

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

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Class Two - Part Two: 1976 Decisions

The Court's 1976 Decisions

On July 2, 1976, two days before the bicentennial of the Declaration of Independence, the Supreme Court handed down five decisions on the constitutionality of the capital punishment statutes adopted by Georgia, Florida, Texas, North Carolina and Louisiana.

The Court had one new member since its decision in *Furman*. Justice William O. Douglas retired and was replaced by Justice John Paul Stevens, who was appointed by President Gerald Ford. Four members of the Court – Chief Justice Burger, and Justices White, Blackmun and Rehnquist – voted to uphold all five of the statutes. Justice Brennan and Marshall voted to declare the death penalty unconstitutional in all cases.

The remaining three justices – Stewart, Powell and Stevens – voted to uphold the Georgia, Florida and Texas statutes, which required, in different ways, that the sentencer's discretion to impose the death penalty be guided, and to declare unconstitutional the North Carolina and Louisiana statutes, which made the death penalty mandatory for certain crimes. They joined in plurality opinions in all five cases. Justice Stewart wrote the opinion in *Gregg v. Georgia* and *Woodson v. North Carolina*, Justice Powell wrote the opinion in *Proffitt v. Florida*, and Justice Stevens wrote the opinions in *Jurek v. Texas* and *Roberts v. Louisiana*. Chief Justice Burger, and Justices White, Blackmun and Rehnquist filed concurring opinions in *Gregg*, *Proffitt* and *Jurek*, thus upholding those statutes by a 7-2 vote, and

Justices Brennan and Marshall filed concurring opinions in *Woodson* and *Roberts*, thus striking down the mandatory statutes by a 5-4 vote. Because the other members of the Court did not join the plurality opinions of Stewart, Powell and Stevens in any of the cases, there was no majority opinion in any of the five cases. Thus, there remained a lack of clarity with regard to the meaning of the “cruel and unusual” clause of the Eighth Amendment and how it was to be applied.

For consideration:

As you read the cases that follow, what, if any, shifts do you see in the discussion of the “cruel and unusual” clause of the Eighth Amendment from the principles identified by the nine decisions in *Furman* – particularly the five opinions that made up the majority – and the Court's earlier Eighth Amendment cases, particularly *Weems* and *Troup v. Dulles*?

What, if any, differences do you see in the way the justices treat the justification for the death penalty – deterrence and retribution?

After reading the five cases, how would you express what the “cruel and unusual” clause means and how it is to be applied?

What differences do you see in how the Georgia, Florida and Texas statutes operate? How do they vary in the amount of discretion they give the jury in deciding punishment?

Do the statutes that were upheld appear to be sufficient to remedy the defects identified by the

five justices in the majority in *Furman* – in particularly the problem of arbitrariness? Is the jury’s discretion guided in a way that will produce consistent application of the death penalty so it is no longer “wantonly and freakishly applied,” like “being struck by lightning,” or like a lottery?

Do you see anything in the statutes which might allow for arbitrary imposition of the death penalty?

Prosecutors make two critical decisions – whether to seek the death penalty in any case where it is authorized by statute and whether to resolve the case with a plea bargain in which the defendant pleads guilty in exchange for a sentence less than death. Several justices reject the argument that different practices by different prosecutors will result in arbitrary imposition of the death penalty. Are different policies by prosecutors in seeking the death penalty – for example, one prosecutor never seeks the death penalty while another prosecutor in the same state frequently seeks it – constitutionally acceptable so long as the death penalty is authorized by the statutes in the cases where it is sought?

Stated another way, does a person who is sentenced to death have any complaint if other people *who are also eligible* for death under the same statute are not sentenced to death because the prosecutors in the other cases did not seek death or resolved them with plea bargains, or juries imposed life imprisonment instead of death? If so, what is that complaint and what is it based on?

Is mere difference in prosecutorial practices from one judicial district to another by separately elected prosecutors present an issue or must there be something more resulting from the different policies, such as racial disparities?

Be prepared to discuss the constitutional deficiencies of the mandatory statutes as identified by the plurality opinions in *Woodson* and *Roberts*. What is the Eighth Amendment basis for the decisions? What points were most

persuasive in the plurality opinion of Justices Stewart, Powell and Stevens? Besides striking down the mandatory death penalty statutes, how might those decisions apply to capital cases after 1976?

Is the Texas death penalty statute a mandatory statute, as asserted in the dissents in *Woodson* and *Roberts*? How so?

Based on all the cases, what are the essential elements of a constitutional death penalty statute?

Troy Leon GREGG, Petitioner,
v.
State of GEORGIA.

United States Supreme Court
428 U.S. 153, 96 S.Ct. 2909 (1976)

Justice Stewart announced the decision of the Court and filed an opinion joined by Powell and Stevens, JJ. White, J., filed an opinion concurring in the judgment in which Burger, C.J., and Rehnquist, J., joined. Burger, C.J. and Rehnquist, J., filed a statement concurring in the judgment. Blackmun, J., filed a statement concurring in the judgment. Brennan, J., filed a dissenting opinion. Marshall, J., filed a dissenting opinion.

Judgment of the Court, and opinion of Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice STEVENS, announced by **Mr. Justice STEWART.**

The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.

I

The petitioner, Troy Gregg, was charged with committing armed robbery and murder. In accordance with Georgia procedure in capital cases, the trial was in two stages, a guilt stage and a sentencing stage. The evidence at the guilt trial established that on November 21, 1973, the

petitioner and a traveling companion, Floyd Allen, while hitchhiking north in Florida were picked up by Fred Simmons and Bob Moore. * * * While still in Florida, they picked up another hitchhiker, Dennis Weaver, who rode with them to Atlanta, where he was let out about 11 p.m. A short time later the four men interrupted their journey for a rest stop along the highway. The next morning the bodies of Simmons and Moore were discovered in a ditch nearby.

On November 23, after reading about the shootings in an Atlanta newspaper, Weaver communicated with the Gwinnett County police and related information concerning the journey with the victims, including a description of the car. The next afternoon, the petitioner and Allen, while in Simmons' car, were arrested in Asheville, N.C. * * * [A] .25-caliber pistol, later shown to be that used to kill Simmons and Moore, was found in the petitioner's pocket. * * * [T]he petitioner signed a statement in which he admitted shooting, then robbing Simmons and Moore. He justified the slayings on grounds of self-defense. * * *

* * *

* * * The jury found the petitioner guilty of two counts of armed robbery and two counts of murder.

