., 1977).

Distinction between judicial notice of scientific facts and the admissibility of scientific evidence must be carefully maintained. (Commonwealth v. Vitello, at 592 n. 17) Appellant's proffer clearly shows that the level of acceptance (competency) now has risen to a "demonstrable stage." (Vitello, supra) See also State of Utah v. Rebeterano, ___ P.2d ___, (Utah, 1984), Case No. 18428, filed April 30, 1984.

Sergeant Thirsk testified that he had conducted 261 polygraphs (Tr. 1/13, 82); that he conducted the polygraph examinations on Ms. Sagars at the request of the County Attorney's office (Id. 119-120); that on prior occasions, criminal cases were dismissed by the Salt Lake County Attorney's office on the basis of a polygraph alone (Id. 112-113); and

that blind scoring of the Sergeant Thirsk polygraph machine tracings by two other police officers and an employee of Adult Probation and Parole all scored Ms. Sagars deceptive.

Dr. Kircher testified that his doctoral degree was in the sub-specialty of experimental psychology and had the qualifications, education and publications reflected in his vitae, Defense Exhibit 46. He recited the field and laboratory studies achieving a reliability and accuracy in the order of 90% or more (Id. 1/13, 5-11), and firmly stated that sound scientific research produced no evidence whatsoever that a deceptive person could defeat the test. (Id. 55)

The State offered no evidence or witness to refute plaintiff's proffer of scientific acceptance. The State chose simply to question witnesses about possible biases, knowledge of quoted passages contained in various publications and hypothetical questions.

Absent evidence to the contrary, plaintiff's evidentiary proffer must be taken as true unless it is so inherently improbable judicial notice can be taken of its improbability. Furthermore, a ". . .failure to achieve the standard of general acceptance need not freeze the evidentiary development of the polygraph in view of its unique potential as a tool of justice." (Vitello, supra at 592)

(3) Policy considerations or other exclusionary rules may limit otherwise relevant evidence. (See Rule 7, U.R.E. (current Rules 402 and 702).) The age-old "confusion and

prejudice to the jury" consideration has oft-times been cited a policy supporting polygraph exclusion. (McCormick on Evidence, 2nd Ed. 1972 at 491) Such was the trial court's opinion. (Tr. 1/13, 119-120) The weakness of an exclusion based on that notion is amply demonstrated by the admissibility of opinion evidence in the following areas: ballistics, fingerprints, radar guns, breathalyzer, intoxilizer, paternity based on blood analysis, arson or fire investigations, insanity based on mental defect, voice analysis for identification, hair sample analysis or battered child syndrome. This list certainly is not exhaustive and pointedly has failed to include character evidence admitted under federal and state rules for many years. See e.g., Federal Rules of Evidence 608, 1983, and Utah Rules of Evidence 608, formerly U.R.E. 46-47. As noted by the Court in Ridling, supra, ". . . fitting in the polygraph opinion will require no alteration of these [character opinion] rules." (350 F.Supp. at 96)

Opponents to the admission of opinion evidence based upon polygraph examination have claimed such opinion invades the province of the jury. Such ignores the traditional role of the jury as the ultimate finder of fact and presupposes the jury will place undue weight on such opinion evidence notwithstanding court instructions. Such also ignores the traditional cleansing role of cross-examination and expert testimony of opposing parties. This court so held in State v. Jenkins, 523 P.2d 123 (Utah, 1974), stating:

When this evidence was received, it had the same status as any other evidence; that is, it was to be considered by the jury in connection with all of the other evidence in the case; and it was their prerogative to give it whatever credibility they thought it was entitled to. (See Section 77-24-1, Utah Code Annotated, 1953; People v. Chadwick, 25 P. 737, 7 Utah 134; and State v. Scott, 447 P.2d 908, 22 U.2d 27.) Id. at 1234.

The Court in Ridling was a little more expansive, although supportive of the position stated by this Court, reasoning in the following manner:

The argument that the jury will be displaced by a machine or by a polygraph examiner lacks merit. The jury will make the final determination of guilt or innocence. In this connection it is important to understand how different juries are today than they were when the restrictive rules of evidence were first developed. On the whole they read widely. Largely because of television they know generally what is going on in the world. Their educational background is extensive. They think. They reason. They are really very good at sorting out good evidence from bad, of separating the credible witness from the incredible, and of disregarding experts who attempt to inject their opinions into areas of which they have little knowledge. They would welcome all evidence having a bearing on the problem they are deciding and the give and take of deliberation would expose weaknesses in any witness or evidence. A modern jury, that must deliberate, and must agree, is the ideal body to evaluate opinions of this kind. The search for truth should be enhanced, eliminating some cases in which both sides agree there is no real issue, and in other cases assisting the jury to reach a just result. Ridling, supra, at 98.

More recently this Court in State v. Tanner, supra,

reiterated the evidentiary impact of polygraph evidence, stating:

The defendant claims that the favorable results of the polygraph test that she took automatically raise a reasonable doubt as to her guilt. We do not agree. The court was not obligated to give more weight to that evidence than to other evidence presented. The weight and credibility given the evidence is decided by the finder of fact, in this case, the court. The court did not err in basing its conclusions on the other evidence before it. We do not hold that a favorable polygraph test raises a reasonable doubt as a matter of law. Id. at 551.

A thirdly-stated policy opposing admissibility of polygraph-based opinion evidence is one decrying the consumption of time at trial. To say such is even a valid policy consideration in a death penalty case borders on the ludicrous, and to decry trial time in a death penalty case involving relatively few witnesses and court time (approximately 11 trial days all told) probably creeps across the threshold. The Court will not relinquish power to control scope of examination and cross-examination of experts by virtue of admitting polygraph based opinion evidence. The proffer in the case at bar consumed less than one day, although admittedly the proffer and cross-examination was less extensive than rationally expected had the jury been present.

Other policy considerations supporting admissibility may be loosely grouped to include (a) right of confrontation, (b) untrammelled right to produce exculpatory evidence, (c) latitude in impeachment or cross-examination, (d) widespread

reliance of such opinion by law enforcement, (e) exercise of prosecutorial discretion based on polygraph opinion, (f) irrevocability of the death penalty allowing greater latitude and (g) greater need in a single eyewitness prosecution. These are treated below.

(a) The right of confrontation is the mainstay of our criminal process. Guaranteed by Article I, Section 12 of the Utah Constitution and the Sixth Amendment to the United States Constitution, the right of confrontation includes the right to cross-examination. (Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1963))

In Smith v. Illinois, 300 U.S. 129, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968), the trial court erroneously limited defendant's cross-examination of the principal witness in a trial which had as its sole issue the credibility of the prosecution witness. When credibility of one witness is the sole issue, ". . . prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . ." (390 U.S. at 132, 19 L.Ed.2d at 959 quoting Alford v. United States, 282 U.S. 687, 75 L.Ed. 624, 51 S.Ct. 218 (1931)) See also McMorris v. Israel, 743 F.2d 458 (7th Cir., 1981), involving a polygraph in a "stipulation" state, n. 6 at 461.

Appellant was similarly situated as Smith, supra, in that the Court made it abundantly clear on the record and

off the record that polygraph would not be mentioned in front of the jury. Effective cross-examination of Ms. Sagars was precluded in that the setting, motivations and nature of her statements could not be properly demonstrated. In fact, in cross-examining Sergeant Thirsk, the prosecutor elicited responses indicative of prior consistent statements made by Ms. Sagars, thereby compounding appellant's denial of effective cross-examination or confrontation. (See Tr. 1/12, 123-128.)

