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In the

Supreme Court of the United States

Troy Leon Gregg,

Petitioner,

v.

State Of Georgia,

Respondent.

No. 74-6257

Washington, D. C.
March 31, 1976

Pages 1 thru 31

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v. No. 74-6257

STATE OF GEORGIA,

Respondent.

Washington, D. C.

Wednesday, March 31, 1976

The above-entitled matter came on for argument at 1:28 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

G. HUGHEL HARRISON, ESQ., P.O. Box. 88, Lawrenceville, Georgia 30245, for the petitioner.

G. THOMAS DAVIS, ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia, for the respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Harrison will open with 6257, Gregg against Georgia.

Mr. Harrison, you may proceed when you are ready.

ORAL ARGUMENT OF G. HUGHEL HARRISON

ON BEHALF OF THE PETITIONER

MR. HARRISON: Mr. Chief Justice, and may it please the Court: I am Hughel Harrison from Lawrenceville, Georgia, and I represent Troy Leon Gregg, who is now under two death sentences for murder. Originally he was tried on two murder charges plus two armed robbery cases. The Georgia Supreme Court on its review of the case set aside the death penalty as to armed robbery on two grounds: That the armed robberies had been used as an aggravating circumstance on the murder cases and that the death penalty was disproportionate for the punishment of this crime.

Gregg was not tried under a 1973 law in Georgia with some changes in our death penalty. It is interesting to note that only one offense, and that of perjury, was deleted. The General Assembly provided for a bifurcated trial under which at the first phase you would determine guilt or innocence and that only. Then that same jury was to consider the punishment that would be imposed.

We submit that in this area we still have some of the arbitrariness and the discretion and that we do not meet

the Furman standard.

In the 1973 law there were 10 enumerated statutory aggravating circumstances. Those are set out, and I believe they are set out in the brief for the respondent in that the appendix was not printed on the appellant's or petitioner's brief. Those are specified and referred to as the statutory aggravating circumstances.

At this phase of the trial, the trial judge must determine which of those he will submit and in addition the jury, as I understand the law, can consider other aggravating circumstances, to use the language "as authorized by law." Nowhere does the statute make any definition of a mitigating circumstance. It is completely silent.

Now, in this case when we proceed with the sentencing phase and after instructions -- and these instructions are required to be carried out with the jury and the jury make its findings and indicate what the aggravating circumstances are. This record reveals, if I recall correctly, that some three were submitted. The jury returned its verdict and made its recommendation of death, which was binding upon the court when that recommendation is made. It was a substantive change in our law. Before that the jury made its finding, if it made a recommendation of mercy, then only a life sentence could be imposed. If it returned a verdict of guilty in these cases, then it was the automatic death sentence.

Now, then the '73 law provides for an appeal. This is in addition to statutory review. This was in addition to the usual and normal appeal which was done in this case. And it is submitted that while this is desirable, it does not cure some of the discrepancies and arbitrariness of Furman.

In this the trial court is required to submit to the appellate court his evaluation, shown on Appendix B of the brief for the respondent. I would direct the Court's attention to this because it illustrates the effect of action in the trial court level on the appellate court. One of the issues in this report, No. 7 on page 3b on the end, "Was there evidence of mitigating circumstances?" The trial court says "No."

This removes from consideration the evidence that was adduced in this case and where there was a written statement exculpatory in nature taken at the time of the arrest, this removed it, and I submit removed it in the appellate level. It must be remembered that in this case, and I would apologize for going into the evidence to this point, but upon arrest in North Carolina, Gregg made a statement to the Geòrgia authorities when they questioned him about what had happened. It was exculpatory in nature in that he said there was a fight and he did it in self-defense. There was evidence in the record, including the lip of one Sam Allen and some evidence as to some abrasions on the hands of one of the victims.

But Gregg was carried from Asheville down Interstate 85 past the most direct route to Lawrenceville sometime before daybreak early in the morning in the presence of and after having been transported from Asheville to this area with the district attorney, the prosecuting officer, in the back seat with him and Gregg under handcuffs, and the other passengers in that car being the chief of the county police of Gwinnett County and one of the detectives.

But that entourage turned around and proceeded back north to the scene, and it's supposed to be that Detective Blannott said that there was a restatement or a reenactment of what happened. The officer testified that the chief of police told Gregg that this is the way it happened, wasn't it? Gregg is supposed to have said, "Yes." But this record reveals that Gregg refused to sign a statement. Gregg denied it on the trial of the case. But this removed entirely, we submit, any consideration of the mitigating circumstances.

