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In the

Supreme Court of the United States

Charles William Proffitt,

Petitioner

v.

State Of Florida,

Respondent.

No. 75-5706

Washington, D. C.
March 31, 1976

Pages 1 thru 36

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CHARLES WILLIAM PROFFITT,

Petitioner,

v. No. 75-5706

STATE OF FLORIDA,

Respondent.

Washington, D. C.

Wednesday, March 31, 1976

The above-entitled matter came on for argument at 2:18 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

CLINTON A. CURTIS, ESQ., Office of the Public Defender, Tenth Judicial Circuit, Hall of Justice Annex, 495 N. Carpenter Street, Bartow, Florida 33830, for the petitioner.

ROBERT L. SHEVIN, ESQ., Attorney General of Florida, The Capitol Building, Tallahassee, Florida 32304, 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 5706, Proffitt against Florida.

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

ORAL ARGUMENT OF CLINTON A. CURTIS ON BEHALF OF THE PETITIONER

MR. CURTIS: Thank you, Mr. Chief Justice, and may it please the Court: The Court has already heard arguments relating to the discretionary elements and features of the pre- and post-sentence procedures, which are basically the same as those that exist in Florida. I will therefore limit my remarks to the procedure under post-Furman statutes as they relate to the actual structuring of the sentencing procedure itself.

Florida's Death Penalty Act became law on the 8th of December 1972, and since that date some 70 have been sentenced to die. Nineteen of these sentences have thus far been reviewed. Twelve sentences, including the petitioner's, have been affirmed and seven vacated. I understand there might be one or two more that have been added to the number since this information was obtained approximately 30 days ago, but that's as close as I could get.

The statutes of course provide for a life sentence upon conviction of a capital felony --

QUESTION: The seven that were vacated, was that in

connection with the convictions or --

MR. CURTIS: Vacated on death sentence.

QUESTION: Just on the sentence case.

MR. CURTIS: Yes.

The statutes of Florida provide that a life sentence will be imposed upon a conviction for a capital felony and consisting of not less than 25 years without hope of parole. And this capital felony is defined as premeditated murder or murder during the commission of eight enumerated felonies, and there is another capital felony which is rape of a child 11 years or under. But the imposition of the life sentence is mandatory unless the death penalty is determined and imposed pursuant to the new Death Penalty Act. This Act provides for a bifurcated procedure. Upon conviction for a capital felony, a sentencing hearing is conducted before the same trial jury in order to obtain and advise a recommendation of life or a death sentence. No reasons need be given in the verdict returned by the jury. It's simply a statement that, "We, the majority, have determined to recommend either life or death." That's basically the form of the verdict that is given to the judge.

The trial judge may notwithstanding the jury's recommendation enter either a sentence of life or death. If he imposes death, he is required to file written findings in support of his sentence.

The statute requires a review of all death sentences by the Supreme Court of Florida. Eight aggravating and seven mitigating circumstances are set forth in the statute for consideration of the sentencer, the jury for advisory purposes, the trial judge for sentencing purposes.

On the 26th of July 1973 the Supreme Court of Florida held this particular Act constitutional, acknowledging that there was discretion in the sentencing procedure but that this discretion, possible and necessary, was reasonable and controlled and thereby complied with the test of Furman v. Georgia.

The petitioner was charged in July of 1973 and was convicted in March of 1974 of premeditated murder of one Joel Medgebow by stabbing. The jury recommended and the trial judge imposed a death sentence. Petitioner's claim that the statute was unconstitution was rejected on the authority of the early decision of State v. Dixon. We submit the death sentences imposed under this statute are arbitrary because they may be and have been based on nonstatutory enumerated factors and that the uncontrolled discretion of the sentencer is permitted and required to evaluate and apply the statutory circumstances.

Now, in the petitioner's case the trial judge found, as set forth in his written findings, four aggravating circumstances. One of these circumstances was that the defendant has a propensity to commit the crime for which he was charged and that he is a danger and menace to society. This is not one

of the statutory enumerated aggravating circumstances. In affirming this death sentence, the Florida Supreme Court approved the concept --

QUESTION: How did it make that known?

MR. CURTIS: By the affirmance itself. And in an earlier case, in Sawyer v. State, the defendant was convicted of murder and robbery, and the Supreme Court of Florida affirmed the trial judge's sentence of death citing, among other things, that the defendant had certain tendencies --

QUESTION: You said the jury made this --

MR. CURTIS: I said the jury --

QUESTION: Well, you didn't say it, but I got the impression. It's not the jury that you are talking about now, is it?

