ORIGINAL

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In the

Supreme Court of the United States

ERNEST JOHN DOBBERT, JR.,

PETITIONER,

V.

STATE OF FLORIDA,

RESPONDENT.

No. 76-5306

Washington, D. C.
March 28, 1977

Pages 1 thru 47

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ERNEST JOHN DOBBERT, JR., Petitioner,	:	
v.	:	No. 76-5306
STATE OF FLORIDA, Respondent.	:	

Washington, D. C.

Monday, March 28, 1977

The above-entitled matter came on for argument at 11:44 o'clock, a.m.

BEFORE:

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

APPEARANCES:

LOUIS O. FROST, JR., ESQ., Public Defender, Fourth Judicial Circuit, 221 Duval County Courthouse, Jacksonville, Florida, 32202, for the Petitioner.

CHARLES W. MUSGROVE, ESQ., Assistant Attorney General of Florida, Tallahassee, Florida, 32304, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-5306, Dobbert against State of Florida.

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

ORAL ARGUMENT OF LOUIS O. FROST, JR., ESQ.,

ON BEHALF OF THE PETITIONER

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

Before I begin my argument, I'd like to take a brief moment to introduce to the Court my chief deputy who is here with me today, Mr. William P. White, III, and for whose help I am deeply indebted for preparing and presenting this case to the Court.

I would also like to publicly thank your very competent Clerk, Mr. Rodak, for all his assistance.

My name is Louis Frost and I am the Public Defender in the Fourth Judicial Circuit of Florida. I appear here on behalf of the Petitioner, Ernest John Dobbert, Jr., on petition for writ of certiorari to the Supreme Court of Florida.

The issues involved which we have to deal with today are: one, whether or not the trial court, in applying the 1972 death penalty provision of the Florida statute to this defendant, Ernest John Dobbert, Jr., violated the constitutional provisions of the United States Constitution, prohibiting ex post facto laws, and when it is applied it also -- to this

defendant, when it is applied to him, whether or not it violated the Constitution provision prohibiting one from having his equal protection of the laws violated, under the Fourteenth Amendment of the Constitution; and, third, whether or not the trial court erred in failing to grant the defendant, in this case and the Petitioner herein, a change of venue in the circumstances, as they existed in Duval County, Florida.

I think to place the case in better perspective, before the Court, I would briefly summarize some of the facts.

The Petitioner, in this case, first came to the attention of the law enforcement authorities in the City of Jacksonville in the spring of 1972, at which time his oldest son, Ernest John Dobbert, III, was found wandering around a motel in Jacksonville, the Holiday Inn. He was taken into protective custody. He appeared to have bruises upon his back and his hands and burns. He was taken before a circuit judge and questioned and thereupon began to reveal a story of child torture and child abuse to himself, his two sisters, a brother, and the ultimate culmination of death of one of his younger sisters and brother by his father, the Petitioner herein.

Shortly thereafter, immediately thereafter, a warrant was issued for his arrest and he was not found.

Shortly thereafter, his younger dauther was found in a local hospital in Fort Lauderdale, Florida, with a note

pinned to her clothing asking that she be returned to her mother in Wisconsin. At that time, almost simultaneously with that, the Petitioner's abandoned automobile was found near the Inland Waterway and there was an apparent suicide note left with it, that the Petitioner committed suicide.

The Petitioner was not heard of until the spring of 1973 when he was apprehended in Houston, Texas. He elected to exercise his right to fight extradition back to the State of Florida, which he did and which culminated, finally, in his extradition to Florida.

He was appointed public counsel, through the Public Defender's office, and Justin (?) Sullivan of our office was appointed. He raised at pretrial and during trial the questions presented herein which were denied by the trial court.

The trial court proceeded to attempt to pick a jury and the jury was finally selected after four and a half days of voir dire. The defendant was tried, convicted of one count of murder in the first degree, of one of his children, of one count of murder in the second degree of another child, of one count of child torture to one of his children, and one count of child abuse, a lesser included offense of child torture.

Immediately thereafter, on the question of punishment, the jury who had sat in that case, deliberated under the

statute in effect at the time of the trial and recommended by a ten to two majority that the Petitioner be sentenced to life imprisonment under the count of murder in the first degree.

The court, subsequently thereto, overruled that recommendation of mercy and imposed the death penalty as to the Petitioner.

Now, from that judgment and sentence, the Petitioner appealed to the Supreme Court of Florida and the Supreme Court of Florida ruled in their majority opinion that the trial court was correct and that it didn't violate due process in failing to change venue, citing the recent decision of this Court of Murphy v. Florida.

However, they failed to touch upon the question of equal protection and ex post facto, as raised herein. We petitioned this Court for certiorari and that petition was herein granted.

During the time of the initial finding of the youngest son -- I mean the oldest son, Ernest John Dobbert, III, in Jacksonville, Florida, immediately thereupon the news media, the local television, radio and newspaper began to cover every gruesome tale and incident surrounding this particular case. And they did so right up until the apprehension -- or rather taking into custody, excuse me -- of the youngest daughter of the Petitioner in Fort Lauderdale,

Florida, after which when the Petitioner was not found, the press subsided until his apprehension in Houston, Texas. And from the time he was apprehended in Houston until the time he was tried, convicted and sentenced, the media was continual in covering every incident involving every phase of this entire proceeding. This is more clearly pointed out by the Appendix to the petition and next hereto.

The first issue that this Court must consider is whether or not, by applying the 1972 death penalty provisions of the Florida statute which has been recently held to be constitutional in your case in Proffitt v. Florida, whether or not application of that particular death penalty provision of the statute to this defendant and this Petitioner for an offense which was committed, allegedly committed, prior to the enactment, and also prior to a decision in Furman. And the date of that offense for which he was convicted and sentenced to death was alleged to have been December 31, 1971.