Now, where does that leave us? I objected strenuously, tried to keep this evidence out. Notwithstanding this, on the trial of this case when it was charged, the effect of the charge in this case is to submit to this jury the question you either acquit him or you convict him. The lesser included offenses of manslaughter, or even the statutory right of a jury to find an attempt, even if a crime was committed, effectively deprive the jury of any discretion except you either find him -- it's

either murder or justifiable homicide. That's what the charge is in this case.

QUESTION: Well, do you say it deprived them of an opportunity to find him not guilty, acquit him totally?

MR. HARRISON: No, sir, certainly --

QUESTION: The dispensing factor is always there, isn't it?

MR. HARRISON: Yes, sir, Mr. Chief Justice. But also as a matter of right, I think a jury, at least in Georgia, has a right to convict of a lesser included offense, particularly in a capital case. That's true in most other felonies, but in a capital case --

QUESTION: You are addressing this for another separate area apart from the 8th Amendment argument, I take it.

MR. HARRISON: Not of necessity, your Honor. I think it comes back down to show whether we use equal protection in this sense of what happened to Allen. There were two people who were involved in an incident, two people, one suffering the death sentence and one going away with 10 years, for no reason, no explainable reason. Gregg, no prior record, he admitted he killed the people, but he said he did it in self-defense. The jury rejected it and that apparently is the end of it. He is still suffering the death penalty and he is under it today, two of them.

Your Honor, we submit that the 1973 law was an attempt to meet Furman, and it hasn't done it. It still leaves that discretion, both in the prosecution. I submit to you, whether it's right or wrong, and I would be the first to admit that some discretion must be vested in a prosecuting attorney. We must have it. But is that to be unlimited, and is it to have the right to carry with it, "You live, you die."

QUESTION: Do you take the position that the existence of that discretion is fatal to the 8th Amendment arguments? You go along with the arguments, in other words, that Mr. Amsterdam and others --

MR. HARRISON: I would follow that argument, Mr. Chief Justice, and in particular to this point, that in the end result whatever process we might have to get to that, that here under this statute, the arbitrariness, no guidelines, your Honor, there is nothing in the statute of Georgia --a man can be indicted for murder and before that case is called to trial, the district attorney can stand up with no reason and Nolle pros it and that's the end of the case.

The only limitation on it is that once it's submitted to a jury, then he must have the approval to do it.

QUESTION: The court has no power over a noll pros?

MR. HARRISON: Except, your Honor, when it becomes really affected in the breast of the court for trial. Before that case is called for trial, the district attorney can just

nolle pros it. He can determine when he calls it and if he will call it.

QUESTION: Could his successor reinstate that, go ahead with the trial?

MR. HARRISON: I'm sorry, I didn't understand.

QUESTION: Could his successor -- suppose the county attorney and prosecutor were removed by the Governor or some other process, or he failed of reelection, could they proceed?

MR. HARRISON: Of course, there is that remedy to the ballot box, but he would have to proceed to reindict, and I am sure the argument might be made, well, he doesn't indict, but for all practical purposes he does, because he attends upon the grand jury, he prepares the indictment and submits it.

There is only, your Honor--the individual discretion I submit to you is the only limitation on whether or not a district attorney--what he does. Just as in this case -- and there could be no better illustration of it than in this case -- Sam Allen who was with him and under any theory of Georgia law, he is just as guilty as Troy Leon Gregg. We have no excuse to use him as a state's witness, no trade-off.

QUESTION: He didn't testify, did he?

MR. HARRISON: No, sir. His only appearance in this case was to be brought to an adjunct to the courtroom for the purpose of identification. That was all.

QUESTION: Identifying him or his identifying your

client?

MR. HARRISON: No, sir, I believe it was for the purpose of an officer identifying Sam Allen, if I recall it correctly.

QUESTION: My understanding was Allen did not testify.

MR. HARRISON: He did not. He was just brought to the edge of the courtroom so he could be seen.

So it was not necessary, and the usual thing of turning state's evidence is not apparent here. So this to me is a perfect illustration of two people, equally guilty under the theory of law, one with 10 to 20 years, and the other with the death penalty, with no prior record.

