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Case No. 20090771

in the

Utah Supreme Court

VON LESTER TAYLOR,
PETITIONER/APPELLANT,

vs.

STATE OF UTAH,
RESPONDENT/APPELLEE.

BRIEF OF APPELLEE

Appeal from dismissal of successive petition for post-conviction relief, challenging convictions for two counts of Capital Homicide, in the Third Judicial District Court of Utah, Summit County, the Honorable Bruce Lubeck presiding.

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. iv

STATEMENT OF JURISDICTION. 1

STATEMENT OF THE ISSUES. 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES. 2

STATEMENT OF THE CASE. 3

STATEMENT OF FACTS. 4

SUMMARY OF ARGUMENT. 9

ARGUMENT

I TAYLOR IS NOT INNOCENT. 10

II THE DISTRICT COURT CORRECTLY RULED THAT CLAIMS ALREADY RAISED ARE PROCEDURALLY BARRED. 16

III THE DISTRICT COURT CORRECTLY RULED THAT CLAIMS THAT COULD HAVE BEEN PREVIOUSLY RAISED ARE PROCEDURALLY BARRED, AND NO EXCEPTION APPLIES TO EXCUSE TAYLOR FROM THAT BAR. 17

A Taylor has failed to establish that he meets any common-law exception to the procedural bar.. 17

1 Taylor has failed to establish that his claims are not frivolous or were not withheld for tactical reasons.. 18

2 Taylor failed to establish that his claims meet the PCRA requirements for newly discovered evidence.. 20

B The district court correctly concluded that there is no ineffective-assistance exception to the successive petition procedural bar.. 22

C The Court may affirm on the alternative bases either that Taylor never established that the right to effective assistance of post-conviction counsel had been violated or that the right does not exist.. 25

1 Taylor never established that prior post-conviction counsel was ineffective.. 26

2 Taylor failed to prove that inadequate funding to his prior post-conviction counsel allows him to proceed with his successive post-conviction claims.. 27

a Taylor failed to establish that the funding was inadequate.. 28

b Taylor failed to establish that he was prejudiced by inadequate funding.. 29

3 Alternatively, Taylor had no right to the effective assistance of post-conviction counsel.. 30

a The 2008 amendment to § 202 applies to Taylor's case.. 30

b This Court should overrule *Menzies*.. 36

IV THIS COURT MAY AFFIRM THE DISMISSAL OF THE POST-CONVICTION PETITION ON THE ALTERNATIVE BASIS THAT TAYLOR'S CLAIMS ARE TIME BARRED. 37

A Taylor did not provide any legally sufficient excuse for filing an untimely petition.. 39

B Taylor failed to establish that his claims are meritorious.. 40

V TAYLOR'S CLAIM THAT THE ATTORNEY GENERAL SHOULD BE ESTOPPED FROM ASSERTING THE PCRA LIMITS ON POST-CONVICTION RELIEF IS FRIVOLOUS 62

CONCLUSION 65

ADDENDA

Addendum A: Ruling and Order,
Dated August 17, 2009

Addendum B: Transcript- Interview of Scott Manley,
Dated December 26, 1990

Addendum C: Report of Dr. Louis A. Moench, M.D.,
Dated February 28, 1991

Addendum D: Robina Gillespie Levine Affidavit,
Dated February 11, 2009

Addendum E: Voir Dire Notes

Addendum F: U.S. Const. Amend. VI;
Utah Const. Art. I, § 12;
28 U.S.C. § 2265;
Utah Code Ann. § 78B-9-102, 104-107, 109;
Former Utah Code Ann. § 78-35a-102, 104-107, 109;
Utah Code Ann. § 78B-9-202;
Former Utah Code Ann. § 78-35a-202;
Utah Code Ann. § 78B-9-402-404;
Utah Code Ann. § 76-3-207;
Utah Code Ann. § 78B-1-103, formerly § 78-46-3;
Utah Code Ann. § 77-38-9;
Utah R. Civ. P. 65C;
Utah R. Crim. P. 29;
Utah R. Evid. 606;
Utah R. Evid 1101

TABLE OF AUTHORITIES

FEDERAL CASES

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) 49

Breechen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994) 41

Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991) 33

Hawkins v. Hannigan, 185 F.3d 1146 (10th Cir. 1999) 30

Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983) 19

Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758 (1986) 51

Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222 (1992) 46

Mu'Min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899 (1991) 46

O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728 (1999) 16

Stafford v. Saffle, 34 F.3d 1557 (10th Cir. 1994) 41

Strickland v. Washington, 466 U.S. 668 (1984) 26, 27

Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936 (1999) 56, 57

Taylor v. Utah, 525 U.S. 833 (1998) 3

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989) 48

Thomas v. Gilmore, 144 F.3d 513 (7th Cir. 1998),
cert. denied, 525 U.S. 1123 (1999) 29

Tison v. Arizona, 481 U.S. 137 (1987) 57

United State v. Abello-Silva, 948 F.2d 1168 (10th Cir. 1991),
cert. denied, 506 U.S. 835 (1992) 41

United States v. Simpson, 950 F.2d 1519 (10th Cir. 1991) 53

Wiggins v. Smith, 539 U.S. 510 (2003) 26

Yarborough v. Gentry, 540 U.S. 1 (2003)....................19

Youngblood v. West Virginia, 547 U.S. 867, 126 S.Ct. 2188 (2006)....................56

STATE CASES

Adams v. State, 2005 UT 62, 123 P.3d 400....................2, 39, 40

American Towers Owners Assoc., Inc., v. CCI Mechanical, Inc.,
930 P.2d 1182 (Utah 1996)....................16

Berneau v. Martino, 2009 UT 87, 223 P.3d 1128....................24, 35

Bruner v. Carver, 920 P.2d 1153 (Utah 1996)....................49

Counties v. Utah State Tax Comm'n, 2010 UT 50, ___ P.3d ___....................32

Dep't of Social Services. v. Higgs, 656 P.2d 998 (Utah 1982)....................34

Evans & Sutherland Computer Corp., v. Utah State Tax Comm.,
953 P.2d 435 (Utah 1997)....................2, 31

Gardner v. Galetka, 2004 UT 42, 94 P.3d 263....................20

Gardner v. Galetka, 2007 UT 3, 151 P.3d 968....................18

In re: Disconnection of Certain Territory from Highland City,
668 P.2d 544 (Utah 1983)....................31

Lafferty v. State, 2007 UT 73, 175 P.3d 530,
cert. denied, 129 S. Ct. 43 (2008)....................27, 42

Marshal v. Industrial Comm'n of Utah, 704 P.2d 581 (Utah 1985)....................31

Menzies v. Galetka, 2006 UT 81, 150 P.3d 480....................*passim*

Okland v. Industrial Comm'n., 520 P.2d 208 (Utah 1974)....................34

Parsons v. Barnes, 871 P.2d 516 (Utah), *cert. denied*, 513 U.S. 966 (1994)....................26

State v. Baker, 884 P.2d 1280 (Utah App. 1994)....................36

State v. Baker, 935 P.2d 503 (Utah 1997)....................46

State v. Bankhead, 727 P.2d 216 (Utah 1986) 48

State v. Bishop, 753 P.2d 439 (Utah 1988) 17, 35

State v. Clark, 2004 UT 25, 89 P.3d 162 19

State v. Cobb, 774 P.2d 1123 (UT 1989) 42

State v. Daniels, 2002 UT 2, 40 P.3d 611 ......31, 32

State v. Gee, 498 P.2d 662 (Utah 1992) 43, 53

State v. James, 767 P.2d 549 (Utah 1989) 41

State v. Lucero, 866 P.2d 1 (Utah 1993) 43, 53

State v. Menzies, 845 P.2d 220 (Utah 1992) 59

State v. Menzies, 889 P.2d 393 (Utah 1994) 47, 48

State v. Parsons, 781 P.2d 1275 (Utah 1989) 41

State v. Pearson, 943 P.2d 1347 (Utah 1997) 41

State v. Russell, 917 P.2d 557 (Utah App. 1996) 59

State v. Sery, 758 P.2d 935 (Utah App. 1988) 41

State v. Taylor, 947 P.2d 681 (Utah 1997),
cert. denied, 525 U.S. 833 (1998) 3, 26, 30

State v. Valdez, 2006 UT 39, 140 P.3d 1219 48

State v. Wach, 2001 UT 35, 24 P.3d 948 45

State v. Wood, 868 P.2d 70 (Utah 1993) 47

Taylor v. State, 2007 UT 12, 156 P.3d 739 ......*passim*

Tschaggeny v. Milbank Insur. Co., 2007 UT 37, 163 P.3d 615 51

Wickham v. Galetka, 2002 UT 72, 61 P.3d 978 49

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, 158 P.3d 1088 62

FEDERAL STATUTES

28 U.S.C. §§ 2261 through 2266 (1996) 35

STATE STATUTES

Utah Code Ann. § 76-3-207 (West 2010) 54, 55

Utah Code Ann. § 77-38-9 (West 2010)....................55

Utah Code Ann. § 78-35a-106 (West 2007) 17

Utah Code Ann. § 78A-3-102 (West 2009) 1

Utah Code Ann. § 78B-1-103 (West 2009)....................48

Utah Code Ann. § 78B-1-113 (West 2009)....................48

Utah Code Ann. § 78B-9-104 (West 2009)....................20

Utah Code Ann. § 78B-9-202 (West 2008)....................31

Utah Code Ann. §§ 78B-9-401 through 405 (West 2010....................11, 64

Utah Const. Art. I 41

STATE RULES

Utah R. Evid. 606....................53

Utah R. Evid. 1101....................54

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Taylor appeals from the denial of his second petition for post-conviction relief challenging his two convictions for Capital Homicide. This Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(i) (West 2009).

STATEMENT OF THE ISSUES

1. Did the district court properly dismiss Taylor's successive post-conviction claims because they are procedurally barred?

Standard of Review. This Court "review[s] an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law." *Taylor v. State*, 2007 UT 12, ¶ 13, 156 P.3d 739 (internal quotations and case cites omitted).

2. Do the newly amended provisions of the Post-Conviction Remedies Act apply to Taylor's successive petition?

Standard of Review. "Whether a statute operates retroactively is a question of law, which we review for correctness without deference to the district court." *Evans & Sutherland Computer Corp., v. Utah State Tax Comm.,* 953 P.2d 435, 437 (Utah 1997).

3. As an alternative basis for relief, may this Court affirm because Taylor's claims are time-barred under the PCRA and do not meet the "interests of justice" exception?

Standard of Review. What meets the "interests of justice" exception to the PCRA time bar is a legal determination to be made in accordance with precedent from this court under a de novo standard of review. *Adams v. State*, 2005 UT 62, ¶ 8, 123 P.3d 400.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Copies of the following statutes and rules are included as addendum F.

- United States Const. Amend. VI.
- Utah Const. Art. I, § 12.
- 28 United States Code § 2265(a)(1) - formerly § 2261(c).
- Post-Conviction Remedies Act, Utah Code Ann. § 78B-9-102, 104 – 107 and 109
- Former Utah Code Ann. §78-35a-102, 104 through 107 and 109.
- Capital Sentence Cases, Utah Code Ann. § 78B-9-202.
- Former Utah Code Ann. § 78-35a-202.
- PostConviction Determination of Factual Innocence, Utah Code Ann. §78B-9-402 through 404.
- Capital felony – Sentencing proceeding, Utah Code Ann. § 76-3-207.
- Jurors selected from random cross section, Utah Code Ann. § 78B-1-103, formerly §78-46-3
- Rights of Crime Victims Act, Utah Code Ann. § 77-38-9(7).
- Utah Rule of Civil Procedure 65C, Post-Conviction Relief.
- Utah Rule of Criminal Procedure 29(e) – Change of Venue.
- Utah Rule of Evidence 606 – Competency of Juror as Witness.
- Utah Rule of Evidence 1101(b)(3) – Applicability of Rules.

STATEMENT OF THE CASE

The State charged Taylor with two counts of capital murder for murdering Beth Potts and Kay Tiede. The State also charged Taylor with attempted aggravated murder of Rolph Tiede; aggravated arson; two counts of aggravated kidnapping of Linae Tiede and Trisha Tiede; aggravated robbery; theft of the Tiede's car; and failure to respond to an officer's signal to stop (TR2-5).[1]

Taylor pled guilty to two capital homicide charges, and the State dismissed the other charges (TR105-116, 2517). A jury sentenced Taylor to death for each murder. *State v. Taylor*, 947 P.2d 681, 683 (Utah 1997), *cert. denied*, 525 U.S. 833 (1998) (*Taylor I*).

After the jury imposed sentence, Taylor moved to withdraw his guilty pleas. The trial court denied the motion (TR250-51, 281). Taylor appealed. During the direct appeal, this Court remanded the case for an evidentiary hearing on trial counsel's effectiveness. After six days of hearings, the trial court found that Taylor had not been deprived of his Sixth Amendment right to the effective assistance of counsel (TR1134-52, 1179-94). This Court affirmed. *State v. Taylor*, 947 P.2d 681 (1998) (*Taylor I*). The United States Supreme Court denied review. *Taylor v. Utah,* 525 U.S. 833 (1998).

On February 23, 1998, counsel was appointed to represent Taylor in State post-conviction proceedings (PCR 1105). One year later, Taylor filed his first State post-conviction petition (PCR 1). The parties stipulated that Taylor could file an amended

[1] TR refers to the record in the underlying criminal case. PCR refers to the post-conviction record in the first post-conviction case. R refers to the post-conviction record in the second post-conviction case – the matter that is currently on appeal.

petition (PCR134). Over three years later, Taylor filed his First Amended Petition (PCR512). The State moved for summary judgment on all of Taylor's claims (PCR819, 823). After full briefing and argument, the post-conviction court granted summary judgment and denied post-conviction relief (PCR1928-67). Taylor timely appealed (PCR1977). This Court affirmed. *Taylor v. State*, 2007 UT 12, 156 P.3d 739 (*Taylor II*).

On September 4, 2007, Taylor filed a federal petition for writ of habeas corpus, case no. 2:07-CV-00194-TC. The federal case has been stayed pending the outcome of Taylor's successive state petition for post-conviction relief.

On November 5, 2007, Taylor filed a second state petition for post-conviction relief. On August 17, 2009, the petition was dismissed (addendum A). Taylor timely appealed.

STATEMENT OF FACTS[2]

Taylor went on a crime spree that included burglaries; robbery; kidnapping two young women; a high-speed car chase with the kidnapped girls in the car; attempted murder of a man that Taylor twice shot in the head, doused with gasoline, and left in a burning cabin; and the murders of a woman and her seventy-six-year-old, partially blind mother.

On December 14, 1990 Taylor and his co-defendant, Stephen Deli, failed to return to the Orange Street Community Correctional Center, a half-way house to which Taylor had been paroled after his imprisonment for a 1989 aggravated burglary (TR317:732-42).[3] Taylor and Deli fled to Taylor's parents' cabin in Beaver Springs (TR317:780).

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[2] Taylor inappropriately includes argument and incorrect assumptions in his statement of facts. The State addresses and corrects those statements as necessary in argument below.

[3] Transcripts not individually paginated are cited by volume record number and page.

The Taylor's cabin was near "Tiede's Tranquility," a cabin owned by the Tiede family (TR317:676-77, 771). Rolph and Kay Tiede and their children Linae (20), Shaun (17), and Trisha (16) were spending the holidays at the cabin (TR316:489-94; 317:675-77). On December 21st they went to Salt Lake City for Christmas shopping and spent the night at the home of Beth Potts, Kay's 76-year old mother (TR316:494; 317:678).

While the Tiedes were gone, Taylor and Deli broke into their cabin (TR 316:564, 594, 317:782-83, 786-90). Taylor opened the Tiedes' Christmas presents while Deli videotaped him (TR316:620-22). The next morning, Taylor called his friend Scott Manley (TR317:662, 671-74; State's Ex.57-A, addendum B). He said "he was at one of those cabins with handguns and . . . he was going to shoot some people." When Manley asked about the owners, Taylor replied that he "was going to waste them all" (*Id.,* addendum B, pp. 653-54).

That same morning, Beth Potts, Rolph and Kay Tiede, and the two Tiede girls drove from Salt Lake back to the cabin (TR316:495). Because the roads were snowpacked, they parked their car at the gate to the Beaver Springs development (TR316:495-97). While Rolph and Trisha left on an errand, Linae, Kay, and Beth Potts headed up the two miles to the cabin on two snowmobiles (TR316:496-97).

Linae entered the cabin first (TR316:498-99). When she opened the door, Taylor "came out holding his gun" pointed at her (TR316:499, 317:795). Taylor demanded to know who else had arrived with Linae. Linae told him that her grandmother and mother were downstairs (R316:501, 317:795). Taylor told Linae to call them (TR316:501). Linae called to Kay that there were robbers in the cabin. Kay ran up the stairs. Deli walked out from the

back bedroom holding a rifle (TR316:501). Kay told Taylor and Deli that Beth was handicapped and would need help getting upstairs. (Beth was partially blind, had equilibrium problems, and needed help walking) (R316:495). Kay, accompanied by Deli, went back downstairs to retrieve Beth. Taylor, still pointing his gun at Linae, ordered her to sit down (TR316:495, 501, 504-05). Kay and Beth offered to give Taylor, who was already wearing Rolph Tiede's warm-up suit, money or anything else he wanted (TR316:505). Taylor pointed a gun at Kay and shot her (TR316:506).

When Beth Potts said something and started to move, she was also shot and Linae saw "blood spray everywhere" (TR316:509-10). Linae did not see who shot Beth (R316:510).[4] Linae turned to face the fireplace and started praying out loud while the shooting continued (TR316:510). Taylor told her "to shut up, it wouldn't work, 'cause he was a devil worshipper" (TR316:511).

Deli took Linae into a bedroom and tied her up with clear packing tape (TR316:511-12). Taylor came into the bedroom and said he "had to shoot the bitch in the head twice" (TR316:513). He told Linae that her grandmother was "disgusting because she was lying in a pool of blood" (TR316:537). Taylor asked Linae for money, whether they had a car, and where the car keys were. Linae told Taylor that her father might have money in his coat pockets, and that her father kept a set of keys under the car's floor mat because the car had a combination door lock. Taylor began searching the coats in the closet (TR316:514-15).

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[4] Linae opined that Taylor shot Beth Potts (TR316:541). Taylor's statement to Dr. Moench confirmed this (R496A, Pet's Ex. 57, addendum C).

Taylor suggested that they "start the cabin on fire to get rid of our tracks" (TR316:515-16). Taylor left to get a gas can from the garage. Deli told Linae that she would have to go with them or they would have to kill her. So Linae went upstairs with Deli, and she saw Taylor pouring gasoline in the living room. She did not see Kay or Beth, and Taylor told her that they were dead (TR316:517, 519). Taylor "acted calm, just like he knew what he was doing, just like it was a regular day" (TR316:520).

As Taylor and Deli were preparing the snowmobiles to leave, they heard other snowmobiles approaching. Taylor and Deli ran into the garage and yelled to Linae to get in the garage (TR316:520-21). As Rolph came up, he could see Linae standing in the doorway and could tell she had been crying (R317:681). Taylor "jumped out from behind the garage door, and pointed a gun in [Rolph's] face, and told [him] to get in the garage." (R317:682). As Rolph walked in, Taylor grabbed Linae "by the throat and stuck a gun to [her] back" (TR316:522, 317:682, 806). When Trisha arrived, Taylor and Deli ordered her into the garage as well (TR316:522, 317:683). Taylor told Rolph to take his clothes off, so Rolph took off his parka (TR317:683). Taylor also asked Rolph if he had any money (TR316:522, 317:683-84, 806-07). Rolph had $105. Taylor told him to "toss it over here" (TR316:523; 317:684). Taylor ordered Deli to pick up the money (TR316:524).

After obtaining the money, Taylor ordered Deli to shoot Rolph (TR317:684; 316:524). Deli raised his gun, cocked it, aimed at Rolph's face, but then hesitated (TR316:524, 317:685-86). Taylor "became impatient" and shot Rolph (R316:524-25, 317:686). That particular bullet was loaded with bird shot (TR317:687). Pellets embedded

in Rolph's eye area, nose, and forehead; the shot knocked him down and broke his jaw (id.). Rolph was conscious and bleeding, but he "froze for fear of further shots," pretending he was unconscious (TR317:687-89). As he heard Taylor and Deli cursing the cabin for refusing to burn and talking with his daughters, Rolph "continued to lay there and tried to stay conscious and tried to stay alive and not move" (TR317:688). He was hoping to maintain his strength "so that somehow [he] could get [his] girls back" (TR317:689).

Later, Taylor returned to the garage (R316:526). Linae heard more gunshots (R316:526-27). Rolph heard someone walk up to him and he was shot again at point blank range in the head (TR317:688, 690). "It was so close that the plastic wadding from the cartridge was stuck in [his] forehead," leaving a dent in his skull, but still not killing him (TR317:690). Later someone poured gasoline on the floor and over Rolph (TR317:691).

Taylor and Deli finished loading up the snowmobiles and left on two snowmobiles with the girls driving (R316:526-27). Deli wanted to drive, but Taylor refused, telling Deli that Linae and Trisha should drive because they knew how to drive the snowmobiles (TR316:527). When Taylor, Deli, Linae, and Trisha got to the Tiede's car, Taylor ordered Linae to open the car and get the keys for him (R316:529-30). The four left in the Tiede's car, with Taylor driving (TR316:529-30, 317:811).

Meanwhile, Rolph got up and went upstairs to look for his mother-in-law and his wife (TR317:692). He attempted to stomp out the burning carpet, but "all of a sudden [he] was a ball of fire, because [he] had been soaked with gas" (TR317:692-93). He removed his outer clothes and doused them in the shower (TR317:693). Rolph tried to use the phone, but found

that the wires had been cut (TR317:693). Eventually he abandoned the effort to put out the fire and rode a snowmobile back to the main road where he was rescued by his brother Randy (TR317:694). Rolph got in Randy's car and they started down the canyon. When they got to a point where the cell phone worked, they called the police (TR316:695-96).

Soon police began a high-speed pursuit of the Tiede car (TR316:533-34). As they got close to Kamas, Linae saw a police vehicle with its lights flashing parked crossways in the road. Taylor "gunned" the car around the roadblock, driving approximately seventy miles per hour through a thirty-five mile per hour zone (TR316:533-35; 317:630-31). Taylor began to lose control of the car, eventually crashing it (TR316:535; 317:630-33, 639). He then pointed his gun at Deli and said, "It's time for us to die now" (TR316:535-36, 317:814). Deli grabbed the gun, yelled, "We have hostages, we have hostages," and got out of the car. Deli pointed the gun at police. When an officer fired at Deli, Taylor and Deli surrendered (TR316:535-36; 317:637-38).

SUMMARY OF ARGUMENT

Taylor is not innocent, and his claim of innocence is not a "gateway" through the Post-Conviction Remedies Act (PCRA) procedural bar rules.

The district court correctly dismissed Taylor's successive petition because all of his claims are procedurally barred. Taylor does not challenge the ruling that claims previously raised and addressed are procedurally barred. The only issue Taylor raises on appeal is whether the district court erroneously ruled that claims that could have been, but were not previously raised are also procedurally barred (Taylor's br. at 1, 12). Taylor has failed to

establish that the district court misinterpreted the PCRA procedural bars, or erroneously determined that none of the common law exceptions excused him from the procedural bars. He has also failed to establish that his prior post-conviction counsel was ineffective or that his claim of ineffective assistance of counsel excuses him from the procedural bar.

As an alternative basis for affirmance, this Court may hold that the amended provisions of the Post-Conviction Remedies Act, which went into effect on May 5, 2008, apply to Taylor's petition. If the amended provisions apply, then Taylor has no right to the effective assistance of prior post-conviction counsel. Therefore, a claim of ineffective assistance cannot excuse the procedural bar and cannot entitle him to post-conviction relief.

This Court may also affirm on the alternative basis that even if any of Taylor's claims are not procedurally barred, they are time-barred. Taylor's successive petition was not filed within the PCRA's one-year statute of limitations, and none of Taylor's claims meet the "interests of justice" exception to the time bar.

Finally, Taylor's claim that the Attorney General should be estopped from asserting the PCRA limits on post-conviction relief is frivolous.

ARGUMENT

I. TAYLOR IS NOT INNOCENT.

Taylor asserts that he "has credibly pled that he is actually innocent." (Taylor's br. at 11). He then argues that his claim of innocence is a "gateway through procedural bar." *Id.* Taylor's innocence claim is not a "gateway" through procedural bar because he is not innocent and his claims do not otherwise meet any exception to the procedural bar rules.

Taylor founds his claim of innocence on his premise that there is some evidence calling into question whether he fired any of the shots that killed Kay and Beth. Taylor's claim is based on a misleadingly incomplete recitation of the undisputed facts, and rests on erroneous legal assumptions.[5] In addition, Taylor previously raised and lost these same allegations in his first post-conviction action, when he claimed that there was no factual basis for his guilty plea (R1275).

Taylor's claim that he is innocent is legally insupportable. It rests on the faulty premise that he can be guilty of capital murder only if he fired a kill shot. But Taylor could also be guilty as an accomplice, and he admitted that he "was a participant in the events that led to the deaths of Ms. Tiede and Ms. Potts." (R672). Therefore, even if his claims were true, that he did not fire the shots that actually killed Beth Potts and Kay Tiede, Taylor is not "innocent" because his admitted participation makes him guilty as an accomplice and guilty of felony murder.

Finally, the undisputed evidence refutes Taylor's claim that he may not have fired any of the fatal shots. Taylor's "innocence" claim rests on the premise that the fatal shots most likely came from the .44 caliber gun, and that Deli had that gun. But Taylor ignores other undisputed evidence demonstrating that he fired the shots that killed Beth and Kay, and may have fired all of the shots.

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[5] The State has never argued that Taylor would not be entitled to relief if he could establish that he is innocent. If Taylor did not actually engage in the conduct for which he was convicted, he could file a petition for determination of factual innocence under Utah Code § 78B-9-401 through 405 (West 2010). He has not done so and his innocence claim cannot meet the requirements of that statute.

Taylor admitted to Dr. Moench that he was the actual shooter who killed both victims (R496A, Pet's Ex. 57, addendum C). That statement has not been retracted or refuted. Taylor has never provided any affidavit or declaration asserting that he did not shoot Kay or Beth. At his own trial, Deli testified that Taylor did all of the shooting and that Deli shot no one (R974, State's Ex. 28 - affidavit of Robina Levine, addendum D).

Taylor's argument rests on misstatements of the evidence. Taylor asserts that Linae "unequivocally stated that Mr. Taylor carried a .38 caliber handgun and Edward Deli carried a .44 caliber weapon." (Taylor's br. at 5). That is not accurate. Linae testified that when she first saw Mr. Taylor, he was holding the gun marked as State's exhibit 10, which was the .38 handgun (TR316:499). She also saw a rifle sitting next to the couch, about 5 or 6 feet from Taylor, and Mr. Deli was holding a rifle (State's Exhibit 11-A). Deli also had a gun in his belt (TR316:502-03). Numerous shots were fired (R316:510, 562). Linae never *saw* Taylor with the .44 (emphasis added) (TR316:547). But Linae did not see who fired most of the shots or which guns were used because she turned facing the fireplace wall and started to pray (TR316:510). Linae was also tied up in the bedroom during part of the crime (TR316:511-512).

Taylor asserts that "with the possible exception of a bullet graze to Kay Tiede's arm, and the non-fatal pellet shots fired by Mr. Taylor, all of the other injuries to Kay Tiede and Beth Potts were in fact caused by the .44 caliber weapon carried by Mr. Deli." (Taylor's br. at 6). Taylor is wrong. The medical examiner, Dr. Schnittker, testified that the fatal wound to Kay was consistent with a .38. The other wound, which could have been fatal, was

consistent with a .44 (TR317:704-07, 713). She also testified that Beth had a .44 wound to the head and a .38 wound to the chest, both of which would have been fatal (317:712).

The FBI crime scene investigator recovered eight bullets from the scene, including .22 pellets, .38 and .44 caliber bullets, and numerous casings, including "22's 38's and 44 calibers" (R316:562). He also testified that the .22 caliber weapon was the lever action rifle, State's Exhibit 11-A (R316:576). That rifle, State's Exhibit 11-A, is the gun Linae identified as the rifle carried by Deli (R316:502). In addition, Dr. Schnittker testified that the nonfatal pellet wounds were going back to front, therefore the shooter would have to be off to the side and to the back of the victim (R317:719).

The forensic and eye-witness evidence establishes that Taylor fired a fatal shot into Kay. Linae saw Taylor shoot Kay in the left upper chest area (TR319:16, 316:509). Kay grabbed herself where she had been shot and fell over (TR316:509). Dr. Schnittker testified that the fatal wound to Kay entered near her left shoulder and exited from her right back. The bullet passed through Kay's lungs and aorta (TR317:707, 710; PCR1370, 1538, 1540, 1554-62). She also testified that the size of the wound was "consistent with a medium caliber or 38." (TR704). Another wound through her back was consistent with either a .38 or a .44, but the diameter of the wound more closely matched a larger caliber, such as a .44 (TR317:705-07). That wound "might have been fatal." (R317:709).

Taylor has presented a declaration from Dr. Schnittker, which he claims "calls into question many of the facts relied upon by the State, and raises substantial concerns surrounding whether Mr. Taylor was even guilty of the two murders he pled guilty to."

(Taylor's br. at 44). However, Dr. Schnittker's declaration does not dispute, contradict, or discredit her autopsy results and testimony (TR317:699-722, R496GG, Pet.'s Ex. 117).

Dr. Schnittker found a .38 caliber bullet in Kay's sweatshirt when she performed the autopsy. She testified that the .38 bullet found in Kay's sweatshirt was consistent with the fatal wound (TR317:707). That statement has not been disputed or refuted. Taylor argued below that "it appears that the coroner was incorrect when she assumed that the .38 she found in Kay Tiede's clothing had passed through her body." (R676). However, in her 2007 statement, Dr. Schnittker merely concludes that "[t]he location of this bullet is consistent with Gunshot Wound #2, but I cannot be certain that this bullet caused the injuries of Gunshot Wound #2." (R496GG, Pet.'s ex. 117, ¶ 5).

In addition, Taylor admits that two .38 caliber bullets were recovered (R675). FBI agent Bell testified that they recovered a .38 bullet at the scene, which tested positive for blood, indicating that it had passed through somebody's body (TR573-74). Finally, Taylor admitted to Dr. Moench that he emptied the .38 into Kay and Beth, then grabbed the .44 from Deli and emptied that gun into the women as well (TR 479, addendum C). All available evidence establishes that Taylor fired the shot that killed Kay Tiede.

Similarly, the forensic and eye-witness evidence establishes that Taylor fired a shot that did kill or would have killed Beth. Police recovered two .44 caliber bullets from the basement that had passed through Beth's body and the living room floor. The police report indicates that it appeared two additional rounds had been fired through Beth's body, but police never recovered those rounds (PCR1369-70.)

The medical examiner testified that Beth suffered a head wound and a wound near her feet that were more consistent with a .44 caliber bullet. She also testified that Beth suffered a right breast wound more consistent with a .38 caliber bullet. The breast wound would have been fatal if the .44 head wound had not killed Beth first. (TR317:704, 710-11). Both the .38 shot to the chest and the .44 shot to the head would have been fatal. Therefore, even if Taylor only used the .38, the shot he fired would have killed Beth.

Beth was shot in the head, and Linae testified that Taylor said he "had to shoot the bitch in the head twice." (TR317:513; 319:21, PCR1538). Plus, Taylor admitted to Dr. Moench that he was the actual shooter who killed both victims (R496A, Pet's Ex 57, addendum C). All available evidence demonstrates that Taylor fired at least one and possibly both fatal shots into Beth. As the medical examiner noted, "one shooter could use two different guns." (TR317:715).

Taylor admitted to Dr. Moench that he emptied the .38 into Kay and Beth, then grabbed the .44 from Deli and emptied that gun into the women as well (R496A, Pet's Ex 57, addendum C). Taylor told Dr. Moench that Deli looked at him "as if to say 'what in hell are you doing?'" Taylor said, "'I shot two people with no motive, out of cold blood, with my gun, then Ed's [Deli's].'" *Id.* Taylor has never submitted any affidavit or declaration claiming that he did not shoot Kay Tiede or Beth Potts. Deli testified at his own trial that Taylor did all of the shooting and that Deli shot no one (R974, addendum D). All of the testimony and evidence, including Taylor's own statements, establish that Taylor fired fatal shots into Kay and Beth. Taylor's claim of innocence is meritless.

II. THE DISTRICT COURT CORRECTLY RULED THAT CLAIMS ALREADY RAISED ARE PROCEDURALLY BARRED.

The district court ruled that claims already raised and addressed are procedurally barred. Claims 1-4, 6-8, 11, 13, 15-18, 20, 22, 23, 26, 28, 29 and 30 "were raised and addressed in a prior proceeding, either at trial, on direct appeal, in Petitioner's initial post-conviction case, or in his appeal from the denial of his initial petition for post-conviction relief and, therefore, they are procedurally barred under the PCRA" (R1229-80).

Taylor has not challenged the district court's ruling on this issue (Taylor's br. at 12). However, he states that he "raises and preserves, but does not brief at length any of the claims deemed successive by the district court." *Id.* "Issues not briefed by an appellant are deemed waived and abandoned." *American Towers Owners Assoc., Inc., v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1185, FN 5 (Utah 1996) (abrogated on other grounds, 2009 UT 65). By failing to brief the claims, Taylor has waived them on appeal.

Taylor states that he "will not burden this Court with arguments" unless this Court determines that it has not had a full opportunity to review any of these claims or "if Respondent reverses course and contends that any or all of these claims have not previously been presented to this Court for consideration."[6] (Taylor's br. at 13). Taylor cannot shift the burden to the court. A "reviewing court is entitled to have the issues clearly defined with

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[6] It is not and has never been the State's position that all of the claims previously raised were presented to this Court. As the State pointed out below, it does not concede that all claims previously raised were fully exhausted for federal habeas purposes (R1031-32). A claim raised and addressed at trial or in a prior post-conviction action would be procedurally barred under the PCRA. If the claim was not then raised on appeal in the Utah Supreme Court it may not be exhausted for federal habeas purposes. Exhaustion requires presentation to the highest state court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847, 119 S.Ct. 1728 (1999).

pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) (overruled in part by 235 Utah Adv. Rep. 23).

III. THE DISTRICT COURT CORRECTLY RULED THAT CLAIMS THAT COULD HAVE BEEN PREVIOUSLY RAISED ARE PROCEDURALLY BARRED, AND NO EXCEPTION APPLIES TO EXCUSE TAYLOR FROM THAT BAR.

The only issue Taylor raises on appeal is whether the district court erred in dismissing claims 5, 9, 10, 12, 14, 19, 21, 24, 25 and 27 (Taylor's br. at 1, 12). The district court ruled that all of these claims are procedurally barred because they could have been, but were not previously raised at trial, on appeal, or in his prior post-conviction petition, and Taylor has "not shown that any statutory or common law exceptions apply that would permit the Court to consider the merits of these claims." (R1306).

Under the PCRA, a petitioner is not eligible for relief upon any ground that "could have been but was not raised at trial or on appeal" or that "could have been, but was not, raised in a previous request for post-conviction relief." Utah Code Ann. § 78-35a-106 (West 2007); § 78B-9-106 (West 2008).[7] Taylor has failed to establish that the district court misinterpreted or misapplied the PCRA or the common law.

A. Taylor has failed to establish that he meets any common-law exception to the procedural bar.

Taylor claims that the "good cause" common law exception to the procedural bar applies to him (Taylor's br. at 17). "[E]ven where a claim of error could have been raised

[7]The common law procedural bar rule is the same. *Gardner v. Galetka*, 2007 UT 3, ¶17, 151 P.3d 968.

earlier, post-conviction relief may be available in those 'rare cases' or 'unusual circumstances' where 'an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred' that would make it 'unconscionable' not to reexamine the issue." *Gardner v. Galetka,* 2007 UT 3, ¶ 17, 151 P.3d 968. The district court correctly concluded that Taylor failed to establish that any exception applies to excuse his claims from being procedurally barred.[8]

1. Taylor has failed to establish that his claims are not frivolous or were not withheld for tactical reasons.

Taylor claims that the "fundamental unfairness" exception applies to him because he is innocent (Taylor's br. at 17). But as shown in point I, Taylor is not innocent. Taylor also argues that the procedural bar should not apply because his claims were "overlooked in good faith with no intent to delay or abuse the writ." (Taylor's br. at 18). However, before a post-conviction court is required to consider whether any of the common law exceptions apply to excuse the procedural bar, a determination must be made that the claims "are not frivolous and were not withheld for tactical reasons." (R1248, 1297); *see Gardner v. Galetka*, 2007 UT 3, ¶ 26, 151 P.3d 968.

Taylor argues that if the district court believed that prior post-conviction counsel may have had a tactical basis for not bringing these claims, it should have held an evidentiary

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[8] Under the procedural bar section, Taylor also claims that his petition was timely (Taylor's br. at 14). However, the PCRA statute of limitations is not relevant to the procedural bar. If Taylor's claims could have been raised at trial, on appeal, or in his previous post-conviction petition, then the procedural bar applies. § 78B-9-106. If he could not have previously raised the claim, then the procedural bar would not apply, although the claim might still be untimely under § 78B-9-107. The State addresses the timeliness of Taylor's claims in point IV below.

hearing to examine the issue (Taylor's br. at 19). Taylor is mistaken. The burden is his. Under the PCRA, the respondent has the burden of pleading any ground of preclusion, such as a procedural bar, "but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence." § 78B-9-105.

As the district court correctly held, "if the substance of a successive claim was not raised in a prior post-conviction petition, it must be presumed that the reason for not raising it was tactical or strategic in nature. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003)." (R1249). In order to overcome this presumption, a petitioner must show that "there was no 'conceivable tactical basis for counsel's actions.'" *State v. Clark,* 2004 UT 25, ¶ 6, 89 P.3d 162 (quoting *Bryant*, 965 P.2d at 542) (R1298).

The district court held that Taylor "nowhere demonstrates that [the claims] were not withheld for tactical reasons." (R1297). In fact, the district court held that "[n]ot only has Petitioner not even attempted to specifically meet this burden, it is unlikely that he could do so." (R1298). On appeal Taylor merely argues that "[t]here was no conceivable tactical basis for counsel's withholding of claims that could potentially yield relief for Mr. Taylor." (Taylor's br. at 48). Taylor's conclusory statement assumes that his claims are meritorious. However, as addressed in point IV below, none of his claims are meritorious. In addition, counsel is not obligated to raise every colorable issue. *Jones v. Barnes*, 463 U.S. 745, 751-53, 103 S.Ct. 3308 (1983).

The district court held that "[a]ll of the claims raised in Petitioner's successive petition that were not previously raised are claims for which a reasonable basis can be

articulated as to why they were not raised in a prior proceeding." (R1298). For example, the claims might not have been raised because they were weaker or less persuasive than other claims. *Id.* Raising weaker claims could have been futile and might have distracted the post-conviction court from fuller consideration of the stronger claims. *Id.*

2. Taylor failed to establish that his claims meet the PCRA requirements for newly discovered evidence.

Taylor asserts, as an exception to the procedural bar, that two of his claims are based on newly discovered evidence (Taylor's br. at 16). However the district court correctly noted that this former common law exception has been codified in the PCRA, which specifically sets out the grounds for relief based on newly discovered evidence (R1283). As this Court stated, the PCRA "provides for relief on the basis of 'newly discovered material evidence,' thereby incorporating the second *Hurst* factor.'" *Gardner v. Galetka,* 2004 UT 42, ¶ 14, 94 P.3d 263.

Taylor asserts that claim 14, alleging exclusion of non-Church of Jesus Christ of Latter-Day Saints (LDS) members from the jury, and claim 24, Scott Manley's declaration, are based on newly discovered evidence (Taylor's br. at 16). Under the PCRA, a petitioner must establish that "neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence." § 78B-9-104(1)(e)(i) (West 2009).

Prior counsel either knew or could have discovered with the exercise of reasonable diligence the evidence on which Taylor bases his successive claims 14 and 24. In claim 14,

Taylor argues that the prosecutor excluded non-LDS venire members from the jury. Taylor asserts that this claim presents new facts not previously known, because it is based on prosecutor notes that were not provided to any of his former counsel (Taylor's br. at 16, 33). However the issue is not whether the notes themselves were provided, but whether Taylor or his counsel knew of or with the exercise of reasonable diligence could have discovered the evidence contained in the notes.

The notes show the venire members names, with notes written under each name. Under some of those names is the notation "LDS." The notes also show who was stricken (R496A, Pet's Ex. 77, addendum E). Taylor's trial counsel certainly knew how venire members had answered voir dire questions, and therefore knew who stated they were LDS or not. He also knew which venire members were stricken by the State. Regardless of whether any of Taylor's prior counsel actually received or reviewed the voir dire notes, Taylor fails to establish that his claim that venire members were stricken because of their religion is based on evidence that his trial counsel did not already know.

In claim 24, Taylor argues that the 2007 declaration obtained from Mr. Manley is newly discovered evidence and claims that his prior post-conviction counsel could not locate and interview Manley because of lack of funding (Taylor's br. at 17).[9] But as the district

[9] Manley's 2007 declaration claims that on the way to his taped interview, one of the parole officers told him that they knew Taylor was guilty and they expected him to make the story on Taylor bigger, and that if he didn't they were going to send Manley "back to the joint on some big heavy time." However, Manley also acknowledges in his declaration that since 1994 he has been on medication for mental illness, and that he hears and see things that are not there. (R496GG, Pet.'s ex. 115).

court noted, Taylor "does not discuss nor demonstrate that the new evidence he now possesses is evidence that could not have been discovered through the exercise of reasonable diligence." (R1285). Instead, he merely contends that the evidence was not discovered as a result of inadequate funding for prior post-conviction counsel (R1286).

