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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM ANDREWS,	:	
Petitioner,	:	
v.	:	Case No. 18230
LAWRENCE MORRIS, Warden of the Utah State Prison,	:	
	:	
Respondent.		

PETITION FOR REHEARING

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FILED

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Clerk, Supreme Court, Utah

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Petitioner William Andrews hereby moves the Court for rehearing and reconsideration of its decision, issued November 16, 1983, denying his Petition for habeas corpus and reaffirming his sentence of death. With all respect, Petitioner submits this Court has misapprehended the facts of this case, misapplied the law, and denied him the equal protection of the law of this State.

Petitioner will not reiterate all the arguments he has made here before in this rehearing petition. He maintains them, however, and adopts them by reference. The argument in this petition will limit itself to those specific areas in which Petitioner believes the Court has misappreneded the facts or misapplied the law to his case.

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1. The Facts

The statement of facts in the appendix to the Court's opinion reveals a fundamental misunderstanding of the evidence of the culpability of Petitioner William Andrews. There was no evidence anyone was "forced by [Andrews] ... to drink a caustic chemical substance capable of causing their death." Ibid. Orren Walker testified that Pierre did that. Tr. 3075-76, 3085-87, 3183. No witnesses testified that "the substance would have caused the death of the ... victims ... but for the promptness of the medical attention given to them." There was certainly evidence that Andrews made an "effort to halt the course of events". See Tr. 3072, 3073-74, 3091, 3183. And it is simply not true that "Andrews was present and either assisted or observed Pierre during all the events described" in the Court's appendix. See Tr. 3093, 3100-10, 3188.

There is a very real question as to whether the death penalty could constitutionally be imposed on William Andrews, under any standard. See Enmund v. Florida, 50 U.S.L.W. 5087 (July 2, 1982); Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982); Jones v. Thigpen, 555 F.Supp. 870 (S.D. Miss. 1983); People v. Tiller, 447 N.E.2d 174 (Ill. 1983), cert. denied ___ U.S. ___ (1983); State v. McDaniel, 665 P.2d 70 (Ariz. 1983). Certainly, in light of these facts, the error in the sentencing standard applied in his case cannot be harmless "beyond a reasonable doubt."

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2. <u>The Question of Retroactivity</u>

This Court's attempt to apply federal retroactivity analysis to this case consistently overlooks one critical fact: this case is sui generis. Though there may be a difference in the purpose served by the Wood standard and the purpose of the reasonable doubt standard at the guilt phase of a criminal trial, the major constitutional difference is that the need for certitude and consistency is greater where life and death are at stake. See Gardner v. Florida, 430 U.S. 349 (1977); Beck v. Alabama, 447 U.S. 625 (1980); State v. Wood, 648 P.2d 71 (Utah 1977).

If the purpose of the Wood standard was to promote "fairness", Petitioner had as much right to a fair trial as Walter Wood, Joseph Paul Franklin (to whose trial court this Court rushed its Wood decision before it was final, see Yocum Affidavit, Petition Exhibit D), and all the cases that have enjoyed it since. If the purpose of the Wood standard was to promote "consistency" (slip op. 19), the result of this decision is to destroy that, by consistently applying the same standard in all cases except these petitioners.

Wood may have been a "'clear break with the past'" (slip op. 21), but the only past there was is this case: in no other capital case affirmed by this Court has the jury been instructed in the

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manner it was here.[1] In the only other case with this instruction error, where the defendant's crime was certainly no less serious than this one, the death penalty was reversed. See State v. Brown, 607 P.2d 261 (Utah 1980).

The Court never deals with the second aspect of the Johnson test, "the extent of reliance on the old rule ...." Slip op. at 17. That is understandable, because there was none. No other case would have to be reversed by a holding that this rule was retroactive, as this Court well knows. Because of that, the statement that it "would not serve the administration of justice" to so hold (slip op. 21) translates into a statement that "the administration of justice" requires these petitioners to die--while Gerald Brown, Walter Wood, Joseph Franklin, John Calhoun, and others guilty of similar crimes are let live. That is not the meaning of Johnson's objective tests. It is a euphemism for a deliberate denial of the equal protection of the law.

---

1 The Court's statement that "a higher standard may have in fact been employed in some non-jury cases" prior to Wood (slip op. 21 n.5) overlooks the fact that the Wood standard was given to the juries in State v. John Michael Calhoun and State v. Joseph Paul Franklin. See Petition Ex. B. The Court is also incorrect "that prior to Brown, the Pierre standard was consistently used in capital prosecutions, see, e.g., State v. Codianna, Utah, 573 P.2d 343 (1977) ...." Slip op. at 21. The Pierre standard was not applied by the trial court in Codianna. And if "e.g." means "for example", there are no other examples that either Respondent or the Court have pointed to.

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3. The Equal Protection Question.

Petitioner made it clear in his petition here that he limited the issues to those which arose out of the Wood decision, and did not attempt to relitigate those issues this Court had previously rejected in this case. See Petitioner's Reply Memo at 10. Petitioner has therefore not again proffered the evidence this Court refused to hear in Andrews v. Morris, 607 P.2d 816, 825 (Utah 1980), regarding the arbitrary and racially discriminatory manner in which the death penalty had been imposed throughout the State of Utah, and the particular evidence of discrimination against Petitioner in this case. That evidence has been gathered for a hearing in federal court--and Petitioner remains willing to present it in state court; but this Court has refused to hear it.

