IN THE SUPREME COURT OF THE STATE OF UTAH

Troy Michael Kell, Petitioner /Appellant, v. LARRY BENZON, Warden of the Utah State Prison, Respondent /Appellee.	PUBLIC Case No. 20180788 District Court Case. No. 180600004 Death Penalty Case

APPELLANT'S BRIEF

Appeal from the Sixth Judicial District Court,
In and For Sanpete County, Honorable Wallace Lee

Andrew F. Peterson
Erin Riley
Assistant Solicitors General
Utah Attorney General's Office
Criminal Appeals
160 E. 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84111
(801) 366-0180 telephone
andrewpeterson@agutah.gov
eriley@agutah.gov

Attorneys for Respondent / Appellee

Jonathan T. Nish (UT Bar No. 14739)
B. Kent Morgan (UT Bar No. 3945)
Morgan, Nish & Associates, P.C.
975 West 850 South
Woods Cross, UT 84087
(801) 397-1780 telephone

Jon M. Sands
Federal Public Defender
District of Arizona
Lindsey Layer (VA No. 79151)
Alexandra H. LeClair (AZ No. 026269)
Arizona Federal Public Defender Office
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
(602) 889-3960 facsimile
Lindsey_Layer@fd.org
Alexandra_LeClair@fd.org

Attorneys for Petitioner-Appellant Kell

STATEMENT OF PARTIES

I. List of Current Parties

a. Petitioner-Appellant: Troy Michael Kell

Counsel:

Jonathan T. Nish (UT Bar No. 14739)
B. Kent Morgan (UT Bar No. 3945)
Morgan, Nish & Associates, P.C.
975 West 850 South
Woods Cross, UT 84087
(801) 397-1780 telephone

Jon M. Sands
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Arizona Federal Public Defender Office
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
(602) 889-3960 facsimile
Lindsey_Layer@fd.org
Alexandra_LeClair@fd.org

b. Respondent-Appellee: Larry Benzon, Warden of the Utah State Prison

Counsel:

Andrew F. Peterson
Erin Riley
Assistant Solicitors General
Utah Attorney General's Office
Criminal Appeals
160 E. 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84111
(801) 366-0180 telephone
andrewpeterson@agutah.gov
eriley@agutah.gov

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INTRODUCTION

Mr. Kell appeals the district court's order granting summary judgment on his post-conviction petition, in which he alleged that the trial judge gave jurors a supplemental instruction during their penalty phase deliberations, outside the presence of Mr. Kell or his counsel, which unconstitutionally shifted the burden of proof to Mr. Kell to prove that his life should be spared. This claim could have been raised in Mr. Kell's initial post-conviction proceedings, but was not, due to ineffective assistance of post-conviction counsel. At the time of his initial post-conviction proceedings, Mr. Kell had a substantive right to the effective assistance of post-conviction counsel, *see Menzies v. Galetka*, 2006 UT 81, however Mr. Kell's post-conviction counsel conducted almost no investigation, including failing to interview even a single juror, and filed a petition which the federal district court in this case called "perfunctory." (Mem. Decision and Order, *Kell v. Benzon*, No. 2:07-CV-359-CW (D. Utah, Nov. 16, 2017), ECF No. 258 at 5.)

The district court agreed that Mr. Kell had a right to the effective assistance of counsel in his initial post-conviction proceedings, (PCR II ROA at 909),[1] but, by granting

[1] Mr. Kell will refer to several different dockets in this brief, as well as transcripts from prior state court proceedings. Filings from state trial court proceedings are referenced as "ROA" followed by the paginated number prepared by the trial court for Mr. Kell's direct appeal (*e.g.* ROA 646.) Transcripts from the state court trial will be referred to as "Tr. (date) at (page(s))," followed by a description of the proceeding if needed to distinguish proceedings. Filings from Mr. Kell's initial state post-conviction proceedings will be referred to as "PCR ROA" followed by the paginated number from that record. References to the record on appeal in the current proceedings will be designated as "PCR II ROA" followed by a page number.

summary judgment and dismissing his petition, left him without a mechanism to enforce that right. This Court should find that the default of Mr. Kell's claim is excused as a result of the ineffective assistance of his post-conviction counsel, in violation of his substantive rights. In the alternative, the Court should recognize and apply the egregious injustice exception contemplated in *Winward v. State*, 2012 UT 85.

Mr. Kell was tried for capital murder inside in the confines of the prison where the crime for which he was on trial occurred. While the jury deliberated just yards away from the scene of the crime, the trial judge came into the jury room and, without the presence of Mr. Kell or his lawyers, contradicted his prior instructions, telling jurors that it was Mr. Kell who bore the burden of establishing that his life should be spared. Neither the jury's question nor the judge's instruction were entered into the record. Because Mr. Kell's post-conviction counsel failed to conduct a reasonable investigation of Mr. Kell's case, in violation of Mr. Kell's statutory rights, this claim was defaulted. As a result, unless this Court recognizes an avenue for Mr. Kell to excuse the default, the most likely outcome is that no court will ever address this significant constitutional violation on the merits.

STATEMENT OF THE ISSUES

I. Whether Mr. Kell's Fifth and Fourteenth Amendment rights were violated when the trial judge gave jurors a supplemental instruction during penalty phase deliberations, outside the presence of Mr. Kell or his counsel, that shifted the burden of proof to Mr. Kell

Mr. Kell raised this claim in his Petition and Memorandum in Support. (PCR II ROA 24-29.) The Court reviews the denial of post-conviction relief for correctness, with

"no deference to the district court's legal conclusions." *State v. Poole*, 2010 UT 25, ¶ 8; *see also Wickham v. Galetka*, 2002 UT 72, ¶ 7 ("Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness, giving no deference to the post-conviction court's conclusion.").

II. Whether Mr. Kell's right to the effective assistance of counsel in his prior post-conviction proceedings may be cause to overcome any procedural default of his underlying claim

Mr. Kell raised this argument in his Memorandum in Support of his Petition and in his Memorandum Opposing Motion for Summary Judgment. (PCR II ROA 29-34, 808-14.) The Court reviews the denial of post-conviction relief for correctness, with "no deference to the district court's legal conclusions." *Poole*, 2010 UT 25, ¶ 8; *see also Wickham*, 2002 UT 72, ¶ 7 ("Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness, giving no deference to the post-conviction court's conclusion.").

III. Whether the district court erred when it determined that Mr. Kell's claim, which was defaulted in 2005 due to the ineffective assistance of prior post-conviction counsel, was nonetheless subject to the 2008 amendments to the Post-Conviction Remedies Act ("PCRA") and also could not be raised in a new petition for post-conviction relief

These arguments were addressed in Mr. Kell's Memorandum Opposing Motion for Summary Judgment. (PCR II ROA 807-14.) The Court reviews the denial of post-conviction relief for correctness, with "no deference to the district court's legal conclusions." *Poole*, 2010 UT 25, ¶ 8; *see also Wickham*, 2002 UT 72, ¶ 7 ("Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law

reviewed for correctness, giving no deference to the post-conviction court's conclusion.").

IV. Whether the egregious-injustice exception, outlined by the Court in *Winward v. State*, provides an exception to the procedural default rules of the PCRA

This argument was raised in Mr. Kell's Memorandum Opposing Motion for Summary Judgment. (PCR II ROA 814-19.) The Court reviews the denial of post-conviction relief for correctness, with "no deference to the district court's legal conclusions." *Poole*, 2010 UT 25, ¶ 8; *see also Wickham*, 2002 UT 72, ¶ 7 ("Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness, giving no deference to the post-conviction court's conclusion.").

STATEMENT OF THE CASE

I. Statement of Facts

On July 19, 1994, Petitioner Troy Michael Kell, along with his co-defendants, Eric Daniels, John Cannistraci, and Paul Payne, was charged with the aggravated murder of Lonnie Blackmon. (ROA 2-3.) The charging documents alleged that Mr. Kell committed the offense (1) while confined in a correctional institution; (2) after having been previously convicted of first degree murder and robbery on May 18, 1987; and (3) while under a sentence of life imprisonment for that same conviction. (ROA 2-3.) On September 23, 1994, the State filed an Amended Information which additionally alleged that Mr. Kell committed the homicide "in an especially heinous, atrocious, cruel, or exceptionally depraved manner." (ROA 120-21.) All pre-trial and trial proceedings were held inside the Central Utah Correctional Facility (CUCF) prison, in a room that was not designated as

public courtroom until November 15, 1995.

Jury voir dire began in Mr. Kell's case inside CUCF prison on June 6, 1996, and lasted through June 12, 1996. (ROA 2071-83.) The guilt phase of the trial lasted from June 13, 1996, through June 21, 1996. (ROA 2084-2154.) On June 21, 1996, jurors found Mr. Kell guilty of aggravated murder. (ROA 2328.) The jurors also found all four aggravating circumstances proven beyond a reasonable doubt. (ROA 2329.)

The penalty phase began on June 24, 1996. (ROA 2155.) On June 26, 1996, the jury returned a verdict of death. (ROA 2369.) Mr. Kell was sentenced to death by the trial judge on August 1, 1996. (Tr. 8/1/1996.) The trial judge stated that he was required, by state statute, to follow the jury's verdict and impose a death sentence. (Tr. 8/1/1996 at 5908.)

In the course of investigating his federal habeas petition, Mr. Kell's federal habeas counsel spoke with the jurors and obtain signed declarations in May 2012. (*See* PCR II ROA 51-57) (Addendums 4-6.) Those declarations state that while jurors were deliberating during the penalty phase, the trial judge entered the room inside CUCF where jurors were deliberating and gave the jury an unconstitutional instruction, outside of the presence of Mr. Kell and his counsel, which shifted the burden of proof in the sentencing determination.

Three jurors specifically recalled the judge providing clarification for them on a point of law during the penalty phase deliberations. One of these jurors specifically recalled that she had a difficult time voting for the death penalty until the trial judge came and spoke to jurors and told them "that Kell's attorneys had to show us that Kell's life should be spared." (PCR II ROA 56 ¶ 2) (Addendum 6.) The judge's supplemental instruction was

decisive for this juror in voting for death. (PCR II ROA 56 ¶ 4) (Addendum 6.) Two other jurors similarly recalled the judge giving an additional instruction to the jury. (PCR II ROA 51, 53-54) (Addendums 4 & 5.) There are no indications in the trial transcripts or the record on appeal of a question from the jury after the beginning of deliberations, during either the guilt or penalty phases. (Tr. 6/21/1996 at 5464-67; Tr. 6/25/1996 at 5735-37; Tr. 6/26/1996 at 5742.)

II. Procedural History

On August 1, 1996, Mr. Kell was sentenced to death in the Sixth District Court of Sanpete County, Utah. (Tr. 8/1/1996.) Mr. Kell's direct appeal was denied on November 1, 2002. *State v. Kell*, 2002 UT 106 (*Kell I*). Attorney Michael Esplin was initially appointed to represent Mr. Kell in his state post-conviction proceedings and filed a Preliminary Petition for Post-Conviction Relief in the state district court on May 16, 2003. (PCR ROA 1-5a.) Subsequently, Mr. Esplin withdrew and attorneys Aric Cramer and William Morrison were appointed. (PCR ROA 42-43, 54-55.) Mr. Cramer and Mr. Morrison filed an Amended Petition for Post-Conviction Relief on August 1, 2005. (PCR II ROA 252-72) (Addendum 3.) The petition was only 21 pages in length, contained only one case citation, and appended no declarations or other new evidence. The state moved to dismiss the petition on December 2, 2012. (PCR ROA 290-93.) The state court granted the motion to dismiss on January 23, 2007, and the Utah Supreme Court affirmed the dismissal on September 5, 2008. *Kell v. State*, 2008 UT 62 (*Kell II*).

Federal habeas counsel were appointed on May 31, 2007, while Mr. Kell's initial

state post-conviction proceedings were still ongoing. Following denial of his post-conviction appeal by the Utah Supreme Court on September 5, 2008, Mr. Kell filed a Motion for Relief Pursuant to Utah Rule 60(b) in the state court on January 13, 2009. (PCR ROA 684-851.) In his Rule 60(b) motion, Mr. Kell alleged that he had received ineffective assistance of counsel in his post-conviction proceedings because counsel had failed to investigate and failed to raise many meritorious claims. On May 27, 2009, federal habeas counsel filed an initial petition in Mr. Kell's federal habeas case. (Initial Pet. for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, *Kell v. Benzon*, No. 2:07-CV-359-CW-PMW (D. Utah, May 27, 2009), ECF No. 36.) On June 12, 2009, counsel filed a Motion to Stay Federal Habeas Proceedings to resolve previously-pending state-court litigation. (Mot. to Stay Fed. Habeas Proc., *Kell v. Benzon*, No. 2:07-CV-359 (D. Utah, Jun. 12, 2009), ECF Nos. 40, 41.) In its order on Mr. Kell's Motion to Stay, the federal district court noted that Mr. Kell had filed a "protective federal habeas petition," despite still-pending state court litigation, in order to ensure compliance with the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") statute of limitations. (Mem. Decision and Order Granting Stay, *Kell v. Benzon*, No. 2:07-CV-359-CW-PMW (D. Utah, Oct. 10, 2009), ECF No. 51.) The district court granted the motion and stayed the case while the proceedings in state court were completed.

The Utah Supreme Court issued its opinion on the Rule 60(b) appeal on May 4, 2012. *See Kell v. State*, 2012 UT 25 (*Kell III*). Rehearing was denied on August 29, 2012 and the case was remitted on September 24, 2012. *See id*.

Mr. Kell filed his Amended Petition for Writ of Habeas Corpus in the federal district court on January 14, 2013. (Am. Pet. for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, *Kell v. Benzon*, No. 2:07-CV-359-CW-PMW (D. Utah, Jan. 14, 2013), ECF No. 94.) In his Amended Petition, Mr. Kell included for the first time the claim that is the subject of this appeal, alleging that the trial judge gave jurors a supplemental instruction, outside the presence of Mr. Kell and his counsel, that unconstitutionally shifted the burden of proof to Mr. Kell in the penalty phase. (Am. Pet. for Writ of Habeas Corpus, *Kell v. Benzon*, No. 2:07-CV-359-CW-PMW (D. Utah, Jan. 14, 2013), ECF No. 94.)

