

The Burger Court Opinion Writing Database

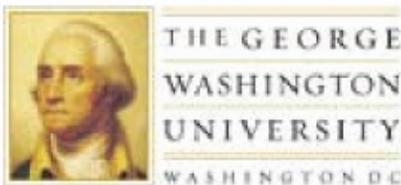
Furman v. Georgia

408 U.S. 238 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Changes throughout

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 69-5003, 69-5030, AND 69-5031

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writs of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

At the outset it is important to note that only two members of the Court, MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, have concluded that the Eighth Amendment prohibits capital punishment for all crimes and under all circumstances. MR. JUSTICE DOUGLAS has also determined that the death penalty contravenes the Eighth Amendment, although I do not read his opinion as necessarily requiring final abolition of the penalty.¹ For the reasons set forth in Parts I-IV of this opinion, I conclude that the constitutional prohibition against "cruel and unusual punishments" cannot be construed to bar the imposition of the punishment of death.

MR. JUSTICE STEWART and MR. JUSTICE WHITE have concluded that petitioners' death sentences must be set

¹ See n. 25, *infra*.

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U.S. DEPARTMENT OF CONGRESS

3

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

CHAMBERS OF
THE CHIEF JUSTICE

June 16, 1972

Re: Capital Cases

Dear Harry, Lewis and Bill:

Please join me in your opinions.

Regards,

WRB

Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Copies to the Conference

REPRODUCED FROM THE COLLECTION

OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT CONFERENCE

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

CHAMBERS OF
THE CHIEF JUSTICE

June 30, 1972

~~68-5027~~
69-5003, 69-5030, 69-5031

MEMORANDUM TO THE CONFERENCE:

I am amending my dissent in the capital cases to insert at page 6, preceding the sentence beginning on the 5th line from the bottom, the following:

"Thus the explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment; it does not expressly or by implication acknowledge the legal power to impose any of the various punishments that have been banned as cruel since 1791."

This, of course, makes no charge in thrust or meaning but only of emphasis.

Regards,

W503

cc: The Clerk

File
Rec'd
4/2

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 69-5003, 69-5030, AND 69-5031

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Supreme Court of Georgia.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[February —, 1972]

MR. JUSTICE DOUGLAS.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitutes "cruel and unusual punishments" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth.¹ I vote to reverse each

¹ The opinion of the Supreme Court of Georgia affirming Furman's conviction of murder and sentence of death is reported in 225 Ga. 253, 167 S. E. 2d 628, and its opinion affirming Jackson's conviction of rape and sentence of death is reported in 225 Ga. 790, 171 S. E. 2d 501. The conviction of Branch of rape and the sentence of death was affirmed by the Court of Criminal Appeals of Texas and reported in 447 S. W. 2d 932.

Oca 71
Douglas

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

1, 6/7, 13, 16
MM

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

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Nos. 69-5003, 69-5030, AND 69-5031 Circulated:

2/24/72

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writ of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[February —, 1972]

MR. JUSTICE DOUGLAS.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitutes "cruel and unusual punishments" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth.¹ I vote to vacate each

¹ The opinion of the Supreme Court of Georgia affirming Furman's conviction of murder and sentence of death is reported in 225 Ga. 253, 167 S. E. 2d 628, and its opinion affirming Jackson's conviction of rape and sentence of death is reported in 225 Ga. 790, 171 S. E. 2d 501. The conviction of Branch of rape and the sentence of death was affirmed by the Court of Criminal Appeals of Texas and reported in 447 S. W. 2d 932.

