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## FLORIDA DEATH PENALTY: A LACK OF DISCRETION?

The defendants were indicted in Dade County, Florida, for first degree murder. The trial judge dismissed the indictment, stating that Florida Statutes, section 782.04 (1971), which defines the crime of murder, and section 921.141 (1971), which provides the procedural alternatives for sentencing following a conviction for a capital felony, were unconstitutional. The reason for the court's determination was that the sections provided for cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution, as construed by the United States Supreme Court in *Furman v. Georgia*.<sup>1</sup> The state appealed to the Supreme Court of Florida,<sup>2</sup> which *held*, reversed: The Florida death penalty statutes are not violative of the eighth or fourteenth amendments. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973).

Prior to *Dixon*, the United States Supreme Court, in determining the constitutionality of the death penalty, held that "the imposition and carrying out of the death penalty in these cases [with the possible exception of a very few mandatory statutes] constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."<sup>3</sup> Accordingly, each of the three cases before the Court was "reversed insofar as it leaves undisturbed the death sentence imposed."<sup>4</sup> Two of the opinions written by the *Furman* majority held capital punishment per se a violation of the United States Constitution, while the remaining three opinions agreed that discretionary death penalties are unconstitutional.<sup>5</sup> This deci-

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1. 408 U.S. 238 (1972) (per curiam) [hereinafter cited as *Furman*].

2. This case was consolidated with three others which were certified and involved the same question of law.

3. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).

4. *Id.* at 240. Each of the Justices wrote a separate opinion in *Furman*; the decision was 5 to 4. Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White and Mr. Justice Marshall wrote concurring opinions. Mr. Chief Justice Burger, Mr. Justice Blackmun, Mr. Justice Powell and Mr. Justice Rehnquist wrote dissenting opinions.

5. Mr. Justice Brennan and Mr. Justice Marshall shared the view that the death penalty is unconstitutional per se regardless of the presence or absence of the sentencer's discretion. *Furman v. Georgia*, 408 U.S. 238, 257-306, 314-74 (1972). As Mr. Chief Justice Burger expressed it, those two Justices "concluded that the Eighth Amendment prohibits capital punishment for all crimes and under all circumstances." *Id.* at 375. See also the dissenting opinion of Mr. Justice Powell. *Id.* at 415.

Mr. Justice Douglas made it clear that his view would strike down any discretionary capital punishment provision, reserving only the question of the constitutionality of a mandatory capital punishment provision. "Whether a mandatory death penalty would otherwise [if evenhandedly applied] be constitutional is a question I do not reach." *Id.* at 257.

Mr. Justice Stewart, also specified that statutes which make "the death penalty the mandatory punishment" are the only ones he considered to be beyond the scope of the *Furman* decision. *Id.* at 306-10. He maintained that if not mandatory, "death sentences are the product of a legal system that brings them . . . within the very core of the Eighth Amendment's guarantee . . ." *Id.* at 309.

Mr. Justice White similarly reserved only the question of "[t]he facial constitutionality of statutes requiring the imposition of the death penalty," because it was not before the Court. *Id.* at 310. His opinion clearly reached "the constitutionality of capital punishment statutes under which . . . the legislature does not itself mandate the penalty in any particu-

sion was followed by a series of approximately 120 unanimous per curiam opinions by the Court invalidating the unexecuted death sentences imposed under twenty six discretionary state death statutes.<sup>6</sup>

In accordance with the doctrine enunciated in *Furman*, the Supreme Court of Florida declared in *Donaldson v. Sack* that "Florida no longer has what has been termed a 'capital case'."<sup>7</sup> Following this decision, the court reversed the death sentences of all the death row inmates in Florida.<sup>8</sup> The highest courts of the other twenty five states which have ruled on this question have similarly invalidated every form of discretionary death sentencing procedure under *Furman*. In response to the Florida court, and in recognition of *Furman*, the Florida Legislature enacted a new death penalty statute. The provisions of the new statute retained murder and rape as capital felonies.<sup>9</sup> Procedural changes as to how to impose death sentences were made, but it appears that the discretionary factors found prohibitive in *Furman* remain in this process.<sup>10</sup>

In determining the constitutionality of the new statute, the court in *Dixon* ruled that the "mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman* . . . rather, [it was] the quality of discretion and the manner in which it was applied that dictated the rule . . ."<sup>11</sup> The court reasoned that if the discretion necessary in the statute is "reasonable and controlled," and not "capricious and discriminatory," the test of *Furman* is fulfilled. This conclusion was reached despite the fact that the Supreme Court has overturned every discretionary death sentence, regardless of its form or nature, that has come before it.<sup>12</sup>

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lar class or kind of case . . . but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized." *Id.* at 311.

