In the

Supreme Court of the United States

JESSE THURMAN FOWLER,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

No. 73-7031

Washington, D. C.
April 21, 1975

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Monday, April 21, 1975.

The above-entitled matter came on for argument at 1:01 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:

ANTHONY G. AMSTERDAM, ESQ., Stanford University Law School, Stanford, California 94305; on behalf of the Petitioner.

JEAN A. BENOY, ESQ., Deputy Attorney General of North Carolina, North Carolina Department of Justice, P. O. Box 629, Raleigh, North Carolina 27602; on behalf of the Respondent.

ROBERT H. BORK, ESQ., Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

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'll hear arguments next in 73-7031, Fowler against North Carolina.

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.

May it please the Court:

This case presents the single question, whether the death sentence imposed upon petitioner, Jesse Fowler, under the laws of North Carolina, constitutes a cruel and unusual punishment under the Eighth and Fourteenth Amendments.

Mr. Fowler is one of 47 persons presently on death row in North Carolina who have been condemned to die as a result of the 1973 decision of the North Carolina Supreme Court, in State vs. Waddell.

The Waddell case was a response to this Court's decision in Furman vs. Georgia, and in Waddell the North Carolina Supreme Court prospectively severed and struck down the so-called mercy proviso of North Carolina statutory law, thereby leaving an automatic death penalty in effect in the State of North Carolina for four crimes: first-degree murder; rape; first-degree burglary; and arson.

Mr. Fowler has been condemned to die for first-degree murder in a prosecution predicated upon a theory of premedita-

tion and deliberation.

Our Eighth Amendment contention in this Court has two aspects.

First, we believe that the arbitrary selectivity permitted and encouraged by North Carolina procedures and substantive law for the trial of capital cases involves the same sort of latitude for prosecutorial enduring imposition of the death penalty, the most extreme penalty known to the law, that this Court condemned in Furman.

It is true that the procedures under which the selected decisions are made are different, but the decision to advert or to impose the death penalty is no less arbitrary.

Secondly, we contend that judged under proper Eighth Amendment standards, the death penalty for any civilian peacetime crime is now inconsistent with the evolving standards of decency that this Court has said are the measure of a cruel and unusual punishment under the Eighth Amendment.

Those two contentions are related, because the same arbitrary selectivity, which enables a rare and wanton imposition of the death penalty and brings the case within Furman, also explains why it is possible for a penalty to persist legislatively, even though its regular and even-handed application to more than a scant handful of randomly chosen persons would affront contemporary standards of

decency.

However, the two aspects of the argument are divisible, and I would like to take them separately, proceeding first to our argument based directly on Furman.

In order to understand the nature of the North Carolina procedures which we challenge, I think it's useful to review briefly North Carolina law in both its substantive and its procedural aspects, and I think it may be useful to the Court, and I shall try to point to the places where North Carolina law is different, if it is, from the law applicable to capital trials in other jurisdictions.

I'd like to discuss North Carolina law under three basic headings, I think all are relevant.

First, the breadth of offenses for which the death penalty is authorized.

Secondly, the vague,subjective, intuitive, moralistic, judgmental character of the distinctions, drawn between capital offenses and non-capital offenses which allow juries virtually total freedom to convict on a capital or non-capital offense.

And, finally, the procedures under North Carolina law, which permit the selective determination to be made of who will live and who will die, using nothing more or less than the vague substantive standards that North Carolina law provides.

Now, first, with regard to the breadth of offenses.

In addition to the death penalty for rape, first-degree burglary, and arson, North Carolina law, under Waddell, provides the death penalty for the crime of first-degree murder.

The crime of first-degree murder in North Carolina is rather broad. It can be made out by felony murder -- unlike many other jurisdictions, there are not, in North Carolina, an exhaustive list of enumerated felonies upon which felony murder can be predicated; any felony inherently dangerous to life will support a first-degree murder conviction under a felony murder theory.

And, in addition to that, first-degree murder can be predicated on a number of specified means not involved in this case, such as poison, torture, that sort of thing; and also premeditation deliberation.

Premeditation deliberation is very broad, as it has been construed by North Carolina courts. No appreciable amount of prior thought, contemplation or reflection is required. Premeditation may be inferred from what is sometimes called the excessive force or brutality used in a particular killing; and this, although it is not uncommon in the United States, is also not universal. A number of jurisdictions, for example, will not support a first-degree murder conviction unless there is evidence of either prior

planning activity or motive or what is sometimes called exacting manner; that is, a setting of a snare gun, or seizing of a weapon and carrying it to a situs or something of that sort.

North Carolina law requires none of that. And I think that it is significant that since 1903 the North Carolina Supreme Court has never reversed a jury conviction of first-degree murder for want of evidence of premeditation deliberation. And if you look at the various cases which have been decided by North Carolina juries, in which verdicts have been returned for first-degree murder or second-degree murder or manslaughter, you will find that they are not in any conceivable way rationally distinguishable. They simply fit no pattern. The jury goes in there and comes back -- if you look at Appendix C to our brief -- with verdicts for first-degree murder or second-degree murder or manslaughter.

And on the facts of any case which will support a second-degree murder conviction, the North Carolina Supreme Court will affirm a first-degree murder conviction.

There are four cases, actually two are alternative grounds, in the entire history of North Carolina in which the North Carolina Supreme Court has found evidence of premeditation deliberation lacking. They were decided immediately after the enactment of the 1893 statute that divided murder into degrees. And since that time there has been a significant

evolution of the concept of proof for premeditation deliberation by inference. So what we have, in effect, is that virtually any killing with a gun is one in which the jury has a complete option to find first-degree murder or second-degree murder or manslaughter.

Now, that is somewhat broader, although, as I say, it is no solecism, it is somewhat broader than what first-degree murder is in most jurisdictions.

A second aspect of North Carolina law that is significant is the definition of malice in North Carolina, which is also an element of first-degree murder.

The significant thing here is that malice is said to be presumed by law conferring the burden upon the defendant to negate it, in any case of the use of a deadly weapon; and the burden of proof on the defendant to negate malice is said to be in the satisfaction of the jury, or to the satisfaction of the jury.

Which doesn't mean a preponderance of the evidence, doesn't mean any weight of the evidence, North Carolina judges are absolutely forbidden to charge about evidence at all in that connection; it is simply the satisfaction of the jury.

To give the Court an idea of the kinds of moralistic terms that go to the jury, and on which the jury makes the sorts of decisions that it makes, it may be worthwhile to

advert to the charge in this particular case. And if the Court looks at page 72 in the Appendix, you will see that premeditation and deliberation is defined in a number of ways in the second paragraph there; and it is said that ordinarily premeditation and deliberation is not susceptible of direct proof but may be inferred from circumstances, among others, where the evidence shows that the killing is done in a brutal and ferocious manner.

Similarly, over on page 73, in connection with malice, it is said that -- at the end of the second complete paragraph on the page -- "malice may be general or particular and it may be express or implied. General malice is wickedness, a disposition to do wrong regardless of social duty and fatally bent on mischief."

The next to last paragraph on the page, that "when there is no direct evidence of intent to kill but the fact of the killing is surrounded by such circumstances as to carry a plain indication of some wicked intent of an aggravated nature, then the law in such case implies malice.

Now, again, this is not a solecism under North Carolina law. The Court is doubtless familiar with the old common law formulation that malice is abandoning a malignant heart and that sort of thing; but North Carolina law, with its peculiar burden on the defendant to negative malice to the satisfaction of the jury, those make the determination

of the gravity of the offense an entirely subjective and judgmental matter.

That brings me, then, to how a defendant negatives malice under North Carolina law, and here North Carolina law is really quite unique. What will negative malice under North Carolina law includes provocation and passion, with an elaborate body of finespun moralistic notions.

To give the Court an example of that, in connection with the provocation and passion doctrine, at the top of page 75, in the Court's charge in this case, the court said that an act of killing may be by provocation if it is the result of temporary excitement by which the control of one's reason is disturbed, and then goes on, "not from any wickedness of heart or cruelty or recklessness of disposition or desire for revenge", et cetera.