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U.S. LIBRARY OF CONGRESS

Revised

*Best Copy
Revised
5-19*

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 69-5003, 69-5030, AND 69-5031

William Henry Furman, Petitioner, 69-5003 v. State of Georgia.	}	On Writ of Certiorari to the Supreme Court of Georgia.
Lucious Jackson, Jr., Petitioner, 69-5030 v. State of Georgia.	}	On Writ of Certiorari to the Court of Criminal Appeals of Texas.
Elmer Branch, Petitioner, 69-5031 v. State of Texas.	}	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[February —, 1972]

MR. JUSTICE DOUGLAS.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitutes "cruel and unusual punishments" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth.¹ I vote to vacate each

¹ The opinion of the Supreme Court of Georgia affirming Furman's conviction of murder and sentence of death is reported in 225 Ga. 253, 167 S. E. 2d 628, and its opinion affirming Jackson's conviction of rape and sentence of death is reported in 225 Ga. 790, 171 S. E. 2d 501. The conviction of Branch of rape and the sentence of death was affirmed by the Court of Criminal Appeals of Texas and reported in 447 S. W. 2d 932.

Oct 76 Douglas

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*Desk Copy
Review
5-22*

6th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 69-5003, 69-5030, AND 69-5031

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writ of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[February —, 1972]

MR. JUSTICE DOUGLAS.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitutes "cruel and unusual punishments" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth.¹ I vote to vacate each

¹ The opinion of the Supreme Court of Georgia affirming Furman's conviction of murder and sentence of death is reported in 225 Ga. 253, 167 S. E. 2d 628, and its opinion affirming Jackson's conviction of rape and sentence of death is reported in 225 Ga. 790, 171 S. E. 2d 501. The conviction of Branch of rape and the sentence of death was affirmed by the Court of Criminal Appeals of Texas and reported in 447 S. W. 2d 932.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Oct 71 Douglas

6, 8, 16, 17

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

7th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas; J.

Nos. 69-5003, 69-5030, AND 69-5031

Circulate: _____

Recirculated: 6/15/72

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writs of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[February —, 1972]

MR. JUSTICE DOUGLAS.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitutes "cruel and unusual punishments" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth.¹ I vote to vacate each

¹ The opinion of the Supreme Court of Georgia affirming Furman's conviction of murder and sentence of death is reported in 225 Ga. 253, 167 S. E. 2d 628, and its opinion affirming Jackson's conviction of rape and sentence of death is reported in 225 Ga. 790, 171 S. E. 2d 501. The conviction of Branch of rape and the sentence of death was affirmed by the Court of Criminal Appeals of Texas and reported in 447 S. W. 2d 932.

3/

89

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Burger
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan

8th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 69-5003, 69-5030, AND 69-5031

From: Department of Justice
Circulated:
Recirculated: 6-21

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writs of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

MR. JUSTICE DOUGLAS.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitutes "cruel and unusual punishments" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth.¹ I vote to vacate each

¹ The opinion of the Supreme Court of Georgia affirming Furman's conviction of murder and sentence of death is reported in 225 Ga. 253, 167 S. E. 2d 628, and its opinion affirming Jackson's conviction of rape and sentence of death is reported in 225 Ga. 790, 171 S. E. 2d 501. The conviction of Branch of rape and the sentence of death was affirmed by the Court of Criminal Appeals of Texas and reported in 447 S. W. 2d 932.

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION OF THE LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 26, 1972

Memorandum to Mr. Justice Brennan:

Dear Bill:

This memorandum is to advise that I have gone over all of your various memoranda on the Capital Cases.

As respects those that are being held for our decisions in those three, I agree with all the recommendations which you have made in your various memoranda.

W. O. D.

Mr. Justice Brennan

Wm. Brennan 00171

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 26, 1972

MEMORANDUM TO THE CONFERENCE:

In my opinion in the Capital Cases
I would add the following to the paragraph on the
last page:

Any law which is non-discriminatory on its face
may be applied in such a way as to violate the Equal
Protection Clause of the Fourteenth Amendment. Yick
Wo v. Hopkins, 118 U.S. 356. Such consequence
might be the adding of a mandatory death penalty where
equal or lesser sentences were imposed on the elite,
a harsher one on the minorities or members of the lower
castes. Whether a mandatory death penalty would other-
wise be constitutional is a question I do not reach.