6. Prior to *Furman*, Florida provided for imposition of the death penalty in cases of murder and rape. FLA. STAT. §§ 782.04(1), 794.01 (1971). It was also available for a number of other crimes (bombing or machine gunning in public places and kidnapping for ransom) but, practically speaking, never used. The former death penalty sentencing provisions provided that the life-death decision was in the hands of the jury, with a majority of the jurors sufficient to make a binding recommendation of life imprisonment. FLA. STAT. § 921.141 (1971).

7. 265 So. 2d 499, 505 (Fla. 1972).

8. *Anderson v. State*, 267 So. 2d 8 (Fla. 1972); *In re Baker*, 267 So. 2d 331 (Fla. 1972).

9. The Governor's Committee to Study Capital Punishment recommended to the legislature that rape not be made capital since "[i]t is believed that prior classification of rape as a capital felony under these circumstances has resulted in disparities and too often reflects racial bias." FINAL REPORT OF THE GOVERNOR'S COMMITTEE TO STUDY CAPITAL PUNISHMENT at 155 (November, 1972).

10. See FLA. STAT. § 921.141(4) (Supp. 1972).

11. 283 So. 2d at 6.

12. Mr. Justice Stewart specifically listed the types of capital punishment provisions not immediately affected by the Court's decision. *Furman v. Georgia*, 408 U.S. 238, 307 (1972). These are all instances where legislatures have "specified that the penalty of death shall be the mandatory punishment for every person convicted of engaging in certain designated criminal conduct." *Id.* at 307. Mr. Justice Powell made the same point: "[W]hile statutes in 40 states permit capital punishment for a variety of crimes, the constitutionality of a very few mandatory statutes remains undecided. See concurring opinions by Mr. Justice Stewart and Mr. Justice White. Since Rhode Island's only capital statute—murder by a life term prisoner

The majority in *Dixon* enumerated five statutory steps between conviction and the imposition of the death penalty which "provide adequate safeguards against discretion."<sup>13</sup> One of the "safeguard" steps is the establishment of a bifurcated trial system in which the defendant is convicted in one trial and the determination of whether the defendant should be sentenced to death is made in another. This provision for bifurcated trials is not a unique innovation. Indeed, similar bifurcated trial systems which were in effect in several states were declared unconstitutional in *Furman*.<sup>14</sup> At the sentencing proceeding, evidence is admitted which relates to the enumerated aggravating and mitigating circumstances in the statute.<sup>15</sup> Additional evidence may be admitted on any matter the trial court deems "relevant" and of "probative value." All of this evidence is then weighed to determine if it is "sufficient" to impose the death penalty. Other than the requirement that the circumstances must be "sufficient," the new statute provides no other guidelines. Therefore the statute allows judicial determination in this process to be dependent upon the undirected discretion of the individual jurors and trial judge.

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—is mandatory, no law in that State is struck down by virtue of the Court's decision today." *Id.* at 417 n.2.

Furthermore, the Florida Attorney General concluded, on the basis of the *Furman* decision, that the legislature could constitutionally reenact capital punishment only "so long as said legislation is mandatory in its terms." 283 So. 2d at 14, *citing* Memorandum, Attorney General of Florida at 7 (July 7, 1972).

13. First, the question of punishment is reserved for a post-conviction hearing so that the trial judge and jury can hear other information regarding the defendant and the crime of which he has been convicted before determining whether or not death will be required.

The second step of the sentencing procedure is that the jury . . . must hear the new evidence presented at the post-conviction hearing and make a recommendation as to the penalty, that is, life or death. . . .

The third step . . . is that the trial judge actually determines the sentence to be imposed—guided by, but not bound by, the findings of the jury . . . .

The fourth step . . . is that the trial judge justifies his sentence of death in writing.

The most important safeguard presented in FLA. STAT. § 921.141, is the pro-  
pounding or aggravating and mitigating circumstances which must be determinative  
of the sentence imposed.

