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Florida's Legislative Response to Furman: An Exercise in Futility?

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THE AFTERMATH OF FURMAN: THE FLORIDA EXPERIENCE

The Supreme Court's decision abolishing the death penalty, at least as it existed in most jurisdictions, hardly represents the final resolution of the controversy over capital punishment. Given substantial public sentiment which apparently favors capital punishment in some form—voiced, for example, in the results of the recent referendum in California—various legislative bodies will face the question of whether capital punishment can and should be legislatively reinstated. In December 1972 the State of Florida became the first jurisdiction to pass judgment on this question. The legislature enacted a bill allowing imposition of the death penalty in certain circumstances.

The two articles which follow highlight the competing policy and legal considerations which face legislatures after *Furman*, and illustrate one state's response to those considerations. The first article is a slightly revised version of a memorandum to the Florida Governor's Committee to Study Capital Punishment, submitted by the Committee's Legal Advisory Staff. It sketches the various possible legislative responses to *Furman* and recommends one. The second indicates other recommendations made to the legislators and comments on the ultimate legislative determination.

I. THE FUTURE OF CAPITAL PUNISHMENT IN FLORIDA: ANALYSIS AND RECOMMENDATIONS*

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The purpose of this memorandum is to advise the Florida Governor's Committee to Study Capital Punishment regarding the consitutional effects of the decision rendered by the Supreme Court of the United States on June 29, 1972, in *Furman v. Georgia*.[1]

The five-man majority in *Furman* agreed on a one-paragraph decision reversing the judgments of the courts of Georgia and Texas and holding that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." [2] In addition to the per curiam opinion, the *Furman* decision includes nine separate opinions in which each Justice of the majority and minority expresses his own views.

Following *Furman*, the Florida supreme court ruled in *Donaldson v. Sack*[3] that capital punishment no longer exists in Florida, since *Furman* invalidates Florida's capital punishment laws along with those of Georgia and Texas. Consequently, capital punishment cannot constitutionally be imposed unless Florida statutes are amended, and then only

* The original text of this memorandum was prepared at the request of the Honorable E. Harris Drew, Chairman of the Florida Governor's Committee to Study Capital Punishment, for submission to a meeting of the Committee at Tallahassee on October 20, 1972.

The writers were appointed by Governor Reubin Askew, after consultation with the deans of the four law schools in Florida, to serve as legal advisors to the Committee.

This memorandum reflects the personal views of the authors, and should not be attributed to any of the institutions with which they are affiliated.

Although the version which appears here does not deviate significantly from that which was submitted to the Committee, it was necessary to alter that text slightly so as to make this article and the one following more understandable and useful to the non-Florida reader. An unedited copy of the memorandum is included in FINAL REPORT OF THE [FLA.] GOVERNOR'S COMMITTEE TO STUDY CAPITAL PUNISHMENT (Nov. 21, 1972).

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[1] Furman v. Georgia, 408 U.S. 238 (1972).

[2] 408 U.S. at 239-40.

[3] 265 So. 2d 499 (Fla. 1972). The law as it existed before this decision is summarized in Erhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?* 64 J. CRIM. L. & C. 10 (1973).

if the amended statutes satisfy the standards required by *Furman*. Whether any capital punishment statute could satisfy these standards is, of course, a crucial question for this Committee.

Our comments inevitably involve prediction of the manner in which the Supreme Court is likely to decide future cases. In making these predictions, we assume that the nine Justices currently on the Court will continue in office and that each Justice will decide future cases consistently with the views he expressed in *Furman*.

SOME OR ALL OF THE FOUR JUSTICES WHO DISSENTED IN FURMAN ARE LIKELY TO CHANGE THEIR VOTES IN FUTURE CASES OUT OF RESPECT FOR THE PRECEDENT ESTABLISHED IN FURMAN

Dissenting opinions in *Furman* were written by Chief Justice Burger and by Justices Blackmun, Powell and Rehnquist. The underlying theme of all four dissents is that legislatures, not the courts, should decide whether capital punishment is an acceptable penalty. Not a single Justice stated that he personally favored capital punishment. To the contrary, Justice Blackmun wrote: "Were I a legislator, I would vote against the death penalty. . . ." [4] And the Chief Justice, in an opinion joined by all four dissenters, stated: "If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall [who held capital punishment unconstitutional] or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes." [5] Instead, the four dissenters based their votes upon their view that the Supreme Court should not interfere with legislative judgments about the acceptability of capital punishment.

The *Furman* majority, however, considered the question of the wisdom of the legislative judgment as appropriate for judicial determination. They reached the question, decided it, and thereby established a new precedent. While the full scope of *Furman*, as precedent, is uncertain in view of the five separate opinions written by the five Justices who constituted the majority, one aspect of the decision is perfectly clear. The five-man majority, in their one paragraph opinion, invalidated the judgments of the Georgia and Texas courts which had applied their states' respective capital punishment statutes. In so doing, the Supreme Court necessarily decided that it could and would exercise its authority on this topic, despite the contrary arguments of the four dissenters.

Out of respect for this precedent, it is likely that some or all of the four Justices who dissented in *Furman* will consider themselves bound in future cases to consider the question they refused to reach in *Furman*. A substantial tradition argues in favor of this approach. The most notable advocate of this position in recent years was the late Justice Harlan, who frequently dissented from "landmark" decisions of the Supreme Court but usually changed his vote when similar issues came to the Court again so as to conform to the precedent established by the majority.[6]

Thus, it is unlikely that the vote of five to four will be repeated in future Supreme Court litigation involving capital punishment. Now that the Court's role in this matter has been established by the *Furman* precedent, some or all of the four dissenters in *Furman* are likely to consider the question on its merits, and some or all of these Justices are likely to vote for abolition of capital punishment, or at least to restrict its use to a small category of the most heinous crimes.

AN AMENDMENT TO FLORIDA STATUTES REMOVING JURY DISCRETION TO RECOMMEND MERCY FOR CERTAIN CAPITAL OFFENSES IS UNLIKELY TO WITHSTAND CONSTITUTIONAL CHALLENGE

Some legal authorities in Florida, notably the Attorney General, assert that capital punishment may be constitutionally reinstated under the *Furman* decision if the punishment is made "mandatory" upon conviction for certain heinous crimes by removing all jury discretion to recommend mercy.[7]

[4] 408 U.S. at 406 (Blackmun, J., dissenting).
[5] 408 U.S. at 375 (Burger, C. J., dissenting).

[6] As examples of the late Justice Harlan's respect for precedent, *see* Aguilar v. Texas, 378 U.S. 108, 116 (1964) (Harlan, J., concurring); Griffin v. California, 380 U.S. 609, 615–17 (1965) (Harlan, J., concurring); Orozco v. Texas, 394 U.S. 324, 327–28 (1969) (Harlan, J., concurring).

The tendency of the Burger Court to adhere to the precedents established by the Warren Court is noted in: Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, in SUPREME COURT REVIEW 265 (1971); Kalven, *Foreword, The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 5 (1971). On the general topic of precedent in the Supreme Court, *see* Boudin, *The Problem of Stare Decisis in our Constitutional Theory*, 8 N.Y.U.L.Q. 589 (1931); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 VALPARAISO L. REV. 101 (1969).

[7] In his official legal memorandum on the *Furman* decision dated July 7, 1972, the Attorney General of Florida argues strongly that a system of mandatory death penalties for certain types of homicide may be

This position is based primarily on the two crucial concurring opinions of Justices Stewart and White in *Furman*. These opinions state that quite different questions would be presented by a statute which mandatorily applied the death penalty to certain types of crimes, and that no view is expressed regarding the constitutionality of such a statute.[8]

It is argued with some persuasiveness that a system which eliminated the arbitrary application of capital punishment would in all likelihood be viewed as consititutional by Justices Stewart and White. Therefore, the argument concludes that capital punishment can be constitutionally reinstated for certain heinous offenses so long as jury discretion to recommend mercy is eliminated, and that Justices Stewart and White, together with the dissenting Justices in *Furman* (Burger, C. J., and Blackmun, Powell, and Rehnquist, JJ.) would vote to uphold the constitutionality of such a system. This legal analysis, while appealing on the surface, is unsound and must be rejected.

First, the position assumes that the four dissenting Justices in *Furman* would uphold the constitutionality of a system of mandatory death penalties. This assumption is extremely doubtful, based on statements by the four dissenters in *Furman*. Chief Justice Burger, joined by all the dissenters, makes the following statement in his opinion:

> Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for abolition.[9]

Justice Blackmun, in his separate dissenting opinion, states that if legislatures responded to the *Furman* decision by enacting mandatory capital punishment without the possibility of imposing lesser punishments, such legislation would be "regressive and of an antique mold, for it [would] eliminate the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago." [10] Moreover, as we have previously indicated, some or all of the dissenting Justices in *Furman* may change their votes out of respect for the *Furman* precedent and rule unconstitutional any legislation reinstating capital punishment.

The concurring opinions of Justices Brennan and Marshall make it clear that any statutory scheme to reinstate capital punishment would be unconstitutional under their interpretation of the eighth amendment.[11] The views of these Justices along with the four dissenters would therefore seem to invalidate any legislative effort to reinstitute capital punishment on a mandatory basis.

Second, the argument in favor of reinstating capital punishment through a system of mandatory death penalties assumes that eliminating jury discretion to recommend mercy will substantially eliminate the risk of arbitrary application of capital punishment, so as to satisfy the constitutional objections of Justices Stewart and White in

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constitutionally reinstituted. Specifically, the Attorney General suggests that death be mandatorily imposed as a punishment for the murder of a law enforcement officer, the murder of any penal institution officer, any murder pursuant to a contract for profit, any murder committed or perpetrated during the commission of any felony directed against another person, any murder by an assassin or person taking the life of any state or federal official, any murder committed by a parolee or probationer previously convicted of first degree murder, and any murder of a person in connection with a hijacking of an airplane, bus, train, ship or any other commercial vehicle.

