In the

Supreme Court of the United States

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ELMER BRANCH,

Petitioner,

vs. No. 69-5031

STATE OF TEXAS,

Respondent.

Washington, D. C.
January 17, 1972

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Monday, January 17, 1972.

The above-entitled matter came on for argument at 1:54 o'clock, p.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:

MELVYN CARSON BRUDER, ESQ., 706 Main Street, Suite 300, Dallas, Texas 75202, for the Petitioner.

CHARLES ALAN WRIGHT, ESQ., 2500 Red River Street, Austin, Texas 78705, 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 No. 69-5031, Branch against Texas.

Mr. Bruder.

ORAL ARGUMENT OF MELVYN CARSON BRUDER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BRUDER: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the Court of Criminal Appeals to review a death-penalty rape conviction in the Wilbarger County District Court in the State of Texas.

The evidence adduced by the State, which was uncontroverted by any evidence put on by the defendant, petitioner in this case, indicated that in the early morning hours a young Negro male, later identified to be the petitioner, forced his way into the home of the complainant and assaulted her. The act of rape occurred. Conversation ensued thereafter for some time. He then left, and was arrested, convicted, and given the death penalty.

There was absolutely no medical testimony showing any type of injury, of any sort, to the complainant in this case.

We feel that capital punishment in this case is unusual, under the Eighth Amendment, for two basic reasons:

First of all, the standards by which we suggest this Court should gauge whether or not capital punishment is unusual

in any case indicate that it is unusual in terms of frequency of use; the fact that it is used on identifiable minorities; and the fact that it has a historical pattern of use in the South upon blacks.

We respectfully submit that the standards which are appropriate for this Court's use are those laid out in Baker vs. Carr, Brown vs. Board of Education, and Jacobellis vs. Ohio. That is to say, national standards must be employed to determine whether or not the use of any punishment in any one case, in any county or State, is unusual or is not unusual.

Applying these national standards, we see that there are a very limited number of States that use capital punishment as punishment for the offense of rape.

In going to Texas, we have some statistics in an article by Koeninger, which I've cited in the brief. I think these statistics go further than most statistics that have been presented to the Court.

The Koeninger studies go not only to the number of blacks who have received the death penalty for rape, but they also cover the frequency with which any defendant accused of rape can expect to receive the death penalty. So the fact that 89 percent or 90 percent of all persons convicted of rape and given the death penalty in Texas are black might be a convincing argument; but we feel that a more convincing argument is the fact that when a black man in Texas is convicted of rape, he

has an 88 percent chance of receiving the death penalty. And this is in contradiction to the 22 percent chance that any white or Chicano faces in the same situation.

Q And where do you get that percent?

MR. BRUDER: This percentage is based on Koeninger's article, in which he says the ratio --

Q I don't find that in your brief.

MR. BRUDER: It appears in the brief at pages 19 and 20, Mr. Justice Douglas.

Q Thank you.

MR. BRUDER: The amazing thing that I found in the Koeninger studies is there have been some instances in Texas of joint trials, a Negro and a white defendant accused of raping the same person at the same time. And Koeninger's studies indicate that in these type of cases the Negro invariably will get the death penalty, whereas the white or Latin-American will be spared that fate.

Now, the State has attempted to refute some of these statistics by saying that Negroes commit more rapes. They cite some Philadelphia indemnity statistics. I don't think these are applicable in view of Koeninger's thoroughness, because Koeninger uses pure statistics:

The expectancy of the death penalty on a racial basis, as opposed to the percentages of race, who get death and who do not get death.

Now, another interesting point that concerns this case only: In Texas the Legislature has seen fit to create a number of offenses, all of which, conceivably, could be charged in a rape situation. There is the offense of aggravated assault, male or female; the offense of murder or assault to murder, with or without malice.

The only --

Q This point of discrimination, was that raised at the trial or on the appeal in this case?

MR. BRUDER: Your Honor, I believe it was briefed very generally in the brief. I did not participate until after the conviction was affirmed. As I recall, there were no statistics or no proof introduced at the trial level or on any hearing for motion for new trial. It was, I believe, mentioned in the brief filed by the petitioner's court-appointed attorney in the Court of Criminal Appeals.

The only difference between an assault to rape or an assault to murder or aggravated assault and rape is the act of intercourse. The punishment for any man who assaults any woman in the State of Texas cannot exceed 25 years, unless he accomplishes the act of rape, in which case the punishment goes from 25 years to death.

We feel that this is certainly an inconsistency within the legislative penological system in Texas, which ought to be considered in determining whether or not the use of the death

penalty for rape, coupled with the, what I consider to be, light punishment in assault cases of similar nature, is unusual because of this distinction.

In the State of Texas there is another consideration that sheds light, and at this point I might say that it perhaps was improperly briefed as my fifth point. I think that the mention of the facts under that fifth point have bearing as an issue to be decided here, not whether or not Article 1.14, authorizing the prosecutor to seek or waive the death penalty, is unconstitutional. Clearly that was not raised below.