283 So. 2d at 7-8.

14. At the time of *Furman*, six states provided for bifurcated trials in capital cases: CAL. PENAL CODE, § 190.1 (Deering 1966); CONN. GEN. STAT. ANN. § 53-10 (1960); GA. CODE ANN., § 27-2534 (1972); N.Y. PENAL LAW §§ 125.30, .35 (McKinney 1967); PA. STAT. ANN. tit. 18, § 4701 (1963); TEXAS CODE CRIM. PROC. ANN. art. 37.07 (1966). Four of these states had capital cases before the United States Supreme Court, and the death sentence in each case was reversed. *Davis v. Connecticut*, 408 U.S. 935 (1972); *Jackson v. Georgia*, 408 U.S. 238 (1972); *Scoleri v. Pennsylvania*, 408 U.S. 934 (1972); *Phelan v. Brierley*, 408 U.S. 939 (1972); *Matthews v. Texas*, 408 U.S. 940 (1972); *Curry v. Texas*, 408 U.S. 939 (1972); *McKenzie v. Texas*, 408 U.S. 938 (1972). New York had no case before the Court and California had, shortly before *Furman*, ruled the state's death penalty unconstitutional. *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972); *see Aikens v. California*, 406 U.S. 813 (1972).

15. FLA. STAT. § 921.141(1) (Supp. 1972). New York law provided basically this same element and was subsequently declared unconstitutional. N.Y. PENAL LAW § 125.30 (McKinney Supp. 1970-71), § 125.35 (McKinney 1967).

The possibilities of variation in the process of weighing and appraising factors are limitless, resulting in death sentences which are uncontrollably discretionary in fact.<sup>16</sup> Such weighing of aggravating and mitigating circumstances was also required by several states, either by statute or case law, but their death penalty statutes were found to be unconstitutional as a result of *Furman*.<sup>17</sup>

In *Dixon*, the majority of the court stated that the existence of the aggravating and mitigating circumstances is "[t]he most important safeguard presented in Fla. Stat. § 921.141 . . . ." <sup>18</sup> because the aggravating circumstances actually define those crimes for which the death penalty is applicable in the absence of mitigating circumstances. In reference to this same type of reasoning, Mr. Chief Justice Burger, dissenting in *Furman*, stated that:

all past efforts to "identify before the fact" the cases in which the penalty is to be imposed have been "uniformly unsuccessful" . . . . One problem is that "the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . . ." As the Court stated in *McGautha*, "[t]he infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no jury would need." Thus, unless the Court in *McGautha* misjudged the experience of history, there is little reason to believe that sentencing standards in any form will substantially alter the discretionary character of the prevailing system of sentencing in capital cases.<sup>19</sup>

Therefore, it appears that the listing of all the aggravating and mitigating circumstances which should be considered in deciding whether to impose the death penalty is an impossible task, and that the discretion applied in the new Florida death statute is incapable of being controlled.

In addition to the discretionary elements in section 921.141(4), the vague words used to describe the enumerated aggravating and mitigating circumstances are subject to varying interpretations by both judges and juries. For example, one of the mitigating circumstances requires a showing of no "significant" history of prior activity, the influence of "extreme"

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16. For further analysis on this point, see the dissenting opinion of Justice Ervin, 283 So. 2d at 11.

17. See CONN. GEN. STAT. ANN. § 53a-46(a) (Supp. 1972); N.J. STAT. ANN., § 2A; 113-4 (1969); TENN. CODE ANN., §§ 39-2406 (1955); *People v. Black*, 367 Ill. 209, 10 N.E.2d 801 (1937); *People v. Sullivan*, 345 Ill. 87, 177 N.E. 733 (1931); *Sundahl v. State*, 154 Neb. 550, 48 N.W.2d 689 (1951); *Lewis v. State*, 451 P.2d 399 (Okla. Crim. App. 1949); *Waters v. State*, 197 P.2d 299 (Okla. Crim. App. 1948); *Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241 (1959); *Commonwealth v. Irelam*, 341 Pa. 43, 17 A.2d 897 (1941); *Commonwealth v. Garramore*, 307 Pa. 507, 161 A. 733 (1932); *State v. Reynolds*, 41 N.J. 163, 195 A.2d 449 (1963); *State v. Tudor*, 154 Ohio St. 249, 95 N.E.2d 385 (1950).

18. 283 So. 2d at 8.

