Gregg v. Georgia

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE STEWART.

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

I

The petitioner, Troy Gregg, was charged with committing armed robbery and murder. In accordance with Georgia procedure in capital cases, the trial was in two stages, a guilt stage and a sentencing stage. The evidence at the guilt trial established that, on November 21, 1973, the petitioner and a traveling companion, Floyd Allen, while hitchhiking north in Florida were picked up by Fred Simmons and Bob Moore. Their car broke down, but they continued north after Simmons purchased another vehicle with some of the cash he was carrying. While still in Florida, they picked up another hitchhiker, Dennis Weaver, who rode with them to Atlanta, where he was let out about 11 p.m. Page 428 U. S. 159 A short time later, the four men interrupted their journey for a rest stop along the highway. The next morning the bodies of Simmons and Moore were discovered in a ditch nearby.

On November 23, after reading about the shootings in an Atlanta newspaper, Weaver communicated with the Gwinnett County police and related information concerning the journey with the victims, including a description of the car. The next afternoon, the petitioner and Allen, while in Simmons' car, were arrested in Asheville, N.C. In the search incident to the arrest a .25-caliber pistol, later shown to be that used to kill Simmons and Moore, was found in the petitioner's pocket. After receiving the warnings required by *Miranda v. Arizona,* 384 U. S. 436 (1966), and signing a written waiver of his rights, the petitioner signed a statement in which he admitted shooting, then robbing Simmons and Moore. He justified the slayings on grounds of self-defense. The next day, while being transferred to Lawrenceville, Ga., the petitioner and Allen were taken to the scene of the shootings. Upon arriving there, Allen recounted the events leading to the slayings. His version of these events was as follows: After Simmons and Moore left the car, the petitioner stated that he intended to rob them. The petitioner then took his pistol in hand and positioned himself on the car to improve his aim. As Simmons and Moore came up an embankment toward the car, the petitioner fired three shots and the two men fell near a ditch. The petitioner, at close range, then fired a shot into the head of each. He robbed them of valuables and drove away with Allen.

A medical examiner testified that Simmons died from a bullet wound in the eye, and that Moore died from bullet wounds in the cheek and in the back of the head. He further testified that both men had several bruises Page 428 U. S. 160 and abrasions about the face and head which probably were sustained either from the fall into the ditch or from being dragged or pushed along the embankment. Although Allen did not testify, a police detective recounted the substance of Allen's statements about the slayings, and indicated that, directly after Allen had made these statements, the petitioner had admitted that Allen's account was accurate. The petitioner testified in his own defense. He confirmed that Allen had made the statements described by the detective,

but denied their truth or ever having admitted to their accuracy. He indicated that he had shot Simmons and Moore because of fear and in self-defense, testifying they had attacked Allen and him, one wielding a pipe and the other a knife. [Footnote 1]

The trial judge submitted the murder charges to the jury on both felony murder and nonfelony murder theories. He also instructed on the issue of self-defense, but declined to instruct on manslaughter. He submitted the robbery case to the jury on both an armed robbery theory and on the lesser included offense of robbery by intimidation. The jury found the petitioner guilty of two counts of armed robbery and two counts of murder.

At the penalty stage, which took place before the same jury, neither the prosecutor nor the petitioner's lawyer offered any additional evidence. Both counsel, however, made lengthy arguments dealing generally with the propriety of capital punishment under the circumstances and with the weight of the evidence of guilt. The trial judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count. Page 428 U. S. 161

The judge further charged the jury that, in determining what sentence was appropriate, the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.

Finally, the judge instructed the jury that it "would not be authorized to consider [imposing] the penalty of death" unless it first found beyond a reasonable doubt one of these aggravating circumstances;

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

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

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

Tr. 476-477. Finding the first and second of these circumstances, the jury returned verdicts of death on each count.

The Supreme Court of Georgia affirmed the convictions and the imposition of the death sentences for murder. 233 Ga. 117, 210 S.E.2d 659 (1974). After reviewing the trial transcript and the record, including the evidence, and comparing the evidence and sentence in similar cases in accordance with the requirements of Georgia law, the court concluded that, considering the nature of the crime and the defendant, the sentences of death had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases. [Footnote 2] The death Page 428 U. S. 162 sentences imposed for armed robbery, however, were vacated on the grounds that the death penalty had rarely been imposed in Georgia for that offense, and that the jury improperly considered the murders as aggravating

circumstances for the robberies after having considered the armed robberies as aggravating circumstances for the murders. *Id.* at 127, 210 S.E.2d at 667.

We granted the petitioner's application for a writ of certiorari limited to his challenge to the imposition of the death sentences in this case as "cruel and unusual" punishment in violation of the Eighth and the Fourteenth Amendments. 423 U.S. 1082 (1976).

II

Before considering the issues presented, it is necessary to understand the Georgia statutory scheme for the imposition of the death penalty. [Footnote 3] The Georgia statute, as amended after our decision in *Furman v. Georgia,* 408 U. S. 238(1972), retains the death penalty for six categories of crime: murder, [Footnote 4] kidnaping for ransom or where Page 428 U. S. 163 the victim is harmed, armed robbery, [Footnote 5] rape, treason, and aircraft hijacking. [Footnote 6] Ga.Code Ann. §§ 26-1101, 26-1311 26-1902, 26-2001, 26-2201, 26-3301 (1972). The capital defendant's guilt or innocence is determined in the traditional manner, either by a trial judge or a jury, in the first stage of a bifurcated trial.

If trial is by jury, the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence. *Sims v. State,* 203 Ga. 668, 47 S.E.2d 862 (1948). *See Linder v. State,* 132 Ga.App. 624, 625, 208 S.E.2d 630, 631 (1974). After a verdict, finding, or plea of guilty to a capital crime, a presentence hearing is conducted before whoever made the determination of guilt. The sentencing procedures are essentially the same in both bench and jury trials. At the hearing:

"[T]he judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of any prior conviction and pleas: Provided, however, that Page 428 U. S. 164 only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge [or jury] shall also hear argument by the defendant or his counsel and the prosecuting attorney . . . regarding the punishment to be imposed."

§ 27-2503 (Supp. 1975). The defendant is accorded substantial latitude as to the types of evidence that he may introduce.*See Brown v. State,* 235 Ga. 64, 647-650, 220 S.E.2d 922, 925-926 (1975). [Footnote 7] Evidence considered during the guilt stage may be considered during the sentencing stage without being resubmitted. *Eberheart v. State,* 232 Ga. 247, 253, 206 S.E.2d 12, 17 (1974). [Footnote 8]

In the assessment of the appropriate sentence to be imposed, the judge is also required to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence. . . ." § 27-2534.1(b) (Supp. 1975). The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute. Before a convicted defendant may be sentenced to death, however, except in cases of treason or aircraft hijacking, the jury, or the trial judge in cases tried without a jury, must find beyond a reasonable

doubt one of the 10 aggravating circumstances specified Page 428 U. S. 165 in the statute. [Footnote 9] The sentence of death may be imposed only if the jury (or judge) finds one of the statutory aggravating circumstances and then elects to Page 428 U. S. 166 impose that sentence. § 23102 (Supp. 1975). If the verdict is death, the jury or judge must specify the aggravating circumstance(s) found. § 27-253.1(c) (Supp. 1975). In jury cases, the trial judge is bound by the jury's recommended sentence. §§ 23102, 27-2514 (Supp. 1975).

