

1980

# William Andrews v. Lawrence Morris : Brief of Respondent in Opposition to Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

-----  
:  
WILLIAM ANDREWS, :

Petitioner-Appellant, :

Case No.

-vs- :

16168

LAWRENCE MORRIS, as Warden :  
of the Utah State Prison, :

Respondent-Appellee. :  
:

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RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR REHEARING  
-----

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- : -----  
WILLIAM ANDREWS, :  
Petitioner-Appellant, :  
-vs- : Case No.  
16168  
LAWRENCE MORRIS, as Warden :  
of the Utah State Prison, :  
Respondent-Appellee. :  
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RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR REHEARING  
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INTRODUCTORY STATEMENT

It has been respondent's position consistently that all issues raised in appellant's petition for habeas corpus in the lower court were purely legal in nature and could be disposed of as matters of law. Thus, respondent moved to dismiss the petition alternatively on the merits and on the basis of the waiver doctrine. This Court agreed with respondent and, although disposing of the petition on the waiver doctrine, additionally reached the merits and ruled on them as a matter of law. Therefore, contrary to appellant's contention in his petition for rehearing that no "full hearing" has ever

dealing fully and completely with all issues asserted by appellant after full briefing of those issues and oral argument thereon, has effectively accorded appellant full opportunity to argue the legal merits of his claims in the numerous proceedings up to this present petition for rehearing. Thus, a full hearing or airing of the issues has been allowed.

As for appellant's argument that he has been requesting a continuance throughout this entire proceeding, the record of the November 29-30, 1978, habeas corpus hearing clearly reflects that no such continuance was requested. Appellant never asked for additional time to prepare for argument on the respondent's motion to dismiss. Respondent fails to see where a continuance was requested by appellant on pages 26-27, 29 of the November 30, 1978, transcript, although vague references were made as to the need to brief some of the issues addressed at the hearing. This was done when appellant appealed the dismissal of his habeas corpus petition to this Court. Appellant is now presenting a duplicative argument of these issues again here.

Finally, at the outset, respondent submits that the sound, universally-accepted criteria for determining whether a factual evidentiary hearing is necessary has

been observed in this case. In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979), the Court ruled that such hearings are only proper when factual issues, as to the facts in the case itself, are in question. The Court held:

. . . if only questions of law are involved, an evidentiary hearing to develop fully the facts underlying a petitioner's complaints would be pointless.

578 F.2d at 590.

This Court recognized and adopted this standard in the present case. In Andrews v. Morris, No. 16168, filed February 13, 1980, this Court held:

. . . where it affirmatively appears from the petition that a petitioner is not entitled to the writ, an evidentiary hearing is unnecessary. Hence, if the petition raises legal questions only, an evidentiary hearing to fully develop the underlying facts would be pointless, and is not required.

Advance sheet, at page 7. Respondent submits that this view is correct and continues to be so at this stage of the rehearing process as well.

#### POINT I

APPELLANT HAS NOT RAISED ANY ISSUES WHICH WOULD JUSTIFY A REHEARING IN THIS MATTER.

In Cummings v. Nielson, 42 Utah 157, 129 Pac. 619 (1913), this Court noted:

When this court . . . has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result.

Id. at 624 (emphasis added).

The Court had much earlier noted that a rehearing would not be allowed where the petitioner sought merely to reargue the case and presented no new facts or law. Ducheneau v. House, 4 Utah 483, 11 Pac. 618 at 619 (1886). See also Yearian v. Spiers, 4 Utah 482, 11 Pac. 618 (1886). The standards set forth in these cases is repeated and explained in more recent decisions from other jurisdictions. In Commonwealth v. Cheeks, 429 Pa. 89, 239 A.2d 793 at 796 (1968), the court said:

Supreme Court Rule 71 states, inter alia, that the petition for reargument "must specify particularly the point supposed to have been overlooked or misapprehended by the Court." Certainly, it cannot be said that our Court "misapprehended" the Pointer claim, since it was never in fact raised. Furthermore, we believe that a proper interpretation of the term "overlooked" in the rule would require a showing that our Court failed to consider some finding of fact or proposition of law relevant to the disposition of an issue actually raised by the parties. It does not mean that reargument may be granted simply because one of the parties "overlooked" a relevant issue. Thus, in the present case,



since Cheeks' petition failed to show either that the Court misapprehended or overlooked any point raised in his appeal, the petition was properly denied without ever reaching the merits of the Pointer claim therein asserted. (Emphasis in original.)

In Sarmiento v. State, 371 So.2d 1047 at 1053 (Fla. App. 1979), the Florida court rejected the State's petition for rehearing stating:

[The] . . . argument, however, was never raised by the state either in its main brief or on oral argument in this cause and was in no way overlooked by this court. It cannot, therefore, be raised for the first time on a motion for rehearing.

See also Davis v. State, 400 A.2d 292 at 299 (Del. 1979). Finally, in United States v. Sutherland, 428 F.2d 1152 at 1158 (5th Cir. 1970), the court rejected a petition for rehearing and said:

The point was not raised in the court below nor has it been previously raised in this court. Having tried and appealed its case on one theory, an unsuccessful party may not then use a petition for rehearing as a device to test a new theory. (Emphasis in original.)

Clearly, new issues may not be raised via petition for rehearing. Moreover, a petition for rehearing should not be used to re-present arguments "based upon later discovered and subsequent authority." Ash v. State, 560 P.2d 369 (Wyo. 1977). Rehearings should only be granted when the court has misconstrued or misapplied the facts

or the law as presented and argued on appeal. As this Court said in Beaver County v. Howe Indemnity Co., 88 Utah 1, 52 P.2d 435 (1935):

If an opinion is to be modified it should be modified because it fails to correctly state the law, or for some other reason which makes its language or statements improper or inapplicable.

Id. at 459.

In Ash v. State, supra at 370, the dissenting opinion noted further that no rehearing should be granted unless there is a reasonable probability that the court may have arrived at an erroneous conclusion or overlooked some important matter necessary to a correct decision.

