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Texas Death Penalty Statutes Comply with the Discretion Requirements of the United States Supreme Court.

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sentation," however, never developed beyond the right of an individual to an "equally weighted" vote.⁵² The argument has been advanced that to correct the inequalities of past discrimination, "benign" redistricting should be used to insure relatively equal representation to various minorities. This argument has been consistently rejected by the federal courts.⁵³ In *Whitcomb v. Chavis*,⁵⁴ the Court held that interest groups as groups have no constitutional right to legislative representation; that the equalization of representation is not a constitutional requirement.⁵⁵

The potential dilution argument, on the other hand, is based on the same precepts as the accepted present dilution standard. The reapportionment scheme in *Gilbert* allegedly prevented an identifiable minority group from obtaining a population majority in one precinct. The concept of "equality of opportunity to participate in the political processes" cannot coexist with the allowance of reapportionment schemes which continually fragment potential majorities. By avoiding a proper determination of potential dilution, *Gilbert* sanctions reapportionment schemes that simultaneously conform to equal population standards, while working a dilution of the voting strength of various minorities by continually breaking up and redistributing potential population majorities.

The resolution of the potential dilution argument will depend largely upon the treatment by the Supreme Court of *Beer* and *City of Richmond*. Positive treatment of these cases, however, would still leave future challengers of reapportionment schemes facing the manifest unwillingness of courts to expand reapportionment standards of review.

Stephen L. Hubbard

CONSTITUTIONAL LAW—Death Penalty—Texas Death Penalty
Statutes Comply with the Discretion Requirements
of the United States Supreme Court

Jurek v. State,

522 S.W.2d 934 (Tex. Crim. App. 1975).

Appellant Jurek was convicted of capital murder in the 24th Judicial District Court of DeWitt County, Texas. The indictment charged that Jurek ab-

52. See Dixon, *The Warren Court Crusade For The Holy Grail of "One Man—One Vote,"* 1969 SUP. CT. REV. 219.

53. E.g., *Gilbert v. Sterrett*, 509 F.2d 1389, 1394 (5th Cir. 1975). Compare *Taylor v. McKeithen*, 407 U.S. 191, 193-94 (1972) with *Taylor v. McKeithen*, 499 F.2d 893, 910 (5th Cir. 1974).

54. 403 U.S. 124 (1971).

55. *Id.* at 153; *Wendler v. Stone*, 350 F. Supp. 838, 849 (S.D. Fla. 1972).

ducted a 10 year old girl and drove her to the outskirts of the town of Cuero where, when she rebuffed his sexual advances, he choked her and threw her body into the Guadalupe River. On appeal to the Court of Criminal Appeals, Jurek contended that the assessment of the death penalty under Article 1257 of the Texas Penal Code¹ and Article 37.071 of the Texas Code of Criminal Procedure was cruel and unusual punishment under the ruling of the Supreme Court of the United States in *Furman v. Georgia*.² Held—*Affirmed*. The Texas statute satisfies the requirements of *Furman* by satisfactorily guiding the deliberations of the jury so as to guard against arbitrary infliction of the death penalty.

The Supreme Court in *Furman v. Georgia*³ and its companion Texas case, *Branch v. Texas*⁴ declared that the death penalty, as imposed by the particular state statutes which were then before the Court, was "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."⁵ In arriving at this decision, the Court considered abundant persuasive authority, which encompassed treatments of the political and philosophic implications of the death penalty, and prior cases dealing with the question of "cruel and unusual punishment."⁶ The Court in *Furman* also explicitly denied that it was overruling its recent decision in *McGautha v. California*,⁷ although the two decisions are difficult to reconcile. *McGautha* held that California and Ohio procedures allowing juries the absolute discretion to pronounce life or death sentences did not violate the due process requirement of the Constitution of the United States.⁸ Yet the opinions in *Furman*, delivered only two years later by the same Court, suggest that such "uncontrolled discretion" in the sentencing authority was the reason for striking down the disputed statutes.⁹

Only two opinions in *Furman* have generally been interpreted by commentators to find the death penalty unconstitutional *per se*;¹⁰ the remaining members of the Court suggested that there may well be a statutory procedure for inflicting the death penalty which the Court could find valid.¹¹ The nine separate opinions provide little in terms of concrete guidelines for drafting

1. Article 1257 was superseded by § 19.03 TEX. CRIM. PROC. ANN. (1974).

2. 408 U.S. 238 (1972).

3. *Id.*

4. 447 S.W.2d 932 (Tex. Crim. App. 1969).