(b) The untrammelled right to produce exculpatory evidence in criminal defense should promote caution in limiting in any way defendant's attempts to show a lack of culpability. In United States v. Hart, 344 F.Supp. 522 (E.D.N.Y., 1971), the Court followed the lead of Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), and held:

The results of the tests which the government had [the witness] take are admissible on behalf of the defendant because the government initially thought they were reliable enough to assist it in evaluating its witness. 344 F.Supp. at 524.

(c) The policy of allowing wide latitude in cross-examinations also supports the notion that proper areas of inquiry may range far and wide in showing the bias, motivations, character or honesty of a witness. Relevancy parameters should be the only restriction.

(d) Today's policy of widespread use of polygraphs in law enforcement is further supportive of impeachment evidence admissibility. Evidence during appellant's proffer indicated

that the Salt Lake City Police Department employed at least three polygraph examiners (Tr. 1/13, 86-91), and the County Attorney's office at least one, Steve Bartlett, named but not called by the State. Adult Probation and Parole also employs at least one polygraph examiner. (Ibid.) Presumably decisions in the law enforcement field are based, at least in part, upon the opinions of such polygraph examiners.

(e) The practice and policy of basing prosecutorial decisions upon the results of polygraph examinations is well known and supported in the record at Tr. 1/13, 111-113. See also Bailey and Rothblatt, Investigation and Preparation of Criminal Cases Federal and State, (Bancroft-Whitney Co., 1970).

(f) Death penalty cases have engendered a policy of greater caution in limiting evidence. In Green v. Georgia, 442 U.S. 95, 60 L.Ed.2d 738, 99 S.Ct. 2150 (1979), the Court held that the hearsay rule could not bar evidence tending to exculpate defendants in a death penalty case. In Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982), the Court held that failure to consider defendant's unhappy upbringing and emotional disturbance warranted reversal. This policy is treated hereafter as a substantive argument.

(g) The policy in single accomplice-witness cases should be one of greater latitude in presenting credibility evidence. Until 1980 Utah law prohibited convictions based solely on the uncorroborated testimony of an accomplice. (Section 77-17-7, Utah Code Annotated, 1953, as amended (prior

(1980)) The 1980 amendment allowed such conviction and permits the trial court to give a cautionary instruction. That cautionary instruction should not ring hollow by excluding evidence. (Appellant requested and received such a cautionary instruction. Although many facets of Ms. Sagars story were corroborated, not one single piece of physical evidence actually connected defendant to the scene of the crime.)

Since defendant proffered relevant scientific evidence based upon a recognized, substantive body of knowledge, it was error of the trial court to exclude the evidence during the guilt phase of the trial.

**B. ANY EVIDENCE IN MITIGATION IS ADMISSIBLE
DURING THE PENALTY PHASE OF A CAPITAL CASE.**

Appellant moved in writing on January 19, 1983, for the admission of polygraph evidence during the penalty phase of the trial scheduled to commence on January 20, 1983. Record at 281 Although the Court denied the motion, that denial apparently was made without the benefit of a clear record, (Tr. 1/20, 72) but the position of the Court was made abundantly clear on the record that, in the trial court's opinion, polygraphs had no place in the courtroom. (Tr. 1/13, 119-120) Objection was again orally made on February 4, 1983, on the record. (Tr. 2/4, 11)

Section 76-3-207(2), Utah Code Annotated, 1953, as amended, provided for relaxed evidentiary rules during the penalty phase of a capital felony, stating:

(2) In these sentencing proceedings, evidence may be presented as to any matter the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court deems to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and the defendant shall be permitted to present argument for or against sentence of death. Aggravating circumstances shall include those as outlined in 76-5-202. Mitigation circumstances shall include the following:

(a) The defendant has no significant history of prior criminal activity.

* * *

(g) And any other fact in mitigation of the penalty.

Relaxation of evidentiary rules is the crux of bifurcated guilt and penalty hearings as a means to avoid prejudice in the guilt phase. See State v. Brown, 607 P.2d 261 (Utah, 1980), in which defendant objected to relaxation of the evidentiary rules.

Appellant's motion specifically cited Green v. Georgia, supra, in which the death penalty was vacated because the trial court had excluded during the penalty phase hearsay evidence tending to exculpate defendant. The statement was of a third person allegedly confessing to the actual shooting, although the petitioner had already been found guilty. The Court held:

Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. Id. 442 U.S. at 97, 60 L.Ed.2d at 741.

Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), decided shortly before Green, supra, addressed the nagging question of what facts must be taken into account at sentencing in capital cases. The Court held:

. . . We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigation factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (Emphasis by the Court.) (Footnotes omitted.) 438 U.S. at 604, 57 L.Ed.2d at 990.

The Court decided Bell v. Ohio, 438 U.S. 637, 57 L.Ed.2d 1010, 98 S.Ct. 2977 (1978), the same day as Lockett, supra, and similarly concluded the Ohio death penalty statute was constitutionally infirm because petitioner had been precluded from presenting any factor in mitigation. Ohio's statute permitted only three specified factors in mitigation to be considered; to wit: (a) victim inducement or facilitation, (b) defendant's duress, coercion or strong provocation, and (c) mental defects not amounting to insanity. The statute allowed the Court to consider the nature and circumstances of the crime and the defendant.

The penalty of death was again vacated in Eddings

v. Oklahoma, supra, because the ". . . sentence was imposed without the type of individualized consideration of mitigating factors. . . required by the Eighth and Fourteenth Amendments in capital cases." (Id. 455 U.S. at 105, 71 L.Ed.2d at 5, citing Lockett v. Ohio, supra.)

Similar to Utah's sentencing statute, the Oklahoma statute permitted evidence of any mitigating circumstances. (Compare Section 76-3-207, Utah Code Annotated, to Oklahoma statute, Title 21, Section 701.10 (1980).) The trial court had found the aggravating circumstances had been proven beyond a reasonable doubt and in mitigation considered only defendant's youth but refused to consider his turbulent background. The Court held that evidence of a violent background was relevant and required to be considered stating:

The sentencer. . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Footnote: We note that the Oklahoma death penalty statute permits defendant to present evidence "as to any mitigation circumstances." Lockett requires the sentencer to listen. (Citation omitted.) Eddings, supra, 455 U.S. at 114-115, 71 L.Ed.2d at 11.

The case at bar presents a classic Lockett-Eddings exclusion of relevant evidence proffered by Tillman in mitigation during the penalty phase. The evidence had a tendency to show deception by the State's chief witness and tended to support appellant's theory of the case to the effect that the evidence

could reasonably infer Ms. Sagars perpetrated the crime. The evidence clearly was ". . .any other fact in mitigation. . ." (Section 76-3-207(2)(g), Utah Code Annotated) to which the sentencer was required to listen. This Court's comments in State v. Wood, 748 P.2d 71 (Utah, 1982), although directed at the burden of proof during the penalty phase, still are appropriate to the issue at bar:

Even if Solomon--like wisdom were available in framing objective standards, their whole purpose could be thwarted if the governing procedural rules allowed the sentencing body to impose the death penalty in the face of evidence which creates a reasonable or substantial doubt as to the appropriateness of that penalty. Id. at 81.

