10-1971

Branch v. Texas

Lewis F. Powell Jr.

Death Case
Argued 1/17/72

BENCH MEMO

No. 69-5031 OT 1971
Branch v. Texas
Cert to Texas Ct Crim App

I. QUESTIONS PRESENTED

(1) Does the imposition and carrying out of the death penalty for rape constitute cruel and unusual punishment because it is not in accord with contempory standards of decency and is excessive and disproportionate to the offense?

(2) Does the fact that the death penalty is given for rape only in 16 states make its imposition a denial in those states of equal protection of the law?

(3) Does utilization of the death penalty for rape violate the due process clause of the 14th Amendment because it is nothing more than a thinly veiled attempt to legitimatize racial homicide?

(4) Does the Texas procedure for determining which defendants are to be freed from the jury's determination whether to impose the death penalty, deny equal protection of the law?

Relevant cases: Same as Aikens & Jackson memos.

II. FACTS

Petr, Elmer Branch, was tried by a jury in the Walburger County Dsitrict Court for the rape of Mrs. Grady Stowe. The jury returned a verdict of guilty and imposed the death penalty. The victim was a 65-year-old widow, white, and living alone in a rural Texas community. Petr, a 20-year-old Negro, perpetrated the rape by forcing his way into the victim's home while she slept. He was unarmed and the victim suffered bo serious injuries or threat of injury. Indeed, after the rape, the victim and Petr sat around in the bedroom carrying on a rather casual conversation about why he had decided to rape her. All testimony regarding the rape was elicited on direct examination of the victim since Petr's attorney decided not to cross-examine her. The jury's assessment of the death penalty was affirmed by the Texas Ct Crim App where Petr's 8th Amendment claim was rejected, that ct relying on former cases holding the death penalty for rape not cruel and unusual.

Petr apparently had only one prior conviction, that for theft. His IQ was around 67 (borderline mentality) and he had the equivalent of a 5th grade education.

III. CONTENTIONS OF THE PARTIES

At the outset it should be pointed out that two of Petr's proffered issues are not within the limited grant of certiorari in this case. Question # 2--interstate inequality in punishment for rape violates equal protection--is a straight equal protection argument having nothing to do with the 8th Amendment or the incorporating clause (due process) of the 14th Amendment. Additionally, as the State's brief points out, this issue was not raised below. I would reject this argument as not before the Court at this time. Likewise, Question # 4--whether the prosecutor's power to avoid seeking the death penalty in a rape case, provides

unfettered discretion to a state official to discriminate against defendants accused of rape thereby violating the equal protection clause--is not fairly before this Court. Petr fails to tie this argument into his cruel and unusual punishment argument and it is therefore not appropriate for consideration at this time.

Although phrased in stronger terms, Petr's other contentions are essentially the same as those raised in Aikens, Furman, and Jackson. It should be noted that Petr does not seem to argue that the death penalty may never be imposed in this country in view of prevailing community standards of decency. His argument is only that the it may not be impsed where the crime is rape. (See p. 9 of Petr's brief.) Therefore, he does not incorporate by reference the argument made in Aikens. Petr's argument differs from the argument in Jackson in that he asserts that imposition of the death penalty is cruel and unusual only when the rape does not threaten the life of the victim. Petr does not appear to argue that the death penalty may never be imposed for rape, only that it may not be utilized in cases lacking additional facts of threatened death. This is the tact taken by the 4th Circuit in Ralph v. Warden, 438 F.2d 786 (1970).

The State's responive brief, written, I understand, by Charles Alan Wright, persuasively draws together the arguments scattered through the other State briefs in these cases. It is worthy of note that the State in this case does not contest the incorporation of the 8th Amendment as the State of Georgia has done.

The State also takes a forthright stand on the "new penology" argument made in this case and the others that the death penalty may not be imposed because it serves none of the recognized purposes of correction and punishment. The State freely states that it may retain the penalty for retributive purposes and that this Court and the Constitution have never held that retribution is not an

acceptable, albeit undesirable, motive for legislative imposition of punishment. Furthermore, the matter of deterrence of which much has been made in these cases is treated as a question for the individual states to decide. The evidence on the deterrent value of the penalty is not sufficiently persuasive either way to allow of a constitutional pronouncement throwing the penalty out.