5. *Furman v. Georgia*, 408 U.S. 238, 240 (1972).

6. *See, e.g.*, *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349 (1910). *See generally* REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953; H. BEDAU, THE DEATH PENALTY IN AMERICA (1964); R. CLARK, CRIME IN AMERICA (1970).

7. 402 U.S. 183 (1971).

8. *Id.* at 196-208.

9. *Furman v. Georgia*, 408 U.S. 238, 253 (1972).

10. *Id.* at 305, 370-71 (Brennan and Marshall, JJ., concurring).

11. *Id.* at 257, 306, 310-11 (Chief Justice Burger, Justices Blackmun, Powell and Rehnquist) (separate opinions).

such a procedure which can meet constitutional standards.¹² Justices Douglas and White both focused their disapproval on procedures which allow discretion to the jury in imposing the death penalty.¹³ Justice Stewart, however, was more alarmed by the arbitrariness with which the death penalty is so "wantonly and freakishly imposed."¹⁴ This arbitrariness is a result of the discretion granted to the sentencing authority. Therefore all three of these opinions might be interpreted as calling for statutes which remove all discretion from the sentencing authority, thereby mandating death for certain crimes.

In response to *Furman*, several states have enacted statutes which purport to be mandatory.¹⁵ These statutes generally attempt to remove all discretion from the sentencing authority by requiring death for certain narrowly defined crimes, such as murder by the use of explosives,¹⁶ or for the murder of certain types of victims, such as law enforcement officers.¹⁷ North Carolina has imposed a mandatory death penalty for first degree murder by repealing the mercy provision in its statute, which allowed a jury to recommend life imprisonment.¹⁸

Other state courts, however, have recognized that "discretion and judgment are essential to the judicial process, and are present at all stages of its progression."¹⁹ States taking this approach have, since *Furman*, sought to direct and control the discretion allowed, at least as to the sentencing authority, by delineating adequate guidelines so that the results are "controlled by clear and objective standards so as to produce non-discriminatory application."²⁰

A common approach among the states which permit a jury to exercise limited discretion is to enumerate certain aggravating circumstances which, if the jury finds them to be present, are then weighed against mitigating circumstances.²¹ An example of such a procedure is found in the newly-enacted Florida Murder Statute.²² Aggravating circumstances in this statute

12. *Id.* at 375, 411, 417, 465; *State v. Fowler*, 203 S.E.2d 803 (N.C.), *cert. granted*, 419 U.S. 963 (1974), which have recently been argued before the Court, are attempts by the Court to deal with the unsettled questions of *Furman*.

13. *Furman v. Georgia*, 408 U.S. 238, 253, 311 (1972) (concurring opinions).

14. *Id.* at 310 (concurring opinion).

15. *E.g.*, IND. ANN. STAT. § 10-3401 (Supp. 1973); LA. REV. STAT. ANN. § 14:30 (Supp. 1974); N.M. STAT. ANN. § 40A-29-2 (Supp. 1973).

16. IND. ANN. STAT. § 10-3401(b)(2) (Supp. 1974).

17. *Id.* at § 10-3401(b)(1); *accord*, GA. CODE ANN. § 27-2534.1(b)(8) (Supp. 1974); TENN. CODE ANN. § 39-2402(1)(c) (Supp. 1974); TEX. PENAL CODE ANN. § 19.03(a)(1) (1974).

18. N.C. GEN. STAT. § 14-17 (Supp. 1974).

19. *State v. Dixon*, 283 So. 2d 1, 6 (Fla. 1973); *accord*, *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974).

20. *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974).

21. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973).

22. FLA. STAT. ANN. § 921.141 (Supp. 1975); *see* GA. CODE ANN. § 27-2534.1 (Supp. 1974).

include knowingly creating a great risk of death to many persons, committing a capital felony for pecuniary gain, and committing a capital felony which is unusually "heinous, atrocious or cruel."²³ The statute's mitigating circumstances include the fact that the defendant has no prior significant criminal history, that he was under the influence of extreme emotional disturbance, or that his age might have affected his culpability.²⁴ The Florida statute allows considerable discretion in sentencing, however, in that the court is not bound by the jury's recommendation on punishment.²⁵