At the penalty stage, which took place before the same jury, neither the prosecutor nor the petitioner's lawyer offered any additional evidence. Both counsel, however, made lengthy arguments dealing generally with the propriety of capital punishment under the circumstances and with the weight of the evidence of guilt. The trial judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count. The judge further charged the jury that in determining what sentence was appropriate the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.

Finally, the judge instructed the jury that it

“would not be authorized to consider [imposing] the penalty of death” unless it first found beyond a reasonable doubt one of these aggravating circumstances:

One – That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore].

Two – That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.

Three – The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [sic] involved the depravity of [the] mind of the defendant.

Finding the first and second of these circumstances, the jury returned verdicts of death on each count.

* * *

II

Before considering the issues presented it is necessary to understand the Georgia statutory scheme for the imposition of the death penalty. * * * The capital defendant's guilt or innocence is determined in the traditional manner, either by a trial judge or a jury, in the first stage of a bifurcated trial.

* * * After a verdict, finding, or plea of guilty to a capital crime, a presentence hearing is conducted before whoever made the determination of guilt. * * * At the hearing:

[T]he judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that

only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge [or jury] shall also hear argument by the defendant or his counsel and the prosecuting attorney . . . regarding the punishment to be imposed.

The defendant is accorded substantial latitude as to the types of evidence that he may introduce. Evidence considered during the guilt stage may be considered during the sentencing stage without being resubmitted.

In the assessment of the appropriate sentence to be imposed the judge is also required to consider or to include in his instructions to the jury “any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence. . . .” The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute. Before a convicted defendant may be sentenced to death, * * * the jury * * * must find beyond a reasonable doubt one of the 10 aggravating circumstances specified in the statute. The sentence of death may be imposed only if the jury * * * finds one of the statutory aggravating circumstances and then elects to impose that sentence. If the verdict is death, the jury * * * must specify the aggravating circumstance(s) found. In jury cases, the trial judge is bound by the jury’s recommended sentence.

In addition to the conventional appellate process available in all criminal cases, provision is made for special expedited direct review by the Supreme Court of Georgia of the appropriateness of imposing the sentence of death in the particular case. The court is directed to consider “the punishment as well as any errors enumerated by way of appeal,” and to determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or anything arbitrary factor, and
- (2) Whether * * * the evidence supports the

jury’s or judge’s finding of a statutory aggravating circumstance * * * and

- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

If the court affirms a death sentence, it is required to include in its decision reference to similar cases that it has taken into consideration.

A transcript and complete record of the trial, as well as a separate report by the trial judge, are transmitted to the court for its use in reviewing the sentence. * * * In cases in which the death sentence is affirmed there remains the possibility of executive clemency.

III

We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, “cruel and unusual” in violation of the Eighth and Fourteenth Amendments of the Constitution.

* * *

A

* * *

In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. The constitutionality of the sentence of death itself was not at issue, and the criterion used to evaluate the mode of execution was its similarity to “torture” and other “barbarous” methods.

But the Court has not confined the prohibition embodied in the Eighth Amendment to “barbarous” methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that “a principle to be vital, must be capable of wider application than the mischief which gave it birth.”

Thus the Clause forbidding “cruel and unusual” punishments “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”

* * *

* * * [T]he Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. * * * [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with “the dignity of man,” which is the “basic concept underlying the Eighth Amendment.” This means, at least, that the punishment not be “excessive.” When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into “excessiveness” has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.

B

Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.

* * * [T]he [Eighth] Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not.”¹⁹

But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators .

* * *

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. “[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people” * * *

C

* * * We now consider specifically whether the sentence of death for the crime of murder is a Per se violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question.

The imposition of the death penalty for the crime of murder has a long history of acceptance

19. Although legislative measures adopted by the people’s chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power. * * *

both in the United States and in England. The common-law rule imposed a mandatory death sentence on all convicted murderers. The penalty continued to be used into the 20th century by most American States, although the breadth of the common-law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy.

It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes. The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law

And the Fourteenth Amendment, adopted over three-quarters of a century later, similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of “life, liberty, or property” without due process of law.

* * *

Four years ago, the petitioners in *Furman* and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. * * * This view was accepted by two Justices. Three other Justices were unwilling to

go so far; focusing on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted, they joined in the conclusion that the statutes before the Court were constitutionally invalid.

The petitioners in the capital cases before the Court today renew the “standards of decency” argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. These recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman* primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes. But all of the post-*Furman* Statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

* * *

The jury also is a significant and reliable objective index of contemporary values because it is so directly involved. The Court has said that “one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between

contemporary community values and the penal system.” It may be true that evolving standards have influenced juries in recent decades to be more discriminating in imposing the sentence of death. But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases. Indeed, the actions of juries in many States since *Furman* are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since *Furman* and by the end of March 1976, more than 460 persons were subject to death sentences.

As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. Although we cannot “invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology,” the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

In part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

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 law.

“Retribution is no longer the dominant objective of the criminal law,” but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive. * * *

* * * We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. Indeed, many of the post-*Furman* statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Finally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed. There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender,³⁵ we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

* * *

IV

We now consider whether Georgia may impose the death penalty on the petitioner in this case.

A

* * * Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner * * *

35. We do not address here the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life for example, when capital punishment is imposed for rape, kidnaping, or armed robbery that does not result in the death of any human being.

Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that "[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." * * *

* * *

Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure one in which the question of sentence is not considered until the determination of guilt has been made is the best answer. * * *

* * *

* * * Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. To the extent that this problem is inherent in jury sentencing, it may not be totally correctable. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems

particularly relevant to the sentencing decision.

The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. * * *

* * * While * * * standards [to guide a capital jury's sentencing deliberations] are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*,⁴⁶ for each distinct system must be examined on an individual basis. Rather, we have embarked upon

46. A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.

this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman*'s constitutional concerns

B

We now turn to consideration of the constitutionality of Georgia's capital-sentencing procedures. * * *

Georgia * * * narrow[ed] the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, but it must find a *statutory* aggravating circumstance before recommending a sentence of death.