However, the grant of legislative authority to all prosecutors in Texas, which enables them to select who will be candidates for the death penalty and who will not be candidates, obtains as a forceful argument in this case in support of this petitioner's point.

I think the argument made by the District Attorney in this case points out this; he told the gentlemen of the jury, he said:

"The responsibility lies with me and solely with me for you being qualified on the death penalty. The State allows me, the law allows me, as State's Attorney, to waive the death penalty, but it also directs me in a case I am going to insist on the death penalty, that I give written notice to the Defendant. . . . I don't know how much confidence you folks have in me as your District Attorney, but I'm telling you

gentlemen that had I not thought that this case justified the supreme penalty, I would have waived the death penalty."

Q Mr. Bruder, isn't that a provision that is common to a number of other States besides Texas?

MR. BRUDER: Frankly, Your Honor, I don't know. I've seen some statutes which do not have it, and I have not investigated all of the statutes; because a lot of them, of course, were not tied in to rape statutes, and I was just unable to get all of them.

If it -- I would say that if it is common to all the other States, then it would have to suffer the same defect in other States as it does in Texas, that the grant of this authority to the District Attorney to, in effect, change the range of punishment, depending upon any number of factors which he alone controlled, such as the race of the defendant, the facts of the case.

Q How would you distinguish that in the situation where the prosecutor decides to prosecute for a lesser rather than a greater offense?

MR. BRUDER: Because in a -- when the prosecutor makes a decision, he could make a decision based on facts that are available to him, whether or not he thinks he can prove up his case, whether or not he thinks he can get a conviction for burglary as opposed to breaking and entering private property, or something like this.

The difference, the main difference is that the Legislature has assigned a range of punishment to this crime, that that range of punishment is really very nebulous until the defendant knows with certainty whether or not the prosecutor is going to seek the death penalty.

The prosecutor, instead of choosing the offense based on the law and based on the facts of the case, is changing the range of punishment.

Q Under the laws of Texas, how binding is that decision of the prosecutor on either the judge or the jury?

MR. BRUDER: Once the judge -- well, once the State has decided not to seek the death penalty, the death penalty cannot be given.

Q Once he decides to go for the death penalty, how binding is that?

MR. BRUDER: Well, he certainly can waive his right to go for it by asking for something less, or by withdrawing his notice prior to trial. But the point is that unless he asks for the death penalty, as prescribed by statute, it cannot be given by the jury.

Q And that hurts the defendant?

MR. BRUDER: I think it does, Your Honor, because -- perhaps if he doesn't have this authority, a jury is not going to be told what this prosecutor told this jury.

Mr. Renfro is an elected public official, and he's

elected by those people on the jury. He's telling them that, "It's my decision, the Legislature has given this decision to me, and I have decided, to the exclusion of all the other cases, this is the one that I want you to" --

Q Well, assume that he was wrong in saying it. How does that reach the issue in this case?

MR. BRUDER: I don't think we can assume -- if we assume he was wrong in saying it, we would have a jury that didn't believe him, and we wouldn't have a death-penalty case.

I mean, he is right in saying that the Legislature does give him the authority. Because the District Attorneys in Texas have the absolute authority to seek a waiver against the --

Q Well, I guess you would say that some jurors may say, "If the prosecutor prosecutes the case, the man's guilty", but that's not what we've got, this is not the issue we've got before us. Their faith in the prosecuting attorney, I don't see what's so great about it.

MR. BRUDER: I don't think it's a question of their faith, it's a question of whether or not the prosecutor ought to have the right to change the range of punishment for any reason that he desires.

Q Well, I don't -- do you know of any State that prohibits the prosecutor from either -- from making -- the prosecutor from making the charge of whether to go for the

death penalty or not?

Do you know of any State?

MR. BRUDER: Well, Your Honor, the State of Texas, if one is charged with burning of the State Capitol, there is a mandatory death penalty. So --

Q Well, do you know of any State in which there is not a mandatory death penalty, which doesn't give the prosecutor the right to either go for the death penalty or not?

MR. BRUDER: If I understand the question correctly, my answer would be that I don't know of any State that does not give the prosecutor the choice.

Q So any prosecutor in the country can make this same statement?

And, if so, what's so different about Texas?

MR. BRUDER: Because in some other State, where the prosecutor does not have a requirement imposed to file the notice, the jury could override the prosecutor's will and still assess the death penalty.

Q They couldn't do that in Texas?

MR. BRUDER: In Texas, the jury cannot; once the prosecutor has given notice not to seek the death penalty, the jury may not assess the death penalty. If they do it is a void judgment.

Q It's what?

MR. BRUDER: It's a void judgment. And the Court of

Criminal Appeals would either remand it or reverse it.

Q But if the prosecutor seeks the death penalty, the jury is perfectly free not to return a death penalty, isn't it?

MR. BRUDER: That's correct. That's correct. The full range of punishment then applies.

We have briefed in the brief the point that this can be used against identifiable racial minorities by the prosecutor, and I think it is a valid consideration in support of the fact that identifiable racial minorities in Texas do receive the death penalty.