Now, your Honors, the '73 Act is not intended at all -- it made no change in what happened beyond the appellate level and executive clemency. It's in the area of being in the court with the prosecutor, with the jury, and the trial judge, even in his instructions, and I don't think we can avoid that in this instance, and the uncertainty of what the jury is given to find insofar as aggravating circumstances.

Mr. Justice Powell, you were asking about some of the broadness of the language that was contained in the North Carolina statute. The code section enumerating these 10, if you look on 8A of Appendix A, you see they start. enumerating these aggravating circumstances.

QUESTION: The appendix to the brief.

MR. HARRISON: Of the respondent, yes.

Number (2) "The offense of murder, rape, armed robbery, kidnapping was committed while the offender was engaged in the commission of another capital felony, aggravated battery, or the offense of murder committed while the offender was engaged in the commission of burglary or arson in the first degree." This was given to this jury.

(3) was not given.

And then (4) was purported to be given and a comparison of this with what was actually given leaves much to be desired, but"the offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value."

Your Honors, the only proof of the taking of the money, of any money, was possibly that contained in the exculpatory statement taken in North Carolina and then the purported transaction out in the early morning that Gregg denied.

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

Aggravated battery under Georgia law today could cover almost anything from a touch if it had intent to commit harm.

QUESTION: Was this one covered in the instructions?

MR. HARRISON: This was given in the instructions, your Honor. Nos. (2), (4), and (7) were given, and they were returned.

Your Honors, I think it's important to hear this Georgia statute . It sets and enumerates these ten, and some reference is made to these being the statutory aggravating circumstances. But in the introduction there is no limitation on the aggravating circumstances otherwise authorized by law. What law? What jurisdiction? Where? This is at the top of the page, Mr. Chief Justice, under B 27-2534.

QUESTION: In this context do you think that is something you can't follow?

MR. HARRISON: I think it creates the confusion of why have -- if you are going to enumerate the statutory conditions, why go back and cover the whole Code from A to Z, as might be authorized by law? And if we are going to do this, why do we leave mitigating circumstances undefined anywhere?

Now, it's this uncertainty that permeates, that we submit that this statute cannot meet the Furman decision.

With that, your Honor, we submit that under these circumstances, that in this case we do not have to go to the ultimate question of the death penalty under the 8th Amendment, even though we say that even there we question the sufficiency of proof to justify the taking of human life. Two wrongs don't make a right, and whatever a man has done, he pays his penalty,

and we submit to the Court that there is a real 8th Amendment issue. And that's not to be tested by what a General Assembly thinks. It's to be tested by an interpretation of the Constitution.

I would submit that a more proper test, and I submit that this Court has consistently held that when you take away a right, that the burdens not necessarily be upon the person accused. Traditionally the authority of an individual accused with a crime in this country to stand mute and be clothed with the protection of the Constitution. He doesn't have to say, "I am not guilty." He doesn't have to say anything but, "I am here," and he doesn't have to say that. That the cloak of the Constitution protects, and when we lose sight of this, that the State in order to come to remove any facet of and particularly the life, the most precious thing he has, that the State must prove it.

I submit in conclusion, your Honor, that the Weems case and the Robinson case and really the Dulles case show that this Court can take and can consider any punishment imposable under the judicial system in this country today and you can place it in the balance of does it meet the test of the 8th Amendment without any apologies to anyone anywhere. And that's where this comes down to. The bottom line is, is it justified, or has the Government proven that it is such a punishment, has it proven that there is such a deterrent that

in 1976 we will continue to impose the death penalty under such conditions when we don't know for sure.

QUESTION: You cited among others the Dulles case, didn't you?

MR. HARRISON: Yes, sir.

QUESTION: That has some language in it that isn't very favorable to your side.

MR. HARRISON: Yes, sir, but I believe the theory or the idea there of looking into the punishment is present here, Mr. Justice.

With that, your Honors, we would ask the Court to reverse this decision, to follow the Furman line of cases and that these two death penalties on this young man be reversed.

Thank you.

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

Mr. Davis.

ORAL ARGUMENT OF G. THOMAS DAVIS ON BEHALF OF THE RESPONDENT

MR. DAVIS: Mr. Chief Justice, and may it please the Court: I argue on behalf of the State of Georgia.

Briefly at the beginning I wish to address a few of the comments made by Mr. Harrison as to the facts of this case. I do not wish to reargue the case factually.