MR. CURTIS: That's correct. You see, all the jury does under this system is to return the verdict of recommendation. Then the trial judge, in the event, and only in the event, he determines to impose the death sentence, he prepares a series of written findings to support the death sentence. I must point out, I think it's only fair to do so, that in State v. Dixon there was a statement to the effect that the Supreme Court would urge the lower courts to file written findings in the event they determine to impose life sentences also. But I found as a matter of practice this is not done.

But in any event, to return to the point, your Honor,

in this respect --

QUESTION: Mr. Curtis, while you are interrupted here, there were four aggravating circumstances here, one of which was a nonstatutory. Were the other three found by the trial judge to be statutory --

MR. CURTIS: There were three statutory aggravating circumstances and one nonstatutory. The nonstatutory is the one I was relating to you.

QUESTION: Why was not the fourth simply superfluous then? I don't quite understand the force of your argument on that.

MR. CURTIS: The force of the argument is this: If the trial judge felt that the three aggravating circumstances were sufficient to support his position that the death sentence should be imposed, why was it necessary for him to come forward and come with a nonstatutory aggravating circumstance? And this will become more relevant as we get into the discussion of sufficiency, which is this weighing process that Florida requires and is somewhat different than any of the other statutes that have been thus far presented.

QUESTION: Now, tell me again, where was that fourth, the extra one, articulated?

MR. CURTIS: In the written findings of the trial judge --

QUESTION: And your position is now that the reviewing

court then and now had no way of knowing whether that might have been the dominant one or the basic one. Is that your point?

MR. CURTIS: I think that's a fair assessment of it, your Honor.

Now, as I said, Sawyer v. State stands for the same proposition where there were additional nonstatutory aggravating circumstances cited and with approval when the trial judge cited--as a matter of fact, the Supreme Court of Florida took these facts and placed them in the notion or in the form of aggravating circumstances, and those facts were pending robbery charges against the defendant, the defendant's demeanor and conduct during the course of the trial, as well as the defendant's alleged incurable drug habit.

Now, the Supreme Court has also approved and relied on nonstatutory mitigating circumstances in the form of a defendant's war record, emotional strain of the defendant, as well as sentences that have been administered to accomplices or co-defenders which are less than death.

Now, we advance to the Court the notion that since the sentencer may rely on nonstatutory factors, of course his discretion cannot be controlled by the factors.

Now, to the point of weighing, the statute permits the sentencer's arbitrary evaluation of the enumerated circumstances. Now, according to the statute the sentencer

determines whether sufficient aggravating or mitigating circumstances exist and whether the mitigating outweigh the aggravating circumstances. Nowhere in the statute do we have a definition of the term "sufficient." The weight or relative significance of a circumstance or culmination thereof is likewise not in the statute. I am told that this circumstance has more weight or is entitled to more weight than any other. In other words, the presence or absence of any such circumstance or culmination thereof does not compel a particular result. This is somewhat different than the Federal statute where you have aggravating circumstances and if that is found to exist, such and such result will occur, and then if mitigating circumstances exist, such and such result will occur. There is no such definition in our statute.

QUESTION: Pre-Furman did the jury sentence?

MR. CURTIS: Yes.

QUESTION: What was the instruction to the jury then about sentencing, do you remember?

MR. CURTIS: Yes.

QUESTION: What was that?

MR. CURTIS: It was basically, the statute provided that in the event of conviction, death would follow, unless the jury recommended mercy, and the judge had absolutely nothing to do with it.

QUESTION: What did they say to the jury about the

mercy? Anything?

MR. CURTIS: That was read --

QUESTION: Did they say it is within your discretion, or what?

MR. CURTIS: Yes.

QUESTION: Did they expressly say that?

MR. CURTIS: I can't answer it quite that way, because of vagueness; it has been some time. But I would have to say it was left to their determination.

QUESTION: We are safe in assuming that the judge informed them of that discretion.

MR. CURTIS: Oh, yes. But as to whether or not there was an expanded instruction on the --

QUESTION: Standards.

MR. CURTIS: Yes. I really don't recall.

Now, the Supreme Court has stated that its responsibility in this overall process -- and mind you, the statute does not define what the Supreme Court's responsibility is. But the Supreme Court has defined that it is to review a death sentence case in the light of facts presented in evidence as well as other decisions and determine whether or not the sentence of death was too great. And no opinion that has been rendered by the Supreme Court of Florida thus far affirming the death sentence explains why a less harsh penalty would not be sufficient, nor has any opinion compared

a death sentence case with the many life sentences imposed for basically the same or substantially the same type of conduct. Such a comparative review is impossible, it's frankly impossible, since the many life sentences are reviewed, if at all, not by the Supreme Court of Florida, but by the district courts of appeal.

