




10-1975

Gregg v, Georgia

Lewis F. Powell Jr.

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There are separate files for each of the following cases:

No. 74-6257 Gregg v. Georgia
No. 75-5394 Jurek v. Texas
No. 75-5491 Woodson v. North Carolina
No. 75-5706 Proffitt v. Florida
No. 75-5844 Roberts v. Louisiana

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

May 15, 1975

MEMORANDUM FOR THE CHIEF JUSTICE

Subject: Capital Punishment Cases

This is a preliminary memorandum. My research on the project you gave me Tuesday is continuing. However, I thought you might like something for tomorrow's Conference.

Including the three cases listed for Friday's Conference,* there are 15 cases being held for Fowler. Of these, 8 are from North Carolina and suffer the same drawbacks as Fowler, including, most importantly, that they involve a judicially constructed pre-Furman statute. Five cases are from Georgia and involve that State's post-Furman statute which provides a bifurcated procedure whereby after conviction the jury determines whether one or more statutorily specified aggravating circumstances are present and, if so, whether the death penalty should be imposed. Considerable discretion appears to rest with the jury, however, in the consideration of mitigating factors which are not defined by the statute and the statute appears open to a Furman "discretion equals arbitrariness" argument at least on that aspect. The statute is similar to many which have been enacted by the states, however, and my cursory readings so far suggest that the Court sooner or later will have to take a "discretionary" statute to answer the questions raised by Furman. In such a case, one of the Georgia holds appear to be a particularly good candidate for a grant. House v. Georgia, 74-5196, involves the brutal sex murder of two seven-year-old boys. Petr, who is white and who confessed to the crimes, concedes that there is no constitutional question of importance presented by his conviction, and attacks only the death penalty. Jack Greenberg of the ACLU is on the cert petition along with local counsel.

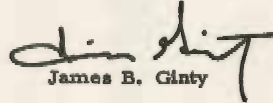
*/Ross v. Georgia, 74-6207; Gregg v. Georgia, 74-6257; Ward v. North Carolina, 74-6263; all on list 2, sheet 2 for the May 16 Conference.

Of the two other cases being held for Fowler, one is from Louisiana and the other is from Florida. The Florida post-Furman statute is similar to the Georgia statute in that it provides for a bifurcated proceeding, but, unlike the Georgia "aggravating only" statute, the Florida statute also delimits the mitigating factors which may be considered and--at least when a death sentence is imposed--requires the sentencers to state which aggravating and mitigating circumstances are found. The Florida statute appears weakened to a "discretionary equals arbitrariness" attack, however, in that it authorizes the sentencers to hear evidence unrelated to statutory criteria, so long as it is "relevant to sentence." The jury's findings are advisory only, and in at least one case making its way up here, the trial judge overrode the jury's recommendation for life and imposed the death sentence. The single Florida case being held involves the slaying of a barmaid. The facts are not well developed, the Florida SC was split, as was the jury, on imposition of the death penalty and the case in addition raises a Witherspoon issue regarding the exclusion from the jury of a juror because of her attitude toward the death penalty. The jury also was instructed on seven lesser included offenses.

The Louisiana case, Selman v. Louisiana, No. 74-6065, is the only one before the Court involving a "mandatory" death statute. Louisiana's post-Furman statute prescribes the death penalty for first degree murder, for "aggravated rape," for treason and for "aggravated kidnapping." The statute specifically provides that a jury may not make "[a]ny qualification. . . or addition to a verdict of guilty beyond a specification of the offense as to which the verdict is found." Conviction of lesser included offenses is permitted, however. The statute specifies the "responsive verdicts" which may be returned in any capital case and, at least to this extent, the statute is susceptible to attack. In the Selman case, petr who is white was convicted of two counts of "aggravated rape" on two white girls. The facts, however, appear to highlight the rather fine distinction drawn between aggravated and simple rape under Louisiana law. Indeed, one of the Louisiana Justices dissented on the alternative ground that death was an unconstitutional disproportionate punishment for rape in which no one was hurt. The case also involves the jury selection method condemned in Taylor v. Louisiana, but which was held not to have retroactive effect in Daniel v. Louisiana, decided January 27, 1975. Petr, however, makes a due process/equal protection argument involving what appears to be a minor deviation in the compilation of the venire list--women were automatically struck from petr's list, as opposed to being automatically excused when they appeared for service.

Only one case is now pending on the Court's docket. It is another Florida case and it also does not appear to be a likely candidate for review.

Again, this is a preliminary memorandum. Unless instructed otherwise, I will continue my research on the present holds, concentrating on the Georgia and Louisiana cases. I will review and categorize the various post-Furman statutes and will also see if I can determine what, if any, other capital cases are making their way up here.


James B. Ginty

10/16/75
in
supra
file

Hold

DISCUSS

PRELIMINARY MEMORANDUM

May 16, 1975 Conference

Cert to Ga. Sup Ct.
(Grice for all but Gunter,
dissenting)

List 2, Sheet 2

No. 74-6257

GREGG

CAPITAL CASE

v.