The fact that perhaps whites and Chicanos do not get the death penalty as frequently as blacks is due, in large part, to the fact that the prosecutor simply doesn't ask for it. Even waives it, thinking that he can't get it or just not wanting to get it for any number of good reasons.

I don't think that the issue of capital punishment in a rape case such as this need hang on all the arguments made for abolition of capital punishment in any case. I think the opinion in Ralph v. Warden clearly points out that the infrequency of its use, the infrequency of its availability across this nation, indicates that it is not a fit punishment; and I think that the arguments which would be urged in support of the equal protection argument or due process argument would obtain in an argument to show that it was unusual.

As far as the question of whether or not unusual should be defined by new or old standards, I would cite the Court to the case, Mr. Justice White's dissent in Weems, which the third objective of unusual, definition of unusual that he laid down was: Operation, the unusual prohibition operates to restrain any lawmaking power from endowing the judiciary with the right to exert an illegal discretion as to the kind and extent of punishment to be inflicted.

Now, that has to be measured in contemporary terms by contemporary standards, not by standards of two centuries ago. Otherwise the word "unusual" has no meaning because it is fixed by what occurred back in the 1700's.

If you please, I would like to reserve the remainder of my argument for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wright.

ORAL ARGUMENT OF CHARLES ALAN WRIGHT, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. WRIGHT: Mr. Chief Justice, and may it please the Court:

I will endeavor not to repeat arguments that have been presented in the three cases that have preceded, and limit myself to those points that haven't been raised and I, perhaps, may be helpful to the Court.

My own analysis of the case begins with the question

the Chief Justice put to Mr. Amsterdam in the argument of the Furman case, and to which I say with respect I do not think there was a complete answer.

The Chief Justice pointed out that many of the jurisdictions that Mr. Amsterdam and those associated with him regard as abolitionist jurisdictions have in fact not abolished capital punishment entirely. They have preserved that extreme penalty for somewhat unusual cases: the murder of a policeman or a correctionman or official, or a murder committed by a person already serving a life sentence, or, in English and Canadian versions we find dockyard arson, or piracy with violence.

It seems to me that this is extremely important. Because if one accepts that there is any case, any crime for which death is an appropriate punishment, then I think most of the force of the argument Professor Amsterdam has made vanishes. If we were to say, for example, as Congress said only seven years ago, that the assassination of a President is a crime so heinous that only the death penalty is meat for it.

Then I cannot see how it can be argued that the penalty is unconstitutional merely because it is a penalty that may not be inflicted in a great many cases, because it is somewhat rare, as has been suggested to us today.

I would find it very difficult to understand how this Court, as a constitutional matter, could draw these kinds of

shadings and distinctions that England and Canada and New York and some other jurisdictions have done. I do not see how you could write an opinion and say, We are persuaded that capital punishment is in general cruel and unusual, but this does not disable the legislature from taking care of Presidential assassins or bombers of 747's or other very unusual people of that kind.

It seems to me that the Constitution necessarily paints with a much broader brush than a legislature can do, and the Court has to respect these broad differentiations.

But if then we can say that the Presidential assassin constitutionally can be executed, it seems to me that we have established that death is, in itself, not inherently cruel.

Now, there's much more than that in my reading of the Eighth Amendment. The analysis that I've suggested in the brief is that the Eighth Amendment bars those things that are inherently cruel and perhaps also those things that are cruelly excessive. And I think of course one -- there would still be ample room to say that the death penalty for some particular crime may be cruelly excessive, even though we have held it is not inherently cruel, and said there are some things to which you can apply it.

But I do think that we have progressed part-way toward decision, if we can recognize that the death penalty is

not at all times for all crimes a constitutionally impermissible punishment, because --

Q Couldn't that argument be directed in the other direction, Mr. Wright, as well? Here we have generalized statutes, in this case involving rape. You say it's been established, and that's the statute that's before us in this particular case.

MR. WRIGHT: Correct.

Q We don't have a statute before us involving the penalty that Congress may have imposed for assassination of a President of the United States. And it might be that the death sentence for a highly particularized crime such as that might be constitutional, but that this legislation now before us might not be; wouldn't they?

MR. WRIGHT: I would submit, in response to that, Justice Stewart, that perhaps such a position can be made, such an argument can be presented; but that at least is not the argument that I have understood the petitioners in this case to be making.

Mr. Amsterdam, in the two murder cases, says that a death is unconstitutional for any civilian peacetime crime; and of course a more limited, specialized view was taken of rape, to which I will come in a moment, by Mr. Greenberg and Mr. Bruder. Now, I cannot, myself, see the constitutional argument that would say that murderers generally cannot be

punished by death and maybe we will find some that constitutionally can.

That involves reading a sort of fine print in the Constitution that I cannot detect there.

Q Well, certainly, as you are beginning to suggest in your argument, the -- even if one accepts, as you just said, that the death sentence, per se, is not a violation of the Eighth Amendment, it doesn't follow that the death sentence can be imposed under the Eighth Amendment for anything within the State Legislature's whims, such as petty larcey, does it?

