

1977

Utah v. William Andrews : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH
BYU REUBEN CLARK LAW SCHOOL

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

WILLIAM ANDREWS,

Defendant-Appellant.

Case No.
13902

BRIEF OF RESPONDENT

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,
IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE
HONORABLE JOHN F. WAHLQUIST, JUDGE, PRESIDING

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FILED

MAR 16 1977

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

:

Plaintiff-Respondent,

:

CASE NO.
13902

-vs-

WILLIAM ANDREWS,

:

Defendant-Appellant.

:

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with three counts of murder in the first degree in violation of Utah Code Ann. § 76-5-202 (Supp. 1973), for the murder of Carol Naisbitt, Michelle Ansley and Stanley Walker; and two counts of aggravated robbery in violation of Utah Code Ann. § 76-6-302 (Supp. 1973), for the robbery of Orren W. Walker and Stanley Walker during the robbery of the Ogden Hi Fi Shop on April 22, 1974.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and was found guilty on all five counts on November 15, 1974. A separate

hearing was held to determine sentence on the three murder convictions and on November 20, 1974, the jury unanimously recommended that appellant be sentenced to death on all three counts of first degree murder. On November 27, 1974, the Honorable John F. Wahlquist sentenced appellant to death by shooting on all counts of first degree murder. Appellant was also sentenced to an indeterminate term of not less than five years to life imprisonment on the two counts of aggravated robbery.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the jury at both the trial and the hearing on sentence. In the alternative, if this Court determines that the death penalty as provided in Utah Code Ann. § 76-3-207 (Supp. 1973) is unconstitutional, respondent seeks an order remanding the case to the trial court solely to impose a sentence of life imprisonment.

STATEMENT OF FACTS

On Monday, April 22, 1974, three people (Stanley Walker, Michelle Ansley and Carol Naisbitt) were tortured and murdered in the basement of the Ogden Hi Fi Shop; two others, Orren W. Walker and Cortney Naisbitt, were likewise brutally tortured but survived (Tr.3070,3073-3074,3084-3087,3101-3113). Orren Walker was forced by appellant and

his co-defendant, Pierre, to drink a caustic substance later identified as liquid Drano (T.2890), after which his mouth was taped (T.3087). One of Mr. Walker's assailants then fired a shot at him at close range which missed; however, a second shot was fired which penetrated Mr. Walker's head (T.3103). Later a ball point pen was stomped into Mr. Walker's ear by appellants' co-defendant, Pierre (T.3110-3111). Mr. Walker was also choked around the neck with an electrical cord by Pierre (T.3110).

Cortney Naisbitt was likewise forced by appellant and co-defendant, Pierre, to drink the liquid Drano which he was unable to expell and which burned his mouth, throat, esophagus and intestines (T.2548,2550,2551). As a result, Cortney required surgery on his intestinal track and an esophagus transplant. Cortney was also shot in the head (T.3101), which caused paralysis (T.2548). The murders and attempted murders were committed during the robbery of the Hi Fi Shop (Tr.2866-2885,2930-A-2940). Later, during the week of April 22, 1974, appellant, Dale Pierre, and Keith Roberts (all airmen from Hill Air Force Base) were arrested and charged with three counts of First Degree Murder and two counts of aggravated robbery for the crimes committed at the Hi Fi Shop. The three men were tried to a jury with the Honorable John F.

Wahlquist, Judge of the Second District Court of Utah, presiding. The trial began October 15, 1974, and ended on November 20, 1974. The jury found appellant and Dale Pierre guilty on all five counts and Roberts guilty on two counts of aggravated robbery and recommended that appellant and Dale Pierre receive the death penalty for the murders of Carol Naisbitt, Stanley Walker, and Michelle Ansley.

The evidence presented by the state against appellant was extensive. Besides the eyewitness account of Orren Walker, one of the victims, sixty-five witnesses and over 300 pieces of physical evidence implicated appellant in the crime (Tr.4347-4362).

George Platco, the State's first witness, testified that in February of 1974 while he was on barracks duty with appellant that appellant stated: "One of these days I would like to rob a Hi Fi Shop and if anybody gets in my way I will kill them" (Tr.1549).

Neal T. Robins testified that in November, 1973, he sold a blue 1970 Chevrolet Van to appellant and that Andrews expressed a desire to put special wheels ("mags") and tires on the van (Tr.1559). Robins further testified that he saw appellant in the van approximately 30-40 days later and the van had mag wheels on it (Tr.1560,1563).