The jury determined beyond a reasonable doubt that Mr. Gregg was guilty of two murders with malice while in the

commission of an armed robbery. Mr. Harrison has intimated that another man involved in the crime was somehow arbitrarily and capriciously not sentenced to death but given a sentence in years. Mr. Harrison has failed to point out that the other man, Mr. Allen, involved was 16 years of age and could not have been punished by death in Georgia. Additionally, there was no evidence to indicate that he had any prior knowledge of Mr. Gregg's planning to kill these two men.

In response to this Court's decision in Furman, the General Assembly of Georgia in 1973 enacted a new procedure, a new death statute procedure. In doing so they allowed controlle discretion. In complying with this Court's decision in Furman they eliminated arbitrariness and capriciousness from the imposition, as this Court had held was present, they eliminated that from the imposition of the death sentence. They did that in several ways:

First, they set out 10 aggravating circumstances by statute. And as Mr. Harrison said, they also provided any other aggravating circumstance allowed by law, otherwise allowed by law, which simply means any other where in Georgia law you could find an aggravating circumstance, and that, to my knowledge, is only one other place and only one other aggravating circumstance, which would be a prior conviction, which is not included in the first statutory aggravated circumstance which provides for prior capital convictions and

prior convictions of serious criminal assault. In other words, a district attorney could present in aggravation, let's say, a prior burglary. However, before a death sentence may be imposed, the jury must determine beyond a reasonable doubt the presence of one of the statutory aggravating circumstances.

It is true that the General Assembly did not define mitigating circumstances. They said mitigating circumstances as otherwise provided by law. Again, they are referring us back to the general Bifurcated Trial Act, which allows that open to the defense counsel to permit him to present evidence of any factor which could legally be considered in mitigation, not barred by the Constitution or rules of evidence or some other general rule.

They provided in a very important part for the procedure for swift and immediate appellate review. This review was directed to include an examination of the record by the Supreme Court of Georgia, an examination of a trial report which is included --the trial report in this case by the trial judge is included in Appendix B to respondent's brief --to determine the presence of any passion, prejudice, or any other arbitrary factor.

Second, they were mandated by the General Assembly of Georgia to determine whether the evidence in fact supported the aggravating circumstance found.

And, third, to examine other cases to determine whether

the sentence imposed in that particular case under review was disproportionate to the sentence imposed in other similar cases considering both the crime and the defendant.

A third thing the General Assembly did was to provide for a bifurcated trial procedure. They did not do this in the Death Sentence Act, but it was done before.

QUESTION: This wasn't a bifurcated proceeding at the trial level, was it?

MR. DAVIS: Yes, your Honor, it was. First there was a determination of guilt or nonguilt; second was the punishment.

QUESTION: Yes, with the judge instructing the jury at the second phase [illegible] giving them for consideration three of the statutory aggravating circumstances and what, if any, mitigating circumstances. In the report to the appellate court he said there were none.

MR. DAVIS: That's right. He indicated there was no evidence submitted at the second phase of the trial in mitigation. I think that's what he had tendered on the court, and he saw none in the trial-in-chief.

QUESTION: Was anything proffered on behalf of the defendant?

MR. DAVIS: There was nothing proffered, your Honor.

His charge to the jury on that point is in respondent's brief at page 15. He charged them they could consider any

mitigating circumstances that they saw from the evidence.

QUESTION: You responded to Mr. Justice Stewart that there were two stages, two separate proceedings. But there are some crimes in Georgia which do not call for separate penalty proceedings, isn't that true?

MR. DAVIS: I'm not aware of any, your Honor. In all felony cases the law provides for bifurcated trial.

QUESTION: Precisely what issue is submitted to the jury in Georgia in the second trial? I have not read that instruction.

MR. DAVIS: The instruction, as I pointed out to the Court, was just what the court charged them and mitigating factors.

QUESTION: Page 15 of the respondent's brief.

MR. DAVIS: The statute requires that the trial court determine from the evidence presented what statutory aggravating circumstances are warranted. He then gives those in charge to the jury and any mitigating that is presented or warranted by the evidence. They are also given to the jury in writing. The jury -- and of course argument by his counsel. Before he does this, of course, there is the opportunity for counsel to present additional evidence of aggravation or of mitigation.

QUESTION: In this case, as I understand, no evidence of mitigating circumstances was offered by the defendant.

MR. DAVIS: That is correct, your Honor.