These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as *Furman*'s jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime). As a result, while some jury discretion still exists, "the discretion to be exercised is

controlled by clear and objective standards so as to produce non-discriminatory application.”

As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State’s Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury’s finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.

* * * On their face these procedures seem to satisfy the concerns of *Furman*. No longer should there be “no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not.” [citing Justice White’s concurring opinion in *Furman*]

The petitioner contends, however, that the changes in the Georgia sentencing procedures are only cosmetic, that the arbitrariness and capriciousness condemned by *Furman* continue to exist in Georgia both in traditional practices that still remain and in the new sentencing procedures adopted in response to *Furman*.

1

First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

* * * Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.⁵⁰

2

* * * Gregg urges that the statutory aggravating circumstances are too broad and too vague, that the sentencing procedure allows for arbitrary grants of mercy, and that the scope of the evidence and argument that can be considered at the presentence hearing is too wide.

[Gregg] attacks the seventh statutory aggravating circumstance, which authorizes imposition of the death penalty if the murder was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,” contending that it is so broad that capital punishment could be imposed in any murder case.

50. The petitioner’s argument is nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted. Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.

Moreover, it would be unconstitutional. Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in *Woodson v. North Carolina* * * * * *

It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction. In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of the seventh and that homicide was a horrifying torture-murder.

* * * [Gregg] attacks that part of § 27-2534.1(b)(1) that authorizes a jury to consider whether a defendant has a "substantial history of serious assaultive criminal convictions." The Supreme Court of Georgia, however, has demonstrated a concern that the new sentencing procedures provide guidance to juries. It held this provision to be impermissibly vague because it did not provide the jury with "sufficiently 'clear and objective standards.'" Second, the petitioner points to § 27-2534.1(b)(3) which speaks of creating a "great risk of death to more than one person." While such a phrase might be susceptible of an overly broad interpretation, the Supreme Court of Georgia has not so construed it. The only case in which the court upheld a conviction in reliance on this aggravating circumstance involved a man who stood up in a church and fired a gun indiscriminately into the audience. On the other hand, the court expressly reversed a finding of great risk when the victim was simply kidnaped in a parking lot.

The petitioner next argues that the requirements of *Furman* are not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets *Furman*. Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional

death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

The petitioner objects, finally, to the wide scope of evidence and argument allowed at presentence hearings. We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

3

* * * The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." In performing sentence-review function, the Georgia court has held that "if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive." The court on another occasion stated that "we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally"

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes

when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

V

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. * * * The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. * * *

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, concurring in the judgment.

* * *

* * * The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries – even given discretion *not* to impose the death penalty – will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device. * * *

* * *

Petitioner also argues that decisions made by the prosecutor either in negotiating a plea to some lesser offense than capital murder or in simply declining to charge capital murder are

standardless and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in *Furman*. I address this point separately cause the cases in which no capital offense is charged escape the view of the Georgia Supreme Court and are not considered by it in determining whether a particular sentence is excessive or disproportionate.

Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.

Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive

life imprisonment a lesser penalty or are acquitted or never charged seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued in effect that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. * * * Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

* * *

Statement of **THE CHIEF JUSTICE** and **Mr. Justice REHNQUIST**:

We concur in the judgment and join the opinion of Mr. Justice WHITE agreeing with its analysis that Georgia's system of capital punishment comports with the Court's holding in *Furman v. Georgia*.

Mr. Justice BLACKMUN, concurring in the judgment.

I concur in the judgment. [citing his and the other three dissenting opinions in *Furman*]

Mr. Justice BRENNAN, dissenting [This opinion also applies to *Proffitt v. Florida* and *Jurek v. Texas*.]

* * * In *Furman v. Georgia*, I read "evolving standards of decency" as requiring focus upon the essence of the death penalty itself and not primarily or solely upon the procedures under which the determination to inflict the penalty upon a particular person was made. * * *

* * *

That continues to be my view. For the Clause forbidding cruel and unusual punishments under our constitutional system of government embodies in unique degree moral principles restraining the punishments at our civilized society may impose on those persons who transgress its laws. * * *

This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether * * * "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society. * * * [T]he State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings – a punishment must not be so severe as to be degrading to human dignity. A judicial determination whether the punishment of death comports with human dignity is therefore not only permitted but compelled by the Clause.

* * *

The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity." As such it is a penalty that "subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause]." I therefore would hold, on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause. "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first."⁶

6. A. Camus, *Reflections on the Guillotine* 5-6 (Fridtojof-Karla Pub 1960).

Mr. Justice MARSHALL, dissenting. [This dissent also applies to *Proffitt v. Florida* and *Jurek v. Texas*.]

* * * Since the decision in *Furman*, the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes, and Congress has enacted a law providing the death penalty for air piracy resulting in death. I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people. But if the constitutionality of the death penalty turns, as I have urged, on the opinion of an *informed* citizenry, then even the enactment of new death statutes cannot be viewed as conclusive.

* * * [T]he enactment of those statutes has no bearing whatsoever on the conclusion that the death penalty is unconstitutional because it is excessive. An excessive penalty is invalid under the Cruel and Unusual Punishments Clause “even though popular sentiment may favor” it. * * *

The two purposes that sustain the death penalty as nonexcessive in the Court’s view are general deterrence and retribution. * * *

[Justice Marshall reviewed the studies regarding deterrence.]

* * * The evidence I reviewed in *Furman* remains convincing, in my view that “capital punishment is not necessary as a deterrent to crime in our society.” The justification for the death penalty must be found elsewhere.

The other principal purpose said to be served by the death penalty is retribution. * * * It is this notion that I find to be the most disturbing aspect of today’s unfortunate decisions.

* * * On one level, it can be said that the notion of retribution or reprobation is the basis of our insistence that only those who have broken the law be punished, and in this sense the notion is

quite obviously central to a just system of criminal sanctions. But our recognition that retribution plays a crucial role in determining who may be punished by no means requires approval of retribution as a general justification for punishment. It is the question whether retribution can provide a moral justification for punishment – in particular capital punishment – that we must consider.

