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Utah v. Dale S. Pierre : Amicus Brief

Utah Supreme Court

Vernon B Romney; Attorney General; Earl F. Dorius; Assistant Attorney General; Attorneys for Respondent; David S. Young; Amicus Curiae for Respondent.
D Gilbert Athay, Robert Van Sciver; Randall T Gaither; Attorneys for Appellant; Ronald J. Yengich; Amicus Curiae for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

DALE S. PIERRE,
Defendant-Appellant.

Case No. 13903

BRIEF OF AMICUS CURIAE

Appeal from the Second Judicial District in and for Davis County, State of Utah, the Honorable John F. Wahlquist, presiding.

D. GILBERT ATHAY
ROBERT VAN SCIVER
RANDALL T. GAITHER
321 South Sixth East
Salt Lake City, Utah 84102

Attorneys for Appellant

VERNON B. ROMNEY
Attorney General
EARL F. DORIUS
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Respondent

RONALD J. YENGICH
Salt Lake Legal Defender Association
343 South Sixth East
Salt Lake City, Utah 84102

Amicus Curiae for Appellant

DAVID S. YOUNG, Executive Director
Statewide Association of Prosecutors of Utah
220 South Second East, No. 440
Salt Lake City, Utah 84111

Amicus Curiae for Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 13903
DALE S. PIERRE,	:	
Defendant-Appellant	:	

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is a criminal proceeding brought by the State of Utah against Dale S. Pierre, Defendant-Appellant, charging him with three counts of murder in the first degree in violation of Section 76-5-202, Utah Code Annotated (1953), and two counts of aggravated robbery in violation of Section 76-6-302, Utah Code Annotated (1973 Supp.).

DISPOSITION IN THE LOWER COURT

The Defendant-Appellant was found guilty of three counts of first-degree murder and two counts of aggravated robbery in the District Court of the Second Judicial District in and for Davis County, Utah, on November 15, 1974. The jury

recommended after a hearing that the Defendant be sentenced to death on all three counts of first-degree murder on November 20, 1974. On November 27, 1974, the Honorable John F. Wahlquist sentenced the Defendant to death by shooting on all three counts of first-degree murder and further sentenced the defendant to an indeterminate term of not less than five years to life imprisonment in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The Defendant-Appellant seeks an order of this Court reversing the judgment rendered at trial and hearing on the sentence of this cause, and a ruling remanding the cause to the trial court for a new trial, or in the alternative, an order setting aside the sentence of death and remanding the case to the trial court for the imposition of the sentence of life imprisonment.

STATEMENT OF FACTS

Amicus stipulates to the facts as stated in the brief of Respondent in this appeal, which clearly and graphically depict the Defendant's brutal, savage, and senseless slaughter of three human beings after subjecting them, and two others, to an agonizing torture.

ARGUMENT

I. THE COURT MUST CONSIDER PUBLIC STANDARDS OF DECENCY IN DECIDING UPON CAPITAL PUNISHMENT AND THE PUBLIC UNQUESTIONABLY FAVORS CAPITAL PUNISHMENT.

Both the United States Constitution and the Constitution of the State of Utah prohibit the infliction of "cruel and unusual punishments" (U. S. Constitution, Amendment 8; Utah Constitution, Article I, Section 9).

In Weems v. U. S., 217 U.S. 349 (1910), the United States Supreme Court rejected a static interpretation of this "cruel and unusual" language when it recognized that "time . . . brings into existence new conditions and purposes," and the interpretation of what constitutes cruel and unusual punishment may change as "public opinion becomes enlightened by a human justice" (217 U.S. at 378). Later, in Trop v. Dulles, 356 U.S. 86 (1958), the U. S. Supreme Court reaffirmed this position when it asserted that the Eighth Amendment derived its meaning from the "evolving standards of decency that mark progress of a maturing society" (356 U.S. at 101).

