IN THE

Supreme Court of the United States

No. 69-5003

WILLIAM HENRY FURMAN, *Petitioner,*

v.

GEORGIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONER

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OPINION BELOW

The syllabus opinion of the Supreme Court of Georgia affirming petitioner's conviction of murder and sentence of death by electrocution is reported at 225 Ga. 253, 167 S.E. 2d 628, and appears in the Appendix [hereafter cited as A.____] at A. 66-68.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Georgia was entered on April 24, 1969. (A. 68.) A petition for *certiorari* was filed on July 23, 1969, and was granted (limited to one question) on June 28, 1971 (A. 69).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It involves the Due Process Clause of the Fourteenth Amendment.

It further involves Ga. Code Ann. §§ 26-1001, 26-1002, 26-1005, 26-1009, 27-2512, 27-2602, 27-2604 which are set forth in Appendix A to this brief [hereafter cited as App. A, pp._____], at App A, pp. 1a - 4a, *infra.*

QUESTION PRESENTED

Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

STATEMENT OF THE CASE

Petitioner William Henry Furman was convicted of murder and sentenced to die following a one-day jury trial in the Superior Court of Chatham County, Georgia, on September 20, 1968. (A. 10-65.) The trial was very brief. Jury selection began at about 10:00 a.m.;[1] the taking of

[1]One venireman was excused for cause over petitioner's objection (A. 13-14 [Tr. 6-9]) because of his opposition to the death penalty. He was asked if he would refuse to impose capital punishment

evidence and the court's charge to the jury were concluded by approximately 3:30 p.m. (A. 64 [Tr. 119]); the jury retired at 3:35 p.m. *(ibid.)* and returned its death verdict at 5:10 p.m. *(ibid.)*.

The murdered man was William Joseph Micke, Jr. His widow testified at the trial that Mr. Micke was twenty-nine years old, and lived with her and five children—ranging in age from one to fifteen—in a house in the City of Savannah. (A. 17-18 [Tr. 12-13.]) Mr. Micke was employed by the Coast Guard; and on August 11, 1967, he began work at a second job, at the Tiffany Lounge, to supplement his income. (A. 18 [Tr. 13].) He returned home from that job at about midnight; then he and his wife retired for the night. *(Ibid.)*

Between 2:00 and 2:30 a.m., Mr. and Mrs. Micke heard noise coming from the dining room or kitchen area of the house. They thought that it was their eleven year-old son sleepwalking, and Mr. Micke went to investigate. Mrs. Micke heard him call the boy, heard his footsteps quicken, then heard "a real loud sound and he screamed." (A. 19 [Tr. 15]; see A. 17-19 [Tr. 13-15].) She ran and locked herself with her children in her daughters' bedroom, where they all began to shout for the neighbors. The neighbors came in a few minutes, and Mrs. Micke immediately phoned the police who arrived shortly thereafter. (A. 19-20, 21-22 [Tr. 15-16, 19-20].) From her testimony and that of an investigating officer, the jury could find that Mr. Micke's assailant had entered the rear porch of the house through

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in a case regardless of the evidence, and said, "I believe I would" (A. 13 [Tr. 5]); when asked whether his opposition to the death penalty would affect his decision as to a defendant's guilt, he said "I think it would" *(Ibid.)*. Veniremen were not excused for cause who, although opposed to capital punishment, said that they could impose it in some circumstances, and that their attitudes toward capital punishment would not prevent them from making an impartial determination of the defendant's guilt. (A. 12, 14-15 [Tr. 4, 7-9].) The Georgia Supreme Court held that this form of death qualification was proper under *Witherspoon v. Illinois*, 391 U.S. 510 (1968). (A. 66.)

a screen door (which might or might not have been locked), had moved a washing machine away from the porch wall outside the kitchen window, and had reached through the kitchen window to unlatch the kitchen door from the inside. (A. 19-21, 25 [Tr. 16-19, 24].)

The investigating officer, responding to a call at the Micke house at about 2:30 a.m., found Mr. Micke lying dead on the kitchen floor. (A. 24-26 [Tr. 23-26].) The cause of death was later determined to be a single pistol wound which entered Mr. Micke's upper chest near the midline and passed through the lung causing severe hemorrhaging. (A. 32 [Tr. 35-36].) The bullet which produced this wound had been fired through the kitchen door from the outside while the door was closed. (A. 27, 29-30 [Tr. 28, 31-32].) Only one bullet hole was found in the door (A. 55 [Tr. 92-93]), which was constructed of solid plywood with no window (A. 20, 22, 29 [Tr. 17, 20-21, 31]). The prosecution adduced no evidence that more than this one shot was fired at the Micke house that night.[2]

Petitioner Furman was identified as Mr. Micke's killer because his fingerprints, taken following his arrest, matched several latent prints that were lifted from the surface of the washing machine on the Mickes' rear porch. (A. 33-34, 35-36 [Tr. 40-43, 50-55].) Petitioner was also seen and apprehended leaving the area with the murder weapon shortly after the killing, under the following circumstances.