QUESTION: He would have been punishable under that previous Florida statute, though, by death, would he not have?

MR. FROST: Not after your decision in Furman.

QUESTION: But, according to the terms of the Florida law, he would have been, would he not?

MR. FROST: According to the terms, would he have been punished by death? We don't know whether he would have been punished --

QUESTION: Would he have been punishable, not punished?

MR. FROST: Would he have been subjected to the death penalty, if he had been tried at that time?

QUESTION: Did Florida law, apart from our decision in Furman, authorize punishment by death for the offense of which he was found guilty?

MR. FROST: I submit no, at the time he was tried, because by your decision in Furman you left only life imprisonment for those people --

QUESTION: My question, Mr. Frost, was: Apart from our decision in Furman, if you simply read the statute that Florida had on the books at the time.

MR. FROST: Well, if we didn't have the '72 statute to compare with it, yes, that would be the answer, but if you eliminate Furman then you have to go on and compare the two statutes, the one that was enacted, effective December the 8th, 1972, with the one that was in effect at the time of the commission of his offense. To determine whether or not you've got an ex post facto violation, you have to compare those two statutes.

QUESTION: Your claim, then, isn't that he was not -- he could not have been punishable by death previous to the enactment of the new Florida statute, but that there was enough difference in the factors to be considered?

MR. FROST: Well, it is two-fold, Mr. Justice Rehnquist. It is, one, that he could not receive the death penalty in any event because of your decision in Furman for a pre-Furman offense when it was tried subsequent to the enactment of the new statute. That's number one, because there was no valid death penalty provision in effect in Florida after your decision in Furman.

QUESTION: And what's your second part?

MR. FROST: And the second part is, regardless of Furman, regardless of Furman, if you take Furman away and, assume that you had never decided Furman, then you would have to compare the two statutes.

And the second point is that at the time of his trial -- it's two-fold -- number one, the statute in existence at the time of his trial provided for a recommendation of mercy as being a binding sentence of life imprisonment. In other words, if he had been tried, convicted and a jury, by ten to two or by whatever majority had recommended mercy, then he could not have received the death penalty.

However, under the 1972 statute, under which he was tried and convicted, the judge did not have to follow that recommendation and the Petitioner lost the right, that substantive right, to have that binding recommendation of the jury.

Regardless of whatever the verdict was, regardless

if it was even a recommendation, under the first statute, he had the right to the potential of having the jury come back with a majority recommendation, and if so he would have only received a life sentence.

Whereas, under the new statute, that would not be the case and could not be, that the judge could have followed recommendation or could not have. The judge had the ultimate sentencing power under the new case -- new statute.

QUESTION: Under the old law, was the judge bound by the jury's verdict in either event? Or, if the jury did not recommend mercy, could the judge, nonetheless, impose something less than death?

MR. FROST: No. If the jury did not recommend mercy, he got death.

Does that answer your question, sir?

QUESTION: Yes.

MR. FROST: And the second point, in addition to having the right to have that binding recommendation from the jury, he also had the right, under the old statute, that if he was convicted and sentenced to life imprisonment, that he would be eligible for parole as decided upon by the parole board and parole commission. At any time after he served six months in the State of Florida, he would be eligible. When and if he was paroled after that time, it is up to the board.

However, under the new statute, that he was tried

under and was convicted under, under that statute, if he is convicted and sentenced to life imprisonment, he has to serve a minimum period of twenty-five years before he is eligible for any parole.

So, again, we submit that regardless of Furman and if you just take Furman out when comparing the two statutes that we have here, there is an additional substantive right that he is deprived of when the new statute is applied to him, that of being tried under a statute which carries the potential of him being convicted, sentenced to life imprisonment and having to serve twenty-five years of that sentence before he would be entitled to parole.

QUESTION: But that didn't happen in his case.

MR. FROST: That didn't happen, but, as I read your decision of this Court in Lindsey v. Washington, that is not the test. The test is whether the standard which we go by, whether or not that potential existed, and not whether or not he actually got life imprisonment or not. It was inherent within the statute that that could have happened at the time that he went in.

QUESTION: Wouldn't you think that the Lindsey v. Washington was limited to cases where the death penalty was actually imposed and laid down procedural guarantees where that happened?

MR. FROST: Well, that wasn't even a death penalty

case, Mr. Justice Rehnquist, but it was a fifteen-year penalty provision where it was subsequently changed that the judge had to give a minimum sentence of fifteen years.

And in the first case, it was any term of years up to fifteen. In the trial and the reversal, they tried him under the new statute and the judge gave him fifteen years, which was the same that he had gotten under the original statute. However, under the second statute, he was not eligible for parole until he had completed the fifteen years, where in the first instance he could -- or at least not eligible until the parole board considered it, whereas, in the first case, he would have been eligible after he completed his time and had nothing more hanging on his head.

In other words, he got the same sentence. He got fifteen years but --

QUESTION: But he had different parole rights, in his particular case, didn't he, in Lindsey?

MR. FROST: Different parole rights? He had to do fifteen years before he was eligible for parole.

QUESTION: You are making the argument here that something which could not possibly have affected your client, in view of the sentence of death, is something, nonetheless, which he is free to challenge on an ex post facto basis.

MR. FROST: I think so, if the statute is standing there and would deprive him of a potential substantive right

that could work to his detriment. We must look at the standard.

Now, in the binding recommendation of mercy from the jury, there is no question about it there. There was only potential there, but it, in fact, did happen in that case. The jury did come back, ten to two, for life, and then the judge overruled that ten to two and gave him death.

Now, the Petitioner would also argue that to apply the new 1972 death penalty provision to the Petitioner was a violation of equal protection laws of the Fourteenth Amendment.