It has been argued at some hearings of this Committee, that classifying certain murders as punishable by death and others punishable by life imprisonment may violate the equal protection clause of the fourteenth amendment to the United States Constitution and article I, section 2 of the Florida Constitution (1968). This objection is unsound. A legitimate governmental purpose is evident in the proposed legislative scheme, namely, to punish more severely those heinous-type murders which, more than other murders, threaten the peace and safety of the community. Statutory classifications of this nature are not condemned by the equal protection clause so long as some legitimate governmental purpose is served by the classification. Watts v. United States, 394 U.S. 705, 707 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). However, it is our ultimate conclusion that a system of mandatory death penalties cannot be sustained under the *Furman* decision.

[8] 408 U.S. at 306 (Stewart, J., concurring); 408 U.S. at 310–11 (White, J., concurring).

[9] 408 U.S. at 401 (Burger, C. J., dissenting).

[10] 408 U.S. at 413 (Blackmun, J., dissenting).

[11] "When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual,' and the states may no longer inflict it as a punishment for crimes." 408 U.S. at 305 (Brennan, J., concurring); "There is but one conclusion that can be drawn from all of this—i.e., the death penalty is an excessive and unnecessary punishment which violates the Eighth Amendment." 408 U.S. at 358–59 (Marshall, J., concurring).

Furman. This is extremely doubtful. Other areas of unfettered discretion contribute substantially to the arbitrary application of capital punishment in Florida, to wit: executive clemency by the Governor and pardon board, jury discretion to convict of lesser included offenses, and "plea bargaining" to lesser included offenses. Since these areas of discretion would remain intact under a system which eliminated jury discretion to recommend mercy, it is highly unlikely that such a system would reduce the risk of arbitrariness sufficiently to satisfy the basic constitutional objections of Justices Stewart and White. Furthermore, any effort to eliminate these critical areas of discretion would fortify the position of the four dissenting Justices in *Furman* who observed that such a system would be so regressive as to be unconstitutional, making total abolition the only alternative.

In short, it is our considered opinion that any effort to reinstitute capital punishment on a mandatory basis for certain heinous offenses by eliminating jury discretion to recommend mercy is unlikely to be upheld under the *Furman* decision.

AN AMENDMENT TO FLORIDA STATUTES PROVIDING DETAILED GUIDELINES FOR JURY DETERMINATION OF MERCY IS UNLIKELY TO WITHSTAND CONSTITUTIONAL CHALLENGE

In his dissenting opinion, Chief Justice Burger speculates on the impact of the Court's decision in *Furman*, and suggests that legislatures "may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed." [12]

A tenable argument can be made that a statute providing detailed guidelines controlling the imposition of capital punishment would be held valid by a majority of the Court, including some Justices who concurred in *Furman* as well as some or all of those who dissented.

Advocates of this approach would point out that three members of the majority in *Furman*, Justices Douglas,[13] White and Stewart, do not hold capital punishment unconstitutional per se, but carefully limit their concurring opinions to systems where the decision between life and death for the defendant rests in the complete discretion of the jury.

Vesting complete discretion in the jury without any guidelines for the imposition of the penalty causes Justice White to conclude that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." [14] He is also concerned that the judgment which state legislatures have made regarding the death penalty is lost when the jury is delegated the sentencing authority and can, without violating any trust or statutory policy, refuse to impose the penalty no matter what the circumstances of the crime.

Similarly, Justice Stewart, who finds the death penalty to be impermissible where it is "wantonly and freakishly imposed," [15] implies that the death penalty is not unconstitutional per se when he recognizes that retribution is a constitutionally permissible ingredient in the imposition of punishment. The capricious selection by the jury of those upon whom the sentence of death will be imposed is Stewart's chief objection to the present sentencing procedures. Thus, it is arguable that the Court would uphold capital punishment if imposed in a manner which eliminates capriciousness and uncontrolled discretion in the sentencing process.

Both the Model Penal Code and the Report of the National Commission on Reform of Federal Criminal Laws recommend sentencing procedures which attempt to define when the death penalty may be imposed. Each proposal sets forth certain aggravating and mitigating circumstances which serve as guidelines for imposing the death penalty.[16] In order to stand any chance of satisfying constitutional requirements, statutory guidelines must evidently be made obligatory rather than merely advisory, otherwise the sentence can still be imposed in a completely capricious and arbitrary manner.[17] The Model Penal Code meets this argu-

[12] 408 U.S. at 400 (Burger, C. J., dissenting).

[13] Justice Douglas finds the discretionary statutes to be unconstitutional in their application as the death penalty was arbitrarily and selectively applied in a manner inconsistent "with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." 408 U.S. at 257 (Douglas, J., concurring).

[14] 408 U.S. at 313 (White, J., concurring).

[15] 408 U.S. at 310 (Stewart, J., concurring).

[16] MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962); REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, pt. 1, §§ 3601–04 (1971). In addition to providing guidelines, a legislature following this approach should specifically negate constitutionally impermissible criteria, *e.g.*, race. *See* McGautha v. California, 402 U.S. 183, 207 (1971).

[17] *See, e.g., In re* Anderson, 69 Cal. App. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968) (Tobriner, J., dissenting). In Donaldson v. Sack, 265 So. 2d 499, 504

ment by requiring, for the imposition of the death penalty, a finding of the presence of one of the enumerated aggravating circumstances and a further finding that there are no mitigating circumstances sufficient to call for leniency.[18]

Thus, it can be argued that the requirements of *Furman* would be satisfied by a statute incorporating the Model Penal Code approach, requiring specific findings regarding aggravating or mitigating circumstances. The sentence would be determined at a penalty trial, separate from the trial for determination of guilt. The penalty trial would, under one view of the matter, be conducted by a judge without a jury.[19] The specific findings made at the penalty trial, as well as the sentence imposed on the basis of these findings, would be subject to complete appellate review.[20]

While a statute along these lines would undoubtedly reduce the scope of the jury's discretion, in our opinion the statute would be unlikely to withstand constitutional challenge.

We base this opinion on the same reasons that led us to conclude, in the preceding section, that a statute imposing mandatory death penalties would be unlikely to withstand constitutional challenge. First, a statute imposing guidelines for jury determination of mercy, coupled with a requirement of specific findings and appellate review, might be rejected by some or all of the Justices who dissented in *Furman*, as a "regressive" attempt to divest the jury of its flexibility and discretion. Second, such a statute would still leave vast areas of discretion, including executive clemency, jury discretion to convict of lesser included offenses, and "plea bargaining" to lesser included offenses. Thus, a substantial and unacceptable risk of arbitrariness would remain.

NO STATUTE IMPOSING CAPITAL PUNISHMENT CAN BE EXPECTED TO WITHSTAND CONSTITUTIONAL CHALLENGE UNLESS ENACTED IN CONTEXT OF FUNDAMENTAL CHANGES IN OUR SYSTEM OF CRIMINAL JUSTICE—AND EVEN IF FUNDAMENTAL CHANGES ARE MADE IN OUR SYSTEM, IT IS UNLIKELY THAT A CONSTITUTIONAL CAPITAL PUNISHMENT STATUTE CAN BE ENACTED

We read *Furman* as requiring extremely reliable guarantees in capital cases, because of the unique severity and finality of capital punishment. The Court leaves open at least the theoretical possibility of a valid capital punishment statute, but gives no clear blueprint of an improved system which could administer capital punishment with an acceptable degree of reliability.

Our discussion in the previous two sections of this memorandum indicates that, in our view, the Court's requirements would probably not be satisfied, either by a statute providing mandatory capital punishment, or by a statute providing detailed guidelines for jury determination of mercy.

An acceptable system would necessarily include provisions designed to eliminate, as far as humanly possible, the risk of arbitrary, freakish or discriminatory decision in capital cases, not only in the jury function, but at all stages of the process where substantial discretion now exists. Amongst other stages where discretion is currently exercised, we direct special attention to the clemency power, exercised pursuant to the Florida Constitution[21] by the Governor and three members of the cabinet. Any attempt to make changes in this function would evidently require amendment of the Florida Constitution.

In order to design a system of capital punishment which would have a theoretical chance of withstanding constitutional challenge, the legislative draftsman would need inputs from experienced prosecutors, defense counsel, trial judges, Florida supreme court justices, and officials of the execu-

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(Fla. 1972), the Florida Supreme Court did not rule on the constitutionality of ch. 72-72, [1972] Fla. Sess. Laws 122, *amending* FLA. STAT. § 921.141 (1971), providing for bifurcated trials in capital cases and listing certain aggravating and mitigating circumstances, since it was not effective until October 1, 1972. However, the new statute apparently contains constitutional infirmities in that it does not require a finding of the presence of an aggravating circumstance prior to the imposition of the death penalty, but rather allows the jury that same discretion in determining when the death penalty should be imposed which was condemned in *Furman*. The Florida statute also lacks the additional requirements discussed in notes 19 and 20 and accompanying text *infra*.

[18] MODEL PENAL CODE, *supra* note 16, at § 210.6(2).

[19] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft, 1968), referring to the judge's role in sentencing, states: "clearly the most telling argument against jury sentencing is that a proper sentencing decision calls on an expertise which a jury cannot possibly be expected to bring with it to the trial, nor develop for the one occassion on which it will be used." *Id.* at 47.

[20] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS 367 (1971) recommends amendment of 28 U.S.C. § 1291 (1970) by providing that the jurisdiction of the courts of appeal "shall in criminal cases include the power to review the sentence and to modify or set it aside for further proceedings."

[21] FLA. CONST. art. IV, § 8.

tive department familiar with the exercise of the clemency power. The assistance of these persons would be necessary in order to identify the stages of the process at which substantial discretion currently exists, to discuss the types of abuse most likely to occur, and to suggest methods by which the risk of abuse could be reduced to the stringent requirements of *Furman*.

This Committee has not received evidence on these matters, except for a few passing references made by some witnesses. We consider it would be premature, on the basis of the present state of the Committee's record, for us to offer any recommendations on these matters. We merely note that no statute imposing capital punishment is likely to have even a theoretical chance of withstanding constitutional challenge unless enacted in the context of fundamental changes in our system of criminal justice.

We have described, as "theoretical," the possibility of drafting a capital punishment statute which would satisfy the *Furman* requirements. This description is based upon a number of considerations which suggest that, while *Furman* on its face appears to leave the door open to the enactment of valid capital punishment statutes, the decision strongly implies that capital punishment in the United States is a thing of the past.

First, some or all of the four Justices who dissented in *Furman* may change their votes in future cases, out of respect for the precedent established by the *Furman* majority. We have discussed this matter in a previous section.

