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CAPITAL PUNISHMENT IN SOUTH CAROLINA: THE END OF AN ERA
Laughlin McDonald *

I. INTRODUCTION

On the last day of 1971 Term the United States Supreme Court handed down its decision in Furman v. Georgia1 invalidating the capital sentences of approximately 600 inmates on death rows across the country. The decision was at once unprecedented yet the result of a clear abolitionist trend at almost every level of the system of criminal justice of the United States. The decision was surprising, unexpected, an apparently radical break with our history, but it was also a decision whose time was irresistibly at hand. Public reaction to the ruling conceded as much. While there were protests from some, those protests seemed perfunctory. Certainly they were not of the same intensity and conviction as those which followed, and still follow, the school desegregation cases of the fifties or the criminal confession cases of the sixties. The public mood at the time of announcement of the decision was one of acquiescence and acknowledgment that in abolishing the death penalty the court had but done in a formal way what had come to be our actual practice.

Furman v. Georgia settles certain issues beyond all question. It settles the fact all current death sentences are unconstitutional and may not be carried out.2 Following Furman v. Georgia, all of the 118 capital cases before it were reversed by the Supreme Court as to sentence.3 These cases, from 26 states,


1. 408 U.S. 283, 33 L. Ed. 2d 346 (1972). Jackson v. Georgia and Branch v. Texas were the remaining cases in the consolidated opinion. On October 10, 1972, the Supreme Court denied motions for rehearing filed by Texas, Georgia and other states affected by Furman v. Georgia. --- U.S. ---, 34 L. Ed. 2d 163.

2. "The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings." Id. at 346.

involved widely differing factual situations and procedural postures. Some were appeals and petitions for certiorari from state courts including those in which the state court had determined the Eighth Amendment issue and those in which it had not. Some were state post-conviction cases in which the Eighth Amendment had been raised and in which it had not. Some were federal habeas corpus cases including those in which the Eighth Amendment issue was apparently never raised. While in most cases sentencing was entirely within the jury's discretion, in some cases the judge did the sentencing or had the power of overriding a jury recommendation of either life or death. Some cases involved brutal murder, some mass murder, and some the murder of law enforcement officers, and aggravated rape. Furman thus settles the fact that "capital punishment within the confines of the statutes now before us has for all practical purposes run its course" and that the sentence of death may not be imposed upon those defendants awaiting trial on charges for which capital punishment was formerly an alternative.


14. Dissenting opinion of Justice Powell, 33 L. Ed. 2d at 452.
What the decision does not clearly settle, however, is whether capital punishment per se has also run its course, or whether some version embodied in other and appropriate statutes would pass the test of constitutionality. Only two Justices for the majority, Brennan and Marshall, specifically held capital punishment under all circumstances to be a violation of the Eighth Amendment. The other three Justices speaking for the majority, White, Stewart and Douglas, did not reach the ultimate issue decided by Brennan and Marshall basing their opinions rather upon the arbitrary and discriminatory way in which the death sentence has been imposed in the United States. The four dissenters, even though two of them, Chief Justice Burger and Justice Blackmun, confessed that they were personally opposed to the death penalty, and a third,

15. See concurring opinion of Justice Brennan: "The punishment of death is therefore 'cruel and unusual' and the States may no longer inflict it as a punishment for crimes." 33 L. Ed. 2d at 387; and concurring opinion of Justice Marshall: "We achieve 'a major milestone in the long road up from barbarism' [footnote omitted] and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment." 33 L. Ed. 2d at 425.

16. See concurring opinion of Justice Stewart: "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." 33 L. Ed. 2d at 390; concurring opinion of Justice White: "I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." 33 L. Ed. 2d at 392; and, concurring opinion of Justice Douglas: "Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." 33 L. Ed. 2d at 359.

17. See dissenting opinion of Chief Justice Burger: "If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes." 33 L. Ed. 2d at 428; and dissenting opinion of Justice Blackmun: "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 the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and
Justice Powell, regretted "the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness," all invoked judicial restraint in justification of their stand not to hold the death penalty unconstitutional.

Although the majority opinion decides much, much is left in doubt. Since only two members of the Court found the death penalty unconstitutional per se, the dissenters indulged the implied assumption that capital punishment under some circumstances would be constitutional. Chief Justice Burger suggests that state legislatures might comply with the Court's ruling by providing standards for judges and juries to follow in determining sentence in capital cases or by defining with greater precision than heretofore those crimes for which the death penalty could be imposed. He also speculates that the

adopted in the several opinions filed by the Justices who vote to reverse these convictions." 33 L. Ed. 2d at 445-46.

18. 33 L. Ed. 2d at 480.

19. See dissenting opinion of Chief Justice Burger: "The highest judicial duty is to recognize the limits on judicial power to permit the democratic processes to deal with matters falling outside those limits." 33 L. Ed. 2d at 445; dissenting opinion of Justice Powell: "With deference and respect for the views of the Justices who differ, it seems to me that . . . as a matter of policy and precedent this is a classic case for the exercise of our oft-announced allegiance to judicial restraint." 33 L. Ed. 2d at 479; dissenting opinion of Justice Blackmun: "There—on the Legislative Branch of the State or Federal Government, and secondarily, on the Executive Branch—is where the authority and responsibility for this kind of action lies. The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue." 33 L. Ed. 2d at 448; and dissenting opinion of Justice Rehnquist: "It is for this reason that judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review. The Court's holding in these cases has been reached, I believe, in complete disregard of that implied condition." 33 L. Ed. 2d at 483. Chief Justice Burger and Justices Powell and Blackmun were of the further stated opinion that the Eighth Amendment was no bar to imposition of the death penalty.

20. See dissenting opinion of Mr. Justice Powell, 408 U.S. 417, note 2: "While statutes in 40 states permit capital punishment for a variety of crimes, the constitutionality of a very few mandatory statutes remains undecided . . . . Since Rhode Island's only capital statute—murder by a life term prisoner—is mandatory, no law in that State is struck down by virtue of the Court's decision today." The remaining mandatory death statutes are: 10 U.S.C. §906 (acting as a spy for the enemy in time of war); MASS. GENERAL LAWS, ch. 265 §2 (murder during the commission of forcible rape); and OHIO REVISED CODE, Tit. 29, §§2901.09-2901.10 (assassination of the President or Governor of a state).

21. 33 L.Ed.2d at 442.
only "safe" course state legislatures might pursue would be to provide mandatory death sentences, thereby denying the jury an opportunity to exercise its discretion in the arbitrary manner condemned by the majority. In the same breath, however, the Chief Justice confesses doubts about the constitutionality of such a capital punishment scheme:

If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition . . . I could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution.22

These doubts are echoed by another dissenter, Justice Blackmun: "This approach, it seems to me, encourages legislation that is regressive and of antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago."23 Apparently, then the kind of precision in definition and imposition of the death penalty which the dissent suggests would satisfy at least two of the majority, i.e. mandatory death sentence for certain crimes, would be rejected by an equal number of dissenters. The Chief Justice, quoting Justice Harlan, concedes as well that all past efforts to meticulously define and devise standards for imposition of the death penalty have been "uniformly unsuccessful."24 Thus, the availability of capital punishment to state legislatures through statutory changes may be more theoretical than actual.

II. THE RESTORATION MOVEMENT

Several states have now taken steps to resurrect the death penalty. Florida enacted a new death law on December 8, 1972, classifying felonies into five categories: capital felonies, life felonies, and felonies in the first, second and third degrees. The capital felonies for which either death or life imprisonment may be imposed, are: rape, premeditated murder, murder committed by a person engaged in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, kidnapping, aircraft piracy, bombing or distribution of heroin

22. Id. at 443.
23. Id. at 450.
24. Id. at 443.
where the drug is the cause of death of the user. Those convicted of capital felonies are entitled to have an advisory of death or life imprisonment rendered in a separate sentencing trial by jury based upon aggravating and mitigating circumstances. By terms of the statute, aggravating factors are limited to whether:

(a) The capital felony was committed by a person under sentence of imprisonment;
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;
(c) The defendant knowingly created a great risk of death to many persons;
(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
(f) The capital felony was committed for pecuniary gain;
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
(h) The capital felony was especially heinous, atrocious or cruel.