IV. DISCUSSION

As I have indicated in our discussion, I find the State's brief in this case, and Petr's brief in Aikens to express most cogently the arguments on both sides. There is little that I can add to those presentations.

LAH

Branch v. Texas 69-5031 1/17/72
(Death penalty for Rape)

Mr. Bruder (Petr.)

Rape established but new medical test. as to ill-effects on victim.

Standards - must be material — as in Brown v. Bd Ed, Baker v. Kerr, etc

Statistics (Br. p/9,20) show that when a Black is convicted, chances are 88% that he will receive D/S. Far less % of whites.

Issue of discrimination not raised at trial. May have been mentioned in Tex. Ct of Cr. appeals;

. If a prosecutor does not ask for D/P, it cannot be given by jury. Bruder argues this is prejudicial. (But what is relevancy of this in case before Court).

Bruder does not necessarily attack D/P in all cases — but only in rape.

Prof. Wright (for Texas)
Will not repeat other arguments.

Most of states which have abolished D/S have not excluded all crimes. (See N.M. statute). This requires, simply factually, that any statute which does make only mandatory D/S for any crime (e.g. murder of policeman, jailor, prisoner, rape etc.) be held to violate 8th amend. You can't depend D/S for killing a policeman as not being "cruel & unusual" and condemn a general murder statute as being "cruel & unusual."

Meaning of "cruel & unusual": Taken from Eng. Decl. of Rts, but history is not too helpful. Prof. Wright thinks we must ascertain - as best we can - as whether the type of punishment is tolerated & accepted by consensus of contemporary America. We may look at objective as - 41 states, jury sentences, etc., etc.

As to whether "rarity" is an ingredient of "unusual" it is not controlling. "Rarity" is a 14th Amend argument - not 8th.

× × ×

Statistics of last 10 yrs. not reliable - because of judicial action, etc.

× × × ×

Concepts do change. "Cruel & unusual" is not and does not have an "unmistakable meaning."

(over)

Wright (cont.)

If we outlaw D/Es because of racial prejudice, then would lack logically to outlaw life imprisonment & possibly other types of punishment. Thus, this is an equal protection — not an 8th amend — problem. — no particular case?

Stewart asked how one can show the racial prejudice? Wright replied: That has been shown in school & other type cases (But Wright did not answer this rule/practicality)

Composition of jury should take care of this — it not racially unobjectionable in its composition; the jury system should take care of the discrimination)

Wright thinks Justice Black's opinion in Witherspoon is not one that could be applied. He thinks Harlan's opinion suggests a more objective test. But Wright thinks Harlan's "skirt" Court too thinly.

Conf. 1/21/72

Court ..... *Voted on*....., 19...

Argued ..1/17/72....., 19... *Assigned* ....., 19... No. 69-5031

Submitted ....., 19... *Announced* ....., 19...

BRANCH

vs.

TEXAS

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

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Some of My Notes
Spring 1972

Death Cases

Charles Black's Brief (Branch v Texas
65-5031

(Note: See my notes + ~~references~~
on back of Brief)

1. This Case (Rape). Only attacks D/S
on "certain kinds of rape" – 4

2. Issue in all of these cases. Not
the "wisdom or social desirability
of capital punishment. These are
quests. addressed wholly to legislators"

Judges personally opposed have
upheld Court.:

Francis v. Resweber, 329 U.S. 459
at 470 (Frankfurter)

Maxwell v. Bishop, 398 F 2d 138, 154
(8th CC) – Blackmun

In re Anderson, 69 Cal. 2d 613,
634, 635 (J. Mosk)

Black's quote is on point

Cf: McGautha v. Calif, 402 U.S. 183,
226 (Black) (1971)

Witherspoon v Ill, 391 U.S.
510, 542 (White)

References to ~~[illegible]~~ community's [illegible]
on death punishment – 19

P. Case for Court in Compelling (p 5 at top)

Black – McGautha 402 U.S. 183, 226

First Congress – 6

Time line of cases in this Ct. – 6

Only last term, Ct folded 130 years (McGautha) discussing the const. of procedures – "a singularly academic exercise of the Const. penalty does not permit the penalty ever to be imposed – 6

Aikens brief (Amsterdam) admits Ct. would have sustained Const. as late as Furman or "even Troop" – 6.