Applying these standards to the instant petition, respondent submits that no rehearing should be allowed. Appellant challenges this court's decision on a number of grounds, all of which have either been specifically considered or never raised. A careful reading of appellant's brief discloses the fact that all the issues raised have or could have been dealt with within the regular appellate processes and should not now be considered via a petition for rehearing.

In Point I appellant argues, first, that not all of appellant's claims were addressed by this Court's opinion. It is clear, nevertheless, that, given the

action of this Court in affirming the dismissal of appellant's habeas corpus complaint, this Court rejected all of appellant's claims. Appellant does not indicate any instance wherein this Court has affirmatively misconstrued or misstated the law with respect to these claims or arrived at an improper conclusion. This Court is simply being asked to consider the same issues over again. There is no reasonable probability that such a consideration will produce a different result.

Appellant argues, further, in Point I, that the recent decision of State v. Brown, No. 15481, filed February 7, 1980, is inconsistent with the court's opinion in this matter. The specific issues addressed by State v. Brown have never been raised in this case and should not be considered at this stage. See Commonwealth v. Cheeks, Sarmiento v. State and United States v. Sutherland, all supra. (See a full discussion of State v. Brown, infra.)

In his second point, although appellant claims that the court's opinion "misconstrues the record," appellant also fails to raise a claim which justifies a rehearing. This Court has considered the record in this matter on several different occasions. Appellant does no more in this instance than to disagree with the Court on what the testimony reveals the facts to be. Although he

points to portions of the record which, he says, indicate mistakes in the Court's characterization of the facts, the Court's conclusions may also be supported by references to the record. Moreover, appellant specifically raised the question of proof of his direct involvement in the killings in the previous appeal (see Andrews v. Morris, Brief of Appellant at p. 22). His claim in this instance amounts to nothing more than a request for this Court to reverse itself on an issue already considered explicitly. Appellant has not shown that this Court affirmatively misconstrued the facts nor has he raised a reasonable possibility that the Court might reverse itself.

Appellant's third point also fails to demonstrate a mistake which would necessitate a rehearing. He points to no law or facts which were misconstrued but argues, instead, that "a growing body of literature" (Appellant's Brief at p. 12) is in conflict with the conclusion of this Court. Again, no reasonable likelihood of reversal is raised because of a demonstrated misappalication of law or fact.

In summary, a rehearing should only be granted when it is demonstrated that the Court has misconstrued the facts or misapplied the law with respect to issues raised and considered on appeal. Rehearings should not be forums for the consideration of issues never

rejected be reconsidered. Appellant has failed to demonstrate a reasonable possibility that this Court would reverse itself because of any error in application of law or fact to issues considered in the previous appeal of this matter. A rehearing should not be allowed.

#### POINT II

THIS COURT HAS PROPERLY CONSIDERED ALL OF APPELLANT'S CLAIMS RELATIVE TO THE ALLEGED UNCONSTITUTIONALITY OF THE UTAH DEATH PENALTY AND SUCH CONSIDERATION IS FURTHERMORE CONSISTENT WITH STATE V. BROWN.

Respondent submits that the majority of the issues appellant is now raising have been fully dealt with in the several proceedings prior to this present action. For the Court's convenience, respondent will summarize these issues as argued in appellant's brief, Point I and then indicate where the issue has been previously ruled on:

1. sentencing authority has "unguided and unfettered discretion" to choose which defendant will be sentenced to death--State v. Pierre, appellant's brief (appellant Andrews adopted the bulk of appellant Pierre's brief) at pages 14-15; State v. Pierre, 572 P.2d at 1345; Andrews v. Utah, appellant's petition for certiorari to the Supreme Court of the United States, at pages 27-29 (cert. den. Oct. 2, 1978); Andrews v. Morris, appellant's amended

petition for habeas corpus, at page 4; Andrews v. Morris, appellant's brief, at page 21; and Andrews v. Morris, No. 16168, filed Feb. 13, 1980, at pages 9-10 (advance sheet).

2. sentencing authority not required to make findings--Andrews v. Utah, appellant's petition for certiorari, at pages 15-18; Andrews v. Morris, appellant's amended petition for habeas corpus, at page 4; Andrews v. Morris, appellant's brief, at page 21; and Andrews v. Morris, No. 16168, filed February 13, 1980, at page 10.

3. aggravating circumstances not pled by the state, found by the jury or specified in the verdict--State v. Pierre, 572 P.2d at 1345; Andrews v. Utah, appellant's petition for certiorari, at page 15; Andrews v. Morris, amended petition for habeas corpus, at page 5; Andrews v. Morris, appellant's brief at page 21; and Andrews v. Morris, No. 16168, filed February 13, 1980 at page 10.

4. aggravating circumstances were not limited to those enumerated by the state--State v. Pierre, appellant's brief at page 16; State v. Pierre, 572 P.2d at 1345; Andrews v. Utah, appellant's petition for certiorari, at pages 29-31; Andrews v. Morris, amended petition for habeas corpus, at pages 5-6; Andrews v. Morris, appellant's brief, at pages 20-21; and Andrews

v. Morris, No. 16168, filed February 13, 1980, at pages 9-10.

5. no standards to guide jury (see infra on State v. Brown discussion)--State v. Pierre, 572 P.2d at 1345; Andrews v. Utah, appellant's petition for certiorari, at pages 15-18; Andrews v. Morris, amended petition for habeas corpus, at pages 6-7; Andrews v. Morris, appellant's brief, at page 21; and Andrews v. Morris, No. 16168, filed Feb. 13, 1980, at pages 9-10.

6. insufficient record for this Court's review--Andrews v. Morris, amended petition for habeas corpus, at pages 8-9; Andrews v. Morris, appellant's brief, at pages 11-14; and Andrews v. Morris, No. 16168, filed Feb. 13, 1980, at pages 7-8.

