For Opinion See 96 S.Ct. 2950

Supreme Court of the United States.
Jerry Lane JUREK, Petitioner,
v.
STATE OF TEXAS, Respondent.
No. 75-5394.
October Term, 1975.
March 25, 1976.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Brief for the Respondent

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***1 OPINION BELOW**

The opinion of the Texas Court of Criminal Appeals is *Jurek v. State*, 522 S.W.2d 934 (Tex.Crim. App. 1975) (hereinafter cited as *Jurek*).

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of murder under the laws of Texas violate the Eighth or Fourteenth Amendment to the Constitution of the United States.

***2 STATEMENT OF THE CASE**

In view of the paramount issue of law before the Court, Petitioner's "Statement of the Case" sufficiently relates the facts of his case relevant to that issue. To the extent, if any, that Petitioner's statement casts any doubt on the accuracy of the factual summary contained in *Jurek v. State*, 522 S.W.2d 934 (Tex. Crim. App. 1975), Respondent, of course, relies on that opinion. Respondent has further provided this Court with information relating to the overall administration of the capital punishment statutes challenged by Petitioner. In that regard, Respondent has lodged with the Court copies of a recent study on the operation of the challenged statutes conducted by the Texas Judicial Council, an independent state agency created for the continuous study of and report upon, *inter alia*, the procedure and practices of the judicial system of the State of Texas, the work accomplished and the results produced by that system and its various parts, and methods for its improvement. TEX.CIV.STAT.ANN. art. 2328a (Supp. 1976).

In regard to the instant case, Respondent would call the Court's attention to the argumentative nature of Petitioner's "Statement of the Case" with respect to issues which are not before the Court. For example, Petitioner impliedly argues the inadmissibility of his confessions. (Petitioner's Brief at 12 and n.8). Though Respondent could cite the Court to testimony and exhibits in the record soundly rebutting Petitioner's erroneous characterization of the facts relating to the confessions, that is not necessary in view of the Court's refusal to grant certiorari on that issue. Petitioner also impliedly argues the insufficiency of the evidence on ***3** rape and/or kidnapping and on identification. Notwithstanding the irrelevancy of such issues, Respondent would apprise the Court that Petitioner twice admits that a kidnapping was established by the evidence (Petitioner's Brief at 17-18, 72), and that the record is replete with evidence which establishes beyond all doubt Petitioner's perpetration of the capital murder charged. Indeed, Petitioner accurately sums up the record in this case by candidly admitting that "[h]e committed a horrendous crime." (Petitioner's Brief at 76).

SUMMARY OF ARGUMENT

I.

Capital punishment *per se* is not cruel and unusual punishment. First, it is beyond doubt that the Eighth Amendment was not originally intended to bar capital punishment. Second, capital punishment is consistent

with the "evolving standards of decency" under that constitutional provision. The acceptability of capital punishment under a progressive Eighth Amendment is demonstrated by the overwhelming weight of judical precedent, by public opinion measured in polls and referendums, and by the state and federal legislatures-the institutions most directly responsible to public opinion and society's standards of decency. The suggestion that Eighth Amendment standards are enlightened, rather than citizen, standards is nothing more than a thinly veiled opportunity for judical imposition of personal convictions upon the entire nation under a constitutional rubric. Third, policy determinations involving questions of penological efficacy are not of a constitutional dimension. Proponents of the constitutional invalidation of capital ***4** punishment *per se* contend that the punishment is unconstitutional if it is more severe than necessary to further legitimate state interests such as retribution, incapacitation and deterrence. Such a test not only is completely without precedence in Eighth Amendment jurisprudence, but also invites the court to serve as a super-legislature, sitting in judgment on the wisdom of numerous legislative enactments. Most importantly, any such test would necessarily incorporate into the Constitution itself the vagaries of new and competing theories in the science of human behavior. In short, it is constitutionally permissible for the Texas legislature to determine that the imposition of the death penalty pursuant to the challenged statutes furthers important social goals. Fourth, the "discretion" inherent in our constitutional system of criminal justice does not render its end result unconstitutional. Each of the opportunities for choice in the criminal justice system is either compelled or permitted by the United States Constitution. Each such opportunity was designed expressly to shield an accused from unjust conviction or punishment. Notwithstanding the inherent possibility of an "erroneous" exercise of judgment, the authors of the Constitution placed these safeguards in that document at the same time as the prohibition against cruel and unusual punishments. Yet Petitioner argues that the guarantees so created render the criminal justice system incapable of producing a constitutional sentence. Surely the Constitution is not so inherently and fatally inconsistent.

***5 II.**

The administration of the death penalty pursuant to the Texas capital punishment statutes does not violate the United States Constitution. These statutes restrict the availability of the death penalty to narrowly circumscribed categories of murder from which Texas citizens desperately need protection. The categories focus on the killing of human beings in situations where the most salient features of the circumstances surrounding the act are calculation and conscious risk assessment. The imposition of the death penalty in these types of cases can reasonably be thought to maximize the deterrent effect of that penalty and fulfill a significant need for retribution. Upon conviction of a murder within the confines of these statutory cagetories, the jury is asked several questions which direct and guide the deliberations on sentencing by focusing their attention on the need for incapacitation and the possible existence of mitigating factors. If the jury unanimously answers these questions in the affirmative, the court must impose the death penalty; if ten or more jurors answer any question in the negative, the court must impose a sentence of life imprisonment. In sum, the Texas capital punishment statutes rectify the judicially criticized defects of the statutes struck down in *Furman v. Georgia*, 408 U.S. 238 (1972). In addition to rectifying these defects in theory, the Texas statutes have in fact done so in practice.