Second, the guarantees needed in order to satisfy the *Furman* requirements may be so expensive and time consuming that no legislature would be willing to provide them.

Third, Justices Douglas, Stewart and White may have been motivated to write their separate concurring opinions by the desire to condemn arbitrary, freakish or discriminatory exercises of discretion throughout our system of criminal justice. These three Justices may, in future cases, be prepared to vote against capital punishment, regardless of the system under which it may be administered; they refrained from taking such a position in *Furman*, perhaps in order to focus attention upon the arbitrary, freakish or discriminatory aspects of existing systems of imposing punishment, in non-capital as well as capital cases.

Fourth, it seems unlikely that the United States Supreme Court would permit reinstatement of capital punishment in any form in the United States, with the possible exception of the military, after having taken the drastic measure of ordering the release of over 600 convicts from death rows throughout the country.

FURMAN AND OTHER RECENT DECISIONS SERVE NOTICE THAT THE UNITED STATES SUPREME COURT IS READY TO REQUIRE FUNDAMENTAL CHANGES IN OUR ENTIRE SYSTEM OF CRIMINAL JUSTICE AND CORRECTIONS, WHETHER OR NOT WE ATTEMPT TO REINSTATE CAPITAL PUNISHMENT

We have pointed out, in the previous section, that *Furman* requires extremely reliable guarantees in capital cases, because of the unique severity and finality of capital punishment. We have also noted that some of the concurring opinions in *Furman* may be read as condemning the risks of arbitrary, freakish and discriminatory decision-making throughout our system of criminal justice and corrections.

Thus, while capital cases demand the most rigorous guarantees—perhaps so rigorous as to be impossible of attainment—non-capital cases also require guarantees, not quite so rigorous as in capital cases, but in many respects more rigorous than are currently available.

We read *Furman* and some other recent decisions of the United States Supreme Court as strong indications that the Court is ready to require fundamental changes in our entire system of criminal justice and corrections, whether or not we attempt to reinstate capital punishment.

The opinions by Justices Douglas, Stewart and White have already been mentioned, as condemning the risks of arbitrary, freakish and discriminatory decisions, wherever they may exist in our system. Some of the other opinions in *Furman* support this view.

For example, Justice Brennan develops a four-point cumulative test for measuring punishments against the eighth amendment:[22] (1) if the punishment is unduly severe; (2) if there is a strong probability that it will be inflicted arbitrarily; (3) if it is substantially rejected by contemporary society; and (4) if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment. Justice Marshall follows a similar approach.[23] Justice White implies

[22] 408 U.S. at 271–81 (Brennan, J., concurring).
[23] *Id.* at 330–32 (Marshall, J., concurring).

that a penalty, in order to satisfy constitutional standards, must demonstrably serve "discernible social or public purposes." [24]

The dissenting Justices express hesitancy about reaching such questions. Thus, Chief Justice Burger observes that the eighth amendment "is not addressed to social utility and does not command that enlightened principles of penology always be followed." [25] He points out that, "If it were proper to put the states to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment." [26]

However, to the extent that the *Furman* majority has indeed opened up this avenue, some or all of the dissenters may respect *Furman* as a precedent for the proposition that the Court should examine the social utility of punishments in general.[27] And, as the Chief Justice puts it, "If anywhere in the whole spectrum of criminal justice fresh ideas deserve sober analysis, the sentencing and correctional area ranks high on the list." [28]

Our view that *Furman* calls for legislative reconsideration of the entire system of criminal justice and corrections is reinforced by a number of other cases decided by the Supreme Court during the months preceding *Furman*[29] and by the numerous off-the-bench statements made by Chief Justice Burger advocating drastic reform in many of these areas.[30] The Burger Court is likely to move further in these areas than in the trial procedure area which was a major concern of the Warren Court.

[24] *Id.* at 312 (White, J., concurring).
[25] *Id.* at 394 (Burger, C. J., dissenting).
[26] *Id.* at 396.
[27] *See* note 6 and accompanying text *supra*.
[28] 408 U.S. at 402 (Burger, C. J., dissenting).
[29] Morrissey v. Brewer, 408 U.S. 471 (1972) (proceedings for parole revocation must provide certain minimum due process guarantees); Jackson v. Indiana, 406 U.S. 715 (1972) (Indiana system of pretrial committment of mentally incompetent defendants held unconstitutional); McNeal v. Director, Patuxent Institution, 407 U.S. 245 (1972) (inmate confined indefinitely as defective delinquent held entitled to procedural safeguards commensurate with long-term imprisonment); Murel v. Criminal Court, 407 U.S. 355 (1972) (review of delinquency law refused only because statute was undergoing substantial revision); Humphrey v. Cady, 405 U.S. 504 (1972) (Wisconsin Sex Crimes Act held seriously questionable under equal protection guarantee); Cruz v. Beto, 405 U.S. 319 (1972) (prisoners have right to participate in religion of choice); United States v. Tucker, 404 U.S. 443 (1972) (prior invalid convictions must not be considered in imposing sentence for subsequent crimes); Santobello v. New York, 404 U.S. 257 (1971) (plea bargain, once made, must be fulfilled at time of sentencing); Wilwording v. Swenson, 404 U.S. 249 (1971) (habeas corpus relief available to prisoners seeking review of living conditions and discipline without need to exhaust state remedies).

COMPREHENSIVE STUDY OF ENTIRE SYSTEM OF CRIMINAL JUSTICE AND CORRECTIONS IS A VITAL COUNTERPART TO THE WORK OF THIS COMMITTEE

A comprehensive study of our entire system of criminal justice and corrections is vital for a number of reasons.

First, as indicated above, *Furman* and other recent decisions of the United States Supreme Court indicate that the Court will require fundamental reforms.

[30] For many years we neglected the entire spectrum of criminal justice. Slowly, but with increasing pace we have corrected procedural inequities. . . . In time we must take stock of what we have done and see whether all of it is wise and useful and constructive.

Meanwhile we must soon turn increased attention and resources to the disposition of the guilty once the fact finding process is over. Without effective correctional systems an increasing proportion of our population will become chronic criminals with no other way of life except the revolving door of crime, prison and more crime.

Address by Chief Justice Burger, American Bar Association Convention, Dallas, Texas, Aug. 11, 1969, as quoted in 39 GEO. WASH. L. REV. 185 (1970).

In 1971, the Chief Justice called criminal correction the "most neglected" part of the criminal justice system and defined six urgent needs in relation to it.

The Chief Justice first called attention to the inadequate physical plant of our prisons itself, pointing out that rising crime has created severe overcrowding and that prisons "are poorly located and inaccessible to the families of the inmates, too far away from facilities for work release programs, and located in areas that do not provide adequate housing for personnel of the institutions." The Chief Justice then emphasized the need to recruit prison staffs of the highest caliber and training and the need to classify and separate clearly different types of offenders and prevent prisons from criminalizing their occupants. Chief Justice Burger also pointed out the failure of our prisons to provide their youthful occupants with exercise programs to "burn off the surplus energies of youth" and with work and educational programs which will motivate inmates to improve themselves. Society has "a moral obligation to try to change an offender—to make him a reasonably successful human being." Finally, the Chief Justice stressed the need that every individual has to communicate with others. Every inmate should be given an opportunity to communicate with those who run the institutions and should be given a chance to regulate part of his life.

Edwards, *Foreword—Penitentiaries Produce No Penitents*, 63 J. CRIM. L.C. & P.S. 154, 159–60 (1972), quoting from an address by Chief Justice Burger, 1971 National Conference on Corrections, summarized in 10 BNA CRIM. L. REP. 2238 (Dec. 29, 1971).

Second, this Committee's deliberations about capital punishment necessarily lead to discussion of alternative sanctions, in the event that capital punishment is deemed to be either inappropriate or constitutionally impermissible. For example, concern has repeatedly been raised at Committee meetings, as to whether any other sanction can provide a comparable deterrent effect, tending to prevent the robber from killing his victim and to prevent the prisoner from killing his guard or fellow-inmate. If a suitable non-capital sanction could be found, the relative utility of capital punishment would be reduced.

Third, this Committee's deliberations about capital punishment necessarily lead to discussion of the corrections system. Special concern has been expressed at Committee meetings, about the need for a reliable system of classifying inmates, so that society is protected against the release of that relatively small percentage of inmates who remain dangerous despite the best efforts of rehabilitation programs. If dangerous inmates could be reliably classified and kept in custody, again the relative utility of capital punishment would be reduced. And, of course, the entire system of rehabilitation programs has caused serious concern.

This Committee has not been charged with responsibility for a comprehensive review of the entire system of criminal justice and corrections, nor could such an undertaking have been accomplished within the time allotted.

However, the need for such a project becomes apparent from this Committee's deliberations about its assigned topic. The question whether to reinstate capital punishment cannot adequately be answered without serious consideration of the alternatives.

As a counterpart to the work of this Committee, a comprehensive study would be highly appropriate, covering our entire system of criminal justice and corrections.

Substantial research projects have been conducted, in Florida and elsewhere, on various aspects of criminal justice and corrections, but we are not aware of any readily available source of the comprehensive information we deem an essential basis for legislative proposals. However, the availability of various research materials will reduce the amount of time which would otherwise be needed to complete the project we suggest. We estimate that our suggested project could be completed within between six and twelve months, if funded so as to employ at least one full-time project director, together with consultants and supporting secretarial and research personnel. Completion of the project within that period would enable legislative proposals, including budgetary recommendations, to be submitted to the Florida Legislature no later than its regular 1974 session.

RECOMMENDATION—NO ATTEMPT TO REINSTATE CAPITAL PUNISHMENT PENDING COMPLETION OF COMPREHENSIVE STUDY

We were asked to advise the Committee regarding the constitutional effects of *Furman v. Georgia*. Having commented on the assigned topic, we feel obliged to follow through by submitting a recommendation to the Committee, based upon our overall evaluations of the various matters discussed.

We recommend that a comprehensive study of our entire system of criminal justice and corrections be commissioned and undertaken, as discussed in the preceding section, and that, pending completion of the comprehensive study, no attempt be made to reinstate capital punishment in Florida.