QUESTION: Where are you reading from?

MR. AMSTERDAM: The top of page 75, Mr. Justice Brennan, of the Appendix --

QUESTION: Yes. I mean which paragraph?

MR. AMSTERDAM: First paragraph. Forgive me. The very top line, "not from any wickedness" is the end of that line.

QUESTION: Yes, I see.

MR. AMSTERDAM: So, in addition to the provocation and passion doctrine, North Carolina law is quite unique in

recognizing a whole variety of other ways in which defendants can get off a murder conviction.

There's the unreasonable fear doctrine. The defendant has no reasonable fear and acts in self-defense; but has an unreasonable fear, then that isn't murder. If a defendant has some basis for action in self-defense but uses excessive force, then that is manslaughter. Ironically, because the North Carolina courts also permit an inference of premeditation and deliberation from grossly excessive force; so that the distinction is between "excessive force", which gives you manslaughter, and "grossly excessive force", which may give you first-degree murder.

Again, all of the various issues that go to malice must be proved, quote, "to the satisfaction of the jury".

In addition, the self-defense doctrine involved in this particular case is also highly moralistic. Terms are used about the defendant being free from fault, as was used in the jury charge in this case, wrong or blame, and that sort of thing.

Now, these substantive rules are very important because when one considers the process through which a capital case goes, a series of decision makers must apply, these kinds of vague, amorphous and judgmental formulations, under which, first, the prosecutor, then the grand jury, then the prosecutor again, then a petit jury must determine whether or not the

defendant, in effect, deserves to die.

And that brings me to the description of that procedure, and again some unique features of North Carolina law.

The charging decision in North Carolina is initially made by a grand jury. The grand jury may indict, for example, for first-degree murder, a capital crime, or for second-degree murder, a non-capital crime.

What is rather unique in North Carolina is the prosecutor's power to waive the death penalty. The prosecutor may simply announce when the case is called to trial that he is not going to try the case for first-degree, that he's going to try it for second-degree; and that -- or, as they say in North Carolina, such lesser offenses as the evidence may show -- and that effectively announced to the criminal the capital degree of the offense, there is no control over that decision by the prosecutor, there is no judicial review of it, it is simply an arbitrary decision by the prosecutor.

QUESTION: But there's nothing unusual about that, is there?

MR. AMSTERDAM: Pardon me?

QUESTION: That's not unique in any way, is it? That prosecutorial discretion is in no way unique to North Carolina, is it?

MR. AMSTERDAM: Well, yes and no. Prosecutors

make initial determinations what to charge in many jurisdictions. It is rather rare, though, that without explanation or leave of court, prosecutor on a first-degree murder indictment can simply walk in and say, "We don't want first-degree".

That is to say, ordinarily, once the indictment has been returned --

QUESTION: Oh, you're talking about post-indictment?

MR. AMSTERDAM: Yes, I am, indeed.

But the initial charging decision is quite common.

QUESTION: Right.

MR. AMSTERDAM: But it is that second step, if you will, in North Carolina that is far more uncommon. Again, no unique, not solecistic; but far less common.

QUESTION: How many -- prosecutors in North Carolina, I think, are called solicitors, are they not?

MR. AMSTERDAM: Yes, they're called solicitors.

QUESTION: And is there one in each county?

MR. AMSTERDAM: Yes, there is. And that's a constitutional office in North Carolina, they are not subject to control by the Attorney General; the Attorney General could not, for example, advise them to conform with any given set of regulations on prosecution or non-prosecution. It is an office which is under no control but its own.

QUESTION: Is it an elective office?

MR. AMSTERDAM: I believe that that is correct.

QUESTION: How many counties in North Carolina?

MR. AMSTERDAM: That I would not know, I'm afraid -- I'm sure that my opposing counsel can inform the Court.

QUESTION: In a North Carolina indictment, do you simply state the crime of first-degree murder, or do you have to state what penalty you may seek?

MR. AMSTERDAM: In North Carolina, the indictment for murder is an open murder indictment. That is to say, the indictment is for murder, and then the prosecutor may -- an indictment which simply says that the defendant did kill and murder. For example, in this case, there's no first-degree allegation as such, it simply says that the defendant did kill and murder X on such-and-such a date.

QUESTION: So the prosecutor at the grand jury stage doesn't have to commit himself, I take it?

MR. AMSTERDAM: The grand jury doesn't have to identify the degree of the offense. However, it apparently may, because if you look at some North Carolina cases you see a description in them that the defendant was indicted for second-degree murder.

Now, I am not sufficiently familiar with North Carolina practice to know whether that is a unique feature that a particular grand jury may just stick in; but I have seen enough North Carolina murder indictments to know that

it is not uncommon to use a general form of a murder indictment, and that, too, is common in many States.

Simply an indictment charging murder, and then the degree is treated as an aggravating circumstance provable at trial, but not --

QUESTION: In that situation, the first time a prosecutor would ever have occasion to elect is when he makes his opening statement, isn't it?

MR. AMSTERDAM: That is unclear. That is to say, it is unclear how much effect the prosecutor himself will have on a grand jury.

QUESTION: No, I don't -- I mean his opening statement to the petit jury.

MR. AMSTERDAM: No, but what I mean is that it is his first opportunity to elect, in the sense that presumably he could ask the grand jury to come back with a second-degree murder indictment if he chose to.

And if it is true that a grand jury may return a second-degree murder indictment, and if, as is not uncommon, a grand jury will do what the prosecutor wishes. Then I assume that the prosecutor can ask the grand jury to come back with second-degree; in which case it would not be his first opportunity after the indictment comes down.

QUESTION: Well, Mr. Amsterdam, may there be a separate form of indictment for manslaughter?

MR. AMSTERDAM: The allegation for manslaughter would indeed be different, because the murder allegation charge is with malice aforethought; and manslaughter indictment would not.

QUESTION: And yet I gather from what you said earlier, under the open form of murder indictment, charging with malice aforethought, the jury, whatever the prosecutor may do, is at liberty to bring in either a second-degree verdict or a manslaughter verdict?

MR. AMSTERDAM: Yes, that is correct. They cannot, however, bring in a first-degree verdict if the prosecutor waives it. If the prosecutor says, when the case is called, "We're not seeking first-degree", then they may not bring in first-degree, but they may bring in either second-degree or they may bring in manslaughter. That's correct.

QUESTION: But manslaughter is included as a traditional lesser-included offense, is it not?

MR. AMSTERDAM: Oh, yes, it certainly is.

QUESTION: They can always return a manslaughter verdict on a murder indictment, can't they?

MR. AMSTERDAM: A voluntary --

QUESTION: They are always free to do that.

MR. AMSTERDAM: Yes. A voluntary manslaughter conviction, or perhaps even involuntary manslaughter in some circumstances could be returned on the ordinary murder indict-

ment, and that is true in most States.

Now, --

QUESTION: Mr. Amsterdam, the indictment in this case does say "with malice aforethought". So this is a first-degree, isn't it?

MR. AMSTERDAM: Well, it is an open murder indictment, that is correct; that is, it will support a first-degree --

QUESTION: Well, "with malice aforethought" can't be anything but first-degree, can it?

MR. AMSTERDAM: Well, yes, it could, indeed.

QUESTION: How?

MR. AMSTERDAM: A killing with malice aforethought is second-degree murder, you have to super-add to that premeditation and deliberation to make it first-degree.

QUESTION: Yes, I know.

QUESTION: But doesn't the indictment also refer to Section 14-17, which is the first-degree murder statute?

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

QUESTION: I say, I'm looking at the indictment, as Justice Marshall was, and it ends up with a citation of G.S. 14-17, which I think is the first-degree murder statute, is it not?

MR. AMSTERDAM: No, 14-17, Mr. Justice Blackmun, if you look in our brief at page 2, covers both first and second-

degree murder. That is to say, it distinguishes the two and sets the penalty for both.

So that it is an appropriate citation for first-degree murder, or it is an appropriate citation for second-degree murder indictment.