***6 ARGUMENT AND AUTHORITIES**

I. Capital Punishment Per Se Is Not Cruel And Unusual Punishment.

It is clear from the plain language of the Constitution itself that its framers had no thought of eliminating capital punishment. The Fifth Amendment three times extends its protections to circumstances in which an accused stands to forfeit his life.[FN1] It therefore cannot be argued that the prohibition of "cruel and unusual punishments" in the Eighth Amendment was originally intended to bar capital punishment.

> FN1. The Fourteenth Amendment some 77 years later likewise specifically recognized the death penalty.

Furthermore, in its most recent pronouncement on capital punishment, *Furman v. Georgia*, 408 U.S. 238 (1972),[FN2] four members of this Court expressly rejected and three refused to pass upon the proposi-

tion that capital punishment, in any and all circumstances, is cruel and unusual in contravention of the Eighth Amendment to the United States Constitution. Nevertheless, Petitioner again urges the Court to reach this result by imputing to "cruel and unusual" a meaning inconsistent with historical usage, contemporary understanding, and judicial self-restraint. The argument against *per se* constutionality is of three genres. First, there is the incredible assertion that the death penalty can never be constitutionally imposed under the prevailing criminal justice system because that system does not require the blind prosecution, conviction and execution of every person who initially, arguably falls within the scope of the capital punishment statutes. Second, it is urged, on the ***7** basis of subjective morality, that the death penalty violates those "evolving standards of decency" from which the Eighth Amendment draws its meaning. Third, policy arguments of penological inefficacy are elevated to a proposed constitutional defect of "excessive severity." All of these arguments are untenable under sound principles of constitutional interpretation.

FN2. The companion cases of *Furman v. Georgia, Jackson v. Georgia* and *Branch v. Texas* will be referenced to hereinafter as *Furman*.

A. The "Discretion" Inherent In Our Constitutional System Of Justice Does Not Render Its End Result Unconstitutional

One of Petitioner's basic assertions is that the "discretion exercised at all[FN3] stages of capital prosecutions under procedures common to Texas and other jurisdictions" invariably results in an arbitrary application of the death penalty. (Petitioner's Brief at 33, cited hereinafter as Pet. Br. ____). Petitioner goes so far as to state that such discretion is "uncontrollable" and would thus render unconstitutional any death penalty obtained pursuant to the criminal justice system extant in our nation. *Id*. However, since each avenue of discretion is either compelled or permitted by the Constitution, it is rather anomalous to conclude that these constitutionally mandated or approved choices made at each stage of the criminal justice process render its end result unconstitutional. Moreover, such a challenge to the operation of our system of criminal justice by necessity assails the end ***8** result, whether that be the imposition of the death penalty, life imprisonment without parole or a term of years.[FN4] Finally, the presence of some discretion within the criminal process is undoubtedly a necessity if that process is to serve the ends of justice.

FN3. Respondent does not address the issue of discretion at the punishment stage at this point because of organization, because it is the only area of "discretion" relevant to *Furman*, and because it is unnecessary to Petitioner's instant assertion since he explicitly adopts the argument in *Fowler v. North Carolina*, No. 73-7031, Petitioner's Brief at 41-101, which reaches the same conclusion in the absence of a punishment stage.

FN4. Petitioner would, of course, assert that the death penalty is unique. Though that is true in a general sense, it is unquestionably false in the constitutional context of the criminal process assailed by Petitioner. The Fifth Amendment guarantees that "[n]o person shall be held to answer for a *capital, or otherwise infamous crime*, unless on a presentment or *indictment of a Grand Jury*[;] . . . nor shall any person be compelled in *any* criminal case to be a witness against himself, nor be deprived of *life* [*or*] *liberty* without due *process* of law . . ." (emphasis supplied). The Sixth Amendment extends its guarantee to trial by jury, among others, to "*all* criminal prosecutions." (emphasis supplied). Thus, the Constitution itself negates any distinction between capital and noncapital cases vis-a-vis the process wherein they must be prosecuted. It is significant to note that no such distinction is recognized in two of the constitutional guarantees, indictment and trial by jury, which Petitioner attempts to utilize as a basis for his present argument.

1. *Each of the Sources of "Discretion" in our Present Criminal Justice System is Either Mandated or Permitted by the Constitution.*[FN5]

FN5. References made are to the United States Constitution. Since this section of the brief is based on the internal consistency of that document, it is irrelevant whether the constitutional provisions cited have been made applicable to the states through the

Fourteenth Amendment.

Petitioner attacks each of the areas of our criminal justice system where choice is permitted. Thus, Petitioner assails the prosecutor's power (in conjunction with the grand jury) to decide whom to charge and with what offense, and his power to engage in plea ***9** bargaining, the jury's power to convict of a lesser offense or acquit, and, finally, the executive's power to exercise clemency.

The Constitution itself inevitably creates the opportunity for choice at the charging stage, when it guarantees that (for present purposes) the criminal process cannot even be invoked against an individual except by "indictment of a Grand Jury." U.S. CONST. amend. V. It would be highly unreasonable to conclude that a grand jury's[FN6] exercise of this constitutionally mandated opportunity for choice impugns to any degree the constitutionality of the penalty which is ultimately imposed. Yet, this is the substance of Petitioner's argument.

FN6. To the extent that a federal prosecutor has control over the charging decision, that power inheres in the constitutional separation of the executive and judicial functions. See *Fowler v. North Carolina*, No. 73-7301, Brief for the United States as Amicus Curiae at 63-64.

Though the exercise of choice in plea bargaining, unlike the grand jury's option to charge, has not been explicitly mandated by the Constitution, it has been approved and encouraged by this Court as an integral part of our criminal justice system. *Santobello v. New York*, 404 U.S. 257, 260 (1971); *Brady v. United States*, 397 U.S. 742, 751-52 (1970)

The right to trial by jury is explicitly guaranteed by the Sixth Amendment. Thus, the power of the jury to acquit a defendant of the offense charged, either by a finding of not guilty or by conviction of a lesser included offense,[FN7] is a power explicitly protected by the ***10** Constitution in allowing no review of jury acquittals. *United States v. Sisson*, 399 U.S. 267, 289 (1970). Moreover, the power of the executive to exercise clemency is also created by the Constitution itself and is not subject to judicial review. *Schick v. Reed*, 419 U.S. 256 (1974).[FN8]

FN7. A conviction for a lesser included offense is an acquittal of the greater offense charged. *Green v. United States*, 355 U.S. 184 (1957).