This recommendation is based upon our view that: (1) no constitutional basis can justify any attempt to reinstate capital punishment without an accompanying fundamental change in our system of criminal justice, which can be attempted only after the comprehensive study; (2) no satisfactory policy choice regarding capital punishment can be made without adequate study of alternative types of sanction, which again can be adequately considered only after the comprehensive study; and (3) our entire system of criminal justice and corrections needs reform, whether or not capital punishment is reinstated.

Immediate enactment of a statute imposing capital punishment would offer few benefits to society. The existence of the statute might serve as a deterrent to would-be perpetrators of capital offenses, if they were aware of the statute, if they believed it would survive constitutional challenge, and if they were deterred by the possibility of being themselves subjected to its penalty. However, most people who would be aware of a new statute would also be aware that the United States Supreme Court decided in 1972 that capital punishment was unconstitutional and released over 600 inmates from death row. Nothing short of another decision by that Court is likely to convince the general public that capital punishment has been effectively

reinstated. Unless and until such a decision is rendered, the deterrent effect of any capital punishment statute is likely to be minimal.

We have expressed serious doubts whether any capital punishment statute could possibly withstand constitutional challenge, even if drafted after the most careful study and consideration. The risk of unconstitutionality would be greatly increased if the statute were drafted hastily, without benefit of the comprehensive study. The high risk of having the statute declared unconstitutional would produce a corresponding risk of demoralization of law enforcement officers, together with general confusion in the administration of criminal justice.

Furthermore, if a statute reinstating capital punishment were enacted hastily, without benefit of the comprehensive study, the statute might reflect premature decisions on momentous policy choices, and our progress toward sound reform might be delayed.

II. FLORIDA'S LEGISLATIVE RESPONSE TO FURMAN: AN EXERCISE IN FUTILITY?*

CHARLES W. EHRHARDT** AND L. HAROLD LEVINSON†

Furman v. Georgia,[1] decided by a five to four vote of the United States Supreme Court in June 1972, held that the imposition and carrying out of the death penalty under the statutes of Georgia and Texas constituted cruel and unusual punishment, in violation of the eighth and fourteenth Amendments. Less than six months later, Florida became the first state to enact a post-*Furman* capital punishment statute.[2]

This article traces the background of the new Florida statute, including summaries of pre-existing Florida law on capital punishment, judicial responses to *Furman*, and the legislative history of the new statute. The article concludes with a commentary on various aspects of the new statute.

FLORIDA LAW AT TIME OF FURMAN V. GEORGIA

At the time *Furman* was decided, Florida statutes[3] provided that a defendant found guilty of a capital felony must be sentenced to death unless the verdict included a recommendation of mercy by the jury, in which event the sentence must be life imprisonment.

A statutory amendment was enacted in March 1972,[4] to become effective on October 1, 1972, providing, for the first time in Florida law, a bifurcated trial. The statute provided that a defendant convicted of a capital felony was to receive a separate sentencing "trial" on the question whether the penalty would be death or life imprisonment. The resulting jury decision was binding on the court. The statute contained lists of aggravating and mitigating circumstances, but only as guidelines for the matters to be considered during the sentencing proceeding. This bifurcated trial provision was never used, since the *Furman* decision intervened between the enactment and the effective date of the statute, and the Florida Supreme Court interpreted *Furman* as eliminating all capital felonies in Florida.[5]

Another statutory amendment, also enacted in

* The authors served as members of the five-man legal staff of the Governor's Committee to Study Capital Punishment, and participated in the proceedings of the committee from August until November, 1972, as well as in preparation of the memorandum submitted by the legal advisory staff, an edited version of which appears as a companion piece to this article.

The views expressed in this article are those of the authors and should not be attributed to the committee or to the institutions with which the authors are associated.

Preparation of this article was greatly facilitated by the cooperation of Robert Mounts, Assistant General Counsel, Office of the Governor, and Martha Bass, Director of Senate Legislative Services. The authors gratefully acknowledge their assistance.

The title of this article is adapted from a statement by retired Florida supreme court Chief Justice E. Harris Drew, Chairman of the Governor's Committee to Study Capital Punishment, reported in the Miami (Fla.) Herald, Dec. 3, 1972, at 1-B, that Florida's post-*Furman* capital punishment statute was "an exercise in futility."

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[1] 408 U.S. 238 (1972).

[2] Ch. 72-724, [1972] Fla. Sess. Laws__ (Spec. Sess. 1972), enacted by the Florida Legislature on December 1, signed by the Governor on December 8, 1972, thereupon becoming law.

[3] FLA. STATS. §§ 775.082(1), 921.141 (1971).

[4] Ch. 72-72, [1972] Fla. Sess. Laws 122, *amending* FLA. STATS. § 921.141 (1971).

[5] *See* note 21 *infra* and accompanying text.

March 1972,[6] to become effective on October 1, 1972, provided that if the death penalty were held unconstitutional, persons previously sentenced to death must be re-sentenced to life imprisonment, by the trial court, with no eligibility for parole. This re-sentencing provision was rendered ineffective when the Florida supreme court re-sentenced all death row inmates prior to October 1, 1972.[7]

Under pre-*Furman* Florida law, an appeal could be taken to the Florida supreme court, as a matter of right, in all cases where the death penalty was imposed.[8] The supreme court could review the conviction of guilt, but not the severity of the sentence.[9] If the trial court did not impose the death sentence, appeal was taken to the district court of appeals, the intermediate appellate court which has general appellate jurisdiction in all matters except those in which the Florida Constitution confers jurisdiction elsewhere.[10]

Pre-*Furman* Florida law classified felonies as being either capital, or first, second or third degree.[11] The capital felonies were: premeditated murder,[12] certain felony-murders,[13] bombing or machine-gunning in public places,[14] homicide caused by a destructive device,[15] rape of a female of the age of ten years or more,[16] "carnal knowledge and abuse" of a female child under the age of ten years,[17] and kidnapping for ransom.[18]

At the time of the *Furman* decision, a stay order was in effect, issued in 1967 by a federal court in Florida,[19] preventing the execution of any death sentence in Florida pending the outcome of the Supreme Court litigation testing the constitutionality of capital punishment. In addition, Governor Reubin Askew issued an Executive Order in February 1972,[20] staying the execution of any death sentence in Florida until July 1, 1973, so as to provide time for the outcome of pending litigation, and for legislative consideration of the entire question of capital punishment. The Executive Order recited that the Governor had unsuccessfully requested the 1972 Florida Legislature to declare a legislative moratorium on further executions, and to authorize appointment of a commission to examine the whole area of capital punishment, capital offenses and capital offenders in Florida.

Judicial Responses to Furman

In *Donaldson v. Sack*,[21] decided on July 17, 1972, the Florida supreme court held that *Furman* eliminated capital punishment—and capital felonies—from Florida law, until new legislation might revive them. The court further held that persons thereafter convicted of offenses designated on the statute books as "capital" should be punished by life imprisonment, and that various incidents of capital felonies, such as the twelve-man trial jury,[22] were no longer required.

Two weeks later, in *Newman v. Wainwright*,[23] the United States Court of Appeals for the Fifth Circuit emphasized that *Furman* invalidated the capital punishment statutes of Florida. The court noted that in Florida, as in Georgia and Texas, whose statutes were before the Supreme Court in

[6] Ch. 72-118, [1972] Fla. Sess. Laws 258, *amending* Fla. Stats. § 775.082 (1971).

[7] *See* notes 25 & 26 *infra* and accompanying text.

[8] Fla. Const. art. V, §4(2) (1968), *renumbered* art. V, § 3(b)(1) (March 1972). See note 10 *infra* regarding the additional provision in the 1972 amendment of the constitution, authorizing the legislature to expand the supreme court's jurisdiction to include appeals from sentences of life imprisonment.

[9] Fla. Stats. § 924.06 (1971) provides that a defendant may appeal from "a sentence, on the ground that it is illegal." The only provision for discretionary reduction of sentences by an appellate court is in Fla. Stats. § 924.41(3) (1971) authorizing the circuit court to lower sentences imposed by the municipal court. (The circuit court is the court of general trial jurisdiction, which sits also as an appellate court to review judgments of municipal courts. The municipal courts will be phased out of existence by 1977, pursuant to § 20(d)(4) of Article V, the Judiciary Article of the Florida Constitution, as amended in March 1972.)

[10] Fla. Const. art. V, § 5(3) (1968), *renumbered* art. V, § 4(b) (March 1972) but substantially unchanged. The 1972 amendment of Article V contained a new provision, § 3(b)(2), authorizing the legislature to expand the supreme court's jurisdiction to include appeals from sentences of life imprisonment. If this provision were implemented by legislation, the district courts of appeal would automatically lose this jurisdiction.

[11] Fla. Stats. § 775.081(1) (1971).

[12] Fla. Stats. § 782.04(1) (1971).

[13] *Id.* The felony murders were those "committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping."

[14] Fla. Stats. § 790.16(1) (1971).

[15] Fla. Stats. § 790.161(1) (1971).

[16] Fla. Stats. § 794.01 (1971).

[17] *Id.*

[18] Fla. Stats. § 805.02 (1971).

[19] Adderly v. Wainwright, 272 F. Supp. 530 (M.D. Fla. 1967), 46 F.R.D. 97 (M.D. Fla. 1968), *dismissed as moot* __ F. Supp. __ (M.D. Fla. 1972).

[20] Exec. Order [Fla.] No. 72-8 (February 21, 1972).

[21] 265 So. 2d 499 (Fla. 1972).

[22] Fla. Const. art. 1, § 22 provides that "the qualifications and the number of jurors, not fewer than six, shall be fixed by law." Fla. Stats. § 913.10 (1971) provides for a twelve-member jury in capital cases, and a six-member jury in all other criminal cases.

[23] 464 F.2d 615 (5th Cir. 1972).

