In the

Supreme Court of the United States

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WILLIAM HENRY FURMAN,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

No. 69-5003

Washington, D. C.
January 17, 1972

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v.	:	No. 69-5003
STATE OF GEORGIA, Respondent.	:	

Washington, D. C.,

Monday, January 17, 1972.

The above-entitled matter came on for argument at 11:09 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ANTHONY G. AMSTERDAM, ESQ., Stanford University Law School, Stanford, California 94305, for the Petitioner.

MRS. DOROTHY T. BEASLEY, Assistant Attorney General of Georgia, 132 State Judicial Building, 40 Capitol Square, S. W., Atlanta, Georgia, for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 69-5003, Furman against Georgia.

Mr. Amsterdam, you may proceed whenever you're ready.

ORAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.,

ON BEHALF OF THE PETITIONER

MR. AMSTERDAM: Thank you, Mr. Chief Justice.

One thing I perhaps should make clear is our position on the question asked by Mr. Justice Stewart as to whether, if there were shown to be any legitimate legislative basis for a punishment, that would itself end the Eighth Amendment claim.

The answer, in my judgment, is unmistakably no.

The argument about whether there is a legitimate base for legislative judgment has a very, very small part in our brief, as I am sure the Court has noticed. We have essentially simply pointed out that one of the reasons why a court need not hesitate to strike down a rare and harsh punishment like capital punishment is that it's not taking away anything that's very important to the States, both in the sense that the only thing that is really in issue here is whether, instead of killing 20 or 15 people randomly selected a year, they're going to keep them in prison; and the impact of that from all available determiners is inconsequential.

But we don't urge that a legislature could not -- we don't urge in this form at this time that the legislature

could not find that there is a basis for boiling in oil. That, I think, really presents the question very squarely.

Mr. George said, and I think the States generally take the position, that if boiling in oil came before this Court, even though it had a legitimate legislative base, even though the legislature might find that boiling in oil was a deterrent, that somehow the Court could say that that was a cruel and unusual punishment because it was, quote, "unnecessarily cruel", close quote.

I want to simply point out to the Court who is arguing subjective standards here and who is arguing objective standards.

How could this Court say, or how could Mr. George say that boiling in oil is unnecessary, if a legislature finds that in order to deter some particularly serious crime that the whole broad concept of being boiled in oil is the way that we do it?

I think that it is the respondents and not the petitioners who are urging the Court to react at that visceral level.

Our proposition, I think, is a much more objective one. It looks not to what society says but to what it does. And we don't reject the fact that 41 States have it on their statute, but there must be a phenomenon with which one must start. Well, one must also ask: What do they do with it?

Now, let's look at this thing, if we may, for a moment in the world picture. We're not talking about Mozambique and Liechtenstein. We are talking about a progressive trend which has brought virtually every nation in the Western Hemisphere, with the possible exception of Paraguay and Chile, to abolish the death penalty.

We are talking about a progressive trend which has caused all of the English-speaking nations of the world, except some of the American States and four States in Australia, to abolish the death penalty.

We are talking about --

Q How did they do it? By what process did they do it in most of these places, Mr. Amsterdam?

MR. AMSTERDAM: It is different in different places. In many places the legislatures have abolished it. And in many places exactly the same thing has happened as has happened in the United States. That it has simply ceased being applied in fact.

And we think that the fact that --

Q It isn't a process which is generally one done by courts in these countries, is it?

MR. AMSTERDAM: No, no. No. Unquestionably not. And in most countries, of course, Your Honor, courts don't have the kind of constitutional supervision. But --

Q Now, if the Court undertakes to accept your

general proposition on the cruel and unusual aspect, couldn't a court make exceptions to it for certain crimes, or would a court be obliged to follow an all-or-nothing approach?

MR. AMSTERDAM: If -- Mr. Chief Justice, if Your Honor means, could the Court find that the death penalty is unconstitutional for some crimes and not for others, I believe that it could rationally, although I do not think it should or can on the indicators available to the Court in this country.

Q But could the Court, for example, make an exception as to homicides committed by life-term prisoners, either of a fellow prisoner or of a guard?

MR. AMSTERDAM: On that --

Q I'm talking about that kind of a narrow exception, as a legislature could.

MR. AMSTERDAM: Yes. Well, that, it seems to me, is a different question, whether the legislature could. I don't think the Court could under a general statute. I don't think that the Court could take a statute like in California, which says: any first-degree murder incurs a death penalty. Or a statute like Georgia's, which says: any murder, the death penalty may be imposed.

And so why do they apply it in some cases and not in others?

But I do think that a different question would be presented if a different and narrower statute were presented.

There's no doubt about that.