MR. WRIGHT: That I think is very clear, yes, sir.

But that if we have established that the death penalty sometimes is constitutional, it is still open to my friends to challenge any particular application of it to a class of crime, by saying that you cannot do. I am willing to read Weems with all the problems it presents as introducing a principle of proportionality, and like I would say, if it's petty larcency it would shock the conscience of the community were we today to execute a person who picks a pocket, whatever may have been our English tradition 300 years ago.

Because, in my analysis, the meaning of cruel and unusual is not very likely to be found in the dictionary. I don't get a great deal of help in parsing the words. I find that even the history of the words here is less helpful than it is in most questions of constitutional construction. It is

clear that they were taken verbatim from the English Declaration of Rights a century before. There was some scholarly thought that the American draftsmen didn't understand what the English meant by them.

The concept that the Eighth Amendment seems to me to express, as the Chief Justice said in his plurality opinion in Trop, is that we aren't going to allow inhuman treatment. And I would say that the kinds of things we won't allow are those that the common conscience of America rejects.

My own guess is that even if the Eighth Amendment had never been adopted, that this Court would not uphold a sentence that a man be boiled in oil. I think that under the due process clause it would be impossible to say that that's taking his life away without due process of law. And I think that, just as due process has always been a very difficult concept to interpret, so cruel and unusual is going to be.

It is not easy for nine of you sitting on that side of the bench to decide what it is that the common conscience of America regards as meat, and what it regards as improper.

I do not think that this is, as my brother Amsterdam suggests, to say that this is a subjective determination. It would be subjective if the Justices were free to say: I think death or any other penalty is bad, therefore it is unconstitutional.

But that is not at all the same question as asking

yourself to ascertain, as best you can, what it is that the conscience of the whole country permits rather than relying on your own individual judgment.

I think that if you do ask what I visualize is the proper question, that the answer has to be that whatever the future may hold, that capital punishment today is tolerated, accepted by the conscience of America. This is shown not only by the statutes on the books, by the votes of jurors, by votes in referendums, by polls, by the very fact that we have so much debate about it. With all the fervor that the crusade has been waged with to abolish capital punishment, there have still been those who insist, "no, at this time in society we need this, we think it's a superior deterrent."

Though we recognize we can't prove that statistically, we think that it does provide a sense of expressing the community's moral outrage, that it helps make a more peaceful society than if the community has to take the law in its own hands.

It is difficult for me to understand, but merely because we do not execute a great many people every week, that this in some way shows that America has now rejected capital punishment. I would think that it would be cause for rejoicing that we've become increasingly selective about imposing the ultimate and most severe penalty.

Q Mr. Wright, what if it were shown that only one

in a hundred rapists were put to death out of a hundred cases, approximately -- presenting approximately the same facts; would that make any difference in your argument?

MR. WRIGHT: It would not trouble me, Justice White, under the cruel and unusual clause, it would trouble me immensely under the due process clause.

Q Well, --

MR. WRIGHT: It seems to me it's McGautha all over again.

Q I know, but you say we should rejoice that we've become increasingly selective. In my example there wouldn't be any selectivity there, there would just be you might arguably say the State is executing only enough people to make the death penalty a credible threat.

But you say that wouldn't present any question for you under the cruel and unusual clause?

MR. WRIGHT: No, sir; not under cruel and unusual. It would under due process, it would under equal protection. It would seem to me arbitrary if 100 similarly circumstanced defendants are convicted, 99 of them go to prison and then one is selected by law for process under the death penalty and is executed.

Q Other than you -- your argument on this phase of it would be, then, that no matter how rare the imposition is, that the cruel and unusual punishment provision is not

implicated?

MR. WRIGHT: Unless it came to the point that you put hypothetically, that we could satisfy ourselves that the people simply would not tolerate imposition of the punishment more widely, that they would be, as my friends argue, revolted if we executed even a reasonable proportion of all rapists and murderers.

Q So your argument is that at some point rarity would be relevant, but that that point hasn't been reached yet?

MR. WRIGHT: I would rather phrase it this way: that I do not know how we can ascertain whether or not we have reached that point. I do not know how we can say --

Q But is not discrimination implicit in the conception as one of the ingredients in the unusual?

MR. WRIGHT: I think it certainly is one of the ingredients, Justice Douglas.

Q Unless discrimination is the way of life for a State.

MR. WRIGHT: I would submit that it is not the only ingredients.

Q No, no. But if what Justice White says, there is 100 prosecutions, one death sentence, aren't you approaching a situation where you may have a case of unusual punishment?

MR. WRIGHT: For myself, sir, I would still prefer not to rest that on the Eighth Amendment. It seems to me that

there are so clear constitutional barriers to that elsewhere.

Q Well, I thought you said that it could be so rare that it would trigger the application of the Eighth Amendment.

