In the

Supreme Court of the United States

JAMES TYRONE WOODSON AND LUBY WAXTON,

Petitioners,

v. No. 75-5491

STATE OF NORTH CAROLINA,

Respondent.

Washington, D. C.
March 31, 1976

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Wednesday, March 31, 1976

The above-entitled matter came on for argument at 11:24 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 P. STEVENS, Associate Justice

APPEARANCES:

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

SIDNEY S. EAGLES, JR., ESQ., Special Deputy Attorney General, North Carolina Department of Justice, P.O. Box 629, Raleigh, North Carolina 27602, for the respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 5491, Woodson and Waxton against North Carolina.

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

ORAL ARGUMENT OF ANTHONY G. AMSTERDAM

ON BEHALF OF PETITIONERS

MR. AMSTERDAM: Mr. Chief Justice, and may it please the Court: If I may, before beginning the presentation of the argument in the Woodson and Waxton case, simply speak to three questions that came up in the previous questioning, and specifically questions asked by Mr. Justice Stewart and Mr. Justice White about the Louisiana practice and the California Practice.

The mystery about the Louisiana practice is no mystery at all. It is explicated at page 33, footnote 45, of our brief in Roberts. The Louisiana Supreme Court does not review sufficiency of the evidence. It does use a no-evidence test to review sufficiency akin to the Thompson v. Louisville test. Whether a new trial motion is filed or not, there is not a question whether the evidence is sufficient to support the -- it's a no-evidence test. There isn't a great mystery about it, it's just that they don't review sufficiency in the normal way.

QUESTION: What about the motion for new trial?

MR. AMSTERDAM: It doesn't make any difference --

QUESTION: I know, but what about in the trial court on the motion for new trial?

MR. AMSTERDAM: Same standard, no-evidence standard, not a sufficiency standard.

The second question had to do with the California practice.

QUESTION: If you took that literally, Mr. Amsterdam, that puts a trial judge into rather a tight corner, doesn't it, to say that having let the case go to the jury in the first place with instructions, he now is called upon in a motion for new trial to decide that there was no evidence to go to the jury. That's a little different from a sufficiency test is it not?

MR. AMSTERDAM: I think it amounts to nothing more or less than the difference between the Thompson v. Louisville constitutional no-evidence test and the standard State sufficiency test.

QUESTION: You are suggesting, then, that the gloss on their literal test is that it makes it a sufficiency test. Is that it?

MR. AMSTERDAM: I think that Louisiana law operationally differs from the law in other States in that neither the trial judge nor the appellate court exercises the degree of scrutiny over the evidence and over the jury that exists in other States. That's a matter of degree.

The question that Mr. Justice Stewart asked about California practice, the reason that they have two stages in California is that some of the special circumstances may not come out at the guilt phase. For example, if the defendant committed an unrelated murder, that's one of the special circumstances.

Another reason for the second phase is that at the first phase the jury may not resolve all of the relevant issues, for example, a case is punishable by death in California if it is first degree murder. It is first degree murder if it is either premiditated and deliberated or a felony murder. So what goes to the jury is an alternative submission -- premeditation and deliberation or a felony murder. Then they come back at the penalty stage and even if there is no new evidence presented, they now have to answer both questions cumulatively. And the answer to how they do that is very interesting, because in fact, as Mr. Justice White's question suggested, there are juries, and they have done it again and again, who have come back at the second phase with a life-sparing verdict that is inconsistent with their verdict at the first stage. Cold-blooded murders where the defendant's contention was an alibi where there is no doubt of the facts of the case that the person, whoever he was who committed the crime, intentionally premeditatively and deliberatively committed a killing in the course of a robbery, the jury then goes ahead

and finds the defendant guilty, and then it is asked the question at the penalty phase, Did the defendant premeditatively and deliberatively kill during the course of a felony, and it comes back, No, and spares the defendant's life.

Now, the third question that came up on the previous arguments that I would just like to mention, Mr. Justice Powell, is we do deal in our reply brief, at pages 3 to 6, with the question of the homicide rate figures about which your Honor asked, and I hope that the Court would look at our reply brief's treatment of that subject.

QUESTION: What page is that?

MR. AMSTERDAM: Pardon me?

QUESTION: What page?

MR. AMSTERDAM: Pages 3 to 6 of the reply brief. And the homicide rate has in fact showed a decrease last year for the first time. But we deal more generally with those figures in the reply brief.

Now, if I may, I said yesterday that the petitioners in the Texas and Louisiana cases made two separate constitutional contentions against their sentences of death. Both of those contentions are also made by the petitioners in this present North Carolina case. Yesterday I spent all of my time talking about the first of those two issues. Today I would like to devote most of my time talking about the second.

In order to begin that, however, I would like to

simply summarize, recapitulate, the essence of the first argument in order to distinguish it from the second, because although both arguments depend upon characteristics of imposition of the death penalty under the present system, including its rarity and arbitrariness, they are very different arguments. I think it's important to state them succinctly.

Our first argument, then, is based square upon Furman v. Georgia. The predicate of the argument is arbitrary selectivity in the administration of the dealth penalty. It is not mere selectivity as such. It is arbitrary selectivity, by which I mean that certain persons are consigned to die and others are spared, call it mercy if you will, as the Government puts it, but other people in like situations are spared with no meaningful basis to distinguish between them. That is an 8th Amendment argument, it is not a due process argument, because the 8th Amendment, unlike the due process clause, is not concerned with process, it is concerned with the result of process. The 8th Amendment is concerned with punishment, it asks whether punishment is cruel or unusual. And punishment may be cruel and unusual even though, as Mr. Justice Stevens asked, the results in a particular case of the process are fair simply looking at that case in isolation.

The 8th amendment question is whether the result

of that process, whether fair or not in isolation, is in the perspective of all of the punishments meted out by the system nevertheless a cruel and unusual punishment. Now, that is why Furman is consistent with McGautha and that is why Furman is not limited to jury discretion.

The Government suggests in its brief that another way to run a system of selecting people to die would be a lottery, that is, if all people convicted of first degree murder were in a lottery and you only kill some of them. It is our contention that Furman would outlaw that just as much as it outlawed the jury discretionary systems involved in Furman, and it is our position that Furman outlaws the present systems before the Court in these five cases, because the results are no better than a lottery.

QUESTION: If you accept McGautha, are you not also accepting the fact that standardless exercise of jury discretion is something different from a lottery? Or doesn't McGautha hold that?

MR. AMSTERDAM: No, no, no. I think that McGautha says -- Mr. Justice Stevens, I am not sure that McGautha does say that. I'm not sure that McGautha addresses the question whether a lottery is unconstitutional. It may well be that McGautha is based on precisely the notion, as the Government suggests, that the State can choose any way it sees fit as a matter of due process rather than cruel or unusual punishment.

QUESTION: Let me put the question a little differently then. Is your argument predicated on the proposition that standardless discretion is equivalent to a lottery? The Solicitor General takes precisely the opposite position on that. He says discretion is not necessarily capricious.

MR. AMSTERDAM: For 8th Amendment purposes standardless discretion is equivalent to a lottery, and for 8th Amendment purposes it would be equivalent to a system in which a prosecutor before trial simply could decide to paper the case capitally or not capitally, as he chose.

Our point is that the 8th Amendment is not concerned with the way the decision is made; it is concerned with whether at the end of the tunnel you look at it and you say, these people are dying like being struck by lightning, and these people are living, and there is no actual basis for it. And whichever procedure --

QUESTION: And further, it is not a rational basis that a jury of 12 people differentiated. One jury of 12 people found that this group should die and another group found that they should not. That is not a rational basis for --

MR. AMSTERDAM: No, it is not. The fact is that each individual jury may come in with different standards, different approaches. There is no way to rationalize a system like that.

Now, our second argument, though, is different. Our

second argument, a safe square one, does not depend on Furman. It would be the same whether Furman had been decided or not. The second argument is that the death penalty is an adevistic butchery which has run its course.

Now, I listened yesterday to the argument of the Attorney General of Texas, and there is something extraordinarily striking about this. The Attorney General of Texas said yesterday, "Look at what we use the death penalty for now. We only use it for this limited class of highly serious murders. We don't use it for all murders any more, we don't use it for rape."

The respondent's brief in Florida says, "Look at the way we use the death penalty now. We use it for a broader range than Texas does, but we have got standards. We don't use it the way it was used before Furman." They say it is not surprising that sentences determined under the system condemned by Furman produce uninformed, irrational, and freakish results.

What are we talking about? We are talking about the way of killing people that was argued for by these very same States in this Court five years ago. We are talking about penalties for which they were killing people 10 years ago, we are talking about penalties for which 15 years ago they were killing 20 people a year, and in the 1930's they were killing 200 people a year, and we are now told that it is no surprise

that they were found to be irrational and arbitrary and uninformed. And what will we be told 10 years from now if the Court sustains these death penalties and we find the system working in a predictable and expectable way? That we have outgrown these death penalties? That these death penalties are equally purposeless and in vain?

Our argument, our second argument, which does not depend on Furman places the death penalty in its historical perspective. These new death penalties that we are having urged on us that the Solicitor General is seeking to sustain are either, just exactly like Furman, that is, the aggravating, mitigating circumstances which amount to a process that is ultimately totally discretionary and uncontrolled, or else they are reversions, they are rollbacks, to the old mandatory death penalty system.

Now, the mandatory death penalty system was repudiated in this country because it was intolerable, because mandatory death penalties for crimes were intolerable and because juries would not convict. And so what happened was --

QUESTION: Mr. Amsterdam, I thought I said that in my dissent in Furman, precisely that.

MR. AMSTERDAM: Mr. Justice Blackmun, I think you got --

QUESTION: Of course, one doesn't read dissents anyway, but the argument you are just making, you know as a

professor that when counsel lose one case, they come up in the next one and distinguish it. This, I don't believe, is deserving of logical inconsistency necessarily, is it?

MR. AMSTERDAM: Mr. Justice Blackmun, I think there is quite a difference. I think that when we are now told that the system under which hundreds of people were put to death was arbitrary and uninformed and irrational, that it is quite an important consideration in whether we should permit a new round of those kinds of killings to begin. Yes, I think that is a very important consideration.

QUESTION: Of course, when they made that statement, they were quoting a minority of the Court, they were adopting a position expressed by a combination of the plurality of opinion plus two concurring opinions, were they not?

MR. AMSTERDAM: I suppose if Furman is rejected, then the concession that the States are now making based on Furman would have to be rejected as well.

QUESTION: Well, I say again, as I said yesterday, hasn't your Furman result prompted this kind of thing which you are now so seriously complaining about?

MR. AMSTERDAM: We have a dialectic process going on. There is no doubt that the States have responded to Furman, but Furman itself responded to what went before -- mandatory capital punishments found unacceptable by the people of the country and unacceptable by the legislatures.

QUESTION: I think I said that in my dissent. So you don't have to argue with me about it.

MR. AMSTERDAM: Absolutely. Absolutely. Discretionary capital punishments put in in their place, and then what happened? What happened was that when given discretion, the systems of American criminal justice so thoroughly repudiated the death penalty that in 1967, for example, the National Crime Commission concluded that the most salient characteristic of capital punishment was that it was infrequently used.

This Court then, as a result of that, and I do not think wrongly, held in Furman v. Georgia that that kind of application of the death penalty violated the Constitution. And now, indeed, the States have responded, but how have they responded? They have responded either by maintaining the old discretionary outlets in a new form for wholesale invasion of the use of the death penalty, or enacting so-called mandatory death penalty schemes in a procedural setting where in fact all these escape hatches exist -- prosecutorial discretion, et cetera.

Now, let me just point out that for our second argument the existence of discretion and escape hatches and arbitrariness in the selective system is not relevant because of Furman. It is relevant because it explains why and how new statutes can be enacted without a considered judgment that the death penalty ought to be used in the regular and even-

handed way which would denote acceptability by the public for 8th Amendment purposes.

The legislatures which have put these penalties in know that they will be averted broadly, erratically, arbitrarily, or by a number of selected devices, and all of them cumulatively, in these various cases. And look at the case before the Court. Look at Woodson and Waxton v. North Carolina. I think it's important to take a good hard look at this case. You have four people who commit a robbery of a package store -- Tucker, Carroll, Woodson, and Waxton. The first one after their apprehension to break the story, to confess, to come clean, is Woodson. Woodson also happens to be the least culpable from all points of view of the four. He goes to trial because it is uncontested that prior to going out to the package store robbery, he was hit by Waxton, hit so hard he was bleeding, and he went along. Now, maybe that is why Tucker and Carroll were willing to plead guilty and get life. At the end of the process, they are going to live, they are in prison and they are going to live.

Woodson, on the other hand, and his lawyer make the judgment that because he has got the most attractive case, because he has got a duress argument that a jury might or might not buy, because he did cooperate with the police, they can take the case in front of a jury. So they go in front of the jury. The jury comes back first degree murder, comes back

death, and Woodson is going to die.

Now, is this unfair? In a due process sense maybe not. In a due process sense you take your money and you run your risk, you pay your money and take your choice, you gamble life or death, get convicted and you die.

But is it a cruel and unusual punishment? Let me ask what purpose is served by killing Mr. Woodson while Tucker and Carroll live? What purpose is served by his death when hundreds of others similarly circumstanced people, chosen by processes which are arbitrary, not in a vindictive sense, not in a sense that people are shirking their responsibilities, but --

QUESTION: Mr. Amsterdam, would you argue for abolishing the jury system in criminal cases because it produces some irrational results sometimes in acquittals?

MR. AMSTERDAM: No, not at all. And that's what I'm saying --

QUESTION: That's the essence of what you are arguing now, that we should abolish the whole system of punishment because it works irrationally sometimes.

MR. AMSTERDAM: Not at all, and I am trying very hard, Mr. Chief Justice, to distinguish the due process argument which is still --

QUESTION: You would concede that the jury system does work irrationally sometimes in criminal cases as well as

others.

MR. AMSTERDAM: Indeed. Indeed. Indeed, there is a looseness throughout the entire system -- prosecutorial discretion, jury discretion, throughout the entire system, which may work irrational results.

The question in these cases is whether what is good enough for meting out remediable punishments, punishments that are within the realm of the knowable and the curable is also good enough for meting out the punishment of life and death. Furman said no.

QUESTION: Your argument is that death is different. This is where you must end up, as yesterday when Mr. Justice Stewart asked you the question, and your answer has to be that death is different. And if it isn't different, you have to lose.

MR. AMSTERDAM: That is absolutely correct. If death is not different, we lose on every argument we have got.

QUESTION: If one wanted to argue retribution, one could say that the victims have already lost.

MR. AMSTERDAM: What did you say?

QUESTION: I say if one wanted to argue retribution, one could say that the victims whom you never mention have already lost.

MR. AMSTERDAM: If one wanted to argue that the system of killing Woodson and not Tucker and Carroll was

retributive, yes, but there is no rational retributive justification for killing the people who are killed. As you inspect each of the justifications put forward for the death penalty crumbles in the face of the facts. The North Carolina legislature has said that everybody who is guilty of first degree murder shall be killed. Now, either they mean it or they don't. If the justification is retribution, then Tucker and Carroll and Woodson and Waxton all of them ought to be dead.

QUESTION: I guess you missed my point. I mentioned victims of the four defendants.

MR. AMSTERDAM: Yes. Victims are unquestionably --

QUESTION: Dead.

MR. AMSTERDAM: -- dead. But I am not sure -- it seems that something must follow from that in terms of why the defendants ought to be dead, or more particularly in this case why two of them ought to be dead and two of them ought to be alive. That's the great problem we are putting our finger on, that when this Court is told that legislative judgments are involved and the Court ought to defer to legislative judgments, legislatures are deciding what particular persons get killed.

QUESTION: Mr. Amsterdam, may I ask you a question getting back to the discussion you were just having with Mr. Justice Blackmun? You were talking about the fact that one person who has committed murder may receive capital punishment

while 8 or 10 or 20 escape it. Let me ask you about the Federal statute that imposes the death penalty only for air piracy that results in death, and that death on a 747 could be 350 people. It doesn't occur very often, fortunately. You wouldn't have the same argument there, would you, because there wouldn't be a Peter, Paul, John, James, or Henry and these other people you have been talking about. There might be a half a dozen in the course of a year who committed air piracy. Do you make the same arguments against the Federal statute that you do against the North Carolina statute?

MR. AMSTERDAM: I would not make the same argument, but I think the Federal statute is subject to attack in that it does nevertheless permit, even within a defined range -- this statute, as I tried to explain to Mr. Justice Stevens on yesterday, I think that one can argue both ways about whether the narrowing of the statute cures the Furman problem so long as discretion remains within the facts framed by the statute to sentence to life or death. On the one hand, the narrower the statute, the less broad the range of play for discretion. On the other hand, the narrower you make the statute, the more alike, as your Honor points out, the people within the class are and the more arbitrary, therefore, it is to distinguish among instead of treating them all the same.

Now, I just think it's premature to anticipate until we see the specific statute in question --

QUESTION: Mr. Amsterdam, you are really reverting back to your first argument now.

MR. AMSTERDAM: I am responding to the question of Mr. Justice --

QUESTION: But your response really is in the --

MR. AMSTERDAM: ... myself in my first argument, yes .

QUESTION: But basically in the context of your first argument. Am I not correct in understanding your second argument, if you really make the same argument regardless of what the statutory procedure is --

MR. AMSTERDAM: Absolutely.

QUESTION: -- and regardless of whether it applies to one person or a thousand.

MR. AMSTERDAM: The second argument is totally independent of that. The second argument is an argument that, at this point in history, in this quarter of the century --

QUESTION: So that your second argument has the same force against the air piracy example that Mr. Justice Powell put as it does against --

MR. AMSTERDAM: Absolutely. Absolutely.

QUESTION: Before you go on, let me pursue that just a step further.

Can you conceive of any crime as to which you would consider the death penalty an appropriate response by society?

MR. AMSTERDAM: No.

QUESTION: Well, let me put a case to you. You've heard about Buchenwald, one of the camps in Germany in which thousands of Jewish citizens were exterminated. It's unthinkable that that could happen again, but who would have thought it would have happened in the 20th century in a country as civilized as Germany was supposed to be. If we had had jurisdiction over the commandant of Buchenwald, would you have thought capital punishment was an appropriate response to what that man or woman was responsible for?

MR. AMSTERDAM: If that happened in the United States with a Constitution with an 8th Amendment against the background of the history we have had, generally I can't answer that question. I think I probably would respond the same way all the human beings to the kinds of atrocities that your Honor is raising. We all have an instinctive reaction that says, "Kill him."

But I think the answer to the question that your Honor is raising, would that crime or any other crime be consistent with the 8th Amendment to the Constitution of the United States against the history/ which this Court must now apply that amendment at this point in time, my answer would be, "No." That's the second of our two arguments, not the first. It's the second, and the answer is categorically, "No."

QUESTION: So if today some fanatic set off a

hydrogen bomb and destroyed New York City, still you think the appropriate remedy for that would be to put him in prison, perhaps out on parole in seven years?

MR. AMSTERDAM: Mr. Justice Powell, there is no question in my mind that the State must have and it does have ample remedies against people who are going to set off hydrogen bombs.

QUESTION: For example.

MR. AMSTERDAM: There is simply no doubt that he is not -- the question of whether to let him out in seven years or not is a totally different question than whether to kill him.

QUESTION: Would you be willing to put him in prison in solitary confinement for life with no parole? Solitary confinement?

MR. AMSTERDAM: The question of life in prison without parole is also not before the Court. I think that under certain limited circumstances it may be permissible to incarcerate somebody -- it seems to me we are now getting constitutional and normative questions mixed up. I see no constitutional objection at all for life imprisonment without parole. As far as the normative provision goes, I don't think it's a wise thing, but I'm not sure that this Court is called upon to make those kinds of judgments.

QUESTION: But you are foreclosing altogether the use

of capital punishment under any and all circumstances, and society must have some effective alternative to protect people. And I am asking you what you think it could be.

MR. AMSTERDAM: Life imprisonment without possibility of parole is quite --

QUESTION: Plus solitary confinement?

MR. AMSTERDAM: What?

QUESTION: Plus solitary confinement.

QUESTION: So that he wouldn't kill anyone else.

QUESTION: So he couldn't kill the guards, wouldn't kill visitors to the prisoners.

MR. AMSTERDAM: This seems to me to be a matter of prison management. The way you prevent children from hurting themselves on sharp objects, you put the sharp objects out of reach. You don't punish them -- I mean, you don't rely exclusively on punishment for picking up sharp objects.

You manage prisons better. You build in securities.

QUESTION: I am asking you, Professor Amsterdam, what you think is constitutionally valid. Would you think the type of punishment that I have just suggested would be constitutionally valid?

MR. AMSTERDAM: Yes.

QUESTION: Aren't there many, many arguments that are exactly the same ones that have been presented to us in this case that total life imprisonment and solitary confinement

is a more cruel punishment and a more unusual punishment than death?

MR. AMSTERDAM: It is neither, Mr. Justice Burger, and not only do my clients, but everybody on death row appreciates the difference. I think there is a difference between death and imprisonment.

QUESTION: That wouldn't foreclose you from making the argument I've just made, and I suspect it would be made that that is more cruel.

MR.AMSTERDAM: It is possible, but it would certainly be rather easy, I think, for this Court to write an opinion that said death is different and make the attorneys who would bring those arguments up feel rather embarrassed about doing so, including myself.

QUESTION: Are you familiar with the article written by the inspector of the prison system in Minnesota that the most cruel and unusual punishment of all is life imprisonment? He is a trained penologist.

MR. AMSTERDAM: I am not familiar with that article, but I am familiar with Jaques Barsund's position that one of the reasons he favors the death penalty is that capital punishment is milder than life imprisonment. I have always thought that was a very good argument for giving a prisoner the choice.

If I may reserve such little time as I have --

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

Mr. Eagles.

ORAL ARGUMENT OF SIDNEY S. EAGLES, JR.

ON BEHALF OF RESPONDENT

MR. EAGLES: Mr. Chief Justice, and may it please the Court: Several problems which I have with some of the statements by Mr. Amsterdam move me to depart from my earlier notions of how I would proceed in order to put to rest a couple of questions which he may have raised in the minds of the Court, not in mine, but perhaps in yours.

As I understood a statement by Mr. Amsterdam and perhaps I misunderstood it, he said that in capital cases the jury system cannot be made rational. I dispute that. Respondent disputes that. Capital punishment does not affect the operation of the jury system except to make our jurors even more sensitive to their constitutional and sworn responsibilities. If the jury system is not rational and sometimes there are cases in which its results on the cold record seem not rational, even so it is the best system known to man, it is deeply engrained in our constitutional system, and until a better alternative comes along, respondent urges that petitioners have no right to complain.

As I understood Mr. Amsterdam's argument, he indicated that the mandatory death penalty had been repudiated, and I was not paying as close attention as I might have, perhaps, and I am not sure whether he said by this Court or by the people.

I suggest that in either event, it has not yet been repudiated by this Court, but two members of the Court in Furman indicated a preference in that direction, and the people, at least the people of North Carolina, the respondent State, have acted definitely to guarantee a mandatory death penalty in a limited series of cases, and I will talk more about that at an appropriate time. All the States have responded, however, to your decision in Furman to assure that in those States, in 35-odd States, I understand 36 in July, that there will be the light in limited cases to bring forward the ultimate sanction of our criminal justice system, the death penalty, for the ultimate crimes, the ultimate crimes which present a thread, if you will, to our system of government and to the people of our country.

I say that in this respect, may it please the Court, that our people are governed by their consent. The Preamble to the Constitution establishes purposes, including which maintenance of domestic tranquility. Now, perhaps for those of us who are fortunate, domestic tranquility prevails, but for the victim in this crime, there is no domestic tranquility. There is nothing, brains have been blown out by a small caliber pistol at close range for no reason except to eliminate a witness. That's the only possible logical reason that you can imagine. There was no resistance, she was an elderly woman of 50-odd years. These

are young strong men, and they just killed her. There has to be a sanction to that kind of treatment.

The assertion by Mr. Amsterdam that Woodson is the least culpable defies my comprehension. Much of his argument has from time to time, but I attribute that to my limitation rather than to him. Woodson was outside with a rifle sitting in the car standing watch. According to the testimony of the other man in the car, Carroll, he was about to get out and shoot Stancil if he hadn't pulled him back into the car, a fortuitous happenstance, may it please the Court, a lucky break, as we say on the street, that Stancil wasn't shot with a rifle out front instead of merely wounded.

Mr. Amsterdam asked what purpose is served by the trial and by the death penalty in these two cases. Well, the purpose is retribution, specific deterrence, and other purposes which have been discussed.

QUESTION: Mr. Eagles, is there any significance in the ages of these four men and the differences in those ages? Am I correct -- perhaps I am not -- the two who did not receive the death penalty were the youngest of the four?

MR. AMSTERDAM: The two who did not receive the death penalty were not only the younger two of the four, your Honor, but they were the least experienced as far as their background went. The two who were here had been, by their own admission, their own testimony, involved in some trouble

with drugs in New Jersey before they came back. Not only that, they were unarmed. The weapons in the case were in the hands of Woodson who had the rifle and Waxton who had the pistol and shot the lady in the head.

QUESTION: What is the age of majority in North Carolina?

MR. EAGLES: Eighteen, your Honor.

QUESTION: They were all over 18, were they not?

MR. EAGLES: Yes, sir. The youngest was 18, as I recall.

QUESTION: The trigger man was given life.

MR. EAGLES: No, sir. Waxton pulled the trigger. The testimony from all three of the witnesses, except Waxton, of course, was that he was the one who put the pistol to the lady's head, without any provocation, but put the pistol to the lady's head and killed her right there on the spot. He, of course, testified, and we set this out in our brief, that it was Tucker, the other fellow who was in there, but even his co-defendant Woodson --

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock.

MR. EAGLES: Thank you, sir.

(Whereupon, at 12 noon, a luncheon recess was taken, to reconvene at 1 p.m. the same day.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Eagles, you may continue.

ORAL ARGUMENT OF SIDNEY S. EAGLES, JR.

ON BEHALF OF RESPONDENT (RESUMED)

MR. EAGLES: Thank you, your Honor.

The remaining point that I wanted to clarify before beginning on what I was prepared to say has to do with the reasons, the rationale behind two of these men being tried and two being permitted to plead, and that is the necessity of meeting the burden of proof beyond a reasonable doubt in order to convict. Without the testimony of at least one witness, and in this case since it could easily have been three against one, or one against an absence of any evidence on the other side, not meeting the burden, the State was required to make some sort of a deal, some sort of a plea bargain in order to be able to prove and meet its proper constitutional burden of proving the case beyond a reasonable doubt.

Now, in this particular case, there is no proper basis for complaint on the part of the petitioner Woodson that he was not permitted to plead because he never tried to. His lawyer, according to the records, had entered into negotiations and had promised that he would make some

recommendations to his client, and the prosecutor anticipated the plea, but one never was forthcoming. It was his decision, certainly not a requirement of constitutional law that he be compelled to plead.

In the case of Waxton, he was the triggerman, and he was probably the dominant individual in the entire plan. He was the one who actually pulled the trigger, according to the testimony of three of the four, and he, of course, said it was his colleague Tucker who was with him, and even if that had been true, under North Carolina law, he would have been guilty as a principal.

The practicality of conviction, however, leads us to require that the prosecutor be able to make the necessary bargain with those that he in his judgment, pursuant to his sworn oath, his experience, and his training, determines are those who he can make a deal with, who will be willing to testify for the State for conviction. Without a conviction, of course, all is for naught.

This is, of course, may it please the Court, not a package store situation in the context that I understand package stores today, this was a convenience market,a small grocery store of the Seven-Eleven quick-mart type. This woman was alone in the store, the men came in, asked for cigarettes, and one of them, without any resistance on her part, put a pistol to her head and shot her. They seized the money and

ran out. They shot another man coming in. They were tried, first degree murder under the felony murder rule in North Carolina, since it was pursuant to a robbery, and they were convicted. At that point there is absolutely no discretion on the part of the trial judge under North Carolina law. He sentenced them to the death sentence, as he was entitled to and he was required to.

The convictions were unanimously affirmed, unanimously, not a single dissenting vote, in the Supreme Court of North Carolina. The same court had in Waddell split 4 to 3. Even there, however, our Supreme Court to a person stated that they had no problem with any constitutional infirmities of capital punishment per se. We urge that is a wise decision. We urge that to you.

As we read the petitioners' briefs, they have not asserted, as we read them, any equal protection clause or any "as applied" clause, "as applied" provisions of the law. They address themselves to the presence or the existence of the institutions as presenting a form of discretion which is impermissible.

QUESTION: Before you proceed, may I interrupt you to ask, what were the claims made in the Supreme Court of the State by the petitioners?

MR. EAGLES: They urged the unconstitutionality of the death penalty, your Honor, and a world of questions

but I won't spell them out at this time, because they were all disposed of. The court went through in this case, examined the record as it does in every capital case, those exceptions and objections brought forward and those that are abandoned; if they appear to the court to be worthy of attention, the court on its own motion considers them. In this particular case, my recollection is that the primary thrust was the statement that had been made by Woodson whether or not that was admissible, and there was perhaps some other question I just don't recall at this time. The primary thrust, though, in that court at that time was the attack on the felony murder rule as being a way of approaching the death penalty and the death penalty per se.

QUESTION: Does your supreme court have power to review the sentence in any way as such?

MR. EAGLES: As such, your Honor, no. However, it would be less than candid to say that our court does not treat capital cases in a special way. They examine every capital case. There is an automatic appeal to our supreme court, every case comes up without regard to the diligence or competence or anything else of the lawyers, and I certainly don't mean to imply anything here, these are able lawyers. They review them, those that are brought forward. In Jarrette, as I recall the opinion, Mr. Justice Lake pointed out that they had been back over 50-odd exceptions that the appellant's counsel had

abandoned and still found there was no basis.

But as to sentence itself, there is no way that our court can say, "This case does not deserve a death sentence, it gets life sentence." You either buy the conviction, you find that there is a sufficiency of evidence, or that there was a constitutional error of some form, or that there was an insufficiency of evidence, that the nonsuit question as a matter of law should have been granted. In that case it goes back for retrial, but they can't adjust the sentence at that time.

QUESTION: Nor, I gather from what you just said, your supreme court cannot reduce the degree of the offense and then affirm the conviction, say, of second-degree murder on its own.

MR. EAGLES: That's right.

QUESTION: It can, however, find that the evidence was insufficient to support a verdict of guilt to first-degree murder and then remand it for a new trial, remand the case for a new trial?

MR. EAGLES: You say insufficiency, your Honor?

QUESTION: Yes.

MR. EAGLES: Yes, they could do that.

QUESTION: And remand the case for a new trial?

MR. EAGLES: Yes, sir.

QUESTION: And then on the new trial, the charge

would be second-degree murder and the lesser included offenses?

MR. EAGLES: No, sir, I don't think so.

QUESTION: It would be first-degree murder.

MR. EAGLES: Yes, sir.

QUESTION: And the lesser included offenses.

MR. EAGLES: Yes, sir, that is my understanding of the law as I understand it in this particular situation.

Here we have a situation where the thrust, as we perceive it, is that first, on the one hand, and the North Carolina situation is one where our General Assembly, our legislature, acted in what it deemed the safest way in response to honorable Court's decision in Furman, wisely or unwisely, and we urge that wisdom is not the question here, constitutionality is the question. But wisely or unwisely, they reacted to this Court's decision in Furman in such a way as to say in order to guarantee the protection to our citizens that a death penalty will have for certain crimes, we will reduce the scope of the crime to which it is applicable but make it mandatory, and that was their answer, not being willing to second guess this Court as to what degree of discretion or judgment after sentence might or might not be permissible.

In doing that, they reduced the number of crimes from four to two, and the one other than murder is rape, and

it is first-degree rape, which is a new type of rape and involves serious bodily injury or deadly weapon or under age victim and an older rapist. The first-degree situation, however, is the same as it was except that the punishment is mandatory.

One point which is made here as we perceive it from petitioners' brief is that there is an arbitrariness, and in the older cases they seem to say that its arbitrariness results from the fewness or the paucity of cases in which the death penalty is actually levied. To be sure, that is not a viable argument of the North Carolina situation, to be sure.

QUESTION: Mr. Eagles, let me just ask on the change that the new statute made in North Carolina practice. The appendix to the petitioners' brief lists I think some 63 cases in which the defendant is under death penalty.

MR. EAGLES: Yes.

QUESTION: That seems to be a somewhat larger number than is true in other States. Would it be your judgment that the kind of overall impact of the change in the statutory scheme has been to increase rather than to decrease the imposition of the death penalty in North Carolina?

MR. EAGLES: It would be my judgment, your Honor, that it has resulted in an increase.

QUESTION: That's my impression. I just wanted to get that clear.

MR. EAGLES: And we have today in death row 106. We had 107, your Honor, we said so in our brief, and at that time was true, but last week a superior court judge acting pursuant to authorization from the General Assembly reviewed the conviction of a black man for rape and found that it fit the criteria for second-degree murder --

QUESTION: Second-degree rape.

MR. EAGLES: Second-degree rape, and reduced it. However, it will soon be 107 because Saturday night a jury came in with a white residential construction executive who had contracted to murder his wife and found him guilty of first-degree murder, and he just hasn't reached central prison yet, but it is at 107 at this time.

QUESTION: Now I have a little problem. You said the court can't reduce it in murder, but it can reduce it in rape?

QUESTION: There is a special provision --

MR. EAGLES: There is a special statutory provision, Mr. Justice Marshall, which provides in the limited number of cases where an individual has been convicted since Waddell of rape in the first degree, there is a statutory provision that provides for post-conviction hearing where he can reexamine the facts and say, if this would have been second-degree rape had the law been in effect, you may consider a lesser punishment accordingly. That does not apply to

murder.

QUESTION: That covers rape convictions obtained after Waddell and before the effective date of the new statute.

MR. EAGLES: Yes, sir, as I understand it.

QUESTION: Before you proceed --

MR. EAGLES: Yes, Mr. Justice Powell.

QUESTION: -- section 14-17 of the North Carolina statute has this phrase in it "includes murder by any other kind of willful, deliberate, and premeditated killing." Is that qualified in any way? It seems terribly broad. I know that's not the case you have here, but as you point out, the petitioner is attacking the system and the entire statute facially.

MR. EAGLES: The statute provides for first-degree murder being under two possibilities, your Honor, a list of established offenses: lying in wait, murder by poisons, or those committed by premeditation and deliberation. That's the one category. That is not limited, as I understand it. If there is premeditation and deliberation and the judge will instruct the jury as to what they may consider and how long it need be, which is not very long under our law, then that's first-degree murder.

Under the second category of first-degree murder is the felony murder rule. In that situation, which is what we have here, robbery, which is one of the newer defenses under

14-17, that a murder occur in the course of that robbery. We also list four or five, as I recall, and the"other offenses." There is a limitation on the language "other offenses" as our court has interpreted it. It has interpreted "other offenses" to talk in terms of those which are inherently dangerous to human life or those for which there is a substantial foreseeable risk of death or killing of an individual and a death results. That was, incidentally, one of the considerations that the General Assembly took into account as it was determining whether to pare down the death penalty considerations, because arson was formerly a death penalty offense and they determined that simple arson if that is not an anomaly, simpe arson without a human life being lost ought not to result, since it would result in the death penalty if a human life was lost, if someone did die as a result of the murder felony.

QUESTION: Is there any other statute in the United States with which you are familiar as broad as this one?

MR. EAGLES: I am not familiar with the other statute in other States, your Honor. I apologize.

The basic argument which we intend to make here is that, first off, there are two questions as other counsel have indicated. We agree with the notion that there are two questions. The due process portions are not raised here. We are talking about a per se system, the existence of our

discretion, if it is discretion, or judgment, as we prefer to style it since discretion carries with it the connotation at least from petitioners' brief of an arbitrariness and a capriciousness which we believe and which we urge to you, which we believe is susceptible to proof, this does not exist in our system.

The death penalty per se as we urge it is not unconstitutional. It's not required as we urge it. The plain language of the Constitution,even the evolving standards of .. or maturing society standards, we believe can only be developed up to the point where it runs into the plain language of the Constitution which permits capital punishment. It's very explicit. It's not casual reference, it's not a single reference; a multiple reference by implication and plain.

The judgment that's complained of in this case, discretion if you will, is that judgment that necessarily occurs in the constitutional mandate, process of trial of any criminal, any accused person. The prosecutor, the grand juror, the petit juror, the trial judge, and indeed our appellate courts, Supreme Court of North Carolina, which hears every death case, are all acting pursuant to oaths of office, statutory obligations, and in some cases constitutional obligations under our Constitution. All these things result, we believe, in a trial which is necessarily constitutionally

perfect in the sense of fairness and due process to the individual being tried. Having resulted in this, over 200 years of evolution of this country and its judicial system, we are shocked, frankly, that petitioners now say that because things are so fair and because your system is so judicious and because your system is so careful about who finally receives the death penalty, that then it's arbitrary. It just does not follow, we urge, it's logically fallacious, it is not supported by any evidence that we are able to assume. It requires, we urge the Court, an assumption that some or all of these officials be acting in bad faith. There is no evidence of that, certainly not in this case. That's not even an issue in this case. But that spectre hangs off in the balance, as petitioners would have it, the way we perceive their posture.

QUESTION: Mr. Eagles, let me ask one more question to be sure I have it correctly in mind. Did I correctly understand that in North Carolina, unlike Louisiana, the trial judge does not regularly submit a lesser included offense instruction to the jury unless the evidence warrants the instruction?

MR. EAGLES: Only where there is some evidence, and there are cases, may it please the Court, where reading the whole record one is hard put to find the evidence on which he bases that, and our court has addressed that

particular problem by saying that doubts should be resolved in favor of the accused being tried, not of course in favor of the whole class of murders.

QUESTION: But your general rule is different from Louisiana practice.

MR. EAGLES: Yes, sir, as I understood the Louisiana rule being explained, it is very different.

The last point that I want to make before I conclude is the notion that the existence of capital punishment in our judicial system being somehow abhorrent to society, there is no evidence that we have found aside from a scholarly writing cited by petitioners, that tends to support that doctrine. The kind offices of the Solicitor General have submitted documentary evidence and statistical evidence that tends to go the other way. We find that to be a draw, if you will, that abhorrence is simply not established if it must be.

We urge this Court that the fact that the General Assembly, the legislature, of the 35, 36 States, and of the Congress, in enacting the death penalty in four years -- and this is not an issue that has been ignored in the past, passed over, that the Court is required to step in and get somebody's attention. The attention of the General Assembly, the attention of our elected representatives, has been focused in every session of the General Assembly of North Carolina since 1961 and perhaps before that, we just didn't check that

far back, there has been a bill introduced to do something with the death penalty, either modify it or eliminate it or change it or do something with it, and they have all failed. The bill that is before you today, the law that provides the death penalty in this particular situation, passed the Senate with only four dissenting votes of 50. The vote in the House was somewhat different and there was a conference committee. The bill finally came out as a compromise.

The idea that death penalty is abhorrent to the standards of society's decency is simply not supportable. Indeed, to strip the States of their ultimate punishment to stem the tide of robberies and murders would more likely offend society.

Thank you.

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

Mr. Amsterdam, you have about two minutes left.

REBUTTAL ARGUMENT OF ANTHONY G. AMSTERDAM

ON BEHALF OF PETITIONERS

MR. AMSTERDAM: I have two minutes. Let me spend half of it, I hope no more, speaking to Justice Stevens' question. I don't think anybody here knows the answer to the question whether lessers are submitted as a matter of routine in North Carolina. We know the law. The law is that the trial judge is not required to submit lessers without evidence, but if he does, the judgment will be affirmed.

QUESTION: Mr. Amsterdam, if in fact there is the difference which counsel describes and which I know you dispute, between the mandatory charge here of the North Carolina statute and the greater area of discretion in the Louisiana practice, and if in fact the North Carolina practice results in a larger number of death penalties, would you nevertheless, under your first argument conclude that the North Carolina statute is less vulnerable than the Louisiana statute? That is what I would understand to be the thrust of your argument.

MR. AMSTERDAM: Less vulnerable in a scale of 1 to 100, yes, sir, but they are both vulnerable, and the difference is marginal in terms of where the line ought to go, if I may put it that way. There is a difference between them, but they are both well below the line of constitutionality, and the difference between them is small in terms of the jump that would have to be made to get up to constitutionality.

QUESTION: Suppose over a period of time, six months or a year, the Gallup Poll and the Harris Poll and all the other polls that are conducted showed 90 percent of the people in this country favor capital punishment, 3 percent undecided, and the balance against it. Do you think that enters into the constitutionality appraisal?

MR. AMSTERDAM: No, your Honor.

QUESTION: And the converse of that would be true.

MR. AMSTERDAM: I don't think that the plebiscites

cut one way or the other.

QUESTION: Well, I got the impression from what you said yesterday and this morning that in some way we have to evaluate the standards of the people of this country today in light of what people think.

MR. AMSTERDAM: I think that's true, but not as a matter of plebiscite.

Your Honor, would it be possible to ask the Court for two more minutes, because the Government has had 35.

MR. CHIEF JUSTICE BURGER: One more minute.

MR. AMSTERDAM: I simply want to make two points very clear. First of all, to attack the death penalty on 8th Amendment grounds is not to express sympathy for crime. It is not to express callousness with regard to victims. The death penalty may be the greatest obstacle to adequate enforcement of crime in this country today because it stops public conscience and makes you think we are doing something about serious crime instead of devising other methods of dealing with it.

Secondly, we are taxed in this case and have been throughout our 8th Amendment presentation with the notion that it is we who are seeking to have this Court use subjective gut feelings to be a superlegislature. That is not true. Our position is the only coherent analytic position of the 8th Amendment. The Government says that the death penalty

for jaywalking would be bad. Why? Because there is an emotional feeling that is being invited that that's too much. It can't be that it's a comparative test, such as Solicitor General Bork suggests. If the 8th Amendment was written to apply only to the Federal Government, not to the States, it couldn't be asking a comparative question. We submit simply that our argument has a coherent 8th Amendment base adequately and properly based on the facts, accounts for the needs of law enforcement and protection of victims, and under that view the death penalty is a violation of the 8th Amendment.

Thank you for the extra --

QUESTION: Mr. Amsterdam, may I give you at least another half a minute? I would like to ask this question. I am sure you feel that each of these five statutes is abhorrent and unconstitutional under the views that you have expressed. Let's assume for the moment that someone, somewhere had to choose among the five, which of the five, in your judgment, you have studied them all, would be most likely to minimize the elements of discretion and arbitrariness that are so offensive to you?

MR. AMSTERDAM: None of them is close enough so that I can give a meaningful answer to that question. I am not trying to simply cop off the question, it's just that they don't come close enough. They are so close together in their total impact and they are so far from where they ought to be

that to draw that marginal difference is essentially, I think, meaningless, Mr. Justice --

QUESTION: You think they ought to be zero. I understand that, but you have no choice among the five statutes?

MR. AMSTERDAM: No, I will say that one of the problems with mandatory death penalty statutes, and I think we have got to face right up to this, is that in 80 or 90 percent of the cases that are processed through, all of the actors involved, the prosecutor, the jury, everybody recognizes a power, an extralegal power, and frequently exercises it. Some court cases go right through the mill and nobody recognizes they have got the power and these people end up dead because nobody realized that all the discretion which is in the system, which is exercised by other prosecutors and other juries, was even available. I think that is a very bad thing. But is it bad, is it worse than what goes on under a system in which overt discretion allows inconsistency judgments with no impairability? I think they are both bad and as bad. That's the best I can do.

I thank the Court.

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

(Whereupon, at 1:27 p.m. arguments in the above-entitled matter was concluded.)