However, as the State argues in point III(C)(2) below, Taylor has not established that post-conviction counsel's funding was inadequate. Taylor has essentially conceded that prior counsel *could* have obtained the declaration if they had located and interviewed Manley. That fact alone defeats Taylor's claim. In addition, Taylor has never asserted that trial or appellate counsel lacked the funding to locate and interview Manley (especially since Manley was present and testified at Taylor's penalty phase hearing).

Taylor has also failed to establish that he meets the additional PCRA requirements for newly discovered evidence. For example, the Manley declaration is merely impeachment evidence. § 78B-9-104(e)(iii). And, as to both claims 14 and 24, Taylor "fails to discuss or demonstrate that, <u>when viewed with all of the other evidence presented in the case</u>, no reasonable trier of fact could have found him guilty of the offense to which he pleaded guilty or subject to the sentences of death he received." (R1288); § 78B-9-104(e)(iv).

Taylor has failed to establish that any exception applies to his claims that would allow him to proceed with procedurally barred claims.

B. The district court correctly concluded that there is no ineffective-assistance exception to the successive petition procedural bar.

Taylor asserts that he has a statutory right to the effective assistance of post-conviction counsel (Taylor's br. at 20). He then argues that his claims could not have been

raised in his previous post-conviction petition because his "post-conviction counsel was prevented from developing these claims by his lack of funding." *Id.* This, he claims, opens the door to merits review of those claims.

In 1997, the Legislature passed 78-35a-202, which requires courts to appoint funded counsel who meet the competency standards established by rule to represent death-sentenced post-conviction petitioners.[10] In *Menzies v. Galetka*, 2006 UT 81, 150 P.3d 480, this Court concluded that the Legislature intended to create a right to post-conviction counsel who would perform at the levels guaranteed by the Sixth and Fourteenth Amendment rights that apply during criminal proceedings. *Id.* at ¶78-82.

Taylor argued that he could rely on the *Menzies* right as an exception to the PCRA's proscription against raising in his successive petition any claim that he could have raised in his first petition (R1250-51). The district court rejected Taylor's argument, concluding that the PCRA included no ineffective-assistance exception to the successive petition bar (R1269-71). The district court ruled that "unlike the procedural bar rule that applies to initial post-conviction petitions, . . . which includes a statutory exception based upon ineffective assistance of trial or appellate counsel. . . . no exception based upon the ineffective assistance of post-conviction counsel is expressly included in the PCRA" (R1295-96). The court reasoned that, because the *Menzies* right is statutory, the Legislature could limit its scope. And, because the Legislature included no ineffective-assistance successive-petition-bar exception, Taylor could not rely on a violation of the *Menzies* statutory right to excuse his

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[10] This provision, as amended in 2008, is now found in section 78B-9-202.

failure to raise his successive-petition claims in his first petition (R1269-71, 1295-96).

The district court's analysis was correct. First, the court correctly concluded that, because *Menzies's* right was statutory, the Legislature had authority to define its reach (R1269). As the court recognized, *Menzies* itself supports that conclusion. *Id.* There, the State argued that "writing an effective assistance requirement into section [202] would make capital post-conviction litigation interminable and end the finality of death sentences." *Menzies*, 2006 UT 81 at ¶ 84. This Court responded that "Utah's post-conviction legislation and associated rules contain appropriate limitations to assist courts in streamlining post-conviction review in death penalty cases. *See, e.g.*, Utah Code Ann. §78-35a-106(2002) (discussing various grounds under which relief may be precluded); Utah R. Civ. P. 65C (containing procedural provisions governing the progression of post-conviction litigation)." *Id.* This Court made it clear that, even though a death-sentenced petitioner has a statutory right to post-conviction counsel, the Legislature may limit the scope of that right by statute.

Second, the district court correctly interpreted the PCRA. Courts must "look first to the plain language of the statutes to determine their meaning and to discern the intent of the legislature." *Berneau v. Martino*, 2009 UT 87, ¶12, 223 P.3d 1128. And "[p]rovisions within a statute are interpreted 'in harmony with other provisions in the same statute and with other statutes under the same and related chapters.'" *Id.* (citation omitted). The plain language of section 202 merely created a right to funded, competent counsel to pursue post-conviction relief in death-penalty cases. § 78B-9-202. It says nothing about the successive-petition procedural bar, much less create an exception to it based on the right to counsel.

The PCRA clearly defines the procedural bars and its exceptions in section § 78B-9-106. Section 106(1)(b) procedurally bars post-conviction relief for claims that were raised at trial or on appeal. Section 106(1)(c) bars relief for claims that could have been, but were not raised at trial or on appeal. And section 106(d) bars relief for claims that were or that could have been, but were not raised in a prior post-conviction action. Section 106(3) creates an ineffective-assistance exception only for section 106(1)(c): claims that could have been, but were not raised at trial or on appeal. By limiting the ineffective-assistance procedural-bar exception to claims that could have been but where not raised at trial or on direct appeal, the PCRA makes clear that any statutory right to the effective assistance of post-conviction counsel is not an exception to the successive petition procedural bar.

Taylor has not established that the district court erred. On appeal, he argues only that the district court erroneously rejected his claim because counsel in his first post-conviction action "was prevented from developing [the claims Taylor first raised in his successive petition] by [the] lack of funding." (Taylor's br. at 20). But Taylor's argument only goes to whether any right to effective post-conviction counsel was violated. It says nothing about whether the violation of the right is an exception to the procedural bar. For the reasons argued, the district court correctly concluded that no such exception exists (R1271).

C. The Court may affirm on the alternative bases either that Taylor never established that the right to effective assistance of post-conviction counsel had been violated or that the right does not exist.

In addition to affirming the district court ruling, this Court may affirm on the alternative, independent bases that 1) Taylor never proved ineffective assistance of prior

post-conviction counsel, or 2) he had no right to the effective-assistance of post-conviction counsel. As to the second, the right does not exist either because 1) the 2008 statutory amendment disavowing it applies to Taylor's case, or 2) this Court erred in *Menzies* when it read that right into the unamended statute.[11]

1. Taylor never established that prior post-conviction counsel was ineffective.

In *Menzies*, this Court equated the statutory right to the effective assistance of post-conviction counsel to the Sixth and Fourteenth Amendment rights that apply at trial and on direct appeal. *Menzies*, 2006 UT 81, ¶ 87. Therefore, in order to establish that his post-conviction counsel were ineffective, Taylor had to prove both 1) that prior post-conviction counsel's representation was objectively deficient; and 2) prejudice. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 523, 525 (2003); *Strickland v. Washington*, 466 U.S. 668, 687-88, 690, 695 (1984); *Parsons v. Barnes*, 871 P.2d 516, 521 (Utah), cert. denied, 513 U.S. 966 (1994).

To prove the deficient-performance element, Taylor had to overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997), *cert. denied*, 525 U.S. 833 (1998); *Parsons*, 871 P.2d at 522.

To prove prejudice, Taylor had to prove that, but for counsel's deficient performance, there would be a reasonable probability of a more favorable result. *Strickland*, 466 U.S. at

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[11] The district court also rejected Taylor's argument that he had a state constitutional right to the effective assistance of post-conviction counsel and could rely on a denial of that right to excuse the successive petition procedural bar (R1250-62). On appeal, Taylor relies only on the statutory right to the effective assistance of post-conviction counsel. He has not argued that he has an independent constitutional right.

695. A convicted person challenging counsel's performance on direct appeal must prove that counsel overlooked a claim that probably would have resulted in reversal. *See, e.g., Lafferty v. State*, 2007 UT 73, ¶48, 175 P.3d 530, *cert. denied*, 129 S. Ct. 43 (2008). Post-conviction review, like direct appeal, is an attempt to overturn the conviction or sentence. Therefore, Taylor had to prove that post-conviction counsel overlooked or mishandled a claim that probably would have resulted in post-conviction relief from his conviction or sentence.

Taylor argues only that his prior counsel "was prevented from developing [the procedurally barred] claims by lack of funding." (Taylor's br. at 20). That bare assertion does not prove ineffective assistance. Taylor has not established that the funds provided were insufficient, or that objectively reasonable representation required counsel to develop the claims that prior post-conviction counsel did not develop in Taylor's first post-conviction action. And Taylor has not proved the requisite prejudice. As shown in point IV below, none of Taylor's claims are meritorious. Therefore, Taylor cannot establish that prior post-conviction counsel omitted any claim that was reasonably likely to have succeeded.

2. Taylor failed to prove that inadequate funding to his prior post-conviction counsel allows him to proceed with his successive post-conviction claims.

Taylor argues that his prior post-conviction counsel was denied critical funds necessary to properly challenge his conviction and sentence (Taylor's br. at 21). He therefore argues that he should be excused from the procedural and time bars and be allowed to proceed with his post-conviction claims. But Taylor failed to establish that the funding was actually inadequate, or that even if the funding was inadequate, that he was prejudiced.

a. Taylor failed to establish that the funding was inadequate.

Taylor has not supported the factual predicate that the funding was inadequate. Taylor's prior post-conviction counsel might not have received as much money as he wanted or even asked for, but that does not establish that he did not or could not have received enough to provide effective assistance of counsel. In addition, Taylor's counsel failed to follow proper procedures to request that the funding be increased (R1024-30).[12]

Taylor's prior post-conviction counsel was entitled to $20,000 for reasonable litigation expenses. Utah Admin. Code R25-4-5. The district court found that prior post-conviction counsel only requested litigation expenses in the amount of $11,555.16, leaving unused the amount of $8,444.84 (R1287). Because there were unused litigation funds still available, the district court found it difficult to conclude that the new evidence Taylor now possesses could not have been discovered through the exercise of reasonable diligence as a result of insufficient funding (R1287-88). Taylor concedes as much (Taylor's br. at 24).

Taylor argues that the district court's calculations are not correct based on information that was not before the district court (Taylor's br. at 24). However, he does not argue or

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[12] Taylor also erroneously argues that the State deliberately interfered with funding (Taylor's br. at 21). However, Taylor fails to ever identify how the State "interfered" with funding. In the district court below, Taylor complains about the fact that the State objected to his *ex parte* requests for funding. He then states that "[t]his unnecessary litigation by the State further depleted Mr. Mauro's already scarce resources." (R693). The State disagrees that its actions were unnecessary, or that its objections "interfered" with funding. The State believes the ex parte communications exceeded those to which the parties agreed and potentially prejudiced the State's position in future federal litigation (R1022-23). Like Taylor's counsel, State's counsel is entitled to protect his client's interests.

establish that the district court was incorrect based on the record in front of it.[13]

Taylor mentions some of the things his counsel spent money on, and some of the things on which he wanted to spend more money. But even assuming that counsel did not have enough money to spend on everything he wanted, this does not establish that his choices were reasonable or necessary. The fact that counsel may not have been able to do everything he wanted, does not establish ineffectiveness. "A reasonable investigation is not, however, the investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight, would conduct." *Thomas v. Gilmore*, 144 F.3d 513, 515 (7th Cir. 1998), *cert. denied*, 525 U.S. 1123 (1999).

b. Taylor failed to establish that he was prejudiced by inadequate funding.

The district court ruled that even if it were to conclude that the available funding hampered prior post-conviction counsel's ability to perform the investigation he believed was necessary, and for that reason, the new evidence he now has could not have been discovered, Taylor "fails to discuss or demonstrate that, <u>when viewed with all of the other evidence presented in the case,</u> no reasonable trier of fact could have found him guilty of the offenses to which he pleaded guilty or subject to the sentences of death he received." R1288). Taylor has not shown that the district court ruling was incorrect.

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[13] Taylor's addendum C is comprised of documents that are not part of the record because they were never provided to the district court below. The State has filed a separate motion asking the Court to strike Taylor's addendum C.

In Taylor's direct appeal, he argued that his trial counsel's "minimal compensation created a per se conflict of interest preventing him from giving Taylor adequate assistance of counsel." *Taylor*, 947 P.2d at 688. This Court found that Taylor had "failed to allege, let alone identify, anything in this particular case to support the theory that *his* defense suffered." *Id.* The same is true here. Taylor has failed to identify any prejudice because he has failed to establish a reasonable probability that his first post-conviction petition would have been granted if his counsel had received additional funds.

Taylor has failed to establish that additional money spent on investigation or additional money spent by the mitigation expert would have provided information that would establish a reasonable probability that his first post-conviction petition would have been granted. As addressed in point IV below, all of Taylor's claims are meritless. "If an omitted issue is meritless, then counsel's failure to raise it does not amount to constitutionally ineffective assistance." *Hawkins v. Hannigan*, 185 F.3d 1146, 1152 (10th Cir. 1999).

3. Alternatively, Taylor had no right to the effective assistance of post-conviction counsel.

This Court also may affirm on the alternative basis that Taylor had no right to the effective assistance of post-conviction counsel at all either 1) because the 2008 amendment to section 202 disavowing that right applies to Taylor's case, or 2) because this Court decided *Menzies* incorrectly in the first place.

a. The 2008 amendment to § 202 applies to Taylor's case.

A little over a year after the Court decided *Menzies*, the Legislature amended the PCRA and added section 202(4). It provides that "[n]othing in this chapter shall be

construed as creating the right to the effective assistance of post-conviction counsel, and relief may not be granted on any claim that post-conviction counsel was ineffective." Utah Code Ann. § 78B-9-202(4) (West 2008). That amendment applies to Taylor's case, and the district court erroneously concluded otherwise.

Generally, the law that exists at the time a plaintiff initiates a lawsuit will govern that suit. *See, e.g., Marshal v. Industrial Comm'n of Utah*, 704 P.2d 581, 582 (Utah 1985). There are, however, exceptions. Amendments that are procedural, as opposed to substantive, apply retroactively. Amendments that "neither create new rights nor destroy existing rights," but "operate in furtherance of a remedy already existing," "appl[y] retrospectively to accrued or pending actions." *Id.* at 582. Amendments that "control[] the mode and form of procedure for enforcing the underlying substantive rights apply to pending actions." *Evans & Sutherland v. Utah State Tax Comm'n*, 953 P.2d 435, 438 (Utah 1997).

An amendment is substantive, as opposed to procedural, if it changes the factors a court must consider in determining whether to grant relief. *See, e.g., In re: Disconnection of Certain Territory from Highland City*, 668 P.2d 544, 548-49 (Utah 1983). Therefore, statutory amendments that broaden, narrow, or eliminate the availability of relief do not apply to pending actions. Amendments that change only how a litigant will go about obtaining or defending against that relief do.

State v. Daniels, 2002 UT 2, 40 P.3d 611, illustrates the point. Daniels was charged with capital murder. *Id.* at ¶13. While Daniels' case was pending, the Legislature changed the sentencing statute to permit a sentence of life without the possibility of parole on the vote

of ten of twelve jurors. But when Daniels' case began, LWOP could be imposed only on the unanimous vote of all twelve jurors. *Id.* at ¶ 37-41. This Court held that the amendment was procedural; therefore, it applied to Daniels. The Court reasoned that the change from a unanimous verdict to a majority of ten jurors had "nothing to do with the substance of [Daniels'] crime or the amount of punishment specified for it; it deals with the procedure by which the jury arrives at a decision on the amount of punishment to impose from sentencing alternatives." *Id.* at ¶ 41.

This Court recently applied the same analysis to an appellate rule adopted after the action at issue began. In *Counties v. Utah State Tax Comm'n*, 2010 UT 50, ___ P.3d ___, the substantive right at issue was the proper valuation method used to assess the value of taxable property. The new rule affected the standard for reviewing the tax commission's valuation. But the Court held that the rule applied because it "control[led' the mode and form of procedure for enforcing" the right to a proper valuation. *Id.* at ¶ 12.

Similarly, section 202's right to counsel – including the 2008 amendment that it does not include a right to the effective assistance of counsel – has "nothing to do with the substance" of Taylor's post-conviction action. Section 104 delineates the claims that will support post-conviction relief. § 78B-9-104; Utah R. Civ. P. 65C(a). Even when Taylor's successive post-conviction action began, section 104 limited relief for ineffective representation to situations where that representation would violate an independent constitutional right. § 78-35a-104(1)(d). The United States Constitution contemplates no right to the effective assistance of state post-conviction counsel. *Coleman v. Thompson*, 501

U.S. 722, 752, 111 S.Ct. 2546, 2566 (1991). This Court has never recognized a state constitutional right to the effective assistance of post-conviction counsel. *Menzies*, 2006 UT 81¶ 84. Taylor apparently has abandoned the claim that he has such a right.

The Legislature limited ineffective-assistance as a procedural bar exception to claims that could have been, but were not raised at trial or on direct appeal. Even if narrowing a procedural bar exception affects a substantive right, §202(4) changed nothing. The addition of §202(4) does not narrow or eliminate a substantive basis for post-conviction relief. It affects only 1) whether and under what circumstances a petitioner may prosecute a post-conviction action with a state-funded attorney, 2) funds available to pay counsel and to cover litigation expenses, and 3) whether the statutory right to post-conviction counsel creates the right to the effective assistance of counsel. It affects only "the machinery available" by which a petitioner may prosecute his action for post-conviction relief. Section 202(4) is not substantive and applies to Taylor's action.

Nevertheless, the district court erroneously concluded otherwise. It ruled that the statutory right to the effective assistance of counsel was substantive because, in *Menzies*, post-conviction counsel's ineffective assistance "affected [Menzies'] substantive rights" (R1268). But the procedural changes that applied retroactively in both *Daniels* and *Counties* also "affected" substantive rights. In *Daniels*, the procedural change made it easier for the State to obtain a harsher sentence. In *Counties*, the procedural change affected the standard of appellate review of a decision on the substantive right. In those cases, as here, the changes did not eliminate or limit the rights themselves.

Another exception to the general rule against retroactivity provides that amendments that clarify a prior enactment apply to pending actions. *See e.g., Okland v. Industrial Comm'n.*, 520 P.2d 208, 210-11 (Utah 1974). *See also Dep't of Social Services. v. Higgs*, 656 P.2d 998, 1001 (Utah 1982). Newly added 202(4) merely clarifies the Legislature's original intent when it provided for state-funded counsel in 1997.

When *Menzies* was decided, §202 provided that "[i]f the court finds that the defendant is indigent, it shall promptly appoint counsel who is qualified to represent defendants in death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure." Utah Code Ann. § 78-35a-202(2)(a) (Supp. 2001). It further provided for reasonably funded counsel. *Id.* at 202(2)(c). But, while it provided for qualified, funded counsel, it said nothing about performance standards, let alone performance standards that paralleled those that applied during the criminal proceedings. Subsection 202(4)'s provision that "[n]othing in [the PCRA] shall be construed as creating the right to the effective assistance of post-conviction counsel" is consistent with the plain language in the unamended 1997 statute.

The 1997 legislative history to 202 further demonstrates that 202(4) merely expresses the Legislature's original intent.[14] The Legislature passed section 202 to meet the federal opt-in conditions for expedited federal habeas review established in 28 U.S.C. §§ 2261

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[14] For example, in the House floor debates, Representative Martin Stephens stated,

> By passing this piece of legislation, and funding these appeals so that they are not pro bono, that's one of the requirements to get into the federal speed up process that Senator Hatch passed with the Anti-Terrorist Act. It was part of the federal prosecution. Without this bill and the funding of these indigent defendants, we can't get into that federal act and speed up process . . . .

Floor Debate on H.B. 76, 1997 Gen. Session, Day 10, January 28, 1997.

through 2266 (1996). *See, e.g. Berneau v. Martino*, 2009 UT 87, ¶ 12, 223 P.3d 1128 (recognizing that a statute's purpose provides insight into its meaning). Section 2261 conditions the opt-in benefits in federal review on the State 1) "establish[ing] . . . a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings;" and 2) "provid[ing] standards of competency for the appointment of such counsel." 28 U.S.C. § 2261(c).[15] Consequently, section 202 provided for both 1) reasonable funds to pay for state post-conviction review in death-penalty cases; and 2) competency standards for the counsel appointed to represent death-sentenced state post-conviction petitioners.

At the same time, the federal opt-in provisions did not condition opting in on a state establishing performance standards for post-conviction counsel. And the federal opt-in requirements nowhere intimate that they apply only where state post-conviction counsel performs to the level required by the Sixth and Fourteenth Amendment during trial and direct appeal. Not surprisingly, then, section 202 included no such requirement.

And, a little over one year after this Court read a right to effective-assistance of counsel into section 202, the Legislature amended section 202 to say that it created no such right. In this context, the 2008 amendment does not remove a right that the Legislature originally granted. It merely clarifies that the 1997 statute did not include the right that this Court read into it. *See State v. Bishop*, 753 P.2d 439, 486 (Utah 1988) ("[w]hen a statute is amended, the amendment is persuasive evidence of the legislature's intent when it passed the

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[15] These requirements are now found in 2265(a)(1).

former, unamended" statute), *overruled on other grounds as recognized by State v. Baker*, 884 P.2d 1280, 1283 (Utah App. 1994). That is, to give Utah the benefit of the expedited federal habeas review procedures, section 202 provided for funded counsel with certain qualifications and nothing more.

The district court erroneously concluded that the amendment was not clarifying. It ruled that the amendment was intended as a response to *Menzies*, not as a clarification. The State agrees that section 202(4) was a response to *Menzies*. That is what makes it clarifying. This Court founded *Menzies* on its interpretation of the Legislature's intent. In response, the Legislature amended the statute to state that it shall not be "construed" the way this Court construed it in *Menzies*. If the Court had correctly discerned the Legislature's original intent, there would have been no reason to amend the statue.

b. This Court should overrule *Menzies*.

The *Menzies* court founded its holding solely on its assessment that the Legislature intended to create a right to the effective assistance of counsel. The sum of the Court's analysis was that, by creating the right to funded counsel, the Legislature must have intended to create a right to the effective assistance of post-conviction counsel because the Legislature could not have meant "that a petitioner in a post-conviction death penalty proceeding is only entitled to ineffective assistance of appointed counsel." *Menzies*, 2006 UT 81, ¶ 82.

Of course, the State never argued in *Menzies* and nothing in section 202 suggests that the Legislature intended to provide petitioners with ineffective assistance of counsel. That does not mean that the Legislature intended to create a right to post-conviction representation

that parallels the Sixth and Fourteenth Amendment rights that apply during a criminal case. As detailed in the prior subsection, section 202's plain language, legislative history, and the 2008 amendment refute the *Menzies* court's contrary surmise. That is, the Legislature intended to provide for funded counsel who had the requisite qualifications and no more.

This case further demonstrates that the Court misapprehended the Legislature's intent. Taylor is here arguing that he is entitled to merits review of claims filed in a voluminous successive petition. Nothing in unamended 202's plain language or Legislative history suggests that the Legislature intended to generate this kind of additional litigation. Rather, the legislative history evinces that the Legislature intended to streamline post-conviction review, not to bog it down.

In sum, the district court correctly concluded that Taylor may not rely on prior post-conviction counsel's alleged ineffective assistance to excuse the successive-petition procedural bar. This Court may affirm on the alternative bases that Taylor did not prove his ineffective assistance claim or that Taylor has no right to the effective assistance of counsel in post-conviction actions.

IV. THIS COURT MAY AFFIRM THE DISMISSAL OF THE POST-CONVICTION PETITION ON THE ALTERNATIVE BASIS THAT TAYLOR'S CLAIMS ARE TIME BARRED.

The PCRA provides that "[a] petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." § 78B-9-107(1). A cause of action for claims based on newly discovered evidence accrues on "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the

petition is based." § 78B-9-107(2)(d) & (e). However, as addressed above, none of Taylor's claims qualify as newly discovered evidence. Therefore Taylor's cause of action accrued on October 5, 1998, the date of "entry of the denial of the petition for writ of certiorari." § 78B-9-107(2)(d). Taylor's second petition was not filed until November 5, 2007, long after expiration of the one-year time limit. The district court ruled that Taylor's petition was filed "over eight years too late, and therefore it is untimely." (R1271).

When Taylor filed his successive petition, §107 included an "interests of justice" exception that may excuse a late filing. The district court did not analyze the interests of justice exception, which requires a merits analysis. In order to avoid reviewing the merits, the district court "opted to simply assume that Petitioner's successive petition was timely filed and consider first whether the successive claims are procedurally barred." (R1273).

When Taylor filed his petition, the PCRA provided that "[I]f the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limits." § 78B-9-107(3).[16] Taylor asserts that his claims would not be subject to timeliness restrictions because the "interests of justice" exception applies (Taylor's br. at 14). He then asserts that no statute of limitations may be constitutionally applied and that proper consideration of meritorious claims will always be in the interests of justice. *Id.*

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[16] Taylor filed his petition in 2007. During the 2008 legislative session the interests of justice exception was removed from the PCRA and replaced with an equitable tolling provision. The State argued below that the amended equitable tolling provision applied to Taylor's successive petition. The district court disagreed (R1235). In this particular case, the State has chosen not to challenge that portion of the district court's ruling.

Under the PCRA, Taylor has the burden of proving that the "interests of justice" exception excuses his late filing. § 78B-9-105. In order to prove the interests of justice exception, Taylor must 1) state why his claims were not timely filed and 2) point to "sufficient factual evidence or legal authority to support a conclusion of meritoriousness." *Adams v. State*, 2005 UT 62 at ¶ 20. In asserting that his claims were not time barred, Taylor ignored this Court's analysis in *Adams*. Taylor never met his burden to establish either that he filed his claims timely or that the interests of justice demand excusing his late filing.[17]

A. Taylor did not provide any legally sufficient excuse for filing an untimely petition.

Under *Adams*, in order to determine whether the interests of justice excuse Taylor's untimely filing, a court should consider the reasons for the delay and whether the claims are meritorious. *Adams*, 2005 UT 62 at ¶ 16. Although not entirely clear, it appears that Taylor claims that prior post-conviction counsel could not have timely discovered certain evidence due to lack of funding. Taylor asserted below that "additional evidence [was] discovered once adequate funding was obtained." (R734). He also claimed that "[h]ad Mr. Mauro been granted the appropriate funding when needed, ... Mr. Taylor could have presented the evidence he now presents in his original petition (R731-32). But Taylor has not proven that the funding was inadequate, that more funding was not available if properly requested, or that his prior post-conviction counsel was ineffective (see argument in point III above).

[17] Taylor asserts that because he has "pled" actual innocence, the interests of justice exception applies. The State agrees that a meritorious claim of innocence would meet the interests of justice exception. But Taylor is not innocent. Merely claiming innocence does not meet the interests of justice exception when the claim lacks merit.

B. Taylor failed to establish that his claims are meritorious.

Whatever the reason for filing an untimely petition, Taylor cannot meet the interests of justice exception unless he can also establish that his claims are meritorious. In order to establish that the claims are meritorious, a "petitioner bears the burden of pointing to sufficient factual evidence or legal authority to support a conclusion of meritoriousness." *Adams*, 2005 UT 62 at ¶ 20. Taylor failed to meet that burden.

Taylor conceded that claims 1-4, 6-8, 11, 13, 15-18, 20, 22, 23, 26, 28, 29, and 30 were raised and addressed in prior proceedings (R1274-79). Taylor has not challenged the district court ruling that these claims are procedurally barred (Taylor's br. at 12). In addition to being procedurally barred, claims already raised and lost are not meritorious.[18] Therefore, in making its alternative argument for affirmance, the State does not repeat its argument as to why these claims are not meritorious.

Claim 5 – Change of venue motion. Taylor alleges that the trial court erred and that he received ineffective assistance of counsel in connection with his change of venue motion (Taylor's br. at 27, R233-34). Taylor made a motion for a change of venue in the trial court, but the motion was denied. Taylor claims that trial counsel was ineffective in his presentation of the motion and for not renewing the motion after it was denied. Taylor also argues that the trial court erred by denying the request for a change of venue. *Id.* However, Taylor waived the issue of whether the court properly denied his motion for change of venue by entering a guilty plea. It is well settled that a voluntary guilty plea constitutes a waiver of

[18] Taylor does not allege that any of these claims are meritorious except 29 and 30.

all non-jurisdictional defects, including pre-plea constitutional violations. *See State v. Parsons*, 781 P.2d 1275, 1278 (Utah 1989); *State v. Sery*, 758 P.2d 935, 938 (Utah App. 1988). Taylor has not established that this did not also waive the issue for the penalty phase.

Alternatively, Taylor has failed to establish that this issue is meritorious. Both the Utah and United States Constitutions guarantee a criminal defendant the right to trial "by an impartial jury." U.S. Const. amend. VI; Utah Const. art. I, § 12. To protect that right, rule 29(e), Utah Rules of Criminal Procedure, permits a trial court to change venue. *State v. James*, 767 P.2d 549, 550 (Utah 1989). In order to establish that the trial court deprived him of his constitutional right to a fair trial in a fair tribunal, Taylor must demonstrate either actual or presumed juror prejudice. *Breechen v. Reynolds*, 41 F.3d 1343, 1350 (10th Cir. 1994). Taylor has established neither.[19]

Post-trial, the issue is whether any biased juror actually sat. Taylor has not established that any biased juror sat, or that his jury was not fair and impartial. In fact, having passed the jury for cause – which necessarily conceded that the jury he faced was impartial - Taylor may not now claim otherwise. *See State v. Pearson*, 943 P.2d 1347, 1350 (Utah 1997). "When a change of venue decision is challenged on appeal following a jury verdict, the determinative question is whether [the] defendant was ultimately tried by a fair

[19] In the district court below, Taylor argued presumed prejudice where the "publicity is so inflammatory that the defendant cannot receive a fair and impartial trial." (R234). However, "presumed prejudice is rarely invoked and only in extreme situations." *United State v. Abello-Silva*, 948 F.2d 1168, 1177 (10th Cir. 1991), *cert. denied*, 506 U.S. 835 (1992). It is "a difficult standard, even in cases in which there has been extensive media coverage." *Stafford v. Saffle*, 34 F.3d 1557, 1566 (10th Cir. 1994). Taylor did not meet this standard. Taylor appears to have abandoned this argument by not raising it on appeal.

and impartial jury." *Lafferty v. State*, 2007 UT 73, ¶¶ 41-43, 175 P.3d 530 (internal cites and quotations omitted). Taylor failed to meet this standard, and therefore failed to establish that his counsel was ineffective or that a refusal to change venue prejudiced him.

On appeal, Taylor claims that by interviewing the jurors he was able to establish that he was not tried by a fair and impartial jury (Taylor br. at 28-29). For support, Taylor claims that juror number five, Blaine Moore, was neither open-minded nor impartial (Taylor's br. at 29). However, Taylor's bare statement that Mr. Moore was biased does not establish bias.[20]

During voir dire, Moore stated that he was acquainted with the prosecutor because he worked with his mother at the temple. When asked whether that would prevent him from being fair and impartial to both sides, Moore answered "No Sir." (TR53-54). As support for his claim that Moore was biased, Taylor cites a different juror's explanation of an acquaintance in a small town (R274, Pet.'s Ex. 40, at ¶ 5). The explanation is irrelevant, because it is not juror Moore's definition of an acquaintance. In addition, it does not in any way refute Mr. Moore's answers to the court. Mr. Moore specifically told the court that his acquaintance with the prosecutor would not prevent him from being fair and impartial to both sides. The mere fact that a juror may be acquainted with the prosecutor does not establish that he was not fair and impartial. *State v. Cobb*, 774 P.2d 1123, 1126 (UT 1989).

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[20] In the district court below, Taylor asserted that Mr. Moore was neither fair nor impartial based on statements he made during voir dire (R274-77). A full reading of the voir dire establishes that juror Moore was not biased or partial (TR248-49). Taylor appears to have abandoned that claim, since he now argues that claim 5 could not have been brought earlier because it was only discovered "[a]fter conducting interviews with approximately three-quarters of the jurors." (Taylor's br. at 28).

Taylor also claimed below that Mr. Moore was inattentive (R276). In support of his claim Taylor provided a different juror's statement saying: "I recall that Mr. Moore was always tired during the trial. He sat next to me, in the back row of the jury box. He fell asleep in the jury box on one occasion. I had to hit him in order to wake him up. He said, 'Thank you, Navee.'" (R271, Pet.'s Ex. 40 at ¶ 7). The fact that a juror was tired does not establish inattentiveness. At the most, Taylor's proffer shows that the one time Mr. Moore fell asleep, the juror next to him immediately woke him, and Mr. Moore thanked her.

Taylor also quotes statements from two jurors who claim that when Mr. Moore came into the jury room he immediately called for death (R276, Pet.'s Ex. 20 and 21). It is not appropriate to ask jurors what occurred in the jury room. Rule of Evidence 606 precludes jurors from "testify[ing] as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." *Id.* "Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes." *Id. See also State v. Gee*, 498 P.2d 662, 665-66 (Utah 1992); *State v. Lucero*, 866 P.2d 1, 4 (Utah 1993).

Taylor's proffer merely shows Mr. Moore's opinion following the conclusion of the penalty hearing. It does not show that his opinion was based on anything other than an impartial assessment of the evidence. And it does not show that he refused to listen to any discussion about the appropriate penalty.

Taylor also asserts that the town of Coalville, Utah was too small for him to get a fair trial in such a high profile case (Taylor's br. at 28). However, Taylor cites no statute, rule, or case law in support of his claim that a defendant cannot have a fair trial in a small town.

Claim 9 - Claim of trial court error in not striking jurors for cause. Taylor alleges that he was prejudiced because the trial court erroneously failed to strike venire members for cause (Taylor's br. at 30, R294). The only sitting juror Taylor complains about is Mr. Moore.[21] And, as shown, Taylor has failed to establish that Mr. Moore was biased.

Defense counsel had not used all of his peremptory challenges before he got to Mr. Moore (R496A, Pet.'s Ex. 77, addendum E) and could have used a peremptory challenge to strike Mr. Moore if he had chosen to.[22] Counsel chose to strike other jurors instead. Taylor argued below that he was entitled to relief because he had to use a peremptory challenge to strike a juror who should have been stricken for cause (R307-8). But Taylor would have been entitled to post-conviction relief only if he had proved a constitutional violation. A defendant does not have a constitutional right to unfettered use of his peremptory challenges.

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[21] Taylor claimed that the trial court erred by not excusing Janet Jones, Robert Lewis, Jeff Rylee, Cindy Lou Schumann, Blaine Moore, and Loreene McNeil (R297-304). However, Janet Jones was struck by a prosecution peremptory challenge, Robert Lewis, Jeff Rylee, Cindy Lou Schumann, and Lorene McNeill were struck by defense peremptory challenges (R307).

[22] Taylor erroneously asserts that the State's main argument was that Taylor did not use all of his peremptory challenges (Taylor's br. at 30). The State's main argument was that Taylor failed to establish that Mr. Moore was biased (R1119-1126). The State also clarified that part of its argument was that defense counsel had not used all of his peremptory challenges before he got to Mr. Moore. The State acknowledged that Taylor eventually used all of his peremptory challenges (R576, 1125, FN 41, R1338:39-40).

And Taylor had a duty to cure any erroneous denial of a for-cause challenge by removing the juror with a peremptory challenge.

A constitutional violation occurs only when a defendant exhausts his peremptory challenges removing jurors who should have been dismissed for cause, and a biased juror sits because the defendant has no more peremptory challenges with which to remove him. *State v. Wach*, 2001 UT 35, ¶ 24, 24 P.3d 948 (citing *State v. Menzies*, 889 P.2d 393, 400 (Utah 1994)). In that circumstance, the constitutional violation is the denial of the right to trial by an impartial jury. That did not happen here. Taylor had peremptories left which he could have used to remove Moore, and he has not shown that Moore was unconstitutionally biased.

This Court has already held that counsel did not perform deficiently during the jury selection process. In the appeal of his first state post-conviction petition, Taylor argued that his trial counsel was ineffective for failing to use a peremptory challenge to remove Mr. Moore. This Court stated that it "cannot conclude that trial counsel had no strategic reasons for keeping . . . Moore and instead exercising his peremptory strikes on other jurors." *Taylor*, 2007 UT 12 at ¶ 86. The Court concluded that "trial counsel did not perform deficiently during the jury selection process. *Id.* at ¶ 88.

Taylor asserts that the above point is irrelevant because "this claim is against the trial court, not trial counsel." (Taylor's br. at 31). If the claim is against the trial court, then counsel's decision to leave Moore on the jury defeats the claim. Taylor did not argue on appeal that the trial court erred in passing Moore for cause. This Court said: "it does not appear that he could have challenged the trial court's decision where he did not attempt to

cure the court's failure to remove Moore by exercising a peremptory strike. *State v. Baker*, 935 P.2d 503, 506 (Utah 1997)." *Taylor*, 2007 UT 12 at ¶ 80, n. 3. Taylor fails to address this insurmountable problem with his claim.

Claim 10 - Voir dire questions. Taylor alleged that the trial court failed to ask certain voir dire questions, resulting in a flawed jury selection process (R311). Although Taylor asserts that he is appealing claim 10 (Taylor's br. at 12), Taylor fails to ever address this claim in his brief, and has therefore waived it on appeal.

In any event, Taylor has never established that this claim is meritorious. There is no constitutional right to a particular form of voir dire, and Taylor had no constitutional right to have certain specific questions asked. "The Constitution does not dictate a catechism for voir dire." *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222 (1992). The purpose of voir dire is to ensure that jurors are impartial, and to assist counsel in exercising peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431, 111 S.Ct. 1899 (1991). As addressed above, Taylor has failed to establish that any biased juror sat.

In addition, although this exact claim was not raised on appeal, Taylor previously claimed that his appellate counsel was ineffective for not challenging trial counsel's failure to submit proposed voir dire questions. *Taylor*, 2007 UT 12 at ¶68. In ruling on the issue, this Court found that the voir dire process was adequate to ensure a fair and impartial jury decided Taylor's sentence. *Id.* Therefore Taylor's claim of a flawed jury selection process cannot be meritorious because this Court has already found that the voir dire process was adequate to safeguard the only constitutional right at issue.

Claim 12 - Blood atonement. Taylor alleges that the jury venire was prejudicially biased by the trial court's introduction of blood atonement into the voir dire (Taylor's br. at 32, R318). Taylor concedes that it "is not per se impermissible to inquire into a venire member's belief in blood atonement" (R325). However, he alleges that it was improper here because the jurors were asked about blood atonement in a manner that suggested the desired answers, and as a result, Blaine Moore and Ron Wilde were not excused for cause despite their belief in blood atonement (R326).[23]

The fact that potential jurors state a belief in blood atonement is not sufficient to establish that they should have been removed for cause. *See State v. Wood*, 868 P.2d 70, 79-80 (Utah 1993) (overruled on other grounds). Below, Taylor quoted language from *Wood*, arguing that "it is prejudicial error if a defendant uses all of his peremptory challenges and one of them was used to remove a juror who should have been removed for cause." (R325). However, that portion of *Wood* was overruled by *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994). To prevail on a claim of error based on the failure to remove a juror for cause, a defendant must "show that a member of the jury was partial or incompetent." *Id.* Taylor has failed to make that showing.

Claim 14 - Allegation that non-LDS jurors were excluded. Taylor's exhibit 77 is a document which shows jurors names, with notes below, and also shows which jurors were stricken by the prosecution or defense (R496A, Pet's Ex. 77, addendum E). Taylor alleges

[23] Taylor also complains again about the State's reading of the voir dire challenges (Taylor's br. at 32). In response, see footnote 22 above.

that exhibit 77 shows that the prosecutor excluded jurors who were not LDS. He then argues that the exclusion of non-LDS from the jury because of their religion deprived him of the right to trial by a jury drawn from a representative cross-section of the community (Taylor's br. at 33, R336). But religion is not a protected category like race and gender, and Taylor had no right to have the seated jurors form a representative cross-section of the community.

Taylor acknowledges that the United States Supreme Court has not extended the Equal Protection Clause to any other categories aside from race and gender (Taylor's br. at 35, R345). But he argues that this Court should do so under the Utah State Constitution. *Id.* Taylor has not provided, and the State has not found any Utah case holding that it is a violation of the Utah Constitution to use a peremptory challenge to strike a juror based on religion. A post-conviction petition is not an appropriate forum to argue for new law. Post-conviction relief is generally unavailable for claims that rest on a new rule announced or created after direct appeal. *See e.g. Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

Taylor also argues that a "qualified citizen may not be excluded from jury service on account of . . . religion . . ." Utah Code Ann. § 78B-1-103 (West 2009), formerly §78-46-3 (addendum F) (Taylor's br. at 35). But Taylor raised no challenge to the composition of the jury in the trial court below. This Court has consistently held that "a party seeking relief based on a 'failure to comply with this act in selecting a . . . trial jury' must move for relief "*before* the trial jury is sworn.'" *State v. Valdez*, 2006 UT 39, ¶ 30, 140 P.3d 1219, citing *State v. Bankhead*, 727 P.2d 216, 217 (Utah 1986); *see also* 78B-1-113 (West 2009). Because Taylor did not move for relief before the jury was sworn, he is precluded from now

raising a claim based on this statute.[24]

Taylor asserts that his claim evolved from federal counsel's acquisition of Exhibit 77, which shows peremptory strikes. He claims that despite prior post-conviction counsel's request for all records from the district court, he never received Exhibit 77 (Taylor's br. at 34). Taylor claims that this "shifts the burden of proof" to the State to explain the impermissible peremptory strikes. *Id.* First, as stated above, the strikes were not impermissible.