Mitigating factors include whether:

(a) The defendant has no significant history of prior criminal activity;
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;
(c) The victim was a participant in the defendant's conduct or consented to the act;
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;
(e) The defendant acted under extreme duress or under the substantial domination of another person;
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(g) The age of the defendant at the time of the crime.

25. Fla. Stat. §782.04 and §794.01 (1972). The only specified life felony involves the intentional impairment of the ability of the United States or any state to defend itself or wage war. Upon conviction, punishment is life imprisonment or imprisonment for a term of not less than thirty years. Punishment for conviction of felonies in the first, second, and third degrees vary depending upon the degree of harm done. See Fla. Stat. §790.16 (1972).
Notwithstanding the recommendation of the jury, the trial judge enters final sentence of death or life imprisonment.\(^{27}\) In each case in which death is imposed, the court must set forth in writing findings of fact based upon the record of trial and the sentencing proceedings, including aggravating and mitigating circumstances.\(^{28}\) The judgment of conviction and sentence of death are subject to automatic review by the Supreme Court of Florida within sixty days after certification of the record and have priority over all other cases.\(^{29}\)

The new Florida death law and its provisions for separate trial as to sentence, findings of fact by the court based upon aggravating and mitigating circumstances in each case in which death is imposed, and automatic review by the Supreme Court marks an attempt to make sentencing visible and rational. It does not, however, avoid what was condemned in \textit{Furman v. Georgia}—discretion and the arbitrariness which inevitably flows from it. As long as the grand jury has the prerogative to indict or not to indict, the prosecutor the authority to determine when, how and what to prosecute,\(^{30}\) the

\(^{27}\) \textit{Fla. Stat.} §775.082 (1972). Those sentenced to life imprisonment upon conviction of capital felonies are required to serve no less than twenty-five years before becoming eligible for parole. For those convicted of life felonies and sentenced to life imprisonment, there is no statutory minimum period to be served before eligibility for parole, while those convicted of life felonies but not sentenced to life imprisonment must be sentenced to a minimum of thirty years.


\(^{29}\) Id.

\(^{30}\) One charged with murder, for example, could be prosecuted for a capital felony pursuant to §782.04 (1) (a) and receive death:

(1) (a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

or for a felony of the first degree pursuant to Section 782.04 (a), and receive a maximum penalty of thirty years imprisonment, or when specifically provided by statute imprisonment for life:

(2) When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of
jury the right to convict or acquit and the governor the power to grant or withhold clemency, the death penalty remains part of a discretionary sentencing structure. Furthermore, many of the features of the Florida law are characteristic of sentencing schemes found unconstitutional in Furman v. Georgia and companion cases. California, Connecticut, New York, Pennsylvania and Texas all had statutes providing for bifurcated trials on the issues of guilt and sentence in capital cases similar to those now provided for in Florida.31 Yet in cases from Pennsylvania, Connecticut and Texas, the Supreme Court reversed capital sentences.32 As for the findings of fact required of the trial court when it imposes death and the standards established to guide the jury in advising as to sentence, the Supreme Court has held, not only that such are not constitutionally required and are “meaningless,” but that they may actually inhibit consideration of the variety of factors which should inform the determination of sentence.

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or

any particular individual or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life, or for such term of years as may be determined by the court.

or for a felony of the second degree pursuant to Section 782.04 (3), and receive a maximum penalty of fifteen years imprisonment:

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.082, §775.083, or §775.084.


32. See e.g., Scoleri v. Pennsylvania, 408 U.S. 934 (1972); Davis v. Connecticut, 408 U.S. 935 (1972); and Morales v. Texas, 408 U.S. 938 (1972). California had previously had its death penalty declared unconstitutional by its Supreme Court, while no capital cases from New York were pending before the United States Supreme Court at the time of decision of Furman v. Georgia.
death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The 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.\(^3\)

The Florida death law seems in no essential feature different from those of other states found unconstitutional in Furman v. Georgia.

Not all death penalty restoration efforts have been a response to Furman v. Georgia. In California, after the decision of the California Supreme Court of February 18, 1972, declaring the death penalty to be in violation of its state law,\(^4\) an initiative was adopted in the November, 1972 general election to restore the death penalty. The measure adopted provides:

Sec. 27. All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.

On February 17, 1972, death was authorized as the penalty for eight offenses in California: treason, perjury in capital cases, first degree murder, kidnapping for ransom or robbery with bodily harm to the victim, train wrecking, malicious assault by life prisoner, explosion of destructive devices causing great bodily injury, and sabotage resulting in death or great bodily injury.\(^5\) Death was mandatory for treason, perjury in capital cases and malicious assault by a life termer

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35. Cal. PENAL CODE §§37, 128, 190, 209, 219, 4500, 12310, and Cal. MIL. & VET. CODE §1672(e).
if a non-inmate victim dies. For other offenses death was discretionary.

The California initiative was placed on the ballot by the California Prison Guards Association.36 Thereafter, Furman v. Georgia was decided and still later the initiative was approved in the November, 1972 general elections. While no one could seriously contend that the initiative nullifies Furman v. Georgia, the argument is made that even if death may not be imposed for violation of those crimes for which death was formerly discretionary, nothing in Furman v. Georgia prohibits retention of the mandatory death offenses and imposing sentences of death for violation of them. Whether or not the Supreme Court will approve mandatory death penalties remains to be seen. However, no Justice presently sitting on the Court has stated that he would do so. Those who did speculate on the matter in Furman v. Georgia either inferred that they would not, or categorically stated they would oppose the death penalty under any circumstances.*

III. DE FACTO ABDICATION OF CAPITAL PUNISHMENT IN SOUTH CAROLINA

What response South Carolina through its legislature might make to Furman v. Georgia is speculative. However, there are objective indicators which inform speculation. One indicator is the practice of the past. If the immediate history of capital punishment in South Carolina is a reliable guide to what the future holds, the conclusion may be fairly drawn that the State has abandoned the death penalty as a punishment for crime.

The last public executions in South Carolina took place a decade ago on April 20, 1962.37 Two men were electrocuted, one for the crime of murder, the other for rape. On that date,


three others were also on death row. Since then twenty-four people have been convicted of capital crimes and sentenced to death by the courts of the State. Prior to Furman v. Georgia, eleven of the unexecuted capital convictions and sentences were in some stage of post conviction review: four on direct appeal to the South Carolina Supreme Court; two on petition for writ of certiorari to the United States Supreme Court; and five pending on motion for new trial in the sentencing court. Of the remaining sixteen people sentenced to death, three had their sentences commuted by the Governor, and thirteen had their convictions or sentences reversed. In view of the fact that several of the thirteen had multiple trials, their collective box score shows two reversals by the United States Supreme Court, nine by the South Carolina Supreme Court, one by the Court of Appeals for the Fourth Circuit, and five by the Circuit Courts of the State. Of the


42. Carlos Alsbrooks, commuted by Governor John C. West on April 12, 1971; John Morris, commuted by Governor West on May 14, 1971; and, Edward Williams, commuted by Governor West on June 7, 1971.