State/Criminal

GEORGIA

Timely

1. Petitioner was convicted of two counts of murder and two counts of armed robbery. He was sentenced to death on all four convictions, but only the sentences on the murder counts were affirmed on appeal. Besides raising the traditional constitutional attacks on capital punishment, petitioner also claims that he was arrested without probable

Hold

for
Faulkner

Two of the
other
issues
are filed

cause and that his "confessions" were both involuntary and in violation of Miranda.

2. Facts: The testimony at trial, as summarized by the Georgia Supreme Court, established that petitioner and a friend were hitchhiking and were picked up by two other men. Subsequently a third hitchhiker (Weaver) was picked up. The five men traveled together for most of the day; at 11:00 p.m. Weaver got out in Atlanta. Shortly thereafter, the original two men in the car got out to "relieve themselves." Petitioner and his friend, apparently at petitioner's instigation, then agreed to rob the two men. Petitioner shot each man in the head and then he and his friend took their money and car and drove on to Asheville, North Carolina. The bodies were discovered the following day; on the day thereafter the third hitchhiker, Weaver, read about the story in the Atlanta newspaper. He called the police and described petitioner and his accomplice in detail; he also described the car and ^{stated} that petitioner's planned destination was Asheville. On the basis of this information petitioner was arrested in Asheville and searched. He was found with \$107 in cash and a gun that was later shown to be the murder weapon. Petitioner was then given his Miranda warnings and signed a written waiver at 3:17 P.M. These warnings were not repeated during petitioner's detention. He was held without questioning until 11:00 p.m., at which time, in response to promptings by the police,

petitioner made and signed a statement admitting the shooting but claiming that it was in self-defense. Shortly thereafter, when another policeman asked petitioner why he ^{had} shot the victims, petitioner answered, "By God, I wanted them dead." Petitioner, along with his accomplice, was then transported to the scene of the crime. At about 5 a.m. the accomplice,* in petitioner's presence, told the police that petitioner shot the victims solely for the purpose of robbing them. When petitioner was asked if that was how it happened he answered in the affirmative, although he apparently refused to sign a confession.

Petitioner testified that the victims, who concededly had been drinking, attacked him with a "knife or pipe" and that, out of fear for his life, he shot them. He also denied that he made the verbal statements to the police.

The jury convicted on all four counts and, in a separate sentencing hearing, recommended death based on the following

* The accomplice was subsequently allowed to plead guilty and received a life sentence; he did not testify at trial.

statutorily designated aggravating factors: with respect to the murders, the jury found that they were committed in the course of another capital felony - i.e., armed robbery - and that they were committed for the purpose of receiving the victims' property; with respect to the robberies, the jury found that they were committed in the course of two other capital felonies - i.e., murder - and that they were committed for the purpose of receiving the victims' property. The trial court sentenced petitioner to die.

The Georgia Supreme Court affirmed except that it vacated the death sentences on the robbery counts finding that the aggravating circumstances in this case could not justify the death penalty for armed robbery. The court, as required by law, reviewed the death penalties on the murders and found them appropriate. It also denied petitioner's claims that his arrest was unconstitutional and that his confessions violated Miranda and were involuntary. On the probable cause issue the court reviewed the information given by Weaver to the police and held, on the basis of U.S. v. Harris, 403 U.S. 573, that there was probable cause. As to petitioner's confessions the court held that the initial Miranda warnings were sufficient for the subsequent interrogations which spanned 14 hours, and that the trial court's finding, after a hearing, that the confessions were voluntary was obviously correct.

One judge dissented on the ground that the Georgia capital punishment statute is unconstitutional under Furman.

3. Contentions: Petitioner contends: (1) there was no probable cause for his arrest since Weaver had not seen the crime and because there was nothing to demonstrate Weaver's reliability as an informant; (2) the confessions were inadmissible since the interrogating officers (different people at different times) did not each renew the Miranda warnings; (3) the confessions were involuntary; (4) the death sentence was cruel and unusual; (5) the Georgia death penalty statute is a denial of the Sixth and Fourteenth Amendments because of the way in which it allows for appellate review of sentences.*

4. Discussion: Aside from the death penalty issues, which will be held for No. 73-7031, Fowler v. N.C., petitioner's other claims are close to frivolous. Perhaps the "better" procedure is for police to give repeated Miranda warnings when an interrogation spans a half a day, but I seriously doubt that the procedure is of constitutional necessity.

There is no response.

May 3, 1975

Klein

Op in petn.

* On this point petitioner incorporates by reference the same argument in the petition for cert in No. 74-5174, Eberheart v. Georgia.

vii

Capital Case
Hold

[illegible]

Sally - follow
my dictated
directions

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

RECEIVED

JUN 10 3 41 PM '75

June 10, 1975

CHAMBERS OF THE
CHIEF JUSTICE

MEMORANDUM FOR THE CHIEF JUSTICE

Subject: Capital Cases

On May 13, you requested that I survey the cases being held for Fowler. I prepared a preliminary memorandum dated May 15 in which I advised that I would continue my research on the present "holds," review the various post-Furman statutes and determine what other capital cases might be making their way to the Court.