Second, Taylor is wrong about shifting the burden of proof. Under the PCRA, "[t]he petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." § 78B-9-105; *Wickham v. Galetka*, 2002 UT 72, ¶ 13, 61 P.3d 978; *Bruner v. Carver*, 920 P.2d 1153, 1155 (Utah 1996). Taylor bears the burden of proof, and he cites no argument or case law for his claim that the burden shifts.

Taylor also asserts that "[a]s the State withheld this document from state habeas counsel, there is no credible argument in favor of barring this claim." (Taylor's br. at 37). First, there is no evidence that "the State" wrongfully withheld this document, creating a *Brady* violation. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963). According to Taylor's own account, he requested the documents from "the district court" not the

[24] In addition, the title of this statute is "Jurors selected from random cross section – Opportunity and obligation to serve." §78B-1-103 (addendum F). It requires that "persons selected for jury service be selected at random from a fair cross section of the population of the county." *Id.* As addressed below, Taylor's claim is that the seated jurors did not form a representative cross-section of the community, not that the persons selected for jury service did not represent a fair cross-section of the community.

prosecutor or the attorney general (Taylor's br. at 34). The *Brady* rule does not apply to the court. Second, the *Brady* rule does not require a prosecutor to automatically turn over voir dire notes to defense counsel. And Taylor never alleges that his prior post-conviction counsel ever asked the prosecutor to turn over voir dire notes.

In addition, Exhibit 77 is merely a hand-written document with notes on the potential jurors, showing who was stricken by the State ("St.") and by the defense ("D") (R496A, Pet's Ex. 77, addendum E). It does not support Taylor's allegation that the prosecution systematically excluded non-LDS jurors. It merely shows that the State struck some jurors where the note about that juror included "LDS" and some jurors where the note about the juror did not include "LDS." Exhibit 77 provides no indication as to why jurors were stricken. Taylor concedes that the prosecution struck four people who were LDS, and the defense struck two people who were not LDS (R339).[25] Taylor provides no evidence to establish that potential jurors were stricken because of their religion. Given the fact that the prosecution struck potential jurors who were both LDS and non-LDS, it is more likely that the reasons they were stricken had nothing to do with their religion.

Next, although Taylor asserts that he was deprived of "the right to trial by a jury drawn from a representative cross-section of the community" (Taylor's br. at 33, R336), his claim is actually that the seated jurors did not form a representative cross-section of the community. But Taylor is not entitled to have the seated jurors form a representative cross-

[25] In addition, Taylor never established that the persons who were stricken and did not have "LDS" under their name were in fact not LDS or identified themselves as not LDS.

section of the community. *See Lockhart v. McCree*, 476 U.S. 162, 173, 106 S.Ct. 1758, 1765 (1986) (citing *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 701-02 (1975). "The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn." *Lockhart*, 476 U.S. at 174 (citing *Pope v. U.S.*, 372 F.2d 710, 725 (C.A. Neb 1967) (*vacated on other grounds,* 392 U.S. 651, 88 S.Ct. 2145 (1968)).[26]

Taylor also asserts that "[t]he striking of Ms. Conner constitutes structural error, therefore no inquiry pursuant to Utah Code Ann. § 78-35a-104(e)(i)-(iv) is necessary." (Taylor's br. at 36). First, Taylor never raised below that a claim of structural error does not have to meet the PCRA newly discovered evidence requirements (R350); therefore, he is precluded from raising it for the first time on appeal. *Tschaggeny v. Milbank Insur. Co.,* 2007 UT 37, ¶ 20, 163 P.3d 615. Second, even if Ms. Conner was stricken based on her religion, that it not a *Batson* violation or a violation of the Utah Constitution, and therefore cannot constitute structural error. Finally, Taylor merely concludes without analysis or support that he can raise a claim of structural error at any time regardless of whether it meets the newly discovered evidence requirements.

Claim 19 - Alleged juror misconduct. Taylor argues that the jury was prejudiced by its consideration of extrinsic evidence and by juror misconduct (Taylor's br. at 37, R390, 394). He alleges that at the end of each day, the jurors met to compare notes and discuss the

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[26] In addition, Taylor has failed to provide any information as to the religious makeup of the community. Therefore, he has never established that the venire panel or the seated jurors in fact did not form a representative cross-section of the community.

case.[27] He also alleges that the jury foreman, Richard Andrews, "said something like, 'if it was your mother or daughter, how would you vote?'" (Taylor's br. at 38).

Even if Mr. Andrews did make this statement,[28] Taylor has failed to establish that it was improper, or that he was prejudiced by it. In arguing that the statement was improper, Taylor cites case law holding that it was improper closing argument for counsel to ask a jury to put themselves in the shoes of the plaintiff (Taylor's br. at 39). Taylor cites no case law, and counsel could find none, stating that it is improper for a juror, during deliberation and within the confines of the jury room, to ask another juror how they would vote if it was their mother or daughter. Taylor merely argues that it *should* be impermissible (R394 ½).[29]

Taylor also argues that juror Jerry Lewis said that at the end of each day, the jurors would meet to compare notes and discuss the case (Taylor's br. at 38, R394,). However, jurors comparing notes is not "extraneous" information. Taylor has not alleged that the

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[27] In his petition below, Taylor also asserted that the jury was influenced by the relationship of the Tiede family to LDS church president Monson, who attended the funeral (R392). He also asserted that the jurors were influenced by the LDS church practice of sealing families in the temple (R393). Taylor does not repeat these arguments on appeal, and they are therefore waived. Even if not waived, they are without merit. Taylor failed to provide any evidence that jurors were aware of or considered the victims' visit to an LDS temple, or that President Monson attended the victims' funeral. Certainly, temple going LDS jurors would have been aware of the LDS practice of "sealing" families in the temple. But again, Taylor provided no evidence that it was ever discussed or considered by the jury.

[28] In its motion to dismiss, the State pointed out that Taylor had failed to provide an affidavit from Mr. Andrews. Taylor responded that Mr. Andrews is dead. Taylor then asserted that the fact that Mr. Andrews has died is a prime example of the prejudice suffered by Taylor. However, this is actually a prime example of why petitioners should not be allowed to file successive petitions many years after the conviction, appeal, and prior post-conviction petition. The State is prejudiced when people have died and are therefore not available to admit or deny statements the petitioner claims they made.

[29] This page is not Bates stamped, but it falls between pages stamped 394 and 395.

jurors discussed matters outside the evidence. In addition, Taylor has failed to establish that this information is admissible, or that it prejudiced him. Jurors may not testify as to how they or other jurors were *subjectively* affected by extraneous information. Under Utah Rule of Evidence 606, "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Utah R. Evid. 606(b). However, "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." *Id.* "Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes." *Id.* "[A] juror may not testify as to the *effect* any outside information had upon the juror." *United States v. Simpson*, 950 F.2d 1519, 1512 (10th Cir. 1991).

"[E]vidence by affidavit or testimony of a juror will not be received to impeach or question the jury verdict or to show the grounds upon which it was rendered, or to show . . . their opinions, surmises and processes of reasoning in arriving at a verdict." *State v. Gee*, 498 P.2d 662, 665-66 (Utah 1992); *and see State v. Lucero*, 866 P.2d 1, 4 (Utah 1993) (holding that trial court properly refused to consider affidavit containing information about the jury's deliberations).

Claim 21 - Admission of evidence. Taylor alleged that his constitutional rights were violated by the improper admission of evidence at the penalty phase of his trial (R386-408). On appeal, Taylor states that he does not oppose dismissal of parts (a), (c), (d), and (f) of claim 21 (Taylor's br. at 41). However, he never addresses parts (b) or (e). *Id.* By failing to address this claim on appeal, Taylor has waived all of claim 21.

Even if Taylor had appropriately appealed claims 21(b) and (e), he failed to establish that those claims were meritorious. In arguing that evidence was improperly admitted at the penalty phase, Taylor relied on language and case law related to the admissibility of evidence at the guilt phase of a trial (R386-408). However, the rules that govern admissibility of evidence at the guilt phase, do not apply at sentencing proceedings. Utah R. Evid. 1101(b)(3). Rather, in a capital felony sentencing proceeding, "[a]ny evidence the court considers to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence." Utah Code Ann. § 76-3-207(2)(b) (West 2010). Taylor did not assert that any of the evidence was admitted in violation of the capital sentencing statute.

In claim 21(b), Taylor asserted that the trial court improperly allowed the prosecution to elicit and perform irrelevant and prejudicial in-court demonstrations (R401). Taylor argued that these demonstrations were "entirely gratuitous" and rendered his trial fundamentally unfair (R404). Taylor continued that, by not intervening "the trial court led the jury to believe they could properly use the 'demonstration' rather than the evidence itself, in determining whether Mr. Taylor should be sentenced to death." (R777). However, Taylor presented no facts or evidence to support his bald assertion that the jury was led to believe

they could use the demonstrations rather than the evidence to determine whether Taylor should be sentenced to death. In addition, there was no reason for the court to intervene, since the demonstrations were properly used to help the jury understand the nature and circumstances of the crime, as specifically permitted by Utah Code Ann. § 76-3-207(2).

In claim 21(e), Taylor complained that the trial court admitted in-life photographs of the victims and 14 photographs of the crime scene (R348-49). Taylor alleged that these photographs were redundant and were offered "solely to inflame the passions of the jury" (R349). But Taylor ignored the fact that in-life photographs of victims are specifically admissible under Utah's *Rights of Crime Victims* Act. § 77-38-9(7) (West 2010). If Taylor's sentences were reversed, and a new sentencing procedure took place, the life photos of the victims would be admissible. In addition, even though this portion of the statute was not yet in effect at the time of Taylor's trial, Taylor failed to establish that life photos of victims were not admissible at a capital felony sentencing proceeding.

Taylor also failed to establish that the crime scene photos were improperly admitted. In capital sentencing proceedings, evidence may be presented on the nature and circumstances of the crime and any other facts in aggravation that the court considers relevant. Utah Code Ann. § 76-3-207(2)(a) permits the sentencer to consider the crime circumstances in determining the sentence to impose. Therefore, crime scene photographs are clearly admissible, and Taylor offers no reasoned basis to conclude otherwise.

Claim 24 - Exculpatory evidence. Taylor asserts that the State failed to disclose the circumstances under which Mr. Manley was interrogated, and therefore failed to disclose

material exculpatory evidence in violation of *Brady* (Taylor's br. at 42, R437). In a 2007 declaration, Manley states that "one of the two parole officers told me that they knew Von was guilty and they expected me to make the story on Von bigger. They told me that if I did not do it they were going to send me back to the joint on some big heavy time." (R496GG, Pet's Ex 115, ¶ 5). But in that same declaration, Manly also acknowledged that since 1994 he has been on medication for mental illness, and that he hears and sees things that are not there. *Id.* The State does not concede that Manley's recollection of his conversation with the parole officer is accurate.

Taylor argues on appeal that "[n]either Respondent, nor the district court addressed the fact that impeachment evidence falls within the *Brady* rule." (Taylor's br. at 42). However, Taylor failed to establish that there was a *Brady* violation. In order to establish a *Brady* violation, Taylor must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to him, and (3) he was prejudiced. *Strickler v. Greene*, 527 U.S. 263, 282, 119 S.Ct. 1936 (1999).

Even if Manley's statement is true, Taylor has failed to establish that the prosecution violated the *Brady* rule. "*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Youngblood v. West Virginia*, 547 U.S. 867, 870, 126 S.Ct. 2188 (internal citation omitted). Taylor has not established that the prosecution knew what the parole officer said to Manley or that the prosecutor's level of responsibility for disclosure is the same for parole officers as it is for police investigators. In addition, even if the prosecution could be held responsible

for knowing what a parole officer said, Taylor has not established that failing to disclose the information was a *Brady* violation. "[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct.1936, 1948 (1999). This Court has already held that "even if Manley's testimony was unreliable, any error the court made in admitting [it] was harmless." *Taylor II*, 2007 UT 12 at ¶ 111. Taylor has not established a reasonable probability that had information about the parole officer's statements to Manley been disclosed, that Taylor would not have received the death penalty.

Claim 25 – Culpability. Taylor alleges that his death sentence is disproportionate to his culpability and therefore violates his constitutional rights (Taylor's br. at 44, R443). This claim is really just a restatement of Taylor's claim of innocence (see point I above). Taylor's allegation that he was less culpable than co-defendant Deli is not supported by the facts, the evidence, or Taylor's own admissions.

Taylor asserts that "[i]t is a fundamental precept that if Mr. Taylor's co-defendant, who only received a life sentence, was the actual killer of Kay Tiede and Beth Potts, then Mr. Taylor's sentence is disproportionate to his culpability and violates his constitutional rights." (Taylor's br. at 44). Taylor's argument is not supported by the law. A death sentence is constitutionally permissible even for a defendant who did not actually kill the victims so long as he was a major participant in the felony murder who acted with reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 150, 158 (1987). The evidence

in this case more than amply meets that standard, even assuming a hypothetical situation in which Taylor fired no kill shots.

Second, Taylor's hypothetical suggestion that he was less culpable than Deli, and that Deli was the actual killer, is not supported by the facts, the evidence, or Taylor's own admissions. Taylor, not Deli, pointed his gun at Linae; Taylor, not Deli, asked Linae who else had arrived with her; after Linae told Taylor that her mother and grandmother were downstairs, Taylor, not Deli, ordered her to call them upstairs; Linae saw Taylor, not Deli, shoot her mother; Linae heard Taylor, not Deli, say that he "had to shoot the bitch in the head twice;" Linae heard Taylor, not Deli, suggest burning the cabin to destroy their fingerprints; Linae saw Taylor, not Deli, pouring gasoline around the cabin. When Rolph and Trisha arrived, Taylor, not Deli, grabbed Linae around the throat, and held a gun to her back. Taylor, not Deli, ordered Rolph to strip and empty his pockets. Taylor ordered Deli to shoot Rolph. When Deli hesitated, Taylor shot Rolph in the face. Taylor, not Deli, decided the girls should drive because they knew how to drive the snowmobiles. And Taylor, not Deli, drove the get-away car (TR316:499-501, 506, 509, 513, 516-517, 522-24, 527, 529-30; 317:681-89.)[30]

In addition, Deli testified at his own trial that Taylor did all of the shooting and that Deli shot no one (R974, State's Ex. 28 - affidavit of Robina Levine, addendum D). And

[30] Taylor also told Dr. Moench that after taking the Tiedes' daughters to the snowmobiles, he returned to the cabin and shot Rolph one more time "'to make sure.'" Taylor "then poured gasoline on [Rolph] and assumed [Rolph] would be consumed in the house fire." (R496A, Pet's Ex. 57, addendum C).

Taylor himself told Dr. Moench that he emptied the .38 into Kay and Beth, then grabbed the .44 from Deli and emptied that gun into the women as well (TR 479, addendum C). He also told Moench that Deli looked at him "as if to say 'what in hell are you doing?'" Taylor said, "'I shot two people with no motive, out of cold blood, with my gun, then [Deli's].'" (R496A, Pet's Ex. 57, addendum C). If Taylor was the more culpable participant, and the one who actually killed both women, then it is not surprising that Deli got a life sentence while Taylor got the death penalty.

Claim 27 - Claim of inadequate record for appeal. Taylor alleges that there was an inadequate appellate record, because the transcript of his penalty hearing voir dire appears to be "possibly" incorrect, and the transcripts of Deli's trial are no longer available (Taylor's br. at 45). Taylor never showed that either claim was meritorious. The transcript shows that juror Chamberlain had a son who was married to prosecutor Adkins' sister (TR315:113). Taylor states that his federal habeas counsel have been unable to confirm that Chamberlain had a son who was married to Adkins' sister (R455). Taylor then jumps to the conclusion that the transcript is in error.

First, Taylor has failed to establish that the transcript is in error. Second, even if the record is in error, that fact alone fails to establish that the claim is meritorious. To prevail on a claim that the record is incorrect, Taylor must show that the record is not "adequate to review specific claims of error already raised," *State v. Russell*, 917 P.2d 557, 559 (Utah App. 1996), and "that his appeal is prejudiced by the transcription errors." *State v. Menzies*, 845 P.2d 220, 228 (Utah 1992) (*Menzies I*). Taylor has not made that showing.

Next, Taylor claims that no complete transcript exists from co-defendant Deli's trial (Taylor's br. at 45). Taylor asserts that his federal counsel have been unable to obtain a copy of Deli's transcript because the court reporter's notes have been destroyed (R455-56). This claim does not entitle Taylor to relief.

First, Taylor and Deli were tried separately. Taylor has failed to establish that he has a constitutional right to a transcript of another person's trial. Second, Taylor likely could have obtained a transcript of Deli's trial if he had requested it within a reasonable time after the trial. Instead, he waited nearly two decades before complaining that he cannot obtain it. Third, Taylor failed to establish that his appellate and prior post-conviction counsel did not consider requesting a transcript of Deli's trial. In fact, counsel may have made a strategic decision not to request a transcript of Deli's trial, because it would not have been helpful.[31]

The only evidence before the Court is that trial counsel's paralegal attended Deli's trial and reported that Deli blamed Taylor for firing all of the shots suffered by both women. There is no evidence that they have attempted to contact Deli's counsel, the court reporter at Deli's trial, or any other participants or observers who could confirm or contradict this report. And Taylor's counsel have obviously had access to Deli (R487, Pet's Ex. 14). Although there is no transcript of Deli's trial, Taylor's counsel have not established that they have no means of reconstructing any critical portions of Deli's trial, such as Deli's testimony. For similar reasons, Taylor has failed to establish that he was prejudiced by the

[31] Trial counsel's paralegal attended most of Deli's trial. She heard Deli testify and blame Taylor for the murders. Therefore, counsel knew that Deli's testimony was damaging to Taylor (R974, Ex 28, addendum D, and see pages 121-124 of 23B hearing transcript).

fact that a transcript of Deli's trial is no longer available. A transcript of Deli's trial would not help Taylor, since Deli testified that Taylor did all of the shooting (R974, State's Ex. 28, addendum D).

Taylor pled guilty and was sentenced to death. Deli went to trial and was sentenced to life in prison. Taylor argues that "[g]iven that the State seems to have introduced the same evidence against both defendants, a proper comparison of the different results must entail a comparison of the transcripts of both trials." (Taylor's br. at 46). Except, of course, that there were not two trials. Taylor pled guilty. The State presented evidence at the penalty phase in Taylor's case. However, evidence at a penalty phase is necessarily specific to each defendant, since evidence may be presented on "the defendant's character, background, history, and mental and physical condition." § 76-3-207(2)(a)(ii).

Claim 29 – ineffective assistance of counsel. Taylor makes it clear on appeal that he is not pleading ineffective assistance of post-conviction counsel "as a stand alone claim." (Taylor's br. at 47). His only reason for raising the issue is to allege that ineffective assistance of prior post-conviction counsel provides an excuse or exception to the procedural bar or time bar. That argument is addressed in point III above.

Claim 30 - Cumulative impact. Taylor argues that with the addition of even a single new claim. the court must conduct a new cumulative error analysis (Taylor's br. at 47). But the district court ruled that all of Taylor's claims are procedurally barred. In the alternative, the State argues that all of Taylor's claims are also time-barred. Taylor is not entitled to a review of the cumulative impact of claims that are procedurally barred and time barred.

V. TAYLOR'S CLAIM THAT THE ATTORNEY GENERAL SHOULD BE ESTOPPED FROM ASSERTING THE PCRA LIMITS ON POST-CONVICTION RELIEF IS FRIVOLOUS.

Taylor asserts that the Utah Attorney General "has been able to craft the PCRA to its decided advantage. As the [Attorney General] was the drafter of this legislation, they should be estopped by this Court from arguing in favor of procedural bars now that their impartiality has resulted in a denial of Mr. Taylor's constitutional rights." (Taylor's br. at 27). Taylor's argument is legally unsupported and factually wrong.

First, this Court amended rule 65C to state that the PCRA "sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal." Utah R. Civ. P. 65C(a) (2010). The advisory committee note states that the amendments "embrace[]" the PCRA "as the law governing post-conviction relief." Taylor offers no explanation why the State should be estopped from asserting statutory defenses that this Court has endorsed.

Second, Taylor has not established any of the elements of estoppel. To estop the State from asserting PCRA defenses, Taylor must establish that 1) the State made a statement or admission that was inconsistent with "'a claim [the State] later asserted;'" 2) Taylor relied on the State's initial statement or admission; 3) Taylor's reliance was reasonable; and 4) the State's change in position resulted in injury to Taylor. *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28 ¶ 14, 158 P.3d 1088 (citation omitted). The State has not taken inconsistent positions. It has consistently argued that the PCRA's procedural bar and time bars apply to

Taylor. Because the State has been consistent, Taylor cannot have relied to his detriment on a prior, inconsistent position.

Finally, Taylor's argument relies on allegations and implications that are wrong. Taylor implies that the State lobbied the Legislature to adopt and amend the PCRA to give the State an unfair advantage in post-conviction litigation.[32] What the PCRA actually does is strike a fair balance between a petitioner's interest in having all his challenges to his conviction or sentence heard against the public's and victims' interests in finality and closure. Fairness and justice do not belong solely to the convicted guilty. Fairness and justice are also owed to the people of this State and to the innocent persons that the guilty have victimized. And, after a criminal appeal ends, the right of a convicted guilty person to challenge his conviction and sentence must begin to give way to the people's right to finality and, more importantly, the victims' right to closure.

As to convicted persons who do not meet the statutory definition of innocence, the PCRA demands only that they bring their claims timely. Its tolling and newly-discovered-evidence provisions and its caveats that a petitioner may raise claims that he could not raise in a prior proceeding demand only that the petitioner proceed with reasonable diligence,

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[32] Taylor states that the Legislature "relies on the Utah Attorney General's Office [] to draft legislation relating to post-conviction proceedings." (Taylor's br. at 27). Taylor implies that the Legislature has delegated its law making function to the Attorney General. That implication is false. The Attorney General does not have carte blanche to write post-conviction law. Like any other organization, person, or entity, the State, through its attorneys, may propose legislation. And, like all other proposed legislation, it is subject to scrutiny by legislators and their counsel. It is vetted in public hearings where all interested parties have an opportunity to address the appropriate legislative committees and caucuses.

unimpeded by State violations of his rights, or by mental or physical impairment. §§ 78B-9-104, 106, and 107. The PCRA bars merits review only when a petitioner fails to comply with those reasonable requirements. And, for those convicted persons who do meet the statutory definition of innocence, the Postconviction Determination of Factual Innocence Act permits relief, including monetary relief, regardless of whether the petitioner has proceeded with reasonable diligence. Utah Code Ann. §§ 78B-9-401 through 405.

Taylor has not argued how this balance is unfair, and it is not. In fact, Taylor asks the Court to adopt a rule that would give petitioners, especially death-sentenced petitioners, a "decided advantage." Taylor insists that "meritorious claims are always subject to review." (Taylor's br. at 26). But imposing no time limit or procedural limit on raising meritorious claims completely disregards legitimate interests in closure and finality. This case exemplifies that problem. Taylor's guilty pleas and death sentence have been affirmed on direct appeal, post-conviction review, and post-conviction appeal. Taylor nevertheless filed a 487-page successive petition and supporting memorandum. He insists that he is entitled to merits review on his claims. And the briefing to address those claims spans 493 pages.

Under Taylor's proposed rule, he could file endless petitions of unlimited length requiring the State and the courts to address whether the claims were meritorious. Even if they were found not to be so, he could forever forestall the execution of his sentence without ever demonstrating that the sentence or the conviction on which it was based was constitutionally infirm. Taylor is not entitled to endless review.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted October 27, 2010.

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CERTIFICATE OF SERVICE

I certify that on October 28, 2010, two copies of the foregoing brief were ☑ mailed

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Addenda

Addendum A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

VON LESTER TAYLOR, Petitioner, vs. STATE OF UTAH, Respondent.	**RULING and ORDER** Case No. 070500645 Judge BRUCE C. LUBECK DATE: August 17, 2009

The above matter came before the court on July 14, 2009 for oral argument on respondent's motion to dismiss.

Petitioner was present through Brian M. Pomerantz and Megan B. Moriarty and respondent was present through Thomas B. Brunker and Erin Riley. Counsel for petitioner waived the appearance of petitioner.

In this capital homicide case petitioner filed a successive petition (petitioner calls it a complete petition) for relief under the Utah Post Conviction Remedies Act and URCP, Rule 65C, on November 5, 2007.

To explain the delays involved in this case, the court notes that petition contained 426 pages of argument. It contained just over 5 volumes of attachments, perhaps 1000 pages of material.

The parties have often either informally or by motion and order obtained extensions of filing deadlines under the rules given the complexity, length and importance of the issues.

Respondent filed a motion to dismiss, consisting of 89 pages, on February 15, 2008. Petitioner filed an opposition response on May 13, 2008, and it was 129 pages in length. On June 13, 2008, respondent moved for permission to file a supplemental memorandum in support if its motion to dismiss. Petitioner opposed that on June 23, 2008. Respondent filed a reply on that request June 26, 2008, and the court on that same date, June 26, 2008, allowed the supplemental memorandum by the State. On July 3, 2008, the parties stipulated to substitute the State of Utah as the correct respondent rather than the warden named in the petition. On July 25, 2008, the State filed a supplemental memo of rather standard length, 23 pages. Petitioner filed an opposition on August 27, 2008. On March 4, 2009, respondent filed a 179 page reply. On March 13, 2009, respondent filed a request to submit. Based thereon oral argument was scheduled originally for April 22, 2009. Respondent filed on March 17, 2009, a notice that permission to file a sur reply may be filed. Respondent also moved to continue the oral argument due to the press of other business and unavailability of counsel. This date was then scheduled for oral argument.

Oral argument was held and the court took the issues under advisement. Before the hearing the court carefully considered the memoranda and other materials submitted by the parties. The court has read all of the pleadings and all of the transcripts that are part of this record, including the preliminary hearing and penalty phase hearing, that are on file in the office of the clerk of this court. The court has examined the exhibits which are attached to the pleadings and has examined the trial exhibits which still remain in the office of the clerk of this court in Summit County. Since taking the issues under advisement, the court has further considered the law and facts relating to the issues and the memoranda of the parties. Now being fully advised, the court renders the following Ruling and Order.

Table of Contents

I. Background 1

II. Summary of the Arguments 7

A. Claims Raised in the Successive Petition 7

B. State's Motion to Dismiss 9

C. Petitioner's Response to the State's Motion 11

D. Supplemental Memoranda 13

E. State's Reply 14

III. Discussion 15

A. Legal Analysis 15

1. The Interests of Justice Exception 15

a. Introduction 15

b. Retroactive Application of Statutory Amendments 17

c. Whether the 2008 Amendments to the PCRA Apply Retroactively 19

2. Procedural Bar Rule 27

a. Introduction 27

b. Common Law Exceptions to the Procedural Bar Rule 30

c. Whether an Exception Exists to the Procedural Bar Rule Based Upon a State Constitutional Right to the Effective Assistance of Post-Conviction Counsel 35

001219

d. Whether an Exception Exists to the Procedural Bar Rule Based Upon a Statutory Right to the Effective Assistance of Post-Conviction Counsel 48

B. Petitioner's Post-Conviction Claims 56

1. Timeliness 56

2. Claims that Were Raised and Addressed in a Prior Proceeding 59

3. Claims that Could Have Been, But Were Not, Raised in Petitioner's Prior Post-Conviction Petition 78

4. Claim Alleging Ineffective Assistance of Prior Post-Conviction Counsel 92

IV. Conclusion 95

I. Background

Gleaned from the record of court proceedings as found by the court and jury at the time, almost nineteen years ago, on December 14, 1990, Petitioner left the Orange Street Community Correctional Center in Salt Lake City and failed to return. On December 21, 1990, Petitioner, along with an accomplice, Edward Deli, broke into the family cabin of Rolf and Kaye Tiede in Summit County while the Tiedes were in Salt Lake City shopping. The following day, the Tiedes returned to the cabin. Part of the family parked at the gate to the Beaver Springs development and Ms. Kaye Tiede, together with her mother, Beth Potts, a woman in her mid-70s, and daughter Linae Tiede, age 20, drove two snowmobiles to the cabin, which was located approximately two miles from the gate which was on the Weber Canyon road. Mr. Rolfe Tiede and his 16 year-old daughter Ticia Tiede drove to a repair shop to pick up additional snowmobiles which were being repaired.

Linae was the first to arrive at the cabin and when she opened the door at the top of the stairs Petitioner confronted her with his gun drawn. He ordered Kaye Tiede and Ms. Potts upstairs. Ms. Potts needed assistance because she was partially blind and needed help walking. Once all three were upstairs, Kaye Tiede offered Petitioner money and whatever else he wanted. Petitioner shot Kaye Tiede near her left shoulder. The bullet

passed through her lungs and aorta, causing her death. Ms. Potts was then shot several times, including at least once in the chest and in the head, either of which could have been the cause of her death. During the shooting, Linae began to pray, but Petitioner told her that praying would not help because he worshiped the devil.

Once the shooting ended, Petitioner determined that he, Deli, and Linae would leave and that the cabin should be burned in order to prevent the discovery of any fingerprints. As they were preparing to leave, Mr. Tiede and his daughter Ticia arrived. Petitioner grabbed Linae by the throat and held his gun to her back. Mr. Tiede and Ticia were both ordered into the garage and Petitioner asked Mr. Tiede for money. Mr. Tiede complied and then Petitioner ordered Deli to shoot Mr. Tiede. When Deli hesitated, Petitioner shot Mr. Tiede in the face. Petitioner said nothing. Prior to leaving the cabin with Linae and Ticia, Petitioner returned to the garage, shot Mr. Tiede again in the head while Mr. Tiede was lying face down on the ground "pretending" to be dead, and poured gasoline over him. Gasoline was scattered through the cabin and it was set on fire before Petitioner and the others left. When Petitioner, Deli, Linae, and Ticia arrived at the gate to the Beaver Springs development at the Weber Canyon Road, Petitioner ordered everyone into the Tiede's car and they drove away. Mr. Tiede, who was not

killed by the attack, was ultimately able to arouse himself, and take a snowmobile to the Weber Canyon Road where he found a family member and they called police. Following a high-speed chase, Petitioner and Deli were apprehended and the two girls were safely taken from Petitioner and Deli.

On December 24, 1990, Petitioner was charged with two counts of capital homicide in the deaths of Kaye Tiede and Ms. Potts, in addition to several other felony counts of attempted aggravated murder, aggravated arson, aggravated kidnaping, aggravated robbery, theft, and failure to respond to an officer's signal to stop.

On May 1, 1991, Petitioner pleaded guilty to the two counts of capital homicide and the State agreed to dismiss all of the other charges. On May 16, 17, 21, and 22, 1991, a sentencing proceeding was convened for the purpose of receiving evidence concerning the appropriate sentence that should be imposed upon Petitioner by the jury. Following their deliberations, on May 24, 1991, the jurors returned a unanimous sentencing decision in favor of death for Petitioner on each count of capital homicide.

Petitioner then sought to withdraw his guilty plea, which was denied by the trial court.

Through his trial counsel, Elliott Levine ("Levine"), Petitioner appealed to the Utah Supreme Court on July 8, 1992. However, after Petitioner's opening brief was filed, on July 20,

1992, the State requested that the brief be stricken and that Levine be removed from his representation of Petitioner. Although Levine was ordered to withdraw and was replaced by J. Bruce Savage ("Savage") in September 1993, the opening brief was not stricken. During the direct appeal, the Supreme Court remanded the case to the trial court for an evidentiary hearing under Utah Rules of Appellate Procedure, Rule 23B, on the claim that trial counsel had been ineffective. Evidence was presented to the trial court at that hearing on May 15, 16, 18, 22, 23, and 24, 1995. The trial court concluded that Petitioner had not been deprived of his right to effective representation under the Sixth Amendment.

Savage then pursued the direct appeal by filing Petitioner's brief on June 3, 1996. On October 24, 1997, the Utah Supreme Court issued its opinion rejecting all of Petitioner's appellate claims. *State v. Taylor, 947 P.2d 681 (Utah 1997) (Taylor I)*. The United States Supreme Court denied the petition for a writ of certiorari on October 5, 1998.

On February 23, 1998, Richard P. Mauro ("Mauro") was appointed as post-conviction counsel pursuant to the PCRA to represent Petitioner in his post-conviction action. Approximately one year later Petitioner filed his Petition for Relief Under the Utah Post-Conviction Remedies Act. On May 30, 2002, Petitioner filed his First Amended Petition for Relief Under the Utah Post-

Conviction Remedies Act. Respondent, Hank Galetka, who was the warden/respondent at the time, filed a motion for summary judgment on September 13, 2002. Oral argument on the motion for summary judgment was heard on April 18, 2003. On March 1, 2004, the post-conviction trial court, granted Respondent's motion for summary judgment and denied post-conviction relief on all of Petitioner's claims. The signed order and judgment was entered on September 22, 2004.

Petitioner timely appealed that decision and the Utah Supreme Court affirmed the post-conviction court, the Honorable Frank. G. Noel, on January 26, 2007. *Taylor v. State, 2007 UT 12, 156 P.3d 739 (Taylor II)*. The request for a rehearing was denied on March 27, 2007. The Office of the Federal Public Defender for the District of Utah was appointed to represent Petitioner in federal court on March 6, 2007. On September 4, 2007, Petitioner filed a federal petition for writ of habeas corpus and, on November 2, 2007, a first amended petition was filed in federal court. Although Petitioner's federal case was, and is, still pending, on November 5, 2007, Petitioner filed this successive petition for post-conviction relief.

To explain the delays involved in this case, the Court notes that the successive petition contained 426 pages of argument and over five volumes of attachments. Moreover, the parties have, either informally or by motion and order, obtained extensions of

the filing deadlines given the complexity, length, and importance of the issues raised. On February 15, 2008, Respondent filed a motion to dismiss, consisting of 89 pages. Petitioner filed a 129 page response in opposition on May 13, 2008. On June 13, 2008, Respondent requested permission to file a supplemental memorandum in support of its motion to dismiss, which Petitioner opposed on June 23, 2008. Respondent filed a reply on that request on June 26, 2008 and the Court, on that same date, allowed the supplemental memorandum by Respondent. On July 3, 2008, the parties stipulated to substitute the State of Utah as the correct respondent rather than the warden of the Utah State Prison. On July 25, 2008, Respondent filed its supplemental memorandum in support of the motion to dismiss and Petitioner filed his response in opposition to the supplemental memorandum on August 27, 2008. On March 4, 2009, Respondent filed a 179 page reply to Petitioner's opposition to the motion to dismiss. On March 13, 2009, Respondent filed a request to submit and, based upon this request, oral argument was scheduled for April 22, 2009. Petitioner moved to continue that date due to conflicts with counsel's schedule. On March 17, 2009, Respondent filed a request for permission to file a sur reply. Oral argument on the motion to dismiss was held on July 14, 2009 and the Court took the issues raised under advisement.

II. Summary of the Arguments

A. Claims Raised in the Successive Petition

Petitioner raised thirty (30) separate grounds for relief in his successive (complete) petition. These include claims that trial counsel was ineffective because he failed to properly investigate the case, failed to conduct an adequate mitigation investigation, failed to adequately counsel and advise Petitioner in connection with his pleas of guilty to two counts of capital homicide, failed to properly litigate and renew the motion for change of venue, was laboring under an actual conflict of interest, performed deficiently during the jury selection process including failing to properly challenge jurors, failed to make appropriate challenges for cause, failed to uncover potential juror bias, and failed to submit voir dire questions, failed to present an adequate mitigation case, and failed to challenge the State's case in aggravation. Petitioner has now abandoned one of those thirty claims.

Petitioner alleges that appellate counsel was ineffective because he failed to properly argue the correct legal standard for ineffective assistance of trial counsel and failed to raise issues that could, and should, have been raised.

Petitioner asserts a claim that because the funding available for his initial post-conviction petition and counsel was inadequate, his prior post-conviction counsel was unable to

provide effective representation.

Petitioner also raises claims asserting that the trial court committed error including that the court improperly denied Petitioner's motion for change of venue, improperly conducted individual voir dire of prospective jurors in chambers, failed to properly grant Petitioner's challenges for cause, asked impermissible questions and ignored responses during jury selection, improperly excluded prospective jurors who were not members of the LDS Church, provided jurors with confusing and erroneous jury instructions and a special verdict form, and improperly admitted evidence.

In addition to the foregoing claims related to alleged trial court error and ineffective assistance of trial, appellate, and post-conviction counsel, Petitioner also asserts that his conviction and death sentences should be vacated because he did not receive the competent assistance of mental health experts, he is actually innocent of causing the deaths of Kaye Tiede and Beth Potts, there is no factual basis for his guilty pleas, a disproportionate number of the jurors who served were members of the LDS Church, jurors were improperly influenced by LDS Church practices and the relationship between Church leaders and the victims' families, there was juror misconduct, there was prosecutorial misconduct, the State failed to disclose exculpatory evidence, the sentences of death are disproportionate

to Petitioner's culpability, the Utah death penalty scheme is unconstitutional because it fails to narrow the class of murderers eligible for the death penalty, there is an inadequate appellate record, lethal intravenous injection constitutes cruel and unusual punishment under the Eighth Amendment, (that claim is now abandoned) and the cumulative impact of all the errors committed in his case violated his constitutional rights.

B. State's Motion to Dismiss

The State responded to Petitioner's successive petition with a motion to dismiss.

First, the State argues that most of Petitioner's claims were raised and adjudicated in a prior proceeding and, therefore, under both the PCRA and the common law they are absolutely procedurally barred. See Utah Code Ann. § 78-35a-106(b) and (d) (2007).[1]

Second, all of Petitioner's claims are ones that could have been, but were not, raised in a prior proceeding. Therefore, under the PCRA, they are all procedurally barred. See Utah Code Ann. § 78-35a-106(c) and (d).

Third, the State initially argued that all of Petitioner's claims were time-barred because they were not raised within one

[1]In 1996, the PCRA was found in Title 78, Chapter 35a. In 2008, the PCRA was re-codified as Title 78B, Chapter 9. All references in this ruling to Title 78, Chapter 35a are to the version of the PCRA that existed at the time Petitioner filed his successive post-conviction petition in 2007.

year of the petition's accrual date and he had not shown that any of the claims satisfied the interests of justice exception; i.e., he had not established that he had a legitimate reason for not raising the claim in a prior proceeding nor that any of his claims were meritorious. See Utah Code Ann. § 78-35a-107(3). According to the State, the time frame for "accrual" of the post-conviction action under the PCRA, even under the 1996 version, was the date on which the petition for a writ of certiorari was denied, which was October 5, 1998. Thus, Petitioner's successive post-conviction petition is eight years late.

However, in a supplemental memorandum, the State argues that the 2008 amendments to the PCRA, which removed the interests of justice exception to the statute of limitations and replaced it with an equitable tolling provisions, apply to Petitioner's successive petition. Thus, according to the State, the interests of justice exception cannot be relied upon by Petitioner to excuse an untimely claim. Furthermore, because Petitioner has not shown that the tolling provision applies to any of his claims, all of his claims are time-barred under 2008 amendments to the PCRA.

Finally, the State argues that Petitioner's claim of ineffective assistance of post-conviction counsel must be dismissed because it is not a proper claim under the PCRA. At the time Petitioner filed his successive petition, the PCRA

"establishe[d] a substantive legal remedy for any person who challenges a conviction or sentence." Utah Code Ann. § 78-35a-102. Because a claim of ineffective assistance of post-conviction counsel is not a challenge to Petitioner's conviction or sentence, it is not a claim for which relief can be granted under the PCRA. Moreover, in its supplemental memorandum addressing the applicability of the 2008 amendments to the PCRA, the PCRA now states that "[n]othing in this chapter shall be construed as creating the right to the effective assistance of post-conviction counsel, and relief may not be granted on any claim that post-conviction counsel was ineffective." Utah Code Ann. § 78B-9-202(4). In light of this new language, the State also argues that the current version of the PCRA precludes Petitioner from obtaining relief on his ineffective assistance of post-conviction counsel claim.

C. Petitioner's Response to the State's Motion to Dismiss

In response to the State's motion to dismiss, Petitioner begins by asserting that he was falsely led to believe that he, rather than his co-defendant Edward Deli, caused the deaths of Kaye Tiede and Ms. Potts and therefore he is factually innocent of the murders to which he pleaded guilty. According to Petitioner, his factual innocence necessarily "trumps the procedural and timeliness bars relied on by the State." (Pet'r

Mem. in Opp. at 15.) The failure to discover this new evidence concerning his factual innocence and to raise the claims in his first petition was the result of ineffective assistance of post-conviction counsel, which in turn was the result of the inadequate amount of funding that was made available to prior post-conviction counsel. Petitioner argues that his claims are not time-barred because the mere passage of time can never justify the continued imprisonment of one who has been denied fundamental rights. Moreover, the interests of justice exception under the PCRA has been satisfied.

In addition, he also argues that he has shown "good cause" or "unusual circumstances" to overcome the procedural bar raised by the State. Specifically, he contends that as a result of the lack of adequate funding and ineffective assistance of prior post-conviction counsel his claims could not have been raised in an earlier petition and new facts not previously known demonstrate either the denial of a constitutional right, that the outcome of his trial might have been different, or the existence of fundamental unfairness in his conviction. Because his claims were overlooked in good faith with no intent to delay the post-conviction process, Petitioner contends that good cause exists that permits him to raise these claims in his successive petition, despite the procedural bar.

D. Supplemental Memoranda

Prior to filing a reply to Petitioner's opposition, the State filed a supplemental memorandum in which it argues that the 2008 amendments to the PCRA that removed the interests of justice exception to the time-bar and ostensibly clarified that post-conviction petitioners do not have a right to the effective assistance of counsel, apply retroactively to Petitioner's successive post-conviction petition. Therefore, the State asserts, Petitioner cannot rely upon the interests of justice exception to excuse the untimely filing of any successive claim and cannot assert as a ground for relief that his post-conviction counsel provided ineffective representation.