45. Moorer v. South Carolina, 368 F.2d 458 (4th Cir. 1966).

thirteen defendants who won reversals, nine had their convictions set aside, two of them twice.\textsuperscript{47} Of the nine, two were thereafter declared mentally incompetent and have never been retried;\textsuperscript{48} four entered pleas of guilty on retrial and were sentenced to a term of years;\textsuperscript{49} one pleaded not guilty and on retrial was convicted of a capital offense with the jury returning a recommendation of mercy and was sentenced to life imprisonment;\textsuperscript{50} one pleaded not guilty and on retrial was convicted of a non-capital offense and was sentenced to a term of years;\textsuperscript{51} and one was retried, found guilty, and again sentenced to death. His sentence, however, was later reversed by the Court of Common Pleas. During appeal by the State, he died of a heart attack.\textsuperscript{52} The remaining four defendants who won reversals had only their sentences set aside. On resentencing each was given a term of life imprisonment.\textsuperscript{53}


\textsuperscript{48} At an evaluation conducted on August 7, 1969, Hershel E. Cain was found to be "mentally ill" and "currently unable to stand trial and participate in his own defense" and on March 6, 1968, Willie James Bell was found to be "mentally ill" and was retained for treatment pursuant to S.C. Code Ann. §32-970 (1962), until his "mental condition improved sufficiently to warrant a release." The State (Columbia, S.C.), April 4, 1968.

\textsuperscript{49} David White was sentenced on September 21, 1967, to 65 years; Louis Moore, on April 4, 1967 to 33 years for common law rape; Ray Horne upon a plea of guilty on November 24, 1969 to life plus 10 years; and Ernest Gamble to 40 years. The State (Columbia, S.C.), April 4, 1968.

\textsuperscript{50} Louis Bostick was retried on February 29, 1968. The State (Columbia, S.C.), April 4, 1968.

\textsuperscript{51} Edward Richburg was retried and convicted of manslaughter in Richland County, April 24, 1969, and was given 18 years.

\textsuperscript{52} See State v. Swirling, discussed p. 15, infra.

\textsuperscript{53} James Esther Thomas was resentenced to life imprisonment pursuant to Thomas v. Leeke, 403 U.S. 948 (1971) and Thomas v. Leeke, 257 S.C. 504, 186 S.E.2d 552 (1971). Hamilton and Cannon also had their sentences set aside, 257 S.C. 428, 186 S.E.2d 419 (1972) and 257 S.C. 425, 186 S.E.2d 413 (1972). James Wilson, Jr. was resentenced to life imprisonment on April 28, 1972, pursuant to defendant's motion for reduction of sentence, relying on United States v. Jackson, 390 U.S. 570 (1968).
The two capital cases from South Carolina in the Supreme Court at the time of decision of Furman v. Georgia, were reversed as to sentence along with the other death cases before the court.\textsuperscript{54} The effect of Furman, moreover, will be to vacate the remaining nine sentences of death outstanding in the state.\textsuperscript{56}

The cases catalogued above show that capital punishment was as a matter of general practice abandoned by South Carolina more than ten years before the decision of the Supreme Court in Furman v. Georgia. This suspension of the death penalty was not, as proponents of capital punishment urge, the result of the application of technical or arbitrary decisions of courts remote from the processes of State criminal justice. Rather, it was the reflection of deeply felt doubts within that system of justice of the propriety of capital punishment itself. To be sure, the South Carolina Supreme Court has consistently held that the death penalty expresses the public policy of the State and is not in violation of the Eighth Amendment.\textsuperscript{56} However, the cryptic holding in these decisions seems wholly undermined by what the Court has done in actual cases before it. The Supreme Court, for example, in every appeal involving a capital conviction, has applied a special presumption against the death penalty in the form of its rule \textit{in favorem vitiae}. Derived from the common law it is a principle literally in favor of life and liberty used “by the Courts of this State aforesetimes to avert a miscarriage of justice,” and as a “haven of refuge” from “grave injustice.”\textsuperscript{67} In capital cases the Court will “search for prejudicial error, whether or not it was the subject of appropriate request, objection or motion in the

\textsuperscript{54} Atkinson v. South Carolina, 33 L. Ed. 2d 752 (1972); and, Fuller v. South Carolina, 33 L. Ed. 2d 755 (1972).

\textsuperscript{55} By Order dated August 30, 1972, Judge J. A. Spruill, Jr. as Presiding Judge of the Court of General Sessions for Aiken County, set aside the death sentences of Holland, Leland, Faust, Poe and Davis: “All concede that, at a minimum, the five defendants were entitled to a remand to the Court of General Sessions for Aiken County for resentencing with the new sentence to be one of life imprisonment.” Slip Opinion, p. 2. Bellue’s death sentence was reduced to life by the Supreme Court of South Carolina on November 20, 1972, Opinion No. 19520, and Gibson’s on November 15, 1972, Opinion No. 19518.


trial court . . . and any such omission on the part of counsel will not be held to waive the Appellant's rights."

Even where the Court has "grave" doubts that errors actually assigned require reversal, the rule is said to require a new trial, for if "in ordering it we err, at least such error has not the finality that affirmation on the present record would have."\(^59\)

By application of the rule in favor of vitae the South Carolina Supreme Court has been responsible for seven of the eleven reversals of capital convictions in the state during the past decade.\(^60\) Of the remaining four reversals, one came from the Court of Common Pleas for Richland County, one from the Court of General Sessions for York County, one from the United States Supreme Court and one from the Court of Appeals for the Fourth Circuit.\(^61\) More significantly, the reversals by the State Supreme Court were in every instance based exclusively or substantially on State rather than federal precedent or rule of law. In State v. White,\(^62\) the defendant had requested the court to charge the jury not to draw any prejudicial inference from his failure to take the stand. The request was refused on the grounds that to call attention to

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61. In Bostick v. South Carolina, 386 U.S. 479 (1967), a murder case, the Court reversed the South Carolina Supreme Court's finding of no exclusion of blacks from Bostick's grand and petit juries. "The judgment of the Supreme Court of South Carolina is reversed. Whitus v. Georgia, 385 U.S. 545 (1967)."
62. In Moore v. South Carolina, 368 F.2d 458 (4th Cir. 1966), the Court of Appeals reversed for failure of the trial court to rule on and properly instruct the jury concerning the voluntariness of statements made by the accused. Moorer subsequently entered a plea of guilty to common law rape and was sentenced on April 4, 1967, to 33 years imprisonment. In State v. Horne, after trial and conviction, Judge Frank Eppes granted defendant's motion for a new trial on the grounds "that the ends of justice would be served by the granting of a new trial." Order for a New Trial, November 10, 1969. At his second trial, Horne plead guilty and got life plus ten (10) years. And in Gamble v. South Carolina, Judge John Grimball granted the petition for writ of habeas corpus reversing on grounds of Witherspoon v. Illinois, 391 U.S. 51 (1968). Order May 2, 1971.
it" would be perhaps more prejudicial than not." The Court, relying on State v. King, State v. Cox, and State v. Howard, construing Section 26-405, Code of Laws of South Carolina, 1962, as amended, held that an accused has the right to have the trial court instruct the jury that failure to take the witness stand and testify on his own behalf does not create a presumption against him, and upon his request, the court must give that instruction. The verdict and sentence were reversed upon this state ground and the case remanded for a new trial. The additional reliance in State v. White, on Bruno v. United States, was not constitutionally required in view of the holding of the Court that the "narrow question" before it was the proper application of 20 Statutes at Large 30, chap. 37, then 28 U.S.C.A. Section 632, rather than one of the amendments of the Constitution of the United States which might have been binding upon the states. "Concededly the charge requested by Bruno was correct. The Act of March 16, 1878, gave him the right to invoke it." White was convicted on retrial and again given the death sentence. During argument to the jury the Solicitor made repeated references to the mothers, wives, sisters and daughters of the jurors in an effort to identify the facts of the case, which involved rape, with their own mothers, wives, sisters or daughters. The Supreme Court found this procedure to be error and reversed the conviction citing State v. Gilstrap.

In view of the absolute discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict. We do know, however, that in asking the jury to determine such issue by relating the circumstances of the case to their loved ones, the Solicitor injected into the case considerations foreign to the record and calculated to take from the trial the necessary element of impartiality.

