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NOTES

FLORIDA'S LEGISLATIVE AND JUDICIAL RESPONSES TO *FURMAN V. GEORGIA*: AN ANALYSIS AND CRITICISM

On June 29, 1972, the Supreme Court of the United States addressed the constitutionality of the death penalty by deciding the case of *Furman v. Georgia*¹ and its two companion cases.² The five man majority agreed only upon a one paragraph per curiam opinion, which held 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."³ The per curiam opinion of the majority was followed by five separate concurring opinions⁴ and four separate dissents.⁵

The impact of the *Furman* decision reached beyond the lives of the three petitioners involved.⁶ In *Stewart v. Massachusetts*⁷ and its companion cases,⁸ all decided on the same day as *Furman*, the Supreme Court vacated death sentences in more than 120 other capital cases, which had been imposed under the capital punishment statutes of 26 states. This plethora of per curiam reversals included nine Florida cases in which the petitioners had been sentenced to death.⁹ In response to

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

2. *Furman v. Georgia*, No. 69-5003; *Jackson v. Georgia*, No. 69-5030; and *Branch v. Texas*, No. 69-5031, were consolidated and decided together. Hereinafter, the three consolidated cases will be referred to as *Furman v. Georgia*.

3. 408 U.S. at 239-40.

4. Concurring opinions were written by Justices Douglas, Brennan, Stewart, White and Marshall, all of whom are holdovers from the Warren Court.

5. Dissenting opinions were written by Chief Justice Burger and Justices Blackmun, Powell and Rehnquist, all of whom are Nixon appointees.

6. Petitioner *Furman* was sentenced to death for murder under GA. CODE ANN. § 26-1005 (Supp. 1971). *Furman v. State*, 167 S.E.2d 628 (Ga. 1969). Petitioner *Jackson* was sentenced to death for rape under GA. CODE ANN. § 26-1302 (Supp. 1971). *Jackson v. State*, 171 S.E.2d 501 (Ga. 1969). Petitioner *Branch* was sentenced to death for rape under TEX. PENAL CODE art. 1189 (1961). *Branch v. State*, 447 S.W.2d 932 (Tex. Crim. App. 1969).

Justice Powell in his dissent recognized the far-reaching effect of *Furman*:

Because of the pervasiveness of the constitutional ruling sought by petitioners, and accepted in varying degrees by five members of the Court, today's departure from established precedent invalidates a staggering number of state and federal laws. The capital punishment laws of no less than 39 States and the District of Columbia are nullified.

408 U.S. at 417 (footnote omitted).

7. 408 U.S. 845 (1972).

8. See 408 U.S. 932-41 (1972).

9. *Hawkins v. Wainwright*, 408 U.S. 941 (1972); *Pitts v. Wainwright*, 408 U.S. 941 (1972); *Williams v. Wainwright*, 408 U.S. 941 (1972); *Boykin v. Florida*, 408 U.S. 940 (1972); *Johnson v. Florida*, 408 U.S. 939 (1972); *Anderson v. Florida*, 408 U.S. 938 (1972); *Brown v. Florida*, 408 U.S. 938 (1972); *Paramore v. Florida*, 408 U.S. 935 (1972); *Thomas v. Florida*, 408 U.S. 935 (1972).

the decision in *Furman* the highest courts of several states invalidated their respective death penalty statutes.¹⁰ The Florida Supreme Court responded by ruling that "Florida no longer has what has been termed a 'capital case'"¹¹ and that all death row inmates would be resentenced to life imprisonment.¹²

After Florida's death penalty statute had been ruled unconstitutional, the Florida Legislature, like the legislatures of several other states,¹³ deemed it necessary to reincarnate the death penalty¹⁴ by means of a statute that would be constitutionally acceptable to the United States Supreme Court. On December 1, 1972, Florida enacted a new Capital Punishment Act,¹⁵ which was patterned after the American Law Institute's Model Penal Code,¹⁶ and thereby became the first state to reinstate the death penalty. Similarly, by upholding the new Florida Capital Punishment Act in *State v. Dixon*,¹⁷ the Florida Supreme Court became the first state supreme court to rule on the constitutionality of a post-*Furman* death penalty statute.

The purpose of this note is to measure Florida's legislative and judicial responses to *Furman* against the constitutional yardstick provided by the five concurring opinions in *Furman*. Because several state legislatures have followed Florida's lead by enacting death penalty statutes patterned after the Model Penal Code,¹⁸ the constitutional

10. See, e.g., *Sullivan v. State*, 194 S.E.2d 410 (Ga. 1972); *State v. Sinclair*, 268 So. 2d 514 (La. 1972); *Capler v. State*, 268 So. 2d 338 (Miss. 1972); *Hodges v. Commonwealth*, 191 S.E.2d 794 (Va. 1972).

11. *Donaldson v. Sack*, 265 So. 2d 499, 505 (Fla. 1972).

12. *In re Baker*, 267 So. 2d 331 (Fla. 1972); *Anderson v. State*, 267 So. 2d 8 (Fla. 1972).

13. As of this writing at least sixteen states have reinstated capital punishment: Arizona, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Indiana, Montana, Nebraska, Nevada, New Mexico, Ohio, Tennessee, Utah and Wyoming. See *St. Petersburg Times*, May 10, 1973, § A, at 24, col. 1.

14. The move to reenact a death penalty was, in many states, undoubtedly a response to political pressure exerted upon legislators by an electorate dissatisfied with the *Furman* decision. In Florida, for example, the reinstatement of capital punishment was an issue in the 1972 legislative election campaign. The new Capital Punishment Act itself was hastily enacted in a special session of the legislature called shortly after the 1972 general election, and was clearly the product of political turmoil. See Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L. & C. 10, 12-15 (1973).

15. Fla. Laws 1973, ch. 72-724, § 9, amending FLA. STAT. § 921.141 (1971) [hereinafter cited as Florida Capital Punishment Act; reference to specific subsections of the act will be indicated parenthetically by reference to the Florida statutes section amended]. The act took effect on December 8, 1972, when it was signed by the Governor.

16. See MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

17. 283 So. 2d 1 (Fla. 1973). This case is the consolidation of four cases: *State v. Dixon*, No. 43,521; *State v. Setser*, No. 43,460; *State v. Hunter*, No. 43,478; and *State v. Sheppard*, No. 43,473.

18. See, e.g., GA. CODE ANN. § 27-25341.1 (1973); MONT. REV. CODES ANN. § 94-5-105

significance of the Florida Capital Punishment Act and of *State v. Dixon* is not limited to Florida alone.

I. THE *Furman* DECISION

In a few cases prior to *Furman* the Supreme Court had indicated in dicta that capital punishment was not constitutionally impermissible.¹⁹ Nevertheless, the Court in *Furman* held that the "imposition and carrying out" of the death penalty under capital punishment statutes of Georgia and Texas was cruel and unusual punishment. Thus any statute, state²⁰ or federal, purporting to reinstate the death penalty must comport with constitutional guidelines set out in *Furman*. Such guidelines, however, do not appear in the majority's per curiam opinion; any guidelines that may exist must be gleaned from the five separate concurring opinions.

(1973); WYO. STAT. ANN. § 6-54 (1973); Ariz. Laws 1973, ch. 138; Ark. Acts 1973, ch. 438; Nev. Laws 1973, ch. 798; Tenn. Laws 1973, ch. 192.

19. Three Supreme Court decisions have implicitly recognized the constitutionality of capital punishment. In *Wilkerson v. Utah*, 99 U.S. 130 (1878), the Court unanimously upheld, as not "cruel and unusual," a public execution by shooting under the laws of the Utah territory. *In re Kemmler*, 136 U.S. 436 (1890), unanimously held that death by electrocution, which had been adopted by New York on the ground that it was more humane than hanging, did not offend the due process clause. Finally, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), held, 5-4, that a second attempt at electrocution, after an initial failure to apply a lethal charge, did not violate the Constitution (eight Justices applied the eighth amendment in *Resweber*; only Justice Frankfurter resorted to the due process clause, and this was a formal distinction only). In a more recent case, *Trop v. Dulles*, 356 U.S. 86 (1958), the Court stated in dicta:

Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.

Id. at 99.

Justice Black echoed this theme in his concurring opinion in *McGautha v. California*, 402 U.S. 183, 226 (1971), by stating: "The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted." The above precedents accepted the death penalty largely as a matter of historical fact and did not contain analyses of the values implicit in the eighth amendment as they relate to capital punishment.

20. The eighth amendment protection against "cruel and unusual punishment" was implicitly held applicable to the states through the fourteenth amendment in *Robinson v. California*, 370 U.S. 660 (1962), which invalidated a California statute imposing criminal sanctions for the passive status of narcotics addiction. Although the Court in *Robinson* did not specifically say it was applying the eighth amendment to the states, it was subsequently stated in *Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963), that *Robinson* "made obligatory on the States the . . . Eighth's ban on cruel and unusual punishment." These decisions apparently overrule *O'Neil v. Vermont*, 144 U.S. 323, 332

A. Common Themes

Two things are readily apparent from the five separate opinions: first, the concurring Justices did not reach the same constitutional conclusion regarding the death penalty; secondly, each concurring Justice's vote turned on different considerations. But even though the *Furman* opinions are distinct, there is some concurrence among them. In order to determine the constitutional guidelines embodied in the decision, it is helpful to draw the common threads from the separate opinions because the impact of the decision is obviously greatest in those areas in which the most Justices agreed.

Although four Justices dissented on grounds that reflect a restrictive view of the Court's role vis-a-vis the legislature, all nine Justices agreed that capital punishment is an unwise public policy. Chief Justice Burger in his dissent (joined by the other three dissenting Justices) said: "If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall [who held capital punishment unqualifiedly unconstitutional] or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes."²¹ Mr. Justice Blackmun, in dissent, added a more condemning statement:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these convictions.²²

All of the Justices also agreed that the eighth amendment, when adopted in 1791, was not intended to bar capital punishment.²³ Nevertheless,

(1892), which held: "[A]s a Federal question, it has always been ruled that the 8th Amendment to the Constitution of the United States does not apply to the States." (Citation omitted.)

21. 408 U.S. at 375-76.

22. *Id.* at 405-06.

23. The eighth amendment prohibition against the infliction of cruel and unusual punishments "received very little debate" when adopted into the Constitution in

either expressly or impliedly, they all approached eighth amendment interpretation in the flexible manner previously employed by the Supreme Court in *Weems v. United States*²⁴ and *Trop v. Dulles*.²⁵

Other commonalities in the five concurring opinions were agreement that the application of the death penalty was arbitrary (Douglas, Brennan, Stewart, White and Marshall, JJ.), that the death penalty was excessive to the ends of the criminal justice system it was supposed to serve (Brennan, Stewart, White and Marshall, JJ.), and that the death penalty was constitutionally impermissible under any circumstances (Brennan and Marshall, JJ.).

1791. *Weems v. United States*, 217 U.S. 349, 368 (1910). See generally Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 840-41 (1969). The original meaning of the clause is somewhat unclear. The exact language found in the eighth amendment can be traced back to the English Bill of Rights of 1689. 408 U.S. at 319 (Marshall, J., concurring). The English Bill of Rights was passed by Parliament in 1689 as a reaction against the Bloody Assizes, a barbarous governmental campaign that led to the successful defeat of the revolution of 1688. *Id.* at 253-55 (Douglas, J., concurring). It is probable that the cruel and unusual punishments that Parliament sought to prohibit in 1689 were those punishments "which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering." *O'Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting). In view of the widespread acceptance and infliction of the death penalty at the time of the adoption of the eighth amendment, it is also probable that "[t]he Eighth Amendment . . . was included in the Bill of Rights to guard against the use of torturous and inhuman punishments, not those of limited efficacy [*i.e.* capital punishment]." 408 U.S. at 391 (Burger, C.J., dissenting). Justice Powell agreed that "whatever punishments the Framers . . . may have intended to prohibit under the 'cruel and unusual' language, there cannot be the slightest doubt that they intended no absolute bar on the Government's authority to impose the death penalty." *Id.* at 419 (Powell, J., dissenting). The view that the eighth amendment was not intended to prohibit the death penalty when adopted and, therefore, that it cannot now be employed to prohibit capital punishment has a curious result if followed to its logical conclusion. Whipping, lopping off of ears, branding, boring through the tongue, and pillorying were all common in 1791. See M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 243 (1973). The reasoning of Justices Burger and Powell could logically recognize these eighteenth- and nineteenth-century punishments as being as constitutionally acceptable as the death penalty.

24. 217 U.S. 349 (1910).

25. 356 U.S. 86 (1958). In *Weems v. United States*, 217 U.S. 349 (1910), the United States Supreme Court stated that the cruel and unusual punishment clause is not static but "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378. In *Trop v. Dulles*, 356 U.S. 86 (1958), the Court noted that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101 (plurality opinion of Warren, C.J.). Express statements accepting this flexible eighth amendment approach were made in *Furman* by Justice Douglas, 408 U.S. at 242 (quoting *Weems* and *Trop*), Justice Marshall, *id.* at 327 (citing *Weems* and quoting *Trop*), and Justice Brennan, *id.* at 278 (citing *Weems* and *Trop* and adding: "The question under this principle . . . is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment un-

B. *The Concurring Opinions*

1. *Brennan and Marshall.*—Justices Brennan and Marshall concluded that capital punishment per se violates the eighth amendment. Their separate opinions follow a similar course. Both examined the history leading to the adoption of the “cruel and unusual punishment” provision and the Supreme Court decisions interpreting it.²⁶ From this analysis they derived certain generally applicable criteria to govern cruel and unusual punishment decisions. Justice Brennan found the central principal to be that “a punishment must not be so severe as to be degrading to the dignity of human beings.”²⁷ To determine this, he developed four interrelated principles and fashioned a cumulative test to guide the court in deciding whether punishments are in accord with human dignity:

If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.²⁸

In contrast to Brennan’s interrelated principles, Justice Marshall derived four distinct criteria from the case law, any of which, if satisfied, would suffice to render a punishment unconstitutional:

First, there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them—*e.g.*, use of the rack, the thumbscrew, or other modes of torture. . . .

acceptable.”). Justice Stewart evidently accepted and applied the same flexible eighth amendment test because he cited with approval portions of the other Justices’ opinions that referred to this test as the appropriate standard. *See id.* at 306 n.1 (Stewart, J., concurring). Justice White clearly adopted this flexible approach because, in concluding that discretionary capital punishment is violative of the eighth amendment, he emphasized that “capital punishment within the confines of the statutes now before us has for all practical purposes run its course.” *Id.* at 313 (White, J., concurring). Furthermore, none of the dissenting Justices rejected the *Weems-Trop* formulation as the controlling test. To the contrary, Chief Justice Burger and Justice Powell, each speaking for all four dissenters, quoted the “evolving standards of decency” test with approval. *Id.* at 383 (Burger, C.J., dissenting), 425 (Powell, J., dissenting).

