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Capital Punishment

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CAPITAL PUNISHMENT

Davis v. Georgia, 429 U.S. 122 (1977).
Gardner v. Florida, 430 U.S. 349 (1977).
Roberts v. La., 97 S. Ct. 1993 (1977).
Dobbert v. Florida, 97 S. Ct. 2290 (1977).
Coker v. Georgia, 97 S. Ct. 2861 (1977).

In 1976, the United States Supreme Court upheld the capital punishment statutes in Georgia,[1] Florida[2] and Texas,[3] all of which permitted a sentence of death for the crime of murder.[4] Those cases represented the first time since *Furman v. Georgia*,[5] that the Court decided to afford the states the right to utilize capital punishment in their criminal justice systems. Since those statutes were designed to prevent the arbitrary imposition of the death sentence by providing certain procedural safeguards,[6] the Court found that they satisfied the major objection raised in *Furman v. Georgia*.[7] However, it did strike down the mandatory provisions of North Carolina[8] and Louisiana[9] in cases of murder because they were "unduly harsh and unworkably rigid."[10] This year different provisions within the Georgia,[11] Louisiana,[12] and Florida[13] statutes were before the Court as it resolved various questions left in the wake of the 1976 decisions.

Most notably, the Court this term decided that it was unconstitutional for Georgia to impose a death sentence for the crime of rape.[14] The Court also found unconstitutional a Louisiana statute which mandated a sentence of death for the murder of a police officer.[15] In related cases, the Court clarified some other issues, including the application of the due process clause to capital sentencing procedures,[16] and the ramifications of excluding potential jurors who have reservations about the use of capital punishment.[17] Finally, in the only case which seems to broaden the application of the death penalty,[18] the Court considered the relevance of the *ex post facto* clause to pre-*Furman* murders.

As these cases illustrate, the Supreme Court continued its bitter debate over the constitutionality of the death penalty this term,[19] but there is no doubt that capital punishment is here to stay. In reaffirming its decisions of 1976,[20] the Court reiterated its view that the imposition of the death penalty for the crime of murder is not a per se violation of the eighth amendment ban on cruel and unusual punishment. As such, the Court this year necessarily narrowed its scope of inquiry, and only considered the particular statutes before it in

[1] Gregg v. Georgia, 428 U.S. 153 (1976).
[2] Proffitt v. Florida, 428 U.S. 242 (1976).
[3] Jurek v. Texas, 428 U.S. 262 (1976).
[4] For an analysis of the 1976 Supreme Court decisions, see Note, 67 J. CRIM. L. & C. 437 (1976).
[5] 408 U.S. 238 (1972).
[6] The basic procedural requirements seem to be:
(1) That there be sentencing guides, usually expressed in terms of aggravating circumstances, to aid the sentencing authority in making the decision whether to impose the death penalty; and
(2) That there be a separate procedure at which the defendant has an opportunity to bring any mitigating circumstances to the attention of the sentencing authority.
See generally 67 J. CRIM. L. & C. 437 (1976).
[7] Justice Stewart found that the sentence of death was "wantonly and so freakishly imposed." 408 U.S. at 310 (Stewart, J., concurring). Justice White found that there was no meaningful basis for distinguishing the few cases in which the death penalty was imposed from the many cases in which it was not. *Id.* at 313 (White, J., concurring).
[8] Woodson v. North Carolina, 428 U.S. 280 (1976).
[9] Roberts v. Louisiana, 428 U.S. 325 (1976).
[10] 428 U.S. at 293.
[11] *See* Coker v. Georgia, 97 S. Ct. 2861 (1977); Davis v. Georgia, 429 U.S. 122 (1976).
[12] *See* Roberts v. Louisiana, 97 S. Ct. 1993 (1977).
[13] *See* Gardner v. Florida, 430 U.S. 349 (1977); Dobbert v. Florida, 97 S. Ct. 2290 (1977).
[14] Coker v. Georgia, 97 S. Ct. 2861 (1977).
[15] Roberts v. Louisiana, 97 S. Ct. 1993 (1977).
[16] Gardner v. Florida, 97 S. Ct. 1197 (1977).
[17] Davis v. Georgia, 430 U.S. 349 (1976).
[18] Dobbert v. Florida, 97 S. Ct. 2290 (1977).
[19] *See, e.g.*, Justice Marshall's vigorous dissent in Gardner v. Florida, 430 U.S. at 365 (Marshall, J., dissenting).
[20] See notes 1-3 and 8-9 *supra* and accompanying text.

an attempt to determine whether they had the effect of imposing death on a prisoner in the arbitrary, capricious or freakish fashion which *Furman v. Georgia* sought to prohibit.[21] Viewed in this light, these cases can be considered as clean-up work for the Court left over from its major decisions of 1976.[22] That is not to say, however, that this Term's decisions are unimportant, for the Court did resolve some very significant issues. Viewed as a whole, the tenor of this Court's decisions was cautious, signifying a reluctance to liberalize to any appreciable extent the use of the death penalty. As such, they represent an attempt by the Court to limit its use, thus entrenching some of the spirit of its decision in *Furman* and its ultimate respect for human life.