Following the completion of litigation regarding discovery and evidentiary development, Mr. Kell filed a motion to stay the federal habeas proceedings pursuant to *Rhines* to allow him to return to state court to exhaust two claims that had not previously been exhausted. (Mot. to Stay Fed. Habeas Proc. and Mem. in Supp., *Kell v. Benzon*, No. 2:07-CV-359-CW-PMW (D. Utah, Sep. 28, 2017), ECF No. 245.) On November 16, 2017, the district court granted Mr. Kell's *Rhines* motion in part. (Mem. Decision and Order, *Kell v. Benzon*, No. 2:07-CV-359-CW (D. Utah, Nov. 16, 2017), ECF No. 258.) The district court held that Mr. Kell had established good cause under *Rhines* based on state post-conviction counsel's deficient performance. (Mem. Decision and Order, *Kell v. Benzon*, No. 2:07-CV-359-CW (D. Utah, Nov. 16, 2017), ECF No. 258 at 5.) The court found that post-conviction counsel "filed a perfunctory petition, failed to conduct even a cursory investigation of the case, including failing to interview even a single juror, and admitted that none of these decisions were strategic." (Mem. Decision and Order, *Kell v. Benzon*,

No. 2:07-CV-359-CW (D. Utah, Nov. 16, 2017), ECF No. 258 at 5.) Counsel's decision to limit investigation could not have been strategic, the court found, "because counsel had not conducted any investigation at all." (Mem. Decision and Order, *Kell v. Benzon*, No. 2:07-CV-359-CW (D. Utah, Nov. 16, 2017), ECF No. 258 at 5.) The court also found "no indication that Kell has engaged in intentional or abusive dilatory litigation tactics." (Mem. Decision and Order, *Kell v. Benzon*, No. 2:07-CV-359-CW (D. Utah, Nov. 16, 2017), ECF No. 258 at 11.) The court found that Mr. Kell's claim alleging that the trial judge gave jurors a supplemental instruction during penalty phase deliberations off the record and outside the presence of counsel, was "potentially significant." (Mem. Decision and Order, *Kell v. Benzon*, No. 2:07-CV-359-CW (D. Utah, Nov. 16, 2017), ECF No. 258 at 10.)

Pursuant to the district court's stay order and authorization for federal habeas counsel to represent him in state court, Mr. Kell filed a petition for post-conviction review in the Sixth Judicial District Court in and for Sanpete County on January 16, 2018. (*See* PCR II ROA 1-36.) On July 3, 2018, the State responded by filing a Motion for Summary Judgment. Following responsive briefing, the Honorable Wallace A. Lee granted the State's Motion for Summary Judgement and dismissed Mr. Kell's Petition for Post-Conviction Relief. (*See* PCR II ROA 906-18) (Addendum 2.) This appeal followed, in which Mr. Kell is challenging the legality of his sentence of death under the state and federal constitutions.

SUMMARY OF ARGUMENT

The district court improperly dismissed Mr. Kell's claim that his Fifth and Fourteenth Amendment rights were violated when the trial judge gave jurors a supplemental instruction during their penalty phase deliberations, outside the presence of Mr. Kell or his counsel, that unconstitutionally shifted the burden of proof to Mr. Kell to demonstrate that his life should be spared. This claim was supported by declarations from three jurors.

This claim should have been raised in Mr. Kell's initial post-conviction proceedings, however it was defaulted due to the ineffective assistance of Mr. Kell's post-conviction counsel. At the time, Mr. Kell had a substantive right to the effective assistance of post-conviction counsel. In a declaration submitted with Mr. Kell's federal habeas petition, post-conviction counsel acknowledged that he conducted minimal investigation during Mr. Kell's post-conviction proceedings and that it did not occur to him to interview jurors. Ultimately, counsel filed a petition that was just 21 pages in length, a large portion of which simply repeated claims from Mr. Kell's direct appeal, contained only one case citation, and did not append a single declaration or any other new evidence.

The district court erred in determining that Mr. Kell's claim was procedurally barred because it should have been raised in a Rule 60(b) motion in Mr. Kell's initial proceedings. Under this Court's decisions in *Menzies v. Galetka*, 2006 UT 81, and in *Kell III*, 2012 UT 25, there is no support for the district court's conclusion. The district court recognized that "Mr. Kell had the right to the effective assistance of counsel in his initial petition," however

its decision would leave Mr. Kell in the untenable position of having a right with no remedy. The district court also erred in addressing Mr. Kell's claim as though it were defaulted in 2013, instead of when it was actually defaulted in 2005. Because Mr. Kell's right to the effective assistance of counsel in his initial post-conviction proceedings cannot retroactively be extinguished, this Court should find that the PCRA that was in effect at the time Mr. Kell's claim was defaulted in 2005.

In the alternative, this Court should hold that the egregious injustice exception to the PCRA's procedural bars, contemplated by this Court in *Winward v. State*, 2012 UT 85, applies and is satisfied here. Mr. Kell has satisfied the threshold requirements of *Winward* because he has demonstrated the meritoriousness of his claim and a reasonable justification for missing the deadline. *See id.* ¶ 18. In addition, Mr. Kell suggests two ways this court could define the egregious injustice exception. The Court could define an exception that mirrors the cause and prejudice exception to procedural default as articulated by the Supreme Court in *Coleman v. Thompson*, 501 U.S. 711 (1991), and *Martinez v. Ryan*, 566 U.S. 1 (2012). Alternatively, the Court could define a more limited exception, applying only to petitioners under sentence of death who can identify a clear constitutional violation which, absent application of the egregious injustice exception, would never receive merits review. This application would serve to ensure that the egregious injustice exception is available in only the most serious of circumstances. Mr. Kell satisfies both articulations of this exception.

Finally, Mr. Kell argues that if he is without a remedy, the 2008 amendments to the

PCRA are an unconstitutional restriction on the authority of the Utah courts over the writ of habeas corpus. In order to avoid the constitutional infirmities of the 2008 amendments to the PCRA, this Court should conclude that judicial exceptions to the time and procedural bars continue to apply.

ARGUMENT

I. Mr. Kell's Fifth and Fourteenth Amendment Rights Were Violated When the Trial Judge Gave Jurors a Supplemental Instruction During Penalty Phase Deliberations, Outside the Presence of Mr. Kell or his Counsel, Which Shifted the Burden of Proof in the Penalty Phase to Mr. Kell in Violation of His Fifth and Fourteenth Amendment Rights

Mr. Kell's rights to due process were violated when the trial court gave jurors an unconstitutional instruction, outside of the presence of Mr. Kell and his counsel and off the record, which shifted the burden of proof to Mr. Kell in the penalty phase of his trial.

Three jurors specifically recall the judge providing clarification for them on a point of law during the penalty-phase deliberations. One of the jurors recalled that the judge came into the deliberation room to clarify a point regarding the burden of proof during sentencing, and her description of the judicial clarification establishes that what the judge said improperly shifted the burden to Mr. Kell. The juror recalled:

> I had a difficult time voting for the death penalty but I agreed to do so after Judge Mower came and spoke to the jurors as we deliberated. He told us that Mr. Kell's attorneys had to show us that Mr. Kell's life should be spared. The jury had bogged down over a definition but the judge's statement helped because we wanted to be sure that we were doing the right thing. I remember that the judge was asked a question while he was speaking to us, and he kidded around and said he couldn't address that question, and said that it was up to us. After the judge came and spoke to us, I felt more comfortable voting for death.

(PCR II ROA 56-57 ¶ 2) (Addendum 6.) The juror further recalled that "[t]here was no defense attorney present when the judge spoke to us during deliberations, though there was somebody with him." (PCR II ROA 56-57 ¶ 3) (Addendum 6.) This misconduct by the judge, including the erroneous shifting of the burden of proof, was decisive for this juror in voting for death: "I had doubts about voting for the death penalty until the judge came in and said the defense needed to make you have that question, 'Is there any doubt?'" (PCR II ROA 56-57 ¶ 4) (Addendum 6.)

Two other jurors did not recall the specific instruction the trial judge gave, but distinctly recalled the occurrence. One juror stated, "I recall Judge Mower coming in to speak to the jury after we'd started deliberating. I don't remember what the issue was but I do remember him coming in and clarifying something for us." (PCR II ROA 51 ¶ 6) (Addendum 4.) Another juror recalled: "They [sic] jury asked the judge for a clarification. I believe it had to do with the range of sentences we could impose. I don't remember how the answer came back to us, whether it was a written reply or spoken reply from the judge." (PCR II ROA 53-54 ¶ 8) (Addendum 5.) There are no indications in the trial transcripts or the record on appeal of a question from the jury after the beginning of deliberations, during either the guilt or penalty phases. (Tr. 6/21/1996 at 5464-67, Tr. 6/25/1996 at 5735-37, and Tr. 6/26/1996 at 5742.)

The judge's actions in this case violated Mr. Kell's state and federal constitutional rights. There is no justification for the State to depart "from strict adherence to basic principles of justice." *See State v. Wood*, 648 P.2d 71, 80 (Utah 1982). "For our system of

justice to command the respect of society, the law must be applied, in all cases, in a judicious and even-handed manner." *Id*. In a death penalty case, both phases of the proceedings "must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). One of those requirements is the right to have the jury determine every material issue presented by the evidence. *See Sandstrom v. Montana*, 442 U.S. 510, 520 (1979); *see also Beck v. Alabama*, 447 U.S. 625, 638 (1980). An erroneous jury instruction impinges this right if "the jury was misled on the applicable law." *Smith v. Ingersoll-Rand Co*., 214 F.3d 1235, 1250 (10th Cir. 2000). When there exists a reasonable likelihood that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside. *See Boyde v. California*, 494 U.S. 370, 379-80 (1990).

The universality of presumptions regarding culpability and the burden of proof required for imposition of criminal sanctions in common-law jurisdictions "reflect a profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, 397 U.S. 358, 361-62 (1970) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)). This means that in order for a jury to impose a capital sentence, it is incumbent on the State to prove the existence of any fact which they have alleged in justification of increasing the presumed punishment from life in prison to that of death. *See Ring v. Arizona*, 536 U.S. 584, 589 (2002). The burden is properly on the prosecution to prove that death is the appropriate punishment. The jury must be properly instructed that is where the burden lies, otherwise, the instructions are constitutionally infirm and reversal

is required.

In its initial instructions, the trial court properly told jurors:

> It is presumed that a person convicted of aggravated murder will be sentenced to life in prison, unless and until the propriety of the death penalty or life in prison without parol[e] is proved beyond a reasonable doubt. This presumption is not a mere form to be disregarded by the jury at pleasure, but is a substantial essential part of the law and is binding upon the jury.

(Tr. 6/25/1996 at 5686; *see also* Tr. 6/25/1996 at 5686-87 ("The burden of proof necessary for a verdict of death or for a verdict of life in prison without parole over life in prison in this case is upon the State. . . You may return a verdict of death only if . . . you are persuaded beyond a reasonable doubt that the totality of aggravating circumstances outweighs the totality of mitigating circumstances"); Tr. 6/25/1996 at 5687, 5688.) These instructions comport with Supreme Court precedent that the relative weight of aggravating and mitigating circumstances is a finding that must be made beyond a reasonable doubt by a jury. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016); *Ring*, 536 U.S. at 589. The trial judge's supplemental instruction to the jury outside the presence of counsel, however, tainted the deliberation process and unconstitutionally shifted the burden to Mr. Kell to prove that his life should be spared.

The judge's actions also violated the Utah Rules of Criminal Procedure. Under the Utah Rules of Criminal Procedure, once the case has been submitted to the jury, the bailiff is charged with preserving the integrity of the deliberations and is instructed that, "[e]xcept by order of the court, the officer . . . shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict." Utah R.

Crim. P. 17(m). If the jury has a question on a point of law, the rules provide that they shall "inform the officer in charge of them, who shall communicate such request to the court." Rule 17(n). The rule then allows the court either to bring in the jury, in the presence of the parties, and respond to the question, or to send in a written response, which is then entered into the record. *Id*. While a court may on occasion respond to a jury question outside the presence of the parties and without their input, such a response must be "in writing" and, "[i]f the judge chooses this course, he or she must at some point enter the question and answer into the record, giving counsel opportunity to object to the instruction." *State v. Lucero*, 866 P.2d 1, 4 (Utah Ct. App. 1993). Furthermore, the instruction must not be "an incorrect or misleading statement of the law." *Id.* The instruction is prejudicial, and therefore constitutes reversible error, if there is "a reasonable likelihood that in its absence there would have been a different result." *State v. Kozik*, 688 P.2d 459, 461 (Utah 1984) (quoting *State v. Urias*, 609 P.2d 1326 (Utah 1980)). Under the circumstances here, the "ex parte communications between the judge and the jury . . . necessitate overturning [the] conviction." *State v. Maestas*, 2012 UT 46, ¶ 69 and n.60 (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 460 (1978) (finding prejudice when judge met privately with jury foreman and gave supplemental jury instruction)). Where a "judge discusses substantive matters with jurors," this Court should presume prejudice. *Id.* ¶ 70.

The United States Supreme Court rightfully places great emphasis on the propriety of the interactions between a judge and a jury. The judge is "the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia*

v. United States, 289 U.S. 466, 469 (1933). "[T]he influence of the trial judge on the jury is necessarily and properly of great weight, and . . . his lightest word or intimation is received with deference and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894). "[T]he judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). Given "the place of importance that trial by jury has in our Bill of Rights" it is incumbent upon our courts to protect "ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Id.* at 615. This is one of those "basic principles of justice" that requires "strict adherence." *Wood*, 648 P.2d at 80. It is a principle that must be adhered to in order to "satisfy the requirements of the Due Process Clause." *Gardner*, 430 U.S. at 358.

The trial judge's decision to address the jury on a point of law outside of the presence of the parties was, at the very least, imprudent and risked irrevocably tainting the jury deliberation process. His failure to enter the jury question and his response into the record was also a violation of the Utah Rules of Criminal Procedure. Most importantly, Judge Mower's ex parte instruction to jurors unconstitutionally shifted the burden of proof for the entire penalty proceeding away from the State and onto Mr. Kell, and requires reversal. On this basis, Mr. Kell is entitled to relief.

II. The District Court Erred in Finding that Mr. Kell's Claim was Procedurally Barred

At the time of his initial post-conviction proceedings, Mr. Kell had a statutory right to the effective assistance of his post-conviction counsel. *Menzies v. Galetka*, 2006 UT 81,

¶ 84. Mr. Kell's post-conviction counsel did not meet the standards of constitutionally effective assistance because he failed to conduct an objectively reasonable investigation of the case. Counsel failed to interview any jurors and failed to present Mr. Kell's claim that the trial judge, ex parte, gave jurors an unconstitutional supplemental instruction.

The district court recognized that Mr. Kell did have a right to the effective assistance of post-conviction counsel in his initial post-conviction proceedings. (PCR II ROA 909) (Addendum 2.) However, the court found that Mr. Kell's claim was nonetheless procedurally barred. The court based this decision in part on its conclusion that this Court's decision in *Menzies* required Mr. Kell to present his argument in a Rule 60(b) motion in his initial case, rather than in a new petition. (PCR II ROA 909) (Addendum 2.) The court further determined that the accrual date for Mr. Kell's claim would have been 2013, and therefore the ineffective assistance of Mr. Kell's post-conviction counsel was not relevant to determining whether the claim was procedurally barred. (PCR II ROA 910-11) (Addendum 2.) The court did not consider whether the default could be excused based on the claim's actual accrual date of 2005. The district court erred in finding Mr. Kell's claim to be procedurally barred. Mr. Kell's claim should be decided on the merits.

A. Mr. Kell Had a Statutory Right to the Effective Assistance of Post-Conviction Counsel During the Time in Which His Claim was Defaulted and Can Excuse the Default Based on the Ineffective Assistance of Post-Conviction Counsel

The district court correctly found that in his initial post-conviction proceedings, Mr. Kell had a statutory right to the effective assistance of counsel in post-conviction. (*See* PCR

II ROA 906-18) (Addendum 2.) The court further noted that "[n]othing in the amendments to the PCRA indicates that the removal of the right to the effective assistance of counsel should apply retroactively." (*See* PCR II ROA 906-18) (Addendum 2.)