QUESTION: And the jury in bringing in a verdict of recommending death, or bringing in a verdict of the death sentence, must include at least one of the statutory aggravating circumstances as found, at least one, and must so state and identify which one?

MR. DAVIS: That's right. In writing.

QUESTION: In writing.

MR. DAVIS: Beyond a reasonable doubt.

I believe, if I understood Mr. Harrison correctly, he stated that the jury found three statutory aggravating circumstances in this case. My recollection is they found two. Three were submitted to them, they refused to find No. (7).

Looking specifically now at the 10 statutory aggravating circumstances in Georgia, they are set out at pages 28 and 29 of respondent's brief. A number of these aggravating circumstances have been attacked, either by petitioner or amicus on behalf of petitioner, as being overly broad,as being meaningless. I want to look at a few of those now.

Take No. (3) which says that the act of murder and armed robbery or kidnapping, knowingly creating a great risk of harm or death to anyone in a public place by means of a weapon, and so on, and endangering the lives of more than one person.

That could fit many things. But to understand the

Georgia death sentence, one must look at the bare wording of the statute in light of the refinement added by the Supreme Court of Georgia. The case of Marcus Wayne Schenault v. State, this was the statutory aggravating circumstance that was found. What Mr. Schenault did was to enter Ebenezer Baptist Church in Atlanta on Sunday morning during the worship service; he sprayed the congregation with gunfire, killing two members of that congregation, and if I recall correctly, wounding others. Now, the jury had no difficulty in finding statutory aggravating circumstance No. (3).

On the other hand -- and the Supreme Court, of course, had no difficulty in affirming it as being supported by the evidence. However, on the other hand, in the case of Jarrell v. State, which was a case in which the defendant abducted a woman at gunpoint in a shopping center parking lot, the State sought aggravating circumstance No. (3). The Supreme Court of Georgia said no, the evidence did not support it.

QUESTION: You said the State sought it.

MR. DAVIS: They submitted evidence. The jury returned it,and the Supreme Court of Georgia --

QUESTION: To that extent the Supreme Court can review the specific decision of the jury.

MR. DAVIS: Very definitely.

And again, the point I was attempting to make, of course, is that the entire picture is not present when one

looks at the bare wording of these aggravating circumstances. Under Georgia's procedure, the Supreme Court plays such a major role, that to understand them one must deal with the refinements added by the Supreme Court of Georgia.

Another statutory aggravating circumstance they attack as being meaningless and overbroad is No. (7) which involves torture and depravity of mind. In the case of ... McCorkadale v. State, where McCorkadale tortured a young woman for several hours by use of acid, fire, surgical scissors, kept her alive -- it's amazing the woman lived as long as she did -- finally breaking her limbs and stuffing her into a trunk, the jury found statutory aggravating circumstance No. (7). There was no problem in affirming that. That would be torture to anyone.

Petitioner in brief or amicus--and I may refer to the petitioner when I mean the Legal Defense Fund submitted a brief in his behalf--cites the case of Floyd v. State as an obvious inappropriate use of statutory aggravating circumstance No. (7), torture again, the question, it's overly broad. What is torture? In the case of Floyd, Floyd entered the home, forced the mother and the daughter who was present, to march up and down stairs trying to force from them the location of money, separated them, threatened the mother with cutting fingers off the daughter, brought them together, knelt them down, put the gun to the daughter's head, kissed her good-bye

and blew her brains out in her mother's presence and then turning to the mother blew her brains out,laughing that she put up her hand to shield from the bullet. He thought that was humorous. The jury found torture, aggravating circumstance No. (7).

They also attacked, and interestingly so, the aggravated battery. They cite the case of Mitchell v. State to support the misuse of that, and I think one of the law professors they quote makes the remark that aggravated battery could apply to anyone murdered. That displays simply a base misunderstanding of Georgia law. Not so, and it has never been used in the State in that manner. Again, their misunderstanding is demonstrated by Maju v. State, they cite it, they make the statement, cite Maju v. State.

The facts in Mitchell, Mitchell entered the grocery store, took the proprietor who was a middle-aged lady and her young son back to the cooler. He shoots the young son and shoots the mother. He leaves. This was in the course of a robbery. He leaves. He thinks he better return and make sure that his work is done well; he returns, shoots again the son, shoots again twice more the mother. He killed the son but he did not kill the mother, even though shot three times, once in the back, the shoulder, and the head. She lived to testify against him at his trial. That was the aggravated battery present in Mitchell, not to the dead son.