Furman, "the death penalty has been inequitably, arbitrarily and infrequently imposed." [24]

In *Anderson v. State*[25] and *In re Baker*,[26] decided on September 8 and 26, 1972, respectively, the Florida supreme court resentenced former death row inmates. The court thus avoided the impact of the pre-*Furman* enactment, effective October 1, 1972, which provided for life imprisonment without eligibility for parole in the event the death penalty were held unconstitutional.[27]

Anderson involved 40 persons whose appeals were still pending in the Florida supreme court. The court held that it retained jurisdiction, and could therefore itself carry out the resentencing, without going through the "ministerial formality" of remanding to the trial court. *Baker* involved 60 persons who did not have appeals pending. The court decided to treat this class on the same basis as the *Anderson* class, as a matter of equal protection. All the *Anderson* and *Baker* inmates were resentenced to life imprisonment and, since parole was not precluded, the possibility of parole remained open. Those inmates who were under sentence of death for rape committed before 1972 were given leave to file a motion with the trial court for mitigation of sentence from life to a term of years, in accordance with pre-1972 law.

The Legislative Response to Furman

Committee Action[28]

A few days after the Supreme Court handed down its decision in *Furman*, some members of the Florida legislature requested the Governor to convene a special legislative session for the purpose of considering the reinstatement of capital punishment. The Governor declined to call a special session at that time, but promised to call one promptly after the general election in November 1972.[29] Meanwhile, the Speaker of the Florida House of Representatives established the House Select Committee on the Death Penalty.[30] The committee held hearings and received testimony from representatives of various interested groups and from the public at large. After deciding that the death penalty should be reinstated, the committee drafted tentative legislation[31] calling for mandatory death sentences upon conviction of premeditated murder and a small number of other crimes. The Select Committee's legislation permitted the jury to convict of lesser included offenses.

On July 28, 1972, Governor Askew issued an Executive Order[32] creating the Governor's Committee to Study Capital Punishment. The order required the committee to undertake a detailed study and

[24] *Id.* at 616.

[25] 267 So. 2d 8 (Fla. 1972).

[26] 267 So. 2d 331 (Fla. 1972).

[27] *See* note 6 and accompanying text *supra*.

[28] In addition to the committee action described in this section, the Attorney General of Florida also suggested legislation requiring imposition of a mandatory death sentence for persons convicted of certain classes of premeditated murder. Fla. S. 1-A, Spec. Sess. § 3 (1972); Fla. H.R. 8-A, Spec. Sess. §3, (1972). *See* Final Report of the [Fla.] House Select Committee on the Death Penalty 4–5 (1972). The Attorney General's proposals, in memorandum form, were widely publicized. *See, e.g.*, St. Petersburg (Fla.) Times, Nov. 26, 1972, at 4-D. Legislative proposals reflecting the Attorney General's views are discussed in note 53 *infra*.

The president of The Florida Bar appointed a five-man committee, which submitted a memorandum to the Governor's Committee to Study Capital Punishment, note 32 and accompanying text *infra*, one week before the special legislative session convened. The Bar committee, speaking for itself and not necessarily for the president or members of the Bar, argued that the statute enacted in March 1972, ch. 72-72, [1972] Fla. Sess. Laws 122, *amending* Fla. Stats. § 921.141 (1971), providing for a bifurcated trial and enumerating aggravating and mitigating circumstances, was compatible with *Furman*. The committee recommended that "Florida . . . proceed under the present law and secure a new ruling from the U.S. Supreme Court." Report of the Death Penalty Committee of The Florida Bar (1972).

The President of the Senate appointed a Senate Council on Criminal Justice which proposed a bill that was never filed or introduced. The Senate Council's bill would have deleted the existing statutory language relating to jury recommendation of mercy, thus making the death penalty mandatory upon conviction of one of the enumerated capital crimes. Interview with Martha Bass, Director of Senate Legislative Services, in Tallahassee, Florida, Dec. 8, 1972.

[29] Governor Askew discussed the matter, in retrospect, in a news conference on November 20, 1972.

> Had I not indicated last summer a special session in the fall, the chances would have been better than even that the Legislature, in the middle of a campaign, might have called themselves back into session. . . . This is better.

St. Petersburg (Fla.) Times, Nov. 21, 1972, at 1-B.

[30] *See* Final Report of the [Fla.] House Select Committee on the Death Penalty 1 (1972).

[31] The Select Committee's proposal is embodied in the original version of Fla. H.R. 1-A, Spec. Sess. (1972) (submitted by Representative Gautier and others). See notes 39–50 and accompanying text *infra* for a discussion of this bill and the degree to which the Governor's bill modified it.

[32] Exec. Order [Fla.] No. 72-37 (July 28, 1972). The blue-ribbon committee's seventeen members included a retired Chief Justice of the Florida supreme court, two ex-Governors, a past president of The Florida Bar, members of the Florida House and Senate, and representatives from many segments of the criminal justice system, as well as a number of informed citizens. The Governor also appointed both an advisory committee and a legal advisory staff.

make recommendations to the Governor as to whether the death penalty should be retained, what alternative forms of punishment were available if the death penalty were not reinstated for some or all of the existing capital crimes, and what changes were required in the procedures relating to the execution of the death penalty, executive clemency, treatment of death row inmates, and other related procedural matters.

After its organizational meeting on August 17, 1972, the committee held a series of public meetings throughout the state to collect information relative to the question of whether capital punishment should be reinstated and, if so, in what form. Expert witnesses from across the nation and members of the public so desiring testified at each meeting. A secondary purpose of the hearings was to serve as a mechanism for public education on the issues surrounding the question of capital punishment.

After three months of deliberations and contrary to the recommendations of the committee's legal advisory staff,[33] the committee recommended to the Governor legislation which provided for a bifurcated trial in capital cases. Sentencing was to be by a panel of three judges after they heard evidence at a separate sentencing hearing, and after they had considered the presence of certain enumerated mitigating and aggravating circumstances.[34] Additionally, the committee passed a resolution calling for the creation of a special citizen's commission to study and make recommendations concerning the improvement of the entire system of criminal justice in Florida.[35]

Legislative Skirmishes

The Florida legislature convened in special session on November 28, 1972, to consider whether capital punishment should be legislatively reinstated.[36] Governor Askew adopted the recommendations of the Governor's Committee to Study Capital Punishment[37] and, in his opening address to a joint session of the legislature, proposed the bifurcated trial for capital cases. His proposal required that all sentencing findings be in accordance with strict statutory guidelines and based upon the record of a separate sentencing proceeding. He strongly urged the legislators to reject any proposal which provided for mandatory imposition of the death penalty without opportunity for mercy. Because he felt that a jury would merely exercise its discretion at an earlier stage by convicting on a lesser charge, he reasoned that the same discretion which *Furman* deemed impermissible would be present under any mandatory system. Moreover, he pointed out that Chief Justice Burger, with three other dissenters in *Furman*, condemned the mandatory imposition of the death penalty as archaic.[38]

Following the Governor's address to the joint session, the House Select Committee on the Death Penalty recommended to the House of Representatives the passage of a series of four bills[39] which directly contradicted the Governor's bill by providing for mandatory death sentences for certain crimes. Under the proposal there was to be no determination by the trial jury other than the guilt of the defendant. Once a guilty verdict was returned, a sentence of death was mandated regardless of any mitigating circumstances or feelings of leniency by the judge or jury.[40] The Select Committee's bill did, however, narrow the list of capital crimes by reclassifying certain felonies, previously capital, as felonies of the first degree, for which the maximum punishment was life imprisonment.[41]

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[33] *See* Ehrhardt, *et al.*, *The Future of Capital Punishment in Florida: Analysis and Recommendations*, 64 J. CRIM. L. & C. 2, 9–10 (1973).

[34] FINAL REPORT OF THE [Fla.] GOVERNOR'S COMMITTEE TO STUDY CAPITAL PUNISHMENT 147-62 (1972). See notes 42–49 and accompanying text *infra* for a discussion of the proposed legislation.

[35] *Id.* at 163-64. A similar study was recommended by the committee's legal advisory staff. Ehrhardt, *supra* note 33, at 8–9.

[36] FLA. H.R. JOUR., Spec. Sess. 1 (1972).

[37] The Governor stated, however, that he continued to have "mixed feelings as to the necessity, the rightness and even the legality of capital punishment in any form." *Id.* at 6.

Representative Johnson, a member of the Governor's Committee, subsequently introduced the bill recommended by the Governor's Committee as an amendment to a bill proposed by the House Select Committee. Fla. H.R. 14-A, Spec. Sess. (1972). A modified version of this bill was subsequently passed by the House. See notes 50–52 and accompanying text *infra*.

[38] FLA. H.R. JOUR., Spec. Sess. 6 (1972).

[39] Fla. H.R. 1-A, H.R. 2-A, H.R. 3-A, H.R. 4-A, Spec. Sess. (1972) (Select Committee bill).

[40] Fla. H.R. 1-A, Spec. Sess. § 1 (1972) (Select Committee bill).

[41] The crimes of throwing bombs when death of a person results, *id.* § 2, kidnapping for ransom, *id.* § 7, and felony-murders not listed below were reduced from capital felonies to felonies of the first degree. Capital crimes under the bill were premeditated murder, *id.* § 2; murder committed by any person engaged in the perpetration of any arson, rape, robbery, burglary, or kidnapping, *id.*; carnal knowledge of a person under the age of thirteen, *id.* § 6; the intentional interference

On the floor of the House, the bill recommended by the Governor's Committee was offered as an amendment to the Select Committee's bill.[42] The proposed amendment entirely changed the philosophy of the bill then under consideration. Rather than being crime-oriented, as was the Select Committee's bill, the Governor's bill was sentencing-oriented, expressing the general policy of taking a life only when a life is taken.[43] The Governor's bill created a new classification of crime, the life felony,[44] redefined capital felonies, and provided a procedure under which the decision would be made as to whether death or life imprisonment would be imposed in capital cases.

Apart from certain novel provisions concerning felony-murder,[45] the focal point of the Governor's bill was the provision for a bifurcated trial in capital cases. Following a conviction for a capital crime, the bill provided for a separate sentencing proceeding to be conducted by the original trial judge and two other judges from outside the judicial circuit in which the trial was held, to be selected by the Chief Justice of the Supreme Court of Florida. Upon findings of fact[46] by a majority of the three-judge court that one of several enumerated aggravating circumstances was present, the death penalty was mandatory.[47] However, if the court found none of these aggravating circumstances to be present, or if the court found a substantial mitigating circumstance to be present,[48] a sentence of life imprisonment was mandated.[49] This novel sentencing procedure represented an attempt to reduce discretion in the sentencing process, yet retain an element of mercy.