In *Coker v. Georgia*,[23] the Court for the first time since *Furman* confronted a situation in which the death penalty was applied in a non-murder case. Petitioner Coker was convicted and sentenced to death for the rape of Mrs. Carver.[24] Pursuant to the Georgia statutory provisions which provide for a separate sentencing procedure,[25] the jury was instructed to determine whether a sentence of death should be imposed.[26] It found that two of the three statutory aggravating circumstances[27] for the crime of rape were present and sentenced Coker to death by electrocution. The Court did not instruct the jury regarding the third aggravating circumstance. In reviewing the

[21] See note 7 *supra*.

[22] See note 20 *supra*.

[23] 97 S. Ct. 2861 (1977).

[24] The Court outlines the facts as follows:

> While serving various sentences for murder, rape, kidnapping, and aggravated assault, petitioner escaped from the Ware Correctional Institution near Waycross, Ga., on September 2, 1974. At approximately 11 p. m. that night, petitioner entered the house of Allen and Elnita Carver through an unlocked kitchen door. Threatening the couple with a "board," he tied up Mr. Carver in the bathroom, obtained a knife from the kitchen, and took Mr. Carver's money and the keys to the family car. Brandishing the knife and saying "you know what's going to happen to you if you try anything, don't you," Coker then raped Mrs. Carver. Soon thereafter, petitioner drove away in the Carver car, taking Mrs. Carver with him. Mr. Carver, freeing himself, notified the police; and not long thereafter petitioner was apprehended. Mrs. Carver was otherwise unharmed.

97 S. Ct. at 2863.

[25] Basically, Georgia provides for a bifurcated trial. The first stage is devoted to a jury determination of guilt or innocence. The second stage is for a jury determination of an appropriate sentence in the event that the defendant is found guilty. *See* GA. CODE ANN. § 26-3102 (Supp. 1976).

[26] For a jury in Georgia to sentence a defendant to death, it must find that certain enumerated aggravating circumstances are present and that they are not outweighed by any mitigating circumstances. GA. CODE ANN. § 26-3102 (Supp. 1976), provides:

> *Capital offenses; jury verdict and sentence.* Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstances shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

GA. CODE ANN. § 27-2302 (1976 Supp.) provides:

> *Recommendation to mercy.*—In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge.

GA. CODE ANN. § 27-2534.1 (1976 Supp.) provides:

> *Mitigating and aggravating circumstances; death penalty.*—(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
>
> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of

case, Justice White, speaking for the Court,[28] determined that death was "grossly disproportionate and excessive punishment for the crime of rape"[29] and thus constituted cruel and unusual punishment.

Justice White first considered the reasons for the eighth amendment and concluded that "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[30] He felt that the role of the Court is to make informed judgments, relying on such factors as history and precedent, legislative attitudes and jury responses as reflected over the years in their sentencing decisions.[31] In surveying current legislative attitudes, the Court found that Georgia was the only state at the present time with a constitutional statute which authorizes a sentence of death when the rape victim is an adult woman.[32] Further, the plurality found it significant that at no time in the past fifty years has a majority of states authorized death as proper punishment for rape.[33] As for the jury response to death for the crime of rape, the Court found that in sixty-three rape cases reviewed by the Georgia Supreme Court since *Furman*, only five were sentenced to death.[34] Based on these statistics, Justice White could not agree with the State's contention that contemporary attitudes as expressed by legislators and jurors found the death penalty acceptable as a punishment for

another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if the verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found the death penalty shall not be imposed.

[27] The Georgia code outlines three separate aggravating circumstances for the crime of rape, but the judge in *Coker* felt that only two of them were present: whether the rape had been committed by a person with a prior record of conviction for a capital felony and whether the rape had been committed in the course of committing another capital felony. Thus the third circumstance, a rape so "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," was not considered by the jury. 97 S. Ct. at 2863-65. See note 26 *supra*.

[28] Justices Stewart, White, Blackmun, and Stevens, formed the plurality opinion. It is significant to note that Justice Blackmun concurred in the plurality opinion. Previously, he had concurred in the decisions of the Court to uphold the Georgia statute in *Gregg v. Georgia*, the Florida statute in *Proffitt v. Florida* and the Texas statute in *Jurek v. Texas*. Furthermore, he also filed opinions in Woodson v. North Carolina, 428 U.S. at 307 and Roberts v. Louisiana, 428 U.S. at 363, dissenting from the Court's decision to invalidate those death penalty statutes. That he now joins the plurality in striking down the death penalty for the crime of rape can be viewed as a moderation of his earlier positions.

[29] 97 S. Ct. at 2866.

[30] *Id.* at 2865.

[31] *Id.* at 2866.

[32] *Id.* at 2867.