Since my May 13 memorandum, one case has been added to the Fowler holds and five cases have been filed and are pending Conference action. There are then twenty-one cases--sixteen holds and the five recent filings--available to the Court for review of the capital punishment issue. 1/ Nine of these twenty-one cases are from North Carolina and suffer the same drawback as Fowler, a pre-Furman judicially constructed statute. The remaining twelve cases all involve post-Furman statutes and can be broken down by states as follows: Georgia-seven; Florida-four; and Louisiana-one. I have analysed these twelve cases in terms of the type of capital punishment statute involved, the facts of each case, and the presence of other issues.

Introduction:

It is possible to identify four basic approaches taken by state legislatures in re-enacting post-Furman capital punishment statutes. Some statutes provide the sentencer, either jury or judge, with a list of aggravating circumstances, one of which must be found before death can be imposed. Others not only specify the circumstances which justify a death sentence,

1/Upwards of 216 capital sentences have been reported. Although I can find no authoritative source, I understand that most of the state supreme courts are withholding adjudication of their states' death penalty statutes pending this Court's decision in Fowler.

but also prescribe the factors which may be considered in mitigation once an aggravating circumstance has been proved. A third set of statutes requires capital punishment when an aggravating and no mitigating circumstance is found, and forbids such punishment in all other cases. Finally, some states have removed all sentencing discretion by requiring death for those convicted of a limited and well-defined number of crimes. 2/

The "model" federal Aircraft Piracy statute appears to take the third- or "aggravating-mitigating"---approach. 3/ Like the first three approaches outlined above, the federal statute provides for a separate hearing to consider sentencing

2/This breakdown is taken from a rather good note in the Harvard Law Review. Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L.R. 1690 (1974). Another breakdown is provided in Annual Survey of American Law, N.Y.U. (Winter 1974), viz: (1) statutes providing for mandatory death for first degree murder and other first degree capital offenses, (2) statutes specifying which aggravating and mitigating circumstances determine when the death penalty, or a lesser penalty, is to be imposed, and (3) specifying those particular fact patterns (e.g., the commission of a murder while under a sentence of life imprisonment, the assassination of a governor) which mandate imposition of the death penalty. A third breakdown is provided by Judge Browning of the Ninth Circuit writing in the Gonzaga Law Review. Judge Browning takes a more general approach and identifies only two types of capital punishment statutes: (1) those which attempt to limit and control discretion by specifying aggravating and mitigating factors to be considered by the sentencing authority in determining whether the death sentence will be imposed; and (2) those purporting to eliminate sentencing discretion entirely by making a death sentence mandatory for specified crimes. He notes your observation in Furman, 408 U.S. at 400 n. 30, that the two approaches "are substantially equivalent." Browning, The New Death Penalty Statutes: Perpetuating A Costly Myth, 9 Gonzaga L.R. 651 (1974).

3/Antihijacking Act of 1974, 88 Stat. 409, amending 49 U.S.C. 1472. See Model Penal Code §210.6 (Proposed Official Draft 1962).

evidence. The jury, if there is no jury, the court, is required to return a special verdict setting forth its findings as to the existence or nonexistence of each of several aggravating and mitigating circumstances specified in the statute. The statute then provides that if it is found by a preponderance of the evidence that one or more of the aggravating factors set forth in the statute exists and that none of the mitigating factors exists the court shall sentence the defendant to death. If no aggravating circumstances are found, or if one or more mitigating factors are found to exist, the statute provides that the court shall not sentence the defendant to death.

There are, of course, no federal capital punishment cases pending before the Court.

The Georgia Cases:

Georgia provides the death penalty for some cases of aircraft hijacking, treason, murder, rape, armed robbery, and kidnapping. Its statutory approach to imposition of capital punishment follows the first category of "aggravating only" statutes. The Georgia statute provides for a separate hearing on the sentence, after which the sentencer is allowed to impose the death penalty if it finds that one or more of the aggravating circumstances specified in the statute exists. These circumstances include murder of a peace officer, murder by a prisoner, contract murder, felony murder, murder creating great risk to others and where the crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In order to impose the death penalty, the judge or jury must specifically designate in writing the aggravating circumstance or circumstances which it found beyond a reasonable doubt. No list of "mitigating circumstances" is provided in the death penalty statute, but Georgia law provides that "the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances. . . otherwise authorized by law. . ."

In Coley v. State, 204 S.E. 2d 612 (Ga. 1974), the Georgia Supreme Court found that the State's new death penalty statute satisfied the requirements of Furman. The court focused on the availability of appellate review and, to a lesser extent, on the aggravating circumstances listed in the statute, concluding that because of these provisions the statute "substantially narrows and guides the discretion of the sentencing authority."