Steven Brunetti and Bob Jensen saw appellant and Pierre writing down the prices of stereo equipment in the Hi Fi Shop on Saturday, April 20th (Tr.1577, 1590). William Harker, a doorman and cashier (Tr.1610) at the Hill Air Force Base movie theater, testified that Pierre saw the movie "Magnum Force" during April, 1974 (Tr.1613). He also explained that there was a scene in the movie in which someone is murdered by being forced to drink Drano. Robert Burbidge stated that Pierre rented a storage unit on April 22, 1974, and signed a lease agreement to that effect (Tr.1663,1670). This lease agreement was found in Pierre's room when searched by police after the Hi Fi Shop crimes (Tr.2467). A search of the storage unit pursuant to a search warrant uncovered a large quantity of stereo equipment which Brent Richardson, owner of the Hi Fi Shop, identified as coming from his store (Tr.2858,2929-2946). Fingerprints of appellant and Pierre were found on stereo objects in the shed. A bottle of drano and a plastic cup were also found in the shed (Tr.2989,3028,2859), during the search.

Theodore Tatten, a security guard, testified that he saw a blue Chevrolet van going east on 23rd Street at about 4:20 on April 22, 1974. The van stopped and parked on 23rd Street, which was approximately a block from the Hi Fi Shop. Mr. Tatten stated that

appellant and Pierre got out of the van and walked west on 23rd Street towards Washington Boulevard in the direction of the Hi Fi Shop (Tr.1688-1690). Ralph Brooks, a meter reader, testified that he observed Keith Roberts driving a blue van east on 23rd Street in the afternoon on April 22nd. He observed that the van had special wide tires and chrome wheels or "mags" (Tr.1699-1701). Another witness, Jeffrey Maxwell, testified that he saw a blue panel van with aluminum slotted "mags" in the parking lot behind the Hi Fi Shop around 6:00 on April 22nd (Tr.1827-1829). He also testified that he saw two black men standing by the van near the back door of the Hi Fi Shop (Tr.1824-1826) passing things from the building into the van (Tr.1829-1830).

Sandra Johnson testified that she saw Mrs. Carol Naisbitt go into the Hi Fi Shop on April 22, 1974, and she saw Pierre come out of the shop briefly and go back in the same night (Tr.1768). She talked to Pierre and noticed that he had a "different" accent. Pierre is a native of Trinidad and has an accent. In addition, two other witnesses, Bob Jensen and Robert Burbidge, testified concerning Pierre's accent (Tr.3294,1593,1667).

Several people testified linking several pieces of physical evidence to appellant. Two young

boys, Walter Grissom and Charles Maxwell, found the wallets and purses of the victims in a garbage dumpster next to appellant's barracks the day after the murder (Tr.2120,2134). Other witnesses traced the chain of custody of a .25 caliber pistol owned by defendant Roberts' roommate which was borrowed by Roberts two or three days before the Hi Fi Shop incident and reappeared a day or two after the crime (Exhibit # 70) (Tr.2263,2312,2337,2374,2376,2377). A .25 caliber pistol was used to kill the victims in the Hi Fi murders (Tr.2082,2188) (Exhibit # 70). It was established by an FBI ballistics expert that the gun owned by Roberts' roommate was used in the Hi Fi murders (Tr.1978-1979) (Exhibit # 70). Likewise, both .25 and .38 caliber slugs were found in the basement of the Hi Fi Shop (Tr.1892). Police officers stated that they found additional personal items of identification belonging to the victims in the dumpster next to appellant's barracks. Pursuant to a search warrant police searched Pierre's room and testified that they found a copy of the storage unit lease agreement which Pierre had entered into for the premises where the stolen Hi Fi equipment was recovered. Pursuant to a search warrant police searched appellant's room and found cellophane wrappers with Hi Fi Shop labels. Hi Fi wrappers were also

found in the garbage can in the latrine of appellant's barracks (Tr.2588,2659-2663). The storage unit was searched on the basis of a search warrant and Brent Richardson identified the stereo equipment found there as coming from his store (Tr.2858,2929-2940). Fingerprints of appellant and Pierre were found on objects in the storage shed (Tr.2989,3028).