[33] *Id.* at 2866.

[34] *Id.* at 2868.

rape. The Court ultimately felt that even in light of all the statistics, the "Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[35] Feeling that death was grossly disproportionate to the crime of rape, the plurality struck down those particular provisions of the Georgia statute as the state applied them to the crime of rape.[36]

In a controversial portion of White's plurality opinion,[37] he took the opportunity to consider the third aggravating circumstance contemplated by the statute, although it was not present in the case: a rape which is "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim."[38] In so doing, he clearly extended the decision beyond the facts of the case so as to strike down the death penalty in all instances of rape. White reasoned that since Georgia does not punish by death any *deliberate* murder which is not accompanied by aggravating circumstances,[39] it would not be easy to justify a punishment of death for the crime of rape that does not involve the death of the victim: "[It would be] difficult to accept the notion that the rape . . . should be punished more heavily than the deliberate killer. . . ."[40]

Justice Powell in a separate opinion agreed with the conclusion reached by the plurality in this instance, but dissented from what he determined was a plurality opinion "so sweeping as to foreclose each of the fifty state legislatures from creating a narrowly defined substantive crime of aggravated rape punishable by death."[41] He felt the plurality had not carried their burden of showing that society finds the penalty disproportionate for all rapists in all circumstances. Since the third aggravating circumstance in the Georgia statute was not before the Court, Justice Powell did not wish to prejudge that issue.

Chief Justice Burger, joined by Justice Rehnquist, dissented, taking issue with every conclusion reached by the plurality. He began by pointing out that since Coker was already sentenced to life imprisonment for armed robbery and rape prior to his escape, the result of the decision is that the states are now effectively prevented from imposing any further punishment upon him for his latest activities. Essentially, he was claiming that the states had no further deterrent at their disposal: "To what extent we have left States 'elbow room' to protect innocent persons from depraved human beings like Coker remains in doubt."[42]

Chief Justice Burger's first contention with the plurality opinion over was the breadth of its holding. He would have narrowed the inquiry to the facts before the court: prisoner serving life sentence; prior criminal record, including rape; and a proven propensity to repeat his offenses, particularly rape. After surveying the doctrine of recidivism and various punishment-enhancement statutes,[43] Burger asserted that it was entirely appropriate for a state to take "an individual's 'well demonstrated propensity for life-endangering behavior' into account in devising punitive measures."[44] He would therefore hold that death as imposed in this case was within the power reserved to the state and "leave for another day the question of whether such sanction would be proper under other circumstances."[45] However, this point does not come to grips with the limitations placed upon the states as expressed in the plurality opinion. The eighth amendment *absolutely* prohibits states from imposing the death penalty for rape since it is "grossly disproportionate" to the crime, thus negating *any* legitimate justifications, including recidivism, that a state may propose for such a penalty.

Chief Justice Burger's next contention was with the plurality's conclusion that public opinion, as voiced by state legislatures, does not favor the death penalty for rape. First, he

[35] *Id.*

[36] As outlined in note 27 *supra*, two of a possible three statutory aggravating circumstances were before the Court.

[37] 97 S. Ct. at 2869.

[38] GA. CODE ANN. § 27-2534.1(b)(7) (Supp. 1976). See note 26 *supra*.

[39] GA. CODE ANN. § 26-3102 (Supp. 1976). See note 26 *supra*.

[40] 97 S. Ct. at 2870.

[41] *Id.* at 2870.

[42] *Id.* at 2872.

[43] *Id.* at 2874, (citing Congressional decisions to (a) punish a third felony more severely than the first two felonies, 18 U.S.C. § 3575 (e)(1) (1970), and (b) punish a second conviction for assault on a mail carrier more severely than the first conviction, 18 U.S.C. § 2114. (1970)).

[44] 97 S. Ct. at 2874.

[45] *Id.* at 2875.

claimed that possibly there has been a trend since *Furman*, citing the Georgia, Louisiana, and North Carolina statutes,[46] and explained the other states' failures to enact similar provisions since *Furman* as perhaps reflecting "hasty legislative compromise occasioned by time pressures following *Furman*, [and] a desire to wait on the experience of those States which did enact such statutes."[47] Second, he criticized the majority for misplaced reliance on the silence of many legislators:

> Having in mind the swift changes in position of some Members of this Court in the short span of five years, can it rationally be considered a relevant indicator of what our society deems 'cruel and unusual' to look solely to what legislatures have *refrained* from doing under conditions of great uncertainty arising from our less than lucid holdings on the Eighth Amendment?[48]

He effectively argued that each state is a laboratory; that perhaps death for rape is a deterrent; that such a statute may well encourage more victims to report the crime of rape; and finally that it could make citizens feel more secure. In any case, Chief Justice Burger argued that the Court should not foreclose the possibility of experimentation which federalism is intended to encourage, for legislative judgment may be altered based on the experience in Georgia. Finally, Burger refused to allow a majority of legislatures to decide the issue. He pointed out that more than one-third of American jurisdictions prior to *Furman* had consistently provided the death penalty for rape, thus voiding any contention that death was rejected by state legislatures in recent times.[49]