26. *See* 408 U.S. at 257-71 (Brennan, J., concurring), 317-30 (Marshall, J., concurring).

27. *Id.* at 271.

28. *Id.* at 282.

Second, there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense. . . . If these punishments are intended to serve a humane purpose, they may be constitutionally permissible. . . .

Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. . . .

Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it.²⁹

On the basis of the last two criteria Justice Marshall found capital punishment unconstitutional. Thus Marshall and Brennan reached the same conclusion regarding capital punishment, and, in doing so, their arguments are in accord on two points: first, both felt that death is an uncivilized punishment degrading to human dignity; secondly, both believed that capital punishment is rejected by the mores of contemporary society.

These two Justices also agreed that the infliction of capital punishment was arbitrary and excessive. Justice Brennan found that the extreme infrequency with which the death penalty historically has been exacted strongly implied that "the punishment is not being regularly and fairly applied";³⁰ furthermore, "[w]hen the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily."³¹ Justice Brennan went on to find that the infrequent application of the death penalty provided evidence that the legitimate goals of the criminal justice system could be served sufficiently by the less excessive punishment of imprisonment.³² Justice Marshall not only agreed that the imposition of the death penalty has been arbitrary, but also found that it has been discriminatory. He supplied statistical evidence in his opinion purporting to indicate that the death penalty has been discriminatorily applied against certain socio-economic and racial minorities.³³ Justice Marshall also found capital punishment excessive from a moral and utilitarian point of view. On moral grounds, he felt that the eighth amendment could not tolerate retribution as the sole justification for criminal punishment;³⁴ on utilitarian grounds,

29. *Id.* at 330-32.

30. *Id.* at 293.

31. *Id.*

32. *Id.* at 300.

33. *See id.* at 364-66.

34. *Id.* at 343.

he was convinced by comparative studies that capital punishment was not an effective deterrent.³⁵

2. *Douglas*.—Justice Douglas' opinion in *Furman* turns on the concept of equal protection that he found implicit in the eighth amendment.³⁶ Justice Douglas felt that the authors of "the Eight Amendment knew what price . . . [was] paid for a system [of law] based . . . on discrimination. . . . [Therefore] the desire for equality was reflected in the ban against 'cruel and unusual punishments'. . . ."³⁷ Douglas' opinion is unique because, rather than addressing the death penalty itself, it focused on the process by which the penalty is inflicted. Moreover, nowhere in his opinion did Douglas take note of the finality and extreme severity of capital punishment.³⁸ Of critical significance to his decision were studies purporting to show that the death penalty fell most heavily on the "lower castes" of society.³⁹ On the basis of this "selective," "arbitrary" and "discriminatory" meting out of the death penalty, revealed by the studies, Douglas concluded:

Thus, these discretionary [capital punishment] statutes are unconstitutional in their operation. They are pregnant with discrimi-

35. *Id.* at 345-54. Justice Marshall also ruled out prevention of recidivism, *id.* at 355, encouragement of guilty pleas, *id.* at 355-56, eugenics, *id.* at 356-57, and economy, *id.* at 357-59, as practical justifications for the death penalty.

36. *Id.* at 255.

37. *Id.*

38. The Douglas opinion is interesting because the unique reasoning he employs could have a far reaching effect. Justice Douglas keys his analysis of capital punishment on the sentencing process rather than on the penalty. What he found "cruel and unusual" about the death penalty was its selective application to the "lower castes" of society. *Id.* at 255. Apparently, Justice Douglas found an irremediable problem within a society that is filled with prejudice toward weak and unpopular minorities. Since this bias of society cannot be corrected, Douglas ruled unconstitutional the imposition of a punishment that gives vent to these prejudices. The discretionary infliction of the death penalty, he felt, was unconstitutional because it had resulted in the discriminatory infliction of the death penalty. However, Douglas' rationale need not stop with capital punishment: presented with the question, Justice Douglas could logically find the entire discretionary American criminal justice sentencing system "cruel and unusual" if he could be shown that it results in the selective application of punishment. Moreover, it seems likely that statistics could be compiled that show that prison sentences, jail sentences and fines also fall most heavily on the "lower castes" of society. Therefore, if Douglas' reasoning is carried to its logical extension, all forms of criminal sanctions could be found to be "cruel and unusual." This conclusion is buttressed by Justice Douglas' observations that skilled and resourceful legal talent is unavailable to the poor and that discretionary sentencing feeds prejudice. *Id.* at 255-56. Thus it would seem that although Justice Douglas did not decide whether the death penalty is per se unconstitutional, the potential scope of his opinion reaches further than the opinions of Justices Brennan and Marshall, who did hold the death penalty to be per se unconstitutional.

39. *Id.* at 249-52.

nation and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.⁴⁰

Justice Douglas did not reach the question of whether the death penalty is unconstitutional in all cases, and thereby left open the question of the constitutionality of a mandatory death penalty statute. He did, however, reassert his basic "cruel and unusual" test by suggesting that a mandatory statute in operation may also fail to comport with the implicit equal protection guarantee of the eighth amendment.⁴¹ To satisfy Douglas' approach to the eighth amendment a statute reinstating the death penalty would, at the very least, need to be mandatory because Justice Douglas found that "the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised . . . or if he is a member of a suspect or unpopular minority . . ." ⁴² The emphasis Justice Douglas placed on the elimination of discretion, some of which is present even under a mandatory statute, would seem to indicate that he would find a sentencing process that retains any degree of discretion unconstitutional. Justice Douglas found that discretion feeds prejudice. Discretion at the indictment level, conviction level or executive clemency level of a mandatory death sentence procedure would also feed prejudice. Therefore, the ultimate effect of Justice Douglas' opinion may be that although the *sentence* of death itself is not unconstitutionally cruel and unusual, the *procedure* for imposing it is.

3. *Stewart and White*.—The opinions of Justices Stewart and White are crucial because these two Justices seem to be the only members of the *Furman* majority who may possibly vote with the *Furman* minority if presented with a new capital punishment case. Such a change of votes would produce a new majority upholding the constitutionality of the death penalty. The legislatures that have reenacted the death penalty have undoubtedly attempted to draft their statutes to satisfy Stewart and White in order to retain capital punishment in a constitutional form.

Justice Stewart did not reach the ultimate question of the constitutionality of the death penalty. Furthermore, he did not rule out

40. *Id.* at 256-57.

41. *Id.* at 257. Justice Douglas concluded that a facially non-discriminatory, mandatory statute would suffer from the same constitutional infirmities as a discretionary statute if, in operation, it resulted in the discriminatory application of the death penalty. To support this conclusion he cited *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

42. 408 U.S. at 255 (Douglas, J., concurring).

retribution as a constitutionally permissible goal of criminal punishment.⁴³ Instead, he postponed for another day the determination of whether a particular class of criminal conduct could be so atrocious that society's interest in maximum deterrence and retribution, by itself, could constitutionally justify capital punishment legislation.⁴⁴ Justice Stewart's opinion, however, did resolve some issues concerning capital punishment. It is important to distinguish those questions he resolved from those he postponed because a statute reenacting the death penalty cannot withstand Stewart's scrutiny if it embodies elements that Stewart has found unconstitutional.

Justice Stewart directed his assault on capital punishment at the two clearest benchmarks of its administration—arbitrariness and infrequency. His primary concern was the capricious and random selection of a handful of unlucky capital offenders to be executed.⁴⁵ In Stewart's opinion "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."⁴⁶ Furthermore, Stewart viewed the administration of the death penalty under existing law as excessive because he regarded the legislative authorization of either life imprisonment or death in most capital cases as tantamount to a legislative determination that the former was a sufficient penalty.⁴⁷

Justice Stewart found death to be an arbitrary and excessive punishment because it has been imposed under capital punishment statutes that "have not provided that the death penalty shall be imposed upon all those who are found guilty . . . [and that have] not ordained that death shall be the automatic punishment."⁴⁸ Moreover, he specified that his opinion does not reach the question of the constitutionality of a mandatory death penalty statute⁴⁹ because "[t]he constitutionality of capital punishment in the abstract is not . . . before us in these cases."⁵⁰ It is not clear from his opinion whether any non-mandatory capital punishment statute could survive Stewart's constitutional test. His opinion did, however, find the death penalty statutes of Texas and Georgia to be "within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments"⁵¹ because neither

43. *Id.* at 308 (Stewart, J., concurring).

44. *Id.* at 307-08.

45. *Id.* at 309-11.

46. *Id.* at 310.

47. *Id.* at 308-09.

48. *Id.* at 308.

49. *Id.* at 307.

50. *Id.* at 308.

51. *Id.* at 309.

Texas nor Georgia had "made a *legislative* determination that forcible rape and murder can be deterred only by imposing the penalty of death upon *all* those who perpetrate those offenses."⁵² Therefore, it would seem that a non-mandatory capital punishment statute would not win Stewart's vote because, by delegating sentencing discretion to a non-legislative body, such a statute would not guarantee that "all" capital offenders are "automatically" executed.

Justice White's opinion is similar to Justice Stewart's in that it reserved the question of "[t]he facial constitutionality of statutes requiring the imposition of the death penalty,"⁵³ and in that it focused on the infrequent and arbitrary application of capital punishment. Stewart accepted retribution as a constitutionally acceptable "ingredient" of capital punishment; White, on the other hand, focused on the deterrent effect of capital punishment, which he believes to be "a major goal of the criminal law."⁵⁴

White agreed with Stewart that the death penalty was arbitrarily imposed, and he would require that there be a "meaningful basis" to distinguish those who are executed from those who are not.⁵⁵ Justice White's main concern, however, was the extremely infrequent infliction of the death penalty which, in his opinion, has resulted in capital punishment's ceasing to be a credible deterrent.⁵⁶ Therefore, he concluded that the imposition of capital punishment

in such circumstances would . . . be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.⁵⁷

52. *Id.* (emphasis added).

53. *Id.* at 310 (White, J., concurring).

54. *Id.* at 311-12.

55. *Id.* at 313.

56. *See id.* at 311-12. White began his analysis of the death penalty with what he considered a "near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." *Id.* at 311. It would seem that White would be hard put to prove his "truism." Studies on the deterrent effect of the death penalty are inconclusive. *See ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953* (Cmd. No. 8932, 1953). *See generally* THE DEATH PENALTY IN AMERICA 258-405 (H. Bedau ed. 1964). White himself admits in *Furman* that he is unable to "prove" his conclusion from data concerning the death penalty and deterrence. 408 U.S. at 313 (White, J., concurring). Thus White's constitutional judgment is based on his own intuitive speculation, which has developed as a result of ten years of exposure to capital cases while on the Supreme Court of the United States. *Id.* Justice White also noted that whatever the need for retribution, that need is not measurably satisfied when the imposition of the death penalty becomes rare. *Id.* at 311.

57. 408 U.S. at 312. Implicit in White's finding that capital punishment no

Thus, before Justice White will accept any reinstatement of the death penalty, he must be shown that the punishment will serve the substantial state purpose of deterrence. Furthermore, because Justice White believes that infrequent imposition of capital punishment has eroded its credibility as a deterrent, a reenactment of capital punishment would have to result in the regular execution of capital offenders in order to satisfy him. Therefore, it is critical to determine what Justice White saw as the cause of infrequent application of the death penalty. The opinion is not entirely clear on this matter; nevertheless some guidance is provided. Apparently, White viewed the source of the infrequency problem to be legislative authorization of the death penalty without a concomitant mandate that the penalty be imposed for particular classes of crime. Instead, sentence determination is delegated to judges and juries, who have infrequently ordered the death penalty.⁵⁸ Since judges and juries have been reluctant to impose the death sentence, White felt that in order to ensure the frequent use of the penalty the legislature must mandate it for particular crimes. If another method could be devised that would result in more frequent infliction of the death penalty, White may find it acceptable; however, it seems doubtful that any constitutional statute could be drafted that requires the sentencer to impose capital punishment more often.⁵⁹

longer served a public purpose when it ceased to be a credible deterrent seems to be a rejection of retribution as a constitutionally permissible justification for the death penalty.

58. *Id.* Justice White expressed concern over the Court's conflict with the legislative judgment regarding capital punishment; however, he did not feel that in this instance the Court had violated the separation of powers doctrine. *Id.* at 313-14. This conclusion was in part based upon his belief that the legislature's delegation of sentencing authority substantially weakens the judicial restraint argument urged by the dissenters. *Id.* at 314. Discretionary capital punishment statutes compel the sentencers to make the quasi-legislative determination of whether the defendant's criminal conduct justifies the penalty of death. "Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do . . ." *Id.* In other words, by abnegating the sentencing decision, the legislature has diluted the respect that the separation of powers doctrine accords to a purely legislative judgment.

59. In *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968), the Court held:

It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal "organized to convict." *Fay v. New York*, 332 U.S. 261, 294. See *Tumey v. Ohio*, 273 U.S. 510. It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. . . .

Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.

*C. Guidelines That Can Be Drawn From
the Concurring Opinions*

Only two of the majority Justices, Brennan and Marshall, held that capital punishment was per se unconstitutional. The remaining three Justices found that the present administration of the death penalty was violative of the eighth and fourteenth amendments. It seems that all of the concurring Justices agreed that the Constitution prohibited the execution of the 631 men and two women awaiting their fates on the death rows of 32 states.⁶⁰ The prospective effect of *Furman*, however, is considerably more uncertain. Nevertheless, any statute reenacting the death penalty must comport with the guidelines set out in the 25,000 words of the five concurring opinions because these guidelines reveal the elements in the pre-*Furman* administration of capital punishment that the Justices found "cruel and unusual."