Most damning of all was the testimony of Orren Walker. He explained how he came to the Hi Fi Shop looking for his son, Stanley, on the night of April 22, 1974 (Tr.3070). Mr. Walker stated that Pierre was at the top of the stairs which led to the basement of the Hi Fi Shop and was holding a small caliber automatic pistol and appellant was at the bottom of those stairs holding a short nose revolver (Tr.3068). Appellant aimed his gun at Mr. Walker as Mr. Walker was forced to come down the stairs into the basement (Tr. 3070). Mr. Walker then saw Cortney Naisbitt, Michelle Ansley, and Mr. Walker's son, Stanley Walker, tied up in the basement of the Hi Fi Shop (Tr.3070). The young people pleaded with appellant and Pierre. Michelle said, "I'm just 19, I don't want to die." Cortney said, "I'm

young, I don't want to die." (Tr.3074). Appellant and Pierre then poured a caustic substance later determined to be Drano into a plastic cup and gave it to Orren Walker to administer to the young people (Tr.3077). Mr. Walker did not make any movement and appellant aimed his gun at Mr. Walker and said, "Man, there is a gun at your head." (Tr.3078). Mr. Walker was then bound with zip cord (Tr.3078-79). Mrs. Naisbitt arrived a little later and appellant and Pierre tied her up with the others (Tr.3083).

When all of the victims were tied up, appellant and Pierre began forcing them to drink the caustic liquid (Tr.3085). When Michelle Ansley asked what the liquid was, appellant identified it as a mixture of vodka and a german drug (Tr.3077). When the victims began coughing and vomiting after drinking the substance, appellant and Pierre put tape across Mr. Walker's and Mrs. Naisbitt's mouths (Tr.3088).

After some discussion between appellant and Pierre, Pierre began shooting the victims. Mrs. Naisbitt was shot first, followed by Cortney, then Pierre fired a shot at Mr. Walker's head which missed and hit the floor. Pierre then shot Stanley and shot Mr. Walker, hitting him in the head (Tr.3101-3103). Pierre then untied Michelle

Ansley and took her in the back room. She returned several minutes later naked and Mr. Walker heard her pleading with appellant's co-defendant Pierre (Tr.3109).

The testimony of Dr. Serge Moore, the State Medical Examiner, established that Michelle Ansley had sexual intercourse the evening of the 22nd between 8:00 and 10:00 p.m. During that time she was bound hand and foot in the basement of the Hi Fi Shop (Tr.2176-2178) except for the several minutes referred to above. Pierre then laid her next to Mr. Walker and shot her (Tr.3110). Pierre also shot Stanley again after shooting Michelle and then strangled Mr. Walker (Tr.3110). A little later Pierre kicked a pen into Orren Walker's ear and apparently left. Orren Walker's testimony established that appellant was the one who several times poured the caustic liquid into the cups while Pierre forced the victims to drink it (Tr.3085). Mr. Walker also stated that appellant told Pierre to take Orren Walker's entire wallet not just the money in it (Tr.3095). Mr. Walker further testified that he was not sure that only one person (Pierre) was present when Michelle and Stanley were shot for the second time (Tr.3214) and that those shots were fired very rapidly in

succession intimating that two people could have been shooting (Tr.3214).

Mr. Walker made no indication nor was there suggestion from appellant's counsel that appellant attempted in any way to stop Pierre from shooting the five victims or raping Michelle Ansley. Moreover, pursuant to Utah Code Ann. § 76-2-202 and 203 (Supp. 1975), appellant is as culpable as Pierre for any crimes which Pierre personally and individually committed during the course of the robbery and murders.

Some time after appellant and Pierre left the shop, help arrived and Cortney, Mrs. Naisbitt and Orren Walker were rushed to hospitals. Cortney Naisbitt survived but has not completely recovered and cannot remember the events of the crime (Tr.2538). Orren Walker, of course, survived, and the other three victims were dead on arrival.

Appellant's defense consisted of one witness. His testimony covers six pages of transcript (Tr.3678-3683). Appellant raised no affirmative defenses nor did he attempt to establish an alibi.

On the basis of the strong evidence against appellant, the jury returned a verdict of guilty. After a consideration of aggravating and mitigating circumstances

presented at the hearing on sentence, the jury also recommended that appellant receive the death penalty for his crimes.

