10-1975

Jurek v. Texas

Lewis F. Powell Jr.

No. 75-5394

JUREK V. TEXAS

At the date of the offense involved in this case,[1] murder was defined in Texas by Texas Penal Code, Article 1256. Murder.

> "Whoever shall voluntarily kill any person within this state shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing."[2]

Article 1257 prescribed the punishment for murder.

> "(a) Except as provided in Subsection (b) of this Article, the punishment for murder shall be confinement in the penitentiary for any term of years not less than two.
>
> (b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:
>
> (1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;
>
> (2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

1/ August 16, 1973.

2/ Effective January 1, 1974, murder is now defined by § 19.02 of the new Texas Penal Code.

> "§19.02 Murder
> (a) A person commits an offense if he:
> (1) intentionally or knowingly causes the death of an individual;
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
> (3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

> (3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
>
> (4) the person committed the murder while escaping or attempting to escape from a penal institution;
>
> (5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.
>
> (c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article, or of any other lesser included offense." 3/

The procedure which must be followed before the death penalty may be imposed is prescribed by Texas Code of Criminal Procedure, Article 37.071.[4/] This statute, which along with Article 1257 was enacted by the Texas legislature in response to this Court's decision in Furman v. Georgia, 408 U.S. 238,[5/] requires that if a defendant has been convicted of a capital offense, the court must conduct a separate sentencing proceeding before the

3/ "Article 1257 was superseded by Section 19.03 of the new Texas Penal Code, Acts 1973, 63rd Leg., Ch. 399, eff. January 1, 1974. Section 19.03 of the new Penal Code is substantially similar to Article 1257 of the old code." Jurek v. State, supra, 522 S.W.2d 934, 936-937 n.1 (Tex. Cr. App. 1975).

4/ Vernon's Texas Code of Criminal Procedure Ann. Article 37.071 (1974), as amended Tex. Act 1973, 63rd Leg., p. 1125, Ch. 426, Art. 3, Sect. 1, eff. June 14, 1973.

5/ This is the conclusion of the Texas Court of Criminal Appeals in this case. 522 S.W.2d at 938.

same jury that tried the issue of guilt. Any relevant evidence may be introduced at this proceeding, and both prosecution and defense may present argument for or against the sentence of death. The jury is then presented with three questions.[6/] To answer the questions "yes," the jury must be unanimous; the concurrence of ten members of the twelve-person jury is sufficient for a "no." If the jury answers "yes" to all the questions presented to it, the judge must sentence the defendant to death. If the answer to any question is "no," the penalty is life imprisonment. The judgment of conviction and sentence of death are subject to automatic, expedited review by the Texas Court of Criminal Appeals, the State's highest court of criminal jurisdiction.

The three questions are:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Art. 37.071(b).

This case was the first one to reach the Court of Criminal Appeals under the current statutes, 522 S.W.2d at 937, and thus is the first case to provide an authoritative construction of the meaning of these questions. The court did not comment on the meaning of the first question, and the third question was not

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6/ Two of the questions are always presented; the third is presented to the jury only if raised by the evidence.

submitted to the jury in this case. However, the court did list some of the "readily apparent" factors which the jury could consider in relation to the second question: (1) whether the defendant had a significant criminal record; (2) the range and severity of his prior criminal conduct; (3) the age of the defendant and whether or not he was acting under duress or domination at the time of the offense; (4) "whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity but more than the emotions of the average man, however inflamed, could withstand." 522 S.W.2d 934, 940. The court did not treat these factors as something on which the jury should be instructed; rather, it considered them to be constitutionally permissible factors which a jury, of its own volition, would consider.

The petitioner in this case, Jerry Lane Jurek, was charged by indictment with the killing of Wendy Adams "by choking and strangling her with his hands, and by drowning her in the water, by throwing her into a river . . . in the course of committing and attempting to commit kidnapping of and forcible rape upon the said Wendy Adams. . . ."[7/]

The evidence at trial consisted of certain statements[8/] made by the petitioner, testimony of several people who saw

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7/ Under the Texas statutes, the consent of a ten year-old child such as Wendy Adams would not be a defense to either kidnapping or rape. Texas Penal Code Articles 1177 and 1183.