Furthermore, in addition to the above references wherein these issues have been addressed, respondent makes these additional observations: as to (2) there is no need for the lower court to make findings where the transcript of the penalty phase is available for review; as to (3) the jury does not need to find each aggravating circumstance unanimously; no United States Supreme Court case requires this; as to (4) it is totally permissible to allow evidence of aggravating circumstances other than those statutorily specified; and as to (5), Jurek v. Texas, 429 U.S. 875 (1976), upholds the Texas

death penalty which statute does not require additional

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written findings to be made after a guilty verdict to support a death sentence, contrary to appellant's assertion.

Thus, as outlined in Point I, this petition may not be granted inasmuch as these above issues have been exhaustively dealt with by this Court and the United States Supreme Court. These issues simply have been raised and considered.

Appellant argues in Point I that the evidence presented at sentencing phase was made with a "total lack of restrictions . . . so that . . . not even constitutional evidentiary limitations were observed. . . ." Respondent submits that the evidence presented by the State at sentencing was, in fact, not only properly within the bounds of constitutional guidelines but, furthermore, was very minimal. The State put on three witnesses: Dr. Louis G. Moench, a psychiatrist, who examined appellant Pierre and testified he was able to distinguish between right and wrong and that he had found no evidence of any mental disease or defect in appellant Pierre (Tr.4129-2137); Lt. John Regni, the Hill Air Force Base personnel officer who testified regarding appellants' Andrews and Pierre work records and disciplinary measures taken against them (Tr.4137-4161);



and Allen Roe, a clinical psychologist at the Utah State Prison who testified as to the average time served by inmates who have been sentenced to life imprisonment. (Tr.4162-4194). Also the State had read into the record a letter from the Bexar County, Texas, Adult Probation Office, which revoked appellant Andrews' Parole. The State then rested.

Appellant relies on Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), for the proposition that appellants were not given adequate notice of the State's inculpatory or aggravating evidence. However, the facts of Smith are starkly distinguishable from the facts in this matter. In Smith a petition for habeas corpus was successful where the petitioner's claim of unfair surprise--a psychiatrist's testimony during the penalty phase -- was deemed a substantial denial of his rights. The prosecution in Smith had, according to the court, "intentionally omitted Dr. Grigson's name from the witness list," Id., at 702, and such action left the petitioner "at best, not fully prepared." Id. Another important factor in Smith is that the petitioner was never informed that the examination he had with Dr. Grigson "concerned more than Smith's competence to stand trial." Id. at 703. Rather, the examination was employed to gather additional evidence to support the State's capital case.

In the present matter the intended use of Dr. Moench's testimony was clearly a known fact. The psychiatrist here, in fact, was initially employed by the appellant Pierre (Tr.4130), and the trial court eventually ordered an examination as well. A discussion was had, out of the presence of the jury (Tr.4129-4134), wherein appellant contended that the information garnered from the doctor's interview with appellant Pierre was the work product of counsel and that his testimony could not be entered without appellant's consent (Tr.4130). The court ruled that Dr. Moench could only testify concerning his general impression as to appellant's sanity and that any additional facts derived from the examination would be protected under an attorney work product privilege and/or a doctor-patient privilege (Tr.4133-4134).

In open court, Dr. Moench testified very generally, as ordered by the court at appellant's insistence, as to appellant Pierre's ability to distinguish right and wrong both legally and morally (Tr.4135-4136) and that appellant Pierre did not have any mental defect or illness (Tr.4136).

The other two state witnesses were likewise not of the Smith type. Appellant had notice of their

being intended witnesses and no objections as to surprise were made by appellant. Thus, respondent contends that no Smith v. Estelle issue is present in the instant matter and that a review of Smith shows that the notice defect there is absent here. Appellant had notice of all statutory aggravating circumstances as well as the witnesses the State intended to call at the penalty phase. It should also be noted that the United States Supreme Court granted the State of Texas' petition for certiorari in the Smith case earlier this month. Thus, the question of the use of such psychiatric testimony at the penalty phase is presently under review by that Court.

Appellant next asserts that juries should not be permitted to sentence a convicted murderer to life or death "without even saying why. . ." (Appellant's Brief at page 4). Such an approach, however, is too mechanical. Furman v. Georgia, 408 U.S. 238 (1972), simply requires that a state have procedures which guarantee that the death penalty is not unbridled or freakish in its application so as to minimize the risk of arbitrary jury reactions. Respondent has repeatedly shown that the State of Utah's death penalty statute has such guarantees. The present system, furthermore, provides that a transcript of the evidence presented at the penalty phase be available to ensure a convicted person of an accurate and fair review on appeal. It

remains, though, a fact of judicial life that absolute certainty can never be achieved regarding what actually motivates a jury to impose a death sentence. Jury deliberations are not recorded and, consequently, the deliberative process remains a sacred secret in any state's system, including those of Georgia, Florida and Texas, which have been expressly upheld by the United States Supreme Court.

Respondent takes issue with appellant's characterization of the jury's sole guideline in this case as being what the jurors "found 'appropriate'". A review of the jury instructions (Tr.4272-4277) reveals that the court emphasized that "the burden of proof to satisfy the jury that a death sentence is appropriate is on the State." (Tr.4273). In instruction number 4, the court enumerated the factors the jury would consider in determining what the proper sentence should be in the case (see Tr.4274-4275). Instruction number 6 stated that each defendant's culpability must be judged independently and that each sentence must be separately supported (Tr.4275-4276).

Thus to characterize the instructions as being based "only on what the jury found 'appropriate'" is a gross misstatement. (Appellant's brief at page 4.)

The major thrust of appellant's Point I is that this Court's recent decision in State v. Brown, No. 15481, filed Feb. 7, 1980 (six (6) days before the Court's decision here) allegedly sets forth new standards which affect appellant's sentence. Appellant contends that evidence was admitted at the penalty phase in violation of Brown; specifically: penological theory and religious opinion, evidence of appellant's work performance and mental health which allegedly included hearsay on hearsay and factually inaccurate testimony. (See discussion, supra, as per the mental status evidence argument.) Respondent will comment on each of these purportedly improper testimonies.