It was significant that the case was a death case. That fact

63. Id. at 242, 133 S.E.2d at 322.
64. 158 S.C. 251, 155 S.E. 409 (1929); 221 S.C. 1, 68 S.E.2d 624 (1951); 35 S.C. 197, 14 S.E. 481 (1890).
65. §26-405 provides in part: "In the trial of all criminal cases the defendant shall be allowed to testify if he desires to do so, and not otherwise, as to the facts and circumstances of the case."
67. 308 U.S. at 293.
68. 205 S.C. 412, 32 S.E.2d 163 (1944).
alone seemed to require reversal. “While we seriously doubt that the argument of the Solicitor had the claimed prejudicial effect and reach our result with reluctance, the probability of prejudice to the rights of the defendant are such that we would not be justified in assuming in a death case that it did not result.” At his third trial, White entered pleas of guilty to two counts of rape and was sentenced to a total of 65 years imprisonment on September 21, 1967. In State v. Bell, another death case, the Supreme Court reversed the conviction on the grounds of irrelevant and inflammatory testimony having been given at trial and because the trial judge erred in not affording the defendant an opportunity prior to trial for a meaningful examination and evaluation of his mental condition by a qualified psychiatrist whose assistance had been enlisted by counsel. Again, the fact that this was a death case was a controlling factor in the Court’s decision. “Even if testimony tending to establish insanity as a defense could not have been developed, expert opinion evidence that the defendant was affected by mental illness might well have been produced. Such testimony may have influenced the jury in the exercise of its discretion to recommend mercy and spare the defendant’s life.” Prior to retrial, Bell was admitted to the State Hospital for examination and was found to be “mentally ill.” He was retained for treatment under Section 32-970, Code of Laws of South Carolina, 1962, as amended, until his “mental condition improved sufficiently to warrant a release.” He has not as of this writing been retried.

State v. Richburg, another reversal in a capital case by the South Carolina Supreme Court, turned upon construction of state evidence law. The Court there found it error for the Solicitor to attempt to impeach his own witness based upon prior inconsistent statements where no evidence had been given which was detrimental to the State’s case at the time of the claimed surprise. Richburg had a total of three trials. The first in June, 1966, resulted in a mistrial. The second was reversed for the reasons set out above. At the third, he was

70. Id., at 504 (emphasis supplied).
71. 250 S.C. 37, 156 S.E.2d 313 (1967).
72. 250 S.C. at 42-43 (emphasis in original).
convicted of manslaughter upon a plea of guilty and sentenced to 18 years imprisonment.\footnote{4}

In \textit{State v. Cain,}\footnote{5} the Court citing \textit{State v. Clinkscales} and \textit{State v. Gardner,}\footnote{6} reversed the conviction and sentence in a capital case due to the failure of the trial judge to give any instructions to the jury regarding the rules governing confessions. Even though the trial judge had not been requested by the defendant to instruct the jury on the question of the voluntariness of his confession, “under the well recognized practice of this Court, where the death penalty is involved, these omissions on the part of counsel will not be held to waive the rights of the appellant.”\footnote{7} Prior to retrial Cain was examined at the State Hospital on August 18, 1968, and found to be “mentally ill.” His last evaluation on August 7, 1969, found him to be “currently unable to stand trial and participate in his own defense.”

\textit{State v. Swilling,}\footnote{8} involved errors of the trial court in charging that the jury could take into consideration the bad reputation of the accused, and the solicitor in attempting to impugn on cross examination the accused’s character and reputation where he had not put his character and reputation in issue. Initially the Court applied the rule \textit{in favorem vitae} to consider matters not made the basis of any exception on appeal, i.e. the cross examination of the accused and his wife by the solicitor. In reversing the conviction, the Court scarcely considered whether there had been any actual prejudice.

“Just what effect these matters had upon the jury is only known to the members thereof. We simply reach the conclusion that such could have affected the verdict in the case. If nothing more, such may well have affected the jury, in the exercise of its discretion, as to whether or not to recommend mercy. Our conclusions that the defendant here is entitled to a new trial is, we think, clearly dictated by the numerous prior decisions of this Court.”\footnote{9}

Swilling was retried on September 7, 1965, convicted and again sentenced to death. His conviction was affirmed by the South Carolina Supreme Court.\footnote{10} Thereafter Judge John

\begin{footnotes}
\footnote{4}{State v. Richburg, 253 S.C. 458, 171 S.E.2d 592 (1969).}
\footnote{5}{246 S.C. 536, 144 S.E.2d 905 (1965).}
\footnote{6}{231 S.C. 650, 99 S.E.2d 663 (1957); 219 S.C. 97, 64 S.E.2d 130 (1951).}
\footnote{7}{246 S.C. 536, 543, 144 S.E.2d at 908.}
\footnote{8}{246 S.C. 144, 142 S.E.2d 864 (1965).}
\footnote{9}{246 S.C. 144, 152-53, 142 S.E.2d at 868.}
\footnote{10}{State v. Swilling, 246 S.C. 541, 155 S.E.2d 607 (1967).}
\end{footnotes}
Grimball granted his petition for writ of habeas corpus and set aside the death sentence on December 14, 1968 citing *Witherspoon v. Illinois*. The state appealed and the Supreme Court remanded on May 6, 1969, for a hearing on certain non-*Witherspoon* issues contained in the petition. In the meantime, Swilling died of a heart attack at the Central Correctional Institution on September 17, 1969.

Robert Wayne Gamble had two capital convictions reversed, one by the South Carolina Supreme Court and one by the Court of Common Pleas for Richland County. Gamble's first conviction for rape in 1968 was dismissed as a result of the introduction into evidence of portions of a confession dealing with crimes unrelated to the one being prosecuted. The court relied upon *State v. Bolin* for the result reached. And once error was shown, the Court invoked the familiar language of capital cases: "What effect the above portion of the confession had upon the jury is only known to the members thereof. When it is made to appear that anything has occurred in a capital case which may have improperly influenced the action of the jury, the accused should be granted a new trial, although he may appear to be ever so guilty."

On retrial in 1966, Gamble was convicted and again sentenced to death. The Supreme Court of South Carolina affirmed and the United States Supreme Court denied certiorari. Thereafter he filed a petition for writ of habeas corpus in the Court of Common Pleas for Richland County which was granted. The record of the *voir dire* in the trial revealed that 12 jurors had been excused for cause who expressed no more than a general opposition to capital punishment. The court found a violation of *Witherspoon v. Illinois*. An additional ground for reversal was the exclusion of Negroes from
Gamble's grand jury. At his third trial Gamble entered a plea of guilty to rape and was sentenced to a term of forty years.  

Capital cases have always received special treatment from the system of criminal justice. Where the accused is indigent and counsel appointed, state law allows for the appointment of two defense attorneys, one of whom must have a minimum of five years of practice before the bar. The rule is otherwise in non-capital cases. In capital cases, as we have seen, doubts are resolved in favor of the defendant. Special rules are promulgated for the consideration of errors. A showing of actual prejudice is regarded as all but irrelevant and precedent is made which has no correlation to other classes of criminal cases. The concession is implicit that in capital cases once sentence is executed there is no second chance for review. Many appeals may be dismissed as frivolous, but almost never those involving the death penalty. Death cases are special cases and but for the fact that human life is involved, they command a disproportionately large amount of the judiciary's time. Barrett Prettyman, a former United States Supreme Court law clerk observes that regardless of the issues of law involved each Justice on the Court gives meticulous attention to the file when he sees the label "capital case" printed in red on the outside cover. "In fact, the capital case receives more attention than any other class of cases coming before the Court." The court's treatment of capital cases is vivid tribute to the deep seated reservations about capital punishment which demonstrably lie at the heart of modern criminal justice.