It was undisputed in the court below that Mr. Kell's post-conviction counsel provided ineffective assistance of counsel with respect to Mr. Kell's claim that jurors were given a supplemental instruction outside the presence of Mr. Kell or his counsel that unconstitutionally shifted the burden of proof to Mr. Kell in the penalty phase. (*See, e.g.*, PCR II ROA 724-49.) Post-conviction counsel was aware at the time of his appointment "that the standard for post-conviction representation in a death-penalty case involves a complete reinvestigation of the case" and admitted he "did not do this." (PCR II ROA 59-61 ¶ 8) (Addendum 7); *see* American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.10.2, cmt. n. 260, (2d ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 1080 (2003) (hereinafter "ABA Guidelines") ("[C]ounsel investigating a capital case should be particularly alert" to investigating jury issues "and make every effort to develop the relevant facts, whether by interviewing jurors or otherwise. Such inquiries can be 'critical in discovering constitutional errors.'").

Counsel describes his professional failures in this case as being caused partially by being under-funded and partially as omissions without excuse. (PCR II ROA 59-61 ¶¶ 6-12, 14) (Addendum 7.) For instance, juror interviews were something that "did not occur to me to do." (PCR II ROA 59-61 ¶ 8) (Addendum 7.) Had counsel interviewed the jurors he would have discovered evidence of this erroneous supplemental instruction described

above. Had he been aware of this information, he would have raised a claim in the post-conviction petition. (PCR II ROA 59-61 ¶¶ 3-4) (Addendum 7.)

This Court has held that the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), provides the appropriate framework for assessing whether a petitioner's statutory right to the effective assistance of counsel has been violated. *Menzies*, 2006 UT 81, ¶ 86 ("We can discern no reason why a statutory right to effective assistance of counsel should be premised on something different from that of the constitutional right: ensuring that the proceeding is reliable and fair by requiring a properly functioning adversarial process."); *see also State v. Templin*, 805 P.2d 182, 185-86 (Utah 1990) (referring to the state court having adopted the *Strickland* standard of review of ineffective assistance of counsel claims and its uniform application to trial, appeals, and habeas proceedings). Under *Strickland*, counsel is ineffective if: (1) the "representation fell below an objective standard of reasonableness;" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 688, 694.

The inquiry under the deficiency prong is "whether counsel's assistance was reasonable considering all the circumstances." *Strickland,* 466 U.S. at 688. Although defense counsel has broad discretion when making strategic decisions, those decisions must be reasonable and informed. *Id.* at 691. The failure to adequately investigate a case cannot be considered a reasonable strategic decision. *See Gregg v. State*, 2012 UT 32, ¶ 24 (quoting *Templin*, 805 P.2d at 188-89 and *Strickland*, 466 U.S. at 689); *see also Correll v.*

Ryan, 539 F.3d 938, 949 (9th Cir. 2008) (en banc) (finding that an "uninformed strategy" is "no strategy at all").

The Supreme Court has repeatedly held that a decision to cease investigation must itself be based on a reasonable investigation. *See Strickland*, 466 U.S. at 690-91; *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Wiggins v. Smith*, 539 U.S. 510, 533-34 (2003); *see also* ABA Guideline 10.15.1(C), (E)(4) and commentary("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation" because "the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case"); ABA Guideline 10.15.1(E)(4) (post-conviction counsel must "continue an aggressive investigation of all aspects of the case").

The *Strickland* prejudice analysis does not depend on whether the outcome of the proceeding would have been different. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). A reviewing court must find that prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694. A "[r]easonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

Post-conviction counsel admitted that he understood that the prevailing professional norms in a post-conviction case require a full reinvestigation of every aspect of the case, and that he did not undertake such an investigation. (*See* PCR II ROA 59-61 ¶ 8)

(Addendum 7.) Certain aspects of the investigation went undone simply because it did not occur to him to conduct such an investigation. (*See* PCR II ROA 59-61 ¶ 8) (Addendum 7.) Counsel himself described his work—some legal research and some investigation of the victim—as "shallow." (*See* PCR II ROA 59-61 ¶ 12) (Addendum 7.)

Post-conviction counsel stated that "[n]one of my failures were the result of my strategy" and "any strategy decisions I made were tainted by my inability to fully investigate the case." (*See* PCR II ROA 59-61 ¶ 14) (Addendum 7.) Furthermore, counsel stated that "[w]ithin a few months of our appointment" his co-counsel "stopped contributing to the case." (*See* PCR II ROA 59-61 ¶ 9) (Addendum 7.) Thus, Mr. Kell was abandoned by one of his post-conviction attorneys, and left only with one who lacked experience and who failed to conduct a minimally adequate investigation of the case. (*See* PCR II ROA 59-61 ¶¶ 1, 9) (Addendum 7); *see also* Mem. Decision and Order, *Kell v. Benzon*, 2:07-CV-359 (D. Utah, Nov. 16, 2017), ECF No. 258 (finding "[post-conviction] counsel filed a perfunctory petition, failed to conduct even a cursory investigation of the case, including failing to interview even a single juror, and admitted that none of these decisions were strategic").)

As a result of post-conviction counsel's deficient performance, Mr. Kell was denied the opportunity to have this significant claim reviewed by any state court. *See Martinez*, 566 U.S. at 10 ("When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim."). Mr. Kell's claim regarding the unconstitutional supplemental instruction was supported by statements from multiple

jurors. Had counsel investigated and presented this claim in Mr. Kell's initial post-conviction proceedings, there is a reasonable probability that he would have obtained relief. Although the State did not dispute that post-conviction counsel provided ineffective assistance of counsel, the court below did not address this argument.

B. The District Court Incorrectly Decided the Procedural Status of Mr. Kell's Claim

Rather than addressing Mr. Kell's claim regarding the ineffective assistance of his post-conviction counsel, the district court incorrectly held that Mr. Kell's claim was barred because it should have been submitted as a Rule 60(b) motion in his initial case, and because it was subject to the 2008 amendments to the PCRA and was therefore procedurally barred. The court's rulings are incorrect.

First, the district court improperly limited the remedies available for a petitioner who has been denied the statutory right to the effective assistance of counsel. Relying on *Menzies v. Galetka*, 2006 UT 81, the district court found that "although Mr. Kell had the right to the effective assistance of counsel in his initial petition, the proper procedure is to raise his argument in a Rule 60(b) motion in his initial case and not in a subsequent petition." (*See* PCR II ROA 909) (Addendum 2.) The court found that "[n]othing in *Menzies* indicates that filing a subsequent petition is the appropriate procedure for the denial of the statutory right to the effective assistance of counsel." *Id*. This Court's decision in *Menzies*, however, does not address the appropriate procedure to remedy the denial of a statutory right to the effective assistance of counsel. The *Menzies* decision found only that

there was a statutory right to the effective assistance of counsel in post-conviction proceedings, and that Mr. Menzies had satisfied the requirements of Rule 60(b)(6) based on his denial of that right. *See Menzies*, 2006 UT 81, ¶¶ 78, 84, 100. The Court in *Menzies* held that ineffective assistance of counsel "may allow a litigant relief" under Rule 60(b)(6). *Id*. ¶78.

Indeed, in Mr. Kell's own case, this Court denied relief on a Rule 60(b) motion because it found that the ruling in *Menzies* applied only to default judgments. *See Kell v. State*, 2012 UT 25, ¶¶ 19-20. Although this Court has not explicitly defined the correct procedure or remedy for a petitioner who has been denied his statutory right to the effective assistance of counsel in post-conviction proceedings, the Court's decisions in *Menzies* and *Kell* suggest that a Rule 60(b) motion is only appropriate where a petitioner's case has been defaulted entirely. It does not follow, however, that a petitioner who received ineffective assistance of counsel in his initial post-conviction proceedings can be left without any avenue to enforce that right. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

Second, the district court found that "under the most generous analysis of the claim's accrual date, Mr. Kell had until May of 2013 to file his petition in state court." (*See* PCR II ROA 906-18) (Addendum 2.) The court then conducted its analysis assuming that

the only possible accrual date of Mr. Kell's claim was May 2013.[2] However, the PCRA in effect at the time of Mr. Kell's initial post-conviction proceedings contained a one-year statute of limitations running from, at the latest, "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." Utah Code Ann. § 78-35a-107 (2004) (Addendum 1.) It is undisputed that the basis of Mr. Kell's claim would have been discoverable had Mr. Kell's post-conviction counsel exercised reasonable diligence. (PCR II ROA 730-31.) Thus, Mr. Kell's claim was defaulted in 2005, not in 2013, as the district court found. Had Mr. Kell filed a petition including this claim in 2013, the court almost certainly would have found that it had already been defaulted. Furthermore, the claim was defaulted when Mr. Kell had a statutory right to the effective assistance of counsel, but was not afforded that right. *See Menzies*, 2006 UT 81 at ¶ 84. The district court erred in not addressing the procedural posture of Mr. Kell's claim based on the date when the claim was actually defaulted, in 2005, at a time when Mr. Kell had a right to the effective assistance of post-conviction counsel.

[2] Mr. Kell argued in his Opposition to Motion for Summary Judgment that if the district court were to find that the 2008 amendments to the PCRA did apply to Mr. Kell's case, which Mr. Kell maintained they did not, the district court should nonetheless find that Mr. Kell's claim was not time-barred because he filed it at the earliest possible time he could, given the pendency of his federal habeas case and the limitations placed on his federal counsel. (PCR II ROA 804-29.) The district court addressed only this argument, and not Mr. Kell's primary argument that the 2008 amendments to the PCRA do not apply to Mr. Kell's claim because at the time it was initially defaulted Mr. Kell had a statutory right to the effective assistance of post-conviction counsel. (*See* PCR II ROA 804-29.)

C. This Court Should Find that the Procedural Bars of the Current PCRA Do Not Apply to Mr. Kell's Claim

At the time that Mr. Kell's claim was defaulted, he had a statutory right to the effective assistance of counsel in post-conviction proceedings. *Menzies*, 2006 UT 81 at ¶ 82 ("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."). Although the state legislature amended the PCRA in 2008 to extinguish the right to effective assistance of post-conviction counsel, *see* Utah Code Ann. § 78B-9-202(4) (2008) (Addendum 1), the legislature did not retroactively terminate the rights that Mr. Kell had during his initial post-conviction proceedings. (*See* PCR II ROA 906-18) (Addendum 2.); Utah Code Ann. § 68-3-3 (2014) (Addendum 1.); *Olsen v. Samuel McIntyre Inv. Co.*, 956 P.2d 257, 261 (Utah 1998) ("A long-standing rule of statutory construction is that we do not apply retroactively legislative enactments that alter substantive law or affect vested rights unless the legislature has clearly expressed that intention."). Thus, the PCRA that was in effect at the time that Mr. Kell's claim was defaulted should apply here.

III. In the Alternative, This Court Should Find that the Judicial Exceptions to the PCRA Apply

Even if this Court finds that the prior version of the PCRA does not apply, Mr. Kell should still receive merits consideration of his claim under the judicial exceptions to the PCRA. This Court has recognized that "because 'the power to review post-conviction petitions 'quintessentially . . . belongs to the judicial branch of government,'' and not the

legislature, . . . [the] common law exceptions 'retain their independent constitutional significance and may be examined by this court in our review of post-conviction petitions." *Tillman v. State*, 2005 UT 56, ¶ 22, (quoting *Gardner v. Galetka*, 2004 UT 42, ¶ 14 and *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989)). Furthermore, "to the degree that the PCRA purports to erect an absolute bar to this court's consideration of successive post-conviction petitions, it suffers from constitutional infirmities." *Gardner*, 2004 UT 42, ¶ 17. The Court noted in *Gardner v. State* that it had not considered whether the 2008 amendments to the PCRA "now wholly accommodate the full measure of our constitutional authority or whether the Utah Constitution requires that we be able to consider, in some cases, the merits of claims otherwise barred by the PCRA." 2010 UT 46, ¶ 93. The court declined to decide the issue in that case.

The Utah Supreme Court again declined to directly address the issue in *Winward v. State*, 2012 UT 85, ¶ 8, because the issue had not been raised below. The court further noted that it would be "improvident" to address the issue where the underlying claim was not meritorious.[3] *Id.* ¶ 17.

The court nonetheless set forth a framework for considering whether a petitioner qualifies for an exception to the PCRA's procedural bars. As a threshold matter, a petitioner

[3] In neither *Gardner* nor *Winward* did the state contest "the existence of an 'egregious injustice' exception to the PCRA's procedural limitations[.]" *Winward*, 2012 UT 85, ¶ 16; *see also Gardner*, 2010 UT 46, ¶ 93 ("The State acknowledges that this court retains constitutional authority, even when a petition is procedurally barred, to determine whether denying relief would result in an egregious injustice.").

"must demonstrate that he has a reasonable justification for missing the deadline combined with a meritorious defense." *Id*. ¶ 18 (citing *Gardner*, 2010 UT 46, ¶ 94). To satisfy this threshold test, a petitioner must show that "given the combined weight of the meritoriousness of the petitioner's claim and the justifications for raising it late, the court should consider recognizing an exception to the PCRA's procedural rules." *Id*. ¶ 20 (quoting *Gardner*, 2010 UT 46, ¶ 94, internal quotation marks omitted). The Court stated this is a "flexible test" which requires the petition have "'an arguable basis in fact,' which would 'support a claim for relief as a matter of law.'" *Id*. (quoting *Adams v. State*, 2005 UT 62, ¶ 19.) In addition, the petitioner must demonstrate "a reasonable justification for missing the deadline[.]" *Id*. ¶ 18. A "mere allegation" of ineffective assistance of counsel is insufficient to meet this requirement. *Id*. ¶ 21.[4] In addition to satisfying the threshold requirements, a petitioner should "include an articulation of the exception itself, its parameters, and the basis for this court's constitutional authority for recognizing such an exception" and "demonstrate why the particular facts of his case qualify under the parameters of the proposed exception." *Id*. ¶ 18.

As discussed above, Mr. Kell has satisfied the threshold requirement under *Winward*. Counsel in Mr. Kell's initial post-conviction proceedings conducted virtually no

[4] The court found that Mr. Winward had not satisfied this standard because he did not allege "any facts to support his claim regarding the ineffectiveness of his [post-conviction] counsel." *Winward*, 2012 UT 85, ¶ 21. The court also found that Mr. Winward's claims were not meritorious because his factual allegations were not supported by the record in the case. *Id*. ¶¶ 22-27.

investigation and filed a petition that was just 21 pages in length, contained only one case citation, and did not append a single declaration or any other new evidence. (*See* PCR II ROA 107-27) (Addendum 2.) Mr. Kell's claim that his post-conviction counsel provided ineffective assistance of counsel was supported by declarations, including an admission from counsel that he did not investigate Mr. Kell's claim and had no strategic basis for failing to do so. (ROA 59-61 ¶ 14) (Addendum 7.)