Now, in that regard, we said in the brief that this may have been better claimed in the posture of a due process argument, in relationship to the constitutional provision that was in existence at the time that the offense was committed. And, at that time, Florida had a savings clause in their constitution, Article 10, Section 9 of the constitution. And that savings clause was not applied in this case to this Petitioner.

That savings clause in that -- in our constitution, which was in existence at the time of the trial, regardless of the ex post facto --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

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

(Whereupon, at 12:00 noon, the Court recessed, to reconvene at 1:00 o'clock, the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: You may resume, counsel.

ORAL ARGUMENT OF LOUIS O. FROST, JR., ESQ.,

ON BEHALF OF THE PETITIONER (Resumed)

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

Due to the lunch break, I would like to just briefly capsule the Petitioner's position to this point.

Number one, the Petitioner asserts that because of your decision in Furman there was no longer a death penalty in effect in the State of Florida and, therefore, the punishment was changed when they applied the new statute to this Petitioner. In other words, the punishment was changed from death to life. In other words, it should have been life but he got death.

Number two, regardless of the decision in Furman, the Petitioner asserts that there has been a change in precedent to his detriment, a substantial change, in that under the old law, if it had been applied, he would have received a sentence of life imprisonment because of the recommendation tendered to by the jury.

Too, that regardless of Furman, when the Petitioner went to trial, if he went to trial under the old statute, he would have had the opporunity to have the binding recommendation

of the jury to mercy, which was not the case under the new statute. The judge -- whether that be right or wrong, he still had a right to have that binding recommendation and that substantive right was taken away from him, and in this case, it worked to his substantial detriment.

Number three, regardless of Furman, that the new statute also had a right that was taken away from him in the old statute, and that is the new statute had annexed to it the provision of twenty-five years without parole if he had a life imprisonment sentence.

And that's the Petitioner's brief capsule to this point.

I just mentioned, at this point, when we recessed, that the Petitioner also asserted that applying the new statute to his case was violation of the Equal Protection Clause of the Fourteenth Amendment. And I indicated to the Court that that argument may have been better framed -- the brief indicates that also -- in the way of due process because of the fact that at the time that the Petitioner was tried, the Constitution of the State of Florida provided and had a savings clause, which savings clause was Article 10, Section 9, of the Constitution, and provided that repeal of criminal statutes, the repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

Now, the case law in Florida has continually

interpreted that constitutional provision in the same manner as ex post facto. In other words, they say that you can't apply an appeal or amendment of a statute that affects the prosecution or punishment retroactively, but only prospectively from the date of the new statute.

In this case, the court ignored that constitutional provision and applied it -- the trial court, Mr. Justice --

QUESTION: -- on review --

MR. FROST: And the Supreme Court of Florida, also. They didn't listen to our argument on that point. They didn't mention it so, apparently, they didn't follow it because they said nothing about it.

QUESTION: Shouldn't that court decide that issue in the first instance?

MR. FROST: I wish they would have.

QUESTION: Should they not even now be required to decide that issue?

MR. FROST: If you were to remand the case back to them? Well, I think they should follow their own law. Yes, sir, I think they should. And I think the law was settled -- in fact, the Attorney General of the State of Florida, construing that very provision of our savings clause in the Constitution, in answer to a question from a state attorney within our state, wherein a statute had been changed regarding rape, applied in 1972 the rape statute in the State of Florida.

If a person was convicted and received a recommendation of mercy from the jury, the trial court could impose a sentence of any number of years up to and including life imprisonment.

In 1972, our Code was changed and it made rape a capital felony, but also provided if there was no recommendation of mercy he could get just life imprisonment, period. He couldn't get any term of years up to and including life.

And, in construing that provision, the Attorney General of the State of Florida, in official opinion in that State, took the position that this particular enactment could not be applied retroactively to someone who committed an offense prior to the enactment of the new Code in January of 1972.

So, therefore, anyone who committed a rape prior to that time received a recommendation and was tried subsequent thereto, still had the benefit of getting any term of years up to and including life imprisonment.

And we say that to apply this law not to this Petitioner in this case in the same fashion, whether it even -- they've even used this case in the State of Florida in its construction when they changed the mode of the imposition of the death penalty from hanging to electrocution, and this Court has commented on that in its case Malloy v. South Carolina, and said well, that wasn't ex post facto, as such, but even in the State of Florida this savings clause provision --

and they cite it in one of the cases in Florida, Washington v. Florida, they cited this savings clause provision and said that a man who brought a petition on habeas because they were going to electrocute him, pursuant to the new statute that had been passed, said, no, he is entitled to be hung under the provisions of the old statute. And they applied the savings clause to him.

Therefore, we say it is a denial of equal protection of the law to this Petitioner to not have the old law apply to him as opposed to the new statute.

In addition, on the equal protection argument, there was -- If we allow the Petitioner to receive the death penalty, as in this case, then we have denied him equal protection of the law because we have placed him in a class that he is going to receive the death penalty simply because of the date of his trial, when he is tried.

Assume, for example, that a co-defendant had been his wife and that she was charged with the same heinous and attrocious acts with which this Petitioner was charged, and she was apprehended, tried and convicted, prior to your decision in Furman, she would have had -- and convicted and sentenced to death, her sentence would have been commuted to life, because everyone else's sentence on death row in Florida was commuted to life.

But, because he is tried subsequent to the enactment

of the new statute, then the obvious invidious discrimination is that he gets death simply because of the date of his trial.

Now, what could be a more freakish application of the death penalty to this Petitioner than to have him placed in that class simply because of the date of the trial.

In the recent decision of the Florida Supreme Court in reversing the case of Lee which was a crime committed pre-Furman, he had been sentenced to death, had the sentence commuted to life, went up and they said it wasn't ex post facto. It came back before the Supreme Court again and they ruled that -- His attorney had made a motion to vacate and set aside his death sentence pursuant to your decision in Furman, about three or four days after Furman came down.