One of the officers who had been called to the Micke house went thence to a street bordering a wooded area south of the house. He saw a man emerge from the woods, walking from the north. The man saw the officer and began to run. The officer called several other officers who

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[2]When petitioner was arrested in possession of the murder gun shortly thereafter (see text, *infra*), the gun contained three live bullets and three expended shells. (A. 42 [Tr. 65].) However, there is no evidence that more than one of these shells was fired at the Micke house. (A. 55 [Tr. 92].)

took up pursuit. Two followed foot-tracks left by the fleeing man in the rain. These led to the nearby house of Mr. James Furman, petitioner's uncle. (A. 38-39 [Tr. 59-61].) The officers followed the tracks around the house to an area which gave entrance to the space under the house. They shined their flashlights in, saw petitioner under the house, and called him out. (A. 39-40 [Tr. 61-62].) Petitioner "reached as if he was reaching for his back pocket and [one officer] . . . pulled [his] . . . pistol and . . . pointed it at him and . . . told him to come out and don't make any move." [A. 40 [Tr. 62].) The officers then pulled petitioner out from under the house, searched him, and found a .22 caliber pistol in "his right front pocket." (A. 42 [Tr. 64]; see also A. 40 [Tr. 63].) This pistol was later identified ballistically as the one which fired the bullet that killed Mr. Micke. (A. 42, 43, 49-50 [Tr. 65, 67-68, 80-81].)

Petitioner was the only eyewitness to the circumstances of Mr. Micke's killing. Two versions of those circumstances were put before the jury at the trial. A detective who questioned petitioner after his arrest testified that petitioner said:

> "that he was in the kitchen; the man came in the kitchen, saw him in there and attempted to grab him as he went out the door; said the man hit the door—instead of catching him, he hit the door, the door slammed between them, he turned around and fired one shot and ran." (A. 47 [Tr. 77]; see also A. 44-45; 49 [Tr. 71-73, 79].)

In his unsworn statement at trial,[3] petitioner denied making this declaration (A. 54-55 [Tr. 91-92]); he said:

> "I admit going to these folks' home and they did caught me in there and I was coming back out,

[3]Under Georgia practice following *Ferguson v. Georgia*, 365 U.S. 570 (1961), a criminal defendant may elect to testify under oath, questioned by his attorney and cross examined by the prosecutor, or to make an unsworn statement without questioning or cross examination. Petitioner "elected" the latter course. See note 8 *infra*.

> backing up and there was a wire down there on the floor. I was coming out backwards and fell back and I didn't intend to kill nobody. I didn't know they was behind the door. The gun went off and I didn't know nothing about no murder until they arrested me, and when the gun went off I was down on the floor and I got up and ran. That's all to it." (A. 54-55 [Tr. 91].)

It is impossible to know, of course, which of those versions of the facts—if either—the trial jury believed. But, as the case comes to this Court, it must be taken to be one in which the Georgia courts have permitted the imposition of a death sentence for an unintended killing, committed by the accidental discharge of a pistol during petitioner's flight from an abortive burglary attempt. This is so for several reasons.

First, Georgia law allows the imposition of the death sentence upon such a basis. Like the common law, but unlike the statutory law of most American jurisdictions today, Georgia does not divide murder into degrees. It maintains two crimes of homicide: murder and manslaughter. Ga. Code Ann., § 26-1001, App. A, p. 1a *infra.* The hallmark of murder is, as at common law, "malice aforethought," see Ga. Code Ann., § 26-1002, App. A, p. 1a *infra;* but a proviso to Ga. Code Ann., § 26-1009 creates a form of constructive malice, or of "felony-murder," by providing that even unintended killings are murder if they "happen in the commission of an unlawful act which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of . . . a crime punishable by death or confinement in the penitentiary." App. A, p. 2a *infra.* The punishment for murder by any person seventeen years of age or older is death by electrocution, except that (1) the jury may make a binding recommendation, in its sole discretion, that the punishment shall instead be life imprisonment; and (2) if the conviction is based solely on circumstantial testimony, the presiding judge is also given discretion to impose a sentence of life imprisonment not-

withstanding the jury's death verdict. Ga. Code Ann. §§ 26-1005, 27-2512, App. A; pp. 1a-3a *infra.*

Second, the jury charge in this case permitted a murder conviction, and thereby a death sentence, if petitioner's killing of Mr. Micke was found to be either (a) actuated by "express malice" (i.e., an intentional killing) (A. 61-62 [Tr. 114-115]), or (b) the product of "implied malice," defined to include "the killing of a human being by the intentional use of a weapon that as used is likely to kill and a killing without justification, mitigation or excuse" (A. 62 [Tr. 115]), or (c) "an involuntary killing . . . in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being or . . . in the prosecution of a crime punishable by . . . confinement in the penitentiary" (A. 62-63 [Tr. 115-116])—here, the crime of burglary (A. 62-63 [Tr. 116-117)]. The jury was specifically instructed:

> "If you believe beyond a reasonable doubt that the defendant broke and entered the dwelling of the deceased with intent to commit a felony or a larceny and that after so breaking and entering with such intent, the defendant killed the deceased in the manner set forth in the indictment, and if you find that such killing was the natural, reasonable and probable consequence of such breaking and entering then, I instruct you that under such circumstances, you would be authorized to convict the defendant of murder and this you would be authorized to do whether the defendant intended to kill the deceased or not." (A. 63 [Tr. 117].)[4] [5]

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[4]Petitioner challenged this instruction as erroneous in paragraph 7 of his Amended Motion for New Trial (R. 34, 42-43), which was overruled (R. 46). [Here and hereafter, references in the form R.___ designate pages of the Clerk's Record in the Superior Court of Chatham County, which is contained in the original record filed in this Court.] The same claim was incorporated by reference in paragraph 7, p. 2, of his Enumeration of Errors filed March 28, 1969, in the

Third, the Georgia Supreme Court rejected petitioner's claim of insufficiency of the evidence upon the express ground that even an involuntary killing in the course of a burglary was murder, and in express reliance upon petitioner's trial statement:

> "The admission in open court by the accused in his unsworn statement that during the period in which he was involved in the commission of a criminal act at the home of the deceased, he accidentally tripped over a wire in leaving the premises causing the gun to go off, together with other facts and circumstances surrounding the death of the deceased by violent means, was sufficient to support the verdict of guilty of murder. . . ." (A. 67-68.)

The jury which sentenced petitioner to die knew nothing about him other than the events of one half-hour of his life on the morning of August 12, 1967—as just recited—and the fact that he was black.[6] However, additional facts ap-

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Georgia Supreme Court. [This document is contained in, but is not paginated as a part of, the original record in this Court.]

[5]The court further charged the jury that, if it convicted the petitioner of murder, it might sentence him to death by electrocution or to life imprisonment without giving "any reason for its action in fixing the punishment at life or death." "The punishment is an alternative punishment and may be one or the other as the jury sees fit." (A. 64 [Tr. 118].)

[6]The cursory nature of the trial which determined that petitioner would die resulted from his indigency. Because petitioner was a pauper, the court appointed counsel to represent him. Under Georgia practice, appointed counsel was compensated $150 for defending a capital murder case. See the affidavit of B. Clarence Mayfield, Esq., dated May 5, 1969, filed in the Georgia Supreme Court and included in the original record in this Court. Counsel sought by written pretrial motions: (1) funds for a defense investigator, (2) "reasonable compensation [for counsel] to enable them [sic: him] to devote the necessary time to prepare a case of this kind," and (3) relief from the requirement that counsel "advance the expenses in the preparation of a trial in the lower court without knowing whether or not such expenses will be reimbursed to him." (Motions, paragraphs 2, 3, 4, R. 12-13.) Each of these requests was denied. (Order, R. 15.)

pear in the record which this Court may properly consider as bearing on the question whether the State of Georgia will be carrying out a cruel and unusual punishment if it electrocutes William Henry Furman. Those facts indicate, in summary, that Petitioner Furman is both mentally deficient and mentally ill.

On October 24, 1967—ten weeks after Mr. Micke's killing and almost a year prior to petitioner's trial—the trial court ordered petitioner committed to the Georgia Central State Hospital at Milledgeville for a psychiatric examination upon his special plea of insanity. (A. 8.) On February 28, 1968, the Superintendent of the Hospital reported by letter to the court that a unanimous staff diagnostic conference on the same date had concluded "that this patient should retain his present diagnosis of Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder." The physicians agreed that "at present the patient is not psychotic, but he is not capable of cooperating with his counsel in the preparation of his defense;" and the staff believed "that he is in need of further psychiatric hospitalization and treatment." (App. B, p. 2b *infra.*)[7] By a subsequent letter of April 15, 1968, the Superintendent reported the same staff diagnosis of "Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder," but concluded that petitioner should now be returned to court for trial because "he is not psychotic at present, knows right from wrong and is able to cooperate with his counsel in preparing his defense." (Id., at 3b-4b.) At the time of trial, petitioner was twenty-six

[7]The reference is to Appendix B to this brief. That Appendix sets forth the texts of the two letters described in this paragraph, and explains why they may properly be considered by this Court although they were not before the Georgia Supreme Court.

years old,[8] had gotten to the sixth grade in school,[9] and was visibly confused by aspects of the proceedings against him.[10]

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

Paragraph 3 of petitioner's Amended Motion for New Trial, filed by leave of court, contended that the death sentence which had been imposed upon him was a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments to the Constitution of the United States. (R. 34, 38-39.) The motion was overruled. (R. 46.) Paragraph 4 of petitioner's Enumeration of Errors in the

[8]Petitioner recited his age in his unsworn statement to the jury. (A. 54 [Tr. 91].)

[9]Petitioner's level of schooling was elicited from him, out of the presence of the jury, while he was being questioned by his counsel and the court in order to determine whether he wished to take the stand. (A. 53 [Tr. 89].)

