

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT PADUCAH  
(Filed Electronically)**

**CRIMINAL ACTION NO. 5:06CR-19-R  
UNITED STATES OF AMERICA,**

**PLAINTIFF,**

**vs.**

**STEVEN DALE GREEN,**

**DEFENDANT.**

**MOTION TO DECLARE THE FEDERAL DEATH PENALTY ACT  
UNCONSTITUTIONAL BECAUSE IT IS ARBITRARY; VIOLATES EVOLVING  
STANDARDS OF DECENCY; AND IS APPLIED IN A FUNDAMENTALLY  
UNFAIR MANNER**

Comes the defendant, Steven Dale Green, by counsel, and moves the Court pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States to declare the Federal Death Penalty Act (FDPA) unconstitutional because it is arbitrary; violates evolving standards of decency; and is applied in a fundamentally unfair manner.

**Statement of the Case**

The defendant, Steven Dale Green, was a Private First Class (PFC) in the United States Army stationed in Iraq on March 12, 2006, when he is alleged to have committed the crimes charged in the indictment herein. (R. 36 Indictment). The indictment reflects that Green is subject to the death penalty for the crimes alleged in Counts 3-10 and Counts 13-16. The

indictment charges as follows:

Count 1 charges Green with conspiring to murder Abeer Kassem Hamza Al-Janabi, Hadeel Kassem Hamza Al-Janabi, Kassem Hamza Rachid Al-Janabi, and Fakhriya Taha Mohsine. 18 U.S.C. §1111 and 18 U.S.C. §1117, and 18 U.S.C. §3261(a)(2).

Count 2 charges him with conspiring to commit aggravated sexual abuse against Abeer Kassem Hamza Al-Janabi. 18 U.S.C. §371, 18 U.S.C. §2241(a), and 18 U.S.C. §3261(a)(2).

Counts 3-6 charge Green with the premeditated murders of the four aforementioned persons. 18 U.S.C. §1111, 18 U.S.C. §3261(a)(2), and 18 U.S.C. §(2).

Counts 7-10 charge Green with felony murder in connection with the deaths of the four aforementioned persons. 18 U.S.C. §1111, 18 U.S.C. §3261(a)(2), and 18 U.S.C. §2.

Count 11 charges Green with aggravated sexual abuse against Abeer Kassem Hamza Al-Janabi. 18 U.S.C. §2241(a), 18 U.S.C. §3261(a)(2), and 18 U.S.C. §2.

Count 12 charges Green with aggravated sexual abuse of a child (Abeer Kassem Hamza Al-Janabi) who was between the ages of 12 and 16. 18 U.S.C. §2241©, 18 U.S.C. §3261(a)(2), and 18 U.S.C. §2.

Counts 13-16 charge Green with using a firearm during a crime of violence against the four aforementioned persons. 18 U.S.C. §§924(c)(1)(A) and 924(j)(1), 18 U.S.C. §3261(a)(2) and 18 U.S.C. §2.

Count 17 charges Green with obstruction of justice. 18 U.S.C. §1512(c)(1).

The indictment also sets forth the following special findings as to Counts, 3 -10, and 13-16:

Paragraph 42(a) alleges that Green was over the age of 18 at the time of the offenses. 18 U.S.C. §3591(a).

Paragraphs 42(b-e) set forth various mental states (“Gateway Factors”) underlying the perpetration of the alleged crimes. 18 U.S.C. §3591(a)(2)(A)-(D).

Paragraphs 42(f)-(I) set forth the following statutory aggravating circumstances with respect to Counts 3-10:

The offenses were committed in a heinous, cruel, and depraved manner in that they involved torture and serious physical abuse, 18 U.S.C. §3592(c)(6);

The offenses were committed after substantial planning and premeditation to cause death, 18 U.S.C. §3592(c)(9);

The victims described in Counts 3, 4, 7, and 8 were particularly vulnerable due to youth, 18 U.S.C. §3592(c)(11); and

The defendant intentionally killed or attempted to kill more than one person in a single criminal episode, 18 U.S.C. §3592(c)(16).

On July 3, 2007, the prosecution filed notice of intent to seek the death penalty as to Counts 3-10 and 13-16. (R. 70 Notice of Intent to Seek Death Penalty) and cited the following statutory and non-statutory aggravators:

Counts 3, 7, and 13 were committed in a heinous, cruel, and depraved manner in that they involved serious physical abuse to Abeer Kassem Hamza Al-Janabi, 18 U.S.C. §3592(c)(6);

Counts 3-10 and 13-16 were committed after substantial planning and premeditation to cause death, 18 U.S.C. §3592(c)(9);

Abeer Kassem Hamza Al-Janabi (Counts 3, 7, and 13) and Hadeel Kassem Hamza Al-Janabi were particularly vulnerable due to youth, 18 U.S.C. §3592(c)(11); and

The defendant intentionally killed more than one person in a single criminal episode, 18 U.S.C. §3592(c)(16).