A divided House approved the Governor's bill 70-47 as an amendment to the bill recommended by the Select Committee,[50] thereby defeating the Select Committee's bill. Thereafter, the Governor's bill was altered in several minor respects[51] by amendments from the floor. The bill, as amended, passed the House unanimously.[52]

The Florida Senate, by a vote of 36 to 1,[53]

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with or injury to property of the United States used for defense or war, *id.* § 3; and the throwing of bombs or discharging of machine guns when death results, *id.* § 5.

[42] FLA. H.R. JOUR., Spec. Sess. 17–20 (1972); Fla. H.R. 14-A, Spec. Sess. (1972).

[43] Fla. H.R. 14-A, Spec. Sess. § 9 (1972) (drafters' comment). FLA. STATS. § 779.07 (1971), listing treason as a capital offense, was not amended by the Governor's bill. The Select Committee's bill listed certain forms of rape as capital felonies, *see* Fla. H.R. 1-A, Spec. Sess. § 6 (1972), as well as treason, *see id.*, § 3.

[44] The life felony classification is retained in § 3, ch. 72–724, [1972] Fla. Sess. Laws __ (Spec. Sess. 1972). The drafters' comment expresses the reason for the new classification:

> Provides a new category of felony to serve as an additional deterrent to those crimes [which], while not classified capital, are especially serious in nature.

Id. The minimum statutory punishment for an offender convicted of a life felony is thirty years, although parole before that time is not precluded. *Id.* § 4.

[45] The bill provided that "the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being shall . . . constitute a capital felony. . . ." Fla. H.R. 14-A, Spec. Sess. § 1 (1972). However, the principle of felony-murder was retained only as a rebuttable presumption of premeditation when a killing occurred during the furtherance of certain serious felonies. *Id.* The Select Committee's bill was much broader in scope. It defined as a capital felony a felony-murder if a person was killed by one "engaged" in the perpetration of certain named felonies. *See* Fla. H.R. 1-A, Spec. Sess. § 1 (1972) (Select Committee bill).

[46] The bill authorized the court to receive any evidence it deemed probative and which related to one or more of the enumerated aggravating or mitigating circumstances, without regard to the traditional exclusionary evidentiary rules, as long as the convicted offender was permitted a fair opportunity to rebut any hearsay statements. Fla. H.R. 14-A, Spec. Sess. § 5 (1972). The bill did not purport to allow evidence excludable on constitutional grounds. *Id.* (drafters' comment).

[47] Fla. H.R. 14-A, Spec. Sess. § 5 (1972).

[48] The bill did not provide for a one-on-one correlation between aggravating and mitigating circumstances. If the court found "that an aggravating circumstance exists as enumerated" and "that no substantial mitigating circumstance exists as enumerated . . . which would warrant leniency" the death penalty was mandatory. *Id.* Too, in contrast with ch. 72–72, [1972] Fla. Sess. Laws 122, *amending* FLA. STATS. § 921.141 (1971), the list of aggravating and mitigating circumstances enumerated were not merely guidelines for the court. The court was restricted to the enumerated circumstances in its decision. *See* Fla. H.R. 14-A, Spec. Sess. § 5 (1972); *cf.* § 9, ch. 72–724, [1972] Fla. Sess. Laws __ (Spec. Sess. 1972).

[49] Fla. H.R. 14-A, Spec. Sess. § 5 (1972).

[50] FLA. H.R. JOUR., Spec. Sess. 20 (1972).

[51] First, carnal knowledge of a person under ten years old by a person seventeen years or older was made a capital felony. Forcible rape of a person ten years or older was classified as a life felony. *Id.* at 22. Additionally, if any person was killed as a result of air piracy within the boundaries of Florida, the offense was deemed capital. *Id.* at 23. The felony-murder section of the Governor's bill was amended to include any killing which resulted "from the unlawful distribution of heroin or cocaine by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user." *Id.*

[52] *Id.* at 23.

[53] FLA. S. JOUR., Spec. Sess. 26 (1972). The Attorney General's bill, see note 28 *supra*, was never actively considered by either the House or Senate although it had been pre-filed in each chamber. The bill provided for the mandatory imposition of the death penalty upon conviction of capital crimes. Although the bill reduced felony-murder from murder in the first degree

adopted the philosophy of the Governor's bill, as amended by the House, but substantially altered the bill's sentencing procedure.[54] While the Senate version retained the sentencing options of the House-amended Governor's bill—death or life imprisonment—the Senate replaced the bill's three-judge sentencing court with the judge and jury which presided at the convicted offender's trial.[55]

Under the Senate bill the jury was to retire after hearing evidence on the existence of aggravating and mitigating circumstances whether or not enumerated in the bill[56] and by majority vote render an advisory opinion to the trial judge (1) on the presence or absence of those factors and (2) whether the death sentence should be imposed. A jury finding that no aggravating circumstances existed or that they were outweighed by mitigating circumstances was conclusive. Thus, if the jury did not recommend the death penalty, the trial judge was required to impose a life sentence. But if the jury's recommendation was for the death penalty, the trial judge was required to reconsider the evidence and make specific written findings of fact as to whether any aggravating circumstances existed and if so whether they were outweighed by any mitigating circumstances. A sentence of death was mandatory unless the court found that insufficient aggravating circumstances existed or, if found to be present, were outweighed by mitigating circumstances;[57] in such a case the court was required to sentence the offender to life in prison, with restricted parole opportunities.[58]

The New Florida Capital Punishment Statute

Because neither the House nor the Senate would retreat from its stance on the procedure and composition of the sentencing proceeding contained in the bill passed by each, a conference committee[59] was necessary to resolve the differences. The statute finally approved[60] is a hybrid: in return for the House's approval of a judge and jury sentencing procedure, the Senate abandoned its insistence that the jury have a determinative role in sentencing in capital cases. While the statute retains the Senate's philosophy that the jury should participate in the sentencing process, the jury now has the authority only to give an advisory sentence which can then be rejected by the trial judge if his findings regarding mitigating and aggravating circumstances justify such action.[61]

Under the new statute, a separate sentencing proceeding for convicted capital offenders is to be conducted "as soon as practicable" by the trial judge before the trial jury. If trial by jury was waived by the defendant or if the defendant pleaded guilty, the sentencing proceeding is to be conducted before a jury empaneled for that purpose, unless also waived by the defendant.[62] Any evidence which has probative value and is relevant to a determination of the sentence to be imposed

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to a life felony, the bill made any unlawful and knowing killing a capital felony when committed under the following circumstances:

1) When committed in the perpetration of certain named felonies; or
2) When committed pursuant to a contract for hire; or
3) When the victim was an elected officer and "assassinated"; or
4) When the victim was a law enforcement officer; or
5) When the perpetrator was a probationer or parolee who had previously been convicted of a life felony or murder in the first or second degree.

The offenses of treason, throwing bombs, discharging destructive devices resulting in death, rape, and kidnapping for ransom were all reclassified as life felonies, with a ten year minimum before parole could be granted.

[54] The most significant other amendment provided that carnal knowledge of a female ten years old or younger by a person seventeen years old or older, with force, was a capital felony. Rape of a female over the age of ten and carnal knowledge of a female under the age of eleven years were reclassified as life felonies. Fla. S. Jour., Spec. Sess. 23 (1972). The Senate also amended the bill so that if a killing occurred during an "aircraft piracy" a rebuttable presumption of premeditated design arose, making conviction of the crime a capital felony. *See id.* at 25.

[55] Fla. S. Jour., Spec. Sess. 23–24 (1972). The final version of the Senate bill provided that if the defendant had waived trial by jury or had pleaded guilty, the sentencing proceeding was to be conducted before a jury empaneled for that purpose. *See id.* at 24.

[56] While the Governor's bill limited the aggravating and mitigating circumstances to those listed in the bill—and limited the scope of evidence at the sentencing hearing to those circumstances—the Senate amendments made it clear that the court, in its discretion, could consider any other factors deemed relevant. *See* Fla. S. Jour., Spec. Sess. 25 (1972). The final statute, however, adopted the limitations of the Governor's bill. *See* notes 65–68 *infra* and accompanying text.

[57] See note 56 *supra*.

[58] Fla. S. Jour., Spec. Sess. 22 (1972).

[59] Fla. H.R. Jour., Spec. Sess. 42 (1972). For an interesting account of the conference committee's actions see Dyckman, *Our Legislature in Action: The Unwisdom of it All*, St. Petersburg (Fla.) Times, Dec. 3, 1972, at 12-B.

[60] The approved bill was signed by the Governor, without public ceremony, on December 8, 1972. St. Petersburg (Fla.) Times, Dec. 9, 1972, at 12-B.

[61] Ch. 72-724, § 9 [1972] Fla. Sess. Laws __ (Spec. Sess. 1972) (*amending* Fla. Stats. § 921.141 (1971)) [hereinafter cited as Florida Capital Punishment Act].

[62] *Id.*

may be received[63] regardless of its admissibility under the exclusionary rules of evidence, provided only that the defendant is accorded a fair opportunity to rebut any hearsay statements. The introduction of any evidence secured in violation of the defendant's constitutional rights is specifically barred. Both the prosecutor and the defendant or his counsel are permitted to present argument for or against the sentence of death.[64]

After hearing the evidence, the jury, by majority vote, is to render an advisory sentence of either life imprisonment or death to the trial judge.[65] If the jury finds that sufficient aggravating circumstances[66] exist to recommend the death sentence, then it must determine whether sufficient mitigating circumstances[67] exist to outweigh the aggravating circumstances justifying a recommendation of life imprisonment.

After receiving the advisory sentence from the jury, the trial court is required to make its own determination as to the presence or absence of aggravating or mitigating circumstances.[68] If the court determines that sufficient aggravating circumstances exist to impose the death penalty and that either no mitigating circumstances exist or those that do exist are insufficient to outweigh the aggravating circumstances, the court must specifically so find in writing and impose the death penalty. Both the judgment of conviction and sentence of death are then subject to automatic review by the Supreme Court of Florida.[69] If, on the other hand, the court determines that

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[63] *Id.* The Governor's bill limited evidence to those matters relating to any of the bill's enumerated aggravating or mitigating circumstances. *See* Fla. H.R. 14-A, Spec. Sess. § 5 (1972). The Senate bill and the final statute are virtually identical with regard to the type of evidence admissible; both provide for any relevant and probative evidence as long as the evidence *includes* matters relating to the enumerated aggravating or mitigating circumstances. *Compare* FLA. S. JOUR., Spec. Sess. 23 (1972) *with* Florida Capital Punishment Act §9.