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

"(1) Whether the sentence of death was imposed Page 428 U. S. 167 under the influence of passion, prejudice, or any other arbitrary factor, and"

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27.2534.1(b), and"

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

§ 27-2537 (Supp. 1975). If the court affirms a death sentence, it is required to include in its decision reference to similar cases that it has taken into consideration. § 27-2537(e) (Supp. 1075). [Footnote 10]

A transcript and complete record of the trial, as well as a separate report by the trial judge, are transmitted to the court for its use in reviewing the sentence. § 27-2537(a) (Supp. 1975). The report is in the form of a 6 1/2-page questionnaire designed to elicit information about the defendant, the crime, and the circumstances of the trial. It requires the trial judge to characterize the trial in several ways designed to test for arbitrariness and disproportionality of sentence. Included in the report are responses to detailed questions concerning the quality of the defendant's representation, whether race played a role in the trial, and, whether, in the trial court's judgment, there was any doubt about Page 428 U. S. 168 the defendant' guilt or the appropriateness of the sentence. A copy of the report is served upon defense counsel. Under its special review authority, the court may either affirm the death sentence or remand the case for resentencing. In cases in which the death sentence is affirmed, there remains the possibility of executive clemency. [Footnote 11]

III

We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. In 428 U. S. we will consider the sentence of death imposed under the Georgia statutes at issue in this case.

The Court, on a number of occasions, has both assumed and asserted the constitutionality of capital punishment. In several cases, that assumption provided a necessary foundation for the decision, as the Court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment. [Footnote 12] But until *Furman v. Georgia,* 408 U. S. 238 (1972), the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and Page 428 U. S. 169 unusual punishment in violation of the Constitution. Although this issue was presented and addressed in *Furman,* it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional per se; [Footnote 13] two Justices would have reached the opposite conclusion; [Footnote 14] and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed. [Footnote 15] We now hold that the punishment of death does not invariably violate the Constitution.

A

The history of the prohibition of "cruel and unusual" punishment already has been reviewed at length. [Footnote 16] The phrase first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary. *See* Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif.L.Rev. 839, 852-853 (1969). The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved. *Id.* at 860. The Page 428 U. S. 170 American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned, however, with proscribing "tortures" and other "barbarous" methods of punishment. *Id.* at 842. [Footnote 17]

In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. The constitutionality of the sentence of death itself was not at issue, and the criterion used to evaluate the mode of execution was its similarity to "torture" and other "barbarous" methods. *See Wilkerson v. Utah,* 99 U. S. 130, 99 U. S. 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment. . . ."); *In re Kemmler,*136 U. S. 436, 136 U. S. 447 (1890) ("Punishments are cruel when they involve torture or a lingering death. . . ."). *See also Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459, 329 U. S. 464 (1947) (second attempt at electrocution found not to violate Page 428 U. S. 171 Eighth Amendment, since failure of initial execution attempt was "an unforeseeable accident" and "[t] here [was] no purpose to inflict unnecessary pain, nor any unnecessary pain involved in the proposed execution").

But the Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States,* 217 U. S. 349, 217 U. S. 373 (1910). Thus, the Clause forbidding "cruel and unusual' punishments 'is not fastened to the obsolete, but may acquire meaning as

public opinion becomes enlightened by a humane justice." *Id.* at 217 U. S. 378. *See also Furman v. Georgia,* 408 U.S. at 408 U. S. 429-430 (POWELL, J., dissenting); *Trop v. Dulles,* 356 U. S. 86, 356 U. S. 100-101 (1958) (plurality opinion).

In *Weems,* the Court addressed the constitutionality of the Philippine punishment of *cadena temporal* for the crime of falsifying an official document. That punishment included imprisonment for at least 12 years and one day, in chains, at hard and painful labor; the loss of many basic civil rights; and subjection to lifetime surveillance. Although the Court acknowledged the possibility that "the cruelty of pain" may be present in the challenged punishment, 217 U.S. at 217 U. S. 366, it did not rely on that factor, for it rejected the proposition that the Eighth Amendment reaches only punishments that are "inhuman and barbarous, torture and the like." *Id.* at 217 U. S. 368. Rather, the Court focused on the lack of proportion between the crime and the offense:

"Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice Page 428 U. S. 172 of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."

Id. at 217 U. S. 366-367. [Footnote 18] Later, in *Trop v. Dulles, supra,* the Court reviewed the constitutionality of the punishment of denationalization imposed upon a soldier who escaped from an Army stockade and became a deserter for one day. Although the concept of proportionality was not the basis of the holding, the plurality observed in dicta that "[f]ines, imprisonment and even execution may be imposed depending upon the enormity of the crime." 356 U.S. at 356 U. S. 100.

The substantive limits imposed by the Eighth Amendment on what can be made criminal and punished were discussed in *Robinson v. California,* 370 U. S. 660 (1962). The Court found unconstitutional a state statute that made the status of being addicted to a narcotic drug a criminal offense. It held, in effect, that it is "cruel and unusual" to impose any punishment at all for the mere status of addiction. The cruelty in the abstract of the actual sentence imposed was irrelevant: "Even one day in prison would be a cruel and unusual punishment for the *crime' of having a common cold." Id. at 370 U. S. 667. Most recently, in Furman v. Georgia, supra, three Justices, in separate concurring opinions, found the Eighth Amendment applicable to procedures employed to select convicted defendants for the sentence of death.*

It is clear from the foregoing precedents that the Page 428 U. S. 173 Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra* at 356 U. S. 101. *See also Jackson v. Bishop,* 404 F.2d 571, 579 (CA8 1968). *Cf. Robinson v. California, supra* at 370 U. S. 666. Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. As we develop below more fully, *see infra* at 428 U. S. 175-176, this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Trop v. Dulles, supra* at 356 U. S. 100 (plurality opinion). This means, at least, that the punishment not be "excessive." When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder), rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime), is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. *Furman v. Georgia, supra,* at 408 U. S. 392-393 (BURGER, C.J., dissenting). *See Wilkerson v. Utah,* 99 U.S. at 99 U. S. 136; *Weems v. United States, supra,* at 217 U. S. 381. Second, the punishment must not be grossly out of proportion to the severity of the crime. *Trop v. Dulles, supra,* at 356 U. S. 100 (plurality opinion) (dictum); *Weems v. United States, supra,* at 217 U. S. 367. Page 428 U. S. 174

B

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

"Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment, and that there are punishments that the Amendment would bar whether legislatively approved or not."