More disturbing to Chief Justice Burger was the plurality's subjective conclusion that death for rape is cruel and unusual under all circumstances: "In striking down the death penalty imposed upon [Coker], the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature."[50] He felt that decisions of state legislatures with regard to criminal sanctions should be presumed valid by the Court.[51] Yet, while criticizing the plurality for "[engrafting] their conceptions of proper public policy"[52] onto legislative judgments, Chief Justice Burger at the same time recognized that the eighth amendment's "concept of disproportionality bars the death penalty for minor crimes."[53] He views rape as anything but a minor crime (as though the plurality does not), yet provides no guidelines nor suggestions as to how anyone, much less the Court, can determine in exactly which instances, and for exactly what crimes the Court should impose their concept of disproportionality upon the states.

The decision in *Coker v. Georgia*, as Burger pointed out in his dissent,[54] leaves the status of many capital punishment provisions in doubt. Given the breadth of Justice White's plurality holding in light of the fact that rape can be such a brutal and demoralizing crime, the fact that Justice Blackmun uncharacteristically joined in the plurality opinion[55] and the unwavering positions of Justices Marshall and Brennan[56] who oppose the death penalty at all times, the reasoning and conclusion of the plurality opinion can be expected to have some enduring effect upon death penalty statutes in future years. The plurality drew a strong distinction between crimes that involve the life of the victim and those that do not; therefore, the constitutionality of death penalty provisions for treason, hijacking, and kidnapping, as well as mass terrorism, are suspect. While Justice Powell concurred in a separate opinion, he prefered to be more moderate in his approach, leaving doubt as to where he will stand in future non-murder cases. That leaves the

[46] *Id.* at 2876.
[47] *Id.* at 2877.
[48] *Id.* (emphasis in original).
[49] *Id.* at 2877.
[50] *Id.* at 2872.
[51] Only last Term in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976), Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens warned that "the requirement of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts," and noted that "we may not act as judges as we might as legislators," *Id.*, at 174–175, 96 S. Ct. at 295.
97 S. Ct. at 2876 n.8.
[52] *Id.* at 2872.
[53] *Id.*
[54] *Id.* at 2880.
[55] See note 28 *supra*.
[56] Throughout this Term, Justice Marshall and Justice Brennan both reiterated their solid and unwavering position that the death penalty is a cruel and unusual punishment in all circumstances. *See* Coker v. Georgia, 97 S. Ct. at 2870; Gardner v. Florida, 430 U.S. at 364–65; Dobbert v. Florida, 97 S. Ct. at 2302; Roberts v. Louisiana, 97 S. Ct. at 1996 n.7.

Court split seven to two[57] on the rape issue, with a six to three[58] split more likely in other non-murder cases that present more gruesome facts for the Court to consider.

In *Roberts v. Louisiana*,[59] the Court, in a per curiam decision, again struck down Louisiana's mandatory death sentence provision which includes a section relating to the killing of a police officer.[60] In that case, Roberts was convicted of murdering a police officer and was sentenced to death as required by Louisiana law.[61] The Court found that *Roberts v. Louisiana*[62] (decided last term) and *Washington v. Louisiana*[63] were dispositive, emphasizing, as was done in the earlier *Roberts* opinion, the need for the sentencing authority to consider mitigating circumstances. "[I]t is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer."[64] The case was remanded for further proceedings not inconsistent with the opinion. Curiously, the Court again specifically left open the question of the propriety of the death sentence when mandatorily imposed upon one who commits murder while serving a life sentence.[65]

Justice Rehnquist dissented on the grounds that such a provision was not cruel and unusual punishment, even under *Furman*, since there was no evidence that it would be freakishly or arbitrarily imposed.[66] Dismissing the 1976 *Roberts* decision as only relevant to another provision in the Louisiana code,[67] and *Washington* as too hastily decided, Justice Rehnquist went on to argue that if the legislature can allow the jury to weigh aggravating against mitigating circumstances, then the legislature can certainly decide at which point "aggravating" can be so overwhelming as to render "mitigating" irrelevant. Although this proposition has some abstract argumentative merit, it does not address the question which the majority decided: Is a mandatory provision inherently cruel and unusual?

This case is significant in that many observers expected the Court, in light of last term's acceptance of the per se constitutionality of the death penalty, to at least uphold mandatory provisions dealing with very specifically defined crimes. In particular, the Court had previously left unresolved the constitutionality of a mandatory death sentence imposed upon a prisoner, sentenced to life imprisonment, who then commits murder.[68] Thus, although the Court had struck down the broader Louisiana provision handled in the 1976 *Roberts* decision, it was

[57] Brennan, Stewart, White, Marshall, Blackmun, Powell and Stevens, JJ., voting against the use of the death penalty, with Burger, C.J., and Rehnquist, J., voting in favor of its use.