Q Yes. Mrs. Beasley, arguing for Georgia, I think conceded that that discrimination is implicit in the Eighth Amendment.

MR. WRIGHT: And I -- I thought what I said, Justice Douglas, that I agree that it is one of the elements in the Eighth Amendment concept of unusualness.

Q Well, what about the situation, then, on the figures that we do have? You say you don't know how to arrive at the --

MR. WRIGHT: On the over-all figures of numbers of executions, I certainly do not. The racial aspect poses a separate problem --

Q Yes, --

MR. WRIGHT: -- that I would like to come to in a moment.

Q -- on that, put it aside for the moment.

MR. WRIGHT: In the first place, I cannot use the figures for the last ten years. It seems to me there have been too many intervening events that make those figures unreliable. I say you would have to go back to a year such as 1962 or earlier in order to have the figures that are at all meaningful.

Q Well, let's assume the figures from '62 on were valid; what would you say about those? And were acceptable.

MR. WRIGHT: They would show increasingly infrequent use of capital punishment. Whether they would show, as Professor Amsterdam argues, that we use it that infrequently because people would be revolted if we used it more frequently, I cannot say. It seems to me that that aspect of his argument is assertion.

Q Don't we have to say, or not?

Is our only way of avoiding answering that question to say the figures are invalid?

MR. WRIGHT: No. It seems to me, as several of my associates have suggested, that the burden is on those who are challenging the constitutionality of State legislation to establish that it violates the Constitution. They need to demonstrate that the common conscience won't accept this.

Q Well, they tender the figures for the years since '62, and say that imposition of the death sentence is so rare that the community is revolted by it, and it must be considered to have rejected it.

MR. WRIGHT: Yes, that's what they say.

Q Now, let's assume the figures are valid, that we can rely on them. What would you say to that?

MR. WRIGHT: Well, I still don't see how the figures establish the second part. They don't establish what the cause

is, Justice White.

Q So, you -- I gather, then, that rarity then just isn't enough to invoke the Eighth Amendment.

MR. WRIGHT: Rarity is, as I've suggested, is, I think, one element of the Eighth Amendment problem, but it is not the only element. We need more, we need to know more than we do know.

Q But that's just another way of saying, on your part, isn't it, that the term "unusual" in the Eighth Amendment does not mean, or at least is not fully synonymous with "infrequent"?

MR. WRIGHT: That is precisely my submission, Mr. Chief Justice.

Q There are other elements, the quality of the punishment as well as the frequency, that go into it.

MR. WRIGHT: My guess is that this Court would have found the Codina Temporal to be cruel and unusual punishment no matter how frequently it was imposed in the Philippines. That it was the quality, the nature of the punishment that was so shocking to a court that had grown up used to other concepts of punishment.

Q Is that the garroting type of --

MR. WRIGHT: No, it's the punishment that was involved in Weems v. United States, in which it simply imposes a number of disabilities on a person; in essence, it was not physically

cruel to him.

Q But let's take the garroting, there'd be a physical aspect that's used in some places, would you say that is the kind of unusualness to which the Constitution is addressed?

MR. WRIGHT: I would say it certainly is, yes, sir.

And I freely concede, and I want to be sure I don't miss this point, that we do have changing concepts here, that what is cruel and unusual is not a static concept; that if, for example, tomorrow someone were to invent a way of executing condemned people that was far superior to the methods now used in the United States, so far superior that it bore no comparison, I think it might be said that it is cruel to continue to use the electric chair, if you now have this marvelous new invention available.

But the Constitution -- though the Constitution itself does not change, it responds to changing circumstances, and has to be applied in particular contexts.

I would like to turn, if I may, to the racial aspect of these cases, particularly as they apply in the rape cases. The figures are undoubtedly very troubling. The figures from Georgia, I think, are perhaps better than those from the State of Texas -- I mean those from Texas are better than those from Georgia. But still anyone reading the bare statistics that of 97 persons executed for rape in Texas, 80 have been Negro, is

going to be considerably worried that racial prejudice has played its part.

And I think it would be disingenuous to deny that over the 47-year period covered by those figures probably it did. So that we pointed out in our brief that until 1954 miscegenation was a crime in Texas, and undoubtedly an interracial rape was thought to be a particularly traumatic event, a particularly grave disturbance of the peace of the State and therefore likely to be punished more severely.

The figures are small. The total number of cases of this kind is sufficiently small, whether we look only to the rapes or even to the murders, as Mr. Amsterdam concedes in his brief, that it is very difficult to form any firm statistical conclusion from them. This at least has been the view of both the Fourth Circuit and the Eighth Circuit.

You cannot be more than suspicious in the figures. There is, I think, an explanation, one may not be happy to make but that history requires that we make, about the incidence of the death penalty at an earlier time in my State, with the customs that it at one time had.

And I think that finally it would belittle what to me is the very important principle that race is utterly irrelevant in sentencing convicted persons. If we were to bring that principle in today in rape cases, under the Eighth Amendment, and say, yes, we think that race has been impermissibly used

in Texas and Georgia in the past, therefore we are going to outlaw the death penalty for rape cases.