[10]At the conclusion of the prosecution's case, the jury was excused, and petitioner's court-appointed counsel asked leave of the court to put the defendant on the stand "to ascertain from him whether or not, for the record, he wishes to make a sworn or unsworn statement or no statement at all." (A. 50 [Tr. 84]). See note 3 *supra*. In yes-and-no responses to counsel's questioning, petitioner stated that counsel had previously talked with him and advised him concerning his making a statement to the jury; and petitioner said and repeated that he did not want to make such a statement. (A. 51-52 [Tr. 85-86.]) The court and counsel then advised petitioner again concerning his rights to make a sworn or unsworn statement or no statement; petitioner was asked if he understood "what we are trying to ask you"; and he replied: "Some of it I don't." (A. 52-53 [Tr. 86-89].) He then answered "yes" to the court's question whether he wanted to tell the jury anything, and repeated this "yes." (A. 53 [Tr. 89].) Without further inquiry regarding the reasons for, or advisedness of, petitioner's unexplained change of mind, counsel and the court treated this response as an election to make an unsworn statement; the jury was recalled; and petitioner took the stand. (A. 54 [Tr. 90].)

Georgia Supreme Court made the same contention.[11] The Georgia Supreme Court rejected it upon the merits. (A. 67.)

SUMMARY OF ARGUMENT

I. Petitioner's sentence of death is a rare, random and arbitrary infliction, prohibited by the Eighth Amendment principles briefed in *Aikens v. California.*

II. The Eighth Amendment forbids affirmance of a death sentence upon this record, which casts doubt upon petitioner's mental soundness. To relegate petitioner to the torments and vicissitudes of a death sentence without appropriate inquiry into his mental condition is to subject him to cruel and unusual punishment.

I.

THE DEATH PENALTY FOR MURDER VIOLATES CONTEMPORARY STANDARDS OF DECENCY IN PUNISHMENT

The Brief for Petitioner in *Aikens v. California* [12] fully develops the reasons why we believe that the death penalty is a cruel and unusual punishment for the crime of murder, as that penalty is administered in the United States today. At the heart of the argument is the principle that the Eighth Amendment condemns a penalty which is so oppressive that it can command public acceptance only by sporadic, exceedingly rare and arbitrary imposition.

Petitioner's case epitomizes that characteristic of the penalty of death for murder. His was a grave offense, but one noways distinguishable from thousands of others for

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[11] P. 1 of the Enumeration of Errors, filed March 28, 1969. [This document is contained in, but is not paginated as a part of, the original record filed in this Court.]

[12] O.T. 1971, No. 68-5027.

which the death penalty is not inflicted. Following a brief trial which told the jury nothing more than that petitioner had killed Mr. Micke by a single handgun shot through a closed door during an armed burglary attempt upon a dwelling—and which permitted his conviction whether or not the fatal shot was intentionally fired—he was condemned to die. The jury knew nothing else about the man they sentenced, except his age and race.

It is inconceivable to imagine contemporary acceptance of the general application of the death penalty upon such a basis. Only wholly random and arbitrary selection of a few, rare murder convicts makes capital punishment for murder tolerable to our society. For the reasons stated in the *Aikens* brief, it is not tolerable to the Eighth Amendment.

II.

PETITIONER'S SENTENCE OF DEATH IMPOSED WITHOUT ADEQUATE INQUIRY CONCERNING HIS MANIFESTLY IMPAIRED MENTAL CONDITION VIOLATES THE EIGHTH AMENDMENT

But there is an additional reason why the sentence of death imposed on this petitioner cannot constitutionally stand. The record in this case bears plain indications that petitioner is mentally ill. The imposition of a death sentence upon him without adequate inquiry concerning either his competency to be executed or his capability to withstand the stress of such a sentence violates the Eighth Amendment.

(1) This Court need not look to evolving standards of decency for evidence that the execution of a mentally disordered person offends the most basic human precepts embodied in our legal history. Coke in 1644 wrote that in earlier years it had been provided that:

> ". . . if a man attainted of treason become mad, that notwithstanding he should be executed which

> cruell and inhuman law lived not long, but was repealed, for in that point also it was against the common law, because by intendment of law the execution of the offender is for example, *ut poena ad paucos, metus ad omnes perveniat*, as before is said: but so it is not when a mad man is executed, but should be a miserable spectacle, both against law and of extreme inhumanity and cruelty, and can be no example to others." (COKE, THIRD INSTITUTE (1644), 6.)[13]

The British Royal Commission on Capital Punishment concluded that:

> "It has for centuries been a principle of the common law that no person who is insane should be executed . . . ." (ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT (H.M.S.O. 1953) [Cmd. 8932] [hereafter cited as ROYAL COMMISSION], 13.[14]

The Commission found that "the Home Secretary is under a statutory obligation to order a special medical inquiry if there is reason to believe that a prisoner under sentence of death is insane, and similar inquiries are often held where a lesser degree of abnormality is suspected." ROYAL COM-

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[13]See also, 1 HAWKINS, PLEAS OF THE CROWN (1716), 2; 4 BLACKSTONE, COMMENTARIES (1803), 24; Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 Howell State Trials 474, 476 (1816); CHITTY, CRIMINAL LAW (Earle Ed. 1819), 525; 1 HALE, PLEAS OF THE CROWN (1678), 35, 370; and the authorities cited in the dissenting opinion of Mr. Justice Frankfurter in *Solesbee v. Balkcom*, 339 U.S. 9, 16-20, (1950).