87. See Note 49, supra.
88. Furman v. Georgia, 33 L. Ed. 2d at 376, n. 34, and Griffin v. Illinois, 351 U.S. 12, 28 (1956). ("It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special consideration.")
91. Louis Moorer's years in state and federal court trying to outwit the hangman and escape the death sentence are not atypical of capital cases. Moorer was sentenced to death on April 4, 1962. He appealed and the Supreme Court affirmed. State v. Moorer, 241 S.C. 487, 129 S.E.2d 330 (1963). He then filed a notice of intent to petition the United States Supreme Court for a Writ of Certiorari, but prior to the expiration of the 90-day perfection period, abandoned certiorari and petitioned the Court of Common Pleas for a writ of habeas corpus, alleging for the first time exclusion of blacks from his grand and petit
IV. THE CONSTITUTIONAL CHALLENGE

As a prelude to \textit{Furman v. Georgia}, the past five years saw more litigation in the Supreme Court attacking the death penalty on constitutional grounds than ever before. Two dej-

juries. The petition was denied after hearing on May 17, 1963. Moorer filed a notice of appeal but the Court of Common Pleas ordered another hearing on the original petition to determine if Moorer had a preliminary hearing prior to trial and if so whether any new grounds for relief under habeas corpus were present. The additional hearing was held on August 30, 1963, after which the Court issued its order denying relief. Moorer appealed from both orders to the South Carolina Supreme Court which resolved all asserted errors against him. Moorer \textit{v.} South Carolina, 244 S.C. 102, 135 S.E.2d 713 (1964). The United States Supreme Court denied certiorari. Moorer \textit{v.} South Carolina, 379 U.S. 860 (1964). Moorer's next step was to file a petition for writ of habeas corpus in the Federal District Court which granted a stay of execution. Moorer \textit{v.} South Carolina, 240 F. Supp. 529 (D.S.C. 1965). The District Court held a further hearing on whether the stay of execution should be continued on December 14, 1964, after which it entered its order continuing the stay pending a determination of the issues involved in the petition. Moorer \textit{v.} South Carolina, 240 F. Supp. 531, 532 (D.S.C. 1964). However, on March 11, 1965, Moorer filed an amended petition to the effect that some of the issues raised had not been presented to the state courts, i.e., the constitutionality of S. C. Code ANN. §16-71 (1962), the general rape statute, and questioned whether petitioner had exhausted his state remedies. By order dated March 12, 1965, the District Court suspended further consideration of the petition and extended the stay of execution only until the parties should have the opportunity to show cause why the Court should not relinquish jurisdiction. Moorer \textit{v.} South Carolina, 239 F. Supp. 180 (D.S.C. 1965). A hearing was duly held after which the District Court relinquished jurisdiction and vacated the stay of execution. Moorer \textit{v.} South Carolina, 249 F. Supp. 531 (E.D.S.C. 1965). On March 31, 1965, Moorer filed another petition for writ of habeas corpus with the Court of Common Pleas. In the meantime, a new execution date had been set for him for May 14, 1965. He thereupon requested a stay of execution pending a hearing on the petition from the Supreme Court but was denied. "We conclude that there is no merit in any of the grounds now asserted by the defendant." Moorer \textit{v.} MacDougall, 245 S.C. 633, 639, 142 S.E.2d at 50 (1965). The Court directed that the sentence previously imposed be executed on May 14, 1965. Moorer next petitioned the District Court for relief which dismissed without a hearing on May 12, 1965. On appeal the Fourth Circuit Court of Appeals granted a stay of execution and found that the petition contained several non-frivolous allegations of denial of federal constitutional rights and that the dismissal without either an evidentiary hearing or consideration of the record was erroneous. The decision below was vacated and the cause remanded for a full evidentiary hearing. Moorer \textit{v.} South Carolina, 347 F.2d 592 (4th Cir. 1965). A pre-trial conference was held in the District Court, Moorer \textit{v.} South Carolina, 244 F. Supp. 531 (E.D.S.C. 1965), and a hearing, after which, the court denied relief and dismissed the petition. Moorer again appealed to the Fourth Circuit which reversed his conviction on the grounds that the trial judge had failed to rule on the voluntariness of state-
cisions, United States v. Jackson\textsuperscript{92} and Witherspoon v. Illinois\textsuperscript{93} invalidated long standing state procedures and statutes requiring potentially sweeping changes in the application of the death penalty across the country. In McGautha v. California,\textsuperscript{94} the Court by a six to three margin refused to declare unconstitutional the single verdict procedure in capital cases and the exercise by juries of absolute and unguided discretion in recommending or withholding mercy. Capital punishment was also attacked elsewhere. The Court of Appeals for the Fourth Circuit held in Ralph v. Warden\textsuperscript{95} that imposition of death for rape where the victim was not substantially harmed physically constituted cruel and unusual punishment. In an historic decision the California Supreme Court declared the death penalty in violation of its state law.

The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment. Judged by contemporary standards of decency, capital punishment is impermissibly cruel. It is being increasingly rejected by society and is now almost wholly repudiated by those most familiar with its processes. Measured by the "evolving standards of decency that mark the progress of a maturing society," capital punishment is, therefore, cruel within the meaning of Article I, section 6 of the California Constitution.\textsuperscript{96}

Witherspoon, which struck down the practice of excusing for cause those jurors in capital cases who expressed only a general opposition to the death penalty, has had almost no impact in South Carolina.\textsuperscript{97} South Carolina's procedure in

\textsuperscript{92} McDonald: Capital Punishment in South Carolina; The End of an Era

\textsuperscript{93} R. B. McDonald, supra note 8, at 373.

\textsuperscript{94} 402 U.S. 183 (1971).

\textsuperscript{95} 438 F.2d 786 (4th Cir. 1970), cert. denied, 33 L.Ed. 766 (1972).

\textsuperscript{96} Witherspoon v. Georgia, 391 U.S. 304 (1968).

\textsuperscript{97} President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts (1967), at 27.

\textsuperscript{98} United States v. Jackson, 960 F.2d 1025 (9th Cir. 1992).

\textsuperscript{99} People v. Anderson, 6 Cal.3d 628, 650-51, 493 P.2d at 895, 100 Cal.Rptr. at 167 (1972).

\textsuperscript{100} "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with due process." 391 U.S. at 523.
impaneling capital juries was analogous to the one condemned in Witherspoon. In State v. Britt, a pre-Witherspoon decision, the Court acknowledged that: "We have held in a murder case, refusing to allow a juror to serve on the case, after admitting on his voir dire examination his disbelief in capital punishment for murder, was not error." Only two post-Witherspoon cases have turned upon that decision. In neither, however, was the Witherspoon issue dispositive. In State v. Swilling, the state appealed a reversal by the circuit court based upon Witherspoon but prior to a decision on appeal the case was mooted by the death of the defendant. In the other case, State v. Gamble, non-Witherspoon issues, i.e. exclusion of blacks from grand and petit juries, were present and furnished independent grounds for reversal. Since Witherspoon, the South Carolina Supreme Court has found state procedures to be in conformity with that decision.

Unlike Witherspoon, United States v. Jackson did have a substantial impact upon capital cases in South Carolina. Jackson struck down the death penalty provisions of the Federal Kidnapping Act which provided that a defendant "shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." The Court reasoned that since only a jury could impose death and since nothing greater than life could be imposed if a plea of guilty was accepted pursuant to Rule 11 or jury trial waived pursuant to Rule 23 (a) of the Federal Rules of Criminal Procedure that the effect of the statutory scheme was to place an

101. See State v. Atkinson, 253 S.C. 531, 536, 172 S.E. at 113 (1970): "Only those members of the panel were excused who stated that their opposition to capital punishment could not be changed by evidence." Cf. Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968), finding that jurors in capital cases even if disqualified under Witherspoon are not precluded from service on trial juries assuming their scruples would permit a fair determination on the issue of guilt. Since Witherspoon was deliberately limited to the narrow issue of imposition of sentence by scrupled jurors, it never decided the issue of determination of guilt by such a jury, leaving the ruling in Crawford intact. Thus, the holding in State v. Atkinson, supra, while correct under Witherspoon, falls short of the requirements of Crawford.
unlawful condition upon the Fifth Amendment right to plead not guilty and the Sixth Amendment right to trial by jury, i.e. the risk of death. Accordingly, the death penalty provisions of the statute were declared unconstitutional.\textsuperscript{103}