About four of the states have "aggravating only" statutes. The statutes are criticized (1) because they do not require either articulated findings or appellate review when the death penalty is not imposed, and even when death is imposed, it does not require articulation of the mitigating factors which were considered. This, it is contended, prevents meaningful comparison of a death sentence with dispositions in prior cases. (2) Because statutes which do not limit the circumstances a sentencer may consider in mitigation are unlikely to provide a workable basis for comparison of cases, it is suggested that reviewing courts may still be frustrated in their attempts to police arbitrariness. 4/

As noted above, there are seven cases--five holds and two recent filings--available to the Court in which the constitutionality of the Georgia statute is raised. 5/ Of the seven, two seem clearly inappropriate for review. Eberheart and Hooks both involve the alleged rape of the same white woman by a group of black men. Gregg involves the execution-style killing and robbery of the driver and occupant of a car by two hitchhikers. The facts appear straight-forward but petitioner raises probable cause and Miranda issues which, although perhaps lacking in merit, distract from the death penalty issue. Ross involves the killing of a police officer during a somewhat confusing robbery and kidnapping scheme. Again, the case looks to be pretty straight-forward, except that petitioner, as in many of the capital cases, raises a Witherspoon issue. One of the recent filings, Moore, raises only a death penalty issue, but seems inappropriate on its facts. During the perpetration of a burglary, Moore, a black man, was surprised by the owner of the house who shot at him with a shotgun. Moore responded, killing the owner. There was evidence Moore had been drinking heavily that day.

The other recent filing, McCorquodale, involves a particularly brutal murder. Petitioner, a white man, was convicted by jury of the murder of a 17-year-old white girl. Petitioner and the victim frequented a section of Atlanta known as

4/ Note, Harv. L. R., *supra* at 1703-04.

5/ The Georgia holds are: Eberheart v. Georgia, No. 74-5174; House v. Georgia, No. 74-5196; Hooks v. Georgia, No. 74-5954; Ross v. Georgia, No. 74-6207; Gregg v. Georgia, No. 74-6257. The new filings are: Moore v. Georgia, No. 74-6547, and McCorquodale v. Georgia, No. 74-6557.

"The Strip." Petitioner accused the victim of stealing \$50 from him and giving the money to a black "pimp." There were eye-witnesses--two girls--who watched petitioner and another man sadistically torture (cigarette burns on the body, slicing nipples with a razor, dripping hot wax in the girl's vagina, etc.), rape and orally sodomize the victim before petitioner, after allowing the girl to "clean up," strangled her to death. In accordance with Georgia law, the jury specially found aggravating circumstances that "the offense of murder. . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Petitioner, Greenberg and Amsterdam on the certiorari petition with local counsel, however, raises a Witherspoon issue--seventeen veniremen were challenged for cause because of their mute expression of conscientious scruples against the death penalty. He also raises a less substantive 4th Amendment issue and charges of prosecutorial misconduct, a reference to the appellate court's responsibility in reviewing the sentence.

One out of the seven Georgia cases, House, appears suitable for review should the Court wish to consider an "aggravating only" statute. Petitioner House is a 28-year-old white male. He was convicted by jury of the brutal strangulation deaths of two seven-year-old boys after he had sexually assaulted them. The jury made the necessary finding that the crimes involved "torture, depravity of mind, or aggravated battery" and petitioner was sentenced to death. Petitioner raises only the death penalty issue, on Furman and per se grounds. Mr. Greenberg is on the certiorari petition with local counsel.

The Florida Cases:

Florida provides the death penalty for some cases of first degree murder and for some cases of rape. The approach taken by Florida in providing for the imposition of capital punishment generally appears to follow the "aggravating-mitigating" class of statutes noted in the introduction. This approach is taken by several states and attempts to limit the sentencer's discretion by delimiting not only the aggravating factors which may be considered but the mitigating circumstances as well. However, unlike the federal statute and other "aggravating-mitigating" statutes which specify the balance to be struck between these factors, this approach requires the sentencer to "weigh" the aggravating and mitigating evidence presented.

R

The Florida statute appears significantly weakened in its attempt to delimit the mitigating factors a sentencer may consider in its provision that the sentencers may hear evidence unrelated to statutory criteria, so long as it is "relevant to sentence." And, in Florida, the jury's determination is not binding on the court. Rather, its decision has the status of a mere recommendation which the judge, after similarly "weighing" the evidence, is free to disregard. The Florida statute has been criticized for allowing perhaps more discretion than the provisions invalidated in Furman. 6/

The Florida statute is in many respects unique and, in any event, none of the four Florida cases--two holds and two recent filings--before the Court appear to be suitable forums for the death penalty debate. 7/ In Sawyer and Gardner the judge overrode the jury's recommendation of life imprisonment. In Hallman, the trial judge sentenced the petitioner to death upon a majority recommendation of death. And, in Hallman, the facts are not entirely clear and tend to highlight the state's somewhat unique distinction between first-degree and second-degree felony murder. There is also a Witherspoon issue (one juror excused for cause without objection) and, on the issue of discretion, the jury was instructed on seven lesser included offenses.

On its facts, Sullivan might be a good candidate for plenary consideration. Petitioner, a white male, was convicted of the brutal murder of an assistant manager of a Howard Johnson's in the perpetration of a robbery. The facts seem straight-forward. Petitioner, however, does raise a rather serious issue of prosecutorial misconduct, purposefully eliciting from accomplice-turned-state's witness that he had passed a polygraph test.