Q You're well aware, of course, that a great many opponents of capital punishment, among them James Bennett, the former Director of the U. S. Prison Bureau, was very strongly against capital punishment as a matter of policy, but preferring to retain it for homicides of a fellow prisoner or of a prison guard. I'm sure you've covered that in some of the briefs.

MR. AMSTERDAM: Well, I have no doubt that a statute of that sort would present a different question to the Court. Because what we have is a general statute which prescribes death as a penalty for murder or in subsequent cases, right.

Now, we've had historical experience with that. We know --

Q But isn't it true that in New York there is such a statute? That's restricted to killing a prison guard.

MR. AMSTERDAM: Oh, yes. As a matter of fact, there are several different statutes, Mr. Justice Marshall, in different States. California has a mandatory death penalty statute for killing by life-termers. It's not only a guard but it's any non-inmate.

There are five States, though, that have statutes such as the Chief Justice suggests, which limits the death penalty to killings of guards in the course of their duty, and that sort of thing.

Now, --

Q Do you think we then could accept your general argument and still find such a statute, one that did not offend the Constitution?

MR. AMSTERDAM: Your Honor, I think a line might be drawn. I don't urge that it be drawn. I see no occasion in these cases, because no such statute is presented.

The problem with those statutes is that we've had insufficient experience with them. The essence of our submission here I think is perfectly plain, that we have had a very considerable experience with general statutes punishing the crime of murder or the crime of rape with death.

And what we find when those statutes are applied, actually applied by juries in particular cases, is that almost never is the penalty of death in fact inflicted.

I think that is not an exaggeration. Now, one doesn't know what juries would do with a different kind of a statute. But one very well knows what the testimony of public opinion, of an enlightened public opinion in this country is with regard to general statutes punishing murder with death.

The -- what juries do, we're in a little disagreement with, I think, the respondents on the significance of that. To start with, as we've pointed out, juries really only do return about 100 death verdicts a year.

Now, to understand how small that is, you have to

compare it with the number of crimes punishable by death. It's a very difficult thing to do. We attempted to do it in one of the appendices to our brief. And what you find out is that juries don't apply the death penalty in perhaps more than one out of 12 or 13, at the very most, cases in which they could. And only a half or a third of those people are actually executed.

Now, notice the non-acceptance, indeed the repudiation, which this implies. We have a country in which 43 jurisdictions have the death penalty on the books, in which hundreds and hundreds and hundreds of people are prosecuted for crimes and convicted of crimes, in which that penalty is available.

Under the best of circumstances for capital punishment, where what is involved in an execution is a secret, clandestine one, which the jury doesn't perceive or clearly understand, where the people who get the death penalty are disproportionately the priors, the poor, and racial minorities -- a point I want to come back to in one second -- and where, in addition, the juries are death-qualified, they have qualified, the juries are returning a hundred death verdicts a year.

Q Mr. Amsterdam, you said that one out of perhaps 12 or 13 death verdicts are returned as to what might be returned. In each of the 12 or 13 were those cases in which

the prosecution had asked for death, or was it just that death could have been returned under the statute if the prosecution had asked for it?

MR. AMSTERDAM: It is impossible to know in what percentage of cases the prosecution asked for it. It is, however, perfectly clear in a number of jurisdictions that the prosecution has no control over the matter. In a number of jurisdictions it is entirely up to the jury, the prosecutor cannot waive it -- the prosecutor cannot ask for it.

It's simply a matter of the jury's discretion.

I think no figures are available on the question of whether the prosecutor asked for it. Although I will say that even the prosecutor's decision not to ask for it is a reflection of the sentiment of the total community. So that I wouldn't discount those cases, even if I knew how many there were.

But the point --

Q Also, your statistics -- you can't tell, even from those fragmentary statistics, whether, as you put it, juries are imposing the death sentence in only one out of every 12 defendants; or does it mean that only one out of every 12 juries is imposing the death sentence?

You don't know which is the -- you don't know which is the constant and which is the variant factor?

MR. AMSTERDAM: No.

Q Or both?

MR. AMSTERDAM: But that's -- that's certainly true, Your Honor.

Q And, Professor Amsterdam, is -- are your most recent remarks also directed to judge-imposed penalties?

MR. AMSTERDAM: The figures that are available do not discriminate. So that the one out of 12 or 13 figure is a total figure that doesn't discriminate between judge sentencing or jury sentencing or where prosecutors, however, have not asked.

All we know is that out of that number of capital cases, that's the number of death sentences that are in fact imposed by the sentencer.