South Carolina's capital punishment scheme was similar to that condemned in \textit{Jackson}. The penalty for murder, killing by stabbing, lynching, killing in a duel, rape, assault with attempt to rape, carnal knowledge, kidnapping where the victim is not released alive prior to trial and conspiracy to kidnap is death except that upon recommendation by the jury of mercy the penalty is life imprisonment.\textsuperscript{104} Prior to \textit{Jackson} state law provided that: "In all cases where by law the punishment is affected by the jury recommending the accused to the mercy of the court, and a plea of guilty is accepted with the approval of the court, the accused shall be sentenced in like manner as if the jury in a trial had recommended him to the mercy of the court.\textsuperscript{105}

The effect of \textit{Jackson} upon South Carolina's capital punishment scheme was first considered by the Supreme Court in \textit{State v. Harper}.\textsuperscript{106} Harper involved an appeal by the state from the trial court's order quashing a murder indictment on the grounds that the penalty provisions of Sections 16-52 and 17-553.4, Code of Laws of South Carolina, 1962, as amended, violated \textit{Jackson}. The court held that Section 17-553.4 allow-

\textsuperscript{103} Cf. \textit{Brady} v. U.S., 397 U.S. 742 (1970), \textit{Parker} v. North Carolina, 397 U.S. 790 (1970) and \textit{North Carolina v. Alford}, 400 U.S. 25 (1970), cases rejecting the claim that \textit{Jackson} type penalty schemes also render unconstitutional and involuntary pleas of guilty. "Plainly, it seems to us, Jackson ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. Jackson prohibits the imposition of the death penalty under §1201 (a), but that decision neither fashioned a new standard for judging the validity of guilty pleas or mandated a new application of the test theretofore fashioned by the courts and since reiterated that guilty pleas are valid if both "voluntary" and "intelligent." 397 U.S. at 747. \textit{Breland v. State}, 253 S.C. 187, 169 S.E.2d 604 (1969); \textit{Quillien v. Lecke}, 303 F. Supp. 698 (D.S.C. 1969).

\textsuperscript{104} The death penalty is apparently mandatory for a third conviction for crimes punishable by death: ". . . he shall be subjected to the maximum sentence provided for such crime." \textit{S.C. Code Ann.}, §17-533.1 (1962). The remaining capital crimes in South Carolina, giving aid or information to the enemy in time of war, leave the matter of sentencing entirely to the discretion of the court. \textit{S.C. Code Ann.} §§44-353, 44-354 (1962).

\textsuperscript{105} \textit{S.C. Code Ann.} §17-553.4 (1962). §17-553.4 was enacted in 1962, the year of the last executions in South Carolina.

\textsuperscript{106} 251 S.C. 379, 162 S.E.2d 712 (1968).
ing imposition of a life sentence upon acceptance by the Court of a plea of guilty was unconstitutional since it placed an unlawful condition upon the exercise of the right to trial by jury. The result finally reached, however, was unlike that in Jackson. The Court reasoned that since the general murder statute, Section 16-52, was enacted in 1894, and Section 17-553.4 in 1962, in the absence of any evidence of legislative intent to give a defendant an absolute right to enter a plea of guilty, the two provisions were severable. "Hereafter, regardless of past custom and practice, the choice between life imprisonment and the death penalty must be left by the trial courts in this state to the jury in every case, in accord with Section 16-52, regardless of how the defendant's guilt has been determined, whether by the verdict of the jury or by a plea of guilty." Thus, Jackson, far from ameliorating the death penalty in South Carolina, actually made its imposition more likely. A case in point is that of Louis Fuller, Jr., who changed his plea of not guilty to one of guilty at the close of the state's case in an obvious attempt to invoke the mercy of the court. The jury promptly sentenced him to the electric chair.

While the immediate effect of Jackson was to make the death penalty more likely in capital cases, it was ultimately responsible for vacating the death sentence in four cases in the state. Thomas v. Leeke, the first of those cases involved a sentence of death actually imposed under a pre-Jackson scheme. Thomas was convicted of rape, sentenced to death and his conviction affirmed. Thereafter he petitioned the circuit court for a writ of habeas corpus asserting that his sentence was unconstitutional under Jackson. The circuit court agreed and remanded him to the Court of General Sessions for resentencing in accord with Section 16-72 as if the jury had recommended mercy. The state appealed and the Supreme Court reversed the vacation of the death penalty decreed by the circuit court. In spite of the holding in Jackson that it was the death penalty provision of the statute there involved which was unconstitutional, and in spite of its own decision

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107. 251 S.C. at 385.
109. See note 53, supra.
110. 403 U.S. 948 (1971).
in *State v. Harper* declaring South Carolina's capital punishment scheme for murder unconstitutional, the Supreme Court found that a death sentence administered under the South Carolina scheme was constitutional on the anomalous theory that since Thomas had pleaded not guilty and gone to trial that his Fifth and Sixth Amendment rights had not in fact been deterred.  

Thomas petitioned the Supreme Court for a writ of certiorari which was granted. In a *per curiam* opinion the court remanded the case to the state for further proceedings in light of *Jackson.* Thereafter on January 20, 1972, the South Carolina Supreme Court entered its order reinstating the decree of the circuit court that Thomas should be resentenced in accord with the provision of Section 16-72 as if the jury had recommended him to the mercy of the court. On the same day the Court vacated two other death sentences and on April 28, 1972, the Court of Common Pleas for Richland County vacated a third and last of those given under the state's pre-*Jackson* scheme.

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113. The fact that *State v. Harper* involved murder (§16-52) and *Thomas v. Leeke* rape (§16-72) does not distinguish the two cases since both involved §17-553.4. However, a defendant who entered a plea of guilty in a murder case was assured a life sentence while a defendant entering a plea of guilty in a rape case could be sentenced to from five to forty years.


Frank Cannon was convicted of rape and sentenced to death in 1965, three years before *Jackson.* On appeal the Supreme Court remanded to the trial court with instructions to make a determination whether defendant's confession was voluntary. *State v. Cannon*, 248 S.C. 596, 151 S.E.2d 752 (1966). The trial court made a general finding of voluntariness. The defendant appealed and again the Supreme Court remanded to the trial court, finding that its conclusions were too general to form the basis for a proper review and instructing it to make further and specific findings upon the issue of voluntariness, including the legality of a search and whether articles recovered as a result of it induced the confession. *State v. Cannon*, 250 S.C. 437, 158 S.E.2d 351 (1967). Cannon's sentence, like that of Hamilton, was vacated on January 20, 1972.

John Wilson, Jr. was sentenced to death in 1967. He filed a notice of appeal but never docketed his case in the Supreme Court due to the failure of
The major constitutional decisions of the last five years involving the death penalty thus accounted for not one single reversal of conviction in South Carolina. Jackson was responsible for the reversal of a number of sentences but had the ultimate effect of making imposition of the death penalty more likely. If indeed the application of the death penalty in South Carolina has been inhibited, the true cause is not to be found in the federal courts.

John Wilson, Jr. was sentenced to death in 1967. He filed a notice of appeal but never docketed his case in the Supreme Court due to the failure of the parties to settle the case and exceptions on appeal. The state finally moved in the trial court for a dismissal of the appeal and the defendant moved for vacation of sentence under Jackson-Thomas. The defendant’s motion was granted and Wilson’s sentence reduced to life imprisonment on April 28, 1972.