* * *

The * * * contentions – that society’s expression of moral outrage through the imposition of the death penalty pre-empts the citizenry from taking the law into its own hands and reinforces moral values – are not retributive in the purest sense. They are essentially utilitarian in that they portray the death penalty as valuable because of its beneficial results. These justifications for the death penalty are inadequate because the penalty is, quite clearly I think, not necessary to the accomplishment of those results.

There remains for consideration, however, what might be termed the purely retributive justification for the death penalty – that the death penalty is appropriate, not because of its beneficial effect on society, but because the taking of the murderer’s life is itself morally good. * * *

* * * The mere fact that the community demands the murderer’s life in return for the evil he has done cannot sustain the death penalty, for as the plurality reminds us, “* * * To be sustained under the Eighth Amendment, the death penalty must “[comport] with the basic concept of human dignity at the core of the Amendment[.]” Under these standards, the taking of life “because the wrongdoer deserves it” surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer’s dignity and worth.”

The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments. * * *

Troy Gregg and several other prisoners escaped from Georgia's death row. While on escape, Troy Gregg was killed. The other escapees were eventually recaptured.

Charles William PROFFITT, Petitioner,
v.
State of FLORIDA.

United States Supreme Court
428 U.S. 242, 96 S.Ct. 2960 (1976).

Powell, J., announced the opinion of the Court and filed an opinion in which Stewart and Stevens, JJ., joined. White, J., filed an opinion concurring in the judgment in which Burger, C.J., and Rehnquist, J., joined. Blackmun, J., filed a statement concurring in the judgment. [The dissents of Justice Brennan and Marshall followed the decision in *Gregg v. Georgia*.]

Judgment of the Court, and opinion of Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice STEVENS, announced by **Mr. Justice POWELL.**

The issue presented by this case is whether the imposition of the sentence of death for the crime of murder under the law of Florida violates the Eighth and Fourteenth Amendments.

I

The petitioner, Charles William Proffitt, was tried, found guilty, and sentenced to death for the first-degree murder of Joel Medgebow. * * *

* * *

* * * [A]s provided by Florida law, a separate hearing was held to determine whether the petitioner should be sentenced to death or to life imprisonment. Under the state law that decision turned on whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist. At that hearing it was shown that the petitioner had one prior conviction, a 1967 charge

of breaking and entering. The State also introduced the testimony of the physician (Dr. Crumbley) at the jail where the petitioner had been held pending trial. He testified that the petitioner had come to him as a physician, and told him that he was concerned that he would harm other people in the future, that he had had an uncontrollable desire to kill that had already resulted in his killing one man, that this desire was building up again, and that he wanted psychiatric help so he would not kill again. Dr. Crumbley also testified that, in his opinion, the petitioner was dangerous and would be a danger to his fellow inmates if imprisoned, but that his condition could be treated successfully.

The jury returned an advisory verdict recommending the sentence of death. The trial judge ordered an independent psychiatric evaluation of the petitioner, the results of which indicated that the petitioner was not, then or at the time of the murder, mentally impaired. The judge then sentenced the petitioner to death. In his written findings supporting the sentence, the judge found as aggravating circumstances that (1) the murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has the propensity to commit murder; (3) the murder was especially heinous, atrocious, and cruel; and (4) the petitioner knowingly, through his intentional act, created a great risk of serious bodily harm and death to many persons. The judge also found specifically that none of the statutory mitigating circumstances existed. The Supreme Court of Florida affirmed. * * *

* * *

III
A

In response to *Furman v. Georgia*, * * * Florida adopted a new capital-sentencing procedure, patterned in large part after the Model Penal Code. Under the new statute, if a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the judge deems

relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present argument on whether the death penalty shall be imposed.

At the conclusion of the hearing the jury is directed to consider “[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.”⁶ The jury’s verdict is

6. The aggravating circumstances are:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

The mitigating circumstances are:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant’s conduct or consented to the act.

(d) The defendant was an accomplice in the capital

determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that “(i)n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.”

The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, “it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient (statutory) aggravating circumstances exist . . . and (b) (t)hat there are insufficient (statutory) mitigating circumstances . . . to outweigh the aggravating circumstances.”

The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible and the Supreme Court of Florida like its Georgia counterpart considers its function to be to “[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.”

felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in *Furman*. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. * * * He must, *inter alia*, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike those considered by a Georgia sentencing jury, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's

appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." * * *

* * * Thus, in Florida, as in Georgia, it is no longer true that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." On its face the Florida system thus satisfies the constitutional deficiencies identified in *Furman*.

B

As in *Gregg*, the petitioner contends, however, that, while perhaps facially acceptable, the new sentencing procedures in actual effect are merely cosmetic, and that arbitrariness and caprice still pervade the system under which Florida imposes the death penalty.

* * *

(2)

* * *

(a)

Initially the petitioner asserts that the enumerated aggravating and mitigating circumstances are so vague and so broad that virtually "any capital defendant becomes a candidate for the death penalty" In particular, the petitioner attacks the eighth and third statutory aggravating circumstances, which authorizes the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel" or "[t]he defendant knowingly created a great risk of death to many persons." These provisions must be considered as they have been construed by the Supreme Court of Florida.

That court has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first

degree murder.” As a consequence, the court has indicated that the eighth statutory provision is directed only at “the conscienceless or pitiless crime which is unnecessarily torturous to the victim.” We can say that the provision, as so construed, provides adequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

In the only case, except for the instant case, in which the third aggravating factor “[t]he defendant knowingly created a great risk of death to many persons” was found, the State Supreme Court held that the defendant created a great risk of death because he “obviously murdered two of the victims in order to avoid a surviving witness to the (first) murder.” As construed by the Supreme Court of Florida these provisions are not impermissibly vague.

(b)

The petitioner next attacks the imprecision of the mitigating circumstances. He argues that whether a defendant acted “under the influence of extreme mental or emotional disturbance,” whether a defendant’s capacity “to conform his conduct to the requirements of law was substantially impaired,” or whether a defendant’s participation as an accomplice in a capital felony was “relatively minor,” are questions beyond the capacity of a jury or judge to determine.

