In the

Supreme Court of the United States

JERRY LANE JUREK, Petitioner, v. TEXAS, Respondent.	:	No. 75-5394
STANISLAUS ROBERTS, Petitioner, v. LOUISIANA, Respondent.	:	No. 75-5844

Washington, D. C.
March 30, 1976
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Washington, D. C.,

Tuesday, March 30, 1976.

The above-entitled matter came on for argument at 1:22 o'clock 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 PAUL STEVENS, Associate Justice

APPEARANCES:

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

JOHN L. HILL, ESQ., Attorney General of Texas, Austin, Texas; on behalf of Respondent Texas.

JAMES L. BABIN, ESQ., Assistant District Attorney, 14th Judicial District, Lake Charles, Louisiana; on behalf of Respondent Louisiana.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 75-5394, Jerry Lane Jurek v. Texas, and No. 75-5844, Stanislaus Roberts v. Louisiana.

Mr. Amsterdam, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.,

ON BEHALF OF PETITIONERS

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

As I know the Court has already been informed, during the first hour I shall be presenting the argument for the petitioners in both Jurek v. Texas and Roberts v. Louisiana, and the respondents in both of those two cases will then reply seriatim during the next hour.

Since these are the first of five cases in which the Court will be considering the constitutionality under the Eighth Amendment of varying forms of capital punishment, it may be useful at the outset to give the Court a brief description of the present state of capital statutes in the country, statutes now in effect, and of the representative character of the five that are now before the Court.

Decision in these cases may go in broader and narrow grounds, and I think it is useful for the Court to know how

these cases fit against the total picture of capital legislation in the country.

Since the Court's 1972 decision in Furman, capital punishment statutes have been enacted in 35 states, of which 34 are now in effect because the Illinois Supreme Court has struck down the constitutionality of that state's death penalty statute on a variety of state and federal grounds.

QUESTION: Didn't the Massachusetts court also strike down its statute?

MR. AMSTERDAM: Yes, Mr. Justice Stewart, but that was a pre-Furman statute, and I will come to those in just one moment, if I may.

QUESTION: I see.

MR. AMSTERDAM: I am talking only about the statutes enacted since Furman. The federal government, of course, has also punished with death certain killings in the course of air piracies.

Now, these various statutes range in breadth in terms of the crime which is made capital from the federal statute, on the one hand, which is a narrow one, or the statute in Rhode Island, which punishes murder by prison inmate, to broad statutes which make all first degree murder punishable by death, and sometimes other crimes as well.

The pre-Furman statutes which this Court mentioned in Furman and whose constitutionality were reserved are, I should

say, largely out of the picture now, because they had either been superseded by new legislation, as in Ohio, Rhode Island, and Virginia, or in Massachusetts where they were not, the Massachusetts Supreme Judicial Court has invalidated as cruel and inhuman punishment the pre-Furman rape-murder statute in that jurisdiction. So we arebasically talking today about the 34 post-Furman statutes, or 35.

Now, these assume a variety of forms, but I think they can fairly be characterized into four major categories. First of all, there are the statutes which involve a bifurcated trial, a two-stage trial proceeding, during the first of which the jury determines whether the defendant is guilty of a crime defined as capital, and in the second stage of which the jury considers or the judge considers -- and this may differ from jurisdiction to jurisdiction, or there be an advisory jury -- a list of aggravating circumstances and a list of mitigating circumstances, or there may just be aggravating circumstances, as in Georgia, with no listed mitigating circumstances. But the unique characteristic of this group of states is a weighing process in which aggravating and mitigating circumstances are supposed to balanced in some way to determine their sufficiency for the purpose of imposing the penalty of death.

Now, there are eight states which had that kind of statute, of which statutes of Florida and Georgia are now before the Court, are quite representative.

The second of the four categories are statutes which require a finding of some specified fact or circumstance or a condition in addition to the elements of the crime described as a capital crime which has to be found, which must be found in order to support the imposition of capital punishment.

Now, these statutes sometimes have a two-stage proceeding, a bifurcated trial, sometimes they have a one-stage proceeding, sometimes, as in Wyoming, they have both, that is, depending on the crime, but the important characteristic here is that there is no weighing or balancing process, inquiries made whether a particular circumstance and aggravating feature exists. If it does, then the death penalty is to be imposed.

Sometimes there is a provision that if an aggravating circumstance is found, but a mitigating circumstance is also found, that the death penalty shall not be imposed. This is the federal statute, for example, the air piracy statute, and Texas is a very good example of this kind of thing. In Texas, as we will see shortly when we get to the Texas statute, it is not enough to convict the defendant of capital murder in order to sentence him to death. In addition to that, three special verdict questions are submitted to the jury, and life or death depends on the answers to those three questions.

Now, the Texas statute is the representative statute in that group that is before the Court now. It looks a little different on its face than many of the other statutes in this

category because it has this rather unique feature about determining whether there is a probability that the defendant would engage in a continuing course of criminal violence and would be a danger to society, but it is interesting that the Texas Court of Criminal Appeals has read into it some of the ALI aggravating and mitigating circumstances by saying that you answer that question by saying whether the defendant acted under duress, whether the defendant had emotional troubles and that sort of thing, so Texas is a fairly representative statute of this second group. Now, that has nine states in it, plus the federal statute.

All right, now, the third group of capital statutes: The third group are statutes where again capital punishment turns on finding some particular designated fact or condition. But here the fact or condition is built into the definition of the crime as an element of the crime, and here we always have a single verdict trial by definition. And what we are talking about is states in which something narrower than first degree murder is punishable by death. It may be called capital murder, it may be first degree murder in five situations, but the jury has to find at a single verdict trial whether the case falls within those situations.

Here there are 11 states, and the Louisiana statute is perfectly exemplary of those states.

The final class is the simplest to describe, are simply

statutes making all first degree murder capital, using the fairly common traditional outlines of first degree murder, that is premeditated and deliberated murder, felony murder, the usual what has always been, with some local variation, first degree murder in this country, and there are seven states in that category. And, of course, North Carolina is represented in that.

My bottom line is obviously that this Court is seeing in the five statutes that are before the Court, although all of these statues vary bit by bit, a fair representative set of the capital punishment statutes which are now in effect in this country.

Now, I would like to make one minor point and then three major ones about that general description. My minor point is that these statutes which are summarized in the appendices to the briefs have to be looked at with some caution in mind, because they generally do not fully reflect the local nor govern the application of the death penalty.

For example, the Georgia statute says in terms that after a conviction of a capital offense, the court shall resume the trial and hold a penalty trial. But in fact we know, and the briefs demonstrate, that the solicitor at that point can simply waive the death penalty and there will be no penalty trial.

The brief of the Colorado Public Defender System

amicus curiae in this case points out that the similar Colorado practice is simply to stipulate not to have a penalty trial. That practice is used in Texas as well, so that there are a variety of outlets that don't appear on the face of the statute, and when the Court examines the description of the statutes, it ought to be aware of that.

Secondly, there are, of course, general principles of criminal procedure that make these statutes work differently than they look on their face. A good example is California, where in theory, again, after the defendant is convicted of a capital crime, the court, if the so-called special circumstances, aggravating circumstances are alleged in the indictment, shall convene a penalty jury. However, it is a general principle of California criminal procedure, under 1181 subdivision 7 of the Appeal Code, that a trial judge has complete discretion to strike from an indictment allegations of factual matters which enhance penalty, so that the aggravating circumstances can be struck out at the discretion of the court.

I simply want to give a sense that the statute should not be taken as written. And there are a couple of rather obvious propositions. One, the statutes are tidier in print than they are in operation; and, number two, they are a lot tidier at this point in time than they will be if they go on for a period of time, because of the natural tendency of any system to develop shortcuts and outlets and that sort of thing.

Now, there are three major points that need to be made:

First, the use of the death penalty at this point in time is therefore characterized in this country by elaborate winnowing processes, involving a selective screening of cases potentially subject to the death penalty, and an array of outlets for avoiding the actual use of the death penalty either by the second stage penalty proceedings in which aggravating and mitigating circumstances are either balanced or adjudicated, or else by definitions of the capital crime which narrow the capital crime and set it off from others along often intangible and impressionistic lines.

The contrast I think is striking between capital punishment as it is authorized by these statutes and the next most severe penalty known to our law, life imprisonment, where if you look you will find --

QUESTION: Mr. Amsterdam, what did you say it was, like what, the second most --

MR. AMSTERDAM: Life imprisonment.

QUESTION: You don't think this is compelled by the holding in Furman?

MR. AMSTERDAM: I'm sorry?

QUESTION: You don't think this is compelled by our holding in 1972, what you've just said?

MR. AMSTERDAM: No. All I was saying at the moment

was to draw a factual distinction between the ways in which the state statutes use capital punishment and use life imprisonment. It is the ultimate thrust of my argument, yes, but I am --

QUESTION: And all I am saying is or asking is wasn't this compelled, this very thing compelled by our holding in the prior case?

MR. AMSTERDAM: No, I don't think that it was necessarily, Mr. Justice Blackmun, that is the way the states chose to use capital punishment. The decision to have a very narrow class of cases to draw lines, to have aggravating and mitigating circumstances - I think the very variety of responses indicate that the states could have responded by making all crimes, including jaywalking, punishable mandatory by death. That would have been a response to Furman as well.

The particular form which the response took was not dictated by Furman, although of course the response was a response to Furman.

QUESTION: Are you surprised that we have these new statutes?

MR. AMSTERDAM: No, but I think it is remarkable even though our submission doesn't basically turn on the nature of their legislative shape, I think it is significant that the statutes are as narrow as they are, and the contrast I am seeking to make is between life imprisonment statutes, which exist

in 52 jurisdictions in this country, for 408 crimes, without all of these elaborate post hock justifications, special circumstances, trials, the aggravating and mitigating circumstances, and the very narrow roster of capital crimes, all encrusted with and surrounded by procedures which permit selective application and, to draw the bottom line, wholesale evasion of the provisions of the death penalty statutes.

QUESTION: And, of course, selective application is what you argued before twice, isn't it?

MR. AMSTERDAM: Yes.

QUESTION: And you can't have been surprised if you read the opinions of 1972 because this kind of thing was forecast at least in one opinion.

MR. AMSTERDAM: The suggestion was certainly made that the legislatures might respond this way, and what I am describing simply is, I think, something that one might not have predicted. We choose the perpetuation of a whole array of mechanisms for selectivity after Furman. You might have expected simply that the states would come back and enact mandatory death penalty statutes. For the most part, they have not. For the most part, they have come back with these highly elaborate and articulated winnowing devices.

Now, I am not suggesting for a moment, Mr. Justice Blackmun, I think the mandatory statute is mandatory in any sense, and that is the point I am going to come back to in a

moment. But in specific answer to the question, I do think that the form that the statutes have assumed is indicative of something less than a broad based acceptance of the death penalty in our society as a regular part of the penal armamentarium of American society.

Life imprisonment, yes, broadly accepted, generally accepted, no particular care to winnow it down. But when the death penalty is involved, all of these selective procedures.

Now, my second major point is that in addition to these winnowing devices, there are other procedures in every state, and here I come back to the mandatory death penalty statute, so-called mandatory death penalty statutes, which permit additional outlets through which potentially capital cases can be processed to non-capital conclusions, and the death penalty can be averted from some defendants while being applied to other defendants in indistinguishable cases on unaccountable grounds.

Some of these procedures are unique to capital cases. For example, the statutes may provide that in order to charge a capital crime, there must be special allegations in the indictment which the prosecutor can simply choose not to include. Some of these procedures are not unique to capital cases, they are common to non-capital and capital cases, but they assume particular importance in capital cases, such as commutation, for example, where the action has always been on

the death case, the attention, the focus of concern, the intensity and all that sort of thing, or the procedures very commonly found in jurisdictions where otherwise lesser offenses are not submitted generally. At a capital trial, a judge will always as a matter of routine give the jury the lesser options so that it can let the defendant off the death penalty.

Some of these outlets and procedures are common in all cases, but assume a particular character and significance in capital cases, for a variety of reasons, which I am going to come back to, but the most important of which is that the life-death decision is inevitably enormous out of all proportion to the factual differences in the particular cases in which the choice of life or death is made and the nature of the decision by the judge or jury to kill a human being, involves an intense, unique indemnatory judgment that has to be made in the often sensational atmosphere of a capital trial.

Now, the third point -- and this will lead me into the constitutional issues specifically -- about the general array of statutes is that I think the differences among the states are less impressive than the similarities. Although the states differ in technical detail, the government's brief I think is right in its amicus presentation in talking collectively about all of them and describing all of the administration of criminal justice in this country as providing, if you will, the road to death with avenues of discretionary mercy shooting

off from the beginning of the process to the end. The avenues are different in the different jurisdictions, they work differently as a technical matter, but basically the sameness, the remarkable sameness of this process appears in all of the five records and all of the five statutes that this Court has and in the other statutes as well.

Now, that brings me to the two constitutional submissions which are made by petitioners Jerry Lane Jurek and Stanislaus Roberts, these two cases, and by the petitioners in the companion cases, and they are, first, that death sentences imposed pursuant to systems of arbitrary selectivity of this sort are unconstitutional under Furman, the square holding of the Furman decision rightly concede compels that result; and, secondly, that apart from this specific holding in Furman, the death penalty as it is used or as it is proposed to be used today is an excessively cruel punishment when it is assessed against the history of this country's use of the punishment in this century.

Now, these are separate contentions, although they are closely connected. And in part three of our brief in Jurek, we describe the interrelationship as best we can between the two arguments.

QUESTION: Mr. Amsterdam, if I may interrupt you, I want to be sure I understand your second point. You qualified it. You said the death penalty as proposed to be used today --

what does that qualification mean, if anything?

MR. AMSTERDAM: Mr. Justice Stewart, I misspoke myself. I said the death penalty as it is used. Until somebody dies, it will not be used. And all I meant by the qualification was the states are proposing to use it in these cases. I thought the qualification important because we still do not know how these statutes will be used. Executive clemency, further proceedings, that sort of thing, remains. All I meant to say was that we are challenging in our second contention the forms of law under which it is now proposed to execute people in the United States.

QUESTION: I thought your second contention was broader, that the execution of a death sentence upon conviction in any state of a person, convicted of any crime, is cruel and unusual punishment, no matter what the technique, whether it be electrocution or hanging or shooting or the gas chamber, and no matter how serious the offense, and no matter how much of a completely fair trial he may have been given. Now, isn't that your point?

MR. AMSTERDAM: That is precisely the second contention, yes.

QUESTION: That is what I thought.

QUESTION: Mr. Amsterdam, both of your major points are Eighth Amendment arguments, aren't they, or not?

MR. AMSTERDAM: Oh, yes, they are both cruel and

unusual punishment arguments and nothing else.

QUESTION: But your point, I take it, the point you have made on both of these aspects is that there can be no statute by a state or by the Congress that would meet the problems posed by the two separate opinions which did not join the plurality in Furman, is that right?

MR. AMSTERDAM: I would distinguish, Mr. Chief Justice, between our two arguments. I think that the first argument does not necessarily assert that proposition. I think that the first argument asserts that -- and that is why we have turned out 40, 50, 60 page briefs in each of these states -- that an accurate, appropriate assessment of the way the criminal justice system functions under the laws of each of these states, demonstrates a quality of selected decision-making which is arbitrary both in its potency, its potentiality, and in fact in the way in which it operates, which brings the capital punishment statutes of those states within the two opinions to which Your Honor refers. That does not necessarily say that no other statute could ever be drafted or any other procedure might not be come up with that might meet it.

The second argument --

QUESTION: I got intimations that you thought that since there is always an initial discretion on the part of the prosecutor and that the other at the far end a power of clemency by an executive, that if those two things were present,

then no statutes can meet these standards.

MR. AMSTERDAM: I would eventually take the position, Mr. Chief Justice, that one or the other or certainly both of those two things in combination would render a statute bad under the first of our two arguments, but that is not a position that needs to be taken in this case because in both the Jrek case and the Roberts case, and in the next three cases coming up, we have prosecutorial charging discretion, prosecutorial charge reduction discretion, discretion by a jury in a guilt phase and sometimes in a punishment phase, and in addition discretion at the commutation stage where it may be, as in Louisiana, you don't even have to formally have commutation, you don't have an execution unless the governor signs a warrant.

Now, when all of those things are in the system, our contention is that the two opinions to which Your Honor refers outlaw the death penalty.

QUESTION: I take it you are going to tell us why you think so?

MR. AMSTERDAM: Pardon me, Your Honor?

QUESTION: I take it you are going to tell us why you think so?

MR. AMSTERDAM: Yes. At the moment I am responding to --

QUESTION: Very well.

MR. AMSTERDAM: -- I will get there, and indeed I hope

to get there right now. Let me describe the Texas statute for the Court.

Just one word before I do, and this is in the nature of kind of an index through the briefs. I just want to point out that the primary briefing of this argument is in part two of the Fowler brief, that we did not repeat these arguments -- I know it is difficult to read, and I apologize for that. We thought it would be more difficult if the Court had to read the same thing six different times.

The major argument about discretion and why we think that the system is brought within the holding of Furman is made in part two of the Fowler brief. There is in the appendix to the Jrek brief, at pages 2-27 to 2-42, a further development of that argument in terms of the theoretical basis that we thought we didn't have to establish again after Furman, but since the government has made a somewhat veiled challenge to Furman itself, we thought it was worth repeating and laying before the Court again.

The theoretical principle that perhaps the most important function that the Eighth Amendment serves in a democratic society is to protect against penalties which are cast in such a form that through discretion in their use they can be applied selectively and sporadically to a numerical few, so that the ordinary pressures on legislation to keep criminal penalties decent are diffused, and that is found, as I said, in the

Jurek appendix.

Now, the Fowler is written in terms of premeditated and deliberated murder. However, I just want to call the Court's attention to the fact that in the Woodson-Waxton brief, the North Carolina brief, we draw the parallel between felony murder and the other kind of murder. We thought it was most useful to draw that parallel there because the Court could thus compare North Carolina laws to both felony murder and premeditated and deliberated murder.

And finally, part two of the Jurek brief and part two of the Roberts brief discuss the specific procedures in Texas and Louisiana that we challenge.

Now, Mr. Justice White, with my apologies for having gone amiss, let me come back and answer Your Honor's question, if I may, which is the critical question I think. Let me describe the Texas statute involved in Jurek.

The Texas statute is a bifurcated trial statute in which capital trial is divided into two stages. The first is to determine guilt and to determine specifically whether the defendant comes within one of five categories of murder which are defined as capital murder, or which make his crime punishable by death or life imprisonment.

If he is found to fall within one of those five categories, then there is a second stage at which the life or death choice is made by the submission of specific questions

to the jury to answer. Let me start by describing the second stage, the so-called sentencing proceeding, not because this is the only stage at which arbitrary selectivity enters into the choice of those who live and die, but because an examination of that stage will point up how little change has in fact been made from the statutes as they existed in Texas and elsewhere prior to Furman.

The first thing I want to note is that at the outset of a Texas capital trial, the jury is death qualified, required to be death qualified by statute, and it is required to be told prior to trial that the question of life or death is in issue. And the Texas Court of Criminal Appeals has held that Furman governs that death qualification for reason I think that is quite important, realistically, in assessing the Texas statute, and I refer to the Hovila case, which is cited at page 48 in the footnote of our brief, in which the Texas court held that Furman was applicable because, it said, the fact remains that the jury will know that their answers to the specific questions submitted at the penalty phase will determine whether the defendant is to be punished by death or life imprisonment.

To say that the jury's answers would not be affected by their attitude toward the death penalty as a punishment for crime simply because they will not bring forth the ultimate verdict, simply because the law attaches death to the answer to factual questions, would be to disregard the obvious.

Now, in petitioner's case --

QUESTION: Would be to disregard the obvious?

MR. AMSTERDAM: Disregard the obvious. In other words, the court is saying, look, everybody knows that when the jury answers these questions --

QUESTION: All right.

MR. AMSTERDAM: In petitioner's case, the following proceedings occurred, and these are one of these marvelous things that lets the cat out of the bag, on page 62 of the brief. During the death qualification of the jury, the judge says to the jury, trying to figure out -- explain to them why they are being death qualified -- the questions you are called upon to answer, whether it is two or three, you must answer them unanimously, if they are going to answer them in the affirmative. In other words, you must answer them yes, if it is your decision that the death penalty should be invoked by the court, not by you. It is mandatory on the part of the judge to enter the sentence.

In other words, under this mandatory scheme in which specific factual questions are being submitted to the jury, what the judge is saying to the jury is, if it is your decision that the defendant should be sentenced to death by the law, then answer the questions yes. You know, this is the way in which in fact the jury will understand it and the way in which in fact the statutes operate.

QUESTION: Is it always the same jury in Texas, Mr. Amsterdam, in both phases of the procedure --

MR. AMSTERDAM: Yes.

QUESTION: -- always the same, by law, the same jury?

MR. AMSTERDAM: Yes.

QUESTION: It can't be a second jury for the --

MR. AMSTERDAM: Texas law anticipates one jury.

Now, two of these three questions -- and, of course, the relevant questions are set out at page 8 of petitioner's brief -- two of the three relevant questions that are submitted for the jury's consideration at the penalty phase are submitted in every case, without regard to the evidence. And one of them is submitted if it is raised by the evidence.

Now, the first questions, running to question three, whether the conduct of the defendant causing death was committed deliberately and with reasonable expectation that death would result, and whether there was provocation, are questions which the jury has already answered before finding the defendant guilty of capital murder, because the definition of the category requires a resolution of both of those issues.

The respondent doesn't dispute this but simply says in its brief that it would not be illogical to rephrase substantially the same question another way before imposing the death penalty, given the infinite variety of human conduct and the imprecision of the human language.

The plain fact remains, however, that the jury is being asked to use the same criteria both to put people into the class of capital murders and then to distinguish among those in the class with the result that this is a clear invitation to the jury to deal inconsistently with the facts in its supposedly factual answers to supposedly factual questions, if it wishes to spare the defendant's life.

The second statutory question is whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Now, I am not going to rehash the obvious problems with that question, which were noted both by the dissenting opinions of two of the five judges of the Texas Court of Criminal Appeals and have been noted in Professor Black's book. But one thing that I do want to hammer home, I think it is awful important, is I think that the way these statutes operate is the real answer to Mr. Justice White's question and the real answer to the consistency of these new statutes with Furman.

I think it is important to hammer home how this record shows this provision is going to be employed. In this case, the evidence on which the jury solemnly decided that the defendant, that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, that evidence consisted of, one,

the fact that the defendant had committed a capital murder, which, of course, is true in all cases; and, two, the one line hearsay opinions of four local citizens in the community that the defendant's reputation for peace and good order were bad.

Now, this case was tried under this statute exactly the way it would have been tried before Furman. The state's position was simple, the defendant was a reprobate, the defendant killed the daughter of a local peace officer, the defendant ought to die. Those propositions have nothing to do with the issues submitted under the Texas statute which theoretically guide the jury's sentencing decision, in fact, however they determined life or death. And the ironic thing, the thing that is most devastating is that you can't even challenge the jury's finding because the question to which it responds is so meaningless.

You can say on this record that the jury in this case found, without sufficient evidence, that the defendant was guilty of capital murder on the theory of attempted forcible rape. I mean, that is a question that has meaning, and the answer to it is that the evidence here is not sufficient. That is kind of a question you can challenge and answer.

But how can you, even on the absurd basis on which this jury condemned this defendant to die, four hearsay statements that the defendant's reputation is bad, how can they say that the evidence is or is not sufficient to establish that

there is a probability that the defendant may engage in future criminal conduct that may be a danger to the community?

The question is devoid of intelligible meaning. I mean, the answer is unchallengeable and, Mr. Justice White, that is one of the reasons why this statute is exactly where we were in Furman. The issue of life or death is simply committed to the unfettered power of the jury without accountability or review, a determination being made and the answer to supposedly factual questions which are simply predicted judgments as disguises for a determination for life or death, no less free, no less unfettered, no less arbitrary than prior to Furman.

Now, this explicit sentencing discretion is itself both proceeded and followed under Texas procedure by a series of other equally arbitrary decision-making processes that decide the question of life or death.

Respondent again is not --

QUESTION: Mr. Amsterdam, before you leave the jury point and go on to the other aspects of discretion, do you think your position on this aspect of the array of discretion is consistent with the McGautha holding? Would you discuss that problem?

MR. AMSTERDAM: Yes, in one sense it is and in another sense it is not. To the extent that Furman is not consistent with McGautha either is our position, but I don't think

Furman is inconsistent with McGautha. When I come back to deal with the overall issue of not only jury discretion but also the other stages, one of the points that I would like to make -- and let me anticipate it at this point, in answer to Your Honor's question -- is that what the federal Constitution is primarily concerned with is not specific state procedures and their shape or form. It is the total impact of the state process on federally protected interests and rights, and that is why I think that McGautha is different.

QUESTION: Let me rephrase the question so you have it in mind. Do you think that in order to distinguish McGautha you must rely on matters such as executive clemency and prosecutorial discretion, or may you do it just within the area of jury discretion?

MR. AMSTERDAM: No way. I think that we do not have to rely on that. I think the jury discretion alone makes these statutes bad under Furman, notwithstanding McGautha. And the reason for that is that what McGautha was concerned with was the validity of specific procedures used by the state, and our whole point is that the Eighth Amendment question is not a due process question of the validity of this procedure or that procedure. It asks about the total impact, the result of the state procedure on federally protected interests.

Now, Furman, some have said, is inconsistent with McGautha. Some have said that the jury discretion which was

recognized in Furman as invalidating the death penalty under the Eighth Amendment was no more or less than the jury discretion that McGautha had held consistent with the Fourteenth Amendment. If you take that view, and I do not, then our position is inconsistent with McGautha. But my answer to your question specifically, Justice Stevens, is we would rely on jury discretion alone without anything else if there were nothing else. We think that that is squarely controlled by Furman, and we think that Furman is not inconsistent with McGautha because Furman is an Eighth Amendment decision which looks to the consequences of jury discretion, rather than simply whether the procedure is good or not.

I would like to talk to the broader question of the impact not only of jury discretion but all of these processes in tandem, not so much in connection with Jurek but, rather, Roberts, because it will be easier to put them all together there. So, if I may, let me just describe now the parallel process in Louisiana and then see if I can draw it all together.

The Louisiana procedures for the handling of capital cases have much in common with those in Texas and other states, but they also have certain localized features that deserve some mention.

Louisiana has a unitary trial procedure, one stage, not a bifurcated procedure, and the decision of whether the defendant shall suffer death is made at this single-stage trial

by a verdict determining whether or not his case falls within one of the five categories designated as first degree murder in Louisiana statute.

Prior to Furman, Louisiana did not divide murder into degrees, it provided that all murders were punishable by life imprisonment or death. Then, as now, murder cases were tried under a single-stage procedure. Then, as now, they were governed by the characteristic Louisiana procedure of what it called responsive burdens.

In Louisiana, there is a statute which provides which verdict should be submitted to the jury upon any charge of a given offense. Now, prior to Furman, the responsive verdicts that had to be submitted to Louisiana jury on a murder charge were guilty, which carried the death penalty; guilty without capital punishment, which, of course, averted the death penalty; guilty of manslaughter, and not guilty.

When it became apparent that this scheme had been invalidated by Furman, because it offered the choice to the jury of guilty verdicts with and without capital punishment, the legislature enacted a new law in 1973 which now provides as follows: Murder is subdivided into first and second degree; the responsive verdict statute has correspondingly been amended; and now on a trial for capital first degree murder, there are still four responsive verdicts, guilty of first degree murder, which entails the death penalty; guilty of second degree

murder, which of course averts the death penalty; guilty of manslaughter; and not guilty.

Like the four responsive verdicts submitted to the jury prior to Furman, these four responsive verdicts must be submitted to the jury in every capital case without regard to the evidence and whether or not there is the slightest evidentiary basis for finding the defendant guilty of anything less than first degree murder.

The jury is death qualified in advance so that they know that their choice of verdicts determines life or death, and the bottom line, in short, is that the jury is permitted to return a non-capital second degree murder verdict in every first degree murder prosecution. This is cold Louisiana law and always has been.

If the Court would look at page 62 and 63 of the brief in Roberts, the Louisiana Supreme Court puts it this way, "Under our peculiar jurisprudence, on trials for murder, the jury may find the prisoner guilty of manslaughter, although the evidence may show him to be guilty of murder."

The next page, the Peterson case: "In Louisiana, where there is evidence to prove the greater offense, it is the jury's province to determine the existence of vel non of lesser culpability and exercise the statutory right to return the manslaughter verdict. This Court will not look to the evidence to make such a determination."

That is now true of second degree, for which the Louisiana legislature has now upped the minimum penalty to 40 years to life, so what it has done in this parcel of legislation is in fact give the jury a non-capital option, exactly like they had before, except the names of the verdicts have been changed.

Now, it may be useful here to compare the practice in Louisiana with that in other states, because this Louisiana practice is also quite common, although it is not called responsive verdicts and there is no statutory basis for it elsewhere.

Some states, like Florida, for example, which is before this Court in one of the five cases, always submit lesser degrees of homicide to the jury, regardless of the evidence, just like in Louisiana. The state's brief in Florida seems to suggest that that is not so, that the submission of lessers depends on the evidence, but the state's brief simply fails to draw a distinction that Florida law draws, which is distinction between lesser degrees of an offense and less or totally different offenses.

In Florida, lesser degrees of an offense are always submitted without regard to the evidence, so --

QUESTION: Mr. Amsterdam, let me interrupt you again to be sure I understand your argument. Does this argument you are making now about the total discretion of the jury to return

a non-capital verdict depend at all on the size of the category of capital crimes? Supposing just one crime, say, air piracy, and nothing else, and assume for the moment that your second argument fails, would your argument about total discretion render such a statute unconsistitutional?

MR. AMSTERDAM: My position --

QUESTION: Let me rephrase it just a little bit for you. Is your argument affected at all by the universe of capital crime?

MR. AMSTERDAM: The answer to Your Honor's second question is yes, although I would have said that in my view even the narrowest capital crime would be assailable on this ground if there were total discretion within --

QUESTION: That is what I am assuming, yes.

MR. AMSTERDAM: -- however, I could see, when we rejected that argument, nevertheless saying perhaps where a statute like killing a guard by a prison inmate under a present life sentence, something like that, that may be so narrow in terms of the group that it hits that you might allow something in that kind of a case that you wouldn't allow for punishment for all first degree murder.

QUESTION: Why?

MR. AMSTERDAM: I myself am not arguing that.

QUESTION: Now, why would one do that and be consistent with your argument?

MR. AMSTERDAM: I think that one might do it on the ground that the amount of arbitrariness which is exhibited in practice might be thought to be diminished by the smaller range over which it had to play. However, Mr. Justice Stevens, I would argue the other way, which is that the smaller the range the more arbitrary the distinction, because the cases by definition are all the same to start with, that is they are so close together at the beginning that discretion within those cases is even more arbitrary. And that is why, Your Honor, I find it difficult to answer conclusively the question. I don't think it makes a difference.

In my argument, if I were arguing that kind of a case, I would say even the narrowest bead cite definition of a crime, if it allowed total and absolute discretion to sentence to life or death within it, or glossed over that discretion, papered it over with these kinds of procedures would be bad. But I could see, Your Honor, the possibility that one might disagree with that but still not these statute standards because they are broader.

Now, Florida, as I say, and a number of other states always submit, as in Louidiana, lesser degrees without regard to the evidence. In some states, like Georgia, North Carolina, and Texas, which are now before the Court, lessers are theoretically supposed to be submitted only when there is evidence to support them.

However, in fact, a couple of practices should be noted. First of all, appellate decisions admonished trial judges to submit to -- are on the side of submitting lessers in any case where the question is doubtful. Secondly, convictions of unsupported lessers, that is if the judge in the case where the evidence shows only first degree murder, submits second degree murder and the jury convicts of second degree or manslaughter, the appellate court virtually everywhere affirms on the ground -- well, the Texas statute says expressly that a verdict is not contrary to law in evidence where it convicts the defendant of an inferior grade of the offenses. North Carolina reaches the same result, Florida reaches the same result on the theory that a defendant can't look a gift horse in the mouth.

But I think the important point here is that we are talking about defendants who are sentenced to less than death looking gift horses in the mouth. What is a gift to them is by interlockable logic, as Professor Charles Black says, very mess less than a gift to the defendant who doesn't get that grace and isn't spared and is not in the exercise uniquely unaccountable discretion saved from going to death.

Another point that in the total look at the way capital punishment functions under the various statutes that ought to be made is that where lessers are not submitted, lesser degrees of murder, as in some felony murder cases where

the evidence may make out felony murder or not, so much invariably so, at least for the prosecutor exercising his discretion, charges the felony in the same trial, that the felony is submitted separately from the murder, the jury has the choice of convicting him of a felony and letting the defendant off of the capital count.

QUESTION: Did I understand, Mr. Amsterdam, that in Louisiana the lesser included offenses are always submitted to the jury?

MR. AMSTERDAM: In Louisiana they are always submitted.

QUESTION: Even in a felony murder case?

MR. AMSTERDAM: Oh, yes, absolutely.

QUESTION: That is what I thought.

MR. AMSTERDAM: Manslaughter is submitted in a felony murder case.

QUESTION: And regardless of what the evidence is?

MR. AMSTERDAM: Regardless of what the evidence is.

QUESTION: In a case where the evidence is either that the person is guilty of first degree murder or innocent, those are the only rational differences, nonetheless the lesser included offenses are always and invariably and inexorably and inevitably submitted to the jury, is that correct?

MR. AMSTERDAM: Yes, by statutory command yes, every case.

QUESTION: That is what I thought.

MR. AMSTERDAM: And that, as I say, is true in other states, including Florida.

QUESTION: Is that characteristic of capital crimes? Is that a characteristic of their criminal law --

MR. AMSTERDAM: Your Honor, in Louisiana, the so-called responsive verdict procedure in Louisiana is a statutory procedure that characterizes its criminal trials of all -- but the statute, 814, which identifies what is a responsive verdict, has a subsection dealing with first degree murder. It has also a subsection dealing with many other crimes.

Now, in addition to the availability to the jury of lesser offense convictions, another feature of the system that ought to be pointed out is the often amorphous lines that separate the greater from the lesser. And here again, Mr. Justice Stevens, perhaps in answer to your question, another distinction that might be made, although I don't make it, might be the extent of amorphousness of the law between the greater and the lesser that the jury would judge and prosecute has to work here.

Mr. Justice Cardozo pointed out, for example, the fact that premeditation, deliberation and such other mystical mental concepts, premeditation is different from intent somehow, because it must precede the killing, although it may be only a split second before the killing, Justice Cardozo rightly pointed

out that this is simply a dispensing power conveyed in a mystifying cloud of words, to use his terminology.

Now, it may be that a statute which draws different lines now might be thought to be less susceptible to challenge, but these statutes, and those in the United States generally today, are characterized by questions of intentionality, premeditation, voluntariness, subjective mental elements.

It is important that all of these discretionary procedures interact against the background of the definitions of the crimes, and to come now specifically to the bottom of Justice White's inquiry about how this all squares with Furman.

What we have is a system in which often amorphously defined and distinguished capital crimes of considerable breadth -- narrower questions may come up later, but now of considerable breadth, are submitted to a legal process in which the decision to move the defendant forward to a death or let him escape or avoid death, is made in a series of stages, with each decision-maker asking the question in theory is this premeditation, deliberation or not, was this in the direct case a killing in the course of forcible rape or was it not, but which in fact, in actual fact unaccountable discretion is allowed to the following actors -- the prosecutor at the charging stage, the prosecutor once again at the stage of nol prossing or dismissing, formally or informally reducing the charges, sometimes the trial judge has to approve and sometimes

he does not, but in each case the vagueness of the law gives him virtually no basis to disapprove.

QUESTION: Mr. Amsterdam, I shouldn't interrupt, but a thought just occurred to me and I would like to ask you, because it is on my mind. Again focusing just on the jury phase and putting to one side for the moment the prosecutorial and clemency phases, do you suppose statutes such as these would be saved if the defendant were given the option of asking for an instruction in the alternative, just the capital verdict or not guilty, if the defendant were given the option to insist on that charge?

MR. AMSTERDAM: No. The problem is that it is the defendant -- all defendants would want the option of the lesser offense. This is a strange kind of a constitutional issue in which procedures which unquestionably help some defendants disadvantage others.

The procedure that Your Honor suggests or describes would simply allow a defendant to gamble or not gamble on jury pardon or mercy. Those defendants who gambled and won would nevertheless make the system arbitrary as to those defendants who lost. The choices made by one defendant surely aren't going to affect the constitutional rights of the others. It is the ones who end up at the short end of the stick, the ones who lose in the lottery, whose deaths are arbitrary and thereby we think under Furman are cruel and unusual.

Giving other defendants the choice which they may exercise to get out from under it doesn't seem to me to affect the ultimate arbitrariness of the result in the case of the defendant who gets sentenced to death.

QUESTION: So you are really not concentrating on the fairness of the procedure in the particular case at all?

MR. AMSTERDAM: No, not at all. It is the fairness of the overall system, and that is what I think Furman focused on. Let me see if I can describe why I think Furman covers this process. I don't think Furman was concerned with fairness of --

QUESTION: Mr. Amsterdam, when you say Furman, what do you mean there?

MR. AMSTERDAM: I mean the lowest possible denominator of interpretation of the opinions in Furman v. Georgia. Furman could not, I think, have been concerned with the fairness of procedures in each individual case. If it were, it would have been inconsistent with McGautha. I think what Furman did was to say -- and this seems to me very consistent with the body of this Court's general jurisprudence -- that the Eighth Amendment and the due process clause of the Fourteenth Amendment are two very different animals, even though it is through the Fourteenth Amendment that the Eighth Amendment becomes applicable to the states.

As a matter of due process, the states are given a

great deal of leeway to shape their procedures as they may, and I don't think that you could quarrel about one form of discretion or another, nor, said McGautha, about any form of discretion, simply as a matter of fairness of the deciding the particular case.

What Furman said was that when a procedure of that sort resulted in an arbitrary dispensation of death across the total range of those cases in which it was authorized, so that the infliction of the death penalty on a particular individual was senseless, his case, indistinguishable from that of others who were spared, the only imposition of that death penalty on him was cruel and unusual in a constitutional sense because he was being selected out of an indistinguishable group for no reason to suffer a penalty inordinately greater than that suffered by others, no rhyme or reason, no justification.

This arbitrariness defeated the penological justifications for capital punishment, this arbitrariness made the death penalty unusual in a constitutional sense, and it is our submission that it doesn't matter whether one device or another is used to achieve that result. The federal --

QUESTION: Mr. Amsterdam, doesn't your argument prove too much? In other words, in our system of adversary criminal justice, we have prosecutorial discretion, we have jury discretion, including jury nullification, which is known, we have the practice of submitting to the jury the option of returning

verdicts of lesser included offenses, we have appellate review, and we have the possibility of executive clemency, and that is true throughout our adversary system of justice. And if a person is sentenced to anything as the end product of that system, under your argument, his sentence, be it life imprisonment or five years imprisonment, is a cruel and unusual punishment, because it is the product of this system. That is your argument, isn't it?

MR. AMSTERDAM: No.

QUESTION: And why not?

MR. AMSTERDAM: It is not. Our argument is essentially that death is different. If you don't accept the view that for constitutional purposes death is different, we lose this case, let me make that very clear. There is nothing that we argue in this case that will touch imprisonment, life imprisonment, any of those things.

Now, why do we say death is different: One, because this Court in Furman said it was different. It seems to me that there is no doubt that this Court did not mean to strike down in Furman sentences of life imprisonment, twenty years, ten years, although courts have just as broad discretion to sentence to those things or less as they did for life or death under the system invalidated in Furman.

Second, the legislatures of the states have recognized that death is different, and this is the thrust of my

point, that in responding to Furman, 35 legislatures have come back with this narrow technical approach allowing -- affording straight careful procedures that allow wholesale outlet, whereas 52 jurisdictions in 408 life imprisonment sentences just, you know, use the penalty. The courts eased it but the legislatures saved it.

Our legal system as a whole has always treated death differently. We allow more peremptorily challenges, we allow automatic appeals, we have indulging requirements, unanimous verdict requirements in some jurisdictions, because death is different.

And, finally, death is factually different. Death is final. Death is irremediable, death is unnullable, it goes beyond this world, it is a legislative decision to do something and we know not what we do. Death is different because even if exactly the same discretionary procedures are used to decide issues of five years versus ten years or life versus death, the result will be more arbitrary on the life or death choice.

Now, why do I say the result will be more arbitrary on the life or death choice. It will be more arbitrary on the life or death choice because the magnitude of what is at stake insures him to kill somebody or spare him dwarfs the factual differences on which the decision is to be made, renders them, as Professors Kalven and Zeisel have said, demeaningly trivial

compared to the stakes in a way that no such other decision is unrelated to the factual basis on which it is made.

The decision is different, the discretion is different, and the result is different, Mr. Justice Stewart, in a death case than in a case where lesser penalties are issued, because, as the history of capital punishment under the discretionary system struck down in Furman shows, the death penalty has become so repugnant, so abhorrent to those who must actually apply it in particular cases, as distinguished in the abstract question of having it on the books, that in order for a jury and a judge and a prosecutor and a governor to condemn a defendant, an intense ad hominem condemnatory judgment has to be made, which is very different from the kind of judgment applies when it is applied with the ten-year question, which is a judgment that is uniquely difficult to control, uniquely difficult to rationalize or regularize.

Now, that, combined with the breadth of discretion which is in the system, some of which is like the discretion involved elsewhere and some of which is not, create a total pattern whose result is that the infliction of death on specific defendants condemned to die is cruel and unusual.

Thank you.

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

Mr. Attorney General.

ORAL ARGUMENT OF JOHN L. HILL, ESQ.,

ON BEHALF OF THE RESPONDENT TEXAS

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

Mr. Amsterdam's first point that the system of selectivity such as was condemned in Furman still exists, we would say certainly as applied to the Texas statute -- and I hope that I will be able to demonstrate this before I am done -- that is not a correct statement, and that the system of selectivity condemned in Furman does not presently exist in the Texas statute, either in theory or, the best evidence, actual practice.

Now, as to his statement that prosecutorial discretion, jury discretion, discretion on behalf of our chief executives of our states, that type of discretion, no statute obviously can cure that, nor should it.

As Justice Stewart observed, his argument indeed does prove too much.

It would be an anomaly to say the least if we were to condemn today in this country as unconstitutional the very procedures that our Constitution create, the same Constitution that created the cruel and unusual punishment provision relied upon my petitioners.

It would be an anomaly to say that we cannot constitutionally carry out the sentence today of death in this country

solely because it is being carried out under the very constitutional procedures that created this country and upon which it was founded. Indeed, that argument proves too much, and I am sure it will be summarily rejected by every Justice.

Now, as to the proposition that the execution of the death penalty in this country, regardless of the circumstances, regardless of the crimes that are selected out by the states for which it is to have application, in the wisdom of state legislatures, regardless of the procedures that are used, regardless of how careful one may be, regardless of the time spent in selecting a fair and impartial jury, regardless of the impartiality of the prosecution, regardless of the facts, regardless of the circumstances of the crime, regardless of affording all of the due process for which this country is noted, regardless of all of that, Mr. Amsterdam would tell us that the execution of the death penalty in America is cruel and unusual punishment, even in those events, and must be condemned.

Need one today say more to this Court than that statement stands without any legal precedent? He stands utterly alone. The unchallenged law of this country, as I speak, is to the contrary. Indeed, he should carry a very heavy and compelling responsibility to ask the Court to overturn everything that has ever been said by this Court and other courts in this country to the effect that the infliction of the death

penalty in the United States of America today is not unconstitutional per se.

The truth is, and it becomes more and more obvious as this litigation proceeds, that there are those who hold very strongly the view and the conviction that the death penalty should no longer be used for any purpose in this country.

There was a very agonizing statement by one of the Justices of this Court expressing his sentiments, "Were that the only issue before the Court, there would be no need for any of us to proceed." That is, of course, not the issue. This Court is not a super legislature. This Court is not the keeper any more than Amsterdam is of the social values and the conscience, the moral standards of the people of this country. That is why we have a federal system of government, that is why we have a republican form of government, that is why we entrust decisions of this type, subject always, of course, to review on constitutional standards to state legislatures.

Now, then, he tells us that really what has happened here in Texas is nothing more than that we just decided that there was a person that was a reprobate and that he killed a young girl whose father happened to be a policeman, and that we decided he ought to die.

Now, upon what meat can anyone feast to grow great and to say that about this case in view of this record? It is the same thing as conceding, in questioning Justice Stevens,

that in his view there could be narrowly defined circumstances, narrowly defined crimes by legislature which might even meet his constitutional standards. He illustrated with one that is a lifer in a prison, who takes the life of someone working there. But the theory seems to be, let me say what this case is about, let me say what the Texas case is about and what the facts are in it, let me say where we draw the line, let me determine what offenses should come within the purview of capital punishment in this country, let me decide what constitutes proper social goals, let me decide where retribution is possible and proper and where it isn't, let me decide when if ever the death penalty will deter and thus serve a legitimate social function, and let me decide where and when incapacitation of a defendant is justified.

Now, I say to all of that, may it please the Court, and it runs through both the Furman presentation and through this presentation, the basic balancing of asking this Court to blindfold yourselves to any viewpoint other than that expressed by the petitioners, to blindfold yourselves to any data or evidence or experience other than that to which they point and the standards for which they have arbitrarily established as the guidepost in this case.

QUESTION: Mr. Attorney General, I wonder if that is really a fair statement of his argument. He has two separate arguments, of course. The first argument, as I understood it,

was that under the Texas system there is total discretion in the jury to return a verdict other than the one that requires the death sentence. And as I understood his argument, he says that the first and third of the three aggravating questions that are submitted to the jury in the punishment hearing have already been answered by the jury and therefore there really is no standard guiding those. Do you have a response to that argument?

MR. HILL: The first question, may it please the Court, that we ask on the sentencing stage, and that is whether the conduct is deliberate, deliberate conduct causing the death. Under our definition of murder, our definition of murder is the person commits an offense, if he intentionally or knowingly causes the death of an individual.

Now, we had a case brought under this statute, it happened in Beaumont, where an individual was trying to break into the jail and release some prisoners. He went in heavily armed and he went in shooting. But in the process, actually the policeman that was killed was killed by a guard who was trying to resist the entrance. So in that particular case, the jury convicted of capital murder, but found no to this first question of a deliberate conduct causing the death. His conduct was deliberate in the sense that he was in and bent on mischief and shooting, but it wasn't -- and it may have been a knowing thing on his part, but there is a distinction between

the deliberate conduct that is asked about in the first question and in some types of capital murders, not in all.

It is a last sobering look by the jurors where there can in fact be a distinction in the circumstances of the case, and we have had 15, if the Court please, no answers to these questions. They haven't been just idle academic gestures.

The second one, that deals with whether or not a person will probably commit criminal acts of violence which would constitute a continuing threat in the future, the last case in which that was answered no, it was a young 21-year-old black that killed a white policeman in the City of Austin. There was some evidence presented, not sufficient to convince the jury that there was provocation, but there was some evidence of a degree of hassle and the individual had no prior record of any kind, was 21 years of age, and that question was answered no, and his life was spared.

And so I submit, Mr. Justice Stevens, that the questions serve the valid purpose of trying first to tie down that this is a deliberate, cold-blooded, voluntary type of killing, without any degree of -- if there was any provocation at all, it cannot be utilized, and to try to separate out those individuals who from the type of crime that they had committed, have shown themselves to be likely recidivists.

QUESTION: Mr. Attorney General, just to finish my thought about the first of the three questions, putting aside

for the moment the second, would it be your view that those 15 cases in which the jury answered no to the first question at the penalty hearing, there was in the record a basis for differentiating between the kind of intent required to support the guilty verdict of murder on the one hand and the kind of intent required to satisfy the statutory command, or would you, in the alternative, say that this was merely an exercise by the jury of its power to be lenient in a particular case?

MR. HILL: I think there was real difference in the jury's mind in those cases. I should -- and co-counsel has handed me a note -- I should state, to be more clear on the point, there were 15 cases in which one of these questions was answered no. There were 12 of those, as I recall my facts, in which it was question number two that was answered no, along with the three times that this particular question was answered no. And if I am not correct, I will ask Mr. Pluymen to correct me.

So there were three instances in which question number one triggered the invoking of the life sentence rather than the death sentence, and there were 12 other instances in which the question on number two was answered no, and that is that the person would not probably commit criminal acts or violent acts in the future as constituting a continuing threat to society.

QUESTION: Then I wonder if you would respond to the

argument Mr. Amsterdam makes that if this case is typical, that the evidence supporting an affirmative answer to question number two consisted of nothing more than the offense itself, plus four hearsay statements by local citizens that they did not approve of this man's reputation, that that question really is bind of an escape hatch by which the jury may exercise leniency? Do you think that --

MR. HILL: No, sir, not at all. I have cited 12 instances in where the jury found -- I recited the one instance of the killing of a policeman -- that I believe the case in point, there was absolutely no evidence, other than the crime itself, which would have indicated recidivism, and the crime itself was not in the jury's mind of such heinous character under the circumstances described as to justify a yes answer.

Now, then, in our case, Mr. Jurek, a 22-year-old white father, who kidnapped a 10-year-old white girl, where her grandmother had taken her for a two-hour swim and had left her in the custody of the pool people, put her in the back of his pickup truck, ran her through the city of Cuero, with her screaming at the top of her voice, "Please help me," had already told people he was going to get that girl or one like her, that they weren't too young to have sex with, and he intended to have it, took her to Hells Bridge, got her out of the truck, undertook to have sex with her, choked her until she fell into unconsciousness and threw her in the river and

left her there to die, which she died almost immediately, went back with his friends and his beer, with no remorse, came back by the bridge with his friends, looking around in the river to see what he could see, and with confessions in the record, plus -- Your Honors, the only way we prove bad character in Texas in these cases is by hearsay. You cannot get up on the witness stand in Texas in a courtroom and say "I believe this person is bad from my experience." It has to be from the person's reputation within the community. So this quick pass-off that it was hearsay testimony doesn't do justice to this record. These were four fine citizens of Cuero that testified that his general reputation in the community for being a law-abiding and peaceful citizen was bad. I don't know how much credence the jury gave to the two questions by the prosecutor that did you know that he had done the same thing to a girl in Louisiana, and one in Cuero before, I don't know whether that had any probative force or not.

QUESTION: Mr. Attorney General, has the Texas Supreme Court told us whether evidence of the offense itself if a sufficiently heinous offense, would be sufficient to satisfy the second question, the aggravating circumstance question?

MR. HILL: No, they have not, and I believe though that the crime itself can show such an incorribility, such a -- free of any remorse -- here he was saying to the town with

the girl in there, get out of my way, get off of the road. He announced then that he was a menace to society. You can have it by the kind of conduct itself, but in this instance we had more. But the point is that that kind of question can be judged by the sufficiency of the evidence. Our Court of Criminal Appeals has already told us that you can have the defendant himself testify, you can have psychiatric testimony as to whether or not the person would likely be a recidivist or not -- there are all kinds of evidence, and there must be substantial enough evidence to support that verdict. That is a point that can be appealed directly to our Court of Criminal Appeals.

We've sent one case back involving a person of Spanish surname today because of the feeling that there was inadequate evidence. These are matters that can be taken care of under due process and under equal protection, has nothing at all in the world to do with the Eighth Amendment. And if I might --

QUESTION: Mr. Attorney General, you could give him life imprisonment, you wouldn't have to worry about recidivism, would you?

MR. HILL: Well, interestingly enough --

QUESTION: I don't mean -- I mean real life, I mean life.

MR. HILL: I know what you mean, Mr. Justice.

QUESTION: You wouldn't have to worry about recidivism then, would you?

QUESTION: Except perhaps as to guards and other inmates and employees of the prison, I suppose that is always a possibility, isn't it?

MR. HILL: Well, of course, we had a lifer who escaped, you might have read about it, we just lost three women as hostages in the course of it, I guess life to them was rather important and to their families, and he was a lifer, what did he have to lose under the --

QUESTION: Oh, I imagine that you get all kinds of cases, but I say if it is actual life imprisonment, you wouldn't have to worry about recidivism unless you want to get some way out case some place.

MR. HILL: Well, but to the --

QUESTION: Do you think that the mere fact that a man is subject to commit another crime entitles him to be killed, is to prevent him from preventing another crime?

MR. HILL: I think --

QUESTION: Why didn't you pick him up the first time and kill him?

MR. HILL: I think the public is entitled --

QUESTION: You didn't, did you? The first time you didn't pick him up.

MR. HILL: I think, Mr. Justice Marshall, that the

legislatures of the states on behalf of the people that they represent are entitled to make that judgment.

QUESTION: The answers have to be affirmative to each of these three questions --

MR. HILL: Have to be unanimous.

QUESTION: -- not just to a single one of them, does it?

MR. HILL: No, sir, it has to be unanimous answers to --

QUESTION: Unanimously affirmative to each of the three?

MR. HILL: Exactly, and --

QUESTION: If there is a negative answer by a 10-to-12 vote, by as many as 10 members of the jury to any one of the three, then --

MR. HILL: Exactly.

QUESTION: -- the death sentence cannot be imposed, is that correct?

MR. HILL: That is right.

QUESTION: While I have interrupted you, Mr. Attorney General, may I ask you this: Since this statute has been in existence, has there been an opportunity for sufficient development of the case law so that you can tell me what the limits, if any, are there on the evidence that can be adduced at this second phase of the proceedings of this penalty phase?

MR. HILL: No limits other than the constitutionality of the evidence under the United States Constitution.

QUESTION: You said it was almost unlimited, didn't you?

MR. HILL: I did, and that is almost unlimited. But it is limited, Mr. Justice Marshall, by the United States Constitution.

QUESTION: Well, surely there can't be a violation of somebody's right against compulsory self-incrimination, I suppose, if he wants to assert it? And it is unlimited for both parties?

MR. HILL: For both parties.

QUESTION: Thank you.

MR. HILL: And the question of recidivism, it seems to me, is the same as the question on deterrence. Mr. Amsterdam himself, it seems to me, acknowledged the significance of the deterrence when he said that, if given a choice, these defendants would choose the life sentence when he was debating about whether or not they should have a choice during the sentenceing process. And of course, that is just a simple recognition by him of his intuitive instinct of human nature to seek to sustain our own lives, the life that we all know is important to every individual. That is an instinct of every human being.

And if that be so, then why isn't it and why shouldn't

it be allowable as a deterrent, as a social goal of deterrent to prevent a lifer in a prison from taking life with immunity, why shouldn't it be a deterrent to prevent someone who has a small child that he intends to raise for kidnap, to have not the incentive of his own life to return that child? Why shouldn't we permit a law in our states such as in Texas? Seventy percent of our crimes under this statute have been murder with armed robbery, 70 percent of them. And incidentally, I want to talk a little bit more about that from the racial standpoint, to show that our statute once it begins to operate, operates free of any racial discrimination.

Why shouldn't there be a deterrent for a person who goes into a convenience store and undertakes to take someone's life, not to have the deterrent of his own life when he is snuffing out the only eye-witness to that crime in most instances?

I don't want to debate all of the reports that are here before you about deterrence and their values, but I think Mr. Amsterdam admitted the thing that appeals to our own logic and common sense when he said that the criminal himself will always seek life rather than the extreme penalty. Of course, it is excessive in its severity, but not in a constitutional sense, and that is where we differ. I will take a back seat to no one in revering human life.

We are talking here about a constitutional question,

and our very Constitution created the right, I submit, on the part of our state legislators to make this discriminating choice, painful as it is, difficult as it is. We tried to meet the objections and criticism that this Court laid down as best that we could discern them, and we turned to a statute where we selected out murder first, murder.

Now, under our prior Texas statutes that you have condemned, we could put people to death for rape alone, for rape alone, we could put them to death. In our old statute, we could put people to death for lying in a death penalty case. We could put them to death for armed robbery. We could put them to death for species of burglary. We could put them to death for treason. We had all kinds of randomness and differentials between our treatment.

Now we have changed that. Our Senate sat down, on the one hand, of the aisle, and they wrote a statute down in Texas that put all of the code materials in again mitigating circumstances and extenuating circumstances and aggravating circumstances. Our House sat down, on the other hand, and wrote a statute like North Carolina's and said guilt-death. We compromised. We went to a House conference. I went over and worked. We tried to pore over Furman. We tried to understand it. What did Justice Burger say when he said he might not like a mandatory sentence? What was the right thing to do?

And we wrote in three -- in the first place, we just

wrote in five categories of murder -- the worst one known as far as calculation and design, murder for hire, when you go pay for it. Certainly, if there is any such thing as a crime that we ought to be able to deter in exact not in excessive punishment but at least a proportionate one for that type of activity. And we said armed robbery, and I have already demonstrated what a problem that has been in our state, the taking of life. It is bad enough to commit the crime of armed robbery, but the consistent taking of life that has gone with it -- do you mean our people have no right in our state to try to deal with that question and with the feeling that there is some deterrent to this excessive but constitutional penalty?

I mentioned the prison situation, where we have already had it in our state, and we've fortunately now, if this Court will say so, you will take our statute out from under a cloud and say to the next person who is a lifer in a penitentiary in the State of Texas that if you kidnap women who are in there teaching and you kill them, this state has the right to ask you to pay in a proportionate way.

Those are the kinds of crimes that we dealt with under our statute, crimes arising out of robbery, burglary, rape, arsen and kidnapping. And then we said to our police officers that we believe we have a right to set a standard to say if someone kills a police officer in our state, that they know within the course of his job that it is not an excessive

and severe punishment to ask for his life.

Now, in that particular category of cases under our statute, we have had three whites kill policemen, two of them received death, one of them received life. We had one Spanish surnamed defendant kill a police officer, a hung jury. We had nine blacks in cases involving police officers, six death penalties, two lifes, and one hung jury.

There is no evidence that once our system begins that there is racial discrimination. In the armed robbery --

QUESTION: Before you leave that -- this is not involved in the present case, but you have brought it up. Is there a requirement under Texas law that the defendant have known that the victim was a police officer?

MR. HILL: No, that he is in the course of duty and that I --

QUESTION: Must he know that he is a police officer?

MR. HILL: I frankly don't know.

QUESTION: Or has that been decided perhaps?

MR. HILL: I frankly --

QUESTION: Most of the Texas cases, they were in uniform, as I remember.

MR. HILL: I beg your pardon?

QUESTION: Most of the Texas cases, they were in uniform. Am I right?

MR. HILL: Yes, sir, but I think what Justice Stewart

may be asking, Mr. Justice Marshall, is that someone is impersonating -- or perhaps you just simply --

QUESTION: A plain clothes officer.

MR. HILL: He is a plain clothes officer, you are not aware that he is in the course of duty.

QUESTION: That's right. We dealt with that here in --

MR. HILL: I will check it for you and --

QUESTION: Well, it is not relevant to this case, but I just --

MR. HILL: My impression is that knowingly would be involved. Now, in those armed robbery cases, we had 23 blacks that were tried. Ten of them received the death penalty. We had 20 whites tried for that same bad crime, and ten of those received the death penalty. We had nine Spanish surnamed defendants commit that horrible crime, and six of those received the death penalty, and one of those has gone back on remand. So in a category where 70 percent -- I'm sorry, if my math is off -- I could go on to show without any question that not only in theory does the Texas statute meet all of the criticisms by having these narrow categories with questions that deal with recidivism and incapacitation and deterrence and retribution, but also that in practice, in actual practice, it has met those standards and is working constitutionally in our state.

QUESTION: Mr. Attorney General, just to save you

the trouble of looking -- I think I quote from your code -- the person murdered was a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman. The defendant knew --

MR. HILL: I appreciate that very much, Mr. Justice Blackmun. I have tried to prepare very diligently for this matter, and I obviously didn't do a hundred percent --

QUESTION: Well, I think it is an obvious answer. You don't have a Feola problem.

MR. CHIEF JUSTICE BURGER: Mr. Babin.

ORAL ARGUMENT OF JAMES L. BABIN, ESQ.,

ON BEHALF OF RESPONDENT LOUISIANA

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

The case of Roberts v. Louisiana pertains to a young black man who killed a 61-year-old white man while engaged in the armed robbery of a filling station on August 18, 1973.

The statute which existed in Louisiana prior to the Furman decision was the murder statute which provided that if you had specific intent to kill or inflict great bodily harm on anyone, and he died as a result of that, then you could receive the death penalty or would receive the death penalty if you were found guilty as charged.

However, in the list of responsive verdicts to the

prior murder charge in Louisiana prior to Furman, one of the responsive verdicts was that the jury could return a verdict of guilty without capital punishment, if the jury saw fit to give mercy to the person who was being gried and who was found guilty, than they could return a responsive verdict of guilty without capital punishment.

However, after the Furman decision, where it was decided by this Honorable Court, the Governor of the State of Louisiana appointed a commission and they met and they enacted certain laws in a special session in Louisiana, which takes a two-thirds vote to open such a special session to legislation such as this which would be considered normal legislation.

The commission discussed the Furman decision and the statutes of Louisiana as they were at that time, and we came up with the first degree murder statute and a second degree murder statute.

The first degree murder statute which Louisiana now has encompasses those type of killings where the defendant himself initiated the action, in other words he started or put into motion whatever later caused the death. In other words, he took a gun and he went into a service station and he held that service station up and as a result of his being there with this dangerous weapon and a result of his specific intent to kill, someone died.

These type of crimes were placed into the first degree

murder statute. You take the crimes of murder, where you have the family argument, you have the bar room brawl, where there is specific intent to kill, but it is not initiated by you committing a felony or you killing a policeman while he is in the engagement of his duties, or while you are in the prison, or while you are committing aggravated rapes or other more serious felonies.

First degree murder encompasses those particular items. Second degree murder takes care of those items or those murders which were not initiated by the defendant himself while he is in the perpetration of those particular instances.

The first degree murder statute in Louisiana carries with it the mandatory death penalty.

QUESTION: If a family argument would be covered by first degree, a family type brawl of the kind you are -- or a bar room brawl, it would be covered, would it not, if more than two people were killed by the same person?

MR. BABIN: If he had the intention to kill more than two.

QUESTION: Yes, and if he did.

MR. BABIN: And if he walked into the bar and he had a gun and he decided to shoot all five men standing at the bar, then it would come under the first degree murder statute, yes, sir.

QUESTION: If there were two or more victims, it

could?

MR. BABIN: Yes, sir. But you would have to show specific intent, or the state would, that he intended to kill more than one.

QUESTION: Yes, I understand that.

MR. BABIN: The first degree murder statute, as I have said, carries with it the mandatory death penalty. The jury in this case, in the case of a first degree murder case, has to find every element of that crime before they can return a verdict of guilty. They must find specific intent to kill. They must find, if it is an armed robbery case, that all of the elements of armed robbery are present. They must find, of course, jurisdiction and they must find the other elements of a crime. They are sworn members of that court. They are sworn to find a person guilty if he is proven guilty of first degree murder, if the state has proven its case beyond a reasonable doubt, each and every one of those elements.

Now, if the state fails to prove each and every one of those elements, then he of course is instructed to return a verdict of not guilty or he is given a list of responsive verdicts which he can return.

Now, this was discussed at the commission when the new laws were enacted. It was at first thought that it would be best just to have guilty or not guilty. But suppose that the state has proven a man -- was unable to prove a man guilty

of first degree murder, but he is able or does prove him beyond a reasonable doubt guilty of second degree murder, should he go free?

The state has proven that he committed a crime. They have not proven that he committed the crime of first degree murder, but they have proven beyond a reasonable doubt all of the elements of another crime, therefore the jury can bring in a responsive verdict of the particular crime that is proven to it beyond a reasonable doubt.

Now, when the judge instructs that jury, and he must instruct them each time, if you find that the state has proven beyond a reasonable doubt all the elements of first degree murder, it is your duty to return a verdict of guilty. Then the court instructs, as they did in this case, if you do not find that the state has proven its case beyond a reasonable doubt as to first degree murder, but that you do find that the state has proven its case beyond a reasonable doubt as to second degree murder, then it is your duty to return a verdict of second degree, and on down the responsive list of verdicts until it comes that if the state has not proven any elements of any of these crimes, then you shall return a verdict of not guilty.

Then if the jury returns a verdict of guilty as charge to first degree murder, it has no discretion whatsoever, the judge has no discretion whatsoever, it is then a mandatory

death sentence. There is no discretion by a person as to whether a particular person will die or not die. If he is found guilty of first degree murder, then he is sentenced to death.

The court has no ability nor discretion either. It has to and, as the statute provides, it must give the death penalty in those cases where the defendant is found guilty of first degree murder.

QUESTION: Under Louisiana law, is the judge (a) authorized, or (b) required to tell the jury the consequences of its verdict of first degree murder?

MR. BABIN: No, Your Honor.

QUESTION: He neither must not -- he must not and he may not, is that right?

MR. BABIN: He does not and must not, yes, sir. However, of course, a jury, as a matter of practicality, is questioned on the death penalty when he is questioned as a juror, and he naturally will know if he is going to be accepted as a juror that it is going to pertain to the death penalty. That is a matter of practicalities. Howver , the jury in Louisiana has no right to sentence in no case, whether it is the death penalty or theft or whatever it may be, that is the judge's prerogative and is not left to the jury.

The part of the argument that has been made --

QUESTION: Mr. Attorney General, is it permissible

argument for defense counsel to explain to the jury that a second degree responsive verdict would avoid the death penalty?

MR. BABIN: No, Your Honor.

QUESTION: It is not?

MR. BABIN: No.

The argument that has been made by Mr. Amsterdam that there are certain prerogatives to the district attorney, that he can nol prost, that he has control of the case, that he can charge as he sees fit, in Louisiana you cannot charge a capital case without bringing it to a grand jury, presenting your evidence and having that accusory body bring the charge. So the D.A. certainly does not have the right to bring a capital case or charge one as he sees fit. He has to do it through a grand jury.

The D.A. does have a right to nol prost even to a grand jury indictment, but this is something that the district attorney stands as a barrier between your law enforcement and the defendant himself. This is something that is to the benefit of the defendant.

The other thing that is brought out by the defendant is --

MR. CHIEF JUSTICE BURGER: We will resume there at 10:00 o'clock in the morning.

[Whereupon, at 3:00 o'clock, p.m., argument in the above entitled case was recessed, to reconvene on Wednesday, March 31, 1976, at 10:00 o'clock a.m.]

IN THE SUPREME COURT OF THE UNITED STATES

JERRY LANE JUREK, Petitioner, v. TEXAS, Respondent.	:	No. 75-5394
STANISLAUS ROBERTS, Petitioner, v. LOUISIANA, Respondent.	:	No. 75-5844

Washington, D. C.,

Tuesday, March 31, 1976.

The above-entitled matter came on for argument at 10:00 o'clock a.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 PAUL STEVENS, Associate Justice

APPEARANCES:

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

JOHN L. HILL, ESQ., Attorney General of Texas, Austin, Texas; on behalf of Respondent Texas.

JAMES L. BABIN, ESQ., Assistant District Attorney, 14th Judicial District, Lake Charles, Louisiana; on behalf of Respondent Louisiana.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Roberts v. Louisiana.

Mr. Babin, you have 16 minutes remaining.

ORAL ARGUMENT OF JAMES L. BABIN, ESQ.,

ON BEHALF OF RESPONDENT LOUISIANA (RESUMED)

MR. BABIN: Thank you, Your Honor.

Mr. Chief Justice and may it please the Court: To briefly just restate our position, like before we finished yesterday afternoon, after the Furman decision the Louisiana legislature, at a special session which requires two-thirds vote to bring up the normal type of legislation which this was, brought the Louisiana murder statute from the plain murder which we had had previous to that time to first degree and second degree murder, placing in the first degree murder statute those crimes which are somewhat initiated by the defendant himself, in other words those that happen with specific intent when he is in the perpetration of aggravated rape, aggravated burglary, armed robbery, or such as that, all people who are hired to kill, people who kill policemen while they are engaged in their duties, and the more serious crimes and the crimes defendants actually initiate and start themselves.

As I have stated before, the second degree murder statute, while it does carry with it in some instances specific intent, it takes care of those killings where you may have a

man who is in a bar, he is drunk, he is in a fight, he does have the intent to kill and he may kill someone, but it is not the type that you will find in the first degree murder statute, which this case involves.

In Louisiana, the legislature also amended the responsive verdict statutes, and the responsive verdict for first degree murder no longer contains the guilty without capital punishment responsive verdict. It is either guilty or guilty of the other crimes, such as second degree murder or manslaughter.

Now, when the judge gives the jury, the sworn members of that court, the instructions as to what they are to do, he will instruct them that you must find that every element which is in first degree murder, in other words, you must find the specific intent to kill, you must find every element in this case of armed robbery. Then and if you do find such elements and it is proven to you by the prosecutor beyond a reasonable doubt, you are to return a verdict of guilty.

If the verdict of guilty is returned in such a case, no longer does the jury nor the judge have any control over what the sentence will be. It is a mandatory death sentence at that stage.

The juries in Louisiana and in the United States, if the argument of the respondent were to be believed, are not dependable, that they will not attempt to follow their duties

that they are sworn to do, that they have taken an oath to do. This goes further, even if you were to follow his argument, than the murder statute. It does not necessarily involve the death penalty. If the juries are suspect, if the jury is not going to follow his instructions, he has said that he will follow the law of the state and he has taken an oath to do so, there is nothing further you can do to make him do that. And if jurors are suspect, then the jury system can no longer exist. And I certainly do not think that this Court in the Furman decision intended such a thing or a change in the system such as that.

The juries that I have had any experience with or the juries that I have tried cases before or I have seen cases tried before appear to me to be the average person and the person who feels the seriousness, especially in a murder case, of the job that he has before him, and one that he will give his best ability that he is able to give to that particular job and to the facts that are presented to him.

The system that is set in Louisiana takes away from the judge or the jury any arbitrariness in the sentence that it will give. The jury is instructed by that judge that whatever is proven to him beyond a reasonable doubt, if it is a crime of first degree murder, as in this case, and the elements are proven to them, then it is their sworn duty to return a verdict of guilty.

Therefore, we do not have -- we have guidelines, first of all, for the jury to reach a verdict. Then once it has reached its verdict, then it longer has any control over that case or that defendant.

The respondent, as I understood also, says that since the district attorney of the various districts or the prosecutors have control over the cases, then you have another human element involved. It is true that the district attorneys or prosecutors in Louisiana and in all other states, I believe, have the right to try cases or nol pros them, as they see fit, or to charge. But in a death penalty case in Louisiana, the district attorney cannot charge by a bill of information. He can only charge by a bill of indictment which is returned by a jury of twelve grand jurors, therefore he has no way to be arbitrary in the initiation of a death penalty charge. It must be brought by a jury of twelve.

Once the charge of first degree murder has been brought, as it was in this case, by a jury of twelve in Calcasieu Parish, and once the defendant is tried, and if he is found guilty, that district attorney loses control of the defendent, the sentencing, and the charge itself. He no longer has any control whatsoever.

So the only control that a district attorney or a prosecutor has is prior to the finding of the final guilt of an individual. But once in Louisiana this man is found guilty

of any crime, no matter what it may be, but particularly in a death case, he has no control whatsoever. It is true in Louisiana that the Governor has the right to commutate sentences.

QUESTION: Before we get there, what is open on appeal in Louisiana from a --

MR. BABIN: Directive of the U.S. Supreme Court, Mr. Justice --

QUESTION: Well, I mean what --

MR. BABIN: -- to the Louisiana Supreme Court.

QUESTION: -- what subjects are open on appeal from a death conviction and a death sentence in Louisiana? May the Appellate Court review the degree of guilt and may it review the sentence or --

MR. BABIN: The Supreme Court of Louisiana, first you will have your bills of --

QUESTION: Is there an intermediate appellate court?

MR. BABIN: No, sir, not for criminal cases.

QUESTION: It goes directly from the trial court to the Supreme Court?

MR. BABIN: Yes, sir.

QUESTION: And appeal is a right?

MR. BABIN: Yes, sir, and it has a right or does review those particular bills of errors that the defense attorney has brought during the trial of the case, plus it has a right

to review anything that is on the face of the record of its own right. That is the Louisiana Supreme Court.

QUESTION: Would it have a right to reduce the sentence?

MR. BABIN: No, sir, it would not. It can remand, reverse, but it cannot reduce a sentence.

QUESTION: Would it have a right to reduce the degree of guilt from first degree to second degree?

MR. BABIN: No, sir.

QUESTION: It would have to remand for a new trial --

MR. BABIN: Right.

QUESTION: -- if it found the evidence insufficient to support a first degree conviction.

MR. BABIN: It doesn't have a right to find the evidence --

QUESTION: A right under that power?

MR. BABIN: Yes, sir, it does not.

QUESTION: It does not have what?

MR. BABIN: It does not have the power just to reduce or to review again that jury's verdict at the final outset.

QUESTION: Doesn't it have the power to --

MR. BABIN: Unless there is an error of patent on the face of the record or there was an error which was brought by the defense attorney in a bill of exceptions which were brought by him.

QUESTION: How about the sufficiency of the evidence?

MR. BABIN: No, sir. That is within the jury's prerogative.

QUESTION: You mean the court couldn't say that this is second degree and not first degree, as I read the record?

MR. BABIN: No, sir.

QUESTION: It can't do it?

MR. BABIN: No, sir.

QUESTION: Is that by specific statute?

MR. BABIN: They just do not have that authority, Your Honor. That is the jury's prerogative only.

QUESTION: Well, let's assume a case where there just wasn't sufficient evidence to sustain a first degree conviction and, for one reason or another, the jury went haywire and so did the trial judge, do you mean to say the Supreme Court of your state would have absolutely no power to set aside that conviction?

MR. BABIN: That is correct, sir. Now, unless, Mr. Justice, there was an error patented on the face of the record that it could tell, but not to just say that it reviewed the evidence and it does not agree with the jury.

QUESTION: Well, that is not what a reversal for insufficiency of evidence is based on. Are you telling us that if the Supreme Court, in its review, determines that there is no evidence to support the verdict, they can't do anything

about it?

MR. BABIN: Well, by that time, Your Honor, there would have been a motion for a new trial with the trial judge, and if there was new evidence or if new evidence was produced before the trial judge, he has a right to grant a new trial, you see.

QUESTION: My question wasn't directed to that. I wasn't talking about new evidence. I was talking about a hypothetical case where the record clearly showed there was insufficient evidence to sustain a verdict of guilty of first degree murder. You told me, I think very clearly, that the Supreme Court of Louisiana has no power to set aside a conviction in such a case.

MR. BABIN: It is my understanding that they do not, Your Honor.

QUESTION: But you don't have a statute, this is just by judicial fiat?

MR. BABIN: This is the jury's decision based on the evidence alone, as I understand your question.

QUESTION: Well, was that true before Furman?

MR. BABIN: Yes, sir.

QUESTION: So that just hasn't changed at all?

MR. BABIN: Not that I know of, Your Honor.

QUESTION: You indicated that the Supreme Court of the state, on review, on its own initiative, could determine

that there is some error. Now, what is the scope of that kind of sui sponde review?

MR. BABIN: What was that, Mr. Chief Justice?

QUESTION: You said that the Supreme Court could notice an error that was apparent on the face of the record.

MR. BABIN: Yes, sir. If there is a --

QUESTION: This does not include, you have already told us, that does not include the power to say there is not sufficient evidence here upon which reasonable men and women could find a verdict of guilty, they can't review that?

MR. BABIN: They don't review that. If there is an error that has been made by the court or the attorneys or any error on the patent on the face of the record, they review that of their own, on their own right.

QUESTION: Well, the federal constitutional rule, of course, is that if there isn't any evidence at all, that the conviction isn't going to stand. Now, I suppose the -- do you suppose the Supreme Court of Louisiana is foreclosed by your own rules from following that standard?

MR. BABIN: Your Honor, it has the right to review the motion for a new trial which would have been filed in the District Court.

QUESTION: Well, that can be made on the grounds of insufficient evidence, can't it?

MR. BABIN: Well, you can ask for a mistrial after

the state has put on its evidence, then if that is not granted, then at the end of that you are allowed to put on evidence or to say that there was not sufficient evidence here and ask for a new trial --

QUESTION: Well, how about after the verdict, you could make the motion for a new trial?

MR. BABIN: Yes, sir.

QUESTION: And you can make it on the ground that there was insufficient evidence?

MR. BABIN: Correct, sir.

QUESTION: And if the motion is denied, the denial of that motion can be reviewed in the Supreme Court?

MR. BABIN: Right, sir.

QUESTION: And hence the Supreme Court of Louisiana may review the trial judgments, the trial court's judgment that there was sufficient evidence?

MR. BABIN: That is what I was saying earlier, sir. Once that motion has been made, the Supreme Court can review that motion that would make for a new trial, yes, sir.

QUESTION: Then if the appropriate motion for a new trial on that ground is made, then they have the same review that is traditional in all other state courts?

MR. BABIN: Yes, sir, they can then review that motion if it was denied, yes, sir.

QUESTION: And grant a new trial if they thought the

District Court should have granted a new trial?

MR. BABIN: There should have been a new trial, that is correct.

QUESTION: Well, then it is just a difference in the mechanism, not a difference in the substance?

MR. BABIN: Yes. I thought you meant that they could take it of their own right, just to look at the evidence -- I thought that was the first question -- and say, well, there is not enough evidence here.

QUESTION: Well, I assume that when a person appeals, he gives the -- he tells the court his grounds for appeal, I would assume that.

MR. BABIN: Yes, sir.

The Governor of the State of Louisiana does have the right of commutation after there has been a review by the Board of Pardons. However, this is only to the benefit of the defendant. The State of Louisiana sees no way where it cannot be to the detriment of the defendant himself, therefore we do not see how it could be used in any way to do away with the statute which the State of Louisiana has for first degree murder, second degree murder, or homicides which occur.

QUESTION: Mr. Attorney General, could I just clear up one thing.

MR. BABIN: Yes, sir.

QUESTION: On the different responsive verdicts, first:

degree, second degree, and manslaughter, does the trial judge -- you may have answered this, but I don't remember -- instructed the jury as to the differences between those offenses?

MR. BABIN: First, the trial judge instructs the jury as to the elements of the crime which the defendant is charged with --

QUESTION: Which is first degree murder.

MR. BABIN: -- and informs them that they must find that each element has been proven beyond a reasonable doubt. Then he informs them of the law of the other responsive verdicts. Then he --

QUESTION: Now, fill that in for me a little. What does he say on that particular subject?

MR. BABIN: He says if you do not find that the state has proven this defendant guilty beyond a reasonable doubt, all of the elements of first degree murder, then you are to return a verdict of not guilty. But if you find that they have not proven all of the elements of first degree murder, but they have proven all of the elements of second degree murder, which he has already given them the definition of -- he gives them the definition also -- then you ought to find him guilty of second degree murder, and on down the line, giving the definition of the crime and also the elements that they ought to find, you see.

The State of Louisiana is not here arguing in a general sense, as the respondent or Mr. Amsterdam is. We have a case which is involved here where a man killed a one-armed man when he was engaged in the perpetration of an armed robbery. In fact, he killed him when it does not appear to the state that he even needed to kill him. This is a killing which has been presented to our grand jury and later to our jury.

Your Honors, we ask that the Supreme Court, the Honorable Supreme Court, affirm this decision.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Babin. Your case is submitted, but along with consideration of all the rebuttal material that will subsequently come in.

MR. CHIEF JUSTICE BURGER: We will hear next 75-5491 and 6257 and 5706, that is Woodson and Waxton v. North Carolina, and we will take there up seriatum here.

Is counsel ready in 5491? Mr. James, you may proceed.

ORAL ARGUMENT OF WILLIAM E. JAMES, ESQ.,

AMICUS CURIAE

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

The State of California is here as amicus curiae, and our concern and interest has been set forth, of course, in our brief, as the interests of those who have joined with us. We are concerned that these petitioners are not going to be content with trying to get this Court to hold unconstitutional the statutes that are presently before the courts in these states, but that they also want an all-encompassing decision of this Court declaring the death penalty unconsitutional per se and invalidting all statutes.

They seem to hold that this Court should state that the death penalty is cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments, and that it is impermissible as to any crime, as to any circumstances, and as to all times it is impermissible.

We submit, as we pointed out in our brief, that there are a number of obstacles to this holding, not the least of which is the Constitution of the United States and its

amendments, particularly the Fifth and Fourteenth Amendments. Also there are the many decisions of this Court in which impliedly or expressly the Court has excepted this punishment as a permissible form of punishment.

We would urge that at this time the Court take the opportunity to hold in a case in which the issue is presented to them that the death penalty is not unconstitutional per se and that it is not in violation of the cruel and unusual clauses in the Eighth and Amendments.

We also urge that this Court take this opportunity that deems it advisable to lay down guidelines to aid the states and the legislatures and Congress in devising acceptable standards for the position of this punishment. We think this will certainly aid the caseload in the courts and prevent the states and the parties from coming back constantly for clarification and guidance in this difficult area.

Now, California has had a unique experience in this field. In 1972, the people of the State of California were faced with the legal and constitutional dilemma that these petitioners would like to have reflected on a nationwide scale. The California Supreme Court, contrary to a line of decisions in that court, some of very recent origin, held that the death penalty was rejected by society, that it was not serving a proper penal purpose, and that it was in violation of the cruel or unusual provisions of the state constitution.

The response of the people was fairly quick. Within a few months, a petition was circulated for an initiative, and this petition obtained the signatures of almost a million qualified electors. This initiative would have enabled the constitution to have a provision that would hold that the death penalty was not to be deemed cruel or unusual punishment.

In November of '72, the electorate passed this initiative by approximately 67 percent of those voting, over 5,300,000 people voting to have this initiative ratified and the amendment made to the state constitution.

Now, we are certain that these petitioners are not going to be satisfied with the declaration that the death penalty is unconstitutional just for their crimes of murder. We are sure that they are going to demand that it is entirely unconstitutional for any crime, regardless of the enormity of the crime and regardless of the legislative determination that there would be some penal purpose served by its availability.

QUESTION: After the amendment of your state constitution by initiative petition, Mr. James, did the legislature act then?

MR. JAMES: Yes.

QUESTION: And what kind of a law, without going into minute detail, did it enact? One similar to any one of these five that we have before us?

MR. JAMES: Well, I think it is somewhat similar to

a group that were mentioned yesterday. It provided that the death penalty would be imposed where a person was convicted of first degree murder and special circumstances had been alleged and proved, and those special circumstances covered murder for hire, killing of a witness to prevent his testimony, killing of a police officer, knowing that he was a police officer in enforcement of his duties, a killing that was perpetrated deliberately and intentionally in the commission of certain felonies, such as rape or robbery, buglary, child molestation, and kidnapping, and multiple murders.

QUESTION: A single phase proceeding or a bifurcated proceeding?

MR. JAMES: A bifurcated hearing.

QUESTION: Before the same jury or two different juries?

MR. JAMES: The same jury would ordinarily hear both, after the proceedings relating to the determination of guilt and any plea as to sanity.

QUESTION: Then in the second phase of the proceeding, there is another evidentiary hearing, is there?

MR. JAMES: Yes, there can be evidence presented by both sides on the special circumstances issue. The statute also covered other crimes for which the death penalty might be imposed.

QUESTION: Such as? What are they?

MR. JAMES: Kidnapping for robbery, where there is a death, train wrecking where there is a death, and killing by a life termer, where there is a non-inmate killed.

QUESTION: Those all involve homicide --

MR. JAMES: They all involve homicide.

QUESTION: -- or death.

MR. JAMES: There are two other statutes that were not amended that call for the death penalty, that were mandatory penalties, treason, penal code, section 37 --

QUESTION: What did you say the second hearing centers around, the sentencing --

MR. JAMES: The determination of the truth of the allegations of the special circumstances which are involved, whether it was a murder for hire or --

QUESTION: But it isn't a mitigating or aggravating circumstance type of statute?

MR. JAMES: No, and the jury comes back with a verdict true or false, or not true, on the special circumstances.

QUESTION: And the penalty then is mandatory?

MR. JAMES: And the penalty is imposed by the judge according to the verdict. If the verdict comes back that the special circumstances alleged are true, the judgment is pronounced.

QUESTION: It doesn't have to do with the particular character of the defendant, but rather the circumstances of the

offense?

MR. JAMES: Yes, that's right, the particular type of homicide that is involved.

QUESTION: Well, wouldn't that have been before the jury in the first phase of the trial?

MR. JAMES: It could well be.

QUESTION: Well, why wouldn't it always be?

MR. JAMES: You mean the special circumstances?

QUESTION: Yes.

MR. JAMES: Well, in addition to proof of guilt of first degree murder in the special circumstances, the defendant must have personally committed the crime, there must be willful and deliberate killing, and --

QUESTION: All of that would have been before the jury in the guilt phase, wouldn't it?

MR. JAMES: Not necessarily on a felony murder where the defendant may be guilty of first degree murder but not a --

QUESTION: But normally the evidence shows what actually happened in this particular case.

MR. JAMES: Normally it would, yes, Your Honor. And frequently in the cases that have come up, very little if any evidence has been presented at the second phase and the jury has been instructed that they can consider the evidence --

QUESTION: Well, is any kind of evidence admissible at that hearing, or is it limited to those particular issues

or special circumstances?

MR. JAMES: It is limited to the special circumstances.

QUESTION: So that if the defendant didn't testify on the guilt stage, is his criminal record admissible?

MR. JAMES: Not unless it is relevant to something, some aspect of the case.

QUESTION: Could he personally testify in the second proceeding?

MR. JAMES: Oh, yes, he certainly can testify.

QUESTION: Well, what would he have to say -- as I understand it, what supports the death sentence in your state, under this new legislation, is not at all anything to do with the defendant personally, his background, his education, his previous record, but only the circumstances of the offense for which he has been found guilty, is that correct?

MR. JAMES: That is correct, Your Honor.

QUESTION: But there is a wider scope of evidence citation?

MR. JAMES: Yes, there would be.

QUESTION: I take it it would cover a case where there were two people convicted of murder and only one of them fired the fatal shot, and you might have a dispute as to which one fired it, they would both be guilty of murder, and the second hearing would determine that the one who actually fired

the shot would suffer the capital punishment, is that the kind of thing you had in mind?

MR. JAMES: Yes, Mr. Justice Stevens, and that was the first case that was tried.

QUESTION: But that dispute would continue into the second phase, the conflict between the co-defendants would certainly continue, if one is going to be electrocuted and one was not, but the jury would have to resolve the issue in the second phase and need not resolve it in the first phase, I take it?

MR. JAMES: They could be both guilty of first degree murder and the question would be whether, under the special circumstance allegation, it was shown that the particular defendant personally committed the crime deliberately and with premeditation.

QUESTION: Some 43 defendants are under sentence of death in your state?

MR. JAMES: Approximately. I was advised last Thursday that another one was convicted and the jury returned a true verdict in San Diego County, so there may be 44.

QUESTION: 44.

MR. JAMES: They are all under the sentence for first degree murder.

QUESTION: Do you know how many second-phase hearings have been held? How many capital convictions have there been?

MR. JAMES: There have been 43 or 44 capital convictions --

QUESTION: Well, I mean --

MR. JAMES: -- whether the trials where the special circumstances --

QUESTION: In how many instances has somebody been found guilty of a crime for which death could be imposed in the second hearing? Well, to put it the other way, in how many instances has the second phase turned out that the death sentence was not imposed?

MR. JAMES: I don't have the figures on that, Your Honor. There were numerous ones. There are instances where the jury was hung on the second phase.

QUESTION: Well, there must be some where they -- are there any where they didn't impose death and weren't hung?

MR. JAMES: Where they didn't impose death?

QUESTION: Yes.

MR. JAMES: No, there would ordinarily be a second trial on the special circumstance hearing and a new jury selected under --

QUESTION: I know, but I take it that in the second phase the jury can come back and say the special circumstances aren't present.

MR. JAMES: Well, then there is --

QUESTION: I know,but they may do that, can't they?

MR. JAMES: On the second?

QUESTION: Yes.

MR. JAMES: Oh, yes.

QUESTION: Well, how many times has that happened?

MR. JAMES: I really would hesitate to tell you, because I don't know if there are any statistics from the 58 counties on that. I know there are quite a number in Los Angeles County, where I come from, and there are quite a number from up north, and I have been advised of instances where there was a second special circumstance hearing because of an initial first jury being hung on the issue.

QUESTION: What you are telling us is that the second jury doesn't rubber-stamp the process and simply declare all of them subject to the death penalty?

MR. JAMES: That is correct.

QUESTION: It is not always the same jury.

QUESTION: Well, the second jury in the second proceeding --

MR. JAMES: Yes, in the second proceeding.

QUESTION: -- the same people?

MR. JAMES: You mean the jury in the second proceeding, that is right, they found the defendants guilty and then have found not true the special circumstances. And second juries, where there has been a hung jury on the first in some instances, found the special circumstances not true. But I

have no accurate figures on that matter at this time, Your Honor.

We submit that the death penalty is not impermissible under the Eighth or Fourteenth Amendments, and that it is not unconstitutional per se. That is our concern. We know that the respondents in these cases are going to discuss their particular statutes in relation to the attacks on it, but we fervently urge the Court to say that the death penalty is not an impermissible punishment, but that it is at least available to society in appropriate cases for its protection, and we would sincerely urge that if the death penalty is to be declared unconstitutional, that the Court consider these various arguments. We also urge that if the death penalty is to be abolished, we trust that it will be abolished in the manner contemplated by the Founding Fathers, and that is by the expression of the people to their elected representatives in Congress and in the state legislatures.

Unless the Court has any further questions, I will submit my argument and thank you for the opportunity to appear before you.

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

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

AMICUS CURIAE

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

The United States appears as amicus curiae in these cases because the Congress has enacted and various Presidents have signed into law statutes that permit capital punishment for various serious crimes.

The constitutional argument made by petitioners' counsel in challenging capital punishment generally I think is rather diffused, in fact I think part of its persuasiveness arises from its diffusion, and I will try to sort out these various propositions that are being urged and attempt to show their inadequacy either singly or collectively to outlaw capital punishment.

To begin with, we know as a fact that the men who framed the Eighth Amendment did not mean -- did not intend as an original matter to outlaw cpaital punishment because, as has been mentioned, they proscribed the procedures that must be used in inflicting it in the Firth Amendment. We know that the men who framed and ratified the Fourteenth Amendment did not intend to outlaw capital punishment, because they also discussed and framed the procedures that must be followed in inflicting it.

So we know as an original matter, as a matter of

original intention, it is quite certain that the Eighth Amendment was not intended to bar the death penalty, and the Constitution contemplates its infliction.

Now, petitioners respond to this in their brief by pointing out that the Fifth Amendment also refers to the infliction of being put twice in jeopardy of life or limb, and they say obviously the Eighth Amendment would bar disfigurement today. Of course it would, but I don't think that avoids the argument from the constitutional text, because punishments for disfigurement are today regarded as cruel and unusual, precisely because the American people came to that conclusion and legislatures stopped enacting such punishments. So that today I think the Court, if some legislature in an aberration tried to direct such a punishment,would find it cruel and unusual.

But the point is it was not judicial movement that made that change, it was an evolution in the standards of decency in American society.

Now, the Eighth Amendment, like some other provisions of the Constitution, does have in it a principle of evolution. The intention of the framers, it seems to me, is entitled to enormous respect, but one cannot exclude the possibility that cruel or unusual punishment means something different today than it meant then. But the principle is one of controlled evlution. The amendment is not an uncontrolled delegation of

power to the judiciary to judge punishments. There are criteria by which the judiciary judges punishments. And I will try to demonstrate that the principle of evolution is applicable here, which controls the case here, not only does not outlaw the death penalty, but in fact affirmatively supports it.

Having done that, I will urge three other propositions that are raised in an Eighth Amendment context by counsel, but I don't think belong there and hence have no proper place in this case, but I will nevertheless discuss them.

I will suggest first that capital punishment is rationally related to legitimate legislative goals of the deterrence of crime and the expression of moral outrage among them; secondly, that capital punishment has has not been shown to be inflicted on the basis of race, and that in any event that question is irrelevant to the issue of the type of punishment; and, thirdly, I will argue that capital punishment is not outlawed because the criminal justice system, which is mandated and permitted by the Constitution, has elements of discretion in it which are intended to be a safeguard of the system.

The principle of evolution that controls the meaning of the cruel and unusual punishments clause is that punishments may not be used which fall far outside the mainstream of our jurisprudence and which are rejected by the current moral

consensus. That is consistent with the history of the clause and the cases this Court has decided under the clause.

Apparently, the cruel and unusual punishments clause of the Eighth Amendment, like the rest of the Bill of Rights, was adopted because the anti-federalists who, objected to the ratification of the Constitution, posed a series of terrible imaginings about the coming tyranny that the federal government would impose upon the citizens and the states. And one part of the rhetoric employed was the suggestion that the federal government would use torture, the screw and the rack, in enforcing its laws.

The Eighth Amandment promised that that would not happen. And since the federal government, of course, had no such intention and did no such thing, the Eighth Amendment became dormant from its adoption, which strongly indicates an understanding at the time that the clause was not to alter existing practices, but was to prevent intolerable innovations or reversions. Punishments native to our jurisprudence and still in use were simply not touched by the clause.

Now, I think the cases reflect that. We have discussed them at some length in our brief, but it was not until 1909, in Weems v. United States, that this Court struck down a punishment, and that punishment was cruel and unusual in every sense. It was a very cruel Spanish punishment, of incredible severity, imposed there for false entries in

official accounts. And this Court said in that case, such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of American commonwealths, and believe that as a precept of justice that punishment for crime should be graduated and proportioned to offense, and I think that is the test of the cruel and unusual punishments clause.

QUESTION: You do accept that principle under the Eighth Amendment, that punishments that are disproportionate or sufficiently disproportionate are impermissible in --

MR. BORK: I do, Mr. Justice White, I think that is quite correct. And I think this case, Weems, tells us what those words mean, cruel and unusual. Unusual means amazing in the light of the practice of the American commonwealths, well outside the mainstream of our jurisprudence, as I was putting it before.

QUESTION: That is a little different from --

MR. BORK: Beg pardon?

QUESTION: That is a little different from just disproportionality.

MR. BORK: No, no, that is unusual. I think cruel is where disproportionality comes in, Mr. Justice White.

QUESTION: What you are saying, I take it, is that the frequency or infrequency has nothing to do with the term unusual as used in the Eighth Amendment?

MR. BORK: I think that is right, Mr. Chief Justice. I think it is the infrequency of the type of punishment, that is, in Weems we had cadena temporal, an extraordinary Spanish punishment, unknown to our jurisprudence, and that is why it was unusual, and not because it was only rarely inflicted.

QUESTION: How frequently was it inflicted in the Philippines, do you know?

MR. BORK: I do not know, Mr. Justice Stewart. But the Court didn't make a point of that. The Court made a point of the type of punishment it was.

Now, I think cruel, as the Court suggested in Weems, means a punishment which is amazing in its lack of proportion to the offense. I don't think the Court defines calibration, whether there is an exact propotion. I think it has to be so wildly out of proportion that it becomes cruel.

QUESTION: It means that, perhaps, but it doesn't mean only that. I mean, in other words, you would concede, I would suppose, that if a state imposed and inflicted capital punishment for jaywalking, it would be cruel and unusual punishment, even though, as you submitted to us, capital punishment per se is not cruel and unusual? But it means -- and that is your point now -- but also what if a state said for the most heinous kind of first degree murders, we are going to inflict breaking a man on the wheel and then disemboweling him while he is still alive, and then burning him up, what would you say

to that?

MR. BORK: I would say that that practice is so out of step with modern morality and modern jurisprudence that the state cannot return to it. That kind of torture was precisely what the framers thought they were outlawing when they wrote the cruel and unusual punishment clause.

QUESTION: So it is not just disproportionality, is it?

MR. BORK: No, no. It is also that it is foreign to our jurisprudence, but that has become for some time and completely out of step with our morality, which that has become, so the state could not revert to those kinds of punishments.

QUESTION: So you also accept judging the cruelty in the light of contemporary morality?

MR. BORK: I do indeed, Mr. Justice White. I accept that or I think however that once we have 35 legislators in the Congress of the United States adopting a penalty, it is impossible to say that it is in conflict with current morality, because I think there is no other source of current morality to which a court may properly look, that is it may not look to the writings of the more enlightened professors.

QUESTION: And do you say the same as to the question of proportionality or do courts have some independent input into that question?

MR. BORK: I think the proportionality would have to

be judged on objective standards as well, that is not a -- for example, proportionality would be judged by the frequency with which legislatures choose. If one jurisdiction only suddenly imposed death for jaywalking or flogging for jaywalking, I think, looking across the spectrum of the American commonwealths and seeing that that was wildly out of proportion with every other jurisdiction, would be one way of judging proportionality.

QUESTION: So if enough legislatures pass a law, you would say the courts have no basis to say that the penalty is disproportionate?

MR. BORK: I doubt very much, Mr. Justice White, whether a court could -- disproportionateness depends in great part upon the moral undersan ding of the community. If the moral understanding of the community in a very widespread way views the punishment as proportionate, I don't know what independent source a court would have to look to.

QUESTION: I take it you are advancing this not as an original argument but simply in response to the suggestion of the petitioners in these cases and in the prior cases that capital punishment is indeed out of step with present day thinking?

MR. BORK: I am indeed, Mr. Chief Justice.

QUESTION: You don't need to defend it affirmatively or no state needs to defend it affirmatively on that concept,

does it?

MR. BORK: No, no, Mr. Chief Justice, that is precisely my point. I think once it is seen that it is within the moral standards of the community as shown by the legislatures of America, including the Congress, and once it is recognized that it is a traditional penalty in our jurisprudence, I think the Eighth Amendment inquiry is at an end. In fact, I think this case is at an end.

QUESTION: Do you think we should overturn Furman then, on the basis --

MR. BORK: I was preparing to suggest that later in my argument, Mr. Justice White.

QUESTION: I thought so. But do you think it is required by your argument?

MR. BORK: No, I don't think what I have said yet requires it, nor do I think that sustaining the validity of the statutes now before this Court requires it, but I think other reasons make it desirable, and I would like to develop those when I discuss discretion.

QUESTION: That is consistent with the position of the United States in prior years.

MR. BORK: Now, I think the things I have just said, it may have been possible, it was possible to think differently about the moral standards of the American community, when Furman v. Georgia was decided. I don't think it is any longer

possible to think differently.

There were factual estimates, impirical judgments made in various concurring opinions in Furman v. Georgia which were fairly made but which subsequent events have shown to be incorrect, and those propositions in Furman are now I think no longer available as premises for constitutional judgment, and I would like to mention them briefly.

First, it was said because the statutes in Furman provided for discretion, whether or not to impose capital punishment in that particular case, the legislative will is not frustrated if capital punishment is never imposed. We know now, I think, that that was not the meaning to be drawn from the existence of discretion in the statutes. By reenacting death penalty statutes, many of them mandatory under certain circumstances, Congress and 35 states have shown that the legislative will is frustrated if the death penalty is never imposed.

Discretion was built into the prior statutes to distinguish between types of killings and types of killers. Congress and the legislatures of the states have shown that if Furman presses them to the choice, they prefer a mandatory death penalty to none.

Secondly, it was said in Furman that capital punishment is cruel because it goes beyond what is necessary not only in degree but in kind. We now know that legislature after

legislature thinks that capital punishment is necessary in degree and in kind. Though I think that this Court cannot really look behind that legislative determination, in a moment I will try to show that the legislatures had every reason to think it was necessary. They made an eminently rational judgment.

Third, it was said in Furman again that the penalty is unusual because it is infrequently imposed. As I have just said in response to the Chief Justice, that seems to me not the constitutional meaning of unusual. That unusual refers to the type of penalty, rare in our jurisprudence, like cadena temporal in Weems, or like denationalization in Trop v. Dulles.

Indeed, I don't think the death penalty is unusual in any relevant sense. It is imposed in a number of cases each year. It is true that legislators and juries and judges restrict it to the most outrageous crimes, but I don't see how it can become unconstitutional because it is used carefully and sparingly, rather than across the board.

The petitioners' argument it seems to me suggests that very broad categories of crimes for which the death penalty was mandatory would make it somehow more constitutional. I think that is a very odd conclusion.

Now, we submit therefore that the death penalty is clearly not a cruel and unusual punishment under the meaning of the Eighth Amendment. And I submit that the Eighth Amendment

is not a warrant for requiring the states or the Congress to come here and justify affirmatively the punishments they wish to use; once it has been seen that the punishment is traditional, the --

QUESTION: Mr. Attorney General, what is your understanding of the meaning of disproportionality? You say that is one of the principles under the Eighth Amendment. Could you spell out what your understanding is of that rule? Disproportionate to what? What difference does it make?

MR. BORK: Well, I think it is shown by Weems, in which this Court said that here a man is given 15 years cadena temporal, which involves painful labor, not hard labor, involves wearing a chain on his wrist and ankle, he is not allowed to sit with counsel, he is deprived of all rights of his family, and for the rest of his life he has to live where the government tells him to, even after he is out, under surveillance, and the Court said to punish, to inflict that punishment for a false entry in official records, which can be done even if it is not shown to harm anyone, is just so out of disproportion with what American jurisprudence shows. American commonwealths just don't punish that way.

QUESTION: Is that what it means or --

MR. BORK: Pardon me? Is that a question --

QUESTION: Is that what it means, or does it mean disproportionate to the offense? Those two are quite different

things.

MR. BORK: I'm sorry, Mr. Justice Stewart, I meant disproportionate to the offense as shown by the proportions to offenses that the American commonwealths use. We look -- the Court says that we look at what the American commonwealths do, and they have nothing as severe for this kind of an offense, maybe two years in prison.

QUESTION: Apparently the state or the government would get out of imposing that offense, it would get out of it whatever you get out of imposing punishments, and you think it is disproportionate is that you don't get out of it the injury inflict is disproportionate to what return the state can be expected to get? I mean, deterring false entries just isn't worth imposing that kind of punishment?

MR. BORK: It is regarded as immoral, but those are things the Court determined in Weems, not because it had some internal scale of what is worth what, but because the Court looked to the practice of American governments and said American governments, state and national, do not impose penalties anything like that severe for that kind of an offense, and this is just way out of proportion, it is aberrational.

QUESTION: That may have been the evidence they looked to to determine whether what they got out of it was worth it, but that nevertheless, determining whether it was worth it was part of it, I take it?

MR. BORK: Maybe part of. What I am suggesting is that the Court looked to objective external standards, rather than to any subjective feeling about whether it is worth it.

QUESTION: Do you think it would be possible that the Court might have come to that same conclusion in Weems if there had been a more severe crime, that is, bank robbery, as distinguished from manipulating figures?

MR. BORK: I do not know, Mr. Chief Justice, because obviously -- well, it might have come to that conclusion in any event, because there simply was no American punishment like that for any crime. The wearing of chains and being sentenced to painful labor and being deprived of the right of even to sit in the family councils, being deprived of all civil rights forever, being required to live where the government told you, forever under their perpetual surveillance -- these are just punishments that we don't inflict of any sort.

QUESTION: Well, don't you think really that the Supreme Court in the Weems case at that time would have said that about a bank robbery, if that punishment had been inflicted for bank robbery?

MR. BORK: You mean it was cruel and unusual?

QUESTION: Yes.

MR. BORK: That is what I am suggesting, Mr. Chief Justice, by saying that --

QUESTION: That is cruel, I don't know about the

disproportionate.

MR. BORK: Well, it is unusual, certainly.

QUESTION: Sure. Well, it might have been unusual, but not in -- what about murder?

MR. BORK: Well, I have been suggesting, Mr. Justice White, that these judgments are made by two factors, is it a traditional punishment in our jurisprudence, so that it is not unusual -- and the answer to that is no, that is not unusual punishment in our jurisprudence for any crime -- and, secondly, is it disproportionate, and the disproportionate question is also judged by the practice of the American states and the American national government, and it is disproportionate by those practices, even for murder. It is just a terribly unusual crime.

But I don't think I have to argue that Weems would have gone the same way had murder been involved.

QUESTION: Am I correct in my understanding that even in Weems the Court was not unanimous?

MR. BORK: There was a dissent by Justice White and Justice Holmes, I believe.

QUESTION: So Holmes joined the dissent?

MR. BORK: Yes, he did.

I said I would, having said I think that -- what I have said so far I think disposes of the case, because I think there is no Eighth Amendment inconsistency here. And to go on

to the other arguments I think is to step into arguments that come from different parts of the Constitution and are not properly before this Court.

QUESTION: Well, the Fourteenth Amendment is embraced in the question, isn't it?

MR. BORK: I thought it was merely the cruel and unusual punishments clause that we were judging, but perhaps I am wrong. In any event, I will go on to the others.

I would like to discuss the element of discretion, because that seems to me to be the crucial part of petitioners' counsel's argument. And the argument appears to be that the fact that at various states in the criminal justice system, people are entitled to make judgments renders the death penalty unconstitutional. I don't think there is any logic to that claim, and I don't think it is a constitutional proposition.

There are a number of difficulties with it. One is the utter implausibility of the idea. The framers wrote a Constitution that both recognized the death penalty and mandated a criminal justice system with discretion in it. I don't think it can be that they wrote a Constitution in which one part makes another part unconstitutional. The mind boggles at the thought that the Constitution is unconstitutional.

When two features have values which compete, they have to be resolved. One does not obliterate the other, yet that is exactly what we are being told happens here. Every

element of discretion that petitioners' counsel complains of is either permitted or compelled by the Constitution. That is true of the charging decision, it is true of the plea bargaining, it is true of the power of the jury to acquit despite the evidence --

QUESTION: Mr. Solicitor General, if I may just interrupt with one question, it would be helpful to me if in discussing the subject of discretion you would differentiate between meeting the argument that Mr. Amsterdam has advanced and meeting the holding of Furman, if one can identify it, if there is a difference between them. Certainly discretion was significant in that holding, and I wonder if you are attacking the decision or merely meeting an argument, or to what extent are you doing one rather than the other?

MR. BORK: Well, I think I am doing both, Mr. Justice Stevens. I am going to suggest that McGautha was correctly decided and that it really is not quite possible for McGautha and Furman to live together. And though it is not necessary for the decision of these cases, that we would be much better to overrule Furman and adhere to McGautha.

The states have been put to a choice by Furman that I think they ought not to have been put to. They have been put in the position of choosing their second preference in modes of imposing capital punishment, and some of them have moved to mandatory statutes. I think that is unfortunate, and

I think they ought to be allowed to go back to a position in which they choose the form of statute that they think is just and efficient, so long as it meets due process requirements.

Mr. Amsterdam said yesterday that he thought McGautha and Furman could live together, and I take it that the argument that was made was that McGautha holds that jury discretion meets the requirements of due process. But Furman holds that while that may be true, the results of the process are intolerable.

Now, I don't understand how a process which produces intolerable results can be due process. So it seems to me that there is a necessary contradiction between those two cases.

QUESTION: Well, they did involve, as you pointed out just a moment ago, two different provisions of the Constitution.

MR. BORK: That is quite true, Mr. Justice Stewart, but that gets us back into the position where the Constitution mandates discretion in a criminal justice system, and that discretion mandated by the Constitution renders illegal a punishment which the Constitution recognizes as legally allowable.

QUESTION: Well, it certainly isn't an unusual situation. It has something that is perfectly permissible under one provision of the Constitution and violates another provision

of the Constitution. There is nothing unusual about that.

MR. BORK: I think this is unique, Mr. Justice Stewart. The Fifth Amendment and the Fourteenth Amendment say use due process of law when you impose the death penalty. To then say that the procedure by which you use due process of law makes it cruel and unusual punishment under the Eighth Amendment, so that all along there was no death penalty, seems to me to be a logical impossibility.

QUESTION: Mr. Solicitor General, let me put another question on the table, and you comment as you see fit as you go along on this matter of discretion. I ask pretty much the same question of Mr. Amsterdam. To what extent do you think Furman properly understood rests on the universe of crimes which merit the capital punishment? Is that relevant to trying to identify the precise holding of Furman? Do you understand my question?

MR. BORK: I am not entirely sure that I do, Mr. Justice Stevens. If you mean --

QUESTION: Well, let me rephrase it a little bit. Is the legal question precisely the same if you have one narrowly defined capital offense in which there are the elements of discretion in the process in the particular case, at the prosecutorial stage, the clemency stage, the jury stage, is that the same legal issue as a case in which the crime for which the defendant is being charged is one of several hundred

crimes which bear a capital offense, all the way, ranging from rape through the various offenses before the court -- that have been before the court from time to time? Is the discretion issue the same in the two different hypothetical cases?

MR. BORK: I would think that it was, Mr. Justice Stevens, at least at the moment I don't perceive any distinction.

QUESTION: If the states single out one crime and said that the killing of a police officer in the line of duty and in the context of the commission of a crime by the killer, that that and only that would be subject to mandatory death penalty, that there is the same breadth of discretion, the same kind of an approach that were suggested in some of the opinions in Furman would apply?

MR. BORK: No, I don't think it would, Mr. Chief Justice, but I take it I was being asked whether the narrowness of the definition of the crime or the number of crimes made any difference in the existence of discretion, and I did not think so. I think the type of statute that you refer to, of course, does avoid the objection that was made in Furman. That is why I say that these cases don't require an overruling of Furman, but --

QUESTION: Let me be sure I understand. Your point is that for your argument, it makes no difference? You

understand that it makes a difference in interpreting the affect of Furman on what we have to do with these cases?

MR. BORK: I'm sorry, Mr. Justice Stevens, I --

QUESTION: Do you think Furman rests at all on the wide variety of crimes which bore the death penalty?

MR. BORK: I didn't think so. I thought it rested upon the number -- in part, as well as upon discretion, in part upon the empirical judgments I discussed about what the legislative will was, and that is why I tried to say that those empirical judgments, while they were plausible or arguable at the time, and since been disproved, so I think that part of Furman is undermined.

QUESTION: Then could you tell me one thing before you finish: If it is not necessary to overrule Furman to decide these cases, as the government contends they should be decided, why not? Why is not Furman controlling?

MR. BORK: Because I think Furman refers to standardless jury discretion, that is all it really applies to. I think the statutes that have been enacted in response to Furman now put standards into the process and therefore is not necessary to overrule Furman.

But I think counsel made it plain thathe objects to every element of discretion in the system, not just jury discretion. He objects to them collectively and, if I understood him correctly yesterday, he objects -- he would object to them

singly. The power of an executive to exercise clemency alone would render -- if that were the only element of discretion -- would render the death penalty unconstitutional.

There is apparently no way, according to this argument, that anybody could devise a system of justice in which anybody used any judgment about the thing which could then inflict the death penalty. The system -- the only system that would meet counsel's objections would be one that was so rigid and automatic and insensitive that it would be morally reprehensible, and then apparently it would meet the moral standards of the Constitution.

The instance of discretion that McGautha recognized, that are built into our system, were built in progressively to make the system safer, and progress in criminal justice has occurred precisely by multiplying the instances and the stages at which discretion can be exercised.

As the system now stands, it is utterly impossible for one person or for several persons, acting freakishly or capriciously, out of malice or prejudice or stupidity, to inflict the death penalty. At every stage, it is possible for a small group and sometimes for one person to prevent imposition of the penalty.

Counsel's real complaint is not that anybody is freakishly convicted and executed but, rather, that some murderers are freakishly spared and given life imprisonment.

In other words, the fault in the system which makes it unconstitutional to inflict the death penalty is that it errs, if it errs at all, on the side of mercy and the side of safety, and that is what we are told makes it unconstitutional.

The more counsel explains that argument, the less I understand it. Yesterday he said that it was true that all these careful procedures that were worked out by the states and by the federal government help some defendants, but, he said, that means by intellectible logic that the procedures disadvantage others. I have seldom heard logic more intellectible.

It is impossible to see how these procedures disadvantage anybody, because the persons who are not spared are not made worse off. They were certainly not disadvantaged by the existence of a chance to escape the death penalty. The argument I think is specious. But there are other defects in it.

These arguments that are made against the death penalty could be made against any other form of punishment. There is not one of them that do not apply to life imprisonment.

Now, the sole answer that counsel gives to this is that capital punishment is unique, it is different. Of course, it is different. Life imprisonment is different from a year imprisonment. Life imprisonment is different from a fine.

QUESTION: But it is different in kind from any term of imprisonment, is it not, in two or three different respects? At least it is wholly retrievable, for one thing --

MR. BORK: Well, I suppose --

QUESTION: -- by contrast to any term of imprisonment?

MR. BORK: Mr. Justice Stewart, I don't know how a life spent in prison is --

QUESTION: Well, if you made a mistake, you can cancel it --

MR. BORK: Oh, I see.

QUESTION: -- and undo it.

MR. BORK: You can undo it to the extent you set him free when you discover the mistake, but the years are gone.

QUESTION: That's right. And it wholly discards any notion of rehabilitation, of course. It is different in that respect.

MR. BORK: It does that.

QUESTION: And it is different in other respects, is it not, not in degree but in kind, it is, and --

MR. BORK: Well, I would suggest as to that, Mr. Justice Stewart, there is only one respect in which it is not different, and that is in contemplation of the Constitution, because the Constitution provides for it, with imprisonment. It draws no line between them. A legislative line can be

drawn between them, but I don't think a constitutional line can be drawn between them.

Capital punishment is also different in one other respect, which I would like to come to, if I have time. It is different in that it deters more than any other punishment. There are some categories of criminals who cannot be deterred any other way. For example, the man serving life imprisonment, and he knows it is a real life term, has no incentive not to kill, and some of them have done so. A man who has committed an offense which carries life imprisonment, but who has not yet been apprehended, has no incentive not to kill to escape and to commit other crimes, except the prospect of a death penalty.

So that, as the ultimate sanction, capital punishment is unique, it is different in the sense that it deters more and thereby saves more innocent lives, and it is unique in that it upholds the basic values of our society symbolically and internalizes them for us more than any other punishment.

So its uniqueness I think is something that has to be weighed in favor of the punishment as well. But I return to my point that I don't think it is unique in the constitutional sense. In fact, the argument for its uniqueness was made yesterday, was that we recognize it is unique because we surround it by so many precautions, procedural safeguards that

other punishments don't have.

Well, I think that is true although I don't see why the very existence of precautions makes it unconstitutional, what we were told. Presumably the same thing would happen if we began to add the same precautions to life imprisonment, it would become unconstitutional, because we recognize its uniqueness.

QUESTION: A good many of these precautions, as you have described them, were generated by the opinion of the Court in the Furman case, the five cases now before us.

MR. BORK: That is entirely true, Mr. Chief Justice. I think that the Furman case did take a step, and the attempt of the legislatures to comply with that case is now what is said to make their efforts unconstitutional. Apparently we are told that the only way they could have had a chance is to come back with a sweeping mandatory death statute for all kinds of crimes, which would make it not unique, which seems to me a very strange position.

But I want to say something about the -- I think what I have said so far is sufficient to dispose of this argument of discretion and what makes the statute unconstitutional. I want to say something else. We have been assuming, and petitioners' counsel have been assuming that discretion means arbitrariness and capriciousness. In using those as synonyms, they are not.

There is really no reason to assume -- certainly McGautha didn't assume it, and certainly our criminal jurisprudence doesn't assume it -- there is no reason to assume that the men and women, lawyers and judges who man our criminal justice system, and the ordinary people who man the grand juries and the petit juries, do not take their responsibilities in capital cases seriously, and that they do not share and reflect a general social understanding of when a crime is serious or heinous.

Petitioners' counsel's argument really requires him to convince this court that the more serious the issue, the more capricious will be the jury, and that the more standards that are given to a jury, the less they will heed any standards. I think that is a reverse argument.

As I said, our system of justice rests upon the thought that people do take their obligations seriously in the system. McGautha specifically rested upon that point. And the evidence suggests that the framers were right to require a jury as a way of eliminating caprice and arbitrariness.

We cited the Stanford Law Review note in our brief, which discusses jury behavior in capital cases, it finds a rational and consistent pattern. We have discussed the book by Messrs. Kalven and Zeisel, "The American Jury."

Now, to support his argument that there is caprise and freakishness and arbitrariness throughout the system at

any time a judgment is to be made, petitioners' counsel really ought to have more than assertion in adverse. He ought to come in here with a study for the entire Nation comparable in seriousness and scope and depth to what Stanford did for California. He ought to come in here with studies not only for the juries but for every stage in the discretionary process, if we are to be told to believe that there is no sense to this process.

The evidence is that there is sense to the process. The assumption of our system is that there is sense to the process, and we have nothing to indicate that there is not.

QUESTION: Mr. Solicitor General, did not the Stanford study show a bias against the blue collar worker as opposed to the white collar worker?

MR. BORK: Well, they thought so. Professor Kalven, who wrote the introduction to that study, noted that he thought that their judgment on that issue was corrupted somewhat by their desire to find a constitutional argument against capital punishment, and he thought that that was not really an accurate conclusion to draw and that there were other explanations for it.

In any event, I don't think that that -- you see, if we found a bias of any kind in the system, I don't know what we would do. It wouldn't be an argument for this case, and this goes to racial bias as well as to any other, because if it is

true that capital punishment is inflicted disproportionately by sex or by race or by social economic group, because of bias, not because of other reasons, then -- and that hasn't been shown around here -- then it must also be true that all other punishments are inflicted with equal bias, because it is the same prosecutors, the same jurors, the same people drawn from the same community, the same judges, the same governor, and I doubt that if we saw a skewing of the system according to some bias that any court would outlaw all punishments for all crimes. We would attack the bias institutionally and in other ways to try to eliminate its effects on the system. But it is an irrelevant question to the question of what punishment you use.

And indeed in our brief -- I doubt that I will have time to reach the point, but we do discuss, and petitioners' counsel comes back with an attack upon our discussion, which I still think is correct. The evidence of racial bias I think is not here. There is some in some studies in the past in the deep South at a time when blacks were systematically excluded from grand and petit juries. I don't think there is enough here anyway to carry the bias argument.

But in any event -- and I would point out that the Ehrlich study on deterrence, which we are told is so worthless that it may be utterly disregarded, a point with which I disagree, we are told worthless. That study is a masterpiece of

sophistication, compared to these rather trivial studies of racial discrimination we are asked to rely upon. But I don't want to get onto that point, because I wish to conclude the point about discretion.

I have examined the discretion point and I have suggested that I think the states should be free to make their first choice about how the death penalty should be decided upon, and I have suggested that I don't think Furman and McGautha can pull it together, and that Furman suggests, although it is not necessary, that Furman should be overruled.

The odd thing about this case is that petitioners' counsel argues that the criminal justice system is too imperfect to permit the death penalty at precisely that moment in our history when the system has more procedural safeguards than at any other time in the history of Anglo American Law. Indeed, that is his complaint about it, too many safeguards.

The better our system becomes, the angrier its opponents become. The real claim here is that the criminal justice system cannot inflict the death penalty so long as human beings are running the system and making any judgments. Whatever that may be, that is not a constitutional argument.

Ultimately, these five cases are cases about democratic government, the right of various legislatures of the United States to choose or reject, according to their own judgment, according to their own moral sense and that of their

people, the death penalty, in accordance with the Constitution, this Court, speaking through Mr. Justice Black, once before I think gave the correct answer to that question in Robinson v. United States. The Court said it is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all. We do not know what provision of law, constitutional or statutory, gives us power holding to nullify the clearly expressed purpose of Congress to authorize the death penalty. Because of a doubt as to the precise congressional purpose in regard to hypothetical cases, that may never arise.

That statement of the Court, we submit, was true throughout our history, and it is as true today as it was when Robinson was decided. The large majority of American states and the Congress of the United States have reaffirmed their judgment that capital punishment is both moral and necessary, and all that is said here by petitioners' counsel is that these legislatures and the people they represent have behaved immorally and unwisely. That is not the test of the Eighth Amendment.

This case is merely the latest in a continuing series seeking to obtain from this Court a political judgment that the opponents of capital punishment have been unable to obtain from the political branches of government. The United States asks that the constitutionality of the death penalty to be

upheld.

QUESTION: Mr. Solicitor General, you haven't had an opportunity to address in your oral argument the issue of deterrence. I recognize, of course, that the statistical data can be construed in various ways, and I would agree that it is perhaps not controlling or conclusive. Yet I would invite your attention to some figures and then ask you a question. I have before me the 1973 report of the Federal Bureau of Investigation. It states that in 1968, 15,720 people were murdered in this country; in 1973, the latest year reported in this report, 19,510 people were murdered -- that is an increase of 42 percent; in gross numbers, that is an increase of 5,790 people. I do not have the more recent figures. I think I have read in the press that they show some slight down-trend.

It is perfectly obvious from these figures that we need some way to deter the slaughter of Americans. I use the word "slaughter" because that word was used in connection with the disaster in Vietnam, in which 55,000 Americans were killed over a six or seven-year period. If the FBI figures are correct, there were more Americans killed in this country, murdered, than there were on the battlefields of Vietnam. Would you care to comment, elaborate or state your views with respect to the deterrent effect, if any, of the death sentence?

MR. BORK: Mr. Justice Powell, it seems to me that it cannot rationally be questioned that the death penalty has

a deterrent effect. Mankind has always thought that throughout its history. We know, as a matter of common sense and common observation, we know that all other aspects of human behavior, as you raise the cost and the risk, the amount of the activity goes down. I don't know why murder should be any different.

I wouldn't have thought that anybody would have doubted that or listened to a couple of academicians who doubted it. And we introduce the Ehrlich study and the Yunker study only to show that there is respectable academic evidence on the side of deterrence. But I would have thought that it is common sense, and I would have thought that in fact the judgment of the legislatures of this country, that they think it deters, is enough -- it is a rational judgment -- we think it is enough for this Court.

And I must say, at a time when international and domestic terrorism is going up, at a time when brutal murders are going up, it is an awesome responsibility to take from the states what they think is a necessary deterrent and save a few hundred guilty people and thereby probably condemn to death thousands of innocent people. That is truly an awesome responsibility.

QUESTION: Granting all of that, Mr. Solicitor General, not that it matters in this case, but the death penalty for drug hasn't done much good, has it? You would just put

that as an exception to the rule, wouldn't you?

MR. BORK: Oh, no, no. Mr. Justice Marshall, many things affect --

QUESTION: I mean it didn't deter the drug people at all, did it?

MR. BORK: I don't know how one could say that it did not. You can't deter perhaps an existing addict, which may be the reason for Robinson v. California, but it is not at all clear that you can't deter people from becoming addicts, from taking the first step.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Amsterdam.

(The Rebuttal Argument of Anthony G. Amsterdam appears in Case Number 75-5491.)

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