8/ The court held a separate hearing to determine whether these statements were given voluntarily, and concluded that they were. The question of the voluntariness of the confessions was also submitted to the jury. The Court of Criminal Appeals affirmed the admissibility of the statements. 522 S.W.2d at 943.

petitioner and Wendy during the day, and the technical evidence. This record shows that petitioner, 22 years old at the time, had been drinking beer in the afternoon. He picked up two friends and they went driving together. Petitioner expressed a desire to "get some pussy" from some young girls they saw, but one of his companions said they were too young. Petitioner dropped the two boys off at the pool hall. He was next seen talking to Wendy, who was ten years old, at the swimming pool where her grandmother had left her to swim. The other witnesses contributed observations of a man resembling the defendant, driving an old pickup like his, going through town at a high rate of speed, with a young blonde girl standing screaming in the bed of the pickup. The last witness to see them heard the girl crying "Help me, help me." He tried to follow them, but lost them in traffic. According to petitioner's statement, he took the girl to the river, choked her,[9/] and threw her unconscious body in the river. Her drowned body was found downriver two days later.

The jury brought in a verdict of guilty.

During the punishment phase of the trial, the State submitted several witnesses who testified to the petitioner's bad reputation in the community. The petitioner's father testified that he had always been steadily employed since he had left school, and that he contributed to the family's support. Since there was no suggestion that the murder had been provoked, only the first two questions were submitted to the jury: (1) do you find from the

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9/ Petitioner originally stated that he started choking Wendy when he got mad when she criticized him and his brother for their drinking. In a later statement he said that he choked her after she refused to have sex with him and started screaming.

evidence beyond a reasonable doubt that the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?; (2) do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? The jury unanimously answered yes to both questions, and the judge therefore, in accordance with the statute, sentenced the petitioner to death. The Court of Criminal Appeals of Texas affirmed, Jurek v. State, 522 S.W.2d 934 (1975). We granted certiorari, ___ U.S. ___, to consider whether the imposition of the death penalty in this case accorded with the Eighth and Fourteenth Amendments to the United States Constitution.

Hold for Fowler

Preliminary Memo

Conf. of Nov. 21, 1975
List 2, Sheet 2

No. 75-5394

Hold for Fowler. Chris

JUREK
v.
TEXAS

Cert. to Ct. Crim. App. (Texas) Timely
(Morrison for major.; Odom, concur & dis in part; Roberts, dis)
State/Criminal (Capital case)

1. SUMMARY: A capital case under Texas' post-Furman statute[1] whereby, once the jury has found a malicious murder under any of 5 enumerated circumstances (e.g., murder for hire), imposition of the death sentence for "capital murder" occurs upon the jury's unanimous

1/This was the first such case to reach the Texas CCA.

affirmative answers to 3 questions submitted to it in a separate sentencing proceeding. The two other issues raised are discussed below, but neither seems substantial enough to constitute an independent grant.

2. FACTS: In the afternoon of August 16, 1973, in Cuero, Texas, petr (25, white male) was, in his own words, driving around in a pick-up truck with 2 teen-age friends "drinking beer [and talking] about getting some pussy." One girl mentioned as a possibility could not be found; three 12-year-olds playing in the park were eyed but not approached when one of the friends said they were "too young." Petr then dropped off his 2 friends at the pool hall and drove back to the park's swimming pool. The victim, the 10-year old daughter of a local police officer, who knew petr, was invited for a ride; she crawled into the back of the pick-up. Several witnesses saw the truck,[2/] with the girl in back, speeding through town, with her screaming for help. Petr drove out to a nearby river and got out; he and the victim, who was still dressed in her bathing suit, talked for awhile. Petr became angry. He then choked her with his bare hands; she fell to the ground. He picked her body up and threw her into

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2/The truck was readily identifiable by what the Texas CCA said was a patchwork, haphazard paint job of blue and white/beige.

the river.[3] The child's body was discovered 2 days later, on the 18th.