FN8. Significantly, this Court has recently held that a challenge to a governor's commutation of the death penalty presents no federal constitutional question. *Rose v. Hodges*, 423 U.S. 19, 96 S.Ct. 175 (1975).

In sum, Petitioner argues that these opportunities for choice in the criminal justice system, though either compelled or permitted by the Constitution, render its end result unconstitutional. In doing so, he ignores the inherent necessity of such "discretion" within the criminal process. More importantly, Petitioner's incredible assertion ignores the fact that each such opportunity for choice was designed expressly to shield an accused from unjust conviction or punishment. The authors of our Contitution were cognizant that the creation of an opportunity for choice inherently granted the opportunity to exercise "erroneous" choice. Notwithstanding this defect, they chose to place these safeguards in the Constitution at the same time as the prohibition against cruel and unusual punishments. Yet Petitioner argues that the guarantees so created render the criminal justice system incapable of producing a sentence which passes muster under the Eighth Amendment. Surely the Constitution is not fatally inconsistent within itself, and this Court should not adopt such an approach.

2. *The Presence of Some "Discretion" Within The Criminal Process Is A Necessity If That Process Is To Serve The Ends Of Justice.*

***11** Not only are the opportunities for choice in the criminal process compelled or permitted by the Constitution, their existence is undoubtedly necessary to avoid totally arbitrary and unjust results.

The underlying premise of Petitioner's assault on the opportunities for choice is that since their exercise is inherently "uncontrollable" (Pet. Br. 33), they must be eliminated if the end result is to be deemed constitutional. Thus, the prosecutor (in conjunction with the grand jury) must charge a capital offense whenever a killing has occurred, the accused must not be permitted to plead to any lesser offense, the jury must convict on the capital charge and impose the death pen-

alty, the Governor cannot exercise clemency and the accused must be executed. Though it seems ludicrous to comment, the obvious sincerity with which Petitioner makes his contentions necessitates Respondent to state that such a system would be the epitome of arbitrariness and injustice.

Notwithstanding the foregoing, this Court should recognize that each opportunity for choice in the criminal justice system serves the express purpose of discriminating among the accused individuals and their alleged acts. Our society long ago recognized that the punishment should be tailored to fit both the criminal and the crime. Hence, we do not hang pickpockets nor punish the insane.[FN9] Moreover, given the infinite variety of the circumstances of offense and offender plus the imprecision of the English language, it would be impossible to inculcate each desired disposition into a ***12** criminal statute. Thus, the necessity for the exercise of discretion in the *administration* of justice.

> FN9. It is interesting to note that Petitioner cites insanity as another "offramp from the road to capital conviction." (Pet. Br. 54 n.70). It is surprising that Petitioner did not mention innocence as yet another offramp.

B. Capital Punishment Is Consistent With "Evolving Standards Of Decency" Under The Eighth Amendment.

The concept of "evolving standards of decency," as applied to the constitutional ban on cruel and unusual punishment, is an established part of our jurisprudence. Respondent does not contend that the meaning of the Eighth Amendment is forever confined to the practices of the Stuarts. But the use of this catch phrase in the manner urged by the petitioner is incongruous with the careful and restrained analysis of this Court in past decisions.

The idea that the meaning of "cruel and unusual punishment" might change with society and its values was first accepted by a Supreme Court majority in *Weems v. United States*, 217 U.S. 349, 378 (1909): "[Cruel and unusual punishment] in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

The Court proceeded to condemn as cruel and unusual a Phillipine punishment of *cadena temporal* (a sentence to hard and painful labor in chains from twelve to twenty years) for falsification of a public record. This constitutional judgment was, however, firmly rooted on public opinion manifested in countless statutes prescribing punishments for violations of the criminal laws. The Court compared the Phillipine punishment for falsification of a public record with punishments for similar crimes such as embezzlement, and more ***13** egregious crimes such as robbery, inciting rebellion, and various degrees of homicide. *Id.* at 380. Comparing the punishment in question with these concrete indicia of public opinion, the legislatively prescribed punishments of the federal and state governments, the Court concluded that it was unconscionably severe.

In *Trop v. Dulles*, 356 U.S. 86 (1958), the Court again applied a progressive concept of cruel and unusual punishment to strike down expatriation as punishment for desertion. Chief Justice Warren's opinion for the Court emphasized that statelessness lay outside *traditional* modes of punishment such as fines and imprisonment, *Id*. at 100, and noted that a nearly unanimous international consensus of civilized nations proscribed the use of this punishment. Even though this opinion is perhaps the high water mark of the "evolving standards" principle, the Court specifically upheld the constitutionality of capital punishment in dicta:

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment -- and they are forceful -- the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." Id*. at 99. (Emphasis supplied).

Thus, it is quite apparent that the cruel and unusual punishment clause is not a judicial harbinger in penological innovation. It takes its meaning from objective indicia such as history and tradition, contemporary opinion, and the laws of various jurisdictions.

***14** A number of Supreme Court cases dealing with attacks on the manner of execution have implicitly

denied also that capital punishment is impermissibly "cruel" in the constitutional sense. *E.g.,* *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1879). Although these decisions did not technically address the constitutionality of capital punishment *per se*, since such attacks lay beyond the legal imagination of past decades, they were squarely premised on the basic assumption that capital punishment was not in itself cruel and unusual.

