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FACTS

On December 12, 1988, two taxicab drivers from Kileen, Texas were murdered by Dwight J. Loving, an Army private stationed at Fort Hood, Texas. The first victim was a member of the Armed Forces on active duty and the second was a retired serviceman who gave Loving a ride from the barracks on the same night as the first killing. Loving attempted to murder a third, but the driver disarmed him and escaped. Civilian and Army officials arrested Loving the next afternoon, and Loving confessed to the killings.[1]

After a trial, an eight-member general court-martial found Loving guilty of premeditated murder and felony murder under Article 118 of the Uniform Code of Military Justice (UCMJ).[2] At his sentencing trial, the court-martial found three aggravating factors: (1) that the premeditated murder was committed during a robbery;[3] (2) that Loving acted as the triggerman in the felony murder;[4] and (3) that Loving, having been found guilty of the premeditated murder, had committed a second murder,[5] which was also proven at his single trial. These aggravating factors were not prescribed by federal statute; rather, they were the product of an Executive Order issued by President Ronald Reagan. The court-martial sentenced Loving to death.[6]

The commander who convened the court-martial approved the findings and sentence. The United States Army Court of Military Review and the United States Court of Appeals for the Armed Forces affirmed, rejecting Loving's claims that the Eighth Amendment and the separation-of-powers doctrine require that Congress, not the President, make the fundamental policy determination respecting the factors that warrant the death penalty.[7] The Supreme Court of the United States granted *certiorari*[8] to resolve whether the President, in our system of separated powers, may prescribe the aggravating factors that permit a court-martial to impose the death penalty upon a member of the armed forces convicted of murder.[9]

HOLDING

The Supreme Court held: (1) the principles of separation-of-powers did not preclude Congress from delegating its constitutional authority to define the aggravating factors that permit imposition of the death penalty in military capital cases to the President; (2) such a delegation took place through enactment of Articles 18, 36 and 56 of the Uniform Code of Military Justice (UCMJ);[10] and (3) once delegated the power by Congress, the President had the authority, as Commander in Chief, to prescribe the aggravating factors without further guidance.[11]

ANALYSIS/APPLICATION IN VIRGINIA

I. Is *Loving* Truly a Separation of Powers Case?

In order to decide *Loving*, the Supreme Court framed the issue as one simply of separation of powers; that is, it asked whether Congress may delegate its power to the President to promulgate a rule that restricts imposition of the death penalty to murders in which aggravating circumstances have been established and selects those aggravating factors. Loving challenged the President's authority to promulgate such a rule, arguing: (1) that Congress cannot constitutionally delegate such authority to the President; (2) that if Congress can constitutionally delegate such authority, it did not do so in this instance; and (3) that if Congress did delegate in this situation, such a delegation was unconstitutional because it lacked any "intelligible principle."[12]

After an exhaustive historical review, going back to 13th century England, which included, incidentally, many references to distaste for the practice of military courts trying capital cases, the Court concluded that Congress **could** delegate its power to prescribe punishment to the President.[13] As to Loving's second argument, the Court construed the language of Articles 18, 36, and 56 together, and concluded that Congress **did** delegate.[14] Loving aptly pointed out that these Articles were enacted prior to *Furman v. Georgia*,[15] which held for the first time that the Constitution required capital sentencing to be guided. Consequently, Loving argued that the Articles could not have been extended to address this issue. The Court held, however, that *Furman* did not undo the delegation. According to the Court, although what would have been an act of grace in 1950 may now be a constitutional requirement, the President has had the power to prescribe such aggravating factors since 1950.[16]

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1 *Loving v. United States*, 116 S. Ct 1737, 1740, 1751 (1996).

2 10 U.S.C. § 918(1), (4).

3 Rule for Courts-Martial (RCM) 1004(c)(7)(B).

4 RCM 1004(c)(8).

5 RCM 1004(c)(7)(J).

6 *Loving*, 116 S. Ct. at 1740.