When (upon a relative's inquiry) a search was started later that evening, one of the witnesses who had seen petr's pick-up at the park identified it as parked in front of petr's house. Petr was arrested at 1:15 am, Aug. 17. The two arresting officers gave him the Miranda warnings at the police station and questioned him for 45 minutes. Petr denied knowing where the child was. He was placed in his cell at 2:30 am and allowed to sleep. Next morning, the DA questioned him, with Miranda warnings, for 15 minutes; petr again denied complicity. Petr was then taken to Austin for a lie detector test that afternoon (17th); certain oral statements made there led to the discovery of the girl's body -- petr admitted the murder. After his being returned to Cuero that evening, petr was taken to a magistrate and advised that he was accused of murder with malice (10:15 pm). Four hours later, under questioning by police and prosecutors (again with Miranda warnings), he gave his first full confession at 1:15 am (18th), in which the argument with the victim was attributed to statements she had made about him and his brother's excessive drinking and its

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3/The pathologist later testified to severe bruises and scratches on her throat; evidence that she had died by drowning; but no evidence of sexual relations or bruises in the genital area. Her bathing suit was intact at the time of the autopsy.

effect on the latter's children. He was then taken to an out-of-town jail to avoid contact with the victim's father. Further questioning continued later that day (18th) at 2 pm; at 7 pm he gave the 2d confession. Therein he corrected what he said was a lie in the first: he had been looking for some "pussy" and, after he and the victim arrived at the river, petr asked her whether she had ever had sex before, and when she said yes he asked her to have sex with him. She said no and started screaming. Petr then commenced choking her. Petr stated at the end of his 2d statement that everything else in the first was true. Counsel was appointed 3 days later.

The state's testimony at the suppression hearing went to showing that the warnings were given at each step; that petr acknowledged his understanding; that he never requested counsel; and that generally petr's confessions were without physical or psychological coercion. The trial ct found them admissible, with written findings, after a pre-trial hearing. Psychiatric testimony at trial on the issue of voluntariness showed: petr had an overall IQ of 80, had the basic capacity to understand the card with the Miranda warnings and his own statements written out, but that under stress petr could tend to be swayed into signing something against his interest. The jury found petr guilty of "capital murder while in the course of committing or attempting to commit kidnapping and/or forcible rape," which

language tracks one of the enumerated offenses in the statute. Art. 1257(b)(2), petn. 3.

3. CONTENTIONS: (aside from the Eighth Amendment claim) Petr: (1) under all the circumstances, the waiver of rights to silence and to counsel was not intelligent, and the confessions were products of unlawful coercion (2) there being a warrantless arrest without probable cause, the confessions are tainted by the initial illegality. Resp: aligns with the Texas CCA, which, after reviewing the facts, simply noted that both the trial judge (after a full Jackson v. Denno hearing) and the jury had found the confessions voluntary. The arrest was based upon ample probable cause: witnesses' description of the truck; there was an outstanding warrant for his arrest from another city of which the arresting officers were aware.

4. DISCUSSION: The Texas CCA is correct on the other two issues, and they are not certworthy. Hold for Fowler.

There is a response.

11/13/75 Mason Texas CCA opin in petn.

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

Argued ....., 19... *Assigned* ....., 19... No. 75-5394

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

JERRY LANE JUREK

vs.

TEXAS

6/5/75 - Cert.

Held
Fowler

	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.														

lfp/ss 4/1/76

April 1, 1976

No. 75-5394 JUREK v. TEXAS

Capital Case - Texas Statute

Mandatory capital punishment, limited to five categories of murder that are defined in such a way as to include "aggravating" factors: (i) murder of on-duty officer or fireman; (ii) kidnapping murder, (iii) felony murder in burglary, rape or arson; (iv) murder for hire; (v) murder during escape from a prison or of a prison employee. There is a bifurcated trial. If the jury convicts, a separate hearing is held to determine whether punishment should be life imprisonment or electrocution. Any relevant evidence may be introduced at the second trial. The jury is required to answer three questions affirmatively and unanimously before the death sentence is imposed.

The questions put to the sentencing jury leave room for consideration discretion: Is the murder "intentionally" committed in the course of a felony? What kind of probability is required as to a defendant's constituting "a continuing threat to society"?