ARGUMENT

POINT I

RESPONDENT REARGUES POINTS 1, 2, 3, 4, 5, 6, 7, 8, AND 12 OF THE STATE'S BRIEF IN RESPONSE TO THE BRIEF OF CO-DEFENDANT DALE PIERRE (UTAH SUPREME COURT NO. 13903), INsofar AS THE SUBSTANCE OF THOSE ARGUMENTS APPLIES TO APPELLANT ANDREWS.

Appellant was charged and convicted of the identical crimes for which defendant Pierre was convicted. The arguments presented by respondent in Points I through VIII, and XII of their brief in State v. Pierre, No. 13903, concerning the constitutionality of the death penalty, the effect of pre-trial publicity, the court's proper denial of appellant's motions for change of venue, continuance, sequestration of the jury, and for separate trials, the admission of Dr. Naisbitt's testimony relating to the medical condition of his son, Cortney, and the propriety of the State's and appellant's burden of proof at the sentence hearing, apply equally to appellant Andrews.

Because of the identical nature of the issues raised and reargued by appellant Andrews (Appellant's Brief, Point I, p.3-4, and the addendum to his brief), respondent respectfully asks this Court to consider the above mentioned issues reargued in behalf of the State as to appellant Andrews with the following additions as to certain points:

A. (POINT 4)

THE SENTENCE OF DEATH IN THIS CASE IS PROPER IN THAT IT IS NOT EXCESSIVE OR DISPROPORTIONATE TO THE OFFENSE, AND THE EVIDENCE PRESENTED AT TRIAL AND AT THE SENTENCING HEARING SUPPORTS THE SENTENCE.

As is argued in Point I of respondent's brief in State v. Pierre, we maintain that mandatory review of death penalty cases is not constitutionally required under Gregg v. Georgia, 96 S.Ct. 2902 (1976), Proffitt v. Florida, 96 S.Ct. 2902 (1976), and Jurek v. Texas, 96 S.Ct. 2950 (1976).

Mr. Justice Stewart reiterated the primary concerns of Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 96 S.Ct. 2902 (1976), when he wrote:

"As a general proposition these concerns [of Furman] are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman,⁴⁶ for each distinct system must be examined on an individual basis.

* * *

46 A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 96 U.S. 2935.

Respondent agrees that the statutory review provisions of Georgia, Florida and Texas were commended in dicta by the United States Supreme Court. The Court did not intimate, however, that such review was the only constitutionally permissible way that jury discretion could be controlled in order to prevent the arbitrary, capricious, wanton and discriminatory imposition of the death penalty. Statutory schemes like Utah's which provide for bifurcated proceedings, require proof of aggravating circumstances, and allow evidence of any mitigating circumstances, also satisfy Furman.

Respondent submits that Utah Code Ann. § 76-3-207(3) (Supp. 1975), and prior Utah Supreme Court decisions (State v. Riley, 41 Utah 2d 225, 126 P.2d 294 (1911), and State v. Stehbach, 78 Utah 350, 2 P.2d 1050 (1931)), coupled with traditional discretionary appeal, allow this Court to comprehensively review the case.

This review contemplates a consideration of alleged errors of law and evidence of discrimination, arbitrariness, and caprice in the sentencing phase.

However, respondent submits that appellant in the present case has failed to meet his burden on appeal in that he has failed to support his allegations with citation from the transcript. Appellant relies by incorporation on the brief of his codefendant Pierre concerning presentation of mitigating factors at the sentencing hearing. Defendant Pierre called two witnesses at the sentencing hearing and their testimony is discussed in Point IV of respondent's State v. Pierre brief. These witnesses were not called by or for appellant and their testimony is not directly applicable to him.

Appellant was the only witness who testified in his behalf at the sentencing hearing. He talked about his personal history and background, including two previous crimes (Tr.4247-4258). Appellant makes no

specific reference in his brief to this testimony nor does he suggest what weight it had or should have.

In the absence of such reference, respondent asserts that the evidence presented at trial and the sentencing hearing support the sentence imposed on appellant. Appellant makes no argument that his penalty is disproportionate and excessive in relation to his crimes. His testimony at the sentencing hearing was self-serving and uncorroborated. The jury in this case was able to observe appellant's demeanor and sincerity when he testified. The Utah death penalty statutes obligate the sentencing authority to weigh aggravating and mitigating circumstances. The jury determined that the death penalty was appropriate in this case and appellant presents no evidence to rebut that determination.