To the extent that there is prejudice among those who impose sentence, whether it be jurors who sentence or judges who sentence or prosecutors who make the initial choice of going for the death penalty or not, or going for any other crime; to the extent that there is prejudice, that prejudice is going to appear not only in cases in which death is the sentence but within which other sentences are given.

Professor Bullock's study, cited in our brief, of the persons who were given prison sentences, shows that that is so. But among those given prison sentences for rape there are figures that make us wonder if race was impermissibly taken into account by Texas jurors in years past.

It seems to me that we honor the principle on which I suggest all of us would agree much better if we regard these as being,as they really are, equal protection arguments. It is a denial of equal protection of the laws if a man, because of his color, suffers a different punishment than someone else of a different color. It's a very grievous violation of the Constitution, but I think that that's where we ought to face it squarely, rather than --

Q How can you face it squarely in any individual case under the equal protection clause?

MR. WRIGHT: I suggest, Justice Stewart, that you can

do what, as Mr. Greenberg has told us, has been done in schools and other things where equal protection arguments are made, you bring forth statistics, you make your prima facie showing, and then you say to the State: Can you justify?

Q Well -- but this will arise in the context of an individual prosecution, an individual conviction, and an individual sentence of death. And how, possibly, can you show -- given the secrecy of the trial jury's deliberation, how, possibly, can you show it a denial of equal protection, merely by showing that a disproportionate number of Negroes has had the death sentence imposed upon them in the past? That has nothing to do with this case, does it? I mean with my hypothetical case.

MR. WRIGHT: Well, I think it would certainly have something to do with an objection on this ground, just as the fact that a particular jury is all white may be challenged, and we may go back into past history and show what historical practices have been in order to establish a pattern of discrimination.

Q But I still don't understand your answer in my hypothetical case. How would it -- how would it begin to show a deprivation of equal protection in an individual case, to merely show that in the past more Negroes than white people have been given the death penalty in rape cases?

MR. WRIGHT: It might lead one to conclude that we ought not allow the present practices that we have for sentences.

Q Then what would the result be? To set aside that conviction and say, henceforth no Negroes can be sentenced to death, but white people can be?

MR. WRIGHT: No. No, of course it would not be that.

Q Well, what -- I mean, how could you get at it under the equal protection clause?

MR. WRIGHT: I think you might have to reexamine your decisions of last term in McGautha and Crampton, McGautha? particularly. I think you might have to see if jury sentencing is a permissible method or whether jury sentencing is not so suspect because of the likelihood that bias will play a part that you have to take this power away from juries; but the Court having decided so recently and so decisively that jury sentencing is proper, that the jury does express the conscience of the community, I would think you'd need quite a powerful showing to change the Court's mind.

Q Well, Professor, you indicate that it would be quite proper, under your view of the Eighth Amendment at least, you say you accept some prior cases suggesting the proportionality of principles.

MR. WRIGHT: Unh-hunh.

Q So, I take it, that it's a legitimate question presented to this Court as to whether, for example, rape where there's been no bodily harm other than the rape is justifi- -- is cause for the death penalty?

MR. WRIGHT: That is certainly a legitimate question, yes.

Q Perfectly straightforward --

MR. WRIGHT: Absolutely. That seems to me to be properly what the parties are here.

Q That's what this case is all about?

MR. WRIGHT: Yes. That's what this case is all about.

Q What's your argument about rape as distinguished from other crimes?

MR. WRIGHT: My argument, first, is that one can -- or a State Legislature reasonably can say that there are some rapes sufficiently serious that, for purposes of retribution and deterrence, the State ought be allowed to provide the death penalty. That it would be doctrine there in the extreme to say that no rape is so bad.

We can take a variant of the case that Justice Marshall put to counsel in the case preceding me: Suppose we have the rape victim who is traumatized for life, really a cripple psychologically, as a result of this experience. That the legislature would not be acting irrationally or improperly to say that for this kind of a very serious case, death is an appropriate penalty.

If that is so, then the question becomes: Can one constitutionally draw a line to separate some rapes from others? I think that every one of us would be horrified if every rapist

were given the death penalty, because some rapes, as Justice Stewart suggested earlier, are not aggravated affairs in any sense.

This is what the Fourth Circuit has undertaken in Ralph v. Warden. I think that the position taken there by the majority, speaking through Judge Butzner, that you can impose death only for rapes in which life has been endangered is a wholly unworkable position; that life is endangered in substantially any rape. And that this would become a question of very arbitrary proof.

We developed that line in our brief. I will try not to repeat what we said there.

Clearly there is more force to the position taken by Chief Judge Haynsworth in the Fourth Circuit, that you can impose death for rapes only if serious physical or psychological harm has resulted. This is at least a more objective test.

My difficulties with it are two: First, I think that in the present imperfections of knowledge that it is very difficult to say with confidence whether or not serious psychological harm has resulted; second, I cannot think that the Constitution permits drawing of lines that refined.