The death penalty notice also listed the following non-statutory aggravators:

Witness Elimination - The defendant killed the victim and witnesses of the alleged rape “to eliminate” them as possible witnesses;

Victim Impact Evidence - The defendant caused injury, harm and loss to the family of each victim as evidenced by his or her “personal characteristics

as a human being and the impact of [his or her] death on [his or her] family;” In addition, the injuries caused by the defendant extend to “the two minor children orphaned as a result of their parents’ death and to those presently caring for the children.”

The government also gave notice that in support of imposing the death penalty it intended to rely on all evidence admitted during the guilt phase of the trial. (R. 70 Notice of Intent to Seek Death Penalty).

Because the death penalty continues to be imposed in an arbitrary, capricious and random manner it can no longer be constitutionally acceptable. The imposition of the death penalty, as detailed below, violates the Eighth Amendment as set out in *Furman v. Georgia*, 408 U.S. 238 (1972), continued evolving standards of decency, and principles of fundamental fairness; consequently, the death notice must be stricken.

## Argument

### **A. the Federal Death Penalty Act Is Unconstitutional Because it Violates the Principles Set Forth in *Furman V. Georgia*, 408 U.S. 238 (1972)**

#### **1. The *Furman* Landscape**

The United States Supreme Court effectively changed the landscape of capital punishment when, in 1972, it faced capital punishment head on and concluded that existing death penalty statutes violated the constitution since they failed to protect against arbitrary, discriminatory, and random application. *Furman v. Georgia*. 408 U.S. 238 (1972). Until *Furman*, special consideration of the death penalty had been given in only two cases.<sup>1</sup> Justice

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<sup>1</sup> *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *McGrath v. California*, 402 U.S. 183 (1971). In *Witherspoon*, the court condemned the practice of allowing prospective jurors in capital cases to be excluded for cause if they expressed the general objections to the death penalty. In *McGrath*, the defendants argued that the jury’s discretion to impose the

Powell, in *Furman*, commented on the Court's decision to change direction from decades of upholding capital punishment:

On virtually every occasion that any opinion has touched on the question of the constitutionality of the death penalty, it has been asserted affirmatively, or tacitly assumed, that the Constitution does not prohibit the penalty. No Justice of the Court, until today, has dissented from this consistent reading of the Constitution. *Furman*, 408 U.S. at 428.

The essence of the Supreme Court's *Furman* decision was captured in Justice Stewart's concurring opinion:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders, . . . many just as reprehensible as these, the petitioners are among a *capriciously selected handful* upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race . . . 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*.

*Furman v. Georgia*, 408 U.S. at 309-10 (Opinion of Stewart, J., concurring; citations and footnotes omitted; emphasis added). To this may be added Justice White's finding that "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes, and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (Opinion of White, J., concurring). In fact, the

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death penalty violated due process because it was not limited or directed in any way by guidelines or standards.

infrequency of death sentences was noted by each of the five concurring Justices in the *Furman* majority. See *Furman*, 408 U.S. at 248 n. 11 (Douglas, J., concurring); *id.* at 291-95 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 312 (White, J., concurring); and, *id.* at 354 n. 124 and 362-63 (Marshall, J., concurring).

Four years later, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court held that the death penalty could be imposed constitutionally under the Georgia death penalty statute enacted after *Furman*. A majority of the justices in *Gregg* found that the Georgia death penalty statute contained features that were likely to remove the arbitrariness, discrimination and purposelessness which the *Furman* Court acknowledged. In so doing, the Court emphasized that its decision was based in large part on the absence of any proof that the reforms in the new Georgia statute could work:

I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in fundamentally fair manner.

*Gregg* (plurality opinion).

Important to note is that *Gregg* did not overrule *Furman*. On the contrary it relied on the *Furman* principles as the litmus test on whether the newly enacted Georgia statute protected against the arbitrariness, the discriminatory, and the purposelessness concluded in *Furman*. Thus, a capital scheme that seeks to protect against the problems outlined in *Furman*, but in fact does not, should not survive constitutional scrutiny.<sup>2</sup>

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<sup>2</sup> Recently, the Washington State Supreme Court when forced to revisit Washington's capital punishment statute was deeply divided on whether its capital statute, with thirty years of application, satisfied the concerns set out in *Furman*. See *State v. Cross*, 156

The argument that the federal death penalty should be struck down because it is so infrequently sought or imposed should not be misunderstood as an argument calling for profligate use of the federal death penalty. As Justice Brennan stated in *Furman*:

The States claim, however, that this rarity is evidence not of arbitrariness, but of informed selectivity.

Informed selectivity, of course, is a value not to be denigrated. Yet, presumably the States could make precisely the same claim if there were 10 executions per year, or five, or even if there were but one. That there may be as many as 50 per year does not strengthen the claim. When the rate of infliction is at that low level, it is highly implausible that only the worst criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in these terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily “extreme.”