All of the concurring Justices found that the administration of the death penalty had been arbitrary, but in reaching this conclusion they employed two different rationales which the opinions failed to distinguish. The first rationale, accepted by Justices Brennan and White, was that arbitrariness is demonstrated by the extreme infrequency with which the death penalty has been imposed.⁶¹ The second rationale, itself embodying two analytic approaches, was that arbitrariness in the capital sentencing process is caused by a lack of rationality. Justice Stewart, for example, thought the application of the death penalty was irrational ("wanton and freakish") because an unlucky handful of capital offenders were randomly selected to die.⁶² Justices Douglas and Marshall, on the other hand, felt that the capital sentencing process was irrational because it discriminated against racial and socio-economic minorities.⁶³ Although statistics do suggest that the constitutionally suspect classifications of race and wealth are the primary factors that distinguish those capital offenders who are sentenced to death from those who are sentenced to prison,⁶⁴ Justices White and Stewart, while not repudiating these statistics, chose to rest their decisions on the aforementioned grounds of infrequency and randomness.⁶⁵

60. M. MELTSNER, *supra* note 23, at 292-93.

61. 408 U.S. at 293 (Brennan, J., concurring), 313 (White, J., concurring).

62. *Id.* at 309-10 (Stewart, J., concurring). Justice White also observed that there was no meaningful distinction between those capital offenders who were executed and those who were not. *Id.* at 313 (White, J., concurring). In a similar vein Justice Brennan noted that there was no "rational basis that could differentiate . . . the few who die from the many who go to prison." *Id.* at 294 (Brennan, J., concurring).

63. *Id.* at 256-57 (Douglas, J., concurring), 364-66 (Marshall, J., concurring).

64. *Id.* at 249-51 (Douglas, J., concurring), 364-66 (Marshall, J., concurring).

65. Justices Douglas and Marshall were the only majority Justices who found that

The guidelines revealed in the concurring opinions of White, Stewart and Douglas are, respectively: (1) the death penalty must be exacted from more of those who are legally eligible for execution;⁶⁶ (2) those executed must be rationally distinguishable from those who are not;⁶⁷ and (3) the penalty must not discriminate against the "lower castes" of society.⁶⁸ These guidelines emerge from the particular rationales emphasized in each of the three opinions; however, it must be observed that the rationales are interrelated. Infrequency, randomness and discrimination are all factored from the unanimously condemned common denominator of arbitrariness. Thus none of the rationales is exclusive to the Justice who emphasized it. Since randomness and discrimination result in an infrequent application of the death penalty, White implicitly condemned them.⁶⁹ Similarly, Stewart would surely find an infrequent, discriminatory infliction of the penalty

the administration of the death penalty had been discriminatory. Justice Stewart felt that racial discrimination had not been proved. *Id.* at 310 (Stewart, J., concurring). Justices Brennan and White did not address the issue of discrimination and, apparently, the dissenters were not convinced by the racial discrimination argument.

The statistics cited by Justices Douglas and Marshall seem to raise a prima facie case of discrimination. *See id.* at 249-51 (Douglas, J., concurring), 364-66 (Marshall, J., concurring). Numerous Supreme Court decisions recognize that a prima facie showing of discrimination shifts the burden of proof to the state to overcome the prima facie case. *See Whitus v. Georgia*, 385 U.S. 545, 551 (1967), stating: "We believe that this proof [*i.e.* statistical evidence of discrimination] constituted a prima facie case of purposeful discrimination." The conviction of the petitioner was reversed by the Court because "[t]he State . . . failed to meet the burden of rebutting the petitioners' prima facie case." *Id.* at 552. *See also Maxwell v. Bishop*, 398 F.2d 138, 146 (8th Cir. 1968), and cases cited therein. *But see id.* at 147-48. In light of these cases it is unclear why some of the Justices seemed to place the burden of proof of discrimination on the petitioners in *Furman* despite the statistics.

66. 408 U.S. at 312-13 (White, J., concurring).

67. *Id.* at 309-10 (Stewart, J., concurring). White's primary concern was that more of those available for execution should be executed. Stewart, on the other hand, found the capricious selection process to be the most objectionable factor. This is the critical difference between the opinions. Apparently, if the elements of caprice could be eliminated from the sentencing procedure, Stewart would not require the penalty to be inflicted with any degree of regularity, whereas White would. These rationales may not be as distinct as they appear, however, because if a sentencing procedure embodying the extreme certainty that Stewart requires could be fashioned, it would perforce result in the execution of *all* those defendants who committed the acts deemed deserving of the death penalty. If those who committed like acts were not regularly executed, then, as Brennan pointed out, "[t]he asserted public belief that [capital offenders] deserve to die [would be] flatly inconsistent with the execution of a . . . few." *Id.* at 304-05.

68. *Id.* at 255-56 (Douglas, J., concurring). For cases dealing with the discriminatory application of criminal law, see *Tate v. Short*, 401 U.S. 395 (1971); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

69. 408 U.S. at 313 (White, J., concurring).

to be wanton and freakish.⁷⁰ Finally, any sort of irrationality in the sentencing process would undoubtedly be repugnant to Douglas' equal protection concept of the eighth amendment.⁷¹ Therefore, it would seem that if a statute reenacting the death penalty is to stand, it must provide extremely reliable guarantees that the penalty will be exacted frequently and in a non-arbitrary and non-discriminatory manner. The critical determination that must be made is what type of statute, if any, can meet these requirements of *Furman*.

There can be little doubt as to the views of three Justices with regard to the constitutionality of discretionary death penalty statutes. Justices Brennan and Marshall found the death penalty unconstitutional regardless of the presence or absence of discretion. Clearly, Douglas would strike down any discretionary capital punishment statute; his opinion reserved only the question of the constitutionality of a mandatory death penalty statute.⁷² Therefore, Stewart's and White's are the key opinions on the issue of the constitutionality of a discretionary statute.

Stewart and White agreed that so long as the legislature has failed to determine and mandate that the automatic penalty in any particular class or kind of case shall be death, the "legislative will is not frustrated if the penalty is never imposed."⁷³ If the legislative will is not frustrated when a capital offender is not sentenced to die, then the imposition of the death penalty ceases to be a function of the collective will of the people as expressed through the legislature; it becomes instead a function of the selective will of individual sentencing bodies. When the death penalty is inflicted subject to the will of individual sentencing bodies, those executed are those whom the individual sentencer has deemed deserving of death. Since Americans are widely divided in their opinions concerning capital punishment and their beliefs as to when death is the appropriate penalty,⁷⁴ what motivates one sentencing

70. *Id.* at 310 (Stewart, J., concurring).

71. *Id.* at 242 (Douglas, J., concurring).

72. *Id.* at 256-57.

73. *Id.* at 309 (Stewart, J., concurring), 311 (White, J., concurring).

74. See *Witherspoon v. Illinois*, 391 U.S. 510, 519-20 (1968). The Court in *Witherspoon* noted the wide diversity of views regarding capital punishment and held that the exclusion of jurors having conscientious or religious scruples against the infliction of the death penalty in general, or against the infliction of the death penalty for certain crimes, was violative of the fourteenth amendment. Only veniremen opposed to the infliction of capital punishment under any and all circumstances can constitutionally be excluded from a capital jury. Thus the make up of juries can vary widely. One jury may be composed of several members basically, but not unalterably, opposed to imposition of the death penalty, while another jury could be composed of members who favor the frequent imposition of the penalty. It would be absurd to assume these two juries would reach the same conclusion on a border line case. Chief Justice Burger takes note of this fact in his dissent to *Furman*:

authority to spare a capital offender may not affect another. When discretion is exercised by judges or juries who have the power to decide whether to execute a capital offender, these personal values and standards of the sentencer—rational and irrational—come into play. Diversity of personal standards and values among sentencing authorities can only result in the death penalty being arbitrarily imposed. Thus Justice Douglas' conclusion seems inescapable: "[D]iscretionary statutes are unconstitutional in their operation. They are pregnant with discrimination"⁷⁵

Justices White and Stewart did not expressly discuss whether any discretionary statute could meet their constitutional test. The answer to that question, however, seems implicit in what their opinions did say. On the authority of Justice Brandeis' concurring opinion in *Ashwander v. Tennessee Valley Authority*,⁷⁶ Stewart indicated that the constitutional scope of his opinion went no further than was necessary.⁷⁷ For this reason, he specifically excepted mandatory death penalty statutes from the holding of his opinion.⁷⁸ Similarly, Justice White noted that he needed only to decide the narrower question; therefore, he did not address himself to mandatory statutes either.⁷⁹

Both opinions, however, did focus on discretionary statutes, making no attempt to distinguish one form of discretion as superior to another.⁸⁰ In view of the fact that both White and Stewart carefully and specifically excepted mandatory statutes from the reach of their opinions, the failure similarly to except any form of discretion would seem to indicate that all discretionary statutes are condemned by the

It would, of course, be unrealistic to assume that juries have been perfectly consistent in choosing the cases where the death penalty is to be imposed, for no human institution performs with perfect consistency. There are doubtless prisoners on death row who would not be there had they been tried before a different jury or in a different State. In this sense their fate has been controlled by a fortuitous circumstance.

408 U.S. at 389.

Just as the opinions of laymen vary with regard to the imposition of the death penalty, it would seem a virtual truism that the opinions of individual judges vary on this subject also. The division among the Justices of the Supreme Court in *Furman* is evidence of this. The holding of *Witherspoon* would seem to extend to judges. Therefore, since no judge should excuse himself from a capital case unless he is unalterably opposed to the death penalty, the inevitable result will be that judges of diverse views regarding capital punishment will sit on the bench in capital cases. This wide variance in views about capital punishment can only lead to a wide variance in sentences.

75. 408 U.S. at 256-57 (Douglas, J., concurring).

76. 297 U.S. 288, 347 (1936).

77. 408 U.S. at 306 (Stewart, J., concurring).

78. *Id.* at 307.

79. *Id.* at 314 (White, J., concurring).

80. *Id.* at 308-09 (Stewart, J., concurring), 311 (White, J., concurring).

constitutional conclusions of the two Justices. In other words, if either Justice had felt that some discretion were still permissible, he would have so indicated.

The Supreme Court's application of *Furman* bears out the Court's condemnation of discretionary capital punishment statutes. On the authority of *Furman* the Supreme Court has vacated death sentences in some 120 cases.⁸¹ Each of the overturned cases shared a common element: discretionary capital sentencing statutes. The impact of *Furman* is also indicated by the unanimous decision in *Moore v. Illinois*.⁸² In *Moore* Mr. Justice Blackmun, writing for the Court, stated: "[T]he Court today has ruled [in *Furman*] that the imposition of the death penalty under statutes such as those of Illinois is violative of the Eighth and Fourteenth Amendments . . . [and the] sentence of death . . . may not now be imposed."⁸³ It would seem that the most definitive statement that could be made about "statutes such as those of Illinois" is that they are discretionary.

In the wake of *Furman*, the highest courts of 26 states have invalidated discretionary capital punishment statutes regardless of form.⁸⁴ The high court of Maryland concluded:

We entertain not the slightest doubt that the imposition of the death sentence under any of the presently existing discretionary statutes of Maryland which authorize, but do not require, that penalty is unconstitutional under *Furman* as violative of the Eighth and Fourteenth Amendments to the federal constitution. In other words, we think the net result of the holding in *Furman* is that the death penalty is unconstitutional when its imposition is not mandatory.⁸⁵

The North Carolina Supreme Court reached a similar result after analysis of the separate opinions in *Furman* and stated: "[T]he *Furman* decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion."⁸⁶ The concurring opinions in *Furman*, together with the Supreme

81. See *Stewart v. Massachusetts*, 408 U.S. 845 (1972), and companion cases, 408 U.S. 932-41 (1972).

82. 408 U.S. 786 (1972).

83. *Id.* at 800.

84. Brief for N.A.A.C.P. Legal Defense Fund as Amicus Curiae, at 12 & app. F., *State v. Dixon*, 283 So. 2d 1 (Fla. 1973).

85. *Bartholomey v. State*, 297 A.2d 696, 701 (Md. 1972).

86. *State v. Waddell*, 194 S.E.2d 19, 25 (N.C. 1973).

Court's uniform reversal of each discretionary death sentence that has come before it, strongly suggest that the Maryland and North Carolina courts were correct in concluding that all discretionary capital punishment statutes are unconstitutional.

D. *The Dissenters*

The opinions of the dissenters in *Furman* focused on several common themes. Furthermore, each of the dissenters concurred in the dissents of the others. The primary theme stressed by each dissent was judicial restraint. The dissenters all agreed that the legislature was better able to decide the issue of capital punishment,⁸⁷ and they criticized the majority for failing to recognize the limits of judicial power.⁸⁸ The fact that the death penalty was so widely exacted and accepted at the time of the eighth amendment's adoption was taken as evidence that the amendment was never intended to abolish the death penalty.⁸⁹ The dissenters went on to reject all of the majority's arguments, claims and statistics regarding the imposition of the death penalty. They felt that the majority Justices' claims were unsupportable and hyperbolic.

The opinion of Mr. Justice Blackmun is the most interesting. He began with a deep probe into his own personal revulsion from capital punishment.⁹⁰ Despite his personal feelings, however, he felt compelled to dissent. His vote seems to have turned on the suddenness of the Court's action.⁹¹ The recent vintage of cases that he believed to have upheld capital punishment troubled Blackmun, and because of them he felt unable to strike down the death penalty.⁹² The *Furman* precedent and Blackmun's own personal views may sway him the other way if the Court is again presented with the issue of the death penalty, because voting to strike down the death penalty in a future case will not be an abrupt reversal of the Court's position. In fact, it does not seem unlikely that, in addition to Blackmun, some or all of the other dissenters may consider themselves bound by the *Furman* precedent.⁹³

87. 408 U.S. at 404-05 (Burger, C.J., dissenting), 409-11 (Blackmun, J., dissenting), 417-19 (Powell, J., dissenting), 466-67 (Rehnquist, J., dissenting).