The Florida statute is only one example of the limited-discretion statutes, all of which attempt to control, in various ways and degrees, the discretion of the sentencing authority. Yet discretion remains as well at other levels of the criminal process, from prosecutorial discretion in fixing the charge to gubernatorial discretion in awarding clemency. Even under some of the so-called "mandatory" statutes, for example, the jury can avoid imposing the death penalty by finding the defendant guilty of a lesser, included offense. The Virginia Supreme Court in *Jefferson v. Commonwealth*,²⁶ however, limited the discretion of the sentencing authority by asserting that under the Virginia statute²⁷ the crime of killing a prison guard by an inmate does not provide for any lesser, included offense.²⁸ Yet the fact situation in that case, where the defendant was technically an "inmate" of one of Virginia's prisons, but actually killed the prison guard in a courtroom, provides an example of the possibility for discretion which remains in fixing the charge.²⁹ While the possibilities for discretion existing throughout the criminal process were noted in the *Furman* opinion,³⁰ it seems likely that whatever guidelines may be immediately forthcoming from the Court will focus on discretion in the sentencing procedure itself.

The Texas death penalty statutes were enacted in an attempt to create a statute which would meet the requirements of *Furman*.³¹ For a defendant

23. FLA. STAT. ANN. § 921.141(5)(c), (f), (h) (Supp. 1975).

24. *Id.* § 921.141(6)(a), (b), (g).

25. *Id.* § 921.141(3). See also GA. CODE CRIM. PROC. ANN. § 27-2528 (Supp. 1974).

26. 204 S.E.2d 258 (Va. 1974).

27. VA. CODE ANN. § 53-291 (1974).

28. *Jefferson v. Commonwealth*, 204 S.E.2d 258, 261 (Va. 1974).

29. The alert prosecutor who wishes to do so may find details with which he can invoke the death penalty. For example, in *State v. Kleasen*, Crim. No. 48461, Dist. Ct. of Travis County, 147th Judicial Dist. of Texas, June 2, 1975, the defendant was charged with capital murder on the grounds that two watches belonging to the deceased were found in his trailer. Clearly the legislative intent of TEX. PENAL CODE § 19.03(a)(2), "the person intentionally commits murder in the course of committing or attempting to commit . . . burglary, robbery . . ." was never meant to encompass such a technicality unless the state is seriously contending that the murder was committed for two watches.

30. *Furman v. Georgia*, 408 U.S. 238, 330 (1972).

31. Note, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410, 420-21 (1973) (recounts the careful drafting of the Texas statute, in contrast to the hurried enactment of the Florida statute); see Ehrhardt,

to be found guilty of capital murder under Section 19.03 of the Texas Penal Code,³² the jury must find he has committed murder under at least one of the aggravating circumstances set out in the statute.³³ In its list of aggravating circumstances, the Texas statute resembles the limited-discretion statutes of states such as Florida.³⁴ Yet unlike those states which provide for mitigating circumstances, Texas requires a unanimous, affirmative answer to all three questions which are considered in the punishment phase of the trial, before the death penalty may be inflicted.³⁵ Thus the Texas statute has been classified as "quasi-mandatory."³⁶

In *Jurek v. State*,³⁷ the Texas Court of Criminal Appeals upheld the constitutionality of the Texas death penalty statutes. In so doing, the Texas court joined five other states which have upheld death penalty statutes in the aftermath of the Supreme Court's decision in *Furman*.³⁸ On their

Hubbart, *et al*, *The Aftermath of Furman; The Florida Experience*, 64 J. CRIM. L. & CRIM., 1, 21 (1973).

32. TEX. PENAL CODE ANN. § 19.03 (1974).

33. *Id.* § 19.03. The statute provides:

Capital Murder

(a) A person commits an offense if he commits murder as defined under Section 19.02(a) of this code and:

- (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
- (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;
- (3) the person commits the murder for remuneration or the promise of remuneration;
- (4) the person commits the murder while escaping or attempting to escape from a penal institution; or
- (5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Id. § 19.03.

34. FLA. STAT. ANN. § 921.141 (Supp. 1975). See also GA. CODE ANN. § 27-2528 (Supp. 1974).

35. TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Supp. 1975) reads, in part:

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

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

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

36. Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1709 n.133 (1974).

37. 522 S.W.2d 934 (Tex. Crim. App. 1975).