A procedural rule should not thwart Mr. Tillman's proffered evidence from reaching the sentencing body.

Since the jury was not apprised of all relevant evidence in mitigation, appellant is entitled, at minimum, to a new penalty phase hearing.

IV

DEFENDANT WAS DENIED A MEANINGFUL COMPARISON OF A LIFE SENTENCE WITH THE DEATH PENALTY.

Section 76-3-208(3), Utah Code Annotated, (Pocket Supplement, 1983), requires the jury, in effect, to compare the life sentence to the death sentence for a particular defendant. That section provides:

(3) The court or jury, as the case may be, shall retire to consider the penalty. In all proceedings before a jury, under this section, it shall be instructed

as to the punishment to be imposed upon a unanimous verdict for death and that to be imposed if a unanimous verdict for death is not found. If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death, the court shall discharge the jury and impose the sentence of life imprisonment.

During argument, appellant's counsel suggested a life sentence for appellant might mean a sentence of some 15 to 20 years if appellant was ever paroled, which was highly unlikely. (Tr. 1/20, 92-93) State's counsel rejoined with, ". . .they were rotten and it took them 40 years to purge their souls. Forty years, not fifteen years as a life imprisonment would mean." (Id. 112) And also, "Can you honestly say to yourselves 15 years hence that a person showing the lack of remorse Mr. Tillman has shown is going to be a better person when he gets out. . . ." (Id. 116)

Appellant's counsel attempted to demonstrate society's interests would be adequately served with a life sentence and State's counsel used the "door" so opened to minimize the meaning of a life sentence. The jury was now pointedly asked to compare penalties of a different magnitude; to wit: death versus 15 years!

With the luxury of hindsight, the foregoing comparison appears as a monstrous error. A life sentence means an indeterminate sentence of five years up to life imprisonment. (Section 76-3-203(1), Utah Code Annotated, 1953, as amended)

the Board of Pardons decides the time and conditions for release, if any. See generally Chapter 27 of Title 77, Utah Code Annotated, (Pocket Supplement as amended in 1983). Presently the Utah State Prison houses murderers who have been incarcerated for almost 20 years without parole dates. (Messrs. Lance and Kelbach come to mind, perhaps others have been incarcerated as long.) The Parole Board's obligation and function is to assess the threat to society in determining appropriate parole dates, and in certain cases, invite the attendance of victims, their families or law enforcement officials. (Section 77-27-3, Utah Code Annotated) For the jury to be informed a life sentence meant fifteen years caused the penalty of death to become more likely. Had the jury been instructed a life sentence in a capital case meant an actual sentence for life for this particular defendant, or that appellant would not be released, if at all, unless an independent board designed to expertly rule on such matters concluded society would not be threatened by such release, the outcome may have been different.

Reasonable minds obviously would view the balancing process undertaken by this jury for some seven hours as being substantially influenced by a more accurate definition of a life sentence under Utah law. Defendant-appellant should have received the benefit of all favorable facts and inferences tending to influence the finder of fact. (See cases cited in Section III B, *infra*, re admissibility of polygraph results at penalty phase.)

Although objection was not concurrently made, appellant moved for a new trial on the grounds the jury could not rationally compare the death penalty to a life sentence when the life sentence was undefined. (Tr. 2/4 at 8 and Motion in Arrest of Judgment, Record at 357-358.) Even though objection is not technically preserved, this Court has reviewed the record for error in a capital case. (State v. Wood, 648 P.2d 71 (Utah, 1982)) Review for possible error, even though not raised on appeal or argued, may be undertaken by the Court sua sponte. (State v. St. Clair, 3 U.2d 230, 282 P.2d 323 at 327 (1955) and State v. Stenback, 78 Utah 350, 2 P.2d 1050 (1931))

The impermissible shift from "life" to fifteen years modified and effected the penalty choice submitted to the jury and therefore entitles appellant to an order remanding the case for new penalty phase proceedings.

V

THE SENTENCE OF DEATH IS DISPROPORTIONATE TO THE
CRIME, THE IMMUNITY GRANTED THE ACCOMPLICE AND
THE SENTENCES METED OUT IN SIMILAR CASES.

A. Proportionality to Crime. The victim received a number of blows to the head and died of asphyxiation due to a fire. The blows probably would have been fatal. (Tr. 1/4, 134-136) The victim was rendered unconscious by the first blow. (Tr. 1/6, 308-310)

It is this court's professed duty to determine whether the sentence of death is disproportionate to the crime. (State

v. Wood, 648 P.2d 71 (Utah, 1982) at 77 and 80 citing State v. Pierre, 572 P.2d 1338 (Utah, 1977)) In Wood, this court held, inter alia, that the lack of constitutional limitations upon the aggravating circumstances flawed the sentencing procedure. (648 P.2d at 85-86) The Court stated that ". . . under Utah law, 'ruthlessness and brutality,' as an aggravating factor, must be limited to those murders involving an aggravated battery or torture." (Citing State v. Codianna, 573 P.2d 343 (Utah, 1977)) (Id. 86) This holding resulted from the application of Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980), cited in Wood, supra.

The United States Supreme Court recently held that the Eighth Amendment did not invariably require a per se comparative proportionality although statutory schemes which require comparative proportionality review have received constitutional approval. (Pulley v. Harris, ___ U.S. ___, 79 L.Ed.2d 29, 104 S.Ct. ___, 34 Cr.L.Rptr. 3027 (1984)) However, "proportionality" in the traditional sense (i.e., gravity of offense and severity of penalty, sentences for other crimes and sentencing practices in other jurisdictions) is still the guiding standard in interpreting the "cruel and unusual" punishment clause of the Eighth Amendment. (Id. 79 L.Ed.2d at 35)

Section 76-1-104, Utah Code Annotated, applies principles of construction to the Code and specifically provides for proportionate sentencing. It states:

76-1-104. Purposes and principles of construction. The provisions of this code shall be construed in accordance with these general purposes.

(1) Forbid and prevent the commission of offenses;

(2) Define adequately the conduct and mental state which constitute each offense and safeguard conduct that is without fault from condemnation as criminal.

(3) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition or differences in rehabilitation possibilities among individual offenders.

(4) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.

Section 76-3-206, Utah Code Annotated, 1953, as amended, requires "automatic review" of all death sentences. Such review had been interpreted to include traditional proportionality review, State v. Pierre, supra; State v. Andrews, 574 P.2d 209, (1977).

This court in Pierre, 572 P.2d 1338 (1977), applied proportionality review stating:

The circumstances of the offenses and the defendant's participation in them. . . we believe, created an episode of extreme cruelty, terror and atrocity. We therefore reject this argument of disproportionality as inconsistent with the obvious facts. . . (Emphasis added) Id. at 1355.

The above-stated conclusion is a profound understatement of the events recounted by a survivor of that tragedy. In comparison appellant Tillman's conduct in this crime as recounted by Carla Sagars simply cannot be equated to the

"cruelty, terror and atrocity" cited above. Appellant's conduct did not rise to the level of ". . .extreme and unusually serious and shocking crimes. . ." (emphasis added) (*Id.* 1356) required before imposition of the ultimate sanction. The men in Utah currently under a sentence of death (excluding appellant) consist of individuals who have committed multiple homicides of almost incredible magnitude, the gruesome details of which this court and the general public have been informed by the news media and appellate review. Without reviewing the undisputed facts of those cases, (one of which has yet to be reviewed by this court), it can be concluded that appellant's crime is unextraordinary and that appellant's sentence of death is disproportionate, factually and legally, to the crime. There was no torture nor extended personal confrontation. The initial assault resulted in unconsciousness and death followed shortly thereafter. No other victims were directly involved.