He also argues that neither a jury nor a judge is capable of deciding how to weigh a defendant’s age or determining whether he had a “significant history of prior criminal activity.” In a similar vein the petitioner argues that it is not possible to make a rational determination whether there are “sufficient” aggravating circumstances that are not outweighed by the mitigating circumstances, since the state law assigns no specific weight to any of the various circumstances to be considered.

While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or

reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority’s discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

* * *

(c)

* * *

* * * [Proffitt] attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute. And any suggestion that the Florida court engages in only cursory or rubber-stamp review of death penalty cases is totally controverted by the fact that it has vacated over one-third of the death sentences that have come before it.

* * *

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, concurring in the judgment.

* * * Under Florida law, the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors. There is good reason to anticipate, then, that as to certain categories of murderers, the penalty will not be imposed freakishly or rarely but will be imposed with regularity; and consequently it cannot be said that the death penalty in Florida as to those categories has ceased “to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system.” *Furman v. Georgia*, 408 U.S. 238, 311 (White, J., concurring). * * *

[T]his conclusion is not undercut by the possibility that some murderers may escape the death penalty solely through exercise of prosecutorial discretion or executive clemency.

* * *

[Justice **BLACKMUN**, concurred in the judgment, citing his dissent and the other dissents in *Furman v. Georgia*.]

Charles William Proffitt was granted habeas corpus relief with regard to his death sentence in 1982 because his defense lawyer was not allowed to cross-examine a psychiatrist whose report was submitted to the sentencing court. See Proffitt v. Wainwright, 685 F.2d 1227, 1252-55 (11th Cir. 1982), modified, 706 F.2d 911 (1983), cert. denied, 428 U.S. 242 (1983).

Proffitt was resentenced to death, but the Florida Supreme Court held on appeal of his case in 1987 that the death penalty was disproportionate, vacated it and reduced his sentence to life imprisonment without eligibility for parole for 25 years. Proffitt v. State, 510 So.2d 896 (Fla. 1987). He remains in prison at the Union Correctional Institution in Raiford, Florida.

Jerry Lane JUREK, Petitioner,
v.
State of TEXAS.

United States Supreme Court
428 U.S. 262, 96 S.Ct. 2950 (1976).

Stevens, J., announced the opinion of the Court and filed an opinion in which Stewart and Powell, JJ., joined. Burger, C.J., filed a statement concurring in the judgment. White, J., filed an opinion concurring in the judgment in which Burger, C.J., and Rehnquist, J., joined. Blackmun, J., filed a statement concurring in the judgment. [The dissents of Justice Brennan and Marshall followed the decision in *Gregg v. Georgia*.]

Judgment of the Court, and opinion of Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice STEVENS, announced by **Mr. Justice STEVENS**.

The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Texas violates the Eighth and Fourteenth Amendments to the Constitution.

* * *

III
A

After this Court held Texas’ system for imposing capital punishment unconstitutional in *Branch v. Texas*, decided with *Furman v. Georgia*, the Texas Legislature narrowed the scope of its laws relating to capital punishment. The new Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations: murder of a peace officer or fireman; murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee.

In addition, Texas adopted a new

capital-sentencing procedure. That procedure requires the jury to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of one of the above categories of murder. The questions the jury must answer are these:

“(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.”

If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed. If the jury finds that the answer to any question is no, then a sentence of life imprisonment results. The law also provides for an expedited review by the Texas Court of Criminal Appeals.

While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances. For example, the Texas statute requires the jury at the guilt-determining stage to consider whether the crime was committed in the course of a particular felony, whether it was committed for hire, or whether the defendant was an inmate of a penal institution at the time of its commission.

Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option even potentially for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.

But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson v. North Carolina*, to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory law that we today hold unconstitutional in *Woodson* . . . A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances. * * * The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.

The second Texas statutory question asks the jury to determine “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” if he were not sentenced to death. The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as “criminal acts of violence” or “continuing threat to society.” In the present case, however, it indicated that it will interpret this second question so as to allow

a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:

In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.

* * * It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.

B

As in the Georgia and Florida cases, however, the petitioner contends that the substantial legislative changes that Texas made in response to this Court's *Furman* decision are no more than cosmetic in nature and have in fact not eliminated the arbitrariness and caprice of the system held in *Furman* to violate the Eighth and Fourteenth Amendments.

* * *

(2)

Focusing on the second statutory question that Texas requires a jury to answer in considering whether to impose a death sentence, the petitioner argues that it is impossible to predict future behavior and that the question is so vague as to be meaningless. It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean

that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

IV

* * * By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution. * * *

[Chief Justice **BURGER**, concurred in the judgment, citing his dissent in *Furman v. Georgia*.]

Mr. Justice WHITE, with whom THE CHIEF

JUSTICE and Mr. Justice REHNQUIST join, concurring in the judgment.

* * * I cannot conclude that the Eighth Amendment forbids the death penalty under any and all circumstances. I also cannot agree with petitioner's other major contention that under the new Texas statute and the State's criminal justice system in general, the criminal jury and other law enforcement officers exercise such a range of discretion that the death penalty will be imposed so seldom, so arbitrarily, and so freakishly that the new statute suffers from the infirmities * * * found [in *Furman*]. Under the revised law, the substantive crime of murder is defined; and when a murder occurs in one of the five circumstances set out in the statute, the death penalty *must* be imposed if the jury also makes the certain additional findings against the defendant. Petitioner claims that the additional questions upon which the death sentence depends are so vague that in essence the jury possesses standardless sentencing power; but I agree with Justices STEWART, POWELL, and STEVENS that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them. The statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions. * * * I cannot conclude at this juncture that the death penalty under this system will be imposed so seldom and arbitrarily as to serve no useful penological function and hence fall within reach of the decision announced by five Members of the Court in *Furman v. Georgia*.

* * *

[Justice BLACKMUN, concurred in the judgment, citing his dissent and the other dissents in *Furman v. Georgia*.]