In Petitioner's memorandum in opposition to the State's supplemental memorandum, he argues that the Utah Supreme Court has exclusive authority to define post-conviction remedies and procedures. Because the Supreme Court has already held that the mere passage of time can never justify rejecting a meritorious claim, removing the interests of justice exception from the PCRA is necessarily ineffectual. Moreover, Petitioner also argues that the 2008 amendments cannot apply retroactively because (1) the interests of justice exception constitutes a vested right that cannot be removed retrospectively, and (2) he has a right under the Utah Constitution to the effective assistance of post-

conviction counsel that the legislature cannot extinguish.

E. State's Reply

In reply, the State repeats the arguments that were set forth in its supplemental memorandum concerning the retroactive application of the 2008 amendments to the PCRA. In addition, the State argues that even if the 2008 amendments do not apply, claims alleging ineffective assistance of post-conviction counsel are not cognizable under the PCRA, Petitioner has no state or federal constitutional right to the effective assistance of post-conviction counsel, the statutory right to post-conviction counsel does not give Petitioner the right to a claim of ineffective assistance of post-conviction counsel in a successive petition, and in any event, Petitioner has failed to establish that his post-conviction counsel was, in fact, ineffective.

Further, the State also contends that Petitioner's claims are procedurally barred because they are claims that were either raised and addressed, or could have been, but were not, raised in a prior proceeding and Petitioner has failed to show that any exception applies or that unusual circumstances exist. Finally, although Petitioner frequently asserts that, with appropriate funding finally provided, his current counsel have discovered new evidence in the case, Petitioner has not shown that any of the recently discovered evidence satisfies the requirements of the

"newly discovered evidence" standard set forth in the PCRA. At best he is essentially making a claim of ineffective assistance of post-conviction counsel, a claim for which no relief may be granted under the PCRA.

III. Discussion

A. Legal Analysis

1. The Interests of Justice Exception

a. Introduction

Under the provisions of the PCRA as they existed when Petitioner filed his successive post-conviction petition, a petitioner was "not eligible for relief . . . upon any ground that . . . [was] barred by the limitation period established in Section 78-35a-107." Utah Code Ann. § 78-35a-106(1)(e). As with the current version of the PCRA, the statute of limitations entitled a petitioner to "relief only if the petition [was] filed within one year after the cause of action [had] accrued." Utah Code Ann. § 78-35a-107(1). Nevertheless, at the time Petitioner filed his successive petition, the PCRA included an exception that, if satisfied, would excuse an untimely filing. Under this exception, "if the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations." Utah Code Ann. § 78-35a-107(3).

In considering this exception, the Utah Supreme Court has

specifically held that a trial court "presented with an untimely post-conviction petition must consider the interests of justice exception before disposing of the petition . . . [and] has no discretion to grant relief on an untimely . . . petition if the 'interests of justice' do not so require." *Johnson v. State, 2006 UT 21, ¶16, 134 P.3d 1133.* On the other hand, if the trial court makes specific findings in support of the interests of justice exception, then the untimeliness of the successive petition must be excused. *See id. at ¶17.* "An analysis of what constitutes an exception in the 'interests of justice' should involve examination of both the meritoriousness of the petitioner's claim and the reason for an untimely filing." *Adams v. State, 2005 UT 62, ¶16, 123 P.3d 400.* However, it is not necessarily required that both prongs of this test be satisfied. As noted by the Supreme Court, depending upon the facts of the particular case under consideration, some claims may require no justification for an untimely filing--such as a claim of actual innocence supported by DNA evidence--while "an entirely frivolous claim would not meet the 'interests of justice' exception even with the best possible excuse for the late filing." *Id.* In other cases, a clear assessment of both prongs will be necessary to determine whether the interests of justice exception is satisfied. "[W]e expect that the district court will give appropriate weight to each of [these] factors according to the

circumstances of a particular case." *Id.*

b. Retroactive Application of Statutory Amendments

During the 2008 legislative session the interests of justice exception was removed from the PCRA and replaced with equitable tolling provisions which toll the limitations period "for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity." Utah Code Ann. § 78B-9-107(3). This change went into effect on May 5, 2008 and therefore, no interests of justice exception currently exists in the PCRA to excuse the failure of a petitioner to timely file a petition for post-conviction relief. "Ordinarily the facts and the law in a given lawsuit are to be applied as of the date of the filing of the original complaint." *Archer v. Utah State Land Bd., 392 P.2d 622, 624 (UT 1964).* It is generally true that "legislation is not given retroactive effect." *B.A.M. Dev., L.L.C. v. Salt Lake County, 2006 UT 2, ¶20, 128 P.3d 1161.* See also *Goebel v. Salt Lake City S. R.R. Co., 2004 UT 80, ¶39, 104 P.3d 1185* ("A statute is not to be applied retroactively unless the statute expressly declares that it operates retroactively."); Utah Code Ann. § 68-3-3 ("No part of these revised statutes is retroactive, unless expressly so declared.").

However, "[a]n exception to the general rule against retroactivity applies to changes which are procedural only." *Olsen v. Samuel McIntyre Inv. Co., 956 P.2d 257, 261 (Utah 1998)*. Unlike substantive law, which "creates, defines[,] and regulates the rights and duties of the parties which may give rise to a cause of action," procedural law "prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective." *Petty v. Clark, 192 P.2d 589, 593-594 (Utah 1948)*. Thus, "statutes which operate in furtherance of a remedy already existing and which neither create new rights nor destroy existing rights . . . appl[y] retrospectively to accrued or pending actions to further the legislature's remedial purpose." *Marshall v. Industrial Comm'n, 704 P.2d 581, 582 (Utah 1985)*. Furthermore, "statutory amendments that merely clarify an ambiguity in an original statute will be given retroactive effect." *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n, 953 P.2d 435, 440 (Utah 1997)* (emphasis added). See also *Oakland Constr. Co. v. Industrial Comm'n, 520 P.2d 208, 210-211 (Utah 1974)* (general principle against retroactive application "has no application where the later statute or amendment deals only with clarification or amplification as to how the law should have been understood prior to its enactment." (emphasis added)). That is, "an exception exists for amendments clarifying statutes, which are applied

retroactively, so long as they 'do not enlarge, eliminate, or destroy vested or contractual rights.'" *Keegan v. State, 896 P.2d 618, 620 (Utah 1995)* (quoting *Board of Equalization* v. *Utah State Tax Comm'n ex rel. Benchmark, Inc., 864 P.2d 882, 884 (Utah 1993))*. Nevertheless, as the Utah Court of Appeals has expressly held, "[w]hen the Legislature amends a statute, we presume it intended to make a substantive, rather than procedural or remedial change." *Wilde* v. *Wilde, 2001 UT App 318, ¶13, 35 P.3d 341.*

c. Whether the 2008 Amendments to the PCRA Apply Retroactively

Nowhere in the 2008 amendments is there language declaring that the removal of the interests of justice exception should apply retroactively. In addition, because the amendments also do not expressly state that they are clarifying in nature, there is a rebuttable presumption that the amendments are substantive and, therefore, should not be applied retroactively. *See State* v. *Amador, 804 P.2d 1233, 1234 (Utah Ct. App. 1990)* ("Every amendment not expressly characterized as a clarification carries the rebuttable presumption that it is intended to change existing legal rights and liabilities."). See also *Thomas* v. *Color Country Mgmt., 2004 UT 12, ¶36, 84 P.3d 1201* (Durham, C.J., concurring) (same). Even without the presumption, however, a

persuasive argument exists that removing the interests of justice exception from the PCRA constitutes a substantive change. Whether an amendment affects substantive rights "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin v. Hadix, 527 U.S. 343, 357-58 (1999) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)). See also Goebel, 2004 UT 80 at ¶39* ("Convenience, reasonableness, and justice are factors we consider in deciding whether a statute has a merely remedial or procedural purpose.").

When Petitioner filed his successive post-conviction petition in November 2007 he had a reasonable expectation that if the State raised the time-bar as a ground for dismissing the claims, he would have the opportunity to argue that the interests of justice exception applies and that his untimely filing should be excused. Having reasonably relied on the existence of the interests of justice exception to excuse his untimeliness, to now preclude him from asserting it would constitute an unfair windfall for the State and would be unfair to some one in Petitioner's position. Moreover, in the same way that a legislative amendment removing the defense of an expired statute of limitations is a change that affects the vested rights of a defendant, *see Roark v. Crabtree, 893 P.2d 1058, 1062 (Utah 1995)* ("Since 1900, this court has consistently maintained that the

defense of an expired statute of limitations is a vested right."), it follows by force of logic that a legislative amendment removing a statutory exception to the defense of an expired statute of limitations is also a change that affects the vested rights of a plaintiff. Thus, the 2008 amendments are substantive in nature because they eliminate a vested right held by Petitioner at the time he filed his successive post-conviction petition. See *Smith v. Cook, 803 P.2d 788, 792 (Utah 1990)* (a statute is considered substantive if it "eliminate[s] or destroy[s] vested rights.").

Notwithstanding language in *Keegan* suggesting that clarifying statutes cannot be applied retroactively if they eliminate vested rights, Keegan, *896 P.2d at 620*, the State argues that *Keegan* does not state the governing law. The State contends that the purpose of the 2008 amendments was to clarify the unamended PCRA, and therefore the amendments should be applied retroactively to Petitioner's case. The court does not find this argument to be persuasive.

First, despite the State's contention otherwise, more recent cases appear to provide support for *Keegan*. The case of *Evans & Sutherland*, which was decided after *Keegan*, specifically states that "under a long-standing exception to the general rule against applying statutes retroactively, statutory amendments that merely clarify an ambiguity in an original statute will be given

retroactive effect." Use of the word "merely" certainly suggests that amendments that do more than simply clarify should not be applied retroactively. Clearly, as the *Keegan* case holds, changes that enlarge, eliminate, or destroy vested or contractual rights do more than merely clarify and, therefore, are not applied retroactively. Furthermore, the case of *Kilpatrick v. Wiley, 2001 UT 107, 37 P.3d 1130*, which the State cites as an example of a recent case that ostensibly treats the clarifying exception as independent from the general rule against retroactivity, also can be read as supporting *Keegan*. After stating that legislative amendments may be applied retroactively when the purpose of the change is to clarify the meaning of an earlier statute, the Supreme Court went on to state that "[f]urther, in light of the fact that we have now reversed the jury's verdict, the plaintiffs have no vested or contractual right that would prohibit application of the amended statute." *Id. at ¶59*. In other words, because the clarifying amendments do not enlarge, eliminate, or destroy vested or contractual rights, i.e. they are procedural, they may be retroactively applied to the case.

Second, the Utah Court of Appeals has directly held that clarifying amendments are procedural in nature. *See Wilde, 2001 UT App 318 at ¶14* ("A procedural or remedial law 'provides a different mode or form of procedure for enforcing substantive

rights,' <u>or clarifies the meaning of an earlier enactment</u>." (quoting *Pilcher v. Department of Soc. Servs., 663 P.2d 450, 455 (Utah 1983)* (emphasis added)). Based upon the foregoing analysis, the principle enunciated in *Keegan* that clarifying amendments may be applied retroactively as long as they do not enlarge, eliminate, or destroy vested or contractual rights, appears to be controlling law.

However, even if the principle set forth in *Keegan* is incorrect, the State has nevertheless failed to persuasively demonstrate that the 2008 amendments are clarifying in nature. Relying on *State v. Bishop, 753 P.2d 439 (Utah 1988)*, overruled on other grounds as recognized by *State v. Baker, 884 P.2d 1280, 1283 (Utah 1994)*, the State contends that legislative acts amending a statute constitute "persuasive evidence of the legislature's intent when it passed the former, unamended statute," *Id. at 486*, i.e., that the amending statute was meant to clarify. Because, according to the State, the Utah Supreme Court incorrectly interpreted the interests of justice exception in the *Adams* case to allow a petitioner to escape the time-bar any time the petitioner could explain the delay and show that the claim was potentially meritorious, the fact alone that the legislature amended the PCRA to remove the interest of justice exception and replace it with an equitable tolling provision is persuasive evidence that the legislature intended to clarify what

it meant when the interests of justice exception was originally included in the PCRA.

However, while the State correctly quotes *Bishop*, the amending statute referred to in the case was specifically entitled "Clarifying Child Kidnaping and Sexual Abuse Act." *Id.* (emphasis added). It is at least arguable that the language quoted by the State draws its meaning from this context, and therefore that the persuasiveness referred to is tied to the language of the amending statute itself stating that it is clarifying the prior enactment. Thus, simply because the legislature amended the PCRA after the Supreme Court's interpretation of the interests of justice exception in *Adams*, this does not necessarily mean that the legislature intended the 2008 amendments to be clarifying in nature, particularly in light of the fact that, unlike *Bishop*, no legislative language was included in the amendments suggesting that the amendments were intended only to be clarifying.

In addition, citing to the case of *Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989)*, the State also argues that because a "purpose of a statute of limitations is to cut off untimely claims regardless of the claim's potential merit," (State's Supplemental Mem. in Supp. at 9) (emphasis added), the Supreme Court's broad interpretation of the interests of justice exception is illogical insofar as it defeats the purpose of

having a limitations statute in the first place. The *Horton* case states that "[i]n general, statutes of limitation are intended to compel the exercise of a right of action within a reasonable time and to suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh." *Id. at 1091.* Nothing in this language suggests that statutes of limitations are intended to cut off claims regardless of their potential merit. Indeed, following the above-quoted language, *Horton* case cites to *Burnett v. New York Central R.R., 380 U.S. 424 (1965)* which held that

> [s]tatutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." . . . The policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights.

Id. at 428 (quoting *Order of Railroad Telegraphers v. Railway*

Express Agency, Inc., 321 U.S. 342, 348-49 (1944) (emphasis added)). This language suggests that it is not true that a limitations statute cuts off untimely claims "regardless of the claim's potential merit." While the State argues that the Utah Supreme Court "made the interests of justice exception so broad, that it defeated the purpose of the statute of limitations," (State's Supplemental Mem. in Supp. at 9), and therefore, that the 2008 amendments removing the interests of justice exception should be viewed as clarifying in nature, this argument is not particularly persuasive given the fact that the "rule" relied upon by the State may not stand for the precise proposition the State suggests it does. The State's arguments simply do not show that the 2008 amendments merely clarify the prior unamended PCRA.

Furthermore, as Petitioner points out, prior to the *Adams* case being decided, the Utah Supreme Court held in *Julian v. State, 966 P.2d 249 (Utah 1998)* that the "proper consideration of meritorious claims raised in a habeas corpus petition will always be in the interests of justice. It necessarily follows that no statute of limitations may be constitutionally applied to bar a habeas petition." *Id. at 254.* Based upon this language, the legislature should have been on notice of the broadness of the Supreme Court's interpretation of the interests of justice exception. Yet, if the 2008 amendments were genuinely intended to clarify the legislature's original intent with respect to the

interests of justice exception, the State has failed to adequately explain why the legislature waited nearly ten years to ultimately remove the interests of justice exception from the PCRA.

Based upon the foregoing analysis, it is the court's conclusion that the 2008 amendments removing the interests of justice exception from the PCRA are not necessarily clarifying in nature. Moreover, even if their purpose is to clarify, the amendments do more than clarify insofar as they eliminate a vested right held by Petitioner at the time he filed his successive post-conviction petition, namely his right to raise the interests of justice exception as a reason to excuse the untimely filing of his successive petition. The 2008 amendments are substantive in nature and, consistent with the general rule against retroactive application of substantive changes, they cannot be applied retroactively. Petitioner is entitled, therefore, to assert the interests of justice exception to excuse the untimeliness of his successive post-conviction petition.

2. Procedural Bar Rule

a. Introduction

The PCRA "establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies." Utah

Code Ann. § 78-35a-102(1). While the "PCRA affords a convicted defendant the opportunity to have his conviction and sentence vacated or modified under certain circumstances," *Lafferty v. State, 2007 UT 73, ¶44, 175 P.3d 530,* because a petition for post-conviction relief "is a collateral attack on a conviction or sentence [and] . . . not a substitute for appellate review," *Taylor II, 2007 UT 12 at ¶14,* a petitioner "is not eligible for relief on claims that were 'raised or addressed' on direct appeal." *Kell v. State, 2008 UT 62, ¶13, 194 P.3d 913* (citing Utah Code Ann. § 78-35a-106(1)(b) (2002)). See also *Lafferty, 2007 UT 73 at ¶44* ("Claims that were brought on direct appeal are ineligible for consideration in post-conviction actions."). Such issues are dismissed as an abuse of the post-conviction process without a ruling on the merits. No exceptions exist for this procedural bar under the PCRA, including assertions that appellate counsel less than adequately raised or argued the issues on appeal. See *Kell, 2008 UT 62 at ¶17* (after opportunity to be heard on appeal, "[w]e presume that this court gave full consideration to the claims, regardless of whether [petitioner's] counsel raised them in the most effective manner.").

In addition to permitting the dismissal of successive post-conviction claims previously raised and addressed at trial or on direct appeal, the PCRA also precludes a petitioner from

obtaining "relief . . . upon any ground that was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief." Utah Code Ann. § 78-35a-106(1)(d). The same is true under the common law. See *Gardner v. Holden, 888 P.2d 608, 613 (Utah 1994) (Gardner I)* ("Issues that could and should have been raised on direct appeal, but were not, may not properly be raised in a habeas corpus proceeding absent unusual circumstances."). Unlike the procedural bar rule that applies to initial post-conviction petitions, see Utah Code Ann. § 78-35a-106(1)(c), which includes a statutory exception based upon ineffective assistance of trial or appellate counsel, see Utah Code Ann. § 78-35a-106(2), no exception based upon ineffective assistance of post-conviction counsel is expressly included in the PCRA that would apply to claims raised in a successive petition for post-conviction relief that could have been, but were not, raised in a prior proceeding. Thus, any successive claim that was raised or that could have been raised, but was not, in a prior post-conviction petition is procedurally barred and no exception exists under the PCRA to excuse this failure.

b. Common Law Exceptions to the Procedural Bar Rule[2]

Notwithstanding the language of the PCRA, under the common law as set forth by the Utah Supreme Court, the merits of a claim that was previously raised and addressed in a prior proceeding may be considered by the trial court if the petitioner is able to demonstrate "unusual circumstances." See *Hurst v. Cook, 777 P.2d 1029, 1036 (Utah 1989)* (a "ground for relief from a conviction or sentence that has once been fully and fairly adjudicated on appeal or in a prior habeas proceeding should not be readjudicated unless it can be shown that there are 'unusual circumstances.'"). See also *Allen v. Friel, 2008 UT 56, ¶12, 194 P.3d 903* ("When the ground for preclusion is that the petitioner already addressed . . . the issue, the petitioner's claim will not be allowed in a post-conviction relief proceeding absent unusual circumstances."); *Lairby v. Barnes, 793 P.2d 377, 378 (Utah 1990)* (same). "For example, a prior adjudication is not a bar to reexamination of a conviction if there has been a retroactive change in the law, a subsequent discovery of suppressed evidence, or newly discovered evidence." *Hurst, 777*

[2]When Petitioner filed his successive petition for post-conviction relief, the PCRA "establishe[d] a substantive legal remedy for any person who challenge[d] a conviction or sentence for a criminal offense and who ha[d] exhausted all other legal remedies." Utah Code Ann. § 78-35a-102(1). However, in 2008, the phrase "a substantive legal remedy" was removed and replaced with "the sole remedy." Nevertheless, although the "amendment appears to have extinguished [the] common law writ authority for future cases[, b]ecause [Petitioner] sought post-conviction relief prior to the implementation of the 2008 amendment, relief through [the] common law writ authority is still available to him." *Peterson v. Kennard, 2008 UT 90, ¶16, 201 P.3d 956.*

P.2d at 1036.

With respect to claims not previously raised, the Utah Supreme Court has "consistently recognized exceptions to [the procedural bar] rule in 'unusual circumstances' where 'good cause' excuses a petitioner's failure to raise the claim earlier." *Tillman v. State, 2005 UT 56, ¶20, 128 P.3d 1123* (citing *Hurst, 777 P.2d at 1036*). See also Utah R. Civ. P. 65C(c) ("Additional claims relating to the legality of the conviction or sentence may not be raised in subsequent [post-conviction] proceedings except for good cause shown."). According to the Supreme Court, it has

> long been our law[] that a procedural default is not always determinative of a collateral attack on a conviction where it is alleged that the trial was not conducted within the bounds of basic fairness or in harmony with constitutional standards. Therefore, even where a claim of error could have been raised earlier, post-conviction relief may be available in those "rare cases" or "unusual circumstances" where "an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred" that would make it "unconscionable" not to reexamine the issue.

Gardner v. Galetka, 2007 UT 3, ¶17, 151 P.3d 968 (Gardner III). See also *Medel v. State, 2008 UT 32, ¶20, 184 P.3d 1226*

("[P]rocedural defaults (such as the ban on successive petitions) should not be determinative in those rare and unusual cases . . . [where it would be] unconscionable not to reexamine the issue [raised].").

The Supreme Court has identified five "good cause" common law exceptions[3] to the procedural bar rule, three of which have been codified either by statute or procedural rule. These common law exceptions are:

> (1) the denial of a constitutional right pursuant to new law that is, or might be, retroactive, (2) new facts not previously known which would show the denial of a constitutional right or might change the outcome of the trial, (3) the existence of fundamental unfairness in a conviction, (4) the illegality of a sentence, [and] (5) a claim overlooked in good faith with no intent to delay or abuse the writ.

Hurst, 777 P.2d at 1037. At the time Petitioner filed his successive petition, exception (1) was implicitly included in the PCRA via Section 78-35a-106(d), exception (2) was expressly provided for in Section 78-35a-104(1)(e), and exception (4) was covered by Rule 22(e) of the Utah Rules of Criminal Procedure. Importantly, because the common law exceptions "retain their

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[3]The Utah Supreme Court has also made clear that the list of common law exceptions set forth in *Hurst v. Cook, 777 P.2d 1029 (Utah 1989)* is not an exhaustive list. See *Gardner v. Galetka, 2007 UT 3, ¶18, 151 P.3d 968* ("We later clarified that this list of 'good cause' exceptions is not exhaustive.").

independent constitutional significance," *Gardner v. Galetka, 2004 UT 42, ¶15, 94 P.3d 263 (Gardner II)*, they can be asserted by petitioners raising successive post-conviction claims regardless of whether the exception has been included in the PCRA.

However, the Utah Supreme Court has also held that because frivolous claims and claims previously withheld for tactical reasons must be summarily denied, <u>see</u> *Hurst, 777 P.2d at 1037*, post conviction petitioners must first demonstrate that a claim is neither frivolous nor was it withheld for tactical reasons before the post-conviction court is required to consider whether any common law exceptions apply that would excuse a petitioner's failure to raise the successive claim in a prior proceeding. See *Gardner III, 2007 UT 3 at ¶26* (because "[f]rivolous claims, . . . and claims that are withheld for tactical reasons should be summarily denied[,] . . . a separate and distinct procedural determination for successive post-conviction claims [must be] made before [the trial court] reach[es] an analysis under the 'good cause' common law exceptions."). In other words, the trial court is required to summarily dismiss all successive post-conviction claims that are frivolous or that were withheld for tactical reasons before considering the applicability of the common law exceptions.

A claim is frivolous if it is facially implausible. <u>See</u> *id.*

at ¶21. Thus, a petitioner raising a successive post-conviction claim must first demonstrate that the claim is not facially implausible before requesting that the trial court consider the common law exceptions. As for claims withheld for tactical reasons, in nearly all cases, if the substance of a successive claim was not raised in a prior post-conviction petition, it must be presumed that the reason for not raising it was tactical or strategic in nature. See *Yarborough v. Gentry, 540 U.S. 1, 5 (2003)* ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect."); *Strickland v. Washington, 466 U.S. 668, 689 (1984)* ("[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (quoting *Michel v. Louisiana, 350 U.S. 91, 101 (1955)*).

Thus, with respect to any successive claim, in order for the trial court to even consider the common law exceptions, the petitioner must overcome the strong presumption that no tactical reasons existed for counsel not to have raised the claim which is now raised in the successive proceeding. That is, the petitioner must demonstrate that "there was no 'conceivable tactical basis for counsel's actions.'" *State v. Clark, 2004 UT 25, ¶6, 89 P.3d 162* (quoting *State v. Bryant, 965 P.2d 539, 542 (Utah Ct. App. 1998)*). See also *State v. Crosby, 927 P.2d 638, 644 (Utah 1996)*

("[W]e give trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis supporting them."); *State v. Farnsworth, 368 P.2d 914, 915 (Utah 1962)* (defendant charged with burglary did not have incompetent counsel where the "record indicate[d] no action or inaction by the trial attorney which could not rationally find explanation in a legitimate exercise of strategy.").

c. Whether an Exception Exists to the Procedural Bar Rule Based Upon a State Constitutional Right to the Effective Assistance of Post-Conviction Counsel

In addition to raising an independent claim of ineffective assistance of prior post-conviction counsel, Petitioner also argues that ineffective assistance of post-conviction counsel constitutes a common law exception to the procedural bar rule and, therefore, many of his other claims are not procedurally barred because the failure to raise these claims in his prior post-conviction petition was the result of ineffective representation. In his memorandum opposing the State's supplemental motion to dismiss, he provides support for this argument by arguing that he has both a state constitutional right and a statutory right to the effective assistance of post-

conviction counsel.

There is no question that Petitioner had a state constitutional right to the effective assistance of trial and appellate counsel during his criminal proceedings. See Utah Const. art. I, § 12 ("In criminal prosecutions the accused shall have the right to . . . defend . . . by counsel."). The Utah Supreme Court has expressly held that a "defendant in a criminal proceeding has a constitutional right to the assistance of counsel at all critical stages of the prosecution." *State v. Hamilton, 732 P.2d 505, 506-507 (Utah 1986)* (citing Utah Const. art. I, § 12). See also *State v. Eichler, 483 P.2d 887, 889 (Utah 1971)* ("It is in accordance with the assurance of the Utah State Constitution that an accused be provided with the assistance of counsel at every important stage of the proceedings against him."). This includes not only the criminal trial, but the appeal as well. See Utah Const. art. I, § 12 ("In all criminal prosecutions the accused shall have the right . . . to have a speedy public trial . . . and the right to appeal."). See also *State v. Tuttle, 713 P.2d 703, 704 (Utah 1985)* ("The Utah Constitution provides that a defendant in a criminal prosecution shall have a 'right to appeal in all cases.' This shows that the drafters of our constitution considered the right of appeal essential to a fair criminal proceeding." (quoting Utah Const. art. I, § 12). Furthermore, as noted above, because the "right

to counsel includes effective assistance of counsel," *State v. Burns, 2000 UT 56, ¶23, 4 P.3d 795,* it follows that Petitioner had a state constitutional right to the effective assistance of counsel both at trial and on appeal.

Nevertheless, the fact that the Utah Constitution guarantees a criminal defendant the right to effective representation at trial and on appeal does not, in and of itself, warrant the conclusion that a state constitutional right to the effective assistance of post-conviction counsel exists. The Utah Supreme Court has never held that post-conviction petitioners in a death penalty case[4] have a state constitutional right to post-conviction counsel. In *Menzies v. Galetka, 2006 UT 81, 150 P.3d 480,* the Supreme Court expressly avoided the issue when it declared that,

> [w]hile we have not yet considered whether such a right exists under the Utah Constitution, there is no need to do so in this case . . . . We do not foreclose the possibility that an indigent death row inmate may have a right to the effective assistance of counsel under the Utah Constitution, but that question must wait for

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[4]In the case of *Hutchings v. State, 2003 UT 52, 84 P.3d 1150,* the Utah Supreme Court considered a decision by the Utah Court of Appeals affirming the trial court's dismissal of a successive, non-capital petition for post-conviction relief. One of the claims raised by the petitioner was that he was "wrongfully denied counsel for purposes of . . . his first petition for post-conviction relief. Id. at ¶19. The Supreme Court held that while the petitioner "may have benefitted from professional assistance in the drafting and presentation of his [first] petition, there is no statutory or constitutional right to counsel in a civil petition for post-conviction relief." Id. at ¶20 (emphasis added).

another day.

Id. at ¶84. Because the Supreme Court has never expressly recognized a constitutional right to effective post-conviction counsel, Petitioner bears the burden of demonstrating that a proper interpretation of the Utah Constitution yields such a right.

Although the Supreme Court has held that the "scope of Utah's constitutional protections 'may be broader or narrower than' those offered by the [federal constitution], 'depending on [our] state constitution's language, history, and interpretation,'" *American Bush v. City of South Salt Lake, 2006 UT 40, ¶9, 140 P.3d 1235* (quoting *West v. Thomson Newspapers, 872 P.2d 999, 1004 n.4 (Utah 1994)),* based upon a careful consideration of Petitioner's arguments, it is the Court's conclusion that Petitioner has not demonstrated that the Utah Constitution includes the right to the effective assistance of post-conviction counsel.

First, Petitioner argues that he has a state constitutional right to post-conviction counsel under Article I, Section 12. However, any reliance on Article I, Section 12's guarantee of the right to counsel is misplaced. While it may be true that the underlying facts associated with a post-conviction petition concern a criminal conviction and sentence, post-conviction proceedings themselves are civil in nature. The Utah Supreme

Court has specifically held that "a petition for post-conviction relief is a civil action, specifically governed by rule 65C of the Utah Rules of Civil Procedure." *Wickham v. Galetka, 2002 UT 72, ¶10, 61 P.3d 978.* See also *Hutchings v. State, 2003 UT 52, ¶20, 84 P.3d 1150* ("[T]here is no statutory or constitutional right to counsel in a civil petition for post-conviction relief."). Moreover, the Utah Court of Appeals has held that, to "avoid any misconceptions . . ., it is reiterated that the Utah Const. Art. I, § 12 declares the right to be defended by counsel applies only in criminal prosecutions, not civil actions." *Walker v. Carlson, 740 P.2d 1372, 1373-74 (Utah Ct. App. 1987)* (emphasis added). Thus, because post-conviction proceedings are civil in nature, Petitioner cannot justifiably rely upon Article I, Section 12 of the Utah Constitution to argue that he had a state constitutional right to the effective assistance of post-conviction counsel while prosecuting his first post-conviction petition.

Second, although Petitioner claims that there has been a steady movement toward the recognition of a state constitutional right to the effective assistance of post-conviction counsel, his argument relies primarily on language from cases emphasizing the need for state-funded post-conviction counsel and he does not cite to any language suggesting that a state constitutional right to effective post-conviction counsel is or may be necessary.

See, e.g., *Julian, 966 P.2d at 259* (Zimmerman, J., concurring) (because the "initial post-conviction proceeding is really part of the criminal trial and review process[,] . . . the defendant should be provided with paid counsel and one state-financed automatic post-conviction proceeding." (emphasis added)); *Parsons v. Barnes, 871 P.2d 516, 530 (Utah 1994)* ("We decline to address and decide in this proceeding whether under the Utah Constitution appointed counsel in a first habeas proceeding has a right to be compensated by the state." (emphasis added)); *Gardner I, 888 P.2d 608 at 622* ("[T]here may be extraordinary cases in which a petitioner for habeas corpus might be entitled under the Utah Constitution to state-compensated counsel, expert witnesses, or investigators." (emphasis added)).

Third, Petitioner argues that while "the [Supreme] Court stated that it has 'not yet considered whether [the right to counsel] exists under the Utah Constitution,' the [Supreme] [C]ourt indicated that such a right may exist, for example when the lack of state funding 'imposes a crippling burden' on capital petitioners." (Pet'r Mem. in Opp. to Supplemental Mot. at 23) (citing *Menzies, 2006 UT 81 at ¶ 84 and ¶20 n.3.*) However, a plain reading of the *Menzies* decision indicates that in footnote 3 the Supreme Court was referring to administrative rules implementing the now-outdated funding requirements of the PCRA and was simply commenting on the fact that the former statutory

funding scheme, with its absolute caps on the payment of attorneys fees and litigation costs, could impose a crippling burden on capital petitioners. While it may be argued that the Supreme Court was suggesting that without sufficient funds, post-conviction counsel may be unable to properly represent his client, i.e. provide effective representation, nowhere in the decision, either impliedly or expressly, did the Supreme Court link inadequate state funding with the existence of a state constitutional right to the effective assistance of counsel. Thus, Petitioner has failed to show that there has been a "steady movement" toward recognizing a state constitutional right to effective post-conviction counsel or that such a constitutional right is required where inadequate funding is provided.

Fourth, Petitioner argues that because the due process clause in Article I, Section 7 of the Utah Constitution has been interpreted by the Utah Supreme Court to provide broader protections than its federal counterpart, the Utah Constitution's due process clause should be interpreted to guarantee the effective assistance of post-conviction counsel.[5] This is

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[5]Presumably, Petitioner makes the argument that the due process clause under the state constitution is broader than its federal counterpart because he recognizes that he had no federal constitutional right to the effective assistance of post-conviction counsel during his initial state post-conviction proceeding. The United States Supreme Court has expressly held that, under the federal constitution, "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman v. Thompson, 501 U.S. 722, 752 (1991).* See also *Menzies v. Galetka, 2006 UT 81, ¶84, 150 P.3d 480* ("We do, however, note that the United States Supreme Court has previously declined to recognize a federal constitutional right to the effective

consistent, he argues, with other jurisdictions that have recognized a state constitutional right to effective post-conviction counsel under the due process clause of their state constitutions. However, the case law from Alaska, Florida, and Mississippi upon which Petitioner relies and the arguments he makes are unpersuasive. It is true that in *Grinols v. State, 74 P.3d 889 (Alaska 2003)* the Alaska Supreme Court held that "the right to counsel in a first application for post-conviction relief is of a constitutional nature, required under the due process clause of the Alaska Constitution," *id. at 894*, and, not surprisingly, that this includes the right to effective representation which may be challenged in a second petition for post-conviction relief. *See id. at 895.* However, whether the Florida Supreme Court has recognized a constitutional right to the effective assistance of counsel under the Florida Constitution is, at best, unclear. As noted in the concurring opinion in *Arbelaez v. Butterworth, 738 So. 2d 326 (Fla. 1999)*, the Florida Supreme Court has "sent out an ambiguous, if not implicitly contradictory signal, when [it] declined to recognize a specific constitutional obligation of the State for provision of post-conviction counsel in capital cases, while at the same time recognizing a limited constitutional due process right to counsel in all post-conviction proceedings." *Id. at 329*

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assistance of counsel in state post-conviction proceedings.").

(Anstead, J., concurring).

The same is true of the Mississippi case, *Jackson v. State, 732 So.2d 187 (Miss. 1999)*, cited by Petitioner. Although the concurring opinion in that case stated that the majority erred in suggesting that a right to post-conviction counsel is found in the Mississippi Constitution, *see id. at 191-92*, the majority opinion itself makes no such express conclusion. Rather, in the context of encouraging the Mississippi legislature to establish a statewide public defender system, the Mississippi Supreme Court stated, "[w]e therefore find that [the petitioner], as a death row inmate, is entitled to appointed and compensated counsel to represent him in his state post-conviction efforts." *Id. at 191.* No mention was made whether this entitlement was constitutional or statutory in nature.

Moreover, it is at least noteworthy that the supreme courts of other states have specifically held that their state constitutions do not include a right to post-conviction counsel. See *In re Beasley, 107 S.W.3d 696, 697 (Tex. App. 2003)* ("Similarly, the Texas Constitution provides no right to counsel in a post-conviction collateral attack."); *McKague v. Warden, Nevada State Prison, 912 P.2d 255, 258 (Nev. 1996)* ("The Nevada Constitution also does not guarantee a right to counsel in post-conviction proceedings. . . ."); *State v. Crowder, 573 N.E.2d 652, 653-654 (Ohio 1991)* ("We agree with the court of appeals

that an indigent petitioner has neither a state nor a federal constitutional right to be represented by an attorney in a post-conviction proceeding.").

Finally, in its reply to Petitioner's memorandum in opposition to the motion to dismiss, the State raises a noteworthy policy argument against the position that the Utah Constitution should be interpreted to guarantee a right to the effective assistance of post-conviction counsel. According to the State, if the Utah Constitution guarantees a right to the effective assistance of post-conviction counsel, it will allow petitioners "to file endless successive petitions re-litigating claims that they previously lost and raising new claims that they should have raised in a prior proceeding, and arguing that the court must reach their merits because any one of a seemingly endless string of post-conviction counsel had been ineffective." (State's Mem. in Reply at 31.) Under this "infinite continuum of litigation" argument, a state constitutional right to post-conviction counsel would result in "an infinite continuum of litigation in many criminal cases." *Bonin v. Vasquez, 999 F.2d 425, 429 (9th Cir. 1993)*. As the *Bonin* court noted, if a petitioner

> has a [constitutional] right to competent counsel in his or her first state post-conviction proceeding because that is the first forum in which the

> ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a [constitutional] right to counsel in the second state post-conviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel's performance in the first state post-conviction proceeding. . . . And so it would go.

Id. at 429-30. The same conclusion was reached by the Arizona Supreme Court when it considered this same issue. In *State v. Mata, 916 P.2d 1035 (Ariz. 1996)*, the Arizona Supreme Court held that

> if defendant deserved effective representation on his first [post-conviction petition] to litigate effectiveness on appeal, then it must follow that he be effectively represented on the second in order to litigate the first. This is because defendant's argument is based on the ill-begotten notion that the right to effective counsel on appeal is empty without effective counsel to challenge appellate counsel's performance. According to defendant's own logic, the right to effective assistance on the first [post-conviction petition] would also be meaningless without another proceeding in which defendant could argue that counsel on that petition was inadequate. We reject

this infinitely regressive notion.

Id. at 1052-53.

In light of the foregoing policy argument, if the Utah Constitution is interpreted to include a right to the effective assistance of post-conviction counsel, then any capital petitioner would be in a position to effectively delay and even halt the full effects of his sentence. In order to avoid this arguably unjust and one-sided result, the Utah Constitution should not be interpreted to include a right to the effective assistance of post-conviction counsel. Support for this conclusion is found in *Menzies* itself. There the State argued that a state constitutional right to the effective assistance of post-conviction counsel "would make capital post-conviction litigation interminable and end the finality of death sentences." *Menzies, 2006 UT 81 at ¶84.* The Utah Supreme Court side-stepped making a direct ruling on this argument by stating that "'[a]s important as finality is, it does not have a higher value than constitutional guarantees of liberty.'" *Id.* (quoting *Hurst,* 777 *P.2d at 1035).* Nevertheless, in the context of the State's infinite continuum of litigation argument, the Supreme Court specifically noted that the PCRA prevents this from occurring because "Utah's post-conviction legislation and associated rules contain appropriate limitations to assist courts in streamlining post-conviction review in death penalty cases." *Id.* Since a

constitutional right to the effective assistance of post-conviction counsel would not be subject to the statutory and rule constraints the Supreme Court has held exists to prevent the possibility of endless post-conviction litigation, the Supreme Court's statement is at least an implied rejection of the notion that the Utah Constitution includes a right to the effective assistance of post-conviction counsel.

Based upon a careful assessment of the arguments provided by Petitioner in support of his contention that capital petitioners enjoy a state constitutional right to the effective assistance of post-conviction counsel, it is the Court's conclusion that Petitioner has not sufficiently demonstrated that a proper interpretation of the Utah Constitution includes a right to the effective assistance of post-conviction counsel. Therefore, Petitioner cannot assert an exception, common law or otherwise, to the PCRA's procedural bar for claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition based upon a state constitutional right to the effective assistance of post-conviction counsel because he has failed to demonstrate that a proper interpretation of the Utah Constitution guarantees him such a right.

d. Whether an Exception Exists to the Procedural Bar Rule Based Upon a Statutory Right to the Effective Assistance of Post-Conviction Counsel

Although Petitioner has not shown that he had a state constitutional right to post-conviction counsel during his initial post-conviction proceedings, nor that a common law exception to the procedural bar rule exists based upon constitutional and common law considerations, under the PCRA he had a statutory right to post-conviction counsel. During the pendency of his initial petition for post-conviction relief, the PCRA required the trial court to determine whether the petitioner was indigent and, if so, "promptly appoint counsel who is qualified to represent [petitioners] in death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure." Utah Code Ann. § 78-35a-202(1)(2)(a). In the *Menzies* case, the Utah Supreme Court considered whether the statutory right to post-conviction counsel entitled capital petitioners to the effective assistance of counsel. The Supreme Court noted that "[g]iven the high stakes inherent in such [capital post-conviction] proceedings--life and liberty--providing a petitioner the procedural safeguard of appointed counsel is an important step in assuring that the underlying criminal conviction was accurate." *Menzies, 2006 UT 81 at ¶82*. In order to take seriously this legislatively created protection, the Supreme

Court concluded that the statutory right to post-conviction counsel necessarily includes "a statutory right to effective assistance of counsel." *Id.*

When the State filed its memorandum in support of the motion to dismiss on February 15, 2008, the State did not contest that Petitioner had a statutory right to the effective assistance of post-conviction counsel. However, new amendments to the PCRA that went into effect on May 5, 2008 added language specifically stating that "[n]othing in this chapter shall be construed as creating the right to the effective assistance of post-conviction counsel, and relief may not be granted on any claim that post-conviction counsel was ineffective." Utah Code Ann. § 78B-9-202(4). In light of this change, in both a supplemental pleading filed on July 25, 2008 and its memorandum in reply filed on February 26, 2009, the State argues that the "no effective assistance of counsel" provision in the PCRA retroactively applies to Petitioner's case and, as a result, while he may have had a statutory right to post-conviction counsel, he did not have a statutory right to the effective assistance of post-conviction counsel. Therefore, the State argues, Petitioner cannot overcome the PCRA's procedural bar for claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition by relying on a statutory right to the effective assistance of post-conviction counsel because the PCRA

now expressly denies Petitioner this statutory right.