QUESTION: Does a death sentence go directly to the Supreme Court of Florida?

MR. CURTIS: Yes.

QUESTION: As of right.

MR. CURTIS: As a statutory direction it goes. All death sentences, whether, I assume, the defendant wishes or not, will be automatically reviewed by the Supreme Court of Florida. But in the situation where life sentences are imposed for capital felonies, if reviewed, as I say, if at all, they go to the district courts of appeals.

QUESTION: Intermediate appellate court, with any possibility of afterwards going to the Supreme Court?

MR. CURTIS: Only in the event of a constitutional question or you have --

QUESTION: Equivalent to certiorari jurisdiction here, roughly so.

MR. CURTIS: That's basically correct.

QUESTION: Does the Florida statute prescribe any special standards for review by the Supreme Court of Florida

comparable to those in Georgia?

MR. CURTIS: None whatsoever.

QUESTION: None whatsoever.

MR.CURTIS: There is an absence of expression in the statute on that point.

QUESTION: Just the customary review. I understand.

MR. CURTIS: Well, customary review, as I say, the Supreme Court of Florida has defined its review as something more than just customary, I would say. It has taken upon itself not only to review the sufficiency of the evidence or what have you, but also to take upon itself to weigh whether or not this death sentence is, as they say, too great and whether a less harsh punishment would be adequate under the circumstances.

QUESTION: Do the questions on the merits go with the review on the sentence?

MR. CURTIS: It's a total review.

QUESTION: Do you know whether and to what extent the convictions have been upset in death cases that have been --

MR. CURTIS: I don't believe that any of the seven -- as I say,this is my recollection -- I don't believe any of the seven that were reversed were reversed because of insufficiency of evidence. It was directed totally at vacation of the death panalty, and I am sure Attorney General Shevin will correct me if I am in error in that regard.

As I say, a review of 19 opinions rendered by the Supreme Court reflect that there is no meaningful basis for distinguishing the death sentence cases from the life sentence cases, that is, the seven that have been vacated. I realize we could engage in a discussion that this case means this and that case means that, this circumstance should be interpreted this way, but I suggest to the Court that we can demonstrate and our brief does discuss just this. Each aggravating circumstance and each mitigating circumstance, we feel, is relevant to a consideration of this statute, that lends itself to the vagueness charge.

But to give you an idea what the Supreme Court of Florida thinks of its procedure and how it assesses this particular statute, I invite the Court's attention to page 86 of our brief, and I would only quote three sentences from that quoted material, and this is from the Alvord case.

"The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur....Certain factual situations may warrant the infliction of capital punishment, but nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case."

Without legislative formulation of the circumstances or culmination thereof which warrant the executing or not executing a defendant, the decision to execute is nothing more than the function of the sentencer. We respectfully submit that the Florida Death Penalty Act permits the arbitrary imposition of the death penalty and is therefore violative of the 8th and 14th Amendments to the Constitution.

Thank you.

QUESTION: May I just ask one question? Did you say the statute would be less vulnerable if it did not have any appellate review?

MR. CURTIS: Less vulnerable if it did not have --

QUESTION: If I understand you, you are pointing out that the Supreme Court has without a reasoned basis granted mercy in seven out of 19 cases when some of the other 12 are really comparable.

MR. CURTIS: No. Excuse me for interrupting.

QUESTION: I was just wondering if your argument was that disparity could be removed by removing the appellate review entirely.

MR. CURTIS: No. I don't think the removal of review is what we are directing ourselves to. It's not having meaningful standards to guide that review so that everyone knows where they are. In other words, if we are going before the Supreme Court of Florida on this issue, you are going to be

talking about this, this, and this, and it's going to be fit within a framework so that if a particular decision is affirmed or reversed, it's affirmed or reversed because of a clear reason. And that's the problem we have with the review that we have here. There is no standard. There is no standard really to truly guide the sentencer, and there is an absence of standards to guide the Supreme Court of Florida in its review.

So I'm not urging that we can make this statute good by eliminating review. Quite the contrary.

I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General.