[14]See also ROYAL COMMISSION 123; Testimony of Sir John Anderson, ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE (1949) [hereafter cited as ROYAL COMMISSION MINUTES], 363:

> "As was stated in the House of Commons in the case of Ronald True, 'the principle that an insane man should not go to execution has been enshrined in the Common Law since the days of Coke and Hale.'"

See also, *e.g.*, *id.* at 3, 40; 128.

MISSION 13. In the event the doctors who examined the condemned man found him insane, the Home Secretary was required to respite the sentence.

> "[I]t is not only right and proper that the Home Secretary should respite the sentence of death and direct the prisoner's removal to Broadmoor or to a mental hospital, but it is his imperative duty to do so, both under the statute and because it is contrary to the common law to execute an insane criminal." (ROYAL COMMISSION 127.)[15]

The reasons advanced for this traditional prohibition have been varied. They include the notions that an insane person can not bring evidence on his own behalf to defeat the sentence,[16] that the execution of an insane person cannot reasonably be thought to deter others,[17] that an insane person is not mentally fit to make peace with his maker,[18] that he has already been punished sufficiently by God or by the devil,[19] and that the execution of an insane person would

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[15]See also ROYAL COMMISSION MINUTES 3, 47, 372, 380. For general discussion of the British procedure, see ROYAL COMMISSION 2, 124-130; ROYAL COMMISSION MINUTES 2, 40, 246, 256, 352, 522; WEIHOFEN, THE URGE TO PUNISH (1956), 52-53. See also WEIHOFEN, THE URGE TO PUNISH (1956), 52-53. See also WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954), 463-470; *Solesbee v. Balkcom*, 339 U.S. 9, 26-32 (1950) (dissenting opinion of Mr. Justice Frankfurter).

[16]See, *e.g.* 4 BLACKSTONE, COMMENTARIES (1803), 24-25; Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 Howell State Trials 474, 476-477 (1868).

[17]See, *e.g.*, COKE, THIRD INSTITUTE (1644), 6, p. 13 *supra.*

[18]See *e.g.*, Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 Howell State Trials 474, 477 (1868): "[It] is inconsistent with religion, as being against Charistian charity to send a great offender quick, as it is stiled, into another world, when he is not of a capacity to fit himself for it."

[19]Ehrenzweig, *A Psychoanalysis of the Insanity Plea–Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell*, 1 CRIM. L. BULL. (No. 9) 3, 21 (1965) [hereafter cited as Ehrenzweig].

not satisfy the extreme judgment inflicted on him.[20] However, "[w]hatever the reason of the law is, it is plain the law is so." Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 Howell State Trials 474, 477 (1816).

> "When we seek the purpose of the rule we are met with diverse explanations of varying persuasiveness. The very multiplicity of explanations suggest that the rule may have been devised to meet an earlier theoretical or practical need or special consensus and has survived the obsolescence of the original cause." Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A. L. REV. 381, 383 (1962) [hereafter cited as *Death, the State, and the Insane*].

Its survival, we suggest, manifests a common and unwavering recognition—albeit expressed through quite wavering and often unsatisfactory rationalizations—of Coke's basic observation that the execution of the mentally ill constitutes "a miserable spectacle," smacking of "extreme inhumanity and cruelty," *supra.*[21]

(2) The record in this proceeding concerning petitioner's mental condition is scant, due in part to the negligible resources allowed his appointed trial counsel,[22] and in part to Georgia practice which forbids a capital defendant to put in evidence of mental impairment relevant to the question of sentencing.[23] However, enough appears, we think to

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[20] *Musselwhite v. State*, 215 Miss. 363, 367, 60 So. 2d 807, 809 (1952): "it is revealed that if he were taken to the electric chair he would not quail or take account of its significance." See also Ehrenzweig, at 14-15.

[21] See also, *e.g.*, Hawles, Remarks from the Trial of Mr. Charles Bateman, 11 Howell State Trials 474, 477 (1816): "[T]hose on whom the misfortune of madness fall, it is inconsistent with humanity to make examples of them. . . ."

[22] See note 6, *supra.*

[23] A defendant may assert incompetency to be tried, and may present evidence on that question; or he may contest guilt on the grounds of criminal irresponsibility at the time of the offence. *E.g.*,

establish significant mental abnormality. Petitioner was diagnosed on February 28, 1968, to be afflicted with "Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder," and was found incapable of cooperating with counsel in his defense. (App. B, p. 2b *infra.*) Although this latter incapacity was found no longer to exist on April 15, 1968, the same diagnosis was reported. (App. B, p. 3b *infra.*) Petitioner was not found to be psychotic; and the character and extent of his condition are not otherwise disclosed; but the record at the least reveals grounds for the gravest doubt of his mental stability.