The Louisiana Case:

Louisiana provides the death penalty for first degree murder, for "aggravated rape," for treason, and for "aggravated

6/ State v. Dixon, 283 So. 2d 1, 26 (Fla. 1973; Boyd, J. dissenting.)

7/ The two Florida holds are: Hallman v. Florida, No. 74-6168, and Sullivan v. Florida, No. 74-6377. The two recent filings are Gardner v. Florida, No. 74-6593 and Sawyer v. Florida, No. 74-6563.

kidnapping." The statute specifies the circumstances defining "first degree" and "aggravated." For example, "aggravated rape" is defined as:

"a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:

- (1) Where the female resists the act to the utmost, but her resistance is overcome by force.
- (2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.
- (3) Where she is under the age of twelve years. . ."

Louisiana is one of at least fourteen states to enact post-Furman "mandatory" death penalty statutes. These statutes appear to be modeled after several pre-Furman mandatory statutes which were specifically excluded from consideration in Furman by Justices Douglas, Stewart and White. ^{8/} By requiring that all defendants convicted of specified, well-defined crimes be sentenced to death, these "mandatory" statutes purport to prevent sentencers from exercising any discretion in interpreting or weighing statutory criteria or in employing nonstatutory criteria.

^{8/}See, e.g., 408 U.S. at 307 and nn. 3-6 (Stewart, J., concurring):

"If we were reviewing death sentences imposed under [mandatory statutes], we would be faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances."

See also, 408 U.S. at 310 (White, J., concurring):

"The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us."

The single Louisiana hold 's the only case now before the Court presenting a "mandatory" capital punishment statute. The case, however, points out the extremely fine distinction made in Louisiana between aggravated and simple rape. Petitioner, a white male, approached the victims and their dates, all white, on a beach, represented that he was a deputy sheriff and that he had a gun [which he never showed], and, telling their dates to go sit by the waters' edge, threatened to either arrest or kill the victims unless they would have sexual relations with him. They did so. No actual force was used. He was eventually apprehended on the basis of information he rather openly supplied during conversations with the victims. One of the Louisiana SC Justices dissented on the death penalty issue on the alternative ground that death was an unconstitutional disproportionate punishment for rape in which no one was hurt.

The case also involves the jury selection method condemned in Taylor v. Louisiana, but which was held not to have retroactive effect in Daniel v. Louisiana, dec'd Jan. 27, 1975. Petitioner, however, makes a due process/equal protection argument over what appears to be minor deviation in the pre-Taylor compilation of the venire list--women were automatically struck from petitioner's list, as opposed to being automatically excused when they appeared for service.

Discussion:

Ideally, the capital punishment issue should be considered in a single-issue case involving a mandatory death penalty statute which presents facts raising little doubt as to the appropriateness of the punishment. The Louisiana case is the only one which involves a mandatory statute, but its facts seem clearly inappropriate. And, while perhaps lacking in merit in view of Daniel, the Taylor issue casts a further shadow over the case and distracts from the capital punishment debate.

I cannot determine whether other cases involving a mandatory statute are making their way to the Court. As I noted earlier, I have not been able to ascertain with any degree of authority what states are holding decisions in capital cases. 10/ The SG may

9/Selman v. Louisiana, No. 74-6065.

10/ The Virginia Supreme Court has upheld that state's pre-Furman "classic" mandatory death-penalty statute prescribing capital punishment for the killing of prison guards. Although a (Footnote continued on following page)

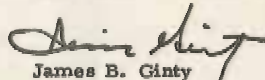
have this information. Certainly, Mr. Amsterdam does.

In the absence of a mandatory statute, the Court should perhaps review a quasi-mandatory "aggravating-mitigating" statute such as the federal Antihijacking Statute. As you noted in Furman, there seems little difference between providing standards for juries and judges to follow in determining the sentence in capital cases or in more narrowly defining the crimes for which the penalty is to be imposed. The Florida statute, however, is a unique and broad variant of the "model" "aggravating-mitigating" statute and would appear to offer no solution to the Furman quandary.

This leaves then only the Georgia cases. Georgia's "aggravating only" statute is representative of those of a number of states and in that respect may be suitable for review. Although open to the same discretionary criticisms made in Furman, and perhaps more open than North Carolina's judicially construed mandatory statute, the case may be useful in establishing the parameters of sentencing discretion. The statute may not satisfy Justices Douglas, Stewart and White on the discretionary issue, however, and the per se constitutionality issue may not be reached.

If the Court is to take an "aggravating only" statute, the House case would seem a particularly good candidate. It is a single-issue case whose facts seem appropriate. And, Mr. Greenberg and, I would assume, Mr. Amsterdam are in the case. The two Georgia cases recently filed with the Clerk will not, in the normal course, come before the Court this term, although responses to the certiorari petitions are due before the end of the month.

I am, of course, available to do any further research you may feel desirable.


