

HAROLD SHERMAN UPTON *v.* JOHN M.  
GRAVES, CIRCUIT JUDGE

CR 73-149

509 S.W. 2d 823

November 13, 1973

BAIL—CRIMINAL PROSECUTIONS—OPERATION & EFFECT OF ACT 438 OF 1973.—Petitioner was entitled to have bail fixed pending retrial after reversal of his first degree murder conviction since the capital felony provisions of Act 438 of 1973 cannot be applied retroactively to offenses committed prior to its adoption. [Ark. Const. Art. 2, § 17.]

*Richard H. Mays*, for petitioner.

*Jim Guy Tucker*, Atty. Gen., for respondent.

Petition for admission to bail.

## PER CURIAM

This is a petition for bail pending retrial of petitioner Harold Sherman Upton following the reversal of his first degree murder conviction, *Upton v. State*, 254 Ark. 664, 497 S.W. 2d 696. The trial court in refusing bail as in capital offense cases recognized the effect of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), on our death penalty statutes, but took the position that Act 438 of 1973 reinstated the death penalty as to felony murder cases committed prior to the effective date thereof. We disagree.

Since the authorities define an ex post facto law as one that renders an act punishable in a manner in which it was not punishable when committed, *White v. Brown*, 468 F. 2d 301 (9th Cir. 1972), it follows that, in view of *Graham v. State*, 253 Ark. 462, 486 S.W. 2d 678 and *Kuehn v. State*, 253 Ark. 889, 489 S.W. 2d 505, the capital felony provisions of Act 438 cannot be applied retrospectively to offenses committed prior to its adoption, Ark. Const. Art. 2 § 17.

This matter is referred back to the trial court for the fixing of bail.