B. Proportionality to Accomplice Sentence. Carla Sagars testified she stalked the victim, provided information, purchased guns, plotted various impossible schemes, committed a number of felonies while employed at the U.S. Bureau of Prisons, aided and abetted the actual homicide by personal participation and received complete and full immunity although she had already voluntarily confessed to her complicity in the offense. (See generally Tr. 1/6, 191 to Tr. 1/7, 512, inclusive.)

Proportionality review in other jurisdictions have

included comparison to accomplice sentences. See e.g., People v. Dillon, 34 Cal.3d 441, 668 P.2d 697 (1983), and Meeks v. State, 339 So.2d 186 (Fla., 1976), cert. den. 439 U.S. 991 (1978), wherein that court compared the life sentence imposed upon the accomplice with the death sentence of appellant who was the dominating figure in the felony-murder, stating:

We are extremely sensitive to the demands of equality before the law in cases in which we must consider whether a sentence of death should be upheld. Our reading of Fuhrman v. Georgia, 408 U.S. 238 (1972), . . . convinces us that identical crimes committed by people with similar criminal histories require identical sentences. Id. at 192.

Appellant in the case at bar does not argue Ms. Sagars should be given the death penalty--there are obvious differences in circumstances, history and claimed complicity--however, appellant strenuously urges this court to compare the incredibly diverse treatment of the two parties to the crime.

The prevalent practice in modern criminal prosecutions involves wide-spread use of "snitches" or immunized witnesses. This practice, coupled with repeal of the Accomplice Corroboration Rule (Section 77-17-7, Utah Code Annotated, as amended in 1980) certainly has facilitated criminal prosecutions, but by the same token has heightened the potential for abuse in the "race to the courthouse." The first one of multiple co-defendants to "confess" and blame the others from the witness stand generally emerges unscathed, victorious (in terms of freedom, fees, new job or identity, lesser criminal record) and,

not incidentally, typically immune from being shown deceptive with respect to the details of the crime itself or the comparative complicity of the slower-footed defendant at trial. The case at bar typifies the extreme result of the confessor to a homicide avoiding all sanctions and the non-confessor receiving the ultimate sanction. The disproportionate treatment between the two participants is the product of arbitrariness and caprice-proscribed in Fuhrman v. Georgia, 408 U.S. 238 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), and prohibited by the Eighth Amendment to the United States Constitution and Article I, Section 9, Utah Constitution. The Court should vacate the penalty of death as patently disproportionate to the full immunity granted the accomplice.

C. Proportionality of Sentence to Similar Cases.

(Comparative proportionality.) Defendant attempted to introduce affidavit evidence during the penalty phase to the effect that a number of previously-tried capital homicide cases in Salt Lake County resulted in life sentences. The motions and affidavits are at pages 289-332 of the record on appeal. The Court barred introduction of the evidence before the jury but permitted the same to be filed as part of the court record. (Tr. 1/20, 72)

This Court has previously ruled the automatic review of capital cases includes review of proportionality of the sentence. (Subsection A, *supra*, and cases there cited) Although comparative proportionality review is not mandated by Federal Constitutional Standards, the practice has been lauded and

occasionally applied. (Pulley v. Harris, supra, and cases cited) This Court has not specifically ruled that comparative proportionality review is to be performed; however, it has stated that:

. . .we believe that this state's system meets the constitutional tests because it is structured to provide reasonably that the unique and irretrievable sanction of death will be mandated by its provisions and processes only in extreme and unusually serious and shocking crimes. . . State v. Pierre, supra, 572 P.2d at 1356.

Subsequently, in Pierre v. Morris, 607 P.2d 812 (Utah, 1980) and Andrews v. Morris, 607 P.2d 816 (Utah, 1980) this Court held that comparative review could not be raised in a subsequent Rule 65 B(i), U.R.C.P., proceeding because such review was deemed a matter of law and Utah's statute was constitutional "on its face." (Id. 814) In Andrews v. Morris, supra, this Court adopted the rationale of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir., 1978), cert. den., 440 U.S. 976 (1979), which prohibited comparison of every decision, trial, juror, prosecutor, etc.

Appellant does not request comparative proportionality review in the manner rejected in Andrews v. Morris, supra, but he reasonably and simply asserts that comparison of his case to the death penalty cases of record, without more would clearly demonstrate other crimes much more vicious, inhumane or reprehensible and that appellant's crime more nearly parallels the crimes of those not given the death penalty. Section

76-1-104(3) and (4), Utah Code Annotated, mandates such comparison.

Appellant further asserts the trial court erred in excluding the affidavits proffered by defendant. The affidavits would have allowed the jury to compare sentences in a more informed manner. That is, the jury could then decide whether the crime in question was an ". . .extreme and unusually serious and shocking. . ." crime. Extreme compared to what? Unusual compared to the "usual"?

Prohibition of the factual comparison denied Mr. Tillman the right to present "any evidence in mitigation" mandated by Section 76-3-207 of the Utah Code and the right to due process of law. Prohibition of a factual comparison eradicates the mechanism which would insure that ". . .the law . . .[is] applied, in all cases, in a judicious and even-handed manner." (State v. Wood, supra, 648 P.2d at 80); The sentence in this case cannot be considered "even-handed" when compared to sentences imposed in cases addressed by the affidavits on file herein, including State v. Hansen, (one homicide perhaps torture, another homicide attempted, disfigurement, etc.); State v. Rocco (same as Hansen); State v. Calhoon, (multiple homicide of prominent businessman and his wife under numerous aggravating circumstances by youthful defendant); State v. Raines, (drug store proprietor murdered during a robbery in front of two witnesses, defendant on parole); State v. Phillips, (homicide to prevent identification by an unresisting

cab driver, defendant notched gun and bragged about deed); State v. Franklin, (multiple homicide of two black joggers for racial motives, prior felonies by defendant); State v. Yoakum, (machine-gun killing of a witness during an aggravated kidnapping - no criminal history, no torture, possible emotional imbalance); State v. Stark, (the killing of a state trooper by an 18-year old parolee); State v. Kanusky, (involved a torture killing by a defendant with a criminal history). On the other side of the coin, death sentences were imposed in Pierre, supra, Andrews, supra, and Bishop, CR-83-1314, Salt Lake County District Court, all alleging multiple homicides. The cases of Wood, supra, and Norton, supra, had the penalty of death vacated.

The sentence of death in this particular case is disproportionate to the unextraordinary crime of which appellant stands convicted. The sentence of death is arbitrary, capricious, and therefore disproportionate to the distinctly cavalier treatment of the accomplice. The sentence of death in this case is freakish and disproportionate to the sentences of other individuals convicted of multiple killings, torture killings or other cruel homicides and fails to equate to those sentenced to death in Utah for multiple and atrocious killings. This Court should vacate the death penalty and remand for imposition of a life sentence.

VI

APPELLANT'S CONVICTION IS INFIRM BECAUSE IT
IS BASED ON A DUPLICITOUS INFORMATION.