Mr. Kell's underlying claim for relief is also supported by "sufficient factual evidence or legal authority to support a conclusion of meritoriousness." *Winward*, 2012 UT 85, ¶ 20. Mr. Kell alleged that the trial judge gave jurors an unconstitutional supplemental instruction, off the record and outside the presence of Mr. Kell and his counsel, in violation of his Fifth and Fourteenth Amendment rights. (*See* PCR II ROA 17-35.) In support of this claim, Mr. Kell provided declarations from three jurors who recalled the trial judge entering the room while the jury was deliberating, outside the presence of Mr. Kell or his counsel, and giving jurors a supplemental instruction which unconstitutionally shifted the burden to Mr. Kell to prove why his life should be spared. (*See* PCR II ROA 51-57) (Addendums 4-6.) In particular, one juror recalled that she "had a difficult time voting for the death penalty" but felt more comfortable after the trial judge came into the room and told the jurors "that Kell's attorneys had to show us that Kell's life should be spared." (PCR II ROA 56 ¶ 2) (Addendum 6.) The trial judge's instruction violated both Utah and federal constitutional law. *See supra* Section I; *see also, e.g.*, *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016); *Ring v. Arizona*, 536 U.S. 584, 589 (2002); *Smith*

v. Ingersoll-Rand Co., 214 F.3d 1235, 1250 (10th Cir. 2000). Mr. Kell has established at least "'an arguable basis in fact,' which would 'support a claim for relief as a matter of law.'" *Winward*, 2012 UT 85, ¶ 20 (quoting *Adams*, 2005 UT 62, ¶ 19).

Second, *Winward* requires that a petitioner's briefing include "an articulation of the exception itself, its parameters, and the basis for this court's constitutional authority for recognizing such an exception." *Winward*, 2012 UT 85, ¶ 18. The petitioner must then "demonstrate why the particular facts of his case qualify under the parameters of the proposed exception." *Id*. Mr. Kell suggested in the court below that the egregious injustice exception should track the exceptions to procedural default that apply in federal court. (*See* PCR II ROA 804-29.) Although under federal law there is no constitutional right to counsel in post-conviction proceedings, *see Coleman v. Thompson*, 501 U.S. 722, 755 (1991), the Supreme Court has recognized that "inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim[.]" *Martinez*, 566 U.S. at 9.

A more limited alternative would be for this Court to confine the egregious injustice exception to instances where, after meeting the threshold requirements of *Winward*, a petitioner under sentence of death identifies a clear constitutional violation that occurred during either phase of trial which, absent application of the egregious injustice exception, would never be reviewed on the merits. By limiting the exception to capital cases, this exception would recognize the long-standing maxim that "death is different." *See Harmelin v. Michigan*, 501 U.S. 957, 994 (1991); *Ford v. Wainwright*, 477 U.S. 399, 414 (1986)

(discussing the "heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life"). Because capital cases are rare in Utah,[5] it would also serve to limit the availability of the egregious injustice exception to the most serious of circumstances, where petitioners might potentially be executed without ever having a meritorious constitutional claim addressed on the merits by any court.

Mr. Kell satisfies this exception because if he is unable to obtain review of his claim in the Utah courts, it is almost certain that no court, state or federal, will ever review the merits of his claim before Mr. Kell is potentially executed. As discussed above, Mr. Kell satisfies the threshold requirement of *Winward* because counsel in his initial post-conviction proceedings provided ineffective assistance in failing to investigate or present a substantial claim that Mr. Kell's constitutional rights were violated when the trial judge gave an unconstitutional instruction to jurors outside the presence of Mr. Kell that shifted the burden of proof to Mr. Kell in the penalty phase of his trial. Mr. Kell's significant constitutional claim is supported by declarations from three of the jurors on his case. One of these jurors confirmed that prior to the judge's unconstitutional instruction, she was not in favor of a death sentence. On the basis of the facts and law alleged above, Mr. Kell has satisfied the egregious injustice exception to procedural default as articulated in *Winward*.

[5] There are currently only eight people on death row in Utah. Furthermore, since 2000, only two death sentences have been handed down in Utah, one of which was a resentencing. *See State v. Maestas*, 2012 UT 46; *State v. Lovell*, 2011 UT 36.

As discussed more fully below, this Court has the authority to apply judicial exceptions to the procedural default rules contained in the PCRA. The Utah Supreme Court retains the authority to "issue all extraordinary writs." Utah Const. art. VIII, § 3 (Addendum 1.) In *Hurst v. Cook*, 777 P.2d 1029 (Utah 1989), this Court discussed the historical context and the importance of the writ of habeas corpus, as well as its development through the case law. The court noted that "the writ of habeas corpus is the only legal form of judicial process referred to in the Utah and United States Constitutions" and that it "has played such a large role in the history of our law that it has received specific constitutional protection." *Id*. at 1033. The court further noted that

> [T]he separation of powers provision, Article V, section 1 of the Utah Constitution, requires, and the Open Courts Provision of the Declaration of Rights, Article I, Section 11, presupposes, a judicial department armed with process sufficient to fulfill its role as the third branch of government. While the essence of judicial power cannot be encapsulated in one writ, the writ of habeas corpus is one of the most important of all judicial tools for the protection of individual liberty.

Id. at 1033-34. The Court went on to note initially the Writ was only available to attack a criminal conviction on the ground that the court lacked jurisdiction or that a sentence was unlawful. *Id*. at 1034. The court nonetheless recognized a broader application for the writ, holding the Writ would lie if a petitioner had been deprived of one of his constitutional rights. *Id*. (citing *Thompson v. Harris*, 144 P.2d 761, 766 (Utah 1943)). This Court thus retains its authority to regulate the writ of habeas corpus and the legislature may not usurp that authority.

IV. If Mr. Kell is Without a Remedy, then the 2008 Amendments to the PCRA are Unconstitutional and this Court Should Exercise its Traditional Common Law Authority over Collateral Proceedings

The Utah Constitution makes clear the importance of the writ of habeas corpus and that the courts hold the power to grant the writ. The Utah constitution provides, "The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it." Utah Const. art. I, § 5 (Addendum 1.) This language corresponds, almost exactly, with that from the federal constitution, which states, "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2 (Addendum 1.) The Utah Constitution further gives the courts the authority "to issue all extraordinary writs," and the Utah Supreme Court "power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause." Utah Const. art. VIII, §§ 3, 5 (Addendum 1.) Among these extraordinary writs is the writ of the habeas corpus. *See Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1152 (Utah 1995) ("[T]he Legislature cannot curtail the constitutional powers of this Court to issue extraordinary writs in appropriate circumstances."). Because the courts' writ power is granted directly by the constitution, the legislature has no authority to diminish or restrict that power. *See Brown v. Cox*, 2017 UT 3, ¶ 14.

Since the founding, the Great Writ has been available to correct "jurisdictional errors and to [correct] errors so gross as to in effect deprive the defendant of his constitutional substantive or procedural rights." *Thompson v. Harris*, 152 P.2d 91, 102

(Utah 1944). As the Utah Supreme Court has noted, "[t]he writ of habeas corpus is the only legal form of judicial process referred to in the Utah and United States Constitutions." *Hurst*, 777 P.2d at 1033. Since the founding of the state, that power has unambiguously been vested in the judicial branch without limitation, short of a complete suspension when the public safety requires it. *See id*. at 1033 ("Quintessentially, the Writ belongs to the judicial branch of government.").

The 2008 amendments to the PCRA purport to restrict the authority of the Utah courts over the writ of habeas corpus. *See* Utah Code Ann. § 78B-9-102(1)(a) (2008). The Utah Supreme Court has previously held that such restrictions on the Great Writ are impermissible. *Julian v. State*, 966 P.2d 249, 254 (Utah 1998); *see also Tillman*, 2005 UT 56, ¶ 22 ("[B]ecause 'the power to review post-conviction petitions 'quintessentially . . . belongs to the judicial branch of government,' and not the legislature, . . . [the] law exceptions 'retain their independent constitutional significance and may be examined by this court in our review of post-conviction petitions.'" (quoting *Gardner*, 2004 UT 42, ¶ 17, and *Hurst*, 777 P.2d at 1033)). In *Julian*, the State sought to assert two different statute of limitations against a petitioner seeking post-conviction relief. The first was the general civil statute of limitations that required claims to be filed within four years, without any exceptions. 966 P.2d at 250-52. The second was the one-year statute of limitations in the then newly enacted PCRA, which at that time included an "interests of justice" exception. *Id*. at 253-54 (citing Utah Code Ann. § 78-35a-107(1) & (3) (1996)).

Considering the four-year statute of limitations, the court held that an absolute limit

without exception was unconstitutional because it "removed flexibility and discretion from state judicial procedure" so that the courts' "ability to guarantee fairness and equity in particular cases" was diminished. *Id*. at 253. Regarding the one-year statute of limitations in the PCRA, the court noted that the "interests of justice" exception should be construed narrowly, applying only in "truly exceptional" circumstances, "so as to promote finality and to protect defendants from having to defend stale claims." *Id*. at 254. The Utah Supreme Court rejected the State's argument:

> We fully appreciate the State's concerns. We emphasize, however, that when a court grants relief pursuant to a habeas corpus petition, it does so on the ground that the petitioner has been wrongfully incarcerated. That is to say, a court should grant relief if the petitioner establishes that he or she has been deprived of due process of law or that it would be unconscionable not to re-examine the conviction. Therefore, if the proper showing is made, the mere passage of time can never justify continued imprisonment of one who has been deprived of fundamental rights, regardless of how difficult it may be for the State to reprosecute that individual.

Id. at 254 (internal citation and quotation marks omitted). The only way to avoid the constitutional infirmities of the 2008 amendments to the PCRA is to conclude that the judicial exceptions to the time and procedural bars survive the amendments.

CONCLUSION

Based on the foregoing, Mr. Kell asks this Court to reverse the district court order granting summary judgment and remand this case so that Mr. Kell's claim can be addressed on the merits.

Respectfully submitted this 21st day of March, 2019

By /s/ Lindsey Layer

Jon M. Sands
Federal Public Defender
Lindsey Layer
Alexandra LeClair
Assistant Federal Public Defender Office
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
(602) 889-3960 facsimile
Lindsey_Layer@fd.org
Alexandra_Leclair@fd.org

Jonathan T. Nish
Morgan, Nish & Associates, P.C.
975 West 850 South
Woods Cross, UT 84087
(801) 397-1780
nish@mnalaw.net

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P.24(a)(11). It contains 10,147 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font of size 13 points.

By /s/ Lindsey Layer
Dated: March 21, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2019, the foregoing Appellant's Brief was filed through electronic mail with the Clerk's Office, copies and the original to be delivered to the Clerk's Office via FedEx per Utah Supreme Court Standing Order No. 11. A copy was electronically mailed and delivered via First Class Mail, postage prepaid, to the following:

Andrew F. Peterson
Erin Riley
Assistant Solicitors General
Utah Attorney General's Office
Criminal Appeals
160 E. 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114
(801) 366-0180 Telephone
andrewpeterson@agutah.gov
eriley@agutah.gov

By /s/ Kat Esparza
Kat Esparza
Assistant Paralegal

Troy Michael Kell v. State of Utah
Utah Supreme Court Case No. 20180788
Addenda Index

Addendum 1:	U.S. Const. art. I, § 9, cl. 2; Utah Const. art. I, § 5; Utah Const. art. VIII, § 3; Utah Const. art. VIII, §, 5; Utah Code Ann. § 78-35a-107(1) & (3) (1996); Utah Code Ann. § 78-35a-107 (2004); Utah Code Ann. § 78B-9-202(4) (2008); Utah Code Ann. § 68-3-3 (2014); Utah Code Ann. § 78B-9-102(1)(a) (2017)
Addendum 2:	Ruling and Order on State's Motion for Summary Judgement and State's Objection to Evidentiary Proffers, dated August 31, 2018 [PCR II ROA 906-18]
Addendum 3:	Amended Petition for Post Conviction Relief and/or Writ of Habeas Corpus, dated August 1, 2005; Addition to Amended Petition for Post Conviction Relief and/or Writ of Habeas Corpus [PCR II ROA 107-127, 129-31]
Addendum 4:	Declaration of Deann Draper, dated May 7, 2012 [PCR II ROA 51]
Addendum 5:	Declaration of Grant Hansen, dated May 17, 2012 [PCR II ROA 53-54]
Addendum 6:	Declaration of Jo Ann Jeppson, dated May 6, 2012 [PCR II ROA 56-57]
Addendum 7:	Declaration of Aric Cramer, dated January 10, 2013 [PCR II ROA 58-61]

Addendum 1

Kello v. State
20180788

United States Code Annotated
Constitution of the United States
Annotated
Article I. The Congress

U.S.C.A. Const. Art. I § 9, cl. 2

Section 9, Clause 2. Suspension of Habeas Corpus

Currentness

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S.C.A. Const. Art. I § 9, cl. 2, USCA CONST Art. I § 9, cl. 2
Current through P.L. 116-5. Title 26 current through 116-7.

End of Document

Article I, Section 5 [Habeas corpus.]

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

Article VIII, Section 3 [Jurisdiction of Supreme Court.]

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.

Article VIII, Section 5 [Jurisdiction of district court and other courts -- Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

1996 Utah Code Ann. § 78-35a-107

1996 Utah Code Archive

UTAH CODE ANNOTATED > TITLE 78. JUDICIAL CODE > PART IV. PARTICULAR PROCEEDINGS > CHAPTER 35a. POST-CONVICTION REMEDIES ACT > PART 1. GENERAL PROVISIONS

§ 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.

End of Document

2004 Utah Code Ann. § 78-35a-107

2004 Utah Code Archive

UTAH CODE ANNOTATED > TITLE 78. JUDICIAL CODE > PART IV. PARTICULAR PROCEEDINGS > CHAPTER 35a. POST-CONVICTION REMEDIES ACT > PART 1. GENERAL PROVISIONS

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(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 77-19-8, 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; 2004, ch. 139, § 2.

End of Document

2008 Utah Code Ann. § 78B-9-202

2008 Utah Code Archive

UTAH CODE ANNOTATED > TITLE 78B. JUDICIAL CODE > CHAPTER 9. POST-CONVICTION REMEDIES ACT > 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 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 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.

History

C. 1953, 78-35a-202, enacted by *L. 1997, ch. 76, § 2*; renumbered by *L. 2008, ch. 3, § 1176*; *2008, ch. 288, § 9*; *2008, ch. 382, § 2240*.

End of Document

2014 Utah Code Ann. § 68-3-3

2014 Utah Code Archive

Utah Code Annotated > Title 68 Statutes > Chapter 3 Construction

68-3-3. Retroactive effect.

A provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive.

History

R.S. 1898 & C.L. 1907, § 2490; C.L. 1917, § 5840; R.S. 1933 & C. 1943, 88-2-3; *2010, ch. 254, § 7*.

End of Document

Utah Code Ann. § 78B-9-102

Statutes current through the 2018 Third Special Session

Utah Code Annotated > Title 78B Judicial Code (Chs. 1 — 21) > Chapter 9 Postconviction Remedies Act (Pts. 1 — 4) > Part 1 General Provisions (§§ 78B-9-101 — 78B-9-110)

78B-9-102. Replacement of prior remedies.

(1)

(a) 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.

(b)A court may not enter an order to withdraw, modify, vacate or otherwise set aside a plea unless it is in conformity with this chapter or *Section 77-13-6*.

(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; renumbered by *L. 2008, ch. 3, § 1166*; 2008, ch. 288, § 2; *2017 ch. 450, § 2*, effective May 9, 2017.

Annotations

Notes

Amendment Notes.

The 2017 amendment, effective by May 9, 2017, in (1), added the (a) designation and added (b).

NOTES TO DECISIONS

Applicability.

Constitutional protections.

Exhaustion of remedies.

Relief inappropriate.

Timeliness.

Applicability.