Furman v. Georgia, 408 U.S. at 408 U. S. 313-314 (WHITE, J., concurring). *See also id.* at 408 U. S. 433 (POWELL, J., dissenting). [Footnote 19] But, while we have an obligation to insure that constitutional Page 428 U. S. 175 bound are not overreached, we may not act as judges as we might as legislators. "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."

Dennis v. United States, 341 U. S. 494, 341 U. S. 525 (1951) (Frankfurter, J., concurring in affirmance of judgment). [Footnote 20]

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

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Page 428 U. S. 176

Furman v. Georgia, supra at 408 U. S. 383 (BURGER, C.J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system, 408 U.S. at 408 U. S. 465-470 (REHNQUIST, J., dissenting), is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." *Gore v. United States,*357 U. S. 386, 357 U. S. 393 (1968). *Cf. Robinson v. California,* 370 U.S. at 370 U. S. 664-665; *Trop v. Dulles,* 356 U.S. at 356 U. S. 103 (plurality opinion); *In re Kemmler,* 136 U.S. at 136 U. S. 447. Caution is necessary lest this Court become, "under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country." *Powell v. Texas,* 392 U. S. 514, 392 U. S. 533 (1968) (plurality opinion). A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience. *See Furman v. Georgia, supra* at 408 U. S. 461-4462 (POWELL, J., dissenting).

C

In the discussion to this point, we have sought to identify the principles and considerations that guide a court in addressing an Eighth Amendment claim. We now consider specifically whether the sentence of death for the crime of murder is a *per se* violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question.

The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common law rule Page 428 U. S. 177 imposed a mandatory death sentence on all convicted murderers. *McGautha v. California,* 402 U. S. 183, 402 U. S. 197-198 (1971). And the penalty continued to be used into the 20th century by most American States, although the breadth of the common law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy. *Id.* at 402 U. S. 199-200. *See Woodson v. North Carolina, post* at 428 U. S. 289-292.

It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes. C. 9, 1 Stat. 112 (1790). The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same

offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

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

For nearly two centuries, this Court, repeatedly and Page 428 U. S. 178 often expressly, has recognized that capital punishment is not invalid *per se.* In *Wilkerson v. Utah,* 99 U.S. at 99 U. S. 134-135, where the Court found no constitutional violation in inflicting death by public shooting, it said:

"Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category within the meaning of the eighth amendment."

Rejecting the contention that death by electrocution was "cruel and unusual," the Court in *In re Kemmler, supra* at 136 U. S. 447, reiterated:

"[T]he punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Again, in *Louisiana ex rel. Francis v. Resweber,* 329 U.S. at 329 U. S. 464, the Court remarked:

"The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."

And in Trop v. Dulles, 356 U.S. at 356 U. S. 99, Mr. Chief Justice Warren, for himself and three other Justices, wrote:

"Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment . . . , 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. " Page 428 U. S. 179

Four years ago, the petitioners in *Furman* and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. The petitioners in those cases said, in effect, that the evolutionary process had come to an end, and that standards of decency required that the Eighth Amendment be construed finally as prohibiting capital punishment for any crime, regardless of its depravity and impact on society. This view was accepted by two Justices. [Footnote 21] Three other Justices were unwilling to go so far; focusing on the procedures by which convicted defendants were selected for the death penalty, rather than on the actual

punishment inflicted, they joined in the conclusion that the statutes before the Court were constitutionally invalid. [Footnote 22]

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

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman.* The legislatures of at least 35 States [Footnote 23] have enacted new statutes that provide for the Page 428 U. S. 180 death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. [Footnote 24] These recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman* primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes. But all of the post-*Furman* statutes make clear that capital punishment Page 428 U. S. 181 itself has not been rejected by the elected representatives of the people.

In the only state-wide referendum occurring since *Furman* and brought to our attention, the people of California adopted a constitutional amendment that authorized capital punishment, in effect negating a prior ruling by the Supreme Court of California in *People v. Anderson,* 6 Cal.3d 628, 493 P.2d 880, *cert. denied,* 406 U.S. 958 (1972), that the death penalty violated the California Constitution. [Footnote 25]

The jury also is a significant and reliable objective index of contemporary values, because it is so directly involved. *See Furman v. Georgia,* 408 U.S. at 408 U. S. 439-440 (POWELL, J., dissenting). *See generally* Powell, Jury Trial of Crimes, 23 Wash. & Lee L.Rev. 1 (1966). The Court has said that "one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system."

Witherspoon v. Illinois, 391 U. S. 510, 391 U. S. 519 n. 15 (1968). It may be true that evolving standards have influenced juries in Page 428 U. S. 182 recent decades to be more discriminating in imposing the sentence of death. [Footnote 26] But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se.* Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases. *See Furman v. Georgia, supra* at 408 U. S. 388 (BURGER, C.J., dissenting). Indeed, the actions of juries in many States since *Furman* are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974, at least 254 persons had been sentenced to

death since *Furman,* [Footnote 27] and, by the end of March, 1976, more than 460 persons were subject to death sentences.

As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. *Trop v. Dulles,* 356 U.S. at 356 U. S. 100 (plurality opinion). Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of Page 428 U. S. 183 penology," *Furman v. Georgia, supra,* at 408 U. S. 451 (POWELL, J., dissenting), the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering. *Cf. Wilkerson v. Utah,* 99 U.S. at 99 U. S. 135-136; *In re Kemmler,* 136 U.S. at 136 U. S. 447. The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders. [Footnote 28]

In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. [Footnote 29] This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes, rather than self-help, to vindicate their wrongs.

"The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law."

Furman v. Georgia, supra at 408 U. S. 308 (STEWART, J., concurring). "Retribution is no longer the dominant objective of the criminal law," *Williams v. New York,* 337 U. S. 241, 337 U. S. 248 (1949), but neither is it a forbidden objective, nor one inconsistent with our respect for the dignity of men. Page 428 U. S. 184 *Furman v. Georgia,* 408 U.S. at 408 U. S. 394-395 (BURGER, C. dissenting); *id.* at 408 U. S. 452-454 (POWELL, J., dissenting); *Powell v. Texas,* 392 U.S. at 392 U. S. 531, 392 U. S. 535-536 (plurality opinion). Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death. [Footnote 30] Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. [Footnote 31] The result Page 428 U. S. 185 simply have been inconclusive. As one opponent of capital punishment has said:

"[A]fter all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and, for systematic and easily visible reasons, cannot know, what the truth about this 'deterrent' effect may be. . . . "

"The inescapable flaw is . . . that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect were observed (and the observed effects, one way or another, are not large), then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A 'scientific' -- that is

to say, a soundly based -- conclusion is simply impossible, and no methodological path out of this tangle suggests itself."