The conviction and sentence of Jerry Lane Jurek, who had a verbal IQ of 66 and was unable to recite the alphabet, give change for a dollar, or say how many weeks are in a year, was later

vacated on habeas corpus review based on a determination that one of the confessions admitted at his trial was involuntarily given. Jurek v. Estelle, 623 F.2d 929 (5th Cir 1980) (en banc), cert. denied, 450 U.S. 1014 (1981). Justice Rehnquist dissented from the denial of certiorari, observing that "Jurek is no stranger to his Court," and stating that "this case involves the voluntariness of a series of confessions, the proper standard of review of state and federal lower court determinations of 'voluntariness' in a habeas corpus proceeding, and the applicability of the harmless-error doctrine," and arguing that the Fifth Circuit's opinion was "wholly unpersuasive." 450 U.S. at 1014-21. Jurek's case was resolved with a plea of guilty to murder and a sentence of life imprisonment with a minimum of 20 years in prisons. He remains in prison at Coffield Unit in Tennessee Colony, Texas.

**James Tyrone WOODSON
and Luby Waxton, Petitioners**

v.

State of NORTH CAROLINA

United States Supreme Court
428 U.S. 280, 96 S.Ct. 2978 (1976).

Stewart, J., announced the opinion of the Court and filed an opinion in which Powell and Stevens, JJ., joined. Brennan, J., filed a statement concurring in the judgment. Marshall filed a statement concurring in the judgment. White, J., filed a dissenting opinion in which Burger, C.J., and Rehnquist, J., joined. Blackmun, J., filed a dissenting statement. Rehnquist, J., filed a dissenting opinion.

Judgment of the Court, and opinion of Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice STEVENS, announced by **Mr. Justice STEWART.**

* * *

* * * [T]he Court now addresses for the first time the question whether a death sentence

returned pursuant to a law imposing a mandatory death penalty for a broad category of homicidal offenses constitutes cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments * * *

A

The Eighth Amendment stands to assure that the State's power to punish is "exercised within the limits of civilized standards." * * * Central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment. As discussed in *Gregg v. Georgia*, indicia of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations.

* * * [W]e begin by sketching the history of mandatory death penalty statutes in the United States. At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses * * * [T]he Colonies at the time of the Revolution imposed death sentences on all persons convicted of any of a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy * * * Almost from the outset jurors reacted unfavorably to the harshness of mandatory death sentences. The States initially responded to this expression of public dissatisfaction with mandatory statutes by limiting the classes of capital offenses.

This reform, however, left unresolved the problem posed by the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences. In 1794, Pennsylvania attempted to alleviate the undue severity of the law by confining the mandatory death penalty to "murder of the first degree" encompassing all "wilful, deliberate and premeditated" killings. Other jurisdictions, including Virginia and Ohio, soon enacted similar measures, and within a generation the practice spread to most of the States.

* * * [T]he reform proved to be an unsatisfactory means of identifying persons appropriately punishable by death * * * Juries continued to find the death penalty inappropriate in a significant number of first-degree murder cases and refused to return guilty verdicts for that crime.

The inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases * * * [B]y the end of World War I, all but eight States, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether. By 1963, all of these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury sentencing.

The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid * * *

* * *

Still further evidence of the incompatibility of mandatory death penalties with contemporary values is provided by the results of jury sentencing under discretionary statutes. * * * Various studies indicate that even in first-degree murder cases juries with sentencing discretion do not impose the death penalty "with any great frequency."³¹ The actions of sentencing juries suggest that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers.

31. Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases. * * *

* * *

[T]here remains the question whether the mandatory statutes adopted by North Carolina and a number of other States following *Furman* evince a sudden reversal of societal values regarding the imposition of capital punishment. In view of the persistent and unswerving legislative rejection of mandatory death penalty statutes beginning in 1838 and continuing for more than 130 years until *Furman*, it seems evident that the post-*Furman* enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing.³⁴ The fact that some States have adopted mandatory measures following *Furman* while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court's multi-opinioned decision in that case.³⁵

* * *

It is now well established that the Eighth Amendment draws much of its meaning from "the evolving standards of decency that mark the progress of a maturing society." As the above discussion makes clear, one of the most

34. A study of public opinion polls on the death penalty concluded that "despite the increasing approval for the death penalty reflected in opinion polls during the last decade, there is evidence that many people supporting the general idea of capital punishment want its administration to depend on the circumstances of the case, the character of the defendant, or both." * * *

35. The fact that, as Mr. Justice REHNQUIST's dissent properly notes, some States "preferred mandatory capital punishment to no capital punishment at all," is entitled to some weight. But such an artificial choice merely establishes a desire for some form of capital punishment; it is hardly "utterly inconsistent with the notion that (those States) regarded mandatory capital sentencing as beyond 'evolving standards of decency.'" It says no more about contemporary values than would the decision of a State, thinking itself faced with a choice between a barbarous punishment and no punishment at all, to choose the former.

significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense. * * *

B

A separate deficiency of North Carolina's mandatory death sentence statute is its failure to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences. * * * It is argued that North Carolina has remedied the inadequacies of the death penalty statutes held unconstitutional in *Furman* by withdrawing all sentencing discretion from juries in capital cases. But when one considers the long and consistent American experience with the death penalty in first-degree murder cases, it becomes evident that mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion.

* * * In view of the historical record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences. Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly. While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.

C

A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In *Furman*, members of the Court acknowledged what cannot be fairly denied – that death is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

This Court has previously recognized that “[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.” * * * [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of 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.

* * *

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

* * * I reject petitioners’ arguments that the death penalty in any circumstances is a violation of the Eighth Amendment and that the North Carolina statute, although making the imposition of the death penalty mandatory upon proof of guilt and a verdict of first-degree murder, will nevertheless result in the death penalty being imposed so seldom and arbitrarily that it is void under *Furman v. Georgia*. * * * I also disagree with the two additional grounds which the plurality *sua sponte* offers for invalidating the North Carolina statute. I would affirm the judgment of the North Carolina Supreme Court.

Mr. Justice BLACKMUN, dissenting.

I dissent for the reasons set forth in my dissent in *Furman v. Georgia*, and in the other dissenting opinions I joined in that case.

Mr. Justice REHNQUIST, dissenting.

I
* * *

As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment * * * was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights. * * * Thus for the plurality to begin its analysis with the assumption that it need only demonstrate that “evolving standards of decency” show that contemporary “society” has rejected such provisions is itself a somewhat shaky point of departure. But even if the assumption be conceded, the plurality opinion’s analysis nonetheless founders.