QUESTION: This statute has been in effect since 1973, Mr. Davis?

MR. DAVIS: Yes, your Honor.

QUESTION: Do you happen to know how many death sentences have been imposed under it?

MR. DAVIS: By our records, 55.

QUESTION: And how many of those, if any, have been set aside by the Supreme Court of Georgia?

MR. DAVIS: One has been completely set aside. There have been a number of cases where there were a number of death sentences imposed and they have set various ones of those aside. The case of Coley v. State is one that they completely vacated the death sentence.

QUESTION: By completely, what do you mean, completely? Compared to what? I mean, how can it -- what do you mean by that?

MR. DAVIS: For example, compared to this case, Gregg. Gregg was sentenced to four death sentences by the jury.

QUESTION: Two death sentences. But let's talk about people, not how many sentences imposed on them.

MR. DAVIS: Right.

QUESTION: One out of 55 people who were convicted to death, or sentenced to death, one of those 55 the death sentence was reversed by the Supreme Court of Georgia, is that it?

MR. DAVIS: That's correct.

QUESTION: And what, a new trial ordered, or what happened in that case?

MR. DAVIS: There would be a new trial as to punishment.

QUESTION: No possibility of a death sentence.

MR. DAVIS: No possibility of the death sentence.

Let me point out for clarity, however, when I used the figure 55, there have not been 55 cases to go before the Supreme Court of Georgia. I was answering the question of how many death sentences were imposed.

QUESTION: Yes.

MR. DAVIS: The Supreme Court of Georgia has decided 30 or 31.

QUESTION: Some involved co-defendants, did they, or what?

MR. DAVIS: No. It depends on what stage of the process --

QUESTION: Some have not yet arrived at the Supreme Court.

MR. DAVIS: Some have been decided, some have been docketed, not decided, and some -- this 55 figure includes up to within two weeks ago.

QUESTION: So that I understand your answer, 54 people now under sentence of death in Georgia, but some of whose

convictions have not yet been reviewed on appeal.

MR. DAVIS: That's correct, your Honor.

Leaving the statutory aggravating circumstances and going to the appellate review, in responding to this Court's decision in Furman, the General Assembly, of course, was faced with the problem -- with having to approve arbitrariness or capriciousness in fact on their procedure. The General Assembly determined not to eliminate the authority of the jury or the trial judge to bring to bear in a case the community values and their first-hand understanding of the facts in that particular case. They wanted to allow the judge or the jury, the fact-finder, to tailor-make the punishment to the defendant in that particular case, keeping in mind and reiterating the principles set down by this Court in Witherspoon and in McGautha, and at the same time eliminating arbitrariness and capriciousness from the procedure. Of course, they did that with the statutory aggravating circumstances, but very importantly, with the appellate review, which mandates, as I have stated earlier, the specific review by the Supreme Court of Georgia for the presence of any arbitrary factor. They enunciate passion, prejudice, or any other, according to statute, arbitrary factor. The court is to examine in detail the record, the trial report, which is a number of pages long. In the trial report there are six questions which deal with whether race was in any way an issue in that case.

Second, of course, the in-depth determination of whether the evidence supported the aggravating circumstance. Both of those, of course, look to the case itself to insure fairness and non-arbitrariness in that particular case.

The third standard and the third thing mandated by the General Assembly was to compare this case with the other cases, and the statute says "other similar cases," considering defendant, considering crime. And, of course, the court has the power if it finds any of that, to vacate the death sentence. This is in addition, of course, to the normal appellate review.

That was the mechanism, or at least a principal mechanism, which was placed into the Georgia death penalty procedure to ensure non-arbitrariness. But what does petitioner say to that? In brief they point to two cases as being a prime example of arbitrariness on behalf of the Supreme Court of Georgia. They point to the case of Coley. Coley was a rape case, an escaped felon, he was robbing a store, abducted a woman, raped her, and was apprehended. He was sentenced to death by the jury. The Supreme Court of Georgia vacated it. Disproportionate.

The case of Coker, an escaped felon, who goes out, enters a home, rapes a young woman who had given birth three weeks before in the presence of her husband, abducts her, and is apprehended. He is sentenced to death. The Supreme Court

of Georgia affirmed.

