Taking the Death Penalty Personally: Justice Thurgood Marshall

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TAKING THE DEATH PENALTY PERSONALLY: JUSTICE THURGOOD MARSHALL

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In 1965, two years before being selected by President Lyndon Johnson to be the first African American appointed to the United States Supreme Court, Thurgood Marshall optimistically predicted that capital punishment would soon be abolished in the United States.1 By the time Justice Thurgood Marshall retired from the United States Supreme Court in 1991, civil libertarians around the world were well acquainted with his staunch opposition to capital punishment. Together with Justice William Brennan, Justice Marshall believed that the death penalty was in all cases "cruel and unusual punishment" prohibited by the Eighth Amendment to the Constitution.2

This article explores possible motivations behind Marshall's strenuous objection to the death penalty and examines some of Marshall's most important work — as defense lawyer and, later, Supreme Court Justice — in capital cases.3

Marshall was born on July 2, 1908, and came of age in an America which thought little or nothing of lynching its black citizens.4 The year Marshall was born, a person was lynched every fourth day.5 Ninety percent of those lynched were black.6 This percentage held until the 1930s.7 Most of those lynched were

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2. See Furman, 408 U.S. at 257 (Brennan, J., concurring); id. at 314 (Marshall, J., concurring).


4. Between 1882 and 1968, 4743 lynchings were reported. Drew L. Kershen, Lynch Law: The Ox Bow Incident 1 (1993) (unpublished manuscript, on file with the Oklahoma Law Review). Seventy-three percent of those lynched were black. Id. Between 1885 and 1907, illegal lynchings Outpaced legal executions in the United States. JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 185 (1984). For example, in 1892 twice as many people were lynched as were legally executed. Id.

5. WILLIAMSON, supra note 4, at 117-18.

6. Id.
accused of murder, but blacks were also mobbed and hanged for lesser offenses such as using offensive language, insulting white women and "disappointment at a Colored entertainment."

Infamous historical events likely colored Marshall's feelings about capital punishment. In 1930, at age twenty-three, Marshall entered Howard University Law School in Washington, D.C. The next year, the Scottsboro boys — nine illiterate blacks between the ages of thirteen and twenty — were charged with raping two white women on a freight train which passed through Tennessee and Alabama. The defendants faced intense hostility from the predominantly white community. The trial judge appointed all members of the bar to represent the defendants. On the morning of the trial, when no lawyer appeared to represent the defendants, the judge appointed a local attorney who undertook their defense with great reluctance. Defense counsel had no opportunity to investigate the case and was allowed to consult with his clients for only thirty minutes before the trials began. Eight of the defendants were sentenced to death.

Marshall's opposition to the death penalty was not based solely on historical accounts of unfairness. Marshall knew from bitter personal experience that America's criminal justice system and the military justice system were infested with hatred and prejudice against minorities. When Marshall was forty-three years old, litigating civil rights cases for the National Association for the Advancement of Colored People (NAACP), he successfully defended black soldiers unjustly
sentenced to death in Korea and Japan.\textsuperscript{12} Those sentences were reduced or reversed after Marshall persuaded military officials and President Harry Truman that serious errors pervaded the soldiers' trials.\textsuperscript{13}

Perhaps Marshall's most famous capital case during this period involved the court martial of Lieutenant Leon A. Gilbert, one of the few black officers of the 24th Infantry stationed in Korea.\textsuperscript{14} Gilbert, a thirty-one-year-old combat veteran, twice had been awarded Bronze Stars during World War II.\textsuperscript{15} Gilbert's Korean tour of duty landed him on the military's death row. After American forces sustained heavy combat casualties, Gilbert was ordered to take A Company to a ridge to provide cover for withdrawing troops.\textsuperscript{16} When heavily armed, better-equipped North Korean troops overran his position, Gilbert evacuated his troops. While retreating, Gilbert's men met up with Colonel Horton V. White, commander of the 24th's Regimental Combat forces. White ordered Gilbert and A Company to retake the ridge. Gilbert, exhausted after nearly three weeks of combat, explained that the area was completely overrun with enemy troops. Gilbert was promptly arrested and charged with "misbehavior in the presence of the enemy," a violation of the Seventy-fifth Article of War.\textsuperscript{17} Within five weeks, Gilbert was court-martialed and sentenced to death by firing squad.\textsuperscript{18}

Marshall flew to Korea, interviewed Gilbert extensively and conducted a thorough investigation. Gilbert told Marshall that all members of Gilbert's court-martial were white and that only prosecution witnesses were permitted to testify in person. Much of what Gilbert told Marshall was corroborated by documentary evidence. For example, Gilbert explained that at the time of the incident he had been without sleep for six days and was suffering from acute dysentery. Marshall uncovered medical reports prepared by a panel of three medical officers who examined Gilbert soon after his arrest. One report described Gilbert as suffering from "anxiety reaction, acute, severe." Another psychiatric report concluded that at the time of the alleged offense, "Lieutenant Gilbert was suffering from a nervous illness . . . which would prevent him from carrying out his duties as ordered."\textsuperscript{19}

Marshall personally wrote to President Truman, explaining that Gilbert had not received a fair trial and arguing that under the Code of Military Justice Gilbert was not responsible for his actions.\textsuperscript{20} Gilbert's case attracted nationwide publicity and