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Wash.2d 580, 132 P.3d 80 (2005). In a 5-4 majority, the statute was barely upheld. However, all four justices dissenting returned to the concerns acknowledged over three-decades ago in *Furman*:

We have continually grounded our proportionality review on the principles set forth in *Furman v. Georgia*, 408 U.S. 238 (1972), construing it as an additional safeguard to ensure that the death penalty is not imposed arbitrarily or capriciously. Additionally, in *Lord* we declared that our concern in conducting proportionality review is “with alleviating the types of major systemic problems identified in *Furman*: random arbitrariness and imposition of the death sentence based on race.” *Lord*, 117 Wash.2d at 910, 822 P.2d 177. They are symptoms of a system where statutory comparability defies rational explanation. The death penalty is like lightning, randomly striking some defendants and not others. No rational explanation exists to explain why some individuals escape the penalty of death and others do not. *State v. Cross*, 156 Wash.2d 580, 650-651.

408 U.S. at 293-94 (Brennan, J., concurring).

At the time *Furman* was decided, as the opinion itself reflects, approximately 15-20% of convicted murderers and rapists were actually sentenced to death in those jurisdictions where the death penalty was available for such offenses. *Furman*, 408 U.S. at 386 n. 11 (Burger, C.J., dissenting, citing four sources to support the statistic). Justice Powell, also dissenting, cited similar statistics. *Id.* at 435 n. 19. Justice Stewart, however, took Chief Justice Burger's statistical analysis as lending support to Justice Stewart's ultimate conclusion that the death penalty was, indeed, in an Eighth Amendment sense, "unusual."

In *Furman*, arbitrariness and caprice were seen as the inevitable side-effects of a rarely-imposed punishment of death. See Justice Scalia's concurring observation in *Walton v. Arizona*, 497 U.S. 639, 658 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002), that the key opinions in *Furman* "focused on the infrequent and seeming randomness with which, under the discretionary state systems, the death penalty was imposed." In *Gregg*, the plurality reiterated this understanding of *Furman*, noting, "It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment." *Gregg v. Georgia*, 428 U.S. 153, 182 n. 26 (plurality opinion); an understanding repeated in *Woodson v. North Carolina*, 428 U.S. 280, 295 n.31 (1976).

## **2. The Failure of the Experiment**

In 1972, Justice Brennan, positing a nation of 200 million people that carries out 50 executions per year, noted:

[w]hen government inflicts a severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied, ... When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.

*Furman*, 408 U.S. at 294 (Brennan, J.) *Id.*

With this backdrop, we no longer need to predict whether the death penalty has complied with the concerns set forth in *Furman* since reflection demonstrates the experiment has failed. After 18 years of experience (1988-2006), it is now apparent that the federal death penalty is sought and imposed far more rarely than in the cases examined in *Furman*. Being sentenced to death in the federal system is truly akin to being struck by lightning; indeed, no meaningful basis may be discerned for distinguishing the cases -- even among the most extreme -- where death is imposed from cases in which it is not. *See*, D. McCord, "Lightning Still Strikes: Evidence From the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More Than Three Decades After *Furman*," 71 BROOKLYN L.REV. 797 (2005).

The *current* state of the federal death penalty after nearly 18 years of experience is summarized in the following table:

**THE STATUS AND DISPOSITION OF POTENTIAL FEDERAL CAPITAL  
CASES  
FROM 1988 TO 2006<sup>3</sup>**

- Total Potential Cases ..... 2,384
- Pending Review by the Department of Justice ..... 223
- Cases Authorized for Capital Prosecution ..... 392
- Presently Pending or in Trial ..... 72
- Trial: Life Sentences ..... 95
- Trial: Death Sentences ..... 51
- Executions ..... 3
- Clemency ..... 1
- Federal Death Row, Active Death Sentence ..... 44

In *Furman*, the Court found the death penalty to be an arbitrary, capricious and a decidedly “unusual” infringement of Eighth Amendment protections. It was the Court’s view that the very infrequency with which the death penalty was sought and imposed served to guarantee arbitrary and capricious application of the ultimate penalty. This conclusion was reached on the basis of a showing that fewer than 20% of defendants charged with capital crimes were actually sentenced to death. In the federal system, the figure is lower by a factor

<sup>3</sup> See Declaration of Attorney Kevin McNally, available online at: [http://capdefnet.org/pdf library/Frequency](http://capdefnet.org/pdf_library/Frequency). See also, “An Overview of the Federal Death Penalty Process,” online at [http://capdefnet.org/fdprc/contents/shared\\_files/docs/1\\_overview\\_of\\_fed\\_death\\_process.asp](http://capdefnet.org/fdprc/contents/shared_files/docs/1_overview_of_fed_death_process.asp). The figures cited are current as June 28, 2006. Two defendants Len Davis and Aquila Barnette were re-sentenced to death after reversals and remands. Mr. Davis co-defendant, Paul Hardy, is awaiting a re-trial. David Hammer, who was sentenced to death in the Middle District of Pennsylvania in the summer of 1998, and then withdrew his direct appeal, won a new penalty trial in December 2005 on the basis of a *Brady* violation.