But this is exactly the form of open indictment that I was describing, in which a jury can come back with either one.

Now, the prosecutor also has the option, of course, of plea bargaining, and this also is quite common, indeed universal.

What is significant, if you take a look at the record in Wake County, and we have referred to that in our brief, is that during the 15-month period during which the Waddell procedures were in effect, we had at least 17 indictments which could have resulted in capital verdicts, to which lesser-include defense pleas were accepted, resulting in non-capital sentences. And what that means is that during that same period there were three cases that abutted at capital verdicts.

So that if you take only the plea bargaining aspect and you don't take the charging discretion in either the first bite or the second bite, you don't take the jury's discretion, you don't take the -- you're not there yet -- the Governor's discretion; take none of that. You're talking

about 15 percent of the cases where the grand jury concluded that there was probable cause of a capital offense, going through to a conviction for a capital offense.

Finally, of course, there is executive clemency, again a very common institution, procedurally somewhat less controlled in North Carolina than elsewhere by the absence of reporting requirements and other procedures, but perhaps not materially different in that regard.

What is interesting is the extraordinary use of clemency in North Carolina, where virtually two-thirds of persons sentenced to death, over long periods of time in this century, have been commuted.

So that the effect of the gubernatorial discretion, sitting upon the whole discretion of the trial system, is again to avert the actual infliction of the death penalty in a very, very large percentage of the cases.

QUESTION: Do I understand your use of executive clemency, then, is directed toward its use, not its existence?

MR. AMSTERDAM: No, I would say that we're not challenging its use in the sense that an equal protection claim, let us say, might be based on discrimination in the actual application of it. What we are saying is that, if you take a look at the North Carolina procedure as a whole, that you have to appreciate that very little or no difference exists between the North Carolina practice under Waddell and

the practices which this Court struck down in Furman. Executive clemency in North Carolina is so frequently used that when it sits on top of all of the other opportunities in the system to avert a sentence of death, the result is the same kind of rare, arbitrary, highly selected infliction of the extreme penalty of death that this Court found a cruel and unusual punishment in Furman.

QUESTION: Well, if it's highly selective, it's one thing; if it's highly arbitrary, it's something quite different. Did you mean highly selective?

MR. AMSTERDAM: Well, I am not using selective in the sense of selection of a few appropriate cases, I am using selective simply to describe a process of selecting, in the same way that one can say discriminating or discriminatory and not have that much difference unless you're pretty confident in who is making the decision.

Here the decision is being made by whatever number of solicitors there are in North Carolina, plus a shuttling corps of jurors brought in for particular cases, over whom there is no control at all.

Now, in that situation, it is our position -- and I think this may speak directly to Mr. Justice Blackmun's point -- it is our position that the administration of capital punishment with substantive standards as vague, amorphous and judgmental as these, through a system of

decisions by individual decion-makers, who are a fleeting group assembled to hear one case and then disbanded, or solicitors who vary from county to county and may be in or may be out. So that whether you get sentenced to life or whether you get sentenced to death is a luck of the draw, at best, and invidious discrimination at worse.

That that system is what is bad. And that is why, in a sense, Mr. Justice Blackmun, yes, we're talking about its exercise, but we're also talking about its existence.

There is no way in which, administering a system of this sort, one can come out with the comfortable conclusions asserted, for example, in the government's amicus brief in this Court, that the death penalty is being reserved for the worst cases, or that it's being reserved for the most heinous cases, or any such thing.

And, indeed, the case before the Court proves it.

It is what we have in the case of Jesse Thurman Fowler is any other shooting that comes out of a barroom brawl. It is no more or less than that. This Court has seen, I venture to say, thousands of them; they are papered very often as manslaughter, they are papered as second-degree murder, and when they are submitted as first-degree murder cases, juries come back indiscriminately with first-degree murder, second-degree murder, or manslaughter. There is simply nothing to assure, in a process of this sort, any

regularity in the imposition of the death penalty.

Selective, Mr. Justice Stewart, in the sense that people are selected; arbitrary in the sense that the way in which they are selected is so rule-less, so ungoverned by any procedures that would enable a rational decision to be made, that the death penalty is simply inflicted, arbitrarily, at the end of --

QUESTION: I want to be sure about my logic here, or yours. Isn't this argument you're now making about executive clemency equally applicable to any other crime, so that if it prevails you demolish the entire criminal justice structure?

MR. AMSTERDAM: No, I don't think that that is so at all, and, indeed, Mr. Justice Blackmun, the -- it isn't simply the executive clemency argument as to which I would draw that distinction. A certain amount of discretion is involved in the prosecution of criminal cases at the prosecutorial level and at the jury level, as well as the gubernatorial level.

I think that there is a constitutional difference between capital and non-capital cases, and the constitutional difference lies in several dimensions.

First of all, Furman held that a frank choice given to a jury or to a judge, because a number of cases decided by this Court in the wake of Furman involved

judicial sentencing and not jury sentencing, among the penalties of life, death and sometimes a term of years, violated the Eighth Amendment.

I did not see anything in this Court's opinion in Furman and would not construe it, nobody has construed it, to mean that a choice of a judge between five years and ten years or a choice of a judge between twenty years and thirty years is, simply because it is of the same nature as the discretion condemned in Furman, subject to constitutional invalidation.

And it gives a very good reason for that distinction. The death penalty is unique. Not only in the law under Furman, but in fact.

The government's suggestion that an attack on discretion in the imposition of the most extreme penalty known to the law, a penalty which consists of separating the defendant from an entire penal regime, the ordinary regime of incarceration with its rehabilitative prospects and ideals and possibilities for second thoughts in judgments and paroles, and doing the one thing that is totally irremedial. The one thing that we don't even understand, because we don't even know what it is when we kill somebody, is simply, really, a different thing. There isn't anybody in the history of law, and this Court time and again has recognized it, denies that death is different from other penalties.

Now, I think it is therefore true that where pro-

cedures that may be used to inflict a penalty of that sort may constitutionally be different than the penalties which -- than the procedures which are used to inflict lesser penalties.

Indeed, I think that the history of the Eighth Amendment itself, particularly the English history of the Bill of Rights, is rather strongly supportive of this. One thing that modern scholarship has shown up about the history of the English Bill of Rights is that it is not true, as was once supposed, that it was primarily a concern against the torments and tortures of the bloody assizes that resulted in the English Bill of Rights in 1689.

In fact, those penalties -- disemboweling, drawing and quartering, and that sort of thing -- continued for a century and a half in England, well after the Bill of Rights of 1689.

What the Bill of Rights of 1689 is concerned with was precisely selective, arbitrary infliction of extreme penalties, such as the penalty imposed on Titus Oates, which was, in effect, the death sentence, not then authorized by law, although it was disguised as something else.

And historically, as well as factually, there is a considerable difference between the arbitrary infliction of extreme penalties and the infliction of lesser penalties.

Now, that, I take it, is exactly what cruel and

unusual in the Eighth Amendment is all about. When a penalty is so harsh that it is only through a system such as this one that it can be made tolerable, where its social acceptance is purchased through the devices of arbitrariness which infect the North Carolina procedure, that is the clearest indication of a penalty which is a cruel and unusual punishment.

Now, inasmuch as I have two able counsel to contend with, I'd prefer to reserve, unless the Court has further questions, the balance of my time.

QUESTION: To clarify one factual question, you referred to a barroom brawl, and I was not clear whether you were speaking in general terms or describing this as a barroom brawl.

MR. AMSTERDAM: The killing here did not result in a brawl in a barroom. It was a fallout, at three hours removed, from a previous fight in a bar, in which the deceased, who had known the defendant for many years, broke his nose as a result of an attack initiated by the deceased.

It is in that sense a barroom brawl.

QUESTION: It was during that three-hour interval, was it, that he went and got himself a weapon and --

MR. AMSTERDAM: There was an interval, but he did not go and get himself a weapon, the record indicates that he was carrying a gun all day, that that was not uncommon, that he was carrying it because a fishing trip had been planned,

and everybody in that group carried weapons to shoot snakes when they went out to fish; and he had the weapon in his pocket throughout the earlier fight with the deceased.

