

1973 WL 27755 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 7, 1973

***1 In Re: Penalties for Murder and Manslaughter; Proposed Bill**

Honorable LaLue Floyd
Post Office Drawer 688
Kingstree, South Carolina 29556

Dear Senator Floyd:

At your suggestion, I discussed today with Senator Ballenger and Smith Proposed legislation for imposing the penalty of death for certain crimes. It was the consensus of opinion of these two members of your Committee that the mandatory death penalty should be provided for murder only, but that such penalty should be provided in all cases of murder and not limited to selected types of cases. It was their opinion, further, that the maximum penalty for manslaughter should be increased to life imprisonment.

In the death penalty case, [Furman v. Georgia](#), 33 L.ed.2d 346, four Supreme Court Justices were of the opinion that the death penalty is constitutional, and five Justices concurred in the majority opinion that such penalty in the cases under review (Murder from Georgia, Rape from Georgia, and Rape from Texas) was unconstitutional. The five majority Justices wrote five separate concurring opinions, giving five slightly different reasons for their views:

Justice	Reason
Douglas	Selective Application
Brennan	Cruel and Unusual Punishment
Stewart	Infrequent Application (Possibly Cruel and Unusual?)
White	Infrequent Application (Possibly Cruel and Unusual?)
Marshall	Cruel and Unusual Punishment

In my view, based upon their concurring opinions in [Furman](#), it appears that two of the majority five (Marshall and Brennan) will not approve the death penalty in any form for any crime, that two (Stewart and White) did not furnish and substantial basis for predicting their view on the cruel and unusual aspect of the question, and that only one (Douglas) appeared to base his objection to the death penalty solely on the basis of its 'selective application to minorities'.

No one, as you no doubt know, can give the Committee any real assurance that the death penalty in any form or circumstance will survive the ultimate test of Supreme Court scrutiny, but there is substantial indication that the plan with the best chance of survival must eliminate the discretion given to juries or judges to choose between death and life imprisonment, or death and any other penalty. Justice White specifically and severely criticized the practice of 'delegating sentencing authority to the jury'.

Chief Justice Burger, in his dissenting opinion, suggests that if he were possessed of legislative power, he would outlaw the death penalty for all but 'the most heinous crimes'. It would be unwarranted speculation, however, to conclude that imposition of the death penalty in selected factual circumstances would stand a better chance of survival than the provision contained in the proposed bill, attached.

I shall, of course, be pleased to meet with your Committee at any time.
Very truly yours,

*2 Joseph C. Coleman
Deputy Attorney General

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