88. *Id.*

89. *Id.* at 391 (Burger, C.J., dissenting), 419 (Powell, J., dissenting).

90. *Id.* at 405-07 (Blackmun, J., dissenting).

91. *Id.* at 408.

92. *Id.* at 408-09.

93. See Ehrhardt, Hubbart, Levinson, Smiley & Wills, *The Future of Capital Punishment in Florida: Analysis and Recommendations*, 64 J. CRIM. L. & C. 2, 3 (1973).

II. FLORIDA'S LEGISLATIVE AND JUDICIAL RESPONSES TO *Furman*

The Florida capital punishment statutes that existed at the time of *Furman* provided that a defendant found guilty of a capital offense must be sentenced to death unless a majority of the jury recommended mercy, in which case the sentence was life imprisonment.⁹⁴ The Florida Legislature amended these statutes in March 1972; the effective date of the amendment was October 1, 1972.⁹⁵ The *Furman* decision in June 1972, and the Florida Supreme Court's interpretation of *Furman* in July⁹⁶ and September,⁹⁷ however, preempted the effect of the 1972 amendment. In late November the Florida Legislature convened in special session and, by passing a new Capital Punishment Act, became the first post-*Furman* state legislature to reinstate the death penalty.⁹⁸

The new death penalty statute provides for a bifurcated trial.⁹⁹ A person found guilty or who pleads guilty to a capital felony receives a second "trial" before the same judge and jury to determine whether the sentence of death should be imposed. If the guilt-determination portion of the trial is without a jury—for example, where the defendant has waived his right to jury trial or has plead guilty—the trial judge must empanel a jury for the sentencing hearing.¹⁰⁰ At this hearing the trial judge has discretion to admit any evidence that may be relevant to the defendant's sentence.¹⁰¹

At the conclusion of the sentencing trial the jury recommends whether the defendant's sentence should be death or life imprisonment.¹⁰² The jury's function, however, is advisory only. Their recommendation does not bind the trial judge, as it is he who makes the actual sentence determination.¹⁰³ The sentencing decisions of both the jury and the trial judge are to be based on the existence or non-existence¹⁰⁴ of eight aggravating circumstances¹⁰⁵ and seven mitigating

94. FLA. STAT. §§ 775.082(1), 921.141 (1971).

95. Fla. Laws 1972, ch. 72-72, § 1, amending FLA. STAT. § 921.141 (1971).

96. *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972).

97. *In re Baker*, 267 So. 2d 331 (Fla. 1972); *Anderson v. State*, 267 So. 2d 8 (Fla. 1972).

98. See note 15 *supra*.

99. Florida Capital Punishment Act § 9 (§ 921.141(1)).

100. Florida Capital Punishment Act § 9 (§ 921.141(1)).

101. Florida Capital Punishment Act § 9 (§ 921.141(1)).

102. Florida Capital Punishment Act § 9 (§ 921.141(2)).

103. Florida Capital Punishment Act § 9 (§ 921.141(3)).

104. Florida Capital Punishment Act § 9 (§§ 921.141(2)-(3)).

105. Florida Capital Punishment Act § 9 (§ 921.141(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;

circumstances¹⁰⁶ enumerated in the statute. If sufficient aggravating circumstances are found that are not outweighed by sufficient mitigating circumstances, the trial judge may impose the sentence of death.¹⁰⁷ In cases where a sentence of death is imposed, the statute requires the trial judge to accompany his sentence with written findings of the facts upon which the sentence was based.¹⁰⁸ Furthermore, if the sen-

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

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

(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnaping, 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.

106. Florida Capital Punishment Act § 9 (§ 921.141(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.

107. Florida Capital Punishment Act § 9 (§ 921.141(3)). The wording of the statute is interesting in that the only mandatory language is the following: [T]he court after weighing the aggravating and mitigating circumstances *shall* enter a sentence of life imprisonment or death" Florida Capital Punishment Act § 9 (§ 921.141(3)) (emphasis added). The only requirement the statute seems to impose upon the court is that the court shall enter a sentence of either death or life imprisonment. The court does not seem to be compelled by the statute to sentence the capital offender to death when aggravating circumstances are found to exist. Fla. Laws 1973, ch. 72-724, § 2, amending FLA. STAT. § 775.082 (1971), however, seems to resolve this dilemma by providing that if the sentencing "procedure . . . results in findings by the court that such person shall be punished by death . . . such person shall be punished by death." But the resolution of this dilemma is not complete, because the Florida Capital Punishment Act does not unambiguously mandate that upon the finding of certain aggravating circumstances the sentence of death *shall* be imposed. Conceivably, a trial judge could weigh the circumstances, determine that sufficient aggravating circumstances exist, and refuse to enter a sentence of death without violating a strict reading of the statute.

108. Florida Capital Punishment Act § 9 (§ 921.141(3)).

tence is death, it is subject to review by the Florida Supreme Court,¹⁰⁹ which will consider both the question of guilt and the question of sentence.¹¹⁰ If the sentence is life imprisonment, however, the question of capital punishment is beyond the jurisdiction of any reviewing court; that is, no court of review may impose the sentence of death.¹¹¹

On July 26, 1973, the Florida Supreme Court upheld the constitutionality of the new Capital Punishment Act by a 7-2 decision in *State v. Dixon*.¹¹² In upholding the statute the Florida court seemed to base its decision primarily on the one paragraph per curiam opinion of the majority in *Furman*. The court stated: "[The per curiam opinion] is the only controlling law which *Furman v. Georgia* . . . provides, as no more specific statement of the law could garner a majority of the members of the high court."¹¹³ Because the *Furman* Court had failed to reach an agreement beyond the per curiam opinion, the Florida Supreme Court apparently felt that analysis of the five concurring majority opinions was unnecessary and, consequently, engaged in none. The Florida court did not specifically note any guidelines in the opinions of Justices Douglas, Brennan, Stewart, White and Marshall; furthermore, the court refused to predict the scope of *Furman*.¹¹⁴

The *Dixon* opinion cited *Furman* ten times: nine of the ten references are general citations to the entire 233 page opinion; one reference is to the per curiam opinion.¹¹⁵ Despite this, the *Dixon* opinion turns on "two points" that the court "gleaned from a careful reading of the nine separate opinions"¹¹⁶ in *Furman*:

First, the opinion does not abolish capital punishment, as only two justices—Mr. Justice Brennan and Mr. Justice Marshall—adopted that extreme position. The second point is a corollary to the first, and one easily drawn. The mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia*¹¹⁷

109. Florida Capital Punishment Act § 9 (§ 921.141(5)).

110. Florida Capital Punishment Act § 9 (§ 921.141(5)).

111. *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973).

112. *Id.*

113. *Id.* at 6.

114. *Id.*

115. *Id.* at 6-11.

116. *Id.* at 6.

117. *Id.* How the court "gleaned" the second point from *Furman*, or where this point can be found in *Furman*, is not indicated by the *Dixon* opinion. The court apparently reached this "corollary" by the following reasoning: first, discretion is inherent in the operation of the judicial process; secondly, since the United States Supreme Court did not hold capital punishment to be unconstitutional per se, they must have implied that it may be inflicted; therefore, capital punishment of necessity will be inflicted in

The Florida Supreme Court went on to note that discretion is essential and fundamental to the judicial process,¹¹⁸ and that the Florida Capital Punishment Act is an attempt to improve the quality of that discretion. The *Dixon* court read *Furman* as tolerating discretion in the capital sentencing process so long as that discretion is of a high quality. The court then found the "possible and necessary" judicial discretion under the new Florida Capital Punishment Act to be "reasonable and controlled."¹¹⁹

The court reached the conclusion that the discretion exercised under the Florida Capital Punishment Act is "reasonable and controlled" by attempting to demonstrate that the statute provides important limitations on judicial sentencing discretion. The court traced the "five steps" of the statute that stand between conviction and execution, and concluded that each step is a concrete safeguard against the unconstitutional application of the death penalty.¹²⁰ The court found that these five steps—the bifurcation of the guilt and sentence hearings, the jury advisory sentence, the vesting of final sentencing authority in the trial judge, the requirement of written findings to support the sentence, and the review by the Florida Supreme Court—would eliminate caprice and discrimination from the sentencing process.¹²¹ Furthermore, the mandatory consideration by the sentencer of enumerated aggravating and mitigating circumstances was deemed to nullify the unbridled discretion that the jury had exercised prior to *Furman*.¹²² These enumerated circumstances were regarded as meaningful limitations on the sentencer's discretion because their meanings were considered by the court to be matters of common knowledge and understandable to the ordinary man.¹²³ The contention that the enumerated circumstances were vaguely worded was expressly rejected by the court.

The opinion placed special emphasis on supreme court review of

the discretionary manner inherent in the judicial process. It must be remembered, however, that although Justices Douglas, White and Stewart found it unnecessary to reach the ultimate question of the constitutionality of the death penalty itself, they did not voice their approval of it. *See* 408 U.S. at 257 (Douglas, J., concurring), 306 (Stewart, J., concurring), 310-11 (White, J., concurring). It may well be that if faced with that ultimate question, those three Justices will join with Justice Brennan and Justice Marshall. Taking the position that the question need not be decided is a much different position from approving the death penalty.

118. 283 So. 2d at 6-7.

119. *Id.* at 10.

120. *Id.* at 7.

121. *Id.* at 7-8.

122. *Id.* at 8-9.

123. *Id.* at 9.

capital sentences.¹²⁴ This "final hearing" provided for all death sentences was found to be significant for two reasons: first, it evidenced the legislature's intent that only the most blackhearted and hardened of capital offenders should die; secondly, it provided for a uniform supervision of all sentencing decisions.¹²⁵ The court felt that its overseeing of the imposition of all death sentences would result in the eventual elimination of sentencing discretion.¹²⁶ The opinion reasoned that review by the supreme court would guarantee similar results on similar facts. Apparently the court anticipated that its review would result in the evolution of a standard to determine whether the sentence of death should be imposed; thereafter no discretion would be called for. The sentencer, as a matter of "reasoned judgment," would merely apply the standard to the particular facts of the case and deduce the result.

It is important to note that the *Dixon* court's interpretation of the Florida Capital Punishment Act clarifies three points that are not apparent from the language of the statute. First, the court required that the trial judge support in writing a sentence of life imprisonment as well as a sentence of death.¹²⁷ Secondly, the majority ruled that since the aggravating circumstances define the capital crime, they must be proved beyond a reasonable doubt.¹²⁸ Finally, the court held that the finding of one or more aggravating circumstances establishes a presumption that death is the proper sentence. That presumption may be overridden, however, by the existence of one or more of the mitigating circumstances.¹²⁹

The *Dixon* opinion is founded on two essential premises: first, the assumption that *Furman* permits discretion; secondly, the conclusion that the discretion permitted by the Florida Capital Punishment Act is of the high quality mandated by *Furman*. Both of these premises are open to criticism. At least three state supreme courts have found that *Furman* permits no discretion to be exercised in the death sentencing process.¹³⁰ A careful reading of the *Furman* opinions would seem to support this conclusion.¹³¹ Further, assuming that *Furman* does not signal the demise of all discretionary capital sentencing, the Florida Capital Punishment Act, when considered in the light of *Furman's*

124. *Id.* at 8.

125. *Id.*

126. *Id.* at 10.

127. *Id.* at 8.

128. *Id.* at 9.

129. *Id.*

130. *State v. Dickerson*, 298 A.2d 761, 762-64 (Del. 1973); *Bartholomey v. State*, 297 A.2d 696 (Md. 1972); *State v. Waddell*, 194 S.E.2d 19, 25 (N.C. 1973).

131. See notes 71-80 and accompanying text *supra*.

five concurring opinions and other recent cases, simply fails to provide the extremely reliable guarantees in capital cases that *Furman* requires.

III. CRITIQUE OF THE FLORIDA CAPITAL PUNISHMENT ACT AND *State v. Dixon*

The Florida Capital Punishment Act is not mandatory.¹³² Therefore, if it is to stand, it must meet the constitutional guidelines set out in the opinion of either Justice Stewart or Justice White.¹³³ It has been suggested that these two opinions implicitly condemn all discretionary statutes because they reserve only the question of mandatory sentencing statutes. The basis for this suggestion is the specific recognition in both opinions that mandatory statutes are outside the scope of their constitutional holdings.¹³⁴ Apparently, the two Justices felt that mandatory statutes may not embody the constitutional defects that they found inherent in the discretionary sentencing systems considered in *Furman*. These constitutional defects are the infrequent application and arbitrary imposition of the death penalty.¹³⁵ If this suggestion is incorrect and if a discretionary capital punishment statute can be constitutionally sound, one thing is then clear: the statute must eliminate arbitrariness or infrequency or both.

The old Florida capital punishment statute provided for a single sentencing decision by a single sentencing body—the jury.¹³⁶ The statute was found to be an unconstitutional exercise of discretion because it had resulted in “the death penalty [being] inequitably, arbitrarily, and infrequently imposed.”¹³⁷ The new statute provides for a five-step sentencing process¹³⁸ that occurs at three different levels.¹³⁹ The critical

132. See notes 99-111 and accompanying text *supra*.

133. See note 72 and accompanying text *supra*. The fact that the Florida Capital Punishment Act has not been shown to result in arbitrary or infrequent capital sentencing cannot save the statute. The United States Supreme Court rejected the argument that each statute must be shown to operate in an unconstitutional manner when it denied Georgia's petition for rehearing, which had been based on such an argument. See *Petition of the State of Georgia for Rehearing* at 17, *Furman v. Georgia*, 409 U.S. 902 (1972); *Furman v. Georgia*, 409 U.S. 902 (1972) (rehearing denied).

134. 408 U.S. at 307 (Stewart, J., concurring), 310-11 (White, J., concurring).

135. *Id.* at 310 (Stewart, J., concurring), 311-12 (White, J., concurring); see notes 42-58 and accompanying text *supra*.