C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 226 (1974).

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, [Footnote 32] there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant Page 428 U. S. 186 deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. [Footnote 33] And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate. [Footnote 34]

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. *Furman v. Georgia, supra* at 408 U. S. 403-405 (BURGER, C.J., dissenting). Indeed, many of the post-*Furman* statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature Page 428 U. S. 187 to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification, and thus is not unconstitutionally severe.

Finally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed. There is no question that death, as a punishment, is unique in its severity and irrevocability. *Furman v. Georgia,*408 U.S. at 408 U. S. 286-291 (BRENNAN, J., concurring); *id.* at 408 U. S. 306 (STEWART, J., concurring). When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. *Powell v. Alabama,* 287 U. S. 45, 287 U. S. 71 (1932); *Reid v. Covert,* 354 U. S. 1, 354 U. S. 77 (1957) (Harlan, J., concurring in result). But we are concerned here only with the imposition of capital punishment for the crime of murder, and, when a life has been taken deliberately by the offender, [Footnote 35] we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

IV

We now consider whether Georgia may impose the death penalty on the petitioner in this case. Page 428 U. S. 188

A

While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. MR. JUSTICE WHITE concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes, and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 408 U. S. 313 (concurring). Indeed, the death sentences examined by the Court in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he 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." *Id.* at 408 U. S. 309-310 (STEWART, J., concurring). [Footnote 36] Page 428 U. S. 189 *Furman* mandates that, where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

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

Pennsylvania ex rel. Sullivan v. Ashe, 302 U. S. 51, 302 U. S. 55 (1937). *See also Williams v. Oklahoma,* 358 U. S. 576, 358 U. S. 585 (1959); *Williams v. New York,* 337 U.S. at 337 U. S. 247. [Footnote 37] Otherwise, "the system cannot function in a consistent and a rational manner." American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 4.1(a), Commentary, p. 201 (App.Draft 1968). *See also* President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 144 (1967); ALI, Model Penal Code § 7.07, Comment 1, pp. 52-53 (Tent.Draft No. 2, 1954). [Footnote 38] Page 428 U. S. 190

The cited studies assumed that the trial judge would be the sentencing authority. If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' [Footnote 39]"

But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. [Footnote 40] This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure -- one in which the Page 428 U. S. 191 question of sentence is not considered until the determination of guilt has been made -- is the best answer. The drafters of the Model Penal Code concluded:

"[If a unitary proceeding is used], the determination of the punishment must be based on less than all the evidence that has a bearing on that issue, such, for example, as a previous criminal record of the accused, or evidence must be admitted on the ground that it is relevant to sentence, though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone. Trial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt."

". . . The obvious solution . . . is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but, once guilt has been determined, opening the record to the further information that is relevant to sentence. This is the analogue of the procedure in the ordinary case when capital punishment is not in issue; the court conducts a separate inquiry before imposing sentence."

ALI, Model Penal Code § 201.6, Comment 5, pp. 74-75 (Tent.Draft No. 9, 1959). *See also Spencer v. Texas,* 385 U. S. 554, 385 U. S. 567-569 (1967); Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, �� 555, 574; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U.Pa.L.Rev. 1099, 1135-1136 (1953). When a human life is at stake, and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated Page 428 U. S. 192 system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman.* [Footnote 41]

But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. *See* American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures, § 1.1(b), Commentary, pp. 467 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: The Courts 26 (1967). To the extent that this problem is inherent in jury sentencing, it may not be totally correctable. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the

crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.

The idea that a jury should be given guidance in its Page 428 U. S. 193 decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. [Footnote 42]*See Gasoline Products Co. v. Champlin Refining Co.,* 283 U. S. 494, 283 U. S. 498 (1931); Fed.Rule Civ.Proc. 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, [Footnote 43] the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case."

ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent.Draft No. 9, 1959) (emphasis in original). [Footnote 44] While such standards are, by Page 428 U. S. 194 necessity somewhat general, they do provide guidance to the sentencing authority, and thereby reduce the likelihood that it will impose a sentence that fairly can be Page 428 U. S. 195 called capricious or arbitrary. [Footnote 45] Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

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

We do not intend to suggest that only the above-described procedures would be permissible under *Furman,* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman,* [Footnote 46] for each distinct system must be examined on an individual basis. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital sentencing systems capable of meeting *Furman's* constitutional concerns. [Footnote 47] Page 428 U. S. 196

B

We now turn to consideration of the constitutionality of Georgia's capital sentencing procedures. In the wake of *Furman,*Georgia amended its capital punishment statute, but chose not to narrow the scope of its murder provisions. *See Part II, supra.* Thus, now, as before *Furman,* in Georgia,

"[a] person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being."

Ga.Code Ann., § 26-1101(a) (1972). All persons convicted of murder "shall be punished by death or by imprisonment for life." § 26-1101(c) (1972).

Georgia did act, however, to narrow the class of murderers subject to capital punishment by specifying 10 Page 428 U. S. 197 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. [Footnote 48] In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. § 27-2534.1(b) (Supp. 1975). The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, *see* § 27-2302 (Supp. 1975), but it must find a statutory aggravating circumstance before recommending a sentence of death.

These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as *Furman's* jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime: was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way, or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (*e.g.,* his youth, the extent of his cooperation with the police, his emotional state at the time of the crime). [Footnote 49] As a result, while Page 428 U. S. 198 some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce nondiscriminatory application." *Coley v. State,* 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974).

As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases. § 27-2537(c) (Supp. 1975).

In short, Georgia's new sentencing procedures require, as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in *Furman,* the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face, these procedures seem to satisfy the concerns of *Furman.* No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." 408 U.S. at 408 U. S. 313 (WHITE, J., concurring).