The evidence regarding penological theory and religious opinion was presented by Gerald Smith and Frazier Crocker, respectively, both of whom were called as defense witnesses (Tr.4198-4231;4234-4247). Respondent submits that if this evidence was inappropriate the responsibility for such error lies with appellant--not respondent. Furthermore, although the respondent finds the evidence of little relevance to the questions before the jury at the penalty phase, nonetheless, the evidence presented was not inflammatory or prejudicial as was the improper evidence at issue in Brown. Thus, this evidence

cannot adversely affect the sentence in the present case.

The testimony appellant alleges included hearsay on hearsay and which contained factually inaccurate evidence also fails to meet the Brown prohibition. Appellant cites to Lt. John Regni's testimony as an example of hearsay on hearsay (Tr.4142-4148). This cite refers to the testimony Lt. Regni offered regarding appellant's work record at Hill Air Force Base. Lt. Regni testified from the official records, Unfavorable Information File (Tr.4141), of all disciplinary action taken against appellant (Tr.4137-4140). These actions were three letters of reprimand, an "Article 15" action (discipline in lieu of court martial) and a vacation of the suspended reduction in appellant's classification to a grade E-1, airman basic (Tr.4142-4145). Such evidence as a record made in the regular course of business, is clearly an exception to the hearsay rule (see Rule 63(13), Utah Rules of Evidence). Furthermore, appellant's only objection to this information--that Lt. Regni was not the custodian of the records (Tr.4141,4148)--was specifically refuted by the State. In response to a question, "Who keeps those files?", Lt. Regni testified, "Sir, I do. I am the custodian for them" (Tr.4150).

The hearsay on hearsay claim must therefore be rejected. The similar claim in Brown is much different.

In Brown a State's witness testified at penalty phase  
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that he heard a declarant testify in another case that defendant Brown had stated, "I just head-shot two f----- for messing with my brother." State v. Brown, at page 11. Actually, defendant did make the comment but it did not include the inflammatory, prejudicial obscenity. "Hearsay on admissible hearsay", Brown at p. 14, was the additional, crucial factor which led this Court to reduce Brown's sentence to life imprisonment. Neither of these factors is present in the instant matter: the hearsay was admissible; no prejudicial evidence, as per Brown, was presented.

One additional factor must be considered as to appellant's contention that State v. Brown has affect on this present case. The Court in Brown refers frequently to the fact that:

. . . in capital cases, this Court, sua sponte, considers manifest and prejudicial error though such error may neither be assigned nor argued, combine to provide for a comprehensive review of the entire case, including the sentence of death, to determine if that sentence resulted from prejudice or arbitrary action or was disproportionate and excessive in relation to the offense for which defendant was convicted.

Advance sheet, at pages 9-10 (emphasis added). This principle was first announced in State v. Stenback, 78 Utah 350, 2 P.2d 1050 (1931). The principle was most

assuredly used in this case as well since a triple first degree murder conviction is at issue. Thus, under this quoted Stenback doctrine, respondent submits that the Court no doubt considered any affect its Brown decision would have on the present case since Brown was filed nearly one week earlier than Andrews v. Morris, and both cases were under advisement at the same time. Since no Brown issues are mentioned in Andrews, presumably the Court considered none to exist and consequently affirmed the dismissal of appellant's petition for habeas corpus. Thus, the Stenback doctrine is a further bar to appellant's petition for rehearing.

As to the asserted factually inaccurate testimony, appellant cites to page 4167 of the transcript wherein Allen Roe, a clinical psychologist at the Utah State Prison, was pressed by appellant Pierre's counsel to name three cases where a released inmate, who had been sentenced to life imprisonment on a first degree murder conviction, committed another murder. Mr. Roe, after protesting he could not be sure of his recollection, named three persons he believed fell into that category (Tr.4167). Whether or not the information Mr. Roe gave was accurate is not clear from the record. Assuming, arguendo, that it was inaccurate, respondent submits that the hard-pressed recollection is so collateral and irrelevant to the



essential issues before the jury at that stage that it cannot be said to have prejudiced the jury as perhaps was the case in Brown. This claim, therefore, must also be rejected.

As to the jury instructions being inadequate in view of the Brown requirements, this Court recognized in Brown that State v. Pierre, 572 P.2d 1338 (Utah 1977) "was the first case involving capital offenses under the criminal code enacted in 1973 " (State v. Brown, note 15, page 14) and in that case (State v. Pierre) the court first established that the burden of proof in capital cases is that "the totality of aggravating circumstances must . . . outweigh the totality of mitigating circumstances." Pierre, at 1347-1348. However, in analyzing the jury instructions' sufficiency as per the Pierre standard in the present case, this Court concluded:

We believe the District Court's instruction thereon satisfied that requirement in this case. And in our appellate review of this matter we conclude that the aggravating circumstances were overwhelmingly present against the defendant and the mitigating circumstances favoring him most minimal--even from the point of view of inference.

572 P.2d at 1348 (emphasis added). This ruling completely forecloses any discussion regarding the jury instructions at penalty phase in this case. Such a specific holding

cannot be thwarted with an inferential reference to the Brown decision, decided more than two years after State v. Pierre.

Finally, appellant again advances the theory that more time is needed to ensure the consistent application of capital punishment especially as per the Brown case. Respondent directs the Court's attention to the reference to Spinkellink v. Wainwright, supra at pages 12-13 of Andrews v. Morris, No. 16168, and submits that this Court's adoption of the Spinkellink position is dispositive on this point. The State cannot be kept in abeyance in its application of the death penalty, waiting for further case law development in order to guarantee that all hypothetical contingencies are resolved. As Spinkellink notes, if this were done "[t]he process would be neverending and the benchmark for comparison would be chronically undefined." Id. at 605.