136. FLA. STAT. § 921.141 (1971), as amended, Fla. Laws 1973, ch. 72-724, § 9.

137. *Newman v. Wainwright*, 464 F.2d 615, 616 (5th Cir. 1972).

138. Bifurcated trial, jury's sentence recommendation, trial judge's sentence determination, trial judge's written findings upon which the sentence is based, and review of the sentence of death by the Florida Supreme Court. See *State v. Dixon*, 283 So. 2d 1, 7-8 (Fla. 1973).

139. Jury, trial judge and Florida Supreme Court.

question is whether the complicated sentencing procedure provided for by the Florida Capital Punishment Act eliminates excessive sentencing discretion, thereby ensuring that the death penalty will not be arbitrarily and infrequently imposed. In other words, is the new death penalty statute so significantly different from the old statute as to provide a qualitatively different exercise of sentencing discretion?

*A. The Florida Capital Punishment Act
Does Not Eliminate Arbitrariness.*

1. *The Enumerated Aggravating and Mitigating Circumstances.*—The majority in *Dixon* stated that “[t]he most important safeguard presented in [the Florida Capital Punishment Act] is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed.”¹⁴⁰ Apparently, the court felt that the enumerated circumstances would place meaningful limitations on the sentencer’s discretion. It seems that, under *Dixon*, the five steps of the sentencing system standing alone would be unconstitutional because, without the enumerated circumstances, the sentencer’s discretion would be unbridled.¹⁴¹ This conclusion is implicit in the emphasis which the *Dixon* court placed on the constitutional safeguards provided by the enumerated circumstances. Therefore, it is critical to the new statute’s constitutionality that the enumerated circumstances do in fact channel and control discretion.

The provision that the sentencer weigh factors other than guilt when making the sentence determination is not unique to the Florida Capital Punishment Act. Several of the death sentences considered by the United States Supreme Court at the time of *Furman* were imposed under state laws that included sentencing standards. These standards purported to limit sentencing discretion to appropriate levels. In 1899, the United States Supreme Court noted the difficulty of laying down exact rules for the infliction of the death penalty that would be applicable to all possible situations.¹⁴² In 1972, the *Furman* line of cases reaffirmed this conclusion by holding death sentences unconstitutional despite the fact that they were imposed under systems that provided standards for the exercise of sentencing discretion.¹⁴³ The Su-

140. 283 So. 2d at 8.

141. Statutes very similar to the Florida Capital Punishment Act were found unconstitutional in the *Furman* line of cases. The only important distinction is that those statutes did not provide an enumerated list of aggravating and mitigating circumstances. See note 143 *infra*.

142. *Winston v. United States*, 172 U.S. 303, 312-13 (1899).

143. In Connecticut, for example, pre-*Furman* law provided for a separate penalty

trial in capital cases, at which "[e]vidence may be presented . . . on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty." CONN. GEN. STAT. ANN. § 53-10 (1960), *as amended*, § 53a-46 (1972). The determination of penalty had to be made "on the evidence presented." CONN. GEN. STAT.-ANN. § 53-10 (1960), *as amended*, § 53a-10 (1972). Despite these sentencing standards, the United States Supreme Court vacated death sentences in Connecticut capital cases after *Furman*. *E.g.*, *Davis v. Connecticut*, 408 U.S. 935 (1972); *Delgado v. Connecticut*, 408 U.S. 940 (1972).

In Illinois, pre-*Furman* law provided that a defendant "was entitled to have his punishment determined upon evidence limited to the facts and circumstances of that crime." *People v. Black*, 10 N.E.2d 801, 804 (Ill. 1937). Furthermore, "[it] was also the duty of the jury to fix the penalty from a consideration of all the circumstances, including the heinousness, atrocity, and cruelty of the crime . . ." *People v. Sullivan*, 177 N.E. 733, 736 (Ill. 1931). *See also* *People v. Winchester*, 185 N.E. 580 (Ill. 1933); *People v. Cassler*, 163 N.E. 430 (Ill. 1928). A trial judge could reduce a jury-imposed death sentence, ILL. REV. STAT. ch. 38, § 1-7-(c) (1) (1972); *see* note 191 *infra*, and the state appellate courts could also modify a sentence of death to life imprisonment. *See* notes 201-02 *infra*. Nevertheless, the United States Supreme Court vacated death sentences in Illinois capital cases after *Furman*. *E.g.*, *Hurst v. Illinois*, 408 U.S. 935 (1972); *Moore v. Illinois*, 408 U.S. 786 (1972).

In Nebraska, pre-*Furman* law provided that, in its decision on the death penalty, a jury "had no right to be actuated by considerations of mercy but should be guided alone by the evidence, the facts, and the circumstances disclosed by the record . . ." *Sundahl v. State*, 48 N.W.2d 689, 704 (Neb. 1951); *see* *Dinsmore v. State*, 85 N.W. 445 (Neb. 1901). Nebraska also provided for appellate review of death sentences. *See* *Sundahl v. State*, 48 N.W.2d 689 (Neb. 1951); notes 201-02 *infra*. Regardless of these protections, the *Furman* Supreme Court vacated death sentences in Nebraska capital cases. *E.g.*, *Pope v. Nebraska*, 408 U.S. 933 (1972); *Alvarez v. Nebraska*, 408 U.S. 937 (1972).

In New Jersey, pre-*Furman* law provided that a recommendation of life imprisonment had to be "upon and after the consideration of all the evidence," N.J. STAT. ANN. § 2A:113-4 (1969), "including the evidence relative to the background and the mental and emotional abilities and disabilities of . . . defendants." *State v. Reynolds*, 195 A.2d 449, 461 (N.J. 1963). *See also* *State v. Mount*, 152 A.2d 343 (N.J. 1959). Capital sentences imposed under New Jersey law were vacated by the Supreme Court in the wake of *Furman*. *E.g.*, *Billingsley v. New Jersey*, 408 U.S. 934 (1972); *In re Reynolds*, 408 U.S. 934 (1972).

In Ohio, pre-*Furman* law provided that the jury's right to recommend mercy was bound by "the facts and circumstances described by the evidence." *State v. Tudor*, 95 N.E.2d 385, 390 (Ohio 1950). It was further provided that the jury "must not be motivated by sympathy or prejudice . . ." *State v. Eaton*, 249 N.E.2d 897, 907 n.4 (Ohio 1969). *See also* *Howell v. State*, 131 N.E. 706 (Ohio 1921). Nevertheless, capital sentences imposed under Ohio law were vacated. *E.g.*, *Carter v. Ohio*, 408 U.S. 936 (1972); *Duling v. Ohio*, 408 U.S. 936 (1972); *Bryson v. Ohio*, 408 U.S. 938 (1972).

In Tennessee, pre-*Furman* law provided that the penalty for murder was death, but that "the jury may, if they are of [the] opinion that there are mitigating circumstances, fix the punishment at [from twenty years to life imprisonment]." TENN. CODE ANN. § 39-2406 (1955). The jury was instructed in these terms and was to make a finding of mitigating circumstances "by a consideration of the evidence and upon a finding of facts creating such opinion." *Woodruff v. State*, 51 S.W.2d 843, 847 (Tenn. 1932). The United States Supreme Court vacated Tennessee capital cases in the wake of *Furman*. *E.g.*, *Herron v. State*, 456 S.W.2d 873, 879 (Tenn. 1970), *vacated mem.*, 408 U.S. 937 (1972), wherein the Tennessee Supreme Court had upheld the death sentence on the ground that "the evidence wholly fails to show mitigating circumstances." *See also* *State v. Dixon*, 283 So. 2d 1, 15-16 (Fla. 1973) (Ervin, J., dissenting).

preme Court obviously felt that these standards were inadequate guarantees that the death penalty would be constitutionally applied. Moreover, as the dissent in *Dixon* noted, some of the sentencing standards and circumstances considered in the *Furman* line of cases were "similar to those provided in the Florida death penalty statute."¹⁴⁴

The Florida Capital Punishment Act is patterned after the American Law Institute's proposed model capital punishment statute.¹⁴⁵ This model statute was examined by the United States Supreme Court in *McGautha v. California*.¹⁴⁶ The question presented in *McGautha* was not the constitutionality of the death penalty, as was the case in *Furman*, and, for that reason, the holdings in the two cases can be distinguished. Nevertheless, *McGautha* is of precedential value because of close similarity between the Model Penal Code statute and the Florida Capital Punishment Act.

The issue in *McGautha* was whether "the absence of standards to guide the jury's discretion on the [capital] punishment issue is constitutionally intolerable."¹⁴⁷ Since unguided jury discretion had been the "settled practice of the Nation,"¹⁴⁸ Justice Harlan, writing for the majority, stated that the petitioners had the burden of making a "strong showing" that jury sentencing standards are constitutionally required.¹⁴⁹ The petitioners in *McGautha* failed to overcome this

144. 283 So. 2d at 15 (Ervin, J., dissenting).

145. Compare the Florida Capital Punishment Act § 9 with the ALI MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

146. 402 U.S. 183 (1971).

147. *Id.* at 196. The Supreme Court "granted certiorari in the *McGautha* case limited to the question whether petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards. 398 U.S. 936 (1970)." 402 U.S. at 185.

148. 402 U.S. at 203.

149. *Id.* To support this allocation of the burden of proof Harlan cited *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970), which states:

It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside. Nearly 50 years ago Mr. Justice Holmes stated: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief.

Cf. Wisconsin v. Yoder, 406 U.S. 205 (1972); *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Justice Holmes commenting that "a page of history is worth a volume of logic").

Harlan's allocation of the burden of proof reflects his view of the Court's limited

"presumption of history" because they could not show that sentencing standards could be developed that would be so sufficiently precise and so sufficiently inclusive as to be significantly superior to the historical practice of standardless jury sentencing.¹⁵⁰ Indeed, Harlan intimated

role in supervising state legislation. It must be noted that the language he cites from *Walz* to support his allocation of the burden states: "Yet an unbroken practice of according the exemption to churches, openly and by *affirmative state action*, not covertly or by state inaction, is not something to be lightly cast aside." 397 U.S. at 678 (emphasis added). This language is not directly apposite to standardless jury sentencing for two reasons. First, affirmative state action can be found in the historical practice of standardless jury sentencing only in the sense that legislative silence is an affirmative act of omission. This is quite different from legislative consideration of an issue (e.g., a tax exemption for churches) followed by decisive action taken on that issue. In such cases the legislature takes responsibility for its decision after weighing the competing interests. In standardless jury sentencing, however, the legislature, by silence, delegates the sentencing responsibility to particular juries. This can hardly be termed affirmative action. Second, the long experience with property tax exemptions for churches apparently indicated that such exemptions worked no "establishment" of religion. In the face of two centuries of such experience, it is not illogical that a burden should rest on a complaining party to prove the contrary. But since experience with standardless sentencing purportedly indicates that it discriminates randomly against the few unfortunate offenders who receive the death penalty, the burden arguably should be with the party seeking to justify the practice. This reasoning, however, was not accepted by the majority in *McGautha*, nor does it seem to have been accepted by either the majority or the dissent in *Furman*.

150. Harlan observed in *McGautha*:

It is apparent that such criteria [sentencing standards] do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice.

402 U.S. at 207 (footnote omitted). The same conclusion was reached in *ROYAL COMMISSION ON CAPITAL PUNISHMENT*, *supra* note 56, ¶ 595:

No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder. Discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished. This conclusion is born out by American experience: there the experiment of degrees of murder, introduced long ago, has had to be supplemented by giving to the courts a discretion that in effect supersedes it.

Chief Justice Burger in his dissent to *Furman* agreed that suitable sentencing standards could not be devised. 408 U.S. at 401. Moreover, he added:

But even assuming that suitable guidelines can be established, there is no assurance that sentencing patterns will change so long as juries are possessed of the power to determine the sentence or to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past. Thus, unless the Court in *McGautha* misjudged the experience of history, there is little reason to believe that sentencing standards in any form will substantially alter the discretionary character of the prevailing system of sentencing in capital cases. That system may fall short of perfection, but it is yet to be shown that a different system would produce more satisfactory results.

Id.

that the drafting of such sentencing standards is "beyond present human ability."¹⁵¹ Thus *McGautha* can be read to stand for the proposition that there is no significant constitutional difference between capital sentencing with standards and capital sentencing without standards—even though sentencing standards may "seem to [be] a better system for dealing with capital cases."¹⁵²

The allocation of a heavy burden of proof due to the "impact of . . . history"¹⁵³ is a somewhat novel device, seldom employed by the Court. On the other hand, it is well established that the Court will allocate a "compelling" burden of proof to the state to justify a statutory infringement on fundamental liberties.¹⁵⁴ Furthermore, the showing of compelling state interest which is required in the area of fundamental rights is certainly a heavier burden of proof than that required to overcome a *McGautha*-type "presumption of history."¹⁵⁵ Since *Furman* can at the very least be read to stand for the proposition that the arbitrary and capricious infliction of the death penalty is violative of the eighth and fourteenth amendments, it is clear that capital punishment statutes can infringe on the fundamental right to life. Indeed, the right to life is the most fundamental of all rights; it is the very right to have rights, because all other rights are meaningless without it. Therefore, the state should bear a heavy burden of showing that a statutory re-enactment of the death penalty comports with *Furman* by eliminating arbitrariness and caprice from the sentencing process.¹⁵⁶

The close similarity between the Florida Capital Punishment Act at issue in *Dixon* and the Model Penal Code statute at issue in *McGautha* indicates that the Florida statute should not have been

151. *McGautha v. California*, 402 U.S. 183, 204 (1971).

152. *Id.* at 195.

153. *Id.* at 203.

154. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). A general treatment of the development of the "compelling interest" doctrine in the area of "fundamental rights" can be found in Justice Harlan's dissent to *Shapiro v. Thompson*, 394 U.S. 618, 658-71 (1969), and in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

155. Justice Burger in *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970), noted that history cannot establish a right to violate the Constitution. The clear implication of this statement is that the Constitution takes precedence over an established practice. Therefore, a burden of proof allocated by the Constitution obviously will be greater than a burden allocated by an established practice. See note 162 *infra*.