19. 408 U.S. 238, 401 (1972) (Burger C.J., dissenting) (citations omitted).

mental or emotional disturbance, or domination by another.<sup>20</sup> Subjective determinations must be made as to whether such factors are present in a particular case, in accord with the various backgrounds and experiences of the individuals who will be applying these standards. The magnitude of these variables would most certainly eliminate any possibility of control in the area of discretion. The same faults exist in the aggravating circumstances, such as "the felony was especially heinous, atrocious, or cruel."<sup>21</sup> As the majority of the court recognized, "to a layman, no capital crime might appear to be less than heinous . . ."<sup>22</sup>

History indicates that the American people have effectively repudiated any discretionary death penalty by seldom imposing it, thereby repudiating any justification of a "compelling state interest."<sup>23</sup> All concurring Justices in *Furman* premised their decisions upon evidence demonstrating the progressive decline, nationwide and worldwide, in the use of the death penalty.<sup>24</sup> The majority of the court in *Dixon* failed to mention this seemingly relevant concept notwithstanding its strong application by the concurring Justices in *Furman*.

The entire thrust of the decisions in *Furman* was to determine the death penalty's validity under the eighth amendment. The Court looks to how the penalty has been *applied* by the people, not to whether the penalty is legislatively authorized or approved by public opinion. For example, if a law is not applied frequently and uniformly, it may affront

20. FLA. STAT. § 921.141 (Supp. 1972).

21. *Id.*

22. 283 So. 2d at 8.

23. Referring to the selection of capital felons as a class upon which the death penalty may be imposed, Justice Ervin in his dissenting opinion stated:

A stricter requirement has been employed . . . where the classification restricts a "fundamental right." In cases involving such classifications . . . the states have been required to prove that a "compelling state interest" is served by the classification.

283 So. 2d at 20.

. . . .  
Because of the infrequent use of the death penalty, it would seem reasonable, in fact mandatory, that the Florida Legislature reconsider the purposes which have traditionally been assumed to justify so harsh a penalty as death. . . . It is my conclusion . . . that the death penalty is [not] supported by any compelling state interest.

283 So. 2d at 21.

24. For example, Mr. Justice Brennan stated:

There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period from which accurate statistics are available. In the 1930's, executions averaged 167 per year; in the 1940's, the average was 128, in the 1950's, it was 72, and in the years 1960-1962 it was 48. There have been a total of 46 executions since then, 36 of them in 1963-1964. Yet our population and the number of capital crimes committed have increased greatly over the past four decades. The contemporary rarity of the infliction of this punishment is the end result of a long-continued decline. . . . When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied.

*Furman v. Georgia*, 408 U.S. 238, 291-93 (1972); see also *id.* at 299, 386-87. The other concurring opinions have similar comments, thus suggesting that the death penalty violates "contemporary standards of decency," the relevant eighth amendment test, and is unconstitutional.

contemporary standards of decency, but not generate the public pressure necessary to secure its repeal by the legislature.<sup>25</sup> The United States Supreme Court in *Weems v. United States*,<sup>26</sup> stated that the cruel and unusual punishment clause is not static but progressive, "[it] is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a human justice."<sup>27</sup> Indeed, Florida's recent history of refusing to impose the death penalty reflects its public opinion in light of which the death penalty's validity should be measured under the eighth amendment.

Sir Winston Churchill wisely said in the House of Commons in 1910:

The word and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country.

A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the state; a constant heart-searching by all charged with the duty of punishment; a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment, tireless efforts toward the discovery of curative and regenerative processes; unflinching faith that there is a treasure if you can only find it, in the heart of every man—these are the symbols which in the treatment of crime and criminal mark and measure the shored up strength of a nation, and are sign and proof of the living virtue within it.<sup>28</sup>

In view of the Supreme Court's decision in *Weems* that the eighth amendment does acquire new meaning in relationship to the public's views on certain punishments as cruel and unusual, and in view of the nationwide trend of the American people refusing to apply the death penalty in any mandatory form, the Florida Legislature and the Florida Supreme Court will have to apply national constitutional standards in their further determination of this issue. The citizens of Florida should not be deprived of their right to life when all other citizens of this country are equally protected by the Constitution of the United States.

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25. The National Crime Commission recently noted that: "The most salient characteristic of capital punishment is that it is infrequently applied. . . . [A]ll available data indicate that judges, juries, and governors are becoming increasingly reluctant to impose, or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT, THE CHALLENGE OF CRIME IN A FREE SOCIETY, at 143 (1967). All informed observers of the death penalty agree that a worldwide trend toward its disuse is nothing short of drastic. See, e.g., United Nations, Department of Economics and Social Affairs, *Capital Punishment*, U.N. Doc. ST/SOA/SD 9-10, 81-82, 96-97 (1968).

26. 217 U.S. 349 (1910) [hereinafter referred to as *Weems*].

27. *Id.* at 378.

28. Quoted in 283 So. 2d at 23.