The long and undisputed (until *Furman*) history of Supreme Court approval of the death penalty is developed in more detail by Chief Justice Burger and Mr. Justice Powell in their dissenting opinions in *Furman*, at 380-84, 421-28. Suffice it to say that until 1972, long after the Supreme Court accepted the idea of a progressive Eighth Amendment, our Supreme Court Justices unanimously found capital punishment *per se* compatible with "evolving standards of decency."

This considerable Supreme Court precedent is supplemented by the holdings of numerous state courts. As pointed out by Mr. Justice Powell in *Furman*, the appellate courts of twenty-six states had passed on the constitutionality of the death penalty under the Eighth Amendment and similar state provisions in the five years preceding that decision. Only one, however, had found it unconstitutional. *Id.* at 442. Moreover, state courts have been virtually unanimous in upholding the constitutionality of the capital statutes drafted subsequent to *Furman. E.g.,* *State v. Dickerson*, 298 A.2d 761 (Del. 1972); *State v. Dixon*, 283 So.2d 1 (Fla. 1973); *Coley v. State*, 204 S.E.2d 612 (Ga. 1973); *State v. Selman*, 300 So.2d 467 (La. 1974). *Contra,* *Commonwealth v. O'Neal*, 339 N.E.2d 676 (Mass. 1975). ***15** Thus, the state and federal judiciaries to this day have overwhelmingly rejected Petitioner's argument that the death penalty *per se* violates the progressive meaning of the Eighth Amendment.

Respondent submits that no changes have been wrought which would lead this Court to conclude that capital punishment is presently inconsistent with "evolving standards of decency." At the time of *Furman*, forty-one states, the District of Columbia, and the United States authorized the imposition of the death penalty.[FN10] *Furman*, at 341 (Marshall, J. concurring). Subsequent to that decision, at least thirty-four states and the United States[FN11] have enacted capital statutes to comply with its requirements. In view of this unequivocal response by the people through their legislators, it would be practically impossible to conclude that capital punishment at this date violates the "standards of decency" to which our society has evolved. Moreover, in California, one of the two[FN12] states in which the death penalty was judicially abolished as violative of the state ban on cruel and unusual punishments, *People v. Anderson*, 493 P.2d 880 (Cal. 1972), the state constitution was subsequently amended by initiative of the people to permit the penalty. ***16** Pursuant to that expression of will by its constituency, the California legislature enacted a new capital statute, CAL. PENAL CODE § §190.1, 209, 219, 4500 (West Supp. 1974). If we assume that legislatures represent community values in their enactments, and our form of government is premised on this assumption, there is no question that capital punishment passes constitutional muster.

FN10. Furthermore, no trend existed towards its abolition, such impetus having halted after World War I. This fact is supported by the singular lack of success by abolitionist forces in those state legislatures where such bills have been put to a vote. *Furman*, at 435 (Powell, J., dissenting) citing H. BEDAU, *THE DEATH PENALTY IN AMERICA* 232 (1967).

FN11. *See* Appendix 4 to Petitioner's Brief and Appendix A to the Brief of Petitioner in *Fowler v. North Carolina*, No. 73-7301.

FN12. The other state was Massachusetts. See *Commonwealth v. O'Neal, supra*.

Opinion polls and state referendums in recent years, with which this Court is now familiar, *Furman* at 386 n.9, 438-439, indicate a difference of national opinion over the wisdom of capital punishment as a policy matter.[FN13] Such differences of policy are not uncommon in a large and heterogeneous society. Very large segments of our society also doubt the wisdom of imprisonment for marijuana users and alcoholic motorists, to name but two examples. Yet it is unlikely that this Court would hold imprisonment in such circumstances to violate a progressive Eighth Amendment. Differences over policy simply do not

rise to the level of a constitutional ban under "evolving standards of decency."

> FN13. More recent polls and referendums suggest that overall public support for capital punishment is rising. In a 1972 referendum in California, over 67% of the voters favored restoration of the death penalty (after judicial abolition) in that jurisdiction.

Thus, the acceptability of capital punishment under a progressive Eighth Amendment is demonstrated by the overwhelming weight of judicial precedent, by public opinion measured in polls and referendums, and by the state and federal legislatures - the institutions most directly responsive to public opinion and society's standards of decency. If the words "cruel and unusual punishment" are in any way related to standards of ***17** decency, then all objective indicia place capital punishment outside the constitutional ban. Even the most articulate opponents of capital punishment concede that the death penalty satisfies any objective tests of constitutionality. *E.g.*, Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1781 (1970). Therefore, they suggest that the Court look "not to actual standards of decency, prevailing in society, but to enlightened standards," *Id*. at 1783, in other words, the value of judgments that would be made by citizens were they as decent and enlightened as their betters. However, such criteria provide only a thinly veiled opportunity for a judge to impose his personal convictions upon the entire nation under a constitutional rubric.

C. Policy Determinations Involving Questions Of Penological Efficacy Are Not Of A Constitutional Dimension.

Proponents of the constitutional invalidation of capital punishment *per se*, including the Petitioner, propose that the Court consider the utility of the death penalty in evaluating its constitutionality. Thus, they contend that the punishment is unconstitutional if it is more severe than necessary to further legitimate state interests such as retribution, incapacitation and deterrence. Respondent submits that such a test not only is completely without precedent in Eighth Amendment jurisprudence, but invites the Court to serve as a super-legislature, sitting in judgment of the wisdom of numerous legislative enactments. Most importantly, any such test would necessarily incorporate into the Constitution itself the vagaries of new and competing theories in the "sciences of human behavior." *See* Petitioner's Petition, Appendix B at 45.