7 In affirming, both courts relied upon *United States v. Curtis*, 32 M.J. 252 (CMA 1991).

8 *Loving*, 116 S. Ct. 39 (1995).

9 *Id.* at 1740.

10 Article 18 states that a court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by" the Code. 10 U.S.C. § 818.

Article 36 provides: "Pretrial, trial, and post-trial procedures, including modes of proof, for [courts martial] . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836(a).

Article 56 specifies that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." 10 U.S.C. § 856.

11 *Loving*, 116 S. Ct. at 1748-51. With regard to the separation-of-powers doctrine, *Loving* is quite an unremarkable decision, as it is has been the Court's trend over the years **not** to find an unconstitutional delegation of power. In fact, the Court has not disapproved of a delegation since 1935. *Id.* at 1750.

12 *Id.*

13 *Id.* at 1744-49.

14 *Id.* at 1749-50.

15 408 U.S. 238 (1972).

16 *Loving*, 116 S. Ct. at 1750.

Finally, as to Loving's third argument, the Court in effect held that no intelligible principle was needed in this situation because the delegation was linked with the President's authority and responsibility as Commander in Chief of the Armed Forces. However, central to the application of the Eighth Amendment[17] is an analysis of the "evolving standards of decency" with regard to what constitutes cruel and unusual punishment.[18] Given that, the issue in Loving may be more properly characterized as an Eighth Amendment question: who is eligible for death and under what circumstances?

In recent years, the Supreme Court has said much about how we should decide this question. In *Gregg v. Georgia,*[19] the Court established the basic proposition that "The Eighth Amendment serves to assure that the State's power to punish is 'exercised within the limits of civilized standards,' and central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment."[20] The Court expanded this principle in *Woodson v. North Carolina,*[21] finding that "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society [are] jury determinations and legislative enactments."[22] Thus, the Supreme Court has instructed that in order to learn what is tolerable under the Eighth Amendment, one must look to what juries do and to what legislatures have done. The Supreme Court has consistently applied this framework of analysis to Eighth Amendment challenges to death penalty schemes.[23]

Thus, if the Court had framed the issue in *Loving* to be an Eighth Amendment concern, it would have been much more difficult for the Court to justify the proposition that the President has the authority to determine the circumstances under which "evolving standards of decency" permit the imposition of death sentences. The Court could not have held that an intelligible principle was unnecessary based solely on the President's status as Commander in Chief, as Eighth Amendment jurisprudence requires that "legislative enactments" (and thus, an "intelligible principle") be considered in determining the circumstances under which "evolving standards of decency" permit death sentences.

II. An Invitation to Challenge the Jurisdiction of Courts-Martial

The question whether courts-martial have jurisdiction over off-post, off-duty crimes committed by military members is an issue that has been vigorously debated by the United States Supreme Court. While the Court first held that courts-martial had jurisdiction only over crimes that were "service-connected"[24] (that is, on-post, on-duty crimes), the Court later overruled this determination in *Solorio v. United States.*[25] In *Solorio,* the court held that jurisdiction of courts-martial depends **solely** on the accused's status as a member of the Armed Forces, and not on the "service connection" of the offense charged.[26] Thus, according to *Solorio,* the court-martial has jurisdiction over any **non-capital** crime committed by a military member, regardless of whether the crime occurred on-post or off-post, on-duty or off-duty. However, *Solorio* was not a capital murder case, and as Justice Stevens points out in his concurrence in *Loving,* the Court has not yet decided whether the rule in *Solorio* should in fact apply to capital cases.[27]

Nonetheless, Justice Stevens acknowledged that *Loving* was not an appropriate case to challenge the applicability of *Solorio* to capital offenses, and voted to uphold Loving's death sentence. This is undoubtedly because Loving's victims were military members and the crime was thus "service connected." The court-martial arguably exercised jurisdiction over Loving both because he himself was an Army private and because the offense had a "service connection." Stated another way, the court-martial did not base its jurisdiction over Loving solely on the fact that he was a member of the Armed Forces, and this precluded any clarification of the applicability of *Solorio.*

However, this did not stop Justice Stevens from pointing out that the issue has not yet been resolved. According to Justice Stevens, capital cases may be different enough from non-capital cases such that the Court should require that there must be a "service connection" for the court-martial to retain jurisdiction over a military defendant charged with capital murder. In effect, Justice Stevens left the door open for defense counsel to challenge the jurisdiction of courts-martial over off-post, off-duty, peacetime crimes committed by military members.