I would vacate each of these judgments.

W. O. D.

Wm
Breuer 0076

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

June 14, 1972

MEMORANDUM TO THE CONFERENCE

Capital Cases

Since there is to be no Court opinion I suppose that, as in the similar situation last year in the Pentagon Papers case, a per curiam will be required. To get the ball rolling, I enclose a suggested draft of one.

I also enclose a typed copy of a completely rewritten draft of my opinion that I sent to the Printer today.

W. J. B. Jr.

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OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT RECORDS

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 15, 1972

MEMORANDUM TO THE CONFERENCE

Capital Cases

Bill Douglas has sent word that he thinks the lineup should appear at the foot of the per curiam. I attach one for consideration of the conference.

Bill also asks that the cases not come down before Monday, June 26, because he wants to prepare an additional footnote for his opinion.

W. J. B. Jr.

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Mr. Justice Douglas, Mr. Justice Brennan,
Mr. Justice Stewart, Mr. Justice White and Mr. Justice
Marshall have filed separate opinions stating their reasons
for reversal. The Chief Justice, Mr. Justice Blackmun,
Mr. Justice Powell and Mr. Justice Rehnquist have filed
separate opinions stating their reasons for affirmance.

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

69-5003
etc.

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 16, 1972

Memorandum to the Conference

Capital Cases

The enclosed is the printed version of
the typed circulation of June 14.

W. J. B. Jr.

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U.S. LIBRARY OF CONGRESS

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION OF THE SUPREME COURT OF THE UNITED STATES

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES ^{From: Brennan, J.}

Nos. 69-5003, 69-5030, AND 69-5031

Circulated: _____

Recirculated: 6/6/72

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writ of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

MR. JUSTICE BRENNAN, concurring.

The petitioners in these cases are under sentences of death. The petitioner in No. 69-5003 was convicted of murder in Georgia; the petitioners in No. 69-5030 and No. 69-5031 were convicted, in Georgia and Texas respectively, of rape. We granted certiorari, 403 U. S. 952 (1971), to consider whether death is today a punishment for crime that is "cruel and unusual" and consequently, by virtue of the Eighth and Fourteenth Amendments, beyond the power of the State to inflict.¹

¹ The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted*." (Emphasis added.) The Cruel and Unusual Punishments Clause is fully applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U. S. 660 (1962); *Gideon v. Wainwright*, 372 U. S. 335,

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN JR.

June 20, 1972

MEMORANDUM TO THE CONFERENCE

Capital Cases

In addition to the cases listed on page 17 through page 23, being held for Furman v. Georgia, et al., page 6 lists No. 71-6204, Brown v. Virginia, and page 7 lists, No. 71-6539, Menthen v. Oklahoma.

I suggest that each of the 5 appeals listed at the top of page 17 be disposed of by an Order List notation as follows:

"The judgment is reversed insofar as it imposes the death penalty and the case is remanded for further proceedings. Furman v. Georgia, ___ U.S. ___ (1972)."

I suggest that we Deny the first case on page 22, No. 71-1284, New Jersey v. Presha, which is here on cert. from the New Jersey Supreme Court's decision invalidating the New Jersey statute under Jackson v. United States.

I suggest that each of the cases here on petition for certiorari listed at pages 17, 18, 19, 20, 21, 22, (except No. 71-1284) 23 and No. 71-6204 Brown v. Virginia, page 6 and No. 71-6539, Menthen v. Oklahoma, page 7 be disposed of by an Order List notation as follows:

"The petition for certiorari is granted. The judgment is reversed insofar as it imposes the death penalty and the case is remanded for further proceedings. Furman v. Georgia, ___ U.S. ___ (1972)."