In conclusion, respondent would emphasize that the fundamental, essential requirements of the major United States Supreme Court cases have been met here. The Furman requirement of minimizing jury arbitrariness has been satisfied. The Supreme Court standards do not require states to provide pure, surgically sterile proceedings,

devoid of all discretion, deliberative secrets and case-by-case inconsistency. The high Court requires that their pronouncements, as previously discussed, be observed. That has been done here.

Respondent suggests that the time has come to put an end to the moratorium on the death penalty presently in existence in the State of Utah.

### POINT III

THIS COURT HAS ADEQUATELY CONSIDERED AND REJECTED APPELLANT'S CLAIM THAT HE DID NOT INTEND TO CAUSE THE DEATH OF THE VICTIMS.

As in Point II, respondent will summarize the issues appellant raises in his Point II and show where these have been exhaustively dealt with:

1. appellant Andrews was not proven to have intended the death of the victims--State v. Andrews, 574 P.2d at 710-711; Andrews v. Morris, appellant's amended petition for habeas corpus, at page 9; Andrews v. Morris, appellant's brief, at page 22; and Andrews v. Morris, No. 16168, filed Feb. 13, 1980, at page 11.

2. the Court dismissed the petition without reviewing the transcript--Andrews v. Morris, appellant's brief, at page 11; and Andrews v. Morris, No. 16168, filed Feb. 13, 1980, at pages 7-8.



Ohio, 438 U.S. 586 (1978), infra.)

Appellant next complains that this Court's statement on page 10 of Andrews v. Morris, No. 16168, as to the aggravating and mitigating evidence presented, is inaccurate. Respondent submits that given the tremendous weight of aggravating circumstances in this case, the Court's observation is correct. This Court has twice reviewed the record and has twice rejected appellant assertion of lack of intent as to the deaths of the victims. Appellant's characterization of the facts has simply not been accepted by the Court.

The central issue in appellant's Point II involves the arguments made in the concurring opinion of Justice White in Lockett v. Ohio, supra. The Lockett case involved five persons in the murder-robbery of a pawnbroker. Petitioner Lockett, the getaway car driver, was convicted of aggravated murder and aggravated robbery and sentenced to death. Her sentence was reversed on appeal because the Ohio statute under which she was sentenced did not give the sentencer enough discretion in considering mitigating factors of the criminal's character, circumstances of the offense, and like considerations. In a concurring opinion, Justice White agreed with the plurality decision that this basic flaw in the statute was sufficient to reverse her death sentence, but also argued that her sentence should be

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reversed because she did not intend the death of the victim.  
He contended that:

. . . it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim."

438 U.S. at 624.

The defect in the Lockett case is not present here. Appellant Andrews' participation in this crime has been reviewed by this Court and found to be of the type required by Utah law to result in the death penalty. Appellant actively participated with appellant Pierre in torturing and murdering the helpless victims. He purposefully helped administer the Drano to the victims. His was not the passive participation of a getaway car driver. The facts of the trial speak for themselves, as was outlined by the State in its brief in opposition to certiorari to the United States Supreme Court in Andrews v. Utah. This statement of facts is helpful in response to appellant's claims here and is therefore set out in full in Appendix A for the Court's reference. This statement of facts shows that the two appellants acted in concert with each other in the commission of the murders. Much like one defendant stabilizing a gun while the other pulls the trigger or one holding a victim secure while the other kills him, the two appellants both intended the murders

of the victims in this case. As to appellant's assertion that he "had argued with [Pierre] and left" before any of the shootings, such is not well-established by the evidence. Orren Walker merely stated that while lying face down on the floor, he did not hear appellant Andrews after a certain point. Appellant certainly did not provide evidence that he, in fact, left.

Appellant concedes that the jury could properly find that Andrews remained with Pierre, yet somehow contends that appellant meets the Justice White test in Lockett of not intending the victim's deaths. Respondent urges that this interpretation is not sufficient to trigger Justice White's Lockett rationale. In light of the above facts of appellant's participation, more must be alleged than a weak contention that appellant left the room before Justice White's test can be applicable. Even if there was enough evidence to support Justice White's test, respondent would remind the Court that his opinion was not joined by any other justice and cannot be considered as binding Supreme Court law on its own. Justice White concurred with the other justices in their opinion as to the defects in admission of mitigating evidence as the key factor in the reversal and then added his comments as to a co-defendant's necessary intent to kill a victim. Respondent agrees with Justice Stewart that Justice White's opinion "represents

only his views." Andrews v. Morris, at page 14, advance sheet.

Moreover, respondent submits that this Lockett rationale is improperly raised here inasmuch as that case was decided subsequent to the present case's direct appeal. (For a complete discussion of the improper retroactive application of later case law, see Andrews v. Morris, No. 16168, brief of respondent, at pages 49-55, which respondent herein incorporates by this reference.)

Finally, under Utah law it is implicit that the jury did find that appellant Andrews possessed a purpose or intended to cause the death of the victims. Utah Code Ann. § 76-5-202(1) states that an actor commits first degree murder when he "intentionally or knowingly causes the death of another." This requirement was set out explicitly to the jury in Jury Instruction No. 8 (R.351), and the jury's return of the guilty verdict on three counts of first degree murder is proof that the jurors found that appellant met this requirement. This finding by the jury is further enforced by the fact that Utah case law requires that all evidence must be viewed in a light most favorable to the verdict. (See State v. Wilson, 565 P.2d 66 (Utah 1977); State v. Allgood, 28 Utah 2d 119, 499 P.2d 269 (1972); and State v. Canfield, 18 Utah 2d 292, 422 P.2d 196 (1967).)



Respondent submits that the jury instructions as to appellant's intent to kill the victims was a clear, proper statement of the requirements to satisfy the statute. Likewise, the instructions as to the accomplice of party whom was also sufficiently clear. Appellant took his chosen program from the jury instructions as an attempt to illustrate intent in connection with the instructions. Yet, when read in their entirety and in complete form, the instructions properly instructed the jury in this area of appellant's criminal involvement as well.