In Furman v. Georgia, 408 U.S. 238 (1972), six Justices accepted the proposition that the definition of what is cruel and unusual punishment changes in accordance with public opinion prevalent at that time (408 U.S. at 242 [Douglas, J., concurring]; Id. at 264 [Brennan, J., concurring]; Id. at 329 [Marshall, J., concurring]; Id. at 382-3 [Burger, C. J., dissenting]; Id. at 409 [Blackmun, J., dissenting]; Id. at 429-30 [Powell, J., dissenting]. These Justices expressed

sharp disagreement, however, on the questions of where the public stands on the issue of capital punishment, whether opinion polls are valid indicators of public sentiment about capital punishment, and the extent to which enlightened public opinion determines contemporary standards of decency.

Public opinion polls are universally accepted as an accurate indicator of the public sentiment in most, but not all, cases. This is clearly shown in this presidential election year by comparing the actual returns with the projected voter response based on a public opinion poll. But even in the constantly changing world of presidential politics, the polls are seldom wrong; and even when they are wrong as to who the winner will be, they are not far wrong. Public opinion polls, although not infallible, are a proper starting point for determining how the public feels on the issue of capital punishment.

The very nature of capital punishment forces legal scholars to consider things well outside the realm of legal theory and legal precedents. As previously noted, judges have long attempted to decide such issues on the basis of the nation's "standards of decency." So, with the assumption that public opinion polls are, at the very least, a helpful starting point in measuring public sentiment, we will discuss the results of some recent polls.

Studies have been made on the results of all of the public opinion polls done in this century. (See "Public Opinion and the Death Penalty," Vidmar and Ellsworth, 26 Stanford Law Review 1245, 1275 [June, 1974].) According to these studies,

public support for the death penalty declined at a fairly consistent rate until 1966. Gallup polls indicated that 62 percent of the people were in favor of capital punishment in 1936 but that this number had declined to 42 percent by 1966.

After 1966, however, this trend has reversed; and by 1969, 51 percent of the American public supported the death penalty. Nationwide polls conducted subsequent to 1969 show that this upward trend has continued. In 1973, 57 percent favored capital punishment (Gallup Opinion Index, March, 1973).

The most recent poll taken indicated that a strong 64 percent of the nation now favors capital punishment. It is interesting to note that no area of the country fell below 63 percent in favoring the death penalty. Further, every category of persons--sex, race, income, religion, political affiliation, occupation, and population, both urban and rural--clearly favored capital punishment. Some of these groups favored the death penalty by as much as a 70-percent ratio (see Gallup Opinion Index, November, 1974).

Opponents of the validity of public opinion polls generally base their criticisms on cases where the poll showed one candidate winning a close election race while, in fact, that candidate lost in a close decision. This is a quibbling over a few percentage points' variance either way. Few, however, could dispute the validity of these public opinion polls taken on the issue of capital punishment. Because of the strong majority--64 percent nationwide--it would be correct to say that the American public has indicated in no uncertain

terms that capital punishment is a valid method in combatting crime in the United States.

Public opinion in favor of capital punishment has not been limited to public opinion polls, however. Since Furman v. Georgia, state legislatures in approximately one half of the states have re-enacted capital punishment statutes (see Amicus Curiae Brief in Support of Defendant-Respondent, pp. 22-25). Furman had effectively voided the death sentences of 631 persons on death row in 32 states (see M. Meltsner, Cruel & Unusual Punishment, pp. 292-93 [1973]).

Finally, in the face of a California Supreme Court decision holding the death penalty unconstitutional, People v. Anderson, 403 P.2d 880, cert. den. 406 U.S. 958 (1972), the people of California approved an amendment to the state constitution calling for reinstatement of the death penalty in November, 1972, by an overwhelming two-to-one majority (see "Death--California Style," 3 San Fernando Valley Law Review, 145, 153). The result of this amendment was a revised codification of California's capital punishment statute.

The California vote indicated that approximately 67 percent of its citizens favored the death penalty. It is interesting to note that this figure is slightly higher than the figure reached by the Gallup Poll mentioned previously herein. If anything, this vote is hard evidence supporting the validity of the 63 percent figure reached by Gallup's pollsters.

While the people of Utah have not had the opportunity to vote on the issue of capital punishment, this Court has upheld the constitutionality of the Utah statute now under attack in this case. In State v. Winkle, 528 P.2d 467 (1974), the Court upheld the statute further, voting that the Furman decision has created great confusion in legal circles throughout the nation. This decision, in light of the public opinion polls, supports the assertion that Utah's citizenry is strongly in favor of capital punishment.