Q Professor Wright, under Texas practice, is the evidence as to the element of damage to the prosecutrix ordinarily introduced in evidence in a rape prosecution? Is that a necessary element of the crime?

MR. WRIGHT: I think not, Justice Rehnquist. That is why there was no record of it here, that it's the fact that the rape occurred and how it occurred that was enough to establish a complete case under Texas law, and therefore it never occurred to anyone to put on evidence one way or the other whether or not Mrs. Stowe suffered any harm.

Q Mr. Wright, in a prior term, I think two years ago, and earlier in this term we've had arguments about jury problems, and the arguments in those cases all tended to emphasize, or a great many of them did, that the jury is the barrier between the individual citizen defendant and the harshness of the law, considered to be much safer than having a judge do it alone.

Now, in this case we seem to be having arguments that the jury fixing the penalty, and I think you almost subscribe to that, a jury fixing the penalty may be a dangerous thing for a defendant.

MR. WRIGHT: I would be hard-put, Mr. Chief Justice, to form a judgment on whether, over-all, it's a good thing or a bad thing for a criminal defendant to have a jury trial. I take it that the Sixth Amendment is simply, for the present, to at least resolve the question that he ought to have one if he wants one.

I do think that there is a possibility of prejudice, not only on racial grounds, on other grounds when you have a

jury setting the sentence, and that perhaps judges can be better disciplined and less likely to do that; but I note the pressures now for appellate review of sentences in the federal system, where we do not use jury sentencing; so that I guess that even judges are hardly acting scientifically on the sentencing.

Q Well, Professor, didn't jury sentencing arise out of some desire to mitigate the harshness of criminal penalties?

MR. WRIGHT: I'm sure that that's the origin of it, Justice White, yes, sir.

Q And, historically, hasn't it been -- or would you say it's been successful in that regard, or not?

MR. WRIGHT: I would say that it was successful. Whether we need jury sentencing today to achieve that purpose, given our advances and other marginal matters, I don't know.

Q But in the -- specifically in the context of the death penalty, that has been the result?

MR. WRIGHT: Oh, yes. Yes.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wright.

Mr. Bruder, do you have anything further?

MR. BRUDER: Yes, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: All right.

REBUTTAL ARGUMENT OF MELVYN CARSON BRUDER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BRUDER: A few anwers. Mr. Justice Rehnquist asked about the evidence with respect to the harm done to the prosecutrix in a rape case.

It has consistently been held admissible by the Court of Criminal Appeals as part of the res gestae. I believe the record in this case shows that Mrs. Stowe, the complaining witness, went to the home of her son, took a bath, and never even sought the aid of a doctor.

Consequently, I would assume from that that there was no medical testimony available, had the State decided to put some on.

The answer is they could have put some on.

Q It's your position that they could have. I take it they weren't required to in order to prove any essential element of the crime?

MR. BRUDER: No, the Court of Criminal Appeals has consistently held that the prosecutrix's testimony as to penetration and so forth is sufficient and need not be corroborated.

In answer to the other question about the frequency of application of Article 1.14. It is the precise application of Article 1.14 is unusual and is not common outside of the State of Texas.

There are two points that Professor Wright has made that I think bear some searching.

First of all, he says Professor Amsterdam's argument that society is now repulsed by the use of the death penalty is refuted because the majority of the States have the death penalty, ergo, the death penalty is acceptable to the majority of Americans.

However, no argument is advanced in support of the proposition that a minority of the States have the death penalty for rape only, ergo, it is unusual.

I think the fact that the minority of States have retained the death penalty for rape only leads to the conclusion drawn by the majority in Ralph v. Warden.

The other point that is made by the brief and not made quote so strongly is the fact that retribution is recognized by the State of Texas as a very important part of punishment.

I would think that it would be extremely hard to justify retribution, where the purpose of retribution is pure vengeance. If you haven't got a life taken, how do you justify the taking of life? Are you doing something greater, punishing greater than the crime itself?

This is where the proportionality or Weems comes into play, and this is where, I believe, this Court has the right to determine proportionality of punishment and to draw

lines with respect to rape, and to work out standards. And if standards cannot be worked out, then, in any event, to at least send the cases back to the State Legislatures and let them establish standards, such as Nevada did.

Q Then you would argue that capital punishment for treason is cruel and unusual?

MR. BRUDER: Exactly. Or --

Q If no life is taken.

MR. BRUDER: Or armed robbery.

Q Kidnapping?

MR. BRUDER: Anything where there is no real threat --

Q Hijacking?

MR. BRUDER: -- endangering the life of the accused. To me you are taking a life for something less than what has occurred. There is absolutely no reason, based on retribution, in that point; and of course the other purposes of punishment do not apply.

Q Then your answer to my question is in the affirmative?

MR. BRUDER: It would be cruel and unusual; any case except homicide or another capital case where more than simply showing a gun to the victim is proved by the State, I would think that --

Q What about treason that resulted in the cost of 10,000 soldiers?