of 10. In fact, far fewer than 20% of those eligible for federal capital punishment are even *exposed* to the death penalty, by way of capital authorization, let alone actually sentenced to death. 2051 potential federal capital defendants have had their cases resolved. Taking the figure for actual valid death sentences returned against federal defendants by federal juries at 47, it may be seen that approximately 2.3% (47/2004) of all potentially death-eligible federal defendants whose cases have been resolved have been actually sentenced to death. In terms of actual federal executions to date three the figure is infinitesimal.<sup>4</sup>

Under an analysis that was persuasive to the Supreme Court in *Furman*, and valid today, the federal death penalty is sought and imposed in an arbitrary, capricious, and unusual manner. The federal death penalty, accordingly, is unconstitutional and the notice of aggravating factors in this case must be dismissed.

## **B. the Federal Death Penalty Act Is Unconstitutional as Violating the Evolving “Standards of Decency” of the Eighth Amendment**

### **1. Evolving Standards of Decency: An Historical Perspective**

Moreover, the Federal Death Penalty Act can no longer satisfy the “evolving standards of decency” to which our society rests. Chief Justice Warren explained nearly fifty years ago that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . that Amendment must draw its meaning from the evolving standards of decency that

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<sup>4</sup> The baseline figure excludes 72 authorized cases that are pending or in trial. It is reasonable to predict that a certain number of those cases will be resolved by plea agreement and that a certain number will proceed to trial, with the statistical likelihood of very few resulting in death sentences. It is also reasonable to assume that some of the 44 federal prisoners now under active sentence of death will succeed in appellate or post-conviction challenges to their convictions or sentences.

marks the progress of a maturity society.” In determining whether the death penalty for a certain crime conforms to contemporary standards of decency, courts and commentators recognize that an assessment of contemporary values is relevant and that standards of decency are not static, but evolve as society matures. *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958).

The prohibition against “cruel and unusual punishment,” like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual.

*Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality).

As *Gregg v. Georgia*, *supra*, teaches, this assessment of contemporary values is not subjective, but an examination of objective indicia that reflect the public attitude towards a given sanction. In sustaining the imposition of the death penalty in *Gregg*, the Court firmly embraced the holdings and dicta from prior cases, such as, *Furman v. Georgia*, 408 U.S. 238 (1972); *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1958); and *Weems v. United States*, 217 U.S. 349 (1910), to the effect that the Eighth Amendment bars not only those punishments that are ‘barbaric’ but also those that are ‘excessive’ in relation to the crime committed.

Furthermore, the review under those evolving standards should be informed by “objective factors to the maximum possible extent.” *Atkins v. Virginia*, 536 U.S. 304 (2002);

see *Hamerlin v. Michigan*, 501 U.S. 957 (1991)(quoting *Rummel v. Estelle*, 445 U.S. 263, 274-275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). To this end, attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

More recently, the Court has echoed this “evolving standards of decency” approach in capital cases. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002), *Roper v. Simmons*, 543 U.S. 551, 560 (2005). In *Atkins*, the Supreme Court overruled its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), which held that there was no categorical exemption for the mentally retarded. In *Roper*, the court overruled its decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which held that it was constitutionally-permissible to execute persons over 15 years old.

In each case, the Court held that evolving standards of decency in our society compelled the conclusion that the death penalty had become unacceptable in circumstances in which it had once been acceptable. In *Atkins*, for example, the Court considered evidence of changing societal standards as expressed in legislation and actual practice, in concluding that executing the mentally retarded violated evolving standards of decency: execution of a mentally-retarded person “has become truly unusual, and it is fair to say that a national consensus has developed against it.” *Atkins*. 536 U.S. at 316. In *Roper*, the Court considered a similar, if less marked, trend against the execution of juveniles. *Roper*, 543 U.S. 564-567. In holding that execution of juveniles violated the Eighth Amendment, the Court also

considered the overwhelming weight of international opinion. *Roper*, at 577-578. The *Roper* Court further considered the appropriateness of imposing the death penalty on juveniles in light of the “two distinct social purposes of the death penalty, ‘retribution and deterrence of capital crimes by prospective offenders.’” *Roper*. At 577 (citing *Atkins*, at 319, quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (Stewart, Powell and Stevens)).

Thus, the relevant evidence in determining whether the death penalty remains constitutional considered in light of history, tradition and precedencies evidence of changing legislation and practice in the United States and in the world. This evidence should be reviewed in light of the purposes of deterrence and retribution, and where there is no evidence that the death penalty advances either, it cannot be deemed to support either of these objectives.