In most cases, public opinion would have little bearing on a court's decision in any particular case. Public opinion cannot change the legal issues to be considered. Here, however, in view of the previously voted pronouncements by the U. S. Supreme Court that public opinion is of utmost and foremost importance in the determination of a capital punishment issue, public opinion must be considered by the Court. Clearly, as evidenced by national opinion polls and Utah's judicial declaration of the constitutionality of its capital punishment statute, Utah's people and its courts favor capital punishment. On this basis, this Court must once again decide this issue in favor of capital punishment.

II. UTAH'S LEGISLATURE CAN REASONABLY DETERMINE THAT THE PROTECTION OF SOCIETY UNDER PRESENT CONDITIONS REQUIRES DEATH AS A FORM OF PUNISHMENT FOR SERIOUS OFFENSES.

Americans live in constant fear for their lives and their property in today's society. A recent Gallup poll indicated that 45 percent of Americans are afraid to walk in

their neighborhood at night. Further, 19 percent do not feel safe and secure in their own homes at night. It is significant to note that 57 percent of the nonwhites polled were afraid to walk in their neighborhood at night, an increase of 9 percent since 1972. Overall, one out of every eight Americans is both afraid to walk in his neighborhood at night and insecure behind the doors of his/her home (see Gallup Poll Index, November, 1975).

In light of these figures, it is not surprising that 21 percent of the large city residents polled and 15 percent of the nation as a whole viewed crime as the top problem facing their communities today. With the present economic situation, it is significant that crime was felt to be a bigger problem than inflation and recession. As late as 1949, only 4 percent of the American public felt that crime was the number one problem in America (see Gallup Poll Index, November, 1975).

The prominence given crime in the public's list of top local problems is by no means limited to the views of residents of the largest cities. Even in medium and small cities, crime is seen as the number one community problem.

There seems to be little hope of these figures improving. One half of the people polled felt that there was more crime in their area than there was twelve months before that date. Federal Bureau of Investigation statistics prove that these people were correct in their feelings.

All crimes increased 9 percent and violent crimes increased 5 percent from 1974 to 1975. In the western states, murder increased by 9 percent during that same period. This

continues a trend that has been evident for several years as shown by the following table:

To	From	Total Crime	Violent Crime	Murder
1969	1968	+ 10%	+ 11%	+ 7
1970	1969	+ 9	+ 12	+ 8
1971	1970	+ 6	+ 11	+ 11
1972	1971	- 4	+ 2	+ 5
1973	1972	+ 6	+ 5	+ 5
1974	1973	+ 18	+ 11	+ 6
1975	1974	+ 9	+ 5	- 1

In 1974, a murder occurred in the United States every 26 minutes and a violent crime occurred every 33 seconds (see FBI, Uniform Crime Reports, March 25, 1976).

The basis for the FBI statistics is their "total crime index," which is a figure indicating the number of crimes committed within a particular area. In Utah, this total crime index increased by 18.2 percent from 1973 to 1974, and the violent crime index increased by 4.4 percent during that time period. Statistics are not yet available for 1974 to 1975 or 1975 to 1976 for Utah.

In an attempt to correct this bleak picture, Utah's legislature has enacted the present capital punishment statute now being challenged in this Court (see Utah Code Annotated, § 76-3-206, 207 [1973 Supp.]). We contend that the death penalty serves a vital purpose in the punishment structure of society and that this is a matter upon which the legislature of this state should make the determination.

The showing as to the social utility of capital punishment should be addressed to the legislative body; and the burden, if any, which must be assumed in the judicial setting, is only to demonstrate that there is, in fact, a basis upon which the legislature of this state could reasonably conclude that certain serious offenses should be punished by death. It is a settled doctrine of constitutional law that the burden of proof is on the one who challenges the constitutionality of a statute and that in the absence of a clear showing of unconstitutionality a state statute will be presumed valid (McGowan v. Maryland, 366 U.S. 420, 425-26 [1961]).

The basic elements commonly ascribed as the purposes of punishment may be reduced to four: (1) deterrence, (2) incapacitation or isolation, (3) rehabilitation, and (4) retribution.

