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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 642

EDWARD BOYKIN, JR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

~~WRIT~~ WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

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C. THE DEATH PENALTY FOR PROPERTY CRIMES IS NOW RESERVED EXCLUSIVELY FOR NEGROES.

It is well recognized that the death penalty has been applied in a discriminatory fashion in this country.

"Clarence Darrow observed that, 'from the beginning, a procession of the poor, the weak, the unfit, have gone through our jails and prisons to their deaths. They have been the victims.' It is the poor, the weak, the ignorant, the hated who are executed. Racial discrimination occurs in the administration of capital punishment. Since we began keeping records in 1930, there have been 2,066 Negroes, and 1,751 white persons put to death, although Negroes made up only one-eighth of our population. Of the 455 men executed for rape, 405 were Negroes." Att. Gen. Clark, Hearings on s. 1760, Subcomm. on Criminal Laws and Procedures, Senate Judiciary Committee (July 2, 1968).

Alabama is no exception to the disturbing pattern. Since 1930 the state has executed 135 persons; of these 107, or 80%, have been black. 42 *National Prisoner Statistics Bulletin*, Table 3 (June, 1968).

Responsible observers have rejected the possibility that a higher crime rate among the poor generally and Negroes specifically accounts for the grossly disproportionate number of Negroes executed and negates discrimination:

"Even conceding this to be so (that the disproportionate number of crimes committed by the poor and members of minority groups accounts for the disproportionate imposition of the death penalty in those groups), there is inequality. For instance, rape is a

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

**BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., AND THE NATIONAL
OFFICE FOR THE RIGHTS OF THE INDIGENT, AS
AMICI CURIAE**

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a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life." (CAMUS 199.)

(7) Finally, our scholar would consider the arguments which are put forward today in support of the death penalty. These rest for the most part upon the proposition that death is the most efficacious deterrent which—if used sufficiently infrequently and within the hiding of prison walls—a non-totalitarian society can stomach.³³ Reading between the lines, he would come to the obvious conclusion of Clarence Darrow: "That capital punishment is horrible and cruel is the reason for its existence." *Darrow, A Comment on Capital Punishment*, in LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* (1960), xv, xvii. And coming to his own conclusion, on the basis of all that we have said above, our scholar would most firmly disagree that death is a punishment which a non-totalitarian society can stomach at all.

Aye, but there's of course the rub. Our hypothetical student of culture is free to reach his own independent con-

³³ See the exhaustive summary in *CAPITAL PUNISHMENT: MATERIAL RELATING TO ITS PURPOSE AND VALUE* (compiled by Hon. Guy Favreau, Canadian Minister of Justice) (Queen's Printer, Ottawa, 1965) [hereafter cited as FAVREAU] 23-28.