## **2. The Evidence is Overwhelming that the Death Penalty is No Longer Constitutional**

A review of the “evolving standards of decency” objectives undoubtedly demonstrates that the death penalty is no longer constitutional. First, the number of executions has significantly declined over the recent years. As of October, 2007, there are thirty-seven (37) states plus the U.S. Federal Government and U.S. Military that have death as a sentencing option. Conversely, there are thirteen (13) states and the District of Columbia that do not. Of the jurisdictions that have the death penalty, four have not imposed an execution since 1976, the year in which the Supreme Court concluded that capital punishment is not per se unconstitutional. *Gregg v. Georgia*, *supra*. The jurisdictions that continue to permit a sentence of death, 25 have not executed in 2007 and the 53 executions in 2006 were the lowest since

1996 when there were 45. In total 1099 persons have been executed through state court procedures since 1976. In 2007, however, there were 42, the lowest number of executions in 13 years.<sup>5</sup> Since 1976, only three persons have been executed under federal law. *Death Penalty Information Center* (last visited Oct. 30, 2007); <http://www.deathpenaltyinfo.org/FactSheet.pdf>

Second, the number of death sentences imposed has also significantly declined. Throughout the 1990s, there were about 300 sentences per year. *Id.* This number began to drop in 1999 and has since declined almost 60% since that year. *Id.* The Bureau of Justice Statistics showed 138 death sentences in 2004 and 128 death sentences in 2005. The number of death row inmates has also steadily declined since 2000. In 2006, the number of death sentences was at its lowest level in 30 years. *Id.*

Third, the death penalty should reflect the “conscience of the community.” *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) and as such, the response of juries reflected in their sentencing decisions are to be consulted as evidence of our “evolving standards of decency.” *Coker v. Georgia*, 433 U.S. 584, 592 (1977). It is apparent that jurors, when asked to impose the death penalty, have continuously rejected the invitation. As previously noted, under the Federal Capital Cases from 1988 - 2006, there have been 2,384 potential death penalty cases of which 146 have resulted in trials. Of these, the jurors rejected a death sentence in ninety-five (95) or 65%. More widespread, Gallup Polls now indicate that more

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<sup>5</sup> There were two months left in 2007 when these statistics were generated, but nevertheless the number of executions in 2006 -- fifty-three -- was still the lowest total in over a decade.

people chose life without parole over a death sentence as punishment for murder (48% to 47%), and virtually every state now has a sentence of life without parole. A more recent poll conducted by the Death Penalty Information Center found that 58% of those polled wanted a national moratorium on executions. *Death Penalty Information Center*; <http://www.deathpenaltyinfo.org/FactSheet.pdf>. This is due in part to the 124 exonerations from death row since 1973, and the belief by a majority of Americans that an innocent person has been executed and that reforms in the law will not eliminate all wrongful convictions.

Fourth, another factor in the “evolving standard” equation is the overwhelming weight of international opinion. *Roper*, at 577-578. As such, international opinion undoubtedly supports the conclusion that capital punishment is no longer tolerable. Internationally, over half of the countries of the world, 90, have no death penalty, another 11 have the death penalty only for extraordinary crimes such as crimes committed under military law, and another 32 countries do not use the death penalty in practice.<sup>6</sup> Only 64 countries, including

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<sup>6</sup> Just a few miles north, the High Court of Canada in *United States v. Burns*, 2001 SCC7, 26129, refused extradition of two individuals charged with Aggravated First Degree Murder -- a death eligible offense -- to Washington State until assurances were given that the death penalty, which is prohibited in Canada, would not be sought, concluding:

In Canada, the death penalty has been rejected as an acceptable element of criminal justice. Capital punishment engages the underlying values of the prohibition against cruel and unusual punishment. It is final and irreversible. Its imposition has been described as arbitrary and its deterrent value has been doubted. Second, at the international level, the abolition of the death penalty has emerged as a major Canadian initiative and reflects a concern increasingly shared by most of the worlds democracies. Canada’s support of international initiatives opposing extradition without assurances, combined with its international advocacy of the abolition of the death penalty itself, leads to the conclusion that in the Canadian view of fundamental justice, capital punishment is unjust and should be stopped. While the evidence does not establish an

the United States, retain and utilize the death penalty. In the last ten years, Georgia, Nepal, Poland, South Africa, Azerbaijan, Bulgaria, Canada, Estonia, Lithuania, the United Kingdom, East Timor, Turkmenistan, Cote D'Ivoire, Malta, Bosnia-Hezegovina, Cyprus, Yugoslavia, Armenia, Bhutan, Greece, Senegal, Turkey, Liberia, Mexico, Philippines, Albania and Rwanda have abolished the death penalty for all crimes. Latvia, Albania, and Chile abolished the death penalty for ordinary crime.

There exists a continuing movement toward moratorium on the death penalty. Recently, the States of Illinois (2000), and New York (2004) have placed a general hold on executions. New Jersey abolished capital punishment in 2007. In addition, twenty (20) states have placed a hold on executions because of questionable methods used. <http://www.deathpenaltyinfo.org/article.php?did=2289>. The questionable method of lethal injection, the method of choice under the Federal Death Penalty Act, is under review in the Supreme Court. (See, No. 07-5439, *Baze et al. v. Rees et al.*) Given the uncertainty of this method, the Federal Death Penalty Act should be halted and the death penalty dismissed.