Note: A finely spun analysis may support view of no exactual holding by Ct., but there is a debating rather than a substantive point. (see #6)

4. "Standards of Decency" have not Evolved perceptibly - certainly not decisively - more Francis, Trop, etc - p 7, 8

1966 Poll - cited in Witherspoon 391 U.S. 510, 520 n 16 (p 7)

But 1969 Poll differs - p 7
(These Poll percentages are of no consequence - 7

The incredible fact is that public opinion is divided - with substantial support for Ill. rule - 7

Good form

Check this cite

The "abolitionists" have "highly articulate lobbies" [redacted] - 7 (Citing Working Papers of Brown Commission pp 1347, 1363 (p 8)
See also reference to Ohio Legislative Comm - Cited p 8

} Anti D/S movement.

Note: The anti D/S movement - coupled with "fervor of a crusade (Aikens Br p 52) has in fact achieved little result in terms of arousing public support - as Poll, 9th vote show. It has been singularly successful in the law reviews, the scholarly journals & some of the press. But if the standard is the public - not just an elitist segment - the crusade has not attained notable success

Results of referenda: (p 8

	For abolition	Against
Oregon (1964)	60 %	40
Colorado (1966)	35 %	65 %
Del (1970)	36 %	64 %

Special leg. Committee (8)

Mass (1958)	Favored abolition	
Penn (1961)	"	"
Mich (1962)	"	"
N.J. (1964)	Favored	Retention
Fla (1965)	"	"

(auth. cited in Brown Committee - p 1365)

Note after - refute idea of trend

Brown Comm (8) (See Laing's memo)

Sharply divided - 8

A.L.I. (8)

41 States + Fed Govt retain it - 9

Congress in 1965 - added death penalty for assassination of Pres, V.P. or Pres. Elect (9)

Action by State Legislatures - 9

Re "two new" states bills were introduced — only in Del.* did one become law. Others either never emerged from Committee or were badly defeated. Badau, The Death Penalty in America, p 232

Read

Really totally abolished - 9

Great Britain
Canada
N.Y.

(As Wright says - if there is a Const. bar to D/P it would preclude the application in any case - even the criminal who deliberately "puts a bomb in a crowded 747")- 10

Those who seek to bar D/P - in force of duly'd pub. op. & the retention of it in some cases by Eng. + Canada — would "impose an absolutist view of a debatable social policy on the states + fed govt" contrary to the clear intent of the Const & the unanimous decisions of all jud. auth.

Use

* See note p 9 of Wright's Brief — Del. repealed it law. W. Va. + Iowa abolished.

A = Appl's Br.
R = Resp (Calif)

Furman (68-5027)

Moot Notes (See R's Br p 38 for Q)

1. Facts

Summarize from Resp's (Calif's) Brief

Quote from Amsterdam's brief as to nature of crimes committed.

2. Const

6th Amend - refers 3 times to penalty of death: (i) presentment or indictment "for a capital ... crime"; (iii) double jeopardy clause clause - "jeopardy of life or limb"; & (iii) & due process clause (R's Br - 39, 40)

14 Amend

8 Amend (R.B. - 40)

3. History of 8th

Va Const 1776 (R.B. 41)

Verbatim from Eng. Bill of Rts of 1689 (RB 41)

May have been directed against "methods" - not against the ultimate sentence (e.g. death OK but not by disembowelling) - R.B. 41.

8th approved by Congress 9/25/1789.