In conclusion, respondent submits that a review of the facts and the jury instructions at this stage of this case supports the verdict arrived at by the jury that appellant Johnson did intend to cause the death of the three victims in this case.

#### POINT IV

THIS COURT HAS ADEQUATELY CONSIDERED AND REJECTED APPELLANT'S CLAIM THAT THE METHOD OF EXECUTION IN UTAH IS UNCONSTITUTIONAL.

As in Point III, respondent will summarize the issue appellant raises in his Point III and show where it has been exhaustively dealt with:

1. method of execution in Utah is cruel and unusual punishment and is based in dogmatic Mormon

for habeas corpus, at page 9; Andrews v. Morris, appellant's brief, at pages 22-23; and Andrews v. Morris, No. 16168, filed Feb. 13, 1980, at pages 11-12.

Respondent makes these additional comments as to this issue. The method of execution claim was correctly disposed of by this Court, as a matter of law, as per Wilkerson v. Utah, 99 U.S. 130 (1878), and its citation in Gregg v. Georgia, 428 U.S. 153, 170 (1976). The Gregg Court analyzed the petitioner's claim that the punishment of death under all circumstances is cruel and unusual and ruled that this Eighth Amendment prohibition only forbids excessive or disproportionate penalties. In holding that the death penalty does not violate the Eighth and Fourteenth Amendments, the high Court acknowledged Utah's method of execution as being a permissible means of employing the death penalty. This recognition of Utah's acceptable method is further illustrated by the Gary Gilmore case. (See, e.g., Bessie Gilmore v. Utah, 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976), wherein the Court terminated a stay of execution; Codianna, et al. v. Utah, cert. denied, 439 U.S. 882 (1978), wherein this specific issue of Utah's method of execution was proffered as a violation of the Eighth Amendment, yet was not deemed

of sufficient importance to merit the Court's analysis; and Andrews v. Utah, cert. denied 439 U.S. 882 (1978).) Respondent therefore urges that this issue has been well-considered and rejected by the Utah Court as well as the United States Supreme Court. Thus, a rehearing should not be granted on this issue.

Respondent submits further that appellant's argument that Utah's methods of execution are constitutional due to "evolving standards of decency" (Trop v. Dulles, 356 U.S. 86, 101 (1958)) is misplaced. Trop's oft-cited phrase must be analyzed in view of its facts. There the Court determined that the penalty of divested national citizenship for a soldier's desertion during war time was disproportionate and cruel and unusual. The imposition of the death penalty upon a convicted triple murderer has been determined already to be neither disproportionate nor cruel and unusual. The United States Supreme Court has not deemed Utah's method of execution to be in violation of the "evolving standards of decency" test in the three occasions it has had to do so. (See discussion supra.)

The appellant's reliance on Coker v. Georgia, 433 U.S. 584 (1977), is likewise misplaced. In Coker, the Supreme Court determined that the imposition of the death penalty upon a defendant convicted of rape was a

disproportionate sentence. Again respondent contends that the Coker facts and the facts herein clearly render the former's analysis inapplicable here.

Again, appellant argues he must be granted an evidentiary hearing on the remotely collateral issues of the degree of pain and suffering Utah's death penalty will impose on appellant and the alleged Mormon doctrine influence as the basis of the death penalty's penal purpose. Respondent reasserts the sound doctrine of Spinkellink and Andrews, both supra, as previously argued. No evidentiary hearing need be held to develop facts when the issues are legal and may be disposed of as a matter of law. Such principle is even more sound when the "facts" appellant seeks to have developed here do not even relate to the facts of the case. These "facts" are merely tangential, collateral after-thoughts which appellant now seeks to employ as the basis of a dilatory evidentiary hearing. Such a basis for a hearing cannot be allowed under the Spinkellink or Andrews decisions.

Appellant cites two articles, written by the same author, as evidence of the "growing body of legal literature" which contends that hanging and shooting violates the Eighth Amendment prohibition and that since the "sole purpose" of Utah's death penalty is to satisfy Mormon doctrine of "blood atonement" and "election of salvation" ~~(sic?) the Utah death penalty is invalid.~~ Respondent

submits that this red-herring argument is forcefully off-set by the United States Supreme Court rulings rejecting similar claims by Utah petitioners (see supra).

In summary, this issue of cruel and unusual punishment has previously been considered and rejected by this Court. The United States Supreme Court has also rejected this claim. Thus, it cannot be used as a basis for a petition for rehearing.

#### CONCLUSION

The present petition for rehearing is defective for several reasons. Primarily, the requirements for granting a rehearing--issues, law or facts which have been overlooked or misconstrued by the court--have not been met. Specifically, the petition is defective because the majority of the issues raised have been previously raised, considered and either resolved or rejected.

The Utah death penalty's constitutionality has been considered in earlier decisions of this Court and the application thereof is consistent with State v. Brown, supra.

The contention that appellant Andrews did not intend the deaths of his victims has also been heretofore analyzed and resolved in respondent's favor.

Finally, the claim that Utah's death penalty violates the Eighth Amendment prohibition against cruel

and unusual punishment has been considered previously by this Court and such claim was rejected.

Respondent submits that the recent decision by this Court in Andrews v. Morris, No. 16168, filed Feb. 13, 1980, was correct and that a rehearing is not merited. Respondent prays that the present petition for rehearing be denied.

Respectfully submitted,

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APPENDIX A

FROM THE STATE OF UTAH'S BRIEF IN  
OPPOSITION TO CERTIORARI IN  
ANDREWS V. UTAH

STATEMENT OF THE CASE

On April 22, 1974, the basement of the Hi Fi Shop in downtown Ogden, Utah, became the scene of a brutal and torturous detention, robbery and murder which left three people dead and two wounded but miraculously alive.

Stanley Walker, assistant manager of the Hi Fi Shop, in his early twenties; a nineteen year old employee and part-time model, Michelle Ansley; and Cortney Naisbitt, a seventeen year old relative of the shop's owner; were taken captive at gunpoint into the basement of the Hi Fi Shop by petitioners Pierre and Andrews (Tr.3069-3070), to facilitate the methodical removal of virtually the entire inventory of stereo equipment from the store for transport to a rented storage locker.