This chapter replaces prior remedies that challenge a conviction or sentence for a criminal offense; it may not be applied retroactively to a post-conviction relief action. *Julian v. State, 2002 UT 61, 451 Utah Adv. 6, 52 P.3d 1168, 2002 Utah LEXIS 86 (Utah 2002)*, superseded by statute as stated in *Mulder v. State, 2016 UT App 207, 823 Utah Adv. 5, 385 P.3d 708, 2016 Utah App. LEXIS 217 (Utah Ct. App. 2016)*.

Where an inmate sought relief pursuant to the Post-Conviction Remedies Act alleging, among other things, denial of his right to effective assistance of counsel, district court properly determined that because an order nunc pro tunc was no longer available as a remedy, the inmate's relief should be sought by a direct appeal; the inmate's untimely filing could be excused. *Johnson v. State, 2006 UT 21, 549 Utah Adv. 3, 134 P.3d 1133, 2006 Utah LEXIS 49 (Utah 2006)*.

As shown in *Utah Code Ann. § 78B-9-102(1)(a)*, the legislature expressly stated that the rules of civil procedure will govern proceedings in PCRA claims. Although the statute provides that procedural requirements to PCRA petitions are found in *Utah R. Civ. P. 65C*, this line cannot be read in isolation. When both provisions are read together, it appears the legislature intended PCRA claims to be governed by all of the rules of civil procedure and that a court should make procedural departures from the rules only when expressly called for in rule 65C. Because rule 65C does not explicitly address new claims in amended petitions filed after the one-year statute of limitations, other rules of civil procedure, including *Utah R. Civ. P. 15(c)*, should be used to fill in the gaps. *State v. Noor, 2019 UT 3, 2019 Utah LEXIS 3 (Utah 2019)*.

Constitutional protections.

Post-conviction proceeding is ultimately civil in nature and does not implicate the same constitutional protections as do criminal prosecutions; a district court may dismiss a petition for failure to prosecute. *Finlayson v. State, 2015 UT App 31, 345 P.3d 1266, 2015 Utah App. LEXIS 53 (Utah Ct. App.)*, cert. denied, *362 P.3d 1256, 2015 Utah LEXIS 237 (Utah 2015)*.

Exhaustion of remedies.

Dismissal of a petition for relief under this chapter was proper because appellant failed to seek a trial de novo in the district court after his convictions in a justice court. The fact that defendant was not represented by counsel for two years after the entry of the sentence or that he sought relief after the period for seeking a trial de novo had expired did not rise to the level of unusual circumstances warranting post-conviction relief. *Peterson v. Kennard, 2007 UT App 26, 570 Utah Adv. 62, 156 P.3d 834, 2007 Utah App. LEXIS 21 (Utah Ct. App. 2007)*, aff'd on other grounds, *2008 UT 90, 620 Utah Adv. 46, 201 P.3d 956, 2008 Utah LEXIS 203 (Utah 2008)*.

Petitioner's Postconviction Relief Act claim was not barred for failure to exhaust legal remedies simply because he failed to file a direct appeal. *Valenzuela-Lozoya v. West Valley City, 2015 UT App 122, 786 Utah Adv. 25, 350 P.3d 244, 2015 Utah App. LEXIS 124 (Utah Ct. App. 2015)*.

Relief inappropriate.

By confining its analysis to whether the justice court had strictly complied with the rule, the district court unnecessarily curtailed its inquiry into whether petitioner's plea was knowing and voluntary, a determination that

had to take into account not only the rule compliance but all the surrounding facts and circumstances of the plea; because the district court applied the wrong legal standard, its grant of postconviction relief was inappropriate. *Valenzuela-Lozoya v. West Valley City, 2015 UT App 122, 786 Utah Adv. 25, 350 P.3d 244, 2015 Utah App. LEXIS 124 (Utah Ct. App. 2015)*.

Timeliness.

Because the language of the PCRA, case law, and the amendments to the PCRA and *Utah R. Civ. P. 65C* supported the district court's application of *Utah R. Civ. P. 15(c)* in the instant case, the district court correctly concluded that it did not have discretion to review petitioner's claims in his amended petition unless the claims related back to the claims in the original petition under rule 15(c). *State v. Noor, 2019 UT 3, 2019 Utah LEXIS 3 (Utah 2019)*.

Cited in

Hutchings v. State, 2003 UT 52, 84 P.3d 1150, 2003 Utah LEXIS 130 (Utah 2003); *Gardner v. Galetka, 2004 UT 42, 94 P.3d 263, 2004 Utah LEXIS 109 (Utah 2004)*; *Bluemel v. State, 2007 UT 90, 173 P.3d 842, 2007 Utah LEXIS 194 (Utah 2007)*; *Logue v. Court of Appeals, 2016 UT 44, 824 Utah Adv. 30, 387 P.3d 976, 2016 Utah LEXIS 124 (Utah 2016)*.

End of Document

Addendum 2

Kell v. State
20180788

IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR SANPETE COUNTY, STATE OF UTAH

TROY MICHAEL KELL, Petitioner, vs. LARRY BENZON, Respondent.	**RULING AND ORDER ON STATE'S MOTION FOR SUMMARY JUDGMENT and STATE'S OBJECTIONS TO EVIDENTIARY PROFFERS** Case No. 180600004 Judge Wallace A. Lee

The State moves for summary judgment on Petitioner Troy Michael Kell's Petition for Post-conviction Relief because it is procedurally barred by the Post-conviction Remedies Act, section 78B-9-106 (hereinafter "PCRA"). The State also objects to several of the evidentiary proffers Mr. Kell attached to his Petition. Neither party requested oral argument. After considering the arguments presented by the parties, the court GRANTS the State's Motion for Summary Judgment and dismisses the Petition. Because the case has been dismissed, the State's objections to the evidentiary proffers are MOOT.

Discussion

The Utah Rules of Civil Procedure dictate that summary judgment is appropriate when there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(a). While the court need only consider materials cited in the motion, it may also consider other materials in the record. *See* Rule 56(c)(3). The Court views the evidence and all reasonable inferences in the light most favorable to the non-moving party. *See Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 36.

The State sets forth 12 undisputed material facts in support of its motion. In his opposing

memorandum, Mr. Kell did not include "a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record" as required by rule 56(a)(2). Thus, for purposes of the motion for summary judgment, the State's undisputed material facts are deemed admitted.[1] In summary, the undisputed material facts show the following:

The Utah Supreme Court upheld Mr. Kell's conviction and sentence of death on November 1, 2002. *See State v. Kell*, 2002 UT 106. Mr. Kell filed his first petition for post-conviction relief in May 2003, followed by an amended petition in August 2005. *See* case number 030600171. The district court denied the petition, and Mr. Kell appealed. While the petition was pending, the federal district court appointed federal defenders to represent Mr. Kell in federal court.

The district court denied the petition for post-conviction relief in 2007, and the Utah Supreme Court affirmed the denial in 2008. *Kell v. State*, 2008 UT 62. In 2009, acting *pro se*, Mr. Kell filed a motion under rule 60(b), alleging that he had received ineffective assistance of counsel. That same year, Mr. Kell's federal defenders filed a Petition for Writ of Habeas Corpus in federal court and sought a stay while Mr. Kell's rule 60(b) motion was pending. The stay was granted. The state district court denied the motion under rule 60(b), and the Utah Supreme Court upheld the district court in 2012. *Kell v. State*, 2012 UT 25.

On January 14, 2013, Mr. Kell, through his federal defenders, filed an amended federal habeas petition in federal court, claiming that the judge in Mr. Kell's criminal trial improperly

[1] In footnote 1 on page 4 of Mr. Kell's response memorandum, Mr. Kell alleges that the State did not dispute the facts Mr. Kell alleged in his memorandum in support of his petition. Rule 56 requires Mr. Kell to assert his facts in numbered paragraphs in his opposing memorandum to a Motion for Summary Judgment, which Mr. Kell did not do. In addition, the "facts" Mr. Kell alleges in his memorandum in support of his petition are not presented in individual numbered paragraphs with supporting citations as required by Rule 56, making it difficult for the State to respond.

instructed the jury during its deliberations without notice to either party. According to the claim, this instruction unconstitutionally shifted the burden of determining a death sentence from the prosecution to the defense. In support of his federal petition, Mr. Kell attached declarations from jurors that served on his case, which were signed and dated in May 2012. Mr. Kell filed his current Petition for Post-conviction relief in the state district court on the January 16, 2018, alleging the same claim that was originally presented in his January 2013 federal petition for habeas corpus.

The State argues that summary judgment is appropriate because undisputed material facts show that Mr. Kell's Petition is barred for two reasons: 1) the claim could have been raised in his first Petition for Post-conviction relief but was not; and 2) it is untimely. Once a respondent pleads a ground of preclusion under section 78B-9-106 of the Utah Code, "the petitioner has the burden to disprove its existence by a preponderance of evidence." Utah Code § 78B-9-105(2). The court will address the two procedural bars raised by the State below.

A. The claim could have been, but was not, raised in Mr. Kell's first Petition for Post-conviction Relief

Section 78B-9-106(1)(d) precludes relief for any claim that "could have been, but was not, raised in a previous request for post-conviction relief." The only current statutory exceptions to this bar to relief are if the failure to raise a claim was "due to force, fraud, or coercion as defined in Section 76-5-308." Utah Code § 78B-9-106(3)(b).

Mr. Kell, through state-appointed counsel, filed an initial petition for post-conviction relief in 2003 and an amended petition in 2005. He has not shown by a preponderance of the evidence that he or his counsel *could not* have raised this claim in that initial petition. All of the facts necessary to support the claim are contained in juror declarations. Mr. Kell has not alleged that he was unable interview the jurors in time to include the claim in the initial petition or that

the jurors were uncooperative. Accordingly, the court concludes that the claim could have been raised in the initial petition.

Mr. Kell does not dispute that the claim could have been raised in the initial petition; however, Mr. Kell argues that the claim was omitted due to the ineffective assistance of his post-conviction relief counsel.

In *Menzies v. Galetka*, the Utah Supreme Court found that under the pre-2008 version of the PCRA, petitioners in capital cases had the right to the effective assistance of post-conviction relief counsel. In 2008, the legislature amended the PCRA to explicitly remove the right to the effective assistance of counsel in subsequent petitions. Nothing in the amendments to the PCRA indicates that the removal of the right to the effective assistance of counsel should apply retroactively.

The court agrees with Mr. Kell that prior to 2008, when he filed his initial petition for post-conviction relief, he had the statutory right to the effective assistance of post-conviction relief counsel. The State argues that the remedy for the violation of any such right is to file a rule 60(b) motion to set aside the denial of an initial petition, as was the remedy in *Menzies v. Galetka*. Mr. Kell, on the other hand, argues that the Supreme Court's holding in *Menzies* allows a petitioner to file a subsequent petition for post-conviction relief and raise claims that could have been raised in a prior petition but were not due to the ineffective assistance of counsel.

Nothing in *Menzies* indicates that filing a subsequent petition is the appropriate procedure for the denial of the statutory right to the effective assistance of counsel. The court, therefore, concludes that although Mr. Kell had the right to the effective assistance of counsel in his initial petition, the proper procedure is to raise his argument in a rule 60(b) motion in his initial case and not in a subsequent petition.

The claim is, therefore, barred under section 78B-9-106(1)(d).

B. The claim is untimely under the statute of limitations

Pursuant to the PCRA statute of limitations, a "petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code § 78B-9-107(1). In relevant part, a cause of action accrues on the latest of several dates, including "(c) the last day for filing a petition for writ of certiorari in . . . the United States Supreme Court, if no petition for writ of certiorari is filed; [and] (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[.]" Utah Code § 78B-9-107(2)(c), (e).

No petition for writ of certiorari was filed in the United States Supreme Court after the Utah Supreme Court affirmed Mr. Kell's conviction and sentence on appeal. *See* Petitioner's Memo. in Support of Petition, at 5. Therefore, under the (2)(c) accrual date, Mr. Kell had until November 2, 2004, to file his claim. Mr. Kell has not shown by a preponderance of the evidence that he or his counsel, in the exercise of reasonable diligence, could not have interviewed the jurors as soon as the trial concluded or within a year after his conviction was affirmed on appeal. In fact, Mr. Kell concedes that his prior post-conviction counsel *should* have interviewed the jurors earlier and raised the claim in his initial petition for post-conviction relief. *See, e.g.*, Memo. in Support of Petition, 15-16. Therefore, pursuant to 78B-9-107(2)(c), the court concludes that the claim is barred by the statute of limitations.

Even if Mr. Kell could not have known of the evidentiary facts by diligently interviewing the jurors, both parties agree that Mr. Kell *did* know of the evidentiary facts by May of 2012 when he was able to obtain declarations from the jurors who served on his case. Therefore, under the most generous analysis of the claim's accrual date, Mr. Kell had until May of 2013 to file his

petition in state court. Because the petition was not filed until January 16, 2018, the claim is barred.

Mr. Kell argues that his late filing should be excused because i) the delay was due to his prior counsel's ineffective assistance of counsel and his current counsel could not file the petition sooner than January 2018; ii) the common law exceptions to the PCRA apply; iii) his claim meets a constitutional exception under the framework established in *Winward v. State*, 2012 UT 85; and iv) the 2008 amendments to the PCRA are unconstitutional.

i. Prior counsel's alleged ineffectiveness does not excuse the late filing

The court has already concluded the proper avenue for relief for the ineffective assistance of post-conviction counsel on a petition filed prior to 2008 is to file a rule 60(b) motion to set aside a judgment. And, even if the Utah Supreme Court's ruling in *Menzies* allows a petitioner to raise his claim in a subsequent petition, Mr. Kell still waited over four and a half years to file a petition after he undisputedly knew of the evidentiary facts in support of his claim.[2]

Mr. Kell's attorneys argue that the court should toll the statute of limitations as a matter of equity because their federal contract does not allow the federal defenders to represent a petitioner in state court proceedings without permission from the federal court. And, according to Mr. Kell's federal defenders, the attorneys were unable to receive a stay in federal court until January of 2018.

As an initial matter, the Memorandum provided by the federal defenders explaining their inability to file in state court merely discusses when *funding* is available to federal defenders to

[2] Mr. Kell has not alleged that his current counsel was ineffective for failing to file the state claim sooner than January 2018, even though he had been represented by the federal defender's office since 2007.

It is unclear whether the statute would have allowed Mr. Kell to allege that his current counsel was ineffective, as the PCRA was amended in 2008 to eliminate the statutory right to the effective assistance of counsel. And ineffective assistance of counsel is not listed as a reason to toll the statute of limitations under section 78B-9-107(3).

litigate in a state forum. It does not prevent the attorneys from filing a petition in state court absent permission. It is not unreasonable or necessarily uncommon for an attorney to represent a petitioner in state court post-conviction relief proceedings pro bono. *See, e.g., Perea v. State,* district court case number 160903792; *Ross v. State*, district court case number 080700641.

Regardless, even if the federal defenders were prevented by legal, ethical, or financial reasons to file a petition in state court on behalf of Mr. Kell, Mr. Kell has not shown by a preponderance of the evidence that *he* was unable to file his state petition by May of 2013. *See Pinder v. State*, 2015 UT 56, ¶ 44 (explaining that "a claim could have been raised when [a petitioner] *or* his counsel became aware of the 'essential factual basis for asserting it'" (emphasis added)).