The petitioner contends, however, that the changes in the Georgia sentencing procedures are only cosmetic, that the arbitrariness and capriciousness condemned by *Furman* continue to exist in Georgia -- both in traditional practices that still remain and in the new sentencing procedures adopted in response to *Furman.* Page 428 U. S. 199

1

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

The existence of these discretionary stages is not determinative of the issues before us. At each of these stages, an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman,* in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards, so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant. [Footnote 50] Page 428 U. S. 200

2

The petitioner further contends that the capital sentencing procedures adopted by Georgia in response to *Furman* do not eliminate the dangers of arbitrariness and caprice in jury sentencing that were held in *Furman* to be violative of the Eighth and Fourteenth Amendments. He claims that the statute is so broad and vague as to leave juries free to act as arbitrarily and capriciously as they wish in deciding whether to impose the death penalty. While there is no claim that the jury in this case relied upon a vague or overbroad provision to establish the existence of a statutory aggravating circumstance, the petitioner looks to the sentencing system as a whole (as the Court did in *Furman* and we do today), and argues that it fails to reduce sufficiently the risk of arbitrary infliction of death sentences. Specifically, Gregg urges that the statutory aggravating circumstances are too broad and too vague, that the sentencing procedure allows for arbitrary grants of mercy, and that the scope of the evidence and argument that can be considered at the presentence hearing is too wide. Page 428 U. S. 201

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

[Footnote 51] It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction. [Footnote 52] In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of the seventh, *see McCorquodale v. State,* 233 Ga. 369, 211 S.E.2d 577 (1974), and that homicide was a horrifying torture-murder. [Footnote 53] Page 428 U. S. 202

The petitioner also argues that two of the statutory aggravating circumstances are vague, and therefore susceptible of widely differing interpretations, thus creating a substantial risk that the death penalty will be arbitrarily inflicted by Georgia juries. [Footnote 54] In light of the decisions of the Supreme Court of Georgia, we must disagree. First, the petitioner attacks that part of § 27-2534.1(b)(1) that authorizes a jury to consider whether a defendant has a "substantial history of serious assaultive criminal convictions." The Supreme Court of Georgia, however, has demonstrated a concern that the new sentencing procedures provide guidance to juries. It held this provision to be impermissibly vague in *Arnold v. State,* 236 Ga. 534, 540, 224 S.E.2d 386, 391 (1976), because it did not provide the jury with "sufficiently *clear and objective standards.'" Second, the petitioner points to § 27-2534.1(b)(3) which speaks of creating a "great risk of death to more than one person." While such a phrase might be susceptible of an overly broad interpretation, the Supreme Court of Georgia has not so construed it. The only case in which the court upheld a conviction in reliance on this aggravating circumstance involved a man who stood up in a church and fired a gun indiscriminately into the audience. See* Page 428 U. S. 203 *Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975). On the other hand, the court expressly reversed a finding of great risk when the victim was simply kidnaped in a parking lot. See Jarrell v. State, 234 Ga. 410, 424, 216 S.E.2d 258, 269 (1975). [Footnote 55]*

The petitioner next argues that the requirements of *Furman* are not met here, because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets *Furman. See supra* at 428 U. S. 198-199. Moreover, it ignores the role of the Supreme Court of Georgia, which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

The petitioner objects, finally, to the wide scope of evidence and argument allowed at presentence hearings. We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing, and to approve open and far-ranging argument. *See, e.g., Brown v. State,* 235 Ga. 644, 220 S.E.2d 922 (1975). So long as the Page 428 U. S. 204 evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision. *See supra* at 428 U. S. 189-190.

Finally, the Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 27-2537(c)(3) (Supp. 1975). [Footnote 56] In performing Page 428 U. S. 205 its sentence review function, the Georgia court has held that, "if the death penalty is only rarely imposed for an act, or it is substantially out of line with sentences imposed for other acts, it will be set aside as excessive."

Coley v. State, 231 Ga. at 834, 204 S.E.2d at 616. The court, on another occasion, stated that "we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally. . . ."

Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975). *See also Jarrell v. State, supra* at 425, 216 S.E.2d at 270 (standard is whether "juries generally throughout the state have imposed the death penalty"); *Smith v. State,* 236 Ga. 12, 24, 222 S.E.2d 308, 318 (1976) (found "a clear pattern" of jury behavior).

It is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously. In *Coley,* it held that

"[t]he prior cases indicate that the past practice among juries faced with similar factual situations and like aggravating circumstances has been to impose only the sentence of life imprisonment for the offense of rape, rather than death."

231 Ga. at 835, 204 S.E.2d at 617. It thereupon reduced Coley's sentence from death to life imprisonment. Similarly, although armed robbery is a capital offense under Georgia law, § 26-1902 (1972), the Georgia court concluded that the death sentences imposed in this case for that crime were "unusual in that they are rarely imposed for [armed robbery]. Thus, under the test provided by statute, . . . they must be considered to be excessive or disproportionate to the penalties imposed in similar cases." 233 Page 428 U. S. 206 Ga. at 127, 210 S.E.2d at 667. The court therefore vacated Gregg's death sentences for armed robbery, and has followed a similar course in every other armed robbery death penalty case to come before it. *See Floyd v. State,* 233 Ga. 280, 285, 210 S.E.2d 810, 814 (1974); *Jarrell v. State,* 234 Ga. at 424-425, 216 S.E.2d at 270. *See Dorsey v. State,* 236 Ga. 591, 225 S.E.2d 418 (1976).

The provision for appellate review in the Georgia capital sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

V

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way, the jury's discretion is channeled. No longer Page 428 U. S. 207 can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

For the reasons expressed in this opinion, we hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution. Accordingly, the judgment of the Georgia Supreme Court is affirmed. *It is so ordered.*

[Footnote 1]

On cross-examination, the State introduced a letter written by the petitioner to Allen entitled, "[a] statement for you," with the instructions that Allen memorize and then burn it. The statement was consistent with the petitioner's testimony at trial.

[Footnote 2]

The court further held, in part, that the trial court did not err in refusing to instruct the jury with respect to voluntary manslaughter, since there was no evidence to support that verdict.

[Footnote 3]

Subsequent to the trial in this case, limited portions of the Georgia statute were amended. None of these amendments changed significantly the substance of the statutory scheme. All references to the statute in this opinion are to the current version.

[Footnote 4]

Georgia Code Ann. § 26-1101 (1972) provides:

"(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart."

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice."

"(c) A person convicted of murder shall be punished by death or by imprisonment for life."

[Footnote 5]

Section 26-1902 (1972) provides:

"A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

[Footnote 6]

These capital felonies currently are defined as they were when *Furman* was decided. The 1973 amendments to the Georgia statute, however, narrowed the class of crimes potentially punishable by death by eliminating capital perjury.*Compare* § 26-2401 (Supp. 1975) *with* § 26-2401 (1972).

[Footnote 7]

It is not clear whether the 1974 amendments to the Georgia statute were intended to broaden the types of evidence admissible at the presentence hearing. *Compare* § 27-2503(a) (Supp. 1975) *with* § 27-2534 (1972) (deletion of limitation "subject to the laws of evidence").

[Footnote 8]

Essentially the same procedures are followed in the case of a guilty plea. The judge considers the factual basis of the plea, as well as evidence in aggravation and mitigation. *See Mitchell v. State,* 234 Ga. 160, 214 S.E.2d 900 (1975).

[Footnote 9]

The statute provides in part:

"(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case."

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:"

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions."

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree."

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person."

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value."

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty."

"(6) The offender caused or directed another to commit. murder or committed murder as an agent or employee of another person."

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties."

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement."

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed."

§ 27-2534.1 (Supp. 1975).