Only 7 months later, Congress provided for death sentence - R.B. 43

See AB p 21, note 16 for discussion of "history"

Cite for History: Weems v. U.S. & esp. dissent of White & Holmes

Also Harlan in McGautha, Douglas in Robinson, Field's dissent in O'Neil, 144 U.S. 323, 340

Aikens

Quotes to use

Black - "No Const. grants this Court no power to reverse convictions because of our personal beliefs." - McGautha v. Calif 402 U.S. 183, 225-6. See also ibid 195-6, 221-22. (RB 42) - See Frankfurter in Trop 356 U.S. 86, 128

Goldberg + Douglas - Ct denounced 8th on 10 times - + only one were 5 Justices willing to invoke the clause (R.B. 44)

Trop v. Dulles 356 U.S. 86 (1958)
Warren - "evolving standards of decency" - 101 (RB 48)
Warren - excellent quote on validity of D/S - 99 (RB 48)

Key Quote ✓ Black - 8th "cannot be read to outlaw capital punishment ... "

Aikens

Sup. Ct. Cases on 8th (p.1)

Wilkerson v. Utah 99 U.S. 130 (1878) - RB 44

Upheld "shooting"

Noted application to "punishments of torture" (p136) (Note: Supports theory that 8th applies to "methods" - not to death, imprisonment or the punishment itself. (e.g. Imprisonment for 10 yrs is not, necessarily a cruel & unusual punishment - but if confined to a particular type cell it might be.)

In re Kemmler 136 U.S. 436 (1890) - RB 45

"Punishment of death is not cruel ---- (8th) implies something inhuman & barbarous, something more than the mere extinguishment of life" - 447

(Note: Again their concern "method")

Weems v. U.S. 217 U.S. 349 (1910) - RB 45, 46

Held - for first time - a punishment C & U.

A Philippine statute authorized - & D was sentenced to - 15 yrs of hard labor to be served in "irons & ankle chains" - with life long disabilities.

Note: Again their in "method" - not merely the 15 yrs of imprisonment.

Aikens

Sup. Ct. Cases (p 2)

Francis v. Resweber, 329 U.S. 459 (1947) R.B 46

First attempt at electrocutions failed.

check other opinions

Court (J. Reed in a plurality opinion) held a proposed second execution did not violate 8th. The opinion is important because it emphasized that "the method of punishment" is controlling.

→ (Check other opinions to see why 5 Justices did not join Reed)

Trop v. Dulles, 356 U.S. 86 (1958) - R B 47

De-nationalization - for one day's desertion from duty - held to violate 8th

Warren, joined by 3 others, wrote opinion

Brennan concurred in separate op.

4 Justices dissented, finding statutes constit.

(Read dissents - Stewart?)

Warren's op. (R.B 48) recognized that "execution may be inflicted ..." p 100

Warren expressly said death penalty "cannot be said to violate const. concept of cruelty ..." p 99 (R B 48)

Warren also used phrases:

8th "must draw its meaning from evolving standards of decency ---- ..." p 101 (R B 48)

Aikens

Supr. Ct. Cases (#3)

Robinson v Calif. 370 U.S. 660 (1962) RB 49

Invalidated a 90 day sentence on a drug addict – not because of nature of punishment (90 days) but because of inappropriateness as applied to a status – i.e. narcotic addict.

→ Case incorporated 8th into 14th

Powell v Texas 392 U.S. 514 (1968) – RB 49

Ct. refused to extend Robinson to one convicted of drunkenness – drawing distinction bet. "status" (addict) & the voluntary (uncompelled) act of intoxication

McGautha v. Calif 402 U.S. 183 (May 3, 1971)

Sustained Calif. law allowing jury (in a two stage procedure) – in the absolute discretion & without prescribed standards – to pronounce death sentence; and Ohio law with allows this – without standards – in a single verdict.

Op. of Ct by Harlan (C.J., Stewart, White & Blackmun) – held that 14th Amend – due process – did not forbid delegating this discretion to jury.

Relevant Language (1) Hist. of cap. punn (197)

(2) discretion of jury to impose D/S (207)

(3) Const. does not guarantee "most enlightened ideas" of scholars"

2 + 2

See Dissents of Douglas & Brennan (assumed validity of D/S

Aikens

Objective Indicators

Applt case is based on Warren's phrase in Trop — "basic standards of decency in contemporary society". Brief argues that the "standards":

"... are manifested by a number of objective indicators" (AB-6)

The principal "indicator" relied upon is the "extreme rarity of actual infliction ..." (AB-6)

But other "objective indicators" indicate that contemporary society considers the death sentence appropriate & not incompatible with "standards of decency".