***18** Proponents of the "excessive severity" test generally attempt to base it upon *Weems v. United States, supra* and *Trop v Dulles, supra*, and the other cases interpreting "cruel and unusual punishments". *See Furman* at 324-28 (Marshall, J., concurring). There are considerations of excessiveness in *Weems* and *Trop*. Indeed, it is impossible to separate the excessiveness of any punishment from its unacceptability under contemporary standards of decency. The fact that no other jurisdiction punishes the same crime with anywhere near the same degree of severity, as in *Weems*, is obviously indicative that society regards such a punishment as unacceptable. Likewise in *Trop*, Chief Justice Warren noted the severity of expatriation in his discussion of its total rejection by the civilized world. However, this Court has never elevated observations of severity to an *independent* principle of "excessive severity" -- a judgment to be made by the Court solely on the basis of whether it considers the particular punishment a wise exercise of legislative power. Furthermore, not only are excessive severity considerations covered by the "evolving standards of decency" test, but the latter avoids inculcating the latest social science debate into the Constitution.

This Court is well acquainted with the foregoing debate, which has raged for generations in the literature and the legislatures, and which continues to this day, particularly in regard to the deterrent effect of capital punishment. Respondent will only say that it is difficult to believe that an extremely complex, mathematical debate on the existence of this effect has reached the Court, and it is frightening to think that it might find its way into the Constitution. See Pet. Br. Appendix C, Appendix E, and Appendix 3 at 3-2 and 3-3.

***19 II. The Administration Of The Death Penalty Pursuant To The Texas Capital Punishment Statutes Does Not Violate The United States Constitution.**

The Texas capital punishment statues were designed to rectify the constitutional defects in the statutory scheme invalidated by this Court in *Branch v. v.*

Texas, 408 U.S. 238 (1974), *sub nom. Furman v. Georgia*. Since an omniscient representative of the people would have great and perhaps insurmountable difficulty in succinctly stating the meaning of the pivotal concurring opinions in *Furman*, Respondent will not attempt to do so.[FN14] However, it is possible to glean some insight by concentrating on the salient features of the statutory schemes considered in *Furman* and the judicial condemnation of the results produced thereby.

FN14. The only authoritative holding of *Furman*, contained in this Court's brief *per curiam* opinion, was that "the imposition and carrying out of the death penalty in *these* cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239. (Emphasis supplied).

A primary attribute of those statutes was that they permitted imposition of punishment ranging from short term imprisonment to death for broadly defined categories of crime ranging from routine armed robbery to murder.[FN15] Such statutory schemes led Mr. ***20** Justice Stewart to object that the death sentences actually imposed thereunder "excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary" and that only a "capriciously selected random handful" were sentenced to death out of the vast number of people for whom the penalty was statutorily available. *Furman* at 309-310. Mr. Justice White also concluded that under such broad categories of offense and permissible punishment, not only is there "no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not," *Id*. at 313, but the "legislative will is not frustrated if (that) penalty is never imposed." *Id* at 311. Moreover, the death penalty had been ordered with such infrequency in relation to its all-encompassing availability that it ceased realistically to further the "social ends it was deemed to serve." *Id*. at 312.

FN15. Under prior Texas law, the death penalty was available as punishment for treason, perjury resulting in the execution of another, rape, robbery by firearm, and undifferentiated murder. TEX. PENAL CODE ANN. arts. 84, 309, 1189, 1408 (1925) and art. 1257 (1927), respectively. Moreover, under these statutes, the minimum permissible punishment for conviction of these offenses was imprisonment for life for treason, death for perjury resulting in the execution of another, and imprisonment for 5 years for rape, 5 years for robbery by firearm, and 2 years for murder. *Id*.

Texas has remedied these defects in the administration of the death penalty. The legislature has restricted the availability of the death penalty to narrowly circumscribed categories of *murder* from which its citizens desperately need protection and in which the utility of its imposition could reasonably be thought to be maximized. Moreover, the punishment upon conviction of a murder within the confines of these categories has been circumscribed to either life imprisonment or death. Either a punishment of life imprisonment or death is mandated by the jury's determination of several sentencing questions which direct and guide their deliberations by focusing their attention on the characteristics of the accused and the nature of his conduct.

The Texas capital punishment statutes were not only designed to remedy the constitutional defects condemned in *Furman*, they have in fact done so in practice.

***21 A. Texas Law Limits The Availability Of The Death Penalty To Specific Categories Of Murder Involving The Calculated Killing Of Another Human Being.**

Effective June 14, 1973, Article 1257 [FN[FN16]] of the Texas Penal Code provided, in relevant part:

FN16. "As amended, Acts 1973, 63rd Leg., p. 1122, ch. 426, Article 1, Sec. 1, eff. June 14,1973. Article 1257 was superseded by Section 19.03 of the new Texas Penal Code, Acts 1973, 63rd Leg., ch. 399, eff. January 1, 1974. Section 19.03 of the new Penal Code is *substantially* similar to Article 1257 of the old code. The indictment alleged the date of the offense as August 16, 1973." *Jurek v. State, supra*, original opinion of the Texas Court of Criminal Appeals at 1 n. 1. (Emphasis suplied). (This footnote is incorrectly printed by West Publishing Com-

pany). Note that "substantially" similar refers to the change in the definition for capital murder from a "voluntary" killing with "malice aforethought" under the delineated circumstances, TEX. PENAL CODE ANN. arts. 1256, 1257(b)(1927), to "intentionally or knowingly caus(ing) the death of an individual" under identical circumstances. TEX. PENAL CODE ANN. §§ 19.02(a)(1) and 19.03(a) (1973).

"(a) Except as provided in Subsection (b) of this Article, the Punishment for murder shall be confinement in the penitentiary for life or for any term of years not less than two.
(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:
(1) the person murdered was a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;
***22** (2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;
(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
(4) the person committed the murder while escaping or attempting to escape from a penal institution;
(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution."[FN17]

FN17. The remainder of Article 1257 stated:

"(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article or of any other lesser included offense.