Dayton - 0071
Death Penalty Case
5005/15027

I suggest that the petition for rehearing in No. 204 O. T. 1970, Crampton v. Ohio, at page 23 be disposed of by an Order List notation as follows:

"The petition for rehearing is granted. The judgment affirming the judgment of the Ohio courts, 402 U.S. 183 (1971) is vacated. The judgment of the Ohio courts, 18 Ohio S. T. 2d 182, 248 N.E. 2d 614 (1969) is reversed insofar as it imposes the death penalty and the case is remanded for further proceedings. Furman v. Georgia, ___ U.S. ___ (1972)."

Three of the cases listed on page 23 are motions for leave to file petitions for habeas corpus:

No. 69-5016 - Pitts v. Wainwright
No. 69-5017 - Hawkins v. Wainwright
No. 70-5020 - Williams v. Wainwright

I suggest a notation on the Order List as follows (See Chaapel v. Cochran, 369 U.S. 869):

"The motion for leave to file an application for a writ of habeas corpus is hereby transferred 'for hearing and determination' in the light of Furman v. Georgia, ___ U.S. ___ (1972) to the United States District Court for the Southern District of Florida, 28 U.S.C. § 2241(b); Rule 31(5) revised Rule of the Supreme Court of the United States, Ex Parte Abernathy, 320 U.S. 219."

W. J. B. Jr.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN JR.

June 20, 1972

SUPPLEMENTAL MEMORANDUM

Capital Cases

Instead of transferring the motions for leave to file original habeas in No. 69-5016 - Pitts v. Wainwright, No. 69-5017, Hawkins v. Wainwright and No. 70-5020, Williams v. Wainwright, the Conference might wish to consider treating the habeas petitions as petitions for certiorari and then dispose of the cases as recommended for other petitions for certiorari.

From my examination of the files it appears that each habeas petition was filed within ninety days of some action of the Florida Supreme Court. In No. 69-5016, that court, on October 7, 1969, denied state habeas and the petition to this Court was filed October 28, 1969.

In No. 69-5017, the Florida Supreme Court denied mandamus on September 30, 1969 and the petition to this Court was filed on October 29, 1969.

In No. 70-5020, the Florida Supreme Court affirmed a denial of state habeas on June 11, 1970 and the petition was filed here on September 9, 1970.

W. J. B. Jr.

Handwritten marks: a scribble and a horizontal line.

To, The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: _____
Circulated 6-20-72 ✓

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 69-5003, 69-5030, AND 69-5031

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writs of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

PER CURIAM.

Petitioner in No. 69-5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga. Code Ann. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S. E. 2d 628 (1969). Petitioner in No. 69-5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga. Code Ann. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 790, 171 S. E. 2d 501 (1969). Petitioner in No. 69-5031 was convicted of rape in Texas and was sentenced to death pursuant to Tex. Penal Code Ann., Art. 1189 (1961). 447 S. W. 2d 932 (Tex. Ct. Crim. App. 1969). Certiorari was granted limited to the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

CONFERENCE OF CLERKS

June 23, 1972

MEMORANDUM TO THE CONFERENCE

Held Capital Cases

69-5043

Bill Rehnquist and I propose the following disposition of the above cases:

1. Deny No. 68-5012 - Howard v. Nevada, death penalty was not imposed.
2. Deny No. 71-1284 - New Jersey v. Presha. This cert is from New Jersey Supreme Court decision invalidating New Jersey's death penalty.
3. Deny No. 70-228 and 70-5198 - Warden v. Ralph and Ralph v. Warden. These are cert and cross-cert from Fourth Circuit's invalidation of Maryland death sentence as applied to conviction for rape.
4. Per Curiam. No. 71-5446 - Stewart v. Massachusetts as per attached draft.
5. Remand appeals as per attached.
6. Remand certs as per attached.
7. Treat original habeas petitions as certs and remand as per attached.
8. Remand No. 204 O. T. 1970 - Crampton v. Ohio as per attached.