And they said, well, it's equal protection here, that we can't discriminate and put him in a class just because his lawyer was astute enough to file a motion prior to trial -- I mean prior -- shortly after your decision in Furman -- to set aside and vacate his death penalty.

So, we submit that to deny the application of the new statute and deny this to him also violates the Equal Protection Clause of the Fourteenth Amendment.

The additional point which we raise in this case is that the trial court erred in failure to change venue and change it to some other county in the State of Florida, other than Duval County where the case was tried.

And I think we have to look at that in light of your recent decision, written by Justice Marshall, in Murphy v. Florida. In looking at it in that light, I would say that our case is distinguishable from the Murphy case for the following reasons: Number one, this case is a death case. This is not a robbery case or a burglary case, as was the situation in Murph the Surf.

In this case, since it is a death penalty case, and in other words the Petitioner here is sentenced to death, I think we have to look at the circumstances that surrounded more closely to see that we do apply fundamental fairness in a situation such as this, and that we are cautious in whether or not we say whether or not the trial court should have or should not have rendered a change of venue.

Two, that this case is different because of the very nature of the offense. Child torture and child killing of two of his minor children. And, therefore, the very odious nature of these facts make people get prejudices just because they hear the case on voir dire, just when you mention it to them.

Three --

QUESTION: But they are going to hear that at the trial anyway, aren't they?

MR. FROST: Yes, sir, they heard it at the trial. They heard it, but the mere fact that they heard it in pre-trial and they knew something about it, coupled with the

continuous press that was going on from the time of the offense until the latter part, when he was tried, convicted and sentenced to death -- I am saying that, and that, alone, may not be enough, Mr. Justice Rehnquist, but the death penalty, the odious nature of the crime and, three, the mass, local community scene.

In other words, just isn't a case like Murph the Surf who had national publicity and the Star of India surrounding him and possibly could have been, maybe, tried nowhere else in the state -- This defendant could have been tried in another county other than Duval County and because of this we feel that the court should have changed venue.

I would like to save the rest of my time for rebuttal, if it please the Court.

QUESTION: Mr. Frost, before you sit down, what do you think is the purpose of the ex post facto prohibition?

MR. FROST: Well, just as Chase announced in Calder v. Bull, we say this is in Category 3, that a person should not be subjected to an increased penalty at the time he is tried over what he could have received at the time of the alleged offense.

In other words,when you compare the two statutes, or you compare what was the punishment then and the punishment now, if it, in fact, increased that punishment, or,additionally, deprived the defendant of a substantive right, some substantive right that he was entitled to under the old statute, then it is

ex post facto.

QUESTION: Don't you think -- First of all, it doesn't apply, I take it, to judicial decisions, as distinguished from the legislative acts.

MR. FROST: Well, I wouldn't concede that. No, sir.

QUESTION: Do you know of any case where they've ever --

MR. FROST: I think the Bowie case was one where it applied in judicial decisions.

QUESTION: Which one?

MR. FROST: Bowie.

QUESTION: You don't feel that Proffitt, in effect, is a holding here, that the Florida procedure before was much more rigorous than now, which would eliminate your ex post facto argument.

MR. FROST: Would you repeat that. I am not sure I quite understand it, Mr. Justice Blackmun.

QUESTION: Well, you know the Proffitt case.

MR. FROST: Yes, sir.

QUESTION: Do you think that your client is better or worse off now that Proffitt has been decided?

MR. FROST: I think that is really immaterial when we are considering ex post facto application of the law. We are not here to go into that, as to whether or not Proffitt decided that this statute met constitutional muster and whether

or not it was, in fact, a better statute than the previous statute that had the recommendation of mercy from the jury without guidelines.

That's not an issue in this ex post facto application, Mr. Justice Blackmun. And I think we have to remember that when we look at this.

QUESTION: Do you take the position that any procedural change results in an ex post facto consideration?

MR. FROST: Any procedural change? No, sir, I do not take that position.

QUESTION: Where do you draw the line?

MR. FROST: Whatever you call it, whether it be called procedural or not, this is certainly a procedure if you want to say it is a procedure. One procedure for invoking the death penalty here and one procedure for invoking the death penalty over here. But if that procedure deprives the defendant, the person that's being subjected to the new law, of a substantive right, then it is ex post facto.

In other words, if that right is a substantive right and it works to his substantial detriment, and what could be more than the substantive right of life, itself. And what could be more of a detriment to this Petitioner than to have his substantive right of life taken away and given death?

QUESTION: What would you say if they had increased the penalty from a minimum of ten years to a minimum of fifty

years? Would you say the ex post facto clause would bar the application of the greater?

MR. FROST: Yes, I would say that that would be a substantive right that he had been deprived of, if they increased the penalty and enhanced the penalty next to the crime. Yes, sir, I would.

QUESTION: Your comment gets back again to Mr. Justice Rehnquist's early question of whether at the time this crime was committed, under Florida law, he was not subject to death?

MR. FROST: Well, the answer to that question --

QUESTION: The only answer you can give is, well, the Proffitt case came along.

MR. FROST: Well, no, Furman came along. Furman is the law. Your decision in Furman is the law, and that law took away the death penalty.

QUESTION: But it wasn't the law at the time of the crime.

MR. FROST: Under the law, at the time of the crime, he would have gotten life imprisonment, because a ten to two recommendation of mercy from that jury would have been binding on the trial court.

QUESTION: Isn't that a bit of speculation as to what that jury would have done?

MR. FROST: I don't think it is speculation, Mr. Justice Blackmun; they heard all of these atrocious, heinous

facts that came out in this trial for five days. And they heard every one of these facts --

QUESTION: Under a different statute.