His attorneys argue that inmates "'are generally ill equipped to represent themselves' and 'cannot rely on a court opinion or the prior work of an attorney addressing that claim,' which they do not have." Pet.'s Opposition, at 7-8 (quoting *Halbert v. Michigan*, 545 U.S. 605, 617 (2005)). While Mr. Kell's attorneys' arguments are well-taken, his attorneys have not shown that Mr. Kell was ill-equipped to represent himself in a state post-conviction relief case. The investigation had been done for him by his federal defenders. The arguments had been made in the federal habeas petition. Mr. Kell could have adopted the same or a similar petition his federal defenders filed in federal court and filed it pro se in state court. And he could have done so prior to when the May 2013 statute of limitations expired. Indeed, Mr. Kell has shown his ability to file pro se motions and appeals, as evidenced by the pro se rule 60(b) motion and appeal he filed in his initial post-conviction relief case.

Once a petition is filed pro se, Utah's PCRA allows a petitioner to file a motion for the court to appoint an attorney pro bono to represent a petitioner on complex or potentially

meritorious claims. Mr. Kell had full access to the court to file his petition and request an attorney. He has not suggested that he was mentally incapacitated or prevented from filing a petition by illegal state action. *See* Utah Code § 78B-9-107(3) (delineating the specific circumstances when the statute of limitations is tolled). Therefore, even if the court had the authority to toll the statute of limitations due to his federal defenders' inability to represent Mr. Kell sooner in state court, Mr. Kell has not shown that there is sufficient reason to do so.

ii. The common law "unusual circumstances" exception to the PCRA does not apply

Mr. Kell next argues the court should consider the merits of his petition because the judicial exceptions to the PCRA still apply. Specifically, Mr. Kell relies on the "unusual circumstances" exception, which the Utah Supreme Court in *State v. Griffin*, 2016 UT 33, ¶ 21, suggests may have survived the 2008 amendments to the PCRA. *See* Pet.'s Opposing Memo., at 11.[3] While the court recognizes that the *Griffin* case is our most recent word from the Utah Supreme Court on this matter, the Supreme Court just one year earlier explicitly indicated the common law exceptions to the PCRA "are available only for claims filed before May 5, 2008." *Pinder v. State*, 2015 UT 56, ¶ 56 (explaining that the common law exceptions "were repudiated by the legislature in 2008"); *see also Taylor v. State*, 2012 UT 5, ¶ 11 n.3. Because Mr. Kell is asking this court to apply the unusual circumstances to his current petition, which was filed after 2008, the court concludes that the common law exceptions do not provide him relief.

Even if the common law exceptions do still apply to the PCRA, as suggested but not held by *Griffin*, under the "unusual circumstances" test, claims that are procedurally barred may only

[3] The Utah Supreme Court in *Griffin* cites to several cases, one of which specifically states that the common law exceptions no longer apply, *see Carter v. State*, 2012 UT 69, ¶ 31, and others that state that the question is still undecided, *see, e.g., Winward v. State*, 2012 UT 85; *State v. Taufui*, 2015 UT App 118, ¶ 14.

The *Griffin* court did not cite to its most recent precedent, *Pinder v. State*, 2015 UT 56, ¶ 56, which explicitly states that the common law exceptions only apply to petitions filed before 2008. It is unclear to this court whether to rely on the direct language in *Pinder* or the language in *Griffin*.

be addressed if "there was an obvious injustice or a substantial and prejudicial denial of a constitutional right." *Taylor v. State*, 2007 UT 12, ¶ 122 (citing *Carter III*, 2001 UT 96, ¶ 15). The court concludes there is no obvious injustice or denial of a constitutional right in applying the statute of limitations here: As explained above, Mr. Kell had every opportunity prior to May of 2013 to file a petition in state court but he failed to do so. Instead he waited over four and a half years to assert his claim in January of 2018.

iii. Mr. Kell has not shown that he meets an egregious injustice exception under *Winward*

Regardless of whether the common law exceptions still apply following the 2008 amendments, in *Gardner v. State*, 2010 UT 46, the Supreme Court acknowledged that it *may* have the authority under the Utah Constitution to address the merits of an otherwise-barred post-conviction relief petition when not addressing it may result in an "egregious injustice." *Id.* ¶ 93.

The State argues the power to recognize such an exception belongs to the Utah Supreme Court and not the district court. The State's argument is well-taken. This court is bound by rule 65C of the Utah Rules of Civil Procedure, which specifically requires that all petitions for post-conviction relief are governed by the PCRA. The PCRA, as amended in 2008, "replaces all prior remedies for review, including extraordinary or common law writs" and is now "the *sole* remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies" § 78B-9-102(1) (emphasis added). In order to recognize a remedy beyond the PCRA, this court would have to ignore rule 65C's mandate to follow the parameters of the Act.

Regardless, in the interest of thoroughness and to ensure this court is addressing all of Mr. Kell's arguments, this court will address whether he has shown that he is entitled to an "egregious injustice" exception under the Utah Constitution.

In *Winward v. State*, 2012 UT 85, the Utah Supreme Court articulated a framework for considering whether a petitioner's claim would be subject to such an exception: First a petitioner has a "heavy burden" to show that he has "a reasonable justification for missing the deadline combined with a meritorious defense." *Id.* ¶ 18. "Only after meeting this threshold requirement will [the court] even consider the existence of an exception to the PCRA." *Id.*

Second, the petitioner must then "fully brief the particulars of this exception," including an "articulation of the exception itself, its parameters, and the basis for [the] court's constitutional authority for recognizing such an exception." *Id.* Finally, a petitioner must explain "why the particular facts of his case qualify under the parameters of the proposed exception." *Id.*

Mr. Kell argues that he has met the *Winward* framework due to the ineffective assistance of his counsel on his initial petition for post-conviction relief, which was filed in 2005. But Mr. Kell misunderstands his burden. He must show that he has a reasonable justification for missing the deadline to file his *current* petition, for which the cause of action accrued in May 2013. As explained above, the court concludes that Mr. Kell did not have a reasonable justification for missing that deadline by four and a half years because he could have filed a petition by May 2013. Accordingly, the court concludes that Mr. Kell has not shown that he meets an "egregious injustice" exception to the bars in the PCRA.

In addition, Mr. Kell did not adequately brief the second and third requirements for the court to recognize an egregious injustice exception to the statute of limitations. He did not include a discussion of the parameters of the exception he is requesting or the court's constitutional authority[4] to recognize such an exception.

[4] Mr. Kell did address the court's constitutional authority to grant relief when challenging the constitutionality of the PCRA in general on pages 21 through 24 of his opposing memorandum.

Accordingly, Mr. Kell has not met his burden to show that an "egregious injustice" exception to the procedural bars in the PCRA applies to his claim.

iv. The 2008 amendments to the PCRA are not unconstitutional

Mr. Kell argues that if no exceptions to the time bars in the PCRA apply, then the PCRA is unconstitutional. The Utah Constitution provides "The privilege of the writ of habeas corpus shall not be suspended" and the court has the power "to issue all extraordinary writs." Utah Const., art. I, § 5; art. VIII, §§ 3, 5. According to Mr. Kell, "[b]ecause the courts' writ power is granted directly by the constitution, the legislature has no authority to diminish or restrict that power." Pet.'s Opposing Memo., at 22 (citing *Brown v. Cox*, 2017 UT 3, ¶ 14).

Even if post-conviction review is coextensive with the writ of habeas corpus, the court concludes that the legislature has not encroached on the court's authority to address post-conviction claims. The Utah Supreme Court has exercised its constitutional power by codifying rules that set forth the parameters and procedure governing writs. In 2009, the Utah Supreme Court amended rule 65C, the court rule governing petitions for post-conviction relief. The amended rule provides that the PCRA "sets forth the manner and extent to which a person may challenge the validity 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 rule also eliminated a petitioner's power to file successive petitions for post-conviction relief and raise additional claims if a petitioner could show "good cause." *Compare* Utah R. Civ. P 65C (2008) *with* Utah R. Civ. P. 65C(d) (2010).

Thus, contrary to Mr. Kell's assertion that the PCRA has limited the court's authority to address a writ, the court has explicitly embraced the PCRA through its codification of rule 65C. The court still retains the authority to amend rule 65C, or, as outlined in *Winward*, to recognize a

constitutional exception to the PCRA's parameters. The Advisory Committee Note to the changes to rule 65C specifically indicates that the restrictions placed on post-conviction relief petitions "do not amount to the suspension of the writ of habeas corpus." Utah R. Civ. P 65C advisory committee note.

Furthermore, as argued by the State, the PCRA gives petitioners a meaningful opportunity to contest their conviction or their sentence. The statute provides a year for petitioners to develop their claims after a cause of action has accrued and includes tolling provisions for petitioners who do not have the mental capacity or ability to file claims sooner. The only restriction the PCRA places on a petitioner is the petitioner must be reasonably diligent in pursuing his or her claims. The court concludes this restriction does not unconstitutionally suspend the writ.

Accordingly, the court concludes that the PCRA is not unconstitutional.

ORDER

For the foregoing reasons, the State's Motion for Summary Judgment is hereby GRANTED. Because there are no outstanding claims, the court orders that Mr. Kell's Petition for Post-conviction Relief is DISMISSED with prejudice.

Due to the dismissal of the case, the State's evidentiary objections are MOOT.

This is the final order of the court.

Dated this 31st day of August, 2018.

BY THE COURT:

Judge Wallace A. Lee
Sixth District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 180600004 by the method and on the date specified.

EMAIL: DANIEL W BOYER dboyer@agutah.gov
EMAIL: B KENT MORGAN morgan@mnalaw.net
EMAIL: JONATHAN T NISH nish@mnalaw.net
EMAIL: ANDREW F PETERSON andrewpeterson@agutah.gov
EMAIL: ERIN RILEY eriley@agutah.gov

Date: 09/05/2018 /s/ LORI KOGIANES

Deputy Court Clerk

Addendum 3

Kell v. State
20180788

Grant W.P. Morrison #3666
MORRISON & MORRISON, L.C.
Attorneys for Petitioner
Troy Michael Kell
352 East 900 South
Salt Lake City, Utah 84111
Telephone (801) 359-7999
Facsimile: (801) 359-1774

Aric Cramer #5460
Cramer & Cramer, L.L.C.
Smith Hyatt Building
845 South Main Street, Suite 23
Bountiful, Utah 84010
Telephone: (801) 299-9999
Facsimile: (801) 298-5161

IN THE SIXTH DISTRICT COURT

IN AND FOR SANPETE COUNTY, STATE OF UTAH

TROY MICHAEL KELL,	:	
Petitioner,	:	**AMENDED PETITION FOR POST CONVICTION RELIEF AND/OR WRIT OF HABEAS CORPUS**
vs.	:	
STATE OF UTAH,		Case No. 030600171
Respondent.	:	Judge David L. Mower

COMES NOW Petitioner Troy Michael Kell by and through his attorneys Grant W. P. Morrison and Aric Cramer, and petitions this court for a writ of habeas corpus and/or post conviction relief in accordance with Utah Code Ann. § 78-35a-101, et. seq., and Rules 65(b) and 65(c) of the Utah Rules of Civil Procedure.

1. Petitioner is confined in the Utah State prison located in Salt Lake County, State of Utah in the custody of the warden of the Utah State Prison, Clint S. Friel.

2. Petitioner is confined pursuant to a conviction entered on or about August 8, 1996, in the Sixth Judicial District Court for Sanpete County, Case Number 941600213. Petitioner was found guilty following a jury trial of Aggravated Murder, a Capital offense, in violation of Utah Code Ann. § 76-5-202. His sentence was death.

3. Petitioner appealed his conviction to the Utah Supreme Court, which has jurisdiction over capitol cases. The Utah Supreme Court affirmed his conviction in *State v. Kell*, 2002 Ut 19, originally filed February 8, 2002 but subsequently amended and filed November 1, 2002.

4. The Supreme Court of the United States denied Kell's petition for a Writ of Certiorari.

5. Troy Kell raised the following issues on appeal to the Utah Supreme Court:

a. The trial court erred by denying Kell his constitutional rights to a public trial, to the presumption of innocence, and to equal protection of the law, by truing him in a courtroom located inside the prison. This was the prison where the purported crime had occurred.

b. The trial court violated Kell's constitutional rights to a fair trial by denying him an impartial jury as a result of the

trial court's rulings on voir dire and challenges for cause.

c. The trial court erred by failing to instruct the jury on the theory of imperfect self-defense manslaughter. Justice Durham and Justice Howe were of the view that any evidence, even the uncorroborated testimony of the defendant entitles a defendant to an instruction on his theory of the case, and that the trial judge should not make credibility determinations in criminal jury trials. They concluded that the trial court erred in failing to instruct the jury on imperfect self-defense manslaughter, but that it was harmless error. Within this argument, the jury was specifically instructed to order its deliberations and not to consider lesser included offenses unless it found the defendant innocent of the greater offense. With regard to the manslaughter, the instructions stated "Do not deliberate or vote on the charge of manslaughter,a lesser included offense, unless the State has failed to prove either aggravated murder or murder." The Court found that language to be improper. Nevertheless, the Court held that the instruction defining aggravated murder as including the absence of emotional disturbance ensured that manslaughter was considered before aggravated murder.

d. The trial court erred by allowing jurors to view a videotape of the homicide.

e. The trial court committed multiple evidentiary errors which individual and cumulatively deprived Kell of a fair trial. Included within this was the "Dear Luther" letter, which the

defendant argued should not be admitted because of its prejudicial nature. Only portions of this letter were admitted. Other issues addressed, were, inter alia, statements allegedly made by Kell to a guard post event, statements made by inmate Francisco Colon, testimony and a small autopsy photograph.

f. The prosecution denied Kell his rights to due process of law and protection under the eighth and Fourteenth Amendments by making improper arguments to the jury. This was raised as a prosecutorial misconduct issue. The Court acknowledged that, "although perhaps ill-advised because of their personal nature (the prosecutor had alluded to his mother having "substantial hardships" during her childhood, yet did not become a criminal), the prosecutor's statement did not constitute misconduct or plain error.

g. The trial court erred during the penalty phase by refusing to allow the jury to consider mercy and sympathy as mitigating factors.

h. The victim impact evidence admitted in the penalty phase and the statute which allows it, are unconstitutional.

i. Section 76-5-202 of the Utah code, which describes the aggravating factors necessary for capital murder, is unconstitutionally vague on its face.

j. The Utah death penalty statutes are unconstitutional because they do not narrow the class of death-eligible murders, thus encouraging the arbitrary and capricious application of the

death penalty.

k. The capital sentencing proceedings were flawed.

l. The imposition of the death penalty violated state and federal constitutional double jeopardy provisions because Kell had already been disciplined through the prison's disciplinary proceedings. *State v. Kell*, 61 P.2d at 1024-1025. This argument was dispatched as frivolous.