But the statute reflects a careful attempt to provide standards to guide a jury to its judgment. In the end, however, this judgment - as is true of so many in any system of justice - is largely subjective.

Capital Cases - Conference
4/2/76

General discussion, subject to further analyses of particular statutes - if desired by any Justice

C.J. - {Same view as in 1972 affirm all cases.

Brennan - {Will never change 1972 view. Reverse all

Stewart - More to be said against Brennan's view today than in 1972. In light of what 35 states have done since 1972, can no longer argue that C/P is incompatible with "evolving standards of decency". These standards - in their context - should be det. by legislature rather than jud. branch.

Cannot agree that C/P is invalid under 8th & 14th Amend in any & all circumstances. As matter of Const. law, can't say C/P is invalid.

Thought it was invalid in 1972 only because of the sporadic & discriminatory way in which C/P was carried out. Juries had no standards to guide them & jury verdicts could not be reviewed in any intelligent way. Opportunity for discrimination was large.

Stewart (cont.)

Ga + Fla have clearly devised valid systems. The crimes are specified + only of ha conviction - in a separate trial - does the jury address the penalty.

In Ga. jury sentence is binding upon judge but not in Fla. This makes no dif.

In both States appellate review is carefully structured.

Each step in process is designed to minimize error + afford opportunity for mercy:

Can't "buy" Amsterdam's view (also Charlie Black's) as to the wrongness of the opportunity for discretion: There must be discretion.

Texas statute is close. Not at rest as to its validity.

N.C. doesn't really change pre-Furman. Is invalid.

La - allowing lesser offense conviction is bad - invalid.

Potter thinks neither N.C. nor La avoids his Furman objections. Potter thinks thinks both 8th + 14th Amend are relevant. There is a "race" implication in as "rape" is included.

Potter added that bifurcated trial is not required. He thinks N.C. + La statutes are not mandatory, but do specify [illegible] offenses.

White - Affirm all four

Agree with much of what Potter said generally.

In 1972 there was a high level of "disproportionality" (sp?). Statutes not evenly enforced.

As far as Furman goes (what Byrnes said there), he thinks all 5 of these states have met its standards. These are very different forms pre-Furman statutes.

(Both Byrnes & Potter recognize "tension" bet. McGautha & Furman.)

Seen no difference of const. dimensions bet. N.C. & La and the statutes of other states.

None of these cases involved rape. Reserves judgment as to C/P for rape (as would & expect under most aggravated circumstances)

after discussion: - Harry asked to mark "passing" on N.C.

Marshall - Reverse all - stands by 1972 op.

Blackmun - Affirm all.

Views have not changed.

Attack on "discretion" is an attack on our entire system.

Rape may be different.

(See my notes on separate sheet)

Rehnquist - Affirm all

Stevens - Affirm - Ga, Fla & Tex
Reverse - N.C. & La (?)

Accepts Furman as controlling.

Has no doubt that C/P is a permissible penalty under the Const. Can't agree that "standards" have yet evolved as Amsterdam urges.

When only issue is 8th amend, it may be unusual to make a procedural analysis. But this seems to be the basis of the Stewart/White rationale, & so he accepts this type of analysis.

If we had a rape case, would feel different.* No suggestion of racial ~~bi~~ bias in three of these states. May be some in N.C. & La statutes.

* ~~Rape~~ C/P for rape is disproportional

Stevens (cont.)

If a rapist knows he may get death for rape then he has an incentive to kill the victim (removes the witness).

Now only 5 or 6 states make rape a c/offense.

Affirm in Ga, Fla & Tex.
Reverse, tentatively, in N.C. & La

N.C. statute results in more executions than pre-Furman (altho this accords with Byron's view. Byron was not as concerned with "discretion" as was Stewart. Byron was concerned primarily with infrequency of imposition)

N.C. has no separate sentencing hearing. Also, jury has too much discretion to find lesser offense. (If I write, I need to talk to John - as I don't understand all of his objections to N.C.)

As to Texas, doesn't mind jury not having standards for jury in trial on guilt so long as there is separate hearing on sentence - with standards.

Powell { Affirm Ga, Fla + Tex on
Possibly affirm La
Passed on N.C. - probably Reverse

I accept Furman as precedent. Also, fair to say that result of Furman has been wholesome in promptly stated to focus on problems.