MR. FROST: Sir?

QUESTION: Under a different statute.

MR. FROST: They heard every one of these facts and they still recommended mercy.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Musgrove.

ORAL ARGUMENT OF CHARLES W. MUSGROVE, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I am Charles Musgrove with the office of the Florida Attorney General in Tallahassee. I represent the Respondent, the State of Florida.

Briefly, it is our position that the argument by the Petitioner as to the ex post facto nature of the sentencing procedure is without merit because this is nothing but a procedural matter. We think the essence of the ex post facto provision is notice. We think that was the gist of this Court's decision in Bowie. More recently, Mr. Justice Stevens wrote a case regarding the application of the Memoirs test in pornography matters in which you confirmed again that the essence of the ex post facto law is notice and there is no

notice problem in this case.

If Mr. Dobbert were a student of the law, he would have known that at the time he committed this offense he was, indeed, subject to the death penalty. At the time he stood trial, he was, indeed, subject to the death penalty. In fact, there was no change whatever in the punishment to which he was subjected.

At the time of the offense, the punishment was either life imprisonment or death. At the time he stood trial, the punishment was either life imprisonment or death.

Now, there was an additional provision in the new Florida law, which Mr. Frost has referred to this morning, which provides for no parole for a period of twenty-five years upon a conviction for a capital felony. Florida has conclusively construed that provision not to apply to any case such as Petitioner's where the offense occurred prior to the effective date of the statute.

So, it is not simply a matter that because Petitioner received the death penalty and not life imprisonment he didn't get the twenty-five years without parole. It is a fact that he could not have gotten it.

It is the Lee decision, which we have heard a lot about already today and you will hear some more from me and I am sure again from Mr. Frost. Lee decides that question.

So, we contend that there simply is no change in the

punishment to which Petitioner was subjected that distinguishes this case from the Lindsey case which was brought up, I believe, by Mr. Justice Rehnquist. Lindsey involved a case in which what had been a maximum punishment, fifteen years, suddenly became a mandatory punishment. The judge was required to impose the fifteen years. And the time that the person would then get out of prison was to be at the discretion of the parole authorities.

That is not the case we have here because there has been no change whatever in the punishment imposable.

Now, you have heard this morning that it is a freakish thing to make the result depend upon the date of trial. I suggest to you that in procedural matters there is no other time to which a procedure can relate except the date of trial, the date when the procedure is to be applied. Certainly, no procedure can apply before its effective date.

If this Court wishes to assume that it is freakish to make the outcome of a case depend upon the date of trial, then I would ask this Court what it was deciding when it decided Johnson v. New Jersey, which applied, as this Court will recall, the dictates of the Miranda decision only to those cases which went to trial after the effective date of the Miranda decision.

I realize this Court has not applied that test since that time. However, I would suggest that to tell the State of Florida that it cannot do the same thing this Court did in

Johnson v. New Jersey, that for Florida to do it would be freakish,would be inconsistent on the part of this Court.

QUESTION: Mr. Musgrove, before you leave that point, is it your submission that if the trial had taken place promptly after the offense and before the decision in Furman, and if then there had been an appeal to this Court and this Court had vacated the death sentence on those circumstances, that Florida could constitutionally have reimposed the death sentence pursuant to a new statute?

MR. MUSGROVE: I would take the position, yes, sir, that Florida could have done so. However, as a practical matter, Florida did not do so. For all those people who were on death row at the time Florida vacated the death sentences and imposed life imprisonment instead.

QUESTION: And Florida did that as a matter of its own policy decision rather than feeling it was under any constitutional compulsion to do so?

MR. MUSGROVE: Mr. Justice Stevens, I cannot tell you what was in the minds of the justices in the Florida Supreme Court. They indicated, on the one hand, that they didn't think there was any way to save their capital statute. However, they were faced, at that very time, with the brand-new procedure.

I have taken the position, in the brief for the Respondent, that they could, in fact, have saved it in a variety of ways. They could have simply adopted the same

procedures that ultimately were adopted in the statute.

However, they were already faced with a brand-new statute which would supersede anything they could do. And they did, indeed, go ahead and wipe out all then existing death penalties, which we suggest is precisely what this Court said had to happen as a result of Furman, namely, that all existing death penalties had been unconstitutionally imposed and could not stand.

QUESTION: But if your view of the law is correct, I take it, wherever there was a death sentence set aside, if a state had elected to adopt a new statute and have another penalty hearing ending up in a death sentence, it could have done that.

MR. MUSGROVE: That is our position, yes, sir.

In fact, that was precisely what was done with Rudolph Valentine Lee. Rudolph Valentine Lee not only received the death sentence but his death sentence was affirmed.

QUESTION: So that those that this Court vacated the death sentence they would be vacated, but the other guy who was convicted under the same circumstances, the Florida courts could reimpose the death sentence?

MR. MUSGROVE: That is our position. It is not involved in this case.

QUESTION: Have you got anything to back that up?

MR. MUSGROVE: The Florida Supreme Court thought it

could do so in Rudolph --

QUESTION: Anything other than Florida Supreme Court?

MR. MUSGROVE: No, sir.

I think this is a very unique case. I don't think either side has found a case quite like it anywhere.

I suggest that whatever decision this Court may make at this time it will be plowing new ground.

Now, Rudolph Valentine Lee was, indeed, ultimately reversed. The death sentence was cast out by the Florida Supreme Court the second go 'round, and the reason it did so, I suggest to this Court, has nothing to do with the situation Mr. Dobbert finds himself in. It is simply this: Mr. Lee, like all others who were on death row at the time this Court decided Furman, should have had his death sentence set aside by either the Florida Supreme Court or upon remand -- I think, actually, all death sentences were set aside by the Florida Supreme Court, either in Baker or in Anderson v. State.