156. See *State v. Dixon*, 283 So. 2d 1, 21-22 (Fla. 1973) (Ervin, J., dissenting); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1785 (1970); Comment, *The Death Penalty Cases*, 56 CAL. L. REV. 1270, 1272-73 (1968).

found to meet the burden of proof allocated to statutes that infringe on fundamental rights. First of all, since *Furman* did not overrule *McGautha*,¹⁵⁷ *McGautha* must still be precedent for the proposition that there is no provable constitutional difference between capital sentencing with enumerated standards and the historical practice of capital sentencing without standards. Thus there is no reason why the *Dixon* court should have felt that sentencing standards save the Florida Capital Punishment Act from the constitutional condemnation of *Furman*. Secondly, since the petitioners in *McGautha* could not meet the burden of showing that sentencing standards are constitutionally superior to the "settled practice of the Nation,"¹⁵⁸ a fortiori the state in *Dixon* should not have met the "compelling" burden of showing that those same sentencing standards will constitutionally eliminate arbitrariness and caprice in the deprivation of a capital offender's fundamental right to life. Thus, because of the heavier burden of proof that should have been allocated in *Dixon*, the *Dixon* court had greater reason to hold sentencing standards constitutionally unsatisfactory than the *McGautha* Court had for holding sentencing standards constitutionally unnecessary.

Despite the similarity between the Model Penal Code statute and the Florida Capital Punishment Act, the *Dixon* court completely ignored *McGautha*. The Florida Supreme Court found that the weighing of aggravating and mitigating circumstances provided "important safeguards" and promoted "reasoned judgment" in the sentencing system.¹⁵⁹ The *McGautha* Court, on the other hand, felt that the same sentencing standards provided no more than "the most minimal control over the sentencing authority's exercise of discretion" and provided "no protection against . . . whimsy and caprice."¹⁶⁰

Another case shedding light on the inadequacy of sentencing standards is *Giaccio v. Pennsylvania*.¹⁶¹ In *Giaccio* the Supreme Court found unconstitutional an 1860 Pennsylvania statute that allowed the jury to impose costs on an acquitted defendant.¹⁶² The basis of the holding in *Giaccio* was that the statute vested in the jury broad and

157. See 408 U.S. at 248 (Douglas, J., concurring), 295 (Brennan, J., concurring), 365 (Marshall, J., concurring).

158. 402 U.S. at 203.

159. 283 So. 2d at 8-10.

160. 402 U.S. at 207.

161. 382 U.S. 399 (1966).

162. *Id.* at 404-05. The statute overturned was enacted in 1860, yet the Court was willing to overturn it because it did not comport with the due process clause. This case is an additional indication that the burden of proof allocated by the possible infringement of fundamental rights is greater than the "presumption of history." See note 155 *supra*.

unlimited powers to make a crucial determination based upon notions of what they thought the law should be.¹⁶³ The Court ruled the statute unconstitutional despite the fact that the jury was guided in making its determinations by standards that had been evolved by the Pennsylvania courts.¹⁶⁴ The Court, however, noted in a footnote: "In so holding we intend to cast no doubt whatever on the constitutionality of the *settled practice of many States* to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits."¹⁶⁵ The *Giaccio* Court did not expressly explain why the sentencing process was excepted from its holding. The language "the settled practice of many States," however, seems to be the key to the exception. Very similar language was used by Justice Harlan in *McGautha* when he referred to standardless capital sentencing as the "settled practice of the Nation."¹⁶⁶ Since *Furman*, standardless capital sentencing is no longer the "settled practice of many States"; therefore capital sentencing no longer can enjoy the presumption that had been accorded to all sentencing prior to *Furman*. Now, capital sentencing may fall within the *Giaccio* rule rather than within the *Giaccio* exception.

After *Furman* the legislature must make the uniform determination of what crimes require the sentence of death, rather than allow the sentencers to make that choice on an ad hoc basis.¹⁶⁷ The Florida Legislature did not mandate the sentence of death for any particular crime. Instead, it established guidelines which the sentencer is to employ in determining whether to exact the penalty of death. The United States Supreme Court in *Giaccio* found that standards such as "reprehensible," "improper" and "outrageous to 'morality and justice'" left the jury with broad and unlimited power.¹⁶⁸ The Florida Capital Punishment Act provides as an aggravating circumstance that

163. 382 U.S. at 403.

164. *Id.* at 403-04.

165. *Id.* at 405 n.8 (emphasis added). It is interesting to note that Justice Stewart in his concurring opinion in *Giaccio* stated:

[D]espite the Court's disclaimer [i.e. the footnote that excepted standardless sentencing], much of the reasoning in its opinion serves to cast grave constitutional doubt upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense.

Id. at 405.

166. 402 U.S. at 203.

167. Both Justices Stewart and White expressed in *Furman* their disapproval of statutes under which "the legislative will is not frustrated if the penalty is never imposed." 408 U.S. at 309 (Stewart, J., concurring), 311 (White, J., concurring).

168. 382 U.S. at 403-04.

"[t]he capital felony was especially heinous, atrocious or cruel."¹⁶⁹ In *Giaccio* the Court also held that the defendant could not properly prepare a defense against such an abstract charge as "misconduct" or "reprehensible conduct."¹⁷⁰ It would seem that it would be equally difficult, if not impossible, for a capital offender to prepare a defense against the state's charge that his murder was "heinous, atrocious or cruel." *Furman* ended capital sentencing's status as the "settled practice of the Nation"; therefore it would seem to follow that *Giaccio* requires more meaningful standards than those provided by the Florida statute in order to limit the discretion of the trial judge when he performs his quasi-legislative sentence determination.¹⁷¹

The conclusion that sentencing standards do not eliminate arbitrariness can also be demonstrated by a careful analysis of the Florida Capital Punishment Act. The aggravating and mitigating circumstances are expressly enumerated in the statute.¹⁷² The statute also provides that the jury's recommendation and the trial judge's sentence must be based on the enumerated circumstances.¹⁷³ Thus the enumerated circumstances are intended to be the exhaustive list of sentencing considerations. By limiting the factors that the sentencer may consider in reaching his sentence determination, the statute introduces a degree of uniformity into the process because each sentence theoretically will be based on the same statutory considerations, and only those considerations. Unfortunately, the statute does not provide a uniform procedure for sentencers to follow when weighing the aggravating and mitigating circumstances. The majority in *Dixon* stated that "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances"¹⁷⁴ But if it is not a counting process, what is it? Without some legislative formulation of the combination of circumstances that justify executing or not executing a defendant, the decision to execute is a function of the sentencer's discretion and nothing more. There are three reasons why the mere requirement that the sufficiency of the aggravating and mitigating

169. See note 105 *supra*.

170. 382 U.S. at 404.

171. The United States Supreme Court has long focused on the constitutional requirement that a criminal statute provide adequate standards to guide the conduct of an accused's trial because adequate standards ensure a fair and non-arbitrary proceeding. See, e.g., *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Musser v. Utah*, 333 U.S. 95, 97 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Herndon v. Lowry*, 301 U.S. 242 (1937).

172. Florida Capital Punishment Act § 9 (§§ 921.141(6)-(7)).

173. Florida Capital Punishment Act § 9 (§§ 921.141(2)-(3)).

174. 283 So. 2d at 10.

circumstances be weighed does not effectively limit the sentencer's discretion. First, nowhere in the statute is the meaning of the word "sufficient" developed, yet it is obviously the core of the matter. Secondly, the statute fails to assign, or even indicate, the relative weights of the various enumerated circumstances. Finally, the statute does not ordain what combination of mitigating circumstances will outweigh what combination of aggravating circumstances.¹⁷⁵

The Florida Supreme Court's interpretation of the Florida Capital Punishment Act imposes an additional restriction on the sentencer's discretion that is not clear from the language of the statute. The court held: "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances"¹⁷⁶ This construction of the statute certainly aids in clarifying the meaning of "sufficient" aggravating or mitigating circumstances; but the clarity necessary to preclude caprice is still lacking. The court did not specify whether each additional aggravating circumstance found is negated by the finding of one more mitigating circumstance. In other words, is a specific number of aggravating circumstances overridden only by an equal number of mitigating circumstances, or are more or fewer mitigating circumstances required? Apparently, the test is not that a specific number of aggravating circumstances is outweighed by the same number of mitigating circumstances because the court stated that the sentencing procedure is not a mere counting

175. The statute could have provided, as Arizona's capital punishment statute does, that

[i]n determining whether to impose a sentence of death or life imprisonment . . . the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

ARIZ. REV. STAT. ANN. § 13-454D (1973). As it is, the Florida statute provides only that the court determine "(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." Florida Capital Punishment Act § 9 (§§ 921.141(3)(a)-(b)). Thus, whereas the Arizona law clearly ordains that the finding of one aggravating circumstance is sufficient justification to execute the defendant, the Florida law has no such provision. Neither of the laws, Arizona's nor Florida's, is clear as to the number of mitigating circumstances that is sufficient to outweigh the aggravating circumstances. For example, statutory wording that would effectively eliminate most judicial discretion in the weighing of aggravating circumstances against mitigating circumstances would be: "The Court shall impose the sentence of death only if it finds one or more aggravating circumstances and no mitigating circumstances."

176. 283 So. 2d at 9.

process.¹⁷⁷ Thus the opinion is inconsistent. In the case where one aggravating circumstance is found, the court has formulated a uniform standard of sufficiency; that is, one aggravating circumstance is sufficient for imposition of the death penalty unless outweighed by one or more mitigating circumstances. However, if more than one aggravating circumstance is found, the determination of sufficient mitigating circumstances is apparently left to the unguided discretion of the sentencer—who is not to engage in a mere counting process.

Under the homicide statute a capital felony is distinguished from a life felony by findings of aggravating circumstances.¹⁷⁸ Thus the aggravating circumstances define the crime of capital murder. For this reason, the court concluded that the existence of aggravating circumstances must be proved beyond a reasonable doubt.¹⁷⁹ This conclusion would seem correct, and it brings certitude to the allocation of the burden of proof, an area untouched by the statute. Nevertheless, the court's interpretation of the statute does not completely remedy the statute's failure to allocate expressly the burden of proof. Whether the existence of mitigating circumstances must be proved beyond a reasonable doubt remains unresolved despite the judicial construction of the statute. *Dixon* does not inform the sentencer of the standard of proof for mitigating circumstances; therefore he is free to exercise unguided discretion when finding mitigating circumstances. Furthermore, whatever the burden of proof, the sentencer must determine as a matter of discretion whether that burden has been met.

The *Dixon* court felt that the Florida Capital Punishment Act evidenced the "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes."¹⁸⁰ In other words, the statute is intended to net for the electric chair only the most reprehensible of capital felons. The language of the enumerated aggravating circumstances, however, seems too broad to achieve this result. Indeed, a sentencer could find any murder to be "especially heinous, atrocious or cruel."¹⁸¹ Thus any case would be a fit one for

177. *Id.* at 10.

178. *Id.* at 9.

179. *Id.*

180. *Id.* at 8.

181. Florida Capital Punishment Act § 9 (§ 921.141(6)(h)). Furthermore, the aggravated class of murders includes all felony murders. Florida Capital Punishment Act § 9 (§§ 921.141(6)(d)-(f)). The same facts that could be taken to justify a finding of aggravation under § 9 (§ 921.141(6)(d)) ("an accomplice in the commission of . . .") could be differently interpreted in support of a finding of mitigation under § 9 (921.141(7)(d)) ("an accomplice in the capital felony . . .").

The problem of felony murder is compounded even more by the homicide statute, Fla. Laws 1973, ch. 72-724, § 3, amending FLA. STAT. § 782.04 (1971). Section 3 (§ 782.04

the sentence of death. By interpreting "especially heinous, atrocious or cruel" to mean a murder that is "unnecessarily torturous to the victim,"¹⁸² the *Dixon* court partially alleviated the problem of overbreadth, thereby imposing some restrictions on the sentencer's discretion. However, it also created a tension within the statute. The court admitted that man is unable "to predict the myriad tortuous paths which criminality can choose to follow."¹⁸³ Yet, at the same time, the court was willing to limit the sentencing determination to thirteen narrowly construed factors. Certainly, all the factors that may induce a trial judge to believe that a murder is aggravated are not enumerated in the statute. For example, either a carefully planned multiple homicide or a political assassination presents circumstances that would induce many people to feel that a crime is aggravated, but these factors are not enumerated in the statute. Therefore, it would seem that the list of aggravating circumstances is inadequate.¹⁸⁴ In fact, it is difficult to imagine that any list could be all inclusive—and therein lies the tension. A narrow interpretation of a list of sentencing standards will result in some important circumstances not being considered, while a broad interpretation of the sentencing standards will result in virtually every case being a fit one for life or death. In the former situation the sentencer will bend the enumerated circumstances to encompass considerations he feels are important; in the latter situation the sentencing standards simply will not be a meaningful restraint on the sentencer's discretion.

Despite the dissent's argument to the contrary, the majority in *Dixon* concluded that the aggravating and mitigating circumstances

(1)(a)), which defines first degree murder, and § 3 (§ 783.04(2)), which defines second degree murder, set forth a proscription against felony murder in virtually identical terms, so that both crimes encompass, and therefore proscribe, the exact same activity. Additional confusion is created by the fact that Fla. Laws 1973, ch. 72-724, § 3, amending FLA. STAT. § 782.04 (1971), provides: "The unlawful killing of a human being . . . when committed by a person engaged in the perpetration of or in the attempt to perpetrate any . . . unlawful throwing, placing or discharging of a destructive device or bomb . . . shall constitute a capital felony." That same activity is also an aggravating circumstance to be weighed by the sentencer when determining whether the death penalty should be inflicted on the capital offender. Florida Capital Punishment Act § 9 (§ 921.141(6)(d)). Furthermore, Fla. Laws 1973, ch. 72-724, § 6(1), amending FLA. STAT. § 790.161 (1971), provides that a person convicted of the same activity shall be guilty of a life felony. In other words, the same act ("bombing") can be a life felony, a capital felony or an aggravated capital felony, and each classification carries a different sentence. See Fla. Laws 1973, ch. 72-74, §§ 1-2, amending FLA. STAT. §§ 775.081(1), 775.082 (1971).