W. J. B. Jr.

Wm. Brown 0076

1/6

No. 71-5446 - Stewart v. Massachusetts

Per Curiam.

The appellant in this case was sentenced to death. The imposition and carrying out of that death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Furman v. Georgia, ___ U.S. ___ (1972). The judgment is therefore vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings.

The judgment in each of the following cases is vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings. Stewart v. Massachusetts, ____ U. S. ____ (1972).

Certiorari is granted in each of the following cases. The judgment in each is vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings. Stewart v. Massachusetts, ___ U.S. ___ (1972).

4/16

9/15

Treating the petition for writ of habeas corpus as a petition for certiorari, certiorari is granted in each of the following cases. The judgment in each is vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings. Stewart v. Massachusetts, ___ U. S. ___ (1972).

3/27

No. 204 O.T. 1970 - Crampton v. Ohio

The petition for rehearing is granted. The judgment affirming the judgment of the Ohio courts, 402 U.S. 183 (1971) is vacated. The judgment of the Ohio courts, 18 Ohio St. 2d 182, 248 N.E. 2d 614 (1969) is vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings. Furman v. Georgia, ___ U.S. ____ (1972).

3

Page 2.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
- Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

2nd DRAFT

Circulated: _____
Recirculated: 6-26-72

SUPREME COURT OF THE UNITED STATES

Nos. 69-5003, 69-5030, AND 69-5031

William Henry Furman, Petitioner, 69-5003 v. State of Georgia. Lucious Jackson, Jr., Petitioner, 69-5030 v. State of Georgia.	}	On Writs of Certiorari to the Supreme Court of Georgia.
Elmer Branch, Petitioner, 69-5031 v. State of Texas.	}	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[June —, 1972]

PER CURIAM.

Petitioner in No. 69-5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga. Code Ann. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S. E. 2d 628 (1969). Petitioner in No. 69-5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga. Code Ann. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 790, 171 S. E. 2d 501 (1969). Petitioner in No. 69-5031 was convicted of rape in Texas and was sentenced to death pursuant to Tex. Penal Code Ann., Art. 1189 (1961). 447 S. W. 2d 932 (Tex. Ct. Crim. App. 1969). Certiorari was granted limited to the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

B

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 13, 1972

MEMORANDUM TO THE CONFERENCE

Re: Capital Cases

There is quite a backlog in the Print Shop. Accord-
ingly, in view of the time limitations pressing upon all of
us, I send herewith to each of you a xeroxed copy of a draft
I have sent to the printer today.

PS.
P.S.

REPRODUCED FROM THE COLLECTIO

THE MANUSCRIPT DIVISION

U.S. SUPREME COURT CONFERENCE

SUPREME COURT OF THE UNITED STATES

Nos. 69-5003, 69-5030, and 69-5031

To: The Chief Justice
Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

William Henry Furman,)
)
Petitioner,)
)
69-5003 v.)
)
State of Georgia.)

From: Stewart, J.
Circulated: JUN 13 1972
Recirculated:

On Writ of Certiorari to the
Supreme Court of Georgia.

Lucius Jackson, Jr.,)
)
Petitioner,)
)
69-5030 v.)
)
State of Georgia.)

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

Elmer Branch,)
)
Petitioner,)
)
69-5031 v.)
)
State of Texas.)

[June , 1972]

MR. JUSTICE STEWART, concurring in the judgment.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the

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5

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES Stewart, J.

Nos. 69-5003, 69-5030, AND 69-5031 Circulated: _____

Recirculated: JUN 14 1972

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writs of Certiorari to the
Supreme Court of Georgia.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

MR. JUSTICE STEWART, concurring in the judgment.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. For these and other reasons three of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible under the Eighth and Fourteenth Amendments. Though their case is a strong one, I find it unnecessary to reach the ultimate question they would decide.