One important factor is that the figures we have, the figures I'm talking about, 100 a year, run through 1968, when Witherspoon was decided. So what we are talking about is the number of sentences imposed principally by juries, because, although there are some judge-sentences in there, most of these are plainly jury-sentences. By juries from whom all persons against capital punishment have been excluded.

Now, this is the group that Mr. George wants us to take as the indicators of public sentiment. They have already pruned out --

Q That's the maximum.

MR. AMSTERDAM: -- all those people who were opposed to capital punishment.

Q Professor Amsterdam, in that connection, how many States have penalties of this kind imposable by a jury as contrasted with those imposable by a judge? Do you know?

MR. AMSTERDAM: Ah -- in how many jurisdictions?

Q In how many jurisdictions does the judge impose sentence as contrasted with how many where the jury imposes sentences. Do you know?

MR. AMSTERDAM: To my knowledge there are two jurisdictions, Maryland and Illinois, where the imposition of the death penalty requires the concurrence of the judge with the jury. That is, the jury's verdict is either advisory, where the judge must concur in the jury's verdict before it can be imposed.

In all other jurisdictions it is the jury which makes the sentencing decision, unless the jury is waived.

Q Well now, this is not true in my home State.

MR. AMSTERDAM: Oh. I'm then quite misinformed. I had understood that it was.

This was rather thoroughly canvassed in the briefs in Maxwell vs. Bishop, and I think the statutory sections are set out there, if the Court should want to refer to them for reference.

I had understood that it was true in all States, that the jury made the determination except those two. But there may be local differences that I'm not aware of.

Q Except where the jury is waived, in which event, as you said, a judge may be able to impose a death penalty in some States?

MR. AMSTERDAM: I'm sorry, Mr. Justice White?

Q Except in those States where -- or except where a jury is waived, in which event, I suppose in some States at least, the judge could impose the death penalty?

MR. AMSTERDAM: Oh, it is -- since United States v. Jackson, it is common that if the jury is waived the judge may impose the death penalty, yes. That's certainly true. The jury is still the primary sentencing instrument in practice, because generally the jury is not in fact waived.

Q Is there anything in the Georgia record that indicates what kind of people Georgia executes?

MR. AMSTERDAM: There are again judicially noticeable figures on this, there is nothing in the record, there is no evidence that was presented. But the figures are perfectly plain from the National Prisoner Statistics: Georgia executes black people, in Georgia, I'd say.

I ought to make some reference as to the state of the record generally, because there's an awful lot of talk here about facts, about what the Los Angeles Police Department says, about deterrents, about who gets the death penalty; unpublished figures from the Georgia Bureau of Prisons; unpublished figures from the California Department of Corrections.

I make very plain that we have been asking for an evidentiary hearing on all of these facts in a lot of courts for a long time. No one has ever given one to us.

The California Supreme Court judgment in Aikens rests upon a record in which the California Supreme Court decided that case on authority of a case in which we had asked for such a hearing and it hadn't been given to us.

We are very far from satisfied with the nature of the factual evidence presented here. But we think from the factual evidence that is judicially noticeable, which does not include Corrections Departments' reports in an unpublished form, that enough appears so that the Court can call the death penalty cruel and unusual punishment.

Now, if, however, the Court has any concern with any of these factual questions, ranging from deterrents to who gets the death penalty, any of these things, an evidentiary hearing would be the proper way to resolve that matter. And in the Aikens case, at least, the case can be disposed of in such a way as to get that hearing.

From the -- I return to this subject of rarity and discrimination. Because the significance of both rarity and the question of who gets the death penalty is twofold.

First of all, when a nation this size, with a going crime scare, burgeoning population, sentencing as few people to death as are in fact sentenced to death, and executes even fewer

of them, and does this against the background, where the ideological debate, where the content of the debate about capital punishment, makes unmistakably clear why this is happening historically, because capital punishment is regarded as indecent, as inconsistent with civilized standards today.

Then that manifests a repudiation quite different from what is manifested by the maintenance of statutes on the books. And that's the second aspect of it.

The very fact that capital punishment comes to be as rare and as infrequently and as discriminatorily imposed as it is takes the pressure off the legislature, quite simply, to do anything about it.

The one reason why the Eighth Amendment must be measured not only by the legislative disapproval but by popular disapproval in terms of what juries and judges and prosecutors do in fact, is that there are in fact more than one way to skin a cat. And that a penalty can be repudiated by public opinion every bit as thorough by legislatures making it optional and then nobody ever applying it as by the legislature's repeal of it.

And this goes back to the Chief Justice's question: how has it been done internationally? In some places it's been done by legislative repeal; in other places what has happened is exactly what happened in this country, it simply falls into disuse.