The Supreme Court of Georgia, in *Arnold v. State,* 236 Ga. 534, 540, 224 S.E.2d 386, 391 (1976), recently held unconstitutional the portion of the first circumstance encompassing persons who have a "substantial history of serious assaultive criminal convictions" because it did not set "sufficiently *clear and objective standards.'"*

[Footnote 10]

The statute requires that the Supreme Court of Georgia obtain and preserve the records of all capital felony cases in which the death penalty was imposed after January 1, 1970, or such earlier date that the court considers appropriate. § 27-2537(f) (Supp. 1975). To aid the court in its disposition of these cases, the statute further provides for the appointment of a special assistant, and authorizes the employment of additional staff members. §§ 27-2537(f)-(h) (Supp. 1975).

[Footnote 11]

See Ga.Const., Art. 5, § 1, � 12, Ga.Code Ann. § 2-3011 (1973); Ga.Code Ann. §§ 77-501, 77-511, 77-513 (1973 and Supp. 1975) (Board of Pardons and Paroles is authorized to commute sentence of death except in cases where Governor refuses to suspend that sentence).

[Footnote 12]

Louisiana ex rel. Francis v. Resweber, 329 U. S. 459, 329 U. S. 464 (1947); *In re Kemmler,* 136 U. S. 436, 136 U. S. 447 (1890); *Wilkerson v. Utah,* 99 U. S. 130, 99 U. S. 134-135 (1879). *See also McGautha v. California,* 402 U. S. 183 (1971); *Witherspoon v. Illinois,* 391 U. S. 510 (1968); *Trop v. Dulles,* 356 U. S. 86, 356 U. S. 100 (1958) (plurality opinion).

[Footnote 13]

408 U.S. at 408 U. S. 375 (BURGER, C.J., dissenting); *id.* at 408 U. S. 405 (BLACKMUN, J., dissenting); *id.* at 408 U. S. 414(POWELL, J., dissenting); *id.* at 408 U. S. 465 (REHNQUIST, J., dissenting).

[Footnote 14]

Id. at 408 U. S. 257 (BRENNAN, J., concurring); *id.* at 408 U. S. 314 (MARSHALL, J., concurring).

[Footnote 15]

Id. at 408 U. S. 240 (Douglas, J., concurring); *id.* at 408 U. S. 306 (STEWART J., concurring); *id.* at 408 U. S. 310 (WHITE, J., concurring).

Since five Justices wrote separately in support of the judgments in *Furman,* the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds -- MR. JUSTICE STEWART and MR. JUSTICE WHITE. *See* n 36, *infra.*

[Footnote 16]

408 U.S. at 408 U. S. 316-328 (MARSHALL, J., concurring).

[Footnote 17]

This conclusion derives primarily from statements made during the debates in the various state conventions called to ratify the Federal Constitution. For example, Virginia delegate Patrick Henry objected vehemently to the lack of a provision banning "cruel and unusual punishments":

"What has distinguished our ancestors? -- That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law in preference to that of the common law. They may introduce the practice of France, Spain, and Germany -- of torturing to extort a confession of the crime."

3 J. Elliot, Debates 447-448 (1863). A similar objection was made in the Massachusetts convention:

"They are nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline."

2 Elliot, *supra* at 111.

[Footnote 18]

The Court remarked on the fact that the law under review "has come to us from a government of a different form and genius from ours," but it also noted that the punishments it inflicted "would have those bad attributes even if they were found in a Federal enactment and not taken from an alien source." 217 U.S. at 217 U. S. 377.

[Footnote 19]

Although legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards, since that Amendment was intended to safeguard individuals from the abuse of legislative power.*See Weems v. United States,* 217 U. S. 349, 217 U. S. 371-373 (1910); *Furman v. Georgia,* 408 U.S. at 408 U. S. 258-269 (BRENNAN, J., concurring). *Robinson v. California,* 370 U. S. 660 (1962), illustrates the proposition that penal laws enacted by state legislatures may violate the Eighth Amendment because, "in the light of contemporary human knowledge," they "would doubtless be universally thought to be an infliction of cruel and unusual punishment." *Id.* at 370 U. S. 666. At the time of *Robinson,* nine States in addition to California had criminal laws that punished addiction similar to the law declared unconstitutional in *Robinson. See* Brief for Appellant in *Robinson v. California,* O.T. 1961, No. 554, p. 15.

[Footnote 20]

See also Furman v. Georgia, supra at 408 U. S. 411 (BLACKMUN, J., dissenting):

"We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great."

[Footnote 21]

See concurring opinions of MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, 408 U.S. at 408 U. S. 257 and 408 U. S. 314.

[Footnote 22]

See concurring opinions of Mr. Justice Douglas, MR. JUSTICE STEWART, and MR. JUSTICE WHITE, *id.* at 408 U. S. 240, 408 U. S. 306, and 408 U. S. 310.

[Footnote 23]

Ala.H.B. 212, §§ 2-4, 6-7 (1975); Ariz.Rev.Stat.Ann. §§ 13-452 to 13-454 (Supp. 1973); Ark.Stat.Ann. § 41-4706 (Supp. 1975); Cal.Penal Code §§ 190.1, 209, 219 (Supp. 1976); Colo.Laws 1974, c. 52, § 4; Conn.Gen.Stat.Rev. §§ 53a-25, 53a-35(b), 53a-46a, 53a-54b (1975); Del.Code Ann. tit. 11, § 4209 (Supp. 1975); Fla.Stat.Ann. §§ 782.04, 921.141 (Supp. 1975-1976); Ga.Code Ann. §§ 26-3102, 27-2528, 27-2534.1, 27-2537 (Supp. 1975); Idaho Code § 18-4004 (Supp. 1975); Ill.Ann.Stat. c. 38, §§ 9-1, 1005-5-3, 1005-8-1A (Supp. 1976-1977); Ind.Stat.Ann. § 35-13-4-1 (1975); Ky.Rev.Stat.Ann. § 507.020 (1975); La.Rev.Stat.Ann. § 14:30 (Supp. 1976); Md.Ann.Code, art. 27, § 413 (Supp. 1975); Miss.Code Ann. §§ 97-3-19, 97-3-21, 97-25-55, 99-17-20 (Supp. 1975); Mo.Ann.Stat. § 559.009, 559.005 (Supp. 1976); Mont.Rev.Codes Ann. § 94-5-105 (Spec.Crim.Code Supp. 1976); Neb.Rev.Stat. §§ 28-401, 29-2521 to 29-2523 (1975); Nev.Rev.Stat. § 200.030 (1973); N.H.Rev.Stat.Ann. § 630:1 (1974); N.M.Stat.Ann. § 40A-29-2 (Supp. 1975); N.Y. Penal Law § 60.06 (1975); N.C.Gen.Stat. § 14-17 (Supp. 1975); Ohio Rev.Code Ann. §§ 2929.02-2929.04 (1975); Okla.Stat.Ann. tit. 21, § 701.1-701.3 (Supp. 1975-1976); Pa.Laws 1974, Act No. 46; R.I.Gen.Laws Ann. § 11-23-2 (Supp. 1975); S.C.Code Ann. § 16-52 (Supp. 1975); Tenn.Code Ann. §§ 39-2402, 39-2406 (1975); Tex.Penal Code Ann. § 19.03(a) (1974); Utah Code Ann. §§ 76-3-206, 76-3-207, 76-5-202 (Supp. 1975); Va.Code Ann. §§ 18.2-10, 18.2-31 (1976); Wash.Rev.Code §§ 9A.32.045, 9A.32.046 (Supp. 1975); Wyo.Stat.Ann. § 6-54 (Supp. 1975).