[58] Brennan, Stewart, White, Marshall, Blackmun and Stevens, JJ., voting against the use of the death penalty, with Burger, C.J., Powell and Rehnquist, JJ., voting in favor of its use.

[59] 97 S. Ct. 1993 (1977).

[60] LA. REV. STAT. ANN. § 14:30 (1974) provides in part:

> ***First degree murder***
>
> First degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
>
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
>
> (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
>
> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]
>
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.
>
> For the purposes of Paragraph (2) herein the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney, or district attorneys' investigator.
>
> Whoever commits the crime of first degree murder shall be punished by death.

In 1975, § 14:30(1) was amended to add the crime of aggravated burglary as a predicate felony for first-degree murder. LA. ACTS 1975, No. 327.

[61] See note 60 *supra*.

[62] 428 U.S. 325 (1976).

[63] 428 U.S. 906 (1976). *Washington* dealt specifically with the murder of a police officer, for which Washington was sentenced to death. The Court struck down the sentence, which was based on the same section in the Louisiana code as the one which was in question this term in Roberts v. Louisiana, 97 S. Ct. 1993 (1977). *See* LA. REV. STAT. ANN. § 14:30(2) (1974), note 60 *supra*.

[64] 97 S. Ct. at 1995-96.

[65] *See* 97 S. Ct. at 1995 n.2, & 1996 n.5.

[66] *Id.* at 1998.

[67] *See* LA. REV. STAT. ANN. § 14:30(1) (1974) note 60 *supra*.

[68] 97 S. Ct. at 1996 n.5.

possible that the Court would find the provision in question in this case acceptable. However, since the Court found the death penalty unacceptable even with respect to a category as narrowly defined as peace-officers, the efficacy of *any* mandatory provisions is left in doubt.

In *Gardner v. Florida*,[69] the plurality found that Gardner, convicted for murder and sentenced to death, was denied due process of law during the sentencing stage of his bifurcated trial. At the conclusion of his trial, the judge instructed the jury pursuant to Florida law[70] to decide whether to impose death or life imprisonment. While they were deliberating, the judge requested a presentence investigation of petitioner Gardner by the Florida Parole and Probation Commission. Meanwhile, the jury found that the aggravating circumstances[71] of the murder were outweighed by the mitigating circumstances[72] of Gardner's drunken state and suggested life imprisonment. The judge reversed the jury's sentence, imposed the death

[69] 430 U.S. 349 (1977).

[70] FLA. STAT. § 921.141 (1972):

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

[71] FLA. STAT. § 921.141(5) (1972):

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after commiting or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt, or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

[72] FLA. STAT. § 921.141(6) (1972):

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the

penalty, and in his ultimate findings, stated that his conclusion was "based on the evidence presented at both stages of the bifurcated proceeding, the arguments of counsel, and his review of 'the factual information contained in said presentence investigation.'"[73] The trial judge did not comment on the contents of the confidential portion of the presentence report at trial and did not disclose them to defense counsel. However, defense counsel made no request to either examine the full report or to be apprised of its contents. On appeal to the Florida Supreme Court, Gardner argued that the trial court had erred in not disclosing the information which was in the presentence investigation. The Florida Supreme Court did not deal with this contention, stating only that the record had been carefully reviewed and that the sentence should be affirmed.[74] However, the confidential portion of the presentence report was not included in the record on appeal, and thus the Florida Supreme Court did not have the opportunity to see the information which had influenced the trial court in its sentencing decision.

Justice Stevens, joined by Justices Stewart and Powell, first dismissed the state's assertion that the Court's decision in *Williams v. New York*[75] was controlling, concluding that the facts were materially different in the present case. Most important was the fact that in *Williams* the "defendant's background . . . contained in the presentence report [was] described in detail by the trial judge in open court."[76] Stevens further noted that the evolving standards of society demand that death be looked at in a different light than other sentences,[77] due in part to the *Furman* decision, and that it is vital that the death sentence by imposed by virtue of reason rather than "caprice or emotion."[78]

Justice Stevens then argued that the sentencing process must satisfy the requirements of due process. However, in support of the proposition, he relied on the principle expressed in two previous cases that "the sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel."[79] In one of the cases which Stevens cites, *Mempa v. Rhay*,[80] the Court specifically narrowed its holding to the situation at hand,[81] that is, the lack of a lawyer at a deferred sentencing or revocation of probation proceeding. In the other case, *Specht v. Patterson*,[82] the Court confronted the issue of the right of counsel to challenge results of psychiatric testing, holding that there was such a right. As Justice Rehnquist points out in his dissent, sentencing procedures in death penalty cases have never before been held to be unfair under the due process clause. Stevens thus can be criticized for relying on two cases which are only remotely similar to the case at bar to support his proposition that "it is now clear that the sentencing process . . . must satisfy the requirements of the Due Process Clause."[83] After dismissing several reasons offered by the state[84] for maintaining the secrecy of such re-

capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

[73] 430 U.S. at 353.