As to rehabilitation, it is obvious that as to the serious criminal offender deemed not capable of rehabilitation and sentenced to death, this purpose of punishment is not viable. In recent years, at least as to the nonviolent offender, rehabilitation was considered the progressive goal of punishment. However, recent studies have cast much doubt on the effectiveness of rehabilitation in the penal system. Indeed, lack of rehabilitation in the penal system was most probably a basis for the enactment of the habitual offender statutes (see Utah Code Annotated, §76-8-1001, 1002 [1973 Supp.]).

As to retribution, while it may not now be recognized as a major objective in our system of punishment, as Lord Justice Denning said:

> The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objectives of punishment as being deterrent or reformative or preventive and nothing else . . . The ultimate justification of any punishment is . . . that it is the emphatic denunciation by the community of a crime; and . . . there are some murders which . . . demand the most emphatic denunication of all, namely the death penalty.
>
> (Quoted in National Commission on Reform of Federal Criminal Laws, 2 Working Papers 1359 [n. 47] [1970])

And as Justice Stewart said in his concurring opinion in Furman v. Georgia, supra at 308:

> On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy--of self-help, vigilante justice and lynch of law.

One commentator, in discussing the retributive theory of punishment, said that those who ignore this facet of punishment are only evidencing sentimental foolishness, that if the natural desire for vengeance is not met and satisfied by the orderly procedure of the criminal law there is danger of reversion to the bloody vengeance of feud and vendetta. He also noted that rather than calling this urge of human nature to be a "passion for revenge" it could, with

equal aptness, be termed the "passion for justice" (Morris R. Cohen, "Moral Aspects of Criminal Law," 49 Yale Law Journal 987 at 1011-12).

One purpose of punishment is isolation or incapacitation. Life imprisonment often provides a woefully inadequate method of protecting society through incapacitation or isolation of the offender. In Utah, the Board of Pardons has absolute discretion regarding when to parole a prisoner (Utah Code Annotated, §76-3-202 [1973 Supp.]). In cases such as this where the Defendant has been convicted of first-degree murder, the prisoner must serve only 15 years of the life-imprisonment sentence. The myth that paroled or incarcerated murderers do not kill again evaporates very readily upon perusal of case reports throughout the nation.

It must be noted that the armed robber or armed burglar commonly faced with a maximum term of life imprisonment if apprehended might well consider himself foolish not to kill his victim or a witness if in doing so he would risk only the same penalty--life imprisonment for murder--while increasing multifold his chances of avoiding apprehension. The armed robber of the one-man liquor store would not let the petitioners' views of the dignity of human life cause him to hesitate for a moment in killing the lonely figure behind the counter at a late hour when there are no other persons around to witness such an execution. The same applies to the willingness of the armed robber to kill a police officer to avoid apprehension and conviction, when without the death penalty the criminal will

risk no added punishment if he does away with his intended captor. This would also be true of the "lifer" in a correctional facility who is faced with only another life sentence for taking the life of a guard in prison. Such a sentence would not only be futile, but would make a mockery of our system of justice.

Some studies have concluded that the death penalty exerts no discernible influence on the rate of homicides. It is evident that these statistical studies were "fatally flawed" in the failure to hold constant other factors besides punishment that might influence the murder rate (see generally Posner, "The Economic Approach to Law," 53 Texas Law Review 757, 766-68 [1975]). In fact, at least one study has concluded that when capital punishment was actually used a significant number of lives were saved (Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," 75 American Economic Review 397 [June, 1975]).

The existence of so many influential factors not susceptible of measurement and correlation would impugn the statistical methodology of the studies concluding that capital punishment has no deterrent effect. Clearly, the existence of these variables precludes a meaningful comparison between general undifferentiated murder statistics and a single proposed causal factor--that of the existence of the death penalty in a particular jurisdiction.

Secondly, the steady increase of homicides across the nation, presumably caused by social and economic factors,

naturally tends to cover up the perceptible deterrent effects of the death penalty which might appear in the antiseptic conditions of the social laboratory.