V. EXECUTIVE CLEMENCY

The recent grants of executive clemency in South Carolina further reflect fundamental reservations about the propriety of the death penalty. Clemency is by nature an extra-judicial process and is generally granted upon the unique or

117 The South Carolina Constitution gives the Governor virtually absolute power to commute death sentences to life imprisonment. “The Governor shall have power to grant reprieves and to commute a sentence of death to that of life imprisonment. The granting of all other clemency to convicted persons shall be vested absolutely in a Probation, Parole and Pardon Board . . .” S.C. Const., art. IV, §11. The Governor is also charged to “take care that the laws be faithfully executed in mercy.” S.C. Const., art. IV, §12. Cf. State v. Harrison, 122 S.C. 523, 527 (1922), commenting upon the analogous Constitutional authority of the Governor to issue reprieves: “The power to grant reprieves is conferred upon the Governor by the Constitution, and there is no limitation whatever placed upon the exercise of such power, either by the Constitution or by the Statute. The Courts have not the power to inquire into the reasons which may have actuated the Governor in granting a reprieve. If it should be declared that the Courts have such power of inquiry, then the right of the Governor to grant a reprieve would become a judicial, as well as a question for the executive department of the government, which unquestionably has not been shown to have been intended.”
particular facts of a given case. As a result, it is often argued that the constitutionality or wisdom of the death penalty itself is not an appropriate consideration for the exercise of the special clemency powers. However, implicit in any grant of clemency is the application of a constitutional standard involving social acceptance of capital punishment. At least five Justices of the Supreme Court have recognized as much. "Executive clemency . . . provides a common means of avoiding unconstitutional or otherwise questionable executions." More recently, Justice Blackmun acknowledged that abolition of the death penalty lies in part on the executive branches of state and federal government. That clemency belies a constitutional basis was conceded in two of the three grants of executive clemency in South Carolina since 1962, where the cruel and unusual aspect of extended incarceration under the sentence of death was cited as a main reason for the action taken. In commuting the sentence of John Morris, an 86-year-old man in failing health, Governor John C. West noted that the "continued uncertainty regarding the validity of the death sentence" and the "peculiar circumstances of this situation, particularly the advanced age of the defendant," including the nine years he had spent on death row, "might well lead to the conclusion that it [the death sentence] constitutes cruel and unusual punishment." And

121. Furman v. Georgia, 33 L. Ed. 2d at 448.
122. Executive Order of Governor John C. West, May 14, 1971. The Governor also noted that 81% of the 241 people executed since 1911 when death sentences began to be carried out by the State rather than the counties imposing sentence have been Negro and two-thirds semi-skilled laborers. John Morris is black, has had no formal education and was formerly a house painter. It is also significant that all those sentenced to death for the crime of rape since 1962 have been black. In each instance the victim was white. See generally, Special Reports of the Southern Regional Council, "Race Makes the Difference: An Analysis of Sentence Disparity Among Black and White Offenders in Southern Prisons" (March 1969), and "Southern Justice: An Indictment" at 5 (Oct. 18, 1965): "Despite the fact that more than half of all convicted rapists are white, 87 percent of all persons executed for rape be-
in commuting the death sentence of 81-year-old Edward Williams, Morris’s accomplice, the Governor again noted that “his advanced age . . . on ‘death row’ might well constitute cruel and unusual punishment.”123 The remaining commutation was the result of “unanimous agreement” of the prosecuting attorneys, the Sheriff and others involved in the case “that clemency should be granted the defendant.”124

The doubts about the imposition of the death sentence contained in the Executive Orders quoted from above may not be discounted as the mere personal opinion of John C. West who happens also to be Governor. For clemency, exercised as it is by the chief elected official of the State, is by its nature responsive to public opinion. It is doubtful that between 1930 and 1963 were Negroes convicted and sentenced by southern courts.” In South Carolina, of the 35 executions for rape since 1911, 30 were of Negroes, and of the 27 executions for assault with intent to ravish, all were of Negroes. In view of the fact that state juries may constitutionally exercise absolute discretion in giving or withholding mercy in capital cases and the fact that the history of jury selection in southern states has largely been one of exclusion of blacks, these figures are not surprising. See, e.g., United States ex rel. Goldsby v. Harpole, 263 F.2d 71, 82 (5th Cir. 1959), where the court said: “As judges of a Circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries.” For a more recent pronouncement, see the dissenting opinion of Chief Justice Burger in Furman v. Georgia, 33 L. Ed. 2d at 37: “The statistics that have been referred to us cover periods when Negroes were systematically excluded from jury service and when racial segregation was official policy in many states.”

123. Executive Order of Governor John C. West, June 7, 1971. Additional reasons for commutation were the absence of a prior criminal history and a good prison record. The convictions of both Morris and Williams were affirmed by the South Carolina Supreme Court, State v. Morris, 243 S.C. 225, 133 S.E.2d 744 (1963), and certiorari denied by the United States Supreme Court, Morris v. South Carolina, 377 U.S. 1001 (1964), rehearing denied, 379 U.S. 873 (1964). Later habeas corpus proceedings in federal court, Williams v. State, 237 F. Supp. 360 (D.S.C. 1965) and Morris v. State, 356 F.2d 432 (4th Cir. 1966), were suspended so that the defendants could exhaust state remedies. The Court of Common Pleas denied relief and both Morris and Williams appealed to the South Carolina Supreme Court. Their sentences were commuted while the appeals were pending, whereupon Morris withdrew his appeal. Williams’s appeal was duly heard and the lower court’s decision affirmed. Williams v. Leeke, 257 S.C. 104, 184 S.E.2d 441 (1971). In view of commutation the court found the capital punishment issues to be moot.

it could or would be exercised without the implied approval of the larger community.\textsuperscript{125}

There is no evidence that these recent grants of clemency have been antagonistic to public opinion, or that there has been any movement to limit by constitutional amendment or otherwise the Governor's powers to remove the sentence of death. The objective data available suggests that through his grants of clemency the Governor has expressed the general sentiment of the people.

VI. NATIONAL AND INTERNATIONAL ABOLITIONIST TRENDS

The trend towards abolition is not limited to South Carolina. As has been repeatedly pointed out, nothing has been so significant about the death penalty in the United States as its infrequent application.\textsuperscript{126} In 1935 an annual high of 199 people were executed. Since then, the number has fitfully but steadily declined. Institutional killing stopped altogether in 1967.\textsuperscript{127}

\begin{table}[h]
\centering
\begin{tabular}{ccc}
1935—199 & 1948—119 & 1961— 42 \\
1936—195 & 1949—119 & 1962— 47 \\
1937—147 & 1950— 82 & 1963— 21 \\
1938—190 & 1951—105 & 1964— 15 \\
1939—160 & 1952— 83 & 1965—  7 \\
1940—124 & 1953— 62 & 1966—  1 \\
1941—123 & 1954— 81 & 1967—  2 \\
1942—147 & 1955— 76 & 1968—  0 \\
1943—131 & 1956— 65 & 1969—  0 \\
\end{tabular}
\caption{Annual Executions in United States\textsuperscript{128}}
\end{table}

\textsuperscript{125} "Pardon, in its societal sense, as opposed to personal forgiveness, presupposes the existence of an authority vested with the power to define criminal acts and to punish doers of the proscribed deeds. Consistent with this is the notion that criminal responsibility is owed to a collective political entity rather than to particular persons, such as the victim or his relations." 39 N.Y.U.L. Rev. at 138.

\textsuperscript{126} "While de jure abolition has ebbed and flowed a de facto abolition has practically become a reality in the United States." 2 National Commission On Reform of Federal Criminal Laws, Working Papers (G.P.O. 1970), 1350-51; and Furman v. Georgia, 33 L. Ed. 2d at 379.

\textsuperscript{127} California and Colorado each carried out an execution in 1967, United States Department of Justice, National Prisoner Statistics: Capital Punishment 1930-1970, at 11 (1971) [hereinafter NPS].