[64] Florida Capital Punishment Act § 9.

[65] *Id.* at § 9(2):

(2) After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh aggravating circumstances found to exist, and

(c) Based on these considerations whether the defendant should be sentenced to life or death.

Subsection (3) makes clear that the jury's recommendation is to be by majority vote. *See* note 68 *infra.*

[66] *Id.* at § 9(6):

(6) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

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

(b) The defendant was previously convicted of another capital 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, 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.

[67] *Id.* at § 9(7):

(7) Mitigating circumstances.—Mitigating Circumstances shall be the following:

(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 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.

[68] *Id.* at § 9(3):

(3) Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the 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) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.

[69] *Id.* at § 9(5).

mitigating circumstances outweigh the aggravating circumstances or that no aggravating circumstances exist, the court must sentence the convicted offender to life imprisonment with restricted parole opportunities.[70]

In addition to premeditated murder, capital felonies include the unlawful killing of a person by an individual engaged in the perpetration of any arson, rape, robbery, burglary, kidnapping, aircraft piracy, the unlawful throwing, placing, or discharging of a destructive device or bomb, or any killing of a human being resulting from the unlawful distribution of heroin by a person over the age of seventeen when such drug is proved to be the proximate cause of the death of the user. The new statute rejects the innovative approach of the House-amended Governor's bill with regard to felony-murder.[71]

The new statute retains the provision of the Senate bill that rape or carnal knowledge of a person under the age of eleven by a person over the age of seventeen years is a capital felony, but rejects the Senate bill's provision that force is required; forcible rape of a person eleven years or older is reduced to a life felony.[72] The crimes of kidnapping,[73] throwing bombs or discharging machine guns in public,[74] and intentional interference with the United States or with any state in the preparation for war or for defense[75] are all reduced from capital felonies to life felonies.

[70] *Id.* § 1. The bill requires that a person who has been convicted of a capital felony and who has received a sentence of life imprisonment serve no less than twenty-five calendar years before becoming eligible for parole. *Id.* § 2 (*amending* FLA. STATS. § 775.082 (1971) *as amended* by ch. 72-118, [1972] Fla. Sess. Laws 258). If the death penalty provisions of the statute are held to be unconstitutional, the statute provides that the sentence for conviction of a capital felony will be life imprisonment, subject to the same parole restriction above. *Id.* (*amending* FLA. STATS. § 794.01 (1971)).

[71] *See* note 45 *supra*.

[72] Florida Capital Punishment Act § 7 (*amending* FLA. STATS. § 794.01 (1971)). However, FLA. STATS. § 794.01(2) (1971), as *amended by* the new capital punishment statute, also provides that, "Whoever . . . unlawfully and carnally knows and abuses a child under the age of eleven years, shall be guilty of a *life* felony." Subsection (1) of amended § 794.01 states flatly that a person seventeen years or older who commits the same crime as in subsection (2) is guilty of a *capital* felony. While the legislative intent was probably to apply the language of subsection (2) only to offenders under the age of seventeen, the statute is not so limited on its face.

[73] Florida Capital Punishment Act § 8 (*amending* FLA. STATS. § 805.02 (1971)).

[74] *Id.* § 5 (*amending* FLA. STATS. § 790.16 (1971)). The statute also provides that a sentence not exceeding life imprisonment is authorized where great bodily harm to another or serious disruption of governmental operations results. *Id.*

[75] *Id.* § 4 (*amending* FLA. STATS. § 779.07 (1971)).

[76] Note 3 *supra*.

[77] Note 4 *supra*.

[78] Notes 59-75 and accompanying text *supra*.

[79] Notes 66 & 67 *supra*.

THE NEW STATUTE—CRITIQUE AND ANALYSIS

Procedural Aspects of the New Bifurcated Trial—Constitutional Problems

Florida law in effect when *Furman* was decided[76] gave the jury complete life-or-death discretion, expressed in the jury decision whether or not to recommend mercy as part of the verdict, at the end of a single-stage trial. The statutory amendment, enacted in March 1972, to take effect on October 1, 1972,[77] provided a bifurcated trial, conducted by the same judge and jury who adjudicated guilt, culminating in a jury decision, binding on the court. The statute contained a list of aggravating and mitigating circumstances, but only as guidelines.

The new law[78] provides a bifurcated trial, by the same judge and jury. The jury's function is advisory only, and their recommendation does not bind the judge. The statutory list of aggravating and mitigating circumstances must be considered in the sentencing proceeding and if the judge imposes the death penalty he must support his decision by findings concerning these circumstances.

The statutory lists of aggravating and mitigating circumstances[79] are intended to narrow the scope of discretion in making the life-or-death decision. However, the lists include some vague language, which may not sufficiently accomplish the narrowing purpose.

The italicized language in the following excerpt from the list of aggravating circumstances seems especially vague: "the capital felony was *especially heinous, atrocious or cruel.*" Amongst the mitigating circumstances: "the defendant has no *significant* history of prior criminal activity"; "the defendant was an accomplice in the capital felony committed by another person and his participation was *relatively minor*"; "the defendant acted under *extreme duress* or under the *substantial domination* of another person"; "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*"; "the

age of the defendant at the time of the crime." Furthermore, the statute requires the jury to render an advisory sentence, as to "whether *sufficient* aggravating circumstances exist as enumerated . . . and whether *sufficient* mitigating circumstances exist as enumerated . . . , which *outweigh* aggravating circumstances found to exist. . . ." [80] The judge must thereafter perform a similar weighing process.[81]

The statute does not specify whether the existence of aggravating or mitigating circumstances must be proven beyond a reasonable doubt, or in some other manner. Nor does the statute clarify whether the trial judge, in performing his weighing process, should give any weight to the recommendation of the jury; even though the jury recommendation has no binding force, it may still have some degree of persuasion.

A considerable amount of discretion thus remains in the sentencing process—first, the discretion which inevitably exists in making a factual determination, even under the most tightly drawn statute; second, the additional discretion which is created by the vague language by which the statute describes the enumerated aggravating and mitigating circumstances; third, the further discretion which is created by vagueness in the statute as regards burden of proof and weight which the judge should give to the jury recommendation.

A system of sentencing based upon enumerated aggravating and mitigating circumstances, with written findings by the court to support the death sentence, may arguably be compatible with *Furman*, provided the court is granted no more discretion than is necessary in order to carry out such a system.[82] The new Florida statute, as indicated above, grants the court unnecessarily broad discretion, which could be significantly reduced by careful redrafting. The existence of this unnecessary amount of discretion raises serious questions under *Furman*.

Williams v. New York,[83] decided by the United States Supreme Court in 1949, sustained the validity of a New York statute which authorized the trial judge to impose the death sentence even though the jury had recommended mercy. The Court noted that the constitutional guarantee of trial by jury involved only the determination of guilt, not the sentence.

While *Williams* indicates that the constitutionality of a capital punishment statute is not impaired by transferring ultimate sentencing authority from the jury to the judge, a post-*Furman* decision by the Delaware supreme court[84] indicates that such a transfer does nothing to enhance the validity of the system when tested against *Furman*. The Delaware court held that state's *Williams*-type statute unconstitutional, since it "delegates to jury and judge uncontrolled discretion in the imposition of the death penalty that now stands condemned by the United States Supreme Court in *Furman*. . . ."[85]

If the United States Supreme Court takes a similar view, Florida has made no progress toward constitutionality by transferring ultimate life-or-death authority from the jury to the judge. And, by making this change, Florida has adopted a policy which has been rejected by the vast majority of jurisdictions. A 1953 law review article[86] noted that only New York,[87] Delaware[88] and Utah[89] authorized the trial court to impose a death sentence after the jury had recommended mercy, while South Dakota[90] permitted the court to grant mercy after a jury recommendation of death but not vice versa. Since then, New York has amended its statute so as to remove this authority from the judge, who can now pronounce the death penalty only upon the unanimous recommendation of the jury.[91] Utah appears to be the

[80] Florida Capital Punishment Act § 9(5). See note 65 *supra*.
[81] *Id.* § 9(3). See note 68 *supra*.
[82] *See, e.g.*, Ehrhardt, *supra* note 33.
[83] 337 U.S. 241 (1949).
[84] State v. Dickerson, __A.2d__ (Del. 1972).
[85] *Id.* at __.
[86] Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953). A similar analysis can be found in MODEL PENAL CODE, App. D, 125 (Tent. Draft No. 9, 1959). The major policy considerations against permitting the judge to overrule the jury are summarized in the commentary to ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 47 (Approved Draft, 1968).
[87] The New York statute was subsequently amended so as to repeal this feature; *see* note 91 and accompanying text *infra*. The history of New York law on this point is traced in People v. Fitzpatrick, 61 Misc. 2d 1043, 308 N.Y.S.2d 18, *motion denied* 34 App. Div. 2d 730, 311 N.Y.S.2d 577, *appeal dismissed*, 27 N.Y.2d 742, 314 N.Y.S.2d 992, 263 N.E. 2d 390 (1970).
[88] The Delaware statute is DEL. CODE ANN. § 3901 (1953) which however was recently held unconstitutional; *see* notes 84–86 and accompanying text *supra*.
[89] The Utah statute is UTAH CODE ANN. § 76-30-4 (1953).
[90] The South Dakota statute is S.D. COMPILED LAWS ANN. § 22-16-13 (1967).
[91] N.Y. PENAL LAW §§ 125.30, 125.35 (McKinney, 1967). *See also* note 87 supra.

only other jurisdiction, besides Florida under the new statute, authorizing the judge to impose a death sentence after the jury has recommended mercy.

Appellate Review Following Imposition of the Death Penalty

Pre-*Furman* Florida law permitted an appeal from the trial court to the Florida supreme court, as a matter of right, in all cases where the death penalty was imposed.[92] The supreme court reviewed the determination of guilt, but could not reduce the sentence as being excessive, so long as the sentence was permissible under the statute. The new law provides automatic review by the supreme court, promptly after the trial, and the supreme court now reviews the sentence as well as the determination of guilt.[93]

By providing for review of the sentence, the new law evidently requires the supreme court to review the trial court's findings of the existence of aggravating and mitigating circumstances, and the process by which the trial court determined that the mitigating circumstances, if any, were not sufficient to outweigh the aggravating circumstances.