III. Applicability of *Furman* to Military Capital Murder

In analyzing *Loving,* the Court stated, "The Government does not contest the application of our death penalty jurisprudence to courts-martial, . . . and we shall **assume** that *Furman* [*v. Georgia*] and the case law resulting from it are applicable to the crime and sentence in question."[28] However, the Court did **not** expressly **hold** that *Furman* and later constitutional limitations control courts-martial. Thus, by its seemingly open invitation to challenge courts-martial jurisdiction over off-post, off-duty offenses against civilian victims, and its failure to resolve the application of constitutional limitations on death sentences to the military, the Court left two issues undecided: (1) the extent of military jurisdiction over capital crimes; and (2) the applicability of *Furman* and its progeny to military trials for capital murder.

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17 Excessive bail shall not be required, nor excessive fines imposed, **nor cruel and unusual punishment inflicted.**" Amendment VIII, Constitution of the United States (emphasis added).

18 The Court held in *Trop v. Dulles,* 356 U.S. 86 (1958) that the Eighth Amendment cruel and unusual punishment clause embodies a flexible concept. What it forbids at any given time is to be determined by "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

19 428 U.S. 153 (1976).

20 *Gregg,* 428 U.S. at 176-82 (citing *Trop v. Dulles,* 356 U.S. at 100).

21 *Woodson v. North Carolina,* 428 U.S. 280 (1976) (holding that evolving standards of decency—jury determinations and legislative enactments—conclusively point to the repudiation of automatic death sentences).

22 *Id.* at 293.

23 *See Penry v. Lynaugh,* 492 U.S. 302 (1989) (holding that Eighth Amendment does not preclude execution of a mentally retarded defendant in the face of insufficient evidence of national consensus against executing mentally retarded people convicted of capital offenses); *Endmund v. Florida,* 458 U.S. 782 (1982) (holding that current judgments of legislatures, juries, and prosecutors weighed heavily on the side of rejecting capital punishment for defendant who neither took life, attempted to take life, nor intended to take life during the course of a robbery).

24 *O'Callahan v. Parker,* 395 U.S. 258, 272 (1969).

25 483 U.S. 435 (1987).

26 *Id.* at 450-51.

27 *Loving,* 116 S. Ct. at 1752.

28 *Id.* at 1742 (emphasis added).

The resolution of such issues raises three possible outcomes. The Court could decide that *Furman* and its progeny do not apply, and that the courts-martial have jurisdiction over off-post, off-duty murders committed by military members. The undesirable result of such a holding would be the trial of some military members for capital murder without any of the constitutional death penalty protections.

Secondly, the Court could decide that *Furman* and its progeny do apply to military capital murder, but that courts-martial have jurisdiction only over service-connected, off-post crimes. This would narrow the scope of military jurisdiction, but equalize the constitutional protections between military members and civilians. Finally, the Court could find that *Furman* is applicable to military capital murder and that there is no limitation on the jurisdiction of courts-martial.