\textsuperscript{128} NPS at 8.
To date, nine states and two federal territories have completely abolished capital punishment—Michigan in 1963, Wisconsin in 1953, Maine in 1876, Minnesota in 1911, Alaska in 1957, Hawaii in 1957, Oregon in 1914, Iowa in 1872, West Virginia in 1965, Puerto Rico in 1929 and the Virgin Islands in 1957.129 Five other states retained it for use in special circumstances—Rhode Island for murder by a life term prisoner, North Dakota for treason and murder by a life term prisoner, New York for murder of a police officer or prison guard on duty, kidnapping for ransom, and killing or destroying vital property during war time, and New Mexico for killing a policeman or prison guard on duty and for commission of a second capital offense.130

Table 2

Abolition Jurisdictions in U. S. (With Abolition Dates)131

<table>
<thead>
<tr>
<th>State</th>
<th>Abolition Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan</td>
<td>(1846)a</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>(1852)b</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>(1853)</td>
</tr>
<tr>
<td>Maine</td>
<td>(1887)</td>
</tr>
<tr>
<td>North Dakota</td>
<td>(1915)c</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>(1929)</td>
</tr>
<tr>
<td>Alaska</td>
<td>(1957)</td>
</tr>
<tr>
<td>Hawaii</td>
<td>(1957)</td>
</tr>
<tr>
<td>Virgin Islands</td>
<td>(1957)</td>
</tr>
<tr>
<td>Oregon</td>
<td>(1964)</td>
</tr>
<tr>
<td>Iowa</td>
<td>(1965)</td>
</tr>
<tr>
<td>West Virginia</td>
<td>(1965)</td>
</tr>
<tr>
<td>New York</td>
<td>(1965)d</td>
</tr>
<tr>
<td>Vermont</td>
<td>(1965)e</td>
</tr>
<tr>
<td>New Mexico</td>
<td>(1969)f</td>
</tr>
</tbody>
</table>

a Death penalty retained for treason until 1968.
b Death penalty restored in 1882 for murder by life term prisoner.

c Death penalty restored in 1882 for murder by life term prisoner.

d Death penalty restored in 1882 for murder by life term prisoner.

e Death penalty restored in 1882 for murder by life term prisoner.


130. See NPS at 50 and The Case Against Capital Punishment, THE WASHINGTON RESEARCH PROJECT at 8 (1971). South Carolina maintains the death sentence for the following: murder (§16-52); killing by stabbing (§16-54); lynching (§16-57); killing in a duel (§16-63); rape, assault with attempt to rape, carnal knowledge (§16-72, 80); kidnapping where victim is not released alive before trial (§16-91); conspiracy to kidnap (§16-92); third conviction for crimes optionally punishable by death (§17-553.1); and giving information or aid to the enemy in time of war (§§44-353, 354).

131. Id.
Death penalty retained for murder by life term prisoner.

Death penalty retained for murder of police officer on duty, and for murder by life term prisoner.

Death penalty retained for murder of police officer or prison guard on duty, kidnapping for ransom, and killing or destruction of vital property by a group during wartime.

Death penalty retained for murder of policeman or prison guard on duty, and for commission of second capital felony.

Although a majority of foreign countries still retain the death penalty a clear trend toward abolition is also apparent internationally. The abolitionists jurisdictions include: Argentina, Australia (Federal), New South Wales, Queensland, Tasmania, Austria, Belgium, Bolivia, Brazil, Canada, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Finland, West Germany, Greenland, Honduras, Iceland, India (Travencore), Israel, Italy, Lichtenstein, Luxembourg, Mexico (Federal as well as 29 of 32 states), Monaco, Mozambique, Nepal, Netherlands, Antilles, New Zealand, Nicaragua, Norway, Panama, Portugal, San Marino, Surinam, Sweden, Switzerland, Great Britain, Northern Ireland, Uruguay, Vatican City State and Venezuela.  

Table 3

<table>
<thead>
<tr>
<th>Worldwide Abolition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina 1922</td>
</tr>
<tr>
<td>Australia (Fed.) 1945</td>
</tr>
<tr>
<td>New South Wales 1955</td>
</tr>
<tr>
<td>Queensland 1922</td>
</tr>
<tr>
<td>Tasmania 1968</td>
</tr>
<tr>
<td>Austria 1968</td>
</tr>
<tr>
<td>Belgium 1868</td>
</tr>
<tr>
<td>Bolivia 1961</td>
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<tr>
<td>Brazil 1946</td>
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<tr>
<td>Canada 1967c</td>
</tr>
<tr>
<td>Colombia 1910</td>
</tr>
<tr>
<td>Costa Rica 1880</td>
</tr>
<tr>
<td>Denmark 1930</td>
</tr>
<tr>
<td>Dominican Republic 1924</td>
</tr>
<tr>
<td>Ecuador 1897</td>
</tr>
<tr>
<td>Finland 1949</td>
</tr>
<tr>
<td>Germany, West 1949</td>
</tr>
</tbody>
</table>

132. Brief for Petitioner, Aikens v. California, No. 68-5027, United States Supreme Court, at 2e-3e, and sources cited therein. Included in the abolitionist states are Canada, Israel, Nepal, New Zealand, the United Kingdom and the Australian jurisdictions, which retain capital punishment for certain extraordinary civil offenses. Also included are eight jurisdictions permitting executions under military law or in time of war—Brazil, Denmark, Finland, Italy, Netherlands, Norway, Sweden and Switzerland.

133. Id.
Greenland 1954 New Zealand 1961
Honduras 1957 Nicaragua 1892
Iceland 1940 Norway 1905
India 1915 Panama 1915
Travencore 1944 Portugal 1867
Israel 1954 San Marino 1848
Italy 1944 Surinam 1927
Lichtenstein 1798 Sweden 1921
Luxembourg 1821 Switzerland 1942
Mexico (Fed.) 1931 United Kingdom 1931
Monaco 1962 Northern Ireland 1966
Mozambique 1867 Uruguay 1907
Nepal 1950 Vatican City State 1969
Netherlands 1886 Venezuela 1863
Antilles 1957

a Excludes one soldier executed in 1918.
b De Facto only; date is last execution.
c Statute abolishing capital punishment for murder expires after a five year period (beginning 1967) if not renewed.
d Excludes one.

Each ten-year period since 1800 has seen an increase both in the total number and rate of foreign jurisdictions abandoning the death penalty.134

VII. CONCLUSION

Those who favor retention of capital punishment insist that certain crimes can be deterred only by the threat of the death sentence, as for example murder of prison guards by life termers. The experience of penal officials, however, has not shown this to be the case. According to Lewis Lawes, former warden of Sing Sing:

I believe that nearly all wardens are united in agreeing that as a group [life termers] constitute the most reliable and dependable men in the institution. In a great majority of cases the murderer is not criminal in his nature as we ordinarily understand this term. Given places of trust and responsibility as they often are, these men invariably make good.135

135. L. LAWES, MAN'S JUDGMENT OF DEATH, at 49.
134. Id.
Statistical surveys also show that prison personnel as well as inmates do not experience a higher rate of assault or homicide from life termers in jurisdictions which do not have the death penalty than in those which do. Upon this authority it is fair to conclude that the parole system and institutional control, including isolation are greater realities for inmates and better deterrents to criminal behavior than the remote spectre of the death penalty.

Opinion polls, as well as the recently insurgent death penalty restoration movement, might reflect a society deeply divided on the issue of retention of capital punishment. But as Justice Brennan noted in his concurring opinion in *Furman v. Georgia*: “The acceptability of a severe punishment is measured . . . by its use.” The use of capital punishment in South Carolina and the Nation shows that that punishment is no longer accepted. Upon the recent authority of the Supreme Court, efforts to resurrect it would embroil the State in yet another expensive, time consuming exercise in waste and futility.

Corrections officials dispute that capital punishment serves a legitimate purpose. The executive concedes that it is unconstitutional and the courts refuse to impose it. The time has now come for the State frankly to acknowledge that the death penalty has been relegated to our history.


137. 33 L. Ed. 2d at 372.

138. “The present director of South Carolina prisons, William D. Leeke, is opposed to the death penalty, partly because he believes that too many poor defendants die while wealthier ones hire lawyers better able to get them life sentences, or even freedom . . . Leeke, who is also president of the State Correctional Administrators Association . . . said that most prison directors in recent surveys said they favor abolishing the death penalty.” Atlanta Journal-Atlanta Constitution, January 30, 1972.