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international law norm against the death penalty, or against extradition to face the death penalty, it does show significant movement towards acceptance internationally of a principle of fundamental justice Canada has already adopted internally -- namely, the abolition of capital punishment. International experience thus confirms the validity of concerns expressed in the Canadian Parliament about capital punishment. It also shows that a rule requiring that assurances be obtained prior to extradition in death penalty cases not only accords with Canada's principled advocacy on the international level, but also is consistent with the practice of other countries with which Canada generally invites comparison, apart from the retentionist jurisdictions in t h e U n i t e d S t a t e s .  
<http://scc.lexum.umontreal.ca/en/2001/2001scc7/2001scc7.html>

Finally, as noted in *Gregg*, a punishment is excessive and unconstitutional if it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering. The evidence shows as well, the lack of any deterrent effect of the death penalty in the United States: The average murder rate among death penalty states in 2006, for 100,000 people, was 5.1. The average murder rate among non-death penalty states in 2006 was 3.1. Since 1976, there have been 961 executions in the south, 127 in the Midwest, 67 in the west and 4 in the northeast. The murder rate in the south in 2006 was 6.8. It was 5.0 in the mid-west, 5.6 in the west and 4.5 in the northeast. *Id.* <http://www.deathpenaltyinfo.org/article.php?scid=12&did=169>

Further, according to a survey of the former and present presidents of the top criminological societies 84% rejected the idea that the death penalty acts as a deterrent to murder. A 1995 poll of police chiefs in the United States found that the majority of the chiefs do not believe that the death penalty is an effective law enforcement tool. *Id.*

The evidence substantially supports the conclusion that the death penalty does comply with the “evolving standards of decency” to justify its existence.

### **C. the Federal Death Penalty Act Violates Fundamental Fairness**

The Federal Death Penalty Act violates fundamental fairness and must be deemed unconstitutional. Beyond any doubt, fundamental fairness is at the heart of the due process of law guaranteed by the 5th and 14th Amendments to the United States Constitution. If the government does not act with fundamental fairness it violates due process. LaFave, Israel and King explain the rationale for the fundamental fairness doctrine in *Criminal Procedure*, Part

1, Chapter 2, §2.4:

fundamental fairness doctrine proceeds from the premise that the Fourteenth Amendments due process clause was designed to make applicable to the states the same basic limitation that had been imposed upon the federal government under the Fifth Amendments due process clause. That limitation, however, is viewed as broader in range and more flexible in content than other Bill of Rights limitations. Due process, the [Supreme] Court has noted “is a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights.”

LaFave, Israel and King quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942).<sup>7</sup>

Fundamental fairness is, thus, a prerequisite to invoking the judicial process to convict an accused person and surely a prerequisite to seeking the ultimate penalty against him. *See, e.g. Woodson v. North Carolina*, 428 U.S. 280 (1976) (unlike other sentencing schemes, a death penalty scheme under which death sentences are mandatory is unconstitutional because they are arbitrary and fail to make individualized consideration of the accused). If the state does not act with fundamental fairness, it may not utilize the criminal justice system to carry out its fundamentally unfair activity. Due Process, under the doctrine of fundamental fairness, has to be decided on a case-by-case basis by considering the totality of the circumstances and with reference to the universal sense of justice.

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<sup>7</sup> With regard to, capital offenses, Lafave, Israel and King, Criminal Procedure §1.7(e), say of fundamental fairness that it must be more stringently applied in death penalty cases, “[w]here a fundamental fairness standard is applied, looking to the totality of the circumstance, the unique character of the death penalty is a circumstance that can tip the scale to produce a violation in a capital case where one would not be found in a noncapital case.” (citing *Gardner v. Florida*, 430 U.S. 349 (1997); *Powell v. Alabama*, 287 U.S. 45(1932); *Ford v. Wainwright*, 477 U.S. 399 (1986)).

In *United States v. Salerno*, 481 U.S. 739, 746 (1987), the United Supreme Court asserted that substantive due process prohibits governmental conduct that either (a) interferes with rights that are deemed fundamental or (b) shocks the conscience. Ultimately, the substantive due process clause is a bulwark . . . against arbitrary government action. *Hurtado v. California*, 110 U.S. 516 (1884). Justice Harlan summed up these due process approaches in *Poe v. Ullman*, 367 U.S. 497 (1961):

[T]he liberty guaranteed by the Due Process Clause . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints, and . . . also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

*Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

Courts may find a substantive due process violation -- not only when the government's conduct unreasonably hinders a fundamental right - but when the government's action is "arbitrary," "irrational," "arbitrary and irrational" or "fundamentally unfair or unjust." *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59,84 (1978). In *Salerno*, 481 U.S. at 746 stated:

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v. Eldridge*, 424 U.S.

319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process.