QUESTION: But it was three hours later when he used it?

MR. AMSTERDAM: Yes, it was, indeed, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Benoy.

ORAL ARGUMENT OF JEAN A. BENOY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The State of North Carolina of course contends here that the death penalty is not cruel and unusual, per se, for any of the reasons stated by the petitioner.

We state, and we say and contend to the Court, that it has not been rejected by the decent standards of contemporary, civilized society. Indeed, the exact converse has been amply demonstrated since this Court's Furman decision by the actions of 31 State Legislatures, the Congress of the United States, juries throughout the United States, and trial and appellate courts throughout the United States, to charge, try, convict and sentence men and women to death.

It has not been demonstrated, indeed, it has not even been claimed here that North Carolina officials have

acted, since Furman, in a manner which was condemned by the Furman decision. That is, attempting to sentence some to death and others to life, who have been found guilty of equal degress of the crime of murder or rape.

The actual judgments which have been exercised by the appropriate officials in the criminal justice system of North Carolina do not create, ipso facto, in and of themselves, a system which of necessity results in an arbitrary, discriminatory, capricious or freakish sentences.

Now, that is the position of the State of North Carolina.

There are several misstatements of the status of law of North Carolina, made by counsel for petitioner, which permeats not only his statement here but in his brief.

Now, for example, first of all, he says and contends that in the State of North Carolina the solicitor or the district attorney has a virtually unbridled discretion to do or not to do that which he sees fit; and the rule of law, Your Honor, in North Carolina is exactly the converse.

Stated in State v. Thurmidge, 250 N.C. 616, at page 623, is the proper statement of the rule of law in North Carolina. The rule is that it is within the control of the court as to whether to allow a solicitor to nolle prosse a case, plea bargain or anything else, but it is usually and properly left to the discretion of the solicitor.

Now, that is the rule of law, therefore he does not have an unbridled discretion, charging discretion.

Secondly, in North Carolina we do not have what is called the presentment. We have an indictment. And a man must be charged with a capital offense by an indictment under the Constitution of North Carolina. We did away with presentments as a charging vehicle.

However, in North Carolina, the presentment is available to the grand jury and is an instruction to the solicitor to send in a bill of indictment charging a citizen with an offense in the State of North Carolina, and he must do so.

The next thing in North Carolina, if he wilfully fails to do his duty, that which he is sworn to do under G.S.7A-66, sets forth the various provisions by which a solicitor may be removed from office; and under 14-230 of the criminal statute, if he wilfully refuses to carry out his sworn duties, he will be guilty of a misdemeanor and subject to two years' imprisonment.

Now, we say and contend, Your Honor, that the solicitor, under those charges of the law, under the control of the court, does not have an unfettered or unbridled discretion, which was the subject of this Furman -- this Court's Furman decision.

QUESTION: Is there a solicitor in each county?

MR. BENOY: No, sir, Your Honor, there are, I think, 22 solicitorial districts -- there are 100 counties in the State, and he is, there are these solicitorial districts, from which he is elected. He has supervisory authority or responsibility for prosecuting those cases in his --

QUESTION: In his district?

MR. BENOY: -- counties; yes, sir.

QUESTION: And he's elected by the voters of that solicitorial district?

MR. BENOY: Yes, sir, he is a --

QUESTION: For how long a term?

MR. BENOY: Four years. He is a constitutional officer of the State of North Carolina.

It's true that the Attorney General does not have supervisory authority, that is, he cannot go and tell him to prosecute or not prosecute; but the trial judge, if he sees an arbitrary abuse of discretion by the solicitor, he certainly has control over him. He can refuse to let him nolle prosse a case, he can refuse to let him plea bargain, and he can remove him from office.

And he can have another prosecuting attorney come in and prosecute that solicitor under 14-230 for the commission of a crime.

That's hardly discretion that the jury had, and the sentencing discretion that the judges had in the Furman

decision.

So we think there's a material difference there.

There are -- I see, we've hit the grand jury; we've touched on the sentencing, or the charging discretion.

The next thing the petitioner says and contends, which we don't understand, is that by virtue of having a trial through a jury of twelve of an offense in the State of North Carolina, which is guaranteed by both the North Carolina Constitution, guaranteed by the United States Constitution, the Sixth Amendment, petitioner says this very right to trial by jury violates the Eighth Amendment.

And we submit, as we stated in our brief, that that's a non sequitur. That just does not make sense.

The next thing we say, that the Constitution of the United States, in the Fifth Amendment and the Fourteenth Amendment, specifically authorize and contemplate the imposition of death penalties, as we pointed out in our brief.

Capital crimes or capital offenses, which is spelled out in the Fifth Amendment, meant in 1776, from an encyclopedia of that 1771 date, meant a punishment for which death may be imposed.

And in the dictionaries and encyclopedias of 1974-75, capital crimes, capital offenses mean identically the same thing: a sentence by which death may be imposed.

When you consider the exact wording of the

Constitution, when you consider the actions of the duly elected representatives of the people of the United States and the State of North Carolina, we say and contend that the death penalty is not condemned, it is authorized and in fact in North Carolina by Act of the General Assembly it is mandated in certain very heinous crimes, such as death, first-degree murder, and rape.

QUESTION: I didn't understand Mr. Amsterdam to say that the death penalty was not authorized by the Constitution, but only that with the evolving standards it has now become outmoded.

MR. BENOY: And we responded to that, Mr. Chief Justice, in the brief, in saying that if it's outmoded, the means to amend the Constitution is set forth in the Constitution itself; and it's not for this Court, we submit, with all due respects, to be amending the Constitution itself and to be nullifying express provisions found in the Constitution.

We say that would be the necessary result to apply the Eighth Amendment in the manner in which petitioner complains.

Let's see -- I am glad to note that petitioner's counsel did state that he was arguing for a per se application of the Eighth Amendment to the situation, based upon the pre-verdict activities of the constitutional official of the State of North Carolina.

Now I would like to make a distinction here, if we

can.

As I understand the Furman case, and as we set forth our understanding of the Furman case in our brief, what it was talking about here, what this Court was concerned with, was the post-verdict sentencing activities of judges and juries when they were sentencing one group of people to one type of punishment for an equal degree of crime as another defendant.

We're talking about here post-verdict activities of public officials in the sentencing process.

What petitioner raises here at, let's see, at pages of his brief -- the first pages of his brief, the page, I believe it is starting at page 45, the district attorney; plea bargaining, 53 to 61; jury discretion, 62 to 94.

He is not talking here about post-verdict activities of anybody. He's talking about the very crux of the criminal justice system in the United States. You're talking about the activities of a grand jury. He's talking about the activities of the solicitor. He is talking about the activities of the jury system itself, which is all there -- to do what? To determine the truth of the matter.

That is what this whole system is about. It has nothing to do with sentencing. And that's what he complains of.

The last factor that he complains of is the governor's ability to grant commutations of sentences; and we stipulated that the governor has that authority. We also stipulated that this Court has held that there's nothing unconstitutional, per se, about that. That that is not subject to judicial review.

That's not to say if in some future point of time a governor started commuting the sentences of all the whites, all the rich, letting the black or the white poor go to the death house, that this Court could not intervene in a proper case and state that that is an arbitrary application of the powers of the governor.

In other words, if we get to, as an applied argument, if the juries start applying the law improperly, violating their oath of office, if the district attorney starts applying the law in violation of his oath of office, if the grand jury is doing something that is violative of its oath of office, then of course, YourHonor, there is an adequate remedy at that time.

But to just wipe it out, in this case, with no presentation of facts, and on the assumption, the underlying assumption that it is, per se, discriminatory, our whole criminal justice system is, per se, discriminatory; I don't know how you can separate the constitutional mandate between life and liberty. There is only one comma separating the

constitutional mandate of life and liberty. And if this Court were to state, or if it were to hold that the mere existence of the grand jury, district attorney, and jury discretion to find facts upon the evidence, to bring charges based upon the evidence and the law according to their oath of office as they understand the Constitution of the United States, and the law of North Carolina, if the Court were to embark upon that course of action, then it's a very short step to then say: and the very same constitutional defects exist as to deprivation of a man's liberty.