[74] *See id.*

[75] Williams v. New York, 337 U.S. 241 (1948). The facts in *Williams* were similar in that "the trial judge rejected the jury's recommendation of mercy and imposed the death sentence in reliance, at least in part, on material contained in a report prepared by the court's probation department." 430 U.S. at 355.

[76] 430 U.S. at 356.

[77] "Since . . . [*Washington*] was written almost thirty years ago, this Court has acknowledged its obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." *Id.* at 357.

[78] *Id.* at 358.

[79] *Id.*

[80] 389 U.S. 128 (1967).

[81] *Id.* at 137.

[82] 386 U.S. 605 (1966).

[83] 430 U.S. at 358.

[84] The state contended that:

(a) An assurance of confidentiality to potential sources of information is essential to enable investigators to obtain relevant but sensitive disclosures from persons unwilling to comment publicly,

(b) Full disclosure of the presentence report will unnecessarily delay the proceedings,

(c) Full disclosure of the presentence report, which includes psychiatric and psychological evaluations, will disrupt the process of rehabilitation, and

(d) Trial judges can be trusted to exercise their discretion in a responsible manner.

Id. at 358–60.

ports as superfluous and improper in light of the Court's 1976 decisions, Stevens asserted that the state supreme court had a duty to consider the full record on appeal. Only then can it protect against the arbitrary and discriminatory effects of death penalty statutes as emphasized by members of the Court in *Furman*.[85]

Finally, Stevens dismissed the contention that Gardner had waived his right to object to the use of the pretrial report by not promptly requesting that its contents be disclosed at the trial level. He offered several reasons for this finding of no effective waiver by Gardner including: (1) the state was not urging that the objection had been waived; (2) the Florida Supreme Court has a duty to consider the total record on appeal; and (3) there is no basis for presuming that defendant made a knowing waiver.[86]

Justice White and Justice Blackmun concurred in separate opinions.[87] Both relied in part on the Court's decision in *Woodson v. North Carolina*,[88] a case which utilized the eighth amendment's ban on cruel and unusual punishment rather than the due process clause to strike down the North Carolina mandatory capital punishment statute. Justice Rehnquist dissented[89] from White and Blackmun's indirect use of the eighth amendment, asserting that procedures alone can not convert a sentence into a cruel and unusual punishment.

The plurality's application in *Gardner* of the due process clause to the sentencing procedures of death penalty proceedings was a significant deviation from its prior death penalty cases. Since *Furman*, the Court has without exception utilized the eighth amendment's prohibition on cruel and unusual punishment to test the validity of various capital punishment statutes.[90] In holding that the due process clause applies to the sentencing stage of the bifurcated trials now favored by numerous states in death penalty cases, the plurality has tapped a new resource to protect itself against the persistent attacks of many critics, headed by Justice Rehnquist, of the Court's broad use of the eighth amendment to limit the scope of the death penalty. As such, the plurality has diversified the underlying reasons for restricting the states in their use of capital punishment. And, since the principles of due process of law are relatively settled, the states will necessarily be more cautious in their decisions to implement the death penalty. This case represents, then, one more instance of the Court refusing to broaden the use of the death penalty, thus ensuring that the states will utilize it properly, with caution and in a non-discriminatory fashion.

In *Dobbert v. Florida*,[91] the Court considered a pre-*Furman* murder. Dobbert was convicted of, among other things, murdering his son and one of his daughters. After the murders, but before trial commenced, *Furman v. Georgia* was handed down, thereby causing the Florida capital punishment statute, which was on the books at the time of the murders, to be invalidated.[92] Florida soon passed another statute,[93] tried Dobbert again and then sentenced him to death under that new statute. His application to the Florida Supreme Court, in which he complained that such an action by Florida violated the *ex post facto* clause of the United States Constitution,[94] was denied. On appeal to the Supreme Court, Dobbert again contended, among other things,[95] that his sentence of death violated the *ex post facto* clause and thus he should be sentenced to life imprisonment. Justice Rehnquist, writing the opinion for the Court, upheld Dobbert's conviction.

The Court considered three *ex post facto* arguments made by Dobbert. First, he contended that there was a change in the function of both judge and jury between the time of his acts and the time of the trial. Prior to *Furman*, Florida juries had the sole right to determine whether to impose the death penalty.[96] The

[85] See note 7 *supra*.

[86] 430 U.S. at 360–61.

[87] *Id.* at 362–64.

[88] 428 U.S. 280 (1976).

[89] 430 U.S. at 371.

[90] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976).

[91] 97 S. Ct. 2290 (1977).

[92] *See* Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), in which the Florida Supreme Court invalidated FLA. STAT. § 921.141(2)(a) (1971).

[93] FLA. STAT. § 921.141 (1972), upheld in Proffitt v. Florida, 428 U.S. 242 (1976). For edited portions of this statute, see notes 68–70 *supra*.