38. *State v. Dickerson*, 298 A.2d 761 (Del. 1972); *State v. Dixon*, 283 So. 2d 1

face, the Texas statutes seem to provide the jury with more precisely drawn guidelines than statutes such as Florida's, which sets forth a similar list of aggravating circumstances.³⁹ The Florida statute is replete with terms so vague that the jury continues to enjoy a considerable amount of discretion in determining, for instance, whether a particular murder is "heinous, atrocious or cruel."⁴⁰ Additionally, jurors under the Florida-type statute are asked to consider a list of mitigating circumstances; then they are to determine whether "sufficient aggravating circumstances exist, and if so whether they are outweighed by sufficient mitigating circumstances."⁴¹ The statute offers no suggested procedure for determining the "sufficiency" of these factors, or what weight they are to be given. In contrast, the Texas procedure provides quite rigidly that, if the jury finds the defendant guilty of capital murder and unanimously answers the three questions in the affirmative, the death penalty *must* be imposed; the prosecutor may no longer waive the death penalty.⁴²

Thus, the Texas statute is less discretionary and more mandatory than the limited-discretion statutes. It does, however, allow for mitigating circumstances, which the totally mandatory statutes omit. The *Furman* opinions when read together seem to suggest⁴³ and some courts have inferred,⁴⁴ that only a totally mandatory statute would be upheld by the Supreme Court. Two of the Justices in that case, however, were aware of the problems such statutes can create.⁴⁵ Foremost among these problems is the fact that when faced with mandatory penalties, juries have historically responded by handing down acquittals with increasing frequency when for some reason they do not wish to impose the mandated penalty.⁴⁶

The Texas statute appears to answer objections to both mandatory and limited-discretion-type statutes. Some problems, however, still remain. A serious issue has been encountered as a result of the second of the three questions a jury must answer—whether there is a "probability that the defendant would commit criminal acts of violence that would constitute a continuing

(Fla. 1973); *Coley v. State*, 204 S.E.2d 612 (Ga. 1974); *State v. Jarrett*, 202 S.E.2d 721 (N.C. 1974); *Jefferson v. Commonwealth*, 204 S.E.2d 258 (Va. 1974). The court in *State v. Winkle*, 528 P.2d 467, 468 (Utah 1975) took a maverick stance in flatly refusing to interpret Utah's statute under *Furman* until the Supreme Court delivers further guidelines. The amusing opinion reflects the frustration many state courts have felt in this regard.

39. FLA. STAT. ANN. § 921.141(5) (Supp. 1975).

40. See *State v. Dixon*, 283 So. 2d 1, 17-18 (Fla. 1973) (dissenting opinion); FLA. STAT. ANN. § 921.141(5)(h) (Supp. 1975).

41. FLA. STAT. ANN. § 921.141(5)(h) (Supp. 1975).

42. Note, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410, 422 (1973).

43. See *Furman v. Georgia*, 408 U.S. 238, 311 (1972).

44. E.g., *Bartholomey v. State*, 297 A.2d 696, 700-701 (Md. Ct. App. 1972); *State v. Waddell*, 194 S.E.2d 19, 28-29 (N.C. 1973).

45. *Furman v. Georgia*, 408 U.S. 238, 339, 413 (1972).

46. *Id.* See also *McGautha v. California*, 402 U.S. 183, 199 (1971).

threat to society."⁴⁷ As Justice Odom pointed out in *Jurek*, the Texas statute is unique in requiring jurors to base their critical decision not on the defendant's *prior* activities—a matter of record and empirically measurable—but on a *prediction* of his *future* behavior.⁴⁸ This must be found "beyond a reasonable doubt."⁴⁹ Evidence of the defendant's past criminal record is admissible in the punishment phase of the proceedings,⁵⁰ but the jury is not instructed that this is the basis on which they are to find a "probability" of future criminal behavior. The very meaning of the term, as Justice Odom observes, is perhaps unconstitutionally vague.⁵¹ The jury is given no statutory guidelines as to how to interpret the term, or as to how strong the probability must be. Moreover, as applied to murderers, the question would require a negative answer because statistics show that convicted murderers as a "class" are least likely to be repeat-offenders.⁵²

A further issue raised by this "probability" section of the Texas statute is the constitutional problem of due process involved in punishing a defendant for possible future conduct.⁵³ As the Court of Criminal Appeals observed in a prior case, though it may be desirable for the state to anticipate and prevent future criminal activity, the constitutional price for doing so is too high.⁵⁴ The Texas statute, as it reads, permits a jury to put a man to death, not because of what he has done, but because of what he may do in the future.

In *Jurek*, Justice Odom maintained that the Texas statute was in fact mandatory, "unless this court is to presume that jurors will ignore their oaths and return perjured answers to one or more of the issues . . . solely to arrive at the result they may feel is proper in a given case."⁵⁵ Events in a recent capital murder case, however, suggest that Justice Odom's view may be an oversimplification.⁵⁶ One juror's account of the panel's deliberations in that case illustrates a fact which juries contemplate in assessing the death penalty

47. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Supp. 1975).