\textsuperscript{12} DAVIS & CLARK, supra note 11, at 320.
\textsuperscript{13} Id.
\textsuperscript{14} ROWAN, supra note 1, at 159; DAVIS & CLARK, supra note 11, at 127.
\textsuperscript{15} ROWAN, supra note 1, at 159.
\textsuperscript{16} Id. at 159-60.
\textsuperscript{17} Id. at 160. According to Rowan, the specific charge — misbehaving himself before the enemy by refusing to advance with his command when ordered to do so — amounted to an accusation of cowardice. Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 165-66.
\textsuperscript{20} Id.
ultimately President Truman commuted Gilbert's sentence to twenty years at hard labor.\footnote{Id. at 160.}

Marshall was not always so fortunate in his representation of the condemned. During his early years of private practice, Marshall represented a former high school classmate who was charged with robbery and murder.\footnote{Id. } Marshall lost, and his client died on the gallows at the Maryland penitentiary in Baltimore.\footnote{Id. } The loss weighed heavily on Marshall's conscience. Marshall explained: "When the time of execution came up, I felt so bad about it — that maybe I was responsible — that I decided I was going to go and see the execution."\footnote{Id. At the last minute, a friend of Marshall's convinced him not to attend.}

A white reporter from the daily \textit{Morning Sun} newspaper was a good friend of mine. And when I told him he said "Now wait a minute. You do whatever you want to do, but I am required to go" and he gave the number [of executions] he had been to, something like a dozen or more. He told me, 'I have been to blank number of executions, and I have puked at every one of them. Now, if you feel you want to go, go ahead," and I chickened out.\footnote{Id.}

Some years later, when asked if the hanging of his classmate had inspired his condemnation of the death penalty, Marshall replied: "Well, I don't know whether that . . . well, it did. It did because I lost the death penalty case in private practice."\footnote{Id.}

A notorious Oklahoma case\footnote{Id. } involving a triple murder also haunted Marshall throughout his career. On New Year's Eve, 1939, Mr. and Mrs. Elmer Rogers and their four-year-old son Elvie Dean were murdered in their home, just northwest of Fort Towson, in Choctaw County, Oklahoma.\footnote{Id. at 160.} The parents had been shot and then axed to death.\footnote{Id. at 160.} After dousing the adults' bodies with kerosene, the murderer set the house ablaze.\footnote{Id. at 160.} Two young children escaped the burning home.\footnote{Id. at 160.} Few doubted that the murderer, if apprehended, would be sentenced to death and promptly executed in Oklahoma's electric chair.

On January 2, 1940, authorities arrested a convict assigned trustee status at the Sawyer prison camp near Fort Towson. The trustee was serving a thirty-year

\begin{enumerate}
\item Id. at 160.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Marshall's more famous connection to Oklahoma was forged several years later when he successfully argued before the United States Supreme Court that Ada Lois Sipuel, a young black woman, should be permitted to attend the University of Oklahoma College of Law, notwithstanding her race. Sipuel v. Oklahoma State Bd. of Regents, 332 U.S. 631 (1948).
\item ROWAN, supra note 1, at 86; Lyons v. Oklahoma, 322 U.S. 596, 598 (1944).
\item Id. at 86.
\item Id.
\item Id.
\item Id.
\end{enumerate}
sentence for killing his wife.\textsuperscript{22} Within a few days, Oklahoma Governor Leon C. Phillips personally became involved in the case.\textsuperscript{23} Phillips told the press that he suspected that trustees at the prison camp had been going out and getting drunk.\textsuperscript{24} Press reports claimed that the trustee arrested had been away from the camp drunk on the night that the Rogers family was murdered.\textsuperscript{25} Suddenly, with little explanation, the trustee was dropped as a suspect and suspicion shifted to W.D. Lyons, a twenty-one-year-old black man.\textsuperscript{26} Lyons had served two terms in the penitentiary for the nonviolent offenses of chicken stealing and burglary.\textsuperscript{27} Lyons was arrested on January 11, 1940.\textsuperscript{28}

The day after Lyons' arrest, Tulsa attorney Amos T. Hall enlisted Marshall's help, telling him that although Lyons had not been charged and had not appeared before a magistrate, police were aggressively seeking a confession.\textsuperscript{29} Although Marshall agreed to help, one full year passed before Lyons was brought to trial. Shortly before the trial began in the Choctaw County Courthouse on January 27, 1941, Marshall flew to Oklahoma City and took a bus to Hugo, Oklahoma.\textsuperscript{30}

The centerpiece of the prosecution's case against Lyons consisted of a series of three confessions.\textsuperscript{31} The circumstances surrounding the confessions were described by Marshall in a letter sent from Oklahoma to NAACP Executive Secretary Walter White in New York.

Trial started early Monday morning and has been going on ever since. The State attempted to introduce confessions. We opposed them and asked that jury be excluded while we put on evidence to show that the confessions were secured by force and violence. They beat [Lyons] all night. Sometime later he was taken up to the County Prosecutor's Office where there were ten or more officers who took turns beating him with blackjacks and what is known as a "Nigger beater" which is a special type of black jack. They went to the place where the murder occurred — where the bodies had been burned and took some of the bones of the dead people, put them in a pan and put them in [Lyons']

\begin{itemize}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.} at 87; Lyons, 322 U.S. at 599.
\item \textsuperscript{38} \textit{Rowan}, supra note 1, at 86.
\item \textsuperscript{39} Curiously, the day after Lyons' arrest, newspapers reported that police had obtained a confession, apparently referring to the trustee at the Sawyer prison camp. \textit{Id.} at 87.
\item \textsuperscript{40} \textit{Id.} at 88-89.
\item \textsuperscript{41} Lyons, 322 U.S. at 597-98. According to the Court, although Lyons was competently represented before and at trial, he was not provided with defense counsel until after the authorities had extracted the confessions. \textit{Id.} at 599. Years later as Solicitor General, Marshall appeared before the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966). Marshall found himself arguing — doubtless contrary to his personal convictions — that the government had no duty to provide an attorney to an indigent suspect during custodial interrogation. \textit{Yale Kamisar et al., Modern Criminal Procedure & Basic Criminal Procedure} 445 (7th ed. 1993).
\end{itemize}
lap (this is admitted by the state). He was told what the bones were including the upper jaw bone and teeth of the dead woman (including the bones of a dead child — also were in the pan). One of the officers admitted that this would have scared him if he had been Lyons. They beat him all night until two-thirty in the morning then he "confessed." They then took him to the scene of the crime and then to the State Pen at McAlester the same night where he made another "confession."