I must also meet the general application argument A-20 et seq. (Memory & procedure)

Amsterdam position: (Test - p 20)

A dilemma arises from 3 "basic principles":

(13)

1. 8th restricts both leg. & jud. action (14)

2. The "force" of 8th is not limited to the prohibition of those atrocities that would have turned stomachs in 18th Cent (15)

The Const. states "principles for an expanding future" (15) - Cardozo

Cites Weems (373-375) - good language (16)

Warren - "evolving standards" (15)

"live dismemberment & similar long gone barbarism" - 20

Then A says: If 1791 is the Const. benchmark (& therefore cap. pun. is valid today because it was widely used in 1791) "then the 8th also does not forbid today - & will never forbid - the stocks & the pillory, public flogging, etc etc. (17, 18) "If the obsolete & abhorrent customs of 1791 are not to be permanently controlling - - - (18)

Pat. over-argues his case.

My note: This is fallacious reasoning.

(a) No one suggests that every form of punishment sanctioned in 1791 would be deemed permissible today. The decisions of the ct recognize that the penalty imposed must neither be cruel or so disproportionate to the offense as to violate the 8th or the D/P clause. (Weems - 15 yrs in irons & Dulles. (Put in note - test of cruelty relates to method of punishment (Weems) - test of disproportionate relates primarily to excessiveness - Trop & O'Neil v Vt)

the due process clause forbids deprivation of life & imprisonment. Would it be contended that all prison sentences are invalid?

Concepts of what is cruel and disproportionate (unusual) do evolve. But the concept of "evolving" — the word relied upon so heavily by Rat — is one of gradualism and progression. To hold the D/S unusual under all circumstances after it has been accepted its Court for has been accepted gradually & leg. for 191 years will be regarded by many as revolutionary; it is hardly evolutionary.

~~Rat overt argument has case.~~

~~(b) Rat also overlooks the~~ destruction ~~recognized by~~ Ret.

(c) Rat position is also fallacious because it equates absolutism with gradualism. Rat relies upon Weems & Trop, but neither of these case outlawed a particular type of punishment in all ~~conceivable~~ cases. The crime in Weems was

(d) Rat's D/S a special status

Possible opening Ftc.

No less than ____ times this Court has recognized expressly that the death sentence is not cruel & unus. punishment The members of the Ct Justices who wrote these opinions were C J

Footnote listing those who concurred

Those who joined in such opinions included ~~J~~ Chief Justice ____ and Justices

The time span of this consistent interpretation of the 8th amend extends from 18 ( ) to 1957 (Trop v Dulles)

No justice of this Ct, ~~under today~~ has until today, has dissented from the unanimous this interpretation.

A similar unanimity of judicial opinion has existed among the Federal C C of A & the St. S/Cts. ____ of the ten Circuits have sustained the D/S against 8th amend attacks. No less than ____ state sup. ct. have ~~recently~~ made similar judgments

4th Circuit

Yet, today a maj. of this Ct reaches a ~~diff~~ contr holding for the 1st time that the D/S is proscribed by the 8th - not just in substance, but where the sentence is disproportionate to the offense but in all cases and under all circumstances.

This supports holding in that The defendant Adams, (found guilty) the St of Calif may not execute the D, Adams,

of two separate rape-murders and a third murder — crimes described by his own counsel as "unmitigated atrocities".

Pat. Br p 3

The effect of this sudden reversal of long established precedents is far reaching. It invalidates separate acts of the Congress of the U.S. It also invalidates numerous provisions of the criminal codes of 41 states. It denies to the Congress and the people & legislatures of each of the 50 states the power — heretofore deemed a legislative power in this country and in all other democratic countries — to impose capital punishment selectively even for the most heinous crime. I know of no such subordination of legisla[tive] of judicial power in any other developed democratic country

[illegible]

The statutes thus invalidated have in many instances been in existence, as enacted & reenacted, during the 197 years of the life of this country. The same Congress that app. the 8th amend enacted the

Get from Cole Amd.

Indeed, this assertion of the Ct today is believed to be the first assertion of judicial power, in a democratic country,