6. The Petitioner has not previously sought post-conviction relief to challenge his conviction and sentence.

7. Petitioner Troy Kell's conviction and sentence of death were obtained in violation on his rights under the Constitution of the United States, the Utah State Constitution, and the statutes and laws of the State of Utah based upon the following facts, and others to be developed after further investigation, discovery and evidentiary hearing, as may be allowed under the funds available, as set for below:

8. Kell's right to a fair and impartial public trial and his right to due process of law under the Sixth and Fourteenth Amendments and Article I Section 12 of the Utah State Constitution have been violated by being forced to stand trial inside the Central Utah Correctional Facility (CUCF). Although previously raised as an issue on appeal, they were not effectively argued by counsel as set forth below.

a. Prior to trial, the question of trial security was

referred by Judge David L. Mower, the trial judge, to the presiding judge of the District, Judge K. I. McKiff. Judge McKiff, conducted independent research, considered security issues raised by the Department of Corrections, and made a determination that the trial should be held at the CUCF, prior to holding a hearing on the issue of trial security and place of trial. The court did not allow Kell's defense attorney sufficient notice and opportunity to prepare for the issues to be considered prior to the hearing, thereby denying Kell the right to due process and his Sixth Amendment rights to counsel.

b. The trial court decision was not based upon fact, but was based upon conclusions as to whether or not jurors would be unduly prejudiced by a trial in a prison setting and the right of petitioner to be tried by a Sanpete County jury. Kell had previously moved for a change of venue from Sanpete County and did not maintain the right to be tried by a Sanpete County jury. Kell's right to the presumption of innocence was compromised by the prison trial since jurors would likely consider him to be more dangerous or likely guilty due to the place of trial. Additionally, trial counsel did not argue or their arguments were inadequate, that the prejudice to Kell would be greatly enhanced by having the jury escorted in and out of all proceedings by a SWAT team, that the attendance of SWAT team members in the courtroom, whose very presence was intimidating by the close cropped or skinhead appearance of most of the team members, especially if the

inference were drawn they were Kell's friends; that Kell was required to testify while shackled, combined with the prison setting ensured that Kell would not receive a fair trial.

c. The trial court did not properly weigh and consider the constitutional rights of the petitioner to a public trial in making the decision to hold the trial in the prison, thereby denying the petitioner his right to due process and his right to a fair public trial under the provisions of Article I Section 12 of the Utah State Constitution. The decision of the court was based primarily upon security issue concerns which should not have been considered. The Daniels Court held that "...we also point out that to hold a criminal trial in a courtroom located inside a prison or other facility simply because a defendant is already incarcerated, or because to do so would be more safe or convenient, would also be error, absent adequate findings and compelling reasons". *Daniels*, at paragraph 26. The public, although not barred from attending the trial, were discouraged by having to attend the proceedings in the prison. Counsel was impermissibly ineffective in failing to properly argue the preceding.

d. The court, having concerns about the security during trial, failed to consider a more reasonable alternative such as moving the trial to a courtroom in another county, where there were court rooms which are secure, spacious and available. There are secure court rooms in both Sevier and Utah counties which are

within reasonable distance of Sanpete County, where numerous trials involving inmate witnesses and defendants considered serious security risks have been held.

e. The proceedings at the prison not only included the jury trial of the guilt or innocence of Petitioner, but also the jury determination of whether Kell was sentenced to life or death. The fact that Kell's trial was held in the prison sent the implied message to the jury that petitioner was extraordinarily dangerous to the point that he could not be tried in a conventional court room. The combination of the charges and cumulative trial evidence within the setting of an inherently dangerous environment of a prison setting, led to the inexorable and entirely predictable sentence of death.

9. The death qualification of the jury violated Kell's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7,9,10 and 12 of the Constitution of the State of Utah.

a. The jurors who were impaneled to hear the evidence, determine the guilt or innocence of Kell, and to determine his sentence were death qualified.

b. The process of death qualification results in jurors who are more prone to convict and to disregard the presumption of innocence than those who are not. This fact is borne out by professional studies conducted by competent experts in the fields of psychology and related fields.

10. The trial court removed potential jurors, V.D. and R.F., for cause based upon the reluctance of the jurors to impose the death penalty, thus violating Kell's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitutions, and Article I, Sections 7, 9, 10 and 12 of the Constitution of the State of Utah.

a. The State moved to remove V.D. for cause based upon her reservations concerning imposing the death penalty. The defense objected (R. 4404-05).

b. The juror did not indicate that she would not impose the death penalty, only that she would have difficulty in doing so except in cases involving child molestation. She did not indicate that she would not impose the death penalty of that she could not follow the instructions of the court. The juror indicated that she did not have a conscientious objection to the death penalty. The juror indicated that she would listen to the evidence including aggravating and mitigating evidence and vote for the appropriate penalty and be fair (4393-4400).

c. The court granted the State's challenge for cause based upon the fact that the juror may be uncomfortable or reluctant to impose death rather than on a showing that the juror could not and would not impose the death penalty upon petitioner, regardless of the evidence ($. 4404-4406).

d. The basis for removal of the juror for cause was improper under the guidelines set forth in *Witherspoon v. Illinois*,

391 U.S. 510 (1968). The preceding issues were not effectively raised by trial or appellate counsel.

e. The State also moved to remove juror R. F. for cause based upon her reluctance to impose the death penalty. The defense objected. (R. 4353-4354).

f. R. F. stated that although she would have difficulty in imposing the death penalty, she could do so in an extreme case. She indicated that she would have to hear the evidence and then under the appropriate circumstances she could possibly impose the death penalty. (R. 4347). The juror also indicated that she had no conscientious objection to the death penalty. (R. 4349).

g. The trial court granted the prosecutions challenge to cause upon the basis that there was a question about whether or not the juror did have a conscientious objection to the death penalty. (R. 4355).

h. The basis for removal of the juror for cause was improper under the guidelines set forth in *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

11. The trial court improperly denied Kell's challenges for cause thus violating Kell's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 7, 9, 10 and 12 of the Constitution of the State of Utah. These arguments were either not raised by trial and appellate counsel, or were not effectively raised.

e. Kell challenged for cause on the basis of the expressed bias of the juror. The trial court denied Kell's challenge. (R. 4155-4156).

f. Juror D.S. revealed in her answers to the questionnaire that she had been told about the crime scene by her husband, that she was acquainted with several of the State's witnesses, that she knew too much about the case, that her husband worked at the Central Utah Correctional Facility and had been involved in cleaning up the crime scene, that she could not be fair and that she had formed an opinion about the case.

g. During voir dire questioning, D.S. indicated that she had doubts about her ability to base her decisions on the evidence in the case and whether or not she could separate what she had been told about the case from the evidence presented in the courtroom and that if she were Kell, she would not feel comfortable having a juror with her state of mind hear the case. (R. 3723-3726).

h. Kell challenged the juror based upon her voir dire responses. The trial court denied his challenge for cause. (R. 3729)

i. Juror S. M. indicated in her answers to the juror questionaire that she was biased due to her belief that prisoner's have too many rights and that she felt it would be a financial hardship for her to serve. S.M. indicated during voir dire that

she would have difficulty setting aside her own beliefs as to what she thought the law ought to be and following the instructions on the law given by the court. (R. 3460-3461). She also felt that her job and financial commitments would make it difficult to concentrate on the trial (R. 3774-3775).

j. Kell challenged S. M. for cause. The trial court denied Kell's challenge. (R. 3778).

k. Juror C. L. indicated difficulty in serving due to job concerns since he was one of two veterinarians in two counties, that he knew several of the State's witnesses, and that he was employed as a veterinarian by the Central Utah Correctional Facility. During voir dire examination, he indicated that he had heard a lot about the case and that it would be interesting to see if he could set aside what he had already heard (R. 4105). He expressed difficulty in committing to consider extreme emotional stress of mental disturbance as a mitigating factor (R. 4116-4117).

l. Kell challenged C. L. for cause based on his unwillingness to consider extreme emotional stress or mental disturbance as a mitigating factor. The court denied Kell's challenge. Trial counsel failed adequately challenge C. L. for cause for his preconceived beliefs relating to the guilt or innocence of Kell, and his employment status as an employee of CUCF, and his relationship with "several" of the State's witnesses.

m. The denial of Kell's challenges for cause violated Kell's rights guaranteed by the Sixth, Eighth and Fourteenth

Amendments to the United States Constitution, and Article 1, Sections 7, 9, 10 and 12 of the Constitution of the State of Utah.

12. Kell's right to a fair and impartial public trial were violated by the denial of his Motion for a Change of Venue to a county other than Sanpete County. Kell had requested that the trial be held in Salt Lake County due to heightened publicity and potential difficulties in obtaining a fair trial in Sanpete County.

a. Although there was initially state-wide publicity regarding Kell's case, the publicity was much more intense in Sanpete County, where the offense occurred. The Central Utah Correctional Facility is located in the city of Gunnison, located in Sanpete County. The numerous law enforcement officers involved in the case are residents of Sanpete County, as were most of the witnesses called in the case. The chance of outside influence upon the jury through media reports, knowledge or close association with witnesses or other improper influences required the case to be moved to a county with fewer risks for juror contamination.

b. Although Kell requested trial in Salt Lake County, he did not object to trial in another county other than Sanpete.

c. Although the court determined that there were sufficient security concerns to require that the trial be held in a prison facility and expressed concerns about whether such a trial would result in a denial of Kell's constitutional rights to a fair public trial, the court denied the Motion for a Change of Venue.

d. Trial and Appellate counsel were derelict in failing

to raise this issue on appeal.

13. The Petitioner's right to a fair trial, due process of law and freedom from cruel and unusual punishment as guaranteed by the Sixth, Eighth and Fourteenth Amendment to the Constitution of the United States and Article I, Sections 7, 9, 10, and 12 of the Utah State Constitution by failure of the trial court and defense counsel to give an adequate reasonable doubt instruction.

a. The trial court's reasonable doubt instruction was constitutionally flawed since it did not provide sufficient guidance to the burden of proof to the jurors.

b. During the penalty phase of the trial, defense counsel did not object to the submission to the jury of the standard of proof.

14. Kell's right to a fair trial was fundamentally denied by the admission, over objection, to the videotape. Although the Utah Supreme Court has ruled that the videotape was admissible, appellate counsel was remiss in not arguing cumulative, after having the medical examiner's testimony, autopsy report and numerous witnesses.

15. Kell's right to a fair trial was violated by the improper admission of evidence.

a. The trial court allowed admission of a letter from Kell called the "Dear Luther" letter. Only partial portions of the letter were admitted and defense counsel failed to effectively present the entirety of the letter. Had the entirety of the letter

been introduced, not just selected "racist" parts, the jury would have had an entirety different perception.

b. The autopsy report of the medical examiner Dr. Maureen Frikke, was admitted over the objection of defense counsel, and the report was allowed to be sent back with the jury while it deliberated. This issue was not raised by appellate counsel, and defense counsel was derelict in failing to raise this issue.

16. Kell's conviction and death sentence were obtained as a result of other incidences of ineffective trial counsel, which occurred prior to or during the trial of the petitioner, as follows:

a. Trial counsel failed to conduct effective and complete pretrial investigation and was not able to devote the necessary time to Kell's case due to the rigorous demand's of trial counsel's practice.

b. Trial counsel filed a pretrial motion for a change of venue from Sanpete County, State of Utah, to Salt Lake County, but did not consider other venues closer in proximity to Sanpete County.

c. Trial counsel's motion for a change of venue was not support by any data such as polls, questionaires, or other demographic information to support the grounds for moving the trial.

d. Trial counsel failed to adequately and effectively brief and raise all of the issues regarding holding the trial in

the Central Utah Correctional facility, including obtaining data from experts on the effect of the prison location upon jurors, witnesses, and Kell's right to a public trial.

e. Trial counsel failed to seek interlocutory review of the adverse ruling on the issue of venue and trial in the prison.

f. Trial counsel failed to adequately brief and research pretrial motions which were filed.

g. Trial counsel failed to file pretrial motions to prevent the introduction of improper evidence.

h. Trial counsel failed to properly investigate and interview state's potential witnesses and to locate and secure rebuttal witnesses and evidence. Included in this were inmates John Gallegos, James Setty and Doug Pierce who could have rebutted the State's argument that there were procedures in place to handle redress of inmate threats, and two black inmates who knew Kell and could rebut the racist claim. Further, defense counsel failed to secure the jackets of the State's witnesses, which could have revealed potential credibility issues; at the very least the claimed racist statements made by Kell purported heard by other inmates were never requested by defense counsel.

i. Trial counsel failed to adequately advise Kell about the necessity not to engage in conversation about the case with custodial officers or other persons outside the presence of counsel.

j. Trial counsel failed to adequately review and make

objection to the improper original transfer of Kell under the Interstate Compact Agreement.

k. Trial counsel failed to appropriately investigate and illustrate prosecutorial misconduct relating to Francisco Colon, whose testimony was devastating at trial, and proper investigation would have shown Colon's testimony to be perjured.

l. Trial counsel was ineffective during the jury selection process by failed to appropriately challenge jurors for cause which forced Kell to expend his peremptory challenges to remove those jurors.

m. Potential juror Gerald Zabriskie indicated that he would impose the death penalty if the State proved a vicious crime, that he knew several of the State's witnesses, that the circumstances under which he would consider a penalty other than the death penalty would be if the defendant were provoked, that it was not an individual judgment as to whether the death penalty should be imposed and that the death penalty was not imposed soon enough after conviction. This juror was passed for cause by Kell's counsel despite issues of bias and unwillingness to make an individual determination of the issues. (R. 3490-3498).

n. Potential juror Helen H. Syme did not indicate that she would hold the State to its burden of proof, indicating that she "guessed" she would. Symes indicated that she felt the defendant should prove his innocence and when asked if defendant did not take the stand if she would hold it against him said

initially that she did not know, then did not positively indicate that she would render a decision based upon her own beliefs as to what penalty would be appropriate. Kell's counsel passed this juror for cause despite the lack of total commitment to a decision based upon her individual judgment. (R. 3674-75), then used one of Kell's peremptory challenges to excuse the juror.

o. Potential juror Dan Brinkerhoff indicated that his son worked at the Central Utah Correctional facility and was working at the time of the homicide and that he believed the death penalty was appropriate in every case of intentional murder, although he did later indicate that he would not "automatically" impose the death penalty in every case of intentional homicide. Kell's counsel did not challenge this juror for cause (R.3796-3801), then used one of Kell's peremptories to excuse the juror.

p. Potential juror Earl J. Brewer indicated that he would impose the death penalty in cases where the murder was premeditated. When asked again he indicated that if it was planned there were no circumstances under which he would not impose death. Although there might be circumstances where he would consider mitigating evidence, the tenor of his responses was that he would impose the death penalty in cases where the penalty was premeditated. The juror also indicated that he had a brother who worked at the prison. There was no inquiry as to whether or not that relationship would cause the juror to favor the prison employees who were witnesses in the case or whether he could give

equal consideration to those who may testify adversely. Kell's counsel did not challenge for cause (R. 3839-43) and counsel used one of Kell's peremptory challenges to remove the juror.

q. Potential juror Elaine S. Redmond indicated that she thought Kell should prove his innocence and that Ross Blackham, one of the prosecutors, was her divorce attorney. During the voir dire, prosecutor Blackham addressed the juror by her first name, Elaine, potentially indicating he had more than a casual acquaintance with the juror. Kell's counsel did not challenge for cause (R. 4220-24) and defense counsel used one of Kell's peremptory challenges to remove her.

r. Kell's trial counsel failed to object to improper opening statements made by the prosecution, and this issue was not raised on appeal.

s. Trail counsel failed to adequately advise Kell as to whether or not Kell should testify in the guilt/innocence phase of the trial where he would be subject to cross examination.

t. Trial counsel failed to have bench conferences transcribed to preserve the record of the proceedings, even though this was a death penalty case.