Marshall succeeded in excluding from evidence the confession obtained after officers placed the bones of the victims on Lyons’ lap. However, the confession allegedly made to Warden Jess Dunn at McAlester State Penitentiary was admitted. Notwithstanding the slender prospects of a black lawyer from New York winning an acquittal for a black defendant in 1941 Hugo, Oklahoma, Marshall relished the battle. Marshall biographer and longtime friend Carl Rowan explained:

The Lyons case embodied everything that Marshall had vowed to work against: the ease with which powerful white criminals could frame indigent blacks; the paucity of lawyers who would defend the poor, or the minorities; the practice of cops and prosecutors holding powerless people in their custody for long periods without charging them with any crime; the practice of officials, such as the governor's "special investigator" Vernon Cheatwood, of using a "nigger beater" to extract confessions; the denial of a "speedy trial," in this case a delay of more than a year, leaving a fair presumption that the prosecution knew its case was weak; the absence of blacks in the criminal justice system, except as defendants; and the costliness and difficulty of appeals, usually before judges who had never been sensitized regarding the injustices that were rooted deep in the American system of justice.

The trial lasted five days. As Marshall predicted, the all-white jury found Lyons guilty. Nonetheless, Lyons' sentence bears testament to Marshall's considerable talent as a trial lawyer. After finding beyond a reasonable doubt that Lyons shot a white family to death, hacked the bodies to pieces with an axe, and then set fire to their home to burn the bodies, the jury did not sentence Lyons to death as one

42. ROWAN, supra note 1, at 90.
43. Lyons, 322 U.S. at 599-600.
44. According to Rowan, Marshall especially delighted in the opportunity to cross-examine the white police officers who Marshall believed beat the confessions out of Lyons. Marshall wrote to Walter White:

We figured [the police officers] would resent being questioned by a Negro and get angry and this would help us. It worked perfectly. They all became angry at the idea of a Negro pushing them into tight corners and making their lies so obvious. Boy, did I like that — and did the Negroes in the Court-room like it.

ROWAN, supra note 1, at 90.
45. Id. at 91. For a wonderfully rich description of the atmosphere surrounding the Lyons case, see id. at 79-97.
46. Lyons, 322 U.S. at 597.
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would expect. Instead, the jury sentenced Lyons to life imprisonment, with a recommendation of mercy.\footnote{ROWAN, supra note 1, at 93. Two months after the sentence, the NAACP magazine, \textit{Crisis}, reported:}

The Criminal Court of Appeals of Oklahoma — then, as now, an all-white court — upheld the verdict of the all-white jury.\footnote{The decisions of the Criminal Court of Appeals of Oklahoma (now known as the Oklahoma Court of Criminal Appeals) are Lyons v. State, 138 P.2d 142 (Okla. Crim. App. 1943) and Lyons v. State, 140 P.2d 248 (Okla. Crim. App. 1943) (denial of request for rehearing). Dissenting from denial of the petition for rehearing, Judge Thomas H. Doyle wrote:}

Marshall argued Lyons' case before the United States Supreme Court on April 26, 1944,\footnote{Lyons v. Oklahoma, 322 U.S. 596 (1944).} and expected to win.\footnote{The final vote was 6-3. Justice Stanley Reed delivered the opinion of the Court. Justice Wiley Rutledge dissented without opinion. Justice Francis Murphy dissented and wrote an opinion which was joined by Justice Hugo Black. Lyons v. Oklahoma, 322 U.S. 596 (1944).} Marshall exhorted the Court to find that Lyons' confessions were coerced in violation of Lyons' rights under the Due Process Clause of the Fourteenth Amendment. In a split decision, the Supreme Court denied relief.\footnote{The majority opinion chronicles Lyons' ordeal in chilling detail.}

According to the majority, the inadmissibility of a coerced confession does not prevent the state from lawfully securing a subsequent confession.\footnote{Eleven days later the second interrogation occurred. Again the evidence of assault is conflicting. Eleven or twelve officials were in and out of the prosecutor's small office during the night. Lyons says that he again suffered assault. Denials of violence were made by all the participants accused by Lyons except the county attorney, his assistant, the jailer and a highway patrolman. Disinterested witnesses testified to statements by an investigator which tended to implicate that officer in the use of force, and the prosecutor in cross-examination used language which gave color to defendant's charge. It is not disputed that an inquiry continued until two-thirty in the morning before an oral inquiry was made into the use of force by officers who were said to have participated.}

The issue remains whether the
later confession was voluntary. Applying the voluntariness test to Lyons' case, six justices agreed with the Oklahoma Criminal Court of Appeals that "the evidence would justify a determination that the effect of a prior coercion was dissipated before the second confession" was obtained. Marshall's disappointment was deep and enduring. Shortly before he died, Marshall confided to a friend, "I still think Lyons was innocent."