* * *

II

The plurality is simply mistaken in its assertion that “[t]he history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid.”

* * *

There can be no question that the legislative and other materials discussed in the plurality’s opinion show a widespread conclusion on the part of state legislatures during the 19th century that the penalty of death was being required for too broad a range of crimes, and that these legislatures proceeded to narrow the range of crimes for which such penalty could be imposed. * * * But petitioners were convicted of first-degree murder, and there is not the slightest suggestion in the material relied upon by the plurality that there had been any turning away at all, much less any such unanimous turning away, from the death penalty as a punishment for those guilty of first-degree murder.

* * *

So far as the action of juries is concerned, the fact that in some cases juries operating under the mandatory system refused to convict obviously guilty defendants does not reflect any “turning away” from the death penalty, or the mandatory death penalty * * *. Given the requirement of unanimity * * * is apparent that a single juror could prevent a jury from returning a verdict of conviction. * * * The fact that such jurors could prevent conviction in a given case, even though the majority of society, speaking through legislatures, had decreed that it should be imposed, certainly does not indicate that society as a whole rejected mandatory punishment for such offenders * * *.

The [legislative] introduction of discretionary sentencing likewise creates no inference that contemporary society had rejected the mandatory system as unduly severe * * *. That society was

unwilling to accept the paradox presented to it by the actions of some maverick juries or jurors – the acquittal of palpably guilty defendants – hardly reflects the sort of “evolving standards of decency” to which the plurality professes obeisance.

* * *

III

* * *

The Texas system much more closely approximates the mandatory North Carolina system which is struck down today. The jury is required to answer three statutory questions. If the questions are unanimously answered in the affirmative, the death penalty *must* be imposed. It is extremely difficult to see how this system can be any less subject to the infirmities caused by juror nullification which the plurality concludes are fatal to North Carolina’s statute. Justices STEWART, POWELL, and STEVENS apparently think they can sidestep this inconsistency because of their belief that one of the three questions will permit consideration of mitigating factors justifying imposition of a life sentence. It is, however, * * * far from clear [from the decision rendered in *Jurek v. Texas*] that the statute is to be read in such a fashion. In any event, while the imposition of such unlimited consideration of mitigating factors may conform to the plurality’s novel constitutional doctrine that “[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed,” the resulting system seems as likely as any to produce the unbridled discretion which was condemned by the separate opinions in *Furman*.

* * *

The plurality’s insistence on “standards” to “guide the jury in its inevitable exercise of the power to determine which . . . murderers shall live and which shall die” is squarely contrary to the Court’s opinion in *McGautha v. California*

(1971)[.] * * * [I]n *McGautha* * * * the Court addressed the “standardless discretion” contention in this language:

* * * To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

* * *

IV

The plurality opinion’s insistence * * * that if the death penalty is to be imposed there must be “particularized consideration of relevant aspects of the character and record of each convicted defendant” is buttressed by neither case authority nor reason.

* * *

The plurality * * * relies upon the indisputable proposition that “death is different” * * * But the respects in which death is “different” from other punishment which may be imposed upon convicted criminals do not seem to me to establish the proposition that the Constitution requires individualized sentencing.

One of the principal reasons why death is different is because it is irreversible; an executed defendant cannot be brought back to life. This aspect of the difference between death and other penalties would undoubtedly support statutory provisions for specially careful review of the fairness of the trial, the accuracy of the fact finding process, and the fairness of the sentencing procedure where the death penalty is imposed. But none of those aspects of the death sentence is at issue here. * * *

The second aspect of the death penalty which makes it “different” from other penalties is the fact that it is indeed an ultimate penalty, which ends a human life rather than simply requiring that

a living human being * * * . This aspect of the difference may enter into the decision of whether or not it is a “cruel and unusual” penalty for a given offense. But since in this case the offense was first-degree murder, that particular inquiry need proceed no further.

* * *

The sentence of James Tyrone Woodson was reduced to life in prison following this decision. He was paroled in 1991. He has lived a law abiding life since then and attends the Trinity United Faith church in Raleigh, North Carolina.

Stanislaus ROBERTS, Petitioner,

v.

State of LOUISIANA.

Supreme Court of the United States
428 U.S. 325, 96 S.Ct. 3001 (1976).

Stevens, J., announced the judgment of the court and filed an opinion in which Stewart and Powell, JJ., joined. Brennan, J., filed a statement concurring in the judgment. Marshall, J., filed a statement concurring in the judgment. Burger, C.J., dissented and filed a statement. White, J., dissented and filed an opinion in which Burger, C.J., Blackmun and Rehnquist, JJ., joined. Blackmun, J., dissented and filed a statement.

Judgment of the Court, and opinion of Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice STEVENS, announced by **Mr. Justice STEVENS.**

The question in this case is whether the imposition of the sentence of death for the crime of first-degree murder under the law of Louisiana violates the Eighth and Fourteenth Amendments.

[Roberts was one of four people who participated in the robbery of a gas station in which the attendant was killed. The other three testified for the prosecution that Roberts fired the fatal shots.]

* * *

Louisiana, like North Carolina, has responded to *Furman* by replacing discretionary jury sentencing in capital cases with mandatory death sentences. Under the present Louisiana law, all persons found guilty of first-degree murder, aggravated rape, aggravated kidnaping, or treason are automatically sentenced to death.

* * *

That Louisiana has adopted a different and somewhat narrower definition of first-degree murder than North Carolina is not of controlling constitutional significance. The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute. * * *

* * *

* * * The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity of the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.

* * *

Under the current Louisiana system, however, every jury in a first-degree murder case is instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there is not a scintilla of evidence to support the lesser verdicts. And, if a lesser verdict is returned, it is treated as an acquittal of all greater charges. This responsive verdict

procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions. * * *

* * * Louisiana's mandatory death sentence law employs a procedure that was rejected by that State's legislature 130 years ago and that subsequently has been renounced by legislatures and juries in every jurisdiction in this Nation. The Eighth Amendment, which draws much of its meaning from "the evolving standards of decency that mark the progress of a maturing society," simply cannot tolerate the reintroduction of a practice so thoroughly discredited.