The 5 states here have endeavored to meet the views of Stewart + White.

If a procedural type of analysis is appropriate under Furman, I think Ga, Fla + Tex have devised careful systems - with standards + procedures designed to minimize if not eliminate most of Furman concerns. Also types of offenses narrowed substantially + carefully identified.

La statute, on its face, is one of best. But it does not have bifurcated trial. Then not essential but is a safeguard. Effect of allowing "lesser offense" convictions not clear to me. I'll consider them further.

N.C. codifies pre-Furman law + practice. For reasons others have stated I'm quite doubtful as to its validity under Furman

Reversed again 6/13. - Content to go to Penn. L.F.P.

J. Stevens said he would support change in Note 7 (N-4)

NO. 75-5394, JUREK v. TEXAS

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS:

The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Texas violates the Eighth and Fourteenth Amendments to the Constitution.

I

The petitioner in this case, Jerry Lane Jurek, was charged by indictment with the killing[1] of Wendy Adams "by choking and strangling her with his hands, and by drowning her in the water, by throwing her into a river . . . in the course of committing and attempting to commit kidnapping of and forcible rape upon the said Wendy Adams."

The evidence at trial consisted of certain statements[2] made by the petitioner, the testimony of several people who saw the petitioner and Wendy during the day, and the technical evidence. This evidence established that the petitioner, 22 years old at the

time, had been drinking beer in the afternoon. He picked up two young friends and they went driving together. The petitioner expressed a desire for sexual relations with some young girls they saw, but one of his companions said they were too young. The petitioner dropped his two friends off at a pool hall. He was next seen talking to Wendy, who was ten years old, at the swimming pool where her grandmother had left her to swim. The other witnesses contributed observations of a man resembling the petitioner driving an old pickup like his, going through town at a high rate of speed, with a young blond girl standing screaming in the bed of the pickup. The last witness to see them heard the girl crying "help me, help me." The witness tried to follow them, but lost them in traffic. According to the petitioner's statement, he took the girl to the river, choked her,[3/] and threw her unconscious body in the river. Her drowned body was found downriver two days later.

The jury returned a verdict of guilty.

Texas law requires that if a defendant has been convicted of a capital offense, the trial court must conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. Any relevant evidence may be introduced at this proceeding,

and both prosecution and defense may present argument for or against the sentence of death. The jury is then presented with two (sometimes three) questions, [4] the answers to which determine whether a death sentence will be imposed.

During the punishment phase of the petitioner's trial, several witnesses for the State testified to the petitioner's bad reputation in the community. The petitioner's father countered with testimony that the petitioner had always been steadily employed since he had left school and that he contributed to his family's support. The jury then considered the two statutory questions relevant to this case: (1) whether the evidence established beyond a reasonable doubt that the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, and (2) whether the evidence established beyond a reasonable doubt that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury unanimously answered yes to both questions, and the judge therefore, in accordance with the statute, sentenced the petitioner to death. The Court of Criminal Appeals of Texas affirmed the judgment. Jurek v. State, 522 S.W. 2d 934 (1975).

We granted certiorari, ____ U.S. ___, to consider whether the imposition of the death penalty in this case violated the Eighth and Fourteenth Amendments of the United States Constitution.

II

The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in Gregg v. Georgia, ante, pp. 14-43.

III

A

After this Court held Texas' system for imposing capital punishment unconstitutional in Branch v. Texas, decided sub nom. Furman v. Georgia, 408 U.S. 238, the Texas Legislature narrowed the scope of its laws relating to capital punishment. The new Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations: murder of a peace officer or fireman; murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and

murder committed by a prison inmate when the victim is a prison employee. See Texas Penal Code § 19.03 (1974). In addition Texas adopted a new capital-sentencing procedure. See Texas Code of Crim. Proc., art. 37.071 (Supp. 1975-1976). That procedure requires the jury to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of one of the above categories of murder. The questions the jury must answer are these:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Texas Code Crim. Proc., art. 37.071 (b) (Supp. 1975-1976).