Stanley's father, Orren Walker, became alarmed when Stanley did not come home for dinner (Tr.3060-3061). His paternal concern led him to the Hi Fi Shop as he sought the whereabouts of his son (Tr.3061,3063,3067). The back door of the Shop was unlocked. He entered and saw that much of the stereo equipment which had been on display earlier that afternoon was now missing (Tr.3064-3065). As he approached the stairway to the Shop's basement, petitioners confronted him with guns, and forced him down the stairs. Orren found the three young people lying on

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the floor, bound hand and foot, pleading with petitioners for their lives (Tr.3073-3075). Petitioner Pierre tried to force Orren to give some unknown drink to the young people (Tr.3077). When Orren tacitly refused, petitioner Andrews placed a gun at his head threatening him (Tr.3077-3078). Petitioners then tied Orren's hands and feet, and placed him by the others (Tr.3078-3079).

Like Orren Walker, Carol Naisbitt became concerned about her son, Courtney, when he failed to return home from an errand (Tr.2540-2541,2080-2081). She sought her son at the Hi Fi Shop at about 8:00 p.m. (Tr.1771-1772,2541). Petitioners captured her at gunpoint and laid her bound next to her son (Tr.3080-3081,3083).

Eventually, in front of the others, petitioners compelled Carol Naisbitt to drink a caustic substance, which caused her to cough and sputter (Tr.3084-3085). The substance was later identified as sodium hydroxide, a chemical compound consistent with liquid Drano (Tr.2208-2210). In turn Courtney, Stanley, Michelle, and Orren were also forced to drink (Tr.3085-3087). Each successive ingestion caused coughing and spitting, yet petitioner Andrews continued to pour and petitioner Pierre continued to administer the corrosive chemical (Tr.3084-3085). Orren Walker, one of the two survivors, tried to let the chemical slowly drain unnoticed out of his mouth (Tr.3087); his forehead became scarred from lying in the resulting pool. Apparently to ensure that the Drano did its desired work, petitioners now covered each victim's mouth with tape (Tr.3087-3088).

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Time passed but the five lived on. Finally, petitioner Pierre shot Carol Naisbitt in the head while she lay next to her son (Tr.3101-3084). Cortney fell next victim to Pierre's gun, also shot in the head (Tr.3103). Orren Walker then heard a bullet strike the floor near his head (Tr.3101). Next, Orren heard his own son shot by Pierre (Tr.3102). Another bullet "stung" into Orren's head (Tr.3103). He began to do simple mental multiplication and to move his toes and fingers to determine how bad his wound was (Tr.3103,3105). Pierre left momentarily, and Orren heard Michelle ask his son Stanley if he were all right (Tr.3102); Stanley was able to reply that he had been shot (Tr.3102).

Pierre returned, untied Michelle who had not been shot and took her into a back room (Tr.3103-3104), while Orren feigned death (Tr.3105). When she was returned she was naked, raped (Tr.3106,3110). (The State medical examiner determined sexual intercourse, post mortum. Tr.2176-2179.) Michelle lay back down at her appointed place and was herself shot in the back of the head by Pierre (Tr.3109-3110). Stanley was then shot a final time; his breathing, which his father, Orren, had been able to hear up to that time, now ceased (Tr.3110).

Later petitioner Pierre tried to discern if Orren Walker was dead (Tr.3112). He attempted to strangle Orren with an electrical cord (Tr.3110,3119). Only by carefully tensing the muscles of his neck was Orren able to survive the strangula-

tion attempt while still playing dead (Tr.3110). The cord was left so tightly tied, his head swelled (Tr.3119). Orren then felt a pointed object shoved into his ear and kicked three times (Tr.3111,3113). The object was a long ballpoint pen (Tr.3124). Somehow Orren was able to keep from flinching as he felt the pen go deeper and deeper with each kick (Tr.3112, 3113). Finally, both assailants were gone.

After some time, Orren heard the voice of his other son upstairs (Tr.3116), and the hours of immediate terror were over. The entire episode had lasted approximately four hours. Michelle and Stanley lay dead (Tr.3120); Carol Naisbitt died en route to the hospital (Tr.2543,3120). Courtney survived to face five weeks of coma (Tr.2546), five months of intensive care (Tr.2551), several operations (Tr.2544-2545,2548-2549, 2551), peritonitis (Tr.2550), blindness of the right eye (Tr. 2552-2553), partial paralysis of his right side (Tr.2547-2548, 2552-2553), and loss of part of his esophagus and stomach lining (Tr.2549-2551). As of the trial date, November, 1974, he was still hospitalized, and except for water and clear liquids was being fed directly into the stomach (Tr.2552). Orren Walker also survived to give his eye-witness testimony at the trial (Tr.3057-3136).

Besides the personal account of Orren Walker, witness after witness corroborated his testimony and implicated petitioners.

One witness overheard Andrews two months prior to the crime state that someday he would like to rob a "hi .fi" shop and would kill anyone who got in his way (Tr.1549). Two witnesses saw both petitioners together in the Hi Fi Shop two days before the robbery-murder writing prices down and looking all over the store, even down the back stairs (Tr.1578-1580,1588,1591-1592).

The owner of the rented storage locker in which the stereo items were found specifically identified Pierre as the person who had rented that particular locker the morning of the crime, supposedly to store a car (Tr.1665-1670). Over \$20,000.00 worth of stereo equipment was recovered from the storage locker which also contained a bottle of liquid Drano, a cup like that used to administer the poison at the scene, and personal items from the shop. Much of the equipment was identified by specific serial number as having come from the Hi Fi Shop (Tr.2447,2865-2885,2936-2955). Personal items like a one-of-a-kind sculpture, a towel purchased in Brazil, a piece of broken display moulding and chairs were specifically identified as coming from the Hi Fi Shop (Tr.2917-2919).