And when it falls into disuse, when there are only a very, very few people, and those predominantly poor, black, personally ugly and socially unacceptable, there simply is no pressure on the legislature to take it off.

Q Mr. Amsterdam, I should have asked you in the last case, but how many are there on Death Row in California?

MR. AMSTERDAM: How many in Death Row? 105 on Death Row in California, to my knowledge at the moment.

Q At the time, the last time the legislature refused to abolish the death penalty, how many were on Death Row?

MR. AMSTERDAM: Oh, about, I would say 85 to 90.

Q Well, how can you say that because there are so few, if you take the State of California? I'm just wondering if you're trying to get too much mileage on your train.

MR. AMSTERDAM: Well, there are a number, I think, of essential points here. A few is a question of relative matter. What you're talking about is an accumulation on Death Row over a period of time of 12 or 13 years. You're talking about 80 people in a prison system that houses thousands and thousands and thousands of people. You are talking about, and I think this is relevant, you're talking about 80 people, of whom at that time 25 or 30 -- actually it was probably up around 30 were members of minority groups.

This problem is another factor in California's

figures. One of the reasons why I have grave concern about California's putting them before you as though they were judicially noticeable, the only racial figures California gives are for 1970. It's very hard -- it's making very clear that 1970 was a strange year in California. Because the last published national figures show that out of 59 people on Death Row in California 25 were black.

Now, the California figures show that out of 100 now 25 are black.

There's something, you know, strange going on there, which --

Q How does that compare to the prison population in California?

MR. AMSTERDAM: Pardon?

Q Is that out of line with, say, the prison population in California?

MR. AMSTERDAM: It is --

Q So far as racial composition there?

MR. AMSTERDAM: -- it is very difficult; it is difficult to know. And there are no published figures that tell us that. What California does is to compare it to the -- received from court in 1970. And one year is no basis for making any kind of judgment.

Q I see.

MR. AMSTERDAM: It is true, though, that California

counts Chicanos as white for these purposes, something which, for one who lives in California, I find rather strange, in terms of the question: Who bears the brunt of the penalty?

When, essentially, is that? When it is this group of people who in fact suffer, realistically the pressure on the legislature is not the same. However limited we are willing to bear the death penalty in its general application, we are still less willing to bear it as applied to us.

Now, the Court has been --

Q Mr. Amsterdam, you were speaking of pressures on legislatures. What are the figures now, the total number, is it something over 600 in Death Row?

MR. AMSTERDAM: The latest available figure to me, Your Honor, is 697.

Q Well, 700 people on Death Row would be quite an enormous pressure on public opinion, would it not?

MR. AMSTERDAM: No, I don't think so. I think, as a matter of fact, public opinion has been lulled in a very significant way by the failure of executions in recent years. I think the public has, in large measure, stopped thinking about the problem. I think that if it is --

Q Well, I was addressing myself, at least suggesting the possibility that if you didn't prevail here that pressure would be reactivated, would it not?

MR. AMSTERDAM: I don't know whether it would or

would not, if you actually started killing people. I am quite confident it wouldn't until you started killing people.

The public is very graphic in the way it thinks about things. Put one execution out there, take one life, and people get very excited. But tell them that tomorrow or the next day a life may be taken, when one hasn't been taken since June 2nd, 1967 -- ehh! -- they don't think about it.

I think that it would cost, and I think it would be a constitutionally intolerable cost, the resumption of executions, to activate any kind of public sentiment. But even if you have that public sentiment activated, the point essentially remains that it is not, you are not capable of generating the kind of legislative or public disapprobation of a penalty which is cast in form so as to be applied, and which is in fact applied to very, very few; and to essentially ugly, minority group members, as you are to a generally applicable penalty.

I'd like to save some time for rebuttal in this matter.

But the point made by several of the respondents that the death penalty is somehow a sancrosanct institution and that society would fall apart if this Court laid its hands on it isn't new. If I may read just for a moment from --

Q Isn't what? Isn't what? I didn't hear you. You said that point isn't what?

MR. AMSTERDAM: Is not new.

Q New? New?

MR. AMSTERDAM: Is not new.

Q I see.

MR. AMSTERDAM: If I may read for a moment from Lod Ellenborough, speaking in the House of Lords in 1813, on a bill for abolishing the death penalty for the crime of privately stealing the amount of five shillings from a shop. Lord Ellenborough, after saying,"How but by the enactments of this capital punishment are the cottages of the industrial poor to be protected? What other security has a poor peasant, when he and his wife come home, that his clothing will be safe other than the death penalty?" goes on to say:

"Your Lordships are told what is extremely true, that the number of people actually put to death for stealing five shillings from a shop is very small. And this circumstance is urged as the reason for the repeal of the law. But before Your Lordships are induced to consent to such repeal, I beg to call to your consideration the number of innocent persons who might have been plundered of their property or destroyed by midnight murderers if the law now sought to be repealed had not been in existence; a law upon which all the retail trade of this commercial country depends, and which I, for one, will not consent to be put in jeopardy."

