

1988

# William Andrews v. Gerald R. Cook : Petition for Rehearing

Utah Supreme Court

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Unknown.

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UTAH SUPREME COURT  
BRIEF

UTAH  
DOCUMENT  
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No. 88-0024

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DOCKET NO. 88-0024 IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM ANDREWS,  
Plaintiff/Appellant,

v.

GERALD R. COOK, Warden of  
the Utah State Prison,  
Defendant/Appellee.

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PETITION FOR REHEARING

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FILED  
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## ARGUMENT

### 1. Misapprehension of the Procedural History.

The Court's opinion asserts that this Petition was not filed until after Appellant's Petition for Certiorari was denied by the Supreme Court of the United States on February 29, 1988. Andrews v. Shulson [sic], No. 880024, filed October 27, 1988, at Slip op.

2. This is incorrect. In fact, this Petition was filed on October 23, 1987, long before the Supreme Court's ruling on Appellant's Petition for Certiorari. The event that triggered the filing of this Petition was not the termination of the original federal habeas proceedings, but this Court's decision in State v. Hansen, 734 P.2d 421 (Utah 1986). See Affidavit of Timothy K. Ford, Petitioner's Addendum at 11.

The facts surrounding this important aspect of the procedural history of this case are undisputed. The Court's opinion should be corrected to eliminate its misstatement on this point.

### 2. Misapprehension of Federal Law.

The Court has misapprehended the federal law regarding abuse of the writ, which it purports to follow. Slip op. at 3. The cases the Court relies upon all dealt with situations where "claims that could have been presented years ago were brought forward--often in a piecemeal fashion--only after the execution date is set or becomes imminent." See Woodard v. Hutchins, 464 U.S. 377, 380 (1984); Anton v. Dugger, 465 U.S. 200, 203 (1984); Straight v. Wainwright, 476 U.S. 1132, 1133 (1986). As noted

above, that was not the case here. In addition, all of the cases the opinion cites involved situations where the petitioner did "not explain why he failed to include his challenge ... in his prior habeas petition." Woodard v. Hutchins, 464 U.S. at 380; see Straight v. Wainwright, 476 U.S. at 1134; Anton v. Dugger, 465 U.S. at 206. Petitioner here offered several explanations and asked for an evidentiary hearing to prove any aspect of them the Respondent questioned. The Court's opinion assumes the record is complete on this point, overlooking that request for a hearing and the District Court's erroneous denial of it.

The Court also misapprehends federal law in its citation of several federal cases for the proposition that "raising issues in a petition that were not but could have been raised in a previous petition, except where good cause is shown, constitutes an abuse of the writ and requires dismissal of the petition." Slip op. at 3. In reality, the federal courts hold that failure to assert a constitutional right or privilege at a time "when the right or privilege was of doubtful existence", followed by the assertion of the claim after a new United States Supreme Court precedent establishes its validity, "constitutes no abuse of the writ of habeas corpus." Smith v. Yeager, 393 U.S. 122, 126 (1968). Only one of the federal circuits has adopted the radically different rule this Court does, equating successive habeas corpus petitions based on new law with procedurally defaulted claims. Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983). The other federal circuits hold to the contrary, and the issue is presently pending

before the Supreme Court of the United States. See Moore v. Kemp, 824 F.2d 874 (11th Cir. 1987), cert. granted, U.S. Supreme Court No. 87-1104 (April 18, 1988).<sup>1</sup>

The Court also misapprehends federal law in its failure to recognize that the "abuse of the writ doctrine should be governed by equitable principles." Stephens v. Kemp, 104 S.Ct. 562, 563 (1983); Sanders v. United States, 371 U.S. 117 (1963). The Court's opinion, while purporting to follow the federal rule in this area, overlooks that crucial part of it--which alone justifies review here, as Justice Durham's dissent points out.

3. Failure to Address the Issue of the Right to Counsel.

The Court's opinion overlooks, and does not address, the question of the right to appointed counsel in Utah post-conviction proceedings. As Petitioner's Briefs have pointed out, this issue is relevant not only to the propriety of the trial court's refusal to appoint counsel to represent Petitioner below, but also to the question of "cause" for the alleged procedural default in the prior post-conviction petition, on which the Court's opinion rests. See Appellant's Brief at 45 n.31; Appellant's Reply Brief at 13 n.11.

On October 31, 1988, the Supreme Court granted certiorari to review the en banc decision in Giarrantano v. Murray, 847 F.2d 1118 (4th Cir. 1988), which held that there is a constitutional right to counsel in state post-conviction proceedings in capital

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<sup>1</sup>To minimize delay in federal review, the Court may wish to hold this Petition until Moore is decided and these federal law issues are resolved.

cases. Because this issue of Utah law is unresolved, and will inevitably have a direct impact on any federal court's assessment of this case on certiorari or in habeas corpus, the Court's opinion should address that question.

4. Compounding the Constitutional Violation.

The Court has granted Respondent's request that this Court depart from its prior practice, by refusing to address in any manner the merits of Petitioner's constitutional claims. Respondent asked this, not for any valid state reason, but for the sole purpose of cutting off Petitioner's access to federal court on these issues. By granting that request, the Court has constructed a special rule barring only the Petitioner's attempts to obtain review in this particular case.

A state court procedural rule, constructed for the purpose of cutting off federal review of federal constitutional issues, is not an independent and adequate state ground. Henry v. Mississippi, 379 U.S. 443 (1965). The federal courts will not, and should not, recognize bars imposed by state procedural rules unless they are "strictly or regularly" followed. Hathorn v. Lovorn, 457 U.S. 255, 262 (1982). The reasons for this "are plain: the state court may be attempting to evade Supreme Court review by interposing a state law ground." Meltzer, State Court Forfeitures of Federal Rights, 99 Harv.L.Rev. 1128, 1138 (1986). The State's arguments in this case, followed by this Court's acceptance of them without explanation for its departure from past practice, can support no other inference but that this



Court's action is specifically intended and designed to cut off Petitioner's right to federal review of a death sentence that the State has virtually conceded is unconstitutional.

Petitioner submits this is not a proper application of state procedural rules. If there is a reason for this Court's decision not to address, in any manner, the merits of Petitioner's constitutional claims, the opinion should be modified to set it forth. If there is no reason other than that the Respondent has urged--to keep Petitioner's claims out of federal court--that, too, should be stated so that Petitioner can ask the federal courts to review the adequacy and propriety of that state "rule". The Court's silence can only be interpreted as an affirmation of the State's cynical and deliberate efforts to insulate a fundamental injustice from review.

#### CONCLUSION

The Court should grant rehearing, address the merits of Petitioner's constitutional claims and vacate his sentence of death. At the least, the Court should modify its opinion to correct its errors regarding the procedural history of this case, and to address the issues set out above.

DATED this 14 day of November, 1988.

Respectfully submitted,



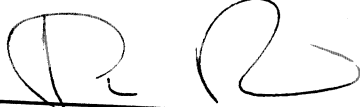
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Timothy K. Ford for  
Attorney for Petitioner

CERTIFICATE OF COUNSEL

As counsel for Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

DATED this 14 day of November, 1988.

  
\_\_\_\_\_  
Timothy K. Ford