The opinions of other Justices today have set out in admirable and thorough detail the origins and judicial history of the Eighth Amendment's guarantee against

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OFFICE OF THE CLERK OF THE SUPREME COURT

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 20, 1972

69-5003 - Furman v. Georgia
and related cases

Dear Bill,

The proposed Per Curiam you have circulated in these cases seems fine to me.

Sincerely yours,

P.S.
/

Mr. Justice Brennan

Copies to the Conference

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OF THE MANUSCRIPT DIVISION

U.S. LIBRARY OF CONGRESS

Style & p. 2

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Nos. 69-5003, 69-5030, AND 69-5031 Recirculated: JUN 27 1972

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writs of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June 29, 1972]

MR. JUSTICE STEWART, concurring in the judgment.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. But I find it unnecessary to reach the ultimate question they would decide. See *Ashwander v. Tennessee Valley Authority*, 397 U. S. 288, 347 (Brandeis, J., concurring).

The opinions of other Justices today have set out in admirable and thorough detail the origins and judicial

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U.S. SUPREME COURT

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

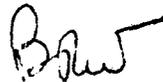
June 13, 1972

MEMORANDUM TO THE CONFERENCE

Re: Nos. 69-5003, 69-5030 and 69-5031

I have sent to the Printer the attached initial draft of a concurring opinion in the capital cases.

Sincerely,



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Capital cases: Nos. 69-5003, 69-5030 & 69-5031
Mr. Justice White, 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. In joining the judgment to reverse these convictions, therefore, I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would not transgress the Eighth Amendment. That question, so ably argued by several of my Brethren, is not presented by these cases and need not be decided.

The narrower question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not

1
B

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 6-14-72

Nos. 69-5003, 69-5030, AND 69-5031

Recirculated: _____

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writs of Certiorari to the
Supreme Court of Georgia.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

MR. JUSTICE WHITE, 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. In joining the judgment to reverse these convictions, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would not transgress the Eighth Amendment. That question, so ably argued by several of my Brethren, is not presented by these cases and need not be decided.

The narrower question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any

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U.S. DEPARTMENT OF JUSTICE

New
1, 2, 3

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan *
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Recirculated: 6/13/72

Nos. 69-5003, 69-5030, and 69-5031

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writ of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

Memorandum of Mr. JUSTICE MARSHALL.

These three cases present the question whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.¹

¹ Certiorari was also granted in a fourth case, *Aikens v. California*, No. 68-5027, but the writ was dismissed after the California Supreme Court held that capital punishment violates the State Constitution. — U. S. —. See *People v. Anderson*, 6 Cal. 3d 288, 493 P. 2d 880, 100 Cal. Rptr. 152, cert. denied, — U. S. — (1972). The California decision reduced by slightly more than 100 the number of persons currently awaiting execution.

Wm. Brennan
0071

221

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 27, 1972

69-5003 etc.

MEMORANDUM TO THE CONFERENCE

Mr. Rodak tells me there are about 15 new capital cases that have accumulated this term. In addition, there are perhaps three or four more which have been held for the capital cases and some other. I have asked him to list all these in two groups for the conferences of April 14 and 21. I hope that this meets with the approval of the Conference.

H.A.B.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 18, 1972

Re: Capital Cases

69-5003, 69-5030, 69-5031

Dear Lewis:

I have now completed my review of your circulation of May 12. As I told you yesterday, I think it is excellent. It is an obvious product of many hours of hard work. It demonstrates the shallowness of many of the arguments made by the petitioners.

When the circulations settle down, I shall probably ask the privilege of joining the opinion even though you do have in it some comments that are essentially personal.

It is of no consequence, of course, but your clerks may wish, for the next rerun, to have the following typographical errors corrected: page 20, next to the last line of the first full paragraph in the footnote; page 34, 15th line; page 42, 9th line.

Sincerely,



Mr. Justice Powell

Supreme Court of the United States

Memorandum

June 5, 1972

Dear Lewis -

Here it is. Unless you object, I may circulate it.