And when you do go to that step, you have then done away with the criminal justice system in the United States as we know it.

And I don't believe, and I say and contend, the State of North Carolina says and contends, that that is not what the Eighth Amendment of the Constitution, nor the Fourteenth Amendment to the Constitution of the United States says and means.

Now, --

QUESTION: In that last illustration that you gave, would you call on the equal protection clause to deal with that?

MR. BENOY: Yes, sir, I believe that's what the equal protection clause is there for.

And the State of North Carolina, as we pointed out in

our brief, Your Honor, has been very, very diligent in pursuing the protection of the citizens under the equal protection law, since this Court has made its interpretation of the meaning of the Fourteenth Amendment. Particularly in the area of race relations.

Not only that, the 1960 or '61 amendment to -- or the new North Carolina Constitution specifically outlawed, under the North Carolina Constitution, any discrimination based upon race, creed, color, or otherwise.

So that the State of North Carolina is not exactly as characterized in petitioner's brief, and our Supreme Court has not, by any tortuous reasoning, attempted to emasculate a decision of this Court.

QUESTION: General Benoy, when you suggest that these problems could be dealt with on a case-by-case or ad hoc or particularized basis, how, possibly, could they be, when one stops to think that the grand jury proceedings are secret; the prosecutor,before a grand jury even is called upon to act, makes his decisions privately or in consultation with his own subordinates; the governor's executive clemency authority, everybody agrees, is wholly unreviewable. So if the governor decided to commute the sentence of every Catholic but not to commute the sentences of any Protestants; how on earth could anybody do anything about that? He has unreviewable executive power.

MR. BENOY: That would be an unlikely event, that illustration wouldn't be true in North Carolina --

QUESTION: It's a highly unlikely event in North Carolina.

MR. BENOY: -- if he let all the Catholics go --

[Laughter.]

MR. BENOY: -- we wouldn't rise to the dignity of a discrimination there.

QUESTION: Well, it's a highly unlikely event, but I'm just trying to inquire about your point here. I don't see how that could possibly turn into a lawsuit, to test it.

MR. BENOY: Well, by the presentation of facts, Your Honor, like the --

QUESTION: Well, what facts?

MR. BENOY: The fact that, for example, if the governor started giving commutation of sentences to the whites, to the Catholics, to the wealthy, and systematically refused to grant commutations to others who were sentenced to death, then it seems to me that a prima facie case could be made at that point.

QUESTION: Where? Maybe before the electorate, but not in any court, could it?

Because this is wholly unreviewable.

MR. BENOY: I don't believe so at all. I believe

an actionwould lie in both the State court and the federal courts to enjoin any further activity until this Court -- until a proper judicial proceeding for the presentation of evidence and facts were found to demonstrate whether or not this was an arbitrary method of exercising of the power of the executive.

QUESTION: But you told us, both in your brief and orally, that this executive power is wholly unreviewable. And all counsel seem to agree with that.

MR. BENOY: Well, unreviewable just in and of itself, but any --

QUESTION: In and of itself.

MR. BENOY: -- any power, any power, Your Honor, the power of any court can be exercised arbitrarily and capriciously. There can be abuses of discretion, and that's why appellate courts sit to return verdicts.

QUESTION: Not to review the unreviewable power of an executive.

MR. BENOY: Well. Of course, I say and contend, Your Honor, that if any power that exists -- there is no such thing as an unbridled power existing --

QUESTION: Well, you told us in your brief that there is such a thing, and that is the power of the Governor of North Carolina to decide whether or not to exercise clemency.

MR. BENOY: Just per se. That's like saying that the power of the jury is there to enter a verdict of guilty or not guilty. That power exists. It's how that power is exercised which we --

QUESTION: No, we both know that is reviewable by the presiding judge at the trial.

MR. BENOY: Yes, sir.

QUESTION: But I'm now directing myself toward the executive power, and I don't understand how anybody could possibly frame a lawsuit.

MR. BENOY: The same way that you frame a lawsuit where the police are going and getting all blacks and not arresting any whites. The arresting power. Any power that exists in the police --

QUESTION: Let's say the Governor has commuted, out of 40 people sentenced to death, he commuted 20 of the sentences, and they were all, happened to be Negroes; not a one of a white man.

Now, would that mean that you'd have to enjoin him the next one he did, would have to be of a white man?

MR. BENOY: No, I believe that once you start making out the case, the next man on death row could come along and say: Not me, you don't execute me, because he refused mine, my pardon, my request for commutation of my life sentence, and he's refusing it on discriminatory and arbitrary basis. He

is picking on the poor, the disadvantaged and underprivileged.

I believe at that point you have a Furman situation. I can't visualize it, but I'm saying that it does exist.

And when I say that it's an unbridled discretion in the --

QUESTION: I suppose if the governor, a candidate for governor, campaigned on a platform that he was never going to let a particular category of people be executed, that would be evidence of the denial of equal protection on your theory of this concept?

MR. BENOY: Yes, sir, I believe it would, and I believe that when you once bring the action, then you have access -- you have the discovery proceeses available to you to go into the mental processes of the governor, what he considered, what he did not consider, what evidence he considered to do it or not do it.

But, as I say here, Your Honor, this is a per se argument that they're making, and it was in that context that we stated that it's an unbridled discretion. He said it's there --

QUESTION: General Benoy, do you know of any time in the history of North Carolina that a Negro's death sentence has been commuted?

MR. BENOY: No, sir, Your Honor; believe it or not, I haven't looked at --

QUESTION: How many?

MR. BENOY: -- at the --

QUESTION: How many? What's the percentage of Negroes in North Carolina?

MR. BENOY: I believe it's about 20 percent of the -- 20 or 30 percent of the population.

QUESTION: And what's the percentage on death row?

MR. BENOY: It's about 50/50, as I understand it.

QUESTION: It gives you no problem?

MR. BENOY: No, sir, it doesn't give me a bit of problem, Your Honor. There are things far more important in the State of North Carolina --

QUESTION: Than race.

MR. BENOY: -- than the race of a man who kills and rapes. And whenever the police react to calls of help from its citizens, and if the citizen who is calling for help is black, white or indifferent, it makes no difference; the police go after them; they track down the murderer; they track down the rapist; and our solicitors bring them to the bar of justice. And after our grand juries indict them, our solicitors prosecute them, the juries convict them, and the judges sentence them; and there's not one aspect of racial overtones in that system of justice in the State of North Carolina.

The fact that there are more Negroes who are killing more Negroes --

QUESTION: How many Negroes do you have on your judicial system?

MR. BENOY: Let's see, I believe there -- I don't know if the last Negress, there was a Negro woman who was a judge --

QUESTION: A neg-what?

MR. BENOY: A Negress, a Negro woman who was a judge in Guilford County. There's a --

QUESTION: You're still using "Negress" down there?

MR. BENOY: -- Negro judge in Wake County. I'm trying to --

QUESTION: You still use the phrase "Negress"?

MR. BENOY: Well, Your Honor, I'm a Caucasian, and I see nothing wrong with using the word "Negro", that's the name of a race of people.

QUESTION: All right. In what are those, trial courts, like magistrates or something?

MR. BENOY: No, sir. We have district court judges who are blacks, --

QUESTION: Name them!

MR. BENOY: I don't know the -- Your Honor, there are 38 superior court judges, there are about 100, and I don't know them, and I'm not on intimate terms with them.

QUESTION: We've been talking about solicitors, haven't we?

MR. BENOY: Yes, sir. There are 28 of them, and I don't know their names, either.

QUESTION: You have Negro solicitors?

MR. BENOY: Yes, sir.

QUESTION: I'd like you to name just one of those. I'm not talking about assistant solicitors, I'm talking about solicitors.

MR. BENOY: Well, I don't know the names of -- you mean the elected solicitor as opposed to --

QUESTION: Yes, sir.