If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed. If the jury finds that the answer to any question is no, then a sentence of life imprisonment results. Texas Code Crim. Proc., art. 37.071(c), (e) (Supp. 1975-1976).[5/] The law also provides for an expedited review by

the Texas Court of Criminal Appeals. See Texas Code Crim. Proc., art. 37.071(f) (Supp. 1975-1976).

The Texas Court of Criminal Appeals has thus far affirmed only two judgments imposing death sentences -- in this case and in Smith v. State, No. 49,809 (Feb. 18, 1976). In the present case the state appellate court noted that its post-Furman law "limits the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses. This insures that the death penalty will be imposed only for the most serious crimes [and] that [it] will only be imposed for the same type of offenses which occur under the same type of circumstances." 522 S.W. 2d, at 939.

While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. See McGautha v. California, 402 U.S. 183, 206, n. 16 (1971); Model Penal Code § 201.6, Comment 3, pp. 71-72 (Tent. Draft No. 9, 1959). In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances. For example,

the Texas statute requires the jury at the guilt determining stage to consider whether the crime was committed in the course of a particular felony, whether it was committed for hire, or whether the defendant was an inmate of a penal institution at the time of its commission. Compare Gregg v. Georgia, ante, pp. ____; Proffitt v. Florida, ante, pp. ____. Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option - even potentially - for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.

But a sentencing system that allowed the jury to consider only aggravating circumstances would fall short of providing the individualized sentencing determination that we today have held in the Gregg and Proffitt cases to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in Woodson v. North Carolina, and Roberts v. Louisiana, post.[6] A jury

must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances. In Gregg v. Georgia, we today hold constitutionally valid a capital-sentencing system that directs the jury to consider any mitigating factors and in Proffitt v. Florida we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances. The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.

The second Texas statutory question [7/] asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death. The Texas Court of Criminal Appeals has yet to define precisely

the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to incorporate into it whatever mitigating circumstances the defense may be able to bring to the jury's attention:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could look further to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however, inflamed, could withstand." 522 S.W. 2d, at 939-940.

In the only other case in which the Texas Court of Criminal Appeals has upheld a death sentence, it focused on the question of whether any mitigating factors were present in the case. See Smith v. State, No. 49,809 (Feb. 16, 1976). In that case the state appellate court examined the sufficiency of the evidence to see if a "yes" answer to question 2 should be sustained. In doing so it examined the defendant's prior conviction on narcotics charges, his subsequent failure to attempt to rehabilitate himself

or obtain employment, the fact that he had not acted under duress or as a result of mental or emotional pressure, his apparent willingness to kill, his lack of remorse after the killing, and the conclusion of a psychiatrist that he had a sociopathic personality and that his patterns of conduct would be the same in the future as they had been in the past.

Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital-murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.

B

As in the Georgia and Florida cases, however, the petitioner contends that the substantial legislative changes that Texas made in response to this Court's Furman decision are no

more than cosmetic in nature and have in fact not eliminated the arbitrariness and caprice of the system held in Furman to violate the Eighth and Fourteenth Amendments.[8/]

(1)

The petitioner first asserts that arbitrariness still pervades the entire criminal justice system of Texas -- from the prosecutor's decision whether to charge a capital offense in the first place and then whether to engage in plea bargaining, through the jury's consideration of lesser included offenses, to the Governor's ultimate power to commute death sentences. This contention fundamentally misinterprets the Furman decision, and we reject it for the reasons set out in our opinion today in Gregg v. Georgia, ante, pp. 60-62.

(2)

Focusing on the second statutory question that Texas requires a jury to answer in considering whether to impose a death sentence, the petitioner argues that it is impossible to predict future behavior and that the question is so vague as to be meaningless. It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however,

does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct.[9] And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.[10] For those sentenced to prison, these same predictions must be made by parole authorities.[11] The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

IV

We conclude that Texas's capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital

murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system assures that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution. Furman v. Georgia, 408 U.S., at 310 (Stewart, J., concurring). Accordingly, the judgment of the Texas Court of Criminal Appeals is affirmed.

It is so ordered.