H.C.B.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1972

MEMORANDUM TO THE CONFERENCE

Re: Capital Cases

I circulate the enclosed as an expression of my present views. It is put together on the assumption that the tentative vote at Conference will be the final one.

Sincerely,

H. A. B.

69-5003
etc.

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REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

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

2nd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Ses: 6/8/72

Nos. 69-5003, 69-5030, AND 69-5031

Recirculated: _____

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writs of Certiorari to the
Supreme Court of Georgia.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

Memorandum of Mr. JUSTICE BLACKMUN.

I join the respective opinions of THE CHIEF JUSTICE and of MR. JUSTICE POWELL, and add only the following, somewhat personal, comments.

1. Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against

U.S. DEPARTMENT OF JUSTICE

3

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1972

Re: Capital Cases

Dear Chief:

Please join me in your opinion.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT

B

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1972

Re: Capital Cases

Dear Lewis:

Please join me in your opinion.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Conference

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OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT RECORDS

3
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1972

Re: Capital Cases

Dear Bill:

Please join me in your opinion.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

REPRODUCED FROM THE COLLECTION

OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT

13
pp. 2, 7, 9, 10

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

4th DRAFT

SUPREME COURT OF THE UNITED STATES From: Blackmun, J.

Nos. 69-5003, 69-5030, AND 69-5031

Circulated: _____
Recirculated: 6/21/72

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writs of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

MR. JUSTICE BLACKMUN, dissenting.

I join the respective opinions of THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, and add only the following, somewhat personal, comments.

1. Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against

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OFFICE OF THE CLERK OF THE SUPREME COURT

June 23, 1972

69-5003, etc.

Dear Bill:

The disposition of the capital cases you propose with your note of this date is acceptable to me. I have only the following suggestions:

1. I assume that No. 71-6204, Brown v. Virginia, and No. 71-6539, Menthen v. Oklahoma, which appear on the list for June 26, will be added to the remand certs.

2. I should be noted as not participating in No. 71-5073, Pope v. Nebraska, which appears on page 17 of the June 22 list. Mr. Rodak has been advised as to this.

Sincerely,

HAB

Mr. Justice Brennan
Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 18, 1972

Re: Capital Cases

69-5003 etc.

Dear Harry:

Thank you for your most gracious note.

I will be happy to welcome any suggestions, and to depersonalize any comments. The latter, of course, will be appropriate if others join.

It would be an honor to have you with me.

Sincerely,



Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 6, 1972

69-5003 etc.

Dear Harry:

Your memorandum in the capital cases is superb - sensitive, well written and unanswerable.

With your permission, I would like to "crib" some of your facts on federal legislation.

I have one thought which I would like to discuss with you. You might call me at your convenience.

Sincerely,

Lewis

Mr. Justice Blackmun

June 6, 1972

69-5003, 69-5030, 69-5031

Dear Harry:

Your memorandum in the capital cases is superb - sensitive, well written and unanswerable.

With your permission, I would like to "crib" some of your facts on federal legislation.

I have one thought which I would like to discuss with you. You might call me at your convenience.

Sincerely,

LFP

Mr. Justice Blackmun

bc: Larry

My thanks for your memorandum with which I am in complete accord.

L. F. P., Jr.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 14, 1972

Re: Capital Cases

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 14, 1972

Re: Capital Cases

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

cc: The Conference

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U.S. DEPARTMENT OF CONGRESS

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 17, 1972

69-5003

Re: Capital Cases

Dear Harry:

I am not joining your opinion in the capital cases only because of its manifest personal character.

As you know, I have the greatest admiration for what you have said so eloquently.

Sincerely,

Lewis

Mr. Justice Blackmun

cc: The Conference

*Wm
Brewer
JCF 71*

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1

M

June 23, 1972

Capital Cases

Gentlemen:

Here is a recirculation of my dissenting opinion in the capital cases.