James B. Ginty

Footnote continued from preceding page

petition for rehearing was denied by the State Supreme Court on June 10, 1974, no certiorari petition has been filed here. State and federal habeas corpus petitions have been filed and are pending. Jefferson v. Commonwealth, 204 S.E. 2d 258 (Va. SC 1974). The Delaware Supreme Court has also upheld its state's post-Furman mandatory statute. The constitutionality of the state statute was decided, however, on certification from a lower court. As far as I am able to determine, no capital case has been decided by the Delaware Supreme Court, although at least one is now pending before it.

Power

July 10, 1975

MEMORANDUM FOR THE CONFERENCE

Subject: Capital Cases

This updates my memorandum of June 11 to the Chief Justice on the status of the death penalty cases.

Since my earlier memorandum, six capital cases have been added to the Court's docket. There are now 16 holds for Fowler and 11 cases pending Conference action. 1/ Continuing my previous breakdown of the cases by states, the recent filings may be categorized as follows:

North Carolina: Three are from North Carolina and suffer the same drawback as the other North Carolina cases, a pre-Furman judicially constructed statute. There are a total of 13 capital cases before the Court from North Carolina, including Fowler. Eight are holds for Fowler and four are pending Conference action. 2/

Georgia: Two of the six recent filings are from Georgia and involve the State's post-Furman "aggravating only" death

1/ Four of the 11 pending cases appear on Summer List No. 2 at page 3. Moore v. Georgia, 74-6547; McCorquodale v. Georgia, 74-6557; Sawyer v. Florida, 74-6563; Gardner v. Florida, 74-6593. The remaining seven cases have not yet "matured."

2/ Fowler v. North Carolina, 73-7031, pending reargument. Henderson v. North Carolina, 73-6853; Dillard v. North Carolina, 73-6875; Noell v. North Carolina, 73-6876; Jarrette v. North Carolina, 73-6877; Crowder v. North Carolina, 73-6878; Honeycutt v. North Carolina, 73-7032; Sparks v. North Carolina, 74-669; and Ward v. North Carolina, 74-6263, all holds. Lampkins v. North Carolina, 74-6673; Gordon v. North Carolina, 74-6733; Stegmann v. North Carolina, 74-6735; and Lowery v. North Carolina, 75-5032, pending.

penalty statute. 3/ There are a total of nine capital cases from Georgia, five holds and four pending Conference action. 4/

In Jarrell, petitioner, a white youth, was convicted by jury of the 1973 kidnapping, robbery and murder of a woman allegedly abducted at a shopping center. The facts are sketchy but petitioner was connected with the gun used in the murder and with the victim's car which he was seen driving the evening of the abduction. Petitioner also confessed and re-enacted the crime. At trial, however, he "did not remember" his confession and presented alibi witnesses to substantiate his claim that he was at home at the time of the victim's death. In a separate proceeding, the jury found in aggravation that the murder had taken place during the commission of another felony, the robbery, and petitioner was sentenced to death. The Georgia SC affirmed (one Justice dissenting), after comparing petr's case with "similar" cases.

Petitioner attacks the death penalty statute on Furman and per se grounds and specifically attacks the Georgia statutory scheme of appellate review. Counsel also mentions in passing a voluntariness issue with respect to petitioner's confession, but does not develop the issue in the petition.

Mitchell involves a particularly cold-blooded execution-style murder of a 14 year old white boy during the robbery of a grocery store. The boy's mother was seriously wounded and obviously left for dead. Petr, a 22-year old black man with more than two years of college pled guilty. He was sentenced by the trial judge after a pre-sentencing hearing during which the mother's eyewitness identification and petitioner's confession were introduced.

3/ The two recent Georgia cases are: Jarrell v. Georgia, 74-6736 and Mitchell v. Georgia, 75-5022.

4/ Eberheart v. Georgia, 74-5174; House v. Georgia, 74-5196; Hooks v. Georgia, 74-5954; Gregg v. Georgia, 74-6257; and Ross v. Georgia, 74-6207, all holds. Moore v. Georgia, 74-6547; McCorquodale v. Georgia, 74-6557; Jarrell v. Georgia, supra, and Mitchell v. Georgia, supra, pending.

Although Mitchell's petition infers that he received something less than effective assistance from his court-appointed white attorney, the only issue raised in the petition is the constitutionality of the death penalty statute and counsel adopts the brief filed in Eberheart v. Georgia, 74-5174, a Fowler hold.

Florida: One of the six recent filings is from Florida and involves that State's somewhat unique "aggravating-mitigating" capital punishment statute. 5/ There are a total of five Florida capital punishment cases at the Court, two holds and three pending Conference action. 6/

The recent Florida filing involves the first degree murder and rape of a 13 year old white girl by a 27 year old black man. The evidence against Alford was circumstantial and in some areas conflicting. He presented numerous alibi witnesses in his defense.

After hearing evidence on sentencing, a majority of the jury rendered an advisory opinion, pursuant to the Florida statute, recommending that petr be sentenced to death. The trial judge concurred, specially finding that the crime was "especially heinous, atrocious and cruel" and was committed in the commission of, or flight from, a felony, i.e., the rape. The trial court also found one mitigating circumstance--petitioner had no prior criminal history. The Florida SC affirmed, one Justice dissenting.