Respondent submits that a comprehensive review of this case is appropriate and necessary. We maintain, however, that it is an impossible and inappropriate burden on this Court to act as appellant's advocate in any review proceeding. Appellant's failure to allege specific error in the sentencing hearing and his failure to support allegations of insufficient evidence with

facts or citation to the transcript does not obligate the Utah Supreme Court to rectify these shortcomings. Appellant's sentence is appropriate and not excessive or disproportionate to his crimes and should be affirmed.

B. (Point 7)

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR SEPARATE TRIAL AND NO PREJUDICE RESULTED THEREFROM.

Respondent incorporates by reference Point VII of its brief in the appeal of Dale Pierre, supplementing it with the following paragraphs herein:

Unlike appellant Pierre, appellant Andrews included an affidavit in support of his motion to sever (T.67,70). However, that affidavit and the oral argument thereon (T. of Var. Pro. 23-31) presented no facts that indicated that the defendants' defenses would be antagonistic. The substance of the affidavit was that appellant "strongly believed" that his defense strategy would differ from Pierre's because appellant would rely on a defense of withdrawal, while Pierre would try to discredit the

eyewitness testimony of Orren Walker and such discrediting would be adverse to appellant.

The incorporated Point VII of respondent's brief in the Pierre appeal clearly refutes the implication of antagonistic defenses. Defenses may be different, even inconsistent, without being antagonistic. Appellant's affidavit fails to get beyond the stage of "belief," supposition and innuendo into the factual realm; therefore, the holding of State v. Rivenburgh, 11 Utah 2d 95, 355 P.2d 689 (1960), that a self-serving affidavit, without more, does not require the granting of a motion to sever, is applicable.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
BY DENYING APPELLANT'S MOTION TO SEQUESTER THE JURY
AFTER TRIAL BUT PRIOR TO THE SENTENCING HEARING.

Following appellant's conviction of three counts
of first degree murder on Friday, November 15, 1974, he
requested a sentencing hearing before the jury to deter-
mine penalty pursuant to Utah Code Ann. § 76-3-207(1)
(Supp. 1973). The trial court suggested that the
sentencing hearing be held the following Tuesday,
November 19, 1974, but the defense attorneys requested
more time to obtain additional witnesses for the hearing
(T. 4110). The state objected to any continuance beyond
the following Tuesday (T. 4110, 4112). At this point the
judge asked the defense attorneys if they were willing
to waive sequestering the jury (presumably if the court
granted their request for additional time) (T. 4110).
Appellant's attorneys and Mr. Pierre's attorney then
explicitly said they waived sequestration:

"THE COURT: Now if you expect any
type of sequester I require that you
go ahead. Are you willing to wave
[sic] that at this point?

MR. ATHAY: We are willing to
wave [sic] it.

MR. CAINE: We also wave [sic] it."
(T. 4110).

The judge then suggested convening the sentencing hearing the following Wednesday, November 20, 1974, rather than Tuesday. The defense attorneys, apparently having thought they would receive more time than only one additional day began to have second thoughts about waiving sequestration:

"MR. ATHAY: If it please the court, if all we are looking at is next Wednesday, I submit that one day is not going to make any difference, and we just as well proceed Tuesday with the sequester. If we are not going to sequester, we would ask for a week. If we are only going to go to Wednesday, we would move and request for sequestration." (Emphasis added.) (T.4111).

Mr. Athay and Mr. Caine then withdrew their prior waiver's of sequestration (T.4111). The court set the sentencing hearing for 9:00 a.m. Wednesday, November 20, 1974, and denied appellant's request to sequester the jury (T. 4114-4115).

Prior to dismissing the jury the court repeatedly admonished them as follows:

". . . it is extremely important there be no misconduct of jurors or anything of this sort, otherwise it will put a hardship on these people that is tremendous. You understand this? Everyone involved.

So everyone would have to obey the rule very carefully to go ahead and if anyone tries to speak to you about the case just resist their efforts.

If anybody wants to compliment you or criticize you for your verdict or anything of this nature, tell them the proceedings are not over and to resist their efforts and of course take nothing serious that you would hear in such a way, you certainly know more about the case than anyone who would ever speak to you about it." (T.4112).

The judge then ordered those who work at Hill Air Force Base and at least four other jurors not to go to work (T.4113). Just prior to excusing the jury the court again reiterated its cautionary instructions:

"You recognize the importance of still staying aloof of all of this? . . . I suggest that you get clear from this building right now. Do not let anybody talk to you in any way. All the admonitions and cautions that I have given you before please abide by them." (T.4114).