[Footnote 24]

Anti-hijacking Act of 1974, 49 U.S.C. §§ 1472(i), (n) (1970 ed., Supp. IV).

[Footnote 25]

In 1968, the people of Massachusetts were asked "Shall the commonwealth . . . retain the death penalty for crime?" A substantial majority of the ballots cast answered "Yes." Of 2,348,005 ballots cast, 1,159,348 voted "Yes," 730,649 voted "No," and 458,008 were blank. *See Commonwealth v. O'Neal,* ___ Mass. ___ and n. 1, 339 N.E.2d 676, 708, and n. 1 (1975) (Reardon, J., dissenting). A December, 1972, Gallup poll indicated that 57% of the people favored the death penalty, while a June, 1973, Harris survey showed support of 59%. Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 Stan.L.Rev. 1245, 1249 n. 22 (1974). In a December, 1970, referendum, the voters of Illinois also rejected the abolition of capital punishment by 1,218,791 votes to 676,302 votes. Report of the Governor's Study Commission on Capital Punishment 43 (Pa.1973).

[Footnote 26]

The number of prisoners who received death sentences in the years from 1961 to 1972 varied from a high of 140 in 1961 to a low of 75 in 1972, with wide fluctuations in the intervening years: 103 in 1962; 93 in 1963; 106 in 1964; 86 in 1965; 118 in 1966; 85 in 1967; 102 in 1968; 97 in 1969; 127 in 1970; and 104 in 1971. Department of Justice, National Prisoner Statistics Bulletin, Capital Punishment 1971-1972, p. 20 (Dec.1974). It has been estimated that, before *Furman,* less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment. *See Woodson v. North Carolina, post* at 428 U. S. 295-296, n. 31.

[Footnote 27]

Department of Justice, National Prisoner Statistics Bulletin, Capital Punishment 1974, pp. 1, 26-27 (Nov.1975)

[Footnote 28]

Another purpose that has been discussed is the incapacitation of dangerous criminals, and the consequent prevention of crimes that they may otherwise commit in the future. *See People v. Anderson,* 6 Cal.3d 628, 651, 493 P.2d 880, 896, *cert. denied,* 406 U.S. 958 (1972); *Commonwealth v. O'Neal, supra* at ___, 339 N.E.2d at 685-686.

[Footnote 29]

See H. Packer, Limits of the Criminal Sanction 43-44 (1968).

[Footnote 30]

Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, spoke to this effect before the British Royal Commission on Capital Punishment:

"Punishment is the way in which society expresses its denunciation of wrongdoing, and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to

consider the objects of punishment as being deterrent or reformative or preventive and nothing else. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is deterrent or not."

Royal Commission on Capital Punishment, Minutes of Evidence, Dec. 1, 1949, p. 207 (1950)

A contemporary writer has noted more recently that opposition to capital punishment "has much more appeal when the discussion is merely academic than when the community is confronted with a crime, or a series of crimes, so gross, so heinous, so cold-blooded that anything short of death seems an inadequate response."

Raspberry, Death Sentence, The Washington Post, Mar. 12, 1976, p. A27, cols. 5-6.

[Footnote 31]

See, e.g., Peck, The Deterrent Effect of Capital Punishment: Ehrlich and His Critics, 85 Yale L.J. 359 (1976); Baldus & Cole, A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale L.J. 170 (1975); Bowers & Pierce, The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment, 85 Yale L.J. 187 (1975); Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am.Econ.Rev. 397 (June 1975); Hook, The Death Sentence, in The Death Penalty in America 146 (H. Bedau ed.1967); T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (1959).

[Footnote 32]

See, e.g., The Death Penalty in America, *supra* at 259-332; Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932.

[Footnote 33]

Other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, the extortion murder of hostages or kidnap victims, and the execution-style killing of witnesses to a crime.

[Footnote 34]

We have been shown no statistics breaking down the total number of murders into the categories described above. The overall trend in the number of murders committed in the nation, however, has been upward for some time. In 1964, reported murders totaled an estimated 9,250. During the ensuing decade, the number reported increased 123%, until it totaled approximately 20,600 in 1974. In 1972, the year *Furman* was announced, the total estimated was 18,520. Despite a fractional decrease in 1975 as compared with 1974, the number of murders increased in the three years immediately following *Furman* to approximately 20,400, an increase of almost 10%. *See* FBI, Uniform Crime Reports, for 1964, 1972, 1974, and 1975, Preliminary Annual Release.

[Footnote 35]

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

[Footnote 36]

This view was expressed by other Members of the Court who concurred in the judgments. *See* 408 U.S. at 408 U. S. 255-257 (Douglas, J.); *id.* at 408 U. S. 291-295 (BRENNAN, J.). The dissenters viewed this concern as the basis for the *Furman*decision:

"The decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; . . . that the selection process has followed no rational pattern."

Id. at 408 U. S. 398-399 (BURGER, C.J., dissenting).

[Footnote 37]

The Federal Rules of Criminal Procedure require as a matter of course that a presentence report containing information about a defendant's background be prepared for use by the sentencing judge. Rule 32(c). The importance of obtaining accurate sentencing information is underscored by the Rule's direction to the sentencing court to "afford the defendant or his counsel an opportunity to comment [on the report] and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report."

Rule 32(c)(3)(A).

[Footnote 38]

Indeed, we hold elsewhere today that, in capital cases, it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence. *See Woodson v. North Carolina, post* at 428 U. S. 303-305.

[Footnote 39]

Witherspoon v. Illinois, 391 U.S. at 391 U. S. 519 n. 15, quoting *Trop v. Dulles,* 356 U.S. at 356 U. S. 101 (plurality opinion). *See also* Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, � 571.

[Footnote 40]

In other situations, this Court has concluded that a jury cannot be expected to consider certain evidence before it on one issue, but not another. *See, e.g., Bruton v. United States,* 391 U. S. 123 (1968); *Jackson v. Denno,* 378 U. S. 368 (1964).

[Footnote 41]

In *United States v. Jackson,* 390 U. S. 570 (1968), the Court considered a statute that provided that, if a defendant pleaded guilty, the maximum penalty would be life imprisonment, but if a defendant chose to go to trial, the maximum penalty upon conviction was death. In holding that the statute was constitutionally invalid, the Court noted:

"The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."