IV. The Benefits of Military Jurisdiction

Despite what has been said about *Furman* and its possibilities, defense counsel in Virginia should not automatically shy away from military jurisdiction if there is an ambiguity as to which jurisdiction should apply.[29] There are many benefits to military jurisdiction. First, military law provides a much more direct and generally broader scope of discovery by an accused than is normally available to him in civilian criminal prosecutions. For example, military law provides that witness statements relating to a charged offense are provided to the accused prior to trial;[30] in other federal courts, the Jencks Act [31] only requires such statements to be provided after the witness has testified. According to military law, the government is obliged to disclose to the defense, as soon as practicable, any evidence known to the government which reasonably tends to reduce punishment.[32] At the request of the defense, the government is obliged to permit the defense to inspect[33] such written material as will be presented at the presentencing proceedings as well as to notify the defense of the names and addresses of the witnesses the government intends to call at the presentencing proceedings.[34] Furthermore, all relevant evidence against the accused in the hands of the government is made directly available to the accused in the Article 32 investigation.[35]

Second, civilian defense counsel is entitled to the assistance of detailed military counsel.[36] Apart from the general assistance that additional counsel can provide, military counsel can aid civilian counsel with the procedural rules of the military system. Third, all death sentences are subject to reduction on appeal. Boards of Review have wide powers over sentences.[37] The Court of Military Appeals has ruled that they are empowered to be compassionate, to reduce legal sentences, and even to commute a death sentence.[38] A board may even decide to affirm no sentence at all.[39] Finally, death sentences are rarely imposed by courts-martial.[40]

Thus, depending on the nature of the case, defense counsel might consider whether the potential benefits of military jurisdiction would outweigh the disadvantages even if the defendant may receive fewer constitutional protections in military court in some respects. Particularly if the *Furman* issue is resolved in favor of extension to courts-martial, as the language of *Loving* indicates it probably will be, clients may sometimes be better served by urging military jurisdiction.

Summary and analysis by:
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29 In addition to the jurisdictional questions raised by the military status of the defendant and victim, the "off-post" question may not be easy to resolve in some cases. There are a significant number of military installations in Virginia, many of which include remote areas whose boundaries are not always defined with precision.

30 R.C.M. 701(a)(1)(C). *But see* Va. Rule 3A:11(b)(2) (no right to witness statements).

31 18 U.S.C. § 3500.

32 R.C.M. 701(a)(6)(C).

33 "Inspect," as used in R.C.M. 701, includes the right to photograph and copy. R.C.M. 701(h).

34 R.C.M. 701(a)(6)(c).

35 10 U.S.C. § 832 (1988). Article 32 provides for a hearing at which the accused is advised of the charges against him. At this hearing, the accused has the full opportunity to cross-examine witnesses against him if they are available and to present evidence on his own behalf either in defense or mitigation. The investigating officer has the right to cross-examine any of the accused's witnesses. If the charges are forwarded after the Article 32 hearing, § 832(b) provides that they "shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused."

36 10 U.S.C. § 838(b)(3)(A) (1988).

37 Article 66 provides, in relevant part: "In a case referred to it, the Court of Criminal Appeals may . . . affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the bases of the entire record, should be approved." 10 U.S.C. § 866 (1988). *See United States v. Cavallaro,* 14 C.M.R. 71 (1954) (holding that although Article 66 does not authorize a board of review to change the form of punishment imposed by a court-martial, a board of review possesses the power to reduce a sentence to make it appropriate).

38 *See United States v. Russo* (No. 13, 565), 29 C.M.R. 168 (holding that whether it be termed commutation, mitigation, or merely a reduction in punishment, both the convening authority and a board of review have the authority to lessen the severity of a death penalty by converting it to a dishonorable discharge and confinement at hard labor).

39 *See United States v. Jackson* (No. 9159), 23 C.M.R. 301 (1957) (holding review board had power to affirm no punishment as the appropriate sentence based on its review of the record). *See also Jackson v. Taylor,* 353 U.S. 569 (1957) (holding army review board had authority to modify life sentence to 20 years after murder conviction was set aside where soldier, who was found guilty of rape, which carried death sentence or life imprisonment, and premeditated murder, which required death sentence or life imprisonment, received gross sentence of life).

40 As of April 30, 1996, there were only eight (8) death row inmates with death sentences imposed by the U.S. Military. NAACP Legal Defense Fund, Death Row, U.S.A. (1996).