The Information charged appellant with Murder in the First Degree, a Capital Offense based upon the felony-murder rule. (Record at 17) At preliminary hearing the Information was amended to allege the underlying felonies of burglary, aggravated burglary or arson or aggravated arson (Record at 17), thereby permitting the jury to find guilt and/or impose the sentence of death upon two classifications of felonies. Appellant complained of such duplicity in his motion in arrest of judgment filed January 28, 1983. (Record at 34) The Motion was argued on February 4, 1983, (Tr. 2/4, 5-8) and denied. (Id. 21)

Appellant also submitted jury instruction in which the felony-murder rule theory was expressed only in terms of burglary or aggravated burglary. (Record at 156, Cf. 157) The Court may take notice of an error even though lacking formal exception to jury instruction. See State v. Dubois, 98 P.2d 354 (Utah, 1940); State v. Peterson, 240 P.2d 504 (Utah, 1952).

In State v. Andrews, 574 P.2d 709 (Utah, 1977), the Court addressed issues even though not raised on appeal of a capital case. (Id. 710) When fundamental rights are involved, a mere failure to object does not bar standing. (State v. Green, 616 P.2d 628 (Wash., 1980))

The law relative to duplicity may be summarized by

quoting the Third Circuit Court of Appeals in U.S. v. Starks, 515 F.2d 112 (1975) at 116-117:

Duplicity is the joining in a single count of two or more distinct and separate offenses. One vice of duplicity is that a general verdict for a defendant on that count does not reveal whether the jury found him not guilty of one crime or not guilty of both. Conceivably, this could prejudice the defendant in protecting himself against double jeopardy. Another vice of duplicity is that a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or of both. Conceivably, this could prejudice the defendant in sentencing and in obtaining appellate review. A third vice of duplicity is that it may prejudice the defendant with respect to evidentiary rulings during the trial, since evidence admissible on one offense might be inadmissible on the other. Joining conspiracy and substantive offenses in the same count present this vice in a particularly aggravated form, because of the admissibility of declarations made by co-conspirators. Assuming such a joinder, and a general guilty verdict, there would ordinarily be no way of discerning whether the jury found the defendant guilty of the offense in proof of which such co-conspirator's admissions were properly admitted. Finally, there is no way of knowing with a general verdict on two separate offenses joined in a single count whether the jury was unanimous with respect to either. (515 F.2d at 116-117)

In Starks, the defendants therein were charged with conspiracy and attempt to violate the Hobbs Act (18 U.S.C.A. Section 1951) through acts of robbery and extortion. The Court overturned the conviction because of duplicity.

A general verdict predicated upon two alternative grounds must be set aside if one of the grounds is infirm.

In Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 484 (1931), a communist was convicted of violating a flag statute which had three definitional clauses, one of which was held unconstitutional. Since the general verdict could have been predicated on the unconstitutional portion of the statute, the verdict was vacated.

In accord is Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), another communist party case in which the Court followed the rule of Stromberg, supra, stating:

. . .we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. (Citation omitted.) 354 U.S. at 311, 1 L.Ed.2d at 1371.

Recently, the United States Supreme Court addressed the application of the Stromberg rule to sentencing procedures in a death penalty case. In Zant v. Stephens, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 235 (1983), Stephens, the respondent, was convicted of murder and sentenced to death after the Georgia jury had found the existence of two (or perhaps three by inference) statutory aggravating circumstances, one of which was later held invalid. Although the conviction was affirmed on a harmless-error rule application, the Court reaffirmed the viability of Stromberg and specifically noted that a different result might be obtained when the penalty phase requires the finder of fact to weigh the aggravating and mitigating

circumstances. (___ U.S. ___, 77 L.Ed.2d at 258 (advance sheets)) Utah law requires such "weighing" procedures. (State v. Wood, supra)

The case at bar is fundamentally identical with State v. Green, supra, in which the defendant allegedly murdered a rape-kidnapping victim. The felony-murder rule was invoked based on either a rape or a kidnapping. On appeal, the Court held that there was insufficient evidence of kidnapping; and inasmuch as it was ". . . impossible for us to know if the jury was unanimous in determining whether aggravated first degree murder was committed in the furtherance of kidnapping or rape. . ." (emphasis by the court) (Id. 631), the case was reversed and remanded. The jury had been instructed that they could find first degree murder if the homicide was in furtherance of a rape or a kidnapping, without requiring the jury to specify which alternate ground or both grounds were the underlying felony. Upon a second review, the Court concluded that kidnapping had not been proven beyond a reasonable doubt and that therefore the required unanimity was lacking. Some jurors could have relied upon the kidnapping and others relied on the rape to conclude guilt of felony-murder.

The case at bar is strikingly similar to State v. Green, supra. Appellant herein was convicted of felony-murder under two distinct types of felonies (each subdivided into aggravated and non-aggravated forms), either one or both felonies being infirm because the felony merged into or was included

within the homicide as argued in Point VII, immediately following. Even if not merged or included, there is no way to tell if the jury was unanimous because of duplicity. It is still impossible to tell whether the jury was unanimous in finding the murder occurred in the commission of a burglary or an arson.

VII

A CAPITAL CONVICTION CANNOT BE OBTAINED UNDER THE FELONY-MURDER RULE WHEN THE FELONY IS MERGED OR INCLUDED IN THE MURDER ITSELF.

Appellant moved, pre-trial, to quash or reduce the Information on the grounds that a lesser-included offense could not constitute one of the dual prongs of the felony-murder rule. (Record at 68-91 and 121-130) He asserted similar grounds in support of his motion for a new trial (Record at 357) and requested instructions aimed at this point. (Record at 156-157) The Information charged Capital Homicide based on felony-murder, Section 76-5-202(1)(d), Utah Code Annotated, 1953, as amended. The felonies alleged were burglary, aggravated burglary, arson or aggravated arson.

The facts relevant to these motions are not substantially disputed. Ms. Sagars testified that the sole purpose for entry into the victim's home was to commit a homicide. (Tr. 491-492) She also testified that the victim's bed was set on fire to finish (at her advice) or hide the murder, (Tr. 1/7, 488-493) The jury was instructed according to the statutory definitions of burglary, aggravated burglary, arson

and aggravated arson (Record at 197, 198), as well as the elements of the felony-murder rule. (Record at 194)

The felony-murder rule is set forth in Section 76-5-202, Utah Code Annotated, 1953, as amended (prior to the 1983 amendments):

Murder in the first degree.--(1) Criminal homicide constitutes murder in the first degree if the actor intentionally and knowingly causes the death of another under any of the following circumstances:

* * *

(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, forcible sodomy, or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping or kidnapping.

The statute was amended post-trial to include additional felonies within the felony-murder rule as well as other changes.

In People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927), Justice Cardozo succinctly stated appellant's position as follows:

The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as e.g. robbery or larceny or burglary or rape. Id. 158 N.E. at 36

To require otherwise would mean ". . .that every homicide, not justifiable or excusable, would occur in the commission of felony, with the result that intent to kill and

deliberation and premeditation would never be essential."
(Ibid.)