Nevertheless, the bill making it a capital offense

to steal five shillings from a shop was in fact repealed and one didn't falter.

I think that all of the available evidence which is judicially noticeable makes it perfectly plain that a judicial ruling by this Court, applying the Eighth Amendment in the way in which we believe it is meant to be applied, and in judging this repudiative penalty a cruel and unusual punishment would take from the States nothing to which they are entitled.

If I may save the rest of my time for rebuttal, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Amsterdam.

Q Before you sit down, Mr. Amsterdam, I just want to be sure that I understand your ultimate argument.

Is it this: that even assuming that retribution is a permissible ingredient of punishment, even assuming that rational people could conclude that the death sentence is the maximum deterrent with the minimum unnecessary cruelty, death in the electric chair, even assuming we're dealing with somebody who is not capable of being rehabilitated and an incorrigible person, even assuming that rational people can conclude that this punishment under these circumstances is the most efficient and the most inexpensive and the most -- and it assures the most complete isolation of the convicted man from ever getting back into society, even assuming all of those things which are

the basic arguments made by your brothers and sister on the other side, you say it is still violative of the Eighth Amendment. Am I right in my understanding of that?

MR. AMSTERDAM: That is correct, Your Honor. The Eighth Amendment we see as a limitation somewhat like the Fourth; it is a limitation on means. It says that the legislature may not use cruel penalties, crueal and unusual penalties, even though they may serve a legitimate goal. Just as they may not engage in unlawful searches and seizures, even though there may be a purpose for them.

Now, we're -- I don't find that we're limited to that on this record, because of this irreparable fact that we can't get an evidentiary hearing on all of the issues Your Honor raises. I think, on evidence which could be presented, we could show that none of the judgments Your Honor supposes could rationally be made.

Q Well, maybe so. But --

MR. AMSTERDAM: But on this record, it is our submission that, accepting each and every one of those propositions, the death penalty is a cruel and unusual punishment.

Q That's what I understood to be your argument.

MR. CHIEF JUSTICE BURGER: Mrs. Beasley.

ORAL ARGUMENT OF MRS. DOROTHY T. BEASLEY,

ON BEHALF OF THE RESPONDENT

MRS. BEASLEY: Mr. Chief Justice, and may it please the Court:

The question in these cases, and particularly in the case now before the Court, that is Furman vs. Georgia, involves the Fourteenth Amendment first.

I think that petitioner has, in all of these arguments in all of these cases, given way to the proposition that the Fourteenth Amendment has anything to do with these cases, and the argument is made simply that it is cruel and unusual punishment to deprive a man of his life. Due process of law is not really looked at at all.

However, as it affects the State, that's exactly the most important point.

The Fourteenth Amendment provides that life, liberty -- that no State may deprive any person of life, liberty, or property without due process of law.

Now, that was written in 1868, long after the Eighth and the Fifth Amendments were written. So that when the restriction was made on the States by way of the Fourteenth Amendment, the death penalty was already recognized and the restriction on the States was only that they not deprive a man of his life or liberty or property without due process of law.

And I would submit that if the Court in these

instances rules that the death penalty is cruel and unusual punishment and may not be imposed by the States, then it would take a constitutional amendment, because the Fourteenth Amendment, as well as the Fifth, would be rewritten. So that you would have the proposition that no State may deprive any person of life, nor may any State deprive any person of liberty or property without due process of law.

Q Could the State boil them in oil?

MRS. BEASLEY: I think not, Your Honor. Because the terms of "due process of law" and the "taking of life or property" does not include corporal punishment of that type. The State may not deprive him of life, liberty, or property without due process of law. But what we had at the beginning of our country was the understanding that it may not impose torture, and that of course would be torturous, as would horse-whipping, as Mr. Justice Stewart mentioned.

Those things were taken out of the realm of punishment at the bery beginning, with the Constitution being enacted, and the Bill of Rights.

Q What is the standard that you use to determine whether any part of the Bill of Rights is applicable to the States?

MRS. BEASLEY: I think whether it is, the standards that have been used by this Court in so many cases in applying the due process clause: Is it a matter of fundamental fairness?

Is it a concept of our ordered liberty?

That's where cruel -- that's where punishment, period, comes in, I think. And whether it is cruel and unusual punishment comes into the concept of ordered liberty, of fundemantal fairness. And I think that so long as the State utilizes fundamental fairness in dealing with its penal system in imposing penalties, that those penalties may be used. Particularly since the States were specifically permitted by the Fourteenth Amendment to utilize the taking of life, so long as it was done with due process of law.