(3) For any man, be he mentally firm or infirm, condemnation under a sentence of death and the "thousand days" on death row create conditions of mind-twisting stress.[24]

> "He hopes by day and despairs of it by night. As the weeks pass, hope and despair increase and become equally unbearable. . . . He is no longer a man but a thing waiting to be handled by the executioners." (Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH (1961), 200-201.)[25]

Dr. Louis J. West has described death row as a "grisly laboratory [which] . . . must constitute the ultimate experimental stress in which he [sic: the] condemned prisoner's personality is incredibly brutalized."[26] Dr. Isidore Zifferstein writes that:

Rogers v. State, 128 Ga. 67, 57 S.E. 227 (1907); *Summerour v. Fortson*, 174 Ga. 862, 164 S.E. 809 (1932).

[24] LAWES, LIFE AND DEATH IN SING SING (1928), 161-162; West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, To Abolish the Death Penalty (March 20-21 and July 2, 1968) (G.P.O. 1970) [hereafter cited as *Hearings*], 124, 127.

[25] See also *Ex parte Medley*, 134 U.S. 160, 172 (1890).

[26] West, *Medicine and Capital Punishment* in *Hearings*, at 127.

> "Modern techniques of execution have aimed at minimizing the physical pain of dying (although we do not really know how much pain is experienced in electrocution or execution by gas). But these modern techniques have retained to the fullest the exquisite psychological suffering of the condemned man."[27]

[27] Zifferstein, *Crime and Punishment*, 1 THE CENTER MAGAZINE (No. 2) 84 (Center for the Study of Democratic Institutions 1968). We must admit that the published literature concerning the psychological impact of the "thousand days" upon condemned men is limited and unsystematic. This is one of the subjects concerning which counsel for petitioner have, in other litigations, unsuccessfully sought to present evidence. See Brief for Petitioner, in *Aikens v. California*, *supra*, n. 120. The literature contains enough, however, to glimpse the extent of the pressures upon the condemned. As execution approaches, some prisoners exhibit grossly psychotic reactions, see, *e.g.*, ESHELMAN, DEATH ROW CHAPLAIN (1962), 159-161; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 221-223, 229-230; Ehrenzweig 11, while other prisoners respond to the stress with psychological mechanisms involving major personality distortion. See Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962).

Institutional practices on death row recognize the likelihood of extreme reactions from the condemned, particularly suicide attempts. "The 'cheating of the chair' by escape or suicide is rendered practically impossible by . . . extraordinary precautions against these contingencies." LAWES, LIFE AND DEATH IN SING SING (1928), 161. In Warden Lawes' experience, these precautions cover the minutest detail, including paring the fingernails of the condemned once or twice a week "as long nails could be used to cut the arteries of the wrist." *Id.* at 163-164. In spite of these precautions, attempts at suicide are not rare phenomena, *id.* at 163, 177, and occasionally succeed, *id.*, 165, 180; LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 334; DUFFY & JENNINGS, THE SAN QUENTIN STORY, (1950) 108-109; ESHELMAN, DEATH ROW CHAPLAIN (1962), 161-164. Such attempts have sometimes required surgical intervention to save the life of the condemned man in order that he could be properly executed. LAWES, LIFE AND DEATH IN SING SING (1928), 165, 177; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 51-52; ESHELMAN, DEATH ROW CHAPLAIN (1962), 164-165. See generally Gottlieb, *Capital Punishment*, 15 CRIME & DELINQUENCY 1, 8-10 (1969).

(4) Under these circumstances, we believe that a judgment inflicting a sentence of death upon petitioner, in the absence of further inquiries into his mental state, subjects him to a cruel and unusual punishment. We recognize that in the *Crampton* case[28] this Court declined to hold that the Due Process Clause required any particular form of procedure by which facts relevant to the sentencing decision in a capital case could be put into the record. But the question here is not one concerning forms of procedure: it is whether, once facts are called to the trial court's attention which convey notice that its process may be unconstitutional, it is required by the Constitution to conduct an adequate inquiry into those facts. Cf. *Pate v. Robinson*, 383 U.S. 375 (1966). We think that it is, where the effect of its process subjects a man who may be mentally ill not only to the jeopardy of electrocution, but to the devastating stresses of death row.

(5) We must also recognize, of course, that the traditional Anglo-American inhibition upon the execution of the insane has been enforced by post-conviction, non-judicial process; and that Georgia provides a form of such process for an inquiry into the insanity of the condemned. See Ga. Code Ann., § 27-2602 (1970 Cum. pocket part), App. A, p. 3a *infra; Solesbee v. Balkcom*, 339 U.S. 9 (1950). Pursuant to that statute, the Governor may, in his discretion, cause a condemned man to be mentally examined; and if the Governor finds that he has become insane subsequent to his conviction, the Governor may commit him to a state hospital until his sanity is restored. When his sanity is restored he is returned to Court, a new death warrant for his execution is signed, and he is executed. Ga. Code Ann. § 27-2604 (1953), App. A, p. 3a *infra*.