In State v. Essman, 403 P.2d 540 (Ariz., 1965), defendant was charged and convicted of first degree murder pursuant to the felony-murder rule on the grounds the defendant feloniously assaulted his wife with a gun resulting in her death. On appeal the Arizona Supreme Court ruled that the act of assault merged into the resultant homicide. The assault could not be deemed a "separate and independent offense which could support a conviction for felony murder." (Id. at 545 citing People v. Moran, supra)

Of similar import is State v. Branch, 415 P.2d 766 (Ore., 1966), wherein the issue on appeal was the propriety of a "felony-murder" instruction when the only felony was the included assault with a dangerous weapon. The state in that case contended that ". . .the felony need not be a collateral one, but that any included felony to entitle the state to an instruction on felony murder." (Id. 767) The Court flatly disagreed, distinguishing collateral felonies from included felonies. For example, a felonious assault upon a police officer resulting in the death of an intervening citizen is a felony-murder; however, absent intervention, the death of a police officer, without more, is not a felony-murder. (Utah's present statute has elevated homicide of a public official to a capital offense. Section 76-5-202, Vol. 8C, Pocket Supplement.)

The California court addressed the issue to People v. Ireland, 70 Cal.2d 522, 75 Cal.Rptr. 188, 450 P.2d 580 (1969), wherein the court reversed a felony-murder conviction in which the underlying felony was assault with a deadly weapon. The court ruled that the felony-murder doctrine has no application to situations wherein the felony portion of the rule consists of the felonious assault upon the victim, ". . . a category which includes the great majority of all homicides." (450 P.2d at 590) The California court adopted the doctrine to void bootstrapping by the prosecution in cases where the felony is ". . . an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged." (Footnote omitted, first emphasis added, second emphasis by the Court.) (Ibid.) With respect to felony-murder based on a burglary, the court overruled (to the extent inconsistent with the opinion) two prior cases which had permitted ". . . a first degree felony-murder instruction based upon a burglary as to which the intended felony is the homicide itself of an offense included therein." (Id. 450 P.2d at 590-591)

In People v. Wilson, 1 Cal.3d 431, 82 Cal.Rptr. 494, 462 P.2d 22 (1969), the court addressed the precise issue at bar; to-wit: Whether the felony-murder rule could be supported by burglary as the underlying felony when the purpose of entry was to commit an assault upon the murdered occupant. The court held that a conviction for felony-murder cannot be based upon

a burglary predicated upon assaultive intent, stating:

Here the prosecution sought to apply the felony-murder rule on the theory that the homicide occurred in the course of a burglary, but the only basis for finding a felonious entry is the intent to commit and assault with a deadly weapon. When, as here, the entry would be non-felonious but for the intent to commit the assault, and the assault is an integral part of the homicide and is included in fact in the offense charged, utilization of the felony-murder rule extends that doctrine 'beyond any rational function that it is designed to serve'. We have heretofore emphasized 'that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application.' (People v. Phillips, (1966), supra, 64 Cal.2d 574, 582, 51 Cal.Rptr. 225, 232, 414 P.2d 353, 360)

'The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.' (People v. Washington, (1965), 62 Cal.2d 777, 781, 44 Cal.Rptr. 442, 445, 402 P.2d 130, 133) Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule. The doctrine can serve its purpose only when applied to a felony independent of the homicide. In Ireland, we reasoned that a man assaulting another with a deadly weapon could not be deterred by the second degree felony-murder rule, since the assault was an integral part of the homicide. Here, the only distinction is that the assault and homicide occurred inside a dwelling so that the underlying felony is burglary based on an intention to assault with a deadly weapon, rather than simply assault with a deadly weapon. (Id. 462 P.2d at 28)

The California Supreme Court in People v. Green, 164 Cal.Rptr. 1, 609 P.2d 468 (1980) again reviewed the

felony-murder rule. In that case, the defendant forced his wife to a secluded area, caused her to disrobe and killed her some 20-30 minutes later. Defendant took the clothes and personal valuables of the victim. He admitted to sexual intercourse immediately prior to the murder.

The State charged Green with capital murder alleging that the homicide was committed (1) during the commission of the robbery; and (2) during the commission of a kidnapping. Finding the felony-murder applied predicated on the robbery, the jury imposed death. On appeal the court reversed, holding that a murder is not committed during a robbery within the meaning of the statute unless the accused has "killed in cold blood in order to advance an independent, felonious purpose; e.g., [has] "carried out an execution-style slaying of the victim of or witness to a holdup, a kidnapping or a rape." (609 P.2d 505) A special circumstance allegation of murder committed during a robbery has not been established where the accused's primary criminal goal "is not to steal but to kill and the robbery is merely incidental to the murder. . .because its sole object is to facilitate or conceal the primary crime." (609 P.2d at 505) The Court concluded:

In the case at hand, for example, it would not rationally distinguish between murderers to hold that this defendant can be subjected to the death penalty because he took his victim's clothing for the purpose of burning it later to prevent identification, when another defendant who committed an identical first degree murder could not be subjected to the death penalty

if for the same purpose he buried the victim fully clothed--or even if he doused the clothed body with gasoline and burned it at the scene instead. To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive 'the risk of wholly arbitrary and capricious action' condemned by the high court plurality in Gregg. (428 U.S. at p. 189, 96 S.Ct. at p. 2932) We conclude that regardless of chronology such a crime is not a murder committed 'during the commission' of a robbery within the meaning of the statute. (Emphasis added.) (Ibid.)

In People v. Thompson, 165 Cal.Rptr. 898, 166 P.2d 883 (1980), decided three months after Green, supra, the defendant was convicted of first degree murder, robbery and first degree burglary, all arising out of an incident technically involving robbery and burglary but in which the primary goal was a homicide. The penalty was death.

The court stated at page 894:

The question presented under People v. Green is whether the shootings were done to advance an independent felonious purpose of stealing the car and keys or whether instead such intended thefts were 'merely incidental to the murder.' Viewing the record as a whole in the light most favorable to the jury's verdicts, as this court must, it is impossible to conclude that the prosecution sustained its burden of proof on this issue.

The perpetrator's final remark to his victims as he held the pillow in front of his gun--'you know why I'm here and you know who sent me'--undeniably indicates that this confrontation was intended primarily (if not exclusively) to be a killing. The man's

refusal without apparent reason to accept any of the victim's jewelry strongly imports that property gain was at most secondary importance.

As in Green and Thompson, supra, the primary criminal goal of Carla Sagars and the appellant was to kill the victim with the hatchet or axe, and the fire was merely incidental to the murder because the fire was set to conceal the primary crime (murder). In fact, the testimony of Carla Sagars clearly shows that it was her desire to set the fire and to put cigarette butts around the fire area to make it look like the victim had been smoking in bed and the death caused by accidental means. (Tr. 1/6, 488-493) The application of the felony-murder rule; i.e., increasing the degree of the crime from second degree murder to first degree murder by virtue of the abortive intent to destroy the crime scene with an arson, is plainly prohibited and, as stated in Green, "would revive the risk of wholly arbitrary and capricious action condemned by the high court plurality in Gregg."

The other aggravating circumstance alleged in the Information, to-wit: burglary or aggravated burglary, is similarly incidental to the homicide. The entry into the victim's home was made solely for the purpose of carrying out the primary criminal goal of Carla Sagars and the appellant to kill. In Thompson, the killer entered the victims' home armed with a gun and shot his two victims and used the ruse of robbery to cover his primary motive; i.e., that he was sent to

the victims' home to kill them, not to steal their property. In Wilson the killer entered the apartment with felonious intent (a burglary) to commit an assault upon the decedent. There is no question here that if the victim had not died, Carla Sagars and the appellant would be guilty of aggravated burglary because they did enter the residence, caused physical injury to the victim and were armed with a deadly weapon. However, the crimes of burglary or aggravated burglary were "merely incident to the murder" (People v. Thompson, supra), and secondary to the primary criminal goal of murder. The State has elected to charge murder in the first degree, a capital felony, alleging that the homicide was committed "during the commission" of a burglary, aggravated burglary, arson or aggravated arson when in fact the reverse has been shown; i.e., that the burglary and/or arson was committed "during the commission" of a homicide and was secondary to the primary criminal goal of homicide.