In addition to challenging the constitutionality of the Florida death penalty statute, petitioner also raises an issue with respect to the seizure of 12 pieces of his clothing not set forth

5/Alford v. Florida, 74-6717.

6/Sullivan v. Florida, 74-6377 and Hallman v. Florida, 74-6168, both holds and Sawyer v. Florida, 74-6563; Gardner v. Florida, 74-6593; and Alford v. Florida, *supra*, pending.

To complete the 28 capital cases now at the Court, there is one Louisiana hold: Selman v. Louisiana, 74-6065.

in a search warrant which authorized only the seizure of spent cartridge casings. Petr also raises a 6th Amend. issue with respect to the reading at his trial of the preliminary hearing testimony of a government witness, contending that the absence of the witness was not justified for legitimate medical reasons.

Attorneys Greenberg and Amsterdam are on the petition.

Discussion: As discussed in my earlier memorandum, neither the Georgia nor Florida capital punishment statutes appear appropriate for review of the death penalty issue. Moreover, with the possible exception of the Mitchell case, the facts and postures of the recent filings also do not appear to be particularly suitable. Mitchell, a Georgia case, does involve a particularly brutal murder, conviction was based on a guilty plea, and petitioner raises only the capital punishment issue. The case has racial overtones, however, particularly the inference that petitioner was not well represented by his appointed counsel.

By my count, there are now 33 states plus the federal government which have enacted post-Furman capital punishment statutes. They breakdown generally as follows: 7/

7/As noted in my previous memorandum it is possible to identify four basic approaches taken by legislatures in re-enacting post-Furman capital punishment statutes. Some statutes provide the sentencer with a list of aggravating circumstances, one of which must be found before death can be imposed. Others not only specify the aggravating circumstances which justify a death sentence, but also prescribe the factors which may be considered in mitigation. A third set of statutes requires capital punishment when an aggravating and no mitigating circumstance is found, and forbids such punishment in all other cases. Finally, some states have attempted to remove all sentencing discretion by requiring death for those convicted of a limited and well-defined number of crimes. See Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. R. 1690 (1974).

My categorizing is rough. In some instances a state statute may be placed in one category for a particular crime and in another category for other crimes. Also, the scheme of some statutes are so unique as to render meaningful categorization impossible.

"aggravating only" (5)

Georgia
Illinois
Montana
Utah
South Carolina

"aggravating-mitigating" (6)

Arizona
Arkansas
Florida (advisory only)
Tennessee
Nebraska
Maryland

"quasi-mandatory, aggravating-mitigating" (7)

California (?)
Connecticut
Pennsylvania
Ohio
Texas (?)
Colorado
Federal Anti-hijacking Act

"mandatory" (16)

Delaware
Idaho
Indiana
Kentucky
Louisiana
Mississippi
Nevada
New Hampshire
New Mexico
New York
Oklahoma
Rhode Island
Wyoming
Montana
North Carolina
Missouri

Only one "mandatory" statute is before the Court. Selman v. Louisiana, 74-6065, a Fowler hold. Challenges to such statutes are sub judice in at least three state supreme courts, New Mexico, Oklahoma and Wyoming, and are pending briefing or argument in at least six others, Delaware, Indiana, Mississippi, Nevada, Rhode Island, and North Carolina.

As noted in my earlier memorandum, the Virginia Supreme Court has upheld that State's pre-Furman "classic" mandatory] death-penalty statute prescribing capital punishment for the killing of a prison guard. The case was not brought up here on certiorari, but state and federal (ED Va.) habeas corpus petitions have been filed below and are pending. See Jefferson v. Commonwealth, 204 S.E. 2d 258 (Va. SC 1974). Another related habeas corpus petition is also pending in MD Va. Lee v. Commonwealth.

I am not aware of any case involving a "mandatory" statute presently making its way to the Court. I understand that one case, involving the rather unique Texas capital punishment statute, will be filed in August.

There are now 283 persons in 25 states under sentence of death:

Alabama	1
Arizona	11
Arkansas	1
California	17
Delaware	1
Florida	42
Georgia	27
Indiana	5
Louisiana	23
Massachusetts	2
Mississippi	4
Montana	1
Nevada	1
New Mexico	8
North Carolina	72
Ohio	13
Oklahoma	14
Pennsylvania	2
Rhode Island	1
South Carolina	5

Tennessee	3
Texas	21
Utah	2
Virginia	2
Wyoming	<u>4</u>
	283

James B. Ginty

*Geni
my file on*

September 26, 1975

MEMORANDUM FOR THE CONFERENCE

Subject: Capital Cases

Since my memorandum of September 10, three capital cases have been added to the Court's docket. Two of the cases are from North Carolina, Robbins v. North Carolina, 75-5426, and Woodson, et al. v. North Carolina, 75-5491. The Robbins case suffers the same drawback as the other North Carolina cases, a pre-Furman judicially construed statute. The Woodson case, however, involves North Carolina's "new," post-Waddell capital punishment statute which was enacted April 8, 1974.