MR. BRUDER: If that was provable, I would say that the death penalty would not be cruel and unusual. Texas --

Q Well, you can't -- I don't see how you can draw that line, you just say it is if it doesn't involve that person injuring somebody.

MR. BRUDER: Well, it could involve any death or endangering any person. Now, that is not to say that you may not have more than an immediate victim. You may have a victim once or twice removed. In the case of treason, the delivery of secret plans which may cost the life of other men. You would have victims which are -- the fact that they are dead or injured can be shown to be a result of the act.

Q What would you say to an attempt on the President's life?

MR. BRUDER: Unless there are facts I can cite --

Q The facts are that he had a machine gun loaded with .50 caliber bullets, and somebody grabbed him just before he pulled the trigger.

MR. BRUDER: I can see no real distinction between the attempt on the President's life and the attempt on any person's life; and unless there are medical facts in a record showing some sort of injury to the person, I can see no reason for the taking of life.

The taking of life, in my opinion, and I think in the opinion of the majority in the Ralph case, must necessarily

depend upon the harm which is done. The punishment must be made to fit the harm done, not exceed it. The taking of life --

Q What do you do with this theory when you get to prison sentences?

MR. BRUDER: I'm sorry, I didn't get that?

Q What if you're not -- in talking about -- in putting capital punishment to one side, how does your theory apply to terms of imprisonment, for example?

MR. BRUDER: I think there was none, because, taking into recognition the advance techniques that we're now aware of that are being used in prison systems, I think sentencing now has become more a function of parole boards and experienced people in the penitentiary system.

Q My question, Mr. Bruder is this: you suggest that, at least arguendo, at least as a secondary argument in this particular case, that whatever may be the constitutionality of imposing the death sentence for deliberate, premeditated murder, it cannot be imposed for rape, or indeed for any other offense unless a human life has been taken. That's your argument, isn't it?

MR. BRUDER: Or endanger to such a degree that medical attention was necessary to save the life.

Q Then I just wondered where that theory got you with respect to something like assault and battery. What's the constitutional outer limit for the punishment for that?

Under the Eighth Amendment.

MR. BRUDER: Under the Eighth Amendment, I see no limitation as far as what the legislature of the States may do. Because --

Q It's not an important question, really.

MR. BRUDER: The main thing is the taking of the life. That's the thing that distinguishes the rape case from the murder case, and the rape case from anything. You're taking the life without demonstrable evidence that the taking of life was necessary and flows from the act; it is unusual, and that may make it cruel as well.

Q Mr. Bruder, I want to be sure I get your distinction. You said no death penalty for rape unless there is substantial medical evidence.

MR. BRUDER: I did not -- not necessarily substantial. Medical evidence, showing that some harm had occurred.

Q Some harm had occurred?

MR. BRUDER: Some harm had occurred. Some physical harm, and that perhaps, but for medical attention, there would have been problems. How serious the problems may be is, I don't think -- it may not even be a question to this Court, it may really be a question for the legislatures.

Q Now you say some physical harm, you're not excluding mental breakdown?

MR. BRUDER: I'm sorry, I shouldn't have excluded it,

no. If there is testimony of some disorder of the mind as a result of it, I think that would also be a very important factor in whether or not the death penalty was permissible.

Q And you're not drawing any distinction between the degree of harm? It could be slight, as long as it is some harm. I just want to know where you draw the line.

MR. BRUDER: Well, I would disagree -- I would draw a line at some point. The harm would have to be of such a nature that it might lead to incapacity or even death.

For instance, in the Branch case, the mere pressing of the arm across the throat, which did not necessitate medical attention, I don't see how that could possibly be serious harm, such as to justify the taking of a life. Because, as I said originally, in Texas a man could beat a woman to the brink of death and still only get 25 years if she recovered, under our assault statutes.

But if he beat her to the brink of death and raped her, perhaps he could get life. It would be inconsistent, and thus it might be a question for the Texas Legislature to resolve, because of the internal inconsistencies.

But I think the necessity for drawing that line is clear under the cruel and unusual prohibition of the Eighth Amendment, and that the least this Court should do in this case, in any event, is to remand the case so that this line can be drawn, much as in the Nevada case; and much as has been

proposed by the model draft in Texas, which has not been enacted.

Q Mr. Bruder, under your theory of the Eighth Amendment, would a court martial be constitutionally entitled to impose the death penalty upon a member of the military for desertion in the face of the enemy?

MR. BRUDER: Well, there are two interesting problems. First of all, you're dealing with a non-civilian and probably a non-peacetime crime. And the second problem is obviously how do you show whether or not that act contributed to death or injury to somebody else?

I would think if there is any probative evidence showing the contribution to injury or death, the answer would be yes.

Q But if not, no?

MR. BRUDER: If not, by using these standards, if these standards apply to civilian peacetime crimes and wartime military crimes, the answer would be that it would be cruel and unusual.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bruder.

Thank you, Mr. Wright.

The case is submitted.

[Whereupon, at 2:53 o'clock, p.m., the case was submitted.]