A third objection to this statistical approach is that it measures the homicide rate in terms of the theoretical existence of the death penalty, that is, the existing statutes and judgments imposing the punishment of death, rather than in terms of the actual existence of the death penalty, that is, the executions carried out. During the previous decade in which the dramatic increases in murders were recorded, while juries continued at a relatively stable rate to fix the penalty of death in the appropriate cases, the annual executions in the United States dwindled to nothing. The period from 1968 through 1973 showed that the number of offenses of murder increased 42 percent and that the rate per hundred thousand inhabitants was up 35 percent (FBI, Uniform Crime Reports, 1973 [September 6, 1974] at 6-7).

U. S. Justice Marshall observed in Powell v. Texas, 392 U.S. 514 at 531 (1968), with general reference to the deterrent effect of criminal sanctions,

> . . . The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts.

We submit that this foregoing statement has equal validity when applied specifically to the deterrent effect of

the death penalty. It would appear to be a fact that to the rational person the threat of the greater punishment has a greater deterrent effect (see Royal Commission on Capital Punishment Report, 1949-1953 at p. 24, Section 68 [1953]).

The United States Supreme Court has also recognized the deterrent effect of capital punishment (see Brady v. U. S., 397 U.S. 742, 775 [1970]; U. S. v. Jackson, 390 U.S. 570, 581 [1968]).

We submit that the Utah State Legislature can also conclude that the existence of the death penalty for certain heinous crimes might cause some potential murderers to be so gripped by fear that they would be deterred from criminal endeavors and would refrain from the firing of a gun at the lonely gas station attendant standing in a gas station or the police officer attempting to effect an arrest. As the "Joint Report" of the Legislative Committee on Capital Punishment of Pennsylvania said: "The plain fact is that it can never be known how many persons are actually deterred by threat of punishment whether capital or otherwise." It is also said that if capital punishment is so unique, so abhorrent, and so fearsome it seems inconceivable that a rational person trying to decide whether to commit a capital crime would ignore the potential penalty of death. The innocent life saved when the potential murderer is "so gripped by fear" of the death penalty as to hold his fire and refrain from taking someone's life is not reflected in the statistics surveyed by the social scientists.

The fact that the death penalty does not deter all is no reason for rejecting this form of punishment. The statistics, to which earlier reference has been made, lump the undeterrable murderers with those that possibly could have been deterred. Studies of murder rates and their relationship to the death penalty would be valid only if they were limited to deterrable homicides involving a course of conduct understandingly embarked upon such as armed robbery, collection of insurance on the victim's life, kidnapping for ransom, etc.

The position of the person who must deal face to face with homicidal offenders--law enforcement officers--understandably takes a position in favor of the death penalty. The late J. Edgar Hoover, Director of the FBI, stated his unqualified objection to the abolition of capital punishment as follows:

> The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty . . . . For the law enforcement officer the time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessary ingredient. (FBI, Uniform Crime Reports, 1959 issue)

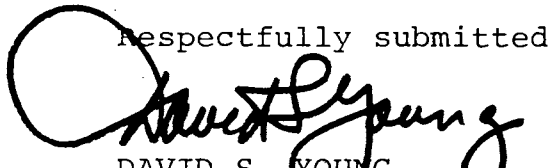
In conclusion, it is submitted that there has been no clear showing that the death penalty serves no legitimate function in our society. The U. S. Constitution and the Constitution of the State of Utah give to the legislature, the elected representatives of the people, the right to determine that the protection of society under present conditions requires death as a form of punishment for certain serious crimes.

CONCLUSION

The will of the people has clearly been shown to favor the existence of capital punishment in Utah. In an era characterized by rising crime rates, mass killings, inmate homicides, revolutionary bombings of public buildings, and the assassination of public figures and law enforcement officers, it would be inappropriate for a legislature to contravene the will of society by abolishing capital punishment. How much less appropriate would it be for this Court to decree that this form of punishment, sanctioned by the history of our state and nation, is now forbidden to the people? A society designed to protect its innocent members from savage and senseless acts demands that it be allowed to use all available methods to afford this protection to its citizenry.

Capital punishment is a viable and effective tool in the never-ending war against crime. To abolish such a tool would undoubtedly do substantial harm to the welfare of Utah residents.

Respectfully submitted,



DAVID S. YOUNG
Statewide Association of
Prosecutors of Utah