And I think that's one of the basic fallacies in most of the arguments that are made by petitioners, because he talks about rarity and discrimination. Well, obviously, then it is not with due process of law, if it's arbitrary. And that is the limitation on the States, not per se as to the penalty.

Q Mrs. Beasley, didn't the Francis case take into cognizance that the State could not impose unnecessary pain? The Francis case, of this Court.

MRS. BEASLEY: Yes, sir, I'm familiar with that case.

Q So they recognized a little more than just due process, didn't they?

MRS. BEASLEY: But that was --

Q Didn't this Court, in that case, recognize that the Eighth Amendment was a part, was applicable to the States?

MRS. BEASLEY: Yes, insofar as --

Q And you're now saying it's not?

MRS. BEASLEY: No, sir; I'm not saying that at all.

Q Oh.

MRS. BEASLEY: What I'm saying is that it comes into the restrictions on the States by way of the due process clause; not that in and of itself, and apart from any consideration of due process, is it applicable to the States. That's very clear, because without the Fourteenth Amendment, the Eighth Amendment wouldn't be applicable to the States at all. Because that's not how it was written.

So that in the concept of due process is where the considerations of how we deal with punishments come in. And I would submit that a State may impose a punishment so long as it is not outside of what we regard in -- as our concept of ordered liberty, the fundamental fairness.

And I think that's exactly where the standards come in. The standards are not so close to line that you can measure them by polls taken today or by the number of people executed within the last ten years. That's too close to the line as far as our concepts of ordered liberty are concerned.

Moreover, I think that the standards that are to be used are the ones that the courts have used throughout the country in recognizing what cruel and unusual punishment means. And the cases that come out of the State courts and out of the

lower Federal courts and of this Court indicate that it means barbarous or uncivilized or torturous, and that type of thing. And certainly the penalty of death, per se, does not come within that prohibition or that understanding.

Mr. Justice Marshall, you asked about whether the meaning of "unusual" has changed. I would submit that it has not. The meaning of "unusual" has not changed from the time that the Eighth Amendment was written, but the application of it, perhaps, has.

And I think, as I said before, that the death penalty itself is outside of a consideration of that nature because it's specifically reserved to the States in the Fourteenth Amendment.

However, if we are going to measure whether in our contemporary society the death penalty is to be regarded as cruel and unusual punishment, I think petitioners are using the wrong guidelines. I think there are three basic ones that are compelling with respect to what is the current standard of decency with regard to punishment.

Now, he talks about the world community, but we don't know why these countries did away with the death penalty, we don't know, for example, whether it was the legislature or the judiciary; but, even more, we don't know whether it was because they regarded it as cruel and unusual punishment, or for some other, varied reasons.

Nor what the crimes were, nor what the punishment for the crimes has been displaced with. For example, if it's displaced with life imprisonment, is the death penalty so much more severe that, in and of itself, it's grossly disproportionate? It's a matter of degree.

Let me go back to -- I mentioned that there were three areas I thought should control insofar as measuring standards of decency. Juries --

Q Where does this standard of decency come from?

MRS. BEASLEY: I think it comes primarily from Trop vs. Dulles, that being the last pronouncement in this area.

Q There was no opinion by the Court in that case?

MRS. BEASLEY: No, there was not. That is correct.

But I think a standard, of course, would have to come into play. I don't think it's that far removed from fundamental fairness, which, to me, is the basic standard that is to be used in these cases.

Q Would you say a State statute that allowed the death sentence to be imposed except on those people who make more than $50,000 a year, would that be --

MRS. BEASLEY: I think that would be discriminatory. That's not looking at the crime; that's looking at the circumstances of the criminal.

Q Do you think that "cruel and unusual" carries with it a connotation of non-discrimination?

MRS. BEASLEY: Oh, yes, indeed. It should be applied in a non-discriminatory manner.

Q Are there any statistics as to what kind of people Georgia executes?

MRS. BEASLEY: Mr. Justice Douglas, we submitted in our brief a chart that I -- obviously it's made up from the statistics which we were able to gather from the Department of Corrections, showing those people now under death penalty --

Q Yes, I've read that.

MRS. BEASLEY: -- in Georgia.

And I don't think that you could say that there's any one class, or that that class had been discriminated against.

Moreover, even if there was shown to be discrimination, and we submit that there is not shown to be discrimination, that that would not invalidate the death penalty per se, but it would be a violation of the equal protection clause, not the Eighth Amendment.