Burglary is a completed offense the moment entry is made with the requisite felonious intent. (Section 76-6-202, Utah Code Annotated) In State v. Sisneros, 631 P.2d 856 (Utah, 1981), the court upheld a burglary conviction based purely on entry with an inferred felonious intent.

Once the offense of burglary is completed, the homicide cannot have occurred "in the commission of" the burglary as required by the felony-murder rule. Mere temporal proximity ought not to elevate the homicide to a capital offense. (See

generally 58 A.L.R.3d 851, Felony-Murder Rule, "Termination of Felony", p. 851-987, for extensive discussion.) The United States Supreme Court may decide the issue in Murphy v. Texas, cert. granted 35 C.L. 4067.

For the foregoing reasons, the capital conviction in this case cannot be supported by the felony-murder rule charged in the Information when the underlying felony or felonies were either completed, merged into the homicide or included in fact in the homicide. The evidence and the law can only permit, at most, a conviction of Second Degree Murder, first degree felony. The Court should reverse and remand for imposition of the appropriate sentence.

VIII

SECTION 76-3-207, U.C.A., IS CONSTITUTIONALLY DEFECTIVE
BECAUSE IT FAILS TO LIMIT AGGRAVATING CIRCUMSTANCES
AND PERMITS THE JURY TO RELY ON ANY FACTS IN AGGRAVATION.

Prior to commencement of penalty proceedings, the State filed a notice of intent to introduce aggravating factors during penalty phase including prior felony convictions, parole status, prior incarcerations and statutory aggravating circumstances based on the felony-murder rule of Section 76-5-202(d), Utah Code Annotated, 1953, as amended (as of trial date). Defendant-appellant filed a notice prior to the penalty phase to the effect he would not seek to rely on lack of criminal history in mitigation and objected verbally to introduction of conviction evidence. (Tr. 1/20, 14 and 68)

Witnesses for the State testified concerning

appellant's prior criminal convictions and appellant's parole status at the time of the offense. (Tr. 1/20, 5-20)

At commencement of the penalty phase, the Court instructed the jury in almost the precise language of the sentencing statute (Section 76-3-207, Utah Code Annotated) that any evidence having probative force may be received regardless of its admissibility. (Tr. 1/20, 2-3) The typed instructions tendered to the jury (Record at 268) and read to them (Tr. 1/20, 73) also advised the jury that any facts in aggravation could be presented. (Instruction No. 4) Instruction No. 6 (Record at 270) then stated "You may consider as aggravating circumstances the very matters which you found to be present beyond a reasonable doubt as elements of the offense of first-degree murder in the guilt phase." (Emphasis added.) And also Instruction No. 7, (Record at 271) "You may consider as aggravating circumstances any other evidence admitted at trial. . .and any other facts in aggravation. . . ."

Section 76-3-207 provides, in pertinent part, as follows:

In these proceedings, evidence may be presented as to any matter the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court deems to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence. . . . Aggravating circumstances shall include those as outlined in 76-5-202.

Section 76-5-202, referred to in the quoted statute, is the substantive Murder in the First Degree statute under which appellant was charged with felony-murder as the aggravating circumstance.

The jury did not specify which one or more aggravating circumstances it relied upon as grounds for imposition of the death penalty. (See Point VI, *infra*, re duplicity.)

Allowing a jury to determine whether to impose the death penalty on the basis of "any facts in aggravation" clearly violates the Eighth and Fourteenth Amendments to the United States Constitution. Henry v. Wainright, 661 F.2d 56 (5th Cir., 1981), reh. 686 F.2d 311 (1982), cer. granted 457 U.S. 1114, 73 L.Ed.2d 1326, 102 S.Ct. 2922 (1983). In Henry the Fifth Circuit Court held that the consideration of non-statutory aggravating circumstances required another sentencing procedure when the initial sentencing procedure involved jury instructions similar to the case at bar. For the jury to consider any aggravating circumstance violated the mandates of Fuhrman v. Georgia, *supra*, and its progeny.

A different statutory scheme subject to the same infirmity was involved in Jordan v. Watkins, 681 F.2d 1067 (5th Cir., 1982), reh. den. 688 F.2d 395 (1982), wherein the jury was not limited in its consideration of aggravating circumstances. See also Bell v. Watkins, 692 F.2d 1002 (5th Cir., 1982).

To the extent Section 76-3-207, Utah Code Annotated, 1953, as amended, permits the jury to consider "any other facts in aggravation," the statute is constitutionally infirm because it fails to adequately ". . . channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Fuhrman* could occur." (*Gregg v. Georgia*, 428 U.S. 153 at 195 n. 46, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976))

Not only was the jury instructed that it could rely on any other fact in aggravation, but it was also instructed that the aggravating circumstance of felony-murder, upon which they could rely to impose the death penalty, had already been found to exist beyond a reasonable doubt. Appellant, on the other hand, sought to limit introduction of prior convictions of defendant via a notice of intent not to claim lack of criminal history in mitigation.

The total effect of the instructions was one which virtually mandated death unless the appellant was able to step forward to give a compelling reason why the death penalty should not be imposed. This Court has held that a life sentence must be presumed until the prosecution has sustained its burden. (*State v. Pierre*, *supra*)

When the statutory language is juxtaposed on the instructions, an unextraordinary homicide results in the first death penalty verdict in Salt Lake County in many years. The jury decision was an aberration, and can only be viewed as

capricious. The statute and instructions failed adequately to channel the sentencing process.

IX

THE REASONABLE DOUBT INSTRUCTIONS GIVEN WERE
CONSTITUTIONALLY INFIRM AND COULD NOT BE HARMLESS ERROR.

Appellant's counsel requested and the Court read and tendered a reasonable doubt instruction during the guilt phase which defined reasonable doubt as:

Now, by reasonable doubt is meant a doubt that is based on reason and one which is reasonable in view of all the evidence. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind and convinces the understanding of those who are bound to act conscientiously upon it. A reasonable doubt is a doubt which reasonable men and women would entertain, and it must arise from the evidence or the lack of evidence in this case. (Record at 148)

Both phases of trial also demanded the jury to assess guilt and penalty in terms of reasonable doubt defined as follows: "A reasonable doubt must be a real substantial doubt and not one that is merely possible or imaginary." (Emphasis added.) (Ibid.)