Appellant admits in his brief that the trial court had discretion over the issue of jury sequestration,¹ but alleges that the trial judge abused his discretion in denying appellant's motion to sequester. In support of this contention, appellant alleges that the environment in the community was "inherently prejudicial" (citing

¹See Utah Code Ann. § 77-31-27 (1953), as amended).

Sheppard v. Maxwell, 384 U.S. 333 (1966)), due to the extent of the publicity the trial allegedly received.

Respondent submits that if such an "inherently prejudicial" condition in fact existed in the community, why was appellant so readily willing to waive sequestering in return for a week's continuance of the sentencing hearing? The record clearly shows the defense attorneys saying that "if we are not going to sequester, we would ask for a week," but "if we are only going to . . . Wednesday we move . . . for sequestration." (T.4111). One would think that in an "inherently prejudicial" community, the defense would want to reduce the amount of time a jury would remain unsequestered, not enlarge it.

Respondent submits that the atmosphere in the community was not "inherently prejudicial" and further that appellant has offered nothing but conclusory, self-serving, unsubstantiated allegations in support of his position and thus has failed to meet his burden of proof.

In Point V of this appeal, appellant similarly alleged it was prejudicial for the court not to sequester the jury during the trial because of the "inherently prejudicial" atmosphere in the community due to pre-

trial news coverage of the case. Respondent, in answer to this claim, clearly established in Point V that the line of cases which discuss "inherently prejudicial" publicity situations¹ are inapplicable to the instant case. (See pp. 59-61 of Respondent's Brief in State v. Pierre, Case No. 13903). As respondent pointed out, the leading Utah case involving the claim of "inherently prejudicial" publicity is Sinclair v. Turner, 20 Utah 2d 126, 434 P.2d 305 (1967), cert. denied 391 U.S. 924. In that case this Court held that pre-trial publicity must be measured against a generally accepted standard of responsible journalism and if that standard is met, the publicity will not be held to be "inherently prejudicial." Appellant in the present case has made no effort to show or even allege that the news coverage to which the jurors might be exposed, violated the above standard. All he alleges is that the case was "widely publicized" and that the testimony

¹Rideau v. Louisiana, 373 U.S. 723 (1963); Sheppard v. Maxwell, 384 U.S. 333 (1966); and Estes v. Texas, 381 U.S. 532 (1965).

at trial was "graphically portrayed daily to the public by both written and electronic media." Thus, the standard for "inherently prejudicial" publicity has not been met.

Therefore, as was shown by respondent in Point V, the traditional rule requiring appellant to prove "identifiable prejudice" applies. See Murphy v. Florida, 421 U.S. 794 (1975), and pp. 51-59, and 70-74 of Respondent's Brief in Pierre, supra. Under this rule, appellant must affirmatively show that news coverage in his case generated community bias to such a degree that his right to a fair trial was placed in jeopardy; he must show a causal nexus between such news reporting and actual juror exposure; and he must show the existence of actual juror prejudice as a result of improper publicity and the court's refusal to sequester the jury. See State v. Sales, 537 P.2d 1031 (Utah 1975), State v. Guertz, 11 Utah 2d 345, 359 P.2d 12 (1961), and State v. Hines, 6 Utah 2d 126, 307 P.2d 887 (1957). Respondent submits that appellant has failed to prove any of the above requirements. In fact, the record establishes the contrary; namely, (1) that the news coverage was not improper, (2) that there was no showing of actual juror exposure to the publicity, (3) that

the trial judge displayed extraordinary caution in admonishing the jury to stay away from sources of publicity and even forbade several jurors from returning to their places of employment, and (4) that there was no showing of actual juror prejudice resulting from publicity. All appellant has alleged is that there was news coverage and community awareness of the case. Such clearly does not warrant sequestering a jury and the trial court properly refused to do so.

In conclusion, respondent re-emphasizes the argument at pp. 70-74 of its brief in Pierre, supra, and submits that there was no abuse of discretion or reversible error in the trial court's denial of appellant's request to sequester the jury.

CONCLUSION

Based upon the foregoing points and authorities contained herein and in respondent's brief in State v. Pierre, Case No. 13903, respondent submits that appellant's conviction and sentence were proper and should be affirmed.

Respectfully submitted,

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