Solesbee sustained the constitutionality of this procedure as a corrective against insanity supervening trial and sen-

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[28] *Crampton v. Ohio*, reported *sub nom. McGautha v. California*, 402 U.S. 183 (1971).

tence. But we do not think that its existence, or even its constitutionality in that context, warrants a court imposing a sentence of death upon a man of manifestly questionable mentality without first making its own thorough inquiry and determination whether he is competent to be put to death and capable of receiving a death sentence.[29] This is so for two basic reasons.

First, the Georgia Governor's process can reprieve a condemned man from death, but not from the torments of a death sentence. Those torments are agonizing even for a mind of normal stability, but may be unbearable for an unstable one. Without adequate judicial inquiry into the mental state of the defendant, a death sentence may be tantamount to a sentence of insanity.

Second, the gubernatorial reprieve merely sets in motion a procedure by which the condemned man is hospitalized and healed enough to kill. Georgia's insistence upon executing a condemned man following his restoration to sanity is consistent with prevailing American practice.[30] It is, however, a plain barbarity which the Eighth Amendment should condemn. In England, at least since 1840, "there has been no case where a prisoner has been executed after being certified insane under the statute in force at the time."[31] In principle as well as in fact, the Royal Commission found:

> ". . . If a prisoner under sentence of death is certified insane and removed to Broadmoor, it is unthinkable that the sentence should ever be carried out in the event of his recovery. . . ."[32]

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[29] See also *Nobles v. Georgia*, 168 U.S. 398 (1897); *Phyle v. Duffy*, 334 U.S. 431 (1948); *Caritativo v. California*, 357 U.S. 549 (1958).

[30] WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954) 468-470; *Death, the State, and the Insane* 382-383; Ehrenzweig 11.

[31] ROYAL COMMISSION 128.

[32] ROYAL COMMISSION 157-158. See also Feltham, *The Common Law and the Execution of Insane Criminals*, 4 MELBOURNE U.L. REV. 434, 475 (1964): "if such a medical inquiry finds a priso-

A judicial sentence of death imposed upon a man in the same condition—or for want of inquiry upon notice that he may be in the same condition—seems to us equally unthinkable. It is no less so because thereafter, by executive grace, he may be permitted to vacillate between insanity and death.

CONCLUSION

The death sentence imposed upon petitioner William Henry Furman should be set aside as a cruel and unusual punishment.

Respectfully submitted,

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ner insane; there should be a mandatory duty upon the executive to reprieve. This, although not required by law, has been the invariable practice in England since 1840 and is no more than common decency and humanity requires."

TABLE OF AUTHORITIES
APPENDICES

APPENDIX A

STATUTORY PROVISIONS INVOLVED

Ga. Code Ann., § 26-1001
(1953 Rev. vol.)
effective prior to July 1, 1969

26-1001. (59 P.C.) Definition; kinds.—Homicide is the killing of a human being, and is of three kinds—murder, manslaughter, and justifiable homicide. (Cobb, 783.)

Ga. Code Ann., § 26-1002
(1953 Rev. vol.)
effective prior to July 1, 1969

26-1002. (60 P.C.) Murder defined.—Murder is the unlawful killing of a human being, in the peace of the State, by a person of sound memory and discretion, with malice aforethought, either express or implied. (Cobb, 783.)

Ga. Code Ann. § 26-1005
(1970 Cum. pocket part)
effective prior to July 1, 1969

26-1005. (63 P.C.) Punishment for murder; recommendation by jury.—The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend, or the the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life. In the former case it is not discretionary with the judge; in the latter it is. When it is shown that a person convicted of murder had not reached his 17th birthday at the time of the commission of the offense, the punishment of such person shall not be death but shall be imprisonment for life.

Whenever a jury, in a capital case of homicide, shall find a verdict of guilty, with a recommendation of mercy, instead of a recommendation of imprisonment for life, in cases

where by law the jury may make such recommendation, such verdict shall be held to mean imprisonment for life. If, in any capital case of homicide, the jury shall make any recommendation, where not authorized by law to make a recommendation of imprisonment for life, the verdict shall be construed as if made without any recommendation. (Cobb, 783. Acts 1875, p. 106; 1878-9, p. 60; 1963, p. 122.)

Ga. Code Ann., § 26-1009
(1953 Rev. vol.)
effective prior to July 1, 1969

26-1009. (67 P.C.) **Involuntary manslaughter defined.**—Involuntary manslaughter shall consist in the killing of a human being without any intention to do so, but in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: Provided, that where such involuntary killing shall happen in the commission of an unlawful act which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, or of a crime punishable by death or confinement in the penitentiary, the offense shall be deemed and adjudged to be murder. (Cobb, 784.)

Ga. Code Ann., § 27-2512
(1953 Rev. vol.)

27-2512. **Electrocution substituted for hanging; place of execution.**—All persons who shall be convicted of a capital crime and who shall have imposed upon them the sentence of death, shall suffer such punishment by electrocution instead of by hanging.

In all cases in which the defendant is sentenced to be electrocuted it shall be the duty of the trial judge, in passing sentence, to direct that the defendant be delivered to the Director of Corrections for electrocution at such penal institution as may be designated by said Director. However, no executions shall be held at the old prison farm in Bald-

win county. (Acts 1924, pp. 195, 197; Acts 1937-38, Extra Sess., p. 330.)