17. Kell's conviction and death sentence were obtained as a result of ineffective assistance of counsel, in violation of his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendment of the Constitution of the United States and Article I, Sections 7, 9 and 12 of the Utah State Constitution which occurred during the

penalty phase of the trial.

a. Trial counsel did not object to the improper opening statement of the prosecutor.

b. Trial counsel did not make an opening statement informing the jury of Kell's position.

c. Trial counsel did not object to the presentation of highly prejudicial victim impact testimony.

d. Trial counsel presented witnesses who were detrimental to Kell and who gave aggravation evidence rather than mitigation evidence.

e. Trial counsel did not object to improper closing arguments from the prosecution.

18. Kell's Appellate counsel was ineffective.

a. Kell's conviction and death sentence were upon on appeal as a result of ineffective counsel.

b. Appellate counsel failed to adequately brief and raise relevant issues on appeal, as reflected herein.

c. Appellate counsel failed to raise the issue of the legality of Kell's transfer from Nevada to Utah.

d. Absent the errors and omissions of trial and appellate counsel, there is a reasonable likelihood that petitioner would not have been convicted of aggravated murder, and a reasonable likelihood that petitioner would not have been sentenced to death.

Wherefore, the petitioner prays as follows:

1. That the Court issue a Writ of Habeas Corpus or as otherwise specified in the Post Conviction Remedies Act, and have the petitioner brought before this Court in order to be discharged from his unconstitutional confinement and restrain, and relieved on his unconstitutional sentence of death.

2. Conduct a hearing wherein proof may be offered in support of the allegations of this petition.

3. For other such further relief as may be appropriate.

DATED this 1st day of August, 2005.

MORRISON & MORRISON, L.C.

Grant W. P. Morrison
Aric Cramer
Attorneys for Troy M. Kell

Certificate of Service

This is to certify that I hand delivered a true and correct copy of the foregoing, to:

Thomas B. Brunker, Esq.
Christopher D. Ballard, Esq.
Assistant Attorneys General
Mark L. Shurtleff
Utah Attorney General
Attorneys for Respondent
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854

on the 1st day of August, 2005.

Grant W.P. Morrison #3666
MORRISON & MORRISON, L.C.
Attorneys for Petitioner
Troy Michael Kell
352 East 900 South
Salt Lake City, Utah 84111
Telephone (801) 359-7999
Facsimile: (801) 359-1774

Aric Cramer #5460
Cramer & Cramer, L.L.C.
Smith Hyatt Building
845 South Main Street, Suite 23
Bountiful, Utah 84010
Telephone: (801) 299-9999
Facsimile: (801) 298-5161

IN THE SIXTH DISTRICT COURT

IN AND FOR SANPETE COUNTY, STATE OF UTAH

TROY MICHAEL KELL,	:	
Petitioner,	:	**ADDITION TO AMENDED PETITION FOR POST CONVICTION RELIEF AND/OR WRIT OF HABEAS CORPUS**
vs.	:	
STATE OF UTAH,		Case No. 030600171
Respondent.	:	Judge David L. Mower

COMES NOW Petitioner Troy Michael Kell by and through his attorneys Grant W. P. Morrison and Aric Cramer, and provides page 11 to the previously submitted Amended Petition for Post Conviction Relief and/or Writ of Habeas Corpus. This page was inadvertently left out of the filing.

Dated this 8th day of August, 2005.

MORRISON & MORRISON, L.C.

Grant W. P. Morrison
Aric Cramer
Attorneys for Troy M. Kell

Certificate of Service

This is to certify that I hand delivered a true and correct copy of the foregoing, to:

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Assistant Attorneys General
Mark L. Shurtleff
Utah Attorney General
Attorneys for Respondent
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854

on the 8th day of August, 2005.

(a) Juror M.C. stated that he would impose the death penalty in any case where intentional homicide was proven. (R. 3393). Although he later indicated that he would listen to the evidence and follow the instruction (R. 3400), he then later reinstated his intent to impose the death penalty for intentional or knowing murder (R. 3401) and that the concept of an "eye for an eye" is correct (R. 3402-3403).

(b) Defense counsel challenged for cause, but the trial court denied the challenge. (R. 3408).

(c) Juror N.B. revealed that he had known the head prosecutor for over twenty-one years, and that he knew him to be a good man. Further, he stated that he did not know the defense counsel and that he would give the prosecutor more credence than he would afford defense counsel and that in a close case his friendship with prosecutor Ross Blackham would cause him to side with the prosecution. (R. 4189)

(d) N. B. also indicated that he had heard a lot about the case and that he was not sure he could set aside what he had heard. (R. 4141).

Addendum 4

Kell v. State
20180788

DECLARATION OF DEANN DRAPER

I declare under penalty of perjury the following to be true and accurate to the best of my information and belief:

1. I was a juror in the capital trial of Troy Kell.

2. I had a very hard time voting to sentence him to death but I voted that way because I didn't think there was anything else we could have done. He was already in prison for life, he'd already committed murder. There wasn't anything else to do but to say he's guilty and sentence him to death.

3. I recall no details of any mitigation evidence that generated any sympathy in my mind for Kell.

4. Going into the prison for the trial was traumatic. It really was. Knowing I was having to go into the prison system, the whole seriousness of it. I knew that having the trial in the prison was a point of controversy. It was mentioned. The judge said he didn't think the trial should be held at a public courthouse. It was something we had to do for our safety and for the safety of the community at large.

5. I was not aware that the family of the victim, Lonnie Blackmon, had won a settlement from the state over his death. The fact that the Utah Attorney General Office was defending the state against that claim while prosecuting Kell was a conflict. That's real obvious.

6. I recall Judge Mower coming in to speak to the jury after we'd started deliberating. I don't remember what the issue was but I do remember him coming in and clarifying something for us.

I **declare under penalty of perjury the foregoing to be true and accurate to the best of my information and belief. Signed this** 7 **day of May, 2012, at Moroni, Utah.**

Deann Draper

Deann Draper

DD

Addendum 5

Kell v. State
20180788

DECLARATION OF GRANT HANSEN

I declare under penalty of perjury the following to be true and accurate to the best of my information and belief:

1. I was the foreman of the jury during Troy Kell's capital trial.

2. The question of guilt was straightforward. Videos played during the trial showed the horrific nature of the crime.

3. The penalty phase where the sentence was determined was a more difficult choice. It was one of the more stressful and emotional things I've been through. To say that another person has to die -- that was a really hard decision.

4. The prison setting of the trial didn't bother me. They had the trial inside the prison because they might have felt more secure. I know they talked about security concerns.

5. When we arrived at the prison each day for trial, we checked in at the admittance gate with an officer. We might have had passes. Then we gathered in the front hallway and walked down the hall to the courtroom together. I have been into the prison since the trial for educational and church matters, so I may be blending the experiences. I don't remember for sure if we passed a control room to get through additional doors. I know there's a control room there now. We may have gone past it at the time of trial; I can't recall with certainty. I remember the courtroom was on the right.

6. When we got to the penalty phase, the disclosure of Kell's prior conviction in Nevada came as a surprise.

7. Once deliberations began, the jurors voted by show of hands whether to have a secret ballot, and it was decided to proceed with secret ballots. Four or five jurors initially indicated that they believed Kell should be executed. The majority wasn't sure at the start. We talked for some time.

8. They jury asked the judge for a clarification. I believe it had to do with the range of sentences we could impose. I don't remember how the answer came back

GRH

to us, whether it was a written reply or spoken reply from the judge.

9. After penalty phase deliberations began in late afternoon, we broke for a meal and talked into the early evening. We went home for the night and came back the next day and made the decision after a couple of hours. I came back the next day thinking that a vote for death was the vote I needed to cast. As final a vote as that can be – to take his life – it was the law. It seemed to me like the attorneys had proved that it was appropriate.

10. A couple of jurors had a hard time voting for death. They held out. We talked about it. We talked about the implications.

~~11. I think we jurors felt we needed something to convince us not to vote for death, and we didn't have that reason.~~

12. At the time, I didn't think about the role the Attorney General's Office played in Kell's prosecution. However, I heard after the trial that the Sanpete County Attorney was unhappy about the role the AG's office played.

13. I thought the defense attorneys and prosecutors were pretty good on both sides, though I recall that defense attorney Doug Neeley talked of driving past the jurors' homes, and that bothered me.

14. I worried some and wondered whether Kell's friends or family might come back against me due to my role in this case.

15. I thought at the time that the death sentence was appropriate, and I still feel that way.

I declare under penalty of perjury the foregoing to be true and accurate to the best of my information and belief. Signed this 17th day of May, 2012, at Gunnison, Utah.

Grant Hansen

Addendum 6

Kell v. State
20180788

DECLARATION OF JO ANN JEPPSON

I declare under penalty of perjury the following to be true and accurate to the best of my information and belief:

1. I was a juror in the capital trial of Troy Kell.

2. I had a difficult time voting for the death penalty but I agreed to do so after Judge Mower came and spoke to the jurors as we deliberated. He told us that Kell's attorneys had to show us that Kell's life should be spared.. The jury had bogged down over a definition but the judge's statement helped because we wanted to be sure that we were doing the right thing. I remember that the judge was asked a question while he was speaking to us, and he kidded around and said he couldn't address that question, and said that it was up to us. After the judge came and spoke to us, I felt more comfortable voting for death.

3. There was no defense attorney present when the judge spoke to us during deliberations, though there was somebody with him – the bailiff, perhaps.

4. I had doubts about voting for the death penalty until the judge came in and said the defense needed to make you have that question, "Is there any doubt?"

5. During deliberations, we jurors tried to go back and think about all the testimonies. That was what kind of kept us in there as long as we were in there. Several of us said, "Wait a minute," and said we wanted to talk about it and not rush our decision Some jurors seemed irritated by the delay.

6. The horrible content of the trial, the video of the crime, game me nightmares during the trial. I discussed these nightmares with fellow juror Beth Ann Erickson, with whom I car-pooled to the trial each day from Ephraim, where we both worked at Snow College. Erickson indicated that she had had nightmares, too. She mentioned it to me several times.

7. I don't think the defense had a prayer of prevailing during the guilt phase of the trial. The crime was on tape.

8. My first impression of Kell was surprisingly good. He was very nice looking, and innocent looking. It was difficult for me to watch his actions on that

videotape.

9. Prior to sentencing, I was hoping to have more of an explanation of Kell's background. His attorneys did a poor job of explaining who he was. His attorneys were passive and seemed like they were kind of phoning it in. We didn't know Kell at all.

10. I think it's possible that Kell might have gotten a life sentence without parole if comprehensive mitigation had been presented. But no such presentation was made.

11. The defense claimed that the victim, Lonnie Blackmon, had provoked the attack by wearing a bandana, but this was never established with certainty. We couldn't figure it out. We asked if we could see that part of the video again, just that part. The only leg the defense had to stand on was that Blackmon was showing colors, and we couldn't see that. It was not clear.

12. I think that Kell was a member of a gang and that the crime had racial overtones. I think Blackmon was in a racial gang as well.

13. The videotape was shown too much. We didn't have to see the whole thing three times. I remember that one of the airings lasted longer than intended, and the jury saw the aftermath of the killing, when SWAT went in secured the unit. Afterwards, they told us we weren't supposed to see the latter stages of the video.

14. I think the prison staff was derelict in its response to the attack. They didn't react. It was awful. I think the prison guards panicked a little bit, and this precluded any opportunity to stop the attack.

15. Though people at the prison, where the trial was held, were very nice to us, the whole atmosphere of the murder trial was kind of scary for those of us on the jury.

I declare under penalty of perjury the foregoing to be true and accurate to the best of my information and belief. Signed this 6th day of May, 2012, at Toquerville, Utah.

Jo Ann Jeppson

Addendum 7

Kell v. State
20180788

DECLARATION OF ARIC CRAMER

I declare under penalty of perjury the following to be true and accurate to the best of my information and belief:

1. I represented Troy Kell as his post-conviction relief attorney. Kell's was either the first or second post-conviction case to which I was appointed.
2. I tried to consult with Kell's trial attorneys, Stephen McCaughey and Douglas Neeley. Neeley suggested I speak with McCaughey, lead defense counsel at trial. McCaughey didn't return my calls. I believe I have spoken with them both since, in passing, but we never had a substantive discussion of the issues.
3. I have been contacted by members of Kell's federal habeas team who inform me that multiple jurors report that the trial judge spoke to them during deliberations. If I had been aware of such an occurrence, I would have made it the subject of a claim during Kell's post-conviction appeal. I may also have filed a complaint with the Judicial Council.
4. Likewise, I am informed that two trial jurors have admitted discussing the case during the trial but before deliberations started. If I had been aware of this information, I would have made it the subject of a claim in Kell's post-conviction appeal.
5. Funding was a problem during the post-conviction appeal. My co-counsel and I were given a flat fee of $5,000 to split to complete all the legal work. As it turned out, my co-counsel essentially withdrew from the case and after a few months, did very little to assist in its preparation.

6. We were also granted a sum of $5,000, if I recall correctly, to complete all investigations. I thought it would be best to develop mitigation, so that is where all the investigation funding went. Even so, that sum was not enough.

7. I hired a mitigation expert who did the best she could with the funds we had at our disposal. But she was precluded from doing things she wanted to do because of insufficient funding. I believe she could have done substantially more if we had had sufficient funding.

8. I was aware at time I was appointed to represent Kell that the standard for post-conviction representation in a death-penalty case involves a complete reinvestigation of the case. I did not do this. Funding limitations dictated some of my decisions, such as hiring only a mitigation specialist and not a fact investigator, and relying on the mitigation specialist to interview witnesses on her own. Other omissions, such as the failure to interview jurors, occurred because it did not occur to me to do so. Additionally, I was not able to complete a thorough investigation into prison policies and practices in order to adequately support the claims regarding the prison trial setting.

9. I had little experience in civil law and was unprepared to handle the summary judgment issue on my own. I had intended to rely on my co-counsel, Grant Morrison, for this issue, as he was experienced in civil law. Within a few months of our appointment, however, Morrison stopped contributing to the case. I should have requested additional funding to bring in another attorney to assist with the case, and specifically to assist with the civil procedures issues. I should have made my concerns about the lack of a contributing second chair known to the court and should have

requested additional funding to bring in another attorney to assist with the case, and specifically to assist with the civil procedures issues but I did not do so.

10. I did not accompany the mitigation expert when she travelled out of state to conduct interviews because we lacked sufficient funding. I never met any of Kell's relatives.

11. Regrettably, I did not make my concerns about the overall lack of funding known to the court. I should have and would make a record of my inability to complete the required tasks if I could do it over again. I would have fought for sufficient funding.

12. My activity on the case was largely legal research. I researched interstate compact issues, the prison trial setting issue and self-defense. I conducted some investigation on my own into the victim. I would describe it all as a shallow investigation, hampered by insufficient time and funding.

13. I spoke with Vicki Gregory, the mental health expert the defense used at trial. That was not a productive conversation.

14. None of my failures were the result of my strategy in the post-conviction proceedings. In fact, any strategy decisions I made were tainted by my inability to fully investigate the case.

Signed this 10 **day of January, 2013, at St. George, Utah.**

Aric Cramer