Marshall's most stunning victory in a capital case came many years later while he served as an associate justice of the United States Supreme Court. In a scholarly sixty-page concurring opinion in Furman v. Georgia, Justice Marshall joined the Court in striking down the death penalty in 1972. According to Justice Marshall, "In Furman I concluded that the death penalty is invalid for two reasons. First, the death penalty is excessive. And second, the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable." Justice Marshall believed that all penalties which were excessive were "cruel." That the death penalty was excessive, in Justice Marshall's view, was conclusively demonstrated by its failure to deter others from committing capital offenses. Justice Marshall's favorite illustration of capital punishment's lack of deterrent effect was the public hanging of pickpockets in seventeenth century England: "You remember the story in England when they made pickpocketing a capital offense? When they were hanging the first pickpocket, people were picking pockets in the crowd!"

Justice Marshall's second reason for holding the death penalty invalid — that a "fully informed" American people would reject it as "morally unacceptable" — fueled his lifelong campaign to educate the public about the horrific reality of capital punishment.

.confession was obtained and that a pan of the victims' bones was placed in Lyons' lap by his interrogators to bring about the confession. As the confession obtained at this time was not offered into evidence, the only bearing these events have here is their tendency to show that the later confession at McAlester was involuntary.  
Id. at 599-600.  
53. Id. at 603.  
54. Id. at 603-04. The Court reasoned that the McAlester confession was separated from the earlier confession by twelve hours. Moreover, the second confession was obtained after Lyons had been transferred from the control of the sheriff's office to the control of the warden. Lyons, as a former inmate at McAlester, was familiar with Warden Dunn. Dunn's interrogation of Lyons was transcribed by a prison stenographer. The Court noted that Lyons' "answers . . . contained statements correcting and supplementing the questioner's information and do not appear to be mere supine attempts to give the desired response to leading questions." Finally, a few days after Dunn's interrogation, Lyons allegedly admitted the murder to a prison guard. Id. at 604-05.  
55. ROWAN, supra note 1, at 97. According to Rowan, Lyons served 25 years in prison before Oklahoma Governor Henry Bellmon pardoned him on May 24, 1965. Id.  
57. ROWAN, supra note 1, at 381-82.  
58. DAVIS & CLARK, supra note 11, at 318.  
59. ROWAN, supra note 1, at 386-87; DAVIS & CLARK, supra note 11, at 318.  
60. See supra note 57 and accompanying text.
Four short years after \textit{Furman}, the Court revived capital punishment in \textit{Gregg v. Georgia}.\textsuperscript{61} Justice Marshall dissented,\textsuperscript{62} holding firm to his beliefs. However, because the \textit{Gregg} Court reinstated capital punishment in 1976 by approving statutory schemes which purported to ensure "heightened reliability"\textsuperscript{63} in capital sentencing decisions, Justice Marshall shifted strategies. He challenged the majority view on its own terms by arguing that no system of capital punishment included sufficient safeguards to ensure the reliability of capital sentencing.

The \textit{Gregg} decision took an enormous personal toll on Justice Marshall. Spectators said that when the majority decision was read from the bench, Justice Marshall appeared visibly shaken.\textsuperscript{64} He left the Court early and later that night suffered a mild heart attack at age sixty-seven.\textsuperscript{65}

Not content to simply dissent without opinion in death penalty cases, or to rely on his belief that the death penalty, however administered, constituted cruel and unusual punishment, Justice Marshall consistently explained why the particular death sentence at issue was unreliable. He argued passionately that the safeguards which other justices considered constitutionally necessary to the imposition of a death sentence were impossible to attain.\textsuperscript{66}

Another weapon Justice Marshall frequently wielded in his lifelong struggle against the death penalty was to write dissents from the full Court's decision to refuse to hear a case. Justice Marshall filed more than 250 dissents from the denial of certiorari in capital cases.\textsuperscript{67} More than 150 of these were filed with written opinions.\textsuperscript{68} Justice Marshall used these opinions to educate his colleagues and members of the bar as to procedural unfairness in capital cases he felt deserved the full Court's review.\textsuperscript{69} For example, in \textit{Evans v. Muncy},\textsuperscript{70} Justice Marshall's opinion dissenting from the denial of certiorari demonstrated that, at least in Wilbert Evans' case, procedural safeguards were insufficient to insure a fair and reliable sentence. Evans' death sentence had been "predicated on a single aggravating circumstance: that if allowed to live Evans would pose a serious threat of future danger to society."\textsuperscript{71} Notwithstanding that the American Psychiatric Association considers the

\textsuperscript{61.} 428 U.S. 153 (1976).
\textsuperscript{62.} Id. at 231 (Marshall, J., dissenting).
\textsuperscript{63.} Id. at 183-207; see also \textit{Woodson v. North Carolina}, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment that a 100-year prison term differs from only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").
\textsuperscript{64.} \textit{DAVIS & CLARK}, supra note 11, at 350.
\textsuperscript{65.} Id.
\textsuperscript{67.} \textit{DAVIS & CLARK}, supra note 11, at 373.
\textsuperscript{68.} Brennan, supra note 66, at 32.
\textsuperscript{69.} Id.
\textsuperscript{70.} 498 U.S. 927 (1990).
\textsuperscript{71.} Id. at 927. Capital jurors in several states, including Oklahoma, are asked to predict whether a defendant is likely to commit acts of violence in the future. In Oklahoma, future dangerousness is specifically listed as an aggravating circumstance which renders the defendant eligible for the death
unreliability of psychiatric predictions of future dangerousness to be "an established 
fact within the [psychiatric] profession," the Court had upheld the use of such 
psychiatric predictions of future dangerousness in capital cases. Evans' death 
sentence, according to Justice Marshall, graphically illustrated the failure of the 
Court's mandated "heightened reliability" in capital cases.