The foregoing definitions have long-standing use in the experience of the undersigned; however, such does not and should not excuse the error in requesting the instruction and the court's use of the instruction, which now appears, in retrospect, to shift the burden to defendant-appellant. In Dunne v. Perrin, 570 F.2d 21 (1st Cir., 1978), the instruction at issue was held to be error of constitutional magnitude. In that

case the instruction required ". . . a reasonable person [to] give or suggest a good and sufficient reason." (Id. 23, fn. 1) The Court concluded that standing alone, the instruction might not be reversible error, although improper in itself. When coupled with other definitions requiring a strong and abiding conviction, not some fanciful or trivial doubt, the instruction as a whole was patently erroneous and an error of constitutional magnitude. (Id. 23-24)

The right to proof beyond a reasonable doubt in a criminal trial (and the penalty phase under modern bifurcated statutes) ". . . has long been assumed. . . constitutionally required." (In re Winship, 397 U.S. 358 at 362, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970), (numerous citations omitted)) And quoting from Davis v. United States, 160 U.S. 469 at 484, the Court in Winship noted:

" . . . No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them. . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged. Id. at 363

The Court expressly held that the reasonable doubt standard was required by the Due Process Clause. (Id. 364)

Although the Court in Dunn v. Perrin, *supra*, reserved for another day whether or not an erroneous reasonable doubt instruction could ever be harmless (Id. 25), Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1966), held that errors of constitutional magnitude require scrutiny

to determine whether the error did not, beyond a reasonable doubt, contribute to the conviction before being held harmless. Appellant submits this standard analogously applies to the penalty phase of trial as well inasmuch as the very life of appellant was at stake. The Davis quote in Winship, supra, quoted above is particularly appropriate.

The instructions at issue herein are closely analogous to those in Dunn, supra. The jury was required to find a "real, substantial doubt" before acquitting appellant or before imposing a life sentence. The jury was required to find an articulate reason for the doubt.

The cumulative effect of the entire instruction in each phase was an impermissible shift in the burden of proof. The prosecution burden was eased by the requirements of articulation and elevation to a "real, substantial" doubt. The penalty phase was constitutionally tainted, requiring remand since to require otherwise is to advance the proposition that there can be harmless constitutional error when imposing the death sentence.

X

APPELLANT'S JURY PANEL UNDERREPRESENTED
RACIAL AND ETHNIC MINORITIES

Appellant's counsel, as required by Anders v. California, 386 U.S. 738 (1967), and State v. Clayton, 639 P.2d 168 (1981), and mindful of Section 78-46-16, Utah Code Annotated (Pocket Supplement, 1983), presents the authority and

argument therefor below.

A criminal defendant has the right to a jury selected from a fair cross-section of the community. (Duren v. Missouri, 439 U.S. 35, 58 L.Ed.2d 579, 99 S.Ct. 664 (1979))

Exclusion of a distinct class or race from the jury panel is constitutional error. Carter v. Jury Commission of Greene County, 396 U.S. 320, 24 L.Ed.2d 549, 90 S.Ct. 518 (1970). For example, in Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975), the systematic exclusion of women from the jury venire deprived the appellant therein of the Sixth Amendment right to a jury trial because of the failure to effect a fair cross-section of the community.

The triple-pronged test of the "fair cross-section" rule is set forth in Duren, supra, and requires the following:

(1) the group allegedly excluded is distinctive in the community;

(2) the distinctive group's representation in the venire vis-a-vis the community is not fair and reasonable; and

(3) underrepresentation of the group is due to systematic exclusion in the selection process.

The foregoing three factors, if demonstrated, present a prima facie violation of the fair cross-section rule and can be rebutted only by demonstrating a significant state interest advanced in the particular selection process. (Id. 439 U.S. at 376-368)

In the case of State v. Bishop, CR-83-1314, et al.,

Third Judicial District, Salt Lake County, State of Utah, defendant therein alleged, and appellant herein adopts the argument that Hispanics are a distinct community group which, during the period of January 1, 1983, through March 31, 1983, (during which time appellant stood trial), were systematically excluded from the jury venire as indicated by the actual number of Hispanic surnames (43) on the panel compared to the statistically anticipated number of Hispanics (99 or 4.98%) on the panel. The apparent exclusion of some 56+% of a distinctive group could be the result of a systematic exclusion under the jury selection system in place. The undersigned knows of no simple method to record and demonstrate the underrepresentation of Blacks, Hispanics, young adults or other distinctive groups since ethnic and other distinctive statistics are not maintained by the court with respect to the jury venire.

Records maintained at the Salt Lake County Clerk's office reflect that during January of 1983, some 1206 prospective jurors were contacted resulting in the disqualification of 260 (21.55%) and excusal of 23 (1.90%) for total exclusion of 283 (23.45%). Similarly, February 1983 showed 21.45% excluded due to 18.73% disqualification and 2.72% excusal and March 1983 showed 27.24% excluded via 21.9% disqualification and 5.33% excusal. The calendar year 1983 averaged 26.66% exclusion. No records of ethnic origin, reason for disqualification or reason for excusal were maintained thereby rendering virtually impossible any means to compare distinctive social groups.

Appellant submits that the three-pronged test of Duren, supra, has been met as demonstrated below.

A. Hispanics are a distinctive group under the criteria of State v. Pierren, 583 P.2d 69 (Utah, 1978), in that the United States Supreme Court has recognized the Mexican-descent group as distinctive. (Hernandez v. Texas, 347 U.S. 475, 98 L.Ed. 866, 74 S.Ct. 667 (1954)) Although the relationship of the Mexican-descent group to the Hispanic group is unknown to the undersigned, the former should constitute a substantial portion of the latter and hence bear some reasonably substantial correlation to Census Bureau statistics relied on. Blacks are a distinctive group as well. (Willis v. Zant, 720 F.2d 1212 (11th Cir., 1983))

B. Hispanics are underrepresented in the venire. According to counsel in Bishop, supra, review indicated more than half of the statistically expected Hispanics did not appear on the venire when reviewing the record for Hispanic surnames.

C. The group is underrepresented through systematic exclusion. Although mechanics of systematic exclusion are unknown to the undersigned and review of juror records at the clerk's office reflect only gross statistics, such statistics show an average of 26.6% are excused, thereby providing a vehicle of some sort to effectuate systematic exclusion.

In Willis v. Zant, supra, the Court held a Georgia death-row inmate was entitled to an evidentiary hearing to demonstrate his allegations that young adults and Blacks were

systematically excluded from Georgia juries.

At minimum, appellant is entitled to a hearing, after opportunity for discovery, to present evidence in support of his contentions. Appellant should be given the opportunity to obtain any evidence in support thereof by the appointment of separate counsel and such other experts and resources necessary to establish the claim.

CONCLUSION

Appellant was deprived of a fair trial because of impermissible comments upon his failure to testify and his inability to adduce evidence tending to show deception by the State's primary witness testifying under a grant of immunity. Appellant's sentence is grossly disproportionate to treatment of the accomplice and others convicted of homicide. The sentence was imposed absent meaningful comparison to the alternative life sentence. The Information was duplicitous and was based on a felony murder wherein the felony had merged into the murder. Instructions shifted the burden of proof without limiting the aggravating factors.

Each error warrants reversal. The cumulative weight of all errors must compel reversal of all proceedings with the appropriate remand for new trial, sentencing procedures and imposition of a life sentence.

Appellant has alleged numerous errors and filed a lengthy brief in support thereof in the belief the record should reflect not only issues raised at trial but also reflect the


mistakes of counsel at trial and reflect the benefit of hindsight in the hope procedural defaults of counsel will not prejudice the client. If counsel has burdened the Court, he apologizes; but if in so doing he has advanced the interests and rights of his client, he has in some small measure discharged his duties to his client, the Court and the people of the State of Utah and society's interest in achieving true and humane justice.

Respectfully submitted this 7 day of June, 1984.

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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, to David Wilkinson, Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this _____ day of June, 1984.