In *Collins v. City of Harker Heights*, 503 U.S. at 128, the Court equated the "shocks the conscience" test with a test for "arbitrariness ... in a constitutional sense." At the core of fundamental fairness is the integrity of the criminal justice system. That is, due process requires the criminal justice system -- substantively and procedurally -- be fundamentally fair. If either is not, then due process is violated.

The Supreme Court has held that the Constitution will not tolerate sentences of death that are imposed in a manner that is arbitrary or capricious. In *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), the Court referred to the "flip side" of this approach, insisting "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." The reality of the federal death penalty in practice is that there is little consistency or predictability in the manner in which federal juries (and in one case, a federal judge) have imposed, or not, the federal death penalty or, indeed, which defendants are allowed to negotiate life terms or less and which proceed to trial. Hopelessly irremediable problems of arbitrariness and caprice mark the administration of the federal death penalty system.

One cannot review the chronicles of murder eligible for the federal death penalty without coming to the realization that *all* of the cases are by their own terms horrible, and *all* involved the infliction of agony on victims and survivors and yet, for indiscernible reasons, some defendants were sentenced to death, while the overwhelming majority were not. Fairness and consistency are the opposite of arbitrariness and caprice. In the demonstrated absence of fairness and consistency, the federal death penalty must be set aside. Examples of

capital trials and verdicts, which demonstrate the arbitrariness, include:

- *United States v. Terry Nichols*, (D. Colo.). McVeigh's co-defendant. Tried, convicted, and sentenced to life in sequential federal and state capital trials.
- *United States v. Khalfan Mohamed and Rashed al`-Owhali*, (S.D.N.Y.). Two defendants associated with Usama bin Laden and al Qaeda convicted in simultaneous terrorist truck-bombings in 1998 of two American embassies in East Africa. 224 killed, including 12 Americans; thousands injured. Tried, convicted, and sentenced to life.
- *United States v. Zacharias Moussaoui*, (E.D.Va.). Defendant convicted of causing thousands of deaths in the September 11, 2001 attacks on the United States sentenced to life.
- *United States v. Joseph Minerd*, (W.D.Pa.). Arson/pipebomb murder of pregnant girlfriend, her fetus and three-year old daughter. Tried, convicted, and sentenced to life.
- *United States v. Coleman Johnson*, (W.D.Va.). Pipe-bomb used to kill pregnant girlfriend and their unborn child to avoid child support. Tried, convicted, and sentenced to life.
- *United States v. Billy Cooper*, (S.D.Miss.). Carjacking double homicide. Tried, convicted, and sentenced to life.
- *United States v. Christopher Vialva and Brandon Bernard*, (W.D. Texas). Carjacking double homicide. Tried, convicted, and sentenced to death.
- *United States v. David Paul Hammer*, (M.D.Pa.) Prison inmate guilty of strangling to death cellmate at USP/Allenwood. Sentenced to death.
- *United States v. Michael ODriscoll*, (M.D.Pa.). Prison inmate guilty of stabbing to death fellow inmate at USP/Allenwood. Same judge, same courtroom, same defense attorneys as *Hammer*. Sentenced to life.
- *United States v. Louis Jones*, (N.D.Texas). Decorated Gulf War veteran with no prior record abducts, rapes and kills young woman soldier. Tried, convicted, and sentenced to death, executed.

- *United States v. Chevy Kehoe and Daniel Lee*, (D.Ark.) Triple murder of two adults and small child in connection with activities of white supremacist organization. Tried and convicted together. Kehoe considered more culpable sentenced to life. Lee sentenced to death after the United States Attorney failed to get permission from the Acting Attorney General to withdraw the death-notice as to Lee.
- *United States v. Gurmeet Singh Dhinsa*, (E.D.N.Y.). Millionaire Sikh businessman hires killers of two employees cooperating with authorities in criminal investigation of defendant. Tried, convicted, and sentenced to life.
- *United States v. Trinity Ingle and Jeffrey Paul*, (W.D.Ark.). Murder of elderly retired National Parks employee. Victim shot while bound and gagged. At separate trials, Ingle is convicted and sentenced to life; Paul is convicted and sentenced to death.
- *United States v. Kristen Gilbert*, (D.Mass.) VA nurse murders four patients and attempts to murder three more. Tried, convicted, and sentenced to life.
- *United States v. LaFawn Bobbitt and Rashi Jones*, (E.D.Va.). Fatal shooting of bank teller during robbery. Security guard also shot and blinded. Tried, convicted, and sentenced to life.
- *United States v. Bille Allen and Norris Holder*, (W.D.Mo.). Fatal shooting of bank teller during robbery. Tried, convicted, and both sentenced to death.
- *United States v. Corey Johnson, James Roane, and Richard Tipton*, (E.D.Va.) Eleven drug-related murders. Tried, convicted, and sentenced to death.
- *United States v. Dean Anthony Beckford*, (E.D.Va.). Six drug-related murders. Tried, convicted, and sentenced to life.
- *United States v. Alan Quinones and Diego Rodriguez*, (S.D.N.Y.) Torture murder of police informant. Tried, convicted, and sentenced to life.
- *United States v. Elijah Williams and Michael Williams* (S.D.N.Y.) Execution-style triple murder by father and son. Tried, convicted, and

sentenced to life.