Uncontroverted evidence from numerous guards showed that Evans was a model 
prisoner during nearly ten years on Virginia's death row. More important, while 
Evans awaited execution "an event occurred which casts grave doubt on the jury's 
prediction of Evans' future dangerousness." Armed with makeshift knives, six 
death row inmates attempted to escape, taking hostage twelve guards and two 
nurses. All hostages were stripped of their clothes, and the guards were disarmed, 
bound, and blindfolded. One nurse was tied to an inmate's bed. As Justice 
Marshall reminded the Court, "According to uncontested proof presented by guards 
taken hostage during the uprising, Evans took decisive steps to calm the riot, saving 
the lives of several hostages and preventing the rape of one of the nurses." Evans' 
actions, according to Justice Marshall, "reveal[ed] the clear error of the jury's 
prediction of Evans' future dangerousness." Moreover,

the Court's decision to let Wilbert Evans be put to death is a compelling 
statement of the failure of this Court's jurisprudence. This Court's 
approach since Gregg v. Georgia has blithely assumed that strict 
procedures will satisfy the dictates of the Eighth Amendment's ban on 
cruel and unusual punishment. As Wilbert Evans' claim makes crystal 
clear, even the most exacting procedures are fallible. Just as the jury 
occasionally "gets it wrong" about whether a defendant charged with 
murder is innocent or guilty, so, too, can the jury "get it wrong" about 
whether a defendant convicted of murder is deserving of death, notwith-
standing the exacting procedures required by the Eighth Amendment. The only difference between Wilbert Evans' case and that of many other 
capital defendants is that the defect in Evans' sentence has been made 
unmistakably clear for us even before his execution is to be carried 
out.

penalty. 21 OKLA. STAT. § 701.12(7) (1991) (defining as an aggravating circumstance "the existence of 
a probability that the defendant would commit criminal acts of violence that would constitute a 
continuing threat to society").
73. Id. at 903-04.
74. Evans, 498 U.S. at 929 (Marshall, J., dissenting from denial of certiorari).
75. Id. at 928.
76. Id.
77. Id.
78. Id.
79. Id. at 929.
80. Id. at 930.
Although the state appeared to concede that the sole basis for Evans' death sentence — future dangerousness — did not exist, it argued that procedural finality required that the execution go forward. Justice Marshall's exasperation with this argument is palpable:

The State's interest in "finality" is no answer to this flaw in the capital-sentencing system. It may indeed be the case that a state cannot realistically accommodate post-sentencing evidence casting doubt on a jury's finding of future dangerousness; but it hardly follows from this that it is Wilbert Evans who should bear the burden of this procedural limitation. In other words, if it is impossible to construct a system capable of accommodating all evidence relevant to a man's entitlement to be spared death — no matter when that evidence is disclosed — then it is the system, not the life of the man sentenced to death, that should be dispatched.

Although his voice was most often raised in dissent in capital cases, Justice Marshall's death penalty jurisprudence also includes several vitally important majority decisions. Writing for the Court in *Caldwell v. Mississippi*, Justice Marshall blunted prosecutors' efforts to reduce jurors' sense of responsibility for their verdicts by emphasizing the existence of appellate review. Bobby Caldwell shot and killed the owner of a small grocery store in the course of robbing it. During closing arguments, the following exchange occurred:

Assistant District Attorney: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know — they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

Counsel for Defendant: Your Honor, I'm going to object to this statement. It's out of order.

Assistant District Attorney: Your Honor, throughout their argument, they said this panel was going kill this man. I think that's terribly unfair.

The Court: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

Assistant District Attorney: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not

81. *Id.*
82. *Id.* at 930-31. Wilbert Evans died in Virginia's electric chair on October 17, 1990.
84. *Id.* at 324.
"If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I do, as Judge Baker told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling you so."

According to Justice Marshall's majority opinion, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." As Justice Marshall explained, minimizing the "truly awesome responsibility of decreeing death for a fellow human" offend the Eighth Amendment's requirement of "heightened reliability" in capital sentencing.

Justice Marshall's views also persuaded a majority of the Court in Ford v. Wainwright. In 1975, Alvin Ford was sentenced to death for the 1974 murder of a Florida police officer. In July 1981, after six years on death row, Ford's mental health began to decline. Ford became delusional and brooded endlessly about imaginary events. Among other things, Ford imagined that messages were being sent to him over the radio, that the Ku Klux Klan conspired to force him to commit suicide, that hostages, including family members, were being held at the prison, and that his sentence had been vacated by a court decision.

In November 1983, a psychiatrist hired by the defense examined Ford, concluded that Ford had no understanding of why he was being executed and found "no reasonable possibility that Mr. Ford was dissembling, malingering, or otherwise putting on a performance." Florida's governor thereafter appointed a panel of three psychiatrists to evaluate Ford's competency to be executed. Although the psychiatrists reached three different diagnoses, all three agreed that Ford was sane for purposes of Florida state law. After the governor signed a death warrant for

85. Id. at 325-26.
86. Id. at 328-29.
87. Id. at 329-30 (citation omitted).
88. Id. at 330. But see Romano v. Oklahoma, 114 S. Ct. 2004 (1994) (holding that there was no Caldwell error where the sentencing jury learned that the defendant stood convicted of — and was sentenced to die for — another unrelated murder).
89. 477 U.S. 399 (1986).
90. Id. at 401.
91. Id. at 402-03. Ford told a psychiatrist who examined him that he was free to leave whenever he chose and that it would be illegal to execute him because of an imaginary landmark case, Ford v. State, which he believed he had won. Id. at 403. In addition, Ford began referring to himself as "Pope John Paul III" and claimed to have appointed nine new justices to the Florida Supreme Court. Id. at 402.
92. Ford's condition thereafter seriously deteriorated and he became virtually incomprehensible, speaking only in a code. Id. at 403.
93. Id. at 403-04.
Ford’s execution, the Supreme Court granted certiorari to decide whether the Eighth Amendment prohibited the execution of the insane.