182. 283 So. 2d at 9.

183. *Id.* at 7.

184. This conclusion is buttressed by the fact that state legislatures that have reenacted the death penalty have been unable to agree on a uniform list of aggravating and mitigating circumstances. See note 18 *supra*.

were not vague.¹⁸⁵ A cursory examination of the statute, however, reveals that the meaning of some of the enumerated circumstances is not plain.¹⁸⁶ It is interesting that the court resolved the vagueness issue in favor of the state when the possibility of vagueness exposed the defendant to the risk of the unconstitutional taking of his life.¹⁸⁷

The final and most important constitutional deficiency in the aggravating and mitigating circumstances is that they cannot prevent the arbitrary mitigation of the death penalty. If a jury or trial judge is determined to spare the life of a capital offender for unconstitutional reasons, it can be done by simply refusing to find that sufficient aggravating circumstances exist, and nothing in the statute remedies this defect.¹⁸⁸

2. *The Five Step Sentencing Process.*—The failure of the aggravating and mitigating circumstances to obviate arbitrary sentencing is exacerbated by the “five steps” of the capital sentencing system. The bifurcated capital trial provided for by the new statute is not an unparalleled innovation. Several of the capital punishment statutes that were considered by the United States Supreme Court in the *Furman* line of cases provided for separate guilt and penalty hearings. Nevertheless, the sentences of death imposed under these statutes were summarily overturned.¹⁸⁹

The new Florida Capital Punishment Act provides that the jury’s sentencing decision is only advisory.¹⁹⁰ Some of the sentences of death overturned in the *Furman* line of cases involved statutes under which the trial judge had the power to override the jury’s recommendation of a life or death sentence.¹⁹¹ This indicates that the Supreme Court

185. *State v. Dixon*, 283 So. 2d 1, 8-9 (Fla. 1973).

186. *See, e.g.*, Florida Capital Punishment Act § 9 (921.141(6)(h)).

187. *See notes* 153-58 and accompanying text *supra*.

188. *See McGautha v. California*, 402 U.S. 183, 204-07 (1971).

189. At the time of *Furman* six states provided for bifurcated trials in capital cases. CAL. PENAL CODE § 190.1 (West 1970); CONN. GEN. STAT. ANN. § 53-10 (Supp. 1965); GA. CODE ANN. § 27-2534 (1972); N.Y. PENAL LAW §§ 125.30, 125.35 (McKinney 1967); PA. STAT. ANN. tit. 18, § 4701 (1963); TEX. CODE CRIM. PRO. art. 37.07 (1966). Four of those states had capital cases before the United States Supreme Court and the death sentence in each case was reversed. *Jackson v. Georgia*, 409 U.S. 1122 (1972); *Matthews v. Texas*, 408 U.S. 940 (1972); *Delgado v. Connecticut*, 408 U.S. 940 (1972); *Phelan v. Brierley*, 408 U.S. 939 (1972); *Curry v. Texas*, 408 U.S. 939 (1972); *McKenzie v. Texas*, 408 U.S. 938 (1972); *Davis v. Connecticut*, 408 U.S. 935 (1972); *Sclerli v. Pennsylvania*, 408 U.S. 934 (1972). New York had no case before the Court and California, shortly before *Furman*, had its death penalty declared unconstitutional by the California Supreme Court. *See People v. Anderson*, 493 P.2d 880, 100 Cal. Rptr. 152 (1972); *Aikens v. California*, 406 U.S. 813 (1972).

190. Florida Capital Punishment Act § 9 (§ 921.141(3)).

191. In several of the cases overturned, state law provided that the jury could make a binding recommendation of mercy, but that a recommendation of death

feels that a jury-recommendation sentencing system is constitutionally inadequate. In fact, the provision for a jury recommendation in the Florida Capital Punishment Act introduces unnecessary discretion into the sentencing procedure because the statute gives no guidance regarding the advisory sentence's relevance. Apparently, the trial judge should give great weight to the advisory sentence, but this is not clear from the statute.¹⁹² If the legislature did not intend the advisory sentence to be important, then the jury's participation in the sentencing hearing would be a senseless and expensive extravagance. The further provision that a penalty jury be empaneled, even if there was no jury at the guilt trial,¹⁹³ does seem to indicate that the legislature intended the trial judge to pay deference to the jury's recommendation. Regardless of the weight that the legislature intended the trial judge to give to the jury advisory sentence, however, there is another reason why the advisory sentences are problematic: they do not report the jury's underlying reasons for the sentencing decision reached. This is quite understandable because, in all likelihood, the advisory sentence will not reflect one distinct rationale. Instead it will be the aggregate of several jurors' opinions. Not the least of the factors motivating the jurors will be the knowledge that they themselves do not make the ultimate sentencing decision.¹⁹⁴ Hence, the jury recommendation is an unknown and possibly unreliable factor in the sentencing process. The capital sentencing system might be more reliable and uniform if the provision for a jury recommendation were eliminated.

Most of the condemned felons saved from death row by the Supreme Court in the wake of *Furman* had been sentenced to death by juries. Several, however, had been sentenced by trial judges who were empowered with discretionary sentencing authority, and who had

could be overridden by a judge. *Tull v. Warden*, 408 U.S. 939 (1972); *Strong v. Maryland*, 408 U.S. 939 (1972); *Bartholomey v. Maryland*, 408 U.S. 938 (1972); *Arrington v. Maryland*, 408 U.S. 938 (1972); *Hurst v. Illinois*, 408 U.S. 935 (1972); *Moore v. Illinois*, 408 U.S. 786 (1972).

192. Obviously, since the statute does not explicitly state the exact weight to be accorded to the jury's recommendations, this decision is left to the discretion of the trial judge. It is not unlikely that some judges will afford great deference to the jury recommendation, while others will not.

193. Florida Capital Punishment Act § 9 (§ 921.141(1)).

194. If faced with complete responsibility for the ultimate determination of death, it is quite conceivable that the jury would make a more careful and considered decision. Moreover, since the sentence recommendation is silent as to its underlying basis, it may in fact be based on a constitutionally impermissible rationale such as race, wealth or sex. The provision that the jury shall base its recommendation on the enumerated aggravating and mitigating circumstances, Florida Capital Punishment Act § 9 (§ 921.141(2)), therefore carries with it no guarantees that the jury will do so. See 408 U.S. at 401 (1972) (Burger, C.J., dissenting).

exercised that authority.¹⁹⁵ The fact that the trial judge, rather than the jury, had imposed the sentence of death was of no import to the Supreme Court when it decided these cases. It is clear that the Court felt that arbitrariness was present in sentencing systems where the judge had the ultimate sentencing authority as well as in systems where such sentencing authority was vested in the jury.¹⁹⁶

The new Florida statute requires that the trial court set forth in writing the findings upon which the sentence of death is based.¹⁹⁷ The *Dixon* court felt that this provision would purge the sentencing process of discrimination and capriciousness.¹⁹⁸ The court also considered it "reasonable to require that a finding that life imprisonment be imposed rather than death should be supported in writing by the trial judge."¹⁹⁹ It is obvious that these requirements do provide important safeguards against the arbitrary infliction of the death penalty because the trial judge must be able to support rationally his decision to sentence a man to death.²⁰⁰ Additionally, capital offenders sentenced to die must be distinguished by the trial judge from those sentenced to life imprisonment. The constitutional soundness of this provision is strengthened by the fact that none of the capital statutes overturned in the *Furman* line of cases provided for such written findings. It is clear, however, that the written findings alone cannot neutralize the arbitrariness inherent in the statute as a whole.

The final step in the sentencing process is the review of death

195. There was discretionary sentencing at the trial level in the following cases: *Menthen v. Oklahoma*, 408 U.S. 940 (1972); *Delgado v. Connecticut*, 408 U.S. 940 (1972); *Gilmore v. Maryland*, 408 U.S. 940 (1972); *White v. Ohio*, 408 U.S. 939 (1972); *Phelan v. Brierley*, 408 U.S. 939 (1972); *Alford v. Eyman*, 408 U.S. 939 (1972); *Staten v. Ohio*, 408 U.S. 938 (1972); *Brickhouse v. Slayton*, 408 U.S. 938 (1972); *Cunningham v. Warden*, 408 U.S. 938 (1972); *Fogg v. Slayton*, 408 U.S. 937 (1972); *Alvarez v. Nebraska*, 408 U.S. 937 (1972); *Mefford v. Warden*, 408 U.S. 935 (1972); *Fesmire v. Oklahoma*, 408 U.S. 935 (1972); *Morford v. Hocker*, 408 U.S. 934 (1972); *Miller v. Maryland*, 408 U.S. 934 (1972); *Kruchten v. Eyman*, 408 U.S. 934 (1972); *Janovic v. Eyman*, 408 U.S. 934 (1972); *Pope v. Nebraska*, 408 U.S. 933 (1972).

196. Indeed, in an earlier case, *Williams v. New York*, 337 U.S. 241, 251 (1949), the Court stated: "[I]t must be remembered that there is possibility of abuse wherever a judge must choose between life imprisonment and death." Prior to *Furman* the "possibility of abuse" had been tolerated; the Supreme Court in *Furman*, however, determined that the possibility of abuse in the capital sentencing process was unconstitutional.

197. Florida Capital Punishment Act § 9 (§ 921.141(3)).

198. 283 So. 2d at 8.

199. *Id.*

200. The value of the judge's written finding may be somewhat attenuated by the silent jury recommendation. For example, if a judge decided to pay substantial respect to the jury's recommendation, the written finding of the judge would not accurately reflect what the sentence is based on, because the judge has no way of knowing what circumstances the jury found to exist. See note 194 *supra*.

sentences by the Florida Supreme Court. This step fails to save the statute from the holding of *Furman* for several reasons. First, the *Furman* line of cases indicates that the United States Supreme Court views such appellate review provisions as an inadequate guarantee against arbitrary sentencing. This is apparent from the fact that several of the death sentences overturned were imposed pursuant to statutes which provided for appellate review.²⁰¹ These sentences were reversed by the Supreme Court despite the fact that the state appellate courts involved had a regular and recent practice of reversing death sentences found to be unwarranted after appellate consideration of aggravating and mitigating circumstances.²⁰²

201. See, e.g., *State v. Alford*, 402 P.2d 557 (Ariz. 1965) (upholding judge-imposed death sentence), *Alford v. Eyman*, No. CIV-6017 Phx-CAM (D. Ariz., June 30, 1967) (granting petition for writ of habeas corpus but staying order pending disposition of state's appeal), *rev'd nom. Eyman v. Alford*, 448 F.2d 306 (9th Cir. 1971), *vacated mem.*, 408 U.S. 939 (1972), stating:

Under A.R.S. 13-1717 this court may reduce the sentence imposed, if the punishment imposed is greater than under the circumstances of the case ought to be inflicted.

. . . .

The record shows that at the time of imposing sentence the trial court, in exercising its discretion, weighed and considered all the relevant matters, including material submitted by the defense, as well as the nature of the offense, the character of the defendant, the defendant's past conduct, past record and criminal activities and the defendant's moral character and associations, together with the fact that the defendant, in entering his plea of guilty, admitted all the elements constituting murder in the first degree. The record shows the commission of an atrocious crime and a total lack of any mitigating circumstances.

See also *State v. Kruchten*, 417 P.2d 510 (Ariz. 1966) (upholding judge-imposed death sentence), 276 F. Supp. 858 (D. Ariz. 1967) (denying petition for writ of habeas corpus), *aff'd sub nom. Kruchten v. Eyman*, 406 F.2d 304 (9th Cir. 1969), *vacated mem.*, 408 U.S. 934 (1972); *People v. Hurst*, 247 N.E.2d 614 (Ill. 1969) (upholding death sentence imposed by jury and sustained by trial judge), *vacated mem. sub nom. Hurst v. Illinois*, 408 U.S. 935 (1972); *State v. Pope*, 184 N.W.2d 395 (Neb. 1971) (upholding judge-imposed death sentence), *vacated mem. sub nom. Pope v. Nebraska*, 408 U.S. 933 (1972); *State v. Alvarez*, 154 N.W.2d 746 (Neb. 1967) (upholding judge-imposed death sentence), 177 N.W.2d 591 (1970) (petition for post-conviction release), *vacated mem.*, 408 U.S. 937 (1972); *Menthen v. State*, 492 P.2d 351 (Okla. Crim. App. 1971) (upholding judge-imposed death sentence), *vacated mem. sub nom. Menthen v. Oklahoma*, 408 U.S. 940 (1972); *Fesmire v. State*, 456 P.2d 573 (Okla. Crim. App. 1969) (judge-imposed death sentence), *vacated mem. sub nom. Fesmire v. Oklahoma*, 408 U.S. 935 (1972); *Commonwealth v. Phelan*, 234 A.2d 540 (Pa. 1967) (upholding judge-imposed death sentence), 312 F. Supp. 350 (E.D. Pa. 1970) (denying petition for writ of habeas corpus), *aff'd sub nom. Phelan v. Brierley*, 408 U.S. 939 (1972). In *Commonwealth v. Hough*, 56 A.2d 84, 85-86 (Pa. 1948), the Pennsylvania Supreme Court reviewed judge-imposed death sentences, see note 202 *infra*, but did not review jury-imposed death sentences. See also *Commonwealth v. Smith*, 176 A.2d 619, 620-21 (Pa. 1962); *Commonwealth v. Edwards*, 110 A.2d 216, 217 (Pa. 1955); *Commonwealth v. Zeitz*, 72 A.2d 282, 285-86 (Pa. 1950).

