Here is my proposed redraft. The major changes are all marked with marginal paperclips. You should, however, thumb through the entire opinion since several changes are not so marked (e.g., page 5). I hope these changes accomplish the primary goal of placing the burden of your argument on the barriers posed before you reach the balancing stage but recognizing at the same time function of this Court to decide questions arising under the Bill of Rights. It attempts to avoid absolutism while leaving little hope that a different result would be possible so long as the penalty is widely recognized by legislatures and imposed by juries.

I have virtually rewritten the excessiveness-rape section (Part VII) to attempt to answer some of Phil's criticisms and to provide a more coherent role for the excessiveness rationale in a theory of cruel and unusual punishment. I wish we didn't need to talk about the rape cases at all but I do not see, at this time, how we can avoid it. Hopefully, either the CJ in a later draft or Justice White in his opinion will focus on this question in a manner that will permit us to simply join up and zap this section. Fair treatment of this issue would require fuller consideration then we have given it. But fuller consideration would entail seemingly senseless duplication of what we have already said.

While a style edit later will improve the opinion substantially, I think, subject to whatever improvements you make, that it is basically ready to circulate.

LAH
May 15, 1972

Re: 68-5027 - Aikens v. California
69-5003 - Furman v. Georgia
69-5030 - Jackson v. Georgia
69-5031 - Branch v. Texas

Dear Lewis:

I have just finished reading your memorandum in the above-entitled cases, and think it is really first rate from beginning to end. The section on retribution was particularly interesting to me, since both your own language and the splendid quotation from Lord Denning articulated a view which I have felt in the pit of my stomach for some time, but for which I have never been able to find words.

In connection with your discussion of recent enactments providing for the death penalty, my recollection is that when I was in the Justice Department I participated in some work on explosives legislation in 1970 in which the law finally enacted by Congress contained a provision for the death penalty.

It may seem like nit-picking to pick out one sentence in a 49-page opinion with which I so fully agree and make a comment about it, but nonetheless I shall do so. Your sentence beginning on the bottom of page 3, explaining the effect of the Fourteenth Amendment on the States, could it seems to me be read as saying that the Fourteenth Amendment carries over not merely the due process language of the Fifth Amendment, but likewise the requirement of indictment and prohibition against double jeopardy. While the Court in Benton v. Maryland
has held that the Fourteenth Amendment incorporates the prohibition against double jeopardy, I personally had some difficulty with that holding; however, apart from that, I have a feeling not verified by any research that the Court has never held the indictment requirement of the Fifth Amendment applicable to the States. Unless you want to go into this aspect of the Fourteenth Amendment in the sentence in question, I would think it could be narrowed to describe the Fourteenth Amendment as carrying over the due process language of the Fifth Amendment without more, or at most the due process language and the double jeopardy prohibition.

Whatever your decision on this very minor point, I shall take great pleasure in joining your fine opinion.

Sincerely,

Mr. Justice Powell
May 18, 1972

Re: Capital Cases

Dear Lewis:

I have now completed my review of your circulation of May 12. As I told you yesterday, I think it is excellent. It is an obvious product of many hours of hard work. It demonstrates the shallowness of many of the arguments made by the petitioners.

When the circulations settle down, I shall probably ask the privilege of joining the opinion even though you do have in it some comments that are essentially personal.

It is of no consequence, of course, but your clerks may wish, for the next rerun, to have the following typographical errors corrected: page 20, next to the last line of the first full paragraph in the footnote; page 34, 15th line; page 42, 9th line.

Sincerely,

Mr. Justice Powell
May 18, 1972

Re: Capital Cases

Dear Harry:

Thank you for your most gracious note.

I will be happy to welcome any suggestions, and to depersonalize any comments. The latter, of course, will be appropriate if others join.

It would be an honor to have you with me.

Sincerely,

Mr. Justice Blackmun
MEMORANDUM TO THE CONFERENCE

I attach a suggested order dismissing the writ of certiorari in the Aikens case.

There are eighteen other death cases from California pending on petitions for certiorari, including Anderson's own earlier petition, plus the petition for rehearing in McGautha. Could we not simply deny the petitions in all these cases with a citation to the Aikens dismissal?

Perhaps the following form would do:

No. 203 October Term 1970
McGautha v. California

The petition for rehearing is denied. See Aikens v. California, supra.

The writs of certiorari in the following cases are denied. See Aikens v. California, supra.

No. 68-5007 Anderson v. California

68-5020 Smith v. Nelson
68-5021 Reeves v. California
68-5025 Massie v. California
68-5026 Varnum v. California
68-5029 Robinson v. California
69-5002 Tolbert v. California
69-5009 Hill v. California
69-5012 Pike v. California
69-5019 Miller v. California
69-5020 Coogler v. California
69-5021 Mabry v. California
69-5022 Nye v. California
69-5026 Robles v. California
69-5037 King v. California
69-5040 Milton v. California
69-5042 Floyd v. California
70-5005 Terry v. California
No. 68-6027 - Aikens v. California

Petitioner in this case, which has been orally argued and is now sub judice, has filed a Suggestion of Mootness and Motion for Remand based on the intervening decision of the California Supreme Court in People v. Anderson, 6 Cal. 3rd 628 (1972). That decision declared capital punishment in California unconstitutional under Article 1, § 6, of the State Constitution. The decision rested on an adequate state ground and the State's petition for writ of certiorari was denied. ___ U.S. __. The California Supreme Court declared in the Anderson case that its decision was fully retroactive and stated that any prisoner currently under sentence of death could petition a superior court to modify its judgment. Petitioner thus no longer faces a realistic threat of execution, and the issue on which certiorari was granted--the constitutionality of the death penalty under the Federal Constitution--is now moot in his case. Accordingly the writ of certiorari is dismissed.