By a margin of 5-4, the Court held that the Cruel and Unusual Punishment Clause of the Eighth Amendment prohibited Florida from carrying out Ford’s execution.94 Writing for the majority, Justice Marshall observed:

[T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. . . .

[T]his Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.95

In Ake v. Oklahoma,96 Justice Marshall’s majority opinion established the right of an indigent defendant to the psychiatric assistance necessary to prepare an effective defense based on mental condition when sanity at the time of the offense is seriously in question.97 On October 15, 1979, Glen Burton Ake and Steven Keith Hatch entered the home of Rev. and Mrs. Richard Douglass, holding the couple and their children, Brooks and Leslie, at gunpoint.98 They ransacked the home and bound and gagged Reverend Douglass, Mrs. Douglass and Brooks Douglass, forcing them to lie on the living room floor.99 Ake and Hatch took turns attempting to rape twelve-year-old Leslie Douglass in a nearby bedroom.100 They then bound and gagged Leslie and forced her to lie alongside the other members of her family.101 While Hatch waited in the getaway car, Ake shot Reverend Douglass and Leslie each twice with a .357 magnum pistol, Mrs. Douglass once, and Brooks once.102 Both parents were killed but Brooks and Leslie somehow survived.103 Ake and

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94. Id. at 401. Several rationales have been advanced in support of this aspect of the Eighth Amendment ban on cruel and unusual punishment: executing an insane person offends humanity; executing insane persons does not further the penological goals of deterrence or retribution; insanity itself is adequate punishment; it is unfair to execute someone who cannot appreciate the moral significance of the relationship between her crime and her punishment; it is unfair to execute someone who cannot prepare for her death. RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 199 (1994). Justice Marshall’s majority opinion in Ford noted “the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience.” Ford, 477 U.S. at 399.
95. Ford, 477 U.S. at 409-10; see also AMNESTY INT’L, UNITED STATES OF AMERICA: DEATH PENALTY BRIEFING 79-81 (1987).
97. Id. at 83.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
Hatch were apprehended and charged with two counts of first degree murder, a crime punishable by death in Oklahoma.\textsuperscript{104}

Ake's behavior in the county jail and at his arraignment was so bizarre that the trial judge, \textit{sua sponte}, ordered that Ake be examined by a psychiatrist.\textsuperscript{105} The psychiatrist diagnosed Ake as a probable paranoid schizophrenic, and reported that Ake "appear[ed] to be frankly delusional. . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven."\textsuperscript{106} Accordingly, Ake was committed to Eastern State Mental Hospital for evaluation of his "present sanity," i.e., his competency to stand trial.\textsuperscript{107}

During Ake's psychiatric commitment, his attorney asked the court either to arrange to have a psychiatrist perform an evaluation of Ake's sanity at the time of the murders, or to provide funds to allow the defense to hire a psychiatrist.\textsuperscript{108} The trial judge denied both requests.\textsuperscript{109}

Within six months of the murders, the chief forensic psychiatrist at Eastern State Mental Hospital informed the court that Ake was not competent to stand trial. Six weeks later, the psychiatrist told the court that Ake's competency had been restored through administration of antipsychotic drugs.\textsuperscript{110} The state then resumed proceedings against Ake.\textsuperscript{111}

During the guilt phase of Ake's trial, his sole defense was insanity.\textsuperscript{112} His attorney called to the stand and questioned each of the psychiatrists who had examined Ake.\textsuperscript{113} However, because no one had examined Ake as to his mental state at the time of the offense, the presumption that Ake was sane at the time of

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\begin{enumerate}
\item[105.] \textit{Id.} at 71.
\item[106.] \textit{Id.}
\item[107.] \textit{Id.; see also Ake}, 663 P.2d at 5. The Supreme Court held in Dusky v. United States, 362 U.S. 402 (1960), that competency to stand trial should be judged under a two-part standard: (1) whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and (2) whether the defendant has a "rational as well as factual understanding of the proceedings against him." In \textit{Godinez v. Moran}, 113 S. Ct. 2680 (1993), the Court ruled that the competency standard for pleading guilty or waiving the right to trial is no higher than or different from the competency standard for standing trial.
\item[108.] Ake, 470 U.S. at 72.
\item[109.] \textit{Id.}
\item[110.] Ake, 470 U.S. at 71. At the time of trial, Ake was receiving 200 milligrams of Thorazine three times daily. The psychiatrist assured the court that, if Ake continued to receive that dosage, his condition would remain stable. \textit{Id.} at 71-72. Since then, the United States Supreme Court has ruled that treating a prisoner with antipsychotic drugs against his will does not violate substantive due process where (1) the prisoner was found to be dangerous to himself or others; and (2) treatment was in the prisoner's best interest. Washington v. Harper, 494 U.S. 210 (1990). The Court has yet to squarely decide whether involuntary medication for the purpose of restoring sanity so that a prisoner may be executed is constitutional. See \textit{Louisiana v. Perry}, 610 So. 2d 746 (La. 1992) (holding that State's "medicate-to-execute" scheme violated the Louisiana Constitution).
\item[111.] Ake, 470 U.S. at 72.
\item[112.] \textit{Id.}
\item[113.] \textit{Id.}
\end{enumerate}
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the crime was left unrebutted.\footnote{114} Lacking any evidence from Ake on the issue, the jury rejected Ake's insanity defense and found him guilty of all counts.\footnote{115}