Ga. Code Ann., § 27-2602
(1970 Cum. Pocket part)

27-2602. (1074 P.C.) Disposition of insane convicts. Cost of investigations.—Upon satisfactory evidence being offered to the Governor, showing reasonable grounds to believe that a person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, in his discretion, have said person examined by such expert physicians as the Governor may choose, the cost of said examination to be paid by the Governor out of the contingent fund. It shall be the responsibility of the Governor to cause said physicians to receive written instructions which plainly set forth the legal definitions of insanity as recognized by the laws of this State, and said physician shall, after making the necessary examination of the prisoner, report in writing to the Governor whether or not reasonable grounds exist to raise an issue that the prisoner is insane by the standards previously specified to them by the Governor. The Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored or determined by laws now in force. (Acts 1903, p. 77; 1960, pp. 988, 989.)

Ga. Code Ann., § 27-2604
(1953 Rev. vol.)

27-2604. (1076 P.C.) Resentence and warrant on recovery of convict.—If the convict mentioned in the preceding section should recover, the fact shall be at once certified by the superintendent of the Milledgeville State Hospital to the judge of the court in which the conviction occurred. Whenever it shall appear to the judge by said certificate, or by inquisition or otherwise, that the convict has recovered and is of sound mind, he shall have the convict removed to the

jail of the county in which the conviction occurred, or to some other safe jail, and shall pass sentence, either in term time or vacation, upon the convict, and he shall issue a new warrant, directing the sheriff to do execution of the sentence at such time and place as may be named in the warrant, which the sheriff shall be bound to do accordingly. The judge shall cause the new warrant, and other proceedings in the case, to be entered on the minutes of said superior court. (Acts 1874, p. 30.)

Ga. Crim. Code, § 26-1101
(1970 Rev. vol.)
(effective July 1, 1969)

26-1101. Murder.—(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

(Acts 1968, pp. 1249, 1276.)

Ga. Crim. Code § 26-3102
(1970 Rev. vol.)
effective July 1, 1969

26-3102. Capital offenses—jury verdict and sentence.—Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a recommendation that such sentence be imposed. Where

a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case recommends the death sentence in its verdict, the court shall not sentence the defendant to death. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

(Acts 1968, pp. 1249, 1335; 1969, p. 809.)

APPENDIX B
PSYCHIATRIC REPORTS

Pursuant to petitioner's commitment for a pretrial mental examination in this case (A. 8), the following two letters were written by the Superintendent of the Georgia Central State Hospital to the trial court below. They were subsequently made a part of the record of the trial court by express written order;[1b] and petitioner's notice of appeal requested the clerk to transmit the entire record to the Georgia Supreme Court.[2b] However, for reasons unknown to us, the clerk of the trial court neglected to transmit the letters as a part of the appellate record; and they were not before the Georgia Supreme Court. Subsequent to this Court's order granting certiorari, petitioner's counsel noticed their absence and asked the clerk of the Chatham County Supreme Court to certify the records of the Georgia Supreme Court. The clerk did so; whereupon the clerk of the Georgia Supreme Court transmitted them to this Court under certification reciting that they were not a part of the record in the Georgia Supreme Court.

Under these circumstances, we think that the letters are properly a part of the record upon which this Court may consider the case. Petitioner did all that he was required to do in order to include them in the appellate record, and is not responsible for the clerk's neglect. The authenticity of the letters cannot be questioned; they are a part of the trial court record; and their absence from the record before the Georgia Supreme Court did not affect the course of the litigation in any way. That court's decision of the Eighth Amendment question was perfunctory in any event, since

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[1b]Order, dated February 20, 1969 (R. 44): "FURTHER ORDERED that the Psychiatric Report of the Movant WILLIAM HENRY FURMAN be and is made a part of this record."

[2b]Notice of Appeal, dated March 3, 1969 (R.1): "The clerk will please include the entire record on appeal."

the question was foreclosed by—and decided summarily on authority of—several prior Georgia decisions.

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STATE OF GEORGIA
CENTRAL STATE HOSPITAL
MILLEDGEVILLE, GEORGIA 31062

February 28, 1968

Honorable Dunbar Harrison
Judge, Superior Court
Eastern Judicial Circuit
c/o Courthouse
Savannah, Georgia

Re: William Henry Furman
Case No: 157 086
Binion 4

Dear Judge Harrison:

The above named patient was admitted to this hospital on October 26, 1967, by Order of your Court.

The patient was presented to a staff meeting today, February 28, 1968. It was the unanimous opinion of the members of the staff, Dr. Elpidio Stincer, Dr. Jose Mendoza, and Dr. Armando Gutierrez, that this patient should retain his present diagnosis of Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder.

It was also agreed that at present the patient is not psychotic, but he is not capable of cooperating with his counsel in the preparation of his defense.

We feel at this time that he is in need of further psychiatric hospitalization and treatment. He will be reevaluated at a later date and presented to the staff again for a deci-