The 1974 statute is a "mandatory" statute prescribing the death penalty for all classes of first degree murder which the statute defines to include murders committed in the perpetration of a robbery. The two petrs, Woodson and Waxton, are black and were convicted by jury of the murder of a white woman during the robbery of a grocery store. They appear to have been convicted in large part on the testimony of two co-defendants who were permitted to plead to lesser charges. The case otherwise appears straight forward and the petition raises only the capital punishment question. Attorneys Greenberg and Amsterdam are on the pleadings.

The other case is from Georgia and involves that State's "aggravating only" capital punishment statute. In Coker v. Georgia, 75-5444, the petitioner was convicted of rape, kidnapping, armed robbery, motor vehicle theft and escape as a result of his escape during an Alcoholics Anonymous meeting in the prison's chapel. Evidence of petitioner's prior convictions for murder, rape, kidnapping and aggravated assault were introduced in aggravation during the separate sentencing hearing and the jury returned a sentence of death on the rape count, specially finding in accordance with the Georgia statute that (1) petitioner had a prior record of conviction for a capital felony and (2) the offense was committed during the commission of another capital felony, viz. armed robbery.

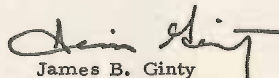
Also since my last memorandum, Alabama has enacted a capital punishment statute. The statute provides for an advisory

opinion by the jury after consideration of aggravating and mitigating evidence and appears to resemble the Florida statute. By my count, 34 states plus the Federal Government have enacted post-Furman capital punishment statutes. Of these, 17 appear to have adopted the "mandatory" approach.

There are now 40 capital cases filed with the Court--Fowler, sixteen cases being held for Fowler, fourteen cases on the September 29 Conference list and nine cases not yet listed.

As of September 5, 318 persons in 26 states were under sentence of death;

Alabama	1
Arizona	11
Arkansas	3
California	17
Colorado	1
Delaware	1
Florida	42
Georgia	27
Indiana	6
Louisiana	25
Massachusetts	3
Mississippi	4
Montana	1
Nevada	1
New Mexico	8
North Carolina	76
Ohio	25
Oklahoma	19
Pennsylvania	3
Rhode Island	1
South Carolina	5
Tennessee	8
Texas	19
Utah	5
Virginia	2
Wyoming	4
	<u>318</u>


James B. Ginty

my
file

November 6, 1975

MEMORANDUM FOR THE CONFERENCE

Subject: Capital Cases

Since my memorandum of September 26, two capital cases have been added to the Court's docket. Wetmore v. North Carolina, No. 75-5697, was filed November 3 and involves North Carolina's old, pre-Furman statute. Petitioner, who was convicted of killing his father, also raises a Mullaney v. Wilbur issue with respect to jury instructions placing the burden of proving insanity of him and an instruction that malice may be presumed from facts establishing an intentional killing with a deadly weapon. Although decided before Mullaney, petitioner raised these issues in the North Carolina Supreme Court. The second case, Proffitt v. Florida, No. 75-5706, filed November 5, involves Florida's advisory "aggravating-mitigating" statute. Petitioner, a 28-year old white male, was convicted of murdering a man during a breaking and entering. A majority of the jury recommended the death penalty and the judge concurred. Petitioner questions only the constitutionality of Florida's capital punishment statute, on Furman and per se grounds.

My memorandum of September 10 advised that the Court could expect up to 30 new cases to be filed within 60 to 90 days. Since September 10, only 5 new cases have been filed. That estimate has been revised downward considerably on the speculation that some of the States are holding petitions for rehearing pending this Court's consideration of the capital punishment issue. I am advised, however, that the NAACP group will be filing six or seven cases in the near future. A breakdown of the cases was not available.

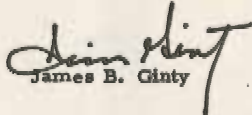
There are presently 41 capital cases on the Court's docket:

Fowler

35 holds for Fowler*
5 cases not yet listed
41

The five cases not yet listed for Conference action are:
Young v. North Carolina, 75-5281; Jurek v. Texas, No. 75-5394;
Robins v. North Carolina, 75-5426; and the recent filings,
Wetmore v. North Carolina, No. 75-5697, and Proffitt v. Florida,
No. 75-5706.

The North Carolina cases all involve that State's old, pre-Furman statute. As discussed in earlier memoranda, Florida's advisory "aggravating-mitigating" statute is unique. The Texas case was discussed in my memorandum of September 10. In that case, the 25-year old white petitioner was convicted of the murder of a 10-year old girl "while in the course of committing or attempting to commit kidnapping and/or forcible rape." He was sentenced to death under Texas' also unique "quasi-mandatory aggravating-mitigating" statute. The dissenting Judges of the Texas Court of Criminal Appeals focused on the imprecise language of certain provisions of the statute. In addition to attacking the constitutionality of the Texas statute, Jurek also raises a voluntariness of confession issue.


James B. Ginty

*Vick v. North Carolina, No. 75-5075, a hold for Fowler, was dismissed under Rule 60 on October 31.