FOOTNOTES

1/ At the time of the charged offense, Texas law provided that

> "[w]hoever shall voluntarily kill any person within this state shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify negligent homicide or which excuse or justify the killing." Texas Penal Code, art. 1256 ( ).

Effective January 1, 1974, murder is now defined by § 19.02 of the new Texas Penal Code:

> "A person commits an offense if he:
> (1) intentionally or knowingly causes the death of an individual;
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
> (3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

Texas law prescribed the punishment for murder as follows:

> "(a) Except as provided in Subsection (b) of this Article, the punishment for murder shall be confinement in the penitentiary for any term of years not less than two.
> (b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:
> (1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an

official duty and who the defendant knew was a peace officer or fireman;
(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;
(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
(4) the person committed the murder while escaping or attempting to escape from a penal institution;
(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article, or of any other lesser included offense." Texas Penal Code, art. 1257 ( ). Article 1257 has been superseded by Section 19.03 of the new Texas Penal Code which is substantially similar to Article 1257 of the old code.

2/ The court held a separate hearing to determine whether these statements were given voluntarily, and concluded that they were. The question of the voluntariness of the confessions was also submitted to the jury. The Court of Criminal Appeals affirmed the admissibility of the statements. 522 S.W. 2d, at 943.

3/ The petitioner originally stated that he started choking Wendy when he got mad when she criticized him

and his brother for their drinking. In a later statement he said that he choked her after she refused to have sexual relations with him and started screaming.

4/ See p. ___, infra.

5/ The jury can answer yes only if all members agree; it can answer no if 10 of 12 members agree. Texas Code Crim. Proc., art. 1237 (d) (Supp. 1975-1976). Texas law is unclear as to the procedure to be followed in the event that the jury is unable to answer the questions. See Vernon's Texas Codes Annotated - Penal § 19.03, Practice Commentary, p. 107 (1974).

6/ When the drafters of the Model Penal Code considered a proposal that would have simply listed aggravating factors as sufficient reasons for imposition of the death penalty, they found the proposal unsatisfactory:

> "Such an approach has the disadvantage, however, of according disproportionate significance to the enumeration of aggravating circumstances when what is rationally necessary is . . . the balancing of any aggravations against any mitigations that appear. The object sought is better attained, in our view, by requiring a finding that an aggravating circumstance has been established and a finding that there are no substantial mitigating circumstances." Model Penal Code § 201.6, Comment 3, p. 72 (Tent. Draft No. 9, 1959).

7/ The first and third questions (which are set out in the text at p. 2, supra) do not allow consideration of mitigating circumstances beyond those relevant to determining guilt. The two questions are, in fact, basically superfluous. It is difficult to imagine a case of murder "with malice aforethought" or one committed "intentionally and knowingly" that did not involve a defendant whose conduct in causing the death of the deceased "was committed deliberately and with the reasonable expectation" that death would result. In its brief the State does not argue to the contrary.

Likewise, it is difficult to see how a defendant convicted of such a crime could show a jury that his conduct was not "unreasonable in response to the provocation." If such a showing were possible, it would seem to be inconsistent with the jury's earlier verdict that the murder was committed "intentionally and knowingly" or "with malice aforethought." The State again does not argue otherwise.

8/ See Branch v. Texas, decided sub nom. Furman v. Georgia, 408 U.S. 238 (1972).

9/ See, e.g., ABA Standards Relating to Pretrial Release § 5.1(a): "It should be presumed that the defendant is entitled to be released on order to appear or on his own recognizance. The presumption may be overcome by a finding that there is substantial risk of nonappearance. . . . In capital cases, the defendant may be detained pending trial if the facts support a finding that the defendant is likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice or will flee if released."

10/ See, e.g., ABA Standards Relating to Sentencing Alternatives and Procedures § 2.5(c): "A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the selection of total confinement in a given case are: (i) Confinement is necessary in order to protect the public from further criminal activity by the defendant . . . ."

A similar conclusion was reached by the drafters of the Model Penal Code:

"The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because: (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime." Model Penal Code § 7.01(1).

11/ See, e.g., Model Penal Code § 305.9(1):

"Whenever the Board of Parole considers the first release of a prisoner who is eligible for release on parole, it shall be the policy of the Board to order his release, unless the Board is of the opinion that his release should be deferred because: (a) there is a substantial risk that he will not conform to the conditions of parole . . . ."