The statute contains no guidelines for the exercise of the supreme court's appellate function. We may wonder, for example, whether the supreme court will sustain the trial court upon a finding of "substantial evidence", even though the supreme court might have reached the opposite result in a hearing de novo.[94] Further, we may ask whether the supreme court should be influenced by the circumstance, where it exists, of a disagreement between the trial judge and jury.[95]

The uncertainties in the statutory procedures for the trial court are, therefore, compounded by uncertainties in the scope of appellate review by the Florida supreme court. The statute vests a significant amount of discretion in that court, to the extent that it possesses almost as much discretion as if the statute simply authorized the supreme court to grant mercy in its discretion. The extent of the supreme court's discretion under the new statute raises additional questions under *Furman*, and may subject the supreme court to an unwelcome new responsibility.

Lack of Change in Procedure at Other Stages of the System

The memorandum submitted in October 1972 by the legal advisory staff of the Governor's Committee suggested that, in order to stand even a theoretical chance of satisfying constitutional standards, a system of capital punishment "would necessarily include provisions designed to eliminate, as far as humanly possible, the risk of arbitrary, freakish or discriminatory decision in capital cases, not only in the jury function, but at all stages of the process where substantial discretion now exists." [96] As examples of areas of substantial discretion, the memorandum mentioned executive clemency, jury discretion to convict of a lesser offense, and plea bargaining to lesser included offenses.[97] These examples were not intended to be an exhaustive listing; additional discretionary functions readily come to mind, including the prosecutor's decision whether or not to prosecute and, if so, what offense to charge and what penalty to suggest; the grand jury function; and the availability and sufficiency of defense counsel beyond the bare minimum required to meet constitutional or statutory requirements.

Amongst these discretionary functions, executive clemency occupies a unique position, since it is exercised by the Governor and members of the cabinet on the basis of authority specifically provided in the Florida Constitution.[98] It cannot

[92] *See* notes 8–10 and accompanying text *supra*.

[93] The difference between "automatic review by the Supreme Court" in the new statute and the "appeal as a matter of right to the Supreme Court" in the old statute is by no means clear, especially as the Florida Constitution confers jurisdiction upon the supreme court in language identical to the old statute. This question could only arise in the highly unlikely event that a person who had been sentenced to death made no attempt to appeal to the supreme court. The court would then have to decide whether to entertain "automatic review" without an active appellant. Under both old and new statutes, if the sentence is not death, appeal is taken from the trial court to the district court of appeals. *See* note 10 *supra*.

[94] In Nelson v. State *ex rel.* Quigg, 156 Fla. 189, 191, 23 So.2d 136, 136–37 (1945), *cert. denied*, 327 U.S. 390 (1946), the court noted the "almost universal rule, that the findings of fact made by an administrative board, bureau or commission, in compliance with law, will not be disturbed on appeal if such findings are sustained by substantial evidence.... This rule finds its counterpart in, if indeed it is not the twin brother of, the rule which requires an appellate court to give great weight to the findings of fact made by a jury or a chancellor and to sustain such findings unless there is no substantial evidence to support them."

[95] The concept is well settled in administrative law, *e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), and may be appropriate for consideration in the appellate review of sentencing.

[96] Ehrhardt, *supra* note 33, at 6.

[97] *Id.*

[98] FLA. CONST. art. IV, § 8 (1968).

therefore be controlled by statute. It could, and arguably should, be controlled by quasi-legislative acts of the executive, announcing procedures and standards so as to accomplish a voluntary self-limitation of the future exercise of clemency in individual cases.[99] The other areas of discretion seem amenable to statutory control.

The new Florida capital punishment statute makes no attempt at limiting discretion at any stage of the process except sentencing. The statute thereby fails to respond adequately to the requirements of *Furman*, as we interpret them.

Parole Restrictions

The new Florida statute contains a provision, without equivalent in prior law, requiring at least twenty-five years of imprisonment to be served before eligibility for parole, by defendants whose lives have been spared after conviction of a capital felony.[100] This provision inevitably puts pressure on the pardon and commutation power of the executive, which is not restricted—and indeed could not be restricted[101]—by the statute. Prisoners confined under the twenty-five year no-parole sentence will obviously seek executive clemency as a means of reducing the length of time to be served. The prospect of this pressure on the executive clemency function emphasizes the need previously noted,[102] for executive development of guidelines for the exercise of clemency.

Moreover, the twenty-five year no-parole sentence raises serious penological questions. Corrections officials testified to the Governor's Committee that lifetime imprisonment, without any possibility of parole, would seriously prejudice prison administration, since inmates would be unmanageable.[103] The officials also testified that, by the time an inmate has been imprisoned for twenty years, he is likely to be either a vegetable or a maniac, and in any event hardly fit for release.[104] The twenty-five year no-parole sentence therefore is likely to result either in the release of inmates after that length of time, in a deteriorated condition with a strong potential of danger to society, or in the imprisonment of inmates for their entire lives, since after twenty-five years they will be found unfit for release.

The Life Felony Classification

The new statute creates the life felony, a new classification relating to offenses less serious than capital felonies but more serious than felonies of the first degree.[105] The life felony carries imprisonment for life, or for a term of years not less than thirty; parole is not precluded. Some felonies which were previously capital are reduced to life felonies.[106]

It is questionable whether this additional classification of offenses is needed. The felony of the first degree carries a maximum term of thirty years or, when specifically provided by statute, life imprisonment.[107] Prisoners seldom serve the full term of their sentences, since they are generally released on parole after serving only a portion of it[108]—and, as pointed out above, corrections officials oppose imprisonment for terms as long as twenty years. In view of current practices with regard to parole, the distinction between the penalties for life felony and felony of the first degree seems minimal.

Committee Support for The New Statute

The report issued by the Governor's Committee to Study Capital Punishment deals almost exclusively with the single question whether capital punishment should be reinstated. The committee's report did not address itself to the other matters in the Executive Order which created the committee, since no significant amount of information had been received on anything other than the

[99] *See generally* K. DAVIS, DISCRETIONARY JUSTICE 126–41, 221–22 (1969).

[100] Florida Capital Punishment Act § 2 (*amending* FLA. STATS. § 775.082 *as amended by* ch. 72–118, [1972] Fla. Sess. Laws 258).

[101] *See* note 98 and accompanying text *supra*.

[102] *See* note 99 and accompanying text *supra*.

[103] Statement by Louie L. Wainwright, Director, Florida Division of Corrections, to the Governor's Committee to Study Capital Punishment, August 17, 1972, in Tallahassee, Florida. Mr. Wainwright's views were supported by testimony of Armond R. Cross, Chairman, Florida Parole and Probation Commission, *id.*

[104] These observations were made in response to questions at the meeting of the committee cited in note 103 *supra*, attended by one of the authors of this article, and are not recorded in these terms in the report of the committee. Newspaper reports of the legislative debate on the twenty-five year no-parole provision are to the same effect. *See, e.g.*, St. Petersburg (Fla.) Times, Dec. 2, 1972, at 1-A.

[105] Florida Capital Punishment Act §§ 1 (*amending* FLA. STATS. § 775.081 (1971)) and 2 (*amending* FLA. STATS. § 775.082, *as amended by* ch. 72–118, [1972] Fla. Sess. Laws 258).

[106] Notes 70–75 and accompanying text *supra*.

[107] FLA. STATS. § 775.082(2)(a) (1971).

[108] Cross, *supra* note 103, notes that "The average length of time served on [life] sentence before parole release is granted is 9.55 years."

question of reinstating capital punishment. The House Select Committee on the Death Penalty prepared a brief report, which focused primarily on the sentencing procedure which should be adopted when capital punishment was reinstated. The Senate Council on Criminal Justice filed no report at all, other than the draft of legislation it recommended.

Thus the new Florida capital punishment statute is supported by committee reports only in one respect—on the question whether to reinstate capital punishment. No part of the committee reports provides significant information on the other matters dealt with in the statute such as sentencing procedure, appellate review, minimum sentence without parole. The lack of committee work products on these crucial questions became especially unforunate when the Senate-House conference committee met during the final night of the legislative session to draft a compromise bill. Many of the deficiencies in the statute might well have been remedied at that time if the conference committee had the benefit of adequate reports containing information about experience in other jurisdictions, surveys of professional and scholarly literature, testimony from experts, and alternative solutions.

Conclusion

Although seriously defective, the statute enacted during the legislature's whirl-wind four day special session appears to have placated the proponents of reinstatement of capital punishment. Doubts about the constitutionality of the statute were frequently expressed, but seldom as criticisms of the new statute or its authors.[109] The *Tampa Tribune* observed editorially:

> Justices of the Supreme Court in their readiness to bend the Constitution to fit their own sentiments may find the new Florida law as invalid as the old. But, if so, some of the responsibility for the callous killings of innocent citizens will rest with the Court, not with Governor Askew and the Legislature. They have fashioned a fair method for punishing the guilty and deterring the potential killer.[110]

Thus, constitutional problems were brushed aside by Florida lawmakers and other leaders of opinion. The capital punishment statute seems to have been an expedient response to election-time politics rather than a sound response to the constitutional and penological needs of the state.[111] The need remains as great after enactment of this statute as before for comprehensive study and reform of our entire system of criminal justice and corrections.

[109] *See, e.g.*, Miami (Fla.) Herald, Dec. 3, 1972, at 1-B; St. Petersburg (Fla.) Times, Dec. 4, 1972, at 1-B. The only editorial criticism in a major Florida newspaper the authors could locate was in the St. Petersburg (Fla.) Times, Dec. 2, 1972, at 16-A:

> Askew should, but no doubt won't, veto the compromise death penalty bill which fails to fully conform to the standards he proposed. . . . It is up to Askew, or the U.S. Supreme Court, to correct the Legislature's hastily written mistake.

[110] Tampa (Fla.) Tribune, Dec. 2, 1972, at 14-A.

[111] This discussion raises problems of legislative ethics, a subject beyond the scope of the present article.