In other words, you may have discrimination in the sentencing in larceny that only black people get the maximum for larceny. Well, obviously, that would be discriminatory. But that wouldn't mean that you couldn't sentence anybody to twenty years' imprisonment for larceny; it would simply mean that in those cases where there was discrimination, those sentences were invalid.

Q That's a case-by-case discrimination.

MRS. BEASLEY: Yes, indeed. And I think their proof falls far short of making out the kind of a prima facie case that this Court has considered in cases like Whitus with regard to discrimination by virtue of race.

But even if -- I say, even if they could make it out, it would not invalidate the death penalty because the same thing would apply to any other punishment; but it doesn't make the death penalty any more cruel and unusual than life imprisonment or twenty years in jail, or even one day in jail, if it's arrived at in a discriminatory manner.

Of course that then goes back to the due process clause, that obviously it has to be arrived at in proceedings which accord due process.

Q Has your court ever considered the question of the discriminatory aspect of the death sentence as applied in Georgia?

MRS. BEASLEY: I think not, because I don't think that it's had the opportunity to do so. Mr. Amsterdam suggested it has not had the opportunity, he has not had the opportunity to present statistics to our courts. But that certainly is not true in these two cases. There was no effort made to bring any statistics, or make any argument, as a matter of fact.

In Furman, the argument wasn't even made in the lower court, it simply was stated but no argument was made. And there

was a very, very short argument, as we pointed out in our brief, in the brief to the Supreme Court of Georgia, citing merely the bald statistics of how many white people and how many black people had been executed since 1930, up to 1968.

Well, that doesn't prove that the death penalty is cruel and unusual punishment.

Moreover, those statistics which talk about the period of time between 1930 and 1968 in Georgia's case are the old statistics that any State failed to take account of the vast changes in criminal justice that has taken place under decisions of this Court, as well as the decisions of State courts.

So that we are safeguarding not only criminals generally, but people who are subject to the death penalty, with greater due process. So that when we do arrive at a consideration that they are ready to be executed, we are sure that they are -- that it was arrived at in a manner comporting with due process.

And I think that's one of the great fallacies in utilizing the statistics with regard to the number of executions that there have been.

How many of them have not been executed because of jury discrimination, or scrupled jurors or illegal confessions or illegal search and seizure or something else that has nothing to do with the penalty that was imposed by the jury.

But, again, let me just return for a moment to what I regard as the measurements of what the standards should be. The standards of fundamental fairness and the standards of an ordered society. As I said, I think it should be the juries, for one. The juries across the country are still imposing the death penalty, and certainly they are representative of the community.

As was said in Williams vs. New York, by Mr. Justice Murphy, in his dissent: In our criminal courts the jury sits as the representative of the community. Its voice is that of the society against which the crime was committed. Its verdict is a community expression.

Witherspoon also refers to the jury speaking for the community, and so does Trop vs. Dulles. And I think that it cannot be overlooked that the juries are still imposing the death penalty and did in the 660 or however many cases resulted in persons now under the death penalty in this country.

They express the community feeling and standards, and that was recognized in Trop. They speak for the community.

If we are going to look at what the standards are here: in the two cases which Georgia has pending before the Court, as a matter of fact in Furman, which is the case right now before the Court, there was only one person out of the total panel of 48 -- which meant one out of 49 because one had

to be added -- who said that they were so against the death penalty that they could never impose it in any case, and that it would affect their determination of guilt. One out of 49.

So that can't show that there is an overwhelming -- these people are selected at random. And, moreover, their feet are put to the fire.

There was some question in one of the earlier arguments about, Well, juries are perhaps just imposing the penalty now because they know it's not going to be imposed.

I would submit that if it's supposed to be the overwhelming repudiation of the death penalty that petitioners talk about, then why would jurors take the unpopular stand in imposing a penalty which the world has repudiated?

And, secondly, how can we presume that a juror, sitting in the place of judgment, is going to take a chance on a penalty not being imposed, when he knows that he's expressing the will of the community?

I would submit that no one with a conscience would do so, and we certainly can't indulge in a presumption of that sort.

Secondly, we speak also of the second measurement then, of what or of who measures the standards? And I would say the judiciary.

And it is particularly appropriate to look there because the judiciary is measuring the death penalty in terms

of whether it is cruel and unusual punishment, not whether it is wise or not whether it is efficient or not whether we can do without it; but is it cruel and unusual punishment.

And reading all of the recent cases from around the country, I find almost none -- I found none, there probably are some -- but none where the courts have declared that it is cruel and unusual punishment. And I'm talking of the State high courts and the lower Federal courts, so that we have the judiciary taking this very question of whether it is cruel and unusual punishment and giving it consideration, and saying, in our opinion, and applying the constitution, we consider that it is not.