Id. at 390 U. S. 581.

[Footnote 42]

But see Md.Const., Art. XV, § 5: "In the trial of all criminal cases, the jury shall be the Judges of the Law, as well as of fact. . . ." *See also* Md.Code Ann., art. 27, § 593 (1971). Maryland judges, however, typically give advisory instructions on the law to the jury. *See* Md. Rule 756; *Wilson v. State,* 239 Md. 245, 210 A.2d 824 (1965).

[Footnote 43]

See McGautha v. California, 402 U.S. at 402 U. S. 204-207; Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, � 595.

[Footnote 44]

The Model Penal Code proposes the following standards:

"(3) Aggravating Circumstances."

"(a) The murder was committed by a convict under sentence of imprisonment."

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

"(c) At the time the murder was committed the defendant also committed another murder."

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

"(e) The murder 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 robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping."

"(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody."

"(g) The murder was committed for pecuniary gain."

"(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."

"(4) Mitigating Circumstances."

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

"(b) The murder 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 homicidal conduct or consented to the homicidal act."

"(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct."

"(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor."

"(f) The defendant acted under duress or under the domination of another person."

"(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication."

"(h) The youth of the defendant at the time of the crime."

ALI Model Penal Code § 210.6 (Proposed Official Draft 1962).

[Footnote 45]

As MR. JUSTICE BRENNAN noted in *McGautha v. California, supra* at 402 U. S. 285-286 (dissenting opinion):

"[E]ven if a State's notion of wise capital sentencing policy is such that the policy cannot be implemented through a formula capable of mechanical application . . . , there is no reason that it should not give some guidance to those called upon to render decision."

[Footnote 46]

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

[Footnote 47]

In *McGautha v. California, supra,* this Court held that the Due Process Clause of the Fourteenth Amendment did not require that a jury be provided with standards to guide its decision whether to recommend a sentence of life imprisonment or death or that the capital sentencing proceeding be separated from the guilt-determination process. *McGautha* was not an Eighth Amendment decision, and, to the extent it purported to deal with Eighth Amendment concerns, it must be read in light of the opinions in *Furman v. Georgia.* There, the Court ruled that death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty violated the Eighth and Fourteenth Amendments. While *Furman* did not overrule *McGautha,* it is clearly in substantial tension with a broad reading of *McGautha's* holding. In view of *Furman, McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court, so as to violate the Due Process Clause. We note that *McGautha's* assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience. In view of that experience and the considerations set forth in the text, we adhere to *Furman's* determination that, where the ultimate punishment of death is at issue, a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

[Footnote 48]

The text of the statute enumerating the various aggravating circumstances is set out at n 9, *supra.*

[Footnote 49]

See Moore v. State, 233 Ga. 861, 865, 213 S.E.2d 829, 832 (1975).

[Footnote 50]

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

Moreover, it would be unconstitutional. Such a system, in many respects, would have the vices of the mandatory death penalty statutes we hold unconstitutional today in *Woodson v. North Carolina, post,* p. 428 U. S. 280, and *Roberts v. Louisiana, post,* p. 428 U. S. 325. The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury trial guarantee and the Double Jeopardy Clause of the Fifth Amendment. In the federal system, it also would be unconstitutional to prohibit a President from deciding, as an act of executive clemency, to reprieve one sentenced to death. U.S.Const., Art. II, § 2.

[Footnote 51]

In light of the limited grant of certiorari, *see supra* at 428 U. S. 162, we review the "vagueness" and "overbreadth" of the statutory aggravating circumstances only to consider whether their imprecision renders this capital sentencing system invalid under the Eighth and Fourteenth Amendments because it is incapable of imposing capital punishment other than by arbitrariness or caprice.

[Footnote 52]

In the course of interpreting Florida's new capital sentencing statute, the Supreme Court of Florida has ruled that the phrase "especially heinous, atrocious or cruel" means a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon,* 283 So.2d 1, 9 (1973). *See Proffitt v. Florida, post* at 428 U. S. 255-256.

[Footnote 53]

Two other reported cases indicate that juries have found aggravating circumstances based on § 27-2534.1(b)(7). In both cases, a separate statutory aggravating circumstance was also found, and the Supreme Court of Georgia did not explicitly rely on the finding of the seventh circumstance when it upheld the death sentence. *See Jarrell v. State,* 234 Ga. 410, 216 S.E.2d 25 (1975) (State Supreme Court upheld finding that defendant committed two other capital felonies -- kidnaping and armed robbery -- in the course of the murder, § 27-2534.1(b)(2); jury also found that the murder was committed for money, § 27-2534.1(b)(4), and that a great risk of death to bystanders was created, § 27-2534.1(b)(3)); *Floyd v. State,* 233 Ga. 280, 210 S.E.2d 810 (1974) (found to have committed a capital felony -- armed robbery -- in the course of the murder, § 27-2534.1(b)(2)).

[Footnote 54]

The petitioner also attacks § 25-2534.1(b)(7) as vague. As we have noted in answering his overbreadth argument concerning this section, however, the state court has not given a broad reading to the scope of this provision, and there is no reason to think that juries will not be able to understand it. *See* n 51, *supra; Proffitt v. Florida, post* at 428 U. S. 255-256.

[Footnote 55]

The petitioner also objects to the last part of § 27-2534.1(b)(3), which requires that the great risk be created "by means of a weapon or device which would normally be hazardous to the lives of more than one person." While the state court has not focused on this section, it seems reasonable to assume that, if a great risk in fact is created, it will be likely that a weapon or device normally hazardous to more than one person will have created it.

[Footnote 56]

The court is required to specify in its opinion the similar cases which it took into consideration. § 27-2537(e) (Supp. 1975). Special provision is made for staff to enable the court to compile data relevant to its consideration of the sentence's validity. §§ 272537(f)-(h) (Supp. 1975). *See generally supra* at 428 U. S. 166-168.

The petitioner claims that this procedure has resulted in an inadequate basis for measuring the proportionality of sentences. First, he notes that nonappealed capital convictions where a life sentence is imposed and cases involving homicides where a capital conviction is not obtained are not included in the group of cases which the Supreme Court of Georgia uses for comparative purposes. The Georgia court has the authority to consider such cases, *see Ross v. State,* 233 Ga. 361, 365-366, 211 S.E.2d 356, 359 (1974), and it does consider appealed murder cases where a life sentence has been imposed. We do not think that the petitioner's argument establishes that the Georgia court's review process is ineffective. The petitioner further complains about the Georgia court's current practice of using some pre-*Furman* cases in its comparative examination. This practice was necessary at the inception of the new procedure in the absence of any post-*Furman* capital cases available for comparison. It is not unconstitutional.