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 6/29/76

Recirculated: _____

No. 75-5394 - Jurek v. Texas

MR. JUSTICE BLACKMUN, concurring.

I concur in the result. See Furman v. Georgia, 408 U. S. 238, 405-414 (1972) (Blackmun, J., dissenting), and id., at 375, 414 and 465.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 29, 1976

Re: No. 75-5394 - Jurek v. Texas

Dear Byron:

Please join me in your concurring opinion.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

STYLISTIC CHANGES THROUGHOUT.

: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: JUL 1 1976

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-5394

Jerry Lane Jurek, Petitioner, v. State of Texas. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[June —, 1976]

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

Following the invalidation of the Texas capital punishment statute in *Branch* v. *Texas*, decided with *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Texas Legislature re-enacted the death penalty for five types of murder, including murders committed in the course of certain felonies and required that it be imposed providing that, after returning a guilty verdict in such murder cases and after a sentencing proceeding at which all relevant evidence is admissable, the jury answers two questions in the affirmative—and a third if raised by the evidence:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

The question in this case is whether the death penalty imposed on Jerry Lane Jurek for the crime of felony murder may be carried out consistently with the Eighth and Fourteenth Amendments.

The opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS (hereinafter the plurality) describes, and I shall not repeat, the facts of the crime and proceedings leading to the imposition of the death penalty when the jury unanimously gave its affirmative answers to the relevant questions posed in the judge's post-verdict instructions. I also agree with the plurality that the judgment of the Texas Criminal Court of Appeals, which affirmed the conviction and judgment, must be affirmed here. *Jurek* v. *State*, 522 S. W. 2d 934 (1975).

For the reasons stated in my dissent in *Roberts* v. *Louisiana*, *post*, I cannot conclude that the Eighth Amendment forbids the death penalty under any and all circumstances. I also cannot agree with petitioner's other major contention that under the new Texas statute and the State's criminal justice system in general, the criminal jury and other law enforcement officers exercise such a range of discretion that the death penalty will be imposed so seldom, so arbitrarily and so freakishly that the new statute suffers from the infirmities which *Branch* v. *Texas* found in its predecessor. Under the revised law, the substantive crime of murder is defined; and when a murder occurs in one of the five circumstances set out in the statute, the death penalty *must* be imposed if the jury also makes the certain additional findings against the defendant. Petitioner claims that the additional questions upon which the death sentence depends are so vague that in essence the jury possesses standardless sentencing power; but I agree with the plurality that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them. The statute does not extend to juries discretionary power to dispense mercy, and it

should not be assumed that juries will disobey or nullify their instructions. As of February of this year, 33 persons, including petitioner, had been sentenced to death under the Texas murder statute. I cannot conclude at this juncture that the death penalty under this system will be imposed so seldom and arbitrarily as to serve no useful penological function and hence fall within reach of the decision announced by five Members of the Court in *Furman* v. *Georgia*.

Nor, for the reasons I have set out in *Roberts*, *post*, and *Gregg*, *ante*, am I convinced that this conclusion should be modified because of the alleged discretion which is exercisable by other major functionaries in the State's criminal justice system. Furthermore, as the plurality states and as the Texas Court of Criminal Appeals has noted, the Texas capital punishment statute limits the imposition of the death penalty to a narrowly defined group of the most brutal crimes and aims at limiting its imposition to similar offenses occurring under similar circumstances. 522 S. W. 2d, at 939.

I concur in the judgment of affirmance.

To: File Date: July 12, 1976

From: Chris Whitman

CAPITAL CASES -- 1975 TERM

In these cases, our primary responsibility was for Parts I, II, and III in No. 74-6257, Gregg v. Georgia. The development of the analysis for all five opinions, however, was a joint effort of the Powell, Stewart, and Stevens chambers. Justice Stewart's chambers took primary responsibility for Part IV of Gregg and Part III in the other four cases. Justice Stevens took primary responsibility for Part I in the four non-Gregg cases. Substantial editing was done by all three chambers on all parts of the five opinions.