(d) If one of the circumstances or conditions enumerated in Subsection (b) of this Article is charged in an indictment, the prospective jurors shall be informed that a sentence of either death or imprisonment for life is mandatory on conviction for the offense charged. No person is qualified to serve as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

***23** Thus, the death penalty in Texas is not only no longer available for crimes other than murder, but is even restricted to narrowly circumscribed categories within the class of murder. "This insures that the death penalty will only be imposed for the same type of offenses which occur under the same type of circumstances." *Jurek, supra* at 939.

It is significant to note that death is presently not a permissible punishment for standard barroom killings or murders of acquaintances,[FN18] which are generally recognized as the least deterrable form of homicide. Instead, the categories in Article 1257(b) focus on the killing of human beings in situations where the most salient features of the circumstances surrounding the act are calculation and conscious risk assessment. Thus, Article 1257(b)(2) applies to murder in the course of committing or attempting to commit robbery, kidnapping, burglary, forcible rape, or arson -- acts which are frequently planned in advance and which present the opportunity and motivation to kill witnesses whose testimony could readily lead to arrest, conviction and incarceration. Section (b)(3) covers the most cold-blooded and calculated killing known to society -murder for hire. The other three sections deal with situations normally involving conscious risk assessment - murder of a policeman or fireman, murder of a prison official, or murder in the course of prison escape.

FN18. Murders of acquaintances are by far the most prevalent homicides. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 39 (1967).

The traditional statistical studies on the deterrent effect of the death penalty have not tested its ***24** effectiveness in deterring the limited categories of murder in which calculation eclipses passion. *E.g.*, SELLIN, THE DEATH PENALTY (1959). In view of the prior statutory schemes, it has not yet been possible to

measure adequately the deterrent effect of capital punishment statutes which are applicable only to such murders and which are invoked on a fairly regular basis. Given the absence of such data and the great need for society to protect itself from these calculated killings, plus the legitimate[FN19] intuitive feeling that the ultimate sanction will be given the greatest weight when the calculated taking of human life hangs in the balance, the legislature can reasonably determine that the imposition of the death penalty in such circumstances furthers the social purpose of deterrence.[FN20]

FN19. *See* ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 1949-53, CMD. No. 8932, at 24, par. 68 (1953).

FN20. The legislature could also choose to believe Professor Ehrlich's conclusion that every execution deters approximately eight murders. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

Furthermore, it is unquestionable that retribution "is a constitutionally [permissible] ingredient in the imposition of punishment."[FN21] *Furman*, 408 U.S. at 308 (Stewart, J., concurring). It would seem that the retributive aspect of punishment varies directly with the magnitude of the crime and the degree of calculation. Thus, the need for retribution increases with the amount of harm inflicted on society, its moral fiber and its members. Similarly, the greater the conscious infliction of that harm, the greater the need for retribution. Hence, the retributive aspect of ***25** punishment would be significant when dealing with offenders who have committed the calculated killing of another human being.

FN21. *See e.g.*, *Williams v. New York*, 337 U.S. 241, 248 (1949).

In sum, the Texas legislature has purposely limited the availability of the death penalty to categories of murder wherein the deterrent effect can reasonably be thought to be maximized and wherein there is a significant need for retribution. However, the legislature did not stop here by making the death penalty mandatory for all convicted killers within these categories. Instead, it continued to tailor the imposition of the death penalty so that it would be of greatest service to society by focusing the jury's attention at the punishment proceeding on the need for incapacitation of the killer and the possible existence of mitigating factors. The Texas legislature can reasonably make these determinations without offending the United States Constitution.

B. The Texas Capital Punishment Statutes Direct And Guide The Jury's Deliberations At The Sentencing Proceeding.

Article 37.071 of the Texas Code of Criminal Procedure establishes a separate jury sentencing procedure which results in the imposition of punishment of either life imprisonment or death. If the jury responds unanimously in the affirmative to several questions, the court must impose the death penalty; if ten or more jurors respond negatively to any one of the questions, the court must impose a sentence of life imprisonment. The questions were written against the background of *Furman* which left unclear whether this Court *might possibly* condemn a purely mandatory death penalty[FN22] even though its application were limited ***26** to narrowly circumscribed categories of murder, and with the knowledge that an exhaustive and precise list of factors to be considered would be too complex to be compressed within the limits of a workable formula for the jury. ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 1949-53, CMD. No. 8932, par. 498, p. 174 (1953); *McGautha v. California*, 402 U.S. 183, 204 (1971). Indeed, Article 37.071 is the product of a compromise reached between two such statutes, each of which had been passed by one house of the Texas legislature. The House version was purely mandatory (TEX. H. B. 200, 63rd Leg., 1973); the Senate version contained a list of aggravating and mitigating factors (TEX. H. B. 200 as amended by S., 63rd Leg., 1973); and the final version was prepared by a joint House-Senate conference committee. Thus, questions were written to direct and guide the jury's deliberations and to focus their attention not only upon the presence of any possible mitigating factors but also upon the need for incapacitation.

FN22. *Furman* at 402 (Burger, C. J., dissenting), 413 (Blackmun, J., dissenting).

The first and third questions asked are as follows:
"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately

and with the reasonable expectation that the death of the deceased or another would result;

* * *

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1), (b)(3) (1973).