48. *Jurek v. State*, 522 S.W.2d 934, 945 (Tex. Crim. App. 1975).

49. TEX. CODE CRIM. PROC. ANN. art. 37.071(c) (Supp. 1975).

50. *Id.* at (a).

51. *Jurek v. State*, 522 S.W.2d 934, 945 (Tex. Crim. App. 1975). The Justice queries:

What did the Legislature mean when it provided that a man's life or death shall rest upon whether there exists a 'probability' that he will perform certain acts in the future? Did it mean, as the words read, that there is a probability, some probability, any probability?

Id. at 945.

52. *Furman v. Georgia*, 408 U.S. 238, 355 (1972).

53. *Jurek v. State*, 522 S.W.2d 934, 945 n. 5 (Tex. Crim. App. 1975); see *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972).

54. *Baker v. State*, 478 S.W.2d 445, 448 (Tex. Crim. App. 1972).

55. *Jurek v. State*, 522 S.W.2d 934, 944 (Tex. Crim. App. 1975).

56. In that case, after the jury had handed down the death penalty, one of the jurors called a press conference to announce that he had reconsidered his affirmative answer on the probability question. *San Antonio Light*, June 5, 1975, at 3, col. 2.

—the possibility of parole. Juror Lewis reported that the jury's decision was based, not on their answers to three statutory questions, but on their fear that if the defendant were sentenced to life in prison, "he'll be out in no time."⁵⁷

Although the "probability" question is the most vulnerable part of article 37.01, the other sections are not without ambiguities. In article 37.071(b) (1) the jury is asked to determine whether the actor's deliberate conduct caused the death with which he is charged, and whether that death was the defendant's reasonable expectation. But a jury needs assistance in interpreting the term "deliberate." Murder, as defined in section 19.02, entails that the defendant's killing of the deceased be "intentional" and "knowing." Before a jury can be required to answer these questions, the defendant must have been convicted of capital murder. Therefore, the "deliberate conduct" issue already would have been determined, unless "deliberate" has some other meaning.⁵⁸ The statute offers no suggestion.

The third question the jury must consider, as required by article 37.071 (b)(3) is whether the defendant's murder of the deceased was unreasonable in response to any provocation which might have been present. This issue should also have been determined in the guilt-or-innocence phase of the trial. Presumably in this context, the jury is asked to consider a provocation not sufficient for acquittal but material enough to be considered a mitigating circumstance. But this is not clear from the wording of the statute. Furthermore, the statute does not clarify whether a defendant could be given the death penalty for a death not factually caused by him, such as in the case of a conspirator, or one who instigated a riot.⁵⁹

Regardless of their weaknesses, the Texas death penalty statutes undoubtedly have restricted the almost total discretion previously given to juries⁶⁰ and should therefore considerably limit the possibilities for arbitrariness demonstrated by older cases.⁶¹

The upholding of these statutes by the Court of Criminal Appeals in *Jurek* indicates they will continue to be upheld, despite criticism, until the United

57. *Id.* at 3, col. 2.

58. Under Texas' bifurcated trial system (TEX. CODE CRIM. PROC. ANN. art. 37.07 (2)(a-d)), in a capital case in which the State seeks the death penalty, punishment is decided in a second "phase" of the trial, after the question of guilt or innocence has been resolved. This aspect of the Texas procedure alone, however, is not likely to assure approval from the United States Supreme Court, as several of the statutes stricken down by *Furman* provided for the same type of bifurcated procedure. *E.g.*, CAL. PENAL CODE ANN. § 190-90.1 (1971); CONN. GEN. STAT. REV. (Supp. 1969); TEX. CODE CRIM. PROC. ANN. art. 37.07(2)(b) (Supp. 1970-71).

59. Searcy and Paterson, *Practice Commentary*, 2 TEX. PENAL CODE ANN. 105, 106 (1974).

60. Tex. Laws 1927, ch. 274, § 2, at 412; Tex. Laws 1913, ch. 116, § 1, at 238; Tex. Laws 1858, ch. 121, tit. 17, ch. 15, at 173.

61. *E.g.*, *Oliver v. State*, 155 Tex. Crim. 461, 464, 236 S.W.2d 143, 145 (1950) (assessment of death for murder with malice within province of jury); *Gatlin v. State*, 113 Tex. Crim. 247, 20 S.W.2d 431, 435 (1929).