* * *

[Justices **BRENNAN** and **MARSHALL** concurred for the reasons stated in their dissenting opinions in *Gregg v. Georgia*. Chief Justice **BURGER** dissented for the reasons stated in his dissent in *Furman v. Georgia*.]

Mr. Justice WHITE, with whom THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice REHNQUIST join, dissenting.

* * *

* * * As I see it, we are now in no position to rule that the State's present law, having eliminated the overt discretionary power of juries, suffers from the same constitutional infirmities which led this Court to invalidate the Georgia death penalty statute in *Furman v. Georgia*.

* * *

It is true that the jury in this case, like juries in other capital cases in Louisiana and elsewhere, may violate its instructions and convict of a lesser

included offense despite the evidence. But for constitutional purposes I am quite unwilling to equate the raw power of nullification with the unlimited discretion extended jurors under prior Louisiana statutes. In *McGautha v. California*, we rejected the argument that vesting standardless sentencing discretion in the jury was unconstitutional under the Due Process Clause. * * *

Nor am I convinced that the Louisiana death penalty for first-degree murder is substantially more vulnerable because the prosecutor is vested with discretion as to the selection and filing of charges, by the practice of plea bargaining or by the power of executive clemency. * * * Of course, someone must exercise discretion and judgment as to what charges are to be filed and against whom; but this essential process is nothing more than the rational enforcement of the State's criminal law and the sensible operation of the criminal justice system. * * *

I have much the same reaction to plea bargaining and executive clemency. A prosecutor may seek or accept pleas to lesser offenses where he is not confident of his first-degree murder case, but this is merely the proper exercise of the prosecutor's discretion as I have already discussed. So too, as illustrated by this case and the North Carolina case, *Woodson v. North Carolina*, some defendants who otherwise would have been tried for first-degree murder, convicted, and sentenced to death are permitted to plead to lesser offenses because they are willing to testify against their codefendants. This is a grisly trade, but it is not irrational; for it is aimed at insuring the successful conclusion of a first-degree murder case against one or more other defendants. Whatever else the practice may be, it is neither inexplicable, freakish, nor violative of the Eighth Amendment. * * *

As for executive clemency, I cannot assume that this power, exercised by governors and vested in the President by Art. II, § 2, of the Constitution, will be used in a standardless and arbitrary manner. * * * The country's experience with the

commutation power does not suggest that it is a senseless lottery, that it operates in an arbitrary or discriminatory manner, or that it will lead to reducing the death penalty to a merely theoretical threat that is imposed only on the luckless few.

* * *

The widespread re-enactment of the death penalty, it seems to me, answers any claims that life imprisonment is adequate punishment to satisfy the need for reprobation or retribution. * * *

* * * It is quite apparent that the relative efficacy of capital punishment and life imprisonment to deter others from crime remains a matter about which reasonable men and reasonable legislators may easily differ. In this posture of the case, it would be neither a proper or wise exercise of the power of judicial review to refuse to accept the reasonable conclusions of Congress and 35 state legislatures that there are indeed certain circumstances in which the death penalty is the more efficacious deterrent of crime.

It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere. * * *

* * *

* * * Even if the character of the accused *must* be considered under the Eighth Amendment, surely a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that the criminal's character is such that he deserves death. Moreover, quite apart from the character of a criminal, a State should constitutionally be able to conclude that the need to deter some crimes and

that the likelihood that the death penalty will succeed in deterring these crimes is such that the death penalty may be made mandatory for all people who commit them. * * *

* * *

Furthermore, Justices STEWART, POWELL, and STEVENS uphold the capital punishment statute of Texas, under which capital punishment is required if the defendant is found guilty of the crime charged and the jury answers two additional questions in the affirmative. Once that occurs, no discretion is left to the jury; death is mandatory. * * * [T]he Texas law is not constitutionally distinguishable from the Louisiana system[.] * * *

* * *

Indeed, the more fundamental objection than the plurality's muddled reasoning is that in *Gregg v. Georgia*, it lectures us at length about the role and place of the judiciary and then proceeds to ignore its own advice, the net effect being to suggest that observers of this institution should pay more attention to what we do than what we say. The plurality claims that it has not forgotten what the past has taught about the limits of judicial review; but I fear that it has again surrendered to the temptation to make policy for and to attempt to govern the country through a misuse of the powers given this Court under the Constitution.

* * *

Mr. Justice BLACKMUN, dissenting.

I dissent for the reasons set forth in my dissent in *Furman v. Georgia*, and in the other dissenting opinions I joined in that case.

Other Statutes Providing for Mandatory Death Sentences

A year later, in another Louisiana case, the Court held that a mandatory death sentence for the killing of a police officer was also unconstitutional. *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977). The Court later held in *Sumner v. Shuman*, 483 U.S. 66 (1987), that a statute making the death penalty mandatory for a prison inmate convicted of murder while serving a life sentence without possibility of parole was unconstitutional.

Executions Resume

Executions resumed in the United States when Gary Gilmore, 36, who did not oppose Utah's efforts to execute him, was killed by a firing squad on January 17, 1977. *See Gilmore v. Utah*, 429 U.S. 1012 (1976) (terminating stay of executing granted to Bessie Gilmore, as next friend of her son, Gary Gilmore); Mikal Gilmore, *SHOT IN THE HEART* (Doubleday 1993) (an account by Gilmore's brother of his life and factors contributing to the case); Norman Mailer, *THE EXECUTIONER'S SONG* (1979) (a novel based on the Gilmore execution).

The next execution was involuntary and it occurred on May 25, 1979, when Florida executed John Spinkellink by electrocution. *See Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) (affirming the denial of habeas corpus relief; the courts misspelled Spinkellink's name on the caption of his case in state and federal courts). There was one other execution in 1979, none the following year, one in 1981, two in 1982, five in 1983, and 21 in 1984. The number of executions increased to 98 in 2000, but have declined since then. There were 43 executions in 2011 and 2012. There were 1,320 executions between 1977 and the end of 2012; over 1,000 of them in the South. *See* Death Penalty Information Center, *Facts About the Death Penalty*, available at www.deathpenaltyinfo.org and click on FactSheet.pdf.