A black acquaintance of petitioners' codefendant, Keith Roberts (who was convicted of aggravated robbery but not the homicides), saw petitioners exit Andrews' blue van about 5:30 p.m. on the evening of the murders, three quarters of a block east of the Hi Fi Shop (Tr.1688,1700-1703). Petitioners walked in the direction of the Shop while the van made a U-turn and drove that same direction (Tr.1700-1703).

Another witness also saw petitioners exit the blue van and walk in the direction of the shop (Tr.1689-1690).

- Another witness saw Andrews' blue van backed up to the rear door of the Hi Fi Shop about 6:30 p.m. and two black men passing stereo equipment into it (Tr.1828-1830). Another witness saw Carol Naisbitt enter the back of the shop about 8:00 p.m. and specifically identified Pierre as being at the back of the Shop somewhat later (Tr.1771-1772). Pierre asked the witness a question and she remembered his accent (Tr.1721). Other witnesses mentioned Pierre's Trinidad accent (Tr.1593,1667,3294).

While looking for empty deposit bottles, the day after the crime, two young boys found purses, wallets, credit cards and other personal effects of the victims in the trash dumpster outside of petitioners' barracks at Hill Air Force Base (Tr.2121-2129,2136-2138).

A search of Pierre's room at the barracks the day after the crime yielded the signed copy of the storage locker rental agreement, and articles from the Hi Fi Shop (Tr.2467,2473-2575). Andrews' room also contained Orren Walker's watchband (Tr.3053-3055,3096), items from the Hi Fi Shop (Tr.2582-2588), and surgical gloves (Tr.2583).

(At one time, Orren Walker had heard sounds like rubber gloves coming from petitioners' direction. Tr.3094-3095.)

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Petitioners gave a portable cassette player to a girl to "hold"; the stereo was from the Hi Fi Shop and contained Orren Walker's watch (Tr.2322-2323,2427,2940,3097).

Three weeks prior to the crime Pierre was even seen at the movie "Magnum Force" a scene from which depicts a pimp pouring Drano down a prostitute's throat to kill her (Tr.1614-1615).

On November 15, 1974, petitioners were found guilty on three counts of murder in the first degree and two counts of aggravated robbery; the guilt phase of the bifurcated capital proceeding was concluded.

During the sentencing phase of Utah's bifurcated capital proceeding, the State called Dr. Louis G. Moench (Tr.4130), who had given petitioner Pierre a psychiatric examination on October 14, 1974 (Tr.4130-4135). The doctor concluded that petitioner Pierre was able to distinguish both legally and morally between right and wrong and suffered from no mental defect or illness which would interfere with his ability to make decisions or to conform his actions to what he perceived to be right or wrong. Dr. Moench also stated that petitioner Pierre was of average intelligence (Tr.4136-4137).

Lt. John Farrer Regni (Tr.4138) was called by the State to testify concerning petitioners' military records. Pierre's record revealed that he had wrongfully appropriated an automobile from another airman (Tr.4152), had failed to report to duty on several occasions (Tr.4153), had twice written checks with insufficient funds (Tr.4153),

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and was a "marginal performer" with limited potential as an airman (Tr.4155). Petitioner Andrews' military record reflected a court-martial and time lost, a letter of reprimand for leaving the scene of an accident (Tr.4142), another letter of reprimand for leaving his appointed place of duty (Tr.4143), and that he had twice failed to go to his appointed place of duty. Petitioner Andrews was listed as a marginal performer and of limited potential as an airman (Tr.4146).

The state also called Mr. Allan Roe, a clinical psychologist at the Utah State Prison. Mr. Roe stated that during the past eight years, ten persons serving life sentences for first degree murder had been released from the Utah State Prison. The persons released had served an average of thirteen years, one month (Tr.4165), with the longest serving seventeen years, and the shortest nine years, one month (Tr.4171). He also stated that three of those released there-after committed other murders.

Petitioners Pierre and Andrews then presented evidence of mitigating circumstances. Mr. Gerald Smith, Ph.D., a professor of criminology at the University of Utah, stated that in his opinion, the death penalty is not a deterrent (Tr.4197-4234).

Mr. Frazier Crocker, Jr., former chaplain at the Utah State Prison, gave a historical overview of capital punishment, and stated that in his opinion, biblical text did not support the imposition of capital punishment (Tr.4234-4247).

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Petitioner Andrews then testified that he was twenty years old; he was the youngest child in a family of five boys and one girl; he had never known his father and his mother had supported the family; he had run away from home when he was ten years old; he was taken away from his parents and reared by an aunt and uncle until he was fifteen; he had received an eighth grade education; he again ran away from home at age fifteen and burglarized a cafe; he was in a juvenile detention center for one year and four months; he then joined the Job Corps where he received a general education diploma (equivalent to graduation from high school) and a welding certificate; he pled guilty to auto theft in San Antonio, Texas, and was placed on probation; and then joined the Air Force (Tr.4247-4270).

Petitioner Pierre did not take the stand or present further evidence of mitigating circumstances in his case.

The trial judge carefully charged the jury concerning their responsibilities during the sentencing proceeding. He stated that the burden of proof necessary to satisfy the jury that a death sentence was appropriate was on the State (Tr.4273). He further stated that all evidence received during the guilt phase of the proceeding could be considered by them, as well as evidence presented during the sentencing proceeding. The jury was also instructed to consider the

circumstances of the crime, the character of each defendant, his background, his general personal history, and his mental and physical condition (Tr.4274). The trial judge also enumerated for the jury the statutory mitigating circumstances contained in Utah Code Ann. § 76-3-207 (Tr.4274-4275).

The jury determined that this was a proper case for the imposition of the death penalty and sentenced petitioners to death. The convictions and sentences were subsequently affirmed by the Utah Supreme Court in State v. Pierre, 572 P.2d 1338 (Utah 1977), and State v. Andrews, 574 P.2d 709 (Utah 1977).