MR. BENOY: I don't believe there is an elected solicitor himself.

QUESTION: I don't, either.

MR. BENOY: There are numerous ones -- well, Your Honor, the electorate is there, we have open elections. There's been no unfair basis, that I know of, excluding any black from running and getting elected. There are blacks in the Legislature. There are blacks on the courts. There are blacks appointed to the Executive Branch of the government, in high positions.

QUESTION: Is there any attack on the composition of the jury in this case?

MR. BENOY: None whatsoever, Your Honor.

That wasn't even brought up.

Now, I'm surprised at one thing that was said here that -- where did he say that the -- well, he said that the North Carolina Supreme Court has said that the burden of proof shifts to the defendant.

There's not a single case in the State of North Carolina that can be cited where the court has ever said, at any time, at any stage of any criminal trial, the burden of proof shifts to a single defendant. Even when he defends on self-defense or alibit, the burden of proof never shifts in the State of North Carolina, and even any intimation in the charge of the trial court to the jury will get you an automatic reversal by that State Supreme Court.

Now, that is just simply a misstatement.

And another thing he says that in North Carolina, for example, in proving one of the elements of offense, he said that the rule is that it must be proved to the satisfaction of the jury; and the rule in the charge of every criminal case that I've ever tried in the State of North Carolina, both as a solicitor and as a member of the Attorney General's staff, that's been the rule, is beyond a reasonable doubt, and to a moral certainty, as to each and every distinct element of the offense charged, which includes premeditation and malice in a first-degree murder charge.

And you'll find that in the charge of this case, at record

on appeal, at page 7.

So I don't know exactly where counsel for petitioner gets his law, but he didn't get it out of the North Carolina law books, and he didn't get it out of the transcripts of the superior court of that State, nor the appellate court.

Now, he said that Jesse Fowler was killed in a bar-room brawl [sic]. The facts of this case are that John Griffin had been in a fight with this defendant, and John Griffin was a black man, Your Honor, who needed help, and he got it as fast as we could get it to him, but he died before we could save his life -- now John Griffin had been in a fight with this man earlier, during the day. He had left the fight. He had gone to visit his two pre-teenage daughters. He was standing on the public streets of the State of North Carolina, visiting his daughters, talking to one of his neighbors, and this fellow, Jesse Thurman Fowler, came by in a car with his nephew and his nephew stopped the car, they called Fowler over -- rather called John Griffin over.

John Griffin told Fowler: Go on away, I don't want to fight you any more.

He then -- Fowler then drove away, goes on up the block, tells his nephew to stop the car and let him out, stalks this decedent, John Griffin, stalks him with a gun, shoots twice while the defendant -- or while the deceased,

Griffin, was trying to protect himself behind a man, the body of a man who was walking along the streets of the State of North Carolina.

If that is not stalking and killing, I do not know what stalking and killing is.

But that's exactly what this man did, Your Honor, exactly what he did. And it seems to me the underlying policy of the State of North Carolina is that we dignify the life of a black man with the same high degree that we value the life of a white man. And when we say that a mandatory penalty for rape shall be death, that means if you rape a black woman in the State of North Carolina, you're going to the gas chamber for it.

And it seems to me that that's a recognition of an underlying policy, whereby the State of North Carolina dignifies the sexuality of a black woman to the same high degree it does a white woman. And we make no apologies for that to anyone.

Now, we say and contend that the Supreme -- that this Supreme Court has never held that the cruel and unusual clause, nor has any State in the Union, except California -- which we'll talk about in a minute -- that no State in the Union has ever interpreted a cruel and unusual proviso in the Constitution, which exists in some form or other in 48 of them, to mean that the death penalty is prohibited.

In the State of California, they so held, and the result of that was a vote by the people of the State of California, by a two-to-one majority, saying that the death penalty will be authorized in the State of California.

So it seems to me that when you consider the contemporary standards of decent, civilized people, which the State of North Carolina says and contends, that the State of North Carolina and the United States of America takes no back seat to any nation on the face of this earth to its standards of decency and civilized conduct, where we have a rule of law, where we're trying to protect innocent citizens, guarantee the right of innocent passage and the ability to walk the streets of our cities and our counties and our State, to rest at home in peace and dignity and with some degree of security. That that's what government is about.

And we say and contend that these standards of civilized society are second to none. We do not take any back seat to anybody on them.

We do not agree with petitioner in saying that we have in some way or other become the low rung on the totem pole -- you can't use four-letter words here.

But we say and contend, YourHonor, that when you examine the Furman decision, you will find that it was -- and of course this Court wrote it -- that it deals with post-verdict activities, where there was an unbridled discretion

given to the judges or the juries. They had applied that unbridled discretion in an arbitrary and capricious manner, so that you ended up with a freakish imposition of the death sentence.

That's what the Court seemed to so hold.

We say and contend that the Republican response to the Furman decision of this Court was to remove that unbridled discretion, which this Court found offended the Constitition of the United States, and we are now sentencing all equally, and petitioner's complaints about the trial procedures set up for the entire administration of criminal justice in the United States does not violate anything that was even addressed to in the Furman case.

Now, he said -- and I believe I have one more minute -- petitioner says, when he was asked about the question of liberty: Furman does not address itself to distinction between five years, ten years and twenty years.

We say that Furman does not address itself to the pre-verdict criminal processes, either.

Thank Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

A good deal of the argument has been taken up with matters peculiar to North Carolina law in the facts of this case, and of course the United States has no interest whatever in that.

The United States is here merely to ask that whatever the outcome of this particular case, the Court make it clear that capital punishment is constitutional, and that the more on prudential judgments about its general use lie with the elected representatives of the people.

Now, I'm going to discuss an aspect of this case that is not fully developed in the briefs, and that is this:

Part of the majority in Furman v. Georgia rested upon empirical judgments. That may be properly revised, I believe, in the course of a continuing dialogue between this Court and the political branches of the federal and State governments.

Now, I want to examine certain of those empirical judgments, to show that they are no longer valid and should be revised, and that, thus, both the death penalty and statutes leaving discretion with juries should, as in McGautha, be held constitutional.

The first proposition I want to discuss is the observation in Furman that under a discretionary statute the legislative will is not frustrated if the death penalty is never imposed.

That was an empirical observation, of course; perhaps debatable then, but the proposition of course is not in disproof, because the Congress and the State Legislatures have responded by enacting laws that do show the legislative will; and they show that the States and the Congress prefer mandatory statutes to none. Showing that the legislative will is frustrated if the death penalty is never imposed.

The second proposition is closely related. It is that death penalties under discretionary statutes are cruel, in the sense that they excessively go beyond, no in degree but in kind, the punishments that the State Legislatures have determined to be necessary.

That, too, might have been debatable, because the State Legislatures may have thought that punishment of that sort was not necessary in every case.

But the doubt has now become a certainty, because, again, most States and the Congress have determined that they think, which is the proposition here, that they think the death penalty is necessary.

The third proposition, of course, is that the penalty is unusual and that it is infrequently imposed.

Well, I'm not sure what the statistics show about that. I do know that at the time of Furman, 600 persons were under the penalty; I am told that now perhaps 200 persons are under the penalty in the last year and a half.

And in the study in the Stanford Law Review, cited in our brief, the jury imposed the death penalty in 103 cases out of 236 capital convictions. So that that frequency, it seems to me, a Legislature might well think -- or a much lower frequency, the Legislature might well think, to be sufficient to achieve deterrent purposes and to reinforce social values.

And, if so, I would not call that unusual in that it's infrequent.

Now, the major argument, I suppose, is that if the penalty is so unique, is that it's capriciously and freakishly imposed. And petitioner's major argument is really based here, arguing that there are so many stages of discretion in the criminal justice system, in any criminal justice system, that the result is bound to be arbitrary.

I would suppose that were true only if the discretion was exercised without some degree of normal human judgment, if it were, in fact, a coin toss at every step. And there is no showing, of course, that it is a coin toss at every step.