The State provides three reasons in support of its contention that the new "no effective assistance of counsel" amendment applies retroactively: First, the new amendment is merely procedural in nature because it neither narrows nor eliminates Petitioner's cause of action and only affects how Petitioner will proceed with his litigation. Second, the new amendment merely clarifies the Legislature's original intent with respect to the right to effective representation in post-conviction proceedings that may have been put into question by the Utah Supreme Court's erroneous conclusion in *Menzies* that the prior Section 202 of the PCRA included the right to the effective assistance of post-conviction counsel. Third, the Legislature intended that the new amendment apply to Petitioner's case. During the 2008 legislative session, Petitioner's case was pending and counsel for the State testified before the Senate Judiciary, Law Enforcement, and Criminal Justice Committee and enumerated the problems the new amendment was intended to remedy and that the amendments were needed immediately.

Petitioner argues in response that the *Menzies* decision effectively vested him with a statutory right to the effective assistance of post-conviction counsel and that this Court does not have the authority to overrule the Utah Supreme Court. In

addition, he also contends that his right to the effective assistance of post-conviction counsel is substantive in nature and that the amendment does more than simply clarify the PCRA, it eliminates this substantive right. Therefore, according to Petitioner, the "no effective assistance of counsel" amendment should not be applied retroactively.

After carefully considering the arguments, it is the Court's conclusion that the "no effective assistance of counsel" amendment to the PCRA does not retroactively apply to Petitioner's case and, therefore, that Petitioner was entitled to the effective representation of post-conviction counsel during his initial post-conviction proceeding.

First, the Court finds unpersuasive the State's argument that the Legislature intended the new amendment to apply retroactively. Nowhere in the 2008 amendments to the PCRA is there language that either impliedly or expressly declares that the new legislation should apply retroactively. Moreover, the fact that counsel for the State argued before a Senate committee that "[w]e need these amendments now for the reasons that I've, I've already said," (State's Supplemental Mem. in Supp. at 18,) does little, in the Court's view, to suggest that the Legislature itself intended the 2008 amendments to apply retroactively.

Second, because Petitioner was appointed counsel under the

PCRA and the Utah Supreme Court has held that capital post-conviction petitioners are statutorily entitled to the effective assistance of counsel under the PCRA, the mandate rule requires this Court to abide by the Supreme Court's ruling. Under the mandate rule,

> pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case. The lower court must not depart from the mandate, and any change with respect to the legal issues governed by the mandate must be made by the appellate court that established it or by a court to which it, in turn, owes obedience.

Thurston v. Box Elder County, 892 P.2d 1034, 1037-1038 (Utah 1995). The fact that the Supreme Court held in a separate case that capital petitioners have a statutory right to the effective assistance of post-conviction counsel does not alter the application of the rule. In light of the Supreme Court ruling in *Menzies*, this Court must afford Petitioner the right to the effective assistance of post-conviction counsel.

Third, while it is true that "statutory amendments that merely clarify an ambiguity in an original statute [must] be given retroactive effect," *Evans & Sutherland, 953 P.2d at 440*, they can only be "applied retroactively[] so long as they 'do not

enlarge, eliminate, or destroy vested or contractual rights.'" *Keegan, 896 P.2d at 620* (quoting *Board of Equalization, 864 P.2d at 884)*. While not dispositive, the timing of the "no effective assistance of counsel" amendment certainly suggests that it was intended not as a clarification of the prior PCRA, but as a response to the Supreme Court's decision in *Menzies*. In addition, the amendment nowhere includes language indicating that it was enacted for purposes of clarification. Moreover, as noted above, Petitioner had a vested right to the effective assistance of post-conviction counsel during his initial post-conviction proceedings which the amendment would eliminate if applied retroactively.

Finally, the right to the effective assistance of counsel is a substantive right. In the *Menzies* decision, the Supreme Court set aside the trial court's judgment against the petitioner because the deficient performance of his attorney "effectively forfeited the entire post-conviction proceeding itself." *Menzies, 2006 UT 81 at ¶100*. Clearly, post-conviction counsel's failure in that case to provide effective representation literally undermined every substantive right the petitioner was entitled to during the course of the proceedings. The fact that the failure to provide effective representation affected the petitioner's substantive rights is a good indication that the right to the effective assistance of counsel is itself a

substantive right.

For all of the foregoing reasons, it is the Court's conclusion that the "no effective assistance of counsel" provision cannot retroactively apply to Petitioner's case and, therefore, that Petitioner had a statutory right to the effective assistance of post-conviction counsel during his initial post-conviction proceedings.

Despite this conclusion, however, it is not accurate that Petitioner's statutory right requires the Court to read into the PCRA an exception to the procedural bar for successive claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition based upon ineffective assistance of post-conviction counsel. The statutory right to the effective assistance of post-conviction counsel is a legislatively created protection and, therefore, it is the Legislature that has the power, and the prerogative, to determine whether this statutory right constitutes an exception to the procedural bar rule with respect to successive post-conviction claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction proceeding. Indeed, language from the *Menzies* decision itself does not demonstrate otherwise and, in fact, supports this general principle. As previously explained, on appeal in *Menzies* the State presented the Supreme Court with the "infinite continuum of litigation"

argument contending "that 'writing an effective assistance requirement into section [78-35a-202] would make capital post-conviction litigation interminable and end the finality of death sentences.'" *Id. at ¶84.* In response to this argument, the Supreme Court stated that, while "[w]e would be remiss in our constitutional role if we were to allow finality to trump the interests at stake in post-conviction death penalty proceedings[,] . . . Utah's post-conviction legislation and associated rules contain appropriate limitations to assist courts in streamlining post-conviction review in death penalty cases." *Id.* For support, the Supreme Court cited to Section 78-35a-106, where the Legislature excluded from the PCRA any reference to ineffective assistance of post-conviction counsel as an exception to the procedural bar for successive claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition.[6]

Based upon the foregoing analysis, it is the Court's

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[6]In addition, in concluding that the statutory right to post-conviction counsel includes the right to the effective assistance of counsel, the Supreme Court explained that, by providing for this right, it believed the Legislature had expressly recognized the "high stakes inherent in such proceedings." *Menzies v. Galetka, 2006 UT 81, ¶82, 150 P.3d 480.* In order to take seriously the Legislature's provision for the appointment of counsel, it was essential, in the Supreme Court's view, to conclude that the right to post-conviction counsel included the right to the effective assistance of counsel. See id. ("We refuse merely to pay lip service to this legislatively created protection by holding that a petitioner in a post-conviction death penalty proceeding is only entitled to ineffective assistance of appointed counsel. Therefore, we hold that [the petitioner] has a statutory right to effective assistance of counsel under Utah Code section 78-35a-202."). There was never any indication in the Supreme Court's reasoning that this conclusion was somehow constitutionally mandated.

conclusion that because the right to post-conviction counsel is a legislatively created protection, it is constitutionally permissible, and within the Legislature's power, to exclude from the PCRA an exception to the procedural bar for successive claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction petition based upon ineffective assistance of post-conviction counsel. Therefore, Petitioner cannot rely on a statutory right to the effective assistance of post-conviction counsel to overcome the procedural bar for successive claims that were raised and addressed, or could have been, but were not, raised in a prior post-conviction proceeding.

B. Petitioner's Post-Conviction Claims

1. Timeliness

The statute of limitations set forth in the PCRA required Petitioner to file his successive petition for post-conviction relief within one year from the time his cause of action accrued. See Utah Code Ann. § 78-35a-107(1). In Petitioner's case, his post-conviction action accrued on October 5, 1998, the date on which the United States Supreme Court denied certiorari review of his direct appeal to the Utah Supreme Court. Thus, Petitioner had until October 5, 1999 to file his current post-conviction action. Because his petition was not filed until November 5, 2007, it is over eight years too late, and therefore it is

untimely. With the exception of claim 1,[7] Petitioner does not directly contest the untimeliness of his successive petition other than to quote language from *Julian* indicating that "the mere passage of time can never justify continued imprisonment of one who has been denied fundamental rights." *Julian, 966 P.2d at 254* (emphasis in original). Rather, Petitioner asserts that the Court should excuse the untimeliness pursuant to the PCRA's "interests of justice" exception. As explained previously in Section III.A.1.a., the Utah Supreme Court has specifically held that a trial court "presented with an untimely post-conviction petition must consider the interests of justice exception before disposing of the petition." *Johnson, 2006 UT 21 at ¶16.* An analysis of what constitutes an exception "in the interests of justice" involves more than simply making a determination that the successive claim is non-frivolous. The Court must go one step further and examine both the meritoriousness of the petitioner's claim and the reason for [the] untimely filing." *Adams, 2005 UT 62 at ¶16.*

The apparent advantage of this approach is that, by engaging in a merits analysis of each untimely successive claim, the post-

[7] In claim 1, Petitioner asserts that he could only have brought this claim after learning of the Utah Supreme Court's use of an erroneous legal standard to evaluate whether he had been prejudiced by trial counsel's deficient performance during the penalty phase of the trial. Since the Supreme Court's decision affirming the denial of his initial post-conviction petition was not entered until January 26, 2007, he asserted that he had one year from that date to raise this claim.

conviction court will presumably be ensuring that "truly" legitimate claims are not overlooked, i.e., those claims "where 'an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred' that would make it 'unconscionable' not to reexamine the issue." *Gardner III, 2007 UT 3 at ¶17.* However, a merits review of claims is generally inconsistent with the purposes of the procedural bar rule- to promote finality, conserve judicial resources, and encourage the orderly and prompt administration of justice. See *United States v. Wiseman, 297 F.3d 975, 979-80 (10th Cir. 2002)* (procedural bar rule promotes "'the interests of judicial efficiency, conservation of scarce judicial resources, and orderly and prompt administration of justice.'" (quoting *Hines v. United States, 971 F.2d 506, 509 (10th Cir. 1992)*). Indeed, in the case of successive claims that are untimely, this purpose is undermined by the interests of justice analysis which requires that a merits review of each claim be performed even for those claims which may, ultimately, be procedurally barred and, hence, would otherwise not require a merits review.

In order to avoid having to engage in an unnecessary review of the merits of Petitioner's successive claims, the Court has opted to simply assume that Petitioner's successive petition was timely filed and consider first whether the successive claims are procedurally barred. If, and only if, the Court determines that

a claim would not be procedurally barred had it been timely filed will the Court then conduct an interests of justice analysis on that claim to determine whether the untimeliness of the claim should be excused.

2. Claims that Were Raised and Addressed in a Prior Proceeding

Petitioner candidly and commendably concedes that the following claims were raised and addressed in a prior proceeding:

Claim 1, alleging that Petitioner's constitutionally deficient legal representation at the penalty phase of his capital trial requires reversal of his death sentence. This claim was previously raised as claim 1 in the direct appeal of his conviction and sentence, and as claims 4, 17, 18, and 21 in his initial post-conviction petition, and as claims 1, 3, and 10 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 34);

Claim 2, alleging that Petitioner's conviction and sentence of death were obtained in violation of his constitutional right to the competent assistance of mental health experts. This claim was previously raised as claim 1 in the direct appeal, and as claims 3 and 21 in his initial petition for post-conviction relief, and as claims 1 and 7 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp.

at 133-34);

Claim 3, alleging that Petitioner's guilty plea is constitutionally defective. This claim was previously raised as claim 1 in the direct appeal of his conviction and sentence, and as claims 1, 1(a)(1), 1(a)(2), 1(a)(3), 2, and 17 in his initial petition for post-conviction relief, and as claim 2 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 140);

Claim 4, alleging that Petitioner is actually innocent of Kaye Tiede's and Beth Potts' homicides and there is no factual basis for his guilty plea. This claim was previously raised as claims 17 and 18 in is initial petition for post-conviction relief. (See Pet'r Mem. in Supp. at 157);

Claim 6, alleging that Petitioner's conviction and sentence are invalid because defense counsel labored under actual conflicts of interest that adversely impacted his representation of Petitioner. This claim was previously raised as claim 24 in his initial post-conviction petition and as claim 12 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 190);

Claim 7, alleging that Petitioner's penalty phase voir dire was infected by trial court error, prosecutorial misconduct, and the ineffective assistance of trial counsel. This claim was previously raised as claim 14 in his initial petition for post-

conviction relief and as claims 5 and 6 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 201);

Claim 8, alleging that Petitioner was prejudiced by trial counsel's constitutionally ineffective assistance throughout the penalty phase voir dire. This claim was previously raised as claim 14 in the initial petition for post-conviction relief and as claim 5 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 221);

Claim 11, alleging that trial counsel did not submit written proposed voir dire questions to the court and failed to take steps to insure that the jury selection process would result in a fair and impartial jury. This claim was previously raised as claim 14 in the initial petition for post-conviction relief. (See Pet'r Mem. in Supp. at 255);

Claim 13, alleging that the trial court unconstitutionally limited the scope of voir dire and asked inappropriate questions regarding the religion practiced by the jurors. This claim was previously raised as claim 15 in the initial petition for post-conviction relief. (See Pet'r Mem. in Supp. at 270);

Claim 15, alleging that the trial court erred in giving jury instructions and a special verdict form that were unconstitutionally weighed in favor of aggravation over mitigation. This claim was previously raised as claims 7, 9, and

11 in the initial petition for post-conviction relief and as claim 4 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 294);

Claim 16, alleging that the jury instructions contained no option for imposition or consideration of a life sentence in violation of Petitioner's constitutional rights. This claim was previously raised as claims 12 and 13 in the initial petition for post-conviction relief and as claim 4 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 310);

Claim 17, alleging that the reasonable doubt instruction was unconstitutional. This claim was previously raised as claim 6 in the initial petition for post-conviction relief and as claim 4 in the appeal from the denial of his post-conviction petition. (See Pet'r Mem. in Supp. at 322);

Claim 18, alleging that the trial court erred in giving jury instructions at the penalty phase that improperly shifted the burden of proof to Petitioner. This claim was previously raised as claims 5 and 8 in the initial petition for post-conviction relief. (See Pet'r Mem. in Supp. at 327);

Claim 20, alleging that Petitioner's conviction is unconstitutional because there was a complete breakdown in the adversarial process. This claim repeats the claims alleged in claim 1 and claim 6 of his current post-conviction petition. As

noted above, the allegations raised in these claims were previously raised as claims 1 in the direct appeal of his conviction and sentence, and as claims 4, 17, 18, 21, and 24 in his initial post-conviction petition, and as claims 1, 3, 10, and 12 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 34, 190);

Claim 22, alleging that Petitioner's constitutional rights were violated by the improper admission of the taped statement of Scott Manley. This claim was previously raised as claim 22 in the initial petition for post-conviction relief and as claim 8 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 350);

Claim 23, alleging that Petitioner's convictions, confinement, and sentence are unconstitutional due to prosecutorial misconduct. This claim was previously raised as claim 23 in the initial petition for post-conviction relief and as claim 9 in the appeal from the denial of his initial post-conviction petition. (See Pet'r Mem. in Supp. at 368);

Claim 26, alleging that the instructions, taken as a whole, fail to narrow the category of persons eligible for the death penalty in violation of Petitioner's constitutional rights. This claim was previously raised as claim 10 in the initial petition for post-conviction relief. (See Pet'r Mem. in Supp. at 390);

Claim 28, alleging that lethal injection violates

Petitioner's Eighth Amendment right to be free from cruel and unusual punishment. This claim was previously raised as claims 20 and 25 in the initial petition for post-conviction relief and as claims 11 and 13 in the appeal from the denial of his post-conviction petition. (See Pet'r Mem. in Supp. at 401);[8]

Claim 29, alleging ineffective assistance of state counsel. With respect to the ineffective assistance of trial and appellate counsel, this claim was previously raised as claim 19 in the initial petition for post-conviction relief and as claim 10 in the appeal from the denial of his post-conviction petition. (See Pet'r Mem. in Supp. at 409);

Claim 30, alleging that Petitioner was denied his constitutional rights because of the cumulative impact of errors. This claim was previously raised as claim 2 in the direct appeal of his conviction and sentence. (See Pet'r Mem. in Supp. at 416).

All of the foregoing claims were raised and addressed in a prior proceeding, either at trial, on direct appeal, in Petitioner's initial petition for post-conviction relief, or in his appeal from the denial of his initial petition for post-

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[8]In addition to acknowledging that this claim was previously raise in his initial petitioner for post-conviction relief and in the appeal from the denial of his petition, in his memorandum in opposition to the State's motion to dismiss, he moved to withdraw this claim on the basis that, "[i]n the wake of new developments, [Petitioner] does not believe that the Petition is the proper forum for this claim in its current form." (Pet'r Mem. in Opp. at 123).

conviction relief and, therefore, they are procedurally barred under the PCRA and no statutory exception exists that would permit the Court to consider the merits of these claims. See Utah Code Ann. § 78B-9-106(1)(b) and (d). See also *Kell, 2008 UT 62 at ¶13* (a post-conviction petitioner "is not eligible for relief on claims that were 'raised or addressed' on direct appeal."). This is so even for claims that appellate counsel failed to raise in the most effective manner. *See id. at ¶17* (after opportunity to be heard on appeal, the Utah Supreme Court "presume[s] that [it] gave full consideration to the claims, regardless of whether [petitioner's] counsel raised them in the most effective manner."). See also *State v. Carter, 776 P.2d 886, 889 (Utah 1989)* (Supreme Court has, "after fully considering the substance of particular claims raised on appeal, summarily (and often without written analysis) dismissed the same as meritless or of no effect. . . . Accordingly, after fully reviewing every claim raised in [a] case, we discuss at length only those issues critical to th[e] appeal.").

However, in *Hurst*, the Utah Supreme Court stated that a "ground for relief from a conviction or sentence that has once been fully and fairly adjudicated on appeal or in a prior [post-conviction] proceeding should not be readjudicated unless it can be shown that there are 'unusual circumstances.'" *Hurst, 777 P.2d at 1036* (emphasis added). Broadly speaking, the Supreme

Court has defined "unusual circumstances" to mean circumstances "where an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred." *Id. at 1035*. Nevertheless, although it remains unclear what, precisely, constitutes the full range of "unusual circumstances," the Supreme Court provided several possibilities, "[f]or example, a prior adjudication is not a bar to reexamination of a conviction if there has been a retroactive change in the law, a subsequent discovery of suppressed evidence, or newly discovered evidence." *Id.*

Petitioner makes several arguments for the proposition that unusual circumstances exist that excuse the procedural bar as it applies to the successive claims he raises that have already been raised and addressed in a prior proceeding.[9]

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[9]In the section of his memorandum in opposition to the State's motion to dismiss where he presents his discussion that the claims that were previously raised are not procedurally barred, Petitioner raises two issues that, in the Court's view, are not relevant to whether "unusual circumstances" exist that would excuse the procedural bar.

First, Petitioner informs the Court that the Utah Attorney General's Office is engaged in a two-pronged effort "to eliminate the Utah Supreme Court's common law exceptions to failures to raise claims in prior proceedings regardless of the resulting unfairness." (Pet'r Mem. in Opp. at 45). The first prong is the Attorney General's unilateral attempt to amend the PCRA to its advantage and to the disadvantage of post-conviction petitioners. The second prong is to amend the Utah Constitution to allow the legislature, rather than the Supreme Court, to define post-conviction procedures, rights, and remedies. Even if what Petitioner asserts is true, simply because the Attorney General may be seeking to amend the PCRA, with or without the input and assistance of other interested parties, has no bearing whatsoever on whether "unusual circumstances" exist that would excuse the procedural bar in this case. Obviously, the Attorney General's Office is entitled to participate in the legislative process and seek to affect the laws of the state just as any other organization or governmental agency or individual is entitled to do. Moreover, Petitioner's bald assertion that the Attorney General's motive is to "seek[] greater power to expedite executions regardless of the merits of the claims," id. at 45, is unhelpful and simply irrelevant to any discussion concerning the existence of common law exceptions

First, Petitioner argues that, after having received adequate funds and performing a more thorough investigation of the case than was previously performed by prior post-conviction counsel, new facts not previously known were discovered which (1) establish the denial of a constitutional right, (2) might have changed the outcome of the trial, and (3) establish the existence of fundamental unfairness in Petitioner's conviction.[10] (See Pet'r Mem. in Opp. at 48). Petitioner's basic argument is that, on the basis of new evidence he discovered as a result of more funding and a more thorough investigation of his case, an

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to the procedural bar rule.

Second, with respect to several of his successive claims, including claims asserting issues that were raised and addressed in a prior proceeding, Petitioner argues that "the PCRA has been crafted by the State to its decided advantage . . . [because t]he State has made the original trial court the first stop [for petitioners seeking post-conviction relief]." Id. at 73. According to Petitioner, this model creates a conflict because it is "commonsense that attacking a judge's decisions is an ineffective way of gaining an impartial hearing from a court." Id. As a result, prior post-conviction counsel was prevented from raising claims, or was required to "water down" claims, in order to avoid potentially raising the ire of the post-conviction judge who was the same judge who presided at Petitioner's trial. Contrary to Petitioner's assertions, it was not the Attorney General who was the drafter of the rule that required the trial court to preside over his prior petition for post-conviction relief. Rather, it was mandated by a rule of civil procedure promulgated by the Utah Supreme Court. See Utah R. Civ. P. 65C(f). Furthermore, it is not commonsense, but more a jaded view of Utah's judicial system, that challenging a judge's decision precludes an impartial hearing on whether the judge's prior rulings or actions were correct. Judges are ethically required to be impartial, regardless of the issues that are being considered. See Utah Code of Judicial Conduct, Canon 1 and Canon 3(B). Petitioner has presented no evidence whatsoever that his post-conviction judge acted unethically or was incapable of being impartial when presented with issues relating to how the judge conducted the trial. Again, this argument is unhelpful and irrelevant to any discussion concerning the existence of common law exceptions to the procedural bar rule.

[10]Petitioner also argues that the claims were "overlooked in good faith with no intent to delay or abuse the writ." *Hurst v. Cook, 777 P.2d 1029, 1037 (Utah 1989)*. This particular common law exception clearly cannot apply to the claims that were raised and addressed in a prior proceeding. Obviously, if the claims were previously raised, they were not overlooked.

exception to the procedural bar exists for all of the claims he has raised in his successive post-conviction petition that were raised and address in a prior proceeding. Therefore, he contends, the Court should reconsider these previously raised claims in light of the new evidence.

As noted above, in 1989 when the *Hurst* case was decided, the Supreme Court indicated that newly discovered evidence constitutes "unusual circumstances" under the common law that would justify reconsidering a previously adjudicated claim. However, in *Gardner II*, the Supreme Court explained that, with the passage of the PCRA in 1996, the legislature effectively codified the common law "newly discovered evidence" exception to the procedural bar. See *Gardner II, 2004 UT 42 at ¶14* ("Likewise, the [PCRA] also provides for relief on the basis of 'newly discovered material evidence,' thereby incorporating the second *Hurst* factor."). See also Utah Code Ann. § 78B-9-104(1)(e). In doing so, rather than identifying newly discovered evidence as an exception to the procedural bar rule, the legislature reformulated it as an independent statutory ground for post-conviction relief. As a result, technically there is no exception under the PCRA to the procedural bar rule on the basis of newly discovered evidence.

Moreover, although the Supreme Court has held that "despite the statutory enactment of the majority of the *Hurst* factors, all

five common law exceptions retain their independent constitutional significance and may be examined by this court in our review of post-conviction petitions," *Gardner II, 2004 UT 42 at ¶15*, the Supreme Court also expressly stated that it will "defer to the legislature unless these fundamental safeguards are repealed or otherwise restricted." *Id.* Because the legislature has neither repealed nor otherwise restricted the PCRA's "newly discovered evidence" ground for relief since *Gardner II* was decided, see Utah Code Ann. § 78B-9-104(1); Utah Code Ann. § 78-35a-104(1) (1996), the requirements for relying upon newly discovered evidence under the PCRA and as a common law exception are co-extensive. It follows that because Petitioner has asserted an exception to the procedural bar rule on the basis "of new facts not previously known which show the denial of a constitutional right or might have changed the outcome of [Petitioner's] trial[, and] the existence of fundamental unfairness in [Petitioner's] conviction," (Pet'r Mem. in Opp. at 48) (emphasis added), he cannot overcome the procedural bar for the successive claims he raises that were raised and addressed in a prior proceeding unless he satisfies the requirements set forth in the PCRA for raising a ground for relief based upon newly discovered evidence.

Under the PCRA, reliance upon newly discovered evidence requires a petitioner to establish that

(I) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received.

Utah Code Ann. § 78B-9-104(1)(e)(I)-(iv). Nowhere in his pleadings does Petitioner specifically address any of these requirements for relying upon newly discovered evidence. At best, and entirely by implication, he suggests that the new evidence is material, is not merely cumulative, and is not merely impeachment. Significantly, however, Petitioner does not discuss nor demonstrate that the new evidence he now possesses is evidence that could not have been discovered through the exercise

of reasonable diligence and included in a prior post-conviction petition. That is, he does not affirmatively establish that the State, or any other governmental agency, purposefully withheld material evidence or failed to provide material evidence when requested. Moreover, there is no indication that the affidavits and additional reports submitted by Petitioner in his current successive petition could not have been presented in support of the claims he raised in his prior post-conviction proceeding. Rather than argue that the new evidence he now possesses could not have been discovered through the exercise of reasonable diligence, Petitioner instead contends that the evidence was not discovered as a result of inadequate funding for prior post-conviction counsel.

There appears to be little question that prior post-conviction counsel was frustrated at the funding mechanism in place at the time Petitioner's initial petition for post-conviction relief was filed and that post-conviction counsel believed the funding provided was inadequate and permitted him to perform only a perfunctory investigation into Petitioner's case. Petitioner alleges that prior post-conviction counsel requested payments in excess of the funding caps from the Division of Finance ("Finance") pursuant to the administrative rules governing the payment of counsel, but that these requests were denied despite the fact that the post-conviction court authorized

the requested funding. Two separate judges deemed the funding to be reasonable and necessary. Initially, the funding available to prior post-conviction counsel was $25,000 in attorney fees and $10,000 in litigation expenses. Prior post-conviction counsel indicated to the post-conviction court that the $10,000 limit was insufficient to perform an adequate investigation and, ultimately, the court authorized up to $40,258.59 in litigation expenses beyond the $10,000 limit. Upon request from prior post-conviction counsel for payment, Finance denied the request.

Subsequently, Finance modified its rules and raised the amount of attorney fees by $5,000, for a maximum of $30,000, and the amount for litigation expenses by $10,000, for a maximum of $20,000. However, based upon the information provided by Petitioner and the State in their pleadings, it appears that, although the post-conviction court authorized up to $40,258.59 in litigation expenses beyond the $10,000 maximum at the time, prior post-conviction counsel ultimately only requested actual litigation expenses in the amount of $11,555.16, leaving unused the amount of $8,444.84 by the court's math. Even if incorrect, the principle is sound. Even if prior post-conviction counsel could not do all he wanted, funding in some amount existed to do more. Despite the apparent funding problems Petitioner argues existed during his prior post-conviction proceedings, it is difficult for the Court to conclude that, with unused litigation

funds still available in some amount, the new evidence that Petitioner now possesses is evidence that could not have been discovered through the exercise of reasonable diligence as a result of insufficient funding.

In any event, even if the Court were to conclude that the funding available hampered prior post-conviction counsel's ability to perform the type of investigation he believed was necessary in the case and, for that reason, the new evidence he now has not only was not discovered, but also could not have been discovered, Petitioner fails to discuss or demonstrate that, <u>when viewed with all of the other evidence presented in the case</u>, no reasonable trier of fact could have found him guilty of the offense to which he pleaded guilty or subject to the sentences of death he received following the penalty phase proceedings.

Thus, because Petitioner has failed to satisfy all of the requirements set forth in 78-35a-104(e)(I)-(iv) for relying upon newly discovered evidence, either as an independent post-conviction claim or as a common law exception to the procedural bar rule, the State is entitled to a dismissal of Petitioner's successive claims that were raised and addressed in a prior proceeding.

Second, in addition to asserting an exception to the procedural bar on the basis of newly discovered evidence, Petitioner also specifically argues that ineffective assistance

of trial, appellate, and prior post-conviction counsel are common law exceptions to the procedural bar rule. (See Pet'r Mem. in Supp. at 32-33). Ineffective assistance of counsel is not one of the common law exceptions enumerated in *Hurst* and, although the list in *Hurst* was not intended to be exhaustive, see *Gardner III, 2007 UT 3 at ¶18* ("We later clarified that this list of 'good cause' exceptions is not exhaustive."), it is also true that the Utah Supreme Court has never formally recognized ineffective assistance of counsel as a common law exception to the procedural bar rule.

In any case, it is simply unclear to the Court how ineffective assistance of trial or appellate counsel can possibly constitute a common law exception to the procedural bar of Petitioner's successive post-conviction claims that were already raised and addressed in a prior proceeding. For example, the fact that trial counsel may have ineffectively raised a claim that Petitioner now raises again in his successive petition is irrelevant to whether the claim was raised and addressed in a prior proceeding, although it would be relevant to an independent claim on direct appeal that trial counsel was ineffective in raising the claim. Thus, while trial counsel's ineffectiveness in raising a claim may itself constitute a separate claim on direct appeal, it does not constitute an exception to the procedural bar rule for successive post-conviction claims that

were raised and addressed in a prior proceeding.

The same is true for ineffective assistance of appellate counsel. The fact that appellate counsel may have ineffectively raised a claim that Petitioner now raises again in his successive petition is irrelevant to whether the claim was raised and addressed in a prior proceeding, although it would be relevant to an independent claim in an initial post-conviction petition that appellate counsel was ineffective in raising the claim. Thus, while appellate counsel's ineffectiveness in raising a claim may itself constitute a separate claim in an initial post-conviction petition, it does not constitute an exception to the procedural bar rule for successive post-conviction claims that were raised and addressed in a prior proceeding.

As for Petitioner's assertion that ineffective assistance of prior post-conviction counsel constitutes a common law exception to the procedural bar rule, this argument also fails. As the Court concluded above in Section III.A.2.c., Petitioner did not demonstrate that a proper interpretation of the Utah Constitution includes a right to the effective assistance of post-conviction counsel. Therefore, Petitioner cannot assert a common law exception to the PCRA's procedural bar for claims that were raised and addressed in a prior proceeding based upon a state constitutional right to the effective assistance of post-conviction counsel because the Utah Constitution does not

guarantee him this right.

Moreover, the Court also concluded above that the right to the effective assistance of post-conviction counsel is a legislatively created protection. As a statutory right, rather than a common law right, Petitioner cannot rely upon this right as the basis for asserting a common law exception to the procedural bar rule for successive post-conviction claims that were raised and addressed in a prior proceeding.

Therefore, because Petitioner has not demonstrated that ineffective assistance of trial, appellate, or post-conviction counsel constitute common law exceptions to the procedural bar rule, the State is entitled to the dismissal of Petitioner's successive claims that were raised and addressed in a prior proceeding.

Finally, in the same section of his memorandum in support of the successive petition where Petitioner discusses the law governing common law exceptions to the procedural bar rule and where he specifically asserts that ineffective assistance of counsel constitutes a common law exception, he also appears to at least imply that the "severe funding limitations [that] ma[de] proper and thorough investigation impossible," (Pet'r Mem. in Supp. at 33), constitutes a common law exception to the procedural bar rule. If this is Petitioner's contention, it is, again, unclear to the Court how this is so. Common law

exceptions enumerated by the Supreme Court deal with the discovery of new or suppressed evidence, new law, and fundamental or constitutional errors. Lack of adequate funding for post-conviction counsel may provide an <u>explanation</u> in support of Petitioner's allegations that prior post-conviction counsel was ineffective or why counsel was unable to do a constitutionally adequate investigation or why counsel failed to discover important evidence in the case. Indeed, in addressing his claim related to the ineffective assistance of post-conviction counsel, Petitioner asserts that "[b]ecause of the administrative rule which severely limit[ed] funding of both the defense and investigation of post-conviction cases, including the retention of the services of crucial and fundamental expert services, . . . [his prior post-conviction] counsel was unable to provide effective assistance of counsel." (Pet'r Mem. in Supp. at 415). See also *Menzies, 2006 UT 81 at ¶20 n.3* (in the context of commenting on "the funds needed to secure [the petitioner] a proper post-conviction proceeding," the Utah Supreme Court noted that "it may be the case that the statutory [funding] scheme imposes a crippling burden on [the petitioner]."). Thus, it is conceivable that the lack of adequate funding may result in constitutional or statutory violations. However, inadequate funding, in and of itself, is neither a violation of Petitioner's constitutional rights nor, so long as the proper funding rules

are followed, is it a violation of Petitioner's statutory rights.

In the Court's view, the lack of adequate funding is not relevant to whether the procedural bar should be excused with respect to claims raised by Petitioner in his successive post-conviction petition that were already raised and addressed in a prior proceeding.

Based upon the foregoing analysis, all of Petitioner's successive claims listed above (all but Claims 5, 9, 10, 12, 14, 19, 21, 24, 25 and 27) that were already raised and addressed in a prior proceeding are procedurally barred under the PCRA and under the common law and Petitioner has not shown that any statutory or common law exceptions apply that would permit the Court to consider the merits of these claims.

Therefore, the State is entitled to a dismissal of these claims, again, all but Claims 5, 9, 10, 12, 14, 19, 21, 24, 25 and 27.

3. Claims that Could Have Been, But Were Not, Raised in Petitioner's Prior Post-Conviction Petition

The PCRA specifically precludes Petitioner from obtaining "relief . . . upon any ground that . . . could have been, but was not, raised in a previous request for post-conviction relief." Utah Code Ann. § 78-35a-106(1)(d). Such claims are also precluded by the common law. See *Gardner I, 888 P.2d at 613*

("Issues that could and should have been raised on direct appeal, but were not, may not properly be raised in a habeas corpus proceeding absent unusual circumstances."). With respect to the following claims, they are all claims that could have been, but were not, raised in Petitioner's prior post-conviction petition:

Claim 5, alleging ineffective assistance of trial counsel and trial court error in connection with Petitioner's motion to change venue;

Claim 9, alleging that Petitioner was prejudiced by the trial court's error in failing to properly strike venire-members for cause during the penalty phase voir dire;

Claim 10, alleging that the trial court failed to ask numerous voir dire questions resulting in a flawed jury selection process;

Claim 12, alleging that Petitioner's jury venire was prejudicially biased by the trial court's introduction of the concept of "blood atonement" into the voir dire;

Claim 14, alleging that the exclusion from the jury of persons who were not members of the LDS Church deprived Petitioner of the right to trial by a jury drawn from a representative cross-section of the community;

Claim 19, alleging that the jury was prejudiced by it's consideration of extrinsic evidence in violation of the due process and equal protection clauses of the United States

Constitution;

Claim 21, alleging that Petitioner's constitutional rights were violated by the improper admission of evidence at the penalty phase of his trial, including (1) the videotape made by Deli of Petitioner in the Tiede's cabin before the homicides, (2) allowing the prosecution to elicit and perform irrelevant and prejudicial in-court "demonstrations," (3) opinion testimony from James Bell, (4) testimony from James Holland, (5) photographs of the Kaye Tiede and Beth Potts before their deaths, and (6) Linae Tiede's statement regarding Petitioner's purported devil worship;

Claim 24, alleging that the State failed to disclose material exculpatory evidence;

Claim 25, alleging that Petitioner's death sentence is disproportionate to his culpability and violates his constitutional rights; and

Claim 27, alleging that Petitioner has been prejudiced in investigating and presenting post-conviction claims and in gathering additional evidence to prove his entitlement to relief as a result of an inadequate and unreliable appellate record.

Petitioner nowhere argues that the foregoing claims are ones that could not have been known and raised in a prior post-conviction petition. As explained previously in Section III.A.2.a., unlike the procedural bar rule that applies to

initial post-conviction petitions, see Utah Code Ann. § 78-35a-106(1)(c), which includes a statutory exception based upon ineffective assistance of trial or appellate counsel, see Utah Code Ann. § 78-35a-106(2), no exception based upon the ineffective assistance of post-conviction counsel is expressly included in the PCRA. Thus, any successive claim that was raised or that could have been raised, but was not, in a prior post-conviction petition, is procedurally barred and no exception exists under the PCRA to excuse this failure.

However, although no statutory exception applies to excuse the failure to raise these types of claims in a prior post-conviction petition, because the common law exceptions have "independent constitutional significance," *Gardner II, 2004 UT 42 at ¶15,* the common law exceptions may be relied upon in order to overcome the procedural bar. Petitioner asserts that four common law exceptions apply that excuse his procedural default, including the three that were previously discussed in Section II.B.: (1) the discovery of new evidence as a result of more funding and a more thorough investigation of the case, (2) ineffective assistance of prior post-conviction counsel, (3) that severe funding limitations existed at the time Petitioner filed his prior post-conviction petition which made a proper and thorough investigation of his case impossible, and (4) all of the claims that were not previously raised were overlooked in good

faith with no intent to delay or abuse the post-conviction process.

As an initial matter, the Utah Supreme Court has explained that before the post-conviction court is required to consider whether any of the common law exceptions apply to excuse the procedural bar, a determination must be made that the claims that could have been raised in a prior post-conviction petition, but were not, are not frivolous and were not withheld for tactical reasons. See *Gardner III, 2007 UT 3 at ¶26* (because "[f]rivolous claims, . . . and claims that are withheld for tactical reasons should be summarily denied[,] . . . a separate and distinct procedural determination for successive post-conviction claims [must be] made before [the trial court] reach[es] an analysis under the 'good cause' common law exceptions.").

Other than merely asserting that his claims were overlooked in good faith, Petitioner nowhere demonstrates that they were not withheld for tactical reasons. It may well be that all of the claims he now raises which could have been raised in a prior post-conviction petition are non-frivolous in nature, but the Court must presume that post-conviction counsel had a legitimate tactical reason for not raising them in the prior petition. See *Gentry, 540 U.S. at 5* ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.").

As explained above, in order to overcome this presumption, Petitioner must show that "there was no 'conceivable tactical basis for counsel's actions.'" *Clark, 2004 UT 25 at ¶6* (quoting *Bryant, 965 P.2d at 542*). Not only has Petitioner not even attempted to specifically meet his burden, it is unlikely that he could do so.

All of the claims raised in Petitioner's successive petition that were not previously raised are claims for which a reasonable basis can be articulated as to why they were not raised in a prior proceeding. For example, given all of the circumstances of the case and the limitations in terms of time, funding, and resources, it is certainly plausible that these claims were not raised in the initial post-conviction petition because they were weaker or less persuasive than the other claims that were raised. Raising weaker claims would have distracted the post-conviction court from fuller consideration of the stronger claims. Raising weaker claims could well have been futile and resulted in a determination the claims were frivolous on their face. This could have been seen as reducing the effectiveness of the arguments as to the stronger claims. Any of these reasons constitute a conceivable tactical basis why post-conviction counsel would not have raised them in Petitioner's prior post-conviction petition.

Furthermore, in Petitioner's memorandum in support of his

successive petition, for every claim that could have been, but was not, raised in a prior post-conviction petition, Petitioner states that he fairly presented the issues associated with these successive claims "in state court pleadings, briefs and associated filings, hearing, and argument." (Pet'r Mem. in Supp. at 174, 235, 252, 259, 277, 331, 338, 379, 385, and 394). If that is true, then even though the issues related to his current claims may not have been specifically and discretely raised as an independent claim in his prior post-conviction petition, they are issues that must have been known to prior post-conviction counsel. They are not, therefore, claims that were overlooked in good faith because the issues involved were present in various state court pleadings submitted or argued by Petitioner's prior trial, appellate, or post-conviction counsel.

Because Petitioner has not satisfied his burden of demonstrating that the claims he now raises that could have been, but were not, raised in his prior post-conviction petition were not withheld for tactical reasons, the Court cannot consider whether any of the common law exceptions to the procedural bar rule apply to his successive petition for post-conviction relief. On this basis alone, the State is entitled to the dismissal of these claims.

Nevertheless, even had Petitioner satisfied his burden of demonstrating that his claims were not withheld for tactical

reasons, he has not shown that any common law exceptions apply that would overcome the procedural bar.

First, Petitioner asserts an exception based upon the discovery of new evidence that resulted from a more recent, and more thorough, investigation of the case because of increased funding available. As previously explained in Section II.B., however, because the statutory and common law exceptions for newly discovered evidence are co-extensive, in order to rely upon this common law exception, Petitioner must satisfy the strict requirements set forth in Section 78-35a-104(e)(I)-(iv). Petitioner has not met this strict requirement. At best, and entirely by implication, his pleadings suggests that the new evidence he has discovered is material, is not merely cumulative, and is not merely impeachment. However, he does not discuss nor demonstrate that the new evidence he now possesses is evidence that could not have been discovered through the exercise of reasonable diligence and included in a prior post-conviction petition. See Utah Code Ann. § 78B-9-104(1)(f)(I) (". . . neither the petitioner nor petitioner's counsel knew of the evidence . . . in time to include the evidence in any previously filed . . . post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence."). He argues that the lack of funding available for prior post-conviction counsel prevented counsel from performing a

constitutionally adequate investigation of Petitioner's case. This argument, however, is at least somewhat contradicted by the fact that unused litigation funds were still available at the conclusion of his prior post-conviction proceedings.

Further, most of the claims do not involve "investigation" but relate to matters in the record-the change of venue issues, voir dire, the admission of certain evidence, the jury composition, and others.