What petitioner does not point out to the Court is that Coker, the second case, had prior convictions for rape and kidnapping, one instance, another instance for rape, aggravated assault, another instance of rape and murder, a brutal murder of a young girl that he had raped. These factors were certified and submitted to the jury under statutory aggravating circumstance No. (1). I submit there is no arbitrariness there, that there is no lack of reason, there is no lack of justification. It would seem apparent to anyone of common human understanding why Coker's death sentence was affirmed and Coley's was vacated.

If I understand the arguments of petitioner and the arguments made yesterday and earlier, what is being complained of under the 8th Amendment is arbitrariness in fact. Now, as I understand the case of Furman, it did not say that discretion was unconstitutional, but that arbitrariness or a system which led to arbitrariness in fact or the wanton and freakish imposition of a death sentence was what was unconstitutional. If so, and if that's the way I understand, and I was listening to the way he used the word "arbitrary" or "arbitrariness," and he said spare for no meaningful basis, without rhyme or reason, without justification, no rational basis. If that is the standard, what has been shown about the Georgia procedure? Has arbitrariness in fact been

demonstrated to any degree? We maintain that what must be avoided is the wanton and freakish imposition, not that everyone who should get a death sentence under a system of justice or concept of justice, that a few escape, but have they even shown anyone escaping?

It's interesting to note some footnotes in their brief where they try to bracket and compare cases in Georgia and say in one crime one is Gregg, this case, two cold-blooded murders and an armed robbery, Gregg is sentenced to death. They cite the case of Brannon v. State, two cold-blooded murders in the course of an armed robbery, sentenced to life imprisonment by the jury.

What they failed to note is that Brannon was 14 years of age, and I seriously ask this Court, in considering those cases, in those briefs, to look below the surface facts shown. In almost every case cited, you will see the circumstantial evidence appearing, you will see the felony murder appearing, not the malice murder; felony murder, confused evidence as to who was the perpetrator, the youth, the question about mental capacity. They appear in every case cited.

The statutory aggravating circumstances in Georgia with the appellate review has led to a group of criminals who have committed horrible, vile, henious crimes being sentenced to death.

QUESTION: Mr. Attorney General, might I ask what

your judgment is on a comparison between this group of 55 who now have received the death sentence as to the pre-Furman experience under the statute? Would you say there are more or less death penalties than there were before? Do you have a judgment on it?

MR. DAVIS: I really do not, your Honor. I don't know what --

QUESTION: I don't want you to say it if you don't have a thought already in mind.

Secondly, could you tell us how many of the 55 are for rape and how many are for murder, if you know?

MR. DAVIS: Of the total 55, I could not say. Of those that have been docketed and have been decided by the court, there are three for rape, one of which is Coker I have discussed with his priors. The other two was rape and kidnapping together with a woman staked out over a .. bed. They also had prior capital crime convictions. Those were the only rapes.

QUESTION: Any for robbery? I know these robbery death sentences were set aside on a comparability basis, and that would imply that there are no existing death sentences for robbery.

MR. DAVIS: That's right.

QUESTION: Although the statute does provide it.

MR. DAVIS: The statute provides it. But looking to the refinement added by the Court, the Court has said that a

death sentence for armed robbery in Georgia, in other words, if you took the facts of Gregg, eliminated the two murders, that's disproportionate and a death sentence cannot be imposed. So there are none in Georgia, armed robbery without murder.

QUESTION: The court didn't quite say that under Georgia law it could never be imposed. No reason why it shouldn't. It said that.

MR. DAVIS: No. Of course, what the court said would have to be considered in light of the facts present in Gregg, and of course the same thing with the rape that was present in Coley.

The General Assembly of Georgia, of course, determined that a death sentence is justified in Georgia, is needed in Georgia, of course, for a number of reasons -- for deterrence, specific deterrence, general deterrence. We have some of those under death sentence now who were under life sentences for capital crimes who committed more capital crimes on escape. So we have the problem with specific deterrence.

The General Assembly of Georgia, as a matter of policy, has determined that there is a general deterrence by the death penalty. We respectfully submit that the Constitution does not demand that the balance of fear weigh more heavily on the citizen than on the potential capital criminal. We think that petitioner has not demonstrated arbitrariness or capriciousness in what has happened under Georgia's death penalty statute.

As we understand Furman, that's what was held to be unconstitutional.

Thank you.

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

(Whereupon, at 2:17 p.m., the arguments in the above-entitled matter were concluded.)