At sentencing, the state urged that Ake be sentenced to death. No new evidence was presented. Rather, the prosecution relied on the guilt phase testimony of the state psychiatrists which strongly suggested that Ake posed a continuing threat to society.\footnote{116} Accordingly, the jury sentenced Ake to death.\footnote{117}

The United States Supreme Court reversed and remanded for a new trial.\footnote{118} This time, Justice Marshall's majority opinion commanded seven votes.\footnote{119} Writing for the Court, Justice Marshall observed:

\textit{[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process and . . . a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.}\footnote{120}

And, Justice Marshall wrote, in the case of a defendant who demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, psychiatric assistance is an essential raw material.\footnote{121} In those circumstances, the state must, at a minimum, assure the defendant access to a competent psychiatrist.\footnote{122} This psychiatrist will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.\footnote{123}

Moreover, Ake was denied the means of presenting evidence to rebut the state's evidence of future dangerousness.\footnote{124} According to Justice Marshall's majority opinion, the defendant and the state share a compelling interest "in assuring that the

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\item \footnote{114} Ake, 663 P.2d at 8. Oklahoma statutes provide that a person shall be presumed competent for the purposes of allocation of the burden of proof and burden of going forward with the evidence. 22 Okla. Stat. § 1175.4 (1991).
\item \footnote{115} Ake, 470 U.S. at 73. In addition to two counts of first degree murder, Ake had been charged with two counts of shooting with intent to kill. Ake, 663 P.2d at 4.
\item \footnote{116} Then, as now, Oklahoma law required proof beyond a reasonable doubt of at least one aggravating circumstance before a defendant becomes eligible for the death penalty. 21 Okla. Stat. §§ 701.11, 701.12 (1991). In Ake's case, the death sentence was based in substantial part on the jury's finding of a likelihood that Ake would commit criminal acts of violence that would constitute a continuing threat to society.
\item \footnote{117} Ake, 470 U.S. at 73. Ake was sentenced to death on each of the two murder counts, and to 500 years imprisonment on each of two counts of shooting with intent to kill. \textit{Id.}
\item \footnote{118} \textit{Id.} at 87.
\item \footnote{119} Chief Justice Warren Burger filed an opinion concurring in the judgment. \textit{Id.} (Burger, C.J., concurring in the judgment). Justice Rehnquist was the lone dissenter. \textit{Id.} (Rehnquist, J., dissenting).
\item \footnote{120} \textit{Id.} at 77.
\item \footnote{121} \textit{Id.} at 83.
\item \footnote{122} \textit{Id.}
\item \footnote{123} \textit{Id.} The Court stopped short of recognizing a constitutional right of indigent defendants to choose a particular psychiatrist or to receive funds to hire their own. \textit{Id.} Under \textit{Ake}, states remain free to decide how to implement the right to psychiatric assistance. \textit{Id.}
\item \footnote{124} \textit{Id.}
\end{itemize}
ultimate sanction is not erroneously imposed."\textsuperscript{125} Without the assistance of a psychiatrist, Ake was deprived of the opportunity to raise in the jurors' minds questions about the state's proof of an aggravating factor which was used to support the sentence of death.\textsuperscript{126} Justice Marshall concluded:

In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.\textsuperscript{127}

Several strong themes emerge from Justice Marshall's death penalty opinions. Perhaps most important, the fallibility of human judgment made the irrevocable nature of the death penalty unacceptable to Justice Marshall. In his \textit{Furman} concurrence, he wrote:

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.\textsuperscript{128}

Earlier in his opinion, Marshall stated:

\textsuperscript{125}  Id. at 84.
\textsuperscript{126}  Id.
\textsuperscript{127}  Id.  
Death is irrevocable . . . . Death, of course, makes rehabilitation impossible; life imprisonment does not. In short, death has always been viewed as the ultimate sanction, and it seems perfectly reasonable to continue to view it as such.

It must be kept in mind, then, that the question to be considered is not whether capital punishment is a deterrent, but whether it is a better deterrent than life imprisonment.  

Known for his irreverence, humility, and wit, Justice Marshall was not afraid to use sarcasm to make his point. "The difficulty is, if you make a mistake, you put a man in jail wrongfully, you can let him out. But death is rather permanent. And what do you do if you execute a man illegally, unconstitutionally, and find that out later? What do you say? 'Oops'?"

The discriminatory nature of capital punishment deeply troubled Justice Marshall. He firmly believed that the death penalty was imposed disproportionately on certain groups, especially minorities and the poor. In chambers, Justice Marshall kept a notebook which contained the number of death-row inmates and classified them according to race, sex, and national origin. Justice Marshall insisted that his law clerks regularly update the notebook.

Justice Marshall viewed as favorite targets of prosecutors seeking the death penalty "the poor, the illiterate, the underprivileged, the member of the minority group — the man who, because he is without means, and is defended by a court-appointed attorney . . . becomes society's sacrificial lamb." Justice Marshall bolstered his argument with statistics. He wrote:

A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population.