Petitioner attacks the submission of these questions on the ground that the jury has already answered them by answering *similar* questions in the affirmative in ***27** finding the accused guilty of capital murder. (Pet. Br. 59-60, 65-66). Even if this were true in a given case, it would not be illogical to rephrase substantially the same question another way before imposing the death penalty, given the infinite variety of human conduct and the imprecision of the English language. It is a way to reinforce that the killing was in fact the calculated elimination of a human being, in the absence of mitigating factors, at which the imposition of the death penalty in Texas is aimed.[FN23] Moreover, at the sentencing hearing, evidence may be presented as to any matter deemed relevant to sentence, Article 37.071(a), and the ***28** Texas Court of Criminal Appeals has ruled that, *inter alia*, evidence of mitigating factors such as action under duress, or the domination of another, or an extreme form of mental or emotional pressure could be considered by the jury. *Jurek, supra* at 939-40. Thus, the jury may have access to information at the sentencing phase which it did not have at the guilt or innocence phase. One prevalent example of this would be the defendant's failure to testify prior to conviction because of trial strategy. In any event, Petitioner's argument that the submission of these two questions is a guise under which juries permit the "erratic escape" of other capital murderers is resoundingly rebutted by the statistics. In the fify-eight (58) cases to date in which the first question has been submitted to a jury, it has been answered in the affirmative on all but three (3) occasions; and all three (3) of those times the second question was also answered in the negative. In the twenty-seven (27) cases in which question three was submitted, it was answered in the affirmative on every occasion.[FN24]

FN23. Unquestionably, the Texas capital punishment statutes hit their mark. Among those sentenced to die are Kenneth Granviel, who murdered two small children, raped and murdered their mother and aunt, and murdered a second aunt; and who, two months later, raped three more women and murdered two of them, *State v. Granviel*, No. 4111, 213th Judicial Dist. Ct. of Tarrant County, Texas,Nov. 6, 1975; Mark Moore, who abducted a secretary during a robbery, raped her, unsuccessfully attempted to sink a car with her in the trunk, and then shot her with a shotgun in the face, chest and vagina, *State v. Moore*, No. C-74-3180-PH, 1st Judicial Dist. Ct. of Dallas County, Texas, May 15, 1974; James Burns, who abducted a welfare recipient, forced him to submit to anal sodomy, forced him to eat excrement and kicked him to death, *State v. Burns*, No. B-7459, 161st Judicial Dist. Ct. of Ector County, Texas, May 24, 1974; Edward Corley, who broke into a trailer house, shotgunned the woman and child who lived there, entered a church one month later and abducted the organist, then took the organist to an abandoned road where he raped her and shot her twice in the head with a shotgun; *State v. Corley*, No. 75-291-C, 54th Judicial Dist. Ct. of McLennan County, Texas Nov. 10, 1975; Ronald O'Bryan, who murdered his own son with poisoned Halloween candy in order to collect on large insurance policies, *State v. O'Bryan*, No. 220323, 209th Judicial Dist. Ct. of Harris County, Texas June 5, 1975; and Robert Kleason, who murdered two Mormon missionaries at his house, cut up their bodies with a hacksaw and disposed of them, *State v. Kleason*, No. 48,462, 167th Judicial Dist. Ct. of Travis County, Texas, June 4, 1975.

FN24. TEXAS JUDICIAL COUNCIL, CAPITAL MURDER STUDY, June 14, 1973 - February 4, 1976 (1976) (hereinafter cited as TJC STUDY). Subsequent to February 4, 1976, Donald G. Franklin, a previously convicted rapist, was convicted of the brutal rape-slaying of a nurse under TEX. PENAL CODE ANN. § 19.03(a)(2) (1974). *State v. Franklin*, No. 76 CR-37-D, 105th Judicial Dist. Ct. of Nueces County, Texas, Mar. 8, 1976. Franklin attacked the nurse when she left work at midnight. Though he

was identified by an eyewitness and though blood was found at the scene, on his clothes and in his apartment, Franklin refused to tell the police the whereabouts of the victim when he was arrested several hours later. The victim was found alive four days later in a field, but died in a hospital from seven stab wounds. Jury questions one and two were answered in the affirmative (question three was not submitted), and Franklin was sentenced to death by the court. Respondent has incorporated this case into the TJC STUDY figures cited in this brief.

***29** The second question submitted to the jury is:
"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;" Article 37.071(b)(2).

This question focuses the jury's attention on the need for incapacitation, thereby directly addressing the issue of whether the imposition of the death penalty in a particular case serves yet a third social purpose.

Petitioner first attacks the submission of this question on a statistical interpretation of the phrase "a probability" that was not only rejected in theory by the opinion of the Court of Criminal Appeals in *Jurek*, but also in practice by the jury determinations to date. (Pet. Br. 64-65) In discussing the factors which a jury may consider in regard to the second question, the court's opinion speaks of the "*likelihood*[FN25] that the defendant would be a continuing threat to society," *Jurek, supra* at 939-40 (emphasis added), thereby rejecting the technical, mathematical definition argued by Petitioner. It is patently absurd to assume that a lay jury would interpret these words in the technical sense. Indeed, Petitioner's assertion that question two "*could* ****30*** *not have been answered in his favor*" due to the technical meaning of the phrase, (Pet. Br. 64, emphasis in original), is conclusively rejected by the "no" answers returned by juries in fifteen (15)[FN26] other capital murder cases.[FN27]

FN25. Mr. Justice Marshall in *Furman* observed that:
"With respect to those who are sentenced to die, it is critical to note that the jury is never asked to determine whether they are *likely* to be recidivists." *Id*. at 355. (Emphasis added). "Likelihood" is commonly defined as "something that is likely to happen." WEBSTER'S NEW WORLD DICTIONARY 849 (College ed. 1968).

FN26. TJC STUDY at 4. The 15 cases in which juries answered the second question "no" involved 8 black defendants, 6 white defendants and 1 Spanish surnamed defendant. *See* Appendix to TJC STUDY. The last such case involved a black defendant who was convicted of murdering a policeman. *State v. Jennings*, No. 48, 991, 147th Judicial Dist. Ct. of Travis County, Texas, Nov. 18, 1975.

FN27. Petitioner questions the meaning of the remaining words in question two. However, such an attack could be mounted against any given phrase out of hundreds contained in a jury instruction. Moreover, the legislature made a reasonable choice in directing and guiding the jury's deliberation on the need for incapacitation instead of giving the jury an unworkable formula by attempting the impossible task of identifying before the fact all factors which could enter into that consideration. See page 26, *supra*.