Now, Lee did not, simply because his attorney made the mistake of following the advice of the Attorney General of Florida and rushing right back to the trial judge to get his sentence set aside, at which point, the state took an appeal. The appeal was ultimately decided after the effective date of the new statute, and Lee, thus, became the only person who had been on death row, prior to the Furman decision, whose sentence to death was not forever set aside. The only one. Not only

that, but it can be said that his mistake was in relying on representations by the state.

All the Supreme Court of Florida decided in Lee was that it would be fundamentally unfair to Mr. Lee to penalize him for what a competent attorney chose to do as a matter of tactics which produced the result that he and he alone, of all those people, was still subject to the death penalty.

Now, the state certainly did not mislead Mr. Dobbert in any fashion. The fact that he did not stand trial, by the way, until after the new procedure took effect, was surely not the state's fault.

The state, for example, did not hide the evidence of these crimes by lying to the authorities, by keeping the children out of school so that the atrocities couldn't be seen, by feigning a suicide in Fort Lauderdale and hiding out in Wisconsin, New Orleans and Texas, and fighting extradition so that he could not possibly have stood trial until after the new procedure took effect. None of that can be laid at the feet of the state. That was Mr. Dobbert's doing, himself.

As a consequence, we say, simply, this is a procedural matter. It did not alter the punishment. It is not ex post facto.

I feel compelled to address the question that, perhaps, has already been resolved in the mind of the Court, to wit: Whether the new statute is, in fact, harsher or

beneficial to the defendant compared to the old one. You will find a survey in the state's brief of the then existing cases. Subsequently, I have updated that. Some seven additional cases have been decided. I do have case numbers and decision dates available.

But, of those seven additional cases that were decided by the Florida Supreme Court, three of those have been affirmed, the death sentences, four have been reversed. That included, by the way, two cases in which the jury had recommended life and that decision was overridden. One of those was affirmed and the other was reversed.

So that, at this point, of a total of thirty-six cases which the Florida Supreme Court has decided on death penalties -- pardon me, forty cases -- twenty-two of those have been affirmed, eighteen of those have been reversed.

The jury recommendations in those cases have included, by my count, twenty-six recommendations to death. Now, in addition, I have included in the matters attached to the Respondent's, and later to my brief, some four cases that we are aware of, and there may well be others, because we don't routinely get those in our Tallahassee office, and the issue of the sentence is not one that is raised on appeal, but we know of at least four cases in which the process went the other way and in which the jury recommended death and the trial judge overruled.

So, we would say, at this point, there are at least eight, and now counting Gardner who this Court just took off death row, nine less people on death row in Florida than there would have been under the old procedure in which the jury recommendation was binding.

We think that is very strong, if not conclusive, evidence that the new procedure is favorable to the defendant, not unfavorable. And we think the defendant is engaging in Monday morning quarterbacking when he says, "Well, look, my jury recommendation in this case would have produced a life sentence for me."

QUESTION: Well, is this your only answer to that point? Your only answer being that, looked at as a whole, the statute is more favorable.

MR. MUSGROVE: That is part of the answer, yes, sir.

QUESTION: What is the other part?

MR. MUSGROVE: Well, first of all, we think he is merely speculating. He cannot say how a jury would -- what sort of a verdict a jury would have returned under the old procedure. The jury would not have had the benefit --

QUESTION: That isn't quite the test, is it?

MR. MUSGROVE: Well, Your Honor --

QUESTION: Under Lindsey?

MR. MUSGROVE: I don't understand Lindsey to have any application to a case such as this, Your Honor. If it does,

it eludes me because Lindsey was a case in which the potential punishment clearly went from a maximum of fifteen years imprisonment to a mandatory fifteen years imprisonment. There was no longer any possibility for the judge to give any less than fifteen years.

QUESTION: I know, but under the old statute, here, if the jury recommended mercy the judge had no alternative.

MR. MUSGROVE: That is true, Your Honor.

QUESTION: He had to accept it.

MR. MUSGROVE: That is true.

QUESTION: And here, the same recommendation, he doesn't have to accept.

MR. MUSGROVE: And under the old system, Your Honor, if the jury recommended death, the judge also had no alternative.

QUESTION: I understand that, but, again, is that your only answer?

MR. MUSGROVE: No, my answer still is that what he is doing he is engaging in Monday morning quarterbacking and saying this is what would have happened under the old procedure. And I suggest again that is speculation on his part. He cannot say, as a matter of fact, what a jury would have done under the old procedure. The jury would not have had the benefit of instructions by the judge of the aggravating and mitigating circumstances. The jury would not have had the benefit of a separate proceeding in which aggravating and mitigating evidence

was offered.

Now, I recognize that in this case very little was offered. Certain psychiatric reports and the defense counsel read to the jury from Mr. Neiser's book, "The Enclosion Conspiracy."

QUESTION: Under the old law, was there an absolute right of appeal to the Supreme Court of Florida?

MR. MUSGROVE: There was, sir, but there was no appellate review, and the Florida Supreme Court had no alternative to simply reduce the sentence. If the Supreme Court thought an unjust result was reached, about all they could do was order a new trial. They had no review of the sentence, as such, a feature which this Court has found to be a very vital one in the present statutory setup and one which has produced, in fact, what we contend is a third opportunity, under the new procedure, for a defendant to get life imprisonment, rather than death, where in the past, he had only one chance. The jury verdict was it. If the jury said die, he died.

QUESTION: Mr. Musgrove, let me ask two questions.

First, I want to be sure I understand your statistics correctly. If I understand you, there are forty cases, death cases, where the trial court has imposed a sentence to death in Florida, under the new statute.

MR. MUSGROVE: Yes, sir.