As I have attempted, in the introductory portion of the opinion, to identify briefly and quite generally the position taken by each of you, I would appreciate being advised if you think I have been unfair or inaccurate. The problem, of course, was how to characterize your respective positions in a sentence. I added a brief paragraph at the end of footnote No. 1 for the purpose of explaining the inadequacy and incompleteness of my reference.

Please feel entirely free to suggest any different language.

Sincerely,

Lewis

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

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IN THE MANUSCRIPT DIVISION

OF THE SUPREME COURT

Change throughout

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Rehnquist

4th DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: JUN 26 1972

Nos. 69-5003, 69-5030, AND 69-5031

Recirculated: _____

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

On Writs of Certiorari to the
Supreme Court of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[May —, 1972]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

The Court granted certiorari in these cases to consider whether the death penalty is any longer a permissible form of punishment. 403 U. S. 952 (1971). It is the judgment of five Justices that the death penalty, as customarily prescribed and implemented in this country today, offends the constitutional prohibition against cruel and unusual punishment. The reasons for that judgment are stated in five separate opinions, expressing as many separate rationales. In my view, none of these opinions provides a constitutionally adequate foundation for the Court's decision.

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U.S. DEPARTMENT OF JUSTICE

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

1st DRAFT

SUPREME COURT OF THE UNITED STATES

MEMORANDUM OF MR. JUSTICE REHNQUIST

Re: CAPITAL CASES

[June —, 1972]

From: Rehnquist, J.

Circulated: 6/13/72

Recirculated: _____

Petitioners seek from this Court a decision that would at one fell swoop invalidate laws enacted by Congress and 41 of the 50 state legislatures, and would consign to the limbo of unconstitutionality under a single rubric penalties for offenses as varied and unique as murder, piracy, mutiny, highjacking, and desertion in the face of the enemy. Such a holding would necessarily bring into sharp relief the fundamental question of the role of judicial review in a democratic society. How can government, by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?

The answer, of course, is found in Hamilton's Federalist Paper No. 78 and in Chief Justice Marshall's classic opinion in *Marbury v. Madison*, 1 Cranch 137 (1803). An oft told story since then, it bears summarization once more. Sovereignty resides ultimately in the people as a whole, and by adopting through their States a written Constitution for the Nation, and subsequently adding amendments to that instrument, they have both granted certain powers to the national Government, and denied other powers to the national and the state governments. Courts are exercising no more than the judicial function conferred upon them by Art. III of the Constitution when they assess, in a case before them, whether or not a particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the

3
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 15, 1973

Re: Capital Cases

Dear Chief:

Please join me.

Sincerely,
WR

Mr. Chief Justice

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 15, 1972

Re: Capital Cases

Dear Lewis:

Please join me.

Sincerely,
W. H. Rehnquist

Mr. Justice Powell

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8
M

page 1 and
stylistic changes

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 69-5003, 69-5030, AND 69-5031

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell

William Henry Furman,
Petitioner,
69-5003 v.
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

From: Rehnquist, J.

Circulated: _____

Recirculated: 6/20/72
On Writs of Certiorari to the
Supreme Court of Georgia.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, dissenting.

The Court's judgment today strikes down a penalty that our Nation's legislators have thought necessary since our country was founded. My Brothers DOUGLAS, BRENNAN, and MARSHALL would at one fell swoop invalidate laws enacted by Congress and 41 of the 50 state legislatures and would consign to the limbo of unconstitutionality under a single rubric penalties for offenses as varied and unique as murder, piracy, mutiny, highjacking, and desertion in the face of the enemy. My Brothers STEWART and WHITE, asserting reliance on a more limited rationale—the reluctance of judges and juries actually to impose the death penalty in the majority of capital cases—join in the judgment in these cases. Whatever its precise rationale, today's holding necessarily brings

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U.S. SUPREME COURT RECORDS