So certainly they, too, express the standard of decency. We talk in other situations of the conscience of the court, that is, for example, the test that's used in effective assistance of counsel, at least in the Fifth Circuit. Does it shock the conscience of the court? That's what we're talking about with regard to standards, not something so close to the line that it can be measured as 51 percent today and 49 percent tomorrow. And that certainly is not the way in which our Constitution is to be utilized or to be construed.

Again, it's a question, I think, for the legislature to determine. Certainly, in Witherspoon, the Court noted that the power of a State to execute a defendant sentenced to death

by a jury does not bear -- has no bearing in what the Court does with respect to whether the State can so execute a person, so long as it is done with due process.

And also I would like to point out that there is, in many of the cases before this Court, Allied Stores of Ohio vs. Barry's, the license tax cases which were in 1866, and cases since then, a presumption of regularity and a presumption of constitutionality of legislative enactments. And that has been overlooked, I think, in the petitioner's argument and position. He has the burden to show that the legislative enactment is unconstitutional, and I think that he has not done so; not with respect to the death penalty per se, in the abstract, which is what he contends should be declared unconstitutional.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Beasley.

Mr. Amsterdam, you have three minutes left.

REBUTTAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.,

ON BEHALF OF THE PETITIONER

MR. AMSTERDAM: Thank you, Mr. Chief Justice. May it please the Court:

On one point I essentially don't disagree with Mrs. Beasley. I think juries are, in many ways, the conscience of the community; although I think that other organs of government, prosecutors and judges, are as well.

Our whole case rests on what juries and prosecutors and the other agencies of government have done, and what they have done is to refuse to impose the death penalty.

The question then arises, Well, why don't we leave them that way? If they're refusing to, why should this Court step in? Why shouldn't it just die of its own weight?

The answer to that is a case like Furman vs. Georgia, where what you have is a regular, garden variety burglary-murder. Unintended killing; somebody shot through the door. The case was submitted on the theory that it was an unintended killing. There are thousands of these. And the jury comes back with death. The defendant is black; the victim is white. That's all the aggravation in the case.

The State which distinguishes between torture and the mere extinguishment of human life can't see that this case is different from the aggravated cases. But the jury is allowed in every case to return the death penalty.

There are Georgia figures in this record. I don't think they're judicially noticeable but they're in this record: 33 people on Death Row; 27 of them black, 6 white.

The reason why juries can't be permitted to go on doing what they have done and slowly, inexorably do away with the death penalty themselves is that in individual and particular cases there are going to be regressions, depending largely on the color of the defendant's skin and the ugliness

of his person. And it is that kind of collectiveness which we think that the death penalty forbids.

Now, I read the lower court cases somewhat differently than Mrs. Beasley does. I would say that the rule developed in the Eighth Amendment area throughout this century has been very plainly the development in the prison cases, which this Court just recognized in Haines v. Kern.

What has happened there is that the Eighth Amendment has been taken and given a whole new meaning to respond to a new problem and new conditions.

Well, what we have in the capital punishment area is exactly the same thing. And our point I repeat again, with regard to race, is not, or poverty is not discrimination; we haven't proved it. On these records we couldn't prove it.

What I am saying is that exactly what is happening in capital punishment, though rare, arbitrary, usually discriminatory, but unprovably discriminatory infliction of a punishment, escapes all other constitutional controls: due process, equal protection. Andescapes the public pressure that keeps legislatures acting decently unless there is something in the Constitution that forbids it.

Q Mr. Amsterdam, you have mentioned a couple of times, and I think Mrs. Beasley also mentioned, a comparison between the type of statistics that you have used in your brief and the type of statistics the States have used. And

you state in your brief and you've stated here that yours are judicially noticeable, whereas you feel the States' are not.

I couldn't find in your brief, though perhaps I'm insufficiently familiar with it, anything other than just the statement to that effect. Do you cover in your brief what you say is judicially noticeable?

MR. AMSTERDAM: No, we don't. But I think the basis of it can be fairly simply stated. The Court -- the concept of judicial notice is essentially that when a writing is put out there in the public domain, which people may rebut, which people may study and answer, that it becomes judicially noticeable because its availability for a professional criticism makes it reliable.

Now, when the State takes figures out of the State Department of Corrections record, which have never been printed anywhere, which is new, is unascertainable, whose significance is not subject to criticism; that's not judicially noticeable. But when you have --

MR. CHIEF JUSTICE BURGER: Your time is up now, Mr. Amsterdam.

MR. AMSTERDAM: Oh.

[Whereupon, at 12:00 noon, the case was submitted.]