Petitioner has made a new and distinct claim here: that singling him and his codefendant out for treatment different from that given every other Utah capital defendant would deny him the equal of the law. See Petition at 3. Though all the cases in which that standard had been applied up to the time of Wood involved white defendants, and the inconsistent positions of the Attorney General of Utah in Petitioner's case and these others, give this claim a racial aspect, it does not rest on race alone. It rests on the simple obligation of the State to apply its law evenhandedly, in all cases before it, the most basic and literal kind of equal protection of the law. That is what Petitioner has been denied here.

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Petitioner did not provide affidavits "regarding the facts and circumstances" of the cases in which the Wood standard was earlier applied, because he had no idea this Court would find those relevant, and Respondent never claimed they were. Surely, the Court was familiar with the facts of the cases of Walter Wood and Gerald Brown. And Petitioner provided descriptions of the case of Joseph Paul Franklin (Petitioner's Brief at 4) and of John Michael Calhoun (Petitioner's Reply Brief at 9 n.9). One of the Justices of this Court, the author of this opinion, sentenced Robert Phillips (see Petition Ex. D); Petitioner understands that case involved a robbery murder of a taxicab driver. Finally, Petitioner specifically asked the Court to remand this case for evidence on this point, if it somehow found this information relevant or the affidavits insufficient. See Petitioner's Brief at 13 n.5. Petitioner cannot understand how anyone can prove that a different result might have obtained in those cases (and others decided since) under a different sentencing standard--at least not without a hearing at which the sentencers themselves could be called. If the Court maintains that question is relevant, Petitioner renews his request for such a hearing here.

Petitioner maintains this issue can and should be decided as a matter of law, however, simply on the basis of the difference in the instructions here. As Petitioner has previously noted, the Court's assumption that the Utah statute, prior to Wood, was constitutional is simply not warranted. Zant v. Stephens, 51

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U.S.L.W. 4891 (June 22, 1983) added additional authority to his argument that statutes of this type--which require no jury findings, do not substantially narrow the scope of capital crimes, and provide for no specific appellate sentencing review--are unconstitutional. See 51 U.W.L.W. at 4894-95. This Court's decision in Wood may cure that constitutional defect; but denying this Petitioner the benefit of that protection can only compound it.

4. The Question of Harmless Error.

The Court's alternative finding of harmless error in this case is remarkable, in light of its recognition that "[n]o measure of 'accuracy' exists whereby that decision [to impose the death penalty] can be analyzed in the same way as the decision about whether a fact is true or false." Slip op. at 20. Certainly, the harmless error standard the Court has fashioned for this case is inconsistent with that fact, and the law elsewhere.

The Court's citation of the harmless error rule upheld in Barclay v. Florida, 51 U.S.L.W. 5206 (July 6, 1983) overlooks a fundamental fact about that Florida rule: it applied only where there is a specific finding that "there were no statutory mitigating circumstances ...." 51 U.S.L.W. 5213 n.12. Here there was no such finding, and substantial evidence of several statutory and non-statutory mitigating factors. See Petitioner's Reply Brief at 9 n.9 & 10. The Court's citation of Zant v. Stephens, is similarly misleading. The Georgia Supreme Court's review "to avoid

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arbitrariness and to assure proportionality" differs substantially from anything this Court is required to do by statute, or has ever done. See Gregg v. Georgia, 428 U.S. 153, 198 (1976). The Court has never purported to compare Petitioner's sentence with those imposed in other cases, has never afforded him an opportunity to submit the facts of other cases for comparison, and has no power to reduce the sentence on the basis of a finding of disproportionality. No principle of law, or fair accessment of the facts supports the statement that "no rational judge or jury could ... have determined" William Andrews did not deserve death. The Court held that in Pierre v. Morris, 607 P.2d 812, 815 (Utah 1980), not in this Petitioner's case.

William Andrews did not kill anyone. William Andrews was 19 years old at the time of his alleged involvement in this crime. William Andrews had never before been convicted of a crime of violence. William Andrews came from a deprived background and a broken home. There was substantial evidence that he made some attempt, however ineffectual, to stop these murders. Surely--if a rational juror could choose to spare the life of Joseph Paul Franklin for the race-motivated cold blooded murder of two people, or John Michael Calhoun for a similar crime in the course of a burglary, or Gerald Brown for his vicious double homicide--a rational juror could decide to spare the life of William Andrews, who killed no one.

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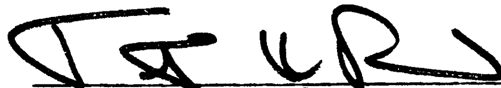
Petitioner once again implores this Court to look individually at his case and decide it under the same standards it has used in others. If it does, he submits that fairness and equal protection require that his death sentence be reversed.

DATED this 2nd day of December, 1983.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that this date I mailed two copies of the foregoing Petition for Rehearing, postage prepaid, addressed to:

Earl F. Dorius
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

DATED this ___ day of December, 1983

____

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