[94] U.S. CONST. art. 1, § 10.

[95] Dobbert had an equal protection claim, as well as a pretrial publicity claim.

[96] FLA. STAT. § 921.141 (1971):

more recent statute provides for a jury recommendation of death or life imprisonment, which is then reviewed by the trial judge.[97] Justice Rehnquist defined the inquiry in terms of the two statutes in toto, rather than engaging in a particularized factual inquiry. Comparing the two statutes in the abstract, he concluded that "the new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime."[98] He suggested that the new statute did not make criminal "a theretofore innocent act, not aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict."[99] In fact, as Justice Rehnquist pointed out, the newer statute provides more protection generally for the accused than did the old. Florida had amended its capital punishment statutes, as a result of *Furman*, to provide for a bifurcated proceeding as well as an automatic review by the state supreme court.[100]

Second, Dobbert claimed that in light of the subsequent holding in *Furman*, there was no death penalty "in effect" in Florida at the time of his murderous acts. At this point, Rehnquist relied on a fair warning test, arguing that since the prior statute, though later held unconstitutional, provided fair warning to all as to the degree of culpability which that state ascribed to murder, Dobbert was on notice and thus did not have an *ex post facto* claim.[101] Justice Stevens in his dissent took strong exception to this test, as will be discussed later.

Dobbert's third *ex post facto* claim was that the new statute provided for a stiffer penalty because it now mandated that twenty-five years be served on a life sentence before one is eligible for parole. The prior statute had contained no such provision. Justice Rehnquist, writing for the Court, again ignored the particular facts of the case and chose to focus on the face of the statutes before him and reasoned that since Dobbert had been sentenced to death rather than life imprisonment, such changes in the parole sections had "no effect on him."[102] The dissent, choosing to look at the actual effect of the entire statute as it worked on Dobbert, took issue with this argument by the majority, arguing that Dobbert would not have been sentenced to death if the new statute had not been utilized. Justice Rehnquist's sole response was that there is no way of knowing what the verdict would have been had the trial been conducted under the old statute.[103]

Dobbert also made an interesting equal protection argument to the Court.[104] He contended that since *Furman* ultimately resulted in the resentencing of hundreds of persons who had been tried and sentenced to die up to that point,[105] he was effectively denied the equal protection afforded to that group of six hundred when he is classed with all those who committed murder after the new statutes were enacted. Rehnquist decided that "Florida obviously had to draw the line at some point" and concluded that it was "not irrational" for the state to relegate Dobbert to the latter class.[106] The use of the double negative "not irrational" avoids the equal protection issue, however. The standard question which the Court has consistently used in the past when confronted with an equal protection argument is: what *rational* reason can there be for classing Dobbert in the former group? And in drawing lines between categories, the states usually have been required to present some principled reasons for delineating the categories which result. Thus, to say that a line had to be drawn somewhere does not justify the drawing of an arbitrary line anywhere.

Justice Stevens in his dissent adeptly boiled the *ex post facto* claim down to its bare essentials:

> At the time of [Dobbert's] offense, there was no constitutional procedure for imposing the death

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> Recommendation to mercy.—A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury. When the verdict includes a recommendation to mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death on a plea of guilty or when a jury is waived shall be sentenced by the court to death or life imprisonment.

[97] *See* notes 70–72 *supra*.
[98] 97 S. Ct. at 2298.
[99] *Id.*
[100] *See* note 70 *supra*.
[101] 97 S. Ct. at 2300.
[102] *Id.*
[103] The jury under the new system operates in an advisory capacity as to the sentence whereas under the old system the jury's recommendation was final. *See* notes 70 & 94 *supra*.
[104] 97 S. Ct. at 2302.
[105] *Id.* at 2306 (Stevens, J., dissenting).
[106] *Id.* at 2302.

> penalty in Florida. . . . It is undisputed, therefore, that a law passed after the offense is the source of Florida's power to put [Dobbert] to death.
>
> . . . .
>
> . . . In the case before us the new standard created the possibility of a death sentence that could not have been lawfully imposed when the offense was committed.[107]

The difference between Justice Stevens' approach and Justice Rehnquist's approach can easily be detected. Whereas Rehnquist prefered to look strictly to the face of the statute in question, Stevens prefered to look at how the statute worked on the defendant in the particular instance.