- *United States v. Thomas Pitera*, (E.D.N.Y.). Seven drug-related murders in organized crime context. Victims tortured and bodies dismembered. Tried, convicted, and sentenced to life.
- *United States v. German Sinisterra and Arboleda Ortiz*, (W.D.Mo.). One drug-related murder and one attempted murder. Tried, convicted, and sentenced to death.
- *United States v. John Bass* (E.D.Mich.). Four drug-related murders. Tried, convicted, and sentenced to life.
- *United States v. Kevin Grey and Rodney Moore*, (D.D.C.). Thirty-one drug-related murders. Tried, convicted, and sentenced to life.
- *United States v. Daryl Johnson*, (N.D.Ill.). Two drug-related murders. Tried, convicted, and sentenced to death.
- *United States v. Tommy Edelin*, (D.D.C.). Fourteen drug-related murders. Tried, convicted, and sentenced to life.
- *United States v. Reynaldo Villarreal and Baldemar Villarreal*, (E.D.Texas). Drug-related murder of law enforcement officer. Tried, convicted, and sentenced to life.
- *United States v. Shahem Johnson and Raheem Johnson*, (E.D.Va.) Brothers tried for five drug-related murders. Tried, convicted, and sentenced to life.
- *United States v. Juan Raul Garza*, (S.D.Texas). Three drug-related murders. Tried, convicted, and sentenced to death, executed.
- *United States v. Dennis*, (E.D.Va.). Six drug-related murders. Tried, convicted, and sentenced to life.
- *United States v. Dixon*, (E.D.N.Y.) Two drug-related murders, including machine-gunning of suspected informant. Tried, convicted, and sentenced to life.
- *United States v. Anthony Jones*, (D.Md.). Six drug-related murders. Tried, convicted, and sentenced to life.

- *United States v. Walter Diaz and Tyrone Walker* (N.D.N.Y.). Two defendants kill a drug-dealer as part of 848 CCE and flee to New York City where, in a failed effort to steal a car, they shoot and kill a woman in lower Manhattan. Later in same day the defendants fired at, but missed, a retired school teacher in Coney Island in a failed armed robbery. Defendant Walker was also found by the jury to have beaten to death an elderly man during a burglary when Walker was 19 years-old. Tried, convicted, and sentenced to life.

By definition, since all of these cases were authorized by the Attorney General of the United States for capital prosecution, these are (or should have been) the “worst of the worst” the federal system has to offer. Indeed, it is likely there is not a crime on the list as to which a prosecutor could not (and probably did) argue in summation, “If this case doesn’t call for the death penalty, what case does?” And yet, in case after case -- indeed, in the overwhelming *majority* of such cases -- juries returned life verdicts or plea agreements were offered and accepted.

The inherently incompatible nature of these two lines of cases has resulted in a return at least in the federal system -- to arbitrary and capricious death sentences. Justice Blackmun made the point that both goals -- guided discretion in imposing death, but no limitation on the information a jury may consider to spare a defendants life -- while required by the Constitution, are, in a real world, unattainable. *See Callins v. Collins*, 497 U.S. 1141, 1145, 1155 (1994) (Blackmun, J., dissenting from the denial of *certiorari* in a Texas capital case and announcing his view that the death penalty is, as applied and administered, unconstitutional.) (“From this day forward, I no longer shall tinker with the machinery of death... All efforts to strike an appropriate balance between these conflicting Constitutional commands are futile.”) If one cannot discern a principled basis for distinguishing between cases where death is

imposed and cases where death is not, then the death penalty falls is arbitrary and capricious.

As detailed above and under an analysis that was persuasive to the Supreme Court in *Furman*, the federal death penalty is sought and imposed in a shockingly arbitrary, capricious and “unusual manner.” The federal death penalty, accordingly, is unconstitutional and the notice of aggravating factors in this case must be dismissed.

### CONCLUSION

It has been three decades since the court in *Furman* expressed its dismay at the arbitrary, capricious, and random application of the death penalty. Thirty years of experience has provided sufficient evidence that the problems and concerns outlined in *Furman* continue to exist.

Moreover, a review of the objective factors illustrate that the time has come for the United States to join the rest of civilized societies and find that the death penalty is no longer viable under our evolving standards of decency. To continue the use of capital punishment, given the arbitrary history it has lead, will continue to impose the most severe punishment in violation of our notions of fundamental fairness.

For these reasons, the Federal Death Penalty Act must be found unconstitutional and the death notice dismissed.

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**CERTIFICATE**

I hereby certify that on February 15, 2008, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Esq., Assistant United States Attorney; James R. Lesousky, Esq., Assistant United States Attorney; and Brian D. Skaret, Esq., Attorney at Law.

/s/ Scott T. Wendelsdorf