QUESTION: And do I correctly understand that, in those forty, fourteen of those were cases in which the jury had recommended mercy?

MR. MUSGROVE: Yes, sir.

QUESTION: And in all fourteen of those, then, the trial judge substituted the verdict of death for the jury's recommendation of mercy.

MR. MUSGROVE: Yes, sir.

QUESTION: Then, the second question I have is: Although we don't know what would have happened under a different statutory scheme before, at least it is true, is it not, that under the prior procedure, the jury might have returned a verdict of mercy, and if it had that would have been the end of the matter on the sentencing?

MR. MUSGROVE: Yes, sir. That is true.

QUESTION: In this case, the jury did that.

MR. MUSGROVE: In this case, the jury recommended mercy. However, the jury was also told its decision was not final. It was told that these were the aggravating circumstances, these were the mitigating circumstances. You were to weigh all of these and reach whatever conclusion you deemed appropriate.

None of that would have happened under the old procedure. And, certainly, there would have been no reading from the book, "The Enclosion Conspiracy," to that jury under

the old procedure. That just would never have happened.

Of those fourteen cases, by the way, in which the jury has recommended life imprisonment and the judge has overridden, nine of those fourteen have been reversed on appeal in the Florida Supreme Court. Only five were allowed to stand, one of which, of course, is before you now in Dobbert.

One, I might mention, was overturned by the very trial judge who imposed it in the first place. That's the Sawyer case which Judge Baker took it upon himself to throw out. And still another one was the decision in Gardner which this Court, just last week, threw out.

So, by and large, I would say this: When the jury recommends mercy in Florida, under the current procedure, it is a very exceptional case, in which an override occurs and is upheld.

The Florida Supreme Court said that, in effect, in Tedder when it said the jury recommendation should be binding in all cases except those in which no reasonable man could disagree. Obviously, they weren't talking about judges, since judges rarely agree --

QUESTION: That wasn't true in the Gardner case.

MR. MUSGROVE: That all reasonable men would agree?

QUESTION: They didn't say anything.

MR. MUSGROVE: No, sir. Gardner preceded Tedder.

However, the Tedder standard was in effect at the time that Dobbert was decided and, in fact, one of the deciding opinions addressed it out expressly. The other dissenting opinion related, basically, to jury instructions and referred briefly to the question of venue.

All of the other five justices of the Florida Supreme Court concurred that the judgment and the sentence were proper.

QUESTION: The Florida Supreme Court didn't consider the issue before us here now, did it?

MR. MUSGROVE: It was presented to the Florida Supreme Court, however, I would suggest that the Florida Supreme Court, having already decided Lee and Miller, which are cited in my brief, did not feel compelled to again address the same issue.

QUESTION: There is no discussion of it?

MR. MUSGROVE: No discussion. No, sir.

QUESTION: It was the subject of a motion for rehearing, was it?

MR. MUSGROVE: Yes, sir.

QUESTION: And that was denied without discussion?

MR. MUSGROVE: Yes, sir. However, in light of Miller and Lee, recent decisions of the Florida Supreme Court, I don't know why they would continue to plow the same ground when they had other issues to address.

QUESTION: It was presented?

MR. MUSGROVE: It was presented. I am sure it was not just ignored entirely.

QUESTION: If it were decided the other way, would it have been dispositive?

MR. MUSGROVE: Well, it would have been dispositive of the sentence.

QUESTION: So that you must conclude that the issue was decided in this case.

MR. MUSGROVE: Yes, sir. It simply was not addressed.

I have heard some discussion here today about the evidence clause, and if I understood Mr. Justice Burger's question correctly, it went to whether this was a federal question at all. I would suggest that it is not.

However, I would also disagree with the Petitioner as to the effect of the evidence clause. Florida has held that it does not apply to procedural matters. Here again, this matter was certainly presented. It was not addressed, but it again had to have been decided, as Mr. Justice White has just pointed out. And I don't think that there is any basis for this Court to go behind what the Florida Supreme Court has done.

Again, I do not understand that this should be considered a federal question.

If there are no further questions, on the question of the ex post facto application, I will address briefly the

question of the change of venue, the request for change of venue.

I think Murphy is the case in which this Court has most recently addressed this subject. I think this case is distinguishable from Murphy, also, and I think in every aspect save one in which it is distinguishable it is distinguishable in favor of the state.

Here, unlike Murphy, there were some very excellent efforts made by the trial judge to control the extent, duration and the effect of what I would concede was, indeed, some fair amount of publicity.

Here, the trial judge imposed an order a couple of months before the trial, limiting statements by court personnel. Here, he sequestered the jury throughout the trial, and he even kept them separated in the jury selection. Initially, jurors were selected, in fact, the first twenty-seven prospective jurors were brought before the court for voir dire one at a time. This proved to be taking too long so, thereafter, nine were brought in, three at a time, thereafter in varying numbers of either six or five at a time, until the jury was finally selected. And tentative jurors were kept separate. Prospective jurors were kept separate from those being questioned and those which were tentatively accepted were kept still in another location.

So that even if one of the jurors were to say,

"Oh, I've read everything" -- one of the prospective jurors were to say -- "I've read everything and I'm just convinced this man is an animal. He's guilty as charged and he deserves to die," nobody except those jurors being questioned right then, and, initially, as I said, they were one at a time, would have even heard this outburst.

So the trial judge took some very excellent measures to preserve the integrity of this trial. Such measures this Court thought in Shepherd would have been sufficient to preserve the integrity of that trial, a trial which this Court will recall was considered to have been conducted in a circus-like atmosphere. Certainly, nothing like that happened here.

Secondly, we have suggested that there is nothing that was in that pretrial publicity that the jury did not hear again at the trial. It was basically straight, factual reporting. In fact, everything, everything was there again for the jury to hear.