130. *Rowan*, *supra* note 1, at 446. In remarks made at the Judicial Conference of the Second Circuit, Justice Marshall said

The unique finality of a capital sentence obliges society to ensure that capital defendants receive a fair chance to present all available defenses, and that they have at least the same opportunities for acquittal as noncapital defendants. The system now in place, however, at times affords capital defendants a lesser opportunity to present their cases than virtually any other litigant. Recent decisions of the Supreme Court have taken their toll on capital defendants and deny, rather than guarantee, these defendants an adequate opportunity to present their defenses.

133. *Id.* at 364 (Marshall, J., concurring). As of October 1994, the racial composition of death row
Justice Marshall also used statistics to support his argument that the death penalty discriminated on the basis of gender. He observed: "Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes." Justice Marshall acknowledged that murder rates of males were significantly greater than murder rates of females. Nonetheless, this failed to account for the gender disparity among persons actually executed. "Men kill between four and five times more frequently than women. Hence, it would not be irregular to see four to five times as many men executed as women. The statistics show a startlingly greater disparity, however."

The searing depth of Thurgood Marshall's anti-death penalty position was perhaps most eloquently expressed in the last dissent Justice Marshall delivered from the bench. *Payne v. Tennessee,* announced on the final day of the Court's 1991 term, departed dramatically from recent precedent and placed in the hands of prosecutors a new lethal weapon: victim impact evidence. In a sense, *Payne* represented the culmination of society's disenchantment with the development of enhanced substantive and procedural safeguards for criminal defendants. Born of this malaise and aided and abetted by the rhetoric of Presidents Reagan and Bush, victims' rights advocates fought for the right of prosecutors to call as witnesses during the sentencing phase of capital murder trials grieving family members to testify to their personal emotional trauma and suffering.

In 1987, Justice Marshall and four colleagues defeated the effort to allow victim impact evidence to be used during capital sentencing in *Booth v. Maryland.* The majority held that the only effect of evidence describing the emotional suffering and trauma of victims would be to inflame juries and lead to death sentences based on emotion and not reason, which would violate the Eighth and Fourteenth Amendments. Moreover, evidence from family members describing the personal characteristics of the murder victim would divert the jury's attention from the defendant. Thus the jury's mission — to make an individualized determination of...
whether a particular defendant should live or die — would be hopelessly clouded by focusing on the victim.

Two years later the Court reaffirmed Booth's holding in South Carolina v. Gathers,\(^1\) again by a 5-4 margin. The Court held that prosecutors would not be allowed to comment on the personal characteristics of murder victims. Although by this time Justice Marshall was eighty-one, tired, and in poor health, Booth and Gathers convinced him that he should not retire. His vote had been decisive in both cases.

Justice William Brennan's retirement in 1990 sealed the fate of Booth and Gathers. And when Chief Justice William Rehnquist announced in Payne v. Tennessee that the Court was reversing Booth and Gathers,\(^2\) Justice Marshall was heartbroken and enraged. Pervis Tyrone Payne had been convicted of the brutal double murder of twenty-eight-year-old Charisse Christopher and her two-year-old daughter Lacie. Charisse's three-year-old son, Nicholas, miraculously survived the attack, notwithstanding a stab wound which completely penetrated through his body from front to back.\(^3\)

During the sentencing phase of Payne's capital murder trial, Charisse's mother, Mary Zvolanek, testified about the effect of the murders on young Nicholas:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He come to me many times during the week and asks me, "Grandmamma, do you miss my Lacie?" And I tell him yes. He says, "I'm worried about my Lacie."\(^4\)

In addition, the prosecutor commented on the continuing effects of Nicholas' experience:

> But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister. . . .

> . . . There is obviously nothing you can do for Charisse and Lacie Jo. But there is something you can do for Nicholas.

> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want

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3. Payne, 501 U.S. at 812. Nicholas' wounds were so severe the he required seven hours of surgery and a transfusion of 1700 cc's of blood — 400 to 500 cc's more than his estimated normal blood volume.
4. Id. at 814-15.
to know what type of justice was done. . . . With your verdict you will provide the answer.142

In Justice Marshall's view, permitting victim impact evidence of this type in capital cases was certain to transform capital sentencing hearings into the judicial equivalent of Irish wakes. Prosecutors were suddenly permitted to whip jurors into a vengeful frenzy, destined to return a verdict of death. Modern-day lynching now had the approval of the highest court in the country. Perhaps worse, the majority's willingness to reverse such recent precedent jeopardized numerous other constitutional rights.

Departing from his usual practice, Justice Marshall delivered his final dissent from the bench. He complained bitterly: "Power, not reason, is the new currency of this Court's decisionmaking. . . . Neither the law nor the facts supporting Booth and Gathers underwent any change in the last four years. Only the personnel of this court did."143 And Justice Marshall warned: "In dispatching Booth and Gathers to their graves, today's majority ominously suggests that an even more extensive upheaval of this court's precedents may be in store."144

Marshall's dissent concluded:

Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably this campaign to resurrect yesterday's "spirited dissents" will squander the authority and legitimacy of this court as a protector of the powerless.145

On June 27, 1991, within two short hours of reading this dissent, Justice Marshall announced his retirement.

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142. Id. at 815. Thus, even though Nicholas was too young to testify, and presumably had not been asked whether he wanted Payne to be executed, the prosecutor imputed to him the desire that Payne be killed.

143. Id. at 844 (Marshall, J., dissenting).

144. Id.

145. Id. at 856 (Marshall, J., dissenting); see also id. at 851-52 & n.2.