It seems to me that the fatal defect in the contention that's advanced is this: the Framers of the Constitution which we are interpreting wrote into it both an assumption of a death penalty and wrote into it a requirement of discretion. They -- in requiring a grand jury, in requiring a petit jury, in assuming a law officer who might or might not go for evidence under the Fourth Amendment. In writing in a pardon and reprieve power, they put in discretion at every step.

And, furthermore, they put their Constitution on top of a system of criminal justice they presupposed, which had discretion at every stage.

So that the constitutional criminal justice system breathes discretion at every pore. And, in fact, I can't understand that a constitutional system that presupposes discretion somehow makes unconstitutional a constitutional system that presupposes the allowability of the death penalty. My mind boggles at the proposition that one part of the constitutional system renders another part of the same system unconstitutional.

In any event, I would like to point out, we have been looking at discretion here from the wrong end. The discretion which is in the system is not the defect of the system, it is indeed the genius of the system.

The petitioner's brief shows how many stages at which

discretion may occur. I don't think that makes the system freakish. I think it makes the system safe.

Indeed, progress in criminal justice has usually been accomplished, or very often been accomplished by increasing rather than decreasing the occasions for fresh judgment and discretion.

As the system now stands, it is utterly impossible for one person or, at some stage, for several persons, acting out of prejudice or out of stupidity, to inflict the death penalty. But at every stage it is possible for a small group to stop the death penalty from being inflicted, and at several stages it's possible for one person to stop the death penalty from being inflicted.

QUESTION: Of course, if nobody is singularly responsible, then that can lead, as we all know, to a buck-passing mentality.

MR. BORK: It can, Your Honor.

QUESTION: Take the famous case of Private Slovik, we're all familiar with; everybody along the line thought the next person would exercise clemency.

MR. BORK: That's true. There was, at that time, a tradition in the military justice system of giving maximums, so that the commanding officer could exercise clemency.

QUESTION: That's right.

MR. BORK: There is no such tradition in the

systems we're discussing today, and I don't think there is in the military justice system any more, either.

But surely I don't think juries anywhere convict in order to allow the Governor to exercise clemency.

QUESTION: Well, there was a study, that we had the last time this basic question was argued, showing -- purporting to show, or leading to the inference that juries sometimes did bring in the death penalty with the belief that it would never be carried out.

MR. BORK: They may. They may.

I would think a discretionary statute would be better in that sense, because the jury wouldn't have to rely upon clemency.

The best studies we have, and I don't see anything in petitioner's brief that matches it, the study from the Stanford Law Review, which was an enormous study and which Professor Kalven, in writing for that, said was the best study he had ever seen, showed indeed that juries were making distinctions and rational distinctions, and showed indeed that there was no reason to think, in that system, that there was any racial discrimination in the discretion the juries used.

So that I think the jury system, when studied, performs better than many of us think it would, offhand. Remembering that they are people who are capable of studying

this matter and making judgments, and there are all these other stages of discretion that act as safeguards.

Which is not to say that a case may never get through. It shouldn't. It is merely that discretion is to be viewed as the good part of the system and not a reason for taking away a penalty that is in the system.

QUESTION: Has it not been a general view in -- or a widespread if not general view, that mandatory sentences are, per se, bad.

MR. BORK: Well, I don't know what the -- I certainly would view a mandatory sentence statute as less good than a discretionary sentencing statute, because --

QUESTION: I'm thinking of the attacks directed at the five and ten and twenty-year mandatory sentences in the drug area, for example.

MR. BORK: Oh, yes. The mandatory sentencing is becoming more and more infrequent in the system.

QUESTION: But the mandatory sentence in the death cases seem to be the one escape hatch left open to the States, in Furman, did it not?

MR. BORK: It did, indeed, Mr. Chief Justice, and that is why I am suggesting that I think it's preferable, given the empirical propositions in Furman, which I think have now been shown -- may have been valid then, but have now been shown to be currently invalid by the actions of the States

and the Congress responding to Furman.

It would now be preferable to allow discretion at the jury stage. If not, it would certainly be preferable, I think, to allow something like the Federal Air Hijacking Act of 1974, which specifies the items to be considered, takes the discretion out of the -- must be considered, requires special findings as to each item of mitigation, each item of aggravation, and tells the judge what sentence he must give, depending on whether one of those items is present or not.

That seems to be an allowable response to Furman. If Furman is regarded as still standing with those empirical propositions after the response that we have seen.

But these arguments against discretion in the system are, as has been suggested, arguments against any form of punishment.

And capital punishment may be unique in every sense but one. It is not unique in a constitutional sense. It has been presupposed by the Constitution, and has been practiced under the Constitution throughout our history.

A legislative line can be drawn, and Legislatures do draw lines, about capital punishment, saving it for certain crimes.

The federal government has done that, and the States have done that, and that, it seems to me, is the way changes in the capital punishment system should occur.

As the -- it seems to me that the odd thing about the petitioner's argument is that they're arguing that the criminal justice system is too imperfect to permit the imposition of a death penalty, and precisely at that moment in our history, when our criminal justice system has had built into it, by this Court and by legislation, more procedural safeguards than at any other time in Anglo-American history.

And it appears occasionally that the better the system becomes, the more agitated its opponents become. And the argument here is, apparently, that a criminal justice system would be tolerable, where the death penalty is involved at least, only where it is not run by humans.

Now, I think a word should be said about the concern about the possibility of racial prejudice entering into sentencing.

It is impossible for me to stand here and say that that does not happen. It is also impossible for anybody to stand here and say that it does happen on the evidence we have been offered by the petitioner's counsel.

Their main evidence appears to be at page 136 of their brief, Note 226. The authorities there are quite conflicting and quite simplistic. The analysis is quite poor in those, but the authorities there cited contradict each other.

One study purports to find racial bias, another study, by Mr. Bedau, says that if you look at additional factors, the racial bias washes out; such as number of previous convictions, for similar crimes.

I'm afraid that footnote is not enough to sustain a finding of a pattern, an inevitable pattern in the infliction of the death penalty across the entire criminal justice system, which would be what is required to strike down the death penalty in every and all cases.

And I've already noted the Stanford study, which says that, indeed, in the way the race factor is handled, there is nothing to complain of in the capital punishment sentences handed down. And I believe one of the studies in the petitioner's footnote, by Mr. Bedau, shows that in New Jersey there is similarly not a problem with capital punishment being inflicted according to race.

I should say a last word about the Eighth Amendment itself. We have submitted in our brief that there is no acceptable mode of judicial construction that makes the death penalty unconstitutional, despite the intentions of the Framers, and in the face of the moral consensus of America, and a moral consensus that has existed from Colonial Times to this very day.

Now, the petitioner's counsel attempts to explain that it's not a real moral consensus, that if people understood

it better, they wouldn't believe it.

But that may or may not be true. The Legislatures understand it fairly well, I think. They debated it, and they have decided it, and they have come down, in the majority of cases, saying that the death penalty is necessary for some purposes.

This case is merely the latest in a series of cases in which the opponents of the death penalty have attempted to get this Court to make a political judgment that the political branches of the State and federal governments have been unwilling to give them.

QUESTION: Of course, in this particular case, Mr. Bork, Mr. Fowler was not sentenced to death under any decision that any Legislature made.

MR. BORK: We point out in our brief, Mr. Justice Stewart, that that would seem to be a troublesome factor here, but we thought that was an argument for the petitioner to make and for North Carolina to answer.

QUESTION: Yes. But in this case, I wonder if it's your argument to make that this is a legislative decision, when very clearly it was not.

MR. BORK: I think it is a legislative decision, but I hesitate to -- I wish North Carolina had an opportunity to speak to that. I hate to bring it up myself. I think that's an argument that should have been advanced by -- in

the brief by petitioner, and should have been answered by North Carolina.

And I feel quite awkward speaking to it, in that circumstance. But I think that, as the whole thrust of our argument, one must admit is that it is a legislative determination, under the Constitution.

QUESTION: At least you would be making that argument in the next case, where we're talking about a new statute passed since Furman.