202. See, e.g., *State v. Maloney*, 464 P.2d 793 (Ariz. 1970) (reversing death sentence on ground that the mitigating circumstance of defendant's youth outweighed the atrocity

A second infirmity in Florida's appellate review provision is that review by the supreme court cannot protect against arbitrary mitigation of the death penalty at the trial court level. The requirement that the trial judge justify in writing the sentence of life imprisonment may aid in establishing a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."²⁰³ It must be remembered, however, that "[c]ases involving *life imprisonment* would not be directly reviewable by [the Florida Supreme] Court, and the District Courts of Appeal would not be empowered to overturn the trial judge on the issue of sentence."²⁰⁴ Thus, under the Florida Capital Punishment Act, condemned capital offenders could be spared if the supreme court found that sufficient aggravating circumstances did not exist. Those sentenced to life imprisonment, however, could not be resentenced to death by the Florida Supreme Court if the mitigating circumstances did not actually outweigh the aggravating circumstances. In other words, even if all those executed are found by the supreme court to be guilty of the most "aggravated" and "indefensible" crimes,²⁰⁵ some of those spared at the trial court level may also be guilty of that same quality of criminal activity.

The third deficiency in the appellate review provision is that the statute fails to specify the standard of review that the supreme court is to use. If the review is *de novo*, the supreme court can exercise un-

of the crime); *State v. Valenzuela*, 403 P.2d 286 (Ariz. 1965) (reversing death sentence because of disparity between defendant's sentence and that imposed upon co-defendant); *People v. Crews*, 244 N.E.2d 593 (Ill. 1969) (reversing death sentence on grounds that defendant had no prior criminal record, was well regarded by friends and was acting under the influence of drugs); *People v. Walcher*, 246 N.E.2d 256 (Ill. 1969) (reversing death sentence on ground that defendant was an alcoholic); *State v. Hall*, 125 N.W.2d 918 (Neb. 1964) (reversing death sentence on grounds that defendant was young, feeble-minded and had no previous record); *Muzik v. State*, 156 N.W. 1056 (Neb. 1916) (reversing death sentence on ground that defendant, although legally sane, was mentally abnormal); *Lewis v. State*, 451 P.2d 399 (Okla. Crim. App. 1967) (reversing death sentence on ground that defendant's participation in felony murder was that of minor accomplice); *Williams v. State*, 205 P.2d 524 (Okla. Crim. App. 1949) (reversing death sentence on grounds that defendant had limited education and was intoxicated at time of crime); *Waters v. State*, 197 P.2d 299 (Okla. Crim. App. 1948) (reversing death sentence on grounds that defendant did not have bad record and victim was engaged in illegal activity when killed); *Commonwealth v. Green*, 151 A.2d 241 (Pa. 1959) (reversing death sentence on grounds of youth of defendant and his low intelligence); *Commonwealth v. Irelan*, 17 A.2d 897 (Pa. 1941) (reversing death sentence on grounds that defendant was a devoted mother, had good reputation, was in desperate financial situation and was poorly educated); *Commonwealth v. Garramone*, 161 A. 733 (Pa. 1932) (reversing death sentence on grounds that defendant was of good character and without criminal record, and that there was provocation present).

203. 408 U.S. at 313 (White, J., concurring).

204. 283 So. 2d at 8 (emphasis added).

205. *Id.*

bridled discretion because the Florida Capital Punishment Act does not expressly restrict review by the supreme court to the aggravating and mitigating circumstances.²⁰⁶ Instead, the act is silent as to what factors the court may consider on appeal. If the standard of review is "no substantial evidence," then the Florida Supreme Court will not be free to correct all prejudicial errors on the part of the trial court.²⁰⁷ Furthermore, whatever the standard of review, the supreme court will be limited to the cold record, and, therefore, the court will be disabled from viewing first hand the evidence upon which the sentence was based.

Lastly, the United States Supreme Court has long held that "[t]he law itself must save the parties' rights, and not leave them to the discretion of the courts as such."²⁰⁸ Therefore, if the Florida Capital Punishment Act does not itself provide the protection for the rights of defendants which *Furman* demands, the mere fact that the Florida Supreme Court can review death sentences should not save the statute.

B. The Florida Capital Punishment Act Will Not Result in a More Frequent Application of the Death Penalty.

Justice Harlan, in his opinion for the majority in *McGautha*, recognized the increased reluctance on the part of American juries to impose the death penalty.²⁰⁹ It would seem that this reluctance on the part of the juries is likely to continue if not increase.²¹⁰ Thus, if the

206. Florida Capital Punishment Act § 9 (§ 921.141(5)).

207. Section 9 (§ 921.141(1)) of the Florida Capital Punishment Act and the *Dixon* court's interpretation of that section, 283 So. 2d at 7, both indicate a broad construction of what is relevant to the sentencing decision. Therefore, it is likely that a large quantity of evidence will be introduced at the sentence hearing. The state will need to prove that sufficient aggravating circumstances exist beyond a reasonable doubt, and the defense will grasp at every straw of mitigating evidence in a frantic effort to save the defendant's life. For this reason, it will be extremely difficult for the supreme court to correct all prejudicial evidentiary decisions made by the trial court.

208. *Louisville & N.R.R. v. Central Stock Yards Co.*, 212 U.S. 132, 144 (1909). Justice Holmes explicated this quotation from *Louisville & N.R.R.* in *International Harvester Co. v. Kentucky*, 234 U.S. 216, 220 (1914), by stating: "The point there was that a defect in a law could not be cured by precautions in a judgment . . ."

209. 402 U.S. at 198-99. See also 408 U.S. at 291-94 (Brennan, J., concurring), 309-10 (Stewart, J., concurring), 311-13 (White, J., concurring), 362-66 (Marshall, J., concurring). Justice Marshall's concurring opinion comprehensively treats the history of capital punishment in England and America. See *id.* at 333-42. He concluded that "[t]he foregoing history demonstrates that capital punishment was carried from Europe to America but, once here, was tempered considerably." *Id.* at 341.

210. An increase in jury reluctance could possibly result from the fact that it has been almost ten years since anyone has been executed in the United States. Furthermore, the history of capital sentencing shows that the incidence of death sentences has been on a steady decline in recent times. See note 209 *supra*.

jury's advisory sentence is respected by the trial judge, the death penalty will continue to be rarely exacted under the Florida Capital Punishment Act.

Vesting the final sentencing authority in the trial judge can only compound the jury tendency to inflict infrequently the ultimate sanction of death. The *Dixon* court stated:

The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. *Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is to be viewed in the light of judicial experience.*²¹¹

The clear implication of the above quote is that the trial judge is to temper sentencing severity on the part of the jury. In recent years, however, juries have evidenced reluctance, rather than overwillingness, when called upon to exact the death penalty. If trial judges do ignore juries' recommended death sentences in a significant number of cases, they will merely be accelerating the trend toward de facto abolition of the penalty. Therefore, it seems that the Florida Capital Punishment Act will continue to result in the infrequent application of the death penalty at the trial court level.

The review of death sentences by the Florida Supreme Court, provided for by the new Florida Capital Punishment Act, would also diminish the frequency of the death penalty's infliction.²¹² In *Stein v. New York*,²¹³ a case decided prior to *Furman*, the United States Supreme Court observed: "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."²¹⁴ There is no reason to believe the Florida Supreme Court will not follow this practice. Thus the entire thrust of the Florida

211. 283 So. 2d at 8 (emphasis added).

212. As noted, the supreme court cannot sentence any capital offender to death who has been sentenced to life by the trial court. *See id.*

213. 346 U.S. 156 (1953).

214. *Id.* at 196. *Andres v. United States*, 333 U.S. 740 (1948), reinforces the conclusion that appellate review of the sentence of death can only result in the infrequent rather than regular application of the death penalty. In *Andres* the Court noted: "In death cases doubts . . . should be resolved in favor of the accused." *Id.* at 752.

Capital Punishment Act increases the opportunities to grant mercy in the capital sentencing process. This increase will inevitably result in the infrequent application of the death penalty.

IV. CAN MANDATORY CAPITAL PUNISHMENT STATUTES SURVIVE *Furman*?

This note has focused upon the Florida Capital Punishment Act and the Florida Supreme Court's treatment of that act. The primary criticism of the Florida act has been that it allows too much discretion when considered in light of *Furman v. Georgia*. It may be a mistake, however, to conclude that a mandatory capital punishment act will meet the test of *Furman*. A mandatory death penalty statute may be constitutionally deficient for two reasons: first, it does not effectively eliminate the excessive discretion; secondly, it is regressive in view of the eighth amendment.

Justice Douglas reserved the question of the constitutionality of a mandatory death penalty; however, he noted that a mandatory penalty may be equally offensive to the concept of equal protection which he found implicit in the eighth amendment.²¹⁵ As the *Dixon* court noted, discretion is essential to the judicial process.²¹⁶ A statute that provides

215. 408 U.S. at 257 (Douglas, J., concurring).

216. The *Dixon* court attempted to reinforce its assumption that "[t]he mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia* . . ." by observing:

Discretion and judgment are essential to the judicial process, and are present at all stages of its progression—arrest, arraignment, trial, verdict, and onward through the final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency. See Fla. Const., art. IV, § 8, F.S.A., and U.S. Const., art. II, § 2. 283 So. 2d at 6.

The *Furman* case does not specifically address itself to discretion at stages other than the sentencing level; nevertheless, the existence of unbridled discretion prior to, and after, the defendant's trial does not necessarily support the position of the *Dixon* majority. Instead, the existence of this "essential" discretion arguably buttresses the position that *Furman* implicitly abolished capital punishment. As the *Dixon* court noted, there are several stages in the criminal justice system where the exercise of discretion may determine whether the death penalty is ultimately exacted. First, the prosecutor has discretion to plea bargain down from a capital offense. Secondly, the grand jury has discretion to indict for a capital or lesser offense. Thirdly, the trial jury has discretion to convict the defendant of a capital offense or a lesser included offense. Finally, the chief executive has discretion to commute a sentence of death. Thus any statute which retains unbridled discretion at any one of these critical stages arguably cannot survive the constitutional test of *Furman*. Moreover, most legislatures are constitutionally unable to limit executive clemency discretion by statute. A constitutional amendment would be required. Article II, section 2 of the United States Constitution confers upon the President the power to grant reprieves and pardons for offenses against the United States. "In most, if not all, of the states, the power to pardon is, by constitutional provision, vested in the governor, and, where so vested, his powers in

that death shall be the mandatory punishment for a certain offense does not necessarily eliminate discretion. From the time of the arrest until the time the sentence is actually carried out, discretion is exercised. This is particularly true at the guilt determination stage of the criminal proceeding. Justice Harlan noted in *McGautha* that the advent of discretionary sentencing was in part a response to the widespread problem of jury pardon, which existed under early mandatory death penalty statutes.²¹⁷ Juries are not precluded from imposing the sentence of death in an arbitrary and capricious manner by a mandatory death penalty statute. They can continue to do so by refusing to convict offenders of capital offenses except in rare, random instances. There is little reason to believe that arbitrary jury pardons, prevalent prior to discretionary sentencing statutes, would not again occur under a new mandatory death penalty statute. Thus the constitutional deficiencies of discretionary statutes are also present under mandatory statutes because the jury remains capable of arbitrarily choosing not to convict a defendant of the capital offense.

A mandatory death penalty statute also does not affect the substantial discretion that exists before and after trial. For example, the prosecutor's ability to plea bargain with a capital suspect would be untouched by a mandatory death penalty statute. The prosecutor's decision to plea bargain with one defendant and not another will not necessarily be based upon the same considerations that motivated the legislature to mandate death for one offense and not another.²¹⁸ Further, after the imposition of the death sentence, a mandatory statute does not affect a governor's discretion to exercise executive clemency.

The second constitutional drawback of a mandatory death penalty statute is that it reverses the evolution of the criminal justice system in the area of capital sentencing. The introduction of discretionary capital sentencing statutes was heralded as an enlightened, humanizing development.²¹⁹ Reverting to a mandatory death penalty statute may run against the grain of eighth amendment interpretation formulated

this respect may not be infringed by legislative action." 59 AM. JUR. 2D *Pardon and Parole* § 16 (1971) (footnotes omitted). This is the case in Florida. See FLA. CONST. art. IV, § 8. The United States Supreme Court recognized commutation of death sentences by state governors in *Schwab v. Berggren*, 143 U.S. 442 (1892). See generally Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136 (1964).

217. 402 U.S. at 199-200; see *Furman v. Georgia*, 408 U.S. 238, 339 (1972) (Marshall, J., concurring).

218. See note 216 *supra*.

219. 408 U.S. at 339 (Marshall, J., concurring); *Andres v. United States*, 333 U.S. 740, 749 (1948).

in *Weems v. United States*²²⁰ and *Trop v. Dulles*.²²¹ In *Weems* the Court recognized that the cruel and unusual punishment clause "may acquire meaning as public opinion becomes enlightened by a humane justice."²²² Chief Justice Warren further refined this standard in *Trop* when he stated that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²²³ At common law all those convicted of capital offenses were executed.²²⁴ Americans found this practice abhorrent and, as a result, the law evolved away from mandatory death penalty statutes.²²⁵ A law reinstating the death penalty by means of a mandatory statute would not seem to comport with enlightened "humane justice" nor with "evolving standards of decency that mark the progress of a maturing society." Furthermore, it seems doubtful that the dissenters in *Furman* would uphold a mandatory death penalty statute. Chief Justice Burger, who was joined by the other dissenters, noted that if a mandatory death sentence "is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition."²²⁶ Justice Blackmun's opinion expressed similar disapproval of mandatory statutes. He felt that 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."²²⁷ Mandatory statutes are reminiscent of less humane and less enlightened periods in our criminal justice system and do not eliminate the possibility of the arbitrary application of the death penalty. Therefore, if faced with the question of the constitutionality of a mandatory statute, it is possible that the Justices who left that question open would disapprove of such legislation. In the unlikely event that Justices White, Stewart and Douglas did vote to uphold a mandatory statute, the four *Furman* dissenters who expressed disapproval of mandatory statutes, together with Justices Marshall and Brennan, could constitute a majority opposed to such a reinstatement of capital punishment.

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220. 217 U.S. 349 (1910).

221. 356 U.S. 86 (1958).

222. 217 U.S. at 378. See note 25 *supra*.

223. 356 U.S. at 101. See note 25 *supra*.

224. 402 U.S. at 198.

225. 408 U.S. at 341 (Marshall, J., concurring).

226. *Id.* at 401 (Burger, C.J., dissenting).

227. *Id.* at 413 (Blackmun, J., dissenting).