Next, Petitioner asserts that question two grants to the jury an impermissible and impossible power to predict future behavior. Such an argument strikes at the heart of our system of justice. Judges and juries time and time again make assessments in both criminal and civil cases concerning events which are likely to occur. For example, in the area of tort law, juries must deal with the concept of "foreseeability." Every time a court issues an injunction, it is based on the likelihood that certain conduct is likely to occur again. In the area of civil commitments, jury assessments must frequently be made as to whether a person will likely be a danger to himself or to others. In criminal sentencing proceedings, juries must frequently decide whether the need for incapacitation calls for a sentence running anywhere from five (5) years to life imprisonment.

***31** When the need to protect society through incapacitation is considered a legitimate goal of the death penalty, why should it be impermissible to ask the

jury to determine that issue directly in an individual case so that the punishment may indeed be tailored to fit the criminal? One could argue forcefully that such an approach would be less objectionable than that used in numerous "habitual" statutes whereby a much greater punishment is imposed *automatically* upon the offender whenever he has one or two prior felony convictions. Such statutes have been ruled constitutional by this Court, *see* Spencer v. Texas, 385 U.S. 554 (1967),[FN28] even though they embody a seemingly arbitrary, *conclusive* presumption as to the likelihood of future criminality and the need to incapacitate for the protection of society. *A fortiori*, a statutory scheme permitting the jury to make such a determination on an individual basis would be constitutional vis-a-vis predictability.

FN28. "Such statutes . . . have been sustained in this Court on several occasions against contention that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities. [Citations omitted]" *Id.* at 559-60.

In sum, the Texas statutes not only limit the availability of the death penalty to narrowly circumscribed categories of murder, but also direct and guide the jury's deliberations at the sentencing proceeding.

C. The Texas Capital Punishment Statutes, In Theory And In Practice, Meet The Objections Raised In *Furman*.

Without attempting to reiterate all the remedial aspects of the present statutes, Respondent will ***32** compare the substance and operation of these statutes with those condemned in *Furman*, with emphasis on the criticism contained in the pivotal concurring opinions.

It is difficult, if not impossible, to separate two important features of the statutes struck down in *Furman*, which formed significant bases for the Court's ruling; one being the extreme infrequency with which juries in their discretion imposed the death penalty under such statutes, the other being the breadth of that sanction's availability.[FN29] Whether separable or not, neither of these features presently exists under Texas law. First, the Texas capital punishment statutes confine the availability of the death penalty to narrowly circumscribed categories of murder. Second, Texas juries, directed and guided in their deliberations pursuant to Article 37.071, have imposed the death penalty with some regularity within these limited categories. Of the 61 cases (out of 75 tried)[FN30] in which the defendant was found guilty of capital murder, 43 received the death penalty.[FN31]

FN29. Indeed *McGautha v. California, supra*, and *Furman* together might be read to permit juries to impose the death penalty purely on the basis of their own judgment pursuant to statutes reasonably circumscribing its availability. Under such an interpretation, it would certainly be permissible to direct and guide the jury's considerations at the sentencing proceeding.

FN30. Of the 14 remaining cases, 6 resulted in convictions for a lesser included offense, 5 resulted in mistrials because of hung juries, and 3 resulted in verdicts of not guilty. TJC STUDY at 4.

FN31. *Id*.

To the extent that the extremely infrequent imposition of the death penalty on those convicted under ***33** the *Furman* statutes created a presumption of "capricious" and "random" selection,[FN32] present evidence is convincing that the present Texas statutes are applied in an even-handed, non-arbitrary fashion.[FN33]

FN32. *See, e.g., Furman* at 293 (Brennan, J., concurring), 309-310 (Stewart, J., concurring).

FN33. For example, 20 whites, 23 blacks and 9 Mexican-Americans were defendants in the capital murder cases involving robbery-killings, and such trials resulted in 10 death penalties, 10 death penalties and 6 death penalties, respectively. *See* Appendix annexed to TJC STUDY. For another example, see n.26, *infra*.

There are other judicially criticized features of the *Furman* statutes and their administration that are

remedied under present Texas law. First, as delineated on pages 23-25, *supra*, the present statutes limit the availability of the death penalty to categories of murder wherein the deterrent effect can reasonably be thought to be maximized and wherein there is a significant need for retribution. Consequently, these social aspects of capital punishment are enhanced by the regularity of its imposition experienced in trials conducted to date. *See Furman* at 311-13 (White, J., concurring). Second, the statistics on the operation of the Texas capital punishment statutes show that no correlation exists between the race/ethnic background of a defendant and the probability that he will be either convicted of capital murder or given the death penalty. TJC STUDY at 7-8. Finally, the "legislative will is . . . frustrated" and the jury "violat[es] its trust," *Furman* at 311, 314 (White, J., concurring), *every* time it refuses to impose the death penalty when it is satisfied that the prosecution has proven the case beyond a reasonable doubt under the ***34** provisions of Articles 1257 and 37.071.[FN34]

FN34. The legislature has prescribed the death penalty for every offender who meets the criteria set out in these Articles. In addition, each juror has taken an oath that he "will a true verdict render according to the law and the evidence," TEX. CODE CRIM. PROC. ANN. art. 35.22 (1965), and "that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." TEX. PENAL CODE ANN. art. 1257(d) (1973).

CONCLUSION

The citizens of the State of Texas urgently need and deserve protection from the horrendous, brutal, and inhuman life-taking actions that occur with increasing frequency. The Texas legislature, as the duly elected representative body of the people, has responded to that need by enacting capital punishment statutes which meet the criticisms raised by the majority of this Court in *Furman v. Georgia*, and which offend no clause of the United States Constitution. It is urged that this Court refrain from taking away the people's power to respond in this manner to the atrocities so frequently visited upon them.

***35** For all of the foregoing reasons, the judgment of the Texas Court of Criminal Appeals should be affirmed.

Respectfully submitted,

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