MR. BORK: That is quite correct. That is quite correct. This statute --

QUESTION: In other words, if this were a legislative decision, you would be backing it up as a legislative decision?

MR. BORK: That is quite correct. That is what --

QUESTION: But the fact is it wasn't.

MR. BORK: The fact is it wasn't, and, as I said at the outset, we are not concerned -- it is not the interest of the United States to discuss the particular aspects of this case; we are concerned merely with the general proposition about the possibility of constitutional capital punishment laws.

And for that reason I once more -- the government asks the Court to preserve the possibility of constitutional capital punishment laws, which the States and the federal government believe they need.

MR. CHIEF JUSTICE BURGER: Mr. Amsterdam, you have about 14 minutes left.

REBUTTAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.,

ON BEHALF OF THE PETITIONER

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

Let me address, if the Court will indulge me, in more than my usual level of incoherence, let me address several points that have come up without any real connection, in terms of positions taken by opposing counsel and questions asked by the Court.

First, I'd like to deal with questions of North Carolina law, in which our view of North Carolina law was, I believe, were unrechallenged.

Although not previously cited, I have looked up the Thurmidge? case, which counsel for North Carolina cited, in 250 N.C., beginning at page 616, for the proposition that North Carolina exercised judicial control over solicitors.

The question in the case is whether or not a solicitor can constitutionally be given the power to issue a warrant, a question which the North Carolina Supreme Court answers, I should add, inconsistently with Coolidge? and with Shadwick; but, nevertheless, answers. And the only thing that's relevant in the case is a dictum which says that in North Carolina if a solicitor chooses to enter a nolle prosse with leave, he must have leave of the court.

The nolle prosse with leave procedure of course is a procedure that this Court is familiar with, in the wake of Clopter v. North Carolina?

It involves staying the case for reprosecution later.

That has nothing to do, at all, with the prosecutor's power to bring a first-degree murder indicted defendant to trial only on second-degree, and therefore we stand on the cases cited in our brief at page 48, principally the Rhyne and Allen cases, that make it very clear that a prosecutor has unbroad, uncontrollable and unreviewable discretion to charge first or second-degree murder on a capital indictment.

Secondly, the question asked with regard to race and the death penalty in North Carolina. I would point out several things. First of all, the racial breakdown of the 47 people condemned to death under Waddell is not 50/50; two-thirds are non-white.

Secondly, consistent studies of racial discrimination in capital sentencing have been addressed to North Carolina and have been addressed to North Carolina under the mandatory system which was in effect before 1949, and has been restored by Waddell and the Garfinkel and Johnson studies, which are cited at page 136, Note 226 of our brief, show that racial discrimination under Waddell is no accident, that it has always been true in North Carolina.

No. 3, we have been called on the question of burden of proof in North Carolina law, and where it lies, I direct the Court's attention to page 74 of the jury charge in this case, with regard to the question of whether in fact the prosecutor has the burden of proof that remains with it throughout the trial "when it is admitted or established by the evidence that the defendant intentionally killed the deceased with a deadly weapon, the law raises two presumptions against the defendant. First, that the killing was unlawful; second, that it was done with malice. And an unlawful killing with malice is murder in the second degree."

"Where those facts are proven, that is an intentional killing with a deadly weapon, the burden then rests upon the defendant to establish facts which would mitigate the offense to manslaughter or justify it all together. This burden on the defendant is not to prove those facts beyond a reasonable doubt but simply to the satisfaction of the jury unless they arise out of evidence from the State." Et cetera.

And on the next page, 76, "To justify a killing by reason of self-defense the defendant must satisfy you of four things:" -- first, second, third, "the defendant must satisfy you"; fourth, "the defendant must satisfy you".

Our statement of the burden of proof is perfectly correct. I believe that all of our statements on the

North Carolina law are in fact quite correct.

Now, if I may then pass to the government's broader and larger argument.

Although the government purports to calling the question what the government regards as empirical propositions underlying Furman, what the government is doing is arguing Furman too late.

Because they are not empirical propositions, they are observations made by the Court as the operation of a system under which 41 States of the United States then having death penalty by legislation had seen it dwindling in the actual administration of the death penalty, from 199 executions in the year 1935 down to an average of 17 during the 1960's, and finally to 15 and 7 and 2 and 1.

That development under which the people of the United States, speaking through their juries, not to the abstract question of whether or not there should be on the statute books an authorization of the death penalty, but whether it should be applied to particular defendants, have spoken eloquently.

The death penalty is a penalty which is tolerated only because it is applied infrequently, it is a penalty which is tolerated only because it is applied discriminatorily to racial minorities and to the poor.

The government has said that the discretion under

which this happens is not a defect in the system, it is the genius of the system.

Of course, when you regard something as a genius or as a defect depends on whether you're standing at the long end of the stick or the short end of the stick.

Charles Black of the Yale Law School made this point very strikingly in his recent book on the death penalty, titled, appropriately "The Inevitability of Caprice and Mistake". He said that a yes answer to the question whether the defendant shall live or die, given by a jury, like the decision of the prosecutor to accept the guilty plea in the plea bargaining process, sounds good.

Somebody escapes death.

The trouble is that if you turn the coin around, somebody else suffers death, because the jury did not find him guilty of a lesser offense rather than the capital charge.

And if the jury's milder verdict may be a function of its sympathies, then its sterner verdict, by inevitable logic, may be a function of its lack of sympathy.

In short, the defects in the system are not accidental, they are endemic. They are not controllable under the equal protection clause, because no more than the governor's decision, a decision of particular juries in particular cases, exhibits no sufficient regularity so that one can even base an equal protection claim.

Justice of this Court are quite familiar with attempts to prove racial discrimination. I think that probably, although it can't be proved for particular counting, perhaps even a particular State, perhaps in the hard way in which facts have to be proved to establish equal protection claims, it could never be proved.

The reason it can't be is not because there's no discrimination. The reason that it can't be is because there is nor regularity sufficient to give you a base line to show discrimination. And that brings me to where I'd like to conclude, which is that the government's argument that in the administration of criminal justice in general, and in the administration of capital justice in particular, discretion is endemic; that there's always room for arbitrariness.

Explains the other aspect of the government's position as to why Legislatures are willing to have a death penalty. Legislatures are not fools. They are perfectly aware that the very discretion which we have been talking about is the discretion with which the death penalty is going to be administered. And whether they have, like many States -- if you look at the amicus brief of the State of Utah , for example, where the Legislature has set standards, one of which is "any other mitigating circumstance", which allow juries to pass up the death penalty, or whether the State of California, if you look at its amicus brief, it purports to have mandatory

categories for what the amicus brief doesn't tell you is about Penal Code Section 11.81.7 in California, which allows a trial judge to set aside the death penalty in any case.

Or whether you look at the North Carolina procedure or the procedure under the Federal Hijacking statute, which the government puts forward, I take it, as a model of a statute that can be administered even-handedly.

Of course, if you look at the Federal Hijacking statute, what you find is that an aggravating circumstance that allows imposition of the death penalty is that the defendant committed or attempted to commit the offense in an especially heinous, cruel or depraved manner.

And the previous section which is an aggravating circumstance, and this is for aircraft piracy, is that in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim.

Very hard to imagine aircraft piracy that doesn't do that.

Legislatures are not fools. They know exactly what is going on. They are aware, with statutes of all of these sorts, administered through the procedures that have become commonplace by centuries of administration of this penalty, unequaled, that the death penalty will be administered

arbitrarily, that it will not fall, that it will be a verdict from all but immune and disfavored few, public acceptance of the death penalty is bought at that price.

And our position before this Court is simply that that is too great a price under the Eighth Amendment. That the very purpose of the Eighth Amendment is to insist that penalties not be inflicted on an unusual few that will not be inflicted, even-handedly and regularly, on some decent proportion of the people that commit the crimes. And any penalty which buys its public acceptability, which buys its acceptance from that kind of administration, is a cruel and unusual punishment.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:27 o'clock, p.m., the case in the above-entitled matter was submitted.]

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