Justice Stevens vigorously attacked the fair warning test devised by the majority in response to Dobbert's second *ex post facto* claim that there was no death penalty statute "in effect" in Florida. He argued that one purpose of the *ex post facto* clause is to protect against such a capricious application of after the fact legislation.[108] He pointed out that citizens often do not know the law, much less a court's interpretation of it, and that *Furman* made it clear the extent to which the death penalty was arbitrarily imposed.[109] If fair warning were the proper test, he continued, nothing would prevent the other hundreds of people, whose death sentences were lifted, from being executed since they had the very same fair warning as did Dobbert.[110] Justice Stevens concluded his dissent by observing the "manifestly intolerable results" which may very well result from the Court's decision, and predicted that the opinion will become "nothing more than an archaic gargoyle."[111]

The importance of the *Dobbert* decision and its ramifications for future interpretations of the *ex post facto* clause are clouded for several reasons. Rehnquist argued effectively, for instance, that the resultant changes in the Florida statutes were largely ameliorative and procedural, thereby answering Dobbert's first *ex post facto* argument which was based on the role changes of judge and jury. His authority for the position that such changes are not governed by the clause is strong. However, it cannot be denied that the *Furman* decision was unique in its effects on various states' approaches to capital punishment. Therefore, when Dobbert further contended that there was no statute "in effect" in Florida, he recognized what the Court had recognized in *Furman*, that is, that the states had to completely alter their approach to capital punishment. Rehnquist fashioned his fair warning test in response to this argument from language in *Chicot County Drainage District v. Baxter State Bank*:[112] "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored."[113] To argue that one of the consequences of the prior statute was to provide fair warning to Dobbert is to ignore the fact that Dobbert was acting under an old system which members of the Court in *Furman* found imposed death "freakishly" and arbitrarily.[114] One could easily agree with Justice Stevens' conclusion, then, that "[a]s applied to pre-*Furman* death penalty statutes, the Court's test is dramatically inadequate."[115] The reasoning utilized by Justice Rehnquist in fashioning the Court's fair warning test, viewed in this light, is difficult to resolve in the context of the Furman decision.

In *Davis v. Georgia*,[116] the Court held in a per curiam decision that a death sentence cannot stand if it is found that even one venireman was excluded because he or she had some qualms about capital punishment. The Court recognized the propriety of excluding those that are irrevocably opposed to capital punishment, but felt that the existence of doubts alone is not sufficient to exclude one from a jury. Specifically, it found *Witherspoon v. Illinois*[117] controlling, which involved a situation in which over thirty veniremen were excluded solely on the basis of their expressed qualms about the use of capital punishment. The Court, in addition, cited three other cases[118]

[107] *Id.* at 2303-05.
[108] *Id.* at 2305.
[109] *Id.* at 2306.
[110] *Id.*
[111] *Id.* at 2307.

[112] 308 U.S. 371 (1940).
[113] 97 S. Ct. at 2300.
[114] See note 7 *supra*.
[115] 97 S. Ct. at 2306.
[116] 429 U.S. 122 (1976).
[117] 391 U.S. 510 (1968).
[118] Wigglesworth v. Ohio, 403 U.S. 947 (1971) (exclusion of one such venireman); Harris v. Texas, 403 U.S. 947 (1971) (exclusion of five or six such veniremen); Adams v. Washington, 403 U.S. 947 (1971) (exclusion of from three to ten such veniremen). The Court reversed all those judgments without opinion, insofar as they imposed the death sentence and cited *Witherspoon* as authority.

for the proposition that the exclusion of even one veniremen would lead to a reversal of a death sentence. Justice Rehnquist dissented, claiming *Witherspoon* should not control and agreed with the reasoning of the Supreme Court of Georgia:

> The rationale of *Witherspoon* and its progeny is not violated where merely *one* of a qualified class or group is excluded. . . .[119] "This record is completely void of any evidence of a systematic and intentional exclusion of a qualified group of jurors so as to deny the appellant a jury of veniremen representing a cross section of the community."[120]

In so arguing, he overlooked the other three decisions cited by the Court. Justice Rehnquist desired to grant certiorari and set a hearing to determine whether this particular venireperson was unalterably opposed to capital punishment since she had been dismissed before that determination had been made. The decision was short, the opinion to the point, and it was certainly well substantiated. This case represents still another instance this Term where the Court has employed a cautious approach, choosing to hold the line on the use of the death penalty.

The Supreme Court handled five cases this Term on the death penalty, an indication that there were and still are many issues left for the Court to resolve. For example, the Court has made clear the desire to leave open the question of mandatory capital punishment for someone serving a life sentence who commits murder.[121] Also, in light of the Court's decision on rape in *Coker v. Georgia*, the constitutionality of numerous statutes prescribing death for crimes not involving the death of its victims, such as hijacking, mass terrorism, kidnapping and treason, is left in doubt. The indications, however, are that such statutes will not stand. The Court has become cautious, almost conservative, in its willingness to approve of the use of the death penalty, thus ensuring that the various states will resort to the death penalty only in a very particular fashion and only for a limited number of offenses.

[119] Davis v. Georgia, 236 Ga. 804, 809–10, 225 S.E.2d 241, 244–45 (1976) (emphasis in original).

[120] 429 U.S. at 122–23 (Rehnquist, J., dissenting) (quoting Davis v. Georgia, 236 Ga. 804, 809–10, 225 S.E.2d 241, 244–45 (1976).

[121] *See* note 63 *supra*.