We have examined the voir dire examination itself and discovered that, unlike Murphy, where everybody had heard of Murphy, a substantial number of prospective jurors had not heard of Mr. Dobbert. Far more jurors were unable to set aside their opinions on Murphy than there were in the Dobbert case. Like Murphy, there were even some in Dobbert, who thought that perhaps he was innocent based on the fact they couldn't find the bodies.

Every step of the way, the voir dire examination here demonstrated that this was not an impossible situation, that it was possible to get a fair jury.

And then, we examine the results of the trial to see if this premise proves to be correct, and in fact it does.

This jury deliberated for, I think, some six or seven hours. It asked to have three witnesses reread, including the son. It considered lesser included offenses, as to all four, and actually returned verdicts on two of those lesser included offenses. And then, by the way, as we all know, this same jury went out and deliberated for, perhaps, a half an hour, or so, and returned a recommendation to life imprisonment.

This, Mr. Dobbert suggests, was an unfair jury, that he could not get a fair jury in Duval County, Florida.

I suggest to this Court that death cases are, indeed, different, and that is the only distinction between this case and Murphy. This is a death case. Death cases are different, I don't deny that, but by the very fact that death cases are different, they are the types of cases which invariably attract great attention in the press. And, unless this Court is prepared to say every capital case must be tried on a change of venue, then you must look to the selection of the jury where there is no change of venue to see if there is prejudice.

And I suggest to you you will find not only no evidence of prejudice, but not even a basis upon which to

conclude that prejudice had to be there despite the protestations of the prospective jurors.

QUESTION: What's the population of Duval County?

MR. MUSGROVE: At the time, it was over half million.

QUESTION: Jacksonville is the County seat?

MR. MUSGROVE: I don't believe they had consolidated it yet, then. Subsequently, they consolidated, but Jacksonville was the county seat, I believe, at the time.

It is one of the larger population areas in Florida. Dade County is larger. Perhaps the Broward-Fort Lauderdale area, but it is one of the largest areas. I am not sure where this case could have been tried, if not Duval County, with a fair jury. I heard about the case in West Palm Beach which is far to the south. Certainly, Fort Lauderdale, where he left the suicide note, heard quite a bit about it.

The basic fact is that this, I sugg , was, in fact, a fair trial jury, very fair, and there has been neither a showing of actual prejudice, or even circumstances in which, as this Court did in Ervin v. Dowd, you held that protestations of -- that prospective jurors could set aside their preordained opinions could not be believed. It's just not that type of case at all.

Certainly, there was nothing like Murphy, the talk about prior convictions that were totally unrelated and that were never heard about at trial. Everything here that the juror

could have learned they did learn again at trial.

So, we would suggest --

QUESTION: Mr. Musgrove, may I go back to the ex post facto point for just a moment?

Do I correctly understand your argument to apply to this situation? Last term, as you know, the Court vacated death sentences in North Carolina and Louisiana.

Could the legislatures of those states today decide to authorize new sentencing procedures for all those individuals whose death sentences were set aside, have rehearings and give the courts power to reimpose those death sentences?

I understand, from your argument, they could.

MR. MUSGROVE: Yes, sir.

QUESTION: There is no basic difference because of the peculiar way this case arose. It is the same basic constitutional issue.

MR. MUSGROVE: It is the same basic issue, Mr. Justice Stevens, and, frankly, the notice is still there which is essentially our position.

QUESTION: Your point being that at the time they committed the offense they were on notice that it was a capital offense.

MR. MUSGROVE: Right.

Now, as far as the significance of this case, whatever you all decide for Florida will not have any great

significance. There are some people still subject to the death sentence, if you decide in favor of state here. Mr. Dobbert is one. Mr. Miller is back up for review again in the Florida Supreme Court. He's another. I know of one, myself, which will yet go to trial. I think it is scheduled now in May. And I am sure there are some others who, for some reasons weren't tried yet. Perhaps, they were in, as the one in Vero Beach, were in insane asylums,held until trial.

But, if this decision is to have any effect at all, and it may have some slight deterrent effect, it will not deter anybody in Florida, except, perhaps, Dobbert, who as this Court has recognized, will never do this again if he is executed. It will not deter anybody in Florida because Florida's procedure is now deemed valid, but in other states, just to illustrate, robbery is usually a planned offense. And one of the things a robber has to calculate on is: Should I kill my witness and, thus, perhaps, run the risk of a death penalty if there is one in my state, or should I let the victim live and run the risk that he will put me in jail? Because, of course, eyewitness testimony is the best possible evidence and the kind that the robber most wants to eliminate.

Now, he may, in his planning, make the definite decision, one way or the other, based on his analysis of his law, if it hasn't been before this Court yet. But if this Court decides in Dobbert that even if the procedure is no good

right then, it can be amended, and the amendment correcting the procedure will be valid and will apply, even to older offenses, then there is a deterrent. He may leave the victim alive.

I realize it is, perhaps, only a slight deterrent, but as far as we are concerned, if any innocent victims have their lives spared as a result of the death penalty, it has served a very useful purpose.

QUESTION: Of all those you've named that are on death row, those that have petitions pending here, they are safe, aren't they?

MR. MUSGROVE: Pardon, sir?

QUESTION: Those that have petitions here, those that are on death row, you are not going to electrocute those, are you?

MR. MUSGROVE: Oh, no. Not right at the moment.

QUESTION: I hope not.

MR. MUSGROVE: We hope we will be allowed to when this Court is through reviewing their cases.

If there are no further questions, we would summarize briefly by saying that this is not an ex post facto application because it is merely procedural and that the argument relating to the change of venue should be rejected on grounds of Murphy because in every instance this case is more favorable for the state than was Murphy.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:45 o'clock, p.m., the case in the above-entitled matter was submitted.)