Moreover, Petitioner has failed to demonstrate that, when viewed with all of the other evidence presented in the case, no reasonable trier of fact could have found him guilty of the offense to which he pleaded guilty or subject to the sentences of death he received following the penalty phase proceedings. See Utah Code Ann. § 78B-9-104(1)(f)(iv), formerly 78-35a-104(e) (". . . viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received."). Because Petitioner has failed to satisfy all of the requirements set forth in the PCRA, he cannot rely upon newly discovered evidence as a common law exception to the procedural bar rule.

Second, Petitioner asserts an exception based upon the ineffective assistance of prior post-conviction counsel. As the Court concluded above in Section III.A.2.c., Petitioner cannot

assert a common law exception to the PCRA's procedural bar for claims that could have been, but were not, raised in his prior post-conviction petition based upon a state constitutional right to the effective assistance of post-conviction counsel because the Utah Constitution does not guarantee him such a right. Moreover, although Petitioner has a statutory right to the effective assistance of post-conviction counsel, because this is a legislatively created right, rather than a common law right, Petitioner cannot rely upon this statutory right as the basis for asserting a common law exception to the procedural bar rule.

Third, Petitioner argues that a common law exception exists based upon the severe funding limitations that existed at the time Petitioner filed his prior post-conviction petition, which made a proper and thorough investigation of his case impossible. As noted above, the lack of adequate funding for post-conviction counsel may provide an explanation in support of Petitioner's allegations that prior post-conviction counsel was ineffective or why counsel was unable to do a constitutionally adequate investigation or why counsel failed to discover allegedly important evidence in the case. However, inadequate funding, in and of itself, is neither a violation of Petitioner's constitutional rights nor, so long as the proper funding rules are followed, is it a violation of Petitioner's statutory rights. Thus, the lack of adequate funding is not a common law exception

to the procedural bar rule that excuses claims that could have been, but were not, raised, in a prior petition for post-conviction relief.

Moreover, as to this argument, it is an argument in this context that relates to the "infinite continuum of litigation" concept, only in this context it is and could be run amok. If $40,000 is provided for post-conviction proceedings, it can always be claimed that $60,000 was needed; if that is provided, $80,000 could be claimed as necessary, and there could never be an end to such a claim. There is never enough time or money. However, the argument is not directly made by Petitioner, but based on this notion, this cannot be a basis for a common law exception to the procedural bar rule.

Finally, Petitioner argues that all of the claims he now raises that could have been, but were not, raised in his prior post-conviction petitioner are claims that were overlooked in good faith with no intent to delay the post-conviction process. Without question, this is a legitimate common law exception to the procedural bar rule that has been expressly recognized by the Utah Supreme Court. See *Hurst, 777 P.2d at 1037* ("A showing of good cause that justifies the filing of a successive claim may be established by showing . . . a claim overlooked in good faith with no intent to delay or abuse the writ."). However, the explanations Petitioner provides in his pleadings lead the Court

to believe that the claims were not, in fact, overlooked in good faith. As noted above, in Petitioner's memorandum in support of this successive petition, for each claim that could have been, but was not, raised in a prior post-conviction petition, he states that he fairly presented the issues associated with these claims "in state court pleadings, briefs and associated filings, hearing, and argument." (Pet'r Mem. in Supp. at 174, 235, 252, 259, 277, 331, 338, 379, 385, and 394). Thus, the issues on the basis of which he now raises claims that were not raised in his prior post-conviction petition were apparently known, or should have been known, to prior post-conviction counsel. They are not, therefore, claims that the Court can conclude were overlooked in good faith. Again, many of the claims in this category are based on facts in the trial record, not facts that require an independent investigation beyond examination of the written record.

Furthermore, even if the Court's inferences from the language Petitioner uses in his pleadings are not warranted, other than making the bald assertion that the claims were overlooked in good faith, Petitioner fails to provide a detailed argument explaining how the exception applies to his case or the reasons in support of this exception. As the State points out, Petitioner nowhere provides legal support for the proposition that the "overlooked in good faith" exception applies "merely

because the evidence [does] not establish that [Petitioner] held back his claim[s] for tactical purposes." (State's Mem. in Reply at 89-90). Indeed, in light of the Utah Supreme Court's view that exceptions to the procedural bar rule should only apply "in those rare and unusual cases in which 'an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred,' making it unconscionable not to reexamine the issue," *Medel, 2008 UT 32 at ¶20* (emphasis added), if a procedural bar can be overcome merely by stating that a claim that could have been, but was not, raised in a prior post-conviction petition was overlooked in good faith with no intent to delay, the exception would effectively eviscerate the rule.

Nevertheless, although Petitioner does not set forth a compelling basis for this argument, presumably the reasons he has in support of the "overlooked in good faith" exception are based upon his contention that new evidence exists that went undiscovered until recently because prior post-conviction counsel was either ineffective or insufficient funding was available to perform a constitutionally adequate investigation.

Even these reasons, however, are insufficient for the Court to conclude that the "overlooked in good faith" exception applies in Petitioner's case. In the most recent decision from the Utah Supreme Court where the "overlooked in good faith" exception was addressed in the context of the discovery of new evidence, see

Tillman, 2005 UT 56. The Utah Supreme Court carefully set forth the grounds in support of the "overlooked in good faith" exception. There the Supreme Court held that the petitioner's post-conviction claim that the State had failed to disclose material exculpatory evidence "was overlooked in good faith with no intent to delay or abuse the post-conviction process," *id. at ¶25,* because (1) the petitioner "had no reason to believe that there [was] undisclosed [evidence] until the State revealed [its] existence some nineteen years later," and (2) the State had made "affirmative representations . . . that no such [evidence] existed." In Petitioner's case, he does not argue that he had no reason to believe that the new evidence he now possesses did not exist. Nor does he establish that the State, or any other governmental agency, affirmatively represented to his prior post-conviction counsel that this new evidence did not exist.

Based upon the foregoing analysis, all of Petitioner's claims that could have been, but were not, raised in his prior post-conviction petition are procedurally barred under the PCRA and under the common law and Petitioner has not shown that any statutory or common law exceptions apply that would permit the Court to consider the merits of these claims.

Therefore, the State is entitled to a dismissal of these claims, 5, 9, 10, 12, 14, 19, 21, 24, 25, and 27.

4. Claim Alleging Ineffective Assistance of Prior Post-Conviction Counsel

In claim 29 of his successive petition, Petitioner argues that because the funding mechanism in place during his prior post-conviction proceedings "severely limit[ed the] funding of both the defense and investigation of post-conviction cases, ' including the retention of the services of crucial and fundamental expert services, and repeated necessity to litigate funding, [Petitioner's prior post-conviction] counsel was unable to provide effective assistance of counsel." (Pet'r Mem. in Supp. at 415). This claim is not procedurally barred insofar as it is not a claim that was raised and addressed in a prior proceeding. Moreover, it is also not a claim that could have been, but was not, raised as a substantive claim in Petitioner's prior post-conviction petition.

On the other hand, it is a claim that, at least in theory, could have been raised in a prior proceeding. That is, a claim of ineffective assistance of post-conviction counsel could have been raised in a Rule 60(b) motion to set aside the judgment, see, *e.g., Menzies, 2006 UT 81 at ¶2* ("Following the dismissal of [the petitioner's] case, [post-conviction counsel] withdrew and new counsel was appointed. [The petitioner] then moved to set aside the district court's dismissal of his petition for post-conviction relief pursuant to rule 60(b) of the Utah Rules of

Civil Procedure."), or on appeal following the post-conviction court's dismissal of Petitioner's post-conviction petition. Practically speaking, however, this was not possible because prior post-conviction counsel continued his representation of Petitioner through the appeal of the dismissal of the post-conviction petition. See *Pascual v. Carver, 876 P.2d 364, 366 (Utah 1994)* ("Counsel on appeal is not expected to allege his own ineffectiveness as counsel for the defendant at trial."); *Parsons, 871 P.2d at 521* ("[T]rial counsel cannot reasonably be expected to raise the issue of his or her own incompetence on appeal."). However, given the circumstances this issue may have been properly raised on appeal, not as a *per se* claim that prior post-conviction counsel was ineffective, but as a claim that he was rendered ineffective by the inadequate funding. This court does not believe that such a claim would be precluded by the above authorities.

Nevertheless, a claim of ineffective assistance of prior post-conviction counsel is not a valid basis for relief under the PCRA or the common law and, therefore, the State is entitled to a dismissal of this claim.

As the State points out, when Petitioner filed his successive post-conviction petition, the PCRA provided "a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense." Utah Code Ann. §

78-35a-102(1) (emphasis added). However, whether prior post-conviction counsel was ineffective is immaterial to whether Petitioner's guilty pleas and the imposition of his death sentences complied with constitutional and statutory requirements. Because Petitioner's claim of ineffective assistance of prior post-conviction counsel is not a claim that challenges his conviction or sentence, it is not a cognizable ground for relief under the PCRA and, therefore, not a claim for which the PCRA can provide a legal remedy.

Moreover, although the PCRA allows a petitioner to seek relief on the basis that he "had ineffective assistance of counsel in violation of the United States Constitution or the Utah Constitution," Utah Code Ann. § 78-35a-104(1)(d), a claim of ineffective assistance of prior post-conviction counsel does not fall within the ambit of this ground for relief because Petitioner is not entitled to the effective assistance of post-conviction counsel under either the federal or state constitutions. The United States Supreme Court has expressly held that, under the federal constitution, "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman v. Thompson, 501 U.S. 722, 752 (1991).* See also *Menzies, 2006 UT 81 at ¶84* ("We do, however, note that

the United States Supreme Court has previously declined to recognize a federal constitutional right to the effective assistance of counsel in state post-conviction proceedings."). In addition, as the Court previously discussed in Section III.A.2.c., Petitioner does not have a right to the effective assistance of post-conviction counsel under the Utah Constitution. Therefore, because Petitioner does not have a constitutional right to the effective assistance of post-conviction counsel under either the federal and state constitutions, he cannot seek post-conviction relief by asserting that he "had ineffective assistance of counsel in violation of the United States Constitution or the Utah Constitution." Utah Code Ann. § 78-35a-104(1)(d).

Based upon the foregoing analysis, Petitioner's claim of ineffective assistance of prior post-conviction counsel is not a recognized ground for relief under the PCRA and, therefore, the State is entitled to a dismissal of this claim, claim 29.

IV. Conclusion

Almost nineteen years ago, Petitioner was charged with, pleaded guilty to, and was sentenced to death for the murders of Kay Tiede and Beth Potts. On direct appeal to the Utah Supreme Court, Petitioner's guilty pleas and sentence of death for both murders were upheld. Petitioner subsequently filed a petition

for post-conviction relief challenging his guilty pleas and death sentence. After several years of litigation, the post-conviction trial court granted the State's motion for summary judgment and denied post-conviction relief on all of Petitioner's claims. On appeal, the post-conviction court's grant of summary judgment was affirmed. Petitioner then sought relief in federal court. Although Petitioner's federal case was, and is, still pending, Petitioner filed a successive petition for post-conviction relief in state district court raising thirty separate claims. The State responded with a motion to dismiss.

The parties' arguments for and against dismissal of the successive petition has required the Court to resolve numerous legal issues, including: (1) that the 2008 amendments to the PCRA, which removed the interests of justice exception to the time-bar, does not apply retroactively to Petitioner's case and, therefore, that Petitioner is entitled to rely on the interests of justice exception to argue that, if the filing of his successive post-conviction petition was untimely, it should be excused in the interests of justice; (2) that Petitioner has not shown that he has either a federal or state constitutional right to the effective assistance of post-conviction counsel and, therefore, that ineffective assistance of post-conviction counsel is not a common law exception to the procedural bar rule; (3) that the 2008 amendments to the PCRA expressly stating that post-

conviction petitioners do not have a statutory right to the effective assistance of post-conviction counsel, does not apply retroactively to Petitioner's case and, therefore, in light of the *Menzies* decision, Petitioner had the statutory right to the effective assistance of post-conviction counsel during his initial post-conviction proceedings; and (4) that because the statutory right to post-conviction counsel is a legislatively created protection, it is constitutionally permissible, and within the Utah Legislature's power, to exclude from the PCRA an exception to the procedural bar rule based upon ineffective assistance of post-conviction counsel and, therefore, that Petitioner cannot rely on his statutory right to the effective assistance of post-conviction counsel to overcome the procedural bar for successive claims that could have been, but were not, raised in his prior post-conviction petition.

Although the parties disagree on whether the untimeliness of Petitioner's successive post-conviction petition should be excused, in order to avoid performing a merits review of each claim to determine whether the interests of justice exception applies, which has the potential of being both unnecessary and counter-productive, the Court has proceeded on the assumption that Petitioner's successive petition is not time-barred. Relying on the foregoing legal conclusions, and after carefully considering all of Petitioner's claims, the Court concludes that

all of his claims, with the exception of his claim alleging ineffective assistance of post-conviction counsel, are procedurally barred either because they were raised and addressed in a prior proceeding or because they are claims that could have been, but were not, raised in his prior petition for post-conviction relief.

As for the ineffective assistance of post-conviction counsel claim, the Court concludes that it is not a cognizable claim under the PCRA because it is not a challenge to Petitioner's conviction or sentence. Therefore, it is not a claim for which the PCRA can provide a legal remedy.

For all of the foregoing reasons, the Court grants the State's motion to dismiss Petitioner's successive post-conviction petition.

Order

IT IS HEREBY ORDERED that the State's Motion to Dismiss Petition for Post-Conviction Relief is granted.

IT IS FURTHER ORDERED that Petitioner's Petition for Relief Under the Utah Post-Conviction Remedies Act is dismissed.

This Ruling and Order constitute the final order of the Court. No further order is necessary to effectuate the Court's

decision.

DATED this 17 day of Aug, 2009.

BY THE COURT:

Judge Bruce C. Lubeck
Third Judicial District Court

STATE OF UTAH
THIRD DISTRICT COURT
SUMMIT COUNTY

Certificate of Delivery

I certify that a true and correct copy of the foregoing Ruling and Order was mailed on the 17th day of August, 2009, to the following:

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B. Blomquist
Deputy Clerk

STATE OF UTAH
THIRD DISTRICT COURT
SUMMIT COUNTY

Addendum B

Interview: Scott I. Manley Date of Birth; November 11. 1959
te: 12/26/90
me: 3:22 P.M.
Conducting Int: Detective Joseph L. Offret, Summit County Sheriff's Department
Present: Detective Robert L. Berry, Summit County Sheriff's Department
Representatives; Carl and Hank

Det. Offret: Apparently Scott, you know Mr. Von Taylor, is that right?

Scott Manley: Right

Det. Offret: How do you know him, tell me what the circumstances are and how you know him.

Scott Manley: We went in the Half Way Houses together.

Det. Offret: How long have you known Von Taylor?

Scott Manley: Two months

Det. Offret: Two months, is that all? Now apparently, well first of all since you are, for the record you are handcuffed right here and you've got leg irons on and whenever somebody's in custody I've got to read them their rights okay? So what I want to do is read you your rights all right, just listen to me. You have the right to remain silent, anything you say can and will be used against you in court. You have the right to legal counsel. If you desire legal counsel and can not afford it it will be provided before any questioning. Anytime you decide to stop answering my questions, you can stop answering my questions even though maybe you have answered a few. Do you understand your rights? Do you want to talk to me about this?

Scott Manley: Yeah I guess.

Det. Offret: Anyway what I want to do, what I have learned, is apparently you had communication with Mr. Taylor and where were you apparently he made a telephone call. So that it doesn't look like I'm leading my witness, one thing that I would like you to do Scott is to say your full name and spell it and your date of birth so that the person that types this can recognize your voice.

Det. Offret: Now let's get back to the issue. You've told me how you know Von Taylor. Tell me about telephone calls, when you received them.

Scott Manley: I only received one from Von.

Det. Offret: Okay

Scott Manley: The other day that I seen my PO he was talking to me. Von Taylor was talking to me.

Det. Offret: At the same time your PO was there?

Scott Manley: Well no, my PO was walking up the hall. Von and me were talking.

ott, Manley: No, it was right at the place.

t. Offret: At the Half Way House?

ott Manley: At that house.

t. Offret: Well I know, but the one you're talking on?

:ott Manley: Yeah, yeah.

et. Offret: Is it a pay phone?

:ott Manley: Yeah

et. Offret: And it's at the Half Way House?

:ott Manley: Yeah

et. Offret: Do you know what the number is?

:ott Manley: No, not really.

et. Offret: Tell me what Half Way House you were at?

cott Manley: Ah, I can't even think of the name of it.

et. Offret: Is it Orange Street?

cott Manley: No, uh uh

t. Offret: Different one?

cott Manley: I can't read or write

et. Offret: Is this your information?

cott Manley: That's all of it.

et. Offret: Scott I. Manley who is a resident at the Fremont Community Correctional Center, 2588 West 2365 South, West Valley City, 84119. And it says here phone number is 801-972-9651. Is that the only phone you have access to?

cott Manley: There's a bunch of them there.

Det. Offret: Is this the one you received the call on, do you know?

Scott Manley: I don't

Det. Offret: You don't know for sure, we'll find that out.

Scott Manley: It was on the pay phone.

Det. Offret: Tell me, okay the phone rings, how did you know you had a telephone call?

cott Manley: One of the staff member told me.

Det. Offret: Come and get you?

Scott Manley: Come and get me.

Scott Manley: No they .dn't.

Det. Offret: Anyway you go to the phone and then what happens, tell me?

Scott Manley: Then he talked, tried to say a couple of words to me and ah he asked me do I know who he is and I said yeah it's Von. And we start talking and he said you know I'm on escape and I said no I didn't.

Det. Offret: So at the time you're talking to him, you didn't know that he was an escapee?

Scott Manley: No

Scott Manley: And ah we were still talking and I said where are you now and he said he was at one of those cabins with handguns and this and that in there. Ah he was going to shoot some people.

Det. Offret: About what time of day, can you remember? Was it morning, afternoon?

Scott Manley: Afternoon.

Det. Offret: In the afternoon, any idea what time? Estimate if you can?

Scott Manley: I was still asleep, I didn't bother looking at my clock when I woke up, because she woke me up.

Det. Offret: What time do you have lunch?

Scott Manley: 11:30

Det. Offret: It was quite a bit later than that then?

Scott Manley: I don't know, yeah I think it was. I don't know about that.

Det. Offret: Tell me specifically what he said if you can remember, as closely as possible, exactly what he told you on the phone.

Scott Manley: Well I asked him what is he going to do, you know, he told me he was at his mom's, away from his mom's cabin, but he told me he went to his mom's cabin.

Det. Offret: He said that he had been there, but when he was on the phone to you he wasn't there?

Scott Manley: Right, he was at another house.

Det. Offret: Okay

Scott Manley: And I was talking and then these two came up. I asked him about, what about the people coming. Who cares, they're wasted. And we heading out, got to get a car and then head out.

Det. Offret: So the people that we're talking about that got killed weren't there yet?

Scott Manley: I think they were.

Det. Offret: Why do you think that?

et. Offret: You could hear gun shots being fired?

et. Offret: Could you hear voices behind his?

cott Manley: I heard somebody talking.

et. Offret: Did it sound like a man or woman?

cott Manley: I ain't so sure, could have been a man.

et. Offret: Did he say anything about being with a friend?

cott Manley: Yeah he told me all about him.

et. Offret: Tell me what he told you.

cott Manley: He told me he got a friend here that escaped from Orange Street with him and they were just out, going to have some fun, go back to New York

et. Offret: Said they were going to go back to New York. But he said he killed these people, or did he say he was going to?

cott Manley: He was going to.

et. Offret: What about having somebody hostage? What about having somebody held hostage?

cott Manley: Well he was saying something about that too.

et. Offret: Remember it as closely as you can, it's really important that you remember that as closely as you can, what he said?

Scott Manley: He just said he was going to head out to New York.

Det. Offret: Did he say he was going to take anybody with him?

Scott Manley: He told me he was going to waste them all.

Det. Offret: He said he was going to waste them all. Did he say how many he had wasted?

Scott Manley: Four, he said he had four people.

Det. Offret: He had four people, and he said he was going to waste them all?

Scott Manley: Yeah

Det. Offret: Did he say he had killed four people or he had four people hostage?

Scott Manley: He didn't say nothing, like you know he said he had four people.

Det. Offret: Tell me what else he told you about the guy he was with? A name, anything like that?

Scott Manley: No, he did say his name, but I can't, I'm bad at names.

Det. Offret: Okay

Det. Offret: What the guys name sounds like?

Scott Manley: Yeah. No I mean I know what the dude sound like that was talking besides Von.

Det. Offret: What did he sound like?

Scott Manley: Somebody that was having a good time, shooting up the house and stuff.

Det. Offret: Did they talk about drinking or drugs or anything like that?

Scott Manley: No, they didn't say nothing about that. Von don't do drugs.

Det. Offret: He does some drinking though?

Scott Manley: Yeah

Det. Offret: And you heard shots being fired?

Scott Manley: Yeah

Det. Offret: Did Von say that he had been shooting or what?

Scott Manley: No it was the other dude was shooting in the house.

Det. Offret: What would you say he was shooting, a .22, or a .44 magnum?

Scott Manley: I would say a .44 magnum.

Det. Offret: Exactly, right on the nose. Did Von say anything about that at all?

Scott Manley: Von said they had one.

Det. Offret: Von said they had a what?

Scott Manley: A .44 magnum and a bunch of other pistols

Det. Offret: Pistols?

Scott Manley: Rifles

Det. Offret: Did he talk about a .38?

Scott Manley: Yeah

Det. Offret: What did he say about it? Was it the gun that you and him had at one time and he went back and got?

Scott Manley: I don't know.

Det. Offret: Could you identify it if I showed that gun to you?

Scott Manley: Yeah

Det. Offret: Tell me about that, how would he have come by going back and getting this gun?

Scott Manley: Well man he told me that he stayed with a friend up there, out there

:ott Manley: Out in ... He ran to Ogden and ..at's what had me on the scary side.

...et. Offret: Okay, why?

...ott Manley: Well there was a gun sitting there and he knew where it was and I knew right when he told me that he wanted to kill some people, you know it just tripped my mind. God I left a gun right in front of his nose. And he know's right where it is at.

et. Offret: Where was it?

cott Manley: It's out in a water thing.

et. Offret: Where is this thing at?

cott Manley: Out there in town there, it's over by the cemetary, but

et. Offret: In Ogden?

Scott Manley: Yeah

Det. Offret: Tell me, like did you throw it in a river.

Scott Manley: Something like, I don't know, I call it a little ditch.

Det. Offret: An irrigation ditch or something like that?

Scott Manley: Yeah but it had water in it. fishes and stuff.

...t. Offret: And you can't tell us more closely where it was, how do you get there?

Scott Manley: All I know is from one side of town it goes all the way up straight through. Got a bridge where you cross, used to be working on the road, bridge goes right across. You just drive right down that road, that follows it and just run right up through.

Det. Offret: How come you threw it in there?

Scott Manley: I got panicing.

Det. Offret: You got scared?

Scott Manley: Yeah

Det. Offret: When were you up in Ogden with him?

Scott Manley: A month and three days ago.

Det. Offret: Quite a while ago then? How did you come by being in possession of this gun?

Scott Manley: Bought it from a friend of his.

...t. Offret: And what is his friends name?

Scott Manley: I couldn't, I didn't bother to

Det. Offret: Did you buy it?

Det. Offret: And he you throw it away?

Scott Manley: He was with me.

Det. Offret: When did he escape, do you know?

Scott Manley: What from the Half Way House?

Det. Offret: Yeah

Scott Manley: He told me a week ago.

Det. Offret: That's prior to the call you got?

Scott Manley: Right

Det. Offret: And you got the call Saturday afternoon?

Scott Manley: He said he was gone for a week out of the Half Way House him and this other kid.

Det. Offret: Did you know the other kid?

Scott Manley: No

Det. Offret: You didn't know his name was Edward Deli?

Scott Manley: No

Det. Offret: Never heard of him or met him?

Scott Manley: Hate his butt if I did.

Det. Offret: If you were up in Ogden with Von, what kind of car did you have?

Scott Manley: Car?

Det. Offret: Yeah did you have a car? Did Von talk to you about having a car when he talked to you on the phone?

Scott Manley: No that's what they were waiting for.

Det. Offret: A car? What did they say about that, that somebody was going to bring one up?

Scott Manley: This is how he was saying it. he said that they were waiting for this car to come into here.

Det. Offret: Okay

Scott Manley: I asked him what are you going to do with the people? You know since the car ain't there, what are you going to do when the car come in, people going to be in it and he said well they're going to have it, they're going to be shot.

Det. Offret: That's what he said about it. So he knew somebody was coming up with a car?

Scott Manley: Yeah, oh yeah, they knew that, they were waiting.

cott Manley: Well no their were presents laying all around, all around the house. And they found $300.00 dollars in money from the presents. *I heard a bunch of shit, that's all it was. And* I didn't believe it. I didn't ran right off to the guards and the guards this and that. I waited until this one guard, because they all, all those guards are silly. There only one or two that you can talk to and get something got straight. I waited until this dude come in and I asked had the two people escaped and he said yes. And ah, I said one names Von to keep him

et. Offret: Interested?

cott Manley: No not keep him interested, but I wanted to know was it Von Taylor. He said Von Taylor was gone. And I just spilled my guts. I said hey man, I'm going to feel like shit if I just don't say that if they come, in the Half Way House too. Just I don't know. The next day they're going to come in the Half Way House.

)et. Offret: They were going to come in the Half Way House after they left these cabins and stuff?

Scott Manley: Get me out.

)et. Offret: Is that why he called you?

cott Manley: Yeah

)et. Offret: Did he want you to walk away and help him out or what? Did he ask you to do that?

Scott Manley: He didn't ask me to kill nobody, cause I wouldn't.

Det. Offret: Well he didn't ask you to kill anybody, what did he want you to do?

Scott Manley: See he needs somebody, do you know what I'm trying to say. He wants power.

Det. Offret: So he's got to have a group of people to lead, he's got to be the leader, is that it?

Scott Manley: No he got to be a follower. *Von, he will shoot somebody* it's hard for me to explain it.

Det. Offret: So when he called and said this on the phone about killing these people, you believed him.

Scott Manley: Yeah because I know Von. I've been around Von.

Det. Offret: Have you been around him when he shot anybody else?

cott Manley: Well no, but I know his dislikes and he said the next time that I ever, they're never going to take me back to prison. They ain't taking him, well they've taken him back, but they ain't never going to let him go.

Det. Offret: Now if I showed you the gun, describe the gun that he might have come back and picked up.

Scott Manley: It was a .357, I know that for a fact. I tore it apart in three places. I tore apart the,

Det. Offret: Okay

Scott Manley: I took that off and tossed it in the river, I'd take off the barrel and chuck that and then I tossed the rest of it.

Det. Offret: How long was the barrel, how many inches?

Scott Manley: It was a stub nose.

Det. Offret: Two inches, four inches?

Scott Manley: Four inches

Det. Offret: What kind of grips?

Det. Offret: Wood?

Scott Manley: Just plain old cheap old.

Det. Offret: I'm going to get a gun and I want you to look at it and tell me whether or not you have seen it before, okay?

Scott Manley: You guys don't got Von up here do you?

Det. Offret: He's upstairs in the jail.

Scott Manley: I feel sorry for you guys. He won't be there very long.

Det. Offret: Did you have bullets for the gun?

Scott Manley: No

Det. Offret: You didn't have any at all huh?

Scott Manley: No

Det. Offret: Does that look like the one? That's not the one?

Scott Manley: That's a .38.

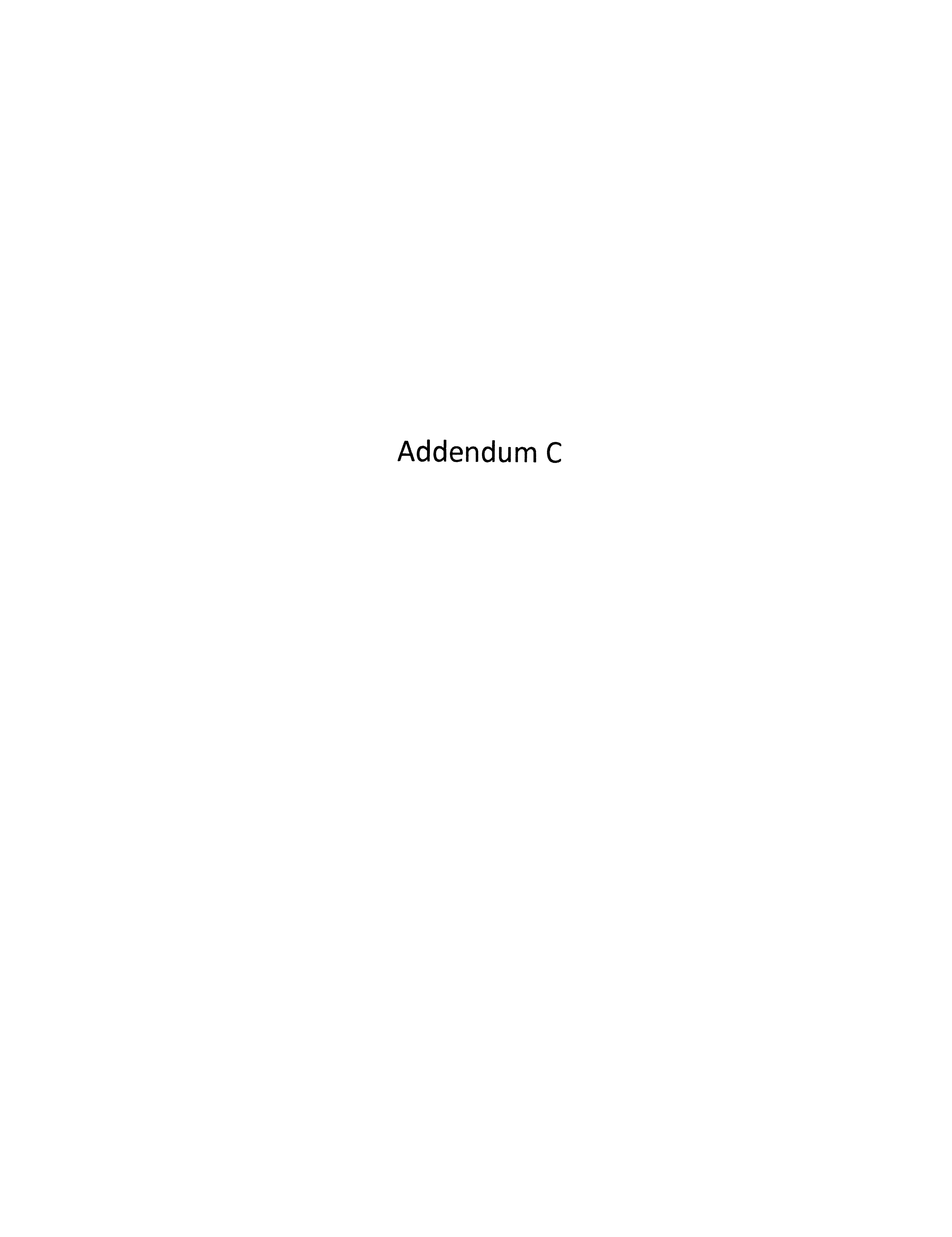
Det. Offret: That's right, it is a .38, not a .357. Just a long shot. Your gun is probably still in the water.

Scott Manley: I'm hoping.

Det. Offret: I'm hoping it is too. Why did you decide to tell your PO's about this?

Scott Manley: Because I was scared. I didn't, I don't want to go to Court. Okay he can get ahold of my people and I'm going to be out on the streets wiped out.

Det. Offret: Well I want you to testify against him. It's important that you do testify against him. You have evidence and statements have been made in a capital felony, a homicide



Addendum C

NORTH REDWOOD OFFICE
679 North Redwood Road
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(801) 322-3481

FOOTHILL OFFICE
1355 Foothill Blvd., Suite 100
Salt Lake City, Utah 84108
(801) 582-7767

EAST MILLCREEK OFFICE
1374 East 3300 South
Salt Lake City, Utah 84106
(801) 484-5283

Salt Lake Clinic

MAIN OFFICE
333 SOUTH NINTH EAST
SALT LAKE CITY, UTAH 84102
(801) 535-8163

SANDY OFFICE
9500 South 1300 East
Sandy, Utah 84094
(801) 576-2100

DRAPER OFFICE
953 East 12400 South
Draper Utah 84020
(801) 576-1086

TAYLORSVILLE OFFICE
3845 West 4700 South
Taylorsville, Utah 84118
(801) 964-4070

February 28, 1991

Judge Frank G. Noel
Third District Court
240 East 400 South
Salt Lake City, Utah 84111

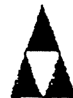
Re: Von Taylor

Dear Judge Noel:

Pursuant to court order I have examined defendant Von Taylor in the Summit County Jail on February 11, 1991, for the purpose of determining his state of mind at the time of the alleged commission of crimes with which he is charged as it relates to a defense of insanity. This evaluation is based on a three hour interview with Mr. Taylor out of the presence of jail staff.

I have also seen the following documents:

1. Summit County Sheriffs Office narrative reports by these officers:
   A. Deputy Brad Wilde on December 22, 1990, with supplemental reports on December 23, and December 24.
   B. Deputy Carey Yates, presumably December 22, 1990, with supplemental report on December 23.
   C. Deputy Steve Stokes on December 22, 1990.
   D. Deputy Alan Siddoway on December 22, 1990, including a time loss of evidence collection.
   E. Officer Jay L. Offret on December 22, 1990, with supplemental reports on December 23 (three reports), December 24, December 26, December 27 (two), December 31 (two) and January 2, 1991.
2. A case report by investigator Jim Bell, undated, describing activities of December 22, and December 23, 1990.
3. Utah State Fire Marshall's investigative report by Marc G. (last name illegible) dated January 3, 1991.
4. Transcripts of interviews with victims.
   A. Detective sergeant Robert L. Berry interviewing LaNae Michelle Tiede on Decmeber 22, 1990.
   B. Deputy Alan Siddoway interviewing Rolf Tiede on December 22, 1990.
5. "Rap sheet" on defendant Taylor dated December 22, 1990.
6. Washington County Sheriffs Office report by Deputy Eugene Roberts on April 30, 1989, including a photcopied handwritten confession by Mr. Taylor, and supplemental report by Deputy Jim Webb on April 31, 1989.
7. Medical examiner's reports of autopsy. Autopsy reports by Sharon I.



Accredited by Accreditation Association for Ambulatory Health Care, Inc.

Schnittker,M.D., Assistant Medical Examiner, dated December 23, 1990, on these victims.
A. Kay Tidwell Tiede.
B. Beth Harmon Tidwell Potts.

8. The Pre-sentence Investigation Report by David G. Christensen, Investigator, Adult Probation and Parole, dated June 9, 1989, including a letter to Corrections by the defendant's sister, Kaye Auble, dated May 29, 1989, and by his parents, Mr. and Mrs. Thomas J. Taylor, dated May 25, 1989.
9. A 90 Day Diagnostic Report by Robyn Williams, Diagnostic Investigator, dated August 31, 1989, including a psychological evaluation by L. Donald Long, Ph.D. psychologist, dated August 11, 1989.

Mr. Taylor is advised of the above-stated purpose of this interview and of its nonconfidentiality. He is told that information gained in the interview will be included in a report to the court to which both prosecuting and defense attorneys will have access. He is further told that this information may be used for him or against him in court, and that he is therefore not obligated to answer any question he chooses not to. He willingly answers all questions, except as noted below.

IDENTIFYING INFORMATION: Von Lester Taylor is a 25-year-old unmarried Caucasian male from Ogden, Utah, who says he has no occupation but has worked in security and in construction. He is now incarcerated in the Summit County Jail.

UNDERSTANDING OF CHARGES: The defendant lists the following charges against him: "Capital homicide, kidnapping, arson, evading an officer, attempted homicide and aggravated robbery."

HISTORY SUPPORTING CHARGES: Mr. Taylor has had charges filed against him as a result of an episode briefly summarized as follows: He and co-defendant Edward Deli walked away from the Orange Street halfway house in Salt Lake City, where they had been serving sentences. They hitchhiked to Oakley, where Taylor's family had a cabin, with intent to proceed on soon to New York to find work in Deli's home state. They broke into his parents' cabin, then a dozen others for supplies, doing extensive damage. Finally, they broke into the cabin of the victims, who had a car which Taylor and Deli intended to steal for the trip to New York. Mr. Taylor and Mr. Deli are accused of murdering two people, a middle-aged woman and her elderly mother, sparing a young adult daughter. When the younger victim's husband and teenage daughter arrived, the man was also shot with fatal intent but not fatal results. The girls were kidnapped, and the defendants and their hostages became involved in a high speed chase with the local police. The defendants were eventually apprehended when the chase ended in an auto accident. The cabin where the crimes took place they had set on fire.

Defendant Taylor gives the following long history of events prior to his arrest. On April 30, 1989 while intoxicated, Mr. Taylor burglarized the house

of a neighbor to his parents, armed with a firearm. He was caught by the owner of the home and jailed in the Washington County Jail upon pleading guilty. After a 90 day pre-sentencing evaluation, during which psychotherapy was recommended, he was sent to the Utah State Prison for over a year. He believes he should have been given a year in jail instead of prison, as this was his first major offense. Disgruntled, he says the only reason for his imprisonment was the judge's friendship with the man whose home he burglarized. (Actually, a year in prison had been recommended by the pre-sentence investigator despite first offense, because a first degree felony with a gun and knife was involved.) He was paroled on October 23, 1990.

In the Iron County unit of the Utah State Prison, he had several "write-ups," including his being kicked out of school for derogatory language toward a teacher he says he had proved wrong. He observes cynically, "They offer rehabilitation but don't let you do it." He had been in the prison's school program learning computers, math, English and German. He was kicked out of that program three days before his parole hearing. There were none of the adverse consequences he had feared, as he was given a 90 day parole date anyway. He was returned to his home town and the Ninth Street halfway house in Ogden. After several weeks there he was seen by a parole officer in a variety department store in the sporting goods section. The officer who saw him reported that he had been near the gun display counter, a violation of parole, although he denies having any intent other than to look at sporting goods. He was transferred to the Orange Street halfway house in Salt Lake.

The defendant describes the Orange Street experience as one where "they are playing a lot of games and (making) rules." While there he found a job grinding slag from steel girders, but was unsatisfied with the pay for the intensity of labor involved and quit after two days. This and other behavior lead to five "write-ups" which meant extra duty, marks on his record, and possibly an extension of his sentence. He had thought for several days about running from the half-way house, but was hesitant because of his expectation of more time in prison if caught.

One day, while job searching with an inmate acquaintance, Edward Deli, they discussed and decided against returning. Having become fugatives, they rode a bus to Ogden where they stayed with Taylor's brother for a night, then in a motel for a night. Deciding to hitchhike to New York where Deli grew up and where they hoped to get jobs, they found rides as far as Morgan. Because of the extreme cold, Taylor offered his parent's cabin in the Smith-Morehouse area near Oakley. Hitchhiking further to Beaver Springs, they stole three wheelers from a cabin, rode to his parent's cabin and broke in. He concedes they went to other cabins, broke windows and obtained food, liquor, and clothing. They felt safe from the law, the area being deserted except for one cabin with visitors. They arrived on Tuesday and stayed until the crime on Saturday took place. They chose the Tiede cabin to burglarize, hoping to steal the occupants' car for their trip to New York. Taylor had had a previous brief encounter with the middle-aged woman occupant who passed him on

the road and asked if he didn't have a snowmobile. His response was sarcastic.

Seeing the burglar alarm was not on, they broke into the Tiede cabin one night and waited until the next day, expecting the visitors to return because of unopened presents under the Christmas tree. Some of the cabin occupants returned around mid-day. As the owner's 20-year-old daughter came upstairs, he confronted her with a gun. Her mother and handicapped grandmother followed. From across the room Taylor pointed a stolen pistol at them, and Deli a stolen rifle. He claims he didn't mean to shoot them and doesn't remember squeezing the trigger, but nevertheless did. The mother of the family was hit first and exclaimed "I've been shot!". Taylor then emptied his gun, a 38 pistol, at the victims, grabbed Deli's 44 pistol, and emptied it at them. He reloaded both guns and counted nine spent cartridges.

He claims not to know why he shot them, cannot say why he didn't shoot their screaming daughter, and says he was not feeling anything. He didn't even feel like he had shot them. He adds that he doesn't know why he didn't shoot himself. Deli looked at him as if to say "what in hell are you doing?" Deli took the hysterically screaming girl to a back room rather than accede to her request to call an ambulance. They surveyed the results of the shooting. One victim was shot through the head and Taylor observed bone fragments, brain matter and blood on the floor. They dragged the bodies of the two women out on the deck, and Taylor threw snow over the bodies and the remains on the floor. He was nauseated by the sight and went to the bathroom to throw up.

They wanted to leave, but didn't know what to do with the house or how to handle the other family members who the girl said were due soon. Concerned about fingerprints or other evidence, the defendant decided to "torch" the house, which he considered easier than wiping it down. He retrieved gasoline from the garage, poured it around the upstairs and lit a match.

As they were getting ready to leave, the girl's father and sister arrived on snowmobiles. Taylor pulled the older girl inside and held a gun to her head, then called to her father to come in under threat that he would kill the girl. He asked the man for money and when a billfold was produced, had him throw it on the ground. He cocked the gun, and there was brief discussion between Deli and himself over who would shoot the father. Taylor pointed the gun and shot him. The father fell. After taking the girls, who had witnessed the shooting, to the snowmobiles, he went back and shot the man one more time "to make sure". He then poured gasoline on the victim and assumed he would be consumed in the house fire.

By then he acknowledged feeling "pretty scared" with three dead people, smoke coming from the burning cabin, and "some guy (who) rode by on a snowmobile." He still hadn't really thought about what he had done, he says. The girls looked at him with an expression of fright and hate, wondering if they would be killed too. His colleague never questioned why he killed them. The

question of raping the girls didn't cross his mind. "I'm not into that," he says.

The two men each got on a snowmobile with the girls driving. They reached the parking area where the older girl unlocked her father's Lincoln town car and gave Taylor the keys. Deli put two rifles, a pistol and two suitcases in the trunk. Then with Taylor driving, Deli in the back, and one girl in front and one in back, they drove away.

At the gate they encountered a man who came toward them who the girls claimed not to know, but who in reality was their uncle. He drove toward Oakley and then toward Kamas. A police officer driving the opposite direction caught their attention. The officer turned to follow them, and they encountered a police pick-up truck blocking the road ahead. Taylor "punched it" and drove around the truck. They went through Kamas well over the upper limit registered by the speedometer, 100 miles per hour he estimates, with the police officers in pursuit. Sliding through an intersection, they came to a stop and were approached by the officers. Deli forced them back with a pistol pointed out the window. They sped down a Dugway road toward Park City and Heber City. As the road curved, he braked, hit a cement barrier, and lost control. The car coasted backward down an embankment and came to rest. Police officers were on the scene immediately. Taylor took Deli's gun, said it was time to die, and put the gun to his head. Deli grabbed the gun, got out of the car, and aimed it at the police. An officer fired and shattered a rear window. Taylor says he grabbed the gun from Deli again and threw it out the window. He could have shot the girls or himself, but says he "didn't want to shoot anyone anymore." They were arrested and jailed.

He says he was treated as well by the police as anyone charged with murder could be. Asked how he now feels about the crime, he says he is sorry he did it, but could not bring himself to ask forgiveness. He says he has always been cold at funerals, assuming that "everyone will die sooner or later" and live on in the same place in an afterlife.

Asked about his feelings over killing someone, he concedes he has killed someone before, stabbing a person through the heart. He declines to talk further about the incident and was never charged.

PAST CRIMINAL RECORD: Mr. Taylor concedes having caused "a whole string of childhood mischief." In early to mid-teens he began using marijuana and cocaine. He sluffed school and participated in stealing cars for joy-riding and four-wheeling. Though almost caught several times, he never was apprehended for this. He says he did it to go along with friends "if you can call them that," and participated "for something to do." His only prior criminal charge was for aggravated burglary. This resulted from an incident in St. George while he was staying alone in his parent's home. Under influence of marijuana and alcohol and looking for money, he burglarized the house of a neighbor he did not like because the neighbor, like his parents, was actively LDS. He needed money to pay off a loan for car repairs to the

credit union. Despite holding a gun on his neighbor, the neighbor lunged at him, subdued him, and summoned the police. He admitted burglarizing another neighbor's camper-trailer the previous night.

PAST PSYCHIATRIC HISTORY: His written confession to the St. George burglary indicates mental distress before the crime and after, eg. "totally going fucking crazy, I want to kill myself to put this out of my life," "my mind, it tells me to die, die, die !!!???" "Mom and dad don't know that I am going insane. . ." He was having serious mood swings and once tried to kill himself according to a brother, who wasn't sure if the attempt was genuine or a gesture for attention. Counseling was recommended by a psychologist who evaluated him in the Iron County Jail. (I have not seen the report of Dr. Kliarsky of Southwest Mental Health). He was placed in a holding cell briefly as a suicide risk. He did not participate in counseling, however. He has had psychological testing in confinement which, he says, revealed him to be extremely paranoid and borderline schizophrenic or depressed and suicidal. He is skeptical of the interpretation.

PSYCHOLOGICAL TESTING: Dr. Long's evaluation, a part of the 90 day diagnostic report, showed his intellectual functioning was average with a full scale I.Q. of 110, in the average range, and Wide Range Achievement Tests in reading, spelling, and arithmetic, consistent with his I.Q. His MMPI test showed him to be irritable, depressed, and shy. Pessimistic and dissatisfied, he was found to have strong dependency needs, a marked lack of social skills, and a feeling of inadequacy in social situations including those with the opposite sex. The test reflected inability to delay gratification or control impulses. His pattern was one of acting out, then avoiding responsibility, but afterward feeling guilty and anxious over his antisocial behavior. A propensity toward addiction was also found. Diagnosis was "Adjustment Disorder with Mixed Emotional Features and elements of Passive Aggressive Personality Disorder." There is no mention of paranoia or borderline schizophrenia in contrast to the defendant's belief.

PAST MEDICAL HISTORY: A prominent scar on the cheek was incurred at age twelve on his father's farm in Idaho when an aerosol can exploded in a fire, the contents burning his face. Plastic surgery reduced the extent of the scar, but a skin graft was recommended and never done. He was bothered by the scar through most of his later childhood, and was sometimes ridiculed by peers who called him "snake face," among other names, referring to the tortuous shape of the scar. He was also self conscious over his very slender body habitus and inability to gain weight. At fourteen he fell out of a truck in which he was joy-riding, with his brother driving. The truck rolled several times, but his only injury was a "road burn around the wrist." He was not scolded for this incident by his father until several years later.

He was on no medications at the time of the present crimes and was using no drugs. He does smoke one pack of cigarettes per day and drinks alcohol only occasionally. He has drunk a lot at one time in the past, but says he has

never been drunk. (This contradicts his written confession to the St. George burglary in which he says he was depressed and drunk.) It was the social thing to do at parties he attended and brought acceptance by his peers. He claimed that when he drank he became crazy. He smoked marijuana regularly but not daily, sometimes alone, sometimes with others. This habit began at age thirteen or fourteen. It made him lightheaded and fearful at times, but he never hallucinated. He has occasionally felt bewildered at what someone was trying to talk over with him, but he insists that despite regular marijuana use, he still could still function well. He tried snorting and smoking cocaine a few years ago but didn't like it.

FAMILY HISTORY: One brother has been in a treatment program for alcohol and drug abuse. No other psychiatric conditions are known to him.

PAST PERSONAL HISTORY: Mr. Taylor was born in Murray, the eighth of eight children. His father, a civilian aircraft maintenance worker in a classified job, traveled all over the world for the Air Force and made a "pretty good" living. He was stern in insisting his children work by mid-teens and bought a farm in Idaho for them to gain work experience and earn wages. If angry, he raised his voice and, rarely, spanked the defendant with a wooden spoon. He once threw him in a closet for sluffing school. He guesses he liked his father but was not close to him. His mother was a homemaker until his eighth year. She was "a nag" about everything, and he was not close to her. Yet he is quoted in the St. George pre-sentence investigation report as saying they are "the best parents anybody could have or want." As the youngest child, he fought a lot with his older siblings, especially a brother two years older and a sister three years older.

His brother eight years older had the most influence on him and he began smoking, drinking alcohol, and using drugs in his teens partly in admiration of his brother who was doing the same thing.

In third grade he once became upset and "tore the class apart." Psychological help was recommended, a fact he did not know for many years. His parents asked for a class change instead of arranging treatment. His sister considered him a loner who was quiet, nonconforming, and a misfit since elementary school days, and in need of counseling for his defensive, negative outlook as a teen and young adult. His parents also found him avoidant and non-conforming, both within and outside his family though they considered him respectful, loving, and kind. Socially he had some friends in elementary school, but tended to keep to himself. The only close friends he remembers moved away. In junior high he became friendly with a few people, and by age 16 had a lot of acquaintances, but not real friends. His neighborhood and LDS ward were upper middle class with "snobbish kids and parents who didn't work for their money." He was alienated by their behavior, not so much by their beliefs. A turning point, he says, was the scarring of his face. He felt rejected and ridiculed by name-calling peers and still feels hate toward them.

He went through his senior year of high school but didn't graduate because of failure to "apply myself," and problems doing math and English. He was in

special education classes in those two subjects. He received D- grades on average, except for special ed classes where he received C's or B's. The teachers were surprised if he came to class, he says.

Though his other siblings are mostly religiously committed people, he gave up church attendance at sixteen. His parents believe he was driven away by a well-meaning but rigid leader who wouldn't tolerate his non-conforming dress. At that time, he discloses, he became interested in "black magic, satanism, or witchcraft" with friends. He attended black masses where small animals were sacrificed under the direction of an acquaintance who had been born into satanic religion, he says. He reports reading the satanic bible a few times and though not really believing what it said, found it more interesting than his parents Mormon religion. Though not serious about it, he did attend satanic rituals regularly on Saturdays for five years. He never conducted the service or performed the animal sacrifice, but did drink the animals' blood. He says he was once invited to a service where a human was to be sacrificed, a three year old girl. He turned down the invitation, but says it did take place and he knows where it was done. His participation in satanic worship ended when the leader joined another coven.

His understanding of satanic principles is that "they do all that Christians don't want you to do," e.g. blaspheming Christian "sacrament" through animal sacrifice, etc. He acknowledges feeling sorry for the animals the first few times but then getting used to it. His own belief is in neither Satan nor God, he says, explaining that "all worship is the same thing." He does believe in a spirit afterlife, and that everyone goes to the same place after death. He uses this idea to minimize the impact of his killings. Asked what should be done with someone who sacrifices a three-year-old child, he rationalized that "religions did it for thousands of years." Asked if someone sacrificed his own three-year-old girl, he replies "I would shoot the son-of a bitch!" His parents did not know of his satanic worship.

He has held various jobs, but none for long. He had a job briefly in a variety store, worked construction for a time and was a security officer at the Freeport Center for a year. He felt unfairly fired from that job when made to share blame for his co-worker's breaking a time clock. He acknowledges that, though his parents tried to instill a work ethic in him, he never liked working. He bummed a lot, lived with other people and sold drugs for a while. His parents supported him materially with room and board through much of his adult life.

He never had a serious girlfriend, saying he was never in a financial position to do so, but has been sexually active since age 16. He has never really desired a relationship with a girl other than personalities on T.V., and doesn't know if he would want to be married. There has been no homosexual experience, though he "threatened to kill a guy" who approached him in prison.

He expresses remorse for his crime and expects he will be sentenced to life in prison. Rather than spend his life in that way, he says, he will ask for the

death sentence and if given it, won't let his attorney appeal it. He won't sit on death row for years, he says. However, he is asking for a change of venue. It was his and his attorney's idea to plead insanity. Asked if he believes he is insane, he replies "No, but how can you determine? I shot two people with no motive, out of cold blood, with my gun, then Ed's." He has never been on trial before, having plea-bargained to a previous charge and received a one-to-fifteen year sentence of which he was to serve eighteen months.

MENTAL STATUS: The defendant is a young adult Caucasian male of asthenic habitus with medium long, "frizzy" hair. He is wearing an orange jail-issued jumpsuit. Eye contact is fair, and speech flow and psychomotor behavior are normal. He is correctly oriented to time, person, place, and situation. Immediate recall is excellent, e.g. three of three words after five minutes. Recent memory is good, e.g., he can give the menu of last night's supper and joke about it. He can give some detail about the most prominent of recent news events, the Persian Gulf war. Remote memory is not as good, e.g. he can name none of his first six school teachers, though this may reflect his attitude towards school as much as memory. Fund of information is good, e.g. he can name the last five presidents in order without difficulty, and equally well, five cities of more than a million in population. Cognition is intact, e.g. he can spell "world" backwards with no difficulty, and can correctly subtract 7's serially from 100. He does this slowly, counting down in his head rather than mentally subtracting, and acts somewhat embarrassed about the process. He is able to do the mathematics of a simple story problem without difficulty. Responses to judgment questions are good, and to insight questions fair, e.g. we need senators and congressmen to "keep the U.S. running." He has no idea why newspapers can be sold for less than the cost of printing them. Affect is appropriate to thoughts, and mood he describes as "average, considering." He acknowledges depressed states when thinking about his crimes or dreaming about them, so that he tries to avoid such thoughts and to stay awake to avoid dreaming. He has flashbacks when awake once in a while. He rates his mood as "half way" on a 1 to 10 scale, and he appears mildly depressed. No suicidal ideation is admitted. There are no delusions, hallucinations, disorder of thought form or thought content, ideas of reference or influence, thought insertion, thought control, blocking, perservation or other psychotic processes. Abstractive ability is fair, e.g. he can correctly give the meaning of a simple proverb, but has not heard of three mildly more complex ones, and can't abstract them. He is able to abstract the common elements of word pairs. Intelligence is estimated at average or perhaps mildly below.

DATA FROM RECORDS: Interviews with victims Rolf and LaNae Tiede generally corroborate the description of the crime the defendant has presented. Officers investigative reports also coincide with the information he gives. However, they describe destructive vandalism of other cabins rather than just breaking in to steal supplies. Most significantly, a statement by Taylor's acquaintance at a halfway house, Scott Manley, says Taylor told him of plans

not to just take the cabin occupants car but to kill them two hours before the shooting took place.

DIAGNOSTIC IMPRESSION:

Axis I: No mental illness (DMS-III RV71.09). History of Adjustment Disorder with Depressed Mood (309.00). Mildly depressed mood now.

Axis II: Antisocial Personality Disorder (301.70) with Schizoid Personality features (301.20).

Axis III: No medical illness.

OPINION: The examinee was able to intend the criminal acts with which he is charged and was not insane at the time of their commission, nor does he show signs of serious mental illness now.

DISCUSSION: The examinee shows characteristic features of antisocial personality disorder. He has been unable to sustain consistent work behavior and has abandoned or been released from several jobs without realistic plans for others. He has failed to conform to social norms of lawful behavior by drug dealing, previous criminal acts and participation in satanic rituals including passive observation of cruelty to animals. He has behaved in reckless disregard of his own or others' safety. He has often acted impulsively without forethought for consequences. He has shown conduct disorder as a teenager, though most of it beginning at age 16, e.g. truancy, car theft for joy riding, early sexual activity, drug abuse and satanic worship. His level of remorse for having killed and otherwise hurt others is shallow and superficial.

Features of schizoid personality in the examinee's history include lack of close relationships within or outside his family, lack of dating experience, few sexual relationships and no marriage, choice of solitary activities, and constricted emotions.

Mr. Taylor appears to have been a misfit in the family in which he was brought up. A learning disorder despite normal intelligence is the probable explanation for his poor school performance and need for special education classes. Already self-conscious regarding his social acceptance as an early adolescent, he evidently lost his confidence further when burdened with a facial scar. Not comfortable in the social mainstream, it appears that he was better accepted by others outside the mainstream and took on their behavioral patterns, e.g. drug and alcohol use, smoking, sexual activity, all in defiance of his family's value system, and truancy from school, stealing cars, using them in dangerous ways for joy-riding and four-wheeling. He was apparently never the leader in such activities, but went along with friends "if you can call them that" for something to do.

Proneness to sensation seeking was also evident in his interest in satanic cult activities. He was apparently there more as an observer than a devoted participant. His history is not one of violent or physically injurious behavior until recent adult years, the animal sacrifice eliciting only his passive involvement.

As an adult he did not seem to make any satisfactory adjustment in a mature lifestyle, e.g. erratic and undependable job history, dependence on parents well into adulthood, no stable relationship with a female or thought of marriage or family, no lasting friendships, and failure to complete any career preparation. Rather than see himself as responsible for this, he demonstrates a pattern of blaming others and regarding himself as the unfortunate victim of unfair treatment.

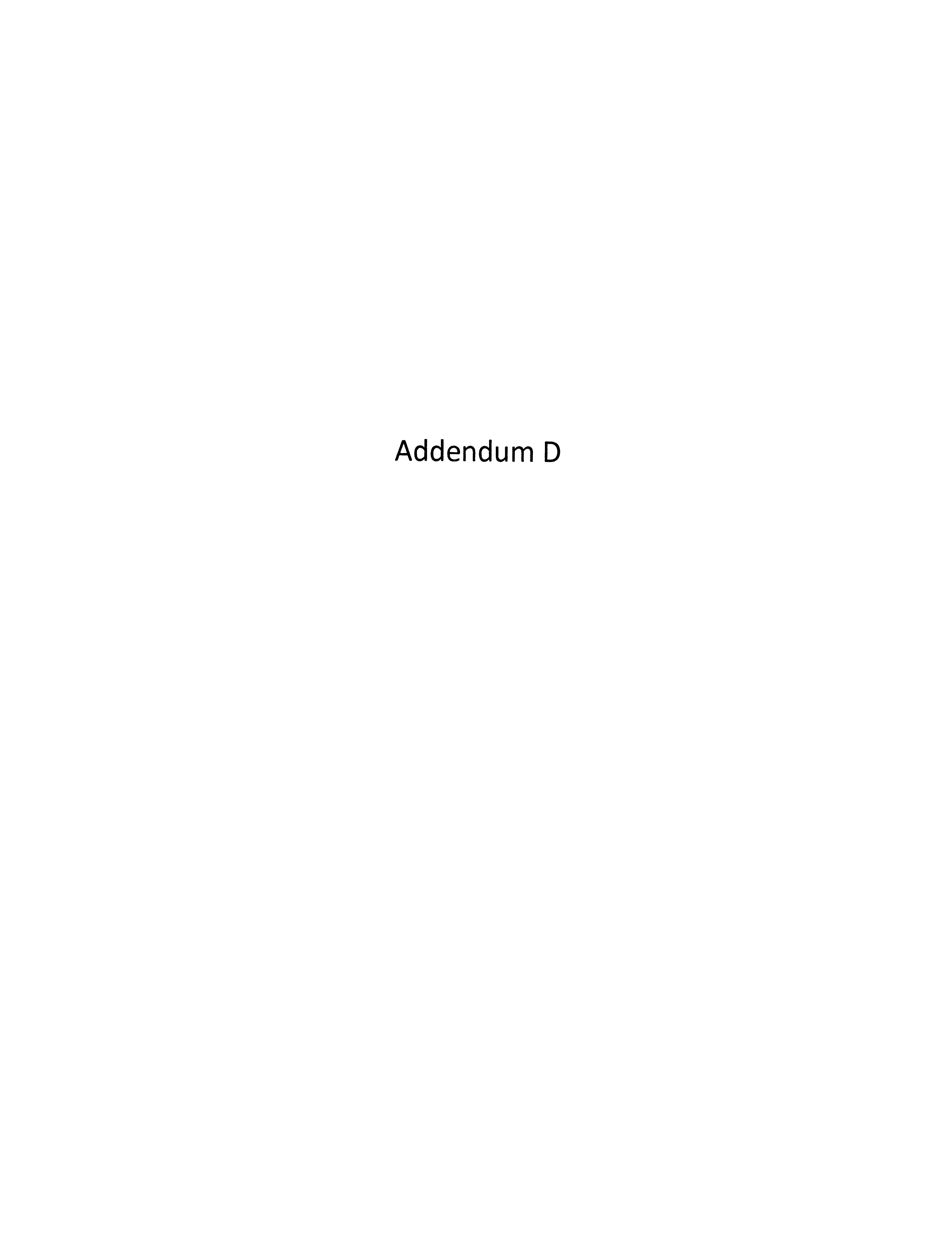
Anger was apparently harbored and magnified. This, coupled with numbness to guilt and inability to empathize engendered by his teen antisocial and satanic cult experiences, made his violent behavior perhaps more understandable. However, there is nothing here to suggest a seriously deprived childhood, victimization by others' abuse, or inability through mental illness or mental deficiency to understand the nature and consequences of his criminal behavior. On the contrary, his criminal acts appear to have been purposeful and at least well enough thought out to try to avoid the legal consequences. Though he does admit responsibility for the shooting, he minimizes that responsibility in the way he describes what took place, e.g. "I didn't mean to shoot them but I did" and "I don't remember squeezing the trigger but I did." "I don't know why, I was not feeling anything." Some display of conscience is evident later in his grabbing the gun with which his cohort confronted the police and his not killing the girls because "I didn't want to shoot anyone anymore."

The random property destruction in the cabins around Oakley, and the destruction of human life itself, is a level of violence sometimes seen with head injured or otherwise brain damaged people. However, he presents no history of head injury and no evidence for brain impairment other than some degree of learning disability in math and English. Altered consciousness such as in an epileptic event could be considered in his saying he did not remember pulling the trigger. However, he remembers sufficient detail immediately before and after the event to discount this possibility, and he gives no history of prior events suggestive of altered consciousness leading to violent behavior. Though he claims alcohol makes him go crazy, he denies being under the influence of drugs or alcohol when the killings took place. He may have had clinical depression at the time of his aggravated burglary charge in January 1990, as is suggested in his written confession, but nothing suggests other major mental illness despite his questioning his sanity then. In sum, his behavior is reflective of a personality disorder, but not of a mental illness, and his state of mind was not so affected as to meet the requirements of the insanity test of the Utah Code.

Sincerely,

Louis A. Moench, M.D.

LAM/bm/jh



Addendum D

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Attorneys for State of Utah

IN THE THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY

STATE OF UTAH

VON LESTER TAYLOR,	:	ROBINA GILLESPIE LEVINE AFFIDAVIT
Petitioner,	:	
v.	:	Judge Bruce Lubeck
STATE OF UTAH,	:	Case No. 070500645
Respondent.	:	

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Robina Gillespie Levine, being first duly sworn testify as follows:

1. I am presently employed in the Utah Attorney General's Office as a paralegal in the Criminal Justice Division.

2. At the time that the State prosecuted Mr. Von Lester Taylor for capital murder, I worked on the defense team. I worked with Mr. Elliot Levine, Mr. Taylor's attorney, as a paralegal on the case. Summit County compensated me separately for my services on the case.

3. Mr. Taylor's co-defendant, Stephen Deli, was tried before Mr. Taylor.

4. As part of my duties on Mr. Taylor's defense team, I sat through the Deli trial, and, among other things, heard Mr. Deli testify.

5. In his testimony, Mr. Deli admitted that he left the half-way house with Mr. Taylor and was involved in burglarizing the Tiede cabin with Mr. Taylor.

6. However, Mr. Deli testified that Mr. Taylor did all of the shooting and that he (Deli) shot no one. Mr. Deli testified that Mr. Taylor began shooting out of the blue, and that Mr. Deli was surprised when Mr. Taylor began shooting. Mr. Deli testified that no argument, confrontation, or threats that preceded the shootings.

DATED Feb. 11, 2009.

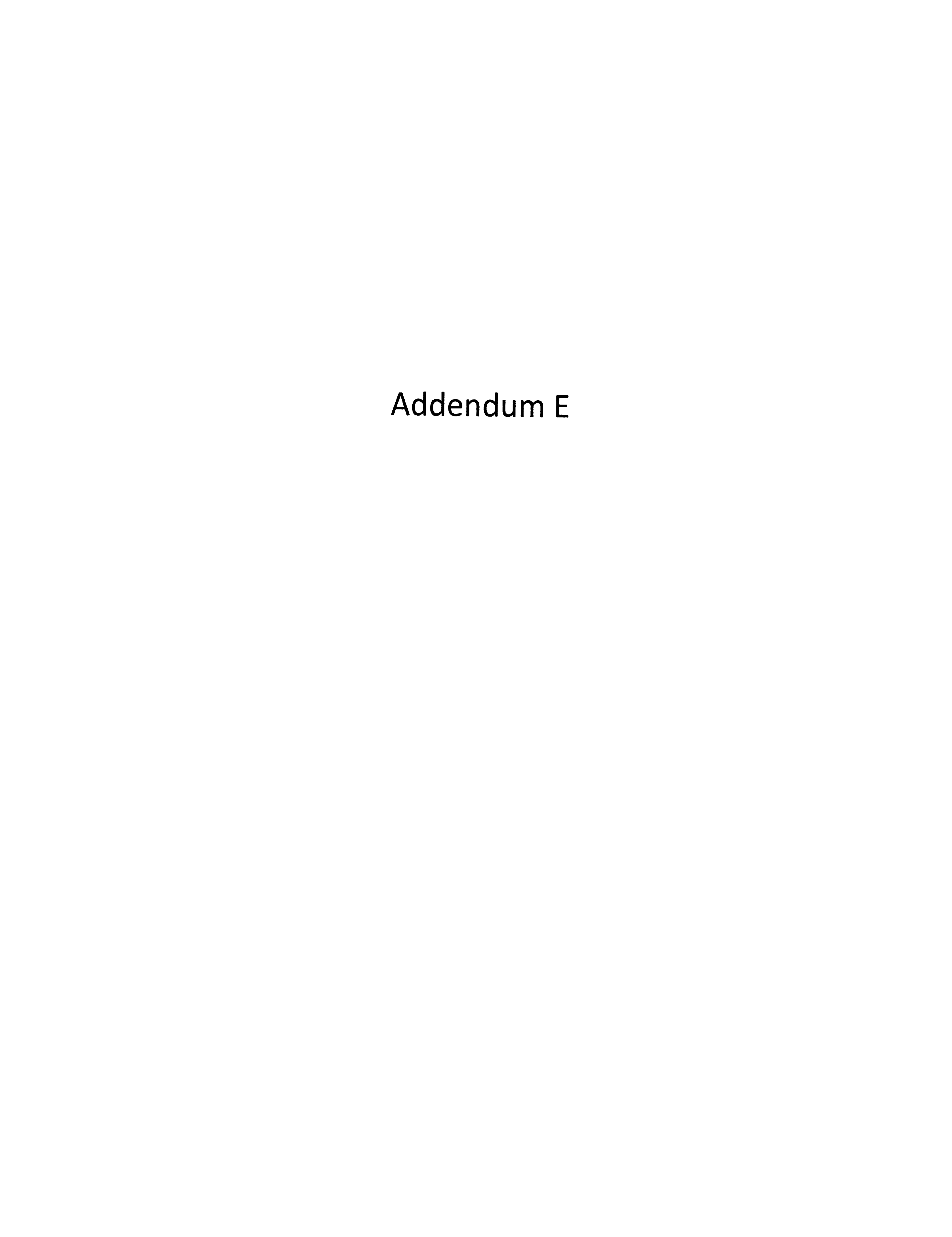
Robina G. Levine
Robina Gillespie Levine

Subscribed and sworn before me Feb. 11, 2009.

Notary Public

10/3/2011
My Commission Expires:

Notary Public
SHYINA L. CRAYTON
Commission Number 571202
My Commission Expires
October 3 2011
State of Utah



Addendum E

Robert Durning Box Sec ½

1 — [illegible] Oldham — Knows me — [illegible] — burglarized — in home — [illegible] cases warranted — [illegible] would — [illegible] — [illegible] — D#1 — 1x

2 — Terry Lewis — Knows Bill Harris — Leavitt Lumber — SSSD — Kyle — Sh. Dept. — ok — believes in D.P. — LDS — Brad Wilde — 4-5 cousin — life sentence severe — 2x

3 — Janet Jones — lived here 1½ years — May Flower mover — LDS — 18 months — bus. school — Knows Linda Smith — cruel way to end life — don't think of any circumstances — St. #2 — 3

4 — Robert Price Lewis — Knows TLC — Unisys — PCFD — all for D.P. — life not a severe punishment — D#2 — 4

5 — Jos. S. Jenkins — Knows me — [illegible] friend — LDS — severe sentence — 5

6 — Michael Robinson 4-7 — Knows me — 5-6 yrs in court — heavy eq. op. — wife R.N. — LDS — I guess if it's deserved — DUI — St. #4 — 6

7 — Robt S. Boyd — Ramas 2 yrs — Fred Marshall — painting — financial hardship — 7

8 — Bruce Rowser 5-7 — Knows me — Knows Levine — R.E. Agent — US Army — 1 yr. Vietnam — M.P. — if person needs it — how people came up w/ it — D#3 — 8

9 — [illegible] Rylee — F.D. — Capt — retired — Alta P.D. — totally necessary some cases — [illegible] — stated to opinion — sure to return — 9

10 — Kathleen Mears — Real Est. — Summit Adv. — Sociology — mixed feelings — some instances may be warranted — questions D.P. in general — Catholic — not supportive — moral struggle — probably follow standard — St. #3 — 10x

11 — Holly Conner 6-7 — st. storage firm — single — methodist — agree w/ D.P. — St. 12 — 11

12 — Cindy Schumann — Knows Mel & Terry — 2nd cousin to Brad — vet. asst. — father ret. UHP or — believes in D.P. — brother at scene — D#5 — 12

13 — Norman A. Nelson — Knows TLC — Summit [illegible] — acct. — MBA — Rotary Club — US Army — burglarized two people in house — basically opposed to d.p. — possibly couldn't follow inst. — 13

14 — Jennifer D. Strickland Ryne (4-6) — clothing store — single — military — USAF / Res. A1C — Knows Tom James — no feelings about D.P. — could impose — Born Again Christian — never heard about — 14

15 — Marci Goodwin (4-6) — psychologist — musician — auto burglary — deter people from murder — believes in it — [illegible] — Nondenominational Baptist — never heard about case — DHP — repeat criminal conduct — calls for harsher penalty

16 — Laurel Vernon — Knows me + Brad Wilde — civil case — believes in D.P. — serious thought about imposing d.p. — no rel. affil. — 16

17 — [illegible] Fletcher — [illegible] Asst. — school program — sisters — [illegible] crim lawyer — mixed feelings — be appropriate if she was only — methodist — [illegible] have cabin — [illegible] — swayed others opinion — 17x

18 — Virginia Embry — Knows me — Bell's Deli — should get d.p. — no rel. affil. — D#7 — 18x

19 — Ellen Gibson (4-6) — Timberline — Archit. — she has Deg. Art — Evans & Sutherland — burglarized — no opinion on d.p. — d.p. possibly — no rel. affiliation — no TV or paper — St. #8 — 19x

20 — Blaine Moore — Knows me — Airforce — son atty — don't like to see anybody die — D.P. may be appropriate — believes in blood atonement — 20x

21 — Drew Harper — Trade College — D.P. is only way to go — shown beyond doubt — 21x

22 — Alexander Morrison — ret. Airline pilot — mil. pilot — Marine Corp. Capt. — daughter law stud. — burglarized — no body ever caught — neither opposes or proposes it — could vote for d.p. — no rel. org. — 22x

23 — Ronald Bair — trapshooter — Sgt. Army — certain circum. warranted — LDS — DUI — 23x

Tracy A. Mitchell (6-7) Bill Mitchell/husband auditor civil case ok - DP if heinous enough - heard in Dec. - LDS - D#1 47x	Ann Zuspann (T5-6) Section 2 clothing Mgr. single bro. & father attys believes in D.P. - doesn't see much difference between 2 penalties - no rel. affiliation St. #7 48x	Carol M. Keesler rel agent - husband Atty - Don't believe D.P. 49x	Janice D Blum (T5-6) h-pilot - Jesse Reid Realty in favor if warranted - Lutheran shot at very close range - no psychol. tends toward D.P. life maybe equal to D.P. - St. #1 50x
Ivan C. Buckner m. PK - metal shop teacher retired - burglarized - wt. HiFi - suffer consequences - 32x	David Geo. Illi student - 802 Cut - class tomorrow wd'll ruffling non refundable 33x	Kory J. Vernon unemployed - N.S.F.D. - surgery knee - favors D.P. - 34x	Edna Hupperich - 3 yrs college - St. Mary's Church h-Delta Pilot - thou shalt not kill conscience would bother - 35x
Phillip Ovard (T4-7) HAFB - Marjio - depends on crime - P. - wouldn't lose no sleep over either - hadn't heard about case St. 6 28x	Gloria Mitchell Oakley - const. in Coalville DUI L - for d.p. - possibly could impose - LDS - Deli should have been 1st - sways toward death - go along with everyone else 29x	Lorene L. McNeil (7) postal clerk - Dairy 1 yr coll - Alan Saddoway S-in-law - at scene - car thru town - believes in D.P. not quite sure could vote D.P. - biased - life not so sever - D#10 30x	Jay L. Turner (T5-7) - construction - exp. aircraft Assn. self educated - Disabled Vet - Navy Viet Nam - somewhat of deterrent - - could vote D.P. - LDS - - bro. incarcerated - bro. dumpster unprovoked manner - St#9 31x
F… Wellborn ns. clinical psychology civil case father pistol whipped - husband caught 24x	Ronald J. Wilde - (T-8) - Accting - R.N. - bro. lawyer - corp. law agrees with d.p. - believes in blood atonement - thinks more toward d.p. - D#8 25x	Donnelle Kohlweg (T4-5) - USAir - Flt. Att. - Delta Airlines mech. - St#10 assault - do believe if no shadow of a doubt - maybe a little hesitance on d.p. Methodist - hospital life is severe enough 26x	Lesa Bird (6-7) - paralegal - div. - everyone has right to due process - - Thinks life is sever - LDS - 27x

Section 3

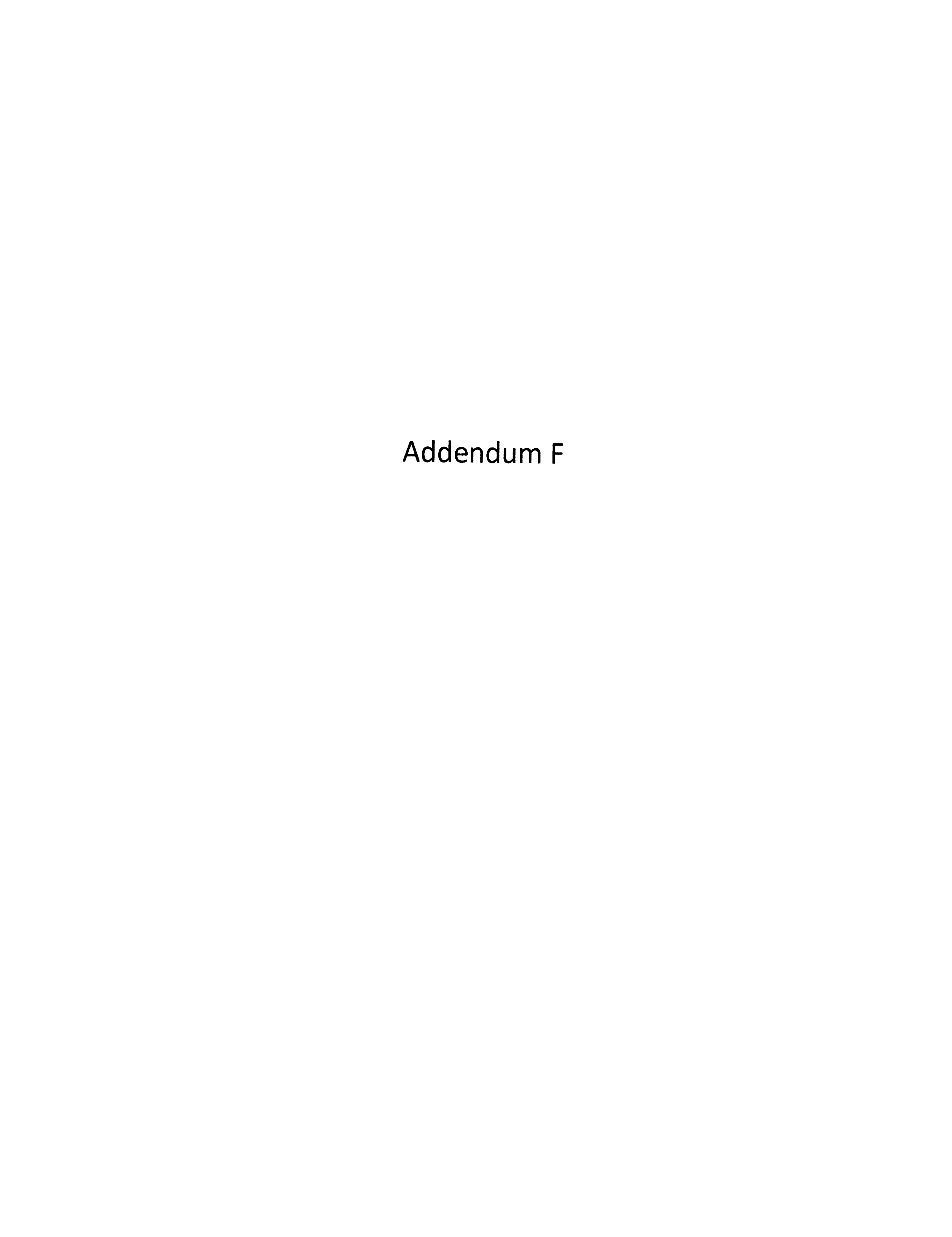
Ronald Lee Morgan self bus - mgmt - 22 yrs. Sgt Maj - Peace Officer UHP - auto burg - robbed Maui - non refundable tickets 44x	David C. Richards - (86') I did land contract - UP Res. W prof. artist - mil. service bro. UHP - believes in cap. pun. but has to be w/o reasonable doubt LDS - car chase life severe 45x	Grant L. Judd - ret. DOT - - penalty should fit crime - - maybe has some reservations - maybe criticized if Life - formed opinion - followed Deli Trial 40x	
Pearl Shill - retired - (6-7) D of P. Safety - depends on evidence - LDS - D#12 40x	Arnold Wayne Bosworth (5-7) Post office - LPN - civil case - burglarized - no feelings toward D.P. - believes in B. Atonement - Life worse than Death - D#9 41x	Debra J. Sholly (1-5) single - unemployed - anthropology not in some cases - depends on circumstances - St#5 42x	Jay Hendrickson (7+) Knows TLC - Tr. Driver Teamsters - if it is appropriate - LDS life is sever 43x
Karin Lorentzon single - travel agent - Hawaii - part non refundable 36x	Ina R. Jones - cook - dairy - Linda Smith - could be deserved - heard on TV - 37x	Bertha Braithwaite - Lions Club - Diesel Repair - favors D.P. - thinks she could - 38x	Irma O'Driscoll Billy Harris nephew - hearing HIMT Drug - widow maybe deserves D.P. - 39x

Phillip Mitchell - civil case 78	Mary Ann Kennally - Heritage Honda - Sec. Ed - sister killed DUI pregnant - 79	Section James Fite ? single - physical trainer - bartender - medic - Army bro. robbed twice 80	Sherri Allen - cabin next to - hus. math teacher bank robberies 81	Virgil Mitchell Uintah Eng. US Army - 82	Keith Buchanan - Regency Hotel - 83	Charles E. Walsh - truck mechanic 84
Lucinda Lafay - bakery - h - tr. Dr. 65	Barbara Francom - personal bias 66	Pamela Blomquist - Knows Def. - D. Asst. - 67	David E. Olson - Knows me - rel. bus. - bk. keeper 68	Susan Crandall - 1 yr. coll. - nursing 69	Derek Lance Kincaid B.S. Botany - ? PC. 70	John Mark Sullivan 71
David C. Chaplin Knows TLC - married Cohne - ? diff to come to D.P. - Not sure could impose - St. #1 52	Marvin A. Larson Pilot Delta - geog. - Capt A.F. 5 yrs Neither for or against - cases where approp Suppose could vote for life I suppose - pressure to vote for - heard LA News - Lutheran 53	Sharee Pace (5-6) - Key BK - larry - - depends on case - hard time but could vote - LDS - 54	Cheryl Chamberlain (6-7) Knows TLC - P.C.H.S. - related to Ed Watson for D.P. - - Life severe - LDS - 55	Todd Reich (6-7) Knows TLC - phy. therapy - bro. Law St. BYU - burglarized uncle shot - approp for certain crimes - LDS - 56	Dennis Gunn (6-7) Knows me - Coalville City - Scott Price - - some instances viable alt. Shadow doubt that best penalty 57	Edwin Homer - I've represented Knows Wife MFS - cr. case USA. [illegible] - D.P. on certain crimes -

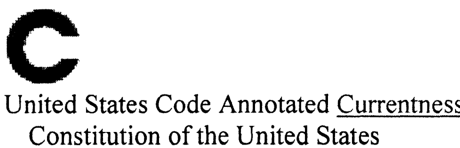
[left margin, partially cut off] ...hard Andrews (6-7) - ...ingle ...s Berry ...its of case ...mediated - ...esbyterian ...nce 1975 - ...ife is sever 51

White

'im McClelland wife pregnant (8)	Bonnie Moffatt Flt. Att. Delta - hus. Delta	Melvin Gines - - Kamas - retired ok	Section 5 Julie Mae Haren	Jeanine Woolstenhulme - comm. college single	Richard Siddoway TLC rep. ex-witness Am. Ex.
85	86	87	88	89	90
Troy Prescott ok	Jack Blonquist	Danny L. Drury - caretaker - ? single - Sgt. US Army - burglarized & robbed at gun point	Jerald F. Brown - ret. - Navy - petty office - ok	Shelly Gines Woodland - h.s. - Utelite - burglarized	Gay Cummins mgr. ski rental - knows Rob Berry - burglarized
72	73	74	75	76	77
rcia Kraatz - (6) c. companies - A. deg. sband - ex police icer - prob. w/ D.P. if served - LDS - favor to admit	Kenneth Gordon Stephens (7) Heweber - farm - believes justice should be served - - hate to but could - LDS - cabin at Soapstone -	Ann Nora Thomas 1st gr. teacher - auto burglary - no one caught	Dixie Stewart Oakley - Acting LDS - burglarized	Jo Post - ballet - acting Baja	Theresa Sanders - family bus. - ?



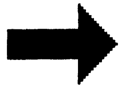
Addendum F



United States Code Annotated Currentness
Constitution of the United States

Annotated

Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)



Amendment VI. Jury trials for crimes, and procedural rights

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

Current through PL 111-237 (excluding P.L. 111-203, 111-211, and 111-226) approved 8-16-10

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END OF DOCUMENT

West's Utah Code Annotated Currentness
Constitution of Utah

Article I. Declaration of Rights

Sec. 12. [Rights of accused persons]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

CREDIT(S)

Laws 1994, S.J.R. 6, § 1, adopted at election Nov. 8, 1994, eff. Jan. 1, 1995.

U.C.A. 1953, Const. Art. 1, § 12, UT CONST Art. 1, § 12

Current with amendments included in the Utah State Bulletin, Number 2010-13, dated July 1, 2010.

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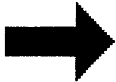
Effective: March 9, 2006

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part VI. Particular Proceedings

Chapter 154. Special Habeas Corpus Procedures in Capital Cases



§ 2265. Certification and judicial review

(a) Certification.--

(1) In general.--If requested by an appropriate State official, the Attorney General of the United States shall determine--

(A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;

(B) the date on which the mechanism described in subparagraph (A) was established; and

(C) whether the State provides standards of competency for the appointment of counsel in proceedings described ın subparagraph (A).

(2) Effective date.--The date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.

(3) Only express requirements.--There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

(b) Regulations.--The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).

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(c) Review of certification.--

(1) In general.--The determination by the Attorney General regarding whether to certify a State under this section is subject to review exclusively as provided under chapter 158 of this title.

(2) Venue.--The Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over matters under paragraph (1), subject to review by the Supreme Court under section 2350 of this title.

(3) Standard of review.--The determination by the Attorney General regarding whether to certify a State under this section shall be subject to de novo review.

CREDIT(S)

(Added Pub.L. 109-177, Title V, § 507(c)(1), Mar. 9, 2006, 120 Stat. 250.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2006 Acts. House Conference Report No. 109-333, see 2006 U.S. Code Cong. and Adm. News, p. 184.

Statement by President, see 2006 U.S. Code Cong. and Adm. News, p. S7.

References in Text

Chapter 158 of this title, referred to in subsec. (c)(1), is Orders of Federal Agencies; Review, 28 U.S.C.A. § 2341 et seq.

Prior Provisions

A prior section 2265, added Pub.L. 104-132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1223, relating to application to State unitary review procedure, was repealed by Pub.L. 109-177, Title V, § 507(c)(1), Mar. 9, 2006, 120 Stat. 250.

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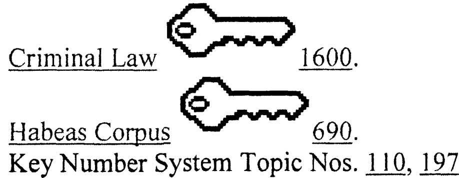

Criminal Law 1600.

Habeas Corpus 690.

Key Number System Topic Nos. 110, 197.

RESEARCH REFERENCES

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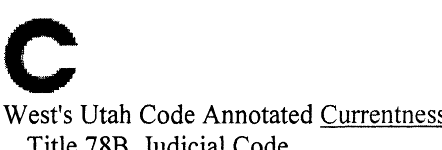
Formerly cited as UT ST § 78-35a-102



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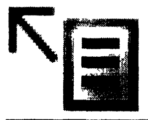
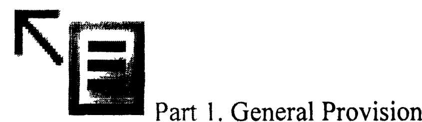

Chapter 9. Post-Conviction Remedies Act (Refs & Annos)


Part 1. General Provisions

§ 78B-9-102. Replacement of prior remedies

(1) This chapter establishes the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). This chapter replaces all prior remedies for review, including extraordinary or common law writs. Proceedings under this chapter are civil and are governed by the rules of civil procedure. Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole.

CREDIT(S)

Laws 2008, c. 3, § 1166, eff. Feb. 7, 2008; Laws 2008, c. 288, § 2, eff. May 5, 2008.

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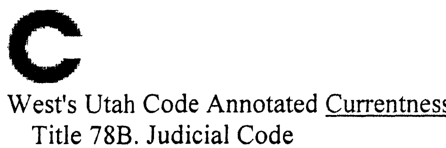
Formerly cited as UT ST § 78-35a-104



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Title 78B. Judicial Code

Chapter 9. Post-Conviction Remedies Act (Refs & Annos)

Part 1. General Provisions

§ 78B-9-104. Grounds for relief--Retroactivity of rule

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

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(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or

(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or

(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted.

(2) The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or Part 4, Post-conviction Determination of Factual Innocence. Claims under Part 3 or Part 4 of this chapter may not be filed as part of a petition under this part, but shall be filed separately and in conformity with the provisions of Part 3 or Part 4.

CREDIT(S)

Laws 2008, c. 3, § 1168, eff. Feb. 7, 2008; Laws 2008, c. 288, § 3, eff. May 5, 2008; Laws 2010, c. 153, § 1, eff. March 25, 2010.

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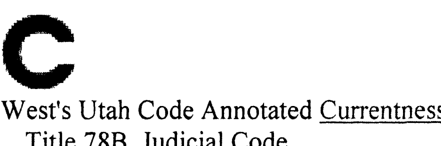
Formerly cited as UT ST § 78-35a-105



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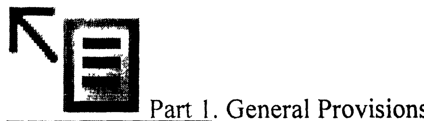
Chapter 9. Post-Conviction Remedies Act (Refs & Annos)



Part 1. General Provisions

§ 78B-9-105. Burden of proof

(1) The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The court may not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record from the criminal case under review.

(2) The respondent has the burden of pleading any ground of preclusion under Section 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

CREDIT(S)

Laws 2008, c. 3, § 1169, eff. Feb. 7, 2008; Laws 2008, c. 288, § 4, eff. May 5, 2008.

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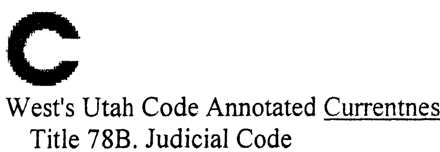
Formerly cited as UT ST § 78-35a-106



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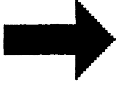
Chapter 9. Post-Conviction Remedies Act (Refs & Annos)

Part 1. General Provisions



§ 78B-9-106. Preclusion of relief--Exception

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion;

(b) was raised or addressed at trial or on appeal;

(c) could have been but was not raised at trial or on appeal;

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or

(e) is barred by the limitation period established in Section 78B-9-107.

(2)(a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.

(b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

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(4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).

CREDIT(S)

Laws 2008, c. 3, § 1170, eff. Feb. 7, 2008; Laws 2008, c. 288, § 5, eff. May 5, 2008; Laws 2010, c. 48, § 1, eff. May 11, 2010.

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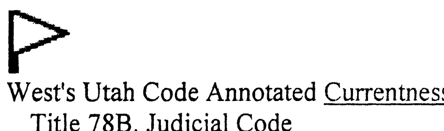

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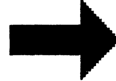

§ 78B-9-107. Statute of limitations for postconviction relief

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this

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Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

CREDIT(S)

Laws 2008, c. 3, § 1171, eff. Feb. 7, 2008; Laws 2008, c. 288, § 6, eff. May 5, 2008; Laws 2008, c. 358, § 1, eff. May 5, 2008.

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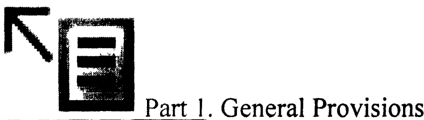
Chapter 9. Post-Conviction Remedies Act (Refs & Annos)



Part 1. General Provisions

§ 78B-9-109. Appointment of pro bono counsel

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition or the appeal contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

CREDIT(S)

Laws 2008, c. 3, § 1173, eff Feb 7, 2008; Laws 2008, c. 288, § 8, eff. May 5, 2008.

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U.C.A. 1953 § 78-35a-102

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART IV. Particular Proceedings
CHAPTER 35a. POST-CONVICTION REMEDIES ACT
PART 1. GENERAL PROVISIONS
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78-35a-102 Replacement of prior remedies.

(1) This chapter establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole.

History: C. 1953, **78-35a-102**, enacted by L. 1996, ch. 235, § 2.

NOTES, REFERENCES, AND ANNOTATIONS

Effective Dates. —Laws 1996, ch. 235 became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

U.C.A. 1953 § 78-35a-102
UT ST § 78-35a-102

END OF DOCUMENT

U.C.A. 1953 § 78-35a-104

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART IV. Particular Proceedings
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PART 1. GENERAL PROVISIONS
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78-35a-104 Grounds for relief —Retroactivity of rule.

(1) Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; or

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received.

(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity.

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U.C.A. 1953 § 78-35a-105

UTAH CODE, 1953
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PART IV. Particular Proceedings
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PART 1. GENERAL PROVISIONS
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78-35a-105 Burden of proof.

The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The respondent has the burden of pleading any ground of preclusion under Section 78-35a-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

History: C. 1953, **78-35a-105**, enacted by L. 1996, ch. 235, § 5.

NOTES, REFERENCES, AND ANNOTATIONS

Effective Dates. —Laws 1996, ch. 235 became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

U.C.A. 1953 § 78-35a-105
UT ST § 78-35a-105

END OF DOCUMENT

U.C.A. 1953 § 78-35a-106

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART IV. Particular Proceedings
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PART 1. GENERAL PROVISIONS
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78-35a-106 Preclusion of relief —Exception.

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion;

(b) was raised or addressed at trial or on appeal;

(c) could have been but was not raised at trial or on appeal;

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or

(e) is barred by the limitation period established in Section 78-35a-107.

(2) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

History: C. 1953, **78-35a-106**, enacted by L. 1996, ch. 235, § 6.

NOTES, REFERENCES, AND ANNOTATIONS

Effective Dates. —Laws 1996, ch. 235 became effective on April 29, 1996, pursuant to Utah Const., Art VI, Sec. 25.

U.C.A. 1953 § 78-35a-106
UT ST § 78-35a-106

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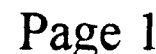

U.C.A. 1953 § 78-35a-107

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART IV. Particular Proceedings
CHAPTER 35a. POST-CONVICTION REMEDIES ACT
PART 1. GENERAL PROVISIONS
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78-35a-107 Statute of limitations for post-conviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

(3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(4) Sections 78-12-35 and 78-12-40 do not extend the limitations period established in this section.

History: C. 1953, 78-12-31.1, enacted by L. 1995, ch. 82, § 1; renumbered by L. 1996, ch. 235, § 7.

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and Reenactments. —Laws 1995, ch. 82, § 1 repeals former § 78-12-31.1, as enacted by Laws 1979, ch. 133, § 1, setting a three-month time limit on the right to petition for a habeas corpus writ, and enacts the present section, effective May 1, 1995.

Amendment Notes. —The 1996 amendment, effective April 29, 1996, renumbered this section, which formerly

U.C.A. 1953 § 78-35a-109

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART IV. Particular Proceedings
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78-35a-109 Appointment of counsel.

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

History: C. 1953, **78-35a-109**, enacted by L. 1996, ch. 235, § 9.

NOTES, REFERENCES, AND ANNOTATIONS

Effective Dates. —Laws 1996, ch. 235 became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

U.C.A. 1953 § 78-35a-109
UT ST § 78-35a-109

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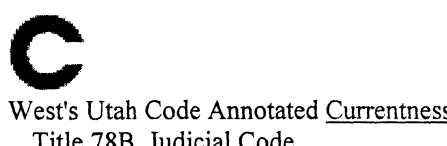
Formerly cited as UT ST § 78-35a-202



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Chapter 9. Post-Conviction Remedies Act (Refs & Annos)

Part 2. Capital Sentence Cases

§ 78B-9-202. Appointment and payment of counsel in death penalty cases

(1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent petitioners.

(2)(a) If a petitioner requests the court to appoint counsel, the court shall determine whether the petitioner is indigent and make findings on the record regarding the petitioner's indigency. If the court finds that the petitioner is indigent, it shall, subject to the provisions of Subsection (5), promptly appoint counsel who is qualified to represent petitioners in post-conviction death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(b) A petitioner who wishes to reject the offer of counsel shall be advised on the record by the court of the consequences of the rejection before the court may accept the rejection.

(3) Attorney fees and litigation expenses incurred in providing the representation provided for in this section and that the court has determined are reasonable shall be paid from state funds by the Division of Finance according to rules established pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(a) In determining whether the requested funds are reasonable, the court should consider:

(i) the extent to which the petitioner requests funds to investigate and develop evidence and legal arguments that

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duplicate the evidence presented and arguments raised in the criminal proceeding; and

(ii) whether the petitioner has established that the requested funds are necessary to develop evidence and legal arguments that are reasonably likely to support post-conviction relief.

(b) The court may authorize payment of attorney fees at a rate of $125 per hour up to a maximum of $60,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).

(c) The court may authorize litigation expenses up to a maximum of $20,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).

(d) The court may authorize the petitioner to apply ex parte for the funds permitted in Subsections (3)(b) and (c) upon a motion to proceed ex parte and if the petitioner establishes the need for confidentiality. The motion to proceed ex parte must be served on counsel representing the state, and the court may not grant the motion without giving the state an opportunity to respond.

(e) In determining whether good cause exists to exceed the maximum sums established in Subsections (3)(b) and (c), the court shall consider:

(i) the extent to which the work done to date and the further work identified by the petitioner duplicates work and investigation performed during the criminal case under review; and

(ii) whether the petitioner has established that the work done to date and the further work identified is reasonably likely to develop evidence or legal arguments that will support post-conviction relief.

(f) The court may permit payment in excess of the maximum amounts established in Subsections (3)(b) and (c) only on the petitioner's motion, provided that:

(i) if the court has granted a motion to file ex parte applications under Subsection (3)(d), the petitioner shall serve the motion to exceed the maximum amounts on an assistant attorney general employed in a division other than the one in which the attorney is employed who represents the state in the post-conviction case; if the court has not granted a motion to file ex parte applications, then the petitioner must serve the attorney representing the state in the post-conviction matter with the motion to exceed the maximum funds;

(ii) if the motion proceeds under Subsection (3)(f)(i), the designated assistant attorney general may not disclose to the attorney representing the state in the post-conviction matter any material the petitioner provides in support of the motion except upon a determination by the court that the material is not protected by or that the petitioner has waived the attorney client privilege or work product doctrine; and

(iii) the court gives the state an opportunity to respond to the request for funds in excess of the maximum amounts provided in Subsections (3)(b) and (c).

(4) Nothing in this chapter shall be construed as creating the right to the effective assistance of post-conviction counsel, and relief may not be granted on any claim that post-conviction counsel was ineffective.

(5) If within 60 days of the request for counsel the court cannot find counsel willing to accept the appointment, the court shall notify the petitioner and the state's counsel in writing. In that event, the petitioner may elect to proceed pro se by serving written notice of that election on the court and state's counsel within 30 days of the court's notice that no counsel could be found. If within 30 days of its notice to the petitioner the court receives no notice that the

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petitioner elects to proceed pro se, the court shall dismiss any pending post-conviction actions and vacate any execution stays, and the state may initiate proceedings under Section 77-19-9 to issue an execution warrant.

CREDIT(S)

Laws 2008, c. 3, § 1176, eff. Feb. 7, 2008; Laws 2008, c. 288, § 9, eff. May 5, 2008; Laws 2008, c. 382, § 2240, eff. May 5, 2008.

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U.C.A. 1953 § 78-35a-202

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART IV. Particular Proceedings
CHAPTER 35a. POST-CONVICTION REMEDIES ACT
PART 2. CAPITAL SENTENCE CASES
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78-35a-202 Appointment and payment of counsel in death penalty cases.

(1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent defendants.

(2) (a) If a defendant requests the court to appoint counsel, the court shall determine whether the defendant is indigent and make findings on the record regarding the defendant's indigency. If the court finds that the defendant is indigent, it shall promptly appoint counsel who is qualified to represent defendants in death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure.

(b) A defendant who wishes to reject the offer of counsel shall be advised on the record by the court of the consequences of the rejection before the court may accept the rejection.

(c) Costs of counsel and other reasonable litigation expenses incurred in providing the representation provided for in this section shall be paid from state funds by the Division of Finance according to rules established pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

History: C. 1953, **78-35a-202**, enacted by L. 1997, ch. 76, § 2.

NOTES, REFERENCES, AND ANNOTATIONS

Effective Dates. — Laws 1997, ch. 76 became effective on May 5, 1997, pursuant to Utah Const., Art. VI, Sec. 25.

U.C.A. 1953 § 78-35a-202
UT ST § 78-35a-202

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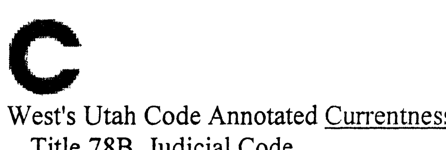

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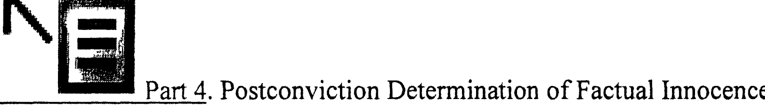
Chapter 9. Post-Conviction Remedies Act (Refs & Annos)



Part 4. Postconviction Determination of Factual Innocence

§ 78B-9-402. Petition for determination of factual innocence--Sufficient allegations--Notification of victim

(1) A person who has been convicted of a felony offense may petition the district court in the county in which the person was convicted for a hearing to establish that the person is factually innocent of the crime or crimes of which the person was convicted .

(2)(a) The petition shall contain an assertion of factual innocence under oath by the petitioner, and shall aver, with supporting affidavits or other credible documents, that:

(i) newly discovered material evidence exists that, if credible, establishes that the petitioner is factually innocent;

(ii) the specific evidence identified by the petitioner in the petition establishes innocence;

(iii) the material evidence is not merely cumulative of evidence that was known;

(iv) the material evidence is not merely impeachment evidence;and

(v) viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent .

(b) The court shall review the petition in accordance with the procedures in Subsection (9)(b), and make a finding that the petition has satisfied the requirements of Subsection (2)(a). If the court finds the petition does not meet all the requirements of Subsection (2)(a), it shall dismiss the petition without prejudice and send notice of the dismissal to the petitioner and the attorney general.

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(3)(a) The petition shall also contain an averment that·

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction motion, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence, or

(ii) a court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence

(b) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the court shall then review the petition to determine if Subsection (3)(a) has been satisfied If the court finds that the requirements of Subsection (3)(a) have not been satisfied, it may dismiss the petition without prejudice and give notice to the petitioner and the attorney general of the dismissal, or the court may enter a finding that based upon the strength of the petition, the requirements of Subsection (3)(a) are waived in the interest of justice.

(4) If the conviction for which the petitioner asserts factual innocence was based upon a plea of guilty, the petition shall contain the specific nature and content of the evidence that establishes factual innocence The court shall review the evidence and may dismiss the petition at any time in the course of the proceedings, if the court finds that the evidence of factual innocence relies solely upon the recantation of testimony or prior statements made by a witness against the petitioner, and the recantation appears to the court to be equivocal or self-serving

(5) A person who has already obtained postconviction relief that vacated or reversed the person's conviction or sentence may also file a petition under this part in the same manner and form as described above, if no retrial or appeal regarding this offense is pending

(6) If some or all of the evidence alleged to be exonerating is biological evidence subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78B-9-301

(7) Except as provided in Subsection (9), the petition shall be in compliance with and governed by Rule 65C, Utah Rules of Civil Procedure, and shall include the underlying criminal case number

(8) After a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel shall cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence which is the subject of the petition

(9)(a) A person who files a petition under this section shall serve notice of the petition and a copy of the petition upon the office of the prosecutor who obtained the conviction and upon the Utah attorney general

(b) The assigned judge shall conduct an initial review of the petition If it is apparent to the court that the petitioner is either merely relitigating facts, issues, or evidence presented in previous proceedings or presenting issues that appear frivolous or speculative on their face, the court shall dismiss the petition, state the basis for the dismissal, and serve notice of dismissal upon the petitioner and the attorney general If, upon completion of the initial review the court does not dismiss the petition, it shall order the attorney general to file a response to the petition The attorney general shall, within 30 days after receipt of the court's order, or within any additional period of time the court allows, answer or otherwise respond to all proceedings initiated under this part

(c) After the time for response by the attorney general under Subsection (9)(b) has passed, the court shall order a

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hearing if it finds the petition meets the requirements of Subsections (2) and (3) and finds there is a bona fide and compelling issue of factual innocence regarding the charges of which the petitioner was convicted.No bona fide and compelling issue of factual innocence exists if the petitioner is merely relitigating facts, issues, or evidence presented in a previous proceeding or if the petitioner is unable to identify with sufficient specificity the nature and reliability of the newly discovered evidence that establishes the petitioner's factual innocence.

(d) If the parties stipulate that the evidence establishes that the petitioner is factually innocent, the court may find the petitioner is factually innocent without holding a hearing.

(10) The court may not grant a petition for a hearing under this part during the period in which criminal proceedings in the matter are pending before any trial or appellate court, unless stipulated to by the parties.

(11) Any victim of a crime that is the subject of a petition under this part, and who has elected to receive notice under Section 77-38-3, shall be notified by the state's attorney of any hearing regarding the petition.

(12) A petition to determine factual innocence under this part, or Part 3, Postconviction Testing of DNA, shall be filed separately from any petition for postconviction relief under Part 1, General Provisions. Separate petitions may be filed simultaneously in the same court.

(13) The procedures governing the filing and adjudication of a petition to determine factual innocence apply to all petitions currently filed or pending and any new petitions filed on or after the effective date of this amendment.

CREDIT(S)

Laws 2008, c. 358, § 6, eff. May 5, 2008; Laws 2009, c. 301, § 1, eff. May 12, 2009; Laws 2010, c. 153, § 3, eff. March 25, 2010.

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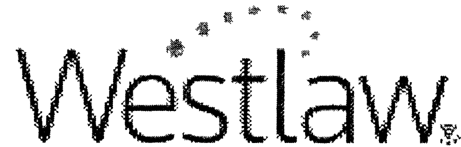

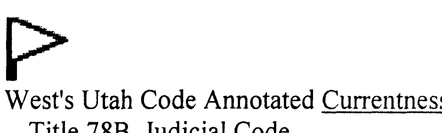

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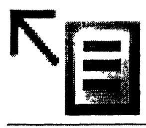
Chapter 9. Post-Conviction Remedies Act (Refs & Annos)

Part 4. Postconviction Determination of Factual Innocence

§ 78B-9-403. Requests for appointment of counsel--Appeals--Postconviction petitions

(1) Subsections 78B-9-109(1) and (2), regarding the appointment of pro bono counsel, apply to any request for the appointment of counsel under this part.

(2) Subsection 78B-9-109(3), regarding effectiveness of counsel, applies to subsequent postconviction petitions and to appeals under this part.

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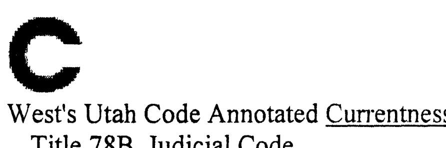

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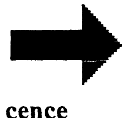
Chapter 9. Post-Conviction Remedies Act (Refs & Annos)

Part 4. Postconviction Determination of Factual Innocence


§ 78B-9-404. Hearing upon petition--Procedures--Court determination of factual innocence

(1)(a) In any hearing conducted under this part, the Utah attorney general shall represent the state.

(b) The burden is upon the petitioner to establish the petitioner's factual innocence by clear and convincing evidence.

(2) The court may consider:

(a) evidence that was suppressed or would be suppressed at a criminal trial; and

(b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its weight and credibility.

(3) In making its determination the court shall consider, in addition to the evidence presented at the hearing under this part, the record of the original criminal case and at any postconviction proceedings in the case.

(4) If the court, after considering all the evidence, determines by clear and convincing evidence that the petitioner:

(a) is factually innocent of one or more offenses of which the petitioner was convicted, the court shall order that those convictions:

(i) be vacated with prejudice; and

(ii) be expunged from the petitioner's record; or

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(b) did not commit one or more offenses of which the petitioner was convicted, but the court does not find by clear and convincing evidence that the petitioner did not commit any lesser included offenses relating to those offenses, the court shall modify the original conviction and sentence of the petitioner as appropriate for the lesser included offense, whether or not the lesser included offense was originally submitted to the trier of fact.

(5)(a) If the court, after considering all the evidence, does not determine by clear and convincing evidence that the petitioner is factually innocent of the offense or offenses the petitioner is challenging and does not find that Subsection (4)(b) applies, the court shall deny the petition regarding the offense or offenses.

(b) If the court finds that the petition was brought in bad faith, it shall enter the finding on the record, and the petitioner may not file a second or successive petition under this section without first applying to and obtaining permission from the court which denied the prior petition.

(6) At least 30 days prior to a hearing on a petition to determine factual innocence, the petitioner and the respondent shall exchange information regarding the evidence each intends to present at the hearing. This information shall include:

(a) a list of witnesses to be called at the hearing; and

(b) a summary of the testimony or other evidence to be introduced through each witness, including any expert witnesses.

(7) Each party is entitled to a copy of any expert report to be introduced or relied upon by that expert or another expert at least 30 days prior to hearing.

CREDIT(S)

Laws 2008, c. 358, § 8, eff. May 5, 2008; Laws 2010, c. 153, § 4, eff. March 25, 2010.

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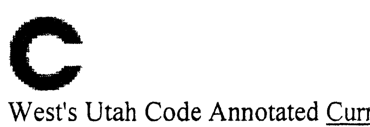

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Title 76. Utah Criminal Code

Chapter 3. Punishments (Refs & Annos)

Part 2. Sentencing

§ 76-3-207. Capital felony--Sentencing proceeding

(1)(a) When a defendant has pled guilty to or been found guilty of a capital felony, there shall be further proceedings before the court or jury on the issue of sentence.

(b) In the case of a plea of guilty to a capital felony, the sentencing proceedings shall be conducted before a jury or, upon request of the defendant and with the approval of the court and the consent of the prosecution, by the court which accepted the plea.

(c)(i) When a defendant has been found guilty of a capital felony, the proceedings shall be conducted before the court or jury which found the defendant guilty, provided the defendant may waive hearing before the jury with the approval of the court and the consent of the prosecution, in which event the hearing shall be before the court.

(ii) If circumstances make it impossible or impractical to reconvene the same jury for the sentencing proceedings, the court may dismiss that jury and convene a new jury for the proceedings.

(d) If a retrial of the sentencing proceedings is necessary as a consequence of a remand from an appellate court, the sentencing authority shall be determined as provided in Subsection (6).

(2)(a) In capital sentencing proceedings, evidence may be presented on:

(i) the nature and circumstances of the crime;

(ii) the defendant's character, background, history, and mental and physical condition;

(iii) the victim and the impact of the crime on the victim's family and community without comparison to other

persons or victims; and

(iv) any other facts in aggravation or mitigation of the penalty that the court considers relevant to the sentence.

(b) Any evidence the court considers 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 the sentence of death.

(3) Aggravating circumstances include those outlined in Section 76-5-202.

(4) Mitigating circumstances include:

(a) the defendant has no significant history of prior criminal activity;

(b) the homicide was committed while the defendant was under the influence of mental or emotional disturbance;

(c) the defendant acted under duress or under the domination of another person;

(d) at the time of the homicide, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired as a result of a mental condition, intoxication, or influence of drugs, except that "mental condition" under this Subsection (4)(d) does not mean an abnormality manifested primarily by repeated criminal conduct;

(e) the youth of the defendant at the time of the crime;

(f) the defendant was an accomplice in the homicide committed by another person and the defendant's participation was relatively minor; and

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

(5)(a) The court or jury, as the case may be, shall retire to consider the penalty. Except as provided in Subsection 76-3-207.5(2), in all proceedings before a jury, under this section, it shall be instructed as to the punishment to be imposed upon a unanimous decision for death and that the penalty of either an indeterminate prison term of not less than 25 years and which may be for life or life in prison without parole, shall be imposed if a unanimous decision for death is not found.

(b) The death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances. 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.

(c) If the jury is unable to reach a unanimous decision imposing the sentence of death, the jury shall then determine whether the penalty of life in prison without parole shall be imposed, except as provided in Subsection 76-3-207.5(2). The penalty of life in prison without parole shall only be imposed if the jury determines that the sentence of life in prison without parole is appropriate. If the jury reports agreement by 10 jurors or more to impose the sentence of life in prison without parole, the court shall discharge the jury and shall impose the sentence of life in prison without parole. If 10 jurors or more do not agree upon a sentence of life in prison without parole, the court shall discharge the jury and impose an indeterminate prison term of not less than 25 years and which may be

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for life.

(d) If the defendant waives hearing before the jury as to sentencing, with the approval of the court and the consent of the prosecution, the court shall determine the appropriate penalty according to the standards of Subsections (5)(b) and (c).

(e) If the defendant is sentenced to more than one term of life in prison with or without the possibility of parole, or in addition to a sentence of life in prison with or without the possibility of parole the defendant is sentenced for other offenses which result in terms of imprisonment, the judge shall determine whether the terms of imprisonment shall be imposed as concurrent or consecutive sentences in accordance with Section 76-3-401.

(6) Upon any appeal by the defendant where the sentence is of death, the appellate court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court for new sentencing proceedings to the extent necessary to correct the error or errors. An error in the sentencing proceedings may not result in the reversal of the conviction of a capital felony. In cases of remand for new sentencing proceedings, all exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing proceedings are admissible in the new sentencing proceedings, and if the sentencing proceeding was before a:

(a) jury, a new jury shall be impaneled for the new sentencing proceeding unless the defendant waives the hearing before the jury with the approval of the court and the consent of the prosecution, in which case the proceeding shall be held according to Subsection (6)(b) or (c), as applicable;

(b) judge, the original trial judge shall conduct the new sentencing proceeding; or

(c) judge, and the original trial judge is unable or unavailable to conduct a new sentencing proceeding, then another judge shall be designated to conduct the new sentencing proceeding, and the new proceeding will be before a jury unless the defendant waives the hearing before the jury with the approval of the court and the consent of the prosecution.

(7) If the penalty of death is held to be unconstitutional by the Utah Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause the person to be brought before the court, and the court shall sentence the person to life in prison without parole.

(8)(a) If the appellate court's final decision regarding any appeal of a sentence of death precludes the imposition of the death penalty due to mental retardation or subaverage general intellectual functioning under Section 77-15a-101, the court having jurisdiction over a defendant previously sentenced to death for a capital felony shall cause the defendant to be brought before the sentencing court, and the court shall sentence the defendant to life in prison without parole.

(b) If the appellate court precludes the imposition of the death penalty under Subsection (8)(a), but the appellate court finds that sentencing the defendant to life in prison without parole is likely to result in a manifest injustice, it may remand the case to the sentencing court for further sentencing proceedings to determine if the defendant should serve a sentence of life in prison without parole or an indeterminate prison term of not less than 25 years and which may be for life.

CREDIT(S)

Laws 1973, c. 196, § 76-3-207; Laws 1982, c. 19, § 1; Laws 1991, c. 10, § 6; Laws 1992, c. 142, § 3; Laws 1995, c. 352, § 5, eff. May 1, 1995; Laws 1997, c. 286, § 1, eff. May 5, 1997; Laws 1998, c. 137, § 1, eff. May 4, 1998; Laws 2001, c. 209, § 5, eff. April 30, 2001; Laws 2002, c. 24, § 1, eff. May 6, 2002; Laws 2002, c. 26, § 1, eff. May 6,

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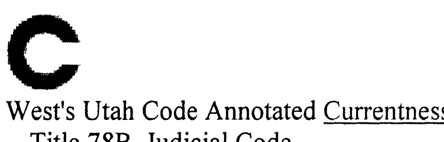
Formerly cited as UT ST § 78-46-2



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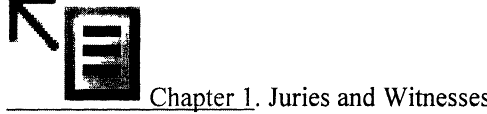
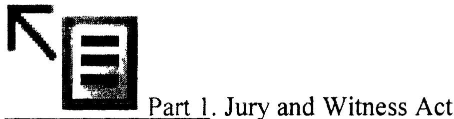

Chapter 1. Juries and Witnesses


Part 1. Jury and Witness Act

§ 78B-1-103. Jurors selected from random cross section --Opportunity and obligation to serve

(1) It is the policy of this state that:

(a) persons selected for jury service be selected at random from a fair cross section of the population of the county:

(b) all qualified citizens have the opportunity in accordance with this chapter to be considered for service; and

(c) all qualified citizens are obligated to serve when summoned, unless excused.

(2) A qualified citizen may not be excluded from jury service on account of race, color, religion, sex, national origin, age, occupation, disability, or economic status.

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Title 77. Utah Code of Criminal Procedure

Chapter 38. Rights of Crime Victims Act

§ 77-38-9. Representative of victim--Court designation--Representation in cases involving minors--Photographs in homicide cases

(1)(a) A victim of a crime may designate, with the approval of the court, a representative who may exercise the same rights that the victim is entitled to exercise under this chapter.

(b) Except as otherwise provided in this section, the victim may revoke the designation at any time.

(c) In cases where the designation is in question, the court may require that the designation of the representative be made in writing by the victim.

(2) In cases in which the victim is deceased or incapacitated, upon request from the victim's spouse, parent, child, or close friend, the court shall designate a representative or representatives of the victim to exercise the rights of a victim under this chapter on behalf of the victim. The responsible prosecuting agency may request a designation to the court.

(3)(a) If the victim is a minor, the court in its discretion may allow the minor to exercise the rights of a victim under this chapter or may allow the victim's parent or other immediate family member to act as a representative of the victim.

(b) The court may also, in its discretion, designate a person who is not a member of the immediate family to represent the interests of the minor.

(4) The representative of a victim of a crime shall not be:

(a) the accused or a person who appears to be accountable or otherwise criminally responsible for or criminally involved in the crime or conduct, a related crime or conduct, or a crime or act arising from the same conduct, criminal episode, or plan as the crime or conduct is defined under the laws of this state;

(b) a person in the custody of or under detention of federal, state, or local authorities; or

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(c) a person whom the court in its discretion considers to be otherwise inappropriate.

(5) Any notices that are to be provided to a victim pursuant to this chapter shall be sent to the victim or the victim's lawful representative.

(6) On behalf of the victim, the prosecutor may assert any right to which the victim is entitled under this chapter, unless the victim requests otherwise or exercises his own rights.

(7) In any homicide prosecution, the prosecution may introduce a photograph of the victim taken before the homicide to establish that the victim was a human being, the identity of the victim, and for other relevant purposes.

CREDIT(S)

Laws 1994, c. 198, § 10; Laws 1995, c. 352, § 15, eff. May 1, 1995.

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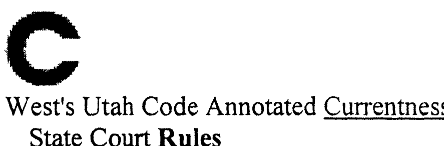

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State Court **Rules**

Utah **Rules** of Civil Procedure (Refs & Annos)

Part VIII. Provisional and Final Remedies and Special Proceedings

RULE 65C. POST-CONVICTION RELIEF

(a) Scope. This **rule** governs proceedings in all petitions for **post-conviction relief** filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

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(d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(e)(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h) (1) Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(h) (2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the re-

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quirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days The court may grant one additional 20 day period to amend for good cause shown

(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General In all other cases, the respondent is the governmental entity that prosecuted the petitioner

(j) Answer or other response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b) Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion No further pleadings or amendments will be permitted unless ordered by the court

(k) Hearings. After pleadings are closed the court shall promptly set the proceeding for a hearing or otherwise dispose of the case The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition At the prehearing conference, the court may

(k)(1) consider the formation and simplification of issues,

(k)(2) require the parties to identify witnesses and documents, and

(k)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing

(l) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel The prehearing conference may be conducted by means of telephone or video conferencing The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding The court may conduct any hearing at the correctional facility where the petitioner is confined

(m) Discovery; records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing The court may order either the petitioner or the respondent to obtain any relevant transcript or court records

(n) Orders; stay.

(n)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure

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(n)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(n)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(o) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(p) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

CREDIT(S)

[Adopted effective July 1, 1996; amended effective November 1, 2008; January 4, 2010.]

Current with amendments effective April 1, 2010.

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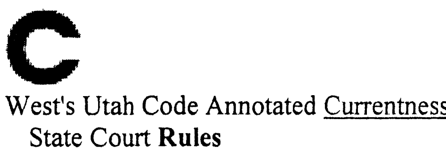

West's Utah Code Annotated Currentness
State Court **Rules**

Utah **Rules** of Criminal Procedure

RULE 29. DISABILITY AND DISQUALIFICATION OF A JUDGE OR CHANGE OF VENUE

(a) If, by reason of death, sickness, or other disability, the judge before whom a trial has begun is unable to continue with the trial, any other judge of that court or any judge assigned by the presiding officer of the Judicial Council, upon certifying that the judge is familiar with the record of the trial, may, unless otherwise disqualified, proceed with and finish the trial, but if the assigned judge is satisfied that neither he nor another substitute judge can proceed with the trial, the judge may, in his discretion, grant a new trial.

(b) If, by reason of death, sickness, or other disability, the judge before whom a defendant has been tried is unable to perform the duties required of the court after a verdict of guilty, any other judge of that court or any judge assigned by the presiding officer of the Judicial Council may perform those duties.

(c)(1)(A) A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias or prejudice, or conflict of interest.

(c)(1)(B) The motion shall be filed after commencement of the action, but not later than 20 days after the last of the following:

(c)(1)(B)(i) assignment of the action or hearing to the judge;

(c)(1)(B)(ii) appearance of the party or the party's attorney; or

(c)(1)(B)(iii) the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

If the last event occurs fewer than 20 days prior to a hearing, the motion shall be filed as soon as practicable.

(c)(1)(C) Signing the motion or affidavit constitutes a certificate under Rule 11, Utah Rules of Civil Procedure and

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subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action.

(c)(2) The judge against whom the motion and affidavit are directed shall, without further hearing, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. The judge shall take no further action in the case until the motion is decided. If the judge grants the motion, the order shall direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. Assignment in justice court cases shall be in accordance with Utah Code Ann. § 78-5-138. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(c)(3)(A) If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so. Assignment in justice court cases shall be in accordance with Utah Code Ann. § 78-5-138.

(c)(3)(B) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion and affidavit an affidavit responsive to questions posed by the reviewing judge.

(c)(3)(C) The reviewing judge may deny a motion not filed in a timely manner.

(d)(1) If the prosecution or a defendant in a criminal action believes that a fair and impartial trial cannot be had in the jurisdiction where the action is pending, either may, by motion, supported by an affidavit setting forth facts, ask to have the trial of the case transferred to another jurisdiction.

(d)(2) If the court is satisfied that the representations made in the affidavit are true and justify transfer of the case, the court shall enter an order for the removal of the case to the court of another jurisdiction free from the objection and all records pertaining to the case shall be transferred forthwith to the court in the other county. If the court is not satisfied that the representations so made justify transfer of the case, the court shall either enter an order denying the transfer or order a formal hearing in court to resolve the matter and receive further evidence with respect to the alleged prejudice.

(e) When a change of judge or place of trial is ordered all documents of record concerning the case shall be transferred without delay to the judge who shall hear the case.

CREDIT(S)

[Amended effective July 22, 1999; November 1, 2002; November 1, 2006.]

Current with amendments effective April 1, 2010.

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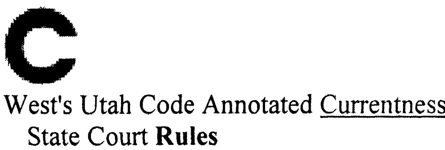

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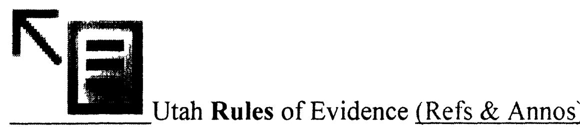

Utah **Rules** of Evidence (Refs & Annos)

Article VI. **Witnesses**

RULE 606. COMPETENCY OF JUROR AS WITNESS

(a) At the trial. A member of the **jury** may not testify as a **witness** before that **jury** in the trial of the case in which the **juror** is sitting. If the **juror** is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the **jury**.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a **juror** may not testify as to any matter or statement occurring during the course of the **jury's** deliberations or to the effect of anything upon that or any other **juror's** mind or emotions as influencing the **juror** to assent to or dissent from the verdict or indictment or concerning the **juror's** mental processes in connection therewith, except that a **juror** may testify on the question whether extraneous prejudicial information was improperly brought to the **jury's** attention or whether any outside influence was improperly brought to bear upon any **juror**. Nor may a **juror's** affidavit or evidence of any statement by the **juror** concerning a matter about which the **juror** would be precluded from testifying be received for these purposes.

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[Amended effective October 1, 1992.]

Current with amendments effective April 1, 2010.

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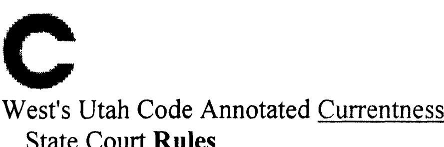

West's Utah Code Annotated Currentness
State Court **Rules**

Utah **Rules** of Evidence (Refs & Annos)

Article XI. Miscellaneous **Rules**

RULE 1101. APPLICABILITY OF RULES

(a) Courts and magistrates. These **rules** apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivisions (b) and (c).

(b) Rules inapplicable. The **rules** (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact which are to be determined under **Rule** 104(a);

(2) Grand jury proceedings;

(3) Miscellaneous proceedings for extradition, sentencing or granting or revocation of probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise;

(4) Contempt proceedings in which the court may act summarily.

(c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under **Rule** 1102.

CREDIT(S)

[Amended effective January 1, 1995; April 1, 1999.]

Current with amendments effective April 1, 2010.

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