ORAL ARGUMENT OF ROBERT L. SHEVIN ON

BEHALF OF THE RESPONDENT

MR. SHEVIN: Thank you, Mr. Chief Justice, and may it please the Court: I would like to comment on about five different areas in the time that I have. One is to lift the death penalty itself; secondly, the 8th Amendment question. I know you have heard a lot on it today, but I do want to comment on that question per se. I want to comment on Mr. Amsterdam's attack on the system, because I think that's pivotal and I don't care what he calls it, what he is really doing is attacking the whole system. He is really talking about due process, regardless of whether he calls it 8th Amendment or not,

because he says he is concerned about the fairness of the system and that is due process, it's nothing else.

I would like to talk about our statute; I would like to talk about our case.

Counsel quoted just before he sat down from the Alvord case. The Alvord -- A-l-v-o-r-d. We have an Alford and an Alvord, and both of them are in this Court. The Alvord case involved an upholding of the death sentence by the Florida Supreme Court. That case involved a mass murder, a man who wiped out an entire family. He raped and then killed a grandmother, a mother, and a daughter. So I don't think that that case speaks to the issue of any discrimination or arbitrariness in the application of the death sentence.

Mr. Justice Stewart inquired on each of the statutes as to whether they provided full appellate review. The Florida statute does provide full appellate review. The Florida statute, under Florida law, the Supreme Court can reverse for insufficient evidence; the Supreme Court has the inherent power to reduce a charge from first degree murder to second degree murder to even manslaughter. So the Supreme Court of Florida has that authority. The Supreme Court of Florida also reviews the sentence. This may be the only case that is before you in which the sentence is specifically reviewed by the Supreme Court. And as has been demonstrated in some 19 cases, they have upheld the death penalty in 13 cases and changed it from death to life

in six cases, hardly an arbitrary selectivity when one-third of those cases has resulted in bringing down of the penalty from death to life.

Also, the Supreme Court is required to read the entire record whether or not there is error alleged, and all of this, we contend, is in response to Furman. It was in response to Furman that we created a bifurcated system, that we created standards for the jury on the basis of aggravating and mitigating circumstances, and that we created appellate review of the sentence.

Mr. Amsterdam says that is different. We recognize death is different. That's why we provided all these safeguards in death penalty cases, because it is different. And I suggest to you that he doesn't want us to treat it different -- he wants a different result; not a matter of treatment, a matter of result.

I would also point out that our bifurcated hearing goes to aggravation and mitigation, and it does involve not just the facts of the murder itself, but the unique qualities of the defendant, all of the factors concerning each particular defendant. In each of these cases, and I intend to review them, there is a reason why the Supreme Court changed it from death to life. Either it had to do with a family squabble or affected the age of the defendant or it involved a case in which the defendant had no prior criminal record.

With regard to the question of how many cases we have had in Florida, Mr. Justice White asked that question several times today. In Florida we have had in the past three years under the new death penalty law some 239 cases that have been tried that could result in either death or life -- 239 capital cases. Of those 239 --

QUESTION: Wait a minute; 239 convictions.

MR. SHEVIN: Two hundred thirty-nine convictions, yes. Of those 239, 64 are on death row. Sixty-four accounts for about 29 percent. Again, hardly arbitrary selectivity.

By the same token, Mr. Justice Burger, it is hardly a rubber stamp. It is not a rubber stamp when we have at least -- when we have 29 percent of the cases resulting in death. It is not a rubber stamp when the Supreme Court reverses in one-third of the cases and reduces it to life. But by the same token, it is not arbitrary selectivity.

QUESTION: General Shevin, you said there were 239 convictions. You don't mean convictions with sentence of death, do you?

MR. SHEVIN: No, 239 cases that went to jury where the death penalty could have been returned.

QUESTION: So there were 239 convictions.

MR. SHEVIN: Yes, 239 convictions. Some of those --

QUESTION: After the conviction the sentence might have been death.

MR. SHEVIN: That's correct.

All right. Counsel mentioned the written findings, and I do want to make it clear that the Supreme Court of Florida in the maturing case law on this death penalty statute has required judges below to enter detailed written findings even when they conclude life imprisonment rather than death, the concept being to allow the Supreme Court to be able to look at those cases as well.

QUESTION: Do you know -- I suppose it's awfully hard to tell, but do you know or do you have any feeling or any evidence that the rate of not guilty verdicts has gone up?

MR. SHEVIN: No, sir, I don't believe at this point we could point to anything that would indicate whether it has gone up or down. I think as far as the number of cases that are going to trial, we have more murders in Florida, and as a result we have more cases going to trial, and we probably have more men on death row now, in response to a question that Mr. Justice Stevens asked, we probably do have a few more men, there is not much difference, than we did pre-Furman.

QUESTION: By the way, Mr. Attorney General, the Solicitor General this morning suggested that Furman had outlived its usefulness and suggested we overrule it. Do you ask us to do that or not?

MR. SHEVIN: I have not asked in our brief that you overrule Furman. I do think there is an inherent conflict

between McGautha and Furman. I do not think you can reconcile those two cases, because in McGautha you say basically that juries are going to make the right decision. In Furman you say basically they may not.

QUESTION: My question is, does Florida submit that its public interest requires Furman be overruled?

MR. SHEVIN: Your Honor, the reason we don't say that is because we came back and adopted a statute with standards and appellate review. We did not adopt a mandatory death penalty statute. We think we have met Furman and therefore since we feel we have met Furman --

QUESTION: You may want another system.

MR. SHEVIN: No, we are satisfied with the system that we have adopted post-Furman.

QUESTION: But if your case can't clear Furman hurdles, do you then ask that Furman be overruled?

MR. SHEVIN: If we can't clear Furman hurdles, we would ask that it be overruled, but we really do believe that we provided a system that meets the arbitrariness that has been outlawed in Furman.

Counsel talked about propensity and he said this was an issue that came to the attention of the judge and the jury and had nothing to do with the aggravating circumstances enumerated in the statute. And the Chief Justice at that point said how did they determine propensity or whether he would

be a danger to society? Very simply, he said he would kill again. We have the testimony in the record of a psychiatrist, of a doctor, and he was asking him -- this was subsequent to the trial. The psychiatrist at the hearing testified--this was after they waived confidentiality--he felt he would do damage to people in the future, that he had already done damage to the people that he had killed, and as a matter of fact, on page 423 of the testimony, "furthermore he was having similar feelings beginning to build up in the cell in which he was confined and he felt this degree of hostility being directed toward a specific inmate." He told the doctor -- and this was part of the testimony that the judge and jury heard on whether or not he should get death or life-- he told the doctor he was going to kill again, that he had this urge to kill again, that he might even kill an inmate in the jail cell.

Now, why shouldn't the judge be able to consider that? Why shouldn't the propensity to kill?

Now, when that came to the Florida Supreme Court, they recognized that that was not one of the enumerated aggravating circumstances, but the Florida Supreme Court through maturing case law on this subject has in effect in several of these cases expanded the aggravation and expanded the mitigating circumstances. As a matter of fact, in the Gardner case they say that a PSI saying that someone is going

to be a menace to society can be considered. In the Hallman case they said the fact that the defendant was nonrehabilitatable can be considered. In our case, in the Proffitt case, the propensity to commit another crime was added aggravating circumstances. In the Sawyer case, Sawyer said he was going to kill the judge. He said, When I get back out of prison, I'm going to kill the judge, I'm going to kill the prosecutor. So this judicial threat was considered as an additional aggravating circumstance.

QUESTION: Mr. Attorney General, just so I understand, the nonstatutory additional aggravating circumstance is not a substitute for statutory circumstances, just additional factors may be considered.

MR. SHEVIN: Your Honor, the statute says that they can consider all relevant material. The Supreme Court has said anything that's relative, of probative value and has not been admitted in violation of the Constitution of the United States or Florida can be considered as long as it deals with either aggravation or mitigation.

QUESTION: But it remains true that one of the ten statutory, or whatever the number is, aggravating circumstances must be found.

MR. SHEVIN: Oh, yes, I think so. In this case there were four. Only one of them was nonstatutory.

QUESTION: I understand.

MR. SHEVIN: As a matter of fact, I want to point out the fairness of this procedure because the Supreme Court of Florida has also found some non-enumerated mitigating circumstances. Again, relevancy is the key. In the Slater case they reduced it from death to life because a co-conspirator had gotten life, and they felt it was unfair to give one of them death when the other one got life. So that was the basis of reducing it by the Florida Supreme Court. In the Taylor case there was a question as to whether he actually pulled the trigger. They weren't sure he pulled the trigger, and as a result they reduced it because they weren't sure he was the triggerman. In the Gardner case they said intoxication is an unenumerated mitigating circumstance. In the Swan case it was a nondeliberate killing. It was a felony murder and they beat this woman, but they said there was no evidence that they intended to kill her. They put her in the closet, and because of the preexisting medical condition, she died in the closet, and the Supreme Court of Florida said that it was basically a nondeliberate felony killing and as a result it could be mitigated.

In the Proffitt case, what we are dealing with here, there was a danger to society, he will kill again by his own statement, he has a propensity to kill, he has an uncontrollable appetite to kill, which is not synonymous with diminished mental capacity. There has been testimony in the

record by two psychiatrists that he understood the criminality of his acts. There was not one mitigating circumstance, and there were four aggravating circumstances.

Now, Mr. Justice Powell, you asked in the last case what kind of review can be had by the Supreme Court, and is there any basis, any standard for that review? In the Dixon case, which is our leading Florida case, the Supreme Court of Florida said that review by this court guarantees that the reasons presented in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race or a woman live and a man die on the basis of sex. If the defendant is sentenced to die, this Court can review that case in light of all the other decisions and determine whether or not the punishment is too great.

They go on in the case to say that we consider it reasonable to require the trial judge to enter a detailed written finding even when he imposes life, even though the statute said it was only required when he imposed death.

So I think that the Supreme Court of Florida has matured this law, has rounded out the circle, and has set forth under what circumstances the death penalty can be applied, under what circumstances it cannot be applied, and all of this, we contend, has been done subsequent to Furman in order to meet Furman.

QUESTION: How about your opponent's contention that the findings in the life cases, that they really never get to the Supreme Court of Florida because they went in the district court of appeals?

MR. SHEVIN: Well, as I pointed out a moment ago, Mr. Justice Rehnquist, the Supreme Court of Florida has said we want the judges to enter written findings even in the life cases, and they have been traditionally argued. Every time someone comes to the Supreme Court of Florida, if they think there is a life case similar to theirs that ought to get them life rather than death, they rely on it very heavily, and those are reported cases in the Southern Reporter, and they are available to the Supreme Court of Florida. Even though they are not reviewed by the Supreme Court of Florida, we contend they are available and are considered by the Supreme Court of Florida.

QUESTION: An attorney with a capital sentence arguing in the Supreme Court of Florida could rely on a district court of appeals' decisionswhich had never gotten to the Supreme Court of Florida as representing trial judges' findings as to what justified the capital --

MR. SHEVIN: And as a matter of fact, let me relate to three cases they referred to, because I think this is very significant. On page 85 of their brief they say, "There appears no rational explanation as to why the Petitioner must suffer

death while the convicted murderers Swan, Halliwell and Tedder were spared" -- in this case it was spared -- "after the discretionary review by the Florida Supreme Court." So it's a little different than the question you asked.

But let me talk about those three cases. In the Swan case, there was a beating, the woman was beaten. Again, he didn't beat her to try to kill her. He put her in a closet and she died, and the Supreme Court said it was nondeliberate homicide, and that's why they reduced it to life in the Swan case.

In the Halliwell case it was a love triangle, a family squabble, no prior record. The defendant in the case was a Vietnamese, or a Vietnam war veteran, excuse me. He was a Green Beret. The Supreme Court said he had been insensitized. He was a Green Beret, he had severe emotional disturbance, and it is true that after he killed this person, after he killed this man, he cut the body up into little pieces and disposed of it. And the Supreme Court had to consider was that heinous, was that atrocious, and they concluded that he cut the body up after the killing, and therefore it wasn't particularly heinous or atrocious and cruel. And that is, I think, a logical position that the court could have taken in light of the fact that the killing had already occurred.

So there were circumstances concerning the defendant in the Halliwell case.

In the Tedder case, again it was a domestic squabble. There was a killing in this case of a mother-in-law. The Supreme Court of Florida said it was not particularly heinous, there were no prior circumstances.

In the Thompson case which they rely upon, the defendant was a 17-year-old boy, again, with no prior criminal record.

Now, the one case they point out where, if I were sitting I might have reached a different conclusion, was the Powers case. The Powers case was a young man -- and in their appendix, I think it's very convenient that they said his age was not available from the record. His age was available. His age happened to be 18. And obviously that was the basis on which the lower court -- this was a case where the lower court,the jury recommended death, the judge imposed life. And in this case it was a rather heinous crime. He came into a store, he showed no remorse afterwards, he sat the man down on a chair and he shot three bullets in his head.

Now, if I were sitting on that case, perhaps I would have reached a different conclusion and perhaps I would have imposed death. But what's interesting about the Powers case is that it does involve a young man who the court below felt had been culturally deprived. It did involve a young man who was less than 18 years old, who had less than a fifth grade education, and under those circumstances, the judge felt that

life was sufficient.

And the other interesting point is that at the time the Powers case was decided, the Supreme Court of Florida had not yet decided Dixon, so the lower court judge didn't have the benefit of the Dixon case or any of the maturing case law at the time he imposed life on Powers. The Jeffrey case is another case involving a domestic quarrel, no criminal record, fifth grade education. Those are the cases he refers to, and we contend that there has been no showing of discrimination, that in each of those cases there was not arbitrary selectivity, that in each of those cases it involves cases in which there was ample reason for mitigation. He doesn't tell you about a case which is pending in your Court, the Alford case, a case involving a rape and murder of a 13-year-old girl in Palm Beach who was both vaginally and anally assaulted, and then shot eight times, twice in the head. He doesn't tell you about another case pending in your Court involving an 11-year-old boy who happened to be riding his bicycle on the wrong street at the wrong time and was mutilated, torn limb from limb. And these are the kinds of cases, these are the kinds of heinous cases that we have pending as a result of the crimes that are committed in the State of Florida.

Mr. Justice Blackmun, you asked at the very beginning of this proceeding, you asked wouldn't the kind of elaborate statutes that Mr. Amsterdam was complaining about, the so-called

winnowing devices, wouldn't they have been predicted or expected under Furman. He said, well, we might have predicted mandatory death. Let me talk about that for just a moment. When I first read Furman, and everybody has gone through these same throes, what did Furman mean, what did it say, what's required, I was concerned that maybe we were required to pass a mandatory death penalty. I didn't like that, because I don't think mandatory death penalties in and of themselves are the fairest kinds of justice. And then when we reread Furman, and we particularly read what the Chief Justice said when he said that legislative bodies may now seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence by more narrowly defining the crimes for which they are beingimposed or determining or providing standards for juries and judges.

Well, that's exactly what Florida did. Florida eliminated rape from its capital crime category except if it involves the rape of a young child less than 11, so it narrowed the crimes, and Florida for the first time provided standards, it provided aggravating circumstances, it provided mitigating circumstances, it provided a bifurcated hearing, it provided a review, all of these, precisely what the legislature did in response to Furman.

But I think this is more important. When I went to

to the legislative committees and in their brief they quote my statement saying that mandatory is probably the safest way to go, and when I went to the legislative committees, that's the position I took, after having read Furman once or twice. And when I went to the legislative committees, the expression of the legislative body was this: We would rather pass a good law, a fair law that might be suspect, than to pass a mandatory death penalty, even if it's allowed by Furman, because it is harsh. And that's the kind of legislation the Florida legislature passed. They didn't pass mandatory death; they have attempted to remove the arbitrariness from the system, they have attempted to remove the discretion so that we have reasoned judgment which is the conclusion of the Supreme Court of Florida, and they have attempted to have review, which is so very, very important.

They agreed, Mr. Justice Blackmun, and with you, Mr. Chief Justice, that to provide mandatory death was a step backward. Now, every State has to do their own thing and has to make their own decision, but that was the decision of the Florida legislature, and we have responded to Furman.

The petitioner in his brief, even though he didn't mention it today, in his brief he says that the death penalty is still being applied disproportionately to blacks and to poor people. Now, maybe that was true prior to Furman, maybe that was true, but it's not true under Florida's new death penalty

law. In 1973, '74, and '75, those three years since we have had our new law, more blacks have been arrested for killing, for murder, than whites, about one-third more, and yet on death row today -- today, not when the brief was filed, but today -- we have 64 people on death row, and of those 64, 34 of them are white and 30 of them are black. So we actually have more people who happen to be white on death row than black people, yet the proportionate number of those kinds of crimes being committeed happens to be about a third higher going the other way. We think this demonstrates that we have even-handed justice in Florida, and incidentally, one-third, one-third of all those on death row in Florida retain their own counsel, not court-appointed counsel. So we do not have just poor people on death row, we do not have just black people on death row. We have even-handed justice.

Let me comment on the deterrent aspects. If capital punishment doesn't deter, then punishment doesn't deter. The whole pain-pleasure philosophy of society is based on the theory that punishment does deter, and the ultimate punishment deters the most. It obviously deters that individual who cannot kill again, it deters the robbers and the rapists who will sustain a greater punishment for murder than for rape or robbery, and therefore may not eliminate the only eyewitnesses to the crime in order to avoid apprehension, and we think it deters homicide generally.

Mr. Justice Powell, you commented earlier about the increase in homicides which you were amazed at had gone over 50 percent. The figures are really quite higher than that. If you go back and look at the murder rate in this country, in 1930, 1940, 1950, all the way up to 1965, you will find that there were approximately 7 to 9 thousand murders committed each and every year. That figure has jumped from between 7 and 9 thousand up to 22 thousand, and this is the decision that the legislature made, this is the decision that they have a right to make, and we contend that this is basically a legislative decision, that contemporary standards of decency are determined by what the legislature and what the people want.

Since I only have a few moments left, I want to direct my attention, if I may, to the question of the system. Now, what they are saying is that because of this discretion, the system is wrong. Now, obviously, they don't want a system in which only capital offenses can be charged, in which only first degree murder charges can be brought back, in which no clemency can be exercised, but that's exactly what they are saying to us today.

Mr. Justice White, in Argersinger v. Hamlin, you told the State of Florida it didn't make any difference whether a man was facing a misdemeanor charge or a felony charge, the inside of the jail looked the same. And I contend that the

inside of the jail looks the same to someone under life imprisonment or 5 years or 99 years as it does to someone facing the ultimate punishment. If the 8th Amendment argument --

QUESTION: The Court said that.

MR. SHEVIN: The Court said that, yes, sir. I was talking about during the discourse of the argument.

If the 8th Amendment argument that he says applies only in capital cases, logically, legally, you cannot apply that only in capital cases. True death is different, but the 8th Amendment doesn't apply just to capital cases, the 8th Amendment applies, it has traditionally been applied, to less than capital cases, and the due process provision talks about life, liberty, or property, and if you are going to deprive somebody of life and you're going to say we can't do that because there is prosecutorial discretion, jury discretion, executive clemency, I submit to you that that same argument applies to a lifer, and even though Mr. Amsterdam stands before this Court and says, "I am only trying to apply it in death cases," there is no way he can foreclose someone who is under a life sentence coming back to this Court and saying, "Give me that same protection." Equal justice under law, that's what the front of the building says, and that's exactly what a lifer is going to say, that's exactly what a man under 5 years, 20 years, and 99 years is going to say. He is going to say that if you say the whole system is wrong, then it's

wrong as to him as well. And for those reasons, we urge you to affirm this conviction, to state in effect that the whole system is not wrong, to state that capital punishment is not cruel and unusual per se, and that it cannot be applied as an 8th Amendment violation just in capital cases so as to attack in effect the entire criminal justice system.

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

Do you have anything further, Mr. Curtis?

REBUTTAL ARGUMENT OF CLINTON A. CURTIS

ON BEHALF OF PETITIONER

MR.CURTIS: Mr. Chief Justice, just one or two comments.

QUESTION: May I ask a question before you start? Do you happen to know the going rate of homicides in Florida at the present time, how many thousands a year or hundreds?

MR. CURTIS: Offhand I don't. There has been a number of statistics submitted in one or more or several of these briefs, and that's one of the matters I would like to address myself to.

QUESTION: You are aware, I think, there is hardly a large city in America, including Washington, that doesn't have more homicides every year than all of the European countries this side of the Iron Curtain. I don't know whether that has emerged in these briefs.

MR. CURTIS: Mr. Chief Justice, if you say it, I will accept that as so. I never thought about comparing the two. I would like to point out that while we have this alleged array of increase and the number of murders and none of us here anyplace in this room is suggesting that we approve of it, and everyone's appalled by it. But to say that because of the absence of this form of punishment that somehow we are going to effectively treat that particular problem disallows for the fact that every other form of serious crime has accelerated far greater proportionate, and and we assume that appropriate punishment is being meted out in terms of what the legislature thinks ought to be done with it.

But I do not wish to get into an exchange about statistics and what they mean or what the effect will be, but I would like to comment on two things: One, the Attorney General referred to equal justice under the law. Well, I think that's what this whole argument is about, and that's what we are here for. It seems inconceivable to me that in Swan v. State where you have what is described by the trial judge as an outrageous, wicked, vile, atrocious, cruel and heinous crime committed during the course of a robbery, that was the beating death of an elderly housekeeper, and the Supreme Court in light of those two aggravating circumstances takes a position that, and I quote, "there were insufficient aggravating circumstances to justify the imposition of the

death penalty.

Now, if we are going to have standards, which Attorney General Shevin is suggesting that these are supposed to be, we are going to have standards, what's good for Mr. Swan is good for Mr. Proffitt. And if we are going to be measured by the jury, the sentencer or the Supreme Court of Florida, we ought to be measured by the same rule, and that's what we are talking about when we say